January 27, 2016

VIA OVERNIGHT MAIL
Hon. Barry P. Sarkisian, J.S.C.
Superior Court of New Jersey
595 Newark Avenue
Jersey City, New Jersey 07306

Re: ***John Paff v. City of Bayonne, et al.***
Our File No.: 9932-007

Dear Judge Sarkisian:

This firm represents Plaintiff John Paff in the above captioned matter. Please accept this letter brief, in lieu of a more formal brief, in support of Plaintiff's application for an Order to Show Cause seeking relief from Defendants' violations of the Open Public Records Act ("OPRA") and the common law, identified in the Verified Complaint and discussed in detail below.

PRELIMINARY STATEMENT

As a life-long open government activist, Plaintiff John Paff is concerned with lack of transparency in government operations. Mr. Paff submits several OPRA requests each year and publishes the information on his websites or drafts editorial pieces on various transparency issues. One topic that especially interests Mr. Paff is lawsuits against government agencies filed by their employees and the settlement agreements pertaining to those lawsuits, as this not only implicates unlawful conduct on the part of the government agency which gave rise to the lawsuit, but also the spending of public tax dollars to settle those lawsuits. More recently, however, Mr. Paff has noticed that government agencies will agree to terms of settlement with the former employee, but take several months to actually sign the settlement agreement (or occasionally never sign the agreement at all). The government agencies then deny his OPRA

requests on the grounds that no settlement agreement has been reached, even though this technically is not true.

To bypass these stall tactics, and provide for more prompt public access to the terms of government settlement agreements, Mr. Paff submitted OPRA requests to Bayonne for government records, such as emails or other correspondences, which reflect the terms of the settlement that was agreed to in two civil lawsuits, but which had not yet been put into a formal writing. Mr. Paff's record requests made it very clear that he was only requesting records that had been transmitted between Bayonne and the opposing party in each lawsuit, and not internal communications between Bayonne and its attorneys and insurers. Nevertheless, even though any responsive records to Mr. Paff's requests were necessarily transmitted between adverse parties in a lawsuit, Defendants perplexingly claim that these records are exempt pursuant to the attorney-client privilege or deliberative process privilege. Those exemptions are only applicable to *internal* records meant to be kept confidential within the agency and its agents (i.e. attorneys). Defendants' response also contravenes OPRA because they declined to even inform Mr. Paff what responsive records they possess, and the specific lawful basis for denying access to each of those records. Therefore, Mr. Paff, as well as this Court, is deprived of any meaningful opportunity to properly assess Defendants' assertion of exemption.

For the reasons argued below, this Court should find Defendants in violation of OPRA and grant Mr. Paff's application for an Order to Show Cause. This Court should also order Defendants to produce a Vaughn Index so their assertions of exemption can be properly assessed by Mr. Paff and this Court.

STATEMENT OF FACTS

On October 20, 2015, Mr. Paff submitted a records request pursuant to OPRA and the common law right of access to Defendants pertaining to two cases filed against Bayonne by former employees of the City: Glunk v. City of Bayonne, 2:15-cv-01908, and Rios v. City of Bayonne, 2:12-cv-04716 (collectively the "Bayonne Lawsuits."). Mr. Paff requested the following records for each case:[1]

> 1. The most recently amended complaint filed by the Plaintiff. If the complaint was not amended, then please provide the original complaint.
>
> 2. The agreement that sets forth the terms and amount of settlement, i.e. the "settlement agreement" related to this case.
>
> 3. If your agency, in its response to #2 above, provides me with the settlement agreement, then you may ignore this paragraph of my request. Otherwise, after reading the "Statement" below, please send me all informal agreements, draft agreements, correspondence, e-mails etc. related to this case that disclose the settlement amount and/or any other settlement terms. I do not want internal communications between your agency and/or its insurer and/or its attorneys. Rather, I want the informal agreements, draft agreements, correspondence, e-mails etc. exchanged between a) your agency and/or its agents/attorneys/insurers and b) the Plaintiff and/or his or her agents/ attorneys/insurers.
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> [See Verified Complaint, Exhibit A.]

The "Statement" at the bottom of Mr. Paff's request explained to Defendants that he was requesting these records because he operates a blog which is dedicated to informing the public about settlements in lawsuits against local government officials and employee. Newspapers and journalists often learn about government settlements from Mr. Paff's blog and publish articles notifying the public about those settlements. [Exhibit A.] Mr. Paff also asked Defendants to

[1] Mr. Paff submitted a separate OPRA request for each of the two Bayonne Lawsuits, but the same records were requested with respect to each of the Bayonne Lawsuits. Since the language of each requests is identical (except for the name of the case), it has only been set forth herein once in the interest of brevity.

describe each document and provide the basis for denial if they chose to deny access to any records that were responsive to his request. [Ibid.]

Pursuant to documents obtained by Mr. Paff on PACER, the terms of proposed settlement agreements between the parties in the Bayonne Lawsuits had been approved by Bayonne on September 24, 2015, which is prior to the date Mr. Paff submitted his OPRA requests. However, although the terms of both settlement agreements were final and agreed upon, they had not actually executed a formal written settlement agreement as of the date of Mr. Paff's record requests. [See Verified Complaint, Exhibit B.]

On October 22, 2015, Mary Beth Golden ("Golden"), the records custodian of Bayonne, responded to Mr. Paff's OPRA requests, stating that Bayonne would need an addition two weeks to respond, "due to the temporary influx of OPRA requests and limited municipal resources, an due to the nature and extent of the records you seek." [See Verified Complaint, Exhibit C.] On November 9, 2015, William Opel ("Opel"), Assistant Corporation Counsel to Bayonne, emailed Mr. Paff with regard to his OPRA requests. Opel provided the most recently amended complaints for the Bayonne Lawsuits that were responsive to Item 1 of Mr. Paff's requests. Opel explained, however, that access was denied with regard to Items 2 and 3 of Mr. Paff's requests, stating:

> At this time, no settlement agreement has been reached in either case. Any correspondence, electronic or otherwise, between counsel for the City and counsel for the plaintiffs would be exempt from disclosure under both the attorney client privilege and the deliberative material exemptions.
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> [See Verified Complaint, Exhibit D.]

No Vaughn Index or similar index was provided. As of the date of this filing, Defendants have not produced any records responsive to Items 2 and 3 of Mr. Paff's OPRA requests.

LEGAL ARGUMENT

I. DEFENDANTS HAVE VIOLATED OPRA BY UNLAWFULLY DENYING ACCESS TO GOVERNMENT RECORDS

OPRA reflects New Jersey's "history of commitment to public participation in government" and its "tradition favoring the public's right to be informed about governmental actions." South Jersey Pub. Co. Inc. v. N.J. Expressway Auth., 124 N.J. 478, 486-87 (1991). The statute's "purpose is 'to maximize public knowledge about public affairs and to minimize the evils inherent in a secluded process.'" Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (quoting Lakewood Residents Assoc., Inc. v. Twp. of Lakewood, 294 N.J. Super. 207, 225 (Law Div. 1994)). A citizen's right to access public records has been deemed "unfettered" absent a statutory exemption. Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003). Accordingly, pursuant to OPRA,

> 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 [OPRA] shall be construed in favor of the public's right of access**. . . .
>
> [N.J.S.A. 47:1A-1 (emphasis added).]

It is solely the public agency's burden to prove that denial of access is authorized by law. N.J.S.A. 47:1A-6.

A. The Records Requested by Mr. Paff are "Government Records" Subject to OPRA

Under OPRA, the first question to be addressed is whether the requested records are, in fact, government records. OPRA broadly defines the term to include:

> [A]ny 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 in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof.
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> [N.J.S.A. 47:1A-1.1.]

This definition of "government records" undoubtedly applies to the records which are the subject of Mr. Paff's OPRA requests, as these settlement agreements and correspondences were "made, maintained or kept on file in the course of [the Defendants'] official business." N.J.S.A. 47:1A-1.1. See also McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 615 (App. Div. 2010)("As is the case with all other forms of communication, e-mails fall within the scope of [N.J.S.A. 47:1A-1.1.]."). Moreover, our Supreme Court has unequivocally held that settlement agreements are government records that must be produced pursuant to OPRA. Asbury Park Press v. Cty. of Monmouth, 201 N.J. 5, 7 (2010).

II. THIS COURT SHOULD ORDER DEFENDANTS TO PREPARE A VAUGHN INDEX AND REVIEW THE RESPONSIVE RECORDS *IN CAMERA*

Even if they believe that records requested are exempt pursuant to OPRA or some other law, a government agency is still required to inform the requestor which responsive records the agency has in their possession and the specific lawful basis for withhold each record. Section 5(g) of the statute specifically states "[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor. . . ." N.J.S.A. 47:1A-5(g). When an agency denies an OPRA request, "the reasons for withholding documents must be specific. Courts will 'simply no longer accept conclusory and generalized allegations of exemptions ... but will require a relatively detailed analysis in manageable segments.'" Newark Morning Ledger

Co. v. New Jersey Sports & Exposition Authority, 423 N.J. Super. 140, 162 (App. Div. 2011)(quoting Loigman v. Kimmelman, 102 N.J. 98, 110 (1986)). By failing to identify the specific basis on which each record was withheld, Defendants violated Section 5(g) of the statue.

The Court should order Defendants to prepare a Vaughn Index describing the documents responsive to Plaintiff's request and the bases on which they have been withheld. "The purpose of a Vaughn Index is not only to facilitate the decision-maker's review of government records to determine whether they contain privileged material ***but also to provide the party seeking disclosure with as much information as possible to use in presenting his case.***" Fisher v. Div. of Law, 400 N.J. Super. 61, 76 (App. Div. 2008) (citing Halpern v. FBI, 181 F.3d 279, 291 (2d Cir. 1999)(emphasis added). A Vaughn Index is especially necessary in circumstances where it is evident that some of the information may not in fact be privileged or exempt from access. Paff v. Div. of Law, 412 N.J. Super. at 161. Likewise, "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.)

Here, Defendants issued what is tantamount to a blanket denial of access, and without identifying the responsive records in their possession and the specific basis for withholding that record, Mr. Paff is constructively deprived of his statutory right to challenge that denial of access on a record-by-record basis. N.J.S.A. 47:1A-6. Likewise, without knowing exactly what records Defendants have denied access to and the specific basis for denying access to each record, this Court would have no basis to conclude that Defendants have met their burden under Section 6 "of proving that the denial of access is authorized by law." A Vaughn Index is also especially

necessary in the instant matter because, as will be demonstrated below, there is a substantial likelihood that Defendants have denied access to records that are not privileged or exempt from public access. Paff v. Div. of Law, supra, at 161. For example, Defendants have asserted that the requested records are exempt pursuant to the attorney-client privilege even though those records were voluntarily transmitted by Bayonne to the opposing party in the Bayonne Lawsuits (the "Bayonne Plaintiffs"), and therefore most certainly are no longer protected communications. See supra, Point III. Accordingly, this Court should order that Defendants produce a Vaughn Index and review the disputed records *in camera* in order to accurately assess Defendants' claims of exemption.

III. THE REQUESTED RECORDS ARE NOT EXEMPT PURSUANT TO THE ATTORNEY-CLIENT PRIVILEGE

The records requested by Mr. Paff cannot be exempt pursuant to the attorney client privilege because each responsive record was transmitted to the adverse plaintiff in each of the Bayonne Lawsuits. "A government record may be excluded from disclosure by other statutory provisions or executive orders, … or exempt from disclosure due to a recognized privilege or grant of confidentiality established in or recognized by the State Constitution, statute, court rule, or judicial decision." O'Boyle v. Borough of Longport, 218 N.J. 168, 185 (2014)(citing N.J.S.A. 47:1A–9(a-b)). "The attorney-client privilege is a recognized privilege that may shield documents that otherwise meet the OPRA definition of government record from inspection or production." Id. "Specifically, the attorney-client privilege generally applies to communications (1) in which legal advice is sought, (2) from an attorney acting in his capacity as a legal advisor, (3) and the communication is made in confidence, (4) by the client." Hedden v. Kean Univ., 434 N.J. Super. 1, 10 (App. Div. 2013). Nevertheless, "the attorney-client

privilege is ordinarily waived when a confidential communication between an attorney and a client is revealed to a third party." O'Boyle, 218 N.J. at 186. "Despite the importance of the privilege, it should be construed strictly." Paff v. Div. of Law, 412 N.J. Super. at 150. Furthermore, under New Jersey law, "the privilege applies only if the asserted holder of the privilege is or sought to become a client." George v. Siemens Indus. Automation, Inc., 182 F.R.D. 134, 139 (D.N.J. 1998).

However, the attorney-client privilege is not absolute, and can be waived if supposedly privileged materials or communications are disclosed to or made in the presence of a third party who is not part of the attorney/client relationship, or are not intended by the client to be kept confidential. In Paff v. Div. of Law, an OPRA request was submitted for informal Administrative Agency Advice letters issued by the Attorney General to subordinate government agencies; the court needed to address whether these advice letters were exempt pursuant to the attorney-client privilege. 412 N.J. Super. at 144. The court held that their existed an attorney/client relationship between the Attorney General and the subordinate government agencies, and therefore the specific advice letters that were requested were exempt pursuant to the attorney/client privilege. Id. at 158. Nevertheless, the court took notice that the privilege had been waived with regard to any letter that had been released to the public. Id. at 146 ("Division clients waived the attorney-client privilege by releasing the [advice letters] to the public or posting them on agency websites."). Similarly, in State v. Gosser, the court held a conversation between an attorney, and husband and wife was not privileged because the attorney only represented the wife at the time the conversation took place. 50 N.J. 438, 387 (1967). Simply put, "the privilege which attaches to a confidential communication between an attorney and client is waived when the substance of

that communication is related to a non-privileged party." Sicpa North America, Inc. v. Donaldson Enterprises, Inc., 179 N.J. Super. 56, 64 (App. Div. 1981)(citations omitted).

The privilege is also waived if the communication was not intended by the client to be kept confidential. In Sicpa North America, the court recognized that "it is the element of confidentiality which waiver destroys and such is the case ***where the communication is intended by the client to be revealed to a third person***; the element of confidentiality is destroyed, and with it the attorney-client privilege is waived." 179 N.J. Super. 56, 61 (App. Div. 1981)(emphasis added); see also Trenton Street Ry. Co. v. Lawlor, 74 N.J. Eq. 828, 831-32 (E. & A. 1908)(Client directing his attorney to settle a lawsuit was not a privileged communication).

Here, Mr. Paff's request *only* pertained to communications and materials "between a) [Bayonne] and/or its agents/attorneys/insurers and b) the [Bayonne] Plaintiff[s] and/or his or her agents/attorneys/insurers." (See Verified Complaint, Exhibit A.) The request further specified that Mr. Paff "[did] not want internal communications between your agency and/or its insurer and/or its attorneys." (Id.)[2] Otherwise put, pursuant to the terms of Mr. Paff's request, any responsive record was necessarily transmitted between Bayonne and the Bayonne Plaintiffs. Moreover, there is no attorney-client relationship between the Bayonne Plaintiffs and Bayonne itself—they are adversaries. Accordingly, the records requested by Mr. Paff are not encompassed by the attorney client privilege.

IV. THE REQUESTED RECORDS ARE NOT EXEMPT PURSUANT TO THE DELIBERATIVE PROCESS PRIVILEGE

Defendants also incorrectly assert that any responsive records would be exempt pursuant to the deliberative process privilege. OPRA exempts "inter-agency or intra-agency advisory,

[2] Internal communications would likely be covered by the attorney-client privilege, but these types of communications are not at issue in the present matter because Mr. Paff did not request those records.

consultative or deliberative material;" this exemption has been construed and understood to encompass the "deliberative process privilege" which is rooted in the common law. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 284-85 (2009). Once it is established that the record at issue is inter-agency or intra-agency, the court must next conduct a two-step inquiry in order to determine if the privilege is applicable. First, a court must determine whether the document is "pre-decisional," meaning that it was generated prior to the adoption of the agency's policy or decision." Id. at 286. Second, a court must evaluate whether the document is "deliberative" in that it "contain[s] opinions, recommendations, or advice about agency policies." Ibid. (internal quotation marks and citation omitted). While draft documents may be exempt pursuant to this provision, the deliberative process privilege is not applicable to the records requested by Mr. Paff for at least three (3) reasons.

A. Communications Between Defendants and the Bayonne Plaintiffs are not Inter-agency or Intra-agency Communications

The deliberative process privilege is inapplicable to the requested records because the Bayonne Plaintiffs are not a "public agency." By its own terms, OPRA makes it quite clear that the deliberate process exemption only applies to "inter-agency or intra-agency" materials. N.J.S.A. 47:1A-1.1. When the record in question is not inter-agency or intra-agency, the privilege simply is not applicable. See Grand Cent. Partnership, Inc. v. Cuomo, 166 F.3d. 473, 484 (2d Cir. 1999)(FOIA deliberative process privilege[3] (which closely tracks that of OPRA) was not applicable to New York City Councilman because he was not an "agency" as defined by FOIA). OPRA broadly defines "public agency" to include:

[3] Our courts frequently turn to case law addressing federal deliberative process privilege for guidance in interpreting that privilege under OPRA. Educ. Law Cntr., 198 N.J. at 285 ("Our courts have turned to federal deliberative process jurisprudence, where such law chiefly has developed, for guidance in ascertaining the scope of OPRA's deliberative process exemption.")

> any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.
>
> [N.J.S.A. 47:1A-1.1.]

Here, it cannot be disputed that the Bayonne Plaintiffs do not fit within this definition, and therefore any communication between Defendants and the Bayonne Plaintiffs cannot be considered inter-agency or intra-agency. Indeed, each of the Bayonne Lawsuits was commenced by an individual acting in his or her individual capacity in positions adversarial to Bayonne. Accordingly, the deliberative process privilege is not applicable to the records requested by Mr. Paff.

B. Defendants Waived Their Deliberative Process Privilege by Disclosing the Requested Records to the Bayonne Plaintiffs

Even if this Court finds that any of the requested records were covered by the deliberative process privilege at some point, Defendants waived that privilege by disclosing those records to the Bayonne Plaintiffs. Our courts have recognized that the deliberative process privilege is "necessary to ensure free and uninhibited communication ***within governmental agencies*** so that the best possible decisions can be reached." Educ. Law. Ctr., 198 N.J. at 286 (emphasis added.). But once a supposedly privileged communication or material is taken outside of a public agency and made known to a member of the public the element of confidentiality longer exists and the

privilege is waived. In Center for Auto Safety v. Dep't of Justice, the court was required to address the issue of whether pre-decisional records transmitted between adverse parties in a Consent Decree case would be encompassed by the deliberative process privilege. 576 F.Supp. 739, 746-47 (D.C. Cir. 1983), vacated in part on other grounds, 1983 WL 1955 (D.C. Cir. July 7, 1983). More specifically, the records at issue "were prepared by agency personnel and consisted of draft Consent Decrees with agency comments thereon and accompanying memoranda discussing mental impressions and views of various agency personnel." Id. The court held that "while these documents may at one time have been used for internal advisory purposes and would therefore be protected, ***when the DOJ elected to use them as tools in their negotiations with the public [the defendants] they lost their internal status***, and their qualification for Exemption 5."[4] Id. at 747 (alterations in original)(emphasis added). The court even recognized that "disclosure of these documents may arguably stifle consent decree negotiations," but ultimately concluded that it "must hold that those documents prepared by and disclosed or transmitted to the Consent Decree defendants are no longer 'inter-agency or intra-agency' documents and are beyond the scope of protection of Exemption 5." Id. at 748.

Here, all the records that were requested by Mr. Paff were transmitted between Defendants and the Bayonne Plaintiffs in the course of settlement negotiations, and therefore Defendants have waived the protected internal status of those records. Consistent with the reasoning of the court in Center for Auto Safety v. Dep't of Justice, which held that under nearly identical circumstances to the present matter that the government agency had waived their deliberative process privilege by disclosing the records to an adverse party in the course of settlement negotiations, while some of the records at issue "may at one time have been used for

[4] For reference, "Exemption 5" refers to the deliberative process privilege of FOIA.

internal advisory purposes and would therefore be protected," Bayonne waived that privilege "when [Bayonne] elected to use them as tools in their [settlement] negotiations with the [Bayonne Plaintiffs.]" 576 F.Supp. 739 at 747. Accordingly, Defendants have waived any deliberative process privilege that could have been asserted over the responsive records.

C. The Requested Records are not Pre-decisional and do not Contain Opinions, Recommendations, or Advice About agency Policies.

Notwithstanding that Mr. Paff has amply demonstrated that the requested records cannot be covered by the deliberative process privilege because they are not inter- or intra-agency communications, and that Defendants waived any privilege which may have existed by disclosing the requested records to the Bayonne Plaintiffs, Defendants' assertion that the requested records are exempt pursuant to the deliberative process privilege must also fail because Defendants cannot establish the necessary elements to assert the privilege in the first place. In determining whether the deliberative process privilege applies, courts must 1) determine whether the document is "pre-decisional," meaning that it was generated prior to the adoption of the agency's policy or decision; and 2) evaluate whether the document is "deliberative" in that it "contain[s] opinions, recommendations, or advice about agency policies." Educ. Law Ctr. 198 N.J. at 286. With regard to Factor 1, "even if the document is pre-decisional at the time it is prepared, it can lose that status if it is adopted, formally ***or informally***, as the agency position on an issue or is used by the agency in its dealings with the public." Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d. 854, 866 (D.C. Cir. 1980)(emphasis added). With regard to Factor 2, the court's determination as to whether the document is deliberative in nature turns on "[(1)] the document's nexus to the decision-making process and [(2)] its ***capacity to expose the agency's deliberations*** during that process." Educ. Law Ctr. 198 N.J. at 297(emphasis added).

Here, the records requested by Mr. Paff fail to meet either of these two criteria. First, while it is true that the settlement agreements in both Bayonne Lawsuits have not actually been signed, there is no reason to doubt that the terms of both settlement agreements have been adopted by Bayonne, albeit informally. See Coastal States Gas Corp. supra, at 866 (document "can lose [predecisional] status if it is adopted, formally ***or informally***…")(emphasis added). Pursuant to letters from counsel for the Bayonne Plaintiffs to the respective court in each lawsuit, Bayonne had communicated that the terms of the proposed settlements had been accepted. (See Verified Complaint, Exhibit B.) Therefore, the records are not pre-decisional in nature because Bayonne had already adopted a position and agreed upon a settlement.

Furthermore, Defendants claim of exemption must also fail because they cannot establish that the records are deliberative in nature and contain opinions, recommendations or advice about an agency decision. Being mindful that any responsive record to Mr. Paff's request *must* have been transmitted between Bayonne and the Bayonne Plaintiffs, two adverse parties in a lawsuit, it is certainly puzzling as to why Defendants would reveal their internal deliberative materials, that contain internal advice and recommendations on how to proceed with the settlement negotiation, which would likely reveal negotiation strategy, to the party they are actively negotiating with. It is simply implausible that Defendants would send the Bayonne Plaintiffs any material which would reveal their internal decision making process. Accordingly, no responsive records are deliberative in nature.

V. MR. PAFF HAS A RIGHT TO THE REQUESTED RECORDS UNDER THE COMMON LAW

At common law, a citizen has an enforceable right to require custodians of public records to make records available for reasonable inspection and examination. Irval Realty v. Bd. of Pub.

Util. Comm'rs, 61 N.J. 366, 372 (1972). Even where a plaintiff is denied access under OPRA, the documents may be available through the right to access under the common law. MAG Entertainment LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 543 (App. Div. 2005). The common law right to access a public record is determined by balancing the requestor's need for the record against the government's need for secrecy. Shuttleworth v. City of Camden, 258 N.J. Super. 573, 583 (App. Div. 1992). A requestor need not establish a personal interest as a public interest is sufficient. Id. Furthermore, our courts have recognized that citizens have "an ***unquestioned interest*** in ensuring that public funds . . . are being spent wisely.") Bergen County Imp. Authority v. North Jersey Media Group, Inc., 370 N.J. Super. 504, 523 (App. Div. 2004) (emphasis added).

In the instant matter, Mr. Paff's interest in the responsive records stems from the fact that he operates a blog which is dedicated to settlements in lawsuits by employees against government agencies, to which newspapers and journalists often turn to for information about the latest settlements agreements between government agencies and their employees, and publish articles about such settlements. (Verified Complaint, Exhibit A.); see also Home News v. State Dep't. of Health, 144 N.J. 446, 454 (1996) (**"**The press's role as the eyes and ears of the public generally is sufficient to confer standing on a newspaper that seeks access to public documents.")(internal quotations omitted). The fact that the press, who serves as the eyes and ears of the public, will have access to these records via Mr. Paff's blog, as well as Mr. Paff's (and by extension, the public's) "unquestioned interest" in ensuring that public funds are being used wisely and responsibly to settle lawsuits against the government demonstrate a compelling interest that these records be disclosed.

On the other hand, Bayonne's need for secrecy with regard to these requested records is greatly diminished by several factors. First, any responsive record has already been disclosed to a member of the public, namely the Bayonne Plaintiffs. Second, Bayonne has already approved the terms of the settlements that are subject of responsive records, albeit informally, and therefore the details surrounding the settlements in the Bayonne Lawsuits will inevitably become public once formally approved. (See Verified Complaint, Exhibit B.) Accordingly this Court should find that the public's interest in the records outweighs Bayonne's need for secrecy, and grant Mr. Paff access to the records they have requested under the Common Law.

CONCLUSION

For all of the foregoing reasons, Mr. Paff respectfully requests that the Court enforce his statutory rights by declaring Defendants in violation of OPRA and requiring them to prepare a Vaughn index. Because Mr. Paff will thus be a prevailing party under the statute, Mr. Paff further requests that the Court enter an Order granting reasonable attorneys' fees and costs of suit.

Respectfully Submitted,

CJ Griffin, Esq.