

PREPARED BY THE COURT

OCT 2 - 2014

NEWARK MORNING LEDGER CO.,  
publisher of The Star-Ledger,

Plaintiff,

v.

OFFICE OF THE GOVERNOR, STATE OF  
NEW JERSEY,

Defendant.

*Ann Regan*  
SUE REGAN  
CLERK OF SUPERIOR COURT

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION –  
MERCER COUNTY

CIVIL ACTION

DOCKET NO. MER-L-948-14

**ORDER AND STATEMENT OF  
REASONS**

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THIS MATTER is before the court by way of a verified complaint and order to show cause filed by Plaintiff Newark Morning Ledger Company, publisher of The Star-Ledger, seeking documents from Defendant Office of the Governor under the Open Public Records Act (“OPRA”), N.J.S.A. 47:1A-1, et. seq., and under the common law right of access; and the Office of the Governor asserting that the documents should not be disclosed because they relate to an ongoing investigation, and that some of the documents are privileged as agency advisory, consultative, or deliberative material; and the court having considered the arguments of the parties set forth in the briefs; and the court having conducted an *in camera* review of the requested documents, a confidential certification of Records Custodian Andrew McNally, Esq., and the brief of Defendant filed under seal; and for the reasons set forth below; and for good cause shown:

IT IS on this 2<sup>nd</sup> day of October, 2014, HEREBY ORDERED that:

1. The protective order entered by the court on September 8, 2014, is lifted as to the privilege log previously submitted by the defendants for *in camera* review. The brief of defendant and the certification of Andrew McNally, Esq., Records Custodian, shall remain under seal pursuant to the previous sealing order issued by the court.
2. Defendant Office of the Governor shall produce to plaintiff by October 10, 2014, the privilege log and the records identified by the Bates numbers DOL008 through DOL016.
3. All remaining documents submitted to the court for *in camera* review are protected as agency advisory, consultative, or deliberative material under both OPRA and the common law. Plaintiff's application for the release of those documents is therefore DENIED.
4. Plaintiff's application for counsel fees is granted. The parties shall negotiate in an effort to resolve the amount of the fee in light of the partial success of plaintiff's order to show cause. If no resolution is reached, plaintiff shall file a motion for counsel fees supported by a certification of services by October 31, 2014. Defendant shall file opposition by November 12, 2014, and plaintiff shall file a reply by November 17, 2014. If any party wishes to have oral argument, that party shall submit a request to the court. If requested, oral argument will be conducted on November 21, 2014, at 3:00 P.M.

  
MARY C. JACOBSON, A.J.S.C.

## REASONS

Plaintiff's request for information relates to the proposed South Jersey Pipeline, which would be constructed in the Pinelands region. Plaintiff is the publisher of The Star-Ledger, a newspaper circulating in Newark and throughout New Jersey. Plaintiff's employee, reporter Christopher Baxter, made a public records request to Defendant for "[c]ommunications . . . sent or received by [staff member] Christina Genovese-Renna, from January 1, 2013 to February 1, 2014, regarding the South Jersey Gas Pipeline proposed for the Pinelands region."

The Office of the Governor denied the records request. Andrew McNally, Assistant Counsel to the Office of the Governor, responded to the records request, stating, "The records you request relate to an investigation in progress and are therefore exempt from disclosure under state law." Mr. McNally cited N.J.S.A. 47:1A-3(a) and N.J.S.A. 47:1A-9. Plaintiff sent a follow-up letter asking the Office of the Governor to reconsider its decision denying access to the records. Defendant did not respond.

Plaintiff filed a verified complaint on April 29, 2014, seeking documents under OPRA and under the common law right of access to public records. The Office of the Governor subsequently sought leave from the court to present its opposition to plaintiff's order to show cause ex parte and under seal. The court granted the Office of the Governor's motion to file its opposition brief ex parte and under seal on September 8, 2014, after hearing oral argument. The defendant thereafter submitted a certification with details of the underlying investigation. The Office of the Governor also provided the documents it deemed responsive to the request to the court for *in camera* review. They have been Bates-stamped DOL001 through DOL016. Documents DOL001 through DOL007 are sought to be protected under the deliberative process

privilege contained in N.J.S.A. 47:1A-1.1, as well as documents protected as part of an ongoing investigation under N.J.S.A. 47:1A-3.

## DISCUSSION

### I. Whether the Court Should Compel Disclosure of the Requested Records under OPRA

OPRA provides that for all “public agencies,” “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions . . . .” N.J.S.A. 47:1A-1. The purpose of OPRA “is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.” Times of Trenton Publ’g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor’s Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). Public policy requires courts to narrowly construe OPRA’s limitations on the right to access government records. Times of Trenton, supra, 183 N.J. at 535; Libertarian Party of Cent. N.J. v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006). When a Plaintiff challenges an agency’s denial of access to records, the burden to show that the denial was justified rests with the defendants. N.J.S.A. 47:1A-6.

Consistent with the policy of maximizing public knowledge about public affairs and promoting an informed citizenry, OPRA defines a “government record” very broadly. Accordingly, a government record includes:

any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file . . . or that has been received in the course of his or its official business. . . .

[N.J.S.A. 47:1A-1.1].

However, OPRA constricts this general definition by naming twenty-one classes of records that are deemed “confidential” and exempt from the definition of “government records.” Id.; Mason v. City of Hoboken, 196 N.J. 51, 65 (2008). Given this statutory scheme, courts have recognized that analysis of an OPRA claim involves a two-step inquiry. The first question is “whether the requested documents meet the statutory definition of government record.” Wilson v. Brown, 404 N.J. Super. 557, 571 (App. Div.), certif. denied, 198 N.J. 473 (2009). If so, the remaining question is “whether any exemption established in or recognized by any other law bars disclosure of the requested documents.” Ibid.

Here, the parties do not dispute that the Office of the Governor is a public agency as defined in N.J.S.A. 47:1A-1.1 and is subject to OPRA’s requirements. The dispute in this case centers on whether the records at issue are protected as confidential under OPRA’s ongoing investigation exemption. The Office of the Governor also claims that a sub-set of responsive records are protected by the deliberative process privilege recognized under OPRA and by the common law. The court will consider each argument in turn.

#### **A. The Ongoing Investigation Exemption Does Not Protect the Requested Records**

The Office of the Governor argues that because the documents at issue are being considered as part of an ongoing investigation, the records requested by The Star-Ledger are protected under OPRA’s exemption for records pertaining to an investigation in progress. The Star-Ledger argues that the requested records were created prior to the start of any purported investigation, so OPRA’s ongoing investigation privilege does not bar disclosure of the records. The court’s *in camera* review of the documents and the certification of Andrew McNally, Custodian of Records for the Office of the Governor, confirms that the documents were created prior to the initiation of any investigation.

OPRA provides an exemption for records relating to an investigation in progress. Specifically, OPRA states, “[W]here it shall appear that the record or records . . . shall pertain to an investigation in progress by any public agency, the right of access . . . may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest.” N.J.S.A. 47:1A-3(a). However, “this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.” Ibid. Therefore, to be protected by this exemption, records must meet the following three requirements: (1) the records must pertain to an investigation in progress, (2) the release of the records must be “inimical to the public interest,” and (3) the record must have been created after the investigation began. See Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 366 (App. Div. 2003) (“If [the record] was a public record when created, then it would remain accessible to the public under N.J.S.A. 47:1A-3(a) even if its release would be inimical to the public interest.”); Asbury Park Press v. Lakewood Twp. Pol. Dept., 354 N.J. Super. 146, 158 (Law Div. 2002) (“In order to find a basis to deny access to the [records], the court must find both that they pertain to an investigation and that their release would be inimical to the public interest.”); N. Jersey Media Grp. v. City of Garfield, No. BER-L-1274-12, 2012 N.J. Super. Unpub. LEXIS 578, at \*14 (Law Div. Mar. 16, 2012) (setting forth the three elements required to meet the exception).

The Star-Ledger argues that the records at issue here are not privileged because they were created prior to any investigation. The Star-Ledger relies on a pair of Appellate Division cases in support of this argument. Serrano, *supra*, 358 N.J. Super. at 355; Courier News v. Hunterdon Cnty. Prosecutor’s Office, 358 N.J. Super. 373, 375 (App. Div. 2003). In Serrano, a newspaper filed an OPRA request seeking a copy of a 911 call from South Brunswick Township. Ibid. The

call at issue was placed prior to a murder committed by the defendant who was later charged with the crime. Id. at 356. The Township denied the request, relying on the prosecutor's assertion that the release would interfere with its ongoing investigation. Ibid. After the request was denied, the newspaper filed a complaint with the Government Records Council ("GRC"), which found that the record was subject to disclosure under OPRA. Id. at 360–61. The defendant's request for a stay was denied, prompting the defendant to seek a stay in the Appellate Division. Id. at 361–62. The Appellate Division found that if the tape was originally a public record, made prior to the criminal incident underlying the investigation, then the Township could have disclosed it prior to the start of the investigation. Id. at 366. For that reason, the Appellate Division noted that public records do "not become retroactively confidential." Id. at 367. The court further found that the public had a greater interest in release of the tape than in its protection, declaring that any inconveniences to the prosecutor caused by release of the tape—such as difficulties in impaneling a jury requiring a possible change of venue—did not make such a release "inimical to the public interest." Ibid.

Another 911 tape was requested under OPRA in Courier News, supra, 358 N.J. Super. at 375. The prosecutor's office denied that request under N.J.S.A. 47:1A-3(a) because it would make finding an impartial jury more difficult and would likely cause juror confusion. Id. at 376. The plaintiff filed a complaint in lieu of prerogative writs challenging the OPRA denial. Id. at 377. The trial court stayed disclosure, finding incorrectly that the newspaper was seeking a mandatory preliminary injunction. Ibid. The trial court applied the factors set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), and concluded that the newspaper did not show irreparable harm. On appeal, the Appellate Division evaluated the case under OPRA. Id. at 378. The court initially noted that the 911 tape had been obtained by the defendant prosecutor's office over a

year before the OPRA request. Id. at 381. The Appellate Division held in favor of the plaintiff newspaper because to protect the records now “would seal every government record associated with a criminal investigation until the trial has been completed and all potential appeals have been exhausted. Such a prospect would directly contravene the citizen’s right of access to government records embodied in OPRA.” Ibid.

Here, the records at issue were created prior to the initiation of any investigation. The denial of access issued by the Governor’s Office does not say anything about the nature of the investigation, the investigatory body, or even the target or targets of the investigation. The letter denial further did not state whether the investigation was criminal or civil. A review of the documents themselves, which were submitted for *in camera* review, reveals nothing about an ongoing investigation. The documents at issue here are therefore like the 911 tapes reviewed in Serrano and Courier News because the communications occurred prior to the investigation. The Governor’s Office cannot retroactively seek to protect the documents because, under these Appellate Division precedents, the documents would otherwise be in the public domain absent the initiation of an investigation.

The Office of the Governor argues that, despite the fact that the records were created prior to the start of an investigation, the records should be protected because their disclosure would be “inimical to the public interest.” N.J.S.A. 47:1A-3(a). While the court in Serrano concluded that the key fact was whether the document was created prior to the investigation and suggested that disclosure could not be blocked even if access would harm the public interest, Serrano, supra, 358 N.J.Super. at 366, the Appellate Division in Courier News, supra, 358 N.J.Super. at 381, stated that a requestor seeking documents claimed to be protected by the ongoing investigation privilege under OPRA would have to show both that the document was



created prior to the start of the investigation and that release of the document would not harm the public interest. Given the divergence in precedents on this point (the decisions were handed down almost contemporaneously with each other), the court will consider the argument made by the Office of the Governor that access to the documents at issue should be blocked solely because disclosure would be harmful to the public interest.

In support of its position, the Governor's Office argues that the confidentiality of investigations must be preserved to protect the subjects of the investigation. Such protection would be especially important if the investigation ends without any public indictment or other public action. Under those circumstances, keeping an ongoing investigation confidential would prevent the targets from suffering reputational harm by having their names associated with an investigation if no wrongdoing is found. The Office of the Governor is correct in asserting the importance of protecting the reputational interest of those who become the subjects of an investigation. See, e.g., State v. Clark, 191 N.J. 503, 512 (2007) (discussing the importance of confidentiality during an investigation of a municipal court judge to "protect judges from unfair allegations that may never lead to formal disciplinary charges"); State v. Doliner, 96 N.J. 236, 247 (1984) (quoting United States v. Procter & Gamble Co., 356 U.S. 677, 681 n.6 (1958)) (setting forth a number of reasons for confidentiality of grand jury materials, including the need "to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation"); State v. Stroger, 97 N.J. 391, 409 (1984) (explaining that the rationale behind confidentiality of attorney ethics investigations is to "protect the attorney in question from the potential unfavorable inferences that might accompany an ethics investigation"). However, the arguments of the Office of the Governor in favor of privacy are not persuasive here. The records themselves do not disclose the fact that any entity is conducting an ongoing

investigation. Furthermore, the certification provided to the court by Mr. McNally, Records Custodian for the Office of the Governor, does not explain in a meaningful way how releasing the documents would be inimical to the public's interest. In fact, it has been represented to the court that any investigation will be concluding soon with the bulk of the work already completed. So it is hard to understand how release of the documents now would compromise the efficacy of an ongoing investigation. In addition, since the documents themselves are part of an otherwise unidentified investigation, they cannot compromise any significant privacy interest protected by the exemption for ongoing investigations contained in OPRA. While release of the documents would undoubtedly fuel speculation about the nature and target of an ongoing investigation, such speculation is not sufficient to block release of the records here, just as speculation about the harm that could be caused to a criminal prosecution by release of the 911 tapes was insufficient to block their release in Serrano and Courier News.

Moreover, there is a valid public interest in disclosing the documents. The Star-Ledger has already raised concerns about the propriety of any role Ms. Renna may have played on the part of the Governor's Office in connection with the Pinelands Pipeline project. See Andrew Mills, *Resigned Christie staffer is married to Pinelands pipeline company exec*, NEWARK STAR-LEDGER, Feb. 3, 2014, [http://www.nj.com/politics/index.ssf/2014/02/resigned\\_christie\\_staffer\\_is\\_married\\_to\\_pinelands\\_pipeline\\_company\\_executive.html](http://www.nj.com/politics/index.ssf/2014/02/resigned_christie_staffer_is_married_to_pinelands_pipeline_company_executive.html). New Jersey courts have recognized "a newspaper's interest in 'keeping a watchful eye on the workings of public agencies.'" S. Jersey Publ'g Co. v. N.J. Expressway Auth., 124 N.J. 478, 487 (1991) (quoting Red Bank Register v. Bd. of Educ., 206 N.J. Super. 1, 9 (App. Div. 1985)). In light of the fact that the records themselves do not convey anything about an investigation, the Office of the Governor cannot cloak an otherwise public document in secrecy under the ongoing investigation

privilege. See N.J.S.A. 47:1A-3(a) (“[T]his provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.”); Serrano, supra, 358 N.J. Super. at 366. (“If [the record] was a public record when created, then it would remain accessible to the public under N.J.S.A. 47:1A-3(a) even if its release would be inimical to the public interest.”). Consequently, Defendant must turnover DOL008 through DOL016 to Plaintiff by October 10, 2014. Documents DOL001 through DOL007 are also claimed to be shielded from disclosure under the deliberative process privilege contained in both OPRA and the common law. That assertion is analyzed separately below.

**B. The Deliberative Process Privilege Protects Documents DOL001 through DOL007 from Disclosure**

Defendant argues that some of the responsive records are protected from disclosure by the deliberative process privilege. Under OPRA, an agency is permitted to deny public access to a document that contains “inter-agency or intra-agency advisory, consultative, or deliberative material.” N.J.S.A. 47:1A-1.1. Documents must meet a two-pronged standard to be protected by the deliberative process privilege. The document must first be “pre-decisional, i.e., generated before the adoption of an agency’s policy or decision.” Ciesla v. N.J. Dep’t of Health and Sr. Svcs., 429 N.J. Super. 127, 138 (App. Div. 2012) (internal citations omitted). If the documents are found to be pre-decisional, then a court is to consider whether the document or information at issue meets the definition of “deliberative, in that it contain[s] opinions, recommendations or advice about agency policies.” Ibid.

The advisory, consultative, or deliberative materials exemption was created in order to encourage free and open candor between government employees within an agency, to prevent government policies from being publicized before officially adopted, and to avoid the public

confusion that would result if information irrelevant to the agency's final decision were released. Educ. Law Ctr. v. Dept. of Educ., 198 N.J. 274, 286 (2009). It is "aimed at protecting the quality of government decisions by shielding the communications received by a decision maker from public disclosure." Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 219 (App. Div. 2005) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975)). This protection "is necessary to ensure free and uninhibited communication within governmental agencies so that the best possible decisions can be reached." Educ. Law Ctr., *supra*, 198 N.J. 274, 286. Documents protected by this exemption are therefore not considered government records subject to OPRA disclosures. N.J.S.A. 47:1A-1.1. See Ciesla, *supra*, 429 N.J. Super. at 143. Notably, the advisory, consultative, or deliberative exemption is unqualified, meaning that it is not subject to a balancing of interests. Rather, once a court is satisfied that the documents meet the two-pronged test, they are protected from disclosure. Ciesla, *supra*, 429 N.J. Super. at 144 ("By carving out deliberative materials from the definition of a 'government record,' the Legislature manifestly did not invite the GRC or courts to dilute that exclusion by undertaking a balancing of the requestor's asserted need against the privilege.").

Documents DOL001 through DOL007 are protected from disclosure by the deliberative process privilege. These documents are emails between government officials from the Board of Public Utilities and the Governor's Office considering the status of the pipeline project and discussing various alternatives for the processing of the application. Revealing this type of strategic communication among officials would reveal the government's decision-making process. Therefore, these documents are protected from disclosure by the deliberative process privilege. Since Documents DOL008 through DOL016 do not implicate the deliberative process privilege, they shall be provided to the plaintiff, as noted above.

## II. Whether the Court Should Compel Disclosure of the Requested Records under the Common Law Right of Access

The Star-Ledger also asserts that it is entitled to disclosure of the documents under the common law doctrine regarding access to public records. Because the court is ordering disclosure of Documents DOL008 through DOL016 under OPRA, the court will only consider common law disclosure with respect to documents DOL001 through DOL007, which the Office of the Governor claims are protected under the deliberative process privilege. See O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 387 (App. Div. 2009) (citing Asbury Park Press v. Cnty. Of Monmouth, 406 N.J. Super. 1, 4 (App. Div. 2009)) (“If disclosure is allowed under OPRA, the court should not reach the issue regarding the common law right.”).

Nothing contained in OPRA is to be construed as limiting the common law right of access to a government record. N.J.S.A. 47:1A-8. Thus, where disclosure of the information is warranted by the common law, “OPRA provisions cannot be invoked to defeat a citizen’s right of access.” Bergen Cnty. Improvement Auth. v. N. Jersey Media Grp., Inc., 370 N.J. Super. 504, 510 (App. Div. 2004). In some instances, “[t]he common-law right of access conceivably can reach a wider array of documents than OPRA.” Ciesla, supra, 429 N.J. Super. at 145. However, “[i]n the absence of clear common law direction on the subject, a court engaged in this process may look to OPRA provisions as expressions of public policy on the question of public access to information.” Bergen Cnty., supra, 370 N.J. Super. at 510.

The Common Law Right of Access is governed by a three-part balancing test:

1. The records must be common-law public documents;
2. the person seeking access must establish an interest in the subject matter of the material; and
3. the citizen's right to access must be balanced against the State's interest in preventing disclosure.

[Keddie v. Rutgers, 148 N.J. 36, 49 (1997) (citations omitted).]

Under the first prong of the common law right of access test, the definition of a "public record" is broader than OPRA's definition of "government record." Mason v. City of Hoboken, 196 N.J. 51, 67 (2008). "Public records available for inspection under the common law include any records made by public officers in the exercise of their functions." Wilson v. Brown, 404 N.J. Super. 557, 581 (App. Div.), certif. den., 198 N.J. 473 (2009). They also include documents filed in a public office, and those that are in the possession of a public agency, but were prepared by a third party. Keddie, supra, 148 N.J. at 49.

To satisfy the second prong of the test, the "interest" of the party seeking the records can be either "a wholesome public interest or a legitimate private interest." Higg-A-Rella v. Cnty. of Essex, supra, 141 N.J. at 46. That interest need not be "purely personal." Irval Realty, Inc. v. Bd. of Pub. Util. Comm'rs, 61 N.J. 366, 372, (1972). Instead, the interest can be "[a]s one citizen or taxpayer out of many, concerned with a public problem or issue, [such that the citizen] might demand and be accorded access to public records bearing upon the problem, even though his individual interest may [be] slight." Ibid. (citations omitted). For example, a newspaper's interest in "keep[ing] a watchful eye on the workings of public agencies" is sufficient to accord standing under the common law. Red Bank Register v. Bd. of Educ., 206 N.J. Super. 1, 9 (App. Div.1985) (quoting Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978)); see also Michelson v. Wyatt, 379 N.J. Super. 611, 624 880 A.2d 458 (2005) (noting that plaintiff's

interest in identifying waste and fraud was “sufficient to support his common law right,” but holding that plaintiff’s interest was “outweighed by the privacy interests of City officials, employees, and retirees”).

The third and final factor requires a court to balance the plaintiff’s interest against the public’s interest in confidentiality and nondisclosure. In conducting this balancing test, the court must examine several factors to determine the public interest in confidentiality:

(1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decision-making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual’s asserted need for the materials.

[Loigman v. Kimmelman, 102 N.J. 98, 113 (1986)]

Where “reasons for maintaining a high degree of confidentiality in the public records are present, even when the citizen asserts a public interest in the information, more than [the] citizen’s status and good faith are necessary to call for production of the documents.” Loigman, supra, 102 N.J. at 105–06. In cases where the deliberative process privilege is invoked, “[o]nce the government demonstrates that the subject materials meet [the] threshold requirements” of the privilege—that the materials are pre-decisional and deliberative in nature—then “the government’s interest in candor is the ‘preponderating policy’ and, . . . the balance is said to have been struck in favor of non-disclosure.” In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 85 (2000). Therefore, “[o]nly in ‘exceptional’ cases will it be deemed consistent

with the public interest to compel an agency to produce inter- or intra-agency advisory [material].” Ciesla, *supra*, 429 N.J. Super. at 146 (quoting Integrity, *supra*, 165 N.J. at 85).

The first two factors are not in dispute in this case. The parties agree that the records at issue are government records, and it is not disputed that The Star-Ledger has a valid interest in obtaining the records. The dispute centers on whether The Star-Ledger’s need for the records outweighs the Office of the Governor’s interest in maintaining confidentiality of the documents. Because the Office of the Governor filed their opposition brief and supporting documents ex parte and under seal, The Star-Ledger has not been given access to the privilege log submitted by the Office of the Governor. Consequently, The Star-Ledger has not been given an opportunity to respond to the Office of the Governor’s deliberative process privilege argument. Nonetheless, The Star-Ledger’s moving brief does raise the right to access the documents under the common law right to know and articulates The Star-Ledger’s interest in the documents. The Star-Ledger relies on a newspaper’s interest in “keep[ing] a watchful eye on the workings of public agencies.” S. Jersey Publ’g, *supra*, 124 N.J. at 487. The Star-Ledger specifically argues that they have a substantial journalistic interest in informing the public about the proposed South Jersey Gas Pipeline.

While the court agrees that the newspaper has a journalistic interest in the proposed South Jersey Pipeline, The Star-Ledger’s interest is not strong enough to overcome the compelling interest of the Office of the Governor in keeping its internal decision-making deliberations confidential. After reviewing the responsive records *in camera*, it is apparent that Documents DOL001 through DOL007 include strategic communications among government officials in which the officials are weighing the pros and cons of various scenarios. To disclose the documents would reveal the factors government officials considered in their decision-making.



The deliberative process privilege is aimed at protecting precisely the type of communication contained in the documents here. If the court were to require disclosure, it would chill similar frank communication among government officials. The Star-Ledger's interest is therefore not "exceptional" enough to warrant requiring the Office of the Governor to breach the deliberative process privilege to release Documents DOL001 through DOL007. Plaintiff's application for disclosure of these documents is thus denied.

As a partially prevailing party, however, Plaintiff is entitled to a counsel fee award. The parties shall negotiate in an effort to resolve the amount of the fee without further court involvement. The order issued by the court provides a schedule for motion practice on this issue if the parties are unable to resolve the matter on their own.