



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

October 31, 2017 Government Records Council Meeting

Karen Murray, Esq.
Complainant

Complaint No. 2015-271

v.

Elizabeth Board of Education (Union)
Custodian of Record

At the October 31, 2017 public meeting, the Government Records Council (“Council”) considered the October 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 the Council dismiss the complaint. The Complainant (via Counsel) withdrew her complaint in a letter to the Government Records Council, dated September 29, 2017, because the parties settled the matter. 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 31st Day of October, 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: November 2, 2017



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Karen Murray, Esq.¹
Complainant**

GRC Complaint No. 2015-271

v.

**Elizabeth Board of Education (Union)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of attorney's bills from September 2009 through present from:

1. Pashman, Stein, P.C.
2. Schwatz, Simon, Edelstein, & Celso, LLC.
3. Garrubbo & Capece, P.C.
4. McCusker, Anselmi, Rosen, & Carvelli, P.C.

Custodian of Record: Harold E. Kennedy, Jr.
Request Received by Custodian: July 2, 2015
Response Made by Custodian: July 15, 2015
GRC Complaint Received: August 25, 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. The Custodian failed to comply with the terms of the Council's January 31, 2017 Interim Order because the Custodian did not respond to it. The Council thus finds that the Custodian, Harold Kennedy, Jr., is hereby in contempt of the Council's Order.
2. "The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's January 31, 2017 Interim Order is

¹ Represented by Raymond S. Londa, Esq., of Londa & Londa (Elizabeth, NJ).

² Represented by Edward J. Kologi, Esq., of Kologi, Simitz (Linden, NJ). Previously represented by Bruce Rosen, Esq., of McCusker, Anselmi, Rosen & Carvelli, P.C. (Florham Park, NJ).

enforceable in the Superior Court if Complainant chooses that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law for the limited purposes described below, the Council stresses that the issue as to the disclosure of the records responsive to the request has already been determined by the Council and thus is not an outstanding issue before the Office of Administrative Law.

3. The Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian failed to respond to the Council's January 31, 2017 Interim Order at all, thereby rendering him in contempt of same. The Custodian's actions thus might be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Additionally, the Office of Administrative Law should determine whether the Complainant is a prevailing party entitled to an award of attorney's fees. N.J.S.A. 47:1A-6; Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Should the Office of Administrative Law determine that the Complainant is a prevailing party, it should determine the reasonable amount to which she is entitled.

Procedural History:

On April 27, 2017, the Council distributed its Interim Order to all parties. On June 30, 2017, the Government Records Council ("GRC") transmitted the complaint to the Office of Administrative Law.

On September 29, 2017, the Complainant's Counsel sent a letter to the GRC, advising that the parties had settled the matter and that the complaint may therefore be dismissed.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council dismiss the complaint. The Complainant (via Counsel) withdrew her complaint in a letter to the Government Records Council, dated September 29, 2017, because the parties settled the matter. Therefore, no further adjudication is required.

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

October 24, 2017



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

INTERIM ORDER

April 25, 2017 Government Records Council Meeting

Karen Murray, Esq.
Complainant

Complaint No. 2015-271

v.

Elizabeth Board of Education (Union)
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. The Custodian failed to comply with the terms of the Council’s January 31, 2017 Interim Order because the Custodian did not respond to it. The Council thus finds that the Custodian, Harold Kennedy, Jr., is hereby in contempt of the Council’s Order.
2. “The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s January 31, 2017 Interim Order is enforceable in the Superior Court if Complainant chooses that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law for the limited purposes described below, the Council stresses that the issue as to the disclosure of the records responsive to the request has already been determined by the Council and thus is not an outstanding issue before the Office of Administrative Law.
3. The Custodian unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian failed to respond to the Council’s January 31, 2017 Interim Order at all, thereby rendering him in contempt of same. The Custodian’s actions thus might be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Additionally, the Office of Administrative Law should determine whether the Complainant is a prevailing party entitled to an award of attorney’s fees. N.J.S.A. 47:1A-6; Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Should the Office of Administrative Law determine



that the Complainant is a prevailing party, it should determine the reasonable amount to which she is entitled.

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**

**Karen Murray, Esq.¹
Complainant**

GRC Complaint No. 2015-271

v.

**Elizabeth Board of Education (Union)²
Custodial Agency**

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1. Pashman, Stein, P.C.
2. Schwartz, Simon, Edelstein, & Celso, LLC.
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Custodian of Record: Harold E. Kennedy, Jr.

Request Received by Custodian: July 2, 2015

Response Made by Custodian: July 15, 2015

GRC Complaint Received: August 25, 2015

Background

January 31, 2017 Council Meeting:

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

1. The Custodian has unlawfully denied access to the responsive bills, even if redactions are required. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. The Custodian therefore must: (1) disclose to the Complainant the records responsive to her OPRA request; or (2) if the Custodian believes a special service charge is warranted, complete a 14-point analysis and provide the Complainant with the estimated cost to provide the responsive records.
2. **The Custodian shall comply with item No. 1 above within five (5) business days**

¹ Represented by Raymond S. Londa, Esq., of Londa & Londa (Elizabeth, NJ).

² Represented by Jonathan Williams, Esq., of DeCotiis, FitzPartrick & Cole, LLP (Teaneck, NJ). Previously represented by Bruce Rosen, Esq., of McCusker, Anselmi, Rosen & Carvelli, P.C. (Florham Park, NJ).

from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4.

3. **If applicable, the Custodian shall make the amount of the charge available to the Complainant within three (3) business days from receipt of the Council's Interim Order. The Custodian shall disclose to the Complainant the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any such redaction upon payment of the special service charge, if any, within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4, to the Executive Director. If a special service charge is applicable and the Complainant fails to pay the special service charge for the requested records by the tenth (10th) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4.^{3 4}**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. 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 February 2, 2017, the Council distributed its Interim Order to all parties. The GRC received no response from the Custodian.⁵

Analysis

Compliance

At its January 31, 2017 meeting, the Council ordered the Custodian to disclose the responsive records to the Complainant or provide her a proposed special service charge. Further, the Council required the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On February 2, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) to comply with the

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 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 The Complainant e-mailed the GRC on January 25, 2017, noting her belief that Custodian's Counsel was conflicted from representing the BOE here because his firm had represented her at the time that she submitted the subject OPRA request.

Order or ten (10) business days if a special service charge was applicable. Thus, the Custodian's response with respect to disclosure was due by close of business on February 9, 2017, and with respect to any special service charge that might be at issue, the response was due on February 16, 2017. To date, the Custodian has not responded to the Council's Order.

Accordingly, the Custodian failed to comply with the terms of the Council's January 31, 2017 Interim Order because the Custodian did not respond to it. The Council thus finds the Custodian, Harold Kennedy, Jr., in contempt of the Council's Order.

Council's January 31, 2017 Interim Order is Enforceable

"The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's January 31, 2017 Interim Order is enforceable in the Superior Court if Complainant chooses that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law ("OAL") for the limited purposes described below, the Council stresses that the issue as to the disclosure of the records responsive to the request has already been determined by the Council and thus is not an outstanding issue before the OAL.

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)).

Here, the Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian failed to respond to the Council's January 31, 2017

Interim Order at all, thereby rendering him in contempt of same. The Custodian's actions thus might be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. Therefore, this complaint should be referred to the OAL for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Additionally, the OAL should determine whether the Complainant is a prevailing party entitled to an award of attorney's fees. N.J.S.A. 47:1A-6; Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Should the OAL determine that the Complainant is a prevailing party, it should determine the reasonable amount to which she is entitled.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to comply with the terms of the Council's January 31, 2017 Interim Order because the Custodian did not respond to it. The Council thus finds that the Custodian, Harold Kennedy, Jr., is hereby in contempt of the Council's Order.
2. "The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's January 31, 2017 Interim Order is enforceable in the Superior Court if Complainant chooses that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law for the limited purposes described below, the Council stresses that the issue as to the disclosure of the records responsive to the request has already been determined by the Council and thus is not an outstanding issue before the Office of Administrative Law.
3. The Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian failed to respond to the Council's January 31, 2017 Interim Order at all, thereby rendering him in contempt of same. The Custodian's actions thus might be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Additionally, the Office of Administrative Law should determine whether the Complainant is a prevailing party entitled to an award of attorney's fees. N.J.S.A. 47:1A-6; Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Should the Office of Administrative Law determine that the Complainant is a prevailing party, it should determine the reasonable amount to which she is entitled.

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

April 18, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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CHRIS CHRISTIE
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INTERIM ORDER

January 31, 2017 Government Records Council Meeting

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At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has unlawfully denied access to the responsive bills, even if redactions are required. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. The Custodian therefore must: (1) disclose to the Complainant the records responsive to her OPRA request; or (2) if the Custodian believes a special service charge is warranted, complete a 14-point analysis and provide the Complainant with the estimated cost to provide the responsive records.
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4.**
3. **If applicable, the Custodian shall make the amount of the charge available to the Complainant within three (3) business days from receipt of the Council’s Interim Order. The Custodian shall disclose to the Complainant the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any such redaction upon payment of the special service charge, if any, within ten (10) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4, to the Executive Director. If a special service charge is applicable and the Complainant fails to pay the special service charge for the requested records by the tenth (10th) business day**



from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4.^{1 2}

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. 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 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
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Decision Distribution Date: February 2, 2017

¹ "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."

² 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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Karen Murray, Esq.¹
Complainant**

GRC Complaint No. 2015-271

v.

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Custodian of Record: Harold E. Kennedy, Jr.

Request Received by Custodian: July 2, 2015

Response Made by Custodian: July 15, 2015

GRC Complaint Received: August 25, 2015

Background³

Request and Response:

On June 30, 2015, on behalf of the Complainant, the Complainant's Counsel submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On July 15, 2015, the Custodian responded in writing, denying the OPRA request because the responsive records contained confidential information. The Custodian further elaborated that the records contain personally identifiable information of staff and students, entries pertaining to litigation, entries showing legal strategy, and other attorney-client privileged information.

¹ Represented by Raymond S. Londa, Esq., of Londa & Londa (Elizabeth, NJ).

² Represented by Bruce Rosen, Esq., of McCusker, Anselmi, Rosen & Carvelli, P.C. (Florham Park, NJ).

³ 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.

Denial of Access Complaint:

On August 25, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted OPRA specifically requires the disclosure of attorney billing records with redactions. N.J.S.A. 47:1A-1.1. The Complainant also argued that both the Superior Court and GRC case law has supported disclosure of attorney bills, with redactions where applicable. The Complainant further argued that it would seem unlikely that any of the four (4) named law firms would include privileged information in their bills. Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191, 198 (October 28, 2002).

The Complainant contended that the bills total over 13 million dollars in taxpayer expenditures, voted on at monthly public meetings. The Complainant asserted that the Elizabeth Board of Education (“BOE”) has an obligation to disclose the responsive bills, with redactions “at no additional cost.” The Complainant also asserted that the BOE has already disclosed these records to the Star-Ledger and New Jersey Office of Fiscal Accountability and Compliance (“OFAC”) on several occasions.

Statement of Information:

On September 28, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 2, 2015. The Custodian certified that his search included reviewing the Elizabeth Board of Education’s (“BOE”) physical files. The Custodian affirmed that the BOE stores its attorney bills by the date on which it issued requisition of payment. The Custodian certified that he and BOE staff estimated that the responsive records numbered over 6,400 pages. The Custodian affirmed that redactions would be required but that doing so on such a voluminous set of records would substantially disrupt the BOE’s operations. The Custodian also certified that some bills could not be redacted in a meaningful manner. The Custodian affirmed that, due to a prior OPRA request, he believed the Complainant would not accept redacted attorney’s bills and would not cooperate with any BOE attempt to accommodate the request reasonably. The Custodian thus affirmed that he had no choice but to deny the request, which he did on July 15, 2015.

To offer background, the Custodian explained that Complainant had previously served as the BOE’s attorney and that she resigned prior to an ongoing ethics proceeding that the BOE had initiated against the Complainant. The Custodian affirmed that the instant complaint, as well as the Complainant’s purported motivation of concern for taxpayer money, is at odds with her former advice to him to not disclose attorney bills in response to OPRA requests. The Custodian certified that the BOE has continued to rely on the Complainant’s advice, including its denial here. The Custodian also certified that one of the identified firms, Pashman, Stein P.C., is currently serving as BOE counsel in the ethics proceeding. The Custodian further affirmed that the BOE never disclosed the responsive bills to the Star-Ledger and only disclosed them to the OFAC as part of an audit, not pursuant to an OPRA request.

The Custodian argued that he did not deny access to the responsive records unlawfully and the complaint should therefore be dismissed. Initially, the Custodian stated that OPRA expressly allows an agency to redact attorney-billing records when attorney-client privileged

material and work product information were present. N.J.S.A. 47:1A-1.1. The Custodian further asserted that courts throughout the country have routinely held that attorney bills are privileged when they reveal the nature of the services rendered. Montgomery Cnty. v. MicroVote Corp., 175 F.3d 296, 304 (3rd Cir. 1999); Chaudhry v. Gallerizzo, 174 F.3d 394, 403 (4th Cir. 1999); Clarke v. Am. Commerce Nat. Bank, 974 F.2d 127, 129 (9th Cir. 1992); De La Roche v. De La Roche, 209 A.D.2d 157, 159, 617 N.Y.S.2d 767, 769 (1994). The Custodian argued that the responsive bills contained detailed descriptions of specific legal services rendered, research, litigation strategy, and conversations the attorneys conducted with the BOE. The Custodian argued that, believing the Complainant would only accept unredacted bills, he denied the request in order to avoid improper disclosure of exempt information.

The Custodian stated that OPRA also allows an agency to charge a special service charge if fulfilling an OPRA request “involves an extraordinary expenditure of time and effort to accommodate the request.” N.J.S.A. 47:1A-5(c). The Custodian contended that this charge can include a custodian’s review and redaction of responsive records. The Courier Post v. Lenape Reg’l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002). The Custodian also contended that there may be instances where attorneys are required to review and redact records. Fisher v. Div. of Law, 400 N.J. Super. 61 (App. Div. 2008).

Additionally, the Custodian stated that OPRA also allows an agency to deny access to a request that would substantially disrupt its operations “after attempting to reach a reasonable solution with the requestor . . .” N.J.S.A. 47:1A-5(g). The Custodian asserted that, even had the Complainant allowed for redactions, the process of reviewing and redacting over 6,400 pages of records would have substantially disrupted the BOE’s operations. The Custodian again stressed that the Complainant would not have cooperated: her argument that the records should have been disclosed “at no additional cost” proves his belief. The Custodian also reiterated that he would not have been able to redact some of the bills in a meaningful manner, in which case the courts have allowed for full nondisclosure. Commc’ns Workers of Am., AFL-CIO v. Rousseau, 417 N.J. Super. 341, 368-369 (App. Div. 2010); North Jersey Media Grp. V. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 390 (App. Div. 2009).

The Custodian further argued that the billing records contained additional information expressly exempt under OPRA. The Custodian contended that the bills included various personnel information of BOE employees, including grievances filed by or against them. Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581 (2011). Further, the Custodian argued that the bills included exempt “student record” information, which is broadly defined as “information related to an individual student gathered . . . and maintained within the school district . . .” N.J.A.C. 6A:32-2.1. The Custodian argued that, although limited exceptions allowing disclosure exist, OPRA requestors are not included in that group. N.J.A.C. 6A:32-7.5. The Custodian asserted that the inherent confidentiality in these regulations, as well as in federal statute, is recognized under OPRA. N.J.S.A. 47:1A-9(a).

Finally, the Custodian contended that the Complainant utilized OPRA here in an improper manner. The Custodian asserted that, given the Complainant’s history with the BOE, her purpose for submitting this OPRA request is questionable. The Custodian noted that the courts have stated that a party utilizing OPRA to obtain records when they are in litigation with

the public agency “should not be ignored.” M.G. v. East Camden Cnty. Reg’l Sch. Dist., 2012 N.J. Super. Unpub. LEXIS 2767 (App. Div. 2012)(citing Spectraserv, Inc. v. Middlesex Cnty. Utils. Auth., 416 N.J. Super. 565, 581 (App. Div. 2010)). The Custodian asserted that the GRC should not ignore the pending ethics proceeding currently pending between the Complainant and Board. The Custodian asserted that this is especially true, given a portion of the Complainant’s OPRA request sought records from BOE’s legal counsel in that action. The Custodian contended that it would not have been reasonable to disclose to the Complainant attorney-client privileged material and work-product relevant to the proceeding against her, regardless of redactions.

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.

Additionally, OPRA provides that:

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

N.J.S.A. 47:1A-1.1 (emphasis added).

In the instant complaint, the Custodian denied access to the responsive attorney bills in their entirety based on several exemptions. However, a plain reading of OPRA does not support the denial of access: OPRA expressly requires the disclosure of attorney bills.⁴ Additionally, the GRC is not persuaded by the Custodian’s argument that he would not be able to redact some of the bills while retaining their meaningfulness, thus warranting nondisclosure anyway.

Accordingly, the Custodian has unlawfully denied access to the responsive bills, even if redactions are required. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. The Custodian therefore must: (1) disclose to the Complainant the records responsive to her OPRA request; or (2) if the Custodian believes a special service charge is warranted, complete a 14-point analysis and provide the Complainant with the estimated cost to provide the responsive records.

Finally, the GRC will briefly address the Custodian’s assertion that the request would have substantially disrupted agency operations. Although it would appear that reviewing and redacting in excess of 6,400 pages of attorney billing records could take a significant amount of

⁴ This is notwithstanding the Custodian’s contention that the Complainant, who previously served as attorney for the BOE, previously advised the BOE to deny access to attorney bills sought under OPRA.

time, the Custodian did not meet the requirements of N.J.S.A. 47:1A-5(g) in order to rely on the substantial disruption exemption. *See* Vessio v. NJ Dep't of Cmty. Affairs, Div. of Fire Safety, GRC Complaint No. 2007-63 (May 2007); Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007); Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2008-13 (June 2009); Karakashian v. NJ Dep't of Law & Pub. Safety, Div. of Consumer Affairs, Office of Medical Bd. of Examiners, GRC Complaint No. 2013-121, *et seq.* (November 2013). Specifically, the Custodian did not attempt “to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency,” admitting in the SOI that he simply presumed that the Complainant would not cooperate anyway. *See* Caldwell v. Vineland Bd. of Educ. (Cumberland), GRC Complaint No. 2009-278 (March 2011). Further, the Custodian did not deny the request based on the substantial disruption exemption. Instead, he chose to deny access to the bills, in their entirety, based on several exemptions.

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 Custodian has unlawfully denied access to the responsive bills, even if redactions are required. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. The Custodian therefore must: (1) disclose to the Complainant the records responsive to her OPRA request; or (2) if the Custodian believes a special service charge is warranted, complete a 14-point analysis and provide the Complainant with the estimated cost to provide the responsive records.
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4.**
3. **If applicable, the Custodian shall make the amount of the charge available to the Complainant within three (3) business days from receipt of the Council’s Interim Order. The Custodian shall disclose to the Complainant the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any such redaction upon payment of the**

special service charge, if any, within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4, to the Executive Director. If a special service charge is applicable and the Complainant fails to pay the special service charge for the requested records by the tenth (10th) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4.^{5 6}

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. 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

January 24, 2017

⁵ "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."

⁶ 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.