THE INNISFREE FOUNDATION, *Plaintiff,* v. CHERRY HILL BOARD OF EDUCATION AND JAMES DEVEREAUX, RECORD CUSTODIAN *Defendants.*	:	NEW JERSEY SUPERIOR COURT CAMDEN COUNTY LAW DIVISION CIVIL ACTION DOCKET NO.: CAM-L-3902-15 **OPINION**

John D. Rue, Esq., of the **Law Offices of John D. Rue** for Plaintiffs, Innisfree Foundation

Raina M. Pitts, Esq., of **Methfessel & Werbel, P.C.** for Defendants, Cherry Hill Board of Education and James Devereaux, Record Custodian.

Deborah Silverman Katz, A.J.S.C.

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INTRODUCTION

This action is brought under the Open Public Records Act (hereinafter "OPRA"), N.J.S.A. § 47:1A-1, et. seq., and common law right of access, through which Plaintiff, the Innisfree Foundation (hereinafter "Innisfree"),[1] requested settlement agreements from Defendants, Cherry Hill Board of Education (hereinafter "Board")[2] and its record custodian, James Devereaux (hereinafter "Devereaux").[3] Mr. Devereaux acknowledged Plaintiff's OPRA request, and in a

[1] The Innisfree Foundation is a non-profit organization of New Jersey, having its address at 40 South Fullerton Avenue, Montclair, New Jersey 07042. The Innisfree Foundation is herein referred to as "Plaintiff," "Requestor," or "Innisfree."

[2] The Cherry Hill Board of Education and Record Custodian James Devereaux are herein referred to as "Defendant," "Defendants," or may be referred to in their individual capacities.

[3] Defendant James Devereaux is the custodian of government records for the Cherry Hill Board of Education as defined by N.J.S.A. § 47:1A-1.1. The Cherry Hill Board of Education is a public school system that provides

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written correspondence, denied it. Defendant has withheld access to the settlement agreements, arguing that redactions would not reasonably protect its students' privacy under the Family Education Rights and Privacy Act (hereinafter "FERPA"), 20 U.S.C. § 1232g, et. seq., and New Jersey Public Records Act (hereinafter "NJ-PRA"), N.J.S.A. § 18A:36-19, et. seq.

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PROCEDURAL HISTORY

By letter dated August 14, 2015, Innisfree requested settlement agreements from Defendant. Twelve (12) days later, in a correspondence dated August 26, 2015, Mr. Devereaux denied Plaintiff's request.[4] Plaintiff filed its Verified Complaint on October 14, 2015, containing two counts, alleging: (1) a violation of OPRA, and (2) a violation of the common law right of access. Plaintiff avers that its interest in access to the requested records "arises out of the foundation's concern for special education programs of the children of its constituents who are classified as in need of special education services under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et. seq."[5,6] The Order to Show Cause was entered two days later on October 16, 2015.

By way of requested relief, Plaintiff asks for (1) copies of settlement agreements from the past two years that "[relate] to disputes between Cherry Hill School District and parents of students related to the provision of special education services;" (2) a complete *Vauhgn* index of any records

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education to children who live within the boundaries of Cherry Hill Township, having its address at 45 Ranoldo Terrace, Cherry Hill, New Jersey 08034.

[4] Although not raised as an issue, and thus not under consideration by the Court, Defendant's response was submitted five days past the seven day statutory deadline set by N.J.S.A. § 47:1A-1, et. seq.

[5] See Plaintiff's brief at p. 3.

[6] A requestor's reasoning for disclosure of documents are not required, nor are they contemplated by OPRA's provisions when those documents are deemed government records. See Gannett N.J. Partners, LP v. Cnty of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) (finding that a party who requests access to public records has a right in maintaining the confidentiality of its inquiry); See also N.J.S.A. § 47:1A-1, et. seq. Here, however, the Court does take interest in Plaintiff's inquiry, since it may implicate potentially identifiable information of Defendants' students.

determined to be withheld;[7] and (3) reasonable attorneys' fees and costs in accordance with N.J.S.A. § 47:1A-6. Defendant answered Plaintiff's Verified Complaint on December 11, 2015, largely denying the allegations, and arguing that it could not release the settlement agreements because redactions to those documents would not adequately protect its students' privacy under both FERPA and NJ-PRA.[8] On December 14, 2015, Plaintiff filed its Reply.

The return of the Order to Show Cause was heard on January 15, 2016, at which time the Court entertained oral argument. Attorneys for both parties personally appeared; this resulted in an Order entered on that same day, requiring Defendant to submit supplemental information as it related to the Board's student body.[9] The Court reserved decision. That decision is contained herein.

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FINDINGS OF FACT

Plaintiff is a non-profit organization that "assists New Jersey families of children with disabilities to obtain the best possible school experience, including but not limited to a free and appropriate public education."[10] Plaintiff's constituents are located throughout the state and include families that reside in Camden County. Mr. Devereaux, one of the named Defendants,

[7] A *Vaughn* index is a procedure utilized by courts to analyze, without exhaustive review, the essence of documents withheld and to determine whether a particular document or documents should be disclosed. Atlantic City Convention Ctr. Auth. v. S. Jersey Publ'g Co., 135 N.J. 53, 68 (1993). A *Vaughn* index "is used in circumstances where there is evidence that some of the documents may not in fact be privileged." Paff v. Div. of Law, 412 N.J. Super. 140, 161 (App. Div. 2010).

[8] In its letter dated August 14, 2015, Plaintiff's OPRA request was accompanied by limiting instructions stating the following: "To the extent that any such records contain personally identifiable information related to any individual student, please redact that personally identifiable information prior to disclosure."

[9] The Order mandated that the Defendant disclose the total number of students in the Cherry Hill School District, and the number of students enrolled in its special education programs.

[10] See Plaintiff's brief at p. 3.

serves in several roles on the Board's behalf; of primary importance to this litigation, he is the designated records custodian.[11]

The material facts relevant to this Court's analysis begin with Plaintiff's request for government records on August 14, 2015, which sought:

> All settlement agreements executed in the past two years and related to disputes between Cherry Hill School District and parents of students related to the provisions of special education services, where the counterparties were parents (or a single parent) of a child or children for whom special education services were or are either provided or sought. (Personally identifiable information may be redacted).

Plaintiff's request included the following limiting instructions:

> (1) To the extent that any such records contain personally identifiable information related to any individual student, please redact that personally identifiable information prior to disclosure.
> (2) To the extent that you assert that any requested records are exempted from disclosure under OPRA, and also unavailable under the common law right of access, please provide a complete Vauhgn index of such records, disclosing "sufficient detail to provide the requestor 'with as much information as possible to use in presenting his case' and to enable the 'decision-maker's review of governmental records to determine whether they contain privileged material.'" Paff v. Div. of Law, 412 N.J. Super. 140, 161 (App. Div. 2010).

Defendant acknowledged the requests, and in written correspondence dated August 26, 2015, denied them. In that denial, Mr. Devereaux advised Mr. Rue, attorney for Plaintiff, that "the District is denying its request based on the Government Records Council's 2012 final decision in Popkin v. Englewood Bd. Of Education,[12] which found [that] these [requested settlement] agreements are confidential records." Mr. Devereaux further stated that Plaintiff's request for a *Vaughn* index was also rejected, as "this is something prepared by order of the court on matters

[11] James Devereaux is the Assistant Superintendent and Business Administrator for the Cherry Hill Public School District.

[12] Popkin v. Englewood Bd. of Educ. Custodian of Records, is a Government Records Council case decided on December 18, 2012. It is, however, non-precedential. See N.J.S.A. § 47:1A-7(g).

which are [un]questionably protected and therefore your request for creation of same at this time is denied."[13]

At oral argument, counsel for Plaintiff acknowledged the sensitivity of the requested documents as they pertain to the privacy of the students and welcomed the redaction of all personally identifiable information as required by law.[14] Plaintiff's August 14, 2015, OPRA request indicated same: "To the extent that any such records contain personally identifiable information related to any individual student, please redact that personally identifiable information prior to disclosure."

Defendant contends that the entire document is protected under FERPA and the NJ-PRA, arguing that the release of any settlement agreements to the Plaintiff would be inappropriate as they may, in combination with other information, implicate the identities of the students within the Cherry Hill School District's special education program.[15] Put differently, Defendant argues that redactions would fail to cure any issues as they pertain to the identity of the students due to the "highly personal, individualized and sensitive information contained therein..."[16] Conversely, Plaintiff argues that FERPA and NJ-PRA do not attach to the entire documents sought, but rather, only to some of the information contained therein.

[13] See Defendant's letter dated August 26, 2015, denying Plaintiff's request.
[14] See, 34 C.F.R. § 99.3 in conjunction with 34 C.F.R. § 99.31(b)(1) (stating that student records must be clear of any "personally identifiable information" in order for them to be disclosable).
[15] See Defendant's opposition brief at pp. 18-20.
[16] See Defendant's opposition brief at p. 19.

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CONCLUSIONS OF LAW

I. OPRA

The legislative intent behind OPRA, N.J.S.A. § 47:1A-1, is clear: "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 . . . ." N.J.S.A. § 47:1A-1. "New Jersey can boast of a long and proud 'tradition of openness and hostility to secrecy in government.'" Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 283 (2009). OPRA furthers this "longstanding public policy" of maximizing "public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 616 (App. Div. 2008), certif. denied, 198 N.J. 316 (2009) (quoting Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)). In keeping with this public policy, any limitations imposed upon this right are to be construed in favor of access. See N.J.S.A. § 47:1A-1; Libertarian Party of Cent. N.J. v. Murphy, 384 N.J. Super. 136, 139, certif. granted in part & remanded, 188 N.J. 487 (2006). It mandates that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest . . . ." N.J.S.A. § 47:1A-1. Doubts as to the public's right of access are to be construed in favor of access. See N.J.S.A. § 47:1A-1; see also Libertarian Party, 384 N.J. Super. at 139.

A. OPRA and Settlement Agreements:

The definition of "government records" is given wide breadth and includes "all documents and similar materials, and all information and data, including electronically stored data, that have been made or received by government in its official business." Asbury Park Press v. Cty. of

Monmouth, 406 N.J. Super. 1, 7 (App. Div. 2009), aff'd, 201 N.J. 5 (2010). Particularly relevant here, settlement agreements qualify as accessible records. See id. at 4. See also Burnett v. Cty. of Gloucester, 415 N.J. Super. 506, 512-13 (App. Div. 2010) (concluding that settlement agreements made in the course of the official business of the county, even ones bearing confidentiality clauses, are not exempt from disclosure). The Burnett Court went on to state that "the public interest in settlements [is a] significant one, since such settlements may provide valuable information regarding the conduct of governmental officials and the condition of government property." Id.

Defendant's denial of Plaintiff's OPRA request was based on the Government Records Council ("GRC") decision in Popkin v. Englewood Bd. Of Education, wherein the GRC held that settlement agreements are exempt from disclosure when they involve student records. As conceded by Defendant at oral argument, pursuant to N.J.S.A. § 47:1A-7, this Court is not bound by that decision. "The Council shall not have jurisdiction over Judicial or Legislative branches of state government or any agency, officer, or employee of those branches." N.J.S.A. § 47:1A-7(g). The Appellate Division has made clear that settlement agreements are subject to access when made with public entities. Burnett, 415 N.J. Super. at 512-13. The Burnett Court made no distinction as to the types of settlement agreements that are subject to access. Id. The settlement agreements Plaintiff seeks fall within the purview of OPRA.

B. Redaction of Records:

As expansive as OPRA may be, the rights it protects are not boundless, and the Legislature cautions that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." N.J.S.A. § 47:1A-1. When a record is redacted or access is denied, OPRA places the burden of proving that the information is exempt

from disclosure on the government. See id. at § 47:1A-6. See also Asbury Park Press, 406 N.J. Super. at 7; Bent, 381 N.J. Super. at 36. OPRA specifically accommodates exemptions from disclosure found in it; other statutes; legislative resolutions of either or both houses; regulations promulgated pursuant to a statute or Executive Order of the Governor; an Executive Order of the Governor; Court Rules; or any federal law, regulation or order. See id. at § 47:1A-9. However, a records custodian cannot withhold access to entire documents when only a portion of those records must be shielded from disclosure. See id. at § 47:1A-5(g).

Defendant argues that FERPA and the NJ-PRA mandate a blanket preclusion from disclosing parents' and students' settlement agreements as part of an OPRA request. This Court disagrees. Defendant's position of non-disclosure is based on (1) the Popkin GRC decision, and (2) its belief that redactions would not adequately protect its students' identities under FERPA and NJ-PRA. As to the former, this Court is not persuaded. Case law unequivocally provides that settlement agreements are accessible under OPRA. Burnett, 415 N.J. Super. at 512-13.[17] As to the latter issue of students' expectancy of privacy under FERPA and NJ-PRA, this Court is similarly not convinced.

The fact that the settlement agreements contained personally identifiable information does not, in and of itself, excuse the Defendant from complying with OPRA. The documents should have been submitted with proper redactions. K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 365 (App. Div. 2011) (hereinafter "K.L. v. Evesham"). A record custodian cannot deny access to an entire document when only a portion of it must be shielded from disclosure. See N.J.S.A. § 47:1A-5(g). When a record is denied, OPRA places the burden of proving that the

[17] Interestingly enough, in its Brief, Defendant cites to L.R. v. Cherry Hill Board of Education Records Custodian, Docket No. CAM-L-04-5609-11 (N.J. Super. Ct. Jan. 6, 2015), a case previously considered by this Court, in which Mr. Devereaux did in fact produce settlement agreements with students' names redacted.

information is exempt from disclosure on the government. See N.J.S.A. § 47:1A-6. See also Asbury Park Press, 406 N.J. Super. at 7; Bent, 381 N.J. Super. at 36. As discussed hereinbelow, Defendant has not specifically proven that information within the requested documents (after redactions), "alone or in combination, is linked or linkable to a specific student..." See 34 C.F.R. § 99.3.

If Defendant believed that information contained within the settlement agreements allowed the disclosure of personal identifying information of a student, the proper protocol would have been to redact the information as necessary (even if that meant blackening a large portion of the document(s)). See generally, K.L. v. Evesham, 423 N.J. Super. at 365. This would have protected Defendants' students' privacy interests under FERPA, while at the same time, allowed Plaintiff an opportunity to be heard relative to the redactions. Defendant's decision to withhold the entire document(s) is unjustified.

Compliance with the provisions of all three statutes (OPRA, FERPA and NJ-PRA) is not only possible, but expected. Ibid. (finding that "such [protected] records ***should*** be released with appropriate redactions to comply with FERPA") (emphasis added). Clearly and unequivocally, the Legislature intended for OPRA, FERPA and NJ-PRA to be complimentary of each other, and not mutually exclusive.

II. FERPA

A. FERPA and Parental Consent:

FERPA prohibits schools from disclosing personally identifiable information contained within a student's records without first obtaining parental consent. 20 U.S.C. § 1233g(a)(3). An "educational record" is one that bears information "directly related to a student" and is "maintained

by an educational agency or institution or by a person acting for such agency or institution." Id. at § 1232g(a)(4)(i)-(ii). Funds are denied to an educational agency "which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein . . .) of students without the written consent of their parents . . . ." Id. at § 1232g(b)(1). Settlement agreements fall within the broad definition of "educational record," as they bear information "directly related to a student" and are "maintained by an educational agency . . . or person acting for such agency."

Defendant argues that since these are educational records, FERPA prohibits disclosure of the settlement agreements, absent parental consent. Defendant further argues that Plaintiff is not an appropriate "authorit[y], person, agency or organization entitled to access the student records pursuant to 20 U.S.C.A. 1232g(b)(1). Contrary to these arguments, however, FERPA's implementing regulations expressly "permit disclosure without consent of any otherwise protected student record, once the personally identifiable information has been redacted." 34 C.F.R. § 99.31(b). 34 C.F.R. § 99.31(b)(1) says:

> An educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by Statute 99.30 **after the removal of all personally identifiable information**...
>
> [34 C.F.R. § 99.31(b)(1) (emphasis added).]

The Appellate Division in K.L. v. Evesham, 423 N.J. Super. 337 (App. Div. 2011) reaffirmed that student records can be disclosed to parents of another student (or another party) after redacting the student's personally identifiable information. Id. at 364.

B. FERPA and Personally Identifiable Information:

"OPRA affirmatively excludes from [the definition of government records] twenty-one separate categories of information . . . for instance, OPRA directs State custodians of public records

to deny access to documents that are exempt from disclosure under federal law." Bent, 381 N.J. Super. at 36 (referencing N.J.S.A. § 47:1A-5(a)). FERPA provides protection to "information" involving student records that would reveal a student's identity. See 20 U.S.C. § 1232(g). However, once the student's information is adequately redacted from the educational record, it loses its protection under FERPA and becomes disclosable under OPRA. See 34 C.F.R. § 99.31(b)(1); N.J.S.A. § 47:1A-1, et. seq. In K.L. v. Evesham, the Court considered the application of both FERPA's confidentiality requirement and a state law requiring disclosure of government records, and held "that such records should be released with appropriate redactions to comply with FERPA." 423 N.J. Super. at 365.

FERPA contains a definition of "personally identifiable information." The regulations that attach to that statute state that such information includes:

> (a) The student's name; (b) The name of the student's parent or other family members; (c) The address of the student or student's family; (d) A personal identifier, such as the student's social security number, student number, or biometric record; (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.
>
> [34 C.F.R. § 99.3.]

The regulation is thus clear as to what "personally identifiable information" includes. Defendant argues that the settlement agreements are protected under FERPA because they contain personal information that, in combination with other information, would reveal its students' identities, regardless of any redactions. Defendant further argues that, though certain information alone would not necessarily identify its students, it is the cumulative effect of combining such

information that threatens privacy.[18] Protection is necessary because, according to the Defendant, much of the information contained within the settlement agreements include sensitive information, such as: (1) students' classification, (2) placements, (3) programs and (4) related services which are uniquely specific to the individual student.[19] Defendant argues that with the use of information from outside directories, student identities could be revealed with reasonable certainty.

34 C.F.R. § 99.3 speaks in terms of the broader "school community," not a specific school district. Although the information contained in the requested settlement agreements may, in combination with other information, threaten student privacy, the redaction of identifiable information (including information based on students' special needs and programming) removes this potential threat, and affords a reasonable expectancy of privacy.

Defendant has not offered any facts or reasons to conclude that Plaintiff could possibly link the redacted documents to specific students. Defendant's hypothesis that "cross referencing information in the subject settlement agreements with other publically-available documents or student/parent directories could easily allow for the identification of the students and parents involved"[20] is not convincing. The arguments that the special education program is a relatively small one, thus making identification reasonably certain is equally unpersuasive. The Cherry Hill School District is very large, comprised of over eleven thousand (11,000) total students. Of that number, twenty-one hundred (2,100) are special education students.[21] Defendant fails to provide anything that would show that any redacted settlement agreement is linkable to any one of its special education students.

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[18] See Defendant's opposition brief at pp. 16-17.
[19] See Defendant's opposition brief at p. 17.
[20] See Defendant's opposition brief at pp. 22-23.
[21] Information obtained by way of the January 15, 2016, Court Order.

III. NJ-PRA

The New Jersey "Pupil Records Act" operates in conjunction with FERPA to safeguard pupil records. See N.J.S.A. § 18A:36-19. The NJ-PRA attempts to balance the competing interests of access to records and "reasonable privacy." See id.; N.J.A.C. § 6A:32-7.1(g)(9)-(10). "Student records" include "information related to an individual student gathered within or outside the school district and maintained within [the school district]." N.J.A.C. § 6A:32-2.1. Any information made or maintained for second-party review falls within this definition and, thus, the statute's purview.

Pursuant to its statutory authority, "[e]ach district board of education shall compile and maintain student records and regulate access, disclosure, or communication of information contained in educational records in a manner that assures the security of such records . . . ." N.J.A.C. § 6A:32-7.1(b). "In providing access to school records in accordance with N.J.A.C. § 6A:32-7.5, school districts must also comply with the requirements of OPRA and FERPA" (internal citation omitted). K.L.v Evesham, 423 N.J. Super. at 350. Chief school administrators, or their designees, are charged with maintaining the security of student records and developing procedures to limit access to authorized persons only. See N.J.A.C. § 6A:32-7.4(a).

A review of the fifteen enumerated persons and entities qualifying as authorized persons under the regulation is not applicable here because Plaintiff is not seeking personally identifiable information within those settlement records. Plaintiff states in its reply brief that "[it] expects and has always expected that some information will be redacted to protect students' identities."[22] Defendant need only redact personally identifiable information in order to satisfy its NJ-PRA obligation. See 34 C.F.R. §§ 99.3, 99.3(b)(1); N.J.A.C. § 6A:32-7.5(g).

[22] See Plaintiff's reply brief at p. 5.

Although NJ-PRA's protections are broader then FERPA, the same results apply. NJ-PRA defines student records narrowly as "information."

> Student records mean information related to an individual student gathered within or outside the school district and maintained within the school district, regardless of the physical form in which it is maintained.
>
> [N.J.A.C. § 6A:32-2.1.]

Accordingly, Defendant is well within its right to properly redact information believed to be covered under the definition of "student record" from the required documents before disclosure, but not to withhold the entire document. NJ-PRA gives the Defendant broad discretion in what it deems "personal identifiable information" as it relates to student records. Defendant has no justifiable excuse not to utilize these broad protections and to provide the agreements with appropriate redactions. Defendant supplies no law or statute expressly allowing it to withhold entire documents but for the reliance on a non-binding GRC decision.

Defendant's refusal to provide requested settlement agreements with redactions is in contravention of NJPRA, FERPA, and OPRA. Such documents should have been provided with the appropriate redactions.

IV. Plaintiff is Entitled to Attorney's Fees

OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. § 47:1A-6. Such fees are awarded when the prevailing party receives a favorable judgment or order from the Court, or under a "catalyst theory." Mason v. City of Hoboken, 196 N.J. 51, 76 (2008). There is no reason for this Court to engage in the two prong catalyst theory test since Plaintiff has successfully persuaded this Court that it is entitled to its requested relief. Plaintiff is entitled to attorney's fees.

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CONCLUSION

For the foregoing reasons, Plaintiff's request for access to the settlement agreements is **GRANTED** with the appropriate redactions. A *Vaughn* index is to be prepared and served with the agreements. Because Plaintiff has prevailed under OPRA, its argument under common law right to access need not be addressed.[23] Moreover, this Court finds Plaintiff to be the prevailing party. Plaintiff's request for attorney's fees is **GRANTED**. Plaintiff shall submit a proposed order of judgement consistent with this opinion within ten (10) days from the date hereunder.

DATED: February 9, 2016

Deborah Silverman Katz

DEBORAH SILVERMAN KATZ, A.J.S.C.

[23] Asbury Park Press v. Cty of Monmouth, 406 N.J. Super. 1,4 (App. Div. 2009) (holding that if disclosure of the requested records is permitted under OPRA, the Court should not reach the issue regarding the common law right).