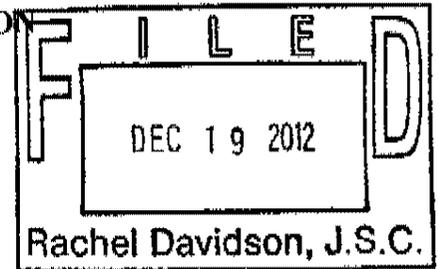


SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY: LAW DIVISION



PREPARED BY THE COURT

SECONDARY PARENT COUNCIL
and LAURA BAKER,

Plaintiffs,

DOCKET NO.: ESX-L-6937-11

CIVIL ACTION

vs.

ORDER

CITY OF NEWARK and ROBERT
MARASCO, in his official capacity as City
Clerk and Custodian of Records for the
City of Newark,

Defendants.

THIS MATTER having been brought before the court by way of plaintiffs' request for the production of documents from defendant under the Open Public Records Act, and the court having read and considered the written submissions of the parties, and the court having reviewed all of the withheld documents in camera, and for the reasons stated below,

IT IS on this 19th day of December, 2012,

ORDERED that defendants produce documents 0001 through 0074 with certain redactions, as explained below.

A handwritten signature in cursive script that reads "Rachel Davidson".

Rachel N. Davidson, J.S.C.

Reasons

This matter comes before the court on the application of the plaintiffs seeking production of certain documents under the Open Public Records Act (“OPRA”), N.J.S.A. 47:1A-1-13. OPRA declares that it is the policy of this state for government records to be “readily accessible for inspection, copying, or examination by the citizens of this State.” 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” Educ. Law. Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 284 (2009) (internal citation omitted). OPRA defines a “government record” as any record “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.” N.J.S.A. 47:1A-1.1. “[I]f the public employce or public entity has not made, maintained, kept or received a document in the course of his or its official business, a document is not a government record subject to production.” Michelson v. Wyatt, 379 N.J. Super. 611, 619 (App. Div. 2005). “[A]ny limitations on the right of access as accorded by [OPRA] shall be construed in favor of the public’s right to access.” Mason v. City of Hoboken, 196 N.J. 51, 64-65 (2008).

Plaintiffs’ OPRA request sought correspondence, memoranda, and other documentation from June 1, 2010 to August 23, 2011 relating to the \$100 million donation made by Facebook to support public education in Newark. In this case, the City of Newark (“Newark”) seeks to withhold 36 documents, which have been stamped 0001-0074 and has provided a privilege log listing them. The documents are all emails that must have been in Newark’s possession for them to appear in the privilege log. The documents provided to the court for review are emails from narrow periods of time, specifically the periods of September 13, 2010 through September 28, 2010, January 19, 2011 through January 20, 2011, and March 27, 2011 through June 27, 2011.

Newark was required to confirm whether there were any documents attached to the emails; it appears that attachments were deleted from the document production. For example, 0005-0006 discusses a draft document and asks for comment, yet the draft itself was not included. Similarly, 0008-0009 specifically states that a document is attached, yet the document is not produced to the court.¹ Of course without reviewing the attachments, the court cannot conclude that any privilege applies to them.

In seeking to withhold documents, Newark bears the burden of proving that a privilege applies to a document. N.J.S.A. 47:1A-6 (“The public agency shall have the burden of proving that the denial of access is authorized by law.”) Although it bears the burden of proof, Newark did not provide the court with any information as to the identities of the various organizations that appear in the emails. Newark also did not provide information regarding the identities of the individuals whose names appeared in the emails or information regarding whether certain email addresses were private or public. For some of the documents, Newark printed out the emails without selecting the option that discloses the email address of the recipient. In those cases, the court cannot determine whether a personal or work email address was used.

According to the complaint, on September 24, 2010 Chris Christie, the governor of New Jersey, Cory Booker, the mayor of the City of Newark, and Mark Zuckerberg, the chief executive of Facebook, appeared on the Oprah Winfrey show to announce the gift of \$100 million to transform Newark’s public schools. According to the press release issued by Newark and still posted on Newark’s website:

Governor Christie and Mayor Booker have committed to a bipartisan initiative to ensure every school-aged child in Newark has access to a high-quality education that prepares them for a successful future and a better quality of life. To begin this new Partnership, the Governor has authorized Mayor Booker to work

¹ See also documents 0011, 0042, 0044, 0059, 0067.

with the local community to develop and implement a comprehensive education plan for the future of the Newark Public School District, based on clear standards and metrics that reward excellence in teaching, school leadership and student achievement. The plan will be carried out under the Mayor's leadership over the next few years.²

This press release, on Newark's website, indicates that Mayor Booker's involvement in this effort was in his capacity as mayor of Newark.

The Foundation for Newark's Future ("FNF") is one of two non-profit organizations founded as part of the \$100 million donation by Mark Zuckerberg. The Newark Public Schools Office of the Advisory Board website lists Newark and FNF as stakeholders. FNF, in turn, lists Mayor Booker as a member of its Board of Trustees, serving ex officio. Black's Law Dictionary defines "ex officio" as "from office; by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office . . ." BLACK'S LAW DICTIONARY 516 (5th ed. 1979). Mayor Booker's position on the Board of Trustees is by virtue of his position as the mayor of Newark and any information he has received regarding FNF was received in his official capacity.

Newark puts forth five different bases for not producing the documents in question: (1) executive privilege; (2) material not made, maintained, or kept in the course of official business; (3) personal information; (4) advisory, deliberative, and/or consultative material; and (5) official information.

Executive Privilege

Newark claims that the executive privilege applies to most of the documents. The executive privilege is addressed in N.J.S.A. 47:1A-9(b) which provides that OPRA:

² Press Release, City of Newark, New Jersey Governor Chris Christie and Newark Mayor Cory A. Booker Join with Facebook Founder and CEO Mark Zuckerberg to Advance a National Model for Improving Public Schools (Sept. 24, 2010) (available at http://www.ci.newark.nj.us/government/mayor_booker/newark_education.php).

[S]hall not abrogate or create any executive . . . privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.

Executive privilege exists to protect the confidential communications pertaining to the executive function. Nero v. Hyland, 76 N.J. 213, 225 (1978).

It is not clear that the executive privilege applies to mayors at all, but even assuming that it does, it does not apply here. The executive privilege “insulates the sensitive decisional and consultative responsibilities of the [executive] which can only be discharged freely and effectively under a mantle of privacy and security.” Wilson v. Brown, 404 N.J. Super. 557, 572 (App Div. 2009) (quoting Nero v. Hyland, 76 N.J. 213, 225-26 (1978)) (addressing executive privilege as related to a state governor).

In determining whether the executive privilege applies, courts employ a balancing test, weighing the public’s interest in disclosure against its interest in maintaining confidentiality. Balancing these interests, New Jersey courts have found executive privilege prevents disclosure under OPRA of records such as investigatory reports compiled for the governor about a potential nominee for a state post, Nero, 76 N.J. at 216, and documents and communications by the governor regarding collective bargaining negotiations with a union, Wilson, 404 N.J. Super. at 564-65. The executive privilege would apply, for example, to deliberations within Newark about whether to accept the \$100 million donation. Such deliberations are completely absent from the emails. The earliest emails provided date from September 13, 2010 (see, e.g., 0007), by which time Facebook’s commitment to make the donation and Newark’s decision to accept it had already been made. The executive privilege does not apply to any of the documents claimed to

be subject to the executive privilege as they do not contain information that implicates the “sensitive decisional and consultative responsibilities” of the mayor.

Material Not Made, Maintained, or Kept in Course of Official Business

After arguing that most of the emails are subject to the executive privilege, Newark simultaneously claims that the emails were not made, maintained, or kept in the course of official business. N.J.S.A. 47:1A-1.1 defines a “government record” as material “that has been made, maintained or kept on file in the course of . . . official business.” The mayor’s official business is not limited to the Faulkner Act, as set forth in N.J.S.A. 40:69A-40, which states what the mayor is required to do, but does not limit what he may do. The court finds that, with one exception, the emails in question were made, maintained, and kept in the course of the official business of Newark.³

The emails in question were all received by Mayor Booker and other members of the mayor’s staff and the mayor and his staff participated in the email communications. Documents 0001-0057 all appear to have been printed from Sharon Macklin’s computer. The plaintiff, without contradiction, identifies Sharon Macklin as Mayor Booker’s executive assistant in City Hall. Newark does not argue anywhere that Ms. Macklin’s relationship with Mayor Booker is anything other than professional. Thus all documents that appear on Ms. Macklin’s computer for her to maintain on the mayor’s behalf appear to be city business. The fact that some of the emails were sent to the mayor using a personal or, perhaps, a campaign-related email address does not exempt them from being considered a public record.⁴

³ The exception is a portion of 0036, discussed below.

⁴ See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127, available at <http://www.state.nj.us/grc/decisions/2005-127.html> (determining that emails on a personal email account were government records and subject to OPRA because the emails were made, maintained, kept, or received in the course of official business). In establishing legal support, “[a] decision of the [Government Records Council] shall not have value as a precedent for any case initiated in Superior Court,” N.J.S.A. 47:A-7, though such decisions are normally accorded deference unless “arbitrary, capricious or unreasonable” or violative of “legislative policies

Because Mayor Booker is a member ex officio of the FNF Board of Trustees, the communications he received regarding FNF also relate to official city business. Indeed, Mayor Booker, in referring to his relationship to FNF and the \$100 million Facebook donation, states on his website, www.corybooker.com, that “in 2010 the City of Newark began a historic transformation of Newark’s schools” (Emphasis added.) This reference confirms that the mayor himself understands that his involvement with the Facebook donation is a public matter. Documents 0058-0060, 0067-0070, 0071-0073, and 0074 all concern FNF, making the mayor’s receipt of these communications relevant to official city business. Document 0061-0065 is an email thread received by Mayor Booker at his “bookerteam.com” address, which has never been explained by Newark to be personal or professional. These e-mails concern the Newark Public Schools and were also sent to Jarrad Toussant, the mayor’s lead advisor on education. Thus, 0061-0065 also clearly relate to official business by Newark. Document 0066 is an email from Mayor Booker to the Superintendent of Newark Public Schools, Cami Anderson, the Acting Commissioner of the New Jersey Department of Education, Chris Cerf, the mayor’s lead advisor on education, Jarrad Toussant, and the mayor’s executive assistant, Sharon Macklin. The email refers to the mayor’s leadership role with regard to Newark’s public schools, again demonstrating that the email relates to official business of Newark.

Personal Information

Newark also claims that every single email is privileged pursuant to N.J.S.A. 47:1A-1, which provides that “a public agency has the 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.” To support its argument,

expressed or implied in the act governing the agency.” Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003) (citing Campbell v. Dep’t of Civil Serv., 39 N.J. 556, 562 (1963)).

Newark alleges that the private email addresses and identities of private persons working in connection with FNF must be safeguarded.

To determine whether a public record includes personal information that should not be disclosed, the following are considered: (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access. Burnett v. Cnty. of Bergen, 198 N.J. 408, 428 (2008) (adopting the factors set forth in Doe v. Poritz, 142 N.J. 1, 88 (1995)). N.J.S.A. 47:1A-1 has been interpreted to prevent disclosure of private information such as one's social security number. Burnett, 198 N.J. at 437. Private information, such as a social security number, may be redacted from the public records that are the subject of an OPRA request. Id.

After analyzing the documents in question using the seven considerations addressed in Burnett, the court concludes that, at most, Newark's claim regarding personal information would protect email addresses of certain recipients, but not the contents of the emails themselves. In considering whether any email addresses should be redacted, the court distinguishes between those people who sent emails to a public person, such as Mayor Booker, and those who received emails and thus did not knowingly inject themselves into the public discourse. There is no expectation of privacy by those who affirmatively communicated with Newark. The addresses of the recipients, however, are not within the description of the requested information, there is a potential harm if their personal addresses are disclosed, especially as to well-known people, and

there is no public need or interest in having their addresses disclosed. For these reasons, email addresses for only these email recipients shall be redacted from Newark's production to plaintiff.

In addition, the court must consider 0035-0036, which includes an email string between two private citizens. One participant subsequently forwarded the email string to Mayor Booker, the mayor's senior advisor Bari Mattes, and others. There is nothing in the email string to indicate that the non-forwarding party had any idea that his email would ever be made public. The court finds that the non-forwarding party does have a reasonable expectation of privacy. Accordingly, Newark shall redact both the address and the text of the non-forwarding party's email (found at the bottom of 0036) but not the rest of the document.

Advisory, Deliberative and/or Consultative Material

With the exception of document 0003-0004, Newark maintains that all of the documents include advisory, deliberative, or consultative material. N.J.S.A. 47:1A-1.1 provides that a government record does "not include inter-agency or intra-agency advisory, consultative, or deliberative material." This exemption has been construed to encompass the deliberative process privilege. Ciesla v. N.J. Dep't of Health & Senior Servs., No. A-5309-10T1, 2012 N.J. Super. LEXIS 183, at *9 (App. Div., Dec. 4, 2012). 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., 198 N.J. at 285 (internal citation omitted). Whether a document is protected by this exception is determined by a two-prong test: (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, which means that the document contains opinions, recommendations, or advice about agency policies. Id. at 286. "[T]he

privilege is necessary to ensure free and uninhibited communication within governmental agencies so that the best possible decisions can be reached.” Id. It is also grounded in the desire to prevent disclosure of proposed policies before they have been fully vetted and adopted by a government agency. Id. Purely factual material that does not reflect a deliberative process is not protected. Id. at 287. The key to identifying deliberative material is how closely the material relates to the formulation or exercise of policy-oriented judgment or to the process by which policy is formulated. Ciesla, 2012 N.J. Super. LEXIS at *11.

The earliest emails produced are dated September 13, 2010. It is clear from those emails that a decision had already been made by Newark to accept the \$100 million donation. Therefore, none of these documents can be pre-decisional and Newark has failed to satisfy the first prong of the Education Law Center test. Newark also fails to satisfy the second prong as the documents do not relate to any policies. Having satisfied neither prong, the deliberative privilege cannot apply to any of the documents.

Official Information

Finally, Newark alleges the official information privilege applies to all documents except 0003-0004. Newark relies on N.J.S.A. 47:1A-9 (quoted above) and N.J.S.A. 2A:84A-27 which provides that “[n]o person shall disclose official information of this State or of the United States (a) if disclosure is forbidden by or pursuant to any Act of Congress or of this State, or (b) if the judge finds that disclosure of the information in the action will be harmful to the interests of the public.” Having reviewed each document, the court cannot identify any Act of Congress or of the State of New Jersey that would be violated by disclosure of these emails, or any harm to the public that would result from disclosure.