



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 29, 2014 Government Records Council Meeting

Thomas H. Foregger
Complainant

Complaint No. 2012-114

v.

Township of Berkeley Heights (Union)
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 2014 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 be dismissed. The Complainant (via Counsel) withdrew her complaint in a letter to the Honorable Richard McGill, Administrative Law Judge, dated June 27, 2014, because this matter were settled. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 29th Day of July, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council



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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**Thomas H. Foregger¹
Complainant**

GRC Complaint No. 2012-114

v.

**Township of Berkeley Heights (Union)²
Custodian of Records**

Records Relevant to Complaint: Copies of all legal bills dated January 2011 - present from Thomas Scrivo.

Custodian of Record: Ana Minkoff

Request Received by Custodian: December 2, 2011

Response Made by Custodian: December 21, 2011

GRC Complaint Received: April 12, 2012

Background

February 26, 2013 Council Meeting:

At its February 26, 2013 public meeting, the Council considered the February 19, 2013 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:

[T]his matter should be transferred to the Office of Administrative Law to determine when the Division issued its decision that ACBOE's plan was an unauthorized ERI. This complaint should also be transferred to the Office of Administrative Law to determine whether the fourteen (14) records identified by the Custodian are releasable or exempt from disclosure as advisory, consultative and deliberative material and whether Ms. O'Hare and the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Procedural History:

On February 27, 2013, the Council distributed its Interim Order to all parties. On March 13, 2013, the complaint was transmitted to the Office of Administrative Law ("OAL").

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Represented by Joseph V. Sordillo, Esq., of McElroy, Deutsch, Mulvaney & Carpenter, LLP (Morristown, NJ).

On June 27, 2014, the Complainant's Counsel sent a letter to the Honorable Richard McGill, Administrative Law Judge, withdrawing this complaint because same was settled.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed. The Complainant (via Counsel) withdrew her complaint in a letter to the Honorable Richard McGill, Administrative Law Judge, dated June 27, 2014, because this matter were settled. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

July 22, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

February 26, 2013 Government Records Council Meeting

Thomas H. Foregger
Complainant

Complaint No. 2012-114

v.

Township of Berkeley Heights (Union)
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the February 19, 2013 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’s December 21, 2011 written response to the Complainant’s OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5(g) because the Custodian failed to provide the Complainant with the specific legal basis for the redactions made to the requested records at the time of the denial.
2. Since there are issues of contested facts, specifically whether the redactions made to the requested attorney invoices contain attorney-client privileged information pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-9, as well as because the Custodian failed to provide the GRC with adequate information to determine what information the Custodian initially redacted from the records, and what redactions the Custodian modified, this complaint should be referred to the Office of Administrative Law (“OAL”) for an *in camera* review *de novo* and a determination of whether the Custodian unlawfully denied access to the redacted portions of the invoices. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested invoices under the totality of the circumstances. Further, OAL should determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6.

Interim Order Rendered by the
Government Records Council
On The 26th Day of February, 2013



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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: February 27, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2013 Council Meeting**

**Thomas H. Foregger¹
Complainant**

GRC Complaint No. 2012-114

v.

**Township of Berkeley Heights (Union)²
Custodian of Records**

Records Relevant to Complaint: Copies of all legal bills dated January 2011 - present from Thomas Scrivo.

Request Made: December 2, 2011

Response Made: December 21, 2011

GRC Complaint Filed: April 12, 2012³

Background⁴

The Complainant submitted his Open Public Records Act (“OPRA”) request on December 2, 2011 seeking the records listed above. The Custodian provided the requested records to the Complainant on December 21, 2011, the thirteenth (13th) business day after receipt of the request, with redactions.⁵

On April 12, 2012, the Government Records Council (“GRC”) received the Complainant’s Denial of Access Complaint in which the Complainant challenges the Custodian’s redactions to the requested records. First, the Complainant states that the Custodian failed to provide any legal basis for said redactions. The Complainant assumes that the Custodian’s legal argument would be that the redactions contain attorney-client privileged information. As such, the Complainant states that legal fee invoices are only privileged if they reveal client secrets or would reveal strategy, and that mundane statements that appear in typical invoices are not privileged. *See Hunterdon County Policeman’s Benevolent Association Local 188 v. Township of Franklin, 286 N.J. Super. 389, 394, 669 A.2d 299, 302 (App. Div. 1996).*

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Ana Minkoff, Custodian of Records. Represented by Joseph V. Sordillo, Esq., of McElroy, Deutsch, Mulvaney & Carpenter, LLP (Morristown, NJ).

³ The GRC received the Denial of Access Complaint on said date.

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

⁵ The Complainant and the Custodian communicated in writing regarding this OPRA request during this thirteen (13) business day period. The Complainant does not dispute any timeliness issues regarding the Custodian’s response to the OPRA request.

The Complainant requests that the GRC conduct an *in camera* review of the requested invoices and order disclosure of said invoices without redactions. Additionally, the Complainant requests that the GRC find that he is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6.

On May 1, 2012, the GRC received the Custodian's Statement of Information ("SOI") in response to the Complainant's Denial of Access Complaint. The Custodian certifies that the redactions made to the invoices provided to the Complainant on December 21, 2011 relate to attorney-client privileged information which is exempt from public access pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-9. The Custodian states that the GRC has consistently held that legal invoices are properly redacted by excluding attorney-client privileged material, including without limitation, names of individuals to whom the attorney spoke and the subject matter of conversations.⁶ However, the Custodian states that redactions made to the requested invoices may need modifications. As such, the Custodian attaches the requested records, with a copy to the Complainant, with modified redactions pursuant to the attorney-client privilege at N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-9. As such, the Custodian requests that the GRC dismiss this complaint finding that the Custodian did not unlawfully deny access to the requested records, and that the Complainant is not a prevailing party.

On June 25, 2012 the GRC received the Complainant Counsel's challenge to the modified redactions made to the requested invoices. The Complainant's Counsel reiterates the Complainant's request for the GRC to conduct an *in camera* review of the requested invoices and to order disclosure of said invoices without redactions.

Analysis⁷

Unlawful Denial of Access

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

The Complainant filed this Denial of Access Complaint challenging redactions made to the requested legal invoices. The Complainant stated that the Custodian failed to provide a specific legal basis for the redactions at the time of the denial. The Custodian failed to provide any evidence in her SOI that she provided the Complainant with the specific legal basis for the redactions at the time of the denial. OPRA mandates that, "if the custodian is unable to comply with a request for access, the custodian shall indicate the specific legal basis therefor on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5(g).

⁶ See GRC Complaint Nos. 2002-34 (March 2003); 2002-35 (March 2003); and 2004-207 (September 2005).

⁷ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

Therefore, the Custodian's December 21, 2011 written response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5(g) because the Custodian failed to provide the Complainant with the specific legal basis for the redactions made to the requested records at the time of the denial.

In the Custodian's SOI, however, the Custodian asserts that the redactions were made pursuant to the attorney-client privilege at N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-9. Nevertheless, the Custodian modified the redactions with her SOI submission and provided the Complainant with said modified records.

As previously stated, OPRA requires a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6. The Custodian failed to provide in her SOI a detailed document index describing the redactions made to the requested records which she initially provided to the Complainant on December 21, 2011. The Custodian also failed to provide in her SOI an adequate list of all the records responsive to the Complainant's OPRA request, including the number of pages for each record. The Custodian merely indicates that the records requested were "2011 Legal Invoices from McElroy, Deutsch, Mulvaney & Carpenter, LLP (consisting of voluminous pages)." Finally, the Custodian failed to provide in her SOI a detailed index describing the modified redactions provided to the Complainant.

The Appellate Division of the New Jersey Superior Court has proffered ways in which the GRC may determine whether a Custodian's claimed exemption applies to a record. In Hyman v. City of Jersey City, 2012 N.J. Super. Unpub. LEXIS 2032 (App. Div. 2012), the court held that:

"[t]he GRC functions in an adjudicative capacity and is statutorily charged, if it is able to do so, to 'make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto[.]' N.J.S.A. 47:1A-7(e) (emphasis added). If the custodian's response to the complaint does not justify the denial of access based upon the claimed privilege or exception, the GRC has a number of options available to it...It may conclude the proffered privilege does not apply and order the release of the document. Ibid. It may, through its Executive Director, require the custodian to submit, within prescribed time limits, additional information deemed necessary for the GRC to adjudicate the complaint. N.J.S.A. 47:1A-7(c)...Additionally, it may '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 Procedure Act,' . . . insofar as they may be applicable and practicable.' N.J.S.A. 47:1A-7(e)."

The Administrative Procedures Act provides that the Office of Administrative Law ("OAL") "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 [OAL]..." N.J.A.C. 1:1-3.2(a).

Therefore, since there are issues of contested facts, specifically whether the redactions made to the requested attorney invoices contain attorney-client privileged information pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-9, as well as because the Custodian failed to provide

the GRC with adequate information to determine what information the Custodian initially redacted from the records, and what redactions the Custodian modified, this complaint should be referred to OAL for an *in camera* review *de novo* and a determination of whether the Custodian unlawfully denied access to the redacted portions of the invoices. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested invoices under the totality of the circumstances. Further, OAL should determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's December 21, 2011 written response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5(g) because the Custodian failed to provide the Complainant with the specific legal basis for the redactions made to the requested records at the time of the denial.
2. Since there are issues of contested facts, specifically whether the redactions made to the requested attorney invoices contain attorney-client privileged information pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-9, as well as because the Custodian failed to provide the GRC with adequate information to determine what information the Custodian initially redacted from the records, and what redactions the Custodian modified, this complaint should be referred to the Office of Administrative Law ("OAL") for an *in camera* review *de novo* and a determination of whether the Custodian unlawfully denied access to the redacted portions of the invoices. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested invoices under the totality of the circumstances. Further, OAL should determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6.

Prepared By: Dara L. Barry
Communications Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

February 19, 2013