

PASHMAN STEIN
A Professional Corporation
Court Plaza South
21 Main Street, Suite 200
Hackensack, NJ 07601
(201) 488-8200
SAMUEL J. SAMARO, ESQ. (#029631988)

Attorneys for Plaintiff,
North Jersey Media Group Inc.

RECEIVED & FILED
SUPERIOR COURT OF NEW JERSEY
FEB - 8 2016
PASSAIC COUNTY

NORTH JERSEY MEDIA GROUP INC.,

Plaintiffs,

v.

**CITY OF CLIFTON and NANCY
FERRIGNO in her capacity as City Clerk
and Custodian of Records for the City of
Clifton,**

Defendants.

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: PASSIC COUNTY
DOCKET NO.: L-543-16**

Civil Action

VERIFIED COMPLAINT

Plaintiff, North Jersey Media Group Inc., d/b/a *The Record*, having its place of business at 1 Garret Mountain Plaza, Woodland Park, New Jersey, by way of Verified Complaint against Defendants, states as follows:

PARTIES

1. Plaintiff is a New Jersey corporation that publishes two daily newspapers, including its flagship newspaper *The Record*, three websites (www.northjersey.com, www.bergen.com, and www.bergencounty.com), and approximately forty community weekly newspapers. As such, Plaintiff is the chief purveyor of news in North Jersey. *The Record* is circulated throughout North Jersey with its greatest circulation in Bergen, Passaic, Morris, and Hudson counties.

2. Plaintiff's primary business is the gathering, editing, and reporting of information for the publication of news stories.

3. Defendant City of Clifton ("Clifton" or the "City") is a government agency pursuant to the laws of the State of New Jersey, with its primary place of business located at 900 Clifton Avenue, Clifton New Jersey 07013.

4. Defendant Nancy Ferrigno is the City Clerk and Custodian of Records for Defendant Clifton. Ms. Ferrigno maintains an office on the First Floor at 900 Clifton Avenue, Clifton New Jersey 07013.

VENUE

5. Venue is properly laid in Passaic County because the Defendants are located in Passaic County and because the cause of action arose in Passaic County. R. 4:3-2(a).

FACTUAL ALLEGATIONS

Clifton's Payroll Problem

6. Plaintiff, publisher of *The Record*, devotes significant time and resources to coverage of newsworthy events occurring in North Jersey, as well as the conduct of State officials, public employees, law enforcement, and governing bodies.

7. For over a year, *The Record* has been investigating and reporting on Clifton's transition from a payroll system that paid City employees bi-weekly to a system that pays employees twice a month. [Attached hereto as Exhibit A is a series of articles published by *The Record*.]

8. *The Record's* investigation revealed that an error in the processing of Clifton's payroll has resulted in City employees not being compensated for every day that they worked. See Exhibit A. Because of the error dates back to each employee's first year of employment, some errors date back to the 1980s.

9. As a result of the investigation and questions raised by employee unions, Clifton commissioned an independent audit of its payroll practice by the accounting firm of Lerch, Vinci & Higgins. See Exhibit A.

10. After the auditor's report was prepared and presented to the City, on January 8, 2016, Clifton issued special payroll checks to 439 employees to make up for days the employees previously worked, but for which they were not compensated. See Exhibit A.

Plaintiff's December 16, 2015 OPRA Request to Clifton

11. On December 16, 2015, Abbot Koloff, a reporter for *The Record*, submitted a request for government records to Clifton, stating the following:

This is a request for information pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 and the common law right of citizens of the state to obtain access to public documents. South Jersey Publishing Co. v. New Jersey Expressway Auth., 124 N.J. 478, 487-89 (1991).

Please provide copies of the following government records:

- 1) The audit of Clifton payroll this year performed by Lerch, Vinci & Higgins of Fair Lawn and any recommendations made regarding the payroll and payment to employees.
- 2) Please provide documents that explain how the city determined the amount to be paid to employees at the beginning of January in lump sums to each employee.
- 4) Please provide memos or letters sent out to employees regarding the lump sums they are to receive in January and the calculations made to determine the amount. If the letters were sent out individually, with different amounts for each employee, please provide the form that was used to create the letter and any letter or memo that was sent out en masse.
- 5) Please provide documents showing payments made to employees who were hired this year, in 2015, and that show the amount of pay they received after Aug. 1 when the city went to a bi-monthly paychecks.

If there are no records responsive to this request, please notify me, in writing, of this fact. If, however, there are portions of a record(s) which must be redacted, please identify the record that has been redacted and the legal basis for your contention that the redacted portion(s) is exempt from disclosure. If a record(s), in its entirety, is exempt from disclosure under OPRA, kindly notify me, in writing, of the exemption under OPRA which you are relying.

If the cost of copies for this request does not exceed \$25, proceed without further approval and send me an invoice with the records. Otherwise, please advise me of the costs before filling the request so that we can discuss arrangements.

Thank you for your attention to this matter and for your assistance. If you have any questions, please feel free to contact me:

[Attached hereto as Exhibit B is a true and accurate copy of Mr. Koloff's December 16, 2015 OPRA Request ("December 16th Request").]

12. On December 28, 2015, Defendant Ferrigno responded to Mr. Koloff's OPRA request by stating the following:

Regarding Item #1, we are in receipt of your request for the report being prepared by the independent auditing firm, Lerch, Vinci & Higgins. The report, even once finalized, will not be a public record as it will be used by the City in connection with actual and/or potential litigation related to grievance and arbitration proceedings. In addition, it will be subject to the deliberative process privilege and will not be subject to a request under OPRA. See Ciesla v. New Jersey Dept. of Health and Senior Services, 429 N.J. Super. 127, 57 A.3d 40 (A.D.2012), which held that the exemption of deliberative materials from definition of a "government record" subject to disclosure under Open Public Records Act (OPRA) is an unqualified one.

Regarding Item #2, the records that are responsive were included with those given to you this afternoon for Item #4. In addition, you were given records responsive to Item #5.

[Attached hereto as Exhibit C is a true and accurate copy of Ms. Ferrigno's December 28, 2015 response email.]

13. The documents Ms. Ferrigno produced in response to the December 16th Request consisted of 490 single page "interoffice memorandums" that were, upon information and belief, sent to each City employee to inform the particular individual how much he or she was going to receive in "special payroll" on January 8, 2016. [By way of example, attached hereto as Exhibit D are true and accurate samples of the interoffice memorandums produced in response to the December 16th Request.]

14. This Verified Complaint challenges Defendants' denial of Plaintiff's December 16th Request for the audit report prepared by Lerch, Vinci & Higgins.

FIRST COUNT
(Violation of OPRA)

15. Plaintiff repeats and incorporates by reference the allegations set forth in the preceding paragraphs as though fully set forth at length herein.

16. Pursuant to N.J.S.A. 47:1A-1, all government records must be "readily accessible" to the citizens of this State.

17. OPRA requires the custodian to grant or deny access to public records "as soon as possible, but not later than seven business days." N.J.S.A. 47:1A-5(i).

18. A public agency has the burden of proving that any denial of access is authorized by law. N.J.S.A. 47:1A-6.

19. Plaintiff made a valid request for "government records" that are subject to access under OPRA, N.J.S.A. 47:1A-1 et seq.

20. The requested records are government records because they were "made, maintained or kept on file," or "received in the course of . . . [Defendant's] official business." N.J.S.A. 47:1A-1.1.

21. The audit report that Plaintiff seeks is not wholly exempt pursuant to any exemption of OPRA or any other law. To the extent any portion of the requested report is exempt, Defendants have an obligation to redact any exempt portion and produce the record with the appropriate redactions. N.J.S.A. 47:1A-5(g).

22. Clifton denied full access to the audit report requested in the December 16th Request.

23. Therefore, Defendants have violated OPRA by:

- a. Failing to provide access to the requested records "as soon as possible, but not later than seven business days after receiving the request," in violation of N.J.S.A. § 47:1A-5(i);
- b. Failing to identify the specific records responsive to the request and the specific lawful basis for withholding each of those records, in violation N.J.S.A. § 47:1A-5(g);
- c. Failing to provide an index of all responsive records deemed by the public agency to be exempt, as required by Paff v. Dep't of Labor, 392 N.J. Super. 334 (App. Div. 2007);
- d. Failing to maintain a OPRA Request Form, in violation of N.J.S.A. § 47:1A-5(f); and
- e. Failing to identify an OPRA Records Custodian in violation of N.J.S.A. § 47:1A-1.1

WHEREFORE, Plaintiff demands judgment against Defendants:

- a. Declaring said actions of Defendants to be in violation of OPRA, N.J.S.A. 47:1A-1 et seq. by failing to provide access to the requested record within seven business days as required by OPRA;
- b. Directing Defendants to grant access to and release the requested record to Plaintiff forthwith;
- c. Alternatively, if the Court believes that any information may be exempt from public access, Plaintiff respectfully asks the Court to review the record *in camera* and then require Defendants to delete or excise from the record the portion(s) which are exempt from public access and promptly permit access to the remainder of the record;

- d. Ordering Defendants to preserve the requested record pending resolution of these proceedings or as otherwise required by law;
- e. Awarding counsel fees and costs pursuant to N.J.S.A. 47:1A-6; and
- f. For such other relief as the Court may deem just and equitable.

SECOND COUNT
(Common Law Right of Access)

37. Plaintiff repeats and incorporates by reference the allegations set forth in the preceding paragraphs as though fully set forth at length herein.

38. The public enjoys a vested common law right of access to public records generated or maintained by public entities. See, e.g., Keddie v. Rutgers, 148 N.J. 36 (1997); S. Jersey Publ'ing Co. v. N.J. Exp'way Auth., 124 N.J. 478 (1991).

39. Defendants maintain the requested public record, which is "necessary to be kept in the discharge of a duty imposed by law" (among other possible qualifying conditions). S. Jersey Publishing Co., 124 N.J. at 487.

40. There is a strong public interest in favor of disclosure of the requested information, and there is no overriding, countervailing interest in confidentiality of the record.

41. Plaintiff, and by extension the public, has a strong interest in understanding how Clifton is paying its employees.

42. Plaintiff, as the eyes and ears of the public, has the right to know information contained in the requested record to provide complete and timely information to the public via *The Record* and its other publications.

43. Accordingly, Defendants' failure to disclose the requested record violated Plaintiff's common law right of access to public records.

WHEREFORE, Plaintiff demands judgment:

- a. Declaring said actions of Defendants to be unlawful and invalid;

- b. Directing Defendants to release the requested record to Plaintiff forthwith. Alternatively, if the Court believes that any information is exempt from public access, Plaintiff respectfully asks the Court to review the record *in camera* and then require Defendants to delete or excise from the record the portion(s) which are exempt from public access and promptly permit access to the remainder of the record;
- c. Ordering Defendants to preserve the requested record pending resolution of these proceedings or as otherwise required by law;
- d. Awarding attorney fees and costs of suit; and
- e. For such other relief as the Court may deem just and equitable.

PASHMAN STEIN
A Professional Corporation,
Attorneys for Plaintiff
North Jersey Media Group Inc.

Dated: February 5, 2016

By: _____
SAMUEL J. SAMARO

CERTIFICATION PURSUANT TO R. 4:5-1

Plaintiff hereby certifies that the matter in controversy is not the subject of any other action pending in any Court and is likewise not the subject of any pending arbitration proceeding. Plaintiff further certifies that it has no knowledge of any contemplated action or arbitration proceeding regarding the subject matter of this action and that Plaintiff is not aware of any other parties who should be joined in this action.

PASHMAN STEIN
A Professional Corporation,
Attorneys for Plaintiff
North Jersey Media Group Inc.

Dated: February 5, 2016

By: _____
SAMUEL J. SAMARO

CERTIFICATION PURSUANT TO R. 4:25-4

Pursuant to R. 4:25-4, Samuel J. Samaro and Jennifer A. Borg, are hereby designated as trial counsel.

PASHMAN STEIN
A Professional Corporation,
Attorneys for Plaintiff
North Jersey Media Group Inc.

Dated: February 5, 2016

By: _____
SAMUEL J. SAMARO

VERIFICATION

I, Abbott Koloff, of full age, hereby certifies as follows:

1. I am a reporter for *The Record*, which is published by North Jersey Media Group Inc., Plaintiff in the foregoing Verified Complaint.

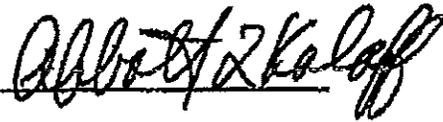
2. The allegations of the Verified Complaint contained in Paragraphs 6-14 are true and based on personal knowledge and the said Verified Complaint is made in truth and good faith and without collusion, for the causes set forth herein.

3. All documents attached to the Verified Complaint and Brief are true copies and have not been redacted, changed, modified, adjusted or otherwise altered in any manner by me or my agents unless so stated.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated:

By:

A handwritten signature in cursive script, appearing to read "Abbot Koloff", written over a horizontal line.

Abbot Koloff

VERIFICATION

I, Jennifer A. Borg, of full age, hereby certifies as follows:

1. I am a General Counsel and Vice President for North Jersey Media Group Inc., Plaintiff in the foregoing Verified Complaint.

2. The allegations of the Verified Complaint contained with Paragraphs 1, 2, and 6 are true and based on personal knowledge and the said Verified Complaint is made in truth and good faith and without collusion, for the causes set forth herein.

3. All documents attached to the Verified Complaint and Brief are true copies and have not been redacted, changed, modified, adjusted or otherwise altered in any manner by me or my agents unless so stated.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.


JENNIFER A. BORG, ESQ.

Dated: February 5, 2016

CERTIFICATION OF FAX/ELECTRONIC SIGNATURE

Samuel J. Samaro, Esq., of full age, certifies and says as follows:

1. I am a member of the law firm of Pashman Stein, P.C. I make this certification of the genuineness of the electronic signature of Abbott Koloff and Jennifer A. Borg.
2. I hereby certify that Mr. Koloff and Ms. Borg have acknowledged to me the genuineness of his signatures on the foregoing verification.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

PASHMAN STEIN
A Professional Corporation
Attorneys for Plaintiff,
North Jersey Media Group Inc.

By: _____
SAMUEL J. SAMARO

Dated: February 5, 2016

EXHIBIT B

Michael Zoller

From: Moore, Patricia
Sent: Friday, December 18, 2015 3:20 PM
To: Koloff, Abbott
Cc: Depsee, Diana
Subject: RE: OPRA request

Thanks, Abbott. I'll calendar it for a response.

Patricia L. Moore, Esq.
Corporate Attorney
North Jersey Media Group Inc.
1 Garret Mountain Plaza
P.O. Box 471
Woodland Park, NJ 07424
T: (973) 569-7685
F: (973) 569-7268

-----Original Message-----

From: Koloff, Abbott
Sent: Friday, December 18, 2015 2:53 PM
To: Moore, Patricia
Subject: FW: OPRA request

Hi Pat: I sent this Wednesday afternoon to Clifton.

-----Original Message-----

From: Koloff, Abbott
Sent: Wednesday, December 16, 2015 2:53 PM
To: 'inferrigno@cliftonnj.org'
Subject: OPRA request

To the Custodian of Records:

This is a request for information pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 and the common law right of citizens of the state to obtain access to public documents. *South Jersey Publishing Co. v. New Jersey Expressway Auth.*, 124 N.J. 478, 487-89 (1991).

Please provide copies of the following government records:

- 1) The audit of Clifton payroll this year performed by Lerch, Vinci & Higgins of Fair Lawn and any recommendations made regarding the payroll and payment to employees.
- 2) Please provide documents that explain how the city determined the amount to be paid to employees at the beginning of January in lump sums to each employee.

4) Please provide memos or letters sent out to employees regarding the lump sums they are to receive in January and the calculations made to determine the amount. If the letters were sent out individually, with different amounts for each employee, please provide the form that was used to create the letter and any letter or memo that was sent out en masse.

5) Please provide documents showing payments made to employees who were hired this year, in 2015, and that show the amount of pay they received after Aug. 1 when the city went to a bi-monthly paychecks.

If there are no records responsive to this request, please notify me, in writing, of this fact. If, however, there are portions of a record(s) which must be redacted, please identify the record that has been redacted and the legal basis for your contention that the redacted portion(s) is exempt from disclosure. If a record(s), in its entirety, is exempt from disclosure under OPRA, kindly notify me, in writing, of the exemption under OPRA which you are relying.

If the cost of copies for this request does not exceed \$25, proceed without further approval and send me an invoice with the records. Otherwise, please advise me of the costs before filling the request so that we can discuss arrangements.

Thank you for your attention to this matter and for your assistance. If you have any questions, please feel free to contact me:

Thank you,
Abbott Koloff
The Record
(973) 569-7059
koloff@northjersey.com

EXHIBIT C

Michael Zoller

From: Moore, Patricia
Sent: Tuesday, December 29, 2015 12:10 PM
To: Depsee, Diana
Subject: FW: OPRA #873

Response received SOL 2/11

Patricia L. Moore, Esq.
Corporate Attorney
North Jersey Media Group Inc.
1 Garret Mountain Plaza
P.O. Box 471
Woodland Park, NJ 07424
T: (973) 589-7685
F: (973) 589-7268

From: Koloff, Abbott
Sent: Monday, December 28, 2015 4:29 PM
To: Moore, Patricia; Borg, Jennifer
Subject: FW: OPRA #873

From: Ferrigno, Nancy [<mailto:nferrigno@cliftonnj.org>]
Sent: Monday, December 28, 2015 4:12 PM
To: Koloff, Abbott
Cc: Liss, Ron; Priore, Matthew; Egan, Thomas
Subject: OPRA #873

Mr. Koloff:

The following is our response to your OPRA request dated and received on 12/16/15. Regarding Item #1, we are in receipt of your request for the report being prepared by the independent auditing firm, Lerch, Vinci & Higgins. The report, even once finalized, will not be a public record as it will be used by the City in connection with actual and/or potential litigation related to grievance and arbitration proceedings. In addition, it will be subject to the deliberative process privilege and will not be subject to a request under OPRA. See *Clesla v. New Jersey Dept. of Health and Senior Services*, 429 N.J. Super. 127, 57 A.3d 40 (A.D.2012), which held that the exemption of deliberative materials from definition of a "government record" subject to disclosure under Open Public Records Act (OPRA) is an unqualified one.

Regarding Item #2, the records that are responsive were included with those given to you this afternoon for Item #4. In addition, you were given records responsive to Item #5.

Nancy Ferrigno
City Clerk
Clifton, New Jersey
973-470-5829

EXHIBIT D



**City of Clifton
Finance Department**

INTEROFFICE MEMORANDUM

Employee: Thomas P Surowiec

Department: Police

Start Date: 01/30/1975

Full Time or Rehire Date:

Starting Base Annual Salary: \$10,999.15

Current Base Salary 2015: \$194,222.34

First Year Earnings:

A. Actual Base Prorated Salary Paid: (237 Days Worked at a Daily Rate of \$42.30)	\$10,026.02
B. Base Salary Actually Owed: (Annual Salary of \$10,999.15 Times Percentage of Year Worked 92.05%)	\$10,125.24
C. Difference (B less A)	\$99.22
D. Daily Rate of Pay (Based on Start Date or Full Time or Rehire Date)	\$42.30
E. Days Owed from Year 1 (C divided by D)	2.35
F. Daily Rate of Pay (Based on 2015 Salary)	\$747.01
G. Value of Days Owed (Based on 2015 Salary)	\$1,755.47

THE AMOUNT OF \$1,755.47 WILL BE PAID ON A SPECIAL PAYROLL ON JANUARY 8, 2016!



**City of Clifton
Finance Department**

INTEROFFICE MEMORANDUM

Employee: Douglas Miller

Department: Police

Start Date: 04/01/1980

Full Time or Rehire Date:

Starting Base Annual Salary: \$8,358.00

Current Base Salary 2015: \$136,565.52

First Year Earnings:

A. Actual Base Prorated Salary Paid: (189 Days Worked at a Daily Rate of \$32.15)	\$6,075.63
B. Base Salary Actually Owed: (Annual Salary of \$8,358.00 Times Percentage of Year Worked 75.14%)	\$6,279.92
C. Difference (B less A)	\$204.29
D. Daily Rate of Pay (Based on Start Date or Full Time or Rehire Date)	\$32.15
E. Days Owed from Year 1 (C divided by D)	6.35
F. Daily Rate of Pay (Based on 2015 Salary)	\$525.25
G. Value of Days Owed (Based on 2015 Salary)	\$3,335.34

THE AMOUNT OF \$3,335.34 WILL BE PAID ON A SPECIAL PAYROLL ON JANUARY 8, 2016!



**City of Clifton
Finance Department**

INTEROFFICE MEMORANDUM

Employee: Doma Sue Camp

Department: Finance

Start Date: 01/20/2015

Full Time or Rehire Date:

Starting Base Annual Salary: \$33,236.01

Current Base Salary 2015: \$33,236.06

First Year Earnings:

A. Actual Base Prorated Salary Paid: (239 Days Worked at a Daily Rate of \$127.83)	\$30,551.60
B. Base Salary Actually Owed: (Annual Salary of \$33,236.01 Times Percentage of Year Worked 94.79%)	\$31,505.92
C. Difference (B less A)	\$954.32
D. Daily Rate of Pay (Based on Start Date or Full Time or Rehire Date)	\$127.83
E. Days Owed from Year 1 (C divided by D)	7.47
F. Daily Rate of Pay (Based on 2015 Salary)	\$127.83
G. Value of Days Owed (Based on 2015 Salary)	\$954.89

THE AMOUNT OF \$954.89 WILL BE PAID ON A SPECIAL PAYROLL ON JANUARY 8, 2016

Samuel J. Samaro
Member of the Firm
Designated by the Supreme Court of New Jersey as a Certified Civil Trial Attorney
ssamaro@pashmanstein.com

February 5, 2016

VIA OVERNIGHT MAIL

Hon. Thomas F. Brogan, P.J.Cv.
Passaic County Courthouse
77 Hamilton Street, 3rd Floor
Paterson, New Jersey 07505

Re: *North Jersey Media Group Inc. v. City of Clifton et al.*
Our File No. 1040-071

Dear Judge Brogan:

This firm represents Plaintiff North Jersey Media Group Inc. 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' unlawful denial of the Open Public Records Act ("OPRA") and common law request identified in the Verified Complaint and discussed in detail below.

PRELIMINARY STATEMENT

Plaintiff North Jersey Media Group Inc. ("NJMG" or "Plaintiff") is a New Jersey corporation that publishes two (2) daily newspapers, including its flagship newspaper *The Record*, three (3) websites, and approximately forty (40) community weekly newspapers. As such, NJMG is the chief purveyor of news in North Jersey. For over a year, Plaintiff has been investigating and reporting on the Defendant City of Clifton's ("Clifton") transition from a payroll system that paid City employees bi-weekly to a system that pays employees twice a

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February 5, 2016
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month. As the chief purveyor in news in North Jersey, NJMG has been at the forefront of reporting and providing information to the public.

Plaintiff's investigation revealed that a glitch in Clifton's payroll has resulted in Clifton employees not being paid for every day that they worked. When this error was brought to Clifton's attention, it commissioned an independent audit (the "Audit Report") of its payroll practice by the accounting firm of Lerch, Vinci & Higgins. As a part of NJMG's continuing news coverage of Clifton's payroll problem, on December 16, 2015, a reporter for *The Record* submitted a request pursuant to OPRA and the common law right to access to Clifton seeking, among other records, a copy of the Audit Report. As discussed in more detail below, Clifton's refusal to grant access to the Audit Report is unlawful.

Consequently, this Court should grant Plaintiff's application for an Order to Show Cause, finding Defendants to be in violation of OPRA and compel them to provide Plaintiff the requested Audit Report forthwith. Additionally, the Court should award Plaintiff counsel fees and costs pursuant to N.J.S.A. 47:1A-6.

STATEMENT OF FACTS

For over a year, NJMG has been investigating and reporting on Clifton's transition from a payroll system that paid City employees bi-weekly to a system that pays employees twice a month. [See Verified Complaint, Exhibit A.] NJMG's investigation revealed that errors in the processing of Clifton's payroll has resulted in City employees not being paid for every day that they worked. See *Id.* As a result of the investigation and questions raised by employee unions, Clifton commissioned the accounting firm of Lerch, Vinci & Higgins to prepare the Audit Report. See *Id.* After the auditor's report was prepared and presented to the City, on January 8,

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2016, Clifton issued special payroll checks to 439 employees to make up for days the employees previously worked, but for which they were not paid. Id. Because the error occurred in the first year of each employee's employment with the City, many of the errors date back to the 1980s.

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PashmanStein

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If the cost of copies for this request does not exceed \$25, proceed without further approval and send me an invoice with the records. Otherwise, please advise me of the costs before filling the request so that we can discuss arrangements.

Thank you for your attention to this matter and for your assistance. If you have any questions, please feel free to contact me:

[See Verified Complaint, Exhibit B ("December 16th Request").]

On December 28, 2015, Defendant Nancy Ferrigno, the City Clerk for Clifton, responded to Mr. Koloff's OPRA request by stating the following:

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Regarding Item #2, the records that are responsive were included with those given to you this afternoon for Item #4. In addition, you were given records responsive to Item #5.

[See Verified Complaint, Exhibit C.]

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on January 8, 2016. [See Verified Complaint, Exhibit D.] As of the date of this filing, Defendants have not released a copy of the Audit Report. Plaintiff's lawsuit challenges the failure to produce the Audit Report.

LEGAL ARGUMENT

I. DEFENDANTS VIOLATED THE OPEN PUBLIC RECORDS ACT

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, which must be narrowly construed. Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003)(emphasis added). 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).]

The first question to be addressed under OPRA is whether the requested record is, in fact, a government record. OPRA broadly defines the term to include:

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[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. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

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

Here, the record at issue is a government record. The December 16th Request sought a copy of the Audit Report prepared by the accounting firm of Lerch, Vinci & Higgins. The Audit Report was prepared at the request of Clifton. Clearly, the Audit Report is a record that Clifton received and maintained in its files in the course of its official business.

Once it is established that a request has been made for a valid government record, the burden is on the responding agency to prove that "the denial of access is authorized by law." N.J.S.A. 47:1A-6. Moreover, any possible exception to the policy favoring broad public access must be narrowly construed. South Jersey Pub. Co., *supra*, 124 N.J. at 496. Here, as discussed in more detail below, Defendants cannot meet their burden that any exemption warrants denying access to the Audit Report in its entirety.

a. Defendants Cannot Withhold the Audit Report Merely Because They Might One Day Rely Upon It in Litigation

The first basis Clifton offers for denying access to the Audit Report is that "[t]he report, even once finalized, will not be a public record as it will be used by the City in connection with

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actual and/or potential litigation related to grievance and arbitration proceedings.” [Verified Complaint, Exhibit C.] As discussed above, OPRA broadly defines which records constitute “government records” that are to be made available at the request of the public. The statute then specifically enumerates twenty-four types of records that are not included in the definition of “government records.” See N.J.S.A. 47:1A-1.1. Records that might allegedly be connected to potential litigation are not one of the classes of records exempt from the definition of “government records.” The closest enumerated exemption that could possibly apply would be “any record within the attorney-client privilege,” but since there is no attorney-client relationship between Clifton and the accounting firm that prepared the Audit Report, that exemption cannot apply. Absent a statutory exemption, the Audit Report’s speculative use in potential litigation sometime in the future cannot serve as a basis for denying Plaintiff’s OPRA request.

b. The Deliberative Process Privilege does not apply to the Audit Report

The second basis Clifton offers for denying access to the Audit Report is that “it wil[l] be subject to the deliberative process privilege and will not be subject to a request under OPRA.” [Verified Complaint, Exhibit C.] Clifton further cites to Ciesla v. New Jersey Dept. of Health and Senior Services, 429 N.J. Super. 127 (App. Div. 2012), for the proposition that the deliberative process privilege is “unqualified.” Id. While the Appellate Division in Ciesla did state that the deliberative process privilege is unqualified, that statement is incorrect as it is in direct contravention to two Supreme Court holdings that the deliberative process privilege is a qualified privilege. Educ. Law Ctr. v. New Jersey Dep’t of Educ., 198 N.J. 274, 287 (2009)(“Because the privilege is a qualified one....”); In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000)(“satisfied that the intent of McClain was to establish a qualified privilege for

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governmental deliberative process materials.”) Accordingly, even if this court were to find that the deliberative process privilege does apply, which it should not, Plaintiff can demonstrate a need for the Audit Report that overcomes the privilege which mandates that Clifton be ordered to produce it.

I. The Audit Report is not Deliberative

“The deliberative process privilege ‘permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” Educ. Law Ctr., *supra*, 198 N.J. at 285 (citation omitted). In order for the privilege to be invoked, two requirements must be met: (1) “the document must be “pre-decisional,” which means that ‘it must have been generated before the adoption of an agency’s policy or decision;’ and (2) “the document must be deliberative; [i.e.] documents “contain opinions, recommendations, or advice about agency policies.” Id. at 286 (quoting In re Liquidation of Integrity Ins. Co., *supra*, 165 N.J. at 84-85). “[P]urely factual material that does not reflect deliberative processes is not protected.” Id. (quoting In re Liquidation of Integrity Ins. Co., *supra*, 165 N.J. at 85).

Plaintiff does not dispute that the Audit Report was “pre-decisional.” The question for this Court is whether it is “deliberative.” The Supreme Court has said that “the key to identifying deliberative material must be how closely the material (including the selection of “factual” or “informational” material) relates to the “formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated.” Id. at 295 (citation omitted). More specifically,

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the question of what is protected under the deliberative process privilege, incorporated into OPRA as an exemption from the definition of a "government document," must depend, first, on whether the information sought is a part of the process leading to formulation of an agency's decision, (not on a simplistic label of "fact" or "opinion,"), and, second, on the material's ability to reflect or to expose the deliberative aspects of that process.

[Id.]

An audit generally consists of analyzing raw numbers. See AUDIT, Black's Law Dictionary (10th ed. 2014) ("A formal examination of an individual's or organization's accounting records, financial situation, or compliance with some other set of standards."). Clifton has offered no evidence that the requested Audit Report is anything more than a factual analysis of its payroll and a calculation of what money is owed to each employee. Indeed, audits are routinely made public and Clifton itself places a copy of its annual audit on its website each year for public viewing. See <http://cliftonnj.org/content/budget-documents.html> (last visited Feb. 4, 2016). Moreover, the Audit Report was never going to lead to a policy decision where Clifton had to choose one policy option over another. Unlike other reports which contain deliberative material and present information to an agency that would cause it to act one way or another, the audit here simply serves to crunch numbers and identify the exact amount of money each employee is owed. Because Clifton has a legal duty to pay each employee what is owed, there was no leeway for making any other decision except for the one that results in the employees being fully compensated. Simply put, there is only one correct answer to the amount of money that is owed and thus no decision-making was required. Thus, the report and its raw data do not present any information that is truly deliberative or that reveals the "formulation or

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exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated.”
Educ. Law Ctr., *supra*, 198 N.J. at 295.

The Appellate Division’s decision in Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354 (App. Div. 2010), is informative. In Tractenberg, the court used the guidelines set forth by the Supreme Court in Educ. Law Ctr. to determine that appraisals requested in an OPRA request were not shielded by the deliberative process privilege. The court reviewed the appraisals and found that they supplied raw data that could be used by the agency to make a decision; they did not, however, contain policy recommendations. *Id.* at 372-373. Accordingly, the court found that “the appraisals do not have the ‘capacity to expose the [Township’s] deliberative thought-processes’ because they are ‘at most . . . intended to . . . provide raw data of a factual nature upon which decisions could be made.’” *Id.* at 373. Therefore, the Tractenberg court ordered that the plaintiff was entitled to unredacted copies of the two appraisals.

Much like the appraisals sought in Tractenberg, the Audit Report sought here is nothing more than a review of raw numbers and a calculation of exactly what money is owed to each employee. Therefore, the Court should find that it is not deliberative and order Clifton to produce it.¹

ii. Plaintiff’s Need for the Audit Report Overrides Clifton’s Interest in Confidentiality

Even if the Court finds that the Audit Report is deliberative so that the privilege is invoked, Plaintiff can overcome the privilege. “Because the privilege is a qualified one, a

¹ To the extent the report for some reason contains any actual deliberative material, OPRA requires Clifton to redact only those portions of the Audit Report and grant access to the remainder of the record. N.J.S.A. 47:1A-5(g).¹

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litigant can still obtain the requested materials upon a showing that the need for the materials overrides the government's interest in confidentiality." Educ. Law Ctr., supra, 198 N.J. at 287.

In making the determination whether a litigant has demonstrated an overriding need, a court should consider the following factors: "(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions."

[Id.(quoting In re Liquidation of Integrity Ins. Co., supra, 165 N.J. at 85-86).]

All of the foregoing factors favor disclosure of the Audit Report. The Audit Report contains raw numbers and factual data that will permit Plaintiff to determine the extent to which Clifton failed to properly pay its employees and if the remedial measures it has now taken are sufficient to correct and rectify the problem. Clifton is responsible for properly paying its employees and shielding the Audit Report from public disclosure permits it to continue to hide from the employees and the public whether or not it has properly compensated its employees for its past mistakes. The disclosure of the Audit Report would not hinder frank and independent discussion regarding Clifton's decision to properly pay its employees. Clifton has admitted that it did not properly pay all of its employees, thus it issued the special payroll checks on January 8, 2016. [See Verified Complaint, Exhibit A.] There are not various solutions to this problem that needed to be discussed, there is only one: Clifton had to properly pay all of its employees for the days they worked. Releasing the Audit Report to Plaintiff will allow the Plaintiff and the public to confirm that they have been properly paid.

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Based on the foregoing, even if the Court finds that Clifton properly invoked the deliberative process privilege, it should find that Plaintiff has overcome the privilege and order that Clifton must produce the Audit Report.

II. NJMG IS A PREVAILING PARTY ENTITLED TO ATTORNEY'S FEES

Plaintiff is statutorily entitled to reasonable attorney's fees and costs. Pursuant to OPRA,

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may . . . institute a proceeding to challenge the custodian's decision by filing an action in Superior Court The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6 (emphasis added).]

New Jersey law has long recognized the "catalyst theory" in regards to an award of attorney's fees. Mason v. City of Hoboken, 196 N.J. 51, 73 (2008). A plaintiff is entitled to attorney's fees if they can demonstrate "1) a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; and 2) that the relief ultimately secured by plaintiffs had a basis in law." Id. at 76; see also Smith v. Hudson Cnty. Register, 422 N.J. Super. 387, 394 (App. Div. 2011) ("A plaintiff may qualify as a prevailing party, and thereby be entitled to a fee award, by taking legal action that provides a 'catalyst' to induce a defendant's compliance with the law.").

Here, NJMG made a valid OPRA request for a government records in the form of the Audit Report. Defendants unlawfully denied access to that record. This litigation, if successful, will serve as the catalyst for Plaintiff obtaining the unlawfully withheld record. Therefore, NJMG is entitled to an award of attorney's fees and costs of suit.

III. NJMG HAS A RIGHT TO ACCESS THE REQUESTED RECORD 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. Division 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. "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. Home News v. State Dep't. of Health, 144 N.J. 446, 454 (1996)(quoting S. Jersey Pub. Co. v. New Jersey Expressway Auth., 124 N.J. 478, 496-97 (1991).

In the instant matter, Plaintiff's right to access the requested record under the common law stems from the fact that it is the publisher of dozens of newspapers and other news outlets (Verified Complaint, ¶ 1) and, as such, serves as "the eyes and ears" of the public. Home News, supra, 144 N.J. at 454. More specifically, one of The Record's greatest areas of circulation is Passaic County, where Clifton is located. Id. Clifton's payment of its employees is a topic of public importance. In an effort to keep Clifton's employees and the public in general informed, NJMG has been investigating and reporting on this issue for over a year. [See e.g. Verified Complaint, Exhibit A.] As a result of NJMG's investigation, Clifton commissioned the Audit

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Report that is the subject of this litigation and on January 8, 2016, issued special payroll checks to 439 employees to make up for days the employees previously worked, but were not paid. Id. The Audit Report itself is now needed so that NJMG can confirm that the January 8th payments properly compensated all employees for the days they worked. Upon information and belief, the Audit Report itself cost the public thousands of dollars and thus the public is entitled to review it.

On the other hand, Clifton should not have a need to keep the Audit Report secret. The factual information in the Audit Report was used to determine how to properly compensate employees. If Clifton has now properly compensated all of its employees it should not need to keep the basis for that compensation secret. In fact, Clifton should want to produce the Audit Report so that it can prove it has resolved the issue and properly compensated all employees.

Accordingly, this Court should find that NJMG's interest in the record outweighs Clifton's need for secrecy, and grant NJMG access to the Audit Report under the Common Law.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully asks this Court to find Defendants in violation of OPRA and to direct them to permit access to the requested record forthwith. Alternatively, Plaintiff seeks access to the requested record pursuant to common law. Finally, because the preceding relief will make NJMG a prevailing party under the statute, it further requests that the Court enter an Order granting reasonable attorney's fees and costs of suit.

Respectfully Submitted,

SAMUEL J. SAMARO