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SECONDARY PARENT COUNCIL and
LAURA BAKER,

Plaintiffs,

v.

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

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
ESSEX COUNTY
DOCKET NO. L-6937-11

Civil Action

PLAINTIFFS' BRIEF IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is an action for access to public records, brought under both the Open Public Records Act, N.J.S.A. 47:1A-1 et seq., and the common law. Plaintiffs are the Secondary Parents Council, an association of parents and grandparents of Newark public school students, and Laura Baker, an SPC member and

officer. Defendants are the City of Newark and its clerk in his capacity as custodian of public records.¹

The SPC seeks access to correspondence and other records generated or received by Newark in connection with a pledge by Facebook founder Mark Zuckerberg to donate \$100 million to the Newark School System and Newark's cognate efforts to reform its public education system. SPC seeks those records to better inform itself about how the money will be allocated and used to restructure the city's schools.

Newark claims the SPC's complaint is procedurally defective and seeks documents that either 1) are not "government" or "public" records or 2) are privileged against disclosure. On that basis, Newark has moved to dismiss the SPC's complaint for failure to state a claim. R. 4:6-2(e).

For the following reasons, the Court should deny that motion in its entirety:

First, the Court can, and should, permit SPC to cure any procedural defect in its form of pleading. Dismissal for a minor pleading defect is wholly inappropriate; in fact, in this case, Newark's opposition to SPC's request raises factual issues that validate SPC's mode of proceeding.

¹ For convenience, this brief will refer to plaintiffs collectively as SPC; to defendants, collectively as Newark.

Second, contrary to Newark's claim, the documents SPC seeks are "government records" under OPRA. Newark's own statements about the Zuckerberg grant, and about the associated restructuring of Newark's schools, make clear that city officials - particularly Mayor Corey Booker - acted in their official capacity when they dealt with these issues.

Third, Newark's attempt to invoke the "deliberative materials" exception to OPRA is both ill-founded and premature. Because it only protects pre-decisional, intra-agency opinions and advice, the deliberative privilege simply does not apply to many of the records SPC seeks. Moreover, Newark cannot invoke the privilege in a "blanket" fashion; it must provide a document-by-document justification for its application. Wholesale dismissal of SPC's complaint is therefore improper.

Fourth, Mayor Booker cannot use "executive privilege" to avoid disclosure of requested records. Executive privilege is the province of the governor, not of municipal mayors. And in any event, because the privilege is qualified, it requires the sort of factually based balancing of the benefits and drawbacks of disclosure that cannot be undertaken on a motion to dismiss.

Fifth, for similar reasons Newark cannot avail itself of the "official information" privilege. Substantively, that privilege does not extend to the type of information SPC seeks;

moreover, its application also requires the fact-based balancing that precludes blanket dismissal of the complaint.

Sixth, contrary to Newark's claim, the the records SPC seeks are common law public records as well - records made or kept on file by public officials. SPC's entitlement to these documents turns on whether its interest in them outweighs any harm that disclosure may cause; once again, the Court cannot make that determination on a motion to dismiss.

Newark's gambit - a motion to dismiss in an OPRA matter that it says must be treated summarily - is curious, to say the least. Such a motion makes little sense, particularly when Newark's claims in opposition raise precisely the sort of factual issues that preclude dismissal.

The Court should reject Newark's flawed approach. It should permit this matter to proceed, after appropriate discovery, to a hearing.

II. STATEMENT OF THE FACTS

The following facts are taken from the complaint in this matter, and from the press release attached to that complaint as Exhibit A:

On September 24, 2010, Newark's Mayor Cory Booker, along with Governor Chris Christie and Facebook Chief Executive Mark Zuckerberg, announced that Zuckerberg would donate \$100 million

to "transform [Newark's] public schools so that all [Newark's] children have access to a high quality education and so that other cities can use Newark as a model to reform their own schools." Zuckerberg created a private foundation, called Startup: Education ("Startup"), to administer this grant.

Contemporaneously, Booker launched the Newark Education and Youth Development Fund, a non-profit organization whose goal was to secure \$100 million to match Zuckerberg's gift, as well as an additional \$50 million to serve Newark's disaffected youth. The fund was later renamed the Fund for Newark's Future ("FNF").

As part of the announcement, Christie and Booker pledged to work together to create a new plan for Newark schools, which have been state-controlled since 1995. Under the agreement between Booker and Christie, the state maintained legal control over the Newark Public School District, but the governor authorized Mayor Booker to develop and implement a comprehensive education plan for the Newark School District.

The parties fully described the arrangement between the state, the city and Zuckerberg in the press release that accompanied the announcement of Zuckerberg's pledge and the creation of FNF. That press release contained the following statements:

Governor Christie and Mayor Booker have committed to a bipartisan initiative to

ensure that 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 with the local community to develop and implement a comprehensive education plan for the future of the Newark Public School District The plan will be carried out under the Mayor's leadership over the next few years.

Governor Christie has committed to work with Mayor Booker to ensure that every child in Newark receives a quality education. Through this Partnership, Mayor Booker will provide local strategic and operational leadership to help Newark improve its public schools ...

Mayor Booker has committed to make education a top priority for his current term in office, engage with the Newark community to develop new educational principles and performance metrics, and implement a comprehensive program to reward excellence. As key milestones in the project are reached, the Startup: Education foundation intends to provide \$100 million over five years to ensure every school-aged child in Newark has access to a high-quality education.

Corey Booker, Newark's mayor, and Chris Christie, New Jersey's governor, are announcing a plan to dramatically improve the quality of education and educational opportunities for students in Newark. Governor Christie is authorizing Mayor Booker to develop and implement a comprehensive education plan for the Newark

Public School District. Through this partnership, Mayor Booker will provide local strategic and operational leadership to help make Newark a national model for improving public schools, with strong accountability and clear metrics designed to foster teacher excellence and student achievement.

As part of this announcement, Mark Zuckerberg announced the creation of a new foundations - Startup: Education - with an initial gift of \$100 million... .

The state will maintain ultimate legal responsibility for the Newark Public Schools. The Governor, recognizing the education reform demands vision and accountability on the local level, has authorized Mayor Booker to develop a community vision for transforming Newark's public schools.

The Secondary Parent Council is a voluntary association of parents and grandparents of students in Newark's public schools. The SPC maintains offices at 39 Montrose Street, Newark, New Jersey. Laura Baker, a Newark resident, is the grandparent of a Newark public school student. Ms. Baker is a member of the SPC and serves as its president emeritus and secretary, and acts as an agent of the organization.

On April 1, 2011, Baker - acting on the SPC's behalf - sent an OPRA request to Newark, in which she sought copies of various records generated in connection with the Zuckerberg gift and the proposal to reform Newark public schools. She also sought these

documents under the common law right of access to public records.

On April 5, 2011, City Clerk Robert Marasco acknowledged receipt of Baker's request and asked for an extension of time until April 26 to locate and compile responsive documents. However, Newark did not respond by April 26; instead, on June 1, 2011, after a phone call from Baker to the City Clerk's office, Marasco notified Baker that Newark "was continuing to search" for responsive records and asked for an additional extension until June 15.

Again Newark failed to make a timely response. On June 30, 2011, Baker wrote Marasco asking for copies of any responsive documents Newark had located to that point. On July 12, 2011, having received no reply to her June 30 letter, Baker again wrote Marasco and requested that the documents be produced immediately.

In response, on July 19, by letter from the city's corporation counsel, Newark denied SPC's records request in its entirety. The city claimed that 1) the request was improperly overbroad; 2) that communications between Mayor Booker and Zuckerberg and others "were not made in the course of the Mayor's official duties"; and 3) that in any event, the documents either privileged or exempt from disclosure.

SPC filed this lawsuit on August 23, 2011.

III. ARGUMENT

On a motion to dismiss, a court must accept a complaint's allegations as true and then determine whether those facts "suggest" a cause of action. Printing Mart-Morristown v. Sharp Electronics, 116 N.J. 739, 746 (1989). If they do, the court must deny the motion. A court may not decide an issue of fact on a motion to dismiss; rather, it must limit itself to the facts alleged in the complaint. See Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987).

Further, when dealing with claims under OPRA, "any limitations on the right of access as accorded by [OPRA] shall be construed in favor of the public's right of access." Mason v. City of Hoboken, 196 N.J. 51, 64-65 (2008), quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004). This presumption furthers the purpose of the Open Public Records Act "to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Id.

Judged by these standards, Newark's motion clearly fails. It fails both on purely legal bases because its claims to exemptions under OPRA are unavailing, and on factual grounds

because material factual issues exist that must be resolved prior to adjudication.

A. Any Procedural "Defect" In SPC's Complaint Is Not Grounds For Dismissal.

A Superior Court action under OPRA "shall proceed in a summary or expedited fashion." N.J.S.A. 47:1A-6. Typically, that requires a court to follow the provisions of 4:67-1(a), which governs summary actions "permitted by rule or statute." See MAG Entertainment, LLC v. Div. of ABC, 375 N.J. Super. 534, 550 (App. Div. 2005); Courier News v. Hunterdon Cty. Pros. Office, 358 N.J. Super. 373, 378 (App. Div. 2003).

R. 4:67-2(a) provides that a summary action under R. 4:67-1(a) be commenced by order to show cause. Newark argues that because SPC instead brought its claim by action in lieu of prerogative writ, the Court should dismiss it.

The Court should reject that argument. First, on its face, Section 6 requires "a summary or expedited" proceeding. (Emphasis supplied). That language is disjunctive. See Alexander v. Bd. of Review, 405 N.J. Super. 408, 417 (App. Div. 2009). Rule 4:67-1(a) speaks of situations where summary actions are "permitted," as opposed to "required." Thus, while a court certainly may properly handle an OPRA case summarily, the governing statute does not appear to mandate it. See

Tractenberg v. Tp. Of West Orange, 416 N.J. Super. 354, 365
(App. Div. 2010).

Second, Defendant's argument elevates form over substance, and would unfairly punish SPC for what is at most a minor procedural mistake. Even if Section 6 of OPRA mandates that a plaintiff proceed under R. 4:67-1(a), the proper remedy is to treat SPC's suit as a summary action, not dismiss it for a procedural error. See In re Carpenter's Estate, 142 N.J.L. 772, 776 (E. & A. 1948).

The cornerstone of our judicial system is that justice is the polestar and the procedures utilized must be molded and applied with that in mind. Our ultimate goal is not, and should not be, swift disposition of cases at the expense of fairness and justice. Rather, our ultimate goal is the fair resolution of controversies and disputes.

Klier v. Sordoni Skansa Constr. Co., 337 N.J. Super. 76, 83
(App. Div. 2001). See also R. 1:1-2 (rules must be construed "to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay").

In fact, SPC would welcome summary resolution of its records request. It agrees that OPRA disputes generally "lend themselves to summary treatment" and that prompt disposition

furthering OPRA's salutary purposes. See MAG Entertainment, supra, 375 N.J. Super. at 552.

Here, however, Newark has failed to take the actions (e.g., providing a privilege log) necessary to expedite the case. Further, Newark's opposition to SPC's request complicates the case in a way that may preclude straightforward summary treatment. The city's claim that the documents SPC seeks are not "government records" raises factual issues about the mayor's actions and about FNF and its relationship to city government; those issues may require the sort of extensive discovery that cannot occur in a summary action. Similarly, its various claims of privilege cannot be adjudicated summarily, or (as Newark appears to believe) in a "blanket" fashion; they require preparation of a privilege log and the Court's individual review of each purportedly privileged document. See infra at Points D, E and F.

When good cause exists, a court may convert a summary action to a plenary action, and take the steps necessary to adequately develop and resolve factual disputes. R. 4:67-5. This case will likely require this Court to exercise that discretion. Accordingly, in these circumstances, SPC's failure to initiate the case by order to show cause does not merit dismissal. The Court should reject Newark's contrary argument.

B. Newark's Involvement, Through Mayor Booker, In The Process of School Reform Constitutes The "Official Business" of the City, And Renders The Requested Documents "Government Records."

Subject to certain exceptions, OPRA makes "government records" available for public inspection and copying. N.J.S.A. 47:1A-1. The statute defines "government record" broadly, to include any document "made, maintained or kept on file" or "received" in the course of his or its official business by any officer, commission, agency or authority of the state or of any political subdivision." N.J.S.A. 47:1A-1.1. This broad definition comports with OPRA's purpose of maximizing public knowledge and government transparency. See Fair Share Housing Center, Inc. v. N.J. League of Municipalities, 207 N.J. 489, 501 (2011).

Newark claims the records SPC seeks are not "government records" subject to OPRA disclosure. This is so, Newark says, because Startup: Education and FNF are not involved in the city's "official business"; rather, they are private non-profit corporations that the city did not create, and that it does not fund, staff, operate or control.

Newark's argument misses the mark. The question is not whether the city created, supports, operates or staffs Startup and FNF. Indeed, SPC's OPRA request was not sent to Startup or

FNF. Rather, it was submitted to the City, and requested documents between city officials and Mr. Zuckerberg, Startup, FNF, and government officials such as the commissioner of education and the governor. The question therefore pertains not to Startup's and FNF's status, but rather to whether Mayor Booker's (and his staff's) involvement with those individuals and entities, as it related to the Zuckerberg grant, occurred in the context of his official capacity as Newark's mayor.

The answer to that question, based on the city's own statements in its press release announcing the Zuckerberg grant, is an unequivocal "yes." The release demonstrates that Mayor Booker portrayed himself as acting in his mayoral capacity, and demonstrates that others involved in the discussions viewed him as having acted in such capacity. Specifically, Newark's press release made clear that:

- 1) Although the state will maintain control of Newark's schools, the governor has "authorized" Mayor Booker, as mayor, to "develop and implement" a "comprehensive education plan" for the school district;

- 2) Mayor Booker will provide "local strategic and operational leadership" as part of a state-city "partnership" devoted to improving the quality of Newark's public education.

3) Mayor Booker has made education "a top priority" for his "current term in office," and his commitment includes engagement "with the Newark community to develop new educational principles and performance metrics and implement a comprehensive program to reward excellence."

4) Both the Zuckerberg grant (administered by Startup: Education) and the "matching" FNF funds are directly connected to Mayor Booker's education reform activities. The plan and the principles developed under Mayor Booker's leadership will guide "the strategic investments" made by the two funds.

In other words, according to the city, when Mayor Booker fulfills his "commitments" to Newark's education reform, he does so as the city's mayor. His activities in connection with the Zuckerberg and FNF money can only be undertaken in his mayoral capacity - "authorized" by the governor to develop "comprehensive education plans" and "principles" that will fulfill his "commitment" to make education a "top priority" of his administration and that will guide the investment of the grant funds.

Any documents generated as a result of those activities are therefore made, maintained, kept on file or received in an official capacity. Accordingly, they are "government records" of the city, subject to OPRA.

Newark cannot avoid that conclusion by pointing to the private, non-profit nature of the Startup and FNF, or to the city's ostensible lack of "direct" involvement in the generation, allocation or disbursement of the grant money. Regardless of the nature of those organizations, the mayor (from whom the documents are being sought) acted in his official capacity. As noted, it is the mayor's and his staff's status, not Startup's or FNF's, which subjects the documents to OPRA.²

Similarly, Newark cannot avoid OPRA's mandate by claiming the mayor's Faulkner Act duties, enumerated in N.J.S.A. 40:69A-40, do not include the activities Mayor Booker has undertaken in connection with Newark school reform. The Faulkner Act vests the mayor with the city's "executive power," whether or not embodied in his enumerated duties. N.J.S.A. 40:69A-39. When Mayor Booker lobbies state government or appears on television or radio, he engages in the city's "official business," even though the Faulkner Act does not mention those activities. The same is true here. Moreover, Newark's overly formalistic approach ignores both the broad sweep of OPRA's coverage and the

²While FNF's status need not be addressed here since the records request was directed to the City and not to FNF, it should be noted that a municipality cannot escape OPRA's broad mandate by "privatizing" or "outsourcing" its activities. See Times of Trenton Pub. Co. v. Lafayette Yard Community Dev. Corp, 183 N.J. 519, 535-36 (2005).

unique situation of Newark's school system, in which state and city have created a "partnership" to reform the city's public education.

Finally, the city's statements create numerous factual issues about whether the requested documents were generated or received in the course of "official business." These issues include 1) the relationship between state and city, 2) the relationship between the city and the private entities, and 3) the way his colleagues - Governor Christie, Education Secretary Cerf, Mr. Zuckerberg - view Mayor Booker and his role in this process. The existence of these issues precludes dismissal of the complaint.

Accordingly, the Court must deny the city's motion to dismiss on this basis. It should affirmatively hold that the documents SPC seeks are "government records" subject to OPRA. Alternatively, it should deny the city's motion to dismiss based on the existence of material factual issues that preclude dismissal.

C. Defendants Are Not Entitled To Dismissal
Based on the "Deliberative Materials"
Exception to OPRA.

Defendants next say the records SPC seeks are protected by the "deliberative materials" exemption to OPRA, and contend their dismissal motion should be granted on that basis. The

"deliberative materials" exception excludes from the disclosure requirements of OPRA "inter-agency and intra-agency advisory, consultative, or deliberative material." N.J.S.A. 47:1A-1.1. Defendants' argument for dismissal on this ground is unavailing, as it ignores fundamental requirements needed for the exception to apply.

First, by its terms the exception only applies to "inter-agency and intra-agency" materials. N.J.S.A. 47:1A-1.1. The exception is not applicable to correspondence between a government official and a non-government official. "The purpose of [protecting deliberative materials] is to foster freedom of expression among governmental employees involved in decision-making and policy formulation." McClelland v. Andrews, 606 F. 1278 (D.C. Cir. 1979). See also In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 84 (2000), quoting Kaiser Alum. & Chem. Corp. v. United States, 157 F.Supp. 939, 945-46 (1958) ("There is a policy involved in this claim of privilege for this advisory opinion - the policy of open, frank discussion between subordinate and chief concerning administrative action").

Therefore, in the current case, the exception would not apply to correspondence between Mayor Booker and Mark Zuckerberg (or any other non-government employee).

Second, even for correspondence solely among government officials, the "deliberative materials" exemption does not create a blanket exception for all correspondence between those individuals. Government agencies may only withhold particular documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental policies are formulated. See N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975).

As explained by the state Supreme Court, for a document to fall under the "deliberative" exception, it must "contain 'opinions, recommendations, or advice about agency policies.'" Education Law Center v. N.J. Dept. of Education, 198 N.J. 274, 286 (2009), quoting In re Liquidation of Integrity Ins. Co., 165 N.J. at 84-85. "Purely factual material that does not reflect deliberative processes is not protected." In re Liquidation of Integrity Ins. Co., 165 N.J. at 85.³ Thus, even emails between Mayor Booker and his staff cannot be withheld under this exception unless they actually contain opinions and advice about agency policies and disclose the agency's deliberative process.

³ Factual material can be subject to the deliberative materials exception "in those instances involving statistical and like data that have factual components, but may project or expose an agency's deliberations or reasoning process." Education Law Center, 198 N.J. at 287. That circumstance is not present here.

Further, the "deliberative materials" exception only covers pre-decisional materials. Gannett N.J. Partners, LP v. Middlesex County, 379 N.J. Super. 205, 219 (App. Div. 2005). See Education Law Center, 198 N.J. at 282; see also N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. at 151 ("it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached"). Thus, intra-governmental correspondence that does not include discussions of whether to accept or reject funding but rather, for example, describes how the mayor or others have decided to implement the funding plan, is not protected.

Because the exemption does not create a "blanket exception" but applies only to particular documents that meet certain criteria, a document-by-document review is required. McClain v. College Hospital, 99 N.J. 346, 360 (1985) ("this exemption has not been regarded as all-exclusive, and saying that the document is an intra-agency memorandum does not make it so"). See also Education Law Center, 198 N.J. at 299 (court must assess each document "in order to determine a document's nexus to [the deliberative] process, and its capacity to expose the agency's deliberative process"); Paff v. New Jersey Labor Bd. Of Review, 379 N.J. Super. 346, 355 (App. Div. 2005) ("[OPRA] contemplates

the GRC's in camera review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption").

Indeed, the Appellate Division has held that when the validity of any claim of privilege under OPRA is at issue, the plaintiff is entitled to review a privilege log/Vaughn Index:

In preparing an explanation of its reasons for denying a request for a government record, an agency ... should be guided by the standard included in R. 4:10-2(e), which permits a party claiming privilege to describe the nature of the documents ... not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Paff, 379 N.J. Super. at 354 (quotation omitted; emphasis in original).

In Fisher v. Division of Law, a case involving the deliberative exemption, the court explained: "The purpose of a Vaughn index is not only to facilitate the decision-maker's review of governmental records to determine whether they contain privileged material but also to provide the party seeking disclosure with as much information as possible to use in presenting his case." 400 N.J. Super. 61, 76 (App. Div. 2008).

Newark has not provided even the number of documents that it claims to be protected under the "deliberative materials"

exemption, much less a description of each document that is sufficient for SPC to make its case and for the Court to determine whether the privilege actually applies in each instance. The absence of such documentation precludes dismissal of the complaint. As noted, SPC need not take Newark's purported claim of privilege at face value.⁴

D. Newark Cannot Invoke "Executive Privilege"
To Shield Mayor Booker's Communications.

OPRA exempts from disclosure documents protected by "any legislative or executive privilege or grant of confidentiality heretofore established or recognized" by law. N.J.S.A. 47:1A-9(b). Newark contends the documents sought are protected by "executive privilege."

This argument fails for both substantive and procedural reasons.

First, "executive privilege," as developed under New Jersey law, does not apply to a mayor. It applies solely to the governor, the state's chief executive, just as the federal executive privilege applies only to the president. See Nero v.

⁴Additionally, "[b]ecause the privilege is a qualified one, a litigant can still obtain the requested materials upon a showing that the need for materials overrides the government's interest in confidentiality." Education Law Center, 198 N.J. at 287. Especially given that defendants have yet to identify and describe the documents being withheld, it is premature for the court to conduct such an assessment, and plaintiff will establish its overriding justification for disclosure through testimony later in this case.

Hyland, 76 N.J. 213, 225-26 (1978), citing United States v. Nixon, 418 U.S. 683, 708 (1974). The privilege is of constitutional dimension, and (as does its federal counterpart) derives from the separation of powers and the desire for a "strong executive") reflected in the 1947 state constitutional revision. Nero, 76 N.J. at 226; see also Wilson v. Brown, 404 N.J. Super. 557, 551-52 (App. Div. 2009).

Newark therefore may not invoke executive privilege. Its efforts to extend the privilege, by analogy, to Mayor Booker, are unpersuasive. A mayor, even a "strong" mayor under the Faulkner Act, is not a constitutional officer and his activities do not implicate the constitutional interests that the executive privilege protects. Moreover, Newark's argument turns entirely on a fortuity: the form of government a municipality happens to select. If accepted, it would create a "two-tier" mayoral system in New Jersey - one (for "strong" mayors) with executive privilege, and one without. The Court should reject that asymmetrical approach.

Second, even if executive privilege were applicable to mayors, the privilege is not absolute. It is "a qualified power to protect the confidentiality of communications pertaining to the executive function." Nero, 76 N.J. at 225. In determining whether to apply it, a court must balance "the interest in

disclosure against the public interest in maintaining confidentiality." Wilson, 404 N.J. Super. at 573. In striking that balance, a court must carefully examine a number of fact-based considerations to determine whether disclosure or confidentiality is appropriate. See Loigman v. Kimmelman, 102 N.J. 98, 113 (1986). That determination cannot be made on a motion to dismiss.

Accordingly, the Court should reject defendants' claim of executive privilege and deny the motion to dismiss on that basis.

E. Defendants Cannot Obtain Dismissal On The Basis of the "Official Information" Privilege.

As an additional basis for dismissal, defendants seek to invoke the "official information" privilege set forth in Evid. R. 515.⁵ The argument fails for reasons similar to those that defeat the claim of executive privilege.

Evid. R. 515 provides that no person shall disclose "official information" of the state "if the judge finds that disclosure of the information will be harmful to the interests of the public." As with executive privilege, the rule explicitly requires a court to balance the benefits of disclosure against the public harm disclosure might cause. As

⁵ The privilege is codified at N.J.S.A. 2A:84A-27.

noted above, that determination is fact-based, and cannot be made in the context of a motion to dismiss.

In addition, the rule does not define "official information." The Supreme Court has indicated that the privilege "protects facts from disclosure," as opposed to opinions. In re Liquidation of Integrity Ins. Co., 165 N.J. at 93. Beyond that, however, the precise scope of the rule is unclear, although it is typically construed narrowly. See Piniero v. N.J. Div. of State Police, 404 N.J. Super. 194, 204-205 (App. Div. 2008).

Newark suggests, without any real analysis or support, that the privilege covers the information SPC seeks, but the cases it cites do not support that claim. Those cases are concerned with protecting the location of police surveillance or identity of persons who contact government in confidence. See In re Liquidation, supra, 165 N.J. at 93, citing State v. Garcia, 131 N.J. 67 (1993), State v. Zenquis, 131 N.J. 84 (1993), and State v. Travis, 133 N.J. Super. 326 (App. Div. 1975); North Jersey Newspapers Co. v. Passaic Cty. Bd. of Freeholders, 127 N.J. 9, 17-19 (1992); McClain v. College Hosp., supra, 99 N.J. at 364; Piniero, supra, 404 N.J. Super. at 206.

Those considerations do not exist in this case. In any event, Newark's ipse dixit only underscores the

inappropriateness of a motion to dismiss on this basis. As the New Jersey Supreme Court stated in North Jersey Newspapers, supra, “[W]e do not believe that N.J.S.A. 2A:84A-27 qualifies the otherwise-unrestricted right of citizen access granted under the Right-to-Know Law.” 127 N.J. at 19. That raises the question whether Evid. R. 515 even applies in an OPRA case.

F. The Court Should Not Dismiss SPC’s Common Law Access Claim.

In its complaint, SPC also asserts a common-law right of access to the requested records. Newark seeks dismissal on the ground that SPC cannot make the showing required for access. Again, Newark’s claim is both premature and substantively flawed.

OPRA preserves the public’s alternative common-law right to access. See N.J.S.A. 47:1A-8. “The common law definition of a public record is broader than the definition contained in OPRA.” Mason v. City of Hoboken, 196 N.J. 51, 67 (2008). “A common-law record is one that is made by a public official in the exercise of his or her public function, either because the record was required or directed to be made or kept, or because it was filed in a public office.” Keddie v. Rutgers, 148 N.J. 36, 49 (1997). For the reasons set forth in Point B of this Argument, supra, the records SPC seeks are common law public records.

To obtain access to a common law record, a requestor must show an interest in the record's subject matter that outweighs the state's interest in preventing disclosure. See Mason, 196 N.J. at 67; Keddie, 148 N.J. at 50. Accordingly, an assertion of a common law right of access requires a court to undertake the same sort of balancing process that a claim of qualified privilege requires. That process must be "concretely focused upon the relative interests of the parties in relation to" the specific materials sought. McClain, supra, 99 N.J. at 361. As noted above, this is a fact-intensive inquiry that cannot be made on a motion to dismiss.

Nothing in Newark's submission suggests otherwise. Its claim that the possible need for anonymity justifies confidentiality is belied by the facts of this case, and the calculatedly public nature of the disclosure. Its claim that Newark has no role in the allocation of the funds is precisely the sort of factual issue that must be investigated and resolved before a claim of common law access can be decided.

Accordingly, the Court should deny Newark's motion to dismiss Count II of SPC's complaint. Additionally, it should hold that the records SPC seeks are public records under the common law as well as under OPRA.

IV. CONCLUSION

Newark's motion raises issues - such as the alleged pleading defect, the blanket claims of privilege and the applicability of the common law right of access - that this Court cannot decide on a motion to dismiss. Furthermore, to the extent Newark says the records sought are not "government records" under OPRA or "public records" under the common law, the city's own statements belie that claim.

Accordingly, the Court should deny Newark's motion to dismiss in its entirety. In addition, it should hold, as a matter of law, that the documents SPC seeks are "government records" as that term is used in the Open Public Records Act and "public records" under the common law.

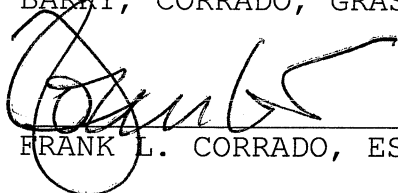
Finally, it should direct Newark to provide an appropriately detailed privilege log or Vaughn index for all documents that it claims are privileged.


Dated:

12/6/11

Respectfully submitted,

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