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October 21, 2011

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○ N.J. & PA. BARS  
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∇ N.J. & FL. BARS  
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+ CERTIFIED CRIMINAL TRIAL ATTORNEY  
○ RULE 1:40 QUALIFIED MEDIATOR

**VIA HAND DELIVERY**

Filing Clerk  
Essex County Superior Court  
50 W. Market Street, Room 131  
Newark, NJ 07102

**Re: Secondary Parent Council & Baker, Laura v City of  
Newark & Marasco, Robert  
Docket No. ESX-L-6937-11  
Our File No. 01000-0029**

Dear Sir/Madam:

Enclosed please find an Original and one copy of the following on behalf of Defendants, City of Newark and Robert Marasco:

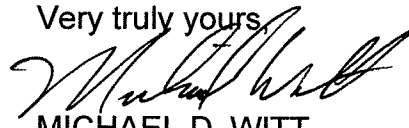
- 1) Stipulation Extending Time for Answer or otherwise plead;
- 2) Notice of Motion to Dismiss Complaint with prejudice in lieu of Answer;
- 3) Certification of Julien X. Neals in support of Notice of Motion to Dismiss;
- 4) Brief on behalf of Defendants, City of Newark and Robert Marasco; and
- 5) Proposed form of Order.

Clerk, Essex County Superior Court  
October 21, 2011  
Page -2-

Additionally, we enclose our check for \$135.00 representing the filing fee. Please file the above and return stamped "filed" copy in the envelope provided. Thank you for your attention to this matter.

Thank you for your kind attention to this matter.

Very truly yours,



MICHAEL D. WITT  
For the Firm

MDW:al

Enclosure

c: Frank L. Corrado, Esq. (w/encl. – via lawyers service)  
Edward Barocas, Esq. - ACLU (w/encl. – via regular)  
Jeanne LoCicero, Esq. - ACLU (w/encl. – via regular)  
Bobby Conner, Esq. - ACLU (w/encl. – via regular)

**CHASAN LEYNER & LAMPARELLO, PC**  
300 Harmon Meadow Boulevard  
Secaucus, New Jersey 07094-3621  
201-348-6000  
Attorneys for Defendants  
File No.: 01000-0029

**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.: ESX-L-6937-11**

**CIVIL ACTION**

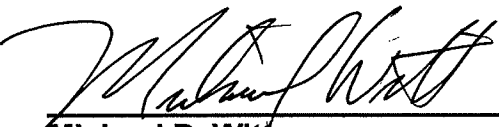
**STIPULATION EXTENDING TIME FOR  
ANSWER OR OTHERWISE PLEAD**

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for Plaintiffs, Secondary Parent Council and Laura Baker and the attorneys for Defendants, City of Newark and Robert Marasco, that the time within which said Defendants may serve and file a responsive pleading to Complaint, or otherwise move or plead, is hereby extended to October 21, 2011.

**BARRY, CORRADO, GRASSI &  
GIBSON, P.C.**

**CHASAN LEYNER & LAMPARELLO, PC**

  
\_\_\_\_\_  
Frank L. Corrado  
Attorneys for Plaintiffs

  
\_\_\_\_\_  
Michael D. Witt  
Attorneys for Defendants

DATED: 10/21/11

**CHASAN LEYNER & LAMPARELLO, PC**  
300 Harmon Meadow Boulevard  
Secaucus, New Jersey 07094-3621  
201-348-6000  
Attorneys for Defendants  
File No.: 01000-0029

**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.: ESX-L-6937-11**

**CIVIL ACTION**

**NOTICE OF MOTION TO DISMISS**  
**COMPLAINT WITH PREJUDICE IN LIEU OF**  
**ANSWER PURSUANT TO R. 4:6-2(e) AS TO**  
**DEFENDANTS, CITY OF NEWARK and**  
**ROBERT MARASCO**

**TO:**

Clerk, Essex County Superior Court  
50 W. Market Street, Room 131  
Newark, NJ 07102

**ON NOTICE:**

Frank L. Corrado, Esq.  
Barry Corrado Grassi & Gibson, PC  
2700 Pacific Ave  
Wildwood, NJ 08260-5248

Edward Barocas, Esq.  
Jeanne LoCicero, Esq.  
Bobby Conner, Esq.  
American Civil Liberties Union of  
New Jersey  
PO Box 32159  
Newark, NJ 07102-0559

**RETURNABLE:**

November 18, 2011 at 9:00 a.m.

**PLACE:**

Essex County Courthouse,  
465 Martin Luther King Jr. Blvd  
Newark, NJ 07102

**RELIEF SOUGHT:** An Order, pursuant to R. 4:6-2(e), dismissing Plaintiffs' Complaint in its entirety with prejudice.

**SUPPORTING DOCUMENTS:** Certification of Julien X. Neals, Brief in Support of Motion to Dismiss and proposed form of Order.

**ARBITRATION HEARING:** Not applicable.

**DISCOVERY END DATE:** Not applicable.

**TRIAL DATE:** Not applicable.

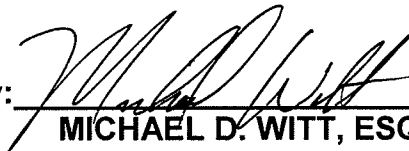
**CERTIFICATION IN LIEU OF OATH  
R. 1:4-4(b):** I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

#### REQUEST FOR ARGUMENT

Pursuant to Rule 1:6-2(d), the undersigned:

- Waives oral argument and consents to disposition on the papers. A proposed form of Order is enclosed;
- Requests oral argument if opposition is received
- Oral argument has been ordered for \_\_\_\_\_.

**CHASAN LEYNER & LAMPARELLO, PC**  
**Attorneys for Defendants**  
**City of Newark and Robert Marasco**

By:   
MICHAEL D. WITT, ESQ.

**Dated: October 21, 2011**

## CERTIFICATION OF MAILING

I certify that the original of this Notice of Motion and the supporting documents have been filed with the Clerk of Essex County Superior Court and true copy sent via Lawyers Service on October 21, 2011, to Frank L. Corrado, Esq. of Barry Corrado Grassi & Gibson, PC, 2700 Pacific Ave, Wildwood, NJ 08260-5248 and regular mail to Edward Barocas, Esq., Jeanne LoCicero, Esq., Bobby Conner, Esq., American Civil Liberties Union of New Jersey, PO Box 32159, Newark, NJ 07102-0559.

**CHASAN LEYNER & LAMPARELLO, PC**  
**Attorneys for Defendants**  
**City of Newark and Robert Marasco**

By:   
MICHAEL D. WITT, ESQ.

**Dated: October 21, 2011**

**CHASAN LEYNER & LAMPARELLO, PC**  
300 Harmon Meadow Boulevard  
Secaucus, New Jersey 07094-3621  
201-348-6000  
Attorneys for Defendants  
File No.: 01000-0029

**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.: ESX-L-6937-11**

**CIVIL ACTION**

**CERTIFICATION OF JULIEN X. NEALS IN  
SUPPORT OF DEFENDANTS' MOTION TO  
DISMISS PLAINTFFS' VERIFIED  
COMPLAINT WITH PREJUDICE**

Julien X. Neals, of full age, certifies as follows:

1. I am attorney-at-law licensed to practice in the State of New Jersey. Since approximately September 2006, I have been employed by the City of Newark (the "City") in the capacities of: (1) Chief Judge of the Municipal Court; (2) Corporation Counsel and Head of the City's Department of Law; and (3) since December 10, 2010, as the City's Business Administrator. I am aware of the facts and circumstances surrounding the above-captioned action and I make this Certification in Support of Defendants' Motion to Dismiss Plaintiffs' Verified Complaint with Prejudice based upon my own knowledge.

2. This matter involves a request for documents made by plaintiffs Secondary Parents Council and Laura Baker (collectively, "Plaintiffs") to the City under

the New Jersey Open Public Records Act and the common law right to inspect public records.

3. In short, the subject matter of Plaintiffs' document request pertains to information regarding the operations of two non-profit entities, Startup: Education and the Foundation for Newark's Future ("FNF").

4. Neither Startup: Education nor FNF were created by the City, nor is either entity a subordinate body to the City.

5. Neither Startup: Education nor FNF are staffed by and/or operated under the auspices of the City.

6. City of Newark Mayor Cory Booker serves in an advisory capacity as a member ex officio of FNF's Board of Trustees. He is not, however, required to do so by the City.

7. The City does not exercise any control over the operations of either Startup: Education or FNF.

8. The City is not responsible for funding either entity or for soliciting funding for either Startup: Education or FNF.

9. Funds donated to either Startup: Education or FNF are not received or processed by the City.

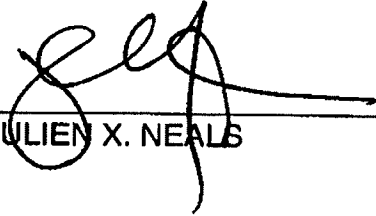
10. The City is not responsible for deciding how any funds expended by either Startup: Education or FNF.

11. The operations of both Startup: Education and FNF are unrelated to the official business of the City. For FNF, attached is a true and correct copy of the "FAQ" page from FNF's website, [www.foundationfornewarkfuture.org](http://www.foundationfornewarkfuture.org).



I certify that the foregoing statements are true to the best of my knowledge. I am aware that if any of the above statements are knowingly or willfully false, I am subject to punishment.

Date: October 20, 2011



JULIEN X. NEALS

# Exhibit A



- [Home](#)
- [About](#)
- [Our Team](#)
- [Grants](#)
- [Teacher Innovation Fund](#)
- [News](#)
- [FAQ's](#)

## FAQ's

### **Q. Is FNF part of Newark city government?**

A. No, the FNF is a 501 © 3 charitable nonprofit organization as designated by the IRS, governed by an independent board of trustees.

### **Q. What is the role of the Advisory Committee?**

A. The Advisory Committee, representing knowledgeable experts and community leaders in the education and youth development fields, will provide broad and deep perspective to the Foundation. It will meet on a quarterly basis and individual members will serve as resources on an ongoing basis.

### **Q. Will FNF funds replace city funds in the schools?**

A. No, the FNF programs will support efforts that will augment NPS's reform strategy including expanding the pipeline of high performing teachers, helping build comprehensive student information systems, integrating holistic student supports and keeping the public informed about educational progress in Newark.

### **Q. Will FNF run any schools itself or run any other programs directly?**

A. The Foundation will run no schools or any programs; it will make grants to programs and initiatives in support of schools.

### **Q. What relationship will the Foundation have with the NPS Superintendent?**

A. The Foundation will work very closely with the Superintendent. The goals of the Superintendent and of the Foundation will be closely aligned.

### **Q. Will FNF share what it learns with the community?**

A. Yes, FNF intends to communicate regularly and to share its results and what it learns.

### **Q. Who guides the overall strategy of the FNF?**

A. The President and CEO will run the day-to-day operations of the FNF and will report to a Board of Trustees, who will work with the President in setting the strategic direction.

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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.: ESX-L-6937-11**

**CIVIL ACTION**

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**BRIEF IN SUPPORT OF MOTION TO DISMISS IN LIEU OF ANSWER PURSUANT  
TO R. 4:6-2(E)**

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**CHASAN LEYNER & LAMPARELLO, PC  
300 Harmon Meadow Boulevard  
Secaucus, New Jersey 07094  
201-348-6000  
Attorneys for Defendants City of Newark and  
Robert Marasco**

**MICHAEL D. WITT, ESQ.  
Of Counsel & on the Brief**

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## PRELIMINARY STATEMENT

Plaintiffs Secondary Parent Council and Laura Baker (collectively, "Plaintiffs") bring this matter before the Court for the purported purpose of accessing government and/or public records held by defendant City of Newark (the "City"). The records sought by Plaintiffs pertain to a pledge of \$100 million made by Mark Zuckerberg, the Chief Executive Officer of Facebook, Inc., to fund Startup: Education, a non-profit entity whose initial mission is to provide financial assistance to the Newark public school system, which has been under the control of the State of New Jersey since 1995. The request for records also pertains to the funding and expenditures of a second non-profit agency, the Foundation for Newark's Future ("FNF", referred to in Plaintiff's Verified Complaint as the "Newark Education and Youth Development Fund"), whose mission is to match Mr. Zuckerberg's pledge and to raise an additional \$50 million for providing financial assistance to Newark's school system and disadvantaged youth. The records were requested under the New Jersey Open Public Records Act and the common law right of citizens to inspect public records.

Plaintiffs' request is deficient, however, in a number of respects, not the least of which are that the records sought do not fall under either the definition of "government records" for purposes of the Open Public Records Act or the meaning of "public record" for purposes of the common law right of access. Neither Startup: Education nor FNF were created by, are a part of, are staffed by, are controlled by, or are funded by the City of Newark. Nor is the operation or spending of either organization part of the official business of the City of Newark. Further, there is no law requiring that the City of

Newark maintain records related to either entity, regardless of the beneficial effect that either entity may have on its residents.

Even if the records sought are deemed to be made, maintained or kept in the course of the City's official business, privileges apply which prevent the disclosure of the records under ORPA and the common law. Further, Plaintiffs have failed to show that their interest in disclosure outweighs the City's interest in keeping the information confidential.

Finally, this matter is procedurally defective. Plaintiffs have failed to commence the action on an Order to Show Cause and, instead, seek to proceed as a normal Discovery Track I case. New Jersey courts have already held that such matters are to proceed in a summary, dispositive fashion and not in the manner in which Plaintiffs are attempting.

For these reasons, the Defendants respectfully request that the Court dismiss Plaintiff's Verified Complaint in its entirety, with prejudice.

## STATEMENT OF FACTS

On September 24, 2010, Mark Zuckerberg, the Chief Executive Officer of Facebook, Inc., announced that he would personally donate \$100 million to fund Startup: Education, a non-profit, non-governmental entity created by Mr. Zuckerberg with the initial goal of providing financial assistance to the Newark public school system. (Verified Complaint, ¶6; Verified Complaint, Exhibit A.) In response to Mr. Zuckerberg's colossal individual act of charity, City of Newark Mayor Cory Booker simultaneously announced the creation of the "Newark Education and Youth Development Fund" (ultimately named the "Foundation for Newark's Future," referred to herein as "FNF"), a separate, non-governmental non-profit organization whose mission would be to secure an additional \$100 million to match the challenge grant available through Startup: Education, and to raise an additional \$50 million to serve disaffected youth. (Verified Complaint, ¶7, Verified Complaint, Exhibit A.)

Neither Startup: Education nor FNF were created by the City, nor is either entity a subordinate body to the City. (Certification of Julien X. Neals dated October 20, 2011 ("Neals Cert."), ¶4). Neither Startup: Education nor FNF are staffed by and/or operated under the auspices of the City. (Neals Cert., ¶5) Mayor Booker serves in an advisory capacity as a member ex officio of FNF's Board of Trustees; he is not, however, required to do so by the City as part of his duties as Mayor. (Neals Cert., ¶6) The City does not exercise any control over the operations of either Startup: Education or FNF. (Neals Cert., ¶7) The City is not responsible for funding either entity or for soliciting funding for either Startup: Education or FNF. (Neals Cert., ¶8) Funds donated to either Startup: Education or FNF are not received or processed by the City. (Neals Cert., ¶9)

The City is not responsible for deciding how any funds expended by either Startup: Education or FNF. (Neals Cert., ¶10) The operations of both Startup: Education and FNF are unrelated to the official business of the City. (Neals Cert., ¶11)

On April 1, 2011, Plaintiffs submitted a letter to defendant Robert P. Marasco, Clerk and Records Custodian for the City (collectively, "Defendants"), requesting copies of certain classes of documents related to Startup: Education and FNF. (Verified Complaint, Exhibit B.) The request was purportedly made pursuant to the New Jersey Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1, et seq., and the common law right of citizens to inspect public records. (Id.) Specifically, Plaintiffs requested all correspondence, memoranda, or any other documentation relating to the \$100 million grant, donation, contribution, gift and/or pledge to Newark public schools by Facebook CEO Mark Zuckerberg ("\$100 Million Facebook Pledge") or any such correspondence related to the raising of matching funds for Mr. Zuckerberg's \$100 Million pledge. (Verified Complaint, Exhibit B.)

On April 5, 2011 and again on June 1, 2011, Robert P. Marasco, Clerk and Records Custodian for the City of Newark, responded in writing to Plaintiffs, advising them that the City was still in the process of searching for responsive records and requesting additional time to locate and compile the same. (Verified Complaint, Exhibits C, D.) Plaintiffs wrote two additional letters demanding requested documents, the first June 30, 2011, and the second on July 12, 2011. (Verified Complaint, Exhibits E, F.)

On July 19, 2011, Anna Pereira, Esq., Corporation Counsel for the City of Newark, sent a letter to Plaintiffs denying their request on numerous grounds, including that: (1) the request was overbroad and failed to identify specific government records

being sought; (2) the requested documents were not government records because they were not made in the course of Mayor Booker's official duties; (3) the requested records were subject to executive privilege; (4) the requested records were subject to official information privilege; and (5) the requested records were subject to deliberative privilege. (Verified Complaint, Exhibit G.)

For the reasons stated herein, Defendants respectfully posit that Plaintiffs have failed to state a claim as a matter of law on either of their theories and, thus, the Verified Complaint should be dismissed with prejudice.

## LEGAL ARGUMENT

### POINT I

#### PLAINTIFFS HAVE FAILED TO PROCEED IN THE MANNER REQUIRED BY N.J.S.A 47:1A-6.

“Without question, proceedings under OPRA are to be conducted in a ‘summary or expedited manner.’” MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 550, 868 A.2d 1067, 1076 (App. Div. 2005) (quoting N.J.S.A. 47:1A-6). This means that a trial court is to proceed under the procedures prescribed in Rule 4:67. R. 4:67-1(a). Thus, an OPRA action is to be “commenced by an order to show cause supported by a verified complaint, and at an initial hearing, if the court is satisfied with the sufficiency of the application, [it] shall order the defendant to show cause why final judgment should not be rendered for the relief sought.” Id. at 550-51, 868 A.2d at 1077; R. 4:67-1(a); R. 4:67-2(a). “Summary actions are, by definition, short, concise, and immediate, and further, are designed to accomplish the salutary purpose of swiftly and effectively disposing of matters which lend themselves to summary treatment.” MAG Entm’t, supra, 375 N.J. Super. at 551, 868 A.2d at 1077 (citing Depos v. Depos, 307 N.J. Super. 396, 399, 704 A.2d 1049 (Ch.Div.1997)) (internal quotations omitted).

Plaintiffs have only filed a verified complaint and had the matter assigned to Discovery Track 1. Not only is such a procedure not permitted, but it is inefficient and unduly burdensome on both the litigants and the courts if such matters proceed any other way. Like almost all OPRA and common law document access cases, this is not a case that requires any fact development that cannot be completed through certifications and, if deemed necessary, an in camera review by the Court of any potentially responsive documents. For the OPRA claim, if the Court determines that

potentially responsive documents are (1) “government records” and (2) not subject to any exception under OPRA, then Plaintiffs are entitled have them. Likewise, if the documents are “public records” at common law, and Plaintiffs have shown by clear and convincing evidence that their interest in disclosure outweighs the City’s interest in maintaining confidentiality, then the documents must be produced.

Nevertheless, Plaintiffs have already served a “litigation hold” letter on Facebook, Inc., apparently signifying an intent to issue a business records subpoena at the very least, if not a deposition notice.<sup>1</sup> Such discovery in ORPA cases is not permitted. MAG Entertainment, supra, 375 N.J. Super. at 551-52, 868 A.2d at 1077. There is no public interest served by having a drawn-out legal battle over such matters. Indeed, protracted litigation serves no purpose other than to further overtax an already overtaxed municipal budget. Accordingly, Defendants respectfully request that Plaintiffs’ Verified Complaint be dismissed in its entirety. In the alternative, Defendants respectfully request that the matter be disposed of in a summary proceeding, as is required.

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<sup>1</sup> In order to avoid burdening the Court with unnecessary documents, Defendants have not attached a copy of the litigation hold letter with this motion. Should Plaintiffs dispute the fact that it was sent, defendants would be happy to provide a copy to the Court upon request.



## POINT II

### **THE REQUESTED RECORDS ARE NOT “GOVERNMENT RECORDS” UNDER N.J.S.A. 47:1A-1.1 AND, THUS NOT SUBJECT TO DISCLOSURE UNDER OPRA.**

OPRA requires that “government records” held by a public agency be available to citizens for inspection and copy, with certain exceptions. N.J.S.A. 47:1A-1. Not all documents held by a public agency, however, are considered to be “government records.” Rather, a “government record,” is one that “that has been made, maintained or kept on file **in the course of his or its official business** by any officer, commission, agency or authority of the State or of any political subdivision thereof...” N.J.S.A. 47:1A-1.1 (emphasis added); see also Mason v. City of Hoboken, 196 N.J. 51, 65, 951 A.2d 1017, 1025 (2008). “In other words, if the public employee 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, 880 A.2d 458, 463 (App. Div. 2005).

In this case, it is simply not the official business of the City of Newark to run or contribute to the operation of either Startup: Education or FNF.<sup>2</sup> As the City’s Business Administrator, the Hon. Julien X. Neals has certified, neither Startup: Education nor FNF were created by the City, nor is either entity a subordinate body to the City. Neither

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<sup>2</sup> It could be argued that Plaintiffs’ fourth request, which seeks the disclosure of communications between the Mayor and/or his staff and various private and public persons and entities is not limited on its face to matters solely concerning Startup: Newark and FNF. This argument would run contrary to the clear intent of Plaintiffs’ request as well as the factual assertions in Plaintiffs’ Verified Complaint. Nevertheless, if Plaintiffs were to make such an argument, it would invalidate the entire request for vagueness. See MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 868 A.2d 1067 (App. Div. 2005)(requiring specificity with regard to a request to view government records).

Startup: Education nor FNF are staffed by and/or operated under the auspices of the City. Mayor Booker serves in an advisory capacity as a member ex officio of FNF's Board of Trustees; he is not, however, required to do so by the City as part of his duties as Mayor. The City does not exercise any control over the operations of either Startup: Education or FNF. The City is not responsible for funding either entity or for soliciting funding for either Startup: Education or FNF. Funds donated to either Startup: Education or FNF are not received or processed by the City. The City is not responsible for deciding how any funds expended by either Startup: Education or FNF. The operations of both Startup: Education and FNF are unrelated to the official business of the City.

Indeed, as Plaintiffs point out, the City has no control over spending for the Newark public schools system; rather, that responsibility has devolved to the State of New Jersey by Administrative Order dated July 5, 1995, and the State has maintained control ever since. The Order requires in relevant part that: "the Board of Education of the City of Newark be removed;" "a State-operated school district be created . . .;" "the Commissioner of Education recommend an individual . . . as State district superintendent of schools to direct all operations of the district;" and "th[e] Administrative Order shall remain in effect until lifted by the State Board of Education upon application and recommendation of the Commissioner of Education...." Contini v. Bd. of Ed. of Newark, 96 N.J.A.R.2d (EDU) 196 (N.J. Adm. July 5, 1995); *aff'd*, 286 N.J. Super. 106 (App.Div. 1995).

Further, a review of the duties of a mayor and a council under a Faulkner Act Council-Mayor form of government do not include the responsibilities of fundraising or

fund spending for unrelated, non-profit entities such as Startup: Education and FNF. N.J.S.A. 40:69A-36 through -43.2.

For these reasons, whatever communications may exist between the Mayor and/or his staff and any other party regarding the operation of either Startup: Education and/or FNF are not made, maintained, kept or received in the course the City's official business. Thus, documents reflecting such communications are not "government records" as defined under OPRA and, therefore, are not subject to compulsory disclosure under OPRA. Accordingly, Defendants respectfully assert that Count I of Plaintiffs' Verified Complaint must be dismissed with prejudice.

### POINT III

**THE REQUESTED RECORDS ARE ADVISORY, CONSULTATIVE, AND DELIBERATIVE IN NATURE, AND ARE THEREFORE EXEMPT FROM DISCLOSURE PURSUANT TO N.J.S.A. 47:1A-1.1.**

Assuming, arguendo, that the Court is inclined to regard that the records at issue were made, maintained or kept in course of the City of Newark's official business, the records would still not be subject to disclosure. The very first exception to the definition of "government record" excludes any records that constitute "inter-agency or intra-agency advisory, consultative, or deliberative material." N.J.S.A. 47:1A-1.1. This exception codifies the deliberative process privilege, which "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. v. New Jersey Dept. of Educ., 198 N.J. 274, 285-86, 966 A.2d 1054, 1060 (2009). "The justification for a deliberative process privilege also arises

out of the desire to prevent disclosure of proposed policies before they have been fully vetted and adopted by a government agency, as well as the desire to prevent the confusion that could result from release of information concerning matters that do not bear on an agency's chosen outcome.” Id. at 286, 966 A.2d at 1061(internal citations omitted).

To invoke the deliberative process privilege the document must meet two threshold requirements. “First, it must be pre-decisional, which means that it must have been generated before the adoption of an agency's policy or decision. Second, the document must be deliberative, which means that the documents contain opinions, recommendations, or advice about agency policies. Id. (Internal citations omitted). Once that threshold is passed, the privilege is invoked and confidentiality is presumed. Id. The presumption can be overcome, but “in all but exceptional cases it is considered against the public interest to compel the government to produce inter-agency advisory opinions.” Id. at 1054, 966 A.2d at 1062 (emphasis added) (internal citations omitted.)

Plaintiffs admit that the records they seek clearly fall under the deliberative process privilege. To wit, Plaintiffs state that they have a compelling interest “in knowing how grant funds donated by Zuckerberg and others **will be allocated and used** to support Newark’s schools,” in “ensuring a fair distribution of those funds so all Newark students benefit from them.” (Verified Complaint, ¶26) Plaintiffs also claim a “strong interest in ensuring that the appropriate public officials, rather than private individuals, decide how to allocate the donated funds,” or in the alternative, “knowing to what extent private provenance of these funds affects allocation.” (Verified Complaint, ¶27) Plaintiffs assert that access to such information will “disclose the priorities of the

[C]ity and the grantors, and their respective degrees of input into and control over the decisions about how to allocate [funds].” (Verified Complaint, ¶28) Thus, Plaintiffs want to know how the spending decisions for two, non-governmental, non-profit entities over whom the City exercises no control will be made, including digging into what the priorities and mental processes of the grantors and decision makers might be.

Assuming again that the City did have an official role in the solicitation or spending of funds for the two entities, the deliberative process privilege is specifically designed to safeguard against just the sort of inquiry Plaintiffs are attempting to make. The privilege recognizes the importance of promoting government's full and frank discussion of ideas when developing new policies, or in examining existing policies and procedures, and further recognizes that such activities constitute a process of policy examination and evaluation. Educ. Law Ctr., supra, 198 N.J. at 295-96, 966 A.2d at 1067. Indeed, the very reason for the existence of the privilege is “to ensure free and uninhibited communication within governmental agencies so that the best possible decisions can be reached....” Id. at 286, 966 A.2d at 1054 (citing Kaiser Aluminum & Chem. Corp. v. United States, 157 F.Supp. 939, 945-46 (Ct.Cl.1958)).

Plaintiffs offer no “exceptional” circumstances to overcome the presumption of validity of the deliberative process privilege. Accordingly, Defendants respectfully assert that Count I of Plaintiffs Complaint be dismissed with prejudice.

#### POINT IV

#### **ADVISORY COMMUNICATIONS BETWEEN THE MAYOR OF NEWARK AND HIS STAFF AND/OR OTHER PARTIES ARE EXEMPT FROM DISCLOSURE UNDER OPRA BY THE EXECUTIVE PRIVILEGE.**

Again, assuming, arguendo, that the Court is inclined to believe that the records at issue were made, maintained or kept in course of the City of Newark's official business, OPRA provides that records that are subject to a recognized executive or legislative privilege or grant of confidentiality established in or recognized by the State Constitution, statute, court rule or judicial decision will be exempt from disclosure. N.J.S.A. 47:1A-9b. The executive privilege is such an exception.

The executive privilege attaches to and protects communications between an executive and the executive's advisors. Nixon v. Sirica, 487 F.2d 700, 713 (D.C.Cir.1973). The privilege is grounded in the concept that "the candor of executive aides and functionaries would be impaired if they were persistently worried that their advice and deliberations were later to be made public." Id.

While most commonly associated with the President of the United States, New Jersey courts have found that the Governor of New Jersey, as a chief executive, is also entitled to a presumptive privilege for communications relating to the executive function, including communications that reflect the decision-making process or that are deliberative in nature. Nero v. Hyland, 76 N.J. 213, 225, 386 A.2d 846, 852 (1978). In 2002, the executive privilege in New Jersey was reinforced by Executive Order No. 26 (McGreevey) which provides: "[a]ny record made, maintained, kept on file or received by the office of the Governor in the course of its official business which is subject to an executive privilege or grant of confidentiality established or recognized by the

Constitution of this State, statute, court rules or judicial law case” shall not be deemed to be government records under OPRA, and thus shall not be subject to public inspection, copying or examination.”

The court in Wilson v. Brown, 404 N.J.Super. 557, 576, 962 A.2d 1122, 1134 (App. Div. 2009), held that “the executive privilege extends to a variety of communications between the chief executive and third parties and that the information exchanged need not be in the nature of formal advice to garner the protection afforded by the privilege.” The court determined that:

the chief executive should be able to receive a broad range of information from diverse sources to discharge the executive function. A broad executive communications privilege applies to documents in their entirety, covering final and post-decisional materials as well as pre-deliberative ones. In that regard, although the privilege is based on the need to preserve the executive’s access to candid advice, it does not encompass only the deliberative or advice portions of documents.

Id. (Internal citations and quotations omitted).

In drawing the analogy between governor and president, New Jersey courts have looked at the function of the executive office rather than the level of executive branch government in which the executive sits. For example, The Wilson court noted:

In addition to broad appointive authority of executive and judicial personnel, the Governor is required to prepare and submit a balanced budget, negotiate with designated representatives of State employees, and maintain the fiscal integrity of the State. N.J. CONST., art. V, § 4, ¶¶ 2-5; N.J. CONST. art. VI, § 6, ¶ 1. To that end, the Governor may selectively veto line items in the annual appropriations bill enacted by both houses of the Legislature. N.J. CONST. art. V, § 1, ¶ 15. Therefore, it is essential that the Governor have available a broad range of information and the ability to obtain solicited and unsolicited advice.

Wilson, supra, 404 N.J. Super. at 576-77 (internal citations and quotations omitted).

Like the Governor vis-à-vis the State, a mayor under the Council-Mayor plan is the repository of all executive power in a municipality, including, but not limited to, the powers to: enforce the municipal charter, ordinances and laws generally; report on the state of the municipality; recommend programs for the improvement of the municipality; control all municipal administrative departments; supervise all boards, commissions, or other agency of municipal government; prepare and submit an annual operating budget, supervise and care for all property owned by the municipality; approve or veto ordinances; and appoint administrative department heads, with the advice and consent of the council, and set administrative employee salaries. See N.J.S.A. 40:49:A-39 through 43a.

Thus, the executive function of the mayor under the City's form of government is very similar, if not identical, to that of the Governor, albeit on a smaller scale. Accordingly, the same protections and immunities, including the executive privilege, apply for the same policy reasons. Thus, communications between Mayor Booker and his staff and/or the third parties identified in Plaintiffs' document request are exempt from disclosure under OPRA and, therefore, Defendants respectfully request that Count I of Plaintiffs' Verified Complaint be dismissed with prejudice.<sup>3</sup>

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<sup>3</sup> It should be noted that even if this Court determines that Mayor Booker is not entitled to assert the executive privilege, one of the items requested by Plaintiffs are communications between the Mayor and/or his staff and the Governor of New Jersey and/or his staff. Although Plaintiffs have not named the Governor as a party, he is beyond doubt entitled to assert the executive privilege with regard to such materials. Further, Plaintiffs have also requested communications between the Mayor and his staff and members of the New Jersey Legislature; such records are also specifically exempted from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.



## POINT V

### PLAINTIFFS ARE NOT ENTITLED TO THE DOCUMENTS UNDER THE COMMON LAW.

As a fallback position, Plaintiffs argue that they have a right to inspect the requested records under the common law right of New Jersey citizens to access “public records.” “Under the common law rule of access to public documents, a citizen is entitled to inspect documents of a public nature ‘ . . . provided he shows the requisite interest therein.’” Nero, supra, 76 N.J. at 222, 386 A.2d at 851(1978) (quoting Ferry v. Williams, 41 N.J.L. 332, 334 (Sup.Ct.1879)). Thus, and unlike the right to view documents under OPRA, the common law right of access is a qualified one:

The common-law right to access public records depends on three requirements: (1) the records must be common-law public documents; (2) the person seeking access must “establish an interest in the subject matter of the material,” South Jersey Publishing Co. v. New Jersey Expressway Auth., 124 N.J. 478, 487 (1991); and (3) the citizen's right to access “must be balanced against the State's interest in preventing disclosure.” Higg-A-Rella [, Inc. v. County of Essex], 141 N.J. [35, 46 (1995)].

Keddie v. Rutgers, State University, 148 N.J. 36, 50 (1997).

Also dissimilar to OPRA, the burden of showing entitlement to access public documents under the common law rests with the requestor, not the responding agency. See Keddie, supra; Home News v. State, Dept. of Health, 144 N.J. 446, 454-55 (1996).

Defendants do not dispute that Plaintiffs would be able to establish an interest in the subject matter of the material sought. However, Plaintiffs cannot prove either the first or third prong of the Keddie test and, therefore, their claims must be dismissed with prejudice.

**A. Public Records**

Under the first prong of the Keddie test, a requestor must show that the record sought is, in fact, a public record. “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 by law to be made or kept, or because it was filed in a public office.” Keddie, supra, 148 N.J. at 49. Plaintiffs make no claim (nor could they) that the records sought in this matter are “filed” with a public office.

Thus, to the extent that the information requested could be considered “public records,” it must be deemed so because the information is “required or directed by law to be made or kept.” However, Plaintiffs have failed to cite any law that would require the City or any officer thereof to make or keep the records that they have requested, to wit records dealing with the actions of two private non-profit entities over whom the City exercises no control. Accordingly, Plaintiffs have failed to state a claim under the common law upon which relief can be granted, and Count II of Plaintiff’s Verified Complaint must be dismissed with prejudice.

**B. The Public Interest in Preserving Confidentiality.**

Plaintiffs fail the third prong of the Keddie test in an equally abject manner. With regard to the third prong, which weighs the private citizen’s interest in access to documents against the public’s interest in keeping such information confidential, the Keddie court stated:

Because the common-law right of access to public records is not absolute, one seeking access to such records must “establish that the balance of its interest in disclosure against the public interest in maintaining confidentiality weighs in favor of disclosure.” Home News, supra, 144 N.J. at 454. Thus, it has been said that the balancing process is

“concretely focused upon the relative interests of the parties in relation to [the] specific materials.” McClain v. College Hosp., 99 N.J. 346, 361 (1985); Atlantic City [Convention Center Authority v. South Jersey Publishing Co.], 135 N.J. 53, 60 (quoting McClain, supra, 99 N.J. at 361.

Generally, the public's interest in nondisclosure is based on the need to keep the information confidential. Where a claim of confidentiality is asserted, the applicant's interest in disclosure is more closely scrutinized. In that context, courts consider whether the claim of confidentiality is “premiered upon a purpose which tends to advance or further a wholesome public interest or a legitimate private interest.” Loigman v. Kimmelman, 102 N.J. 98, 112 (1986) (quoting City of St. Matthews v. Voice of St. Matthews, Inc., 519 S.W.2d 811, 815 (Ky.1974)). However, where the interest in confidentiality is “slight or non-existent,” standing alone will be sufficient to require disclosure to advance a legitimate private interest. Id. at 105,; see also McClain, supra, 99 N.J. at 362.

Keddie, supra, 148 N.J. at 50-51.

Defendants refer to their arguments in Points III and IV of this Letter Brief, supra, to demonstrate that both the Legislature and the courts in this State have established the importance of the deliberative process privilege and the executive privilege. Further, individuals who are generous enough to donate money to help the Newark school system have an interest in not having personal information about themselves disclosed, such as personal contact information, the amount of a donation, or even the identity of a donor or a potential donor. Indeed, the forced disclosure of such information may very well dissuade potential donors from contributing to a very important cause, which is diametrically opposed to Plaintiffs' professed goals.

Equally important, however, is the flaw in Plaintiffs premise that disclosure of such information must be had “to ensure that the proper public officials, rather than private officials, decide how to allocate the donated funds.” As previously stated,

expenditure of donated funds is decided by Startup: Education and FNF, not by public officials. While Mayor Booker was authorized to develop and implement a comprehensive education plan for Newark's public schools, that authority only extended to working with the local community in order to do so. (Verified Complaint, ¶¶9; Exhibit A). There was no such authorization granted to Mayor Booker or the City of Newark to expend the donated funds through Startup: Education and FNF. Id. As to the alternate theory that Plaintiffs have a strong interest in knowing to what extent that private provenance affects the allocation of private money, Plaintiffs provide no legal or equitable basis for that interest.

Thus, even if Plaintiffs had found statutory authority which would have required the City of Newark to maintain records with regard to either Startup: Education or FNF, Plaintiffs' stated interest in disclosure does not outweigh the Defendants' interest in non-disclosure. Accordingly, Defendants respectfully request that Count II of Plaintiffs' Verified Complaint be dismissed with prejudice.

#### **POINT VI**

#### **PLAINTIFFS ARE NOT ENTITLED TO THE TYPE OF DOCUMENTS SOUGHT UNDER THE OFFICIAL INFORMATION PRIVILEGE.**

Finally, N.J.S.A. 2A:84A-27 (N.J.R.E. 515) provides: "No person shall disclose official information of this State or of the United States (a) if disclosure is forbidding by or pursuant to any act of Congress or of this State, or (b) if the judge finds that disclosure of the information in this action will be harmful to the interests of the public." Assuming one again, arguendo, that this Court determines that the documents sought

by Plaintiffs related to the official business of the City, the official business privilege prevents the disclosure of such documents to Plaintiffs.

The New Jersey Supreme Court has clearly stated that not every piece of information held by a public agency is subject to public inspection:

We are a society committed to openness in government. Our courts stand ready to enforce the social policy established by our Legislature on behalf of the public in this area. We do not believe, however, that the Legislature has yet transposed into the public prism every detail of information that public bodies assemble.

North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9, 17, 601 A.2d 693, 697 (1992). With regard to the extent of the official business privilege, the New Supreme Court has stated:

The term “official business” is not defined. However, a prior version of N.J.R.E. 515 defined the term to include “information not open or theretofore officially disclosed to the public relating to the internal affairs of the State...in the course of duty, or transmitted from one such official to another in the course of his duty.”

In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 92, 754 A.2d 1177, 1187 (2000). Noting the difference between the official business privilege and the deliberative process privilege, the court stated, “the basic difference between N.J.R.E. 515 and the deliberative process privilege is that the former protects facts from disclosure whereas the latter protects opinions.” Id.

The Supreme Court has also given examples of when the official business privilege applies:

[T]here may be times – and they may be the most critical times – when a government official will have to make a telephone call that has an arguable claim to confidentiality – times when, for example, a mayor might need to call a city

council member from an opposing political party on a most highly sensitive community issue to enlist that person's support; or times when a mayor might need to call a community activist to calm troubled waters, without causing a disruption that might result from appearing to negotiate with a dissident who may, at the moment, be perceived as a lawbreaker. Those communications appear to be protected, at the state level, by the "official information" privilege."

North Jersey Newspapers Co., supra, 127 N.J. at 17, 601 A.2d at 697. The Supreme Court further noted, however, that the "needs of government" makes the official business privilege applicable to even seemingly mundane situations, such as protecting the identity of a neighbor calling to complain about an ordinance violation. Id.

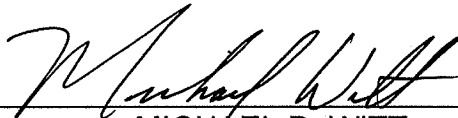
In this case, the official business privilege would shield from disclosure the documents sought by Plaintiffs. The express policies of the State, as embodied in OPRA and the applicable exceptions as noted in Sections II through IV of this Brief, supra, dictate that the disclosure by plaintiffs not be had. Further, since the City has no role in spending the privately donated and privately dispensed funds at issue, the Plaintiffs cannot show that their interest in obtaining the records that they seek outweighs the City's interest in ensuring that it do nothing to prevent those funds from continuing to come in and be used for the benefit of the City's public schools, such as disclose information about the individuals who may be making such donations, as stated in Section V of this Brief. To the point, there is no action of the City that disclosure of the information sought will assist Plaintiffs in analyzing. Accordingly, Defendants respectfully request that Plaintiffs' Verified Complaint be dismissed in its entirety with prejudice.

**CONCLUSION**

For the reasons set forth above, Defendant's respectfully request that Plaintiff's Complaint be dismissed in its entirety with prejudice.

Respectfully submitted,

**CHASAN LEYNER & LAMPARELLO, P.C.**  
**Attorneys for Defendants**  
**City of Newark and Robert Marasco**

By:  \_\_\_\_\_  
MICHAEL D. WITT

Dated: October 21, 2011

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File No.: 01000-0029

**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.: ESX-L-6937-11**

**CIVIL ACTION**

**ORDER DISMISSING COMPLAINT WITH  
PREJUDICE IN LIEU OF ANSWER  
PURSUANT TO R. 4:6-2(e) AS TO  
DEFENDANTS, CITY OF NEWARK and  
ROBERT MARASCO**

**THIS MATTER** having been brought before the Court by Chasan Leyner & Lamparello, PC, attorneys for defendants City of Newark and Robert Marasco, by way of a motion seeking to dismiss the Complaint of plaintiffs Secondary Parent Council and Laura Baker with prejudice, for failure to state a claim upon which relief can be granted, and notice having been given to the plaintiffs, and counsel having appeared before this Court, and the Court having considered the papers submitted in support thereof, and the Court having heard oral argument on the motion, and for good cause having been shown,

**IT IS, THEREFORE,** on this \_\_\_\_\_ day of November, 2011,

**ORDERED THAT:**

1. Plaintiffs' Complaint is dismissed as to defendants City of Newark and Robert Marasco in its entirety with prejudice with each party to bear its own costs, and;



2. A copy of this Order shall be served upon all parties by counsel for plaintiff within seven (7) days of the date hereof.

\_\_\_\_\_  
, J.S.C.

\_\_\_\_\_ Opposed

\_\_\_\_\_ Unopposed