



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

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**FINAL DECISION**

**November 15, 2016 Government Records Council Meeting**

Harry B. Scheeler, Jr.  
Complainant

Complaint No. 2014-143

v.

Borough of West Cape May (Cape May)  
Custodian of Record

At the November 15, 2016 public meeting, the Government Records Council (“Council”) considered the November 9, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council dismisses the complaint because the Complainant withdrew it in writing via e-mail to the GRC on November 3, 2016. 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 15<sup>th</sup> Day of November, 2016

Robin Berg Tabakin, Esq., Chair  
Government Records Council



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

A handwritten signature in black ink, appearing to read "Ritardi". The signature is fluid and cursive, with a long, sweeping underline that extends to the left.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: November 17, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Reconsideration*

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

**Harry B. Scheeler, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-143**

v.

**Borough of West Cape May (Cape May)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of Custodian Counsel's bills for 2013 to include detailed billing.<sup>3</sup>

**Custodian of Record:** Suzanne M. Stocker<sup>4</sup>

**Request Received by Custodian:** November 12, 2013

**Response Made by Custodian:** November 12, 2013

**GRC Complaint Received:** March 25, 2014

**Background**

July 28, 2015 Council Meeting:

At its July 28, 2015 public meeting, the Council considered the July 21, 2015 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council's April 28, 2015 Interim Order because she responded in the prescribed time frame by providing nine (9) copies of the responsive invoices, both with and without redactions, and certified confirmation of compliance to the Executive Director.
2. The Custodian lawfully denied access by redacting portions of the requested records that are exempt from disclosure. However, the Custodian has also unlawfully denied access by redacting material that is not exempt from disclosure. Therefore, the Custodian must disclose to the Complainant the material which, as indicated in the above table, is not exempt from disclosure. N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-1.1.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Frank, L. Corrado, Esq., of Barry, Corrado & Grassi, P.C. (Wildwood, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</sup> The original Custodian of Record was Elaine L. Wallace.

3. **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 simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director.<sup>5</sup>**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Procedural History:

On July 29, 2015, the Council distributed its Interim Order to all parties.

On August 3, 2015, the Custodian’s Counsel filed a request for reconsideration of the Council’s July 28, 2015 Interim Order based on a mistake and extraordinary circumstances. First, Custodian’s Counsel argued that the Council’s Order required the Borough of West Cape May (“Borough”) to disclose information that the Law Division had recently determined was properly redacted. Wilde v. Borough of West Cape May, Docket No. L-517-13. Counsel noted that the Law Division decision addressed the same invoices and redactions (with the exception of the October 4, 2013 invoice) at issue here. Counsel further noted that plaintiff filed an appeal, which was awaiting oral argument at the time of the Council’s Order. Wilde v. Borough of West Cape May, 2015 N.J. Super. Unpub. LEXIS 2313 (App. Div. 2015).<sup>6</sup> Counsel stated his concern that complying with the Order would necessarily moot the appeal because the Borough would be required to disclose the invoices without the redactions that the Law Division already decided were lawful. Counsel noted that the Borough attempted to alert the GRC to the Law Division’s decision in the Statement of Information to: 1) support its position that the redactions were lawful; and 2) that the existence of parallel proceedings could subject the Borough to conflicting orders. Counsel noted that the latter has occurred.

Second, Counsel disputed the Council’s *In Camera* Examination findings that certain redactions were unlawful and must be disclosed. Counsel contended that the Council’s decision ignored that the attorney-client privilege and work-product exemptions, when taken together, protect any information that may provide insight into an agency’s litigation strategy. Counsel contended that the Council’s individualistic approach to reviewing the redactions carries the danger that individual litigation-related entries, even if unprivileged, can be assembled to breach the agency’s litigation strategy. Counsel contended that the Borough lawfully redacted every invoice under the attorney-client and work-product privileges based on current law and prevailing case law. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(b); NJ Court R. 4:10-2(c); O’Boyle v.

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

<sup>6</sup> Counsel noted that the Complainant filed the OPRA request at issue here after he obtained other records regarding plaintiff’s lawsuit through a prior OPRA request.

Borough of Longport, 218 N.J. 168, 185 (2014). *See also* Sussex Commons Assoc., LLC v. Rutgers, The State Univ., 210 N.J. 531, 542 (2012).

Moreover, Counsel stated that the Courts have continuously held that billing records, while disclosable under OPRA, may be subject to the attorney-client and work product privileges. Fidelity & Deposit Co. of Md. v. McCulloch, 186 F.R.D. 516, 523 (E.D. PA. 1996); Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129 (9<sup>th</sup> Cir. 1992). Counsel further stated that the work product privilege extends to an attorney's "selection or compilation" of material that, taken together, could reveal impressions, conclusions, or theories about a case. Shelton v. American Motors Corp., 805 F.2d 1323, 1328 (8<sup>th</sup> Cir. 1986). To this end, Counsel argued that the privilege extended to "selection or compilation" of information contained in an attorney's bill. Counsel asserted that, when litigation is involved, this information may include the identity of individuals with whom the attorney spoke, the topics discussed, the documents reviewed, and the issues researched. Counsel contended that "[t]hese descriptions necessarily reveal strategies, confidential communications, and the thought process behind the representation." Hewes v. Langdon, 853 So.2d 1237, 1249 (Miss. 2003).

Counsel argued that the Borough took great care to redact information relevant to Wilde, 2015 N.J. Super. Unpub. LEXIS 2313, and other matters to avoid revealing the person with whom he spoke, when he spoke with the individual, the subject of that discussion, what documents he reviewed, and what legal research he performed. Counsel argued that the disclosure of this information would allow a plaintiff to identify the Borough's key witnesses, determine the salient issues of a pending case, and conclude how the Borough intended to prosecute or defend itself. Counsel contended that all redactions were applied to pending matters, whether the lawful operation of a winery, a dispute over the cost of water, or accidents that occurred on Borough property or at Borough events. Counsel thus requested that the GRC reconsider its *In Camera* Examination and find that the Borough lawfully redacted the responsive invoices. Alternatively, Counsel requested that the GRC stay compliance until the Appellate Division reached a decision in Wilde, 2015 N.J. Super. Unpub. LEXIS 2313.

#### Additional Submissions:

On August 3, 2015, the Complainant advised that he agreed to a stay of this case until the conclusion of Wilde, 2015 N.J. Super. Unpub. LEXIS 2313. On August 6, 2015, the GRC stayed its adjudication of Custodian Counsel's request for reconsideration pending the conclusion of the Appellate Division's review in Wilde, 2015 N.J. Super. Unpub. LEXIS 2313.

On October 7, 2015, the Appellate Division rendered a decision in Wilde, 2015 N.J. Super. Unpub. LEXIS 2313, remanding the matter to the Law Division. On October 8, 2015, the Complainant sent the Court's decision to the GRC. Thereafter, the parties exchanged e-mails regarding whether the GRC should lift the stay. On October 14, 2015, the GRC e-mailed both parties, stating that it would continue to recognize the stay until the Law Division completed its remand. On October 31, 2016, the GRC e-mailed the parties, asking whether they agreed to lift the stay. The GRC noted that Custodian's Counsel telephonically advised on that day that the parties had settled Wilde, 2015 N.J. Super. Unpub. LEXIS 2313. On the same day, the Complainant e-mailed the GRC, agreeing that the stay should be lifted.

On November 3, 2016, the Complainant withdrew his complaint in writing via e-mail to the GRC.

### **Analysis**

No analysis required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council dismiss the complaint because the Complainant withdrew it in writing via e-mail to the GRC on November 3, 2016. Therefore, no further adjudication is required.

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

November 9, 2016



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

INTERIM ORDER

July 28, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.  
Complainant

Complaint No. 2014-143

v.

Borough of West Cape May (Cape May)  
Custodian of Record

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the July 21, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s April 28, 2015, Interim Order because she responded in the prescribed time frame by providing nine (9) copies of the responsive invoices, both with and without redactions, and certified confirmation of compliance to the Executive Director.
2. The Custodian lawfully denied access by redacting portions of the requested records that are exempt from disclosure. However, the Custodian has also unlawfully denied access by redacting material that is not exempt from disclosure. Therefore, the Custodian must disclose to the Complainant the material which, as indicated in the above table, is not exempt from disclosure. N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-1.1.
3. **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 simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director.<sup>1</sup>**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

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

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of July, 2015

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 29, 2015**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
July 28, 2015 Council Meeting**

**Harry B. Scheeler, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-143**

v.

**Borough of West Cape May (Cape May)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of Custodian Counsel's bills for 2013 to include detailed billing.<sup>3</sup>

**Custodian of Record:** Elaine L. Wallace

**Request Received by Custodian:** November 12, 2013

**Response Made by Custodian:** November 12, 2013

**GRC Complaint Received:** March 25, 2014

**Records Submitted for *In Camera* Examination:**

- Invoice No. 33256, dated March 12, 2013.
- Invoice No. 33257, dated March 12, 2013.
- Invoice No. 33258, dated March 12, 2013.
- Invoice No. 33443, dated April 30, 2013.
- Invoice No. 33444, dated April 30, 2013.
- Invoice No. 33524, dated May 21, 2013.
- Invoice No. 33525, dated May 21, 2013.
- Invoice No. 33683, dated July 12, 2013.
- Invoice No. 33684, dated July 12, 2013.
- Invoice No. 33859, dated August 19, 2013.
- Invoice No. 33860, dated August 19, 2013.
- Invoice No. 33938, dated October 4, 2013.
- Invoice No. 33939, dated October 4, 2013.

**Background**

**April 28, 2015 Council Meeting:**

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Frank, L. Corrado, Esq., of Barry, Corrado & Grassi, P.C. (Wildwood, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

Harry B. Scheeler, Jr. v. Borough of West Cape May (Cape May), 2014-143 – *In Camera* Findings and Recommendations of the Executive Director

At its April 28, 2015, public meeting, the Council considered the April 21, 2015, Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations.

The Council, therefore, found that:

1. Although the Custodian provided a brief explanation of the redactions made to the responsive bills, her failure to include a more detailed explanation of same results in an insufficient response. N.J.S.A. 47:1A-5(g); Courier News v. Hunterdon Cnty. Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003); Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).
2. The GRC must conduct an *in camera* review of the responsive billing invoices to determine the validity of the Custodian's assertion that the records constitute attorney-client material and work product that is privileged and exempt from disclosure. Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9.
3. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), nine (9) copies of the redacted records, a document or redaction index<sup>5</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>6</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On April 29, 2015, the Council distributed its Interim Order to call parties. On May 11, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that she provided nine (9) copies of both the redacted and unredacted records as required by the Council. Additionally, the Custodian certified that she provided a document index reflecting the basis for redactions.

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

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

<sup>6</sup> "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."

Harry B. Scheeler, Jr. v. Borough of West Cape May (Cape May), 2014-143 – *In Camera* Findings and Recommendations of the Executive Director

## Analysis

### Compliance

At its April 28, 2015, meeting, the Council ordered the Custodian to submit nine (9) copies of the responsive invoices with and without redactions for an *in camera* review. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On April 29, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 6, 2015. On May 6, 2015, five (5) days from the Custodian's receipt of the Interim Order, the Custodian requested an extension of five (5) additional business days to comply. The GRC granted the five (5) business days extension. On May 11, 2015, the GRC received the Custodian's compliance package, which included nine (9) copies of the responsive invoices, both with and without redactions, and a certified confirmation of compliance.

Therefore, the Custodian complied with the Council's April 28, 2015, Interim Order because she responded within the prescribed extended time frame by providing nine (9) copies of the responsive invoices, both with and without redactions, and certified confirmation of compliance to the Executive Director.

### Unlawful Denial of Access

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

OPRA provides that a "government record" shall not include "any record within the attorney-client privilege. This paragraph *shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege . . .*" N.J.S.A. 47:1A-1.1 (emphasis added).

To assert attorney-client privilege, a party must show that there was a confidential communication between lawyer and client in the course of that relationship and in professional confidence. N.J.R.E. 504(1). Such communications are only those "which the client either expressly made confidential or which [one] could reasonably assume under the circumstances would be understood by the attorney to be so intended." State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989). However, merely showing that "the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear." Id. at 220-21.

In the context of public entities, the attorney-client privilege extends to communications between the public body, the attorney retained to represent it, necessary intermediaries and

agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. *See* Tractenberg v. Twp. Of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env'tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992). At the same time, the attorney-client relationship does not automatically and completely insulate attorney billings from disclosure. *See* Hunterdon Cnty. P.B.A. Local 188 v. Twp. of Franklin, 286 N.J. Super. 389, 394; In the Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 30 (App. Div. 1989).

The GRC conducted an *in camera* examination on the submitted record. The results of the examination are set forth in the following table:

<b>Redaction No.</b>	<b>Record Name/Date</b>	<b>Description of Redaction</b>	<b>Custodian's Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination<sup>7</sup></b>
Invoice #33257, dated 3/12/13	Entry dated 1/16/13	Identity of an individual attorney conferred with on stated subject matter.	Attorney-client privileged information.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
2.Invoice # 33257, dated 3/12/13	Entry dated 01/24/13	Identity of an individual attorney conferred with on stated subject matter.	Attorney-client privileged information.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>

<sup>7</sup> **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted, a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker and then provide a copy of the blacked-out record to the requester.

3. Invoice # 33257 dated 3/12/13	Entry dated 2/07/13	Identity of subject matter to which attorney prepared for meeting.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The redacted information does not fall within the attorney-client privilege. The information is general enough that it does not reveal any legal advice or strategy. <b>Thus, the Custodian unlawfully redacted the entry and must disclose same.</b>
4. Invoice # 33257 dated 3/12/13	Entry dated 2/11/13.	Identity of an individual attorney conferred with on stated subject matter.	No explanation or citation given for nondisclosure or redaction.	The redacted information does not fall within the attorney-client privilege. The information is general enough that it does not reveal any legal advice or strategy. Further, the Custodian gave no explanation for the nondisclosure or redaction <sup>8</sup> <b>Thus, the Custodian unlawfully redacted the entry and must disclose same.</b> <sup>9</sup>
5. Invoice # 33257 dated 3/12/13	Entry dated 2/12/13	Identity of an individual and subject matter of telephone conference.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted</b>

<sup>8</sup> The redaction appears to have been made using the method of "whiting out" the redacted material. Such a practice fails to make obvious "the specific location of any redacted material in the record" and is thus not appropriate under OPRA. Paff v. Borough of Manasquan, GRC Complaint No. 2009-281 (March 2011).

<sup>9</sup> The Council has "long held that a custodian must provide sufficient information to justify the basis for each redaction." Schwebel v. Twp. of Middletown, GRC Complaint No. 2014-251 (April 2015). Citing Seibert v. Readington [Twp.], GRC Complaint No. 2004-150 (July 2007).

Harry B. Scheeler, Jr. v. Borough of West Cape May (Cape May), 2014-143 – *In Camera* Findings and Recommendations of the Executive Director

				<b>these portions</b>
Invoice # 33257 dated 3/12/13	Entry dated 2/20/13	Identity of an individual to whom attorney sent an e-mail.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
7. Invoice # 33257 dated 3/12/13	Entry dated 2/22/13	Identity of individual and subject matter of a telephone conference.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
8. Invoice # 33257 dated 3/12/13	Entry dated 2/27/13	Identities of individuals with whom attorney met	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
9. Invoice # 33444 dated 4/30/13	Entry dated 3/13/13	Identity of individual with whom attorney met.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
10. Invoice # 33444 dated 4/30/13	Entry dated 3/18/13	Identity of individual and subject matter in attorney's email.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>

11. Invoice # 33444 dated 4/30/13	Entry dated 3/27/13	Identity of an individuals and subject matter in attorney's email.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
12. Invoice # 33525 dated 5/21/13	Entry dated 4/01/13	Identity of an individual and subject matter of letter reviewed by attorney.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that the redaction of the identity of the individual is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal the Borough's strategy. <b>Thus, the Custodian lawfully redacted that portion.</b> However, the redacted information of the subject matter is general enough that it does not fall within the attorney-client privilege. <b>Thus, the Custodian unlawfully redacted that portion of the entry and must disclose the information following the word "regarding."</b>
13. Invoice # 33525 Dated 5/21/13	Entry dated 4/02/13	Identity of individual and subject matter in attorney's telephone conference.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>

14. Invoice # 33683 dated 7/12/13	Entry dated 5/08/13	Identity of individual and subject matter reviewed by attorney.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions</b>
15. Invoice # 33683 dated 7/12/13	Entry dated 5/20/13	Identities of individuals and subject matter.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions</b>
16. Invoice # 33683 dated 7/12/13	Entry dated 5/21/13	Identities of individuals and subject matter.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
17. Invoice # 33683 dated 7/12/13	Entry dated 5/24/13, first redaction on page 2 of invoice, preceded by the words "Willow Creek-review"	Subject matter of attorney's review.	No explanation or citation given for nondisclosure or redaction.	The redacted information does not fall within the attorney-client privilege. The information is general enough that it does not reveal any legal advice or strategy. <b>Thus, the Custodian unlawfully redacted the entry and must disclose same.</b> <sup>10</sup>
18. Invoice #33683 dated	Entry dated 5/24/13, second	Subject matter of attorney's review.	Information that showed Borough's strategy in an	The redacted information does not fall within the

<sup>10</sup> The redaction appears to have been made by "whiting out" the redacted material. See footnote #8 above.  
Harry B. Scheeler, Jr. v. Borough of West Cape May (Cape May), 2014-143 – *In Camera* Findings and Recommendations of the Executive Director



7/12/13	redaction for that date.		ongoing lawsuit.	attorney-client privilege. The information is general enough that it does not reveal any legal advice or strategy. <b>Thus, the Custodian unlawfully redacted the entry and must disclose same.</b>
19. Invoice # 33683 dated 7/12/13	Entry dated 5/31/13 (page two on that invoice, first redaction for that date)	Subject matter of attorney's letter.	Attorney-client privileged information and that showed Borough's strategy in an ongoing, unrelated lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
20. Invoice # 33683 dated 7/12/13	Entry dated 5/31/13 (page two on that invoice, second redaction for that date.)	Identity of individuals attorney had telephone conference with and subject matter.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
21. Invoice # 33859 dated 8/19/13	Entry dated 6/13/13	Identity of individuals attorney had telephone conference with and subject matter.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
22. Invoice # 33859 dated 8/19/13	Entry dated 6/17/13 (on page one of invoice)	Identity of individuals attorney communicated with via e-mail and subject matter.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted</b>

				<b>these portions.</b>
23. Invoice # 33859 dated 8/19/13	Entry dated 6/17/13 (first redaction on page two of the invoice)	Material reviewed by attorney.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
24. Invoice # 33859 dated 8/19/13	Entry dated 6/17/13 (second redaction on page two of the invoice)	Individual and subject matter of an email by the attorney.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The redacted information does not fall within the attorney-client privilege. The information is general enough that it does not reveal any legal advice or strategy. <b>Thus, the Custodian unlawfully redacted the entry and must disclose same.</b>
25. Invoice # 33859 dated 8/19/13	Entry dated 6/26/13	Identification of subject matter of an email.	Information that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
26. Invoice # 33859 dated 8/19/13	Entry dated 6/28/13	Identity of individuals in attorney's telephone conference.	Information that showed Borough's strategy in an ongoing unrelated lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
27. Invoice #33939 dated	Entry dated 7/01/13 (first redaction on	Identity of subject matter of material reviewed by	Information that showed Borough's strategy in an	The GRC is satisfied that same is exempt under <u>N.J.S.A.</u>

10/04/13	page one of the invoice)	attorney.	ongoing unrelated lawsuit.	47:1A-1.1, because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
28. Invoice #33939 dated 10/04/13	Entry dated 7/01/13 (second redaction on page one of that invoice)	Identity of subject matter.	Information that showed Borough's strategy in an ongoing unrelated lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A.</u> 47:1A-1.1, because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
29. Invoice # 33939 dated 10/04/13	Entry dated 7/03/13	Identity of individual receiving an email.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A.</u> 47:1A-1.1, because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
30. Invoice # 33939 dated 10/04/13	Entry dated 7/08/13	Identity of subject matter reviewed by attorney.	Information that showed Borough's strategy in an ongoing unrelated lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A.</u> 47:1A-1.1, because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
31. Invoice # 33939 dated 10/04/13	Entry dated 7/09/13	Identity of subject matter reviewed by attorney.	Information that showed Borough's strategy in an ongoing unrelated lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A.</u> 47:1A-1.1, because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
32. Invoice # 33939 dated 10/04/13	Entry dated 7/10/13	Identification of individual and subject matter of attorney's	Attorney-client privileged information and that showed	The GRC is satisfied that same is exempt under <u>N.J.S.A.</u> 47:1A-1.1, because

		telephone conference.	Borough's strategy in an ongoing lawsuit.	disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
33. Invoice # 33939 dated 10/04/13	Entry dated 7/11/13	Identification of subject matter of attorney's review.	Information that showed Borough's strategy in an ongoing unrelated lawsuit.	The redacted information does not fall within the attorney-client privilege. The information is general enough that it does not reveal any legal advice or strategy. <b>Thus, the Custodian unlawfully redacted the entry and must disclose same.</b>
34. Invoice # 33939 dated 10/04/13	Entry dated 7/15/13	Identification of parties in telephone conference with attorney.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions.</b>
35. Invoice # 33939 dated 10/04/13	Entry dated 7/16/13	Identification of individuals and subject matter of attorney telephone conference.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The GRC is satisfied that same is exempt under <u>N.J.S.A. 47:1A-1.1</u> , because disclosure of same could reveal strategy. <b>Thus, the Custodian lawfully redacted these portions</b>
36. Invoice # 33939 dated 10/04/13	Entry dated 7/17/13	Identification of party and subject matter of attorney's telephone conference.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The redacted information does not fall within the attorney-client privilege. The information is general enough that it does not reveal any legal advice or

				strategy. <b>Thus, the Custodian unlawfully redacted the entry and must disclose same.</b>
37. Invoice # 33939 dated 10/04/13	Entry dated 7/19/13	Identification of individual who conferred with attorney in telephone conference.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The redacted information does not fall within the attorney-client privilege. The information is general enough that it does not reveal any legal advice or strategy. <b>Thus, the Custodian unlawfully redacted the entry and must disclose same.</b>
38. Invoice #33939 dated 10/04/13	Entry dated 7/31/13 (first redaction for that date)	Identification of subject matter of attorney telephone conference.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The redacted information does not fall within the attorney-client privilege. The information is general enough that it does not reveal any legal advice or strategy. <b>Thus, the Custodian unlawfully redacted the entry and must disclose same.</b>
39. Invoice #33939 dated 10/04/13	Entry dated 7/31/13 (second redaction for that date)	Identification of subject matter of attorney telephone conference.	Attorney-client privileged information and that showed Borough's strategy in an ongoing lawsuit.	The redacted information does not fall within the attorney-client privilege. The information is general enough that it does not reveal any legal advice or strategy. <b>Thus, the Custodian unlawfully redacted the entry and must</b>

				<b>disclose same.</b>
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As set forth in the above table, the Custodian lawfully denied access by redacting portions of the requested records that are exempt from disclosure. However, the Custodian has also unlawfully denied access by redacting material that is not exempt from disclosure. Therefore, the Custodian must disclose to the Complainant the material which, as indicated in the above table, is not exempt from disclosure. N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-1.1.

**Knowing & Willful**

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

**Conclusions and Recommendation**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council’s April 28, 2015, Interim Order because she responded in the prescribed time frame by providing nine (9) copies of the responsive invoices, both with and without redactions, and certified confirmation of compliance to the Executive Director.
2. The Custodian lawfully denied access by redacting portions of the requested records that are exempt from disclosure. However, the Custodian has also unlawfully denied access by redacting material that is not exempt from disclosure. Therefore, the Custodian must disclose to the Complainant the material which, as indicated in the above table, is not exempt from disclosure. N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-1.1.
3. **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 simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director.<sup>11</sup>**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By: Ernest Bongiovanni  
Staff Attorney

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<sup>11</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant, but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.  
Harry B. Scheeler, Jr. v. Borough of West Cape May (Cape May), 2014-143 – *In Camera* Findings and Recommendations of the Executive Director

Reviewed By: Joseph D. Glover  
Executive Director

July 21, 2015



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Acting Commissioner

INTERIM ORDER

April 28, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.  
Complainant

Complaint No. 2014-143

v.

Borough of West Cape May (Cape May)  
Custodian of Record

At the April 28, 2015 public meeting, the Government Records Council ("Council") considered the April 21, 2015 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. Although the Custodian provided a brief explanation of the redactions made to the responsive bills, her failure to include a more detailed explanation of same results in an insufficient response. N.J.S.A. 47:1A-5(g); Courier News v. Hunterdon Cnty. Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003); Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).
2. The GRC must conduct an *in camera* review of the responsive billing invoices to determine the validity of the Custodian's assertion that the records constitute attorney-client and work product privileged exempt from disclosure. Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9.
3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), nine (9) copies of the redacted records, a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

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

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

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



4. The Council defers analysis of whether the 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.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of April, 2015

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: April 29, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 28, 2015 Council Meeting**

**Harry B. Scheeler, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-143**

v.

**Borough of West Cape May (Cape May)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of Custodian Counsel’s bills for 2013 to include detailed billing.<sup>3</sup>

**Custodian of Record:** Elaine L. Wallace

**Request Received by Custodian:** November 12, 2013

**Response Made by Custodian:** November 12, 2013

**GRC Complaint Received:** March 25, 2014

**Background<sup>4</sup>**

**Request and Response:**

On November 12, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing, providing the responsive bills with redactions. The Custodian included in her response a document index identifying each redaction and the reason for same: attorney-client privilege and/or attorney work product.

**Denial of Access Complaint:**

On March 25, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s basis for redacting the responsive bills.

First, the Complainant asserted that a custodian is required to “produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality.” Courier News v.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Frank, L. Corrado, Esq., of Barry, Corrado & Grassi, P.C. (Wildwood, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</sup> 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.

Hunterdon Cnty. Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003). Further, the Complainant asserted that a custodian must explain each redaction with enough specificity so as not to not reveal the privileged information but to allow the requestor to assess the applicability of the asserted exemption. Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 354-355 (App. Div.); Burke v. Brandes, 429 N.J. Super. 169, 178 (App. Div. 2012). The Complainant argued that a Custodian's response that only cites to the exemption for each redaction does not comply with N.J.S.A. 47:1A-5(g).

Second, the Complainant disputed that the redacted information is actually subject to the attorney-client privilege exemption. The Complainant stated that the "attorney-client privilege ... does not apply to insulate billings from disclosure." Hunterdon Cnty. Policeman's Benevolent Assoc., Local 188 v. Twp. of Franklin, 286 N.J. Super. 389, 394 (App. Div. 1996). Further, the Complainant stated that only communications between a lawyer and client "in the course of the relationship and in professional confidence, are privileged." N.J.S.A. 2A:84A-20. The Complainant also stated that the privilege is limited to "those situations in which lawful legal advice is the subject of the relationship." In Re: Gonnella, 283 N.J. Super. 509, 512 (Law Div. 1989). The Complainant contended that the Custodian redacted information that appeared not to fit within the attorney-client privilege exemption. The Complainant argued that the redactions appear to be part of mundane sentences, rather than protecting strategy or client secrets.

#### Statement of Information:

On April 22, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on November 12, 2013 and responded on the same day providing access to the responsive records, with redactions.

The Custodian certified that the OPRA request at issue here was identical to an OPRA request submitted to the Borough of West Cape May ("Borough") by Willow Creek Farm. The Custodian certified that her response was also identical. The Custodian stated that Willow Creek Farm subsequently filed an action in Superior Court challenging the redactions. Wilde v. Borough of West Cape May, Docket No. CPM-L-517-13 (February 3, 2014).<sup>5</sup> The Custodian averred that the Law Division determined that no violation of OPRA occurred. The Custodian asserted that the Law Division's decision in that complaint supports the Borough's position here.

#### Additional Submissions:

On May 28, 2014, the Complainant e-mailed the GRC, first noting that although he spoke with Ms. Wilde (the plaintiff in Wilde), he did not submit this request on her behalf. The Complainant argued that the Law Division's decision in Wilde is not dispositive here. The Complainant stated that OPRA affords a requestor the option of filing a complaint in Superior Court or before the GRC: he chose the GRC. The Complainant also reiterated his Denial of Access Complaint arguments.

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<sup>5</sup> On July 28, 2014, the Complainant advised the GRC that the Law Division's decision in Wilde was appealed to the Superior Court, Appellate Division.

## Analysis

### Sufficiency of Response

The Council has previously addressed whether a custodian's failure to provide a specific lawful basis for redactions resulted in an insufficient response. In Paff v. Borough Lavellette (Ocean), GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's OPRA request by providing access to the requested executive session minutes with redactions. The complainant filed a Denial of Access Complaint arguing that the custodian violated OPRA by failing to provide a specific lawful basis for the redactions made to the responsive meeting minutes. The Council held that:

Although the Custodian responded to the Complainant's July 31, 2007 OPRA request by providing the redacted executive session minutes within the statutorily mandated seven (7) business day time frame required by N.J.S.A. 47:1A-5(i), the Custodian's response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction. See Paff v. [Twp.] of Plainsboro, GRC Complaint No. 2005-29, (July 2005)(ordering the custodian to provide redacted executive session minutes with a detailed and lawful basis for each redacted part.). See also [Schwarz] v. NJ [Dep't] of Human [Serv.], GRC Complaint No. 2004-60, (February, 2005)(setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial.). Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A- 5(g).

Id. at 4-5.

However, in Paff v. Borough of Manasquan (Monmouth), GRC Complaint No. 2009-281 (Interim Order dated March 29, 2011), the Council did not hold on whether the custodian's response was insufficient because "even though the Custodian's Counsel provided reasonable explanations for exempting access to the requested minutes, the addition of a statutory citation would have reinforced the Custodian Counsel's position." Id. at 8.

Here, the Custodian provided the responsive records with a document index noting the exact date of each invoice that was redacted and the reason for redaction, excluding a statutory provision. Unlike in Paff, GRC 2007-209, the Custodian provided a brief explanation of the exemption she applied to the redactions. However, although the Custodian did not include a statutory citation, her response differed from that in Paff, GRC 2009-281, because she did not provide a reasonable explanation of the information redacted to allow the Complainant to determine whether the redactions were lawful. For this reason, the Custodian's initial response was insufficient based on the longstanding interpretation of the courts and GRC on this issue.

Therefore, although the Custodian provided a brief explanation of the redactions made to the responsive bills, her failure to include a more detailed explanation of same results in an insufficient response. N.J.S.A. 47:1A-5(g); Courier News, 358 N.J. Super. at 382-83; Paff, GRC 2007-209.

## Unlawful Denial of Access

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

In Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>6</sup> that dismissed the complaint after 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.” Id. The Court stated that:

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

Id. at 355.

Further, the Court stated that:

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

Id.

In this matter, the Complainant argued that the Custodian failed to provide sufficient information to allow him to determine whether the redactions were lawful. Additionally, the Complainant contended that the attorney-client privilege exemption did not apply to the redactions. Conversely, the Custodian asserts that she lawfully redacted portions of the bills. The Custodian also stated that the Law Division’s decision in Wilde supported her denial of access.

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<sup>6</sup> Paff v. N.J. Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

Notwithstanding the court's decision in a similar matter, the GRC must independently verify whether the Custodian lawfully redacted those portions of the invoices.

Therefore the GRC must conduct an *in camera* review of the responsive billing invoices to determine the validity of the Custodian's assertion that the records constitute attorney-client and work product privileged exempt from disclosure. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9.

### **Knowing & Willful**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian provided a brief explanation of the redactions made to the responsive bills, her failure to include a more detailed explanation of same results in an insufficient response. N.J.S.A. 47:1A-5(g); Courier News v. Hunterdon Cnty. Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003); Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).
2. The GRC must conduct an *in camera* review of the responsive billing invoices to determine the validity of the Custodian's assertion that the records constitute attorney-client and work product privileged exempt from disclosure. Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9.
3. **The Custodian must deliver<sup>7</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), nine (9) copies of the redacted records, a document or redaction index<sup>8</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>9</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

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

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

<sup>9</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

4. The Council defers analysis of whether the 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.

Prepared By: Ernest Bongiovanni,  
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Reviewed By: Joseph D. Glover  
Executive Director

April 21, 2015