



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

June 29, 2010 Government Records Council Meeting

Ronald Pittore
Complainant

Complaint No. 2007-216

v.

University of Medicine and Dentistry of New Jersey
Custodian of Record

At the June 29, 2010 public meeting, the Government Records Council ("Council") considered the June 22, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, accepts the Administrative Law Judge's Initial Decision dated May 21, 2010 in which the Judge approved the Stipulation of Dismissal signed by the parties or their representatives.

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 29th Day of June, 2010

Robin Berg Tabakin, Chair
Government Records Council



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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: July 14, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 29, 2010 Council Meeting**

**Ronald Pittore¹
Complainant**

GRC Complaint No. 2007-216

v.

**University of Medicine and Dentistry of New Jersey²
Custodian of Records**

Records Relevant to Complaint: Copy of document prepared by Samuel Moulthrop in May 2007. (The Complainant includes an e-mail from Samuel Moulthrop to William P. Deni, Esq. dated May 22, 2007 which references the report prepared by Samuel Moulthrop).

Request Made: August 27, 2007

Response Made: September 17, 2007

Custodian: Susan Glick

GRC Complaint Filed: September 20, 2007

Background

June 23, 2009

Government Records Council's ("Council") Interim Order. At its June 23, 2009 public meeting, the Council considered the June 16, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that this complaint should be referred to the Office of Administrative Law for a full hearing, including an *in camera* examination of the record submitted for said examination, to determine whether the Custodian unlawfully denied access to the record as attorney-client privileged material, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances and whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees.

June 25, 2009

Council's Interim Order distributed to the parties.

¹ The Complainant is an attorney representing himself.

² Represented by Theodore A. Brown, Esq. (Newark, NJ).

July 7, 2009

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

May 13, 2010

Stipulation of Dismissal submitted to OAL by the parties.

May 21, 2010

Administrative Law Judge’s (“ALJ”) Initial Decision. The ALJ **FINDS** that:

1. “[t]he parties have voluntarily agreed to the Stipulation of Dismissal as evidenced by the signatures of the parties or their representatives.
2. The Stipulation of Dismissal fully disposes of all issues in controversy and is consistent with the law.”

As such, the ALJ **CONCLUDES** that “the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly...approves the settlement.” The ALJ **ORDERS** “the parties [to] comply with the settlement terms and that these proceedings be concluded.”

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the Administrative Law Judge’s Initial Decision dated May 21, 2010 in which the Judge approved the Stipulation of Dismissal signed by the parties or their representatives.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

June 22, 2010



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

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

INTERIM ORDER

June 23, 2009 Government Records Council Meeting

Ronald Pittore
Complainant

Complaint No. 2007-216

v.

University of Medicine and Dentistry of New Jersey
Custodian of Record

At the June 23, 2009 public meeting, the Government Records Council ("Council") considered the June 16, 2009 *Reconsideration of the Council's October 28, 2008 Interim Order* Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint should be referred to the Office of Administrative Law for a full hearing, including an *in camera* examination of the record submitted for said examination, to determine whether the Custodian unlawfully denied access to the record as attorney-client privileged material, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances and whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 23rd Day of June, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Kathryn Forsyth
Government Records Council



Decision Distribution Date: June 25, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Reconsideration of the Council's October 28, 2008 Interim Order*
Supplemental Findings and Recommendations of the Executive Director
June 23, 2009 Council Meeting**

**Ronald Pittore¹
Complainant**

GRC Complaint No. 2007-216

v.

**University of Medicine and Dentistry of New Jersey²
Custodian of Records**

Record Submitted for *In Camera* Examination: "Report of Investigation Regarding Ronald Pittore, Managing Director of the Office of Legal Management" prepared by Samuel P. Moulthrop and Scott A. Ohnegian.

Request Made: August 27, 2007

Response Made: September 17, 2007

Custodian: Susan Glick

GRC Complaint Filed: September 20, 2007

Background

October 29, 2008

At the October 29, 2008 public meeting, the Government Records Council ("Council") considered the October 22, 2008 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian submitted the required records to the GRC in a timely manner, the Custodian failed to comply with the terms of the Council's Interim Order because she failed to submit to the GRC a legal certification pursuant to N.J. Court Rule 1:4-4. and a document or redaction index as required by directive of said Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and provide to the Executive Director certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005).**

¹ The Complainant is an attorney representing himself.

² Represented by John J. Peirano, Esq., of McElroy, Deutsch, Mulvaney & Carpenter, LLP (Morristown, NJ).

Record or Redaction Number	Record Name/Date	Description of Record	Custodian's Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination
1	"Report of Investigation Regarding Ronald Pittore, Managing Director of the Office of Legal Management" prepared by Samuel P. Moulthrop and Scott A. Ohnegian dated May 21, 2007.	This is an investigative report containing a factual background and drawing certain conclusions which are provided to the client along with Counsel's advice.	Attorney-client privileged. ³	<p><u>Redact:</u> Section II titled <i>Executive Summary</i> as "any record within the attorney-client privilege" pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p><u>Redact:</u> Section V titled <i>Analysis of Mr. Pittore's Conduct and his Employment Situation</i> as "any record within the attorney-client privilege" pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>The balance of the report shall be disclosed redacting the names and personal information of individuals providing information to investigative personnel. A</p>

³ Another reason for denial of access was asserted by the Custodian but is not relevant to this *in camera* examination.

				redaction index shall accompany the disclosed record detailing the general nature of the information redacted as well as the lawful basis for each redaction.
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October 30, 2008

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

November 5, 2008

Custodian's certification. The Custodian delivers to the GRC a certification pursuant to N.J. Court Rule 1:4-4 in compliance with paragraph 3 of the Council's May 28, 2008 Interim Order, that the document provided for the *in camera* inspection was the document requested by the Council. The certification also averred that no redactions were made to the document and that it is attorney-client privileged material, and is therefore exempt from disclosure.

November 5, 2008

Facsimile transmission from the Custodian to the GRC. The Custodian requests a stay of the Council's October 29, 2008 Interim Order because the agency intends to request a reconsideration of, or appeal, the Interim Order and wants to protect the confidentiality of the requested record pending their decision.

November 7, 2008

Letter from the GRC to the Custodian. The GRC grants the Custodian's request for a stay.

November 10, 2008

Letter from the Complainant to the GRC. The Complainant objects to the GRC's decision to grant a stay to the Custodian, citing non-compliance by the Custodian with *N.J.A.C. 5:105-2.12(f)*. Specifically, the Complainant states that the Custodian failed to provide a detailed analysis addressing the clear likelihood of success on the merits of the claim, the danger of irreparable harm in the absence of a stay, the harm to others if a stay is not granted and the public interest.

November 13, 2008

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel requests a reconsideration of the Council's October 29, 2008 Interim Order. Counsel states that the Custodian is seeking reconsideration because the Interim Order is premised on erroneous conclusions of law concerning the operation and scope of the attorney-client privilege, the interrelationship of the privilege with OPRA and misguided characterization of sections of the requested report as factual in nature.

Counsel argues that the definition of a government record in OPRA expressly excludes any record within the attorney-client privilege except attorney and consultant bills. Counsel also argues that the GRC misapplied the court's decision in Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997). Counsel states that the GRC erred by only applying the attorney-client privilege to sections of the record because the record was prepared for the University of Medicine and Dentistry of New Jersey ("UMDNJ") by outside counsel for the singular purpose of obtaining legal advice to guide UMDNJ's determination with respect to any action to be taken as to Mr. Pittore. Counsel also argues that a discussion of certain facts is essential to such a communication as the requested record and that the GRC erred in concluding certain sections of the report describing the factual setting were not protected by the attorney-client privilege. Counsel contends that the report is protected from disclosure in its entirety by said privilege.

November 14, 2008

Letter from the Complainant to the GRC. The Complainant objects to the Custodian's request for reconsideration of the Council's October 29, 2008 Interim Order. The Complainant states that the Custodian's Counsel is incorrectly characterizing the attorney-client privilege as an all or nothing privilege. The Complainant argues that such an interpretation of the privilege is clearly contrary to the case law articulated in Payton, supra, at 552, which states "the [attorney-client] privilege very well may apply to portions of the investigation."

The Complainant further argues that in an e-mail between Samuel Moulthrop and William Deni, Esq., dated May 22, 2007 and copied to the Complainant, Mr. Moulthrop characterized the result of the investigation as "our report." Further, the Complainant states that the report pertains directly to him and was not requested by a third party.

Analysis

Whether, upon reconsideration, the Custodian must comply with the Council's findings of the *in camera* examination pursuant to the Council's October 29, 2008 Interim Order?

The Complainant stated that he submitted his request for the record relevant to the complaint on August 27, 2007, but that the Custodian denied him access to the record asserting that it is attorney-client privileged material exempt from disclosure as "any record within the attorney-client privilege" pursuant to N.J.S.A. 47:1A-1.1. The Complainant stated that according to Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997), an attorney who is not performing legal services or rendering advice, as here, does not qualify as a lawyer for purposes of the attorney-client privilege and therefore the attorney-client privilege is inapplicable.

The Complainant contends that UMDNJ has wrongfully and intentionally violated OPRA by withholding the requested report unjustifiably. The Complainant requests that the Council assess penalties against UMDNJ and order the Custodian to release the requested report. Additionally, the Complainant requests an attorney's fee of \$750.00 for his work in attempting to obtain a copy of the requested report because the Complainant is an attorney admitted to practice in New Jersey.

The Custodian's Counsel states that the law firm that prepared the record was retained by UMDNJ to seek "legal advice from its outside counsel, who in turn prepared the report for the purpose of advising the University." Accordingly, Counsel argued that the requested record is exempt from disclosure as attorney-client privileged material.

The GRC conducted an *in camera* examination of the record pursuant to the Council's May 28, 2008 Interim Order. The GRC found that the report should be disclosed in redacted form, and this finding was so ordered in the Council's October 19, 2008 Interim Order.

The evidence of record indicates that this complaint is contested regarding whether the record withheld from disclosure constitutes a record that is exempt in its entirety as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. The Custodian argues that it is exempt from disclosure and that the GRC erred in concluding that it should be disclosed in redacted form; the Complainant contends that it is not exempt in its entirety and that he has been unlawfully denied access to the record pursuant to the Superior Court's decision in Payton, *supra*.

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

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

As such, this complaint should be referred to the Office of Administrative Law for a full hearing, including an *in camera* examination of the record submitted for said examination, to determine whether the Custodian unlawfully denied access to the record as attorney-client privileged material, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances and whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be referred to the Office of Administrative Law for a full hearing, including an *in camera* examination of the record submitted for said examination, to determine whether the Custodian unlawfully denied access to the record as attorney-client privileged material, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances and whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

June 16, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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ROBIN BERG TABAKIN, Chair
COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

October 29, 2008 Government Records Council Meeting

Ronald Pittore
Complainant

Complaint No.2007-216

v.

University of Medicine and Dentistry of New Jersey
Custodian of Record

At the October 29, 2008 public meeting, the Government Records Council ("Council") considered the October 22, 2008 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian submitted the required records to the GRC in a timely manner, the Custodian failed to comply with the terms of the Council's Interim Order because she failed to submit to the GRC a legal certification pursuant to N.J. Court Rule 1:4-4. and a document or redaction index as required by directive of said Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and provide to the Executive Director certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005).**

Record or Redaction Number	Record Name/Date	Description of Record	Custodian's Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination



1	<p>“Report of Investigation Regarding Ronald Pittore, Managing Director of the Office of Legal Management” prepared by Samuel P. Moulthrop and Scott A. Ohnegian dated May 21, 2007.</p>	<p>This is an investigative report containing a factual background and drawing certain conclusions which are provided to the client along with Counsel’s advice.</p>	<p>Attorney-client privileged.¹</p>	<p><u>Redact:</u> Section II titled <i>Executive Summary</i> as “any record within the attorney-client privilege” pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p><u>Redact:</u> Section V titled <i>Analysis of Mr. Pittore’s Conduct and his Employment Situation</i> as “any record within the attorney-client privilege” pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>The balance of the report shall be disclosed redacting the names and personal information of individuals providing information to investigative personnel. A redaction index shall accompany the disclosed record detailing the general nature of the information redacted as well as the lawful basis</p>
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¹ Another reason for denial of access was asserted by the Custodian but is not relevant to this *in camera* examination.

				for each redaction.
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Interim Order Rendered by the
Government Records Council
On The 29th Day of October, 2008

Robin Berg Tabakin, Chair
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: October 30, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
October 29, 2008 Council Meeting**

**Ronald Pittore¹
Complainant**

GRC Complaint No. 2007-216

v.

**University of Medicine and Dentistry of New Jersey²
Custodian of Records**

Record Submitted for *In Camera* Examination: “Report of Investigation Regarding Ronald Pittore, Managing Director of the Office of Legal Management” prepared by Samuel P. Moulthrop and Scott A. Ohnegian.

Request Made: August 27, 2007

Response Made: September 17, 2007

Custodian: Susan Glick

GRC Complaint Filed: September 20, 2007

Background

May 28, 2008

Government Records Council’s Interim Order. At the May 28, 2008 public meeting, the Government Records Council (“Council”) considered the May 21, 2008 Executive Director’s Findings and Recommendations and all related documentation submitted by the parties. By a majority vote, the Council adopted the entirety of said findings and recommendations. The Council therefore found that:

1. The Custodian’s failure to either grant access, deny access, seek clarification or request an extension of time in writing within the statutorily mandated seven (7) business days results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested record to confirm the Custodian’s legal assertion that the record constitutes attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

¹ The Complainant is an attorney representing himself.

² Represented by Theodore A. Brown, Esq. (Newark, NJ).

3. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #2 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. Pursuant to Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004), the Custodian's denial of the Complainant's OPRA request, on the grounds that the Complainant is precluded from obtaining records under OPRA because the Complainant filed a claim under the New Jersey Tort Claims Act, is not a lawful basis for a denial of access.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the *in camera* review.
6. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the outcome of the *in camera* review.

June 4, 2008

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

June 4, 2008

E-mail from the Custodian to the GRC. The Custodian requests the GRC consider e-mail correspondence from the Complainant confirming that the Custodian verbally requested an extension of time to respond to the Complainant's OPRA request.

June 4, 2008

E-mail from the GRC to the Custodian. The GRC acknowledges receipt of the Custodian's e-mail and informs the Custodian that the copy of Complainant's e-mail correspondence should have been submitted with the Custodian's SOI; however, such submission would not have changed the May 28, 2008 decision of the Council.

June 6, 2008

Letter from the Custodian to the GRC in response to the Council's Interim Order. The Custodian forwards nine (9) copies of the requested record to the GRC in unredacted form for *in camera* examination. The Custodian also forwards a letter to the GRC stating that the document submitted to the GRC is the document under review. A document or redaction index was deemed to be unnecessary by the Custodian, therefore one was not provided to the GRC.

³ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁴ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

June 6, 2008

Letter from Theodore A. Brown to the GRC. Mr. Brown, the Director of Compliance Activities, Office of Legal Management, University of Medicine and Dentistry of New Jersey, forwards to the GRC a copy of an e-mail from the Complainant to the Custodian dated October 15, 2007, confirming that the Custodian verbally requested an extension of time to respond to the Complainant's OPRA request.

Analysis

Whether the Custodian complied with the Council's Order?

Paragraph 3 of the Order directed the Custodian to deliver certain records and documentation to the Council within five (5) business days from receipt of said Order. The Order was received by the Custodian on or before June 5, 2008, therefore, the Custodian was required to comply with the terms of the Order no later than June 12, 2008.

The Custodian submitted the required records to the GRC in a timely manner on June 6, 2008; however, the Custodian failed to include the required legal certification. The letter from the Custodian containing her statement that "...the document in this package is the document under review..." does not qualify as the legal certification pursuant to N.J. Court Rule 1:4-4. as required in the Council's Interim Order. Further, the Custodian did not submit a document or redaction index because she stated that no redactions were made. Even if the record was not redacted, a document or redactions index is still required pursuant to the Council's Order.

Although the Custodian submitted the required records to the GRC in a timely manner, the Custodian failed to comply with the terms of the Council's Interim Order because she failed to submit to the GRC a legal certification pursuant to N.J. Court Rule 1:4-4. and a document or redaction index as required by directive of said Order.

Whether the record relevant to this complaint is subject to the attorney-client privilege and is therefore exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1?

In New Jersey, protecting confidentiality within the attorney-client relationship has long been recognized by the courts. *See, e.g. Matter of Grand Jury Subpoenas*, 241 N.J. Super. 18 (App. Div. 1989). In general, the attorney-client privilege renders as confidential communications between a lawyer and a client made in the course of that professional relationship. *See N.J.S.A. 2A: 84A-20 and Fellerman v. Bradley*, 99 N.J. 493, 498-99 (1985). Rule 504 (1) of the New Jersey Rules of Evidence provides that communications between a lawyer and client, "in the course of that relationship and in professional confidence, are privileged..." Such communications as discussion of litigation strategy, evaluation of liability, potential monetary exposure and settlement recommendations are considered privileged. *The Press of Atlantic City v. Ocean County Joint Insurance Fund*, 337 N.J. Super. 480, 487 (Law Div. 2000). Also confidential are mental impressions, legal conclusions, and opinions or theories of attorneys. *In Re Environmental Ins. Actions*, 259 N.J. Super. 308, 317 (App. Div. 1992). However, "a fine line exists between an attorney who provides legal services or advice...and one who

performs essentially non-legal duties. An attorney who is not providing legal services or providing legal advice in some form does not qualify as a “lawyer” for purposes of the [attorney-client] privilege....” Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 550-551 (1997), *citing* United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 563 (App. Div. 1984).

The privilege has been extended to any person who is or may be the agent of either the attorney or the client. *See* State v. Kociolek, 23 N.J. 400 (1957). It includes any “necessary intermediaries...through whom the communications are made.” *Id.* at 413. The attorney-client privilege has also been held to be “fully applicable to communications between a public body and an attorney retained to represent it.” Matter of Grand Jury, *supra*, 241 N.J. Super. at 28, *citing* In Re State Commission of Investigation, 226 N.J. Super. 461 (App. Div. 1988).

The attorney-client privilege is waived if privileged communications are shared with persons who are not representatives of the client or the attorney; however, to be effective, a waiver of the attorney-client privilege must have been made “with knowledge of [the] right or privilege.” State v. J.G., 261 N.J. Super. 409, 419-21 (App. Div. 1993), *certif. denied*, 133 N.J. 436 (1993). Inadvertent disclosure through mere negligence or misfortune does not abrogate the attorney-client privilege. Trilogy Communications, Inc. v. Excom Realty, Inc., 279 N.J. Super. 442, 445 (Law Div. 1994). *See generally*, State v. Davis, 116 N.J. 341, 362-63 (1989).

The Custodian contends that the record submitted for *in camera* examination constitutes attorney-client privileged material and is therefore exempt from disclosure because OPRA excludes from the definition of a government record “any record within the attorney-client privilege.” N.J.S.A. 47:1A-1.1. The Custodian’s Counsel states that the law firm that prepared the record was retained by the University of Medicine and Dentistry of New Jersey (“UMDNJ”) to seek “legal advice from its outside counsel, who in turn prepared a report for the purpose of advising the University.” The report that was subsequently prepared by outside counsel is titled “Report of Investigation Regarding Ronald Pittore, Managing Director of the Office of Legal Management.”

In Payton, *supra*, the defendant resisted plaintiff’s efforts to obtain discovery of an internal investigation by arguing, *inter alia*, that the attorney-client privilege served to protect the entire investigatory process because attorneys participated in the investigation. The New Jersey Supreme Court stressed that the lower court must first evaluate the [investigation] *in camera* to determine what role an attorney may have had in its creation. **If the results of the *in camera* evaluation reveal that the attorney involvement was “...not for the purpose of preparing for litigation or providing legal advice, but rather for some other purpose, the privilege is inapplicable...even where litigation may eventually arise from the subject of the attorney’s activities.”** (Emphasis added). *Id.* at 551.

It is irrelevant whether the report was prepared by an attorney or was deemed by its preparer as confidential attorney work product or attorney-client privileged material. The crucial focus is on the *purpose* of the report. As the Payton court made clear, when

the document is prepared by an attorney or law firm **and** the “...purpose was to provide legal advice or to prepare for litigation, then the privilege applies.”⁵ *Id.*

Here, the record submitted for *in camera* examination is a stapled report (“report”) containing pages numbered from one (1) to thirty-three (33) exclusive of the cover page and table of contents. On the front cover of the report under the title appears the law firm name and address.⁶ Between the firm name and its address are the names Samuel P. Moulthrop and Scott A. Ohnegian.⁷ On the top right corner of each page of the report appears the following message:

“Privileged & Confidential
Attorney-Client Communication
Attorney Work Product”

The report was submitted to UMDNJ by the law firm and signed by Samuel P. Moulthrop and Scott A. Ohnegian on behalf of the law firm. The report is dated May 21, 2007.

Although the Custodian withheld from disclosure the *entire report* based upon attorney-client privilege, such an all-encompassing application of the privilege to deny access is contrary to the intent of OPRA. See N.J.S.A. 47:1A-1. The court in Payton, *supra*, suggesting the privilege should be applied more selectively, noted:

“...despite our doubts about the applicability of the [attorney-client] privilege based solely on the status of those involved in the investigation as attorneys, we stress that the trial court must evaluate the individual documents at issue *in camera* to determine what role an attorney may have had in the creation of those particular documents. ...[t]he privilege very well may apply to portions of the investigation...” *Id.* at 552.

The GRC’s *in camera* examination revealed that such is the case in this matter. Section I of the report is titled, “Scope of Investigation and Engagement.” This section states the purpose of the report, which is twofold: (a) “...to investigate and evaluate facts relating to the suspension of Ronald Pittore...” and (b) “...to provide counsel as to possible actions that may be taken...” A segment of the report was dedicated to the factual setting. In this segment the background was established; however, no advice was provided to the client. This segment of the report was prepared in order to summarize the facts known about the incident, not for the purpose of providing legal advice. Accordingly, this segment does not constitute attorney-client privileged material and is therefore not exempt from disclosure. Other segments of the report do dispense advice and/or suggest strategy, and therefore do constitute material that is exempt from disclosure pursuant to the attorney-client privilege exception of N.J.S.A. 47:1A-1.1. The *in camera* examination reflects this analysis as set forth in the following table:

⁵ Although the BOE Resolution authorized the retention of special counsel to “provide a factual and legal opinion as a result of its findings,” no legal opinion was rendered in the report.

⁶ Riker, Danzig, Scherer, Hyland & Perretti, LLP, One Speedwell Plaza, Morristown, NJ.

⁷ Messrs. Moulthrop and Ohnegian are partners in the law firm.

Record or Redaction Number	Record Name/Date	Description of Record	Custodian's Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination
1	"Report of Investigation Regarding Ronald Pittore, Managing Director of the Office of Legal Management" prepared by Samuel P. Moulthrop and Scott A. Ohnegian dated May 21, 2007.	This is an investigative report containing a factual background and drawing certain conclusions which are provided to the client along with Counsel's advice.	Attorney-client privileged. ⁸	<p><u>Redact:</u> Section II titled <i>Executive Summary</i> as "any record within the attorney-client privilege" pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p><u>Redact:</u> Section V titled <i>Analysis of Mr. Pittore's Conduct and his Employment Situation</i> as "any record within the attorney-client privilege" pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>The balance of the report shall be disclosed redacting the names and personal information of individuals providing information to investigative personnel. A redaction index</p>

⁸ Another reason for denial of access was asserted by the Custodian but is not relevant to this *in camera* examination.

				shall accompany the disclosed record detailing the general nature of the information redacted as well as the lawful basis for each redaction.
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Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian submitted the required records to the GRC in a timely manner, the Custodian failed to comply with the terms of the Council's Interim Order because she failed to submit to the GRC a legal certification pursuant to N.J. Court Rule 1:4-4. and a document or redaction index as required by directive of said Order.

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

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

October 22, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

May 28, 2008 Government Records Council Meeting

Ronald Pittore
Complainant
v.

Complaint No. 2007-216

University of Medicine & Dentistry of New Jersey
Custodian of Record

At the May 28, 2008 public meeting, the Government Records Council ("Council") considered the May 21, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian's failure to either grant access, deny access, seek clarification or request an extension of time in writing within the statutorily mandated seven (7) business days results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested record to confirm the Custodian's legal assertion that the record constitutes attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document 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.**

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

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



4. Pursuant to Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004), the Custodian's denial of the Complainant's OPRA request, on the grounds that the Complainant is precluded from obtaining records under OPRA because the Complainant filed a claim under the New Jersey Tort Claims Act, is not a lawful basis for a denial of access.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the *in camera* review.
6. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the outcome of the *in camera* review.

Interim Order Rendered by the
Government Records Council
On The 28th Day of May, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: June 4, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 28, 2008 Council Meeting**

**Ronald Pittore¹
Complainant**

GRC Complaint No. 2007-216

v.

**University of Medicine and Dentistry of New Jersey²
Custodian of Records**

Records Relevant to Complaint: Copy of document prepared by Samuel Moulthrop in May 2007. (The Complainant includes an e-mail from Samuel Moulthrop to William P. Deni, Esq. dated May 22, 2007 which references the report prepared by Samuel Moulthrop).

Request Made: August 27, 2007

Response Made: September 17, 2007

Custodian: Susan Glick

GRC Complaint Filed: September 20, 2007

Background

August 27, 2007

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

September 17, 2007

Custodian's response to the OPRA request.³ The Custodian responds in writing to the Complainant's OPRA request on the fourteenth (14th) business day following receipt of such request. The Custodian states that access to the requested record is denied because said record is protected by attorney-client privilege.

September 20, 2007

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

- E-mail from Samuel Moulthrop to William P. Deni, Esq. dated May 22, 2007

¹ The Complainant is an attorney representing himself.

² Represented by Theodore A. Brown, Esq. (Newark, NJ).

³ The Custodian also sent a copy of said letter to the Complainant via e-mail on September 17, 2007.

- Complainant's OPRA request dated August 27, 2007
- Custodian's letter response to the Complainant's request dated September 17, 2007
- Custodian's e-mail response to the Complainant's request dated September 17, 2007

The Complainant states that he submitted his OPRA request on August 27, 2007 and on September 10, 2007, he received a telephone call from the Custodian in which the Custodian indicated that she would not provide the requested record because it is protected by attorney-client privilege. The Complainant states that his attorney advised him that pursuant to communications with the University of Medicine and Dentistry of New Jersey's ("UMDNJ") attorney, the requested record constituted an internal investigation of the Complainant's status with UMDNJ. The Complainant states that he was interviewed for six (6) hours for the preparation of the requested record.

Regarding the issue of attorney-client privilege, the Complainant states that the New Jersey Supreme Court addressed this issue in Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997). The Complainant states that the court indicated that an attorney who is not performing legal services or rendering advice does not qualify as a lawyer for purposes of the attorney-client privilege. The Complainant states that the court also indicated that the attorney-client privilege is inapplicable when an attorney conducts an investigation for a purpose other than preparing for litigation or providing legal advice. The Complainant states that a recent communication from UMDNJ characterized the requested report as an investigation at the initiation of the University.

The Complainant contends that UMDNJ has wrongfully and intentionally violated OPRA by withholding the requested report unjustifiably. The Complainant requests that the Council assess penalties against UMDNJ and order the Custodian to release the requested report.

Additionally, the Complainant requests an attorney's fee of \$750.00 for his work in attempting to obtain a copy of the requested report because the Complainant is an attorney admitted to practice in New Jersey.

October 4, 2007

Offer of Mediation sent to both parties.

October 11, 2007

The Custodian declines the Offer of Mediation. The Complainant did not respond to the Offer of Mediation.

October 12, 2007

Request for the Statement of Information sent to the Custodian.

October 18, 2007

Custodian's Statement of Information ("SOI") with the Complainant's Notice of Claim pursuant to N.J.S.A. 59:8-4 dated September 12, 2007 attached. The Custodian certifies receiving the Complainant's OPRA request on August 27, 2007 and providing a written response on September 17, 2007. The Custodian asserts that she and the Complainant had agreed upon an extension of time to respond to said request. The Custodian also certifies that her search for the requested records involved a search within the Department of Legal Management, where the requested record was located. Additionally, the Custodian certifies that no records responsive to the request were destroyed and that employee files must be maintained until six (6) years after termination. The Custodian also certifies that UMDNJ retained the law firm of Riker Danzig Scherer Hyland & Perretti to investigate and evaluate facts relating to the Complainant's suspension and to provide advice as to possible actions that may be taken based on this inquiry and evaluation. The Custodian certifies that the requested report summarized the facts discovered through the firm's investigation and provided a legal analysis of those facts as they relate to the Complainant's employment with UMDNJ.

The Custodian's Counsel states that the Complainant relies on Payton, *supra*, to support his position that UMDNJ's attorney was not performing legal services or rendering advice and therefore does not qualify for purposes of the attorney-client privilege. Counsel asserts that the Complainant's reliance on Payton is misplaced. Counsel states that in Payton, the court addressed whether various records pertaining to the Turnpike Authority's handling and disposition of Payton's complaints of sexual harassment, including the Turnpike Authority's internal investigation, may be made available through discovery, and the extent to which confidentiality concerns limit the discovery of said records. Counsel states that in Payton, the Turnpike Authority indicated via a privilege log that its Equal Opportunity Officer made initial findings about the sexual harassment complaint and issued a final investigative report in conjunction with in-house counsel. Counsel states that the Law Division granted the protective order in its entirety without reviewing the records *in camera*. Counsel states that Appellate Division reversed the trial court and instructed the trial court to inspect the records *in camera* and make appropriate redactions in order to accommodate confidentiality concerns. Counsel also states that the New Jersey Supreme Court affirmed the Appellate Division by stating that the attorney-client privilege did not provide blanket protection simply because the employer's attorney participated in the investigation.

Counsel distinguishes Payton from this present matter because UMDNJ did not conduct the investigation itself, but rather sought legal advice from outside counsel who conducted said investigation and prepared the requested report unassisted by anyone else for the purpose of advising the University. Counsel states that the court in Payton noted that an attorney who is not performing legal services or providing legal advice in some form does not qualify as a lawyer for the purposes of the attorney-client privilege. Counsel asserts that the requested report in the present matter was prepared solely by UMDNJ's attorney for the purpose of providing legal advice as to the Complainant's status at the University. Thus, Counsel contends that the Custodian's denial of access should be upheld.

Additionally, Counsel states that the Complainant filed a Notice of Claim against UMDNJ under the New Jersey Tort Claims Act (N.J.S.A. 59:8-1 et seq.) on or about

September 12, 2007. Counsel states that pursuant to N.J.S.A. 59:8-8, a plaintiff must comply with a statutory waiting period of six (6) months after the filing of the Notice of Claim before bringing suit against a public entity. Counsel contends that the rationale for the waiting period is that discovery is most likely to take place immediately after suit is filed and thus discovery is intended to be prohibited during the six (6) month period of repose. Counsel asserts that the Complainant should not be able to use OPRA to circumvent the prohibition on discovery.

Counsel also states that OPRA does not abrogate any executive or legislative privilege or grant of confidentiality established or recognized by the Constitution of the State of New Jersey, statute, court rule or judicial case law, which privilege or grant of confidentiality may restrict public access to a government record. N.J.S.A. 47:1A-9.⁴ Counsel contends that if the Complainant were to obtain the requested record under OPRA, the Complainant would circumvent the statutory waiting period under the Tort Claims Act and thus would obtain discovery prior to the time in which the Complainant may file suit. As such, Counsel contends that the Custodian's denial of access should be upheld.

October 23, 2007

The Complainant's response to the Custodian's SOI. The Complainant states that at no time prior to the filing of his OPRA request did UMDNJ assert that the requested report was protected by attorney-client privilege. The Complainant questions why the preparer of the report would notify the Complainant's attorney when the report was completed, if said report was privileged. The Complainant asserts that the requested report is investigatory in nature and is not covered under the attorney-client privilege.

Additionally, the Complainant contends that if the Legislature had intended the Tort Claims Act to obstruct the filing of an OPRA request, the Legislature would have written such into the statute. The Complainant asserts that nothing in the Tort Claims Act prohibits a requestor from filing an OPRA request after filing a Notice of Claim.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document,

⁴ N.J.S.A. 47:1A-9.b.

information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... *A government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA]... any record within the attorney-client privilege.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA states that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy therefor ...” N.J.S.A. 47:1A-5.g.

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

OPRA also provides that:

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

The New Jersey Tort Claims Act provides that:

“[a]fter the expiration of six months from the date notice of claim is received, the claimant may file suit in an appropriate court of law.” N.J.S.A. 59:8-8.

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

records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁵ A custodian’s failure to respond in writing to a complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the complainant’s OPRA request. See Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this current complaint, the Custodian certifies receiving the Complainant’s OPRA request on August 27, 2007. The Complainant states that the Custodian denied access to the requested record via telephone on September 10, 2007, the ninth (9th) business day following receipt of said request, and in writing on September 17, 2007, the fourteenth (14th) business day following receipt of said request. The Custodian claims that she and the Complainant agreed to an extension of time to respond to said request. However, nothing in the record indicates that any such agreement exists.

Therefore, the Custodian’s failure to either grant access, deny access, seek clarification or request an extension of time in writing within the statutorily mandated seven (7) business days results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

Nevertheless, the Custodian denied access to the Complainant’s request because the Custodian asserts that the requested record constitutes attorney-client privileged information, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

The Complainant states that pursuant to Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997), an attorney who is not performing legal services or rendering advice does not qualify as a lawyer for purposes of the attorney-client privilege. The Complainant states that the court also indicated that the attorney-client privilege is inapplicable when an attorney conducts an investigation for a purpose other than preparing for litigation or providing legal advice. The Complainant’s Counsel asserts that the requested report was prepared solely by UMDNJ’s attorney for the purpose of providing legal advice as to the Complainant’s status at the University. Thus, Counsel contends that the Custodian’s denial of access should be upheld.

⁵ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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

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

The court also stated that:

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

Further, the court stated that:

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

Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of the requested record (report prepared by Samuel Moulthrop in May 2007) to confirm the Custodian's legal assertion that the record constitutes attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Additionally, the Custodian's Counsel contends that because the Complainant filed a Notice of Claim against UMDNJ, the New Jersey Tort Claims Act prohibits the Complainant from circumventing the discovery process and obtaining the requested record under OPRA.

The New Jersey Tort Claims Act, specifically N.J.S.A. 59:8-8, provides that a claimant may not file suit in a court of law until the expiration of six (6) months from the date the Notice of Claim is received. The Tort claims Act does not specifically state that

⁶ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
Ronald Pittore v. University of Medicine and Dentistry of New Jersey, 2007-216 – Findings and Recommendations of the
Executive Director

a claimant is barred from filing OPRA requests that may be directly or tangentially related to the subject of his/her claim. The Tort Claims Act prohibits a claimant from filing action in a court of law, which in turn prohibits the discovery process, as the Custodian's Counsel noted. In order for the discovery process to begin, a complaint must be filed in a court of law. No such action is required under OPRA; a requestor does not have to file a complaint prior to gaining access to government records under OPRA. A requestor has the statutory right to access government records at his or her discretion.

In Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004), the City of Vineland sought a protective order precluding Mid-Atlantic from conducting discovery outside the limitations of the Federal Rules of Civil Procedure by requesting records under OPRA. In said case, the requestor, Mid-Atlantic, sought access to records under OPRA which were related to a law suit involving the parties. The court held that:

“...documents that are ‘government records’ and subject to public access under OPRA are no less subject to public access because the requestor filed a lawsuit against the governmental entity. The fact that a party may obtain documents though OPRA at an earlier time or that OPRA provides for a shorter time period to respond than the time when document requests are permitted to be served under Rule 26 [of the Federal Rules of Civil Procedure] does not create a conflict so as to deny a citizen of legal rights to seek governmental records under OPRA...”

Therefore, pursuant to Mid-Atlantic, *supra*, the Custodian's denial of the Complainant's OPRA request, on the grounds that the Complainant is precluded from obtaining records under OPRA because the Complainant filed a claim under the New Jersey Tort Claims Act, is not a lawful basis for a denial of access.

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

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

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

The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the outcome of the *in camera* review.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to either grant access, deny access, seek clarification or request an extension of time in writing within the statutorily mandated seven (7) business days results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested record to confirm the Custodian's legal assertion that the record constitutes attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁷ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #2 above), a document or redaction index⁸, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. Pursuant to Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004), the Custodian's denial of the Complainant's OPRA request, on the grounds that the Complainant is precluded from obtaining records under OPRA because the Complainant filed a claim under the New Jersey Tort Claims Act, is not a lawful basis for a denial of access.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the *in camera* review.
6. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the outcome of the *in camera* review.

Prepared By:

Dara Lownie
Senior Case Manager

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

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

Approved By:

Catherine Starghill, Esq.
Executive Director

May 21, 2008