SUPERIOR COURT OF NEW JERSEY

TRAVIS L. FRANCIS
ASSIGNMENT JUDGE

MIDDLESEX COUNTY COURT HOUSE
P.O. BOX 964
NEW BRUNSWICK, NEW JERSEY 08903-0964

Not for publication without approval by committee on opinions.

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RE: Christine Rampolla v. Hatikvah International Academy Charter School and Dr. Marcia Grayson in her capacity as Executive Director of the Hativah International Academy Charter School
Docket No. MID-L-4441-13

Dear Counsel:

Please find the Court's decision below.

This opinion addresses an action under the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 et. seq. ("OPRA") and the Common Law Right of Access seeking disclosure of email correspondence between various parties at Hatikvah International Academy Charter School. The matter was referred to Special Discovery Master, Hon. Glenn Berman, P.J.S.C. (ret.) for review of the arguably "exempt" emails. Defendants moved for reconsideration and Plaintiff cross-moved for reconsideration of the Special Master's findings.

On May 24, 2013, Plaintiff submitted to Dr. Marcia Grayson, custodian of records for Hatikvah, two OPRA requests seeking four categories of documents: 1) "Emails to or from Eli Schapp about the Friends of Hatikvah, including all attachments, between September 2011 to present"; 2) "Emails to or from Eli Schapp about the Eisenreich Foundation, including all attachments, between

September 2011 to present;" (3) "Emails or paper copies to or from Eli Schapp containing or referencing any lease agreements with the Eisenreich Foundation, between September 2011 to present;" and (4) "all correspondence mentioning Lexington Avenue, school facilities, Eisenreich Foundation and/or Plumrose USA, from January 2012 until present, between all combinations of (to or from) Danna Nezaria, Eli Schapp and/or Marc Spektor."

On June 10, 2013, Dr. Grayson notified Plaintiff that their requests for the first three categories of documents were denied on the grounds that any responsive documents were exempt from disclosure under OPRA as deliberative material. Approximately a week later, Defendants denied access to the fourth category of documents requested on the grounds that it was "overly broad" and failed to identify with specificity the records being sought, as required by OPRA. On June 24, 2013, Plaintiff's counsel wrote Defendants asking them to reconsider their prior denial. Defendants' attorneys responded to the Plaintiff on July 9, 2013, noting the deliberative nature of the requested communications and upholding their denial.

Plaintiff filed the instant action on or about July 19, 2013, alleging that Defendants had violated OPRA and the Common Law Right of Access by denying the May 24, 2013 OPRA requests.

This Court held a plenary hearing on September 17, 2013, directing that Defendants file a "*Vaughn* index," of responsive emails, which Defendants filed with the Court on September 30, 2013, for the time period June 1, 2012 to September 30, 2012.

On March 28, 2014, the Court ordered that the Special Master, Judge Berman, determine "whether the documents listed in Defendants' Vaughn indexes should be reviewed *in camera*, disclosed to Plaintiff, or were appropriately withheld." Judge Berman reviewed the relevant emails *in camera*, setting down the reasons for his decisions on the record on August 29, 2014.

After the parties received the decisions, Defendants moved for reconsideration and Plaintiff cross-moved for reconsideration. The reconsideration proceedings lasted part of two days: November 19, 2014 and December 18, 2014. Ultimately, Judge Berman reversed himself on one email, but denied reconsideration of the remaining emails.

In letter briefs submitted to the Court in reply to the Special Master's Recommendations in this matter, Plaintiff asks that this Court accept Judge Berman's recommendations. Defendants however, contest the Special Master's recommendation that it should have to disclose 95 emails, arguing that the Special Master erroneously applied a narrow meaning to deliberative communications.

Plaintiff's Arguments

Plaintiff asserts that OPRA 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, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public's right of access." Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006)(citing N.J.S.A. 47:1A-1). "The purpose of OPRA 'is to maximize public knowledge about public affairs

in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)(quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004). Furthermore, Plaintiff asserts that the New Jersey Supreme Court has stated that, "Those who enacted OPRA understood that knowledge is power in a democracy, and that without access to information contained in records maintained by public agencies citizens cannot monitor operation of our government or hold public officials accountable for their actions." Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489, 502 (2011).

Plaintiff contends that the burden of proving that a denial of access was justified rests solely with the Records Custodian and never shifts. N.J.S.A. 47:1A-6; Asbury Park Press v. Monmouth County, 406 N.J. Super. 1, 7 (App. Div. 2009). Here, Plaintiff asserts the documents sought by Plaintiff are "government records" within the meaning of OPRA. Under OPRA, government records are broadly defined as:

> Any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data, processed or image processed document, information stored or maintained electronically or by the 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 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.

Accordingly, Plaintiff maintains that the email correspondence they seek falls within the definition of "government records" contemplated by the statute. However, Defendants argue that many if not all of their emails are confidential pursuant to the deliberative process privilege. In response, Plaintiff raised the following legal arguments:

I. Administrative Communications Are Not Privileged

The Special Master took the position that the deliberative process privilege should not be used to shield communications that are administrative in nature. This narrower view holds that in order for a communication to be privileged, the communication must relate to the formulation or modification of policy rather than simply administer policy decisions. This view is supported by the published Appellate Division decision of Correctional Medical Servs., Inc. v. Department of Corrections, 426 N.J. Super. 106, 122, 125-126 (App. Div. 2012) ("CMS"). In CMS, the Appellate Division discussed the concept that the deliberative process privilege was intended to protect "open and frank discussion among those" who make "agency decisions." The Court stated that there is a

"profound distinction" between "analysis leading to the formulation of policy decisions" and tasks that are administrative in nature. Id. at 122-123. Thus, Plaintiff contends the issue is not whether a government agency is making a "decision;" the issue is whether the decision that is being made relates to the formulation of or recommended change to "policy" or other decisions of comparable weight.

Based on the distinction set forth under CMS, Plaintiff contends the Special Master correctly decided that the majority of emails at issue in the instant matter were administrative in nature and not deliberative, particularly given that some of the emails related to the drafting of press releases. Therefore, consistent with the Court's finding in CMS, Plaintiff requests that this Court accept the Special Master's finding that emails administrative in nature do not qualify for the deliberative process privilege.

II. Non-Deliberative Portions of Documents Must be Disclosed

During the proceedings before the Special Master, Defendants argued that where the deliberative process privilege protected portions of a record, the entire record must be withheld. At the December 18, 2014 hearing, the Special Master determined that if a portion of a record is deliberative, then that portion of the record may be redacted and the balance of the document produced, based on N.J.S.A. 47:1A-5(g), which states that "If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record." A "government record" is defined as "any paper, written or printed book, document, drawing, map," etc. "that has been made, maintained or kept on file in the course of" the official business of a public agency. N.J.S.A. 47:1A-1.1. Plaintiff contends that contrary to Defendants' interpretation of the statute, the statute does not make reference to "inter-agency or intra-agency advisory, consultative, or deliberative material."

Further, Plaintiff claims Defendants' position is unsupported by case law. Specifically, in Gannett New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005), the Court stated that non-deliberative portions of a document were required to be produced. Gannett involved a County Planning Department's resistance to produce thirteen pages of notes of a principal planner on the basis that the notes constituted deliberative material. Reversing the trial court's erroneous finding that the notes were exempt under OPRA, the Appellate Division held that the "thirteen pages of handwritten notes contained primarily factual material" but that "there [were] a number of entries within the [Planner's] notes that appeared deliberative in nature[.]" Despite Defendants' argument during the proceedings before Judge Berman that Gannett was overruled *sub silencio* by Education Law Center v. New Jersey Dep't of Education, 198 N.J. 274 (2009), Plaintiff maintains that the Education Law Center Court cited and discussed Gannett five times, but did not criticize or comment on the case's holding that if a portion of a document did not contain deliberative material it had to be produced.

Plaintiff contends that the Special Master properly applied the procedure set forth in the Gannett decision, which is that when there is a "question" about whether information within a document is deliberative, the Court must conduct an *in camera* review and "redact the deliberative entries" in

the documents. Plaintiff insists that non-deliberative portions of the email correspondence sought by Plaintiff must be disclosed.

III. Education Law Center

During the proceedings before the Special Master, counsel for Defendants cited and relied heavily upon Education Law Center v. New Jersey Dep't of Education, 198 N.J. 274, 280 (2009), which stands for the proposition that for a document to be shielded by the deliberative process privilege, it must be both pre-decisional and reveal the deliberative process. Plaintiff avers that Defendants' reliance on Education Law Center is ill suited to the facts and circumstances in the instant matter. This is because the document at issue in Education Law Center consisted of "statistical projections used in calculating various approaches to local share contributions under differing alternatives for school funding, which is necessarily deliberative material that would have implicated the deliberative process. Plaintiff contents the focus of this matter turns on whether the material sought is truly deliberative – that is, does it relate to policy formulation or is it merely ministerial in nature? *See* Correctional Medical Servs., Inc. v. Department of Corrections, 426 N.J. Super. 106, 122, 125-126 (App. Div. 2012). Plaintiff insists this Court should not interpret the email correspondence Defendants continue to withhold as documents eligible for nondisclosure based on the holding in Education Law Center, because the email correspondence at issue in this matter does not show the results of hypothetical scenarios that were used as part of a deliberative process.

IV. Emails Regarding the Execution of Policy Are Not Privileged

Finally, Plaintiff argues that all of the emails (or portions of emails) the Special Master recommended for disclosure dealt with the implementation or administration of policy. Consistent with the Appellate Division's finding in Correctional Medical Servs., Inc. v. Department of Corrections, 426 N.J. Super. 106 (App. Div. 2012), which held that the deliberative process privilege only shielded communications that reveal the process by which a policy is formulated (Id. at 122), Plaintiff believes the recommendations of the Special Master should be accepted by this Court because communications related to administration of a policy or its implementation are not privileged.

Defendants' Opposition

Defendants contend that Plaintiffs are not entitled access to the requested records under OPRA and that neither OPRA nor the GRC's Handbook for Records Custodians permit requests that are overly broad or unclear or that would require custodian research. Alternatively, if this Court should find that Plaintiff's requests were proper, Defendants insist the subject materials were properly withheld under OPRA because they were deliberative or factual information related to the formulation of a policy and therefore, ineligible for redaction, despite the Special Master's erroneous finding. In support of their opposition to the Special Master's recommendations Defendants raise the following legal arguments:

I. The Requests Made Were Improper Under the Open Public Records Act

Defendants argue over breadth relying on MAG Entertainment LLC v. Division of Alcoholic Beverage Controls, where the trial court held that Plaintiff's OPRA request was improper because it was overly broad. The Appellate Division affirmed that OPRA requires the production of "identifiable" government records and does not contemplate "open-ended searches of an agency's files." 375 N.J. Super. 534, 549 (App. Div. 2005). Defendant claims the GRC's Handbook for Records Custodians states that if a request is overly broad or unclear, a custodian may deny access pursuant to these decisions. (*See* Handbook at p. 19).

According to Defendants, Plaintiff's initial requests resulted in over 1,300 responsive emails of which non-redundant emails were narrowed to 353. Plaintiff insists that there was no basis for the records custodian to deny their OPRA requests given their specificity. Defendant contends that according to the statute however, OPRA "does not require record custodians to conduct research and correlate data from various government records in the custodians possession." MAG Entertainment, LLC v. Division of Alcoholic Beverage, 375 N.J. Super. 534, 546-547 (quoting Reda v. Tp. Of West Milford, GRC Complaint No. 2002-58 (Jan. 17, 2003)). In the instant matter, Defendant explains that it took over 40 professional hours to compile the responsive emails and cull the attorney-client communication emails. It also took the Special Master several hours to review applicable case law and the emails to determine whether they were deliberative, finding that 39 were indeed deliberative materials.

Defendant asserts that in Spectraserv Inc. v. Middlesex County Utilities Authority, the requestor sought 16 types of documents. The Court held that its requests were overbroad "because [the requests] encompassed records that were exempt from disclosure under OPRA, as ultimately found by both the Special Master and the trial court, and which required further agency efforts to cull, isolate and evaluate." 416 N.J. Super. at 578 (App. Div. 2010). Defendants claim that is precisely what has happened here. Likewise, Defendants assert that the over broad nature of the requests is comparable to other requests the GRC found improper. For instance, in Byrnes v. Borough of Rockaway Police Dept., GRC Complaint No. 2011-113 (May 2012), complainant made the following OPRA request: "E-mails of Doug Scheen, Kyle Schwarzmann, and Michael Godsen for the months of November and December 2010, excluding spam." The GRC found the request invalid because Complainant failed to identify any specific recipients of the emails requested, and further failed to describe with particularity the subject matter of interest. Accordingly, the arduous nature of the work involved in the Special Master's analysis illustrates the requests' impropriety. Defendant asserts that Plaintiff's claims should be denied.

II. Even If The Requests Were Proper, The Subject Materials Were Properly Withheld Because They Are Deliberative Materials

Under OPRA, deliberative materials are explicitly excluded from the definition of "government records" or "record." N.J.S.A. 47:1A-1.1. Defendants emphasize that the Appellate Division has been clear about the policy reasons behind the deliberative process privilege exemption, which exists to "ensure free and uninhibited communication within governmental agencies so that the best possible decisions can be reached..." Education Law Center, 198 N.J. at 280 (2009). In Education Law Center, Defendant avers that the Court held that a document that contains factual

components is entitled to deliberative process privilege protection: 1)"when it was used in the decision-making process;" and 2) its disclosure would reveal deliberations that occurred during that process. Id. at 280-281. "Process" means a "systemic series of actions directed to some end." Id. (quoting Webster's New College Dictionary (2d ed 1986)).

Defendants further argue that "A court must assess fact-based documents against the backdrop of the agency's deliberative efforts in order to determine a document's nexus to that process, and its capacity to expose the agency's deliberative thought-processes." Id. at 299-300. Defendants argue the emails at issue involve Hatikvah's plan to occupy the Facility. Thus, Defendants suggest the emails represent a "systemic series of actions directed to some end." Id. at 296.

At oral arguments on December 14, 2014, the Special Master adopted a three prong test to determine if a material is deliberative: "Is it pre-decisional?" Is it deliberative? Does it relate to the formation of policy?" (Dec. 18, 2014, T10-10-19.) The Special Master defined "policy" as a "development of a plan embracing goals and procedures of a government body or course of action selected from different alternatives." (T 12:22-13:1.) He relied on Webster's Collegiate Dictionary. Id. However, Defendant asserts that the Special Master did not consider the overriding policy formulation that occurred here – pursuit of a plan to occupy the prospective Facility. Defendants insist that nowhere in state or federal case law is there a mandate that a third overt "policy" element be present. Likewise, Defendant claims there is no authority requiring that deliberative communications overtly be about formulating "policies." In creating an overt policy mandate, Defendant asserts the Special Master used a simpler label instead of analyzing "the materials ability to reflect or to expose the deliberative aspects of" the deliberative process. Education Law Center v. New Jersey Dept. of Educ., 198 N.J. 274, 294 (2009) (emphasis added).

Defendant contends that Hatikvah's officials' draft press releases were about the school's decision to locate its facility somewhere. They were pre-decisional, as Hatikvah had not yet released the statement or located the new facility. Defendant claims it can be said that Hatikvah made a "policy" decision to respond forcefully and not abandon its efforts to relocate. Moreover, communications about the draft leases and draft communication releases Defendant asserts were also deliberative. All deliberations leading to Hatikvah's move to the new facility in December 2013 were pre-decisional, inasmuch as they came before their decision to commence occupancy. In Education Law Center, the Supreme Court recognized that deliberations can entail multiple decision options. Defendant believes likewise here, after the East Brunswick Council rejected the zoning board application approving Hatikvah's facility, Hatikvah made a "policy" judgment to continue its pursuit of the facility. Courts have recognized the evolving nature of the policy-making process that this exception is intended to protect." McGee v. Twp. of East Amwel, 416, N.J. Super. 602, 621 (App. Div. 2010)(communications with ex-official can also be deliberative). Defendant asserts that the Special Master's analysis failed to take the same into account.

Furthermore, Defendant asserts although Plaintiff may argue that certain emails cannot be protected by the deliberative process privilege because they were sent or received by non-Hatikvah employees, Defendant contends that this view is inconsistent with the statute, which states that the deliberative process privilege applies to "inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. The statute explicitly contemplates that deliberative communications may include persons not employed by the custodian of records' agency.

Defendant argued Plaintiff's position is also unsupported by case law. In North Jersey Media Group, Inc. v. Borough of Paramus, the Plaintiff submitted an OPRA request to the Paramus Police Department seeking access to an internal report. No. A-4817-07T3 (N.J. App. Div. August 3, 2009). The report was authored by an outside consultant as part of an internal review process designed to improve the operations of the Police Department. The records custodian denied the request on the basis that the document was pre-decisional and deliberative. The court upheld the denial of access. Id. On appeal, the Appellate Division upheld the trial court's decision. The court agreed that the report fell squarely within the deliberative process privilege exemption under OPRA, as it was pre-decisional and advisory in nature. The fact that an outside consultant prepared the report did not change the court's determination.

III. The Special Master's Recommendations To Redact Deliberative Materials Was Erroneous

Defendant further argues that deliberative materials are not "government records" or "records" under OPRA and therefore, not subject to a redactions mandate. "Courts interpret words in a statute according to their plain meaning." Communications Workers of America v. McCormac, 417 N.J. Super. 412 (Law Div. 2008) (citing, among other things, White v. Mattera, 175 N.J. 158 (2003)). Plain meaning has been defined as the "ordinary and well-understood" meanings. Great Atl. & Pac. Tea Co. v. Borough of Point Pleasant, 137 N.J. Super. 136, 143 (1994). Defendants assert that under the clear language of the statute there is no basis for redacting deliberative materials under OPRA because the language only recognizes an exemption for "government records." N.J.S.A. 47:1A-5.

Defendant also contends that Plaintiff's reliance on the Appellate Division decision Gannett New Jersey Partners, LP v. County of Middlesex is misguided because its holding is that redacting is warranted for deliberative communications was repudiated by the Supreme Court in Education Law Center. Not only do Defendants argue that the analysis undertaken by the court in Gannett was improper for its application of the fact/opinion dichotomy – holding that hand-written materials were not deliberative for being "primarily factual" – but Defendants also contend that the Gannett court failed to address whether there is a redaction mandate for materials not part of the definition of "government records" under OPRA.

Defendant insists that review of more relevant case law, specifically, the decision reached by the Appellate Division in Ciesla v. New Jersey Dept. of Health and Senior Services, 429 N.J. Super. 127 (App. Div. 2012), demonstrates why the Special Master's recommendation to redact deliberative materials was improper:

Defendant avers that the phrase "government record" is a critical term of art within OPRA and by carving out deliberative materials from the definition of a "government record," the Legislature manifestly did not invite the GRC or courts to dilute that exclusion by undertaking a balancing of the requestor's asserted need against the privilege. Ciesla, 429 N.J. Super. at 144.

Defendant argues that the Legislature did not invite the courts to dilute the confidentiality of deliberative materials by making them subject to redactions. Indeed, in Education Law Center, the Appellate Division directed redactions of factual material, only to have the Supreme Court reject

that in favor of protection of the deliberative process, including factual information. Education Law Center, 198 N.J. at 282.

Defendant argues that because a custodian of records should not be required to expend significant time and resources parsing out particular sentences or phrases within a document that is otherwise exempt from production, and because here, the School's custodian of records was not required to expend substantial time and resources to transform a deliberative document into a public one by redacting bits of communications, the Special Master's recommendations to redact certain deliberative materials was erroneous.

Court's Findings

In 2002, the Legislature repealed the Right to Know Law and adopted OPRA, codified at N.J.S.A. 47:1A-1 et seq. The purpose of OPRA "'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)).

OPRA states 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, and any limitations on the right of access . . . shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1. OPRA defines "[g]overnment record" broadly as "any paper, written or printed book, document, drawing, map," etc., "that has been made, maintained or kept on file in the course of" the official business of a public agency. N.J.S.A. 47:1A-1.1.

There is an exception to disclosure if a search is overbroad or if unidentifiable MAG Entertainment, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 543 (App. Div. 2005). In MAG, Plaintiff MAG had their liquor license revoked for allegedly serving alcohol to an intoxicated patron who was then involved in a fatal car crash. Plaintiff MAG then filed an OPRA request for "all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person...was involved in a fatal auto accident." The Division's record's custodian rejected MAG's request deeming it a "[general] request for information' obtained through research, rather than a "request for a specific record." Since the request was not limited to a particular time frame and because the agency's case tracking system did not have a search engine, the custodian would have had to manually review the contents of the case file. Id. at 540. The Court stated OPRA,

> is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying or examination.' . . . 'OPRA does not require record custodians to conduct research among its records for a requestor and correlate data from various

> government records in the custodian's possession.' Reba v. Tp. Of West Milford, GRC Complaint No. 2002-58 (January 17, 2003).

In MAG, the Court held,

> Under OPRA, agencies are required to disclose only 'identifiable' governmental records not otherwise exempt. Wholesale requests for general information to be analyzed, collated and complied by the responding government entity are not encompassed therein. In short, OPRA does not countenance open-ended searches of an agency's file. . . . Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.

The instant matter is distinguishable from MAG. The instant matter involves identifiable government records that certainly are not open ended searches and do not require research or an analysis of multiple documents. A simple computer search would suffice. MAG involved a series of searches for "all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person...was involved in a fatal auto accident." The number of action required by that request is far more than that which is required by the instant request. As such, Defendant's reference to MAG is unpersuasive

The Deliberative Process Privilege

OPRA provides, "inter-agency or intra-agency advisory, consultative, or deliberative material" is excluded from disclosure. N.J.S.A. 47:1A-1.1. This exemption is often referred to as the deliberative process privilege and aimed at protecting the quality of government decisions by shielding the communications received by a decision maker from public disclosure. Gannett New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. 219 (App. Div. 2005). To qualify for this privilege, two conditions must be satisfied: (1) the document must be pre-decisional, meaning it was "generated before the adoption of an agency's policy or decision," and (2) it "must be deliberative in nature, containing opinions, recommendations, or advice about agency policies." Id. (quoting In re the Liquidation of Integrity Ins. Co., 165 N.J., 75, 84-85, 754 A.2d 1177 (2000). The privilege does not extend to "[p]urely factual material that does not reflect deliberative process." Id. (quoting In re the Liquidation of Integrity Ins. Co., at 87. Therefore, if a document contains both deliberative and factual materials, the deliberative materials must be redacted and the factual materials disclosed." *See* Gannett, 379 N.J. Super. 205, 219 (2005).

Defendants argue that nearly all of the email correspondence in dispute are confidential pursuant to the deliberative process privilege because the emails concern Defendant's ultimate goal – relocation of the facility. Moreover, Defendants offer a policy argument in defense of their position that if the [email] drafts of government officials were to become public documents, it could have a chilling effect on the future process of drafting public comments, because Defendants argue that

the deliberative process privilege extends to the process itself, not just the formulation of a policy. The Special Master did not find this argument particularly persuasive; nor does this Court.

Addressing Defendant's first argument, in Ciesla v. New Jersey Dep't of Health and Senior Sevs., 429 N.J. Super. 127, 138 (App. Div. 2012), the court stated that a document is "deliberative" if and only if it was "generated before the adoption of an agency's policy or decision" [and] it "contain[s] opinions, recommendations or advice about agency policies." While both parties concede that all of the correspondence was pre-decisional, the Special Master accepted Plaintiff's argument that nearly all of the content was specific to working out the details or the execution of a decision and was therefore, administrative in nature. In reaching this decision, the Special Master declined to expand the universe of what a deliberative-type communication was, finding that the documents for the most part dealt with the effectuation of policy rather than its formulation. That finding is consistent with Education Law Center's holding that " ...individual documents may not be capable of being determined to be, necessarily, deliberative material, or not, standing alone. A court must assess such fact-based documents against the backdrop of an agency's deliberative efforts in order to determine a document's nexus to that process, and its capacity to expose the agency's deliberative thought-processes." 198 N.J. 274 at 300 (2009).

Defendants repeatedly cite to the Education Law Center opinion, to contest the process employed by the Special Master in evaluating the communications at issue arguing the Special Master improperly parceled out smaller facets of the overall communications instead of looking at the communications in their entirety, including whether they contained factual details in order to be considered part of a deliberative process. As the court in Education Law Center stated, "deliberative material need not, in all instances, expressly reflect an overt opinion, recommendation, or advice when a discretionary decision is in development." Still, Plaintiff avers that the case does stand for the proposition that the deliberative process privilege exists to protect the decision-making process regarding policies and regarding changes to existing policies. Alternatively, Plaintiff suggests this protection extends only to changes in the formulation of policy.

According to CMS, which was decided after Education Law Center, there is a distinction between policy and administration. The Education Law Center court acknowledges this distinction in its opinion, stating that one of the jobs of the fact-finder is to determine the nexus between the document at issue and the deliberative process. Here, after scrutinizing the emails submitted for reconsideration and counsels' briefs, the Special Master did not find that the documents related more so to the formulation of policy than they did to the effectuation of policy. This Court agrees and is not convinced that these government records are subject to the deliberative process privilege because its disclosure would reveal the nature of the deliberations that occurred in that process. Id. at 280. The documents at issue are not so "inextricably intertwined with policymaking processes" that the purpose of the deliberative process privilege could be impaired by requiring disclosure.

Turning to Defendants' second argument, with respect to any press release correspondence, Plaintiffs specifically argued before the Special Master that although the Special Master could imagine a situation in which a press release might implicate the discussion of actual policy and create embarrassment for the parties exchanging emails if disclosed, particularly if parties elected to go in different directions, here, the emails withheld by Defendants related to editing a draft as a

draft for the purpose of executing a decision. Consistent with the CMS case, which held that for the privilege to apply, it must related to the formulation of a policy, the Special Master acknowledged the chilling effect that sharing drafts of communications between government officials could have but ultimately ordered that certain sentences in certain emails be redacted as the content of most of the emails at issue were not sensitive enough in nature to represent the chilling effect contemplated by Defendants.

Accordingly, this Court after reviewing the e-mails, concurs with the Special Master's finding that the majority of email correspondence in question does not represent content deliberative in nature and therefore, is appropriate for disclosure.

Disclosure of Non-Deliberative Portions of Documents

N.J.S.A. 47:1A-5(g) states, "If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record." Defendants assert that under the clear language of N.J.S.A. 47:1A-5(g) there is no basis for redacting deliberative materials because the language only recognizes an exemption for "government records." The emails sought are "government records" under OPRA's expansive definition of this term however, which includes not only documents made, maintained or kept on file in the course of a [public agency's] official business," but also any document "received in the course of [the agency's] official business." N.J.S.A. 47:1A-1.1. Since the emails were received in the course of the agency's official business, they must be released to Plaintiff unless protected from disclosure by other provisions of OPRA. Gannett New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. at 213. This Court sees no reason to deviate from the legislature's intent of ensuring access to public documents even if redacted.

Additionally, Defendant's reliance on Gannett does seem to be on point where the Court stated, "non-deliberative portions of a document were required to be produced." Gannett, 423 N.J. Super. at 356-357. During the proceedings with the Special Master though, Defendants raised two objections to this finding: 1) that if a document is deliberative in part, it's deliberative in whole, and 2) that the Gannett case was somehow overruled *sub silencio* by Education Law Center v. New Jersey Dep't of Education, 198 N.J. 274 (2009).

With respect to Defendants' first argument, the Special Master did not find that the statute requires entire disclosure, and as for whether Education Law Center overruled Gannett, the Special Master did not challenge the argument raised by Plaintiff in its papers that the Education Law Center court cited and discussed Gannett five times, without commenting on its holding that the portion of a document that did not contain deliberative material had to be produced. Accordingly, Plaintiff avers that the Special Master correctly followed the procedure set forth in Gannett that the Supreme Court did not repudiate, which is that when there is a "question" about whether information within a document is deliberative, the Court must conduct an in camera review and "redact the deliberative entries" in the documents. *See* also K.L. v. Evesham Township Board of Education, 423 N.J. Super. 337, 362 n.4 (App. Div. 2011) ("Any such deliberative materials could be redacted and the factual portions of the notes disclosed to Plaintiff.") (citing Gannett).

This Court based on the aforementioned cases accepts the Special Master's finding that non-deliberative portions of documents must be disclosed.

Overall, Defendants have not met their burden of proving that the denial access is authorized by law. The last paragraph of N.J.S.A. 47:1A-6 specifically says, "The public agency shall have the burden of proving that the denial access is authorized by law." As for relevant case law addressing this issue, the court in In re the Liquidation of Integrity Ins. Co., 165 N.J., 75, 84-85, 754 A.2d at 1182 (2000), stated that "the governmental entity claiming the privilege bears the burden of establishing that the document in question was in-fact pre-decisional and that it is deliberative in nature, containing opinions, recommendations, or advice about agency policies." With the exception of the sentences ordered redacted or the emails reserved as privileged materials Defendant has not met their burden.

Since Plaintiff has prevailed under OPRA, Plaintiff is entitled to costs, see Rule 4:42-8. Plaintiff is also entitled to reasonable counsel fees pursuant to N.J.S.A. 47:1A-6. For the foregoing reasons, this Court **GRANTS** Plaintiff the principal relief sought, costs and reasonable counsel fees.

Yours truly,

Hon. Travis L. Francis A.J.S.C.