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MORRIS VIEW HEALTHCARE CENTER, Plaintiff/Appellant v. **STATE OF NEW JERSEY DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF AGING SERVICES** and **SARAH WALZER AS CUSTODIAN OF RECORDS** Defendants/Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Civil Action DOCKET NO. A-002353-24 Sat Below: HON. ROBERT T. LOUGY, J.S.C.

AMENDED BRIEF OF PLAINTIFF/APPELLANT, MORRIS VIEW HEALTHCARE CENTER, IN SUPPORT OF ITS APPEAL OF THE MARCH 14, 2025 ORDER

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

Plaintiff/Appellant Morris View Healthcare Center ("Morris View" or "Plaintiff/Appellant") appeals the wrongful denial of access to readily available government records by the State of New Jersey Department of Humans Services ("DHS") Division of Aging Servies ("DoAS"), and Sarah Walzer, as custodian of records (collectively "Defendants/Respondents"). At issue in this appeal are Morris View's five (5) similarly structured requests for access to government records under the Open Public Records Act, N.J.S.A. § 47:1A-1, et seq., made on August 13, 2024 (collectively the "OPRA Requests") for access to records which incontrovertibly exist. These requests were assigned Request Numbers W221935, W229136, W221937, W221938, and W221939 (collectively the "OPRA Requests").

In dismissing Morris View's summary action, the trial court incorrectly determined that OPRA Requests W221935, W221937, W221938, and W221939 were overbroad and lacked sufficient specificity and that OPRA Request W221936 received a sufficient response.

The trial court failed to apply relevant legal precedent and standards with respect to Defendants'/Respondents' obligation to search for documents responsive to OPRA Request W221936, and Defendants'/Respondents' claimed inability to search for documents responsive to the remaining OPRA Requests.

The trial court also failed to properly acknowledge the custodian's legal obligation to search for responsive documents and apply applicable legal requirements to its findings.

Moreover, the trial court misinterpreted and misapplied relevant case law with respect to OPRA Requests W221935, W221937, W221398 and W221939, while simultaneously omitting key facts – including an admission from Defendants/Respondents admitting to their specific failure to search for any responsive documents - and failing to undertake sufficient and accurate analysis for Plaintiff/Appellant's entitlement to the records under the common law right of access.

These numerous errors by the trial court require this Court to reverse the decision of that court and declare the actions of Defendants/Respondents in denying the OPRA Requests to be unlawful and invalid, and to remand this matter to the trial court for further proceedings.

STATEMENT OF FACTS

Morris View is a long term care facility which participates in the Medicaid program and provides services to patients who are Medicaid beneficiaries. Facilities like Morris View, which provide services to Medicaid beneficiaries, must file annual Medicaid cost reports with DHS. DoAS is the division of the DHS which establishes Medicaid rates for long term care facilities like Morris

View. Through its contractor, Myers & Stauffer ("MS"), DoAS conducted acuity audits of Medicaid cost reports filed for the year 2006 for facilities including Morris View. The impact of the acuity audit, which was improperly performed and did not comply with DoAS' own regulations, was to reduce Morris View's per diem Medicaid rate.

The history of the relationship between DoAS and Morris View with respect to the acuity audit is extensive. DoAS originally contracted with MS, an accounting firm in Kansas, for financial services, including clinical acuity audits. In or about June 2009, MS sent Morris View requests for documentation and then issued purported findings with respect to which acuities ostensibly were or were not supported based on the documentation. Since 2010, Morris View has challenged the legality of the audit and the validity of the findings in the matter captioned Morris View Nursing Home v. Department of Human Services, Division of Aging Services which currently bears OAL Docket DAS 07712-21 and Agency No.: Acuity Audit #36 and was initially assigned OAL Docket HLT 11655-2010 N Agency Ref. No. Acuity Audit #36 (the "OAL Litigation"). The OAL Litigation is still pending, fifteen years later, in the Office of Administrative Law.

Moreover, Morris View was not the only long-term care facility in New Jersey whose 2006 Medicaid cost report was the subject of an acuity audit, nor

was Morris View the only facility which challenged the acuity audits of 2006 Medicaid cost reports. See Consolidated Final Agency Decision of Stratford Manor Care and Rehabilitation Center v. New Jersey Department of Health and Senior Services (OAL Docket DAS 04044-11), Canterbury at Cedar Grove v. New Jersey Department of Health and Senior Services (OAL Docket DAS 04042-11), and Briarwood Care and Rehabilitation Center v. New Jersey Department of Health and Senior Services (OAL Docket DAS 03926-11) (hereinafter "Stratford Manor FAD"). Pa38-55.

In fact, on September 8, 2014, DoAS itself issued the "Stratford Manor FAD" consolidated agency decision in connection with the challenges by Stratford Manor, Canterbury and Briarwood explaining that its "decision to re-start acuity audits of nursing home cost reports in 2009 was made because of the audit of nursing facility acuity reporting conducted by the Office of the State Auditor from July 1, 2007[,] through December 31, 2008." Id. at 40. DoAS goes on to explain that "[b]ased on the initial round of audits of the 2006 cost reports, the Division [(DoAS)] decided it was necessary to conduct a second round of audits; therefore, the Division selected an additional list of 125 facilities to be audited . . .". Id. at 43. This second round of audits was initiated because "the first round of acuity audits w[as] insufficiently objective and/or did not contain sufficient data to demonstrate the pervasiveness of the overreporting in the

nursing facility industry." Id. at 52-53. The OPRA Requests are based, in part, on the actions taken by DoAS as detailed in Stratford Manor FAD and the determination of the rates and recoupments (refunds) as a result of the audits conducted by MS.

PROCEDURAL HISTORY

Morris View transmitted five (5) specific, similarly structured, nearly uniform requests for access to government records pursuant to OPRA and the common law right of access (the "OPRA Requests") on August 13, 2024 to the State via its "OPRA Central" web portal. Pa20; Pa24; Pa28; Pa32; Pa36.

The OPRA Requests were assigned tracking numbers W221935, W221936, W221937, W221938, and W221939. Ibid.

OPRA Request W221935 sought "reports, conclusions, analyses, summaries, and memoranda regarding acuity audits of 2006 Medicaid cost reports of nursing facilities." Pa20.

OPRA Request W221936 sought the "criteria utilized in, or applied to, the selection of nursing home Medicaid cost reports for the year 2006 for acuity audits." Pa24.

OPRA Request W221937 sought "calculations of recoupments sought as a result of any acuity audit of a 2006 nursing home Medicaid cost report." Pa28.

OPRA Request W221938 sought "calculations of rate adjustments sought as a result of any acuity audit of a 2006 nursing home Medicaid cost report." Pa32.

Lastly, OPRA Request W221939 sought "correspondence, both physical and electronic, between the division and any provider regarding a 2006 Medicaid cost report, or any acuity audit, recoupment or rate adjustment pertaining to the same." Pa36.

These OPRA Requests were received by Defendants/Respondents on August 13, 2024, establishing a response deadline of August 22, 2024. Pa18-19; Pa22-23; Pa26-27; Pa30-31; Pa34-35. A three (3) business day extension was requested by Defendants/Respondents – but never affirmatively granted by Plaintiffs/Appellants – on August 22, 2024. Defendants/Respondents conveyed its responses to the OPRA Requests on August 27, 2024. Pa18; Pa22; Pa26; Pa30; Pa34. Defendants/Respondents rejected four (4) of the five (5) requests, alleging that they were "improper and overly broad" without providing any further explanation. Pa20-21; Pa28-29; Pa32-33; Pa36-37. The only request that was not rejected outright was OPRA Request W221936 for which Defendants/Respondents were able to conduct a search for responsive documents but claimed to have found none. Pa24-25.

Morris View challenged the improper denial of the OPRA Requests on October 1, 2024 by way of a Verified Complaint and Order to Show Cause. Defendants/Respondents filed its opposition on December 9, 2024, and Plaintiff/Appellant filed its reply on December 27, 2024. Oral argument was held on January 21, 2025.

During oral argument Defendants/Respondents revealed, for the first time, that **Defendants/Respondents never attempted to search the records and documents available from its contracted auditor, MS, in response to the OPRA Requests**. 1T18-20[1]. Furthermore, Defendants/Respondents failed to provide any justification that would have explained why it would be impossible to retrieve responsive documents from MS; Defendants/Respondents only speculatively opined that searching the records that did exist from MS would have involved some unknown level of technological difficulty. 1T19-20.

Despite Defendants/Respondents admitting, on the record, that they never performed any search of MS's data, which they were required to perform in connection with Plaintiff/Appellant's OPRA Requests, by way of Order dated March 14, 2025, the trial court inexplicably affirmed the

[1] "1T" refers to the Transcript of Oral Argument held on January 21, 2025 before the Hon. Robert T. Lougy, J.S.C.

Defendants'/Respondents' unfounded denial of the OPRA Requests and provided its written statement of reasons. This appeal now follows.

THE MARCH 14, 2024 ORDER AND STATEMENT OF REASONS

The trial court concluded that "Defendants properly denied the requests at issue and dismisse[d] Plaintiff's complaint with prejudice." Pa3. However, it did not begin to give any analysis as to whether the denial of the OPRA Requests was proper until page eleven (11) of its sixteen (16) page opinion. Id. at12-17.

According to the trial court, OPRA Request W221935 "is akin to Spectraserv, where the Appellate division found the request overbroad due to the sheer enormity and complexity. While Plaintiff did not specifically use the phrase "any and all,", its request does not specify the nursing facilities and has the same result. It is unreasonable and labor intensive to require Defendants to search for documents related to this request when neither they nor Plaintiff can easily identify which nursing facilities out of the 340 were subject to the 2006 acuity audits." Id. at 13. In its analysis the trial court made no mention of the Stratford Manor FAD that identified facilities other than Morris View which were also the subject of the 2006 acuity audits, nor did it make any mention of the utter failure of Defendants/Respondents to check records held by the third-party contractor, MS, DoAS used to conduct the audits.

The trial court then turned to OPRA Request W221939. Id. The trial court found that "[t]his request is overbroad and would require extensive labor from Defendants to identify responsive documents because it does not limit the request to correspondences regarding acuity audits but to anything involving the 2006 Medicaid cost reports." Id. at 14. The trial court further found that this request was unlike the one in Burke because it was not "more narrowly defined between agencies and offices" and therefore would require "Defendants to search for correspondences between its large agency, and a few hundred nursing facilities not just between the two entities." Id. Again, no mention was made of Stratford Manor FAD or the failure of Defendants/Respondents to reference the records held by MS, the contractor which performed the audits in the court's analysis.

As to OPRA Requests W221937 and W221938, the trial court rejected "Plaintiff's efforts to distinguish N.J. Builders Association. While Plaintiff correctly point[ed] out that records either have calculations or they do not, Plaintiff is not asking for documents with those calculations. It asks for the calculations themselves which Defendants would need to compile and insert into a new record. OPRA does not permit this type of request, as noted in N.J. Builders Association, 390 N.J. Super. at 32." Id. at 15. Consistent with its previous omissions, no mention of Stratford Manor FAD or the failure of

Defendants/Respondents to check the records held by MS, the contractor used to conduct the audits was included in the court's analysis.

Regarding the remaining OPRA Request, Request W221936, the Court relies entirely on the certification of Defendant/Respondent Sarah Walzer wherein Ms. Walzer certifies that she was unable to locate responsive documents. Id. at 16. Once more, the Court's analysis makes no mention of Stratford Manor FAD or the failure of Ms. Walzer to even check the records potentially held by MS, the contractor DoAS used to conduct the audits.

As to the claim under the common law right of access, the totality of the trial court's analysis was as follows: "Plaintiff did not state its particularized need or wholesome public interest at the time of its requests, and in the Complaint it only states that it has such an interest." Id.

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT PLAINTIFF/APPELLANT'S REQUESTS FOR GOVERNMENT RECORDS WERE OVERBROAD BECAUSE DEFENDANTS/RESPONDENTS FAILED TO PROPERLY

SEARCH THEIR RECORDS FOR RESPONSIVE DOCUMENTS, WERE ABLE TO SUCCESSFULLY CONDUCT A POINTED SEARCH OF RESPONSIVE RECORDS FOR OPRA REQUEST W221936, WERE INTIMATELY AWARE OF THE RECORDS SOUGHT, AND EACH REQUEST CONTAINED SPECIFIC IDENTIFIERS THAT ENABLED THE DEFENDANTS/RESPONDENTS TO CONDUCT SPECIFIC SEARCHES FOR RESPONSIVE RECORDS. (Pa0008; Pa0012-Pa0016)

"[T]he issue of whether access to public records under OPRA and the manner of its effectuation are warranted" is reviewed *de novo*. MAG Entm't LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 543 (App. Div. 2005). This Court must therefore independently analyze the OPRA Requests, applicable facts, and case law to determine whether the OPRA Requests were sufficiently specific to allow Defendants/Respondents to conduct pointed searches for responsive records.

In that regard, Defendants/Respondents' (i) failure to conduct a proper search of their records for responsive documents despite an admitted ability to conduct searches for records responsive to OPRA Request W221936, (ii) the

independently specific identifiers in the OPRA Requests, and (iii) intimate knowledge of the records sought undermine any argument that the OPRA Requests were "improper and overbroad," and serve as the basis for why this Court should reverse the finding of the trial court.

A. Defendants/Respondents admitted that they have failed to properly conduct a search for responsive records as is required. (Pa0009-Pa0010; 1T19-20)

A records custodian "is obligated to "locate and redact [the requested] documents, isolate exempt documents, . . . identify requests that require 'extraordinary expenditure of time and effort' and warrant assessment of a 'service charge,' and, when able to comply with a request, 'indicate the specific basis'" thereof." Doe v. Rutgers State Univ. of N.J., 466 N.J. Super. 14, 27 (App. Div. 2021) citing Spectraserv, Inc. v. Middlesex Cnty Utils. Auth., 416 N.J. Super. 565, 576 (App. Div. 2010) (quoting N.J. Builder's Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 177 (App. Div. 2007) (quoting N.J.S.A. § 47:1A-5(a)-(j)). To be sure, OPRA "is not intended as a research tool . . . to force government officials to identify and siphon useful information" and a custodian is not required "to conduct research among its records . . . and correlate data from various government records in the custodian's possession." MAG Entm't LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534,

546-547 (App. Div. 2005). But that is not what Morris View asked Defendants/Respondents to do in any of the OPRA Requests.

As admitted by Defendants/Respondents' attorney, DAG Jessica Sampoli, at oral argument, no search was ever conducted of the records and data held by MS, the contractor that conducted the acuity audits, because Defendants/Respondents doubted that any relevant information or documents would be present. 1T19-20. However, the custodian must still make an affirmative effort to look. Defendants/Respondents, by their own admissions, did not undertake any effort to search for responsive records. Investigating what documents and data are available from MS is an affirmative responsibility of the Defendants/Respondents and, by their own admission, have utterly failed to fulfill that responsibility. Moreover, if any of the OPRA Requests required "extra ordinary expenditure of time and effort that warrants assessment of a service charge", the Defendants/Respondents had an obligation to seek an accommodation from Morris View and report the service charge. Doe v. Rutgers State Univ. of N.J., 466 N.J. Super. 14, 27 (App. Div. 2021). No such report was made, and Defendants/Respondents have failed to fulfill their obligations or comply with the law.

B. Defendants/Respondents' ability to successfully conduct a search for responsive records to OPRA Request W221936 undermines any

assertion that the remaining OPRA Requests were lacking in specificity or overbroad. (Pa0016)

The law is clear that if a custodian of records can perform a search and identify responsive records it "belies any assertion that the request was lacking in specificity or was overbroad." Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2012). OPRA Request W221936 sought "criteria utilized in, or applied to, the selection of nursing home Medicaid cost reports for the year 2006 for acuity audits". Pa24. Defendants'/Respondents' response to OPRA Request W221936 was that "no records were found meeting the criteria as set forth in the referenced OPRA request. As such, the Division must deny this request because it does not make, maintain, keep on file or received these records." Id. at 25. Stated differently, with respect to OPRA Request W221936, Defendants/Respondents conducted the required searches and apparently located no responsive records. Assuming, *arguendo*, that Defendants/Respondents actually conducted the required searches for W221936, they cannot now claim that they lack the ability to conduct searches for records sought in the other four OPRA Requests, as those requests are similarly specific and limited in scope. Because Defendants/Respondents were able to conduct a search for potentially responsive records for one request and conclude that there were no responsive records, a denial of the remaining OPRA requests because

they allegedly are lacking in specificity or are overbroad, is entirely without merit.

C. The trial court failed to account for Defendants/Respondents intimate awareness of the sought after records. (Pa0016)

The trial court's opinion is devoid of any discussion of Defendants'/Respondents' admission that they had not even attempted to search the available records held by MS. The explanation of what is required of a custodian of records as applied to the MS issue, is absent from the trial court's opinion. Furthermore, the trial court overlooks the relevance of the Stratford Manor FAD consolidated decision, and its identification of records, as applied to the instant matter.

The relationship between MS and Defendants/Respondents is foundational to the improper denial of the OPRA Requests. As previously detailed, DoAS contracted with MS to conduct clinical acuity audits of long term care facilities across New Jersey in or about 2009. The calculations sought in the OPRA Requests are Medicaid rates and recoupments (refunds) determined by DoAS following the audits conducted by MS. The Stratford Manor FAD consolidated decision, a decision issued by DoAS itself[2], addressed not only the

[2] DoAS was part of the Department of Health at the time and is now part of DHS.

challenges to these audits, but also the motivation to conduct the audits later performed by MS.

The DoAS issued the Stratford Manor FAD consolidated decision on September 8, 2014, in connection with specifically identified nursing facilities that challenged the acuity audits of their 2006 Medicaid cost reports. As described in that decision, DoAS could not confirm the "pervasiveness of the overreporting in the nursing facility industry" from the 2006 Medicaid cost reports. Pa52-53. If the DoAS did not calculate some values to use as a baseline to compare against the acuity audits by MS that eventually took place, it would be impossible for the DoAS to confirm whether those values were overreported.

The long term care facilities which were parties to this FAD challenged the MS acuity audits of their 2006 cost reports on grounds comparable to those asserted by Morris View. In that FAD, DoAS explained that "[b]ased on the initial round of audits of the 2006 cost reports, the Division [(DoAS)] decided it was necessary to conduct a second round of audits; therefore, the Division selected an additional list of 125 facilities to be audited . . .". Pa43. This second round of audits was initiated because "the first round of acuity audits w[as] insufficiently objective and/or did not contain sufficient data to demonstrate the pervasiveness of the overreporting in the nursing facility industry." Id. at 52-53.

This is far more than just the "allusion" found by the trial court. Pa16. The above quoted language reveals that DoAS not only has the audits of the 2006 cost report, and the cost reports themselves, but had also conducted extensive analyses on those 2006 cost reports and audits to conclude that a second audit was necessary. This conclusion, and the analysis that gave rise to such a conclusion, are but two examples of the "reports, conclusions, analyses, summaries, and memoranda regarding acuity audits of 2006 Medicaid cost reports of nursing facilities" sought by OPRA Request W221935. Pa20.

DoAS' admission that they "selected an **additional** list of 125 facilities to be audited" means that because DoAS was responsible for selecting the first list of facilities to be audited it must therefore have some criteria or methodology – even if that criteria or methodology was random selection – for that first round of audits. Pa43. This unknown criterion is exactly the "criteria utilized in, or applied to, the selection of nursing home Medicaid cost reports for the year 2006 for acuity audits" sought by OPRA Request W221936. Pa24.

Moreover, the extensive relationship between the DoAS and MS and DoAS' long history of litigation with Morris View over its acuity audits further serves to compound the severity of Defendants/Respondents' failure to search for responsive records; Defendants/Respondents had extensive knowledge of the records sought – including but not limited to where the records could potentially

be found – yet failed to act on that knowledge. The trial court's erroneous omission of this information from its decision warrants reversal. Aside from the fact that DoAS itself performed the selection, DoAS has been in litigation[3] with Morris View over its acuity audit for many years. It has intimate and precise knowledge of what records the OPRA Requests sought and DoAS' denial of same while failing to conduct a proper search and locate responsive government records is simply not credible.

D. The trial court failed to properly apply binding precedent and applicable standards as to the sufficiency of the OPRA Requests. (Pa0012-Pa0016)

Even ignoring the glaring omissions from the trial court's opinion, the remaining OPRA Requests independently contain specific identifiers that allowed Defendants/Respondents to conduct a pointed search for responsive records. Each of the remaining OPRA Requests will be addressed in the same order as they appear in the trial court's statement of reasons beginning with OPRA Request W221935, followed by OPRA Request W221939, and then OPRA Requests W221937 and W221938.

[3] The underlying dispute between Morris View and DoAS over the acuity audit, now pending in the OAL, has twice been before the Appellate Division DOCKET NO. A-000454-21T2 (December 3, 2021) and DOCKET NO. A-5648-16T1 (March 5, 2019).

1. OPRA Request W221935 (Pa0012-Pa0013)

OPRA Request W221935 sought "reports, conclusions, analyses, summaries, and memoranda regarding acuity audits of 2006 Medicaid cost reports of nursing facilities." Pa20. The trial court found that, because the custodian of records was unable to "locate a list of every nursing facility whose cost report was subject to an audit in 2006, which would then require the agency to go through the files of every nursing facility in existence in New Jersey in 2006", the request is "overbroad as it requires looking through the cost reports of 340 nursing facilities." Pa12. The trial court then likened OPRA Request W221935 to the request in Spectraserv[4], "due to the sheer enormity and complexity." Id. at 12-13. The trial court also took issue with the request's "any and all" scope. Id. at 13.

The trial court's reliance on Spectraserv and its issue with the request's "any and all" nature are respectfully misplaced. The OPRA Request at issue in Spectraserv was denied for the following three (3) reasons:

> (1) the sheer enormity and complexity of the request, involving approximately 150,000 documents, rendered agency compliance cumbersome and time consuming, involving an "extraordinary expenditure of time and effort." N.J.S.A. 47:1A-5(c); (2) Spectraserv's failure in

[4] Spectraserv, Inc. v. Middlesex Cnty Utils. Auth., 416 N.J. Super. 565 (App. Div. 2010)

> many instances to clearly specify the documents sought necessitated the deployment of indisputably limited agency resources to sift through the MCUA's vast files and identify, analyze and select potentially relevant and responsive public records; and (3) it encompassed records that were exempt from disclosure under OPRA, as ultimately found by both the special master and the trial court, and which required further agency efforts to cull, isolate and evaluate. Indeed, of the 596 documents originally identified by the MCUA as privileged, 205 were eventually upheld by the court as exempt from disclosure and only 171, at most, were deemed otherwise.

[Spectraserv, 416 N.J. Super. at 578-579.]

In sum, the Spectraserv court was concerned by the breadth of the request, the lack of specificity, and the applicable disclosure exemptions; the Spectraserv court was not merely concerned with the number of potentially responsive records. For OPRA Request W221935, it is unknown how many responsive records exist because Defendants/Respondents failed to conduct the required search. Therefore, Spectraserv is not applicable and any comparison to the number of records at issue in Spectraserv is moot because no one knows how many records are potentially responsive due to Defendants'/Respondents' failure to conduct a search. Even if it were not moot, and even if the records responsive to this request did turn out to be voluminous as it was in Spectraserv, the custodian can only deny access to the records after finding that searching for

and producing the responsive records would substantially disrupt agency operations and "after attempting to reach a reasonable solution with the requestor that accommodates the interest of the requestor and agency." N.J.S.A. § 47:1A-5(g). There is no showing in the record that such an attempt was made here, and, in fact, there was none.

A requestor does not have the burden to precisely identify the location where the responsive documents are located; instead, a requestor must make the request with sufficient specificity and clarity to allow the custodian to identify responsive records without extensive effort or the exercise of subjective judgment. Bart v. Passaic County Public Housing, 406 N.J. Super. 445, 451-452 (App. Div. 2009) citing MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 178 (App Div.) certif. denied, 190 N.J. 394 (2007). For the trial court to state to "[i]t is unreasonable and labor intensive to require Defendants to search for documents related to this request when neither they nor Plaintiff can **easily** identify which nursing facilities out of the 340 were subject to the 2006 acuity audits" stands in opposition to the above-cited, well settled case law. Pa13 (emphasis added). As our courts have held, it does not have to be "easy" for the custodian to search

for responsive records based on the request but, rather, it should not require an "extensive effort".

Lastly, as to the alleged "any and all" nature of OPRA Request W2221935, in Burke v. Brandes, 429 N.J. Super. 169, 176 (App. Div. 2012), the Appellate Division reiterated and upheld an earlier decision on this issue. The Burke court explained that:

> "in Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), we found an "any and all" request to be sufficiently specific. In that case, the plaintiff submitted a request to the county on March 14, 2008, asking for "[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present." Id. at 508–09. The fact that the plaintiff did not specify matters to which the settlements related "did not render his request a general request for information obtained through research, rather than a request for a specific record." Id. at 513–14."
>
> [Burke, 429 N.J. Super. at 176.]

Thus, an "any and all" request is not automatically insufficiently specific and overbroad, nor is a request that is deemed to be an "any and all" request a dispositive reason to find that the request fails for overbreadth and lack of specificity. A thorough analysis as to whether the request at issue is "a general request for information obtained through research rather than a request for a specific record" must still take place. Burke, 429 N.J. Super. at 176. The dispositive weight the trial court placed on the "any and all" nature of the request to invalidate it without further examination must therefore fail. Accordingly, the trial court improperly affirmed the denial of OPRA Request W221935.

2. OPRA Request W221939 (Pa0013-Pa0014)

OPRA Request W221939 sought "correspondence, both physical and electronic, between the division and any provider regarding a 2006 Medicaid cost report, or any acuity audit, recoupment or rate adjustment pertaining to the same." Pa36. The trial court found that "this request [was] overbroad and would require extensive labor from Defendants to identify responsive documents because it does not limit the request to correspondences regarding acuity audits to anything involving the 2006 Medicaid cost reports." Pa14. The trial court further found that this request differed from the one in Burke where the OPRA request was between "more narrowly defined agencies and offices". Id.

The trial court's reliance of Burke is misplaced because the holding of Burke was not premised on how "narrowly defined" the agencies and offices were. The request at issue in Burke sought "EZ Pass benefits afforded to retirees of the Port Authority, including all . . . correspondence between the Office of the Governor . . . and the Port Authority . . .". Burke, 429 N.J. Super. at 172. The Burke court held that "Plaintiff's request here was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information." Id. at 176. Elaborating further, the Burke court explained that "the request was limited to particularized identifiable government records, namely, correspondence with another government entity, rather than information generally." Id. The instant request was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information. The specific subject matter was the "2006 Medicaid cost report, or any acuity audit, recoupment or rate adjustment pertaining to the same." Pa36. The instant request was also limited to particularized identifiable government records, namely "correspondence between the Division and any provider," rather than correspondence between the Division and any other entity generally. Ibid. The limited number of providers which filed Medicaid cost reports for the year 2006 provided a discrete, limited number of entities which could have corresponded with the Division. For those reasons, rather than differing from

the request in Burke, OPRA Request W221939 is instead consistent with the with request in Burke. Accordingly, the trial court improperly affirmed the denial of OPRA Request W221939.

3. OPRA Requests W221937 and W221938 (Pa0015)

OPRA requests W221937 and W221938 will be addressed together because the trial court addressed these OPRA requests jointly. OPRA Request W221937 sought "calculations of recoupments sought as a result of any acuity audit of a 2006 nursing home Medicaid cost report." Pa28. OPRA Request W221938 sought "calculations of rate adjustments sought as a result of any acuity audit of a 2006 nursing home Medicaid cost report." Id. at 32. The trial court held that OPRA Requests W221937 and W221938 were the types of requests prohibited by N.J. Builders Association[5] as the request "asks for the calculations themselves which Defendants would need to compile and insert into a new record." Id. at 15.

The trial court misinterpreted the holding in N.J. Builders Association and, therefore, misapplied it as it relates to OPRA Requests W221937 and W221938. The request at issue in N.J. Builders Association was a "five-page, thirty-nine paragraph request [that] b[ore] no resemblance to the record request

[5] N.J. Builder's Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007).

envisioned by the Legislature." N.J. Builders Ass'n, 390 N.J. Super. at 178. The court found that "[r]ather than specifically describing the documents sought, NJBA asked COAH to select the documents in data. In short, NJBA asked COAH to identify the documents, which is NJBA's obligation under OPRA." Id. at 178-179. The N.J. Builders Association court used NJBA's tenth OPRA request as an example of this shortcoming, identifying how that request "required a survey of employees . . . before any attempt to compile the documents and data they [COAH] "relied upon considered, reviewed, or otherwise utilized."" Id. at 178.

OPRA Requests W221937 and W221938 do not share any of the deficiencies found in N.J. Builders Ass'n. Request W221937 does not present any ambiguity that requires Defendants/Respondents to survey other employees or exercise their own discretion to identify whether a document is responsive; either the document has calculations of recoupments sought as a result of any acuity audit of a 2006 nursing home Medicaid cost report or it does not. Similarly, Request W221938 does not present any ambiguity that requires a determination by Defendants/Respondents other than if the potentially responsive document features calculations of rate adjustments because of an acuity audit of a 2006 nursing home Medicaid cost report. Both requests are extraordinarily straightforward and specific in what Morris View was seeking.

Accordingly, the trial court failed to properly assess the specificity of OPRA Requests W221937 and W221938.

II. PLAINTIFF/APPELLANT IS ENTITLED TO RECEIVE RESPONSIVE RECORDS UNDER THE COMMON LAW RIGHT OF ACCESS BECAUSE THE KEDDIE[6] FACTORS WEIGH DECISIVELY IN PLAINTIFF'S/APPELLANT'S FAVOR. (Pa0003; Pa0016-Pa0017)

The trial court's dismissal of Morris View's claim under the common law right of access should be reversed because the Keddie factors weigh heavily in favor of Morris View.

Keddie identifies three factors that determine when it is appropriate to release records to a citizen under the common law right of access: (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; and (3) the citizen's right to access must be balanced against the State's interest in preventing disclosure. Keddie, 148 N.J. at 50. The analysis of this third balancing factor is governed by a separate six-factor analysis. Loigman v. Kimmelman, 102 N.J. 98, 113 (1986). These six factors are as follows:

[6] Keddie v. Rutgers, 148 N.J. 36 (1997).

> (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decision[-]making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.
>
> [Loigman, 102 N.J. at 113.]

A common-law public 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, 148 N.J. at 49. Here, it is beyond doubt that any acuity audits of 2006 Medicaid cost reports of New Jersey nursing facilities would be required to be kept by Defendants/Respondents because Defendants/Respondent DoAS is a public office/agency. As to the second Keddie factor, Morris View, as one of the New Jersey long term care facilities whose 2006 Medicaid cost report was audited, has an undisputed interest in the subject matter of the materials it is seeking.

The last Keddie factor, as applied through the balancing test set forth in Loigman, also weighs in favor of the production of the requested documents. The first two (2) of the six (6) Loigman factors are irrelevant for this analysis because the records sought here have nothing to do with information provided by citizens to the government or would implicate concerns over their identities; the records sought here are purely technical in nature. As to the third Loigman factor, agency self-evaluation, program improvement, or other decision making would only be enhanced by disclosure of the requested records. As has been made abundantly clear, what is being sought in the instant OPRA Requests is factual data and records rather than "evaluative reports of policy makers". Accordingly, the fourth Loigman factor weighs in favor of disclosure to Morris View. Given that no remedial measures have been instituted by an investigative agency and no agency disciplinary or investigatory proceedings have arisen connected to the acuity audit of the 2006 Medicaid cost report for Morris View, the remaining Loigman factors also weigh in favor of disclosure.

Morris View's claim under the common law right of access should therefore be granted because all three Keddie factors weigh decisively in favor of Morris View. The records sought are undoubtedly common-law public records as it was filed in a public office by a public official in the exercise of his or her public function. Morris View unquestionably has an interest in the

requested records because it was one of the New Jersey long term care facilities whose 2006 Medicaid cost report was audited. Lastly, as explained above, the balance of the Loigman factors indisputably favor Morris View. Morris View is entitled to the sought after records under the common law right of access.

CONCLUSION

For the reasons described above, this Court should reverse the decision of the trial court and declare the actions of Defendants/Respondents to be unlawful and invalid and remand this case for further proceedings.

Respectfully submitted,

INGLESINO TAYLOR

By: /s/ Justin A. Marchetta
JUSTIN A. MARCHETTA, ESQ.

Dated: June 11, 2025

MORRIS VIEW HEALTHCARE CENTER, Plaintiff-Appellant, v. STATE OF NEW JERSEY DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF AGING SERVICES and SARAH WALZER AS CUSTODIAN OF RECORDS, Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002353-24 **Civil Action** On Appeal from an Order of the Superior Court of New Jersey, Law Division, MER-L-1928-24 Sat below: Hon. Robert Lougy, A.J.S.C.

BRIEF ON BEHALF OF RESPONDENT

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

In 2006, the New Jersey Department of Humans Services, Division of Aging Services began randomized acuity audits of long term care facilities in the State that participate in the Medicaid program and serve Medicaid beneficiaries. The purpose of that audit was to confirm that the facilities were not overreporting their costs for high-needs patients.

Appellant, Morris View Healthcare Center ("Morris View"), which was one of the audited facilities, submitted five requests to the Division for access under New Jersey's Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1.1 to -13 and the common law right of access. The Division denied four of Morris View's requests as overbroad and unduly burdensome and denied the fifth because it sought a record that does not exist. Morris View sought review of the denials before the trial court. The trial court agreed with the Division and correctly found that: 1) four of the five requests were indeed overbroad and unduly burdensome because they were not specific enough; and 2) the fifth request returned no responsive records.

On appeal, Morris View argues that the trial court erred in finding the requests overbroad, and that four of the five requests denied on that basis were

sufficiently specific. They also claim that the Division failed to conduct proper searches for responsive records.

However, Morris View's uninformed assumptions about the Division's filing system and record retention practices do not save its OPRA requests from being overbroad. Regardless of Morris View's assumptions, the central fact is that to respond to the requests, the Division would have to locate and search all files, both physical and electronic, spanning an undefined number of years, for all nursing facilities that may have submitted a 2006 cost report. And that would only be the first step. Requests of this breadth and lack of specificity would require the custodian to undertake an unreasonably burdensome search, interpret the types of documents sought, and extract data from documents and are thus improper under OPRA. The Division was not obligation to conduct searches for responsive documents in the face of such overbroad requests. All aspects of the trial court's decision should be upheld.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

Morris View appeals the Law Division's March 14, 2025 order and decision finding that the Division and Sarah Walzer, custodian of records (collectively "Respondents") properly denied Morris View's five records requests. (Pb).[2]

A. Morris View's OPRA Request.

On August 8, 2022, requestor Lisa Taylor submitted the following five OPRA requests to the Division:

1. OPRA Request W221935, which sought "Reports conclusions, analyses, summaries and memoranda regarding acuity audits of 2006 Medicaid cost reports of nursing facilities;"

2. OPRA Request W221937, which sought "Calculations of recoupments sought as a result of any acuity audit of a 2006 Medicaid cost report;"

3. OPRA Request W221938, which sought "Calculations of rate adjustments sought as a result of any acuity audit of a 2006 nursing home Medicaid cost report;"

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[1] The procedural history and counterstatement of facts are inextricably intertwined, and have been combined for the court's convenience.

[2] "Pb" refers to Appellant's brief, and "Pa" refers to Appellant's appendix. "T" refers to the Transcript of Oral Argument held on January 21, 2025, before the Hon. Robert T. Lougy, J.S.C.

4. OPRA Request W221939, which sought "Correspondence, both physical and electronic, between the Division and any provider regarding a 2006 Medicaid cost report, or any acuity audit, recoupment, or rate adjustment pertaining to the same;" and

5. OPRA Request W221936, which sought "Criteria utilized in, or applied to, the selection of nursing home Medicaid cost reports for the year 2006 for acuity audits."

   [Pa18-Pa35].

On August 27, 2024, the Division, through records custodian Sarah Walzer, responded to Ms. Taylor by advising that OPRA Requests W221935, W221937, W221938, and W221939, were denied as improper and overbroad. (Pa18-Pa37). The Division denied OPRA Request W221936 because there were no records responsive to the request. (Pa22-Pa25).

B. Trial Court Proceeding

On October 1, 2024, Morris View filed a verified complaint and order to show cause challenging the Division's denial of its requests under OPRA and the common law right of access. (Pa1-12). Morris View's complaint did not identify whether it is a corporation, limited liability company, other incorporated entity, or an unincorporated business under N.J.S.A. 2A:64-1 and did not

otherwise explain its legal capacity under which to bring the underlying complaint. (Pa1-2).

On December 9, 2024, the Division opposed Appellant's order to show cause with a supporting certification from Walzer, seeking dismissal of the complaint in its entirety. (Pa13-16). The Division asserted that Morris View's complaint should be dismissed because the requests were properly denied, four as overbroad and one because it sought records not made or maintained by the Division.

On March 14, 2025, the court denied Morris View's request for records and dismissed the complaint. (Pa2-Pa17). The court agreed the Division properly responded to each of Morris View's five requests. The court addressed each request in turn, noting that an "agency has no obligation under OPRA to provide a requestor with a copy of a record that does not exist or to create a new record from information in its possession." (Pa8-9).

Regarding request W221935, which sought "[r]eports conclusions, analyses, summaries and memoranda regarding acuity audits of 2006 Medicaid cost reports of nursing facilities," the court found that "without further specificity, [Morris View's] request . . . is overbroad as it requires looking through the cost reports of 340 nursing facilities." (Pa12). Regarding request

W221939 which sought all correspondence, "between the Division and any provider regarding a 2006 Medicaid cost report, or any acuity audit, recoupment, or rate adjustment pertaining to the same;" the court rejected Morris View's argument that the request was sufficiently specific because it limited to a specific subject matter and a specific record. (Pa13). Rather, the court held that the request was overbroad because a response "would involve a review of both physical and electronic files, with the review of both past and current employees' mailboxes," and would require "looking through the correspondences involving any of the 340 nursing facilities, not just nursing facilities who had an acuity audit." (Pa13-14). The court also emphasized that "this could span years of correspondences" since Morris View did not provide a date range, and ultimately concluded that the request would require extensive labor by the Division. (Pa14).

Regarding requests W221937 and W221938—which collectively requested calculations of recoupment and any rate adjustments sought as a result of any acuity audit of a 2006 Medicaid cost report"—the court found that Morris View was improperly seeking "calculations themselves, which the Division would need to compile and insert into a new record." (Pa15). The court emphasized that Morris View "is not asking for documents with those

calculations," finding that the Division therefore properly denied requests W221937 and W221938.

Regarding request W221936, to which the Division responded advising it did not maintain records responsive to Morris View's request seeking "[c]riteria utilized in, or applied to, the selection of nursing home Medicaid cost reports for the year 2006 for acuity audits", the court agreed the Division's response was proper explaining that it "cannot make documents that do not exist appear for an OPRA request." (Pa16). The court found Morris View's reliance on the Stratford Manor OAL matter insufficient to demonstrate that requested records exist, noting that "Plaintiff has provided no proof that the records exist." (Pa16). Thus, the trial court upheld the Division's denial of request W221936 as records not made or maintained by the agency. (Pa16).

Turning to Morris View's common law claims, the court explained that the common law right of access applies to records that are common-law public documents in which the requestor has a particularized need or wholesome public interest in the subject matter of the material and where the requestor's right to access outweighs the State's interest in preventing disclosure. (Pa9-10). The court explained that Morris View "did not state its particularized need or wholesome public interest at the time of its requests, and in the Complaint it

only states that it has such an interest." (Pa16). Thus, because Morris View failed to identify an interest for requests W221935, W221937, W221938, and W221939, as required for the common law right of access, the court upheld the Division's denial under the common law. (Pa16). For request W221936, the court also upheld the Division's denial, reiterating that no responsive records are available for which access can be granted. (Pa17).

This appeal follows.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY CONCLUDED THAT MORRIS VIEW HEALTHCARE CENTER WAS NOT ENTITLED TO THE RECORDS UNDER OPRA.

A trial court's determinations with respect to the disclosure or exemption of records under OPRA are "legal conclusions subject to de novo review." O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 379 (App. Div. 2009); Paff v. Div. of Law, 412 N.J. Super. 140, 149 (App. Div. 2010).

Here, the trial court's conclusions under OPRA were correct. He addressed all of Morris View's arguments and correctly concluded that requests W221935, W221937, W221938, and W221939 under OPRA were overbroad because the requests were not specific enough. Further, the trial court correctly

concluded that the Division properly denied request W221936 because the requested records do not exist. (Pa12-17). This decision should be affirmed.

A. The Division Properly Denied Morris View's Requests W221935, W221939, W221937 and W221938 As Overbroad.

To maximize transparency and ensure an "informed citizenry," Mason v. City of Hoboken, 196 N.J. 51, 64 (2008), OPRA broadly defines "government record" and requires a swift response from the public agency. See N.J.S.A. 47:1A-1.1 (defining government record); N.J.S.A. 47:1A-5(i) (requiring response within seven business days). The seven-business day deadline allows time only for the custodian to perform the ministerial task of retrieving the requested record. Spectraserv, Inc. v. Middlesex Cnty. Utils. Auth, 416 N.J. Super. 565, 576 (App. Div. 2010); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 178 (App. Div. 2007) (noting Plaintiff's five-page thirty-nine paragraph request "bears no resemblance to the record request envisioned by the Legislature, which is one submitted on a form that 'provide[s] space for . . . a brief description of the record sought.'"); see also Lagerkvist v. Office of Governor, 443 N.J. Super. 230, 234 (App. Div. 2015).

Given this short timeframe, OPRA does not require the custodian to speculate as to what the requestor seeks, to do research, or to analyze or compile

information. N.J. Builders Ass'n, 390 N.J. Super. at 178. "While OPRA provides an alternative means of access to government documents not otherwise exempt from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'" MAG Entertainment LLC, 375 N.J. Super. at 546 (quoting N.J.S.A. 47:1A-1). "[T]here is no legal basis to expand the custodian's role beyond what the Legislature specifically described in N.J.S.A. 47:1A-5(g)." Lagerkvist, 443 N.J. Super. at 236 (holding records custodians are not obligated to engage in efforts at accommodation were the objection is that the request is unclear and overbroad).

The requestor's obligation, in turn, is to specifically identify the records sought, a task "essential to the agency's obligation and ability to provide a prompt response." N.J. Builders Ass'n, 390 N.J. Super. at 178 (quoting Gannett N.J. Partners v. Cnty. of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005)). Accordingly, OPRA does not encompass requests that are non-specific or unclear. N.J. Builders Ass'n, 390 N.J. Super. at 179. Thus, if a requester fails to sufficiently identify the records requested, the custodian may simply deny the request. Lagerkvist, 443 N.J. Super. 230, 236-37 (App. Div., 2015). Thus, a

proper OPRA request must be "confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information." Burke v. Brandes, 429 N.J. Super. 169, 176 (App. Div., 2012).

To that end, proper requests seeking communications must identify the individuals or accounts to be searched and be confined to a discrete and limited subject matter. See Burke v. Brandes, 429 N.J. Super. 169, 176-78 (App. Div. 2012); see also Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-08 (Apr. 8, 2010) (stating that a proper request for email correspondence must contain "(1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the emails were transmitted, and (3) a valid e-mail request must identify the sender and/or recipient thereof").

In May 2024, the Legislature amended OPRA to incorporate the standard set forth in Burke and Elcavage into the statute by specifically requiring requests for correspondence to "identify a specific job title or accounts to be searched, a specific subject matter, and [be] confined to a reasonable time period." See N.J.S.A. 47:1A-5(g) (amended effective September 4, 2024).

Here, the trial court correctly held that requests W221935, W221939, W221937 and W221938 are improper under OPRA because they each fail to

identify records with specificity to allow for a reasonable search. Specifically, regarding Morris View's Requests W221935 and W221939, the trial court properly held they are "unreasonable and labor intensive," requiring "extensive labor" to identify responsive documents. (Pa12-14).

i. Request W221935

Request W221935 sought "reports, conclusions, analyses, summaries and memoranda regarding acuity audits of 2006 Medicaid cost reports of nursing facilities." As the trial court recognized, the sweeping scope of that request effectively seeks "any and all records" in possession of the Division related to acuity audits of 2006 Medicaid cost reports which makes the request invalid as a matter of law as a panel held in Spectraserv, 416 N.J. Super. at 578. (Pa12).

In that matter, Spectraserv made several broad OPRA requests, requesting "any and all" documents related to a contract between Spectraserv and the Middlesex County Utilities Authority, the termination of same, and the "entire file" for the Authority's subsequent contract with another entity. Spectraserv, 416 N.J. Super. at 570. The Authority reviewed Spectraserv's request and determined that it encompassed approximately 150,000 documents and records. Accordingly, the Authority considered Spectraserv's requests vague and overbroad. Id. at 572. After protracted litigation in the Law Division, a special

master determined that Spectraserv was a prevailing party under OPRA, thus entitling it to attorney's fees. Id. at 575; N.J.S.A. 47:1A-6 (allowing the award of fees to prevailing party). The trial court rejected the special master's finding and found that Spectraserv was not a prevailing party, because its OPRA request was improperly made, in that it was "overly broad and non-specific." Ibid. Spectraserv appealed to this court. This court agreed with the trial court, concluding that requests for "any and all" documents on a subject are generally considered overbroad. The court also concluded that Spectraserv's failure to make specific requests placed an unreasonable burden on the Authority's time and resources that is well beyond what is required by OPRA. Id. at 578.

Morris View argues that Spectraserv is inapplicable here because the State agency in Spectraserv knew the total number of potentially responsive records, whereas the Division does not. (Pb20). This is merely due to differing procedural posture – the state agency in Spectraserv was undertaking a review of the same universe of documents to respond to anticipated discovery demands from plaintiff – that does not render Spectraserv inapplicable. See Spectraserv, 416 N.J. Super. at 572. Moreover, the number of potentially responsive records alone was not dispositive in Spectraserv – there, the court also found that "the sheer enormity and complexity of the request" required a cumbersome search

outside the scope of OPRA. Id. at 578 (emphasis added). That is, the Spectraserv requests "failed to specify a specific document by date, title, and author." Ibid. As in Spectraserv, Morris View's request W221935 seeking "reports, conclusions, analyses, summaries and memoranda" regarding 2006 acuity audits does not identify specific records. (Pa19).

As the trial court correctly noted, neither the Division nor Plaintiff can identify which of 340 nursing facilities were subject to the 2006 acuity audits without individual review of voluminous records. (Pa13). Moreover, for example, the Division does not necessarily have all "conclusions" related to 2006 Medicaid cost reports filed or have documents titled "conclusions." Rather, the Division would have to locate and review every file of every nursing facility for documents that could include communications, drafts, or any other type of document. This sort of cumbersome "any and all" request exceeds what OPRA requires. Spectraserv, 416 N.J. Super. at 572-78; Doe v. Rutgers, State Univ. of N.J., 466 N.J. Super. 14, 27-28 (App. Div. 2021) (same).

ii. Request W221939

Likewise, the trial court properly concluded Morris View's request W221939 seeking "correspondence, both physical and electronic, between the Division and any provider regarding a 2006 Medicaid cost report, or any acuity

audit, recoupment, or rate adjustment pertaining to the same[,]" was overbroad and improper. (Pa35). Significantly, Morris View's request generally concerns 2006 Medicaid cost reports, but fails to identify any date range nor identifiable senders that would permit any custodian to quickly identify precisely which correspondence is responsive. (Pa35). A request that provides "neither names nor any identifiers other than a broad generic description" is the type of "open-ended demand" that is outside the scope of OPRA. MAG, 375 N.J. Super. at 549.

Petitioner claims request W221939 is "limited" and thus similar to the request in Burke because the request was confined to a specific subject. (Pb24-25). However, Burke distinguishes between requests that require the custodian to conduct research, collect data, or use his judgement, versus requests that do not require such a laborious search. Burke, 429 N.J. Super. at 177. The Burke request fell into the latter category because it was confined to a specific subject matter and identified the two entities between whom correspondence was sought. Id. at 177-178. Morris View's request, conversely, sought correspondence between the Division[3] and "any provider," which, according to

[3] This request is made more complicated by the fact that Medicaid cost reports were handled by the Department of Health and Senior Services (DHSS) until 2012, when senior services programs moved back into the Department of Human

Morris View, should be "limited" because the Division knows "[t]he limited number of providers which filed Medicaid cost reports for the year 2006." (Pb24). That assumption is incorrect. The Division does not have a list or file of every nursing facility whose cost report was audited for the year 2006. (Da15). Thus, the trial court correctly observed that request W221939 would require a search through all correspondence, both physical and electronic, to and from 340 nursing facilities, potentially spanning every year back to the year 2006. (Pa14). This is precisely the type of open-ended search which OPRA does not permit. MAG, 375 N.J. Super. at 549.

iii. W221937 and W221938

In addition, the trial court also rightfully concluded that Morris View's Requests W221937 and W221938 are overbroad because they sought "calculations themselves which the Division would need to compile and insert into a new record." (Pa15). W221937 sought "calculations of recoupments sought as a result of any acuity audit of a 2006 nursing home Medicaid cost report" while W221938 sought "calculations of rate adjustments sought as a result of any acuity audit of a 2006 nursing home Medicaid cost report." (Pa28; Pa32).

Services, and DHSS was reorganized as the Department of Health.

It is well-settled that "OPRA only allows requests for records, not requests for information. Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005) (citing MAG, 375 N.J. Super. at 546-49). Here, Morris View's requests for "calculations" did not seek any identifiable record. (Pa28; Pa32). For instance, it did not include any details that would have helped the custodian determine whether responsive records existed, for example, a type of record or a specific date range when the record might have been created.

Morris View now rebrands its requests as seeking a document that "has calculations of recoupments" or "features calculations of rate adjustments." (Pb26). But ultimately, Morris View acknowledges that the actual requests were for "calculations." (Pb25). As this court held in N.J. Builders Association v. N.J. Council on Affordable Housing, it is not the custodian's role to exercise judgment in how to interpret what records respond to the request. 390 N.J. Super. 166 (App. Div. 2007). Am. Civil Liberties Union of N.J. v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533, 536 (App. Div. 2014).

Morris View attempts to distinguish N.J. Builders Association by highlighting that the request in N.J. Builders Association required a survey of employees. (Pb26). But this difference does not alter the underlying principle that OPRA does not obligate a custodian to sift through, analyze, and compile

the agency's files into a new record that did not previously exist. MAG, 375 N.J. Super. at 549. Here, the custodian could not have delivered Morris View's request for "calculations" without reviewing an untold number of documents, analyzing those documents to determine whether they contained the calculations, and compiling a new record containing those calculations. Rather than requesting an identifiable record, Morris View requests information that would require the creation of a record. OPRA does not permit this type of request. N.J. Builders Ass'n, 390 N.J. Super. at 32.

Thus, the trial courts conclusion that these requests are overbroad must be affirmed.

B. The Division Properly Denied Morris View's Request W221936 Because the Division Does Not Maintain Records Responsive To This Request.

Morris View next argues that Request W221936 was improperly denied. It is wrong. Request W221936 sought "criteria utilized in, or applied to, the selection of nursing home Medicaid cost reports for the year 2006 for acuity audits." (Pa23). In responding to this request, the Division custodian contacted the two current Division employees who were part of the relevant rate setting unit when audits of 2006 cost report audits began, to determine whether responsive documents were ever made or maintained. (Pa15). Thereafter, to

confirm that responsive documents were not maintained, the Division custodian reviewed the scope of work for the audit. (Pa15-16). The custodian also looked through physical files, to confirm that no such "criteria" exists. (Pa15-16). Therefore, the Division took the appropriate action to respond to this request. As the trial court aptly observed, we "cannot make documents that do not exist appear for an OPRA request." (Pa16).

Morris View relatedly contends that the Division's ability to conduct a search for records responsive to request W221936 necessarily means that the other four requests could not be overbroad and lacking in specificity. (Pb13-15). This argument ignores the fact that each request is different. Ultimately, the Division's proper denial of W221936 does not bear on the overbreadth of Morris View's other four requests. The key difference for request W221936 is that it properly identified the records sought, allowing the custodian to conduct a reasonable search and determine that the Division does not make or maintain the requested record. (Pa13-16). For the other four requests, the lack of specificity in identifying the records sought would require the Division to engage in a burdensome search to even make this determination. When a requester fails to sufficiently identify the requested records, the custodian may simply deny the request. Lagerkvist, 443 N.J. Super. at 236-37; see also

Spectraserv, 416 N.J. Super. at 578. That is precisely what the Division did here for the four overbroad requests – correctly identified the requests as being open-ended, without sufficient identification of the requested records, and accordingly denied the request.

C. The Division's Stratford Manor Final Agency Decision Has No Bearing On the Division's Proper Denial Of The Requests.

Morris View's repeated reliance on an eleven-year-old consolidated Final Agency Decision issued by the Division to support its speculation that the Division must have "calculate[d] some values" and "has the audits of the 2006 cost report" is misplaced. (Pb4, Pb7-Pb10, Pb15-Pb18).

The Division issued that consolidated Final Agency Decision in Stratford Manor Care and Rehabilitation Center v. New Jersey Department of Health and Senior Services (OAL Docket DAS 04044-11), Canterbury at Cedar Grove v. New Jersey Department of Health and Senior Services (OAL Docket DAS 04042-11), and Briarwood Care and Rehabilitation Center v. New Jersey Department of Health and Senior Services (OAL Docket DAS 03926-11) ("Stratford Manor FAD") on September 8, 2014 – ten years before the instant OPRA requests were filed. (Pb4). Those decisions involved challenges to the 2006 Medicaid cost reports. Morris View assumes that because the Division

issued the Stratford Manor FAD a decade ago, the Division currently has documents responsive to its requests.

Specifically, Morris View asserts that because the Stratford Manor FAD discussed the Division's selection of additional facilities to be audited, the Division must have "calculate[d] some values" and "has the audits of the 2006 cost report. (Pb16). Yet Morris View's requests made no mention of this document or its language and does not make any specific request for any related. To the extent that Morris View assumed that this broad request would lead the custodian to identify documents based on the Stratford Manor FAD, the OPRA custodian is not required to engage in such mind-reading and guesswork about what the requester may be seeking. N.J. Builders Ass'n, 390 N.J. Super. at 178.

Thus, Morris View's insistence that the Stratford Manor FAD confirms the existence of records does not alter the fact that requests W221935, W221937, W221938, and W221939 were overbroad. Similarly, Morris View argues that the Stratford Manor FAD's "conclusion" and "analysis" are responsive to request W221935, yet it fails to appreciate that it did not request the Stratford Manor FAD itself. Ultimately, as the trial court correctly concluded, Morris View's requests did not seek any specific identifiable records—and certainly did not seek the Stratford Manor FAD or records connected thereto—and thus were

properly denied as overbroad without a search. Thus, the trial court properly assessed the OPRA Requests without mention of the Stratford Manor FAD, as it is irrelevant to the Division's proper denials.

D. Custodians Are Not Required To Conduct A Search Or Make Attempts To Resolve Requests That Are Overbroad.

As the Division has consistently maintained, four of Morris Views requests are overbroad. Thus, the Division was not required to conduct a search for records prior to its denial of its requests. See Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236 (App. Div. 2015). Morris View asserts, without any legal support, that even when a request is overbroad "the custodian must still make an affirmative effort to look" and that the Division had "an affirmative responsibility" to conduct searches, including a search of Myers and Stauffer's files. (Pb13). The defining characteristic of an impermissibly overbroad request is that it is non-specific or unclear, requiring the custodian to exercise his discretion or undertake research to begin the process of searching for and retrieving responsive documents. See N.J. Builders Ass'n, 390 N.J. Super. at 179; Doe v. Rutgers, State Univ. of N.J., 466 N.J. Super. 14, 27 (App. Div. 2021). Four of Morris View's OPRA requests were unclear and open-ended, and the Division was under no obligation to conduct a search to confirm

a request that on its face was overbroad.

Similarly, Morris View incorrectly argues that the Division had an obligation to attempt to reach a reasonable solution with Morris View that accommodates both of their interests. (Pb13; Pb21). N.J.S.A. 47:1A-5(g) provides that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after informing the requestor of the potential disruption to agency operations and attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." But this requirement is strictly limited to requests for which a response would excessively burden the agency or disrupt day-to-day operations, and does not apply to requests that are instead denied as overbroad. Lagerkvist, 443 N.J. Super. at 235-36.

Morris View conflates overbroad requests with unduly burdensome requests, asserting that both require the custodian to attempt accommodation prior to denial. (T6). But the accommodation requirement of N.J.S.A. 47:1A-5(g) applies only to unduly burdensome requests, and that "no efforts at accommodation [are] necessary [when] the custodian's objection was that the request was unclear and overbroad." Lagerkvist at 236. This court has held that

it has "no legal basis to expand the custodian's role beyond what the Legislature specifically described in N.J.S.A. 47:1A-5(g)." Lagerkvist at 236 (quoting Am. Civil Liberties Union, 435 N.J. Super. at 541). Thus, with respect to the four overbroad requests, the Division was neither required to conduct a search nor required to make attempts to resolve the requests.[4]

POINT II

THE TRIAL COURT CORRECTLY CONCLUDED THAT MORRIS VIEW HEALTHCARE CENTER WAS NOT ENTITLED TO THE REQUESTED DOCUMENTS UNDER THE COMMON LAW RIGHT OF ACCESS.

It is well-settled that the right to access common law records "is a qualified one." Keddie v. Rutgers, 148 N.J. 36, 49-50 (1997). While potentially broader than the statutory right to a "government record" under OPRA, "[t]he trade-off is that, '[u]nlike a citizen's absolute statutory right of access, a plaintiff's common-law right of access must be balanced against the State's interest in preventing disclosure.'" Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 302 (2009). (second alteration in original) (quoting Higg-A-Rella, Inc.

[4] Morris View does not address whether, as a threshold matter, it has the legal capacity to sue in its merits brief. The trial court likewise did not address that procedural question. Accordingly, the Division has not briefed this issue, but reserves the right to address it in a supplemental filing if necessary.

v. County of Essex, 141 N.J. 35, 46 (1995)). To gain access to public records under the common law, three criteria must be met:

> (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; and (3) the citizen's right to access must be balanced against the State's interest in preventing disclosure.
>
> [Mason,196 N.J. at 68 (quoting Keddie, 148 N.J. at 50) (internal quotation marks and citations omitted).]

The crux of the common law right of access rests within factor three: the balancing test between the State's interest in preventing disclosure and an individual requestor's interest in the records.

In Loigman v. Kimmelman, our Supreme Court set forth the following factors to be weighed in each instance:

> (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may

> circumscribe the individual's asserted need for the materials.
>
> [Loigman v. Kimmelman, 102 N.J. 98, 113 (1986).]

Here, Morris View did not assert any interest – let alone a particularized need or wholesome public interest – at the time of submitting its requests to the Division. (Pa18-36); Loigman, 102 N.J. at 113; Wilson v. Brown, 404 N.J. Super. 557, 583 (App. Div. 2009). Further, Morris View did not declare any specific interest in the records even when it filed a complaint against the Division for denying the requests, and instead merely asserted that "Morris View has both a legitimate private interest and wholesome public interest in the requested government records" without identifying the substance of either interest. (Da9).

On appeal, Morris View argues for the first time that "as one of the New Jersey long term care facilities whose 2006 Medicaid cost report was audited, [it] has an undisputed interest in the subject matter of the materials it is seeking." (Pb28). However, this argument was not presented below and cannot be presented for the first time on appeal. Neider v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Indeed, the trial court correctly found that Morris View's failure to state its particularized need or wholesome public interest at the time of its requests, or even in its complaint, required dismissal of its common law

claim. (Pa16-Pa17).

Even if Morris View had raised this argument below, it would fail. There are no identified documents – either because Morris View did not sufficiently identify them, or because they do not exist – that could serve as the factual predicate for any common law analysis. Accordingly, this court should affirm the trial court's decision on this point.

CONCLUSION

The trial court's decision should be affirmed.

Respectfully submitted,

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MORRIS VIEW HEALTHCARE CENTER, Plaintiff/Appellant v. **STATE OF NEW JERSEY DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF AGING SERVICES** and **SARAH WALZER AS CUSTODIAN OF RECORDS** Defendants/Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Civil Action DOCKET NO. A-002353-24 Sat Below: HON. ROBERT T. LOUGY, J.S.C.

REPLY BRIEF OF PLAINIFF/APPELLANT, MORRIS VIEW HEALTHCARE CENTER, IN SUPPORT OF ITS APPEAL OF THE MARCH 14, 2025 ORDER

Of Counsel and on the Brief:
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

This matter comes before the Court to put to rest the meritless arguments put forward by Respondents to evade their duties to provide responsive records to specific, narrowly tailored OPRA requests. Respondents would have this Court apply inapplicable legal authorities, affirm inaccurate representations of the Trial Court's order and brush aside Respondents' own prior knowledge of the records sought. Such arguments should be wholly rejected by this Court. For the reasons detailed below, this Court should reverse the decision of the trial court and declare the actions of Respondents to be unlawful and invalid and remand the case for further proceedings.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellant incorporates by reference its Statement of Facts and Procedural History as presented at length in its June 11, 2025 submission as if set forth at length herein. Since Appellant's June 11, 2025 submission Respondents requested and received two extensions to file their brief. Respondents filed their brief on September 12, 2025. This Reply Brief now follows.

LEGAL ARGUMENT

I. RESPONDENTS' ARGUMENTS ARE PREMISED ON INAPPLICALBE LAW, MISREPRESENTATIONS OF THE TRIAL COURT'S OPINION, AND AN

UNFOUNDED DISREGARD FOR RESPONDENTS' OWN HISTORY AND RESPONSIBILITIES.

As threshold matters, Respondents fail to apply the correct provisions of OPRA that were in effect at the time the instant OPRA Requests were made, fail to correctly identify the reasoning of the trial court in erroneously affirming the designation of OPRA Requests W221935, W221939, W221937 and W221938 as overbroad, and fail to accurately account for the relevance of Stratford Manor[1] and data retention policies. These failures irreversibly taint the entirety of Respondents' arguments.

Respondents go to great lengths to identify the requirements for a valid OPRA request explaining that "[i]n May 2024, the Legislature amended OPRA to incorporate the standard set forth in Burke and Elcavage into the statute by specifically requiring requests for correspondence to "identify a specific job title or accounts to be searched, a specific subject matter, and [be] confined to a reasonable time period." See N.J.S.A. 47:1A-5(g) (**amended effective September 4, 2024**)." Db11 (emphasis added). What Respondents utterly fail to appreciate is that the instant OPRA Requests, and Respondents' denial of same, were made before the effective date of the changes. The instant OPRA Requests were made nearly **one (1) month before** the effective date of the OPRA

[1] Stratford Manor Care and Rehabilitation Center v. New Jersey Department of Health and Senior Services (OAL Docket DAS 04044-11)

amendments. Accordingly, Respondents' reliance on the OPRA amendments is wholly misplaced and inappropriate. Respondents had no legitimate reason to think that the amendments would have applied and should not have relied on those amendments in responding to the OPRA requests at issue.

As if this alone were not highly problematic, Respondents obfuscate the holding of the Trial Court and Morris View's position of the same. To be clear, the Trial Court found the following with regarding to OPRA Requests W221935, W221939, W221937 and W221938:

OPRA Request W221935 "is overbroad as it requires looking through the cost reports of 340 nursing facilities . . . [i]t is unreasonable and labor intensive to require Defendants to search for documents related to this request when neither they nor Plaintiff can easily identify which nursing facilities out of the 340 were subject to the 2006 acuity audits." Pa12-13.

OPRA Request W221939 "is overbroad and would require extensive labor from Defendants to identify responsive documents because it does not limit the request to correspondences regarding acuity audits but to anything involving the 2006 Medicaid cost reports." Pa14.

OPRA Requests W221937 and W221938 were overbroad because although "Plaintiff correctly points out that records either have calculations or they do not, Plaintiff is not asking for documents with those calculations. It asks

for the calculations themselves which Defendants would need to compile and insert into a new record". Pa15.

Each and every erroneous finding of the Trial Court is predicated on the allegedly burdensome nature of the request. When Respondents state that "Morris View conflates overbroad requests with unduly burdensome requests . . ." and "as the trial court correctly concluded, Morris View's requests did not seek any specific identifiable records[,]" Respondents are grossly misrepresenting the erroneous findings of the Trial Court. Db23; Db21-22. It was the Trial Court that conflated overbroad requests with unduly burdensome requests and as previously noted, Respondents failed to properly search their records as is required under N.J.S.A. 47:1A-5(g) and Lagerkvist v. Office of Governor, 443 N.J. Super. 230 (App. Div. 2015).

Of these foundational problems, the most striking is that Respondents do not contest the relevance of Stratford Manor as put forward by Appellants in its June 11, 2025 merits brief nor do they mention their failure to access the records held by Myers & Stauffer ("MS"), Respondents' vendor that conducted the audits at issue. By way of limited example only, regarding OPRA Request W221936, as described in Stratford Manor, "an additional list of 125 facilities to be audited" in addition to those facilities that were audited previously in the first round of the 2006 cost reports because that "first round of acuity audits

w[as] insufficiently objective and/or did not contain sufficient data to demonstrate the pervasiveness of the overreporting in the nursing facility industry." Pa52-53. The criteria used to select the nursing home Medicaid cost reports to be audited is what was sought by OPRA Request W221936. In their brief, Respondents describe that the custodian went out of her way to contact "two current Division employees who were part of the relevant rate setting unit when audits of the 2006 cost reports began . . .". Clearly, the records referenced in Stratford Manor are of critical relevance to the instant OPRA Requests but were ignored both in the search and in Respondents' submission. Instead of addressing this relevance in any meaningful, substantive fashion, Respondents critique the OPRA Requests for making "no mention" of the documents referenced in Stratford Manor and Morris View's "speculation" of what documents Respondents have as a result of Stratford Manor. Db20-21. Such a critique is nothing more than an attempt to side-step a critical deficiency in the actions of Respondents in responding to the OPRA Requests.

Further, because the underlying audits were for Medicaid and State Medicaid Plans, they are subject to the Federal data retention requirements of 42 CFR § 431.17(c)(1) which require that the records be retained for as long as

the case is active "plus a minimum of 3 years thereafter".[2] Thus, the records should have been retained by Respondents.

Nevertheless, Respondents would have this Court believe that despite Stratford Manor, the data retention requirements of 42 CFR § 431.17(c)(1), and the work of the Division's contractor MS that it would have to "engage in [] mind-reading and guesswork about what the requestor may be seeking." Db21. Such a position flies in the face of the plain facts presented to the Court.

With the background that the foundation of Respondents' arguments is thoroughly flawed, the taint of which permeates each and every argument presented by Respondents, the following addresses the individual merits of each of the OPRA Requests.

II. EACH AND EVERY ONE OF THE OPRA REQUESTS CONTAINS SPECIFIC IDENTIFIERS THAT ENABLED RESPONDENTS TO IDENTIFY AND PROVIDE RESPONSIVE RECORDS.

The similarity of the OPRA Requests in combination with Defendants/Respondents ability to conduct search for the records relevant to OPRA Request W221936 undermines any argument that any of the OPRA Requests were "improper and overbroad".

[2] As a practical matter, the Federal statute of limitations under the False Claims Act, 31 U.S.C. § 3731, the authority under which many Medicaid fraud cases are brought, is ten years.

The law is clear that if a custodian of records can perform a search and identify responsive records it "belies any assertion that the request was lacking in specificity or was overbroad." Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2012).

Respondents go to great lengths to describe how the custodian took to find documents responsive to OPRA Request W221936. Without any described difficulty, "the Division custodian contacted the two current Division employees who were part of the relevant rate setting unit when audits of 2006 cost report audits began, to determine whether responsive documents were ever made or maintained. Thereafter, to confirm that responsive documents were not maintained, the Division custodian reviewed the scope of work for the audit. The custodian also looked through physical files, to confirm that no such "criteria" exists." Db18-19 (internal citations omitted). Yet for reasons which remain unexplained by Respondents, neither the Division employees who were contacted by the Custodian nor the Custodian herself in the subsequent investigation ever thought it was prudent to contact MS – the Division's contractor which conducted the acuity audits – or refer to records already compiled as referenced in Stratford Manor. This willful disregard of potential sources of responsive records is in and of itself a failure of what is required of Respondents under OPRA.

Respondents' subsequent argument that the OPRA Requests are structured so differently as to warrant its unique treatment of OPRA Request W221936 as compared to the remaining OPRA requests is without merit. OPRA Request W221936 sought "criteria utilized in, or applied to, the selection of nursing home Medicaid cost reports for the year 2006 for acuity audits". Pa24. The structure of this request mimics the structure of the remaining requests which are generally structured as follows: [type of record] regarding 2006 [Medicaid cost reports] or [acuity audit]. See Pa20; Pa24; Pa28; Pa32; Pa36. There is no difference between the syntax and substance of this request and any of the remaining OPRA requests. Accordingly, Respondents' ability to search and identify responsive records responsive to OPRA Request W221936 belies any assertion that the remaining requests were lacking in specificity or were overbroad.

What does separate OPRA Request W221936 from the remaining requests is an arbitrary and inconsistent determination by Respondents of what qualifies as "a reasonable search" by the custodian. By Respondents' own admission, the custodian seeking out, finding, and then contacting two current Division employees who were part of the relevant rate setting unit when audits of 2006 cost report audits began, communicating with them to such a degree that the custodian could ascertain whether responsive documents were maintained,

reviewing the scope of work for the audit, looking through an untold number of physical files, qualifies as "a reasonable search". However, Respondents would also have this Court believe that putting forward such an effort for any of the other OPRA requests is excessive despite the similarity in syntax and substance of the OPRA Requests. Respondents cannot arbitrarily decide to look for responsive records for one request – notwithstanding Respondents' failure to contact the Division's contractor MS for any possible responsive records it might have – and refuse to look for responsive records for another under the guise of that other request being overbroad.

The magnitude and severity of the mishandling of OPRA Request W221936 is compounded by Respondents' treating the OPRA Requests as if they were denied for lack of specificity rather than being burdensome. Respondents inaccurately present the OPRA Requests as being denied due to lack of specificity because that is the only way for Respondents to avoid a direct comparison of the efforts they reported they undertook to find responsive records for OPRA Request W221936. Yet, in so doing, Respondents ignore that similar efforts would have been needed to be taken for the remainder of the OPRA Requests due to the similarity in syntax and substance. Given that the Trial Court erroneously held that OPRA Requests W221935, W221939, W221937 and W221938 were overbroad because finding responsive records

would be overly burdensome, Respondents would have to explain how the requests required overly burdensome efforts but contrary to what one might expect, Respondents instead conceded that the efforts needed to find the responsive records are NOT overly burdensome. Respondents therefore have trapped themselves in a web of their own invention.

Respondents then attempt to hide the inherent weaknesses of their arguments behind case law that does not apply.

Regarding OPRA Request W221935, Respondents argue that because the request "does not identify specific records" Respondents "would have to locate and review every file of every nursing facility for documents that could include communications, drafts, or any other type of document[,] [t]his [is the] sort of cumbersome "any and all" request [which] exceeds what OPRA requires." Db14 citing Spectraserv v. Middlesex Cnty Utils. Auth., 416 N.J. Super. 565, 572-578 (App. Div. 2010); Doe v. Rutgers, State Univ. of N.J., 466 N.J. Super. 14, 27-28 (App. Div. 2021). However, Respondents utterly fail to establish that this case is analogous to that in Spectraserv.

Respondents next attempt to liken OPRA Request W221939 to the requests at issue in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2021). Respondents argue that "[a] request that provides "neither names nor any identifiers other than a broad

generic description" is the type of "open-ended demand" that is outside the scope of OPRA". Db15 citing MAG, 375 N.J. Super. at 549. Respondents cherry-picked this citation to MAG; the OPRA requests at issue in MAG were as follows: (1) all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident; and (2) all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity. MAG, 375 N.J. Super. at 539-540. While the requests at issue in MAG were insufficiently specific requests, unlike MAG, Request W221939 identifies with specificity that it is looking for correspondences, names the specific parties involved in this correspondence to the best of Morris View's ability, and names the subject matter of this correspondence giving Respondents clear, point parameters to find responsive documents. MAG is not analogous.

Respondents further allege that OPRA Request W221939 is not like the request in Burke because "[t]he Division does not have a list or file of every nursing facility whose cost report was audited for the year 2006". Db16. However, Respondents did not produce any records- even records for facilities such as Morris View – which it clearly has in its possession. This is in addition

to the improper way Respondents are trying to shift the statutory burden under OPRA to Morris View, despite OPRA's clear requirement that the custodian bear the burden of justifying her denial.

In reference to OPRA Requests W221937 and W221938, Respondents argue, in part, that in order to find responsive documents, the Custodian would have to interpret what records respond to the request thereby violating the principle set forth in N.J. Builders Association v. N.J. Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007). To accept such a conclusion would require this Court to find that the term "calculations" is so ambiguous as to require the custodian's subjective assessment as to whether a document is responsive, despite the fact that this same custodian was – without any issue – able to objectively assess the term "criteria" for OPRA Request W221936. Such a finding is an impossible and unnecessary exercise for a term that has ordinary and plain meaning.

The second argument raised against OPRA Requests W221937 and W221938 is that "[r]ather than requesting an identifiable record, Morris View requests information that would require the creation of a record. OPRA does not permit this type of request." Db18 citing N.J. Builders Ass'n, 390 N.J. Super. at 32. This argument simply but significantly, misstates the records requested; OPRA Requests W221937 and W221938 are not looking for a single record

which is a compilation of "calculations of recoupments" or "calculations of rate adjustments" alone but records that contain them. Moreover, if the responsive records were only partially responsive, or if they would be burdensome to produce due to sheer volume, that would trigger the requirements of N.J.S.A. 47:1A-5(g) and Lagerkvist but Respondents failed to reach out to Morris View to seek any accommodation or impose any service charge for the work that might have been necessary. Their failure to do so violated the requirements of OPRA.

Lastly, while the numerous problems with Respondents' arguments and actions taken regarding OPRA Request W221936 have already been described above, they are of such a severe nature that reiteration is warranted. Despite knowing that MS may have responsive records, having talked to current Division employees who were present when the audits were conducted in 2006, and the data retention policy of 42 CFR § 431.17(c)(1), Respondents made no effort whatsoever to find the records held by MS. This failure to conduct even a cursory search for responsive records is a clear violation of Respondents' statutory obligations under OPRA.

III. MORRIS VIEW IS ENTITLED TO RECEIVE RESPONSIVE RECORDS UNDER THE COMMON LAW RIGHT OF ACCESS BECAUSE THE KEDDIE FACTORS WEIGH DECISIVELY IN ITS FAVOR

Morris View is entitled to receive responsive records under the common law right of access because the Keddie facts weigh decisively in its favor.

As a critical threshold matter, Respondents argue that because "[o]n appeal, Morris View argues for the first time that "as one of the New Jersey long term care facilities whose 2006 Medicaid cost report was audited, [it] has an undisputed interest in the subject matter of the materials it is seeking[]" it cannot be presented on appeal. However, the general rule against presenting an **argument** for the first time on appeal does not apply where the **issue** was raised below but is based on a different theory than the one advocated for in the appellate court. See Docteroff v. Barra Corp., 282 N.J. Super. 230, 237 (App. Div. 1995); Regan v. City of New Brunswick, 305 N.J. Super. 342, 355 (App. Div. 1997), overruled on other grounds Dzwonar v. McDevitt, 177 N.J. 451 (2003); State v. Gruber, 362 N.J. Super. 519, 530 (App. Div.), certif. den. 178 N.J. 251 (2003). The issue of Morris View's common law right of access to responsive documents is well documented in the record below as admitted to by Respondents themselves. See Db26.

The only substantive argument put forward by Respondents is that "[e]ven if Morris View had raised this argument below, it would fail. There are no identified documents – either because Morris View did not sufficiently identify them, or because they do not exist – that could serve as the factual predicate for

any common law analysis." Db27. As Respondents recognize, the proper analysis for the common law right of access to responsive records is an analysis of the Keddie[3] Factors with the "crux of the common law right of access rest[ing] within factor three"; however, Respondents fail to put forward any affirmative case as to why those factors do no weigh decisively in favor of Morris View. Db25-27. This Court should therefore find, for the reasons put forth by Appellant in its June 11, 2025 merits brief, that Morris View unquestionably has an interest in the requested records because it was one of the New Jersey long term care facilities whose 2006 Medicaid cost report was audited.

CONCLUSION

For the reasons described above and in Morris View's June 11, 2025 merits brief, this Court should reverse the decision of the trial court and declare the actions of Defendants/Respondents to be unlawful and invalid and remand this case for further proceedings.

Respectfully submitted,

INGLESINO TAYLOR

By: /s/ Justin A. Marchetta
JUSTIN A. MARCHETTA

Dated: September 26, 2025

[3] Keddie v. Rutgers, 148 N.J. 36 (1997)