



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

**PHILIP D. MURPHY**  
*Governor*

**LT. GOVERNOR SHEILA Y. OLIVER**  
*Commissioner*

**FINAL DECISION**

**March 26, 2019 Government Records Council Meeting**

Jeffrey W. Sauter  
Complainant

Complaint No. 2016-190

v.

Township of Colts Neck (Monmouth)  
Custodian of Record

At the March 26, 2019 public meeting, the Government Records Council (“Council”) considered the March 19, 2019 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s January 31, 2019 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Council Staff.
2. Although the Custodian unlawfully redacted portions the responsive records, the Custodian provided the Complainant with the redacted records as amended in accordance with the Council’s January 31, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 26<sup>th</sup> Day of March, 2019

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: March 29, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff  
March 29, 2019 Council Meeting**

**Jeffrey W. Sauter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-190**

**v.**

**Township of Colts Neck (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

1. Copies of all invoices and vouchers associated with Hearing Officer (retired JSC O'Hagan) hired or used by the Township of Colts Neck ("Township") for the disciplinary action brought against Chief Sauter. The approved, and processed invoices and vouchers should cover the period January 1, 2016 through May 31, 2016.
2. Copies of all invoices and vouchers associated with the Court Stenographer hired or used by the Township for the disciplinary action brought against Chief Sauter. The approved, and processed invoices and vouchers should cover the period January 1, 2016 through May 31, 2016.
3. Copies of all legal expenses or invoices and vouchers to pay Dilworth Paxson LLC, John Bennett and any other law firm or attorney representing the Township associated with the disciplinary action brought against Chief Sauter. The approved, and processed invoices and vouchers should cover the period January 1, 2016 through May 31, 2016.

**Custodian of Record:** Beth Kara

**Requests Received by Custodian:** June 17, 2016

**Response Made by Custodian:** June 22, 2016

**GRC Complaint Received:** July 11, 2016

**Background**

**January 31, 2019 Council Meeting:**

At its January 31, 2019 public meeting, the Council considered the January 22, 2019 *In Camera* Findings and Recommendations of the Council Staff 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 August 28, 2018 Interim Order because she responded in the prescribed time frame providing nine (9) redacted and unredacted

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

<sup>2</sup> Represented by David A. Clark, Esq., of Gluck Walrath, LLP (Trenton, NJ).

copies of the attorney invoices for *in camera* review, and simultaneously provided certified confirmation of compliance to the Council Staff.

2. The Custodian unlawfully denied access to the redacted billing entries identified as not responsive to the OPRA request. N.J.S.A. 47:1A-6; ACLU v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533, 540-541 (App. Div. 2014). Additionally, the Custodian unlawfully denied access to redacted billing entries identified as attorney-client privileged communications where the redaction was solely the identity of the individual who communicated with counsel. N.J.S.A. 47:1A-6; 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. Further, the Custodian shall simultaneously deliver<sup>3</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>4</sup> to the Council Staff.<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 February 4, 2019, the Council distributed its Interim Order to all parties. On February 6, 2019, the Custodian responded to the Council's Interim Order. The Custodian attached a copy of the revised records that were sent simultaneously to the Complainant via e-mail. The Custodian also included a certified copy of compliance.

#### Analysis

##### Compliance

At its January 31, 2019 meeting, the Council ordered the Custodian to provide the Complainant with the responsive records as amended, and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff. On February 4, 2019 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 February 11, 2019.

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<sup>3</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>4</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."

<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.

On February 6, 2016, the second (2<sup>nd</sup>) business day after receipt of the Council's Order, the Custodian responded in writing, stating that the redacted records were provided to the Complainant as amended. The Complainant included copy of the records, as well as a certified confirmation of compliance.

Therefore, the Custodian complied with the Council's January 31, 2019 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Council Staff.

### **Knowing & Willful**

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian unlawfully redacted portions the responsive records, the Custodian provided the Complainant with the redacted records as amended in accordance with the Council's January 31, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's January 31, 2019 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Council Staff.
2. Although the Custodian unlawfully redacted portions the responsive records, the Custodian provided the Complainant with the redacted records as amended in accordance with the Council's January 31, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado  
Staff Attorney

March 19, 2019



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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

INTERIM ORDER

January 31, 2019 Government Records Council Meeting

Jeffrey W. Sauter  
Complainant

Complaint No. 2016-190

v.

Township of Colts Neck (Monmouth)  
Custodian of Record

At the January 31, 2019 public meeting, the Government Records Council ("Council") considered the January 22, 2019 Findings and Recommendations of the Council Staff 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 August 28, 2018 Interim Order because she responded in the prescribed time frame providing nine (9) redacted and unredacted copies of the attorney invoices for *in camera* review, and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the redacted billing entries identified as not responsive to the OPRA request. N.J.S.A. 47:1A-6; ACLU v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533, 540-541 (App. Div. 2014). Additionally, the Custodian unlawfully denied access to redacted billing entries identified as attorney-client privileged communications where the redaction was solely the identity of the individual who communicated with counsel. N.J.S.A. 47:1A-6; 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. Further, the Custodian shall simultaneously deliver<sup>1</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Council Staff.<sup>3</sup>**

<sup>1</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>2</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."

<sup>3</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.



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Council Staff  
January 31, 2019 Council Meeting**

**Jeffrey W. Sauter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-190**

**v.**

**Township of Colts Neck (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

1. Copies of all invoices and vouchers associated with Hearing Officer (retired JSC O'Hagan) hired or used by the Township of Colts Neck ("Township") for the disciplinary action brought against Chief Sauter. The approved, and processed invoices and vouchers should cover the period January 1, 2016 through May 31, 2016.
2. Copies of all invoices and vouchers associated with the Court Stenographer hired or used by the Township for the disciplinary action brought against Chief Sauter. The approved, and processed invoices and vouchers should cover the period January 1, 2016 through May 31, 2016.
3. Copies of all legal expenses or invoices and vouchers to pay Dilworth Paxson LLC, John Bennett and any other law firm or attorney representing the Township associated with the disciplinary action brought against Chief Sauter. The approved, and processed invoices and vouchers should cover the period January 1, 2016 through May 31, 2016.

**Custodian of Record:** Beth Kara

**Requests Received by Custodian:** June 17, 2016

**Response Made by Custodian:** June 22, 2016

**GRC Complaint Received:** July 11, 2016

**Records Submitted for *In Camera* Examination:** Nine (9) copies of the redacted and unredacted requested attorney invoices.

**Background**

**August 28, 2018 Council Meeting:**

At its August 28, 2018 public meeting, the Council considered the August 21, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by

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

<sup>2</sup> Represented by David A. Clark, Esq., of Gluck Walrath, LLP (Trenton, NJ).



the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian failed to provide a specific lawful basis for redactions made to the attorney invoices, her June 22, 2016 response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5(g). See Paff v. Borough of Lafayette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008), and Schwarz v. N.J. Dep't of Human Serv., GRC Complaint No. 2004-60 (February 2005).
2. The GRC must conduct an *in camera* review of the redacted records in order to validate the Custodian's assertions that the documents are, in fact, exempt from disclosure based on OPRA's exemptions for attorney-client privilege, pursuant to N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
3. **The Custodian must deliver<sup>3</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #2 above), nine (9) copies of the redacted records), a document or redaction index<sup>4</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</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 August 29, 2018, the Council distributed its Interim Order to all parties. On September 4, 2018, the Custodian responded to the Council's Interim Order. The Custodian provided the requested nine (9) copies of unredacted invoices for *in camera* review, along with a certification and redaction index.

The unredacted invoices were dated from January 2016 through June 2016, and billed from two (2) separate law firms. While some of the redactions were made because the billing entry was outside of the requested time period, most of the other redactions were made to protect attorney-client privileged communications.

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<sup>3</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>4</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>5</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."

## **Analysis**

### **Compliance**

At its August 28, 2018 meeting, the Council ordered the Custodian to provide nine (9) unredacted copies of the requested attorney invoices within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Council Staff. On August 29, 2018, 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 September 5, 2018.

On September 4, 2018, the fourth (4<sup>th</sup>) business day after receipt of the Council's Order, the Custodian provided nine (9) redacted and unredacted copies of the attorney invoices, a redaction index, and a signed certification to the Council Staff.

Therefore, the Custodian complied with the Council's August 28, 2018 Interim Order because she responded in the prescribed time frame providing nine (9) redacted and unredacted copies of the attorney invoices for *in camera* review, and simultaneously provided certified confirmation of compliance to the Council Staff.

### **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." 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).

OPRA explicitly states that a “public agency shall have the burden of proving that [a] denial of access is *authorized by law*” (emphasis added). N.J.S.A. 47:1A-6. Specifically, OPRA contains no exemption for information “not responsive to” an OPRA request. ACLU v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533, 540-541 (App. Div. 2014). See also Hyland v. Twp. of Lebanon (Hunterdon) & Twp. of Tewksbury (Hunterdon), 2012-227 & 2012-228 (Interim Order dated June 24, 2014).

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

Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination <sup>6</sup>
1	Invoice: 209100 01/27/2016	Billing Entry dated 12/09/2015	Redacted in full as it is outside of the scope of the OPRA request (time period)	Redacting information “outside the scope” of the request is not a lawful basis to deny access to records under OPRA. <u>ACLU 435 N.J. Super.</u> at 540-541. <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>

<sup>6</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, then provide a copy of the blacked-out record to the requester.

2	Invoice: 209100 01/27/2016	Billing Entry dated 12/11/2015	Redacted in full as it is outside of the scope of the OPRA request (time period)	Redacting information “outside the scope” of the request is not a lawful basis to deny access to records under OPRA. <u>ACLU</u> 435 <u>N.J. Super.</u> at 540-541. <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
3	Invoice: 209100 01/27/2016	Billing Entry dated 12/14/2015	Redacted in full as it is outside of the scope of the OPRA request (time period)	Redacting information “outside the scope” of the request is not a lawful basis to deny access to records under OPRA. <u>ACLU</u> 435 <u>N.J. Super.</u> at 540-541. <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
4	Invoice: 209100 01/27/2016	Billing Entry dated 12/15/2015	Redacted in full as it is outside of the scope of the OPRA request (time period)	Redacting information “outside the scope” of the request is not a lawful basis to deny access to records under OPRA. <u>ACLU</u> 435 <u>N.J. Super.</u> at 540-541. <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
5	Invoice: 209100 01/27/2016	Billing Entry dated 12/16/2015	Redacted in full as it is outside of the scope of the OPRA	Redacting information “outside the scope” of the request is not a

			request (time period)	lawful basis to deny access to records under OPRA. <u>ACLU 435 N.J. Super.</u> at 540-541. <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
6	Invoice: 209100 01/27/2016	Billing Entry dated 12/21/2015	Redacted in full as it is outside of the scope of the OPRA request (time period)	Redacting information “outside the scope” of the request is not a lawful basis to deny access to records under OPRA. <u>ACLU 435 N.J. Super.</u> at 540-541. <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
7	Invoice: 209100 01/27/2016	Billing Entry dated 12/29/2015	Redacted in full as it is outside of the scope of the OPRA request (time period)	Redacting information “outside the scope” of the request is not a lawful basis to deny access to records under OPRA. <u>ACLU 435 N.J. Super.</u> at 540-541. <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
8	Invoice: 209100 01/27/2016	Billing Entry dated 01/04/2016	Redacted in full as it is outside of the scope of the OPRA request because the billing entry does not relate to the Sauter disciplinary action.	Redacting information “outside the scope” of the request is not a lawful basis to deny access to records under OPRA. <u>ACLU 435 N.J. Super.</u> at

				540-541. <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
9	Invoice: 209100 01/27/2016	Billing Entry dated 01/07/2016	Partially redacted to delete information not related to the disciplinary action and to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 <u>N.J. Super.</u> Unpub. LEXIS 2543 (App. Div. 2012))	Redacting the identity of the individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
10	Invoice: 209100 01/27/2016	Billing Entry dated 01/15/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 <u>N.J. Super.</u> Unpub. LEXIS 2543 (App. Div. 2012))	Redacting the identity of the individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
11	Invoice: 209100 01/27/2016	Billing Entry dated 01/20/2016	Redacted in full as it is outside of the	Redacting information “outside

			scope of the OPRA request because the billing entry does not relate to the Sauter disciplinary action.	the scope” of the request is not a lawful basis to deny access to records under OPRA. <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
12	Invoice: 209100 01/27/2016	Billing Entry dated 01/25/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 <u>N.J. Super.</u> Unpub. LEXIS 2543 (App. Div. 2012))	Redacting the identity of the individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
13	Invoice: 209475 02/16/2016	Billing Entry dated 01/25/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 <u>N.J. Super.</u> Unpub. LEXIS 2543 (App. Div. 2012))	Redacting the identity of the individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
14	Invoice: 209475 02/16/2016	Billing Entry dated 01/29/2019	Partially redacted to redact	Redacting the identity of the

			information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 <u>N.J. Super.</u> Unpub. LEXIS 2543 (App. Div. 2012))	individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
15	Invoice: 00006 03/01/2016	Billing Entry dated 02/10/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 <u>N.J. Super.</u> Unpub. LEXIS 2543 (App. Div. 2012))	Redacting the identity of the individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
16	Invoice: 00006 03/01/2016	Billing Entry dated 02/11/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 <u>N.J.</u>	Redacting the identity of the individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry</b>



			<u>Super. Unpub. LEXIS 2543 (App. Div. 2012))</u>	<b>and must disclose same.</b>
17	Invoice: 00006 03/01/2016	Billing Entry dated 02/16/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed., 2012 N.J. Super. Unpub. LEXIS 2543 (App. Div. 2012))</u> )	Redacting the identity of the individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
18	Invoice: 00006 03/01/2016	Billing Entry dated 02/18/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed., 2012 N.J. Super. Unpub. LEXIS 2543 (App. Div. 2012))</u> )	Redacting the identity of the individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
19	Invoice: 00006 03/01/2016	Billing Entry dated 02/26/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the	Redacting the identity of the individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications.

			attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 <u>N.J. Super.</u> Unpub. LEXIS 2543 (App. Div. 2012))	<u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
20	Invoice: 00006 03/01/2016	Billing Entry dated 02/29/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 <u>N.J. Super.</u> Unpub. LEXIS 2543 (App. Div. 2012))	Redacting the identity of the individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
21	Invoice: 00029 04/01/2016	Billing Entry dated 03/01/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 <u>N.J. Super.</u> Unpub. LEXIS 2543 (App. Div. 2012))	Redacting the identity of the individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
22	Invoice: 00029 04/01/2016	Billing Entry dated 03/11/2016	Redacted in full as it is outside of the scope of the OPRA request because the	Redacting information “outside the scope” of the request is not a

			billing entry does not relate to the Sauter disciplinary action.	lawful basis to deny access to records under OPRA. <u>ACLU 435 N.J. Super.</u> at 540-541. <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
23	Invoice: 00029 04/01/2016	Billing Entry dated 03/28/2016	Redacted in full as it is outside of the scope of the OPRA request because the billing entry does not relate to the Sauter disciplinary action.	Redacting information “outside the scope” of the request is not a lawful basis to deny access to records under OPRA. <u>ACLU 435 N.J. Super.</u> at 540-541. <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
24	Invoice: 00029 04/01/2016	Billing Entry dated 03/28/2016	Redacted in full as it is outside of the scope of the OPRA request because the billing entry does not relate to the Sauter disciplinary action.	Redacting information “outside the scope” of the request is not a lawful basis to deny access to records under OPRA. <u>ACLU 435 N.J. Super.</u> at 540-541. <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
25	Invoice: 00029 04/01/2016	Billing Entry dated 03/30/2016	Redacted in full as it is outside of the scope of the OPRA request because the billing entry does not relate to the Sauter disciplinary action.	Redacting information “outside the scope” of the request is not a lawful basis to deny access to records under OPRA. <u>ACLU 435 N.J. Super.</u> at

				540-541. <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
26	Invoice: 00051 05/02/2016	Billing Entry dated 04/15/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 N.J. Super. Unpub. LEXIS 2543 (App. Div. 2012))	Redacting the identity of the individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
27	Invoice: 00051 05/02/2016	Billing Entry dated 04/16/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 N.J. Super. Unpub. LEXIS 2543 (App. Div. 2012))	Redacting the identity of the individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
28	Invoice: 00051 05/02/2016	Billing Entry dated 04/18/2016	Partially redacted to redact information protected under attorney-client privilege	Redacting the identity of the individual who communicated with counsel is insufficient to qualify

			(specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 <u>N.J. Super.</u> Unpub. LEXIS 2543 (App. Div. 2012))	as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
29	Invoice: 00051 05/02/2016	Billing Entry dated 04/27/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 <u>N.J. Super.</u> Unpub. LEXIS 2543 (App. Div. 2012))	Redacting the identity of the individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
30	Invoice: 00051 05/02/2016	Billing Entry dated 04/28/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 <u>N.J. Super.</u> Unpub. LEXIS 2543 (App. Div. 2012))	Redacting the identity of the individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>

31	Invoice: 00051 05/02/2016	Billing Entry dated 04/29/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 <u>N.J. Super.</u> Unpub. LEXIS 2543 (App. Div. 2012))	Redacting the identity of the individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
32	Invoice: 00084 06/01/2016	Billing Entry dated 05/04/2016	Redacted in full as it is outside of the scope of the OPRA request because the billing entry does not relate to the Sauter disciplinary action.	Redacting information “outside the scope” of the request is not a lawful basis to deny access to records under OPRA. <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
33	Invoice: 00084 06/01/2016	Billing Entry dated 05/12/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 <u>N.J. Super.</u> Unpub. LEXIS 2543 (App. Div. 2012))	The redaction included specific subject matter discussed in relation to the disciplinary action, and therefore was properly redacted as attorney-client privileged communications. Therefore the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.1.</u>

34	Invoice: 00084 06/01/2016	Billing Entry dated 05/14/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 <u>N.J. Super. Unpub. LEXIS 2543</u> (App. Div. 2012))	The redaction included specific subject matter discussed in relation to the disciplinary action, and therefore was properly redacted as attorney-client privileged communications. Therefore the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.1.</u>
35	Invoice: 00084 06/01/2016	Billing Entry dated 05/25/2016	Partially redacted to redact information protected under attorney-client privilege (specifically, the name of person who spoke with the attorney as authorized under <u>D.F. v. Collingswood Bd. of Ed.</u> , 2012 <u>N.J. Super. Unpub. LEXIS 2543</u> (App. Div. 2012))	Redacting the identity of the individual who communicated with counsel is insufficient to qualify as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u> <b>Thus, the Custodian unlawfully redacted this billing entry and must disclose same.</b>
36	Invoice: 00084 06/01/2016	Billing Entry dated 05/31/2016	Redacted in full as it is outside of the scope of the OPRA request because the billing entry does not relate to the Sauter disciplinary action.	Redacting information “outside the scope” of the request is not a lawful basis to deny access to records under OPRA. <u>ACLU 435 N.J. Super.</u> at 540-541. <b>Thus, the Custodian unlawfully redacted this billing entry</b>

				<b>and must disclose same.</b>
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Therefore, the Custodian's redactions made on the basis that the information was not within the scope of the OPRA request were invalid.

Additionally, the Custodian's reliance on D.F. is misplaced. Therein, the Appellate Division noted the trial court's holding on redactions made to the names of individuals who communicated with an attorney in billing statements. 2012 N.J. Super. Unpub. (slip op. at 4-5). The trial court found that "learning with whom an attorney is speaking is just as important and in some cases even more important than learning what an attorney is researching." Id. (slip op. at 5) (internal quotations omitted). However, the court declined to address the trial court's holding as the order in question was not a final appealable order. Id. Thus, the case is unpersuasive even if published.

Therefore, the Custodian unlawfully denied access to the redacted billing entries identified as not responsive to the OPRA request. N.J.S.A. 47:1A-6; ACLU, 435 N.J. Super. at 540-41. Additionally, the Custodian unlawfully denied access to redacted billing entries identified as attorney-client privileged communications where the redaction was solely the identity of the individual who communicated with counsel. N.J.S.A. 47:1A-6; 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 Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's August 28, 2018 Interim Order because she responded in the prescribed time frame providing nine (9) redacted and unredacted copies of the attorney invoices for *in camera* review, and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the redacted billing entries identified as not responsive to the OPRA request. N.J.S.A. 47:1A-6; ACLU v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533, 540-541 (App. Div. 2014). Additionally, the Custodian unlawfully denied access to redacted billing entries identified as attorney-client privileged communications where the redaction was solely the identity of the individual who communicated with counsel. N.J.S.A. 47:1A-6; 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. Further, the**



**Custodian shall simultaneously deliver<sup>7</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>8</sup> to the Council Staff.<sup>9</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: Samuel A. Rosado  
Staff Attorney

January 22, 2019

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<sup>7</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>8</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."

<sup>9</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.

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 31<sup>st</sup> Day of January, 2019

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: February 4, 2019**



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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

INTERIM ORDER

August 28, 2018 Government Records Council Meeting

Jeffrey W. Sauter  
Complainant

Complaint No. 2016-190

v.

Township of Colts Neck (Monmouth)  
Custodian of Record

At the August 28, 2018 public meeting, the Government Records Council ("Council") considered the August 21, 2018 Findings and Recommendations of the Council Staff 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. Because the Custodian failed to provide a specific lawful basis for redactions made to the attorney invoices, her June 22, 2016 response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5(g). See Paff v. Borough of Lafayette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008), and Schwarz v. N.J. Dep't of Human Serv., GRC Complaint No. 2004-60 (February 2005).
2. The GRC must conduct an *in camera* review of the redacted records in order to validate the Custodian's assertions that the documents are, in fact, exempt from disclosure based on OPRA's exemptions for attorney-client privilege, pursuant to N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #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 Rules, R. 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 August, 2018

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: August 29, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
August 28, 2018 Council Meeting**

**Jeffrey W. Sauter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-190**

**v.**

**Township of Colts Neck (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

1. Copies of all invoices and vouchers associated with Hearing Officer (retired JSC O'Hagan) hired or used by the Township of Colts Neck ("Township") for the disciplinary action brought against Chief Sauter. The approved, and processed invoices and vouchers should cover the period January 1, 2016 through May 31, 2016.
2. Copies of all invoices and vouchers associated with the Court Stenographer hired or used by the Township for the disciplinary action brought against Chief Sauter. The approved, and processed invoices and vouchers should cover the period January 1, 2016 through May 31, 2016.
3. Copies of all legal expenses or invoices and vouchers to pay Dilworth Paxson LLC, John Bennett and any other law firm or attorney representing the Township associated with the disciplinary action brought against Chief Sauter. The approved, and processed invoices and vouchers should cover the period January 1, 2016 through May 31, 2016.

**Custodian of Record:** Beth Kara

**Requests Received by Custodian:** June 17, 2016

**Response Made by Custodian:** June 22, 2016

**GRC Complaint Received:** July 11, 2016

**Background<sup>3</sup>**

**Request and Response:**

On June 16, 2016 the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On June 22, 2016, the Custodian responded in writing, stating that the records were ready to be picked up. On June 27, 2016, the

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

<sup>2</sup> Represented by David A. Clark, Esq., of Gluck Walrath, LLP (Trenton, NJ).

<sup>3</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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Complainant picked up the records at the Custodian's office. That same day, the Complainant e-mailed the Custodian, stating that several of the provided invoices contained redactions and asked the Custodian for unredacted copies. On June 30, 2016, the Custodian responded to the Complainant in writing, stating that the redactions were made because they contained attorney-client privileged material, and thus not subject to disclosure.

#### Denial of Access Complaint:

On July 11, 2016 the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian improperly redacted the invoices based upon attorney-client privilege. The Complainant asserted that many of the line-item redactions only conceal the names of the public officials concerning the legal matter, and not the actual substance of the legal matter.

The Complainant therefore requested that the GRC provide unredacted copies of the invoices, or in the alternative, conduct an *in camera* review of the records to verify whether the redactions were proper in accordance with the law.

#### Statement of Information:

On August 12, 2016 the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on June 17, 2016. The Custodian certified that she responded in writing on June 22, 2016, stating that there were no responsive records for Item No. 1 of the request. The Custodian also certified that responsive records for Item Nos. 2 and 3 were available for pick up, and those records responsive to Item No. 3 were redacted based upon attorney-client privilege.

The Custodian certified that on June 30, 2016, she responded to the Complainant's June 27, 2016 reply to her response to his OPRA request. The Custodian stated that the response explained why the invoices were redacted.

The Custodian contended that N.J.S.A. 47:1A-1.1 protects attorney-client privileged information. See Paff v. Div. of Law, 412 N.J. Super. 140, 150 (App. Div.), certif. denied, 202 N.J. 45 (2010) ("OPRA expressly exempts from the definition of a government record "any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1."). The Custodian referenced D.F. v. Collingswood Bd. of Educ., 2012 N.J. Super. Unpub. LEXIS 2543 (App. Div. 2012), in which the requestor objected to redactions made to attorney invoices, particularly of the names of parties to whom the attorney spoke. The Custodian asserted that the trial judge upheld the redactions, stating that "learning with whom an attorney is speaking is just as important and, in some cases, even more important than learning what an attorney is researching."

The Custodian argued that the redacted names in the invoices at issue are related to ongoing legal proceedings involving the Complainant's brother, Chief Sauter. The Custodian argued that revealing the names is unwarranted for the same reasons set forth in the D.F. opinion; that it could undermine the Township's rights and strategy, lead to feelings of ill will between Chief Sauter and the individuals who communicated with the attorney, and potentially subject those individuals to

retribution. The Custodian asserted that release of the names could create a chilling effect, preventing potential witnesses from speaking openly with the Township during investigations.

The Custodian noted that these concerns are heightened by the fact that the Complainant is the brother of Chief Sauter, who is the subject of the investigation. The Custodian argued that the unredacted portions of the line-items demonstrate the work the attorney did and how much was billed. The Custodian surmised that the Complainant therefore seeks the names of the parties for reasons known only to him. The Custodian also asserted that some of the redacted entries reflect the thought process of counsel, the existence of draft documents, and other hints as to the mindset of counsel in the course of the investigation into Chief Sauter. The Custodian concluded that the redactions are valid via attorney-client privilege.

The Custodian also noted that the GRC has previously supported protecting confidential information via attorney-client privilege, referencing Diaz v. City of Perth Amboy, GRC Complaint No. 2007-53 (February 2008), and Meachem v. Pompton Lakes, GRC Complaint No. 2003-66 (March 2004).

The Custodian concluded by stating that the need to protect client confidences is paramount, and is a principle recognized and protected by the courts and the GRC. The Custodian asserted that he rightfully preserved the attorney-client privilege with the appropriate redactions, and requested that the complaint be dismissed.

### **Analysis**

#### **Insufficient Response**

OPRA provides that if a “custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . .* on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g) (emphasis added). Thus, OPRA requires that, when providing access to redacted records, a custodian shall provide a specific lawful basis for redactions. The Council has held that when responding to an ORPA request with redacted records, the Custodian must provide a specific legal basis for redactions. See Paff v. Borough of Lafayette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). Additionally, the specific citations to the law which justify the redactions are required at the time of the response. See Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February 2005).

In the current matter, the Custodian timely responded to the Complainant’s OPRA request on June 22, 2016. However, the Custodian failed to provide a specific lawful basis for the redactions at the time of the response. It was not until the Complainant disputed the relevant redactions in his June 27, 2016 correspondence that the Custodian stated that they were based upon the attorney-client privilege exemption under N.J.S.A. 47:1A-1.1.

Therefore, because the Custodian failed to provide a specific lawful basis for redactions made to the attorney invoices, her June 22, 2016 response to the Complainant’s OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5(g). See Paff, GRC 2007-209, and Schwarz, GRC 2004-60.

## **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. N.J. 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>4</sup> that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted 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:

[OPRA] 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 found 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.]

Here, the Custodian argued that the redactions made to the records provided to the Complainant were protected under N.J.S.A. 47:1A-1.1, specifically the attorney-client privilege. When this reasoning is advanced, the GRC typically conducts an *in camera* review to confirm its validity.

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<sup>4</sup> Paff v. N.J. Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).



Therefore, the GRC must conduct an *in camera* review of the redacted records in order to validate the Custodian's assertions that the documents are, in fact, exempt from disclosure based on OPRA's exemptions for attorney-client privilege, pursuant to N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

### **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 Council Staff respectfully recommends the Council find that:

1. Because the Custodian failed to provide a specific lawful basis for redactions made to the attorney invoices, her June 22, 2016 response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5(g). See Paff v. Borough of Lafayette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008), and Schwarz v. N.J. Dep't of Human Serv., GRC Complaint No. 2004-60 (February 2005).
2. The GRC must conduct an *in camera* review of the redacted records in order to validate the Custodian's assertions that the documents are, in fact, exempt from disclosure based on OPRA's exemptions for attorney-client privilege, pursuant to N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
3. **The Custodian must deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #2 above), nine (9) copies of the redacted records, a document or redaction index<sup>6</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>7</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.

Prepared By: Samuel A. Rosado  
Staff Attorney

August 21, 2018

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<sup>5</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>6</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>7</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."