



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

FINAL DECISION

March 27, 2012 Government Records Council Meeting

Jesse Wolosky  
Complainant

Complaint No. 2010-317

v.

Township of Parsippany-Troy Hills (Morris)  
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 2012 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 did not unlawfully deny access to the requested records when she redacted the telephone numbers contained in the first 50 OPRA requests made to the records Custodian from January 1, 2010 through August 25, 2010 pursuant to N.J.S.A. 47:1A-5.a and Smith v. Department of Corrections, GRC Complaint No. 2004-163 (June 2005).
2. Because the evidence of record indicates that the privacy rights of individuals who submitted OPRA requests to the Township in their names, e-mail addresses, and home addresses contained in the requested OPRA request forms and OPRA log sheets outweighs the Complainant’s need for such information, the Custodian did not unlawfully deny the Complainant access to the identifying information pursuant to N.J.S.A. 47:1A-1. See Feasel v. City of Trenton (Mercer), GRC Complaint No. 2008-103 (April 2009).
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Additionally, absent a violation of OPRA, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. See Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008). Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, and Mason.



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 27<sup>th</sup> Day of March, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Catherine Starghill, Executive Director  
Government Records Council

**Decision Distribution Date: April 3, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 27, 2012 Council Meeting**

**Jesse Wolosky**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2010-317**

v.

**Township of Parsippany-Troy Hills (Morris)**<sup>2</sup>  
**Custodian of Records**

**Records Relevant to Complaint:** Copies of:

1. The OPRA log sheets from January 1, 2010 until [August 25, 2010];
2. The first 50 OPRA requests made to the records Custodian from January 1, 2010 until [August 25, 2010] excluding those OPRA requests made by Jesse Wolosky.

**Request Made:** August 25, 2010

**Response Made:** August 30, 2010

**Custodian:** Judith I. Silver

**GRC Complaint Filed:** November 30, 2010<sup>3</sup>

**Background**

**August 25, 2010**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA. The Complainant indicates that the preferred method of delivery is e-mail and that the records be placed in chronological order.

**August 30, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the third (3<sup>rd</sup>) business day following receipt of such request. The Custodian states that attached to this e-mail are the records that are responsive to the Complainant's request as well as an explanation for the redactions made to the attached records.

**September 2, 2010**

E-mail from the Complainant to the Custodian. The Complainant thanks the Custodian for the received records.

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Offices of Walter Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Justin A. Marchetta, Esq., of Inglesino, Pearlman, Wyciskala, & Taylor LLC (Parsippany, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

### **November 30, 2010**

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

- Complainant’s OPRA request dated August 25, 2010
- Custodian’s response to the OPRA request dated August 30, 2010
- Letter from the Complainant to the Custodian dated September 2, 2010
- A redacted copy of the Township’s OPRA request forms provided by the Custodian
- A redacted copy of the Township OPRA log sheets provided by the Custodian

The Complainant argues that the Custodian’s redaction of the names, e-mail addresses, telephone numbers, and home addresses on the received records is a misuse of the privacy protections outlined in OPRA and Burnett v. County of Bergen, 198 N.J. 408 (2009). The Complainant argues that a citizen’s reasonable expectation of privacy should be determined on a case-by-case basis. The Complainant contends that a citizen has no reasonable expectation of privacy in a signature on a document that is filed with a public agency as the signatures themselves reveal very little about any particular person. The Complainant asserts that although a signature combined with a disclosed social security number or driver’s license number may pose an identity theft risk, the sought after OPRA requests contain no such personal identifiers.

The Complainant states that the GRC has previously held that “signature lines” on documents may be disclosed in Meaders v. Williams Paterson University, GRC Complaint No. 2005-131 (Interim Order April 2007). The Complainant argues that there is no state interest in maintaining the confidentiality of the names of individuals who make OPRA requests. The Complainant asserts that since OPRA requests can be made anonymously or through third parties, such as a law firm, any person who is concerned about their identity may protect themselves by requesting records anonymously.

The Complainant asserts that while telephone numbers are not disclosable, this exception does not apply to corporate or business telephone numbers. The Complainant maintains that there is no privacy interest in a business or corporate telephone number. The Complainant states that the telephone numbers of business are routinely placed on letterheads.

Additionally, the Complainant argues that there is no reasonable expectation of privacy in a person’s home address or the address of a corporation’s business address. The Complainant states that information where a person does business, where they own property, or where they live is readily available through many means, including their correspondence with public agencies. The Complainant asserts that when names and addresses in public records are not connected and are without personal identifiers, the Courts and the GRC have ordered that those records be disclosed. *See* Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 48-9 (1995) and Walsh v. Township of Middleton, GRC Complaint No. 2008-266 (November 2009).

The Complainant contends that the disclosure of e-mail addresses implicates even fewer privacy concerns than the disclosure of home or business addresses because unwanted e-mails can be deleted. The Complainant argues that there is no requirement that e-mail addresses be provided on OPRA request forms. The Complainant states that individuals who do not want their e-mail addresses revealed on public records can omit them from records requests or set up a free e-mail account for the purpose of sending OPRA requests.

The Complainant requests that the GRC order the Township to provide copies of the requested OPRA requests that do *not* include redactions to names, signatures, corporate or business telephone numbers, facsimile numbers, home addresses, business addresses, and e-mail addresses. Furthermore, the Complainant requests that the GRC determine that he is a prevailing party pursuant to N.J.S.A. 47:1A-6 and Teeters v. Division of Youth and Family Services, 387 N.J. Super. 423 (App. Div. 2006) and award him a reasonable attorney's fee.

The Complainant does not agree to mediate this Complaint.

**December 21, 2010**

Request for the Statement of Information (“SOI”) sent to the Custodian.

**December 22, 2010**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated August 25, 2010
- Custodian's response to the OPRA request dated August 30, 2010
- Letter from the Complainant to the Custodian dated September 2, 2010

The Custodian certifies that a search for responsive records yielded 38 pages of OPRA log sheets and 57 pages of OPRA requests. The Custodian certifies that the OPRA requests forms that required a fee to fulfill have a six (6) year retention schedule, while the OPRA request forms that did not require a fee to fulfill have a three (3) year retention schedule. The Custodian certifies that no records were destroyed. The Custodian certifies that the requested OPRA request forms and log sheets provided to the Complainant contained redactions for the names, e-mail addresses, phone numbers, and home addresses of the citizens requesting records. The Custodian argues that these redactions were made pursuant to OPRA's provision that “a public agency has a responsibility and 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.

The Custodian argues that the Complainant expressed no legitimate purpose to obtain the requested government records and the records produced by the Township were redacted to protect the identity of the individuals who previously requested records from the Township. The Custodian asserts that in today's society, the combination of names, e-mail addresses, addresses, telephone numbers, and signatures can be used by individuals who wish to engage in identity theft. The Custodian maintains that even

without the personal information, the Complainant can easily discern from the supplied records that the Township has been in compliance with OPRA.

The Custodian argues that under the common law right of access, the Complainant's request for records must be denied. The Custodian maintains that a two-prong standard is applied under the common law right of access to determine whether a public entity must comply with a citizen's request for government records. The Custodian cites Higg-A-Rella v. County of Essex, 141 N.J. 35 (1995) in stating that "[f]irst, the person seeking access to the documents must prove standing, that is establish an interest in the subject matter of the material." *Id.* at 46. The Custodian further cites Higg-A-Rella for the proposition that a requestor's interest in the public records must be balanced against the public entity's interest in maintaining confidentiality of the documents. *Id.* The Custodian asserts that the interest may be either "a wholesome public interest or a legitimate private interest." Loigman v. Kimmelman, 102 N.J. 98, 112 (1986).

The Custodian maintains that the application of such a balancing test proves that the Township's response is proper as the Complainant has established no legitimate interest in the subject matter of the material and it is assumed that he is merely trying to engage in "vigilante policing" of the Township's responses to OPRA requests. The Custodian asserts that because the personal information requested may be used for identity theft purposes, the Township is required to protect the citizens' privacy interests.

The Custodian argues that Higg-A-Rella (ordering the disclosure of tax assessment lists containing property street addresses and the names of owners) and Walsh v. Township of Middletown, GRC Complaint No. 2008-266 (November 2009) (ordering the disclosure of the home addresses of public officials) are not applicable here. The Custodian maintains that the amount of personal information contained in the OPRA request forms sought herein far exceeds the amount of personal information contained in the records sought in Higg-A-Rella and Walsh. The Custodian argues that the disclosure of all the personally identifying information would fly in the face of a citizen's reasonable expectation of privacy.

The Custodian asserts that the legislative history of OPRA supports a balancing test that weighs "both the public's strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy." Burnett v. County of Bergen, 198 N.J. 408, 427 (2009). The Custodian further cites Burnett for the proposition that "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *Id.* at 430.

The Custodian maintains that the issue here is "not whether [the individual] has a privacy interest in his address, but whether the inclusion of [that] address, along with other information, implicates any privacy interest." Doe v. Poritz, 142 N.J. 1, 83 (1995). The Custodian argues that an application of the balancing test regarding privacy interest expressed in Burnett and Poritz, supports the Township's redaction of personal information from the responsive records. The Custodian contends that whatever reasons the Complainant may have for wanting the requested records is not outweighed by the

Township's statutory duty to protect the reasonable privacy interest of citizens in the personal information contained therein.

The Custodian further argues that there has been no denial of access because the Township has lawfully redacted the personal information from the requested records and accordingly, the Complainant should not be awarded attorney's fees as a prevailing party pursuant to Teeters v. Division of Youth and Family Services, 387 N.J. Super. 423, 432 (App. Div. 2006).

### **December 28, 2010**

The Complainant's response to the Custodian's SOI. The Complainant argues that the Custodian's concerns about identity theft are overstated. The Complainant asserts that OPRA actions are to proceed in a summary manner. The Complainant cites to Gonzalez v. Ideal Tile Importing Co., Inc., 371 N.J. Super. 349, 358 (App. Div. 2004), stating that unsworn attorney statements are "incapable of conveying facts." *Id.* The Complainant states that the Custodian's SOI contains uncertified statements.<sup>4</sup>

The Complainant contends that names, addresses, e-mail addresses, business telephone numbers, and facsimile machine numbers are not "personal identifiers" that transmit sufficient information to raise privacy concerns. The Complainant states that under the Federal Rule of Civil Procedure 5.2, social security numbers, taxpayer identification numbers, dates of birth, the birth dates of minors and financial account numbers must be redacted from documents filed in Federal Court. The Complainant asserts that under New Jersey Court Rule 1.38-7(a), social security numbers, driver's license numbers, vehicle plate numbers, insurance policy numbers, active financial account numbers, and active credit card numbers must be redacted from documents filed in State Court. The Complainant states that this information must be redacted because it may be useful in aiding identity theft. The Complainant maintains that none of the information that he seeks qualifies as a "personal identifier" that would be redacted if the documents were filed in State or Federal Court.

The Complainant argues that in Burnett, the key issue was whether social security numbers had been redacted from realty transfer records filed with the County Clerk. The Complainant maintains that although these records contained other "personal identifiers," none of those identities were of any concern to the Court in Burnett. The Complainant asserts that if there were a basis to redact such personal information, the Court in Burnett would have done so.

The Complainant request that the GRC order the Township to provide the requested records in unredacted form and to find that the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and award a reasonable attorney's fee.

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<sup>4</sup> The Complainant's assertion is incorrect, as the SOI provided by the Custodian is indeed certified. Jesse Wolosky v. Township of Parsippany-Troy Hills (Morris), 2010-317 – Findings and Recommendations of the Executive Director

**February 22, 2012**

E-mail from the GRC to the Complainant. The GRC requests the completion of a common law balancing test to assess the privacy interests in the instant complaint. Accordingly, the GRC asks the Complainant:<sup>5</sup>

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)?

**February 22, 2012**

E-mail from the GRC to the Custodian. The GRC requests the completion of a common law balancing test to assess the privacy interests in the instant complaint. Accordingly, the GRC asks the Custodian:

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

**February 28, 2012**

Letter from the Custodian to the GRC attaching a completed balancing test questionnaire as follows:

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

The Custodian states that the requested OPRA log sheets and the written OPRA requests contain a comprehensive set of personal identifying information of the individual requestors; specifically, the OPRA log sheets contain the name, address, and signature of the requestor. The Custodian states that written OPRA requests contain the full name (including middle initial), company, mailing address, email address, telephone number, and signature of the requestor.

2. The potential harm in any subsequent consensual disclosure of the requested records.

The Custodian states that she provided the requested records to the Complainant on August 30, 2010. The Custodian further states that the records were redacted to protect the personal identifying information of the requestors and to prevent possible identity theft, which is unfortunately common when such information is released to the public. The Custodian states that if the Township were to be compelled to release

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<sup>5</sup> The Complainant did not respond to the GRC's request for the questionnaire.



unredacted versions of the records, it could no longer comply with its statutory duty pursuant to N.J.S.A. § 47:1A-1 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. The injury from disclosure to the relationship in which the requested record was generated.

The Custodian states that the requested records, OPRA logs and written OPRA requests were generated by members of the public in the course of requesting copies of government records. The Custodian also states that the State Legislature has given municipalities the important task of safeguarding personal information with which it is entrusted. *See N.J.S.A.* 47:1A-1. The Custodian further states that an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form. *See Burnett v. County of Bergen*, 198 N.J. 408, 430 (2009). The Custodian states that members of the public do not fill out OPRA request logs and forms to release their personal information, including addresses, telephone numbers, and signatures, to the general public; rather, they fill out said forms for purposes of identifying themselves sufficiently to the municipality for purposes of obtaining the requested government records.

The Custodian states that disclosure of the unredacted OPRA logs and written OPRA requests would injure the relationship between the Township and the public, and would run afoul of the purposes of OPRA. The Custodian states that the public could no longer obtain open access to government records without running the risk of their sensitive, private, and personal information being released to the general public.

4. The adequacy of safeguards to prevent unauthorized disclosure.

The Custodian states that if the Township were compelled to release unredacted versions of the requested OPRA logs and written OPRA requests, no safeguards are currently in place to prevent the unauthorized disclosure of the individual requestors' sensitive, private, and personal information. The Custodian states that the Township took an affirmative step to safeguard against such disclosure when it redacted the records that it provided to the Complainant. The Custodian states that the Complainant was not denied access to the requested records, rather, the records were produced promptly and correctly, while redacting the personal identifying information of the individual requestors.

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

The Custodian states that there is no express statutory mandate, articulated public policy, or other recognized public interest militating toward access to the unredacted portions of the requested records; on the contrary, there is an express statutory mandate that the Township protect the personal identifying information redacted in the requested records. *See N.J.S.A.* § 47:1A-1 ("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 states that although a strong public interest favors disclosure, it must be balanced with an equally strong public interest in protecting the sensitive, private, and personal information entrusted to the government. See Burnett, 198 N.J. at 430. The Custodian states that the Township properly produced the records requested by the Complainant in a timely manner and with redactions to protect the personal identifying information of the individual requestors.

### Analysis

#### **Whether the Custodian unlawfully denied access to the telephone numbers contained on 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*...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; and nothing contained in P.L. 1963, c. 73 (C. 47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency" (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 ...[a] government record shall not include...[an] unlisted telephone number." (Emphasis added.) N.J.S.A. 47:1A-1.1.

In addition, OPRA provides that:

"[p]rior to allowing access to any government record, the custodian thereof shall redact from that record any information which discloses the social security number, credit card number, unlisted telephone number, or driver license number of any person; except for:

- use by any government agency, including any court or law enforcement agency, in carrying out its functions,
- or any private person or entity acting on behalf thereof,

- or any private person or entity seeking to enforce payment of court-ordered child support...” N.J.S.A. 47:1A-5.a.

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.

In this case, the Complainant requested the first fifty (50) OPRA request forms filed with the Township in 2010 and the OPRA request log. The Custodian timely provided the requested records with redactions to protect telephone numbers contained in the requested records. The Complainant alleged that the redaction of the telephone numbers from the requested records constitutes an unlawful denial of access because some of the OPRA request forms were filed by commercial and business entities and that no privacy interest attaches to commercial telephone numbers.

Conversely, the Custodian argues that these redactions were made pursuant to OPRA’s provision that “a public agency has a responsibility and 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. However, the Complainant maintains that there is no privacy interest in a business or corporate telephone number. The Complainant states that the telephone numbers of businesses are routinely placed on letterheads.

OPRA not only permits the redaction of unlisted telephone numbers, it places an affirmative duty on a custodian to maintain the confidentiality of a person’s unlisted telephone number by providing that “[a] government record shall not include...[an] unlisted telephone number.” N.J.S.A. 47:1A-1.1. A custodian therefore is required to redact an unlisted telephone number from any record disclosed pursuant to N.J.S.A. 47:1A-5.a.

The Council, however, has long recognized the impracticality of this requirement. In Smith v. Department of Corrections, GRC Complaint No. 2004-163 (June 2005), the Council held that the complaint filed for denial of access to telephone records should be dismissed, in part, because the custodian could not safeguard unlisted telephone numbers from disclosure. In Smith, the Council determined that:

“...there is the practical problem with OPRA’s mandate that prior to allowing access to any government record, the custodian must redact

from that record any information which discloses the unlisted phone numbers of any person. N.J.S.A. 47:1A-5.a. It is not likely that any custodian could comply with this OPRA provision by making such redactions with accurate precision when there is a realistic chance that the custodian may miss just one unlisted telephone number...[f]rom a practical standpoint, there may be no way for a custodian to ensure that all unlisted numbers have been redacted...”<sup>6</sup>

Accordingly, a custodian does not have a duty to determine what telephone numbers are unlisted and what telephone numbers are listed pursuant to Smith v. Department of Corrections, GRC Complaint No. 2004-163 (June 2005). Instead, the custodian’s lawful responsibility is to ensure that the privacy concerns of requestors are protected in accordance with N.J.S.A. 47:1A-5.a.

In the matter before the Council, the Custodian redacted telephone numbers from the requested records prior to disclosing such records to the Complainant. Although the Complainant asserts that many of the telephone numbers that were redacted correlate to businesses and should therefore be disclosed, there may be no way for a custodian to separate business telephone numbers from unlisted telephone numbers of private individuals. Pursuant to N.J.S.A. 47:1A-5.a. and the Council’s determination in Smith, the Custodian’s redaction of all telephone numbers from the OPRA request forms provided to the Complainant is not an unlawful denial of access under OPRA.

Therefore, the Custodian did not unlawfully deny access to the requested records when she redacted the telephone numbers contained in the first 50 OPRA requests made to the records Custodian from January 1, 2010 through August 25, 2010 pursuant to N.J.S.A. 47:1A-5.a. and Smith, *supra*.

**Whether the Custodian unlawfully denied access to the names, home addresses, and e-mail addresses contained in the requested records?**

The legislative findings and declarations of OPRA state:

“[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; and nothing contained in P.L. 1963, c. 73 (*C. 47:1A-1 et seq.*), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.” N.J.S.A. 47:1A-1.

In addition, OPRA provides that it shall not:

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<sup>6</sup> See, e.g., Bart v. Passaic County Public Housing Agency, GRC Complaint No. 2007-266 (Interim Order February 2008) (holding that the Custodian properly redacted telephone numbers from the records requested).

“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.” N.J.S.A. 47:1A-9.b.

In this case, the Complainant requested the first fifty (50) OPRA request forms filed with the Township in 2010 and the OPRA request log. The Custodian provided the Complainant with a copy of such records with redactions made to the names, home addresses, and e-mail addresses of the individual requestors listed in the OPRA request log and relevant OPRA request forms. The Complainant argued in the Denial of Access Complaint that that OPRA does not specifically exempt names, home addresses, and e-mail addresses from disclosure. The Custodian contends that the disclosure of such information would impinge on the reasonable expectation of privacy of the citizens whose information is contained in the requested records.

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. The New Jersey Supreme Court has stated that the privacy provision set forth at N.J.S.A. 47:1A-1 “is neither a preface nor a preamble.” Rather, “the very language expressed in the privacy clause reveals its substantive nature; it does not offer reasons why OPRA was adopted, as preambles typically do; instead, it focuses on the law’s implementation. ... Specifically, it imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests.” Burnett v. County of Bergen, 198 N.J. 408, 423 (2009) (upholding the redaction of social security numbers from otherwise public land title records).

As stated, 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, supra; 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).

Additionally, in Feasel v. City of Trenton (Mercer), GRC Complaint No. 2008-103 (April 2009), the Council addressed the disclosability under OPRA of names and addresses contained in payroll records. The complainant, a Union representative, sought 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 asserted that because Local 9 and the Construction Trades Council, labor organizations with which the complainant was affiliated, had 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 had an interest in detecting violations under the Act pursuant to OPRA requests. The Council engaged in the Portiz balancing test and determined that the complainant's need for access did not outweigh the custodian's need to safeguard the requested personal information contained in the certified payroll records. The Council noted that 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 Council determined that 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.

In the instant matter, the Custodian maintained that requestors do not expect the disclosure of their names, e-mail addresses, and home addresses on the OPRA request forms and OPRA log sheet when they request information from the Township. The Custodian argued that while there is no express law or mandate that demands disclosure of this information, there is express law mandating that the Township safeguard the privacy of citizens. The Custodian argued that in the instant matter, the need to safeguard the private information of requestors outweighs the Complainant's need for such information. The Council notes that the Complainant did not respond to the GRC's request for a response to the privacy questionnaire that facilitates the Portiz balancing process.

The evidence of record indicates that there are no adequate safeguards to prevent possible harm and harassment stemming from the disclosure of the identifying information contained in the requested records.

As the Council noted in Feasel, *supra*, the potential harm that could result from the disclosure of names 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). 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 affected employees. PKF, *supra*, 565 F. Supp.2d at 571.

The Council notes that this matter is distinguishable from the Appellate Division’s decision to disclose names and home addresses of dog owners Atlantic County Society for the Prevention of Cruelty to Animals (ACSPCA) v. City of Absecon, (2009 WL 1562967 (N.J. Super. A.D.)). In this case, the Plaintiff requested a list of all licensed dog owners in the city. The Plaintiff stated that it sought the information “to assist in its animal cruelty enforcement efforts...[and] to solicit charitable contributions from the public.” *Id.* at 1. The Appellate Division noted that the Plaintiff was charged with “enforcing all laws and ordinances enacted for the protection of animals and to promote the interests of and protect and care for animals within the State.” *Id.* at 1. The Appellate Division also conducted the privacy balancing test as in the present complaint and determined that the facts of the case favored disclosure of the names and addresses of individuals who possessed dog licenses.

The Appellate Division’s decision in ACSPCA *supra*, is distinguishable from the present complaint because as noted by the Court, the ACSPCA has express statutory authority to assist in animal cruelty enforcement efforts. In the instant complaint, the Complainant is not endowed with any statutory authority to investigate or enforce the law that would outweigh the privacy rights of individuals submitting OPRA requests to the Township. Thus, the evidence of record indicates that the privacy rights of individuals who submitted OPRA requests to the Township in their names, e-mail addresses, and home addresses contained in the requested OPRA request forms and OPRA log sheets outweighs the Complainant’s need for such information.

The instant matter is further distinguishable from the recent unpublished decision of Renna v. County of Union, No. A-1811-10T3 (N.J. Super. App. Div. February 17, 2012). In Renna, the complainant alleged that the redaction of the addresses while only disclosing the names of individuals maintained in a County of Union mailing list constituted an unlawful denial of access. The Court upheld the lower court’s ruling ordering disclosure of the addresses while acquiescing that it was ill practice for the County to solicit name and address information for its mailing list without informing citizens that doing so could make their identifying information disclosable to the public. Furthermore the Court noted that the disclosure of the names and addresses could inhibit citizen’s to take advantage of the services provided by signing up for the County’s newsletter service. Such a chilling effect does not comport with the legislative intentions of OPRA that encourage accessibility without hostility. The drafters of OPRA would be ill served to have the public afraid to complete OPRA request forms for fear of inappropriate use of their personal information by those who wish to express agendas that the public has expressed no interest in or desired involvement. Appropriately,



procedurally and factually, the Court's decision in Renna is *not* dispositive and *not* persuasive here, and accordingly, the Portiz balancing of interests shall be measured in light of the facts and arguments currently before the Council. The Complainant's lack of response to the GRC's February 22, 2012 Common Law Balancing Test leaves the Council with little need for pause.

Therefore, because the evidence of record indicates that the privacy rights of individuals who submitted OPRA requests to the Township in their names, e-mail addresses, and home addresses contained in the requested OPRA request forms and OPRA log sheets outweighs the Complainant's need for such information, the Custodian did not unlawfully deny the Complainant access to the identifying information pursuant to N.J.S.A. 47:1A-1. See Feasel v. City of Trenton (Mercer), GRC Complaint No. 2008-103 (April 2009).

**Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?**

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and

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sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

As the New Jersey Supreme Court noted in Mason, Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, *supra*, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the Federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). "But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes." 196 N.J. at 73 (citations omitted).

The Mason Court then examined the catalyst theory within the context of New Jersey law, stating that:

"New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, cert. denied, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. See also North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999) (applying Singer fee-shifting test to commercial contract).

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); see also Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

After Buckhannon, and after the trial court's decision in this case, the Appellate Division decided Teeters. The plaintiff in Teeters requested records from the Division of Youth and Family Services (DYFS), which DYFS declined to release. 387 N.J. Super. at 424. After the GRC preliminarily found in plaintiff's favor, the parties reached a settlement agreement leaving open whether plaintiff was a "prevailing party" under OPRA. *Id.* at 426-27.

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than

federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon ..." *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA." (Footnote omitted.) Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

The court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.' Singer v. State, 95 N.J. 487, 495, cert denied (1984)."

In the instant matter, the Custodian did not unlawfully deny access to the requested OPRA request forms and OPRA log sheets when she redacted the names, telephone numbers, e-mail addresses and home addresses of requestors from the first fifty OPRA requests and OPRA log sheets requested by the Complainant. Thus, pursuant to Teeters, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, absent a violation of OPRA, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. *See* Mason. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, and Mason.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not unlawfully deny access to the requested records when she redacted the telephone numbers contained in the first 50 OPRA requests made to the records Custodian from January 1, 2010 through August 25, 2010 pursuant to N.J.S.A. 47:1A-5.a and Smith v. Department of Corrections, GRC Complaint No. 2004-163 (June 2005).

2. Because the evidence of record indicates that the privacy rights of individuals who submitted OPRA requests to the Township in their names, e-mail addresses, and home addresses contained in the requested OPRA request forms and OPRA log sheets outweighs the Complainant's need for such information, the Custodian did not unlawfully deny the Complainant access to the identifying information pursuant to N.J.S.A. 47:1A-1. See Feasel v. City of Trenton (Mercer), GRC Complaint No. 2008-103 (April 2009).
  
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, absent a violation of OPRA, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. See Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008). Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, and Mason.

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March 20, 2012