



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

May 24, 2011 Government Records Council Meeting

John A. Ott
Complainant
v.
Cape May County
Custodian of Record

Complaint No. 2010-77

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 2011 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 the evidence of record shows that, similar to the U.S. District Court’s holding in John Does & PKF-Mark III, Inc. v. City of Trenton Dep’t of Pub. Works - Water Div., 565 F. Supp. 2d 560 (D.N.J. 2008) the Complainant’s need for access does not outweigh the Custodian’s need to safeguard the requested personal information contained in the certified payroll records. The release of the employee names could result in harassment and unsolicited contact between the Complainant and the individuals whose names and wages are being requested. Therefore, the Custodian did not unlawfully deny the Complainant access to the names contained in the requested certified payroll records pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy.

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 24th Day of May, 2011

Robin Berg Tabakin, Chair
Government Records Council



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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: June 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

John A. Ott¹
Complainant

GRC Complaint No. 2010-77

v.

Cape May County²
Custodian of Records

Records Relevant to Complaint:

February 16, 2010 OPRA Request:

Certified payroll records for Homestead Plumbing for all work performed on the Cape May County Library for Lower Township.

March 18, 2010 OPRA Request:

Certified payroll records for HP Homestead Plumbing and Heating Inc., with names, from December 9, 2009 to the present, for work performed on the Cape May County Library for Lower Township.

Request Made: February 16, 2010 and March 18, 2010

Response Made: February 17, 2010 and March 22, 2010

Custodian: Nikki Hess

GRC Complaint Filed: March 29, 2010³

Background

February 16, 2010

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

February 16, 2010

Telephone call from the Custodian to the Complainant. The Custodian informs the Complainant that the requested records are ready for pick up.

February 17, 2010

Custodian's response to the Complainant's first (1st) OPRA request. The Custodian responds in writing on the OPRA request form on the first (1st) business day following

¹ Represented by Steven Berkowitz, Esq., of Berkowitz & Associates (Marlton, NJ).

² Represented by James B. Arsenault, Jr., of the Cape May Office of County Counsel (Cape May, NJ).

³ The GRC received the Denial of Access Complaint on April 1, 2010.

receipt of such request. The Custodian notes that the records were picked up on this date at a cost of \$2.10.

March 18, 2010

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

March 22, 2010

Custodian's response to the Complainant's second (2nd) OPRA request. The Custodian responds in writing on the OPRA request form on the second (2nd) business day following receipt of such request. The Custodian states that she has received the Complainant's OPRA requests seeking certified payrolls for Homestead Plumbing (with names).

The Custodian states that the payroll records reference the project title, which includes Upper Township Library Branch, so there is no way to know at which site the contractor was working. The Custodian asks if the Complainant still wants redacted copies of the records which the Custodian has on file, which may or may not include work performed on the Upper Township Branch.

The Custodian also states that she has been advised by the County Counsel that the County is required to redact employee names on all certified payroll records. The Custodian asks if the Complainant still wants these records.

March 29, 2010

Letter from the Complainant to the Custodian. The Complainant states that while he realizes that it is policy to redact names on certified payroll records, he believes it is important to receive the names of the apprentices who worked on the project, in order to verify that they are actually apprentices registered with a government approved apprentice program. The Complainant states that due to this, he will be filing a Denial of Access Complaint with the GRC. The Complainant attaches a copy of such complaint.

March 29, 2010

Denial of Access Complaint filed with the Government Records Council with the following attachments:⁴

- Complainant's first (1st) OPRA request dated February 16, 2010
- Complainant's second (2nd) OPRA request dated March 18, 2010
- E-mail from the Custodian to the Complainant dated March 22, 2010
- Letter from the Complainant to the Custodian dated March 29, 2010

The Complainant states that he requested certified payroll records from Homestead Plumbing on February 16, 2010. The Complainant asserts that he was informed that the requested records were available on February 17, 2010. The Complainant maintains that upon his arrival at the Custodian's office, he found that the requested payroll records

⁴ The Complainant attached additional materials not relevant to the adjudication of this complaint.
John A. Ott v. Cape May County, 2010-77 – Findings and Recommendations of the Executive Director

contained redactions of employee names. The Complainant maintains that the Custodian informed him that the County must redact all employee names on certified payroll records.

The Complainant states that after paying for and reviewing the records, the payroll records indicate that there were both second- and four-year apprentices working for the County. The Complainant asserts that he monitored the job site before submitting a second OPRA request on March 18, 2010. The Complainant states that his second request sought certified payroll records with *only* the names included so that he could verify with the United States Department of Labor, Bureau of Apprenticeship and Training that both the second- and fourth-year apprentices are registered with a government-recognized apprenticeship program. The Complainant also states that he wants to ensure that these employees are being paid the proper wages. The Complainant states that he received an e-mail from the Custodian on March 22, 2010 informing him that the names of employees must be redacted as per County Counsel's policy.

The Complainant does not agree to mediate this complaint.

May 6, 2010

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

May 17, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 17, 2010
- Copies of the requested payroll records

The Custodian certifies that the Complainant has made several OPRA requests. The Custodian certifies that she received and fulfilled an OPRA request from the Complainant on February 16, 2010. The Custodian certifies that she received another OPRA request from the Complainant on March 18, 2010. The Custodian certifies that she believes that the Denial of Access Complaint is related to the March 18, 2010 request. The Custodian certifies that the March 18, 2010 OPRA request was completed on March 31, 2010. In addition, the Custodian certifies that the issue of whether any documents responsive to the Complainant's request were destroyed in accordance with the records retention schedule promulgated by the New Jersey Division of Archives and Records Management ("DARM") is not applicable.

The Custodian certifies that the first OPRA request herein seeks "payroll certification for public work projects for diverse dates relating to the Cape May County Library, Lower Branch, from contractor HP Homestead Plumbing and Heating, Inc." The Custodian certifies that the records may only be archived and destruction is not allowed.

The Custodian certifies that records responsive to both OPRA requests were redacted to protect the names and addresses of employees so as 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; Merino v. Ho-Ho-Kus, GRC Complaint 2003-110 (July 8, 2004); Doe v. Poritz, 142 N.J. 1 (1995).

The Custodian certifies that Stephen O'Connor, the Clerk/Administrator of the Cape May County Board of Chosen Freeholders, is officially designated as the Custodian of Records for the Freeholder Board. The Custodian certifies that she is employed as an Administrative Clerk in the Freeholder's Office and received the Complainant's requests. The Custodian certifies that construction records are provided to the Clerk of the Board as Custodian of Records because her office is the point of contact for contract audits conducted by both the State and County's auditing firm. The Custodian certifies that these contracts generally originate from the Office of County Engineer and that the State mandates that these contracts require that certain documents are submitted by the contractor in a timely manner for the duration of the project. The Custodian certifies that these documents include certified payroll reports for the general contractor and its subcontractors.

The Custodian certifies that the Engineer's Office maintains a log for each project which includes the name of the general contractor and any subcontractors. The Custodian certifies that contractors file their documentation with the Engineer's Office, which provides copies for the Clerk of the Board's files. The Custodian certifies that the transmittal from the Engineer's Office will note the Freeholders' authorizing resolution number to further ensure the documents are placed with the proper project.

The Custodian certifies that prior to archiving, open construction project documents are easily accessed as long as the requestor uses the correct project name. The Custodian certifies that the project name is determined to be the title advertised by the Engineer's Office when the project is initially put out for bids. The Custodian certifies that because many project titles are similar, it sometimes becomes necessary to contact an OPRA requestor for clarification. The Custodian certifies that this is typical procedure and that she produces the appropriate documents after receiving the necessary clarification.

The Custodian states that contractors are required to keep prevailing wage certifications on public jobs pursuant to N.J.S.A. 34:11-56.29 and that these certifications require the contractor to name their employees and the actual rate paid. The Custodian asserts that these certifications are to "be open at all reasonable hours to the inspection of the public body awarding the contract, to any other party to the lease or agreement to lease pursuant to which the public work is done, and to the Commissioner." *Id.* The Custodian states that these certifications may not have to be filed with the public entity, but to the extent that a copy is ever provided, such would seem to be a governmental record under OPRA.

The Custodian argues that OPRA requires that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions . . .*" N.J.S.A. 47:1A-1 (emphasis added). The Custodian states that OPRA also provides that ". . . a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy . . ." N.J.S.A. 47:1A-1. The Custodian argues that the New Jersey Supreme Court has held that public disclosure of an individual's home address "does implicate privacy interests." Doe v. Poritz, 142 N.J. 1, 82 (1995). The Custodian asserts that the Court specifically noted that such privacy interests are affected where disclosure of a person's address results in unsolicited contact.

The Custodian argues that though Poritz presented issues of privacy in connection with Megan's law, its holding has been deemed relevant to requests to access governmental records under OPRA. The Custodian notes that in Merino v. Ho-Ho-Kus, GRC Complaint 2003-110 (July 2004), the GRC accepted that it must, consistent with OPRA "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 maintains that the GRC has since adopted a balancing test, outlined in Poritz, for purposes of harmonizing the public's right to access with a citizen's reasonable expectations of privacy. The Custodian states that the elements of the Poritz balancing test were accepted by the Appellate Division in Burnett v. County of Bergen, 198 N.J. 408, 427 (2009). The Custodian asserts that the factors include:

"(1) the type of record requested; (2) the information is does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access." Burnett, 198 N.J. at 427 (quoting Poritz, 142 N.J. at 88)

The Custodian states that in Burnett, the Appellate Division held that, without ambiguity, the privacy provision "is neither a preface not a preamble." Id. In support of his proposition, the Custodian cites Burnett:

"[T]he 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." Id. at 423.

The Custodian argues that in light of this mandate to balance individual privacy with the right of the public to inspect governmental records, other GRC decisions are instructive as to the redactions made by the County to these specifically requested records. The Custodian states that in Faulkner v. Rutgers University, GRC Complaint NO. 2007-149 (May 2008), the complainant requested names and addresses for Rutgers University football and basketball season ticket holders for 2006. The Custodian asserts that after conducting a balancing test, the Council held that "the Custodian did not unlawfully deny the Complainant access to the requested season ticket holders' lists pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy."

The Custodian notes that in Avin v. Borough of Oradell, GRC Complainant No. 2004-176 (March 2005), the complainant sought access to a "list of all homeowners who

applied for a fire alarm or burglar alarm permit in the last 3 years.” The Custodian states that the Council balanced the severity of the security concerns of the residents of the town against the public’s right of access under OPRA and held that the Custodian should not disclose the homeowners’ names and addresses. The Custodian also cites to Bernstein v. Borough of Allendale, GRC Complaint No. 2004-195 (July 2005) and states that the complainant sought access to the names and addresses of dog license owners. The Custodian states that the Council conducted a balancing test and held that “pursuant to N.J.S.A. 47:1A-1 and Executive Order 21 the records should not be disclosed because of the unsolicited contact, intrusion of potential harm that may result.”

The Custodian argues that in Paff v. Warren County Office of the Prosecutor, GRC Complaint No. 2007-167 (February 2008), the complainant requested various records pertaining to a criminal matter in Warren County. The Custodian asserts that after conducting a balancing test, the Council held that the redacted names and addresses of victims were properly withheld due to privacy concerns pursuant to N.J.S.A. 47:1A-1.

The Custodian maintains that in the context of alarm permits, dog licenses, season tickets to Rutgers football games, and victim information, the GRC has consistently held that names and addresses may be redacted.

The Custodian also argues that names and address of employees hired by a public works contractor should be redacted from prevailing wage certifications required under the New Jersey Prevailing Wage Act.⁵ The Custodian states that the statute that requires those records itself contemplates limited access only to “the public entity awarding the contract, to any other party to the lease or agreement . . . and to the [State Labor] commissioner.” N.J.S.A. 34:11-56.29.⁶

The Custodian asserts that certain details of the public contract awarded to the contractor or subcontractor, including the contractor name, names of principal officers, and business addresses, would presumptively be disclosable under the Prevailing Wage Act. The Custodian argues that a reviewing court or agency would likely balance the public’s right to know against the individual privacy rights pertaining to the employees of a contractor. The Custodian states that while the owners and the operators of the public works contractor may reasonably relinquish some of their privacy rights by seeking public contracts, a similar argument does not apply to rank and file employees of those entities. The Custodian asserts that those employees who have no control over the employer’s decision to seek public works contracts would reasonably expect that their personal information would remain private and be used only in connection with the express purposes of N.J.S.A 34:11-56.29.

⁵ N.J.S.A. 34:11-56.25 et seq.

⁶ This provision of the Prevailing Wage Act states that:

“Every contractor and subcontractor shall keep an accurate record showing the name, craft or trade, and actual hourly rate of wages paid to each worker employed by him in connection with a public work and such records shall be preserved for two years from date of payment. The record shall be open at all reasonable hours to the inspection of the public body awarding the contract, to any other party to the lease or agreement to lease pursuant to which the public work is done, and to the commissioner.”

The Custodian states that the Complainant's Denial of Access complaint argues that "it is important to receive the names of the apprentices in order to verify that they are truly apprentices registered with a government approved apprentice program." The Custodian maintains that the County cannot conclude that the Complainant has that standing under the Prevailing Wage Act. The Custodian states that the County has produced the requested material to the extent of the privacy implications identified and safeguarded under OPRA. The Custodian asserts that the Complainant believes there is a violation of the Prevailing Wage Act, he can file a complaint with the Department of Labor and the Commissioner can investigate and inspect complete copies of relevant records. N.J.S.A. 34:11-56.31.⁷ The Custodian concludes by stating that the Prevailing Wage Act does not seem to confer similar authority to inspect records on third parties, even for the purposes suggested by the Complainant.

November 6, 2010

Letter from Complainant's Counsel to the GRC. In response to the Custodian's SOI, Complainant's Counsel states that Complainant seeks certified payroll records generated by Homestead Plumbing for work performed at the County Library addition in Lower Township (the "Project"). Counsel states that the requested records were provided to the Complainant but the names and addresses of the people who performed the work were redacted. Counsel asserts that the Complainant seeks the names of the individuals who performed work on the Project to determine if the employees were truly apprentices enrolled in a government-approved apprentice program in compliance with New Jersey's Prevailing Wage Law, N.J.S.A. 34:11-56.25 et seq. Counsel maintains that the Complainant does not require the addresses of these individuals and argues that this should allay any concerns regarding unsolicited contact between the Complainant and the people listed on the payrolls. Counsel notes that the Complainant has made a number of similar requests to public entities and has received certified payroll records without the names and addresses of the employees being redacted.

Counsel argues that OPRA requires custodians of government records to permit inspection, examination and/or copying of records subject to certain conditions and privileges. N.J.S.A. 47:1A-1 et seq. Counsel maintains that the burden of proving a lawful denial of access is on the records custodian and that the Custodian has failed to meet that burden. N.J.S.A. 47:1A-6. Counsel asserts that the Complainant recognizes 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

⁷ N.J.S.A. 35:11-56.31 states in pertinent part that:

"The commissioner [of the New Jersey Department of Labor] shall have the authority to:

(a) investigate and ascertain the wages of workmen employed in any public work in the State;

(b) enter and inspect the place of business or employment of any employer or workmen in any public work in the State, for the purpose of examining and inspecting any or all books, registers, payrolls, and other records of any such employer that in any way relate to or have a bearing upon the question of wages, hours, and other conditions of employment of any such workmen; copy any or all of such books, registers, payrolls, and other records as he or his authorized representative may deem necessary or appropriate; and question such workmen for the purpose of ascertaining whether the provisions of this act have been and are being complied with...."

the citizen's reasonable expectation of privacy." Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 368-69 (App. Div. 2003). Additionally, Counsel asserts that it is also recognized that public disclosure of an individual's home address "does implicate privacy interests." Doe v. Poritz, 142 N.J. 1, 82 (1995).

Counsel states that the factors set forth by the New Jersey Supreme Court in weighing such a privacy interest are as follows: "1) the type of record requested, 2) the information the record contains, 3) the potential for harm in any subsequent nonconsensual disclosure, 4) the injury from disclosure to the relationship in which the record was generated, 5) the adequacy of safeguards to prevent unauthorized disclosure, 6) the degree for need of access, 7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access." *Id.* at 87-88.

Counsel maintains that the request at issue is substantively different from the privacy interests addressed in Poritz. Counsel states that in Poritz, the privacy interest involved the disclosure of the names and addresses of sex offenders. Counsel argues that the very purpose of the disclosure was to warn persons of their location, effectively branding each sex offender with the equivalent of a "Scarlet Letter A." Counsel states that the disclosure subjected the offenders to unsolicited contact with victims of sexual crimes or vigilantes.

Counsel contends that this is not the case in the matter before the Council. Counsel maintains that the identification of persons who performed work on a public project does not implicate the kinds of concerns addressed in Poritz. Counsel states that the addresses of the workers do not need to be disclosed. Counsel maintains that this minimizes the possibility of unsolicited contact. Counsel argues that there is no issue regarding vengeance or vigilantism. Counsel argues that the purpose for which the information sought is to ensure compliance with New Jersey's Prevailing Wage Law, the stated public policy of which is "to establish a prevailing wage level for workmen engaged in public works in order to safeguard their efficiency and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to efficiency and well-being." N.J.S.A. 34:11-56.25. Counsel maintains that the distinction between the sex offender registry at issue in Poritz and the information sought herein is clear.

Counsel argues that certain factors must be considered in deciding to release the requested records without redactions. Counsel states that the first two (2) factors are not in dispute. Counsel maintains that Complainant seeks the names of persons who performed work on a public project for the purpose of determining whether the employees were truly apprentices enrolled in a government approved apprentice program in compliance with the Prevailing Wage Law. Counsel states that the third factor concerns the potential for harm in any subsequent nonconsensual disclosure. The Counsel maintains that in this regard there is no harm to the persons who may be identified. The Counsel asserts that due to the protections offered by the Prevailing Wage Act to workmen on public projects, individuals may benefit from disclosure of their names, with the Complainant able to assist workers in pursuing certain remedies under the Act.

Counsel states that the fourth factor requires analysis of the injury incurred due to disclosure and the relationship from which the record was generated. Counsel further

maintains that the relationships at issue are between the contractor and the employees and that if the contractor is not complying with Prevailing Wage Laws, then there may be an impact on the employment relationship. Counsel notes that the impact would be positive for the employee as they would benefit from the protections of the law.

Counsel's fifth factor concerns the adequacy of safeguards to prevent unauthorized disclosure. Counsel asserts that the Complainant would not disclose the information to third parties other than in pursuit of statutory remedies with the Department of Labor or courts of competent jurisdiction, and further asserts that such filings could be done under seal with all necessary protections to preserve confidentiality.

Counsel states that factors six and seven should be considered together. Counsel maintains that these factors consider the need for access and whether there is a law or public policy militating in favor of disclosure. Counsel asserts that these two factors are linked with respect to the request at issue. Counsel maintains that the Complainant seeks the information to determine whether the law and public policy of the State of New Jersey have been followed and honored. Counsel argues that the Prevailing Wage Act exists for the protection of New Jersey employees and its citizens and that disclosure of the names would insure compliance with the law and public policy. Counsel reasons that the effect of non-disclosure would be to mask the possible violation of same and that such a result should not be countenanced. Counsel asserts that this analysis of the relevant factors weighs in favor of disclosure and that the cases relied upon by the Custodian do not support non-disclosure of the names.

Counsel notes that in Faulkner v. Rutgers University, GRC Complaint No. 2007-149 (May 2008), the non-disclosure of Rutgers' season ticket holder names and addresses was upheld by the GRC based on the concern of unsolicited contact between the requester and the season ticket holders. Counsel states that the opinion focused heavily on the relationship between Rutgers and the season ticket holders; in particular, the non-disclosure was upheld to preserve the commercial relationship between the school and the ticket holders based on the concern that Rutgers would lose business if ticket holders felt their privacy was not preserved. Counsel argues that those facts are not the issue here and that the employees are not customers. Counsel asserts that since there is no consumer relationship between the contractor and employee, the Custodian's reliance on Faulkner is unavailing.

Counsel asserts that the Custodian also relies on Avin v. Borough of Oradell, GRC Complaint No. 2004-176 (March 2005), in support of nondisclosure. Counsel states that in Avin, the requester sought the names and addresses of people who sought fire and burglar alarm permits. Counsel argues that the disclosure of such information implicates severe security issues. Counsel states that the publication of homes with or without burglar alarms gives criminals a distinct edge in choosing targets. Counsel maintains that Avin has no bearing on the instant matter. Counsel asserts that disclosure of the employee names will not subject any employee to increased risk of crime.

Counsel notes that the Custodian also relies on Bernstein v. Borough of Wallington, GRC Complaint 2005-01 (April 2005), for the proposition that the names and addresses of persons who hold dog licenses should not be disclosed. Counsel asserts that the GRC

allowed disclosure on the specific basis that it was not an unwarranted invasion of privacy. Apparently the Custodian was unaware of the decision being reversed.

Counsel asserts that the GRC's findings resulting in nondisclosure in Paff v. Warren County Office of the Prosecutor, GRC Complaint No.: 2007-167 (December 2008), are distinguishable from the instant matter. Counsel states that in Paff, the GRC upheld nondisclosure of the names and addresses of criminal complainants on the basis that disclosure would have a chilling effect on willingness to report crimes. Counsel states that this case is dissimilar to the facts in the instant matter.

Counsel argues that the Custodian incorrectly asserts that the Complainant does not have standing to monitor compliance with the Prevailing Wage Act. Counsel maintains that the Custodian incorrectly suggests the requester should file a complaint with the Department of Labor toward that end. Counsel states that the reasoning is wrong as a matter of law and public policy. Counsel argues that the purpose of OPRA is to permit access to government records and make the process of government as transparent as possible in support of a representative democracy. Counsel argues that under no calculus should OPRA be interpreted to favor non-disclosure so that one government entity may monitor another government entity under cover of darkness and contends that this is contrary to the spirit and letter of OPRA.

Counsel argues that the issue of standing is well settled under New Jersey law and further argues that the Prevailing Wage Act was passed to protect the compensation rates paid to laborers under a public work contract. Bankston v. Housing Authority of the City of Newark, 342 N.J.Super. 465, 469 (App. Div. 2001) (citing Horn v. Serritella Bros., Inc., 190 N.J.Super. 280, 283 (App.Div. 1983)). Counsel states that under N.J.S.A. 34:11-56.40, any workman on a public contract who has been paid less than the prevailing wage may maintain a civil action for the full amount of such wage and may also recover attorneys' fees. Counsel asserts that the statute also allows such a workman to pursue such a claim on behalf of other workers similarly situated. Counsel also states that a workman may designate an agent or representative to pursue such a claim on behalf of him or others similarly situated.

Counsel maintains that a contractor who had the second lowest bid on a public contract may maintain a civil action for damages against the lowest bidder if it is determined that said contractor is not complying with the Prevailing Wage Act. N.J.S.A. 34:11-56.47. Counsel asserts that the Prevailing Wage Act grants standing to workmen, contractors, taxpayers and other interested parties to pursue a variety of remedies and the Complainant requires the requested information to pursue said remedies.

Counsel asserts that the Complainant has made similar requests of other public entities for the same purpose and has received the information without the redactions made by the Custodian here. Counsel states that those public entities are Blackwood Township, Ocean City, Upper Deerfield School District, Clementon, Washington Township, Upper Pittsgrove, Ocean County, Camden Board of Education, the N.J. Department of Labor and Lower Township.

Counsel states that Complainant seeks this information to insure the employees who worked on the Project in question are truly apprentices enrolled in a government approved apprentice program in compliance with the Prevailing Wage Act. Counsel maintains that the privacy interests referenced in Doe v. Portiz and the GRC matters discussed herein are not implicated in the instant matter. Counsel asserts that the Complainant seeks the information for the express purpose of enforcing his own rights and of those similarly situated; accordingly, the request should be granted and the arguments of the Custodian rejected.

February 15, 2010

Letters from the GRC to the Custodian and Complainant, respectively. The GRC requests that the Custodian and Complainant complete balancing test forms to assist with the proper adjudication of this complaint.

February 22, 2010

Custodian’s response to the GRC’s request for a balancing test.

Factors for Consideration in Balancing Test	Custodian’s Response
1. The type of records requested.	<p>In County Tracking No. 688-10, the requesting party requested “certified payroll records for Homestead Plumbing for all work performed on County Library addition for Lower Township.”</p> <p>In County Tracking No. 704-10, the requesting party requested “certified payroll records for HP Homestead Plumbing & Heating Inc. with names (no address needed) to confirm with Dept. of Labor – Office of Apprenticeship verification and pay scales for journeyman and 4th year apprentice on job site for payroll # 1 (12-9-09) to present – as per Cape May County Library Renovations for Lower Township.”</p>
2. The information the requested records do or might contain.	<p>In each, the records may include names, addresses and social security numbers of employees of private companies who have contracted with the County to perform plumbing and heating in connection with a County construction project. Moreover, some of the employees are subcontractors, hired by the prime contractor following disclosure to the County.</p>

<p>3. The potential harm in any subsequent non-consensual disclosure of the requested records.</p>	<p>It is impossible to quantify the potential harm in the event of subsequent non-consensual disclosure of personally identifiable information. At a minimum, the potential harm may come in the form of unwanted or non-consensual contact with the employees named therein by the requestor. The employees of these private companies may not be on notice that their personally identifiable information is subject to disclosure under OPRA as a consequence of their employer's performance of public contracting work either as a prime or subcontractor. While the County concedes that the requestor is not seeking information for a business purpose (such as that at issue in <u>Avin v. Borough of Oradell</u>, GRC Complaint 2004-176 (March 2005)), the County submits that the reasonable expectation of privacy arguments are the same and that the release of personally identifiable information in connection with this request violates the privacy interests identified in <u>Doe v. Poritz</u>, 142 N.J. 1 (1995).</p>
<p>4. The injury from disclosure to the relationship in which the requested record was generated.</p>	<p>As noted, it is not clear to the County whether an employee of a private company reasonably knows that his or her personally identifiable information is subject to disclosure under OPRA by virtue of his employer's decision to seek public contracting work or to subcontract with another company that holds a public contract. While the employee may generally be aware of the employer's mandatory reporting obligation to the Department of Labor under the Prevailing Wage Act, it does not stand to reason that they would know or expect that their personally identifiable information (which has been accepted to fall within the reasonable expectation of privacy recognized by New Jersey courts and the Government Records Council) would be subject to disclosure to non-governmental entities by means of an OPRA request. While the County does not have an articulable "injury" should non-redacted disclosure be required, the County submits it is required to balance the privacy interests of these third parties (the employees of its contractors) in responding to OPRA requests.</p>
<p>5. The adequacy of safeguards to prevent unauthorized disclosure.</p>	<p>The County has redacted personally identifiable information from the requested records to mitigate against any danger in subsequent, non-consensual disclosure.</p>
<p>6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.</p>	<p>The County is aware of no such authority, and accordingly has redacted personally identifiable information from the requested documents before production. By way of further response to this and all other inquires contained herein, the County incorporates by this reference the legal arguments originally set forth in the Custodian's Statement of</p>

	Information, particularly but not exclusively at Item 12 thereto.
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February 23, 2011

Complainant's response to the GRC's request for a balancing test.

Need for Access Questions	Complainant's Response
1. Why do you need the requested records or information?	To verify that workers in question are in a bona fide registered apprentice program and paid accordingly.
2. How important is the a requested record or information to you?	Very important due to past history of contractor non-compliance.
3. Do you plan to redistribute the requested records or information?	Only to the N.J. Department of Labor if not found in compliance.
4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government records?	No.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

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 states 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.

Moreover, OPRA also provides that:

“[A]n individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be a government record[.]”
N.J.S.A. C.47:1A-10.

In the instant matter, the Complainant seeks disclosure of payroll records for plumbing apprentices who were doing contract work for Cape May County. In response, the Custodian supplied the Complainant with payroll records that had the names of such employees redacted. The Complainant states that the Custodian informed him that the redaction of names from payroll records was “County policy.”

OPRA provides that “personnel ... records ... shall not be considered a government record ... except that ... *an individual's name*, title, position, salary, *payroll record*, length of service, date of separation and the reason therefor, and the amount and type of any pension received ... *shall be a government record*[.]” [Emphasis added]. N.J.S.A. 47:1A-10.

The United States District Court of New Jersey has also spoken to such an expectation of privacy. In John Does & PKF-Mark III, Inc. v. City of Trenton Dep't of Pub. Works - Water Div., 565 F. Supp. 2d 560 (D.N.J. 2008), the plaintiffs represented a labor union (hereinafter “PKF”) which contracted with the City of Trenton to work on a certain municipal project. Pursuant to the New Jersey Prevailing Wage Act, PKF filed with the City of Trenton weekly certified payroll reports containing employees’ names, homes addresses and social security numbers, as well as additional work-related information. *Id.* at 560-61. In response to an OPRA request made by the Foundation for Fair Contracting, Ltd. (“FFC”), the City provided copies of PKF’s weekly certified payroll reports containing the personal information to FFC. *Id.* at 561. PKF filed a complaint and motion for injunctive relief, seeking to enjoin the City from disseminating the names, addresses, social security numbers and other personally identifying information of any person employed on the project to any third party. *Id.* at 563.⁸ The court subsequently granted New Jersey Building Trades Council

⁸ The court’s decision notes that oral argument was held on March 25, April 21 and April 25, 2008 regarding PKF’s motion for injunctive relief and the motion was granted on May 19, 2008.

(“NJBTC”) motion to intervene because it was one of their affiliated member groups which had received the certified payroll records from the City, and NJBTC asserted that it was entitled to seek such records on an ongoing basis.⁹ *Id.*

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

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

The court noted that although the U.S. Constitution does not mention an explicit right to privacy, and the U.S. Supreme Court has never proclaimed that such a right exists, the Supreme Court has nevertheless recognized certain “zones of privacy” inherent in the amendments to the U.S. Constitution, one of which is avoiding disclosure of personal matters. *Id.* at 567. The court also noted that OPRA commands public agencies to “safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy[,]” and that this safeguard was emphasized by Governor James McGreevey in Executive Order 21. *Id.*, quoting N.J.S.A. 47:1A-1.

The court recognized that in order to determine whether a particular intrusion into an individual’s privacy is justified, the court must engage in a balancing test by weighing the competing interests. *Id.*, citing Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105, 110 (3d Cir. 1987). The court recognized that the facts of Sheet Metal Workers Int’l Ass’n, Local Union No. 19 v. United States Dep’t of Veterans Affairs, 135 F.3d 891 (3d Cir. 1998) were very similar to the instant matter, and therefore found the Third Circuit’s reasoning to be useful and applicable, inasmuch as the Court of Appeals addressed the same concerns regarding an individual’s reasonable expectation of privacy in the face of a government records request.¹⁰ PKF, 565 F. Supp.2d at 567.

⁹ The court later modified NJBTC’s status to amicus because during the pendency of the case NJBTC informed the court that none of its affiliates had any pending OPRA requests for certified records of PKF employees before the City of Trenton. *Id.* at 563.

¹⁰ Sheet Metal Workers concerned a union’s request for names, addresses and social security numbers pursuant to the Freedom of Information Act (“FOIA”), whereas the PKF matter concerned a request for similar records made pursuant to OPRA; however, the court noted that both FOIA and OPRA were enacted to foster transparency in government and both statutes forbid the disclosure of personal information that would amount to an unreasonable invasion of an individual’s privacy. PKF, *supra*, 565 F.Supp.2d at 567.

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

Considering the necessary factors required when weighing competing interests in disclosure of an otherwise public government record,¹¹ the District Court found that the plaintiffs in PKF had made the necessary showing that the dissemination of employee names, addresses and other personal identifying information constituted a violation of the employee's reasonable expectation of privacy. *Id.* at 571. The court found that NJBTC had failed to establish how the release of the employees' names and addresses would serve a legitimate public interest, whereas dissemination of that information would put employees at risk of having their privacy invaded. *Id.* In doing so, the Court noted that "[d]isclosure of employees' personal information to third parties while revealing nothing about the inner workings of government, not only violates these employees' reasonable expectation of privacy under the Federal Constitution, but also does nothing to advance the purpose of OPRA, which is to promote transparency in government." *Id.* The Court therefore granted PKF's motion for an injunction prohibiting the release of the workers' names, home addresses, and other information. *Id.*

N.J.S.A. 47:1A-1 states in pertinent part that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. Moreover, N.J.S.A. 47:1A-9.b. states that OPRA shall not "abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by ... judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record."

In the matter before the Council, the records requested by Complainant are certified payroll records from subcontracting plumbers who performed for the City of Trenton. These records contain, among other employment-related information, the names and salaries of private individuals who have performed work the City of Trenton. The potential harm that could result from the disclosure of the requested payroll records and names of the workers includes harassment by various entities. John Does & PKF-Mark III, Inc. v. City of Trenton Dep't of Pub. Works - Water Div., 565 F. Supp. 2d 560, 562, 564, 567-68, 570-71 (D.N.J. 2008). Neither the Complainant nor the labor organizations with which he is affiliated have an express statutory mandate to enforce wage laws; the enforcement of wage laws is within

¹¹ These factors include 1) the type of record requested; 2) the information the record contains; 3) the potential for harm in any subsequent nonconsensual disclosure; 4) the injury from disclosure to the relationship in which the record was generated; 5) the adequacy of safeguards to prevent unauthorized disclosure; 6) the degree of need for access; 7) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward disclosure. PKF, 565 F.Supp.2d at 567, *citing* United States v. Westinghouse Corp., 638 F.2d 570, 578 (3d Cir. Pa. 1980).

the jurisdiction of the New Jersey Department of Labor. N.J.S.A. 34:11-56.34. Less intrusive means for obtaining information pertaining to wage and hour compliance is available to the Complainant, as was articulated in Sheet Metal Workers, supra, and in PKF, supra. As the court noted in PKF, once the personal information at issue is released, there is nothing to stop others from obtaining it to harass employees. PKF, supra, 565 F. Supp.2d at 571. Such considerations must be made as the Complainant maintains that he is requesting access to the requested names and salaries to verify that the workers in question are in a bona fide registered apprentice program and paid accordingly.

The evidence of record, therefore, shows that, similar to the U.S. District Court's holding in PKF, supra, the Complainant's need for access does not outweigh the Custodian's need to safeguard the requested personal information contained in the certified payroll records. The release of the employee names could result in harassment and unsolicited contact between the Complainant and the individuals whose names and wages are being requested. Therefore, the Custodian did not unlawfully deny the Complainant access to the names contained in the requested certified payroll records pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the evidence of record shows that, similar to the U.S. District Court's holding in John Does & PKF-Mark III, Inc. v. City of Trenton Dep't of Pub. Works - Water Div., 565 F. Supp. 2d 560 (D.N.J. 2008) the Complainant's need for access does not outweigh the Custodian's need to safeguard the requested personal information contained in the certified payroll records. The release of the employee names could result in harassment and unsolicited contact between the Complainant and the individuals whose names and wages are being requested. Therefore, the Custodian did not unlawfully deny the Complainant access to the names contained in the requested certified payroll records pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.

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