



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

December 22, 2009 Government Records Council Meeting

Tina Renna
Complainant

Complaint No. 2008-217

v.

County of Union
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council (“Council”) considered the December 9, 2009 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the Council’s November 4, 2009 Interim Order by providing the Council with the record set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council’s Order.
2. The *In Camera* Examination reveals the Custodian lawfully denied access to the requested record (letter from outside counsel to the County Counsel regarding litigation matters) pursuant to N.J.S.A. 47:1A-6 because the attorney-client privilege was not waived by County Counsel’s statement at the July 24, 2008 Freeholder meeting.
3. Because the Custodian’s behavior did not change as a result of this Denial of Access Complaint, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

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 22nd Day of December, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Harlyne A. Lack, Secretary
Government Records Council

Decision Distribution Date: January 5, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
December 22, 2009 Council Meeting**

**Tina Renna¹
Complainant**

GRC Complaint No. 2008-217

v.

**County of Union²
Custodian of Records**

Records Relevant to Complaint: The written statement read by County Counsel at the July 24, 2008 Freeholder meeting pertaining to employee lawsuits.³

Request Made: July 25, 2008

Response Made: July 28, 2008

Custodian: Nicole DiRado (Clerk of the Board of Chosen Freeholders)

GRC Complaint Filed: September 30, 2008⁴

Records Submitted for *In Camera* Examination: A letter from outside counsel to County Counsel regarding litigation matters.

Background

November 4, 2009

Government Records Council's Interim Order. At the November 4, 2009 public meeting, the Government Records Council ("Council") considered the October 21, 2009 Executive Director's Findings and Recommendations and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. 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 determine the validity of the Custodian's 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 Represented by Walter M. Luers, Esq. (Oxford, NJ).

² Represented by Alexandra De Fresco, Assistant County Counsel.

³ This is the exact wording of the records request submitted to the Custodian and submitted to the GRC by the Complainant as Exhibit 1 of the Denial of Access Complaint.

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

2. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted document, a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁷, 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.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

November 9, 2009

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

November 10, 2009

Certification of the Custodian in response to the Council's Interim Order with the record requested for the *in camera* review and a certification of Robert E. Barry, Esq. (Union County Counsel who made the statements at the Freeholder meeting that are subject of this complaint). Mr. Barry certifies that he attended the July 24, 2008 Freeholder meeting and acted as legal counsel on behalf of the County of Union. Mr. Barry also certifies that in preparation for the meeting, he reviewed many documents including a letter prepared by outside counsel detailing the specific actions, strategies and liability of several different legal matters. Additionally, Mr. Barry certifies that the confidential contents of the letter prepared by outside counsel were never disclosed to any third parties although Mr. Barry also certifies that he did page through the letter as he made his statements regarding litigation at the July 24, 2008 Freeholder meeting. Finally, Mr. Barry certifies that the record provided is the unredacted letter requested for the *in camera* inspection.

Analysis

Whether the Custodian complied with the Council's November 4, 2009 Interim Order?

At its November 4, 2009 public meeting, the Council determined that because the Custodian has asserted that the letter prepared by outside counsel for County Counsel regarding litigation matters constitutes attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, the Council must determine the validity of the Custodian's assertion. Therefore, the GRC must conduct an *in camera* review

⁵ 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.

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

⁷ "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."

of the requested record to determine the validity of the Custodian's assertion that the requested record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted document, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on November 16, 2009.

On November 10, 2009, the Custodian provided the GRC with a legal certification of County Counsel and the unredacted record requested for the *in camera* inspection.⁸ Thus, the Custodian complied with the Council's November 4, 2009 Interim Order within five (5) business days from receipt of such Order or by November 16, 2009.

Whether the Custodian unlawfully denied the Complainant access to the requested record?

The Custodian asserts that she lawfully denied the Complainant access to the letter prepared by outside counsel for County Counsel regarding litigation matters because the record constitutes attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Conversely, the Complainant asserts that the Custodian unlawfully denied access because the privilege was waived when the County Counsel read the letter into the record at the July 24, 2008 Freeholder meeting.

OPRA provides that "[a] government record shall not include the following information which is deemed to be confidential for the purposes [OPRA] ... any record within the attorney-client privilege ..."

OPRA excludes from the definition of a government record any record within the attorney client privilege. N.J.S.A. 47:1A-1.1. In New Jersey, protecting confidentiality within the attorney-client relationship has long been recognized by the courts. *See, e.g. Matter of Grand Jury Subpoenas*, 241 N.J. Super. 18 (App. Div. 1989). In general, the attorney-client privilege renders as confidential communications between a lawyer and a client made in the course of that professional relationship. *See N.J.S.A. 2A: 84A-20 and Fellerman v. Bradley*, 99 N.J. 493, 498-99 (1985). Rule 504 (1) of the New Jersey Rules of Evidence provides that communications between a lawyer and client, "in the course of that relationship and in professional confidence, are privileged...." Such communications as discussion of litigation strategy, evaluation of liability, potential monetary exposure and settlement recommendations are considered privileged. The Press of Atlantic City v. Ocean County Joint Insurance Fund, 337 N.J. Super. 480, 487 (Law Div. 2000). Also confidential are mental impressions, legal conclusions, and opinions or theories of attorneys. In Re Environmental Ins. Actions, 259 N.J. Super. 308, 317 (App. Div. 1992).

The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system." Matter of Grand Jury

⁸ No document or redaction index was necessary since the entire letter from outside counsel is at issue.
Tina Renna v. County of Union, 2008-217 – *In Camera* Findings and Recommendations of the Executive Director

Subpoenas, 241 N.J. Super. 18, 27-8 (App.Div.1989). The attorney-client privilege protects communications between a lawyer and the client made in the course of that professional relationship, and particularly protects information which, if disclosed, would jeopardize the legal position of the client. N.J.S.A. 2A:84A-20; RPC 1.6. The New Jersey Supreme Court has observed that RPC 1.6 “expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client.” In re Advisory Opinion No. 544 of N.J. Sup. Court, 103 N.J. 399, 406 (1986).

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

The GRC conducted an *in camera* examination on the submitted record and compared the record to the verbal statement made at the July 24, 2008 Freeholder meeting as provided on DVD by both parties.⁹

Upon review of the record provided for *in camera* inspection (a letter from outside counsel) and the DVDs of the verbal statement made by County Counsel at the July 24, 2008 Freeholder meeting, it is determined the statement made by County Counsel is not a verbatim recitation of the letter prepared by outside counsel for County Counsel regarding litigation matters. Therefore, the Custodian lawfully denied access to the letter from outside counsel regarding litigation matters because the attorney-client privilege was not waived by County Counsel’s statement at the July 24, 2008 Freeholder meeting.

While the Council’s November 4, 2009 Interim Order deferred 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, there is no need to conduct such analysis because the Custodian lawfully denied the Complainant access to the requested record.

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

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

⁹ Both DVDs provided by each party were reviewed to ensure that one DVD did not differ in content from the other.

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

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

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under OPRA, N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney’s fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The court in Mason, *supra*, at 76, held that “requestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, cert denied (1984).”

In this instant complaint, the Complainant sought access to a letter from outside counsel regarding litigation matters that Complainant asserts County Counsel read into the record at the July 24, 2008 Freeholder meeting.

As revealed by the *in camera* inspection, the Custodian lawfully denied the Complainant access to the letter from outside counsel regarding litigation matters because the attorney-client privilege was not waived by County Counsel's statement at the July 24, 2008 Freeholder meeting. County Counsel did not read the requested letter from outside counsel into the record verbatim.

In Teeters, *supra*, the court held that the Complainant was a prevailing party because she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. In this instant complaint, the Custodian did not alter her behavior because of the filing of this Denial of Access Complaint since the *in camera* inspection revealed that the Custodian lawfully denied the Complainant access to the requested record.

Therefore, because the Custodian's behavior did not change as a result of this Denial of Access Complaint, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council's November 4, 2009 Interim Order by providing the Council with the record set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council's Order.
2. The *In Camera* Examination reveals the Custodian lawfully denied access to the requested record (letter from outside counsel to the County Counsel regarding litigation matters) pursuant to N.J.S.A. 47:1A-6 because the attorney-client privilege was not waived by County Counsel's statement at the July 24, 2008 Freeholder meeting.
3. Because the Custodian's behavior did not change as a result of this Denial of Access Complaint, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

Prepared By: Catherine Starghill, Esq.
Executive Director

December 9, 2009



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

November 4, 2009 Government Records Council Meeting

Tina Renna
Complainant

Complaint No. 2008-217

v.

County of Union
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council ("Council") considered the October 21, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. 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 (the written statement read by County Counsel at the July 24, 2008 freeholder meeting pertaining to employee lawsuits) to determine the validity of the Custodian's assertion that the record constitutes attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, 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.

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."



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

Interim Order Rendered by the
Government Records Council
On The 4th Day of November, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: November 5, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 4, 2009 Council Meeting**

**Tina Renna¹
Complainant**

GRC Complaint No. 2008-217

v.

**County of Union²
Custodian of Records**

Records Relevant to Complaint: The written statement read by County Counsel at the July 24, 2008 freeholder meeting pertaining to employee lawsuits.³

Request Made: July 25, 2008

Response Made: July 28, 2008

Custodian: Nicole DiRado (Clerk of the Board of Chosen Freeholders)

GRC Complaint Filed: September 30, 2008⁴

Background

July 25, 2008

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

July 28, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that access to the requested record is denied because it is the County's position that no document was read into the record. Additionally, the Custodian stated that the document the Complainant refers to was reviewed and relied upon by County Counsel, however it was not submitted as part of the record. Further, the Custodian states that the document constitutes communications between the attorney who represented the County of Union in the referenced matters and County Counsel. Lastly, the Custodian states that the document is attorney-client communication categorized under the attorney-client privilege exemption of OPRA.

¹ Represented by Walter M. Luers, Esq. (Oxford, NJ).

² Represented by Alexandra De Fresco, Assistant County Counsel.

³ This is the exact wording of the records request submitted to the Custodian and submitted to the GRC by the Complainant as Exhibit 1 of the Denial of Access Complaint.

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

September 30, 2008

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

- Complainant’s OPRA request dated July 25, 2008; and
- Letter from the Custodian to the Complainant dated July 28.

The Complainant requests the GRC to take official notice of a video/audio recording of the Union County Board of Freeholders’ July 24, 2008 meeting on the County’s website. Alternatively, the Complainant requests to be allowed to submit a copy of same.

The Complainant asserts that the Union County Board of Freeholders held a public meeting on July 24, 2008 during which a representative of the Union County Counsel’s Office read from a written statement. The Custodian further asserts that it is clear that the representative is reading a written statement aloud because he can be seen turning pages of the statement at 02:01:11 and 02:02:49 of the video recording on the County’s website.

The Complainant asserts that she submitted a records request for the written statement to the Custodian on July 25, 2008 to which the Custodian responded on July 28, 2008 denying access. The Complainant also asserts that the Custodian claims the document from which County Counsel referred to during the meeting was not read into the record, but instead is an attorney-client privileged document between County Counsel and outside counsel representing the County in the employee lawsuits to which the document refers.

The Complainant argues that the attorney-client privilege is not absolute but is strictly construed by the courts and under OPRA. Further, the Complainant argues that since OPRA expressly requires any limitations on the right of access accorded by OPRA shall be construed in favor of the public and the strict construction of the attorney-client privilege, both policies require the party asserting the privilege prove that each requirement for the existence of the privilege be satisfied. Matter of Grand Jury Subpoenas Tecum Served by Sussex County Grand Jury on Farber, 241 N.J. Super. 18, 34 (App. Div. 1989). Also, the Complainant argues that OPRA places the same burden on proof on the public agency denying access under OPRA. The Complainant asserts that the Custodian has not met her burden.

Specifically, the Complainant argues that the attorney-client privilege was waived by County Counsel when the document was read during the open public meeting. Second, the Complainant asserts that there is an issue whether the requested record falls within the attorney-client privilege. According to the Complainant, for a communication to be protected, it must have been made (1) “in a professional confidence”, (2) “between lawyer and his client”, and (3) “in the course of that relationship.” United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 562 (App. Div. 1984). Third, the Complainant asserts that the Custodian offered nothing to show that at least a redacted version of the requested record could be disclosed without undermining the privilege. The Complainant asserts that if a party claiming the attorney-client privilege fails to satisfy its burden of

proving that the communication satisfies each of the required characteristics, then the privilege does not apply. Illinois Education Association v. Illinois State Board of Education, 791 N.E.2d 522 (Ill. 2003). Further, the Complainant asserts that the requested record appears to be a statement that was drafted for the express purpose of being read into the public record and this is the furthest thing from a confidential, privileged record.

The Complainant requests the following relief:

- (1) finding that the Custodian violated OPRA by improperly denying access to the requested record;
- (2) ordering the Custodian to provide immediate access to the requested record;
- (3) finding that Complainant is a prevailing party and awarding a reasonable attorney fee as provided by N.J.S.A. 47:1A-6; and
- (4) if, after the investigation, it is found that the Custodian knowingly and willfully violated OPRA under the totality of the circumstances, assessing civil penalties against the Custodian.

The Complainant does not agree to mediate this complaint.

October 8, 2008

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

October 15, 2008

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated July 25, 2008
- Letter from the Custodian to the Complainant dated July 28, 2008
- Certification of Norman W. Albert, Esq. (Deputy County Counsel) dated October 11, 2008

The Custodian asserts that she received a faxed OPRA request from the Complainant on July 25, 2008. The Custodian also asserts that she responded to this request on July 28, 2008 denying access to the requested record because the letter was prepared by outside counsel and was merely reviewed and relied upon by counsel during the July 24, 2008 Freeholder meeting and that the attorney-client privilege exemption in OPRA prevents disclosure. Further, the Custodian asserts that the privilege was therefore not waived. Also, the Custodian asserts that the Courts have specifically acknowledged this privilege in the context of communications between outside counsel and a government entity because of the need of the governmental client for assurance of confidentiality. Matter of Grand Jury Subpoenas Tecum Served by Sussex County Grand Jury on Farber, 241 N.J. Super. 18, 29 (App. Div. 1989).

The Custodian asserts that it is clear that the communication is covered by the privilege because it was made (1) “in a professional confidence”, (2) “between lawyer and his client”, and (3) “in the course of that relationship.” United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 562 (App. Div. 1984). The correspondence was specifically prepared for counsel to the County (i.e. County Counsel) to advise of the nature, liability and actions of those matters being handled by outside counsel. Therefore, the Custodian concludes that this document clearly falls within the category of communication the privilege is intended to protect.

The Custodian asserts that the Complainant’s argument that a redacted copy of the letter should have been disclosed has no merit because the Courts have consistently held that “any partial waivers of the privileged communication could waive the entire privilege.” Sicpa N. America Corp. V. Donaldson Enter, Inc., 179 N.J. Super. 56, 61-62, 430 A.2d 262 (App. Div. 1981). The Custodian further asserts that merely because an attorney reviews and pages through an attorney-client privileged document does not result in the automatic disclosure of its confidential contents and waiver of the privilege.

In a certification from the Deputy County Counsel who attended the July 24, 2008 meeting of the Union County Board of Chosen Freeholders on behalf of the County Counsel, the Deputy County Counsel certifies that in preparation for the meeting he reviewed many documents including the requested letter prepared by outside counsel detailing the specific actions, strategies and assesses the liability of several different legal matters. The Deputy County Counsel also certifies that the confidential contents of the letter prepared by outside counsel were never disclosed to any third parties. Further, the Deputy County Counsel certifies that at the meeting he reviewed and paged through the letter in preparation for his own statement and paged through the letter as he made his statement. Lastly, the Deputy County Counsel certifies that he never read the confidential contents of the letter into the record or submitted it physically into the record.

The Custodian certifies that no search for the requested record was necessary because the Custodian was aware of the location of the record and no records responsive to the request have been destroyed.

October 8, 2008

Letter from the GRC to the Complainant. The GRC requests that the Complainant submit a copy of the video of the July 24, 2008 meeting of the Union County Board of Chosen Freeholders for which the Complainant wants the GRC to take official notice. Further, the GRC requests the Complainant to provide sufficient information to verify the source of said video. The GRC requests that the video be submitted by October 16, 2008.

October 14, 2008

E-mail from the Complainant to the GRC. The Complainant requests an extension of time to submit the video of the July 24, 2008 meeting of the Union County Board of Chosen Freeholders until October 24, 2008 because the Complainant is seeking a vendor who can put the requested video on a CD or DVD.

October 14, 2008

E-mail from the GRC to the Complainant. The GRC grants the Complainant an extension of time until October 24, 2008 to submit the video of the July 24, 2008 meeting of the Union County Board of Chosen Freeholders.

October 14, 2008

Letter from the Custodian to the GRC (with attachments). The Custodian questions the credibility of the Complainant's request for an extension of the deadline to submit the video of the July 24, 2008 meeting of the Union County Board of Chosen Freeholders because the Complainant is seeking a vendor who can put the requested video on a CD or DVD. The Custodian explains that she provided the Complainant with a copy of the DVD on August 6, 2008.

October 14, 2008

E-mail from the Complainant to the GRC. The Complainant clarifies that she is seeking a vendor to accommodate the GRC's request for the relevant portions of the video which thus requires editing. The Complainant suggests that the County assist in such editing if the County objects to the amount of time the Complainant requires.

October 15, 2008.

E-mail from the GRC to the Complainant and the Custodian. The GRC acknowledges the Custodian's objection to the Complainant's request for an extension of time to submit the video of the July 24, 2008 meeting of the Union County Board of Chosen Freeholders and indicates that the granted extension of time stands. Further, the GRC clarifies that it is only concerned with a specific portion of the video – that portion in which a representative from the County Counsel's Office allegedly read a statement aloud. Lastly, the GRC informs that Custodian that if she objects to the admission of the video such objection such be formally made.

October 16, 2008

Letter from the Custodian to the GRC (with a copy of the video). The Custodian provides a copy of the edited video inclusive only of the portion of the meeting for which the GRC is concerned as requested by Mr. Luers.

November 7, 2008

Letter from the Complainant to the GRC (with a copy of the video). The Complainant provides a copy of the edited video inclusive only of the portion of the meeting for which the GRC is concerned. The Complainant acknowledges that the County has provided same and expresses no objection as long as both videos are the same.

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, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In this complaint, the Complainant asserts that the Custodian unlawfully denied access to the requested record because the letter in question was read into the record by the Deputy County Counsel at the July 24, 2008 meeting of the Union County Board of Chosen Freeholders and is not exempt from disclosure as attorney-client privileged as asserted by the Custodian. Conversely, the Custodian asserts she responded to this request on July 28, 2008 denying access because the letter was prepared by outside counsel and was merely reviewed and relied upon by counsel during the July 24, 2008 Freeholder meeting and that the attorney-client privilege exemption in OPRA prevents disclosure.

The Custodian’s Counsel request that the GRC conduct an *in camera* review of the requested record to determine the validity of the denial. It should be noted that the Council does not conduct *in camera* reviews at the request of the parties.

However, in Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC⁵ 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

⁵ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
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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 to determine the validity of the Custodian’s assertion 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 GRC will also review the video portion of the July 24, 2008 meeting of the Union County Board of Chosen Freeholders to compare the requested record to the verbal statement given by the Deputy County Counsel at that meeting to determine whether the attorney-client privilege is applicable to the record.

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

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

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. 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 (the written statement read by County Counsel at the July 24, 2008 freeholder meeting pertaining to employee lawsuits) to determine the validity of the Custodian's assertion that the record constitutes attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁸, 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.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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

October 21, 2009

⁶The *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.

⁷ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁸ "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."