



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

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

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**RICHARD E. CONSTABLE, III**  
*Commissioner*

**FINAL DECISION**

**April 30, 2013 Government Records Council Meeting**

Joan McGee  
Complainant

Complaint No. 2009-275

v.

Township of East Amwell (Hunterdon)  
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council (“Council”) considered the April 23, 2013 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, adopts the Administrative Law Judge’s (“ALJ”) Initial Decision dated March 20, 2013 in which the ALJ approved the Stipulation of Settlement signed by the parties or their representatives disposing of all issues in this complaint. 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 30<sup>th</sup> Day of April, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 2, 2013**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
April 30, 2013 Council Meeting**

**Joan McGee<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-275**

v.

**Township of East Amwell (Hunterdon)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Total amount of money spent on issues related to Joan McGee paid by the Township of East Amwell ("Township") from 2005 to 2009.<sup>3</sup>

**Request Made:** August 4, 2009

**Response Made:** August 10, 2009

**GRC Complaint Filed:** October 8, 2009<sup>4</sup>

**Background**

At its June 26, 2012 public meeting, the Council considered the June 19, 2012 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 the amended findings and recommendations. The Council, therefore, found that:

1. Because the Custodian has shown that uneven application of the redactions as recommended by the Council was arbitrary and therefore meets the standard for reconsideration, said motion for reconsideration is granted. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. This complaint shall be referred to the Office of Administrative Law for a full hearing to determine whether the Custodian unlawfully denied access to the requested records, including the applicability of any privileges to the records at issue herein, whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and

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

<sup>2</sup> Theresa Stahl, Custodian of Records. Represented by Richard Cushing, Esq., Gebhardt & Kiefer Law Offices (Clinton, NJ).

<sup>3</sup> The Complainant requested additional records which are not at issue in this complaint.

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

unreasonable denial of access under the totality of the circumstances, as well as the applicability of prevailing party attorney fees.

The Council distributed its Interim Order to all parties on June 27, 2012. On October 25, 2012, the GRC transmitted this complaint to the Office of Administrative Law.

On March 7, 2013, the Custodian's Counsel sent a letter to the Honorable Elia Pelios, Administrative Law Judge ("ALJ") attaching a fully executed Stipulation of Settlement in which, among other things, the Complainant agreed to withdraw the instant complaint from consideration. On March 20, 2013, the ALJ released an Initial Decision holding:

"I have reviewed the terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached document.
2. The settlement fully disposes of all issues in the controversy between them and is consistent with the law."<sup>5</sup>

#### Analysis

No analysis required.

#### Conclusions and Recommendations

The Executive Director respectfully recommends the Council adopt the Administrative Law Judge's ("ALJ") Initial Decision dated March 20, 2013 in which the ALJ approved the Stipulation of Settlement signed by the parties or their representatives disposing of all issues in this complaint. No further adjudication is required.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Brandon D. Minde, Esq.  
Executive Director

April 23, 2013

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<sup>5</sup> The parties may have submitted additional correspondence. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

**INTERIM ORDER**

**June 26, 2012 Government Records Council Meeting**

Joan McGee  
Complainant

Complaint No. 2009-275

v.

Township of East Amwell (Hunterdon)  
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council ("Council") considered the June 19, 2012 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian has shown that uneven application of the redactions as recommended by the Council was arbitrary and therefore meets the standard for reconsideration, said motion for reconsideration is granted. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. This complaint shall be referred to the Office of Administrative Law for a full hearing to determine whether the Custodian unlawfully denied access to the requested records, including the applicability of any privileges to the records at issue herein, 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, as well as the applicability of prevailing party attorney fees.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of June, 2012

Steven F. Ritardi, Esq., Acting Chair  
Government Records Council



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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: June 27, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*  
Supplemental Findings and Recommendations of the Executive Director  
June 26, 2012 Council Meeting**

**Joan McGee<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-275**

v.

**Township of East Amwell (Hunterdon)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Total amount of money spent on issues related to Joan McGee paid by the Township of East Amwell (“Township”) from 2005 to 2009.<sup>3</sup>

**Request Made:** August 4, 2009

**Response Made:** August 10, 2009

**Custodian:** Theresa Stahl

**GRC Complaint Filed:** October 8, 2009<sup>4</sup>

**Background**

**February 28, 2012**

Government Records Council’s (“Council”) Interim Order. At its February 28, 2012 public meeting, the Council considered the February 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not fully comply with the Council’s January 25, 2011 Interim Order because she failed to provide all of the records required for an *in camera* review to the Executive Director within the (5) business day time frame to comply with said 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)<sup>5</sup> to the Executive Director.**

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

<sup>2</sup> Represented by Richard Cushing, Esq., Gebhardt & Kiefer Law Offices (Clinton, NJ).

<sup>3</sup> The Complainant requested additional records which are not at issue in this complaint.

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

<sup>5</sup> "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."

3. 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 Custodian's compliance with the Council's Interim Order.

### **February 29, 2012**

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

### **March 5, 2012**

Custodian Counsel's request for stay of the Council's February 28, 2012 Interim Order. Counsel states that the Council's Order required the Township to comply with the findings of an *in camera* review within five (5) business days or until March 7, 2012. Counsel states that pursuant to *N.J.A.C. 5:105-2.12(d)*, this request for stay is being timely submitted within the prescribed time frame to comply with the Council's Order.

Counsel states that the Township is requesting the stay pending submission of a request for reconsideration pursuant to *N.J.A.C. 5:105-2.10*. Counsel states that the Township will submit a request for reconsideration in order to receive clarification of errors in the *in camera* table contained within the Council's Order. Counsel states that the Township Committee will not have an opportunity to review said Order until its meeting on March 8, 2012. Counsel further notes that the Township may also seek reconsideration of the merits of the Order. Counsel thus asserts that a stay is necessary for the Township to fully explore its need for reconsideration with the Township Committee.

Counsel asserts that a stay in this complaint is justifiable because the Township needs clarification without having to guess at the meaning of some of the terms of the Order. Counsel further states that the Township will clearly identify the areas requiring clarification in its request for reconsideration. Counsel asserts that without receiving proper clarification, the Township will be in jeopardy of failing to comply with the Council's Order by failing to appropriately disclose the required information. Counsel further asserts that the Township may also be harmed by finding that it disclosed information that was subject to the attorney-client privilege exemption. Counsel asserts that it is in the public interest for a party to receive clarification of the Council's Order before the party is required to comply with same.

### **March 7, 2012**

Letter from the GRC to the Custodian's Counsel. The GRC states that pursuant to a telephone conversation on this date, the GRC is forwarding clarification of the Council's Order.

The GRC states that Counsel noted that in the Council's Order, the *in camera* review entry for Invoice No. 127234 stated in pertinent part that "Entries dated 10/11/2007 and 10/21/2007: only the names contained in said entry are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 as attorney-client privileged material, except for the name of the Judge contained therein;" however, it does not appear that a Judge is named in said Invoice. The GRC further states that the Counsel noted that the *in camera* review entry for Invoice No. 127736 stated in pertinent part that "the second entry dated

12/30/2007 [is exempt from disclosure under OPRA];” however, the invoice in question shows only one entry for 12/30/2007.

The GRC states that it will therefore edit the *in camera* review entries noted above as follows:

<p>Invoice No. 127234 from Gebhardt &amp; Keifer, Law Offices to East Amwell Twp. dated December 5, 2007</p>	<p><u>N.J.S.A.</u> 47:1A-1 exemption from disclosure records within the attorney-client privilege.</p>	<p>Entries dated 10/1/2007, 10/3/2007, 10/7/2007 and 10/26/2007: the information redacted is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1. as attorney client privileged material.</p> <p><b><i>Entries dated 10/11/2007 and 10/21/2007: only the names contained in said entry are exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1. as attorney client privileged material; all other material in said entry is disclosable.</i></b></p> <p>The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A.</u> 47:1A-1.1. Therefore, the Custodian must disclose the redacted information to the Complainant.</p>
<p>Invoice No. 127736 from Gebhardt &amp; Keifer, Law Offices to East Amwell Twp. dated January 10, 2008</p>	<p><u>N.J.S.A.</u> 47:1A-1 exemption from disclosure records within the attorney-client privilege.</p>	<p>Entries dated 12/9/2007, 12/18/2007, 12/19/2007, 12/20/2007, 12/27/2007, the first entry dated 12/13/2007, the first entry dated 12/26/2007, <b><i>and the entry dated 12/30/2007:</i></b> the information redacted is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. as attorney client privileged material.</p> <p>The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1. Therefore, the Custodian must disclose the redacted information to the Complainant.</p>

The GRC states that pursuant to these edits to the Council’s Order, the five (5) business day compliance period will be calculated as beginning on the date of this letter. The GRC thus requests that Counsel withdraw her March 5, 2012 request for a stay of the Council’s decision for purposes of clarification of the Order in writing.



The GRC states that should the Township decide to appeal the merits of the Council's Order requiring disclosure of portions of the requested attorney invoices, the Township must request a stay of the Council's Order prior to March 14, 2012 and must serve the GRC with a copy of the Notice of Appeal to the Superior Court of New Jersey, Appellate Division.

The GRC states that requests for a stay must conform with the GRC's regulations at *N.J.A.C. 5:105-2.12*. The GRC further states that a requests for reconsideration must conform with the GRC's regulations at *N.J.A.C. 5:105-2.10*.

### **March 8, 2012**

Letter from the Custodian's Counsel to the GRC. Counsel states that she is in receipt of the GRC's letter containing clarification of the Council's Order. Counsel states that the letter addresses the issue of mistakes in the Order that Counsel intended to raise in a request for reconsideration. Counsel further states that the letter further provides for a new deadline until March 14, 2012 to comply with said Order. Counsel states that as a result, she withdraws her March 5, 2012 request for a stay with the understanding that the Township has until March 14, 2012 to request a stay in connection with the revised Order.

### **March 13, 2012**

Custodian Counsel's request for stay of the Council's February 28, 2012 Interim Order revised on March 7, 2012. Counsel states that the Township is requesting a stay in order to file a request for reconsideration of the Council's February 28, 2012 Interim Order revised on March 7, 2012. Counsel states that pursuant to *N.J.A.C. 5:105-2.10*, a request for reconsideration must be filed within ten (10) business days of the Township's receipt of the revised Order, or March 21, 2012; however, the Township was required to comply with the revised Order by March 14, 2012. Counsel states that the request for stay is being timely submitted within the extended deadline to comply with the Council's revised Order.

Counsel asserts that a stay is justified to enable the Township to submit reconsideration without having to choose between violating the Council's Order or disclosing records, thus mooting the request for reconsideration. Counsel asserts that the Township will need the full ten (10) business days to prepare a request for reconsideration because of the number of *in camera* entries.

Counsel states that in the basis for the request for reconsideration will be mistakes in the application of the standard of review that the Council determined were applicable. Counsel further states that the Township will argue that similar entries were evaluated differently: the Township believes that it is mistakenly being asked to disclose information protected by the attorney-client privilege. Counsel states that as stated in the *in camera* review, quoting Matter of Grand Jury Subpoenas, 241 N.J. Super. 18 (App. Div. 1989), the attorney-client privilege exemption "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." *Id.* at 27-28. Counsel asserts that the Township will suffer irreparable harm by being forced to

disclose material protected under the attorney-client privilege and the public will be harmed by the erosion of the privilege.

### **March 14, 2012**

E-mail from the Complainant to the Custodian's Counsel. The Complainant argues that she objects to the request for stay because it includes no statement from the Custodian that she does not understand the Council's Order or that she is claiming that some of the information ordered to be disclosed is protected by the attorney-client privilege. The Complainant argues that Counsel clearly did not consult with the Custodian or Township Committee prior to filing the request for stay. The Complainant contends that this is inappropriate because the attorney-client privilege belongs to the client and not the attorney.

The Complainant further contends that Counsel's reconsideration will not succeed on the merits. The Complainant asserts that Counsel is not applying the correct legal standard: any entries concerning the Complainant, any lawsuit or advice about any lawsuit are no longer applicable to a list of charges on invoices to be paid by public funds. The Complainant notes that there is no pending or active lawsuits in the Township, as Counsel will admit.

The Complainant henceforth argues that the request for stay should be denied. The Complainant notes that she has now been waiting to receive the responsive invoices for years now.

### **March 21, 2012**

Custodian's request for reconsideration. The Custodian's Counsel requests that the Council reconsider its February 28, 2012 Interim Order based on a mistake. Counsel disputes the Council's determination based on its *in camera* review of the invoices responsive to the Complainant's OPRA request.

Counsel states that after an *in camera* review, the Council determined that some of the bills should be redacted differently or not redacted at all. Counsel states that the Council's Order required the Township to release and/or change the redaction of certain records requested by the Complainant that were redacted based on the attorney-client privilege. Counsel states that the Council subsequently revised its Order on March 7, 2012 by clarifying two (2) entries in the table set forth in the Order.

Counsel contends that the Council made mistakes in identifying information to be released and that those mistakes undermine the integrity of the attorney-client privilege. Counsel further contends that the Council's contradictory approach to what it will and will not permit a municipality to redact makes it impossible for a municipality to know what is appropriate to redact in the future. Counsel contends that without clarity in this area, a municipality must choose between violating OPRA or waiving its right to assert the attorney-client privilege for any matters covered by the bills.

Counsel states that OPRA specifically addresses attorney bills and provides for the redaction of such bills:

“A government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA] ... any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege ...” N.J.S.A. 47:1A-1.1.

Counsel states that OPRA further provides that:

“The provisions of this act, shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule, or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.” N.J.S.A. 47:1A-9(b).

Counsel states that read together, these provisions protect attorney-client privileged documents and attorney work product from disclosure. Counsel states that the attorney-client privilege is recognized in New Jersey statutes and rules:

“General rule. Subject to Rule 37 and except as otherwise provided by paragraph 2 of this rule communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a result of a breach of the lawyer-client relationship, or (iv) in the course of a recognized confidential or privileged communication between the client and such witness. The privilege shall be claimed by the lawyer unless otherwise instructed by the client or his representative. Where a corporation or association is the client having the privilege and it has been dissolved, the privilege may be claimed by its successors, assigns or trustees in dissolution.” N.J.S.A. 2A:84A-20(1); N.J.R.E. 504.

Counsel states that the purpose of the privilege is to encourage open discussions between an attorney and his or her client. Fisher v. United States, 425 U.S. 391 (1976). Counsel states that the privilege is applicable to the communications between a public body and its attorney. Paff v. Division of Law, 412 N.J. Super. 140 (App. Div. 2010). Counsel states that although the privilege is strictly construed, New Jersey Courts have supported a more generous view of the privilege than Federal courts. *Id.* at 157. Counsel states that using this generous view, the Paff Court determined that plaintiff was not entitled to a subject matter list of administrative agency advice letters because the letters themselves were privileged.

Counsel contends that in permitting redaction of some of the bills at issue here, the Council recognized that the attorney-client privilege applies to communications between a municipal attorney and municipality and that attorney bills can include information protected by the attorney-client privilege. Counsel notes that bills may contain such information as the dates of conferences regarding a particular issue, individuals whom the attorney consulted, when reports and memos were prepared and distributed and what issues were important enough to research and report on. Counsel contends that most of this information is provided to enable the municipality to review the bills meaningfully so that it can question charges where appropriate. Counsel further contends that this same information can give an outside party an outline of the municipality's legal strategy: when did it know something, what reports did it receive, who communicated with the municipal attorney and on what topics.

Counsel contends that here, the bills were uniformly redacted to address the concern that legal strategy would be revealed through disclosure of this type of information. Counsel argues that the redactions removed the identity of clients or contacts (name or job title) and the subject matter of services but not the date, the time or the amount. Counsel thus contends that the Complainant was still able to see the amount of money spent on legal bills related to issues she raised or litigated. Counsel asserts that this was consistent with her request for "total amount of money spent on issues related to Joan McGee paid by [the Township] in 2005, 2006, 2007, 2008 and 2009."

Counsel asserts that although the Council permitted many of the redactions of identities and subject matter, it did not take a uniform approach to other attorney-client material contained in the bills. Counsel contends that the Council has mistakenly treated similar entries differently so that it is impossible to discern what in the Council's view is privileged and what is not. Counsel argues that below is a list of bills noting the apparent inconsistencies in the Council's handling of similar entries:

- Invoice No. 122194 dated February 13, 2007: The Council permitted the redaction of identities and subject matter in the entry dated 1/10/07, lines three and four of the entry dated 1/16/07 and the entry dated 1/18/07 but required such information to be revealed in the entries dated 1/3/07, 1/8/07, 1/9/07, 1/11/07, 1/16/07 (line two), and 1/31/07.
- Invoice No. 122867 dated March 21, 2007: The Council permitted the redaction of identities/titles and subject matter in the entries dated 2/8/07, and 2/27/07 and the last redaction in the entry dated 2/11/07 but required such information to be revealed in the remaining entries on this bill. In particular, compare the treatment of the 2/8/07 entry with the treatment of the first part of the 2/11/07 entry and the treatment of the 2/15/07 entry with the treatment of the 2/27/07 entry.
- Invoice No. 125143: The Council did not permit the redaction of identities/titles or subject matters in this invoice where it did in other invoices. Compare (1) the treatment of the 6/22/07 entry with the treatment of the 1/18/07 entry from Invoice No. 122194; (2) the treatment of the 7/16/07 entry with the treatment of the 8/23/07 entry from Invoice No. 125798; and (3) the treatment of the 7/31/07 entry with the treatment of the 10/26/07 entry from Invoice No. 127734.

- Invoice No. 125798: The Council permitted the redaction of identities/titles and subject matter for the entries dated 8/2/07, 8/7/07, 8/8/07, 8/13/07, 8/14/07, 8/17/07, and 8/23/07 but required such information to be revealed in the remaining entries, In particular (1) the entries for 8/10/07 and 8/13/07 are almost identical yet treated differently; and (2) the entry for 8/16/07 is almost identical to the entries for 8/17/07 and 8/13/07 yet treated differently.
- Invoice No. 126591: The three entries on this invoice where the Council did not permit redactions are indistinguishable from other entries where redaction was permitted. Compare (1) the treatment of the first entry on 9/9/07 with the treatment of the 9/27/07 entry; and (2) the treatment of the second entry on 9/9/07 with the treatment of the 9/24/07 entry. Also compare (1) the treatment of the 9/17/07 entry with the treatment of the 1/18/07 entry from Invoice No. 122194; and (2) the treatment of the 9/24/07 entry with the treatment of both the 3/21/08 entry (second entry) from Invoice No. 129121 and the 4/17/08 entry from Invoice No. 129935.
- Invoice No. 127234: The two entries on this invoice where the Council permitted only the redaction of names are indistinguishable from the remaining entries where additional redaction was permitted. In particular, compare the treatment of the 10/1/07 entry with the 10/11/07 and 10/21/07 entries.
- Invoice No. 127736: The Council disallowed the redaction of three entries on this invoice. However, (1) the redactions that were disallowed in the second entry on 12/13/07 are not meaningfully different from the redactions that were allowed in the 1/18/07 entry from Invoice No. 122191 and the 12/27/07 entry from this invoice; (2) the redactions that were disallowed in the 12/21/07 entry were allowed in the 10/26/07 entry from Invoice No. 127234; and (3) the redactions that were disallowed in the second 12/26/07 entry are indistinguishable from the redactions allowed in the 12/30/07 entry.
- Invoice No. 128327: The Council did not permit the redaction of the 1/10/08 entry but did permit such redactions in the 1/18/07 entry from Invoice No. 122194, the 3/13/08 entry from Invoice No. 129121 and the 12/2/07 from Invoice No. 127736.
- Invoice No. 132254: All of the redactions disallowed by the Council on this invoice were allowed on other invoices For example, compare: (1) the treatment of the 9/15/08 entry with the 8/13/08 entry from Invoice No. 131640 and entry 12/20/07 from Invoice No. 127736; (2) the treatment of the 9/17/08 entry with the 8/13/08 entry from Invoice No. 131640 and entry 1/18/07 from Invoice No. 122194; (3) the treatment of the fifth entry dated 9/18/08 with the treatment of the 12/9/07 entry from Invoice No. 127736; (4) the treatment of the sixth entry dated 9/18/08 with the fifth line from the 8/18/08 entry of Invoice No. 131640 and the 7/2/08 entry from Invoice No. 131354; (5) the treatment of the 9/21/08 entry with the 8/14/08 entry from Invoice No. 131640; (6) the treatment of the 9/22/08 entry with the treatment of the 6/22/08 entry from Invoice No. 130552; and the treatment of the 9/25/08 entry with the treatment of the 12/30/07 entry from Invoice No. 127736.
- Invoice No. 133260: The main difference between the redactions allowed by the Council on this invoice and the redactions disallowed is that the first category of redactions use a person's name and the second use a person's title. However, there is no support for such a distinction. In most cases, a person familiar with the

Township knows the name that goes with the title. Even someone who is not familiar with the Township can easily find out what names go with what titles. In addition, the treatment of the 11/6/08 and 11/7/08 entries are inconsistent with the treatment of similar entries: compare the treatment of entry 1/18/07 from Invoice No. 122194, the 2/8/07 entry from Invoice No. 122867, and the 4/6/08 entry from Invoice No. 129938.

Counsel states that OPRA clearly provides that attorney bills as a whole are not exempt from its provisions but may be redacted to protect the attorney-client privilege. Counsel contends that the Township attempted to comply with OPRA but now faces complying with a contradictory Order. Counsel thus states that the Township is requesting a reconsideration of the Order to obtain a uniform application of the standard chosen by the Council so that similar entries are treated similarly. Counsel contends that an uneven application abrogates OPRA's attorney-client privilege exemption and offers no guidance to public agencies in responding to requests for attorney bills. Counsel further argues that guidance in this area is particularly important as a municipality may be in jeopardy of waiving its right to the attorney-client privilege in complying with OPRA. *See N.J.R.E. 530* (providing for a waiver of the attorney-client privilege if the party claiming the privilege "without coercion and with knowledge of his right of privilege" disclosed or consented to the disclosure of "any part of the privileged matter."). Counsel argues that compliance with OPRA should not require a public agency to waive attorney-client privilege, especially because parties in litigation with a public agency are increasingly submitting OPRA requests.

Counsel therefore requests the Council reconsider its February 28, 2012 Interim Order to correct the uneven application of the attorney-client privilege to the bills at issue.

### **March 21, 2012**

Complainant's objections to the request for reconsideration. The Complainant contends that the Township's request for reconsideration is without merit because Counsel does not provide any information concerning the legal issues being declared as privileged. The Complainant contends that not all statements, advice or comments from an attorney to a municipality are privileged. The Complainant contends that many types of attorney-municipality communications, such as executive session minutes, real estate transactions, etc., are public records subject to disclosure once the matter has concluded. The Complainant argues that the attorney-client privilege does not last forever.

The Complainant further contends that Counsel failed to provide any indication of whether the bills concern pending lawsuits, a real estate transaction, personnel negotiations, or other issue that would be similarly privileged. The Complainant notes that she is requesting bills from 2007 and prior and there are currently no aforementioned actions that still exist from 2007. The Complainant argues that if the executive session minutes are now public, then the bills should similarly be public records subject to access without redactions.

The Complainant finally argues that the Council's February 28, 2012 Interim Order is valid and Counsel's inability to understand the Order is specious at best. The

Complainant contends that, as an example, it is possible that some names in the bills were personnel who are still employed while other names deal directly with a lawsuit. The Complainant argues that because Counsel will not disclose the type of action for each invoice entry to her, same could also be a reason why the GRC would have differentiated between certain similar pieces of information in conducting its *in camera* review.

### Analysis

#### **Whether the Complainant has met the required standard for reconsideration of the Council's February 28, 2012 Interim Order?**

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

In the matter before the Council, the Council issued its February 27, 2012 Interim Order on February 29, 2012, requiring that the Custodian comply with said Order by March 7, 2012. On March 5, 2012, the custodian requested a stay of the Council's Interim Order; the GRC issued a clarification of said Order on March 7, 2012, requiring the Custodian to comply with the clarified Order by March 14, 2012. The Custodian requested a stay of the clarified Order on March 13, 2012 and requested ten (10) business days, or to March 27, 2012, to prepare a request for reconsideration because of the number of *in camera* entries; the Custodian thereafter filed the request for reconsideration of this matter on March 21, 2012. Thus, the Custodian filed the request for reconsideration within the extended time period to do so.

Applicable case law holds that:

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

System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of this motion for reconsideration, the Custodian asserted that the Council made mistakes in identifying information to be released and that those mistakes undermine the integrity of the attorney-client privilege. Counsel further contended that the Council's contradictory approach to what it will and will not permit a municipality to redact makes it impossible for a municipality to know what is appropriate to redact in the future. Counsel contended that without clarity in this area, a municipality must choose between violating OPRA or waiving its right to assert the attorney-client privilege for any matters covered by the bills.

Counsel contended that in permitting redaction of some of the bills at issue here, the Council recognized that the attorney-client privilege applies to communications between a municipal attorney and municipality and that attorney bills can include information protected by the attorney-client privilege. Counsel noted that bills may contain such information as the dates of conferences regarding a particular issue, individuals whom the attorney consulted, when reports and memos were prepared and distributed and what issues were important enough to research and report on. Counsel contended that most of this information is provided to enable the municipality to review the bills meaningfully so that it can question charges where appropriate. Counsel further contended that this same information can give an outside party an outline of the municipality's legal strategy: when did it know something, what reports did it receive, who communicated with the municipal attorney and on what topics.

Counsel contended that here, the bills were uniformly redacted to address the concern that legal strategy would be revealed through disclosure of this type of information. Counsel argued that the redactions removed the identity of clients or contacts (name or job title) and the subject matter of services but not the date, the time or the amount. Counsel thus contended that the Complainant was still able to see the amount of money spent on legal bills related to issues she raised or litigated. Counsel asserted that this was consistent with her request for "total amount of money spent on issues related to Joan McGee paid by [the Township] in 2005, 2006, 2007, 2008 and 2009."

Counsel asserted that the Council did not take a uniform approach to other attorney-client material contained in the bills. Counsel contended similar entries were treated differently, so that becomes impossible to discern what in the Council's view is privileged and what is not. Counsel provided a list of bills noting the apparent inconsistencies in the Council's handling of similar entries:

- Invoice No. 122194 dated February 13, 2007: The Council permitted the redaction of identities and subject matter in the entry dated 1/10/07, lines three and four of the entry dated 1/16/07 and the entry dated 1/18/07 but required such information to be revealed in the entries dated 1/3/07, 1/8/07, 1/9/07, 1/11/07, 1/16/07 (line two), and 1/31/07.
- Invoice No. 122867 dated March 21, 2007: The Council permitted the redaction of identities/titles and subject matter in the entries dated 2/8/07, and 2/27/07 and the last redaction in the entry dated 2/11/07 but required such information to be



- revealed in the remaining entries on this bill. In particular, compare the treatment of the 2/8/07 entry with the treatment of the first part of the 2/11/07 entry and the treatment of the 2/15/07 entry with the treatment of the 2/27/07 entry.
- Invoice No. 125143: The Council did not permit the redaction of identities/titles or subject matters in this invoice where it did in other invoices. Compare (1) the treatment of the 6/22/07 entry with the treatment of the 1/18/07 entry from Invoice No. 122194; (2) the treatment of the 7/16/07 entry with the treatment of the 8/23/07 entry from Invoice No. 125798; and (3) the treatment of the 7/31/07 entry with the treatment of the 10/26/07 entry from Invoice No. 127734.
  - Invoice No. 125798: The Council permitted the redaction of identities/titles and subject matter for the entries dated 8/2/07, 8/7/07, 8/8/07, 8/13/07, 8/14/07, 8/17/07, and 8/23/07 but required such information to be revealed in the remaining entries, In particular (1) the entries for 8/10/07 and 8/13/07 are almost identical yet treated differently; and (2) the entry for 8/16/07 is almost identical to the entries for 8/17/07 and 8/13/07 yet treated differently.
  - Invoice No. 126591: The three entries on this invoice where the Council did not permit redactions are indistinguishable from other entries where redaction was permitted. Compare (1) the treatment of the first entry on 9/9/07 with the treatment of the 9/27/07 entry; and (2) the treatment of the second entry on 9/9/07 with the treatment of the 9/24/07 entry. Also compare (1) the treatment of the 9/17/07 entry with the treatment of the 1/18/07 entry from Invoice No. 122194; and (2) the treatment of the 9/24/07 entry with the treatment of both the 3/21/08 entry (second entry) from Invoice No. 129121 and the 4/17/08 entry from Invoice No. 129935.
  - Invoice No. 127234: The two entries on this invoice where the Council permitted only the redaction of names are indistinguishable from the remaining entries where additional redaction was permitted. In particular, compare the treatment of the 10/1/07 entry with the 10/11/07 and 10/21/07 entries.
  - Invoice No. 127736: The Council disallowed the redaction of three entries on this invoice. However, (1) the redactions that were disallowed in the second entry on 12/13/07 are not meaningfully different from the redactions that were allowed in the 1/18/07 entry from Invoice No. 122191 and the 12/27/07 entry from this invoice; (2) the redactions that were disallowed in the 12/21/07 entry were allowed in the 10/26/07 entry from Invoice No. 127234; and (3) the redactions that were disallowed in the second 12/26/07 entry are indistinguishable from the redactions allowed in the 12/30/07 entry.
  - Invoice No. 128327: The Council did not permit the redaction of the 1/10/08 entry but did permit such redactions in the 1/18/07 entry from Invoice No. 122194, the 3/13/08 entry from Invoice No. 129121 and the 12/2/07 from Invoice No. 127736.
  - Invoice No. 132254: All of the redactions disallowed by the Council on this invoice were allowed on other invoices For example, compare: (1) the treatment of the 9/15/08 entry with the 8/13/08 entry from Invoice No. 131640 and entry 12/20/07 from Invoice No. 127736; (2) the treatment of the 9/17/08 entry with the 8/13/08 entry from Invoice No. 131640 and entry 1/18/07 from Invoice No. 122194; (3) the treatment of the fifth entry dated 9/18/08 with the treatment of the 12/9/07 entry from Invoice No. 127736; (4) the treatment of the sixth entry dated 9/18/08 with the fifth line from the 8/18/08 entry of Invoice No. 131640 and the

7/2/08 entry from Invoice No. 131354; (5) the treatment of the 9/21/08 entry with the 8/14/08 entry from Invoice No. 131640; (6) the treatment of the 9/22/08 entry with the treatment of the 6/22/08 entry from Invoice No. 130552; and the treatment of the 9/25/08 entry with the treatment of the 12/30/07 entry from Invoice No. 127736.

- Invoice No. 133260: The main difference between the redactions allowed by the Council on this invoice and the redactions disallowed is that the first category of redactions use a person's name and the second use a person's title. However, there is no support for such a distinction. In most cases, a person familiar with the Township knows the name that goes with the title. Even someone who is not familiar with the Township can easily find out what names go with what titles. In addition, the treatment of the 11/6/08 and 11/7/08 entries are inconsistent with the treatment of similar entries: compare the treatment of entry 1/18/07 from Invoice No. 122194, the 2/8/07 entry from Invoice No. 122867, and the 4/6/08 entry from Invoice No. 129938.

Counsel contended that this uneven application abrogates OPRA's attorney-client privilege exemption and offers no guidance to public agencies in responding to requests for attorney bills. Counsel further argued that guidance in this area is particularly important as a municipality may be in jeopardy of waiving its right to the attorney-client privilege in complying with OPRA. *See N.J.R.E. 530* (providing for a waiver of the attorney-client privilege if the party claiming the privilege "without coercion and with knowledge of his right of privilege" disclosed or consented to the disclosure of "any part of the privileged matter."). Counsel argued that compliance with OPRA should not require a public agency to waive attorney-client privilege, especially because parties in litigation with a public agency are increasingly submitting OPRA requests.

In her objection to the Custodian's request for reconsideration, the Complainant asserted that Counsel did not provide any information concerning the legal issues being declared as privileged. The Complainant contended that not all statements, advice or comments from an attorney to a municipality are privileged and observed that many types of attorney-municipality communications, such as executive session minutes, real estate transactions, etc., are public records subject to disclosure once the matter has concluded. The Complainant argued that the attorney-client privilege does not last forever.

The Complainant further contended that Counsel failed to provide any indication of whether the bills concern pending lawsuits, a real estate transaction, personnel negotiations, or other issue that would be similarly privileged. The Complainant noted that she is requesting bills from 2007 and prior and there are currently no aforementioned actions that still exist from 2007. The Complainant argued that if the executive session minutes are now public, then the bills should similarly be public records subject to access without redactions.

Finally, the Complainant argued that, as an example, it is possible that some names in the bills were personnel who are still employed while other names deal directly with a lawsuit. The Complainant argues that because Counsel will not disclose the type of action for each invoice entry to her, this could also be a reason why the GRC would have

differentiated between certain similar pieces of information in conducting its in camera review.

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above; (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *See Cummings, supra*. Moreover, the moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D'Atria, supra*, 242 N.J. Super. at 401. The Custodian has so established; specifically, the Custodian has shown that uneven application of the redactions as recommended by the Council was arbitrary and therefore meets the standard for reconsideration.

Moreover, the parties have raised contested issues of material fact regarding whether the records at issue in this matter contain attorney client privileged material exempt from disclosure under OPRA, the identity of the individuals named in the records at issue, and whether any of the matters referenced in such records have been concluded, and the effect on the disclosability of the records such conclusion may have.

The evidence of record indicates that this complaint is contested regarding whether the records at issue in this matter contain attorney client privileged material exempt from disclosure under OPRA, and whether the Custodian has waived any privileges to which the records at issue are subject.

OPRA states that if the GRC is unable to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, the [GRC] shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the Administrative Procedures Act [APA]. N.J.S.A. 47:1A-7.e.

The APA further provides that the Office of Administrative Law "shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the Office of Administrative Law..." N.J.A.C. 1:1-3.2(a).

As such, this complaint should be referred to the Office of Administrative Law for a full hearing to determine whether the Custodian unlawfully denied access to the requested records, including the applicability of any privileges to the records at issue herein. The Administrative Law Judge should also determine 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, as well as the applicability of prevailing party attorney fees.

Therefore, because the Custodian has shown that uneven application of the redactions as recommended by the Council was arbitrary and therefore meets the standard for reconsideration, said motion for reconsideration is granted. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For

A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian has shown that uneven application of the redactions as recommended by the Council was arbitrary and therefore meets the standard for reconsideration, said motion for reconsideration is granted. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. This complaint shall be referred to the Office of Administrative Law for a full hearing to determine whether the Custodian unlawfully denied access to the requested records, including the applicability of any privileges to the records at issue herein, 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, as well as the applicability of prevailing party attorney fees.

Prepared and

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

June 19, 2012



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

INTERIM ORDER

February 28, 2012 Government Records Council Meeting

Joan McGee  
Complainant

Complaint No. 2009-275

v.

Township of East Amwell (Hunterdon)  
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council ("Council") considered the February 21, 2012 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not fully comply with the Council's January 25, 2011 Interim Order because she failed to provide all of the records required for an *in camera* review to the Executive Director within the (5) business day time frame to comply with said 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)<sup>1</sup> to the Executive Director.**
3. 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 Custodian's compliance with the Council's Interim Order.

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<sup>1</sup> "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."

<b>Record or Redaction Number</b>	<b>Custodian's Explanation/Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination<sup>2</sup></b>
Invoice #122194 from Gebhardt & Keifer, Law Offices to East Amwell Twp. dated February 13, 2007	<u>N.J.S.A.</u> 47:1A-1 exemption from disclosure records within the attorney-client privilege.	Entry dated 1/10/2007, second redaction in entry dated 1/16/2007, entry dated 1/18/2007: the information redacted is attorney-client privileged information and is exempt from disclosure under OPRA pursuant to <u>N.J.S.A.</u> 47:1A-1.1.  The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A.</u> 47:1A-1.1. Therefore, the Custodian must disclose the redacted information to the Complainant.
Invoice #122867 from Gebhardt & Keifer, Law Offices to East Amwell Twp. dated March 21, 2007	<u>N.J.S.A.</u> 47:1A-1 exemption from disclosure records within the attorney-client privilege.	Entries dated 2/8/2007 and 2/27/2007; the information redacted is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1. as attorney client privileged material.  Entry dated 2/11/2007: only the last redaction in that entry is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1. as attorney client privileged material.  The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A.</u> 47:1A-1.1. Therefore, the Custodian must disclose the redacted information to the Complainant.
Invoice	<u>N.J.S.A.</u> 47:1A-1	The redacted material is not attorney-client

<sup>2</sup> **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>#125143 from Gebhardt &amp; Keifer, Law Offices to East Amwell Twp. dated August 8, 2007</p>	<p>exemption from disclosure records within the attorney-client privilege.</p>	<p>privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A.</u> 47:1A-1.1. Therefore, the Custodian must disclose the redacted information to the Complainant.</p>
<p>Invoice #125798 from Gebhardt &amp; Keifer, Law Offices to East Amwell Twp. dated September 17, 2007</p>	<p><u>N.J.S.A.</u> 47:1A-1 exemption from disclosure records within the attorney-client privilege.</p>	<p>Entries dated 8/2/2007, 8/7/2007, 8/8/2007, 8/13/2007, 8/14/2007, 8/17/2007 and 8/23/2007: the information redacted is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1. as attorney client privileged material.</p> <p>Entry dated 8/16/2007: only the names contained in said entry are exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1. as attorney client privileged material; all other material in said entry is disclosable.</p> <p>The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A.</u> 47:1A-1.1. Therefore, the Custodian must disclose the redacted information to the Complainant.</p>
<p>Invoice #126591 from Gebhardt &amp; Keifer, Law Offices to East Amwell Twp. dated November 2, 2007</p>	<p><u>N.J.S.A.</u> 47:1A-1 exemption from disclosure records within the attorney-client privilege.</p>	<p>Entries dated 9/1/2007, 9/4/2007, and 9/9/2007: the information redacted is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1. as attorney client privileged material.</p> <p>Entries dated 9/24/2007 and 9/27/2007: only the names contained in said entry are exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1. as attorney client privileged material, except for the name of the Judge contained therein; all other material in said entry is disclosable.</p> <p>The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A.</u> 47:1A-1.1. Therefore, the Custodian must disclose the redacted information to the Complainant.</p>

<p>Invoice #127234 from Gebhardt &amp; Keifer, Law Offices to East Amwell Twp. dated December 5, 2007</p>	<p><u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.</p>	<p>Entries dated 10/1/2007, 10/3/2007, 10/7/2007 and 10/26/2007: the information redacted is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as attorney client privileged material.</p> <p>Entries dated 10/11/2007 and 10/21/2007: only the names contained in said entry are exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as attorney client privileged material, except for the name of the Judge contained therein; all other material in said entry is disclosable.</p> <p>The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.</p>
<p>Invoice #127736 from Gebhardt &amp; Keifer, Law Offices to East Amwell Twp. dated January 10, 2008</p>	<p><u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.</p>	<p>Entries dated 12/9/2007, 12/18/2007, 12/19/2007, 12/20/2007, 12/27/2007, the first entry dated 12/13/2007, the first entry dated 12/26/2007, and the second entry dated 12/30/2007: the information redacted is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as attorney client privileged material.</p> <p>The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.</p>
<p>Invoice #128327 from Gebhardt &amp; Keifer, Law Offices to East Amwell Twp. dated February 14, 2008</p>	<p><u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.</p>	<p>Entry dated 1/17/2008: the information redacted is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as attorney client privileged material.</p> <p>The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.</p>



Invoice #129121 from Gebhardt & Keifer, Law Offices to East Amwell Twp. dated April 14, 2008	<u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.	All of the redacted information is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as attorney client privileged material.
Invoice #129935 from Gebhardt & Keifer, Law Offices to East Amwell Twp. dated May 19, 2008	<u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.	All of the redacted information is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as attorney client privileged material.
Invoice #130128 from Gebhardt & Keifer, Law Offices to East Amwell Twp. dated June 26, 2008	<u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.	All of the redacted information is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as attorney client privileged material.
Invoice #130552 from Gebhardt & Keifer, Law Offices to East Amwell Twp. dated July 9, 2008	<u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.	All of the redacted information is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as attorney client privileged material.
Invoice #131354 from Gebhardt & Keifer, Law Offices to East Amwell Twp. dated August 22, 2008	<u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.	All of the redacted information is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as attorney client privileged material.

<p>Invoice #131640 from Gebhardt &amp; Keifer, Law Offices to East Amwell Twp. dated September 18, 2008</p>	<p><u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.</p>	<p>All of the redacted information is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as attorney client privileged material.</p>
<p>Invoice #132254 from Gebhardt &amp; Keifer, Law Offices to East Amwell Twp. dated October 22, 2008</p>	<p><u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.</p>	<p>First and second entries dated 9/18/2008, entry dated 9/19/2008: the information redacted is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as attorney client privileged material.</p> <p>The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.</p>
<p>Invoice #133260 from Gebhardt &amp; Keifer, Law Offices to East Amwell Twp. dated December 23, 2008</p>	<p><u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.</p>	<p>Entries dated 11/3/2008, 11/5/2008, and 11/14/2008: the information redacted is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as attorney client privileged material.</p> <p>The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.</p>
<p>Invoice from Scibal &amp; Assoc. to East Amwell Twp. dated April 9, 2009</p>	<p><u>N.J.S.A. 47:1A-1</u> exempts from disclosure communications with the public agency's insurance carrier, administrative service organization or risk management office. This record is also exempt from disclosure under the attorney</p>	<p>Information redacted is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as a communication with the public agency's insurance carrier, administrative service organization or risk management office.</p>

	client privilege as it pertains to bills for legal counsel for litigation.	
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Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of February, 2012

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 29, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
February 28, 2012 Council Meeting**

**Joan McGee<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-275**

v.

**Township of East Amwell (Hunterdon)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Total amount of money spent on issues related to Joan McGee paid by East Amwell Township from 2005 to 2009.<sup>3</sup>

**Request Made:** August 4, 2009

**Response Made:** August 10, 2009

**Custodian:** Theresa Stahl

**GRC Complaint Filed:** October 8, 2009<sup>4</sup>

**Background**

**January 25, 2011**

Government Records Council's Interim Order. At the January 25, 2011 public meeting, the Government Records Council ("Council") considered the January 18, 2011 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. Because the requested invoices are records to which immediate access must be provided pursuant to N.J.S.A. 47:1A-5.e., and because the Custodian provided access to the requested invoices on the twenty-third (23<sup>rd</sup>) business day after receipt of the Complainant's OPRA request, the Custodian has violated N.J.S.A. 47:1A-5.e.
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 records to determine the validity of the Custodian's assertion that the records contain attorney-client privileged information and communications with the Township's insurance carrier, administrative service

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

<sup>2</sup> Represented by Richard Cushing, Esq., Gebhardt & Kiefer Law Offices (Clinton, NJ).

<sup>3</sup> The Complainant requested additional records which are not at issue in this complaint.

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

organization or risk management office which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

3. **The Custodian must deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted documents listed below, a document or redaction index,<sup>6</sup> as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> 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.**

- Invoice #122194 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated February 13, 2007
- Invoice #122867 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated March 21, 2007
- Invoice # 125143 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated August 8, 2007
- Invoice # 125798 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated September 17, 2007
- Invoice # 126591 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated November 2, 2007
- Invoice # 127234 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated December 5, 2007
- Invoice # 127736 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated January 10, 2008
- Invoice # 128327 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated February 14, 2008
- Invoice # 129121 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated April 14, 2008
- Invoice # 129935 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated May 19, 2008
- Invoice # 130128 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated June 26, 2008
- Invoice # 130552 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated July 9, 2008
- Invoice # 131354 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated August 22, 2008
- Invoice # 131640 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated September 18, 2008
- Invoice # 132254 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated October 22, 2008

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<sup>5</sup> 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.

<sup>6</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>7</sup> "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."

- Invoice # 133260 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated December 23, 2008
  - Invoice from Scibal Associates to Township of East Amwell dated April 9, 2009
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 Custodian's compliance with the Council's Interim Order.

**February 7, 2011**

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

**February 11, 2011**

Custodian's Counsel provides the following records for the Council's *in camera* review:

- Invoice # 122194 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated February 13, 2007
- Invoice # 122867 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated March 21, 2007
- Invoice # 125143 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated August 8, 2007
- Invoice # 125798 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated September 17, 2007
- Invoice # 126591 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated November 2, 2007
- Invoice # 127234 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated December 5, 2007
- Invoice # 127736 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated January 10, 2008
- Invoice # 128327 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated February 14, 2008
- Invoice # 129121 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated April 14, 2008
- Invoice # 129935 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated May 19, 2008
- Invoice # 130128 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated June 26, 2008
- Invoice # 130552 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated July 9, 2008
- Invoice # 131354 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated August 22, 2008
- Invoice # 131640 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated September 18, 2008
- Invoice # 132254 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated October 22, 2008

- Invoice # 133260 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated December 23, 2008
- Invoice from Scibal Associates to Township of East Amwell dated April 9, 2009

#### **April 6, 2011**

E-mail from Custodian's Counsel to the GRC. Counsel provides a redacted copy of the second page of Invoice # 125798 and a redacted copy of the Scibal Associates Invoice dated April 6, 2009. Counsel states that it appears from her records that the second page of this document was inadvertently omitted from the materials originally provided to the Complainant. Counsel provides the Complainant with a copy of these records.

#### **April 6, 2011**

E-mail from the Complainant to the GRC. The Complainant acknowledges receipt of the materials that Custodian's Counsel e-mailed to the GRC on April 6, 2011 and asks that the material be included as part of her appeal.

### **Analysis**

#### **Whether the Custodian complied with the Council's January 25, 2011 Interim Order?**

At its January 25, 2011 public meeting, the Council determined that because the Custodian asserted that the requested records were lawfully redacted to protect attorney-client privileged material and communications with an agency's insurance carrier which are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1., the Council must determine whether the legal conclusion asserted by the Custodian is properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested records were properly redacted.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records, 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 records provided are the records requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on February 12, 2011.

The Custodian's Counsel provided the records required for the *in camera* review on February 11, 2011. However, on April 6, 2011 the Custodian provided to the GRC a redacted copy of the second page of Invoice # 125798 and a redacted copy of the Scibal Associates Invoice dated April 6, 2009. Counsel states that it appears from her records that the second page of this document was inadvertently omitted from the materials originally provided to the Complainant.

Therefore, the Custodian did not fully comply with the Council's January 25, 2011 Interim Order because she failed to provide all of the records required for an *in*

camera review to the Executive Director within the five (5) business day time frame to comply with said Order.

### **Whether the Custodian unlawfully redacted 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 ... The terms *shall not include inter-agency or intra-agency advisory, consultative, or deliberative material...* information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

The Custodian asserts that she lawfully redacted the requested records because the redacted information is attorney-client privileged material, attorney work product containing legal strategy, and advice from Gebhardt & Keifer to the Borough, all of which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A- 1.1, N.J.S.A. 47:1A-9.b. and Rule 4:10-2(c), and communications with the public agency’s insurance carrier, administrative service organization or risk management office which are exempt from disclosure under N.J.S.A. 47:1A-1.

OPRA excludes from the definition of a government record any record within the attorney client privilege. N.J.S.A. 47:1A-1.1. In New Jersey, protecting confidentiality within the attorney-client relationship has long been recognized by the courts. *See, e.g. Matter of Grand Jury Subpoenas*, 241 N.J. Super. 18 (App. Div. 1989). In general, the attorney-client privilege renders as confidential communications between a lawyer and a client made in the course of that professional relationship. *See N.J.S.A. 2A: 84A-20 and Fellerman v. Bradley*, 99 N.J. 493, 498-99 (1985). Rule 504 (1) of the New Jersey Rules of Evidence provides that communications between a lawyer and client, “in the course of that relationship and in professional confidence, are privileged...” Such communications as discussion of litigation strategy, evaluation of liability, potential monetary exposure



and settlement recommendations are considered privileged. The Press of Atlantic City v. Ocean County Joint Insurance Fund, 337 N.J. Super. 480, 487 (Law Div. 2000). Also confidential are mental impressions, legal conclusions, and opinions or theories of attorneys. In Re Environmental Ins. Actions, 259 N.J. Super. 308, 317 (App. Div. 1992). 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.*

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

<b>Record or Redaction Number</b>	<b>Custodian's Explanation/Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination<sup>8</sup></b>
Invoice #122194 from	N.J.S.A. 47:1A-1 exemption from disclosure records	Entry dated 1/10/2007, second redaction in entry dated 1/16/2007, entry dated 1/18/2007: the information redacted is attorney-client

<sup>8</sup> **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>Gebhardt &amp; Keifer, Law Offices to East Amwell Twp. dated February 13, 2007</p>	<p>within the attorney-client privilege.</p>	<p>privileged information and is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p>The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.</p>
<p>Invoice #122867 from Gebhardt &amp; Keifer, Law Offices to East Amwell Twp. dated March 21, 2007</p>	<p><u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.</p>	<p>Entries dated 2/8/2007 and 2/27/2007; the information redacted is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as attorney client privileged material.</p> <p>Entry dated 2/11/2007: only the last redaction in that entry is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as attorney client privileged material.</p> <p>The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.</p>
<p>Invoice #125143 from Gebhardt &amp; Keifer, Law Offices to East Amwell Twp. dated August 8, 2007</p>	<p><u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.</p>	<p>The redacted material is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.</p>
<p>Invoice #125798 from Gebhardt &amp; Keifer, Law Offices to East Amwell Twp. dated</p>	<p><u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.</p>	<p>Entries dated 8/2/2007, 8/7/2007, 8/8/2007, 8/13/2007, 8/14/2007, 8/17/2007 and 8/23/2007: the information redacted is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as attorney client privileged material.</p> <p>Entry dated 8/16/2007: only the names contained in said entry are exempt from</p>

September 17, 2007		<p>disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>. as attorney client privileged material; all other material in said entry is disclosable.</p> <p>The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A. 47:1A-1.1</u>. Therefore, the Custodian must disclose the redacted information to the Complainant.</p>
Invoice #126591 from Gebhardt & Keifer, Law Offices to East Amwell Twp. dated November 2, 2007	<u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.	<p>Entries dated 9/1/2007, 9/4/2007, and 9/9/2007: the information redacted is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>. as attorney client privileged material.</p> <p>Entries dated 9/24/2007 and 9/27/2007: only the names contained in said entry are exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>. as attorney client privileged material, except for the name of the Judge contained therein; all other material in said entry is disclosable.</p> <p>The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A. 47:1A-1.1</u>. Therefore, the Custodian must disclose the redacted information to the Complainant.</p>
Invoice #127234 from Gebhardt & Keifer, Law Offices to East Amwell Twp. dated December 5, 2007	<u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.	<p>Entries dated 10/1/2007, 10/3/2007, 10/7/2007 and 10/26/2007: the information redacted is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>. as attorney client privileged material.</p> <p>Entries dated 10/11/2007 and 10/21/2007: only the names contained in said entry are exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>. as attorney client privileged material; all other material in said entry is disclosable.</p> <p>The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not</p>

		exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
Invoice #127736 from Gebhardt & Keifer, Law Offices to East Amwell Twp. dated January 10, 2008	<u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.	<p>Entries dated 12/9/2007, 12/18/2007, 12/19/2007, 12/20/2007, 12/27/2007, the first entry dated 12/13/2007, the first entry dated 12/26/2007, and the entry dated 12/30/2007: the information redacted is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>. as attorney client privileged material.</p> <p>The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A. 47:1A-1.1</u>. Therefore, the Custodian must disclose the redacted information to the Complainant.</p>
Invoice #128327 from Gebhardt & Keifer, Law Offices to East Amwell Twp. dated February 14, 2008	<u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.	<p>Entry dated 1/17/2008: the information redacted is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>. as attorney client privileged material.</p> <p>The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A. 47:1A-1.1</u>. Therefore, the Custodian must disclose the redacted information to the Complainant.</p>
Invoice #129121 from Gebhardt & Keifer, Law Offices to East Amwell Twp. dated April 14, 2008	<u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.	All of the redacted information is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . as attorney client privileged material.
Invoice #129935 from Gebhardt & Keifer, Law Offices to	<u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.	All of the redacted information is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . as attorney client privileged material.

East Amwell Twp. dated May 19, 2008		
Invoice #130128 from Gebhardt & Keifer, Law Offices to East Amwell Twp. dated June 26, 2008	<u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.	All of the redacted information is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . as attorney client privileged material.
Invoice #130552 from Gebhardt & Keifer, Law Offices to East Amwell Twp. dated July 9, 2008	<u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.	All of the redacted information is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . as attorney client privileged material.
Invoice #131354 from Gebhardt & Keifer, Law Offices to East Amwell Twp. dated August 22, 2008	<u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.	All of the redacted information is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . as attorney client privileged material.
Invoice #131640 from Gebhardt & Keifer, Law Offices to East Amwell Twp. dated September 18, 2008	<u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.	All of the redacted information is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . as attorney client privileged material.
Invoice #132254 from Gebhardt &	<u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-	First and second entries dated 9/18/2008, entry dated 9/19/2008: the information redacted is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . as attorney client privileged

Keifer, Law Offices to East Amwell Twp. dated October 22, 2008	client privilege.	material.  The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
Invoice #133260 from Gebhardt & Keifer, Law Offices to East Amwell Twp. dated December 23, 2008	<u>N.J.S.A. 47:1A-1</u> exemption from disclosure records within the attorney-client privilege.	Entries dated 11/3/2008, 11/5/2008, and 11/14/2008: the information redacted is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . as attorney client privileged material.  The remaining information redacted is not attorney-client privileged. The information is general enough that it does not reveal any legal advice, strategy or work product and is not exempt from disclosure as attorney-client privileged pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
Invoice from Scibal & Assoc. to East Amwell Twp. dated April 9, 2009	<u>N.J.S.A. 47:1A-1</u> exempts from disclosure communications with the public agency's insurance carrier, administrative service organization or risk management office. This record is also exempt from disclosure under the attorney client privilege as it pertains to bills for legal counsel for litigation.	Information redacted is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . as a communication with the public agency's insurance carrier, administrative service organization or risk management office.

Thus, the Custodian must disclose the material which is not exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 to the Complainant.

**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 Custodian's compliance with the Council's Interim Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council's January 25, 2011 Interim Order because she failed to provide all of the records required for an *in camera* review to the Executive Director within the (5) business day time frame to comply with said 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)<sup>9</sup> to the Executive Director.**
3. 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 Custodian's compliance with the Council's Interim Order.

Prepared By: Karyn Gordon, Esq.  
In House Counsel

Approved By: Catherine Starghill, Esq.  
Executive Director

February 21, 2012

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<sup>9</sup> "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."  
Joan McGee v. East Amwell Township (Hunterdon), 2009-275 – *In Camera* Findings and Recommendations of the Executive Director



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  
Commissioner

**INTERIM ORDER**

**January 25, 2011 Government Records Council Meeting**

Joan McGee  
Complainant

Complaint No. 2009-275

v.

Township of East Amwell (Hunterdon)  
Custodian of Record

At the January 25, 2011 public meeting, the Government Records Council ("Council") considered the January 18, 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:

1. Because the requested invoices are records to which immediate access must be provided pursuant to N.J.S.A. 47:1A-5.e., and because the Custodian provided access to the requested invoices on the twenty-third (23<sup>rd</sup>) business day after receipt of the Complainant's OPRA request, the Custodian has violated N.J.S.A. 47:1A-5.e.
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 records to determine the validity of the Custodian's assertion that the records contain attorney-client privileged information and communications with the Township's insurance carrier, administrative service organization or risk management office which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted documents listed below, a document or redaction index,<sup>2</sup> as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be**

<sup>1</sup> 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.

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

<sup>3</sup> "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."



**received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

- Invoice #122194 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated February 13, 2007
  - Invoice #122867 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated March 21, 2007
  - Invoice # 125143 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated August 8, 2007
  - Invoice # 125798 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated September 17, 2007
  - Invoice # 126591 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated November 2, 2007
  - Invoice # 127234 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated December 5, 2007
  - Invoice # 127736 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated January 10, 2008
  - Invoice # 128327 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated February 14, 2008
  - Invoice # 129121 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated April 14, 2008
  - Invoice # 129935 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated May 19, 2008
  - Invoice # 130128 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated June 26, 2008
  - Invoice # 130552 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated July 9, 2008
  - Invoice # 131354 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated August 22, 2008
  - Invoice # 131640 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated September 18, 2008
  - Invoice # 132254 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated October 22, 2008
  - Invoice # 133260 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated December 23, 2008
  - Invoice from Scibal Associates to Township of East Amwell dated April 9, 2009
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 Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of January, 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: February 4, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 25, 2011 Council Meeting**

**Joan McGee<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-275**

v.

**Township of East Amwell (Hunterdon)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Total amount of money spent on issues related to Joan McGee paid by East Amwell Township from 2005 to 2009.<sup>3</sup>

**Request Made:** August 4, 2009

**Response Made:** August 10, 2009

**Custodian:** Theresa Stahl

**GRC Complaint Filed:** October 8, 2009<sup>4</sup>

**Background**

**August 4, 2009**

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.<sup>5</sup>

**August 10, 2009**

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the fourth (4<sup>th</sup>) business day following receipt of such request. The Custodian states that there is no document showing the total amount of money spent on issues related to Joan McGee paid by the Township from 2005 to 2009. The Custodian states that she can obtain vouchers from vendors relating to matters involving the Complainant and asks if there are specific vendors or categories the Complainant can identify in order to clarify the OPRA request.

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

<sup>2</sup> Represented by Richard Cushing, Esq., Gebhardt & Kiefer Law Offices (Clinton, NJ).

<sup>3</sup> The Complainant requested additional records which are not at issue in this complaint.

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

<sup>5</sup> The Complainant notes on her OPRA request form that an extension of time to respond to August 18, 2009 is voluntarily granted.

**August 14, 2009**

E-mail from the Complainant to the Custodian. The Complainant states that she agrees with the Custodian that no documents exist which contain a list of the requested information. The Complainant states that in the past Jane Luhrs responded to requests such as the one at issue by researching same and providing that information to the Complainant. The Complainant states that she would like all of the legal vouchers for those years and can add up the charges herself. The Complainant also states that she may have questions regarding the vouchers and what they refer to and asks if the Custodian will be available to answer such questions. The Complainant states that if she does add up the charges the Township cannot then argue that the amounts which the Complainant arrives at are wrong unless the Township wishes to provide an accurate accounting.

**August 18, 2009**

E-mail from the Custodian to the Complainant. The Custodian states that she is working with the Treasurer to obtain the requested legal bills and hopes to have same available by the end of the week. The Custodian states that she will contact the Complainant.

**August 26, 2009**

E-mail from the Custodian to the Complainant. The Custodian states that she should have the requested legal bills ready for the Complainant's review by August 28, 2009.

**September 1, 2009**

E-mail from the Custodian to the Complainant. The Custodian states that the requested legal bills are ready for review and confirms the Complainant's intention to come in the following week to review same.

**September 2, 2009**

E-mail from the Complainant to the Custodian. The Complainant states that she will be in on the Tuesday after Labor Day to review the requested legal bills.

**September 9, 2009**

E-mail from the Custodian to the Complainant. The Custodian states that she had the requested legal bills available for the Complainant's review on September 9, 2009 and the Complainant did not come to review same. The Custodian requests that the Complainant reschedule the review.

**September 9, 2009**

E-mail from the Complainant to the Custodian. The Complainant states that she was mistaken as to the date for reviewing the records and asks to reschedule the review of the legal bills at the Custodian's convenience.

**September 10, 2009**

E-mail from the Custodian to the Complainant. The Custodian states that the Complainant can come in any time to review the requested legal bills.

**September 11, 2009**

E-mail from the Complainant to the Custodian. The Complainant states that she is available to review the requested legal bills on September 15.

**October 8, 2009**

Denial of Access complaint filed with the GRC with the following attachments:

- Complainant's OPRA request dated August 4, 2009
- Custodian's response to the OPRA request dated September 1, 2009
- Invoice #122194 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated February 13, 2007
- Invoice #122867 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated March 21, 2007
- Invoice # 125143 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated August 8, 2007
- Invoice # 125798 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated September 17, 2007
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- Invoice # 132254 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated October 22, 2008
- Invoice # 133260 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated December 23, 2008
- Invoice from Scibal Associates to Township of East Amwell dated April 9, 2009

The Complainant asserts that the Township Clerk provided all invoices as requested; however, several of the invoices were almost entirely redacted. The Complainant states that the Township Clerk informed the Complainant that the invoices were redacted after the submission of the Complainant's OPRA request. The Complainant

states that the invoices were presented to the Township Committee for payment without any redactions.

The Complainant does not agree to mediate this complaint.

**October 16, 2009**

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

**October 26, 2009**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated August 4, 2009
- E-mail from the Custodian to the Complainant dated August 10, 2009
- E-mail from the Custodian to the Complainant dated August 18, 2009
- E-mail from the Custodian to the Complainant dated August 26, 2009
- E-mail from the Custodian to the Complainant dated September 1, 2009
- E-mail from the Complainant to the Custodian dated September 2, 2009
- E-mail from the Custodian to the Complainant dated September 9, 2009
- E-mail from the Complainant to the Custodian dated September 9, 2009
- E-mail from the Custodian to the Complainant dated September 10, 2009
- E-mail from the Complainant to the Custodian dated September 11, 2009

The Custodian certifies that the following invoices were provided to the Complainant on September 15, 2009:

1. Invoice #122194 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated February 13, 2007
2. Invoice #122867 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated March 21, 2007
3. Invoice # 125143 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated August 8, 2007
4. Invoice # 125798 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated September 17, 2007
5. Invoice # 126591 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated November 2, 2007
6. Invoice # 127234 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated December 5, 2007
7. Invoice # 127736 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated January 10, 2008
8. Invoice # 128327 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated February 14, 2008
9. Invoice # 129121 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated April 14, 2008
10. Invoice # 129935 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated May 19, 2008
11. Invoice # 130128 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated June 26, 2008

12. Invoice # 130552 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated July 9, 2008
13. Invoice # 131354 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated August 22, 2008
14. Invoice # 131640 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated September 18, 2008
15. Invoice # 132254 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated October 22, 2008
16. Invoice # 133260 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated December 23, 2008
17. Invoice from Scibal Associates to Township of East Amwell dated April 9, 2009

The Custodian further certifies that all invoices are subject to a six (6) year records retention requirement.

The Custodian certifies that she received the Complainant's OPRA request on August 4, 2009 after hours and that the OPRA request contained a voluntarily granted extension until August 18, 2009 to provide the requested records. The Custodian certifies that she notified the Treasurer, who was out of town, of the OPRA request via e-mail on August 5, 2009. The Custodian certifies that the Township Attorney advised that because no record existed which showed the total amount of money spent on issues related to Joan McGee paid by the Township from 2005 to 2009, the Township was under no obligation to create such a record. The Custodian further certifies that the Township Attorney advised that vouchers could be provided for the Complainant's review and that the Township Attorney further advised that he wanted to redact any information considered privileged. The Custodian certifies that she advised the Complainant of such on August 10, 2009 and again on August 12, 2009. The Custodian certifies that the Complainant replied on August 14, 2009 and extended the deadline to provide responsive records until September 1, 2009. The Custodian certifies that she advised the Complainant via e-mail on August 26, 2009 that the requested records would be available for review by August 28, 2009. The Custodian further certifies that the Complainant did not come in to review the requested vouchers until September 15, 2009.

The Custodian asserts that N.J.S.A. 47:1A-1 allows exemption of records within the attorney-client privilege from disclosure.<sup>6</sup> The Custodian contends that this citation is applicable to all of the attorney invoices. The Custodian further contends that, with regard to the invoice from Scibal Associates, N.J.S.A. 47:1A-1 also exempts from disclosure under OPRA all communications with a public agency's insurance carrier, administrative service organization or risk management office. The Custodian further contends that such invoice is exempt from disclosure under OPRA as part of attorney-client privilege as it pertains to bills for legal counsel for litigation.

### Analysis

#### **Whether the Custodian unlawfully denied access to the requested records?**

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<sup>6</sup> N.J.S.A. 47:1A-1.1 exempts from the definition of a government record materials which are within the attorney-client privilege.

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:

“[a] government record shall not include the following information which is deemed to be confidential:

...

any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege;

...

information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office[.]” N.J.S.A. 47:1A-1.1.

Moreover, OPRA provides that:

“[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” N.J.S.A. 47:1A-5.e.

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.



Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the matter before the Council, the Complainant requested invoices showing the monies paid by the Township on matters involving the Complainant from 2005 to 2009. The Custodian provided invoices containing redactions for material which the Custodian contends fall within the attorney-client privilege, as well as the exemption from disclosure in N.J.S.A. 47:1A-1.1 for communications with a public agency's insurance carrier, administrative service organization or risk management office.

OPRA requires that immediate access be provided to vouchers. N.J.S.A. 47:1A-5.e. In the matter before the Council, the Custodian did not provide immediate access to the requested invoices; instead, the Custodian provided access to the requested invoices on September 9, 2009, twenty-three (23) business days after receipt of the Complainant's OPRA request.

Therefore, because the requested invoices are records to which immediate access must be provided pursuant to N.J.S.A. 47:1A-5.e., and because the Custodian provided access to the requested invoices on the twenty-third (23<sup>rd</sup>) business day after receipt of the Complainant's OPRA request, the Custodian has violated N.J.S.A. 47:1A-5.e.

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 GRC<sup>7</sup> 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:

“[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:

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<sup>7</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).  
Joan McGee v. East Amwell Township (Hunterdon), 2009-275 – Findings and Recommendations of the Executive Director

“[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 records to determine the validity of the Custodian’s assertion that the records contain attorney-client privileged information and communications with the Township’s insurance carrier, administrative service organization or risk management office which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

**Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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 Custodian’s compliance with the Council’s Interim Order.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the requested invoices are records to which immediate access must be provided pursuant to N.J.S.A. 47:1A-5.e., and because the Custodian provided access to the requested invoices on the twenty-third (23<sup>rd</sup>) business day after receipt of the Complainant’s OPRA request, the Custodian has violated N.J.S.A. 47:1A-5.e.
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 records to determine the validity of the Custodian’s assertion that the records contain attorney-client privileged information and communications with the Township’s insurance carrier, administrative service organization or risk management office which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>8</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted documents listed below, a document or redaction index,<sup>9</sup> as well as a legal certification from the Custodian, in**

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<sup>8</sup> 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.

<sup>9</sup> 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 1:4-4,<sup>10</sup> 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.**

- Invoice #122194 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated February 13, 2007
- Invoice #122867 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated March 21, 2007
- Invoice # 125143 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated August 8, 2007
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- Invoice # 133260 from Gebhardt & Kiefer, Law Offices to East Amwell Township dated December 23, 2008
- Invoice from Scibal Associates to Township of East Amwell dated April 9, 2009

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 Custodian's compliance with the Council's Interim Order.

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<sup>10</sup> "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."

Prepared By: Karyn Gordon, Esq.  
In House Counsel

Approved By: Catherine Starghill, Esq.  
Executive Director

January 18, 2011