



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

LORI GRIFA
Acting Commissioner

FINAL DECISION

May 27, 2010 Government Records Council Meeting

Tina Renna
(Union County Watchdog Association)
Complainant

Complaint No. 2008-86

v.

Union County Improvement Authority
Custodian of Record

At the May 27, 2010 public meeting, the Government Records Council (“Council”) considered the May 24, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint should be dismissed because the Complainant voluntarily withdrew her complaint from the Office of Administrative Law via letter dated May 10, 2010. Therefore, no further adjudication is required.

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 27th Day of May, 2010

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 2, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 27, 2010 Council Meeting**

Tina Renna¹
(Union County Watchdog Association)
Complainant

GRC Complaint No. 2008-86

v.

Union County Improvement Authority²
Custodian of Records

Records Relevant to Complaint:

Vouchers, purchase orders and bills for the following:

1. DeCotiis, FitzPatrick, Cole & Wisler, LLP's legal services in the amount of \$36,095.30, dated February 28, 2008.
2. DeCotiis, FitzPatrick, Cole & Wisler, LLP's legal services in the amount of \$28,529.66, dated February 28, 2008.³

Request Made: March 10, 2008

Response Made: March 17, 2008

Custodian: Charlotte DeFilippo

GRC Complaint Filed: April 18, 2008⁴

Background

September 30, 2009

Government Records Council's ("Council") Interim Order. At its September 30, 2009 public meeting, the Council considered the September 23, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. While the Custodian did not initially comply with the Interim Order in a timely matter, Custodian Counsel's actions were prudent and timely thereafter. Therefore, the Custodian has complied with the Council's August 11, 2009 Interim Order.
2. Although the Recording Secretary granted access to the requested attorney invoices within the statutorily mandated seven (7) business days, the Secretary

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Gina A. Bilangi, Esq., of DeCotiis, FitzPatrick, Cole & Wisler, LLP (Teaneck, NJ).

³ The Complainant requested additional records, however, said records are not the subject of this Denial of Access Complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

failed to provide the Complainant with the specific legal basis for the redactions resulting in an insufficient response pursuant to N.J.S.A. 47:1A-5.g., and although the Custodian did not appropriately comply with the Council's March 25, 2009 Interim Order and did not initially comply in a timely matter with the Council's August 11, 2009 Interim Order, Custodian Counsel's actions were prudent and timely thereafter. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's August 11, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

October 5, 2009

Council's Interim Order distributed to the parties.

December 30, 2009

Complaint transmitted to the Office of Administrative Law ("OAL").

May 10, 2010

Letter from Complainant's Counsel to Administrative Law Judge. The Complainant's Counsel confirms receipt of settlement funds from the Union County Improvement Authority. As such, Counsel states that the Complainant hereby withdraws her complaint.

May 20, 2010

Complaint referred back to the GRC from OAL.

Analysis

No analysis is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant voluntarily withdrew her complaint from the Office of Administrative Law via letter dated May 10, 2010. Therefore, no further adjudication is required.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 24, 2010



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

September 30, 2009 Government Records Council Meeting

Tina Renna
(Union County Watchdog Association)
Complainant

Complaint No. 2008-86

v.

Union County Improvement Authority
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. While the Custodian did not initially comply with the Interim Order in a timely matter, Custodian Counsel’s actions were prudent and timely thereafter. Therefore, the Custodian has complied with the Council’s August 11, 2009 Interim Order.
2. Although the Recording Secretary granted access to the requested attorney invoices within the statutorily mandated seven (7) business days, the Secretary failed to provide the Complainant with the specific legal basis for the redactions resulting in an insufficient response pursuant to N.J.S.A. 47:1A-5.g., and although the Custodian did not appropriately comply with the Council’s March 25, 2009 Interim Order and did not initially comply in a timely matter with the Council’s August 11, 2009 Interim Order, Custodian Counsel’s actions were prudent and timely thereafter. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s “deemed” denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council’s August 11, 2009 Interim Order, the Complainant has achieved “the



desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual casual nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 30th Day of September, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: October 6, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Tina Renna¹
(Union County Watchdog Association)
Complainant

GRC Complaint No. 2008-86

v.

Union County Improvement Authority²
Custodian of Records

Records Relevant to Complaint:

Vouchers, purchase orders and bills for the following:

1. DeCotiis, FitzPatrick, Cole & Wisler, LLP's legal services in the amount of \$36,095.30, dated February 28, 2008.
2. DeCotiis, FitzPatrick, Cole & Wisler, LLP's legal services in the amount of \$28,529.66, dated February 28, 2008.³

Request Made: March 10, 2008

Response Made: March 17, 2008

Custodian: Charlotte DeFilippo

GRC Complaint Filed: April 18, 2008⁴

Background

August 11, 2009

Government Records Council's ("Council") Interim Order. At its August 11, 2009 public meeting, the Council considered the August 4, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian has complied with the Council's March 25, 2009 Interim Order by providing the Council with all records set forth in Paragraph 3 of the Order within five (5) business days of receiving the Council's Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the *in camera* results table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of**

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Gina A. Bilangi, Esq., of DeCotiis, FitzPatrick, Cole & Wisler, LLP (Teaneck, NJ).

³ The Complainant requested additional records, however, said records are not the subject of this Denial of Access Complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director.

August 13, 2009

Council's Interim Order distributed to the parties.

August 28, 2009

E-mail from the GRC to the Custodian. The Executive Director informs the Custodian that of this date, the GRC has not received the Custodian's compliance with the Council's August 11, 2009 Interim Order and the time has expired on the submission datelines for a request for stay and request for reconsideration of said Interim Order pursuant to *N.J.A.C. 5:105-2.12* and *N.J.A.C. 5:105-2.10*, respectively. Lastly, the Executive Director directed the Custodian to reply immediately to the e-mail indication when the Custodian's compliance would be completed.

August 28, 2009

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel apologizes for the delay and requests an extension of the deadline for compliance to the Council's August 11, 2009 Interim Order until Tuesday, September 1, 2009. Counsel attributes the Custodian's noncompliance with the Interim Order to Counsel's oversight.

August 28, 2009

E-mail from the GRC to the Custodian's Counsel. The Executive Director grants the Custodian's request for an extension of the deadline to comply with the Council's August 11, 2009 Interim Order.

August 28, 2009

E-mail from the Complainant's Counsel to the Custodian. The Complainant's Counsel agrees to the extension.

September 1, 2009

Custodian's response to the Council's Interim Order. The Custodian's Counsel asks the Executive Director to review the redactions made by the Custodian to ensure that the redactions were made appropriately in accordance with the Council's August 11, 2009 Interim Order.

September 10, 2009

E-mail from the GRC to the Custodian (with copy to the Complainant). The Executive Director attached the invoices redacted in accordance with the Council's August 11, 2009 Interim Order in an effort to expedite the Complainant's receipt of the requested records.

Analysis

Whether the Custodian complied with the Council's August 11, 2009 Interim Order?

At its August 11, 2009 public meeting, the Council order the Custodian to disclose the attorneys' invoices with certain redactions requested by the Complainant based on the finding of an *in camera* examination. The Council ordered that the Custodian to disclose these invoices to the Complainant within five (5) business days from receipt of the Interim Order which was distributed to the parties on August 13, 2009, with a legal certification, in accordance with N.J. Court Rule 1:4-4, to the Executive Director indicating that the invoices has been disclosed as ordered.

Having not received conformance of compliance with the Interim Order from the Custodian by August 28, 2009⁵, the Executive Director sent an e-mail to the Custodian requesting such compliance. The Custodian's Counsel requested an extension of the compliance deadline until September 1, 2009. On September 1, 2009, the Custodian's Counsel sent a letter to the Executive Director requesting review of the redactions made to the invoices to ensure proper compliance with the Interim Order. On September 10, 2009, the Executive Director sent an e-mail to the parties attaching the invoices with redactions made in accordance with the Council's August 11, 2009 Interim Order in an effort to expedite the Complainant's receipt of the redacted records. Thus, there is no need for the Custodian to provide the Executive Director with a legal certification, in accordance with N.J. Court Rule 1:4-4, that the invoices have been disclosed to the Complainant as ordered.

The Custodian in this complaint requested an extension for compliance with the Council's August 11, 2009 Interim Order after her noncompliance was pointed out by the Executive Director. The Custodian's Counsel attributes such delay in compliance to Counsel's oversight. Upon the extended deadline for compliance to the Interim Order, the Custodian's Counsel prudently requested the Executive Director's review of the redactions made to the invoices. Thus, while the Custodian did not initially comply with the Interim Order in a timely matter, Custodian Counsel's actions were prudent and timely thereafter. Therefore, the Custodian has complied with the Council's August 11, 2009 Interim Order.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

⁵ Compliance with the Council's August 11, 2009 Interim Order was due by end of business on August 20, 2009. Additionally, the deadline for a request for stay expired on August 20, 2009. Further, the deadline for a request for reconsideration expired on August 27, 2009.
Tina Renna (on behalf of the Union County Watchdog Association), 2008-86 – Supplemental Findings and Recommendations of the Executive Director 3

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

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

Although the Recording Secretary granted access to the requested attorney invoices within the statutorily mandated seven (7) business days, the Secretary failed to provide the Complainant with the specific legal basis for the redactions resulting in an insufficient response pursuant to N.J.S.A. 47:1A-5.g., and although the Custodian did not appropriately comply with the Council’s March 25, 2009 Interim Order and did not initially comply in a timely matter with the Council’s August 11, 2009 Interim Order, Custodian Counsel’s actions were prudent and timely thereafter. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s deemed denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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. *Id.* at 432. 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 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)). The court in Buckhannon 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 (7th ed. 1999)). 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 this complaint before the Council, most of the Custodian’s initial redactions made to the attorney invoices previously provided to the Complainant were determined unlawful pursuant to OPRA. Therefore, the Council ordered the Custodian to provide the Complainant the attorney invoices with few redactions pursuant to the Council’s August 11, 2009 Interim Order. As such, the Custodian’s conduct has changed as the result of this complaint.

Pursuant to Teeters, supra, and the Council's August 11, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, supra, a factual casual nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. While the Custodian did not initially comply with the Interim Order in a timely matter, Custodian Counsel's actions were prudent and timely thereafter. Therefore, the Custodian has complied with the Council's August 11, 2009 Interim Order.
2. Although the Recording Secretary granted access to the requested attorney invoices within the statutorily mandated seven (7) business days, the Secretary failed to provide the Complainant with the specific legal basis for the redactions resulting in an insufficient response pursuant to N.J.S.A. 47:1A-5.g., and although the Custodian did not appropriately comply with the Council's March 25, 2009 Interim Order and did not initially comply in a timely matter with the Council's August 11, 2009 Interim Order, Custodian Counsel's actions were prudent and timely thereafter. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's August 11, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual casual nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared and
Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

August 11, 2009 Government Records Council Meeting

Tina Renna
(on behalf of the Union County Watchdog Association)
Complainant

Complaint No. 2008-86

v.
Union County Improvement Authority
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council ("Council") considered the August 4, 2009 *In Camera* 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 has complied with the Council's March 25, 2009 Interim Order by providing the Council with all records set forth in Paragraph 3 of the Order within five (5) business days of receiving the Council's Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director.**

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ¹
1.	DeCotiis, FitzPatrick, Cole & Wisler, LLP invoice #94103 dated December 10, 2007	All posting dates, descriptions and hours were redacted.	The redactions were made so as not to reveal details of matters protected by the attorney-client privilege and/or relating to personnel matters and on-going investigation.	The entire invoice must be disclosed except for the following information which is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1</u> as this information may reveal litigation strategy: (1) <u>Under work performed by AMP (page 1)</u> , entire description for the 11/12/07 entry; (2) <u>Under work performed by GAB (page 2)</u> , the entire description for the third (3 rd) 11/05/07 entry; (3) <u>Under work performed by GAB (page 3)</u> , the

¹ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				<p>entire description for the third (3rd) 11/13/07 entry; (4) <u>Under work performed by GAB (page 3)</u>, the entire description for the second (2nd) 11/14/07 entry; (5) <u>Under work performed by GAB (page 4)</u>, the part of the description after the first (1st) semicolon and before the second (2nd) semicolon for the second (2nd) 11/16/07 entry; (6) <u>Under work performed by JLW (page 5)</u>, the part of the description before the first (1st) semicolon for the 11/14/07 entry; (7) <u>Under work performed by JLW (page 5)</u>, the part of the description after the first (1st) semicolon for the 11/16/07 entry; (8) <u>Under work performed by JLW (page 5)</u>, the entire description for the 11/19/07 entry; and (9) <u>Under work performed by</u></p>
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				WRL (page 6), the entire description for the 11/30/07 entry.
2.	DeCotiis, FitzPatrick, Cole & Wisler, LLP invoice #95354 dated January 22, 2008	All posting dates, descriptions and hours were redacted.	The redactions were made so as not to reveal details of matters protected by the attorney-client privilege and/or relating to personnel matters and on-going investigation.	The entire invoice must be disclosed except for the following information which are exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1</u> as this information may reveal litigation strategy: (1) Under work performed by GAB (page 2) , the part of the description after “matters” and before the period for the fourth (4 th) 12/7/07 entry [last entry on the page]; (2) Under work performed by GAB (page 3) , the entire description for the 12/7/07 entry; (3) Under work performed by JLW (page 5) , the entire description for the two (2) 11/29/07 entries; (4) Under work performed by JLW (page 5) , the part of the

				<p>description before the first (1st) semicolon and the part of the description after the second (2nd) semicolon for the 12/10/07 entry; (5) <u>Under work performed by JLW (page 5)</u>, the part of the description before the first (1st) semicolon for the 12/11/07 entry; (6) <u>Under work performed by JLW (page 5)</u>, the part of the description after the second (2nd) semicolon for the 12/12/07 entry; (7) <u>Under work performed by WRL (page 5)</u>, the entire descriptions for all of the entries.</p>
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Interim Order Rendered by the
 Government Records Council
 On The 11th Day of August, 2009

Robin Berg Tabakin, Chair
 Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: August 13, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Tina Renna
(on behalf of the Union County Watchdog Association)¹
Complainant

GRC Complaint No. 2008-86

v.

Union County Improvement Authority²
Custodian of Records

Records Submitted for *In Camera* Examination:

1. DeCotiis, FitzPatrick, Cole & Wisler, LLP invoice #94103 dated December 10, 2007.
2. DeCotiis, FitzPatrick, Cole & Wisler, LLP invoice #95354 dated January 22, 2008.

Request Made: March 10, 2008

Response Made: March 17, 2008

Custodian: Charlotte DeFilippo

GRC Complaint Filed: April 18, 2008³

Background

March 25, 2009

Government Records Council's Interim Order. At the March 25, 2009 public meeting, the Government Records Council ("Council") considered the March 18, 2009 Executive Director's Findings and Recommendations and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. Although the Recording Secretary granted access to the requested attorney bills within the statutorily mandated seven (7) business days, the Secretary failed to provide the Complainant with the specific legal basis for the redactions. As such, the Secretary's response to the Complainant's request is insufficient pursuant to N.J.S.A. 47:1A-5.g.
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested bills to determine the validity of the Custodian's assertion that the

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Gina A. Bilangi, Esq., of DeCotiis, FitzPatrick, Cole & Wisler, LLP (Teaneck, NJ).

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

redactions constitute attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, litigation and personnel matters pursuant to N.J.S.A. 10:4-12 as well as discussions pertaining to an ongoing investigation pursuant to N.J.S.A. 47:1A-3.a.

3. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #2 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁶, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the Council's *in camera* review.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the outcome of the Council's *in camera* review.

March 27, 2009

Council's Interim Order ("Order") distributed to the parties.

April 6, 2009

Certification of the Custodian in response to the Council's Interim Order with the following attachments:

1. Document/Redaction Index,
2. Unredacted copy of the DeCotiis, FitzPatrick, Cole & Wisler, LLP invoice #94103 dated December 10, 2007, and
3. Unredacted copy of the DeCotiis, FitzPatrick, Cole & Wisler, LLP invoice #95354 dated January 22, 2008.

The Custodian certifies that she is the Executive Director of the Union County Improvement Authority ("UCIA") and that she has complied with the GRC's March 25, 2009 Interim Order. Further, the Custodian certifies that she directed her staff to provide the Complainant with the requested attorney invoices in a timely manner, but with redactions of detailed descriptions of matters, or discussions from which the public may be excluded pursuant to the Open Public Meetings Act (specifically N.J.S.A. 10:4-12), and/or protected by the attorney-client privilege. Therefore, the Custodian certifies that the invoices were redacted so as not to reveal the posting date, individual entries, and individual hours for each task. The Custodian certifies that if these invoices are released to the public without

⁴ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁵ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

redactions at this time, it could be very damaging to the UCIA and the UCIA could be compromised during the on-going investigation. Finally, the Custodian certifies that she respectfully requests under the circumstances that the GRC make a finding that the UCIA did not knowingly and willfully violate OPRA and not find the Complainant to be a prevailing party entitled to reasonable attorneys' fees.

April 7, 2009

Letter from the Complainant's Counsel to the Custodian's Counsel. The Complainant's Counsel thanks the Custodian's Counsel for the correspondence dated April 6, 2009 addressed to the GRC in compliance with the March 25, 2009 Interim Order. The Complainant's Counsel goes on to request a copy of the document/redaction index and the certification of the Custodian.

April 8, 2009

Letter from the Custodian's Counsel to the Complainant's Counsel. The Custodian's Counsel states that a copy of the certification of the Custodian and the document/redaction index are enclosed.

Analysis

Whether the Custodian complied with the GRC's March 25, 2009 Interim Order?

The Custodian delivered to the Council on April 6, 2009 (within five (5) business days from receipt of the Council's Interim Order) in a sealed envelope nine (9) copies of the requested unredacted documents, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Therefore, the Custodian has complied with the Council's March 25, 2009 Interim Order.

Whether the Custodian unlawfully redacted the records provided to the Complainant?

The Custodian asserts receiving the Complainant's OPRA request via facsimile on March 10, 2008. The Custodian asserts that on March 17, 2008 she directed her staff to provide the Complainant with a written response to her OPRA request and the requested invoices in redacted form. The Custodian later certifies that the redactions made to the requested invoices pertain to attorney-client privileged information, litigation and personnel matters, as well as discussions pertaining to an ongoing investigation. The Custodian later asserts that N.J.S.A. 47:1A-3.a. exempts from public access records pertaining to an investigation in progress. The Custodian also states that N.J.S.A. 10:4-12 allows governing bodies to exclude the public from the discussion of personnel matters. Further, the Custodian asserts that the descriptions in the legal invoices are detailed in such a manner which warranted redaction in their entirety. The Custodian states that the UCIA will make unredacted copies of the requested invoices available as soon as the matters are concluded.

The Complainant's Counsel asserts that had the UCIA provided a specific legal basis for the redactions at the time the invoices were provided, presumably the UCIA would claim OPRA's attorney-client privilege exemption. Counsel states that pursuant to N.J.S.A.

2A:84A-20, only communications between a lawyer and a client “in the course of the relationship and in professional confidence, are privileged.” Counsel states that pursuant to In re Gonnella, 283 N.J. Super. 509 (Law. Div. 1989), the attorney-client privilege is limited to “those situations in which lawful legal advice is the object of the relationship.” As such, Counsel contends that not every communication between a lawyer and his/her client is privileged.

Additionally, Counsel states that under New Jersey law, “the attorney-client privilege...does not apply to insulate billings from disclosure.” Hunterdon County Policeman’s Benevolent Association Local 188 v. Township of Franklin, 286 N.J. Super. 389 (App. Div. 1996) (affirming the trial court’s holding that billing records are not privileged and are accessible under the Right-to Know law). Counsel asserts that legal invoices are only privileged if they reveal client secrets or would reveal strategy. Counsel contends that statements such as “conference call with client” or “review and digest Smith disposition” are not privileged. Counsel also asserts that no privilege applies to the dates on which work occurred, who performed the task, or the amount of time spent on each task.

The Complainant’s Counsel states that the Custodian failed to defend the UCIA’s failure to identify the reasons for the redactions to the requested invoices at the time the UCIA responded to the Complainant’s OPRA request. Counsel asserts that the privileges later cited by the Custodian do not justify all of the redactions such as time spent on tasks and dates work was performed. Further, Counsel states that the Custodian failed to provide any specific information to support the UCIA’s claim that there is an investigation in progress that warrants the redactions to the requested bills.

Considering the Custodian’s assertion that the information contained in the attorneys’ invoices is exempt from access under the attorney-client privilege, the GRC notes that OPRA excludes from the definition of a government record “any record within the attorney-client privilege.” N.J.S.A. 47:1A-1.1. The attorney-client privilege “recognizes that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system.” Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 27-8 (App.Div.1989). The attorney-client privilege protects communications between a lawyer and the client made in the course of that professional relationship, and particularly protects information which, if disclosed, would jeopardize the legal position of the client. N.J.S.A. 2A:84A-20; RPC 1.6. The New Jersey Supreme Court has observed that RPC 1.6 “expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client.” In re Advisory Opinion No. 544 of N.J. Sup. Court, 103 N.J. 399, 406 (1986).

Redaction of otherwise public documents is appropriate where protection of privileged or confidential subject matter is a concern. South Jersey Publishing Co., Inc. v. N. J. Expressway Authority, 124 N.J. 478, 488-9 (1991). Moreover, whether the matter contained in the requested documents pertains to pending or closed cases is important, because the need for confidentiality is greater in pending matters. Keddie v. Rutgers, State University, 148 N.J. 36, 54 (1997). Nevertheless, “[e]ven in closed cases. . .attorney work-

product and documents containing legal strategies may be entitled to protection from disclosure." *Id.*

Addressing the issue of alleged privileged or confidential information contained in attorneys' bills, the Judge in The Courier Post v. Lenape Regional High School District, 360 N.J.Super. 191 (Law Division, 2002) concluded,

"I fail to understand why it is necessary for confidential or privileged material to appear on an attorney's bill in the first place. I can rationalize no compelling reason for it. If a reason does exist, two areas of concern arise. In the first instance, it is clear that a public agency represented by outside counsel has sufficient control over, and should dictate, how attorney's bills should be prepared and presented. Certainly, this is not a novel issue. Problems relating to redaction have been evident since enactment of the RTKL [Right to Know Law] and, before that, under the common law right-to-know. This is a problem which is not new and which public agencies should have already taken into account. Rules, regulations and protocols should have been adopted years ago which would have eliminated the need for confidential or privileged material to be placed in attorneys' bills. If, indeed, there is some need for confidential or privileged information to accompany bills, it can and should be by way of a separate memorandum or letter which can be easily separated from the bill itself." *Id.* at 206-207.

The Custodian also asserts that the redacted information is exempt because it relates to personnel matters. OPRA exempts from disclosure all personnel records with certain exceptions.⁷ However, attorneys' invoices are not personnel records as described in N.J.S.A. 47:1A-10 and are therefore not exempt under OPRA's personnel record exemption.

Further, the provision of the Open Public Meetings Act (N.J.S.A. 10:4-12.b.(8))⁸ which allows a governing body to exclude the public from a meeting of the governing body to engage in discussions relating to personnel matters is not applicable to attorneys' bills as is asserted by the Custodian. This provision only relates to meeting minutes.

⁷ N.J.S.A. 47:1A-10 provides in relevant part that personnel or pension records of any individual in the possession of a public agency 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 therefore, and the amount and type of any pension received shall be a government record.

⁸ N.J.S.A. 10:4-12.b. (8) provides in relevant part that a public body may exclude the public only from that portion of a meeting at which the public body discusses any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

Lastly, the Custodian asserts that the information redacted relate to an on-going investigation and are therefore exempt under N.J.S.A. 47:1A-3.a. of OPRA.⁹ However, the Custodian provided no evidence to support that there is information regarding an on-going investigation contained in the requested attorneys' bills, or that access to the requested attorney's bills would be inimical to the public interest. The GRC notes that it can not imagine an instance in which access to any information contained in a public agency's attorneys' bills would be inimical to the public's interest.

The GRC conducted an *in camera* examination on the submitted records. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination¹⁰
1.	DeCotiis, FitzPatrick, Cole & Wisler, LLP invoice #94103 dated December 10, 2007	All posting dates, descriptions and hours were redacted.	The redactions were made so as not to reveal details of matters protected by the attorney-client privilege and/or relating to personnel matters and on-going investigation.	The entire invoice must be disclosed <u>except</u> for the following information which is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1</u> as this information may reveal litigation strategy: (1) Under work performed by

⁹ N.J.S.A. 47:1A-3.a. provides in relevant part that where it shall appear that the record or records which are sought pertain to an investigation in progress by any public agency, the right of access provided for in OPRA may be denied if that access is inimical to the public interest.

¹⁰ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				<p><u>AMP (page 1)</u>, entire description for the 11/12/07 entry;</p> <p>(2) <u>Under work performed by GAB (page 2)</u>, the entire description for the third (3rd) 11/05/07 entry;</p> <p>(3) <u>Under work performed by GAB (page 3)</u>, the entire description for the third (3rd) 11/13/07 entry;</p> <p>(4) <u>Under work performed by GAB (page 3)</u>, the entire description for the second (2nd) 11/14/07 entry;</p> <p>(5) <u>Under work performed by GAB (page 4)</u>, the part of the description after the first (1st) semicolon and before the second (2nd) semicolon for the second (2nd) 11/16/07 entry;</p> <p>(6) <u>Under work performed by JLW (page 5)</u>, the part of the description before the first (1st) semicolon for the 11/14/07 entry;</p> <p>(7) <u>Under work performed by JLW (page 5)</u>, the part of the description after</p>
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				<p>the first (1st) semicolon for the 11/16/07 entry; (8) Under work performed by JLW (page 5), the entire description for the 11/19/07 entry; and (9) Under work performed by WRL (page 6), the entire description for the 11/30/07 entry.</p>
2.	DeCotiis, FitzPatrick, Cole & Wisler, LLP invoice #95354 dated January 22, 2008	All posting dates, descriptions and hours were redacted.	The redactions were made so as not to reveal details of matters protected by the attorney-client privilege and/or relating to personnel matters and on-going investigation.	<p>The entire invoice must be disclosed except for the following information which are exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1</u> as this information may reveal litigation strategy: (1) Under work performed by GAB (page 2), the part of the description after “matters” and before the period for the fourth (4th) 12/7/07 entry [last entry on the page]; (2) Under work performed by GAB (page 3), the entire description for the 12/7/07 entry; (3) Under work</p>

				<p>performed by <u>JLW (page 5)</u>, the entire description for the two (2) 11/29/07 entries;</p> <p>(4) <u>Under work performed by JLW (page 5)</u>, the part of the description before the first (1st) semicolon and the part of the description after the second (2nd) semicolon for the 12/10/07 entry;</p> <p>(5) <u>Under work performed by JLW (page 5)</u>, the part of the description before the first (1st) semicolon for the 12/11/07 entry;</p> <p>(6) <u>Under work performed by JLW (page 5)</u>, the part of the description after the second (2nd) semicolon for the 12/12/07 entry;</p> <p>(7) <u>Under work performed by WRL (page 5)</u>, the entire descriptions for all of the entries.</p>
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Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council’s March 25, 2009 Interim Order by providing the Council with all records set forth in Paragraph 3 of the Order within five (5) business days of receiving the Council’s Order.

2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director.**

Prepared & Approved By: Catherine Starghill, Esq.
Executive Director

August 15, 2009



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

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

INTERIM ORDER

March 25, 2009 Government Records Council Meeting

Tina Renna
(on behalf of the Union County Watchdog Association)
Complainant

Complaint No. 2008-86

v.

Union County Improvement Authority
Custodian of Record

At the March 25, 2009 public meeting, the Government Records Council (“Council”) considered the March 18, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Recording Secretary granted access to the requested attorney bills within the statutorily mandated seven (7) business days, the Secretary failed to provide the Complainant with the specific legal basis for the redactions. As such, the Secretary’s response to the Complainant’s request is insufficient pursuant to N.J.S.A. 47:1A-5.g.
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested bills to determine the validity of the Custodian’s assertion that the redactions constitute attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, litigation and personnel matters pursuant to N.J.S.A. 10:4-12 as well as discussions pertaining to an ongoing investigation pursuant to N.J.S.A. 47:1A-3.a.
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #2 above), a document or redaction index², as well as a legal certification from the Custodian, in**

¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.



accordance with N.J. Court Rule 1:4-4³, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the Council's *in camera* review.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the outcome of the Council's *in camera* review.

Interim Order Rendered by the
Government Records Council
On The 25th Day of March, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: March 27, 2009

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 25, 2009 Council Meeting**

Tina Renna **GRC Complaint No. 2008-86**
(on behalf of the Union County Watchdog Association)¹
Complainant

v.

Union County Improvement Authority²
Custodian of Records

Records Relevant to Complaint: Vouchers, purchase orders and bills for the following:

1. DeCotiis, FitzPatrick, Cole & Wisler, LLP's legal services in the amount of \$36,095.30, dated February 28, 2008
2. DeCotiis, FitzPatrick, Cole & Wisler, LLP's legal services in the amount of \$28,529.66, dated February 28, 2008³

Request Made: March 10, 2008

Response Made: March 17, 2008

Custodian: Charlotte DeFilippo

GRC Complaint Filed: April 18, 2008⁴

Background

March 10, 2008

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

March 17, 2008

Jennifer Erdos, Recording Secretary's, response to the OPRA request. The Secretary responds in writing to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Secretary states that she attached copies of the requested bills to this e-mail and states that information was redacted from said bills.

April 18, 2008

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

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Gina A. Bilangi, Esq., of DeCotiis, FitzPatrick, Cole & Wisler, LLP (Teaneck, NJ).

³ The Complainant requested additional records, however, said records are not the subject of this Denial of Access Complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

- Complainant’s OPRA request dated March 10, 2008
- Recording Secretary’s response to the Complainant’s OPRA request dated March 17, 2008
- DeCotiis, FitzPatrick, Cole & Wisler, LLP’s bills dated December 10, 2007 (with redactions)
- DeCotiis, FitzPatrick, Cole & Wisler, LLP’s bills dated January 22, 2008 (with redactions)

The Complainant’s Counsel states that the Complainant submitted her OPRA request on March 10, 2008 for certain legal bills from DeCotiis, FitzPatrick, Cole & Wisler, LLP, the law firm utilized by the Union County Improvement Authority (“UCIA”). Counsel states that the UCIA responded on March 17, 2008 and provided two (2) heavily redacted invoices to the Complainant. Counsel states that the “Date,” “Description” and “Hours” columns are redacted in their entirety. Counsel states that the UCIA failed to identify the specific legal basis for said redactions. Counsel states that the UCIA’s March 17, 2008 response merely indicates that information has been redacted from the requested bills.

Counsel asserts that had the UCIA provided a specific legal basis for said redactions, presumably the UCIA would claim OPRA’s attorney-client privilege exemption. Counsel states that pursuant to N.J.S.A. 2A:84A-20, only communications between a lawyer and a client “in the course of the relationship and in professional confidence, are privileged.” Counsel states that pursuant to In re Gonnella, 283 N.J. Super. 509 (Law. Div. 1989), the attorney-client privilege is limited to “those situations in which lawful legal advice is the object of the relationship.” As such, Counsel contends that not every communication between a lawyer and his/her client is privileged.

Additionally, Counsel states that under New Jersey law, “the attorney-client privilege...does not apply to insulate billings from disclosure.” Hunterdon County Policeman’s Benevolent Association Local 188 v. Township of Franklin, 286 N.J. Super. 389 (App. Div. 1996) (affirming the trial court’s holding that billing records are not privileged and are accessible under the Right-to Know law). Counsel asserts that legal invoices are only privileged if they reveal client secrets or would reveal strategy. Counsel contends that statements such as “conference call with client” or “review and digest Smith disposition” are not privileged. Counsel also asserts that no privilege applies to the dates on which work occurred, who performed the task or the amount of time spent on each task.

Counsel contends that the Custodian violated OPRA because she failed to provide a specific legal basis for the redactions made to the requested bills. Counsel requests that the Council conduct an *in camera* review of said bills to determine whether the redactions are proper pursuant to OPRA. Additionally, Counsel requests the following relief from the Council:

1. A finding that the Custodian denied access and violated OPRA by redacting information from the requested bills which is not subject to any privilege
2. An order compelling the Custodian to provide immediate access to all of the information that was improperly redacted from the requested bills

3. A finding that the Complainant is a “prevailing party” and entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6
4. A fine assessed against the Custodian if after an investigation the Council determines that the Custodian knowingly and willfully violated OPRA.

The Complainant did not agree to mediate this complaint.

April 28, 2008

Request for the Statement of Information sent to the Custodian.

May 5, 2008

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

- Complainant’s OPRA request dated March 10, 2008
- Recording Secretary’s response to the Complainant’s request dated March 17, 2008

The Custodian certifies receiving the Complainant’s OPRA request via facsimile on March 10, 2008. The Custodian certifies that on March 17, 2008 she directed Jennifer Erdos, Recording Secretary, to provide the Complainant with a written response to her OPRA request in which Jennifer Erdos provided the Complainant with the requested bills in redacted form.

The Custodian contends that the redactions made to the requested bills pertain to attorney-client privileged information, litigation and personnel matters, as well as discussions pertaining to an ongoing investigation. The Custodian states that N.J.S.A. 47:1A-3⁵ exempts from public access records pertaining to an investigation in progress. The Custodian also states that N.J.S.A. 10:4-12 allows governing bodies to exclude the public from the discussion of personnel matters. Further, the Custodian asserts that the descriptions in the legal bills are detailed in such a manner which warranted redaction in their entirety. The Custodian states that the UCIA will make unredacted copies of the requested bills available as soon as the matters are concluded.

The Custodian certifies that the UCIA undertook extreme diligence in searching, compiling and forwarding the requested records to the Complainant. The Custodian certifies that the records are permanently maintained by the UCIA in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).

June 4, 2008

The Complainant Counsel’s response to the Custodian’s SOI. The Complainant’s Counsel states that the Custodian failed to defend the UCIA’s failure to identify the reasons for the redactions to the requested bills at the time the UCIA responded to the Complainant’s OPRA request. Counsel asserts that the privileges cited by the Custodian do not justify all of the redactions such as time spent on tasks and dates work was performed. Further, Counsel states that the Custodian failed to provide any specific

⁵ N.J.S.A. 47:1A-3.a.

information to support the UCIA’s claim that there is an investigation in progress that warrants the redactions to the requested bills.

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 also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof. If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A-5.g.

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.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.

In this instant complaint, the Custodian certified receiving the Complainant's OPRA request on March 10, 2008. The Custodian certified that she directed Jennifer Erdos, Recording Secretary, to respond to the Complainant's request on March 17, 2008, the fifth (5th) business day following the Custodian's receipt of said request, in which Jennifer Erdos released the requested bills in redacted form. The UCIA's response to the Complainant did not identify the specific legal basis for the redactions.

N.J.S.A. 47:1A-5.g. states that if a Custodian is "unable to comply with a request for access, then the Custodian shall indicate the specific basis" for noncompliance.

Therefore, although the Recording Secretary granted access to the requested attorney bills within the statutorily mandated seven (7) business days, the Secretary failed to provide the Complainant with the specific legal basis for the redactions. As such, the Secretary's response to the Complainant's request is insufficient pursuant to N.J.S.A. 47:1A-5.g.

In the Custodian's Statement of Information dated May 5, 2008, the Custodian asserts that the redactions made to the requested bills relate to attorney-client privileged information, litigation and personnel matters as well as discussions pertaining to an ongoing investigation. The Custodian states that N.J.S.A. 47:1A-3.a. exempts from public access records pertaining to an investigation in progress. The Custodian also states that N.J.S.A. 10:4-12 allows governing bodies to exclude the public from the discussion of personnel matters.

The Complainant's Counsel requests that the Council conduct an *in camera* review of the requested bills to determine the validity of the redactions. It should be noted that the Council does not conduct *in camera* reviews at the request of the parties.

However, in Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC⁶ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

"OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers."

The court also stated that:

⁶ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
Tina Renna v. Union County Improvement Authority, 2008-86 – Findings and Recommendations of the Executive Director

“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the requested bills to determine the validity of the Custodian’s assertion that the redactions constitute attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, litigation and personnel matters pursuant to N.J.S.A. 10:4-12 as well as discussions pertaining to an ongoing investigation pursuant to N.J.S.A. 47:1A-3.a.

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

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the Council’s *in camera* review.

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

The Council defers analysis of whether the Complainant is a prevailing party pending the outcome of the Council’s *in camera* review.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Recording Secretary granted access to the requested attorney bills within the statutorily mandated seven (7) business days, the Secretary failed to provide the Complainant with the specific legal basis for the

redactions. As such, the Secretary's response to the Complainant's request is insufficient pursuant to N.J.S.A. 47:1A-5.g.

2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested bills to determine the validity of the Custodian's assertion that the redactions constitute attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, litigation and personnel matters pursuant to N.J.S.A. 10:4-12 as well as discussions pertaining to an ongoing investigation pursuant to N.J.S.A. 47:1A-3.a.
3. **The Custodian must deliver⁷ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #2 above), a document or redaction index⁸, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁹, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the Council's *in camera* review.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the outcome of the Council's *in camera* review.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 18, 2009

⁷ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁸ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."