



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

July 25, 2017 Government Records Council Meeting

Eric M. Aronowitz, Esq.
(o/b/o Middlesex County
Board of Social Services)
Complainant

Complaint No. 2015-113

v.

NJ Department of Human Services
Division of Medical Assistance and Health Services
Custodian of Record

At the July 25, 2017 public meeting, the Government Records Council (“Council”) considered the July 18, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Based on the atypical procedural circumstances of the complaint, the Council should stay its Interim Order for disclosure of the responsive vouchers and invoices, pending any appeal to the Appellate Division by the parties. N.J.A.C. 5:105-2.12. The Council does not retain jurisdiction.
2. The Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for the Complainant to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 25th Day of July, 2017

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: July 28, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 25, 2017 Council Meeting**

**Eric M. Aronowitz, Esq.
(On Behalf of Middlesex County
Board of Social Services)¹
Complainant**

GRC Complaint No. 2015-113

v.

**New Jersey Department of Human Services,
Division of Medical Assistance & Health Services²
Custodial Agency**

Records Relevant to Complaint: Copies via U.S. mail of:

1. All vouchers for payment submitted by Xerox State Healthcare, LLC (“Xerox”), in 2014 and 2015 reflecting Medicaid and Family Care cases processed and active cases pursuant to State Contract A61036 (“Contract”).
2. All payments made to Xerox in 2014 and 2015 for active cases and the processing of new Medicaid and Family Care cases under Line Nos. 0035 and 0036 of the Contract, broken down by county (if possible) and program code.³

Custodian of Record: Dianna Rosenheim
Request Received by Custodian: March 16, 2015
Response Made by Custodian: March 24, 2015
GRC Complaint Received: April 16, 2015

Background

April 25, 2017 Council Meeting:

At its April 25, 2017 public meeting, the Council considered the April 18, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Given that the Appellate Division has now denied without prejudice Xerox’s motion for leave to appeal, the Government Records Council (“GRC”) formally requires the Custodian to comply with Council’s November 15, 2016 Order. However, the GRC

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant sought additional records that are not at issue in this complaint.

notes that it will also decide the remaining issues as indicated by the Appellate Division in its March 27, 2017 denial.

2. Although the Custodian unlawfully denied access to certain portions of the responsive invoices and vouchers, she properly redacted other information contained therein. N.J.S.A. 47:1A-6. Further, the Custodian timely complied with the Council's April 26, 2016 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's November 15, 2016 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council ordered disclosure of the responsive vouchers and invoices without certain redactions. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On April 27, 2017, the Council distributed its Interim Order to all parties.

On the same day, Paul P. Josephson, Esq., on behalf of intervenor Xerox, submitted a request for a stay. N.J.A.C. 5:105-2.12. Specifically, Xerox requested that the Council stay disclosure (as provided in conclusion No. 1 above) and dispose of the remaining issue of fees so that Xerox may file an appeal of the Council's finalized decision. Xerox noted that the Appellate Division previously denied his interlocutory motion for leave to appeal without prejudice, thus permitting Xerox to file again after the Council disposed of all remaining issues. Xerox also argued that the Council should grant his stay because it met the standard derived in Crowe v. DeGioia, 90 N.J. 126, 132 (1982).

On May 17, 2017, the Complainant sent a letter to the GRC, stating that the parties had reached a fee agreement. The Complainant noted that he agreed to stay payment of fees until after the final disposition of any appeals filed by either the Custodian or Xerox.

Analysis

Request for a Stay

At its April 25, 2017 meeting, the Council reinstated its November 15, 2016 Interim Order requiring the Custodian to disclose the responsive vouchers and invoice in accordance with the Council's *In Camera Examination* and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4. On April 27, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the disclosure portion of said Order. Thus, the Custodian's response was due by close of business on May 4, 2017.

On April 27, 2017, the same day as receipt of the Council's Order, Xerox submitted a request for a stay, asking that the Council not require disclosure until a final decision was rendered and Xerox had the opportunity to appeal the disclosure order. Xerox sought the relief because the Appellate Division previously denied an interlocutory appeal without prejudice, pending the conclusion of all other issues on the record. Xerox also addressed the Crowe, factors in his letter. Most compelling of the arguments was that requiring disclosure of the invoices before an appeal would effectively moot Xerox's challenge to the Council's *In Camera Examination* findings.

The GRC acknowledges that the Custodian and Xerox have not complied with the Council's Order to date based on Xerox's intent to appeal its *In Camera Examination* findings. Notwithstanding that compliance has not been achieved, Xerox's intent to appeal the Council's disclosure order is evident in the record. Specifically, Xerox has already filed a motion for leave to appeal from the Council's Interim Order, which the Appellate Division denied. For that reason, the complaint should proceed to final adjudication, even though the compliance issue remains outstanding. Therefore, the Council should grant Xerox's request for a stay of the Council's Interim Order, which would allow for an appeal from a final decision.

Accordingly, based on the atypical procedural circumstances of the complaint, the Council should stay its Interim Order for disclosure of the responsive vouchers and invoices, pending any appeal to the Appellate Division by the parties. N.J.A.C. 5:105-2.12. The Council does not retain jurisdiction.

Prevailing Party Attorney's Fees

At its April 25, 2017 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that the "parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days." The Council further ordered that the parties notify it of a settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13."

On April 27, 2017, the Council distributed its Interim Order to all parties; thus, the Custodian's response was due by close of business on May 25, 2017. On May 17, 2017, the Complainant notified the GRC that the parties reached a settlement on the fee award amount. The Complainant also noted that he agreed to stay payment of the fee until the final disposition of any appeal filed by the Custodian or Xerox.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for the Complainant to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Based on the atypical procedural circumstances of the complaint, the Council should stay its Interim Order for disclosure of the responsive vouchers and invoices, pending any appeal to the Appellate Division by the parties. N.J.A.C. 5:105-2.12. The Council does not retain jurisdiction.
2. The Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for the Complainant to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

July 18, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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INTERIM ORDER

April 25, 2017 Government Records Council Meeting

Eric M. Aronowitz, Esq.
(o/b/o Middlesex County
Board of Social Services)
Complainant

Complaint No. 2015-113

v.

NJ Department of Human Services,
Division of Medical Assistance & Health Services
Custodian of Record

At the April 25, 2017 public meeting, the Government Records Council (“Council”) considered the April 18, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Given that the Appellate Division has now denied without prejudice Xerox’s motion for leave to appeal, the GRC formally requires the Custodian to comply with Council’s November 15, 2016 Order. However, the GRC notes that it will also decide the remaining issues as indicated by the Appellate Division in its March 27, 2017 denial.
2. Although the Custodian unlawfully denied access to certain portions of the responsive invoices and vouchers, she properly redacted other information contained therein. N.J.S.A. 47:1A-6. Further, the Custodian timely complied with the Council’s April 26, 2016 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s November 15, 2016 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council ordered disclosure of the responsive vouchers and invoices without certain redactions. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a



reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Interim Order Rendered by the
Government Records Council
On The 25th Day of April, 2017

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: April 27, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 25, 2017 Council Meeting**

**Eric M. Aronowitz, Esq.
(On Behalf of Middlesex County
Board of Social Services)¹
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GRC Complaint No. 2015-113

v.

**New Jersey Department of Human Services,
Division of Medical Assistance & Health Services²
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Records Relevant to Complaint: Copies via U.S. mail of:

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2. All payments made to Xerox in 2014 and 2015 for active cases and the processing of new Medicaid and Family Care cases under Line Nos. 0035 and 0036 of the Contract, broken down by county (if possible) and program code.³

Custodian of Record: Dianna Rosenheim
Request Received by Custodian: March 16, 2015
Response Made by Custodian: March 24, 2015
GRC Complaint Received: April 16, 2015

Background

January 31, 2017 Council Meeting:

At its January 31, 2017 public meeting, the Council considered the January 24, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

Xerox has failed to establish in its request for reconsideration of the Council’s November 15, 2016 Interim Order that either: 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant sought additional records that are not at issue in this complaint.

did not consider the significance of probative, competent evidence. Xerox failed to establish that the complaint should be reconsidered based on a mistake. Xerox has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, Xerox failed to provide any persuasive evidence that the Council made a mistake in requiring disclosure of basic pricing information contained in the responsive vouchers. Thus, Xerox's request for reconsideration should be denied. 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 S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Procedural History:

On February 2, 2017, the Council distributed its Interim Order to all parties, which denied Xerox's request for reconsideration and left undisturbed its November 16, 2016 Interim Order requiring the Custodian's compliance. On February 8, 2017, on behalf of intervenor Xerox, Paul P. Josephson, Esq., e-mailed the GRC advising that Xerox intended to appeal the Council's decision and would seek a stay.

On the same day, the GRC responded via e-mail, advising the parties of the proper procedure for a stay. N.J.A.C. 5:105-2.12; Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.* (Interim Order dated March 25, 2014). The GRC also extended the compliance time frame from February 9, 2017, to February 16, 2017.

On February 16, 2017, Mr. Josephson submitted to the GRC a request for stay pending determination of Xerox's "Notice of Motion for Leave to Appeal," submitted to the Appellate Division. On February 22, 2017, the GRC granted Xerox's request for stay and advised that it would not address the remaining outstanding issues until the Appellate Division rendered a decision.⁴

On March 27, 2017, the Appellate Division denied Xerox's motion for leave to appeal without prejudice to Xerox's ability to file an appeal "after the GRC decides the counsel fee issue and any other open issues." Id.

Analysis

Compliance

At its November 15, 2016 meeting, the Council ordered the Custodian to disclose the responsive invoices consistent with the *In Camera* Examination findings. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On November 16, 2017, the Council distributed its

⁴ The Complainant declined to submit objections to Xerox's request for stay.

Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 23, 2016.

Initially, Mr. Josephson sought, and the GRC granted, an extension of time until November 30, 2016, to comply with the Council's Order. Thereafter, Mr. Josephson filed a request for reconsideration and a "Notice of Motion for Leave to Appeal" the Council's Order after reconsideration was denied. The GRC briefly stayed compliance, pending the Appellate Division's decision in this matter. On March 27, 2017, the Appellate Division denied Xerox's motion for leave to appeal until the GRC has addressed all remaining issues and attorney's fees. Thus, the GRC is satisfied that it may proceed with adjudicating the remainder of this complaint.

Accordingly, given that the Appellate Division has now denied without prejudice Xerox's motion for leave to appeal, the GRC formally requires the Custodian to comply with Council's November 15, 2016 Order. However, the GRC notes that it will also decide the remaining issues as indicated by the Appellate Division in its March 27, 2017 denial.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian unlawfully denied access to certain portions of the responsive invoices and vouchers, she properly redacted other information contained therein. N.J.S.A. 47:1A-6. Further, the Custodian timely complied with the Council's April 26, 2016 Interim

Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

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

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). "But in interpreting New Jersey law, we look to state law precedent and the specific state statute

before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

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

Mason at 73-76 (2008).

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

Id. at 76.

Here, the Complainant filed the instant complaint on behalf of his client, seeking disclosure of the responsive invoices and vouchers without redactions. The Council subsequently performed and *in camera* review and determined that some of the redactions were unlawful. Thus the Council required disclosure of the responsive records without certain redactions. Aronowitz, GRC 2015-113 (Interim Order dated November 15, 2016). Thereafter, the Council denied Xerox’s request for reconsideration and is again ordering disclosure. For these reasons, the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees. This is notwithstanding the possibility that Xerox may refile their appeal with the Appellate Division.

Accordingly, pursuant to the Council’s November 15, 2016 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council ordered disclosure of the responsive vouchers and invoices without certain redactions. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to**

decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Given that the Appellate Division has now denied without prejudice Xerox's motion for leave to appeal, the GRC formally requires the Custodian to comply with Council's November 15, 2016 Order. However, the GRC notes that it will also decide the remaining issues as indicated by the Appellate Division in its March 27, 2017 denial.
2. Although the Custodian unlawfully denied access to certain portions of the responsive invoices and vouchers, she properly redacted other information contained therein. N.J.S.A. 47:1A-6. Further, the Custodian timely complied with the Council's April 26, 2016 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's November 15, 2016 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council ordered disclosure of the responsive vouchers and invoices without certain redactions. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

April 18, 2017



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Division of Medical Assistance & Health Services
Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that Xerox has failed to establish in his request for reconsideration of the Council’s November 15, 2016 Interim Order that either: 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Xerox failed to establish that the complaint should be reconsidered based on a mistake. Xerox has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, Xerox failed to provide any persuasive evidence that the Council made a mistake in requiring disclosure of basic pricing information contained in the responsive vouchers. Thus, Xerox’s request for reconsideration should be denied. 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 S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Interim Order Rendered by the
Government Records Council
On The 31st Day of January, 2017

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: February 2, 2017



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration

**Supplemental Findings and Recommendations of the Executive Director
January 31, 2017 Council Meeting**

**Eric M. Aronowitz, Esq.
(On Behalf of Middlesex County
Board of Social Services)¹
Complainant**

GRC Complaint No. 2015-113

v.

**New Jersey Department of Human Services,
Division of Medical Assistance & Health Services²
Custodial Agency**

Records Relevant to Complaint: Copies via U.S. mail of:

1. All vouchers for payment submitted by Xerox State Healthcare, LLC (“Xerox”), in 2014 and 2015 reflecting Medicaid and Family Care cases processed and active cases pursuant to State Contract A61036 (“Contract”).
2. All payments made to Xerox in 2014 and 2015 for active cases and the processing of new Medicaid and Family Care cases under Line Nos. 0035 and 0036 of the Contract, broken down by county (if possible) and program code.³

Custodian of Record: Dianna Rosenheim
Request Received by Custodian: March 16, 2015
Response Made by Custodian: March 24, 2015
GRC Complaint Received: April 16, 2015

Background

November 15, 2016 Council Meeting:

At its November 15, 2016 public meeting, the Council considered the September 22, 2016 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant sought additional records that are not at issue in this complaint.

1. The Custodian complied with the Council's April 26, 2016 Interim Order because she responded in the prescribed time frame by providing to the GRC nine (9) copies of the redacted and unredacted vouchers, a document index, and certified confirmation of compliance to the Executive Director.
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 and analysis above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**⁴
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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On November 16, 2016, the Council distributed its Interim Order to all parties. On November 22, 2016, on behalf of intervenor Xerox, Paul P. Josephson, Esq., requested five (5) additional business days to respond to the Council's Interim Order because he intended to submit a request for reconsideration. On November 23, 2016, the GRC granted Xerox's request for an extension of five (5) business days, or until December 1, 2016.⁵

Request for Reconsideration:

On November 30, 2016, Xerox filed a request for reconsideration of the Council's November 15, 2016 Interim Order based on a mistake. Therein, Xerox alleged that the Council mistakenly applied case law and failed to take into account critical facts when reaching its decision.

Case Law Supports that Pricing Information is Proprietary/Trade Secret Information that Would Give an Advantage To Competitors

Xerox argued that the Council erred by allowing for disclosure of "Expansion Staff Hours," "Tech Resource Hours," and "Expansion Monthly Admin Fee" on the opinion that the pricing information was not complex. Commc'ns Workers of Am., AFL-CIO v. Rousseau, 417

⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁵ Prior to submitting the request for reconsideration, Xerox contacted the GRC on November 30, 2016 via e-mail, stating that the actual last day of the extension was December 1, 2016, and not November 30, 2016, as the GRC initially stated in its November 23, 2016 e-mail. The GRC recognizes the miscalculation but notes that the incorrect date had no adverse effect on intervenor Xerox's ability to submit its request for reconsideration.

N.J. Super. 341 (App. Div. 2010); Lagerkvist v. NJ Dep't of Env'tl. Protection, 2011 N.J. Super. Unpub. LEXIS 1912, 56-58 (July 12, 2011). Xerox argued that in CWA, 417 N.J. Super. 341, the Appellate Division determined that “[a] trade secret may include pricing . . .” Id. 361. Xerox argued that the Court’s application of the trade secret exemption to individual casino patrons’ wager amounts in Trump’s Castle Assoc., v. Tallone, 275 N.J. Super. 159, 162 (App. Div. 1994), supports this argument.

Xerox contended that the question here is not whether a complex agreement between the State and Xerox existed but whether the redacted pricing information qualifies as “any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.” CWA, 417 N.J. Super. at 361 (emphasis added)(citing Restatement (Third), Unfair Competition § 39). Xerox asserted that the answer to this question is: yes, competitors will possibly be able to determine Xerox’s costs in order to gain advantage in the bid process. Xerox argued that, even if the pricing appears as a single unit price, competitors would be able to detect cyclical and seasonal fluctuations in “level of effort.” Xerox argued that the competitors would then “back in to hourly effort and costs, as opposed to extracting an exact hourly rate from the specific hourly charges the Council already determined to be exempt. Further, Xerox noted that many of Xerox’s competitors often employ former Xerox employees, which may add meaning to the single unit prices. Xerox asserted that even if competitors needed to expend extra effort to reverse engineer pricing, the harm that disclosure would cause Xerox is still great because the competitors could undercut them in the current bidding process.

The Council Failed to Consider a Texas Supreme Court Decision Addressing This Novel Issue

Xerox noted that, although Texas precedent is not binding, the Council erred by not acknowledging the Texas Supreme Court’s decision in Boeing Co. v. Paxton, 466 S.W.3d 831 (2015)⁶ in its Order. Xerox asserted that the court addressed a provision of its own public records law identically worded to OPRA. Texas Gov’t Code §552.104. Xerox stated that the court there held that financial terms of a lease between Boeing and the Port Authority of San Antonio, including rental rate, maintenance costs, and lease incentives, were exempt because those terms could reveal aspects of Boeing’s overhead cost that could give an advantage to bidders and competitors. Xerox noted that the Port Authority has already released the “gross rent amounts” paid by Boeing in the past, similar to Xerox’s disclosure of total cost here. Xerox argued that with no prior precedent, the Council should have looked to Boeing, 466 S.W.3d 831, when deciding this complaint.

Xerox argued that, contrary to Boeing, the Council erred here in holding that the redacted pricing information was not proprietary because competitors could not reverse engineer cost based solely on that information. Xerox argued that the Boeing Court held that disclosure of any information was an advantage over having none. Xerox asserted that, given the highly competitive industry in which a small number of competitors closely watch each other,

⁶ The GRC notes that the court’s decision, which included a dissenting opinion, reversed the Appellate Division’s finding that Boeing had no standing as a third party to rely on the Texas public records law’s exemptions. Eric M. Aronowitz, Esq. (On Behalf of Middlesex County Board of Social Services) v. New Jersey Department of Human Services, Division of Medical Assistance & Health Services, 2015-113 – Supplemental Findings and Recommendations of the Executive Director 3

disclosure of the pricing information could provide valuable metrics necessary to determine Xerox's costs, workflows, and staffing levels to gain a bidding advantage.

Xerox Submitted Staff Pricing With an Expectation of Confidentiality and Protected it to the Extent Permitted by Law

Xerox asserted that the Council erred by implying that Xerox had no expectation of confidentiality when it submitted pricing information to the State. Xerox argued that, to the contrary, Xerox submitted its supplemental staffing proposal with a confidentiality disclaimer. Xerox stated that this disclaimer barred the disclosure of any "confidential information, ideas, know-how, concepts, processes, and trade secrets . . ." Xerox also noted that the disclaimer required the New Jersey Department of Treasury ("Treasury") to notify Xerox immediately if a third party made a request for the proposal "so that Xerox will have an opportunity to . . . [protect] the proprietary contents . . . from unauthorized disclosure." Xerox averred that Xerox takes exceptional efforts to protect information concerning its services from competitors as reflected in the current and past proposal disclaimers. Xerox asserted that the Order implied that Xerox carelessly waived its right to keep the pricing information confidential by voluntarily disclosing same to the New Jersey Department of Health ("DOH"). Xerox argued that, to the contrary, Lagerkvist, 2011 N.J. Super. Unpub. LEXIS 1912, does not support that a vendor waives any right to nondisclosure of pricing information to get paid for services. Further, Xerox noted that upon notification that DOH received the subject OPRA request, Xerox took immediate action to keep its pricing information from disclosure.

Xerox did Argue that the Amounts Themselves are Trade Secrets and Proprietary

Xerox contended that the Council erred by reasoning that Xerox never argued that the redacted pricing information "themselves are trade secret or proprietary information . . ." Xerox stated that Xerox required DOH to redact the pricing information, which it did, and has vigorously defended against disclosure. Xerox asserted that Xerox actively treated this information as proprietary and a trade secret.

Xerox's Position is Specific to This Complaint and Not "Any Price Term in Any Government Record"

Xerox argued that the Council's Order is fatally flawed because it erroneously concluded that Xerox's position could be applied to any price included in a government record. Xerox argued that this position is contrary to Xerox's actual position: that the facts here support that the pricing information remain redacted. Further, Xerox asserted that Xerox has never asserted, nor requested, that the Council broadly rule that all pricing information in any government record is proprietary and not subject to disclosure.

Xerox argued that it is not the case here that DOH advertised and solicited bids based on a detailed pricing line, only for the vendor to attempt to shield that information after entering into a contract with the vendor. Xerox agreed that a vendor would have reasonable notice that the information would become public and that a vendor could better decide whether to submit a proposal. More specifically, Xerox averred that Xerox's position here is that when a vendor

enters into a single price contract with an agency that is later modified for additional work, the cost and pricing of that work is reasonably proprietary and trade secret in nature. Xerox asserted that the Council could (and should) grant reconsideration based on the specific facts here without creating broader precedent.

Objections:

On December 13, 2016, the Complainant submitted objections to the request for reconsideration. Therein, the Complainant argued that the Council correctly required disclosure of the vouchers without redactions and that no reconsideration is warranted. The Complainant contended that disclosure of the unredacted vouchers would allow the Middlesex County Board of Social Services (“MCBSS”) to determine the potential negative impact on its budget, which is clearly in the public interest.

The Complainant refuted that the information at issue here was similar to that in CWA, 417 N.J. Super. 341, and Lagerkvist, 2011 N.J. Super. Unpub. LEXIS 1912. Specifically, the Complainant asserted that the pricing information at issue here did not represent highly complex and detailed financial and strategic information. Further, the Complainant argued that Xerox failed to provide a detailed analysis on how competitors would be able to “reverse engineer” a bid based on disclosure of unredacted vouchers.

Additionally, the Complainant noted that the Council must look to the relationship between parties at the time of disclosure of commercial information, as well as the intended use, when determining this issue. *Citing LaMorte Burns & Co. v. Walters*, 167 N.J. 285 299 (2001). The Complainant also reiterated a previous argument that MCBSS could not be considered a competitor because it cannot bid in the ongoing contracting cycle. The Complainant again noted that the MCBSS is simply trying to determine the significance and cost-effectiveness of Xerox taking over a function historically performed by it.

Finally, the Complainant argued that the redacted information is only a small portion of the overall draft Request for Proposal (“RFP”) dated May 19, 2015. The Complainant argued that the 107 page RFP, which largely mirrors the original 2004 RFP upon which the Contract was based, did not include the call center expansion and county level backlogs. The Complainant contended that the total of 38 separate line items was increased to 40 in the new RFP to address the backlog issue. The Complainant contended that such a miniscule change in the number of line items supports that disclosure of the redacted pricing information will not provide any advantage to competitors or bidders.

Analysis

Reconsideration

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, on behalf of intervenor Xerox, Xerox filed the request for reconsideration of the Council's November 15, 2016 Interim Order on November 30, 2016, the fourth (4th) business day of the extended time frame.

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, . . . 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 S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

After reviewing the parties' arguments, the GRC is satisfied that it need not disturb its Order. Xerox's arguments, including some previously advanced in prior submissions, remain unpersuasive. Initially, Xerox provided no compelling arguments on how the Council erred in finding that the “Quantity” and “Unit” columns should be disclosed. Further, regarding the “Unit Price” and “Amount” columns, Xerox continued to surmise that a competitor could reverse engineer or glean important staffing information from costs and prices, even if non-specific. However, Xerox did not provide significant details evidencing how a competitor could glean this information. Xerox never gets beyond merely stating that the pricing is a trade secret, proprietary, or could give an advantage to competitive bidders. Xerox does not adequately show that the prices are any different than pricing terms in any other contract and simply relies on a superficial statement that the numbers could permit others to glean information. Moreover, the GRC elucidated its understanding of the difference between specific and non-specific pricing by upholding the denial of access to a set of hours and prices from the January 1, 2014 voucher and March 16, 2015 invoice because of their specific nature. That information is intrinsically different than the basic pricing information to which it is requiring disclosure. With respect to Xerox's references to Texas law and other statutes, those laws are not properly instructive as to how OPRA should either be interpreted or administered. For those reasons, the Council should decline to reconsider its Order.

As the moving party, Xerox was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. Xerox failed to establish that the complaint should be reconsidered based on mistake. Xerox has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, Xerox failed to provide any persuasive evidence that the Council made a mistake in requiring disclosure of basic pricing information contained in the responsive vouchers. Thus, Xerox's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that Xerox has failed to establish in his request for reconsideration of the Council's November 15, 2016 Interim Order that either: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Xerox failed to establish that the complaint should be reconsidered based on a mistake. Xerox has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, Xerox failed to provide any persuasive evidence that the Council made a mistake in requiring disclosure of basic pricing information contained in the responsive vouchers. Thus, Xerox's request for reconsideration should be denied. 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 S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

January 24, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PO Box 819
TRENTON, NJ 08625-0819

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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

November 15, 2016 Government Records Council Meeting

Eric M. Aronowitz, Esq.
(o/b/o Middlesex County
Board of Social Services)
Complainant

Complaint No. 2015-113

v.

NJ Department of Human Services,
Division of Medical Assistance and Health Services
Custodian of Record

At the November 15, 2016 public meeting, the Government Records Council (“Council”) considered the September 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s April 26, 2016 Interim Order because she responded in the prescribed time frame by providing to the GRC nine (9) copies of the redacted and unredacted voucher, a document index, and certified confirmation of compliance to the Executive Director.
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 and analysis above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.¹**
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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Interim Order Rendered by the
Government Records Council
On The 15th Day of November, 2016

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: November 16, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
November 15, 2016 Council Meeting**

**Eric M. Aronowitz, Esq.
(On Behalf of Middlesex County
Board of Social Services)¹
Complainant**

GRC Complaint No. 2015-113

v.

**New Jersey Department of Human Services,
Division of Medical Assistance & Health Services²
Custodial Agency**

Records Relevant to Complaint: Copies via U.S. mail of:

1. All vouchers for payment submitted by Xerox State Healthcare, LLC (“Xerox”), in 2014 and 2015 reflecting Medicaid and Family Care cases processed and active cases pursuant to State Contract A61036 (“Contract”).
2. All payments made to Xerox in 2014 and 2015 for active cases and the processing of new Medicaid and Family Care cases under Line Nos. 0035 and 0036 of the Contract, broken down by county (if possible) and program code.³

Custodian of Record: Dianna Rosenheim
Request Received by Custodian: March 16, 2015
Response Made by Custodian: March 24, 2015
GRC Complaint Received: April 16, 2015

Records Submitted for *In Camera* Examination: Ten (10) vouchers and one (1) invoice containing redactions.

Background

April 26, 2016 Council Meeting:

At its April 26, 2016 public meeting, the Council considered the March 22, 2016 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 No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant sought additional records that are not at issue in this complaint.

1. The GRC must conduct an *in camera* review of only those vouchers containing redactions to determine the validity of the Custodian's assertion that the redactions are lawful under OPRA because they contain proprietary commercial or financial information and information that, if disclosed, would provide an advantage to competitors and bidders. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), nine (9) copies of the redacted records, a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ that the records provided are the records 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.**
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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On April 28, 2016, the Council distributed its Interim Order to all parties. On May 3, 2016, the Custodian responded to the Council's Interim Order. The Custodian provided to the GRC nine (9) copies of the redacted and unredacted vouchers at issue here, as well as a document index. Further, the Custodian provided certified confirmation of compliance to the Executive Director.

Analysis

Compliance

At its April 26, 2016 meeting, the Council ordered the Custodian to search for and provide any records responsive to the Complainant's OPRA request Nos. 1 and 2. Moreover, the Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On April 28, 2016, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to

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

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

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

comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 5, 2016.

On May 3, 2016, the Custodian delivered to the GRC nine (9) copies of the redacted and unredacted vouchers the Council ordered to review *in camera*. The Custodian also provided a document index and submitted certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's April 26, 2016 Interim Order because she responded in the prescribed time frame by providing to the GRC nine (9) copies of the redacted and unredacted voucher, a document index, and certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

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. N.J.S.A. 47:1A-6.

OPRA provides that:

A government record shall not include . . . *trade secrets and proprietary commercial or financial information* obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure.

N.J.S.A. 47:1A-1.1 (emphasis added). OPRA also exempts "information which, if disclosed, would give an advantage to competitors or bidders." Id.

The GRC first notes that the Custodian identified a number of apparent redactions and certified that they covered incorrect purchase order numbers and incorrect dates. The Custodian further averred that the apparent redactions were actually on the original records and were not redacted as part of the New Jersey Department of Health's ("DHS") response to the Complainant's OPRA request. The GRC has reviewed the originals and confirmed the Custodian's certification to be accurate. For this reason, the GRC only address the redactions made to the "Quantity," "Unit," "Unit Price," and "Amount" columns on each of the eleven (11) vouchers.

The GRC conducted an *in camera* examination on the submitted records. The redacted contents included "Quantity" that, with few exceptions as discussed in the below table, utilize the same number. Additionally, the "Unit" column uses a similar identifier in all redacted and unredacted vouchers. The redacted contents also included the "Unit Price" and "Amount" columns, which vary in the "Expansion Staff Hours" and "Tech Resource Hours" rows by voucher. Further, the "Expansion Monthly Admin Fee" row reflects the same figure in "Unit Price" and "Amount" throughout the ten (10) vouchers.

Initially, the exception to the above is the January 1, 2014 voucher and March 16, 2015 invoice. For this reason, the GRC will provide the exceptions in the below table and address the remainder of the redactions thereafter. The results of January 1, 2014 voucher and March 16, 2015 invoice examinations are set forth in the following table:

Record No.	Record Name/Date	Description of Redaction	Custodian's Explanation/ Citation for Redactions	Findings of the <i>In Camera</i> Examination⁷
1.	January 1, 2014 voucher	1. "Expansion Staff Hours" – "Quantity"	Trade secret, proprietary commercial, or financial information; advantage to bidders and competitors. <u>N.J.S.A. 47:1A-1.1.</u>	The "Quantity" redaction reflects a particular number on which Xerox based its price. The GRC is satisfied that this information could be used by competitors or bidders and could allow them to glean a pricing that the <u>CWA</u> Court classified as "trade secret." <u>Id.</u> at 361. The Custodian thus lawfully denied access to this particular redaction.
2.	March 16, 2015 invoice	1. "County Work Backlog – Supervisor Hours" - "Quantity" 2. "County Work Backlog – Team Lead Hours" - the hours worked and hourly rate	Trade secret, proprietary commercial, or financial information; advantage to bidders and competitors. <u>N.J.S.A. 47:1A-1.1.</u>	As noted in the above entry, the "Quantity" redaction, as well as the hourly worked/ hourly rates, contained within this invoice reflect a particular number that the GRC finds exempt under OPRA. <u>N.J.S.A. 47:1A-1.1;</u> <u>CWA</u> , 417 <u>N.J. Super.</u> at 361. The Custodian thus lawfully denied access to these particular redactions.

⁷ **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.

		3. "County Work Backlog – CSR Hours" - the hours worked and hourly rate		
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"Unit Price" and "Amount" in all Vouchers and the Invoice

The information contained in the "Unit Price" and "Amount" columns do not constitute trade secret or proprietary information. Both the "Unit Price" and "Amount" columns reflect the total amount billed for staffing ("Expansion Staff Hours"), Internet Technology services (Tech. Resource Hours) and an administration fee.

Xerox's arguments in support of its claims that this information is trade secret or proprietary are unpersuasive. The information Xerox attempts to redact is wholly unlike the investment agreements at issue in CWA, 417 N.J. Super. at 348-363. The CWA investment agreements detailed the relationship between the state-employee pension fund and certain investment firms that would manage private equity funds under the agreements. Id. The CWA Court held that the investment agreements were proprietary because there was substantial evidence that the investment firms had an expectation of confidentiality, which was outlined extensively in the agreements. Id. The agreements also qualified as trade secrets because of the bespoke and complex nature of the agreements, the length to which each detailed the procedures for maintaining confidentiality, and the fact the agreements are not filed with any public agency. Id. The CWA Court also found that the investment agreements were exempt from OPRA because the agreements contained very detailed information about the funds' required operations and limitations on what the managers could do that "would provide a competitive advantage not only to other private equity funds but also to other investors interested in the same sectors, companies, or properties." CWA, 417 N.J. Super. at 363.

Additionally, in Lagerkvist v. NJ Dep't Of Env'tl. Prot., 2011 N.J. Super. Unpub. LEXIS 1912 (Law Div. 2011), the Court dealt with similarly complex blind auction bids that were governed by a very detailed legislative scheme underlying a multi-state compact. Id. In both CWA and Lagerkvist, the Courts determined that the State's interests were furthered by non-disclosure because disclosure would undermine the viability of the investment agreements in CWA and the blind-auction bidding in Lagerkvist.

The information redacted in the present matter is dissimilar to the highly detailed documents in CWA and Lagerkvist. Presently at issue are merely total amounts billed to the public each month for the three broad categories. Of particular note is that Xerox created the vouchers containing the subject information specifically to submit them to a public agency. Further, Xerox does not argue that the amounts themselves are trade secrets or proprietary information, instead arguing that a competitor could "reverse engineer the costs of call center activity" from the information. Lt. Br. in Support of Mot. to Intervene, 6. This claim is not

addressed in the cases cited dealing with OPRA.⁸ However, it is significant that Xerox's arguments are non-specific and could equally be applied to any price term in any government record. Therefore, while the GRC takes very seriously the need to protect Xerox's proprietary information and to prevent disclosure of information that gives an advantage to competitors or bidders, it is satisfied that the disclosure of these cumulative billing amounts furthers the relevant legislative policies without damaging Xerox's competitive position or disclosing any trade secret or proprietary information.

"Quantity" and "Unit" in All Remaining Vouchers and the Invoice

Regarding all remaining voucher redactions not addressed in the above chart, the GRC does not agree that disclosure of the "Quantity" column would expose proprietary information, nor would it give an advantage to bidders and/or competitors. All of those "Quantity" entries are the same, nondescript number. The GRC does not believe that, as argued by Paul Josephson's June 26, 2015 Motion to Intervene,⁹ disclosure of this information would allow Xerox's competitors to glean important proprietary staffing information. Further, the "Quantity" number appears in a number of invoices already provided to the Complainant.

Moreover, the GRC does not agree that disclosure of the "Unit" columns would expose proprietary information, nor would it give an advantage to bidders and/or competitors. The "Unit" column contents are innocuous at best and the Custodian already disclosed the same contents in all unredacted vouchers. As also noted for the "Quantity" column, the GRC does not agree that disclosure of the "Unit" column information would provide Xerox's competitors any insight into proprietary staffing information. Further, neither the Custodian nor Xerox has provided a compelling argument regarding nondisclosure, especially in light of the fact the same was repeatedly disclosed in all other vouchers.

Thus, the Custodian lawfully denied access to certain redactions as identified above in the *In Camera* Examination Table and subsequent paragraphs. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; CWA, 417 N.J. Super. at 361. However, the Custodian also unlawfully denied access to certain information the GRC deems to not reveal any important proprietary or commercial information or that is otherwise innocuous. N.J.S.A. 47:1A-6.

Knowing & Willful

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.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

⁸ Boeing Company v. Paxton 2015 Tex. LEXIS 583 (Tex. Sup. Ct., June 9, 2015), addresses a Texas state statute.

⁹ Aronowitz, GRC 2015-113, at 3-5.

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Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's April 26, 2016 Interim Order because she responded in the prescribed time frame by providing to the GRC nine (9) copies of the redacted and unredacted voucher, a document index, and certified confirmation of compliance to the Executive Director.
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 and analysis above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**¹⁰
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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

September 22, 2016¹¹

¹⁰ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

¹¹ This complaint was prepared for adjudication at the Council's September 29, 2016 meeting; however, the complaint was tabled based on legal advice.



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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

April 26, 2016 Government Records Council Meeting

Eric M. Aronowitz, Esq.
(On behalf of Middlesex County
Board of Social Services)
Complainant

Complaint No. 2015-113

v.

NJ Department of Human Services,
Division of Medical Assistance & Health Services
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council ("Council") considered the March 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of only those vouchers containing redactions to determine the validity of the Custodian's assertion that the redactions are lawful under OPRA because they contain proprietary commercial or financial information and information that, if disclosed, would provide an advantage to competitors and bidders. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), nine (9) copies of the redacted records, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records 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.**
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.

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

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

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

4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 26th Day of April, 2016

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: April 28, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 26, 2016 Council Meeting**

**Eric M. Aronowitz, Esq.
(On Behalf of Middlesex County
Board of Social Services)¹
Complainant**

GRC Complaint No. 2015-113

v.

**New Jersey Department of Human Services,
Division of Medical Assistance & Health Services²
Custodial Agency**

Records Relevant to Complaint: Copies via U.S. mail of:

1. All vouchers for payment submitted by Xerox State Healthcare, LLC (“Xerox”), in 2014 and 2015 reflecting Medicaid and Family Care cases processed and active cases pursuant to State Contract A61036 (“Contract”).
2. All payments made to Xerox in 2014 and 2015 for active cases and the processing of new Medicaid and Family Care cases under Line Nos. 0035 and 0036 of the Contract, broken down by county (if possible) and program code.³

Custodian of Record: Dianna Rosenheim
Request Received by Custodian: March 16, 2015
Response Made by Custodian: March 24, 2015
GRC Complaint Received: April 16, 2015

Background⁴

Request and Response:

On March 16, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 24, 2015, Kelly Pushko, Deputy OPRA Custodian, responded in writing on behalf of the Custodian seeking an extension of time until April 1, 2015. On March 25, 2015, the Complainant acquiesced to the extension. On March 31, 2015, Ms. Pushko asked for a second (2nd) extension of time until April

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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13, 2015, due to upcoming holidays and vacations. On the same day, the Complainant stated that he would only allow for an extension until April 8, 2015 because he needed the records prior to April 9, 2015.

On April 8, 2015, Ms. Pushko responded to the Complainant, providing access to multiple responsive records. Ms. Pushko noted that redactions were applied to the records to protect trade secret and proprietary information. N.J.S.A. 47:1A-1.1; Commc'ns Workers of Am., AFL-CIO v. Rousseau, 417 N.J. Super. 341, 357 (App. Div. 2010); Newark Morning Star Ledger, Co. v. NJ Sports & Exposition Auth., 423 N.J. Super. 140, 167-71 (App. Div. 2011).

Denial of Access Complaint:

On April 16, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant disputed that the Division of Medical Assistance & Health Services ("DMAHS") lawfully redacted the records responsive to item No. 1, contending that none of the redactions involved trade secret or proprietary information. The Complainant asserted that the redactions were applied to specific numbers within each category used to determine the total amount of Xerox's payment vouchers. The Complainant further argued that disclosure of the redacted information would not give an advantage to competitors or bidders.

The Complainant further argued that DMAHS only provided one (1) invoice for February 2015, in response to item No. 2. The Complainant noted that same contained redactions. Further, the Complainant noted that DMAHS failed to provide any other invoices for the period from January 2014 to present. The Complainant contended that (1) DMAHS' failure to provide all records in response to item No. 2 and (2) the Custodian's redactions both represented an unlawful denial of access.

Statement of Information:⁵

On June 16, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that her office received the OPRA request on March 16, 2015. The Custodian certified that her search included asking DMAHS' fiscal staff to retrieve responsive records, which they then referred to Xerox to review and identify proprietary information. The Custodian certified that after two (2) extensions of time, her office responded in writing on April 8, 2015, providing access to responsive records with redactions.

The Custodian certified that she redacted the quantity, unit, unit price, and amount sections because the information constituted trade secret and proprietary information. The Custodian affirmed that Xerox asserted that release of the information would provide an advantage to competitors and would be detrimental to their business. The Custodian contended that all redactions were executed in accordance with existing OPRA exemptions and precedential case law. N.J.S.A. 47:1A-1.1; CWA, 417 N.J. Super. at 357; Newark Morning Star Ledger, Co., 423 N.J. Super. at 167-71.

⁵ On April 29, 2015, the complaint was referred to mediation. On June 8, 2015, the complaint was referred back to the GRC for adjudication.

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Motion to Intervene

On June 26, 2015, Paul P. Josephson, Esq., submitted a motion to intervene and opposition to disclosure brief on behalf of Xerox. Mr. Josephson averred that, in accordance with relevant regulations and Administrative Procedures Act provisions, Xerox should be allowed to intervene in the instant complaint. N.J.A.C. 5:105-1.1; N.J.A.C. 1:1-16.1 et seq., NJ Court Rule R. 4:33, et seq. Mr. Josephson stated that Xerox had a substantial interest in the outcome of this complaint because the threshold issue centered on its own proprietary and confidential information. Mr. Josephson asserted that only Xerox would be adversely affected by disclosure of the redacted information because its competitors could directly benefit. Mr. Josephson noted that the GRC previously allowed Xerox to intervene in a similar complaint. *See Hodes v. NJ Dep't of Human Serv.*, GRC Complaint No. 2012-225 (October 2013).⁶

Mr. Josephson stated that DMAHS provided the Complainant with monthly payment vouchers indicating the gross amounts billed by Xerox. Mr. Josephson stated that the Complainant has disputed the following redactions DMAHS made at Xerox's request:

- Number of hours expended by Xerox.
- Unit pricing for:
 - Additional call center capacity in 2014 to handle increased volume as a result of the Affordable Care Act (“ACA”);
 - Processing applications for Medicare benefits backlogged at the county level from February 2015 and beyond (in the above and this case, shown as “Expendable Staff Hours” and “Expansion Monthly Admin Fee”);
 - Undertaking system modifications requested by the State (shown as “Tech Resource Hours”).

Mr. Josephson argued that the redacted information contained detailed staffing and cost information, the disclosure of which would give an advantage to competitors and bidders, reveal proprietary commercial and financial information, and disclose trade secret information. Mr. Josephson argued that Xerox spent many years and voluminous amounts of money developing the methods, technology, and protocols necessary to perform the required Contract duties securely and adequately.

Mr. Josephson asserted that the Complainant appeared not to appreciate how disclosure of the information would give an advantage to competitors or bidders. However, Mr. Josephson asserted that background on the competitive nature of the industry that serves DMAHS, the State's contracting procedures, and the context under which Xerox has been assigned the additional services proves that disclosure of the records would provide an advantage to competitors and bidders.

Mr. Josephson stated that Xerox contracted with DMAHS to, among other things, screen and process Medicaid and NJ FamilyCare applications, determine eligibility, and assess and control premiums. Mr. Josephson stated that, in short, Xerox is closely involved in reviewing and

⁶ On July 14, 2015, the GRC e-mailed all parties, advising that it granted Xerox's motion to intervene. Eric M. Aronwitz, Esq. (On Behalf of Middlesex County Board of Social Services) v. New Jersey Department of Human Services, Division of Medical Assistance & Health Services, 2015-113 – Findings and Recommendations of the Executive Director

maintaining highly sensitive personal health and benefit information for citizens participating in these programs. More specifically, Mr. Josephson stated that the State awarded a contract in 2004 to Xerox's predecessor, ACS Healthcare, LLC. Mr. Josephson stated that the contract consisted of, among other things, two (2) fixed prices for application review and enrollment management and a third fee for printing and mailing costs associated with enrollment efforts. Mr. Josephson stated that, effective January 1, 2011, Xerox agreed to be compensated on a "per member per month basis" of \$3.94 for NJ FamilyCare members and \$1.47 for Medicaid members, plus additional lump sum costs for other services. Mr. Josephson stated that the most recent prices are \$3.98 and \$1.49 per member respectively and that the contract was extended several times until its expiration date of December 31, 2015.

Mr. Josephson argued that since 2004, Xerox and other companies anticipated that the State would release a request for proposals ("RFP") to go out to bid on the Contract services. Mr. Josephson noted that DMAHS announced its intention to release a formal RFP and, on May 19, 2015, sent out public solicitations for comments on the draft RFP. Mr. Josephson asserted that, as a result, the New Jersey Department of Human Services ("DHS") received numerous requests seeking to obtain various aspects and details of Xerox's work, all with the presumed goal of gaining enough insight to dictate their bidding strategies. Mr. Josephson stated that Xerox has consistently opposed disclosure of any detailed information concerning its operation methods and costs that could assist competitors in developing their own proposals.

Mr. Josephson stated that Xerox took exceptional efforts to protect information and data concerning its services. Mr. Josephson averred that Xerox consistently requested that DHS protect select information concerning its services by redacting the information at issue here. Mr. Josephson argued that disclosure of staffing levels, costs, and details would provide a road map for Xerox's competitors, thereby exposing its means and methods of fulfilling its Contract obligations. Mr. Josephson noted that DHS has acquiesced to the redactions in each instance, and no previous requestors challenged said redactions.

Mr. Josephson contended that the upcoming RFP process would hinge on price and other factors; however, price will likely be especially important. Mr. Josephson asserted that a competitor's ability to estimate cost associated with the Contract would be crucial. Mr. Josephson contended that call center and enrollment activity are key functions representing a significant portion of Xerox's cost. Mr. Josephson noted that where Xerox used to charge a monthly flat rate, the change to a per-member rate in 2011 (which is already known by Xerox's competitors) could allow them to glean the amount of time Xerox expended in its process, the cost of labor, and profits. Mr. Josephson argued that disclosure of the information would give a significant advantage to competitors and bidders in their proposals during the upcoming RFP. Mr. Josephson argued that disclosure of the redacted information would allow any of these companies effectively to "reverse-engineer" how Xerox operates and at what cost.

Mr. Josephson contended that precedent supports nondisclosure of financial terms of an agreement between the State and a private entity. CWA, 417 N.J. Super. at 357; Lagerkvist v. NJ Dep't of Env'tl. Protection, 2011 N.J. Super. Unpub. LEXIS 1912, 56-58 (July 12, 2011); Boeing Co. v. Paxton, 466 S.W.3d 831 (2015)(holding that Boeing demonstrated that the information withheld, including the common maintenance costs and future rent, among other things, could be

used by a competitor to underbid the company). Additionally, Mr. Josephson noted that the Courts have already determined that “a trade secret may also include pricing . . .” CWA, 417 N.J. Super. at 356 (citing Trump’s Castle Assoc., v. Tallone, 275 N.J. Super. 159, 162 (App. Div. 1994)).

Mr. Josephson averred that the redacted information on the 2014 vouchers dealt with Xerox’s expansion of its call center due to changes in the ACA that went “beyond the scope of the . . . Contract.” Mr. Josephson further noted that the redactions to the 2015 vouchers dealt with the backlog reassignment. Mr. Josephson argued that Xerox priced the expansion work differently than the Contract rates because of the actual cost of additional labor and a fixed monthly administrative fee for additional facilities and equipment. Mr. Josephson noted that Xerox’s proposal for these costs included a confidentiality clause on its cover page, warning that disclosure would provide an advantage to competitors. Mr. Josephson argued that the advantage is not hypothetical: 1) there is an upcoming RFP; 2) the pool of companies qualified to perform the Contract’s duties is small; and 3) all of these companies closely track each other to maintain a competitive position.

Mr. Josephson asserted that although it is unlikely that Middlesex County Board of Social Services (“MCBSS”), the Complainant’s client, would bid against Xerox, there is still a competitive posture relative to Xerox through the MCBSS. Specifically, Mr. Josephson contended that the records sought relate to Xerox’s obligation to eliminate a significant application backlog, which was previously the responsibility of county welfare boards like MCBSS. Mr. Josephson averred that DHS reassigned this duty to Xerox as part of a January 2015 proposal to clear an estimated 60,000 unprocessed Medicaid applications and 10,000 Medicaid cases because several counties were unable to timely process them. Mr. Josephson asserted that Xerox and MCBSS are competitors in the sense that DHS is currently reimbursing MCBSS to process applications, but may reassign this task to Xerox in the future and cease reimbursing MCBSS as a result.

Further, Mr. Josephson argued that even if the MCBSS were not viewed as a Xerox competitor, disclosure of the redacted information presents a significant potential for release of trade secret and proprietary information to Xerox competitors via OPRA requests submitted to the County of Middlesex (“County”). More specifically, Mr. Josephson argued that competitors could obtain sensitive information they could not otherwise get through DHS by submitting OPRA requests to the County, who has no express obligation to notify Xerox or defend their claims against disclosure.

Additional Submissions:

On July 6, 2015, the Complainant submitted a letter brief, stating that he did not object to Xerox’s motion to intervene. However, the Complainant reiterated his position that the Custodian’s redactions were unlawful under OPRA and requested that the GRC require disclosure of the vouchers without redactions.

The Complainant first argued that disclosure of the vouchers in their entirety served the public’s interest in determining the extent of the relationship between Xerox and DMAHS and in

comparison to the relationship between DMAHS and the County Welfare Agencies. The Complainant contended that only the unredacted invoices would provide the MCBSS the ability to make such a determination. Specifically, the Complainant noted that Xerox's take-over of the application process, not covered under the Contract, has had a deleterious effect on the MCBSS's budget. The Complainant argued that the MCBSS' loss of reimbursements from DMAHS would require the County to allocate more property tax funds to the MCBSS. The Complainant asserted that he submitted the subject OPRA request in good faith and to determine whether millions in tax dollars were being used in the best way.

Second, the Complainant disputed Xerox's argument that the redacted information would give a competitive edge to potential bidders. The Complainant contended that the draft RFP mirrored the original 2004 RFP, which was based on prices for 38 line items not to include call center expansion and county welfare board backlogs. The Complainant argued that disclosure of the redacted information would not provide an advantage to bidders and competitors because it is not part of the RFP. Further, the Complainant noted the facts warrant disclosure because the MCBSS could never be Xerox's competitor because it was precluded not submit a bid in response to the RFP. LaMonte Burns & Co. v. Walters, 167 N.J. 285 299 (2001)(reasoning that the relationship between parties at the time of disclosure of commercial information, as well as the intended use, should be considered). Moreover, the Complainant averred that MCBSS could obviate Xerox's concern of third-party disclosures by agreeing to notify Xerox of any OPRA requests for the invoices.

Finally, the Complainant argued that the redactions appeared to remove hourly rates and the number of hours Xerox utilized to perform certain tasks not associated with the Contract. The Complainant argued that this information did not fall under the cited exemptions at N.J.S.A. 47:1A-1.1. The Complainant distinguished the Council's decision in Hodes, GRC 2012-225, from the instant complaint, arguing that the redacted information in no way falls into a category with "significant system security."

Analysis

Unlawful Denial of Access

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 Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁷ that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted 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

⁷ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

[OPRA] 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-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court found that:

We 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-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Complainant disputed the redactions made to the responsive vouchers. Conversely, the Custodian and Xerox argued that the redacted information was exempt under OPRA as trade secret, proprietary commercial, or financial information, the disclosure of which would provide an advantage to competitors and bidders in an upcoming RFP. N.J.S.A. 47:1A-1.1; CWA, 417 N.J. Super. at 357; Newark Morning Star Ledger, Co., 423 N.J. Super. at 167-71. However, the GRC must review same in order to determine the full applicability of the cited exemptions.

Therefore, the GRC must conduct an *in camera* review of only those vouchers containing redactions to determine the validity of the Custodian’s assertion that the redactions are lawful under OPRA because they contain proprietary commercial or financial information and information that, if disclosed, would provide an advantage to competitors and bidders. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.

Knowing & Willful

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.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party 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 GRC must conduct an *in camera* review of only those vouchers containing redactions to determine the validity of the Custodian's assertion that the redactions are lawful under OPRA because they contain proprietary commercial or financial information and information that, if disclosed, would provide an advantage to competitors and bidders. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), nine (9) copies of the redacted records, a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁰ that the records provided are the records 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.**
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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

March 22, 2016¹¹

⁸ The *in camera* records 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.

⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "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."

¹¹ This complaint could not be adjudicated at the Council's March 29, 2016 meeting due to lack of a quorum. Eric M. Aronwitz, Esq. (On Behalf of Middlesex County Board of Social Services) v. New Jersey Department of Human Services, Division of Medical Assistance & Health Services, 2015-113 – Findings and Recommendations of the Executive Director