

FILE COPY

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

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M. LINDA PIERCE
MUSCOGEE COUNTY
SUPERIOR COURT

JOHN T. DARR, in his official
capacity as Sheriff of Muscogee County,

Plaintiff,

v.

CIVIL ACTION FILE
NO. SU-14-CV-3437-94

COLUMBUS, GEORGIA, a City, a public
corporation and a political subdivision of
the State of Georgia; TERESA P.
TOMLINSON, in her official capacity as
Mayor of Columbus, ISAAH HUGLEY,
in his official capacity as the City Manager
of Columbus, PAM HODGE, in her
official capacity as Finance Director of
Columbus, JERRY "POPS" BARNES, in
his official capacity as District 1
Councilor, GLENN DAVIS, in his official
capacity as District 2 Councilor, BRUCE
HUFF, in his official capacity as District
3 Councilor, EVELYN TURNER PUGH,
in her official capacity as District 4
Councilor, MIKE BAKER, in his official
capacity as District 5 Councilor, GARY
ALLEN, in his official capacity as District
6 Councilor, EVELYN "MIMI"
WOODSON, in her official capacity as
District 7 Councilor, TOM BUCK, in his
official capacity as District 8 Councilor,
JUDY THOMAS, in her official capacity
as District 9 at Large Councilor, and
BERRY "SKIP" HENDERSON, in his
official capacity as District 10 at Large
Councilor,

Defendants.

**DEFENDANTS RESPONSE TO PLAINTIFF'S
MOTION TO STRIKE THE AUGUST 12, 2016 NOTICE OF FILING**

COME NOW, Defendants and file this their Response to Plaintiff's Motion to Strike Defendants' Notice of Filing and respectfully show this Court as follows:

INTRODUCTION

Plaintiff's counsel has filed an extensive Motion to Strike for two reasons: (1) to avoid having any objection by the Defendants to the fees they have requested of this Court on the record in this litigation and (2) to ensure the taxpayers who are paying for this litigation do not have access to information related to the public expenditures. To suggest that privileged or confidential information has been released by the Defendants is patently frivolous, particularly when this Court has placed the burden of redacting all of that information squarely upon the shoulders of Sheriff's own counsel, no "confidential" designation was obtained or records ordered sealed, and the records at issue were served upon defense counsel, which would constitute a waiver.

The method of the payment of the Sheriff's extensive litigation fees has been at issue since the origination of the case. The Sheriff refused to pay for his counsel from the funds of the governing authority assigned for his use and benefit, and he asked the Court to order that the Defendant CCG pay for his fees out of public funds other than the Sheriff's budget and assigned for other purposes.¹ In no event can Defendants be estopped from duly objecting to Plaintiff's attorneys fees, and in no event can the Defendants be estopped from creating a record for appeal of a legitimate legal issue of first impression that impacts the use of public funds.

¹ Defendants have objected on several occasions, including on December 10, 2014 and February 1, 2016, to the manner and method of the payment of the Sheriff's legal fees. The Motion to Strike is correct in that the Defendants do contend that the Sheriff should pay for his own legal fees out of his duly appropriated CCG budget under O.C.G.A. §45-9-21(e), as that would eliminate all objections and concerns over the review of those bills and the payment of the same. Otherwise, the Court is forced to contrive a manner and method of payment that allows it to determine the "reasonableness" of the fees and yet, balances the confidentiality of the information provided so that objections to that award could still be made by the opposing party.

At the outset, Defendants must set the record straight. Judge Fuller indeed ordered that Defendant CCG pay the Sheriff's legal fees from particular funds not within the Sheriff's budget. But, he then was required to devise a manner and method by which he could rule on the fee requests submitted. After multiple issues arose, with *ex parte* communications from Sheriff's counsel and an inability to object to fee awards previously provided, the Defendants requested this Court revisit the manner in which the Sheriff's attorneys were paid for this litigation.²

In modifying Judge Fuller's Order, this Court specifically eliminated the potential to reveal attorney-client privileged or work-product information, requiring the Sheriff's counsel to redact all invoices submitted and to provide a copy of the same to counsel for Defendants. In effect, the *in-camera* review previously in place was discontinued, a fact understood and acknowledged by Sheriff's counsel, Kerry Howell, at the hearing discussing this very issue:

Judge, why would there be the need for in camera review if you weren't sending the – if you were sending the judge redacted bills?"

See Exhibit "A" – Transcript copy of quote from Kerry Howell during oral argument of Defendants' Motion to Seal and Special Master Appointment, April 20, 2016.³ And, consistent with that recognition, no marking of "Confidential," "Privilege", or the like exists on the letter and invoices served on defense counsel, which indicates that even Plaintiff's counsel had no anticipation that these redacted documents were somehow protected from the public view.

² Defendants' Motion to Seal and for Special Master Appointment, February 1, 2016.

³ After the modification of the original Order, Plaintiff's counsel has submitted other invoices to the Court, none of which describe the review to be undertaken as an *in camera* review. Previously they had described the submission in that manner and noted the materials submitted were in fact being done so *in camera*. See Exhibit "B" – Ltr. from Kellye Moore to Judge Fuller, October 2, 2015; Exhibit "C" – Ltr. from Kerry Howell to Judge Fuller, December 8, 2015; Exhibit "D" – Ltr. from Kellye Moore to Judge Raymond, August 3, 2016; Exhibit "E" – Ltr. from Kerry Howell to Judge Raymond, June 28, 2016.

This Court has eliminated the concern of confidentiality in the redacted fee invoices and placed the burden of redacting that information squarely upon Sheriff's counsel. At the same time, the Court has required the Sheriff to provide the Defendants a copy of the redacted invoices to allow for the opportunity to file an objection to the reasonableness of the fees, if necessary. Any objection, whether a general cautionary concern or an objection to a specific line item entry, would have to be on the record. It is without merit for Sheriff's counsel to suggest that all appellate rights should be lost in such a serious and repeatedly preserved legal issue. The Sheriff's Motion to Strike is just another example of a complete waste of taxpayer dollars in continuing litigation and legal positions that have no legal merit.

ARGUMENT AND CITATION OF AUTHORITY

A. Records of the Court are Public Filings Available For Public Review Unless Deemed Confidential After Application and Finding of Need is Expressly Made by the Court.

No item related to litigation may be deemed "confidential" and kept from public view, except upon formal motion, specific judicial finding made and a narrow confidential designation provided. *See generally* U.S.C.R. 21 (providing that all court records are public and are to be available for public inspection unless public access is limited by law or by the procedure set forth in Rule 21.1); *see generally* Savannah College of Art & Design v. School of Visual Arts, Inc., 270 Ga. 791 (1999)(demonstrating the procedure by which confidentiality is to be applied for and by which is it granted under the U.S.C.R.). No such Confidentiality Order has been entered in this case and no party can self-declare materials confidential and exempt from public view. In fact, this Court has specifically modified the previous *in camera* Order of Judge Fuller to place the burden upon the Sheriff's counsel to ensure that all information contained within the invoices submitted to the Court and to Defendants would be redacted as follows:

This Court is modifying the previous Order to provide that the Plaintiff's counsel submit to the Court **redacted** billing invoices **removing any material which could be deemed to be arguments, trial strategy, privileged matters**, thoughts, theories or suggestions of the rightness of the Plaintiff's side of the case. The Plaintiff's counsel are to provide to the Defendant's counsel copies of these redacted invoices. Plaintiff's counsel may submit redacted invoices for the Court's consideration for all unpaid fees and expenses immediately, and on a monthly basis thereafter. The Plaintiff's concern that redacted invoices may not provide the Court with sufficient information to determine the reasonableness of the billing will be addressed with counsel for all parties when, and if, it becomes an issue.

(Order of Judge Raymond, June 24, 2016). No Confidentiality Order exists in this case and no statute exist which declares any of the material duly filed by Defendants to be confidential *per se*. See Atlanta Journal v. Long, 258 Ga. 410 (1988)(where the Supreme Court described the procedure to seal or otherwise make documents confidential and the great burden that is placed on the party seeking confidentiality).

As required by this Court's Order of June 24, 2016, Sheriff's counsel should not have submitted any privileged or otherwise confidential information in the invoices before the Court. The *in camera* inspection, by its very nature, is no longer needed, as Plaintiff's counsel has expressly acknowledged. See St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C., 293 Ga. 419 (2013) (specifically pointing out where documents or materials contain arguably privileged information, the trial court may need to conduct an *in camera* review to ensure those portions are redacted *prior to production*); see also McKesson HBOC, Inc. v. Adler, 254 Ga. App. 500 (2002) (describing the *in camera* procedure for which the purpose is to avoid the disclosure of privileged information). Similarly, since the records have been redacted

by Plaintiff's own counsel, there is no harm in allowing transparency for the public to know the basis of the funds expended.⁴

The rationale of the Motion to Strike ignores a basic tenet of Georgia law –that no document is confidential absent a specific court order to that effect or statutory directive. U.S.C.R. 21. The Motion to strike further ignores the control given to the redaction of the records to Plaintiff's counsel and the completely lack of any injury to Plaintiff from filing a redacted, non-confidential document necessary to protect the record and legal issues in this case and which is questionably subject to the Georgia Open Records Act . The Sheriff's misguided attempt to keep the Defendants' general objection and attachments out of the appellate record and from the eyes of the taxpayers who must pay for the continuation of this litigation should be **denied.**

B. Plaintiff's Attempts to Prevent Objections to the Reasonableness of the Fees Awarded Pursuant to O.C.G.A. § 45-9-21 are Without Legal Merit.

The very language of O.C.G.A. § 45-9-21(e) demonstrates a standard that must be held if the Judge in the litigation awards the constitutional officer fees, which are supposed to be "reasonable". Plaintiff's counsel is suggesting that Defendants have no way of objecting to their fee submissions or any fees awarded. Without attaching the objected to fee invoices to the Defendants' objection, there is no information contained in the record to support that objection

⁴ On August 11, 2016, CCG received an Open Records Act Request by Mike Owen, a journalist with the Columbus Ledger Enquirer. *See* Exhibit "F" – GORA request from Mike Owen. The request specifically asked for any bills for legal fees that have come to the city from Darr's attorneys since his appearance before Council on July 26, 2016. *Id.* On August 3, 2016, Kellye Moore, as counsel for Sheriff Darr, submitted redacted invoices to the Court and to Defendants in contemplation of Court Ordered payment. Having received these non-privileged submissions, Defendants responded to the Open Records Act Request by providing a copy of the same to Mike Owen. *See* O.C.G.A. 50-18-70, et. seq. (Open Records Act does not protect information which is kept in the regular course of business and contains no privileged information).

or to evidence that it was made. The proposition that objections or contested issues must appear in the record for the preservation of a proper record for appeal is black letter law. The leading Georgia treatise on appellate practice says it best:

The fundamental and basic precept of appellate jurisprudence with regard to record preservation in Georgia is that in order for the complaining party to prevail when an alleged error is reviewed by an appellate court, he or she has the burden of proving such error by the official record of the proceedings compiled in the lower court...The necessary corollary to these fundamental principles is the precept that a reviewing court will not consider the substance of enumerations of errors which were not properly preserved in the court below.

See Georgia Appellate Practice With Forms, § 9:1, C. McFadden, C. Sheppard, C. Cork III, G. Snyder, Jr., D. Webster, K. Jenkins, (2015 ed. West.)

It is clear that any objection or concern over any specific issue or line item in a bill, which Defendant CCG is being required to pay, would have to be in the record. With these concepts in mind, Defendants' counsel's actions in filing its objection and the actual documents to which it is objecting is proper procedure and in fact what is contemplated by O.C.G.A. §45-9-21(e).⁵

The taxpayers of Columbus, Georgia are footing the bill for the continuation of Sheriff Darr's lawsuit against CCG and the representative Defendants. At this time, there is no claim

⁵ Plaintiff argues that Defendants should be estopped from challenging the reasonableness of the fees on the grounds that the legal work that is the subject of the dispute arose from the fact that the Sheriff was requested to come before Council pursuant to Ordinance 13-39. This assertion is completely without merit, especially given the fact that this Court has already decided that Ordinance 13-39 is a valid and constitutional ordinance. This Court has previously (on June 21, 2016) adjudicated all issues pertaining to Ordinance 13-39 in favor of Defendants. As a result, there should be no further billings by Plaintiff's counsel on any issues pertaining to Ordinance 13-39. To continue to attempt to counsel Sheriff Darr on an Ordinance deemed by this Court to be valid is exactly the type of billings that should be examined by this Court and deemed unreasonable as part of continued fee bill submissions. Defendants' position on this issue is not inconsistent. By Plaintiff's very logic, the attorneys for Sheriff Darr should be allowed to continue to research the very Executive Budget Process that this Court has already deemed legal, valid and proper then submit bills regarding the same claiming that they are reasonable. This position is without merit.

remaining in the lawsuit against the Executive Defendants, Tomlinson, Hugley, and Hodge. The continuation of efforts in litigation against these Defendants, who have been dismissed in effect by the Order of this Court on Defendants' Motion for Summary Judgment on the Budget Process, would be unwarranted and would give rise to an immediate objection on any attorneys' fees incurred for those claims. Likewise, the Defendants should not have to pay for any political advice received or day-to-day advice garnered by the Sheriff from his attorneys. To suggest the Defendants have no opportunity to record an objection to the multitude of fees incurred by the Sheriff in this litigation contradicts the very language of O.C.G.A. §45-9-21(e) and the process derived by this Court for awarding those fees.


CONCLUSION

By virtue of the foregoing, Defendants request the Plaintiff's Motion to Strike the August 12, 2016 Notice of Filing be DENIED.

Respectfully submitted this 17th day of August 2016.


P.O. Box 5742
Columbus, GA 31906
P: 706-464-5298

THE SCHONDELMAYER FIRM L.L.C.


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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO STRIKE THE AUGUST 12, 2016 NOTICE OF FILING** via electronic mail, per agreement of counsel and the Court, addressed as follows:

W. Kerry Howell
W. Kerry Howell, LLC
230 Second Street
Macon, GA 31201
wkhowell_law@bellsouth.net

Larry Walker
Kellye C. Moore
Walker, Hulbert, Gray & Moore, LLP
909 Ball Street
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Mr. Duke Groover
James|Bates
231 Riverside Drive
Macon, Georgia 31201
dgroover@jamesbatesllp.com

This 17 day of August, 2016.


Attorney for Defendants

Exhibit "A"

SUPERIOR COURT OF MUSCOGEE COUNTY

STATE OF GEORGIA

JOHN T. DARR, Sheriff,)
)
 Plaintiff,)
) CIVIL ACTION FILE NUMBER:
 versus)
) SU-14-CV-3437-94
 COLUMBUS CONSOLIDATED)
 GOVERNMENT, et al.,)
)
 Defendants.)

Trial proceedings in the above-styled case,
before the Honorable Philip T. Raymond, III,
reported by Leo A. LaPalm, at the Columbus
Consolidated Government Center, Columbus, Georgia,
on April 20, 2016, commencing at 10:05 a.m.

Leo LaPalm
Certified Court Reporter
Columbus, Georgia
(706) 442-1567

APPEARANCE OF COUNSEL:

FOR THE PLAINTIFF:

W. Kerry Howell
230 3rd Street
Macon, Georgia 31201

Kellye C. Moore
Larry Walker
Walker, Hulbert, Gray & Moore
909 Ball Street
Perry, Georgia 31069

Duke Groover
Mary Beth Hand
James-Bates-Brannan-Groover-LLP
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FOR THE DEFENDANTS:

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Mark D. Maholick
Hall Booth Smith, P.C.
233 12th Street, Suite 500
Corporate Center
Columbus, GA 31901

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I N D E X

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Honor.

Judge, do you have Judge Fuller's order?

THE COURT: I do.

MR. HOWELL: Judge Fuller's order in paragraph 10 talks about the detailed billings of the Sheriff would constitute attorney-client -- would be protected by the attorney-client privilege. It would be inappropriate for the defendants to review them. 45-9-21 provides adequate safeguards to ensure the Sheriff's fees are reasonable and necessary. Then in paragraph 14, the Sheriff's attorneys are ordered to submit their fees and expenses monthly to the court for an in camera review along with an affidavit establishing that the fees and expenses are reasonable and necessary.

Judge, why would there be the need for in camera review if you weren't sending the -- if you were sending the judge redacted bills? How can one read paragraph 10 of his order saying that detailed bills will not be shared, they'll be performed for an in camera review without realizing in paragraph 14, the judge is required that detailed bills be provided to him? Judge, how can a judge approve attorney's fees without seeing the detailed bills? I mean, Judge, what are we supposed to say, "Prepare for motion, eight hours, research six hours, meet with client, three hours?" Where is the detail?

Exhibit "B"



WALKER HULBERT GRAY & MOORE, LLP
ATTORNEYS AT LAW

LARRY WALKER
DAVID G. WALKER
DAVID P. HULBERT, JR.
MICHAEL G. GRAY
KELLYE C. MOORE
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TELEPHONE: (478)987-1415
FACSIMILE: (478)987-1077
E-MAIL: mail@whgmlaw.com

October 2, 2015

Honorable Hilton Fuller
32 Lullwater Estate Road
Atlanta, Georgia 30307

Via email hmf Fuller665@aol.com
and FedEx Overnight Delivery

Re: John T. Darr, Sheriff of Muscogee County vs. Columbus, Georgia, et al.
Superior Court of Muscogee County
Civil Action File No. SU14CV3437

Dear Judge Fuller:

Please find enclosed hard copies of the following documents:

1. Plaintiff Sheriff Darr's proposed Discovery and Scheduling Order; and,
2. Affidavit of Kellye C. Moore submitted pursuant to the Court's Order on Sheriff Darr's Petition for the Appointment of Counsel and Payment of Attorneys' Fees and Costs requiring monthly submission of bills for fees and expenses for *in camera* review along with an affidavit establishing that the fees and expenses charged are reasonable and necessary.

If you have any questions regarding the affidavit or the attached invoice, or if you need further documentation, please let me know. Thank you for your consideration of these matters.

Very truly yours,

Kellye C. Moore

/kcm

Enclosures

cc: Ms. Melanie V. Slaton (via email mvs@hatcherstubbs.com)(w/out Affidavit)
Ms. Carter P. Schondelmayer (via email cschondelmayer@outlook.com)(w/out Affidavit)
Sheriff John Darr via FedEx Overnight Delivery
Mr. W. Kerry Howell (via email wkhowell_law@bellsouth.net)(w/out Affidavit)
Mr. Larry Walker (via email lawlker@whgmlaw.com) (w/out Affidavit)

Exhibit "C"

W. KERRY HOWELL, LLC

ATTORNEY AT LAW
230 THIRD STREET
MACON, GEORGIA 31201

W. KERRY HOWELL
wkhowell_law@bellsouth.net

TELEPHONE (478) 745-0111
FACSIMILE (478) 745-0020

December 8, 2015

VIA FEDERAL EXPRESS

Judge Hilton Fuller
32 Lullwater Estate Road
Atlanta, Georgia 30307

Re: *John T. Darr vs. Columbus Consolidated Government, et al.*
Superior Court of Muscogee County
Civil Action No. SU-14-CV-3437-94

Dear Judge Fuller:

I hope you are well. In compliance with the Court's April 22, 2015 Attorney's Fees Order, please find enclosed my supplemental affidavit in support of my additional attorney's fees and expenses incurred from November 1, 2015 through and including November 30, 2015. I submit this for your *in camera* review in accordance with your Order. I copy opposing counsel with this cover letter only.

Thank you.

Respectfully,



W. Kerry Howell

WKH/bmi
Enclosure to Judge Fuller only
cc: Carter Schondelmayer (without enclosure)
Melanie Slaton (without enclosure)
Kellye Moore (via email)

1733-001

Exhibit “D”



WALKER HULBERT GRAY & MOORE, LLP
ATTORNEYS AT LAW

LARRY WALKER
DAVID G. WALKER
DAVID P. HULBERT, JR.
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August 3, 2016

The Honorable Philip T. Raymond, III
Judge, Macon Circuit Superior Court
601 Mulberry Street
Macon, GA 31201

Via email praymond@maconbibb.us
and U.S. Mail

Re: John T. Darr, Sheriff of Muscogee County v. Columbus, Georgia, et al.
Superior Court of Muscogee County
Civil Action File No. SU14CV3437

Dear Judge Raymond:

Pursuant to your Order, enclosed is a copy of my bill for the time and expenses for my firm in the representation of Sheriff Darr from June 25, 2016 through July 31, 2016 and my accompanying affidavit.

Thank you for your attention to these matters.

Very truly yours,


Kellye C. Moore

/kcm

Enclosures

cc: Carter P. Schondelmayer (cschondelmayer@outlook.com)
Paul D. Ivey, Jr. (pivey@hallboothsmith.com)
Melanie V. Slaton (mmlaton@hallboothsmith.com)
Mark D. Maholick (mmaholick@hallboothsmith.com)
W. Kerry Howell (wkhowell_law@bellsouth.net)
Duke R. Groover (dgroover@jamesbatesllp.com)

Exhibit “E”

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June 28, 2016

VIA HAND DELIVERY AND EMAIL ONLY

Judge Philip T. Raymond, III
310 Bibb County Courthouse
Macon, Georgia 31201

Re: *John T. Darr vs. Columbus Consolidated Government, et al.*
Superior Court of Muscogee County
Civil Action No. SU-14-CV-3437-94

Dear Judge Raymond:

Pursuant to your Order of Friday June 24, 2016, I enclose a copy of my bill for the time and expenses for my firm in the representation of Sheriff Darr from December 1, 2015 until and including June 24, 2016.

I also attach a copy of my affidavit as to these fees and expenses.

Thank you.

Respectfully,



W. Kerry Howell

WKH/bmi

cc: Carter Schondelmayer (via email only)
Melanie Slaton (via email only)
Mark Maholic (via email only)
Paul Ivey (via email only)
Duke Groover (via email only)
Kellye Moore (via email only)

Exhibit “F”

From: "Owen, Mike" <mowen@ledger-enquirer.com>
To: Clifton Fay <cfay@columbusga.org>,
Date: 08/11/2016 12:44 PM
Subject: Open records request

Clifton,

This is an open records request for any recent correspondence between Councilor Skip Henderson and Sheriff John Darr concerning the sheriff's recent appearance before Columbus Council to discuss his budget. I am also requesting any replies from either Sheriff Darr or his attorneys concerning Henderson's letter and/or Darr's appearance before Council. In addition, I am requesting any bills for legal fees that have come to the city from Darr's attorneys since his appearance before Council.

Thank you,

Mike Owen

Columbus Ledger-Enquirer