

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5503-13T4

BARBARA BRAY WILDE,

Plaintiff-Appellant,

v.

BOROUGH OF WEST CAPE MAY,

Defendant-Respondent.

Argued September 21, 2015 – Decided October 7, 2015

Before Judges Fasciale and Nugent.

On appeal from Superior Court of New Jersey,
Law Division, Cape May County, Docket No. L-
517-13.

Colin G. Bell argued the cause for appellant
(Hankin, Sandman, Palladino & Weintrob,
P.C., attorneys; Mr. Bell, on the brief).

Frank L. Corrado argued the cause for
respondent (Barry, Corrado & Grassi, P.C.,
attorneys; Mr. Corrado, on the brief).

PER CURIAM

Plaintiff appeals from a February 3, 2014 order denying in part her request for documents under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and limiting the scope of her counsel fee award to compensate for a single OPRA violation; and a June 16, 2014 order awarding a reduced amount of fees for that

violation, but denying her request for additional counsel fees resulting from a successful motion for reconsideration.

We reverse the orders pertaining to plaintiff's counsel fees without prejudice, remand for an in camera inspection of documents defendant Borough of West Cape May asserts are protected by the attorney-client and work-product privileges, and direct the judge to thereafter consider anew plaintiff's application for counsel fees and costs incurred by defendant's OPRA violations.¹

We discern the following facts from the record created on the return date of plaintiff's order to show cause (OTSC) and subsequent reconsideration motion.

Before filing her complaint, plaintiff requested that defendant produce correspondence and solicitor bills pursuant to OPRA. Defendant produced ninety-nine pages of redacted or partially redacted documents in response to her request for correspondence. Defendant also provided forty-one pages of redacted bills. Defendant produced the documents without an explanation or privilege log pertaining to any of the redactions.

¹ At oral argument before us, defendant's counsel did not object to the judge performing an in camera review.

Plaintiff then filed this OPRA complaint and OTSC seeking production of un-redacted documents or a privilege log. After receiving the complaint, but before the return date of the OTSC, defendant produced a log corresponding to the redactions. In the log, defendant asserted that three documents contained material "unrelated" to plaintiff's OPRA request. According to defendant, the rest of the redactions were protected by the attorney-client and work-product privileges, as reflected by the log. In response to the complaint, defendant also produced two documents that defendant concluded were "inadvertently redacted or withheld in error."

On the return date of the OTSC, the judge conducted oral argument, rendering an oral opinion leading to the issuance of the February 3, 2014 order. The judge determined that defendant violated OPRA solely by failing to produce the log, limited plaintiff's counsel fee entitlement to that violation, and instructed plaintiff's counsel to produce a certification of legal services. The judge concluded, without conducting an in camera review, that defendant properly redacted and withheld documents based on relevancy grounds or the attorney-client and work-product privileges. Consequently, the judge denied plaintiff's request for un-redacted copies of the remaining correspondence and bills.

Plaintiff's counsel complied with the February 3, 2014 order and provided a certification seeking \$4,395 in counsel fees for legal services incurred to obtain the log. While the application for fees was pending, we decided American Civil Liberties Union of New Jersey v. New Jersey Division of Criminal Justice, 435 N.J. Super. 533 (App. Div. 2014). A few days later, plaintiff moved for reconsideration of the February 3, 2014 order, which defendant opposed.

The judge conducted oral argument on the reconsideration motion. Plaintiff relied on American Civil Liberties Union, supra, further asserting that a unilateral redaction of documents on relevancy grounds is unauthorized under OPRA, which plaintiff maintained had "always been the law." As a result, plaintiff contended that the judge's decision denying her request for un-redacted copies of the "unrelated" documents was palpably incorrect.

On reconsideration, the judge agreed that defendant improperly unilaterally redacted documents on relevancy grounds. The judge ordered defendant to produce the un-redacted documents as to the "unrelated information." Plaintiff concluded therefore that she succeeded on her reconsideration motion and requested additional counsel fees. The judge denied that request concluding that the catalyst for turning over the un-

redacted documents was the American Civil Liberties Union decision, which he had interpreted as creating new law, not plaintiff's complaint or reconsideration motion.

The judge then resolved the original pending fee application relating to the log. Defendant argued that the certification of legal services supplied by plaintiff's counsel contained entries unrelated to the log. The judge reviewed the certification stating that although "this is somewhat arbitrary," he would reduce the legal fees by twenty-five percent. He then awarded plaintiff fees in the amount of \$2,417.63 plus \$340 in costs.

On appeal, plaintiff argues that the judge erred by (1) proceeding without an in camera review of the so-called privileged documents; (2) denying her request on reconsideration for additional fees; and (3) reducing her original fee award by twenty-five percent.

Our standard of review is plenary with respect to interpretation of OPRA and its exclusions. Asbury Park Press v. Cnty. of Monmouth, 406 N.J. Super. 1, 6 (App. Div. 2009), aff'd, 201 N.J. 5 (2010).

I.

We agree with plaintiff that an in camera inspection of the documents purportedly protected by the attorney-client or work-product privilege was warranted.

Pursuant to N.J.S.A. 47:1A-1, the Legislature has declared the public policy of this State that

government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access[.]

If a custodian of records is unable to comply with a request, then the custodian "shall indicate the specific basis therefore on the request form and promptly return it to the requestor."

N.J.S.A. 47:1A-5g. In general, "[t]he attorney-client privilege is a recognized privilege that may shield documents that otherwise meet the OPRA definition of government record from inspection or production." O'Boyle v. Borough of Longport, 218 N.J. 168, 185 (2014). The same is true for otherwise responsive OPRA documents "if they fall within the work-product doctrine." Id. at 188.

Here, defendant asserted that the attorney-client and work-product privileges shielded correspondence and solicitor bills.

We previously stated "the court is obliged, when a claim of confidentiality or privilege is made by the public custodian of the record, to inspect the challenged document in camera to determine the viability of the claim." Hartz Mountain Indus., Inc. v. N.J. Sports & Exposition Auth., 369 N.J. Super. 175, 183 (App. Div.), certif. denied, 182 N.J. 147 (2004). This is especially so here because defendant also asserted the privileges to justify redacting the solicitor bills. See Hunterdon Cnty. Policemen's Benev. Ass'n, Local 188 v. Twp. of Franklin, 286 N.J. Super. 389, 394 (App. Div. 1996) (indicating that the attorney-client privilege is ordinarily inapplicable to "lawyers' bills for services to a public entity"). We therefore remand for the judge to undertake the necessary in camera inspection. We leave the scope and breadth of the in camera inspection to the discretion of the judge.

II.

We conclude that the judge erred by denying plaintiff counsel fees related to her reconsideration motion because her motion was the catalyst for requiring defendant to turn over the "unrelated" correspondence.

Pursuant to N.J.S.A. 47:1A-6, "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." Thus, a prevailing party in an OPRA lawsuit is entitled

to such counsel fees. Smith v. Hudson Cnty. Register, 422 N.J. Super. 387, 393 (App. Div. 2011). A litigant could be considered a "prevailing party" entitled to an award of counsel fees if "the lawsuit brought about a voluntary change in the defendant's conduct[,]" thereby achieving the result sought in the litigation. Mason v. City of Hoboken, 196 N.J. 51, 72 (2008).

Here, plaintiff's motion for reconsideration caused defendant to produce the documents defendant erroneously withheld as "unrelated" to plaintiff's OPRA request. That should have been the result on the return date of plaintiff's OTSC, obviating the need for a reconsideration motion. Thus, we deem plaintiff to be the "prevailing party" as to defendant's production of the "unrelated information."

We reject defendant's assertion that we announced a new rule of law in our American Civil Liberties Union decision. In American Civil Liberties Union, Judge Fuentes reiterated the long-standing existing law that the redaction of "unrelated information" is

not grounded on any of the statutorily recognized exemptions to disclosure in OPRA, N.J.S.A. 47:1A-1.1, or on a claim of confidentiality under the common law. Absent a legally recognized exception to disclosure, a citizen's right of access to public information is unfettered. Courier

News v. Hunterdon Cty. Prosecutor's Office,
358 N.J. Super. 373, 383 (App. Div. 2003).

[Am. Civil Liberties Union, supra, 435 N.J. Super. at 536.]

We have long since held that "OPRA only allows requests for records, not requests for information." See Bent v. Twp. of Stafford Police Dep't, Custodian of Records, 381 N.J. Super. 30, 37 (App. Div. 2005). "OPRA affirmatively excludes from such definition twenty-one separate categories of information, N.J.S.A. 47:1A-1.1, thereby 'significantly reduc[ing] the universe of publicly-accessible information.'" Id. at 36 (alternation in original) (citation omitted). Therefore, a decision to restrict access to government records under OPRA "must be supported by one or more of the twenty-one categories of information recognized in N.J.S.A. 47:1A-1[.]" Am. Civil Liberties Union, supra, 435 N.J. Super. at 541. Such is not the case here as to the documents related to defendant's "unrelated information" contention.


III.

We remand on the issue of counsel fees. We note that in response to the complaint and before the return date of the OTSC, defendant produced not only the privilege log, but also other documents that it conceded were "inadvertently redacted or withheld in error." As a result, the fee award should have

included plaintiff's status as a prevailing party as to those documents. That said, plaintiff's entitlement to additional fees and costs may substantially change on remand if the judge concludes that the remaining withheld documents are not protected by the attorney-client or work-product privilege. As a result, we direct the judge to consider anew plaintiff's fee application.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.²

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

² We decline to consider plaintiff's informal application for appellate fees because such request must be made by motion supported by the requisite affidavits. R. 2:11-4. Because plaintiff's trial counsel fees abide the remand proceedings, we refer to the judge's disposition of plaintiff's request for appellate fees. Ibid.