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**D.F., a Minor, Individually and by his Parent and Legal Guardian, A.C.,
Plaintiffs-Appellants, v. COLLINGSWOOD BOARD OF EDUCATION,
Defendant-Respondent.**

DOCKET NO. A-5311-14T2

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2016 N.J. Super. Unpub. LEXIS 2449

**September 22, 2016, Argued
November 10, 2016, Decided**

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1] On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-3813-10.

COUNSEL: Walter M. Luers argued the cause for appellant (Law Offices of Walter M. Luers, L.L.C., attorneys; Mr. Luers, of counsel and on the briefs; Jamie Epstein, on the briefs).

Walter F. Kawalec, III argued the cause for respondent (Marshall Dennehey Warner Coleman & Goggin, attorneys; Mr. Kawalec and Richard L. Goldstein, on the brief).

JUDGES: Before Judges O'Connor and Whipple.

OPINION

PER CURIAM

Plaintiffs, A.C. and D.F., a parent and minor child, appeal from October 8, 2010, November 12, 2010, and June 26, 2015 orders denying their request for the disclosure of documents pursuant to *New Jersey's Open Public Records Act (OPRA)*, *N.J.S.A. 47:1A-1 to -12*.

D.F. was a student in the Collingswood Public School system. In 2009, his mother, A.C., brought an administrative claim and ultimately, a federal lawsuit asserting D.F.'s educational rights were violated under the *Individuals with Disabilities Act (IDEA)*. *20 U.S.C.A. §§ 1400-1482*. In June 2010, plaintiffs' counsel filed a request with the Collingswood Board of Education (the Board) for records pursuant to OPRA, *N.J.S.A. 47:1A-1 to-12*. In particular, the request sought:

All records, including, but not limited to, bills, vouchers, [*2] contracts, etc., whether in electronic or paper media, whether received or sent, which makes reference to attorney's fees from 11/11/09 to present which make reference to . . . [D.F.] and/or his mother, [A.C.].

I also request a copy of the Board's current contract with the Board's attorney and/or law firm.

Immediate access is requested for these "bills, vouchers, contracts", pursuant to OPRA *N.J.S.A. 47:1A-5(e)*.

The Board responded stating invoices for legal services were available for inspection and copying, but the names of certain persons identified in the records had been redacted under the attorney client privilege.

Plaintiffs filed a complaint and order to show cause under OPRA, seeking disclosure of the 162 redacted names in the billing records. On October 8, 2010, the trial judge ordered the Board to provide the un-redacted billing records for in-camera review and provide justification for the redactions in a legal memorandum. The Board complied, providing un-redacted records and a letter brief on October 21, 2010. Plaintiffs only received the letter brief. In the letter brief, the Board argued for the application of attorney client privilege in OPRA cases. The Board also argued the identities of [*3] individuals employed by the Board who sought legal counsel should be protected because a chilling effect could result from the revelation of their identities, particularly where plaintiffs were involved in litigation against the Board. The Board also argued the information, if unredacted, could give plaintiffs insight into the Board's legal strategy.

On November 12, 2010, the trial judge denied plaintiffs' order to show cause without prejudice:

While I do not know the - how each and every person whose name is set forth in the un-redacted bills fits in the case it would certainly seem to me that there are references to fact witnesses, there are references to professionals, there are references to the staff of the Collingswood Board of Education and requiring the Board of Education's counsel to reveal those persons with whom he or she is speaking, particularly when the date of the communication is also noted can certainly give rise to insight into counsel's trial strategy, theories of the case and would undermine the client's - potentially undermine the client's rights and strategy in this litigation.

The trial judge dismissed the complaint without prejudice because of the on-going litigation, [*4] but opined the rationale for redaction might not exist after the completion of litigation.

Plaintiff filed an appeal, which we dismissed as interlocutory without addressing the merits. After completion of the IDEA litigation, plaintiffs filed a second appeal, which we dismissed as interlocutory by order of April 21, 2015. Plaintiffs returned to the Law Division, moving for summary judgement before a second judge. Plaintiffs argued defendant had not provided a sufficient factual basis to establish it was entitled to assert the attorney client privilege for the 162 redacted names and should, at the very least, be ordered to serve and file a privilege log. Plaintiffs also argued they had an interest in disclosure of the names under the *Family Educational Rights and Privacy Act (FERPA)*, 20 *U.S.C.A. § 1232*, because D.F.'s records were allegedly disclosed to other people without his consent. Plaintiffs also sought costs and attorney's fees.

The second judge denied the application because the law of the case doctrine precluded him from revisiting the trial judge's previous ruling. This appeal followed.

On appeal, plaintiffs argue the court erred by failing to require defendant to submit evidence in the form of [*5] a privilege log or certification to support the claim of attorney client privilege, the privilege does not apply to names in billing records, the court erred by relying on the attorney work-product privilege as a reason for non-disclosure, and the court's findings were inconsistent. Plaintiffs also argue the Board should be foreclosed from now supplementing the record to establish the privilege's application, and the Board's actions may have violated plaintiffs' right to know who

was given access to his records pursuant to FERPA. Plaintiffs also argue they are entitled to an award of fees.

This court reviews a trial court's determination of whether access to public records was warranted under OPRA de novo. *Paff v. N.J. State Firemen's Ass'n*, 431 N.J. Super. 278, 286, 69 A.3d 118 (App. Div. 2013).

We now turn to our review of the dismissal of plaintiffs' complaint and order to show cause by the trial judge on November 12, 2010. The judge required the Board to provide un-redacted billing records for in camera review and submission of a legal brief to support finding the names privileged. Plaintiff asserts it was error not to require the Board to produce a privilege log or *Vaughn*¹ index. We disagree.

1 *Vaughn v. Rosen*, 484 F.2d 820, 157 U.S. App. D.C. 340 (D.C. Cir. 1973).

When a government custodian is unable to comply with the OPRA request relying [*6] upon attorney client privilege, the "mere assertion of privilege" is not enough. *Burke v. Brandes*, 429 N.J. Super. 169, 178, 57 A.3d 552 (App. Div. 2012). When stating the reasons for the denial of a request, the government agency need not reveal the privileged material, but must follow the standard in *Rule 4:10-2(e)*, "which permits the party claiming privilege to 'describe the nature of the documents . . . not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.'" *Paff v. New Jersey Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346, 354, 878 A.2d 31 (App. Div. 2005) (quoting *R. 4:10-2(e)*).

When attorney client privilege has been claimed in an OPRA action, courts have either ordered a privilege log to be produced or conducted an in-camera review in order to determine whether the privilege applies. *N.J.S.A. 47:1A-1 to-12* does not mandate a privilege log must be filed when a government agency asserts a claim of attorney client privilege. We have 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." *MAG Entm't, LLC v. Div. of Alcoholic Beverage Control*, 375 N.J. Super. 534, 545, 868 A.2d 1067 (App. Div. 2005) (citing *Hartz Mountain Indus., Inc. v. N.J. Sports & Exposition Auth.*, 369 N.J. Super. 175, 183, 848 A.2d 793 (App. Div. 2004)). The purpose of an in-camera inspection is to allow both parties the opportunity to address principles related [*7] to the claim of confidentiality and privilege; in-camera review also allows the government custodian to argue specifically "why the document should be deemed privileged or confidential or otherwise exempt from the access obligation." *Ibid.* (quoting *Hartz Mountain, supra*, 369 N.J. Super. at 183).

The judge herein was within his discretion to conduct an in-camera review to determine the validity of defendant's claim of privilege. However, that does not end the inquiry.

After conducting the in-camera review, the judge did "not know how each and every person whose name is set forth in the un-redacted bills fits in the case." In other words, the in-camera review did not demonstrate whether the redacted names were subject to the privilege. Rather than ask the Board for additional information to clarify the assertion of the attorney client privilege vis-a-vis the redacted names, the judge, sua sponte, dismissed plaintiffs' complaint because disclosure of the redacted names could reveal trial strategy in the underlying litigation. The judge then opined his rationale might not apply in the future after the resolution of the underlying litigation.

Hence, the trial judge left unanswered the questions of the applicability of the attorney client [*8] privilege, as well as whether the completion of the underlying litigation was a changed circumstance requiring disclosure of the redacted names.

The judge erred in dismissing the complaint because the records could "give rise to insight into counsel's trial strategy." "A party's right to access public records is not abridged because it may be involved in other litigation with the governmental agency required to respond to the OPRA request." *MAG, supra*, 375 N.J. Super. at 545. In *MAG*, we said, "[t]he fact that litigation was pending between the [the parties] when *MAG* made its public records request does not, in itself, relieve the government agency of its obligation to comply with OPRA." *Id.* at 544. "Documents that are

'governmental records' and subject to public access under OPRA are no less subject to public access because the requesting party is opposing the public entity in possession of material sought in collateral litigation." *Id.* at 545. The pendency of collateral litigation "neither diminishes nor expands the requestor's right of access to government records under OPRA." *N.J. Builders Ass'n, v. N.J. Council on Affordable Hous.*, 390 N.J. Super. 166, 182, 915 A.2d 23 (App. Div. 2007). In *Spectraserv, Inc. v. Middlesex Cty. Utils. Auth.*, 416 N.J. Super. 565, 581, 7 A.3d 231 (App. Div. 2010), we stated that "although the pendency of collateral litigation 'neither diminishes nor expands the requestor's right of access to government records under OPRA,' [*9] it is not a fact to be ignored." (internal citations omitted).

The blanket dismissal of plaintiffs' complaint because disclosure of redacted names could give rise to insight into trial strategy is error for the same reason the judge could not determine the applicability of the attorney client privilege. The Board's submission did not identify which of the 162 redacted names were employees and/or administrators, whether any sought legal counsel, and more significantly, whether any were not employees of the Board or third parties. The submission did not distinguish fact witnesses from expert witnesses and did not establish whether any of the individuals were actual clients. Any determination the information provided would give insight into trial strategy is speculative.

Armed with the foregoing analysis we turn to whether the second judge's determination that his review was precluded by the law of the case doctrine. We conclude it was not because the trial judge did not make findings regarding the attorney client privilege and because the trial judge suggested the completion of the underlying litigation might be a changed circumstance. Plaintiffs argue defendant should not be permitted [*10] to supplement the record with information it should have provided initially. We disagree and direct the scope of the inquiry, including the request for fees to the discretion of the trial judge. We reverse the dismissal of plaintiffs' complaint and remand the matter for amplification of these issues consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.