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<tr><td>ASIAN HATE CRIMES TASK FORCE, a non-profit organization,

PLAINTIFF/RESPONDENT,

v.

VOORHEES TOWNSHIP, VOORHEES POLICE DEPARTMENT, DEE OBER, in official capacity as records custodian, and EVERBRIDGE, INC.

DEFENDANTS/CROSS APPELLANTS/RESPONDENTS.</td><td>SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-002634-22

On Appeal from the Final Decision of the Superior Court of New Jersey, Law Division, Civil Part, Camden County

Docket Below: L-4005-21</td></tr>
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PLAINTIFF/RESPONDENT,

v.

HADDON HEIGHTS, and KELLY SANTOSUSSO, in his official capacity as records custodian,

DEFENDANTS/CROSS APPELLANTS/RESPONDENTS.</td><td>SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-002634-22

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Docket Below: L-0055-22</td></tr>
<tr><td>CARMINE SODORA,

PLAINTIFF/RESPONDENT,

V.

CITY OF HOBOKEN; JAMES J. FARINA, in his official capacity as records custodian; and EVERBRIDGE, INC.</td><td>SUPERIOR COURT OF NEW JERSEY
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FILED, Clerk of the Appellate Division, October 04, 2023, **A-002634-22**, AMENDED

DEFENDANTS/APPELLANTS/CROSS-RESPONDENTS.	Docket Below: L-0744-22

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS-CROSS RESPONDENTS, THE CITY OF HOBOKEN AND JAMES J. FARINA, IN HIS OFFICIAL CAPACITY AS RECORDS CUSTODIAN

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PRELIMINARY STATEMENT

The primary issue presented by this appeal is whether e-mail addresses of individuals who signed up to receive local alerts from a municipality through a third-party vendor are required to be disclosed under the Open Public Records Act ("OPRA"). In this case, the e-mail addresses should not be required to be disclosed because OPRA's privacy provision is applicable. Subscribers are not participating in an active public act, seeking to influence government decisions, or engaging with public officials regarding governmental business. Rather, they are providing their personal information to a private, third-party entity to passively receive important and potentially lifesaving governmental alerts.

The City of Hoboken (the "City" or "Hoboken") contracts with Everbridge/Nixle ("Nixle") to send out local alerts in categories such as severe weather, criminal activity, severe traffic, missing persons, and community events. Residents can access a link to sign up for these alerts in a few ways, including through an embedded link provided on the City's website, inputting their zip code on Nixle's website, or texting their zip code to a specified number provided by Nixle to receive text alerts. When signing up through Nixle, residents are prompted to enter their e-mail address; set a password; provide their full name; language preference; mobile phone number; and home phone number. This personal information is not provided to the City. The City is not

provided with a list of contact information for individuals who sign up or any sort of e-mail distribution list. The City simply sends the text of the alert to be sent out to Nixle, who then distributes it through the individual's preferred method of communication.

The privacy interest of individuals who signed up for Nixle alerts outweighs the need for access. The Plaintiff/Respondent/requestor in this matter is a resident who sought the e-mail addresses to be able to send information about a referendum vote related to bonding for a new high school facility. Providing an individual with personal contact information to send unsolicited information in no way furthers the purpose of the OPRA statute. The individuals who sign up for local alerts are engaging in the passive act of merely signing up to receive specific categories of communications. Their contact information does not further the goal of transparency in government. If an individual seeks to obtain contact information to send out messages regarding their own political opinions or to promote their advocacy group, there are many ways to solicit contact information from people that wish to receive these messages, voluntarily.

Not only is the requested information not subject to disclosure under OPRA's privacy provision, but the trial court also erred in finding that the information requested was a public record that the City was obligated to provide

to the requestor. The specific request was for "the City of Hoboken E-mail distribution list it uses to send all Nixle.com e-mails. This list would include all e-mail addresses that the City of Hoboken generally sends Nixle alerts to." The City does not make, maintain, or keep on file such a document or record. As described above, the City does not send Nixle.com e-mails. Individuals sign up directly through Nixle and Nixle maintains the personal information of subscribers independently of the City. This specific situation also leads to the issue of whether Nixle, a private entity, is subject to OPRA. In this case, the information requested is not a document or record being prepared on the City's behalf. Rather, the information requested is personal information provided to a private entity when users sign up for its services. This personal information, and the ability to maintain the personal information securely, is essential to Nixle's business, therefore making it proprietary information as well.

For the reasons set forth above and herein, the City of Hoboken submits that the information requested in the OPRA request does not constitute a public record, and if it were to be considered a public record, the personal e-mail addresses provided to the third-party entity should be considered not subject to disclosure pursuant to OPRA's privacy provision.

FILED, Clerk of the Appellate Division, October 04, 2023, **A-002634-22**, **AMENDED**

PROCEDURAL HISTORY

This matter was initiated by Plaintiff/Respondent Carmine Sodora in accordance with the Open Public Records Act, N.J.S.A. 47:1a-1 et seq. by way of Complaint and Motion for Order to Show Cause Hearing on January 10, 2022. D022-030. The basis for this motion was that Plaintiff/Respondent filed an OPRA request with the City of Hoboken on January 4, 2022 (hereinafter referred to as the "Request"). Da210-213. The Order to Show Cause was originally granted, and a hearing date was set by Judge Christine M. Vanek. Da061-064. Ultimately, Plaintiff/Respondent's Complaint was amended to add Nixle as a party. Da042-049.

On March 23, 2022, this matter was transferred to Camden County and consolidated with two (2) other matters, involving similar issues. Da066-070. The Plaintiff/Respondent in the other matters is the "Asian Hate Crimes Task Force", and the Defendants are Voorhees Township and the Borough of Haddon Heights.[1] *Id.* Oral argument was held on April 21, 2022 as to all these matters.[2]

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[1] The City of Hoboken was the only municipal defendant to argue the privacy issue and whether the requested information was a public record under the OPRA statute. For the purposes of this brief, the City is not planning to include pleadings or other procedural documents for the other matters in the Appendix, as they are not relevant to the City's arguments contained herein. However, the City will gladly provide any additional items or pleadings at the Court's request, if deemed necessary for further consideration.

[2] See "1T" Transcript of Proceedings from April 21, 2022.

On May 26, 2022, the City received the trial court's decision in this matter, which found that the e-mail addresses are a public record; that the privacy exception to OPRA did not apply to e-mail addresses; and that OPRA extends to personal information provided by individuals to a private entity when signing up for a third-party service that provides governmental alerts. Da072-124. The trial court gave the parties the opportunity to brief the issue of counsel fees due to the unique situation, and further oral argument was scheduled on that issue specifically. *Id.*

The City filed a Motion for Reconsideration on June 13, 2022. Da126-128. The City argued in the Motion for Reconsideration that the Court misinterpreted the definition of a government record as set forth in the OPRA statute; that the Court failed to appropriately consider the evidence and persuasive authority, including newly presented evidence, as to the privacy issue; and that the trial court erred in determining that the requested information was required to be disclosed under the common law right of access. *Id.* This motion was denied after being considered "on the papers", on July 1, 2022. Da130-148.

On July 21, 2023, the Court entered a Consent Order prepared by the parties which confirmed that the May 25, 2022 Order was not a final judgment or order for purposes of appeal, since the issue of counsel fees was not yet

resolved. Da150-154. The Consent Order also stayed production of the documents/records and the payment of counsel fees, pending this appeal. *Id.* On August 30, 2022, Nixle filed a Motion for Reconsideration, which was denied on November 3, 2023. Da156-180.

Oral argument was then held on the issue of counsel fees on March 13, 2023.[3] On March 28, 2023, the Court issued an order which approved a reduced fee award, finding the municipal parties responsible for a portion of fees associated with their specific matter. Da182-208. Hoboken's portion totaled $16,526.80. *Id.* Voorhees had a separate action for indemnification against Everbridge, which was granted. *Id.*

STATEMENT OF FACTS

The OPRA request at issue in this matter specifically sought the following:

1. City of Hoboken E-mail distribution list it uses to send all Nixle.com e-mails
2. Copies of contracts and proposals between the City of Hoboken and Mount Vernon Group[4]
3. Copies of contracts and proposals between the Hoboken Board of Education and Mount Vernon Group.[5] Da208-211.

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[3] See "2T" Transcript of Proceedings from March 13, 2023.

[4] This specific portion of the request/the City's response thereto has not been disputed.

[5] This specific portion of the request/the City's response thereto has not been disputed.

The City's response to this request was due on January 13, 2022. An initial response was sent prematurely by the Hoboken City Clerk to the requestor on Thursday, January 6, 2022, prior to the expiration of the seven (7) day period for response. Da215-217 at ⁋ 5. This initial response stated that the request was forwarded to the Law Department and that no responsive record existed in the department. *Id.* Although accurate, this response did not capture the City's complete response and therefore a supplemental response was sent to the requestor on January 12, 2022. *Id.* Ultimately, the City's response indicated the following in relevant part:

> As to Request #1, please note that there is no such document and/or record. E-mails are entered one at a time into the Nixle system, and it is not possible through the Nixle system to generate a list of all e-mails that have been entered. The City does not separately make, maintain, or keep on file a list of e-mail addresses that have been entered into the Nixle system. Therefore, the City does not have any documents or records that may be potentially responsive to your request for "distribution lists." Further, even if a document and/or record did exist which contained the requested information, it is noted that the information contained within the hypothetical distribution lists (personal e-mail addresses of citizens) have been determined to be private information which is properly redacted from the response to an OPRA request. OPRA provides that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy[.]" N.J.S.A. 47:1A-1. See Wolosky v. Somerset County, A-1024-15T4, 2017 WL 1179852, at *3 (N.J. Super. App. Div. Mar. 30, 2017). "E-mail and home addresses do not directly relate to the "core concern" of OPRA." Da217-221.

As to the request for the "distribution list that it uses to send Nixle alerts" the City did not, and to this day, does not, have such a document and/or record. Da215-217 at ⁋ 11-12. The City of Hoboken has an agreement with Nixle to send out alerts to residents who sign up for Nixle alerts. Da227-238. The Nixle alerts (whether via e-mail or text message) are not sent from the City to a certain "distribution list." Da215-217. The message is prepared by the City and then entered into the Nixle system, along with a selection of what type of message it is (i.e. public safety alert). *Id.* Nixle then generates the message and sends it out to those individuals who have signed up for that specific type of alert in that zip code. *Id.* The City does not maintain a list of individuals and/or the e-mail addresses of those individuals who have signed up for Nixle alerts. Residents sign up for Nixle alerts through Nixle's website or through a link powered by Nixle on the City's website. *Id.* The Hoboken website specifically states, "Your information is not shared with the City of Hoboken, and you may unsubscribe at any time." Da225.

Admittedly, although there is no document that is made, maintained, or kept on file by the City responsive to this request, the information requested can presumably be created and produced by a third-party/private entity, Nixle. However, the City's use of the Nixle service is conditioned upon abiding by the regulations contained in the "Terms of Service" with Nixle. Da227.

Foremost, the Nixle service is only available to governmental agencies (the "Services"). The Services are intended to facilitate the ability of the City to publish and send messages to residents by SMS text message, e-mail and online, and to receive anonymous crime tips. Furthermore, the "Conduct" section of the Terms of Service, prohibit the City from "(b) use any of the Services for political, commercial or advertising purposes" and "(f) collect[ing] or stor[ing] personal data of any other user". *Id.* In this matter, the requestor is not a Governmental agency and is seeking the e-mail address information to utilize for a political purpose. Da024. Therefore, the Plaintiff/Respondent's utilization of the information provided to Nixle would be in violation of Nixle's terms of service and in direct conflict with the rules in place when residents sign up for the service.

Residents[6] utilize Nixle with the understanding that when they sign up that they will only receive those communications from the City about emergency and other issues that impact the City and that their contact information is not shared with the municipality or any other party. Specifically, residents know that they will not receive communications from other groups, organizations, or political,

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[6] Any person can sign up for Nixle alerts for the City of Hoboken, including those who live, work, or otherwise visit the City. For purposes of this brief the term residents as used herein shall mean any individual who signed up for Nixle alerts for the City of Hoboken.

commercial, or advertising communications. If the City were to provide access to this information (assuming *arguendo* that the City had a responsive public record), the terms and conditions and expectations of residents would be violated. Furthermore, if the e-mails are considered public record, it would allow anyone to obtain the information and utilize the same for political, commercial, and advertising purposes in direct contradiction to the terms and conditions residents expected when the service was established. Simply put, residents would be subject to having their confidential contact information obtained by any number of individuals or groups who could then use private e-mail addresses and other contact information to distribute unwanted communications. Not only would this violate those terms expressed to the users, but it could hamper the City's ability to communicate emergency and other important information to residents by discouraging usage. Finally, the information input by residents known as "recipient information" is expressly owned by Nixle and therefore is not the City's information to which it is entitled. Da227.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

A lower Court's determination of the applicability of OPRA should be reviewed de novo by the Appellate Division. *Paff v. New Jersey State Firemen's*

Ass'n, 431 N.J. Super. 278, 286 (App. Div. 2013). Therefore, the lower Court's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan*, 140 N.J. 366, 378 (1995).

II. THE INFORMATION SOUGHT BY THE REQUESTOR IS EXEMPT FROM DISCLOSURE UNDER THE OPEN PUBLIC RECORDS ACT'S PRIVACY PROVISION (Da115)

OPRA provides that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest[.]" *N.J.S.A.* 47:1A-1. The New Jersey Legislature enacted OPRA "'to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" *Mason v. City of Hoboken*, 196 N.J. 51, 64 (2008) (quoting *Asbury Park Press v. Ocean Cty. Prosecutor's Office*, 374 N.J. Super. 312, 329 (Law. Div. 2004)). The New Jersey Supreme Court has explained that "[w]ith broad public access to information about how state and local governments operate, citizens and the media can play a watchful role in . . . guarding against corruption and misconduct." *Burnett v. Cty. of Bergen*, 198 N.J. 408, 414 (2009).

The OPRA statute specifically speaks to the protection of privacy, stating "a public agency has a responsibility and an obligation to safeguard from public

access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." *N.J.S.A.* 47:1A-1.

Therefore, as a threshold matter, a public agency seeking to withhold records from public view pursuant to the privacy exception of OPRA "must present a colorable claim that public access to the records requested would invade a person's objectively reasonable expectation of privacy." *Brennan v. Bergen County Prosecutor's Office*, 233 N.J. 330, 342 (2018). Once the public agency has satisfied this threshold factor, the Court must then balance the privacy interests of its citizens against the public's interest in disclosure of the private information. *See Doe v. Poritz*, 142 N.J. 1, 87-88 (1995). This balancing test requires the Court to consider the seven factors as laid out by the Supreme Court in *Doe*. *Ibid.*

The seven factors to be considered are: (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other

recognized public interest militating toward access. *Id.* at 88 (citing *Faison v. Parker,* 823 F. Supp. 1198, 1201 (E.D.Pa. 1993)).

In this instance, the residents are providing their contact information, including e-mail address, through a private, non-governmental entity, which then allows them to receive notifications from their local municipality. These individuals have a reasonable expectation that their contact information will be used by Nixle for the intended purpose in accordance with the Terms of Service (to receive notifications from the municipality) and not for any other purpose. This particularly applies to political emails, which are prohibited under Nixle's Terms of Service. After the City received the lower court's decision, the City utilized Nixle to send out a short survey to Nixle users to take the temperature of how important the privacy issue is to them and what their expectations were regarding the maintenance of their e-mail address and other personal information. Da238-249. The results were as follows:

1. When you signed up for Nixle alerts, did you have an expectation that your e-mail address would be maintained privately by Nixle/the City of Hoboken?

   a. Yes – 1,301 (93.6%)

   b. No – 89 (6.4%)

2. Do you object to the City releasing your e-mail address to anyone who asks for it through an OPRA request, based solely upon the fact that you signed up for Nixle alerts?

a. Yes – 1,331 (95.76%)

b. No – 59 (4.24%)

3. How important to you is it that the City/ Nixle safeguard and keep your contact information private?

a. Very important – 1,305 (93.88%)

b. Neutral – 59 (4.24%)

c. Not important – 26 (1.87%)

4. Would you consider it inappropriate/harassing to receive spam or unwanted advertisement e-mails from third-parties based upon the fact that you signed up to receive Nixle alerts?

a. Yes – 1,361 (97.91%)

b. No – 29 (2.09%)

5. Do you believe that the City should file an appeal of the judge's decision requiring the release of your e-mail address to anyone who requests it in order to protect your e-mail address from disclosure?

a. Yes- 1,339 (96.33%)

b. No- 51 (3.67%) *Id.*

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The lower court decision indicates that Everbridge/Nixle's privacy policy does not actually make any promises to safeguard someone's privacy, when read closely and with a critical eye. Da111. However, it is undisputed that amongst Nixle's subscribers in Hoboken, there was a reasonable expectation that the information they used to sign up for Nixle would be maintained privately. Da240-251. Further, the numbers clearly show that an overwhelming majority of subscribers would find it harassing to receive spam or unwanted e-mails from third-parties based upon the fact that they subscribe to Nixle alerts. *Id.*

Therefore, there is a reasonable expectation of privacy on the part of the residents that their personal information would not become public record by passively signing up for a third-party, private service to merely receive local government alerts. These individuals are not engaging in an inherently political endeavor by merely seeking to receive important information about their community.

The Court below did correctly find that there was a colorable claim of privacy in the requested e-mail addresses, primarily basing its determination on the fact that Nixle's Terms of Service and Privacy Policy indicate that said information will be maintained privately. Da109. Therefore, an analysis of the *Doe* factors is warranted in this matter.

Moving to the *Doe* balancing test, the type of "record" requested is personal e-mail addresses, which are not in themselves a "document" or "record", but personal information used to sign up for a third-party local alert service. OPRA's intended purpose is to "maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." *Asbury Park Press v. Ocean County Prosecutor's Office*, 374 N.J. Super. 312, 329 (Law Div. 2004). The disclosure of the e-mail addresses of individuals passively receiving local alerts through a third-party service does not maximize public knowledge about public affairs.

Additionally, this personal information was not created for Nixle and the information used to sign up for Nixle is not unique to Nixle's services, but rather an e-mail address of the individual that is likely also used for many other purposes. People use their e-mail addresses now as one of the primary methods of communication for delivery and receipt for personal and business mail, and e-mail addresses are often used as user identification for online accounts, such as for online shopping and online banking. Therefore, it is not accurate to characterize the "records" at issue as something that was "created" by Nixle, as the lower court did, and thereby ignore the uniquely personal nature of an e-mail address.

The potential for harm in the nonconsensual disclosure of this information includes citizens being spammed with unwanted communications and solicitations, citizens being unwilling to sign up for this service, and the potential that these individuals will be hacked, as e-mail addresses are often one half of the login information required for most online accounts.

There are also health and safety benefits to citizens participation in the Nixle service. For example, if there is an emergent event or dangerous condition, this is way the City can communicate with residents to warn and advise them of how to proceed. If residents become aware that signing up for Nixle will lead to the disclosure of their personal e-mail address to anyone who asks for it, they are unlikely to continue using the service. This could prevent residents from receiving lifesaving communications.

The lower court indicated that, "If one receives an unsolicited e-mail, one can simply block or change it." Da110. It was the City's position in response to the OPRA request and subsequent Order to Show Cause that simply blocking an e-mail will not address the potential issue. Further, changing an e-mail address is not a simple endeavor. As indicated above, e-mail addresses are used for almost all personal and business correspondence, and an e-mail address itself is utilized as user identification for various websites, including banking websites. If the Court's Decision were to stand as is, it would mean that essentially any

person or organization could obtain the e-mail addresses of every single person in every municipality that uses Nixle or a similar service. This means that residents will be faced with making a choose to receive important public information and inevitably being spammed with never ending unwanted e-mails, and potentially subject to hacking attempts, or forgo registering to receive important and potentially lifesaving emergency communications from the City and maintaining confidentiality in their personal email, cellphone and other contact information.

As to the degree of the need for access, the Plaintiff/Respondent claims that he is seeking the e-mail addresses so that he can provide residents with information regarding a bond referendum that was held by the Hoboken School Board on January 25, 2022. Da024. Therefore, the stated need is for a political purpose. There are many other ways that the Plaintiff/Respondent can obtain e-mail addresses of residents who are interested in receiving this type of communication by directly soliciting them. There is no shortage of methods to solicit contact information from individuals who voluntarily wish to receive information from Plaintiff/Respondent, and therefore his stated objective can be accomplished without the requested list.

In further support of the City's position that OPRA's privacy provision should apply to these e-mail addresses, in factual scenarios which are directly

on point, the Government Records Council ("GRC"), the governmental body tasked with adjudicating OPRA disputes, and the Appellate Division in unpublished decisions, have determined that private e-mail addresses are not subject to disclosure under OPRA. The GRC has made this determination in the matters of *D'Andrea v. NJ Civil Service Commission*, GRC 2014-153 and *Beggiato v. Twp. of Hillsborough*, GRC 2017-144. In the *D'Andrea* matter, the GRC determined that personal e-mail addresses of public officials were properly redacted based upon the personal privacy exception. In *Beggiato*, the GRC found that that email addresses for a Township email list were private and rightfully excluded under *N.J.S.A.* 47:1A-1.

The Appellate Division has found that personal e-mail addresses should not be disclosed under OPRA's privacy provision in the case of OPRA requests themselves. *See Wolosky v. Somerset Cty.*, 2017 WL 1179852 (N.J. Super. Ct. App. Div. Mar. 30, 2017) (holding that the County was not required to disclose the email addresses of individuals who had previously submitted OPRA requests because individuals who submitted said requests "did not waive their right to nondisclosure of personal information in the requests" and that the email addresses of requestors did not go to a "core concern" of OPRA).

Most relevantly, the Appellate Division recently found that members of the public who submit their email addresses to receive electronic newsletters

and notices from a municipality have an objectively reasonable expectation that their email addresses will not be disclosed to a non-government organization that intends to send unsolicited emails to them to further the organization's political and social objectives. *See Rise Against Hate v. Cherry Hill Township*, A-1440-21, 2023 WL 2670720, at *1 (N.J. Super. App. Div. Mar. 29, 2023). The *Rise Against Hate* matter is almost identical in fact to this matter, except that the municipalities in that case actually did maintain the e-mail addresses and therefore actually did have a responsive document or record. Therefore, the facts in the instant matter are more persuasive because the City does not even maintain the requested information.

Therefore, the *Doe* balancing test weighs in favor of non-disclosure of citizens' private e-mail addresses, and this position is supported by extremely relevant and persuasive authority. Not only should the e-mail addresses be subject to OPRA's privacy provision, but if residents cannot rely upon their e-mail addresses being maintained privately, many residents will likely remove themselves from the alerts, which are important to the health and safety of the public.

III. THE TRIAL COURT ERRED IN FINDING THAT THE REQUESTED INFORMATION WAS A PUBLIC RECORD AS DEFINED IN THE OPEN PUBLIC RECORDS ACT (Da107)

The Trial Court erred on two different conclusions when it found that the requested information was a public record as defined in the Open Public Records Act. Foremost, the Trial Court erred in finding that the OPRA Statute includes entities acting under the "Authority" of a State Entity. The Trial Court also erred when it found that the information requested should be considered a public document or record. Based upon these erroneous findings the holding of the Trial Court should be overturned.

A. THE TRIAL COURT ERRED IN FINDING THAT THE OPRA STATUTE INCLUDES ENTITIES ACTING UNDER THE "AUTHORITY" OF A STATE ENTITY (Da097)

The specific request in this instance does not constitute "government record" under the plain language of the OPRA statute, because the request does not identify a document or record that is, or was, made, maintained, or kept on file by the City of Hoboken. The request sought "City of Hoboken E-mail distribution list it uses to send all Nixle.com e-mails." Da210. There is no such document or record given that the City does not send out or distribute "Nixle.com e-mails." Da216. That being said, assuming *arguendo,* that the requestor did request the e-mail distribution list utilized by Nixle to send out Hoboken's alerts, there is still the issue of whether Nixle is subject to OPRA, being that it is a private company and not a governmental entity. When addressing whether OPRA reaches a private agency, the lower court found that

the text of the OPRA statute specifically includes this type of situation. It is the City's position that the OPRA statute does not contemplate private entities being subject to OPRA.

The specific text of the OPRA statute is as follows:

> "Government record" or "record" means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business **by any such officer, commission, agency, or authority of the State** or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

The court below interpreted the above language to include the phrase (in some form) "with the authority of the State." Da099. The trial court utilized this reasoning as a basis for determining that the OPRA statute already included language that third-party entities are subject to OPRA so long as they are operating with the, or pursuant to, the authority of a municipality. However, this is a parsing of the statutory language which if accepted would lead to an incorrect result. The use of "authority" in this context clearly means an "authority of the State", for example, a housing authority or improvement authority. Prior to the word "authority" it does not state "with the" "under the"

or "subject to the". The use of "authority" is clearly part of a list of entities whose records are subject to OPRA. It is undisputed that entities such as housing authorities and improvement authorities are "authorities of the State" and are subject to OPRA. *See Bergen County Imp. Auth. v. N. Jersey Media Group, Inc.*, 851 A.2d 731, 734 (N.J. Super. App. Div. 2004); *Newark Morning Ledger Co. v. New Jersey Sports & Exposition Authority*, 423 N.J.Super. 140, 31 A.3d 623 (A.D.2011); *Bart v. City Of Paterson Housing Authority*, 403 N.J.Super. 609, 959 A.2d 1227 (A.D.2008), certification denied 198 N.J. 316, 966 A.2d 1080 (OPRA case involving "authorities"). Taking the trial court's interpretation as fact and to its logical conclusion, this would mean that "authorities" such as those listed above are not subject to OPRA. Therefore, the Decision is based upon the incorrect assertion that OPRA's text contemplates a situation where an entity acts with the "authority of the State", rather than listing state authorities as those entities subject to OPRA. Da099.

It is correct that courts have determined that the fact that a third-party maintains records does not mean those records are exempt from OPRA. *See Burnett v. County of Gloucester*, 2 A.3d 1110, 1116 (N.J. Super. App. Div. 2010). However, the conclusion that any time an entity is acting with the "authority of the State" it is subject to OPRA as to all of the information it

maintains to perform its function, is an extreme and unprecedented expansion of OPRA, based upon an incorrect reading of the statutory language.

After incorrectly concluding that the text of the OPRA law contemplated "when an entity acts with the 'authority of the State' to perpetuate the government's "official course of business", the trial court determined that it "must look at the standards adopted nationwide to determine whether public disclosure is warranted." Da099-Da100. The trial court then engaged in an analysis of two different tests utilized in other jurisdictions, the "functional equivalent test" and the "public function approach." Da100. Frankly, it is the City's position that the OPRA statute absolutely does not state that private entities acting with the authority of the state are subject to OPRA and therefore that these two tests should not be considered.

Our courts have recognized that "'where the Legislature has clearly and explicitly defined a term within a statute, [courts] must assume it did so intentionally and with the intent that its stated definition be applied to that term throughout the statute.'" *Commerce Bancorp, Inc. v. InterArch, Inc.*, 417 N.J. Super. 329, 336-37 (App. Div. 2010) (quoting *Simpkins v. Saiani*, 356 N.J. Super. 26, 32-33 (App. Div. 2002)), certif. denied, 205 N.J. 519 (2011); see also *Febbi v. Bd. of Review*, 35 N.J. 601, 606 (1961) ("When the Legislature has clearly defined a term, the courts are bound by that definition."); *Nebinger v.*

Md. Cos. Co., 312 N.J. Super. 400, 406 (App. Div. 1998) ("When the Legislature has specifically defined a term, that definition governs.").

The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language. *DiProspero v. Penn*, 183 N.J. 477, 492 (2005), citing *Frugis v. Bracigliano*, 177 N.J. 250, 280 (2003). New Jersey courts ascribe to the statutory words their ordinary meaning and significance, *Lane v. Holderman*, 23 N.J. 304, 313 (1957), and read them in context with related provisions so as to give sense to the legislation as a whole. *Chasin v. Montclair State Univ.*, 159 N.J. 418, 426-27 (1999).

It is not the function of a court to "rewrite a plainly-written enactment of the Legislature or presume that the Legislature intended something other than that expressed by way of the plain language." *O'Connell v. State*, 171 N.J. 484, 488 (2002). Courts cannot "write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment," *Craster v. Bd. of Comm'rs of Newark*, 9 N.J. 225, 230 (1952), or "engage in conjecture or surmise which will circumvent the plain meaning of the act[.]" *In re Closing of Jamesburg High School*, 83 N.J. 540, 548 (1980). The court's "duty is to construe and apply the statute as enacted." *Ibid.*

A court should not "resort to extrinsic interpretative aids" when "the statutory language is clear and unambiguous, and susceptible to only one interpretation…" *Lozano v. Frank DeLuca Const.*, 178 N.J. 513, 522 (2004) (internal quotations omitted). Therefore, since the plain language of OPRA clearly does not contemplate private entities being subject to OPRA's provisions, it is not necessary to engage in tests utilized in other jurisdictions. Nixle, a private entity, is not subject to OPRA under the plain language of the law.

B. THE INFORMATION REQUESTED IS NOT A PUBLIC DOCUMENT OR RECORD, BUT PERSONAL INFORMATION PROVIDED TO A PRIVATE ENTITY (Da099)

This situation is also distinct from the factual scenario in matters such as *Burnett*, *supra*, where the issue was whether documents or documents created by a third-party on behalf of a governmental agency are subject to OPRA. In this instance, the request does not seek documents or records, but rather seeks personal information obtained by the private entity when users sign up for its services.

It is important to note the reason why Nixle's terms and conditions state that they do not provide personal information to the municipalities that they contract with. This provides a layer of protection for the personal information of those signing up, and neutrality for those individuals who are seeking to

merely receive governmental alerts without providing their personal information to government officials. The fact that this personal information would not be shared with the municipal entity was something relied upon and expected by residents when signing up for Nixle's services. That is why the personal information of individuals signing up for a third-party service should not constitute a public document or record, and is not similar to an agreement prepared on behalf of a governmental entity (as was the situation in *Burnett*, *supra*).

IV. THE INFORMATION SOUGHT BY THE REQUESTOR IS NOT DISCLOSABLE UNDER THE COMMON LAW RIGHT TO ACCESS PUBLIC DOCUMENTS (Da122)

The common law definition of a public record is more expansive than the definition contained in OPRA. *Bergen County Improvement Auth. v. N. Jersey Media Group, Inc.,* 370 N.J. Super. 504, 509–10, (App.Div.), certif. denied, 182 N.J. 143 (2004). To constitute a public record under the common law, the item must be "a written memorial ... made by a public officer, and ... the officer [must] be authorized by law to make it." *Nero v. Hyland*, 76 N.J. 213, 222 (1978). To access this broader class of documents, requestors must make a greater showing than required under OPRA: (1) "the person seeking access must 'establish an interest in the subject matter of the material' "; and (2) "the citizen's right to access 'must be balanced against the State's interest in preventing

disclosure.'" *Keddie v. Rutgers, State University*, 148 N.J. 36, 50 (1997). Under OPRA, the requestor's interest in a document is irrelevant, whereas in the common law right of access the interest of the requestor is considered and "balanced against the State's interest in preventing disclosure." *Id*. The common law right of access involves a two-step inquiry; first, a litigant must establish an interest in the public record. *N. Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders*, 127 N.J. 9, 13 (1992). Second, a Plaintiff/Respondent's interest in disclosure of the relevant documents must outweigh the State's interest in non-disclosure. *Higg-A-Rella, Inc. v. County of Essex*, 660 A.2d 1163, 1169 (N.J. 1995). In making that determination, courts are to consider the following factors: (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 (1986).

It must first be noted that in his request the Plaintiff/Respondent did not provide information as to an interest in the "subject matter" of the request in his OPRA request. That being said, there is no "written memorial" made by a public officer therefore the above analysis cannot be completed and is not relevant to this case. As previously discussed, residents sign up for Nixle alerts directly through the Nixle website. No City officer maintains a written memorial which contains the information inputted by residents when they sign up.

The City also submits that even if there was a written memorial, the City's interest in maintaining the private contact information of those signed up for Nixle alerts outweighs the Plaintiff/Respondent's interest in obtaining their contact information to send his unsolicited political opinions.

V. THE CITY OF HOBOKEN SHOULD NOT BE RESPONSIBLE FOR COUNSEL FEES UNDER THE OPEN PUBLIC RECORDS ACT (Da207)

The City submits that the lower court erred in finding that the information requested in the OPRA request at issue was a public document or record. Even assuming, *arguendo,* that the information at issue were to be considered a public document or record, the City submits that OPRA's privacy provision should apply and therefore this information should not be subject to disclosure.

Therefore, the Plaintiff/Respondent should not have been the prevailing party and not entitled to attorney's fees. That being said, the City also opines that the lower court erred in finding that the City was responsible for attorney's fees for failing to produce a document and/or record that is not in the City's control or custody, but is personal information maintained by a private entity.

If the City were ultimately obligated to produce the records in question, the City would not be able to produce same. This underscores the error made by the Court in finding that the information requested is public record subject to disclosure under OPRA, and finding that not only is a private entity subject to ORPA, but that a municipality is also responsible for somehow forcing said private entity to produce the documents or records. As fully detailed above, there is nothing in the OPRA statute that contemplates a private entity being subject to OPRA, or how a fee award would work when the private entity has full custody and control of the records in question.

The lower court suggested during oral argument on the issue of fees that the municipal entity should be responsible for filing a suit against the private entity to either force compliance with the OPRA request or seek indemnification. However, it is the City's position that this course of action is outside the scope of the plain language of the statute and would place an

unprecedented burden on governmental resources to be forced to constantly pursue litigation in this manner.

Therefore, the City submits that it should not be responsible for counsel fees in this matter, because the lower court's fee determination was based upon an incorrect and incomplete finding that the information requested constitutes a public document or record and that private entities are subject to OPRA.

CONCLUSION

For the reasons set forth above, the trial court's orders in this matter dated May 26, 2022; July 1, 2022; and March 28, 2023, should be overturned as a matter of law.

City of Hoboken- Office of Corporation Counsel
/s/ *Alyssa L. Wells, Esq.*

Original Date of Submission: September 8, 2023
Amended Version Submitted: October 4, 2023

ASIAN HATE CRIMES TASK FORCE, a non-profit organization, Plaintiff-Respondent, v. VOORHEES TOWNSHIP, VOORHEES POLICE DEPARTMENT, DEE OBER, in her official capacity as records custodian, and EVERBRIDGE, INC., Defendants-Appellants/Cross-Appellants/Respondents.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **CIVIL ACTION** **On appeal from a final judgment of the Superior Court of New Jersey, Law Division, Civil Part, Camden County** **A-002634-22** **Docket No. Below CAM-L-4005-21** **SAT BELOW:** **Hon. Deborah Silverman Katz, A.J.S.C. Superior Court, Camden County**
ASIAN HATE CRIMES TASK FORCE, a non-profit organization, Plaintiff-Respondent, v. HADDON HEIGHTS, and KELLY SANTOSUSSO, in his official capacity as records custodian, Defendants-Cross-Appellants/Respondents.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **CIVIL ACTION** **On appeal from a final judgment of the Superior Court of New Jersey, Law Division, Civil Part, Camden County** **A-002634-22** **Docket No. Below CAM-L-0055-22** **SAT BELOW:** **Hon. Deborah Silverman Katz, A.J.S.C. Superior Court, Camden County**

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<td>CARMINE SODORA,

Plaintiff-Respondent,

v.

CITY OF HOBOKEN, JAMES J. FARINA, in his official capacity as records custodian, and EVERBRIDGE, INC.,

Defendants-Appellants/Respondent.</td>
<td>SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

CIVIL ACTION

On appeal from a final judgment of the Superior Court of New Jersey, Law Division, Civil Part, Camden County

A-002634-22

Docket No. Below CAM-L-0744-22

SAT BELOW:

Hon. Deborah Silverman Katz, A.J.S.C. Superior Court, Camden County</td>
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BRIEF OF PLAINTIFFS-APPELLANTS ASIAN HATE CRIMES TASK FORCE AND CARMINE SODORA

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PRELIMINARY STATEMENT

We represent Plaintiffs Carmine Sodora and Asian Hate Crimes Task Force ("Plaintiffs"). The Court should affirm the Trial Court's opinion and order in all respects.

Defendants City of Hoboken and Municipal Clerk James J. Farina simply never proved their case before the Trial Court. Their arguments before that Court and before this Court rest on a series of assumptions about how people behave or would behave. But Defendants, who have the burden of proof, simply never proved their case. They never proved what harm would occur if the requested email addresses were disclosed. They also never proved that recipients of municipal alerts could not protect themselves from unwanted emails by filtering out messages, using email addresses dedicated to the receipt of municipal alerts, or receiving alerts via text message rather than email.

Defendants also ask this Court to reverse the Trial Court's holding that Defendant Everbridge, Inc. ("Everbridge"), is a public agency under OPRA. But Defendant Everbridge has not appealed or cross-appealed that holding and has not filed a brief in this case. Also, Defendants never identified this issue as one of the issues to be raised on appeal in their Notice of Appeal. Therefore, this Court should decline to reach that issue. But if this Court addresses that issue, which is one of first impression in New Jersey, the Court should affirm the Trial

Court.

If this Court affirms disclosure of the requested records under OPRA, this Court should also affirm the Trial Court's award of counsel fees in favor of Plaintiffs and against Defendants, because Plaintiffs would be traditional prevailing parties under OPRA's mandatory fee-shifting in favor of requestors who achieve access to public records.

We also bring to the Court's attention the case of Rise Against Hate v. Cherry Hill Township, __ N.J. __ (2023), Docket Number 088145, currently pending before the New Jersey Supreme Court. That matter was argued before the Court on November 28, 2023, and a decision is pending. That case also involves access under OPRA to municipal email notification lists.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

To Defendants' statement of facts and procedural history, we add the following.

Defendant Haddon Heights initially filed a cross-appeal in this case, but Plaintiffs and Defendant Haddon Heights settled that cross-appeal, which was withdrawn on December 15, 2023.

Defendant Everbridge has, so far, not participated in this appeal, although

[1] Because the facts and procedural history are intertwined, those sections have been combined.

they have not filed a letter of non-participation, either. Defendant Everbridge has not appealed or cross-appealed the Trial Court's holding that it is subject to OPRA. Defendant Everbridge's brief was due January 15, 2024, but as of the filing of this brief, Defendant Everbridge has not filed its own brief or filed a request or motion for an extension of time to file its brief. Finally, we add that both the Trial Court and Defendants sometimes refer to the email service provided by Everbridge by its trade name, Nixle. We do the same.

Although Defendant City of Hoboken is asking this Court to reverse the Trial Court's holding that Defendant Everbridge is subject to OPRA, Hoboken did not identify this issue in its notice of appeal, and therefore that issue has been waived. (Da015 to Da016).

LEGAL ARGUMENT

POINT I

EMAIL ADDRESSES COLLECTED BY A PUBLIC ENTITY'S CONTRACTED PARTY AT TAXPAYER'S EXPENSE ARE PUBLIC RECORDS

First, we discuss the standards applicable to OPRA cases and this appeal. Second, we discuss access to email records. Third, we briefly discuss prevailing party counsel fees.

A. The Standards Applicable to OPRA Cases

Our Supreme Court has held that "Those who enacted OPRA understood that knowledge is power in a democracy, and that without access to information

contained in records maintained by public agencies citizens cannot monitor the operation of our government or hold public officials accountable for their actions." Fair Share Housing Ctr, Inc. v. N.J. State League of Municipalities, 207 N.J. 489, 502 (2011).

OPRA mandates that

> government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public's right of access.
>
> [Libertarian Party of Cent. N.J. v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006) (alterations in original) (citing N.J.S.A. 47:1A-1)].

"The purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Off., 374 N.J. Super. 312, 329 (Law Div. 2004)).

The burden of proof in showing that a denial of access was justified rests solely with the records custodian. N.J.S.A. 47:1A-6; Asbury Park Press v. Monmouth Cnty., 406 N.J. Super. 1, 7 (App. Div. 2009), aff'd o.b., 201 N.J. 5 (2010).

Under OPRA, a "government record":

> means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof.
>
> [N.J.S.A. 47:1A-1.1.]

In this case, the parties agree that the standard of review in this case is de novo, primarily because the matter below was heard based on undisputed facts and no live testimony was taken. "[D]eterminations about the applicability of OPRA and its exemptions are legal conclusions and are therefore subject to de novo review." Simmons v. Mercado, 247 N.J. 24, 38 (2021) (alterations in original; internal citation and quotation marks omitted). The Trial Court's legal conclusions and interpretations of law are reviewed de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). This Court owes no deference to findings that are not based on witness testimony or credibility findings. Yueh v. Yueh, 329 N.J. Super. 447, 461 (App. Div. 2000).

B. OPRA, Privacy, Email Addresses and the Leading New Jersey Supreme Court Privacy Cases

No published case addresses whether email addresses used by private individuals to communicate with public officials are public records. Also, there is no general exception for email addresses in OPRA or any other law. Consequently, the only reason why an email address might be withheld or redacted is a person's reasonable expectation of privacy. N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. 408, 423 (2009) (stating that OPRA allows for the protection "against disclosure of personal information which would run contrary to reasonable privacy interests.").

To determine whether a person has a reasonable expectation of privacy in any public record, the Court must engage in a two-step process. First, "a custodian must present a colorable claim that public access to the records requested would invade a person's objectively reasonable expectation of privacy." Brennan v. Bergen Cnty. Prosecutor's Off., 233 N.J. 330, 342 (2018). If not, the inquiry ends, and the record is public. Ibid. (holding that if a custodian cannot make a "threshold showing" of a "colorable claim" of privacy, "there is no need to resort to the Doe factors."). If a custodian has presented a "colorable claim" of privacy, then the Court proceeds to the second step, which is an analysis of the factors set forth in Doe v. Poritz, 142 N.J. 1 (1995). Ibid.

Here, the Trial Court held that a reasonable person had a colorable claim of

privacy in their email address. (Da109). Because Plaintiffs have not cross-appealed that holding, we will proceed to a discussion of the privacy balancing test.

When courts have analyzed privacy, they have been reluctant to impose categorical exemptions to OPRA in the absence of legislative action.

In Bozzi v. City of Jersey City, , the Supreme Court held that licensed pet owners had no reasonable expectation of privacy in their names and addresses. 248 N.J. 274, 287 (2021). The Court held that "owning a dog is a substantially public endeavor in which people do not have a reasonable expectation of privacy that exempts their personal information from disclosure under the privacy clause of OPRA." Id. at 287. The Supreme Court described owning a dog as an "inherently . . . public endeavor[.]" Id. at 286.

The Bozzi Court also found that "legislative inaction" regarding home addresses was "particularly significant." Id. at 284-85. When the Legislature passed OPRA, the Legislature created a Privacy Commission, which in turn wrote and released the December 31, 2004 Final Report of Privacy Study Commission Study. N.J.S.A. 47:1A-15. In that Final Report, the Privacy Study Commission recommended that home addresses should be treated as confidential information. Because the Legislature has never acted on this recommendation, the Bozzi Court was reluctant to create an exception for home addresses when the Legislature had not. Ibid.

The Bozzi Court's holding regarding Legislative inaction on home addresses is equally applicable to Legislative inaction regarding email addresses. The Legislature has never acted upon the Privacy Commission's recommendations that email addresses be treated the same as "unlisted telephone numbers," which are exempt under OPRA. N.J.S.A. 47:1A-5.

In the other leading New Jersey Supreme Court OPRA privacy case, the Court held that the names and addresses of successful bidders who participated in a public auction of forfeited property were public records. Brennan, 233 N.J. at 342. The Supreme Court held that "the sale of government property at a public auction is a quintessential public event that calls for transparency." Id. at 343. The Court continued:

> To guard against **possible abuses**, the public has a right to know what property was sold, at what price, and to whom. OPRA's plain terms call for disclosure of that type of recorded information, including the names and addresses of successful bidders. To hold otherwise would jeopardize OPRA's purpose: to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.
>
> [Ibid. (emphasis added; internal citation and quotation marks omitted).]

Thus, the Court held that successful bidders have no reasonable expectation of privacy in their home addresses. The Brennan Court, like the Bozzi Court, observed that OPRA contains exceptions for home addresses only in "limited

situations," and does not contain an "overarching exception for the disclosure of names and addresses." Brennan, 233 N.J. Super. at 337.

The critical concept contained in both Bozzi and Brennan, is that Legislative inaction regarding the Privacy Study Commission's recommendation that email addresses be treated the same as unlisted phone numbers "strongly caution[ed] against creating a judicial exemption[.]" Bozzi, 248 N.J. at 285.

The analysis of the Courts in Brennan and Bozzi exactly applicable here. As referenced earlier, the Privacy Study Commission recommended that email addresses, like home addresses, "should be accorded the same protection as unlisted telephone numbers, i.e., they should remain confidential." But the Legislature has never acted upon that recommendation in the intervening thirteen years, even though it has had plenty of opportunity.

The Legislature has never adopted an "overarching" exception for email addresses, even though proposed amendments that would exempt e-mails under OPRA have been filed in at least the last four legislative sessions, including the current one. (Pa198 to Pa227). While this is not dispositive, the absence of legislative action on this issue suggests that the Legislature does not intend that all e-mail addresses be confidential. Bozzi, 258 N.J. at 285 ("[T]he Legislature's inaction with respect to the recommended exemptions strongly cautions against creating a judicial exemption in this context.").

Private email addresses should be treated like home addresses: they are public unless made exempt under specific circumstances. Brennan, 233 N.J. at 337-38; Bozzi, 248 N.J. at 286.

When conducting a privacy analysis,[2] the Court must analyze seven factors.[3] Those factors are:

> (I) the type of record requested; (2) the information it docs or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, a11iculated public policy, or other recognized public interest militating toward access.
>
> [Burnett, 198 N.J. at 427.]

The first two factors are the type of record requested and the information it contains. Application of these two factors to this case is not controversial: Plaintiffs requested email addresses. The email addresses are "private" email addresses, meaning that the email addresses are not associated with the domain

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[2] The Trial Court's discussion of the privacy test begins at Da108, and the Court's discussion of the Doe factors begins at Da109.

[3] The Supreme Court has articulated modified privacy balancing tests in those cases involving access to student records and access to internal affairs reports, Rivera v. Union Cnty. Prosecutor's Off., 250 N.J. 124, 147-48 (2022), L.R. v. Camden City Public Sch. Dist., 238 N.J. 547, 575 (2019), but neither of those categories of records are implicated in this proceeding.

names of governments, although nothing would prevent a government official from using their government email address to sign up for the types of email alerts offered by the Defendants. The Trial Court held that these email addresses were public records within the meaning of OPRA because they were created by "third-party agencies on behalf of the government to effectuate a public function and are made with the 'authority of the State.'" (Da110).

The third factor addresses the "potential for harm in any subsequent disclosure." (Ibid.). The Trial Court held that private email addresses were less sensitive than home addresses, which were released in the Bozzi case. The Trial Court held that email can "simply" be blocked or changed, while physical addresses "cannot be easily changed."

Defendant City of Hoboken never provided the Court with a factual basis to show any potential harm. The February 11, 2022 Certification of Hoboken Municipal Clerk James J. Farina filed by Hoboken never addressed any harm in disclosure. (Da215 to Da217).

During the proceedings below Hoboken also filed the April 8, 2022 Supplemental Certification of Alyssa L. Bongiovanni, Esq., who at the time was Hoboken Assistant Counsel for the City of Hoboken, Da057, but that certification only addressed whether Hoboken physically maintained the responsive records, not the potential harm in disclosure. Harm was not addressed

at all. (Da057 to Da059). On June 13, 2022, after Defendant Hoboken was served with the Trial Court's order of disclosure on May 26, 2022, Da071, Hoboken conducted an on-line survey in which over 90 percent of respondents objected to the disclosure of their email addresses that they submitted to Hoboken's email notification contractor. (Da240 to Da251). In none of Hoboken's submissions did they identify the potential for harm.

Defendants' certifications identify no harm or potential for harm to disclosure. If we give Defendants the benefit of the doubt, at most the Defendants have identified the potential for inconvenience. But, even that inconvenience to the public can be remedied by (1) withdrawing an email address from the list; (2) using a free email account (such as Gmail) for the specific purpose of receiving these types of notices; and (3) using filters to block out unwanted emails. In addition, those who do not want their email address disclosed may elect to receive alerts via text message. Unlike email addresses, private phone numbers are generally treated as exempt.

Assuming that any person would be inconvenienced by the disclosure of their email address to Plaintiffs, the Doe privacy test does not give weight to inconveniences, it gives weight to potential harm. Here, Defendants never provided the Court with any evidence of the potential for harm if the emails are disclosed.

The fourth Doe factor is "the injury that disclosure would cause to the relationship that created the record." (Da110). Applied to this case, the issue is whether the relationship between Hoboken and those who signed up for the Nixle alerts would be damaged. Here, there is no relationship to harm. In the proceedings before the Trial Court, Defendants produced no evidence that any relationship between Defendants and any other person would be harmed. Defendants never provided any evidence of harm.

During the proceedings below, Defendants provided no evidence that anyone was removing themselves from the Nixle alerts or that there was any other harm to any relationship. Defendants simply did not prove their case. Presumably, if the benefits of signing up for email alerts outweigh the inconveniences, then the public will sign up for the alerts.

Defendants also never proved that anyone would be dissuaded from using the Nixle alert system. The Trial Court made the specific finding that "The idea that users will be deterred from registering for public service notifications is unsubstantiated. Nothing in the record demonstrates that receiving unsolicited e-mails would cause someone to unsubscribe from this service." (Da112 to Da113). The only evidence that could possibly support the notion that people would not use the Nixle alerts is Hoboken's post-decision survey that they conducted after they received the Court's decision, and even then only they

presented evidence that only two people indicated they wanted to be removed from the Nixle alert list (and one of them was a Hoboken City employee).

In support of both their motion for reconsideration in the Trial Court and on this appeal, Hoboken relies on the results of an online internet poll. The results are located at Da240 to Da251. This poll should be given no weight. First, it was commissioned after Hoboken was served with the Trial Court's decision. Second, Hoboken produced no data or information regarding the methodology of the survey or whether the responses were valid. Third, the survey was simply an attempt to attack a decision that Hoboken viewed as unfavorable.

We note that in the Brennan case, the Supreme Court gave no weight to a survey conducted by the Defendants in that case while the matter was pending before Superior Court. A large plurality of respondents (16 of 39) in that survey did not want their personal information disclosed. Brennan, 233 N.J. at 335. But when the Supreme Court determined that respondents' personal information should be disclosed, the Court gave that survey no weight, and only discussed that survey as part of its discussion of the facts. The Court did not discuss that survey in its analysis at all.

The fifth factor is whether there are "safeguards in place to protect this information to see whether disclosure would undermine that process." (Da113) (citing Carter v. Doe, 230 N.J. 258, 280 (2017)). The Trial Court held that it was

a sufficient safeguard that "users can readily delete, block or ignore anything unsolicited." (Da113). Defendants never provided any evidence that would dispute or undermine this holding.

The sixth factor is the degree of need. The Trial Court held that Plaintiffs' "civic purpose" was a sufficient need. The Trial Court held that Plaintiffs' goal of raising "awareness about local issues" was "consistent with OPRA that a democratic society operates best through transparency." (Da113). Defendants never provided any counterbalance to this finding. Although the Nixle alert system is a private system, it is paid for by government funds. Hoboken contracts with Everbridge to provide the Nixle alerts. (Da080).

The seventh factor is whether a statutory or public policy "seeks to prevent this type of disclosure." (Da114). No specific law or policy prevents the disclosure of email addresses. As discussed above, no specific statute or rule exempts email addresses. The Trial Court also held that the issue of whether there should be a general exemption for email addresses should be addressed by the Legislature: "As noted above, the Legislature has hac many opportunities to exempt private personal information, such as e-mails and phone number, from OPRA but has declined each opportunity." (Da115).

Defendants argue that email addresses are "likely also used for many other purposes." (Db16). This argument is speculative, and Defendants provided no

evidence to support this claim. Defendant City of Hoboken cites no evidence in the record to support their claim, and there is none in the record.

Defendants also claim there is a "potential for harm," but again they never cite the actual harm. There is no evidence that any "potential" harm in this case is any different from any other on-line transaction. Defendants claim there is the "potential that these individuals will be hacked," but they provide no evidence, only speculation.

Defendants argue that if the public are dissuaded from using the Nixle service, people could be prevented from "receiving lifesaving communications." Again, this is mere speculation masked as argument. There is no record evidence that lives will be lost if anyone does not receive Nixle alerts. And, for anyone who has concerns about disclosure, they may elect to receive Nixle alerts by text message. (Db8; Da213 to Da215) (discussing how Nixle alerts may be received by text message or email).

Defendants cite decisions of the Government Records Council ("GRC") holding that private email addresses are not public records, but decisions of the GRC are only binding on the parties to each case and cannot constitute precedent in Superior Court. The Trial Court and this Court owes no deference to GRC decisions, because "in proceedings initiated in Superior Court concerning an OPRA request, GRC decisions are not entitled to any deference." Paff v.

Galloway Township, 229 N.J. 340, 356 (2017).

Defendants also discuss the unpublished cases of Wolosky v. Somerset County and Rise Against Hate v. Cherry Hill Township. (Db19). Wolosky is an unpublished opinion that, by Court rule, should be given no weight. Rise Against Hate does address the same legal issue as that appeal, but it is also an unpublished opinion. With respect to the Rise Against Hate case, on July 6, 2023, the Supreme Court granted certification, Rise Against Hate v. Cherry Hill Township, __ N.J. __ (2023). That matter was argued before the Court on November 28, 2023, and a decision is pending.

POINT II

THE EMAIL RECORDS ARE "PUBLIC RECORDS"

The emails maintained by Everbridge are public records because those emails were maintained pursuant to an agreement between Defendant City of Hoboken and Everbridge.

OPRA defines a public record as any document created or maintained or kept on the file in the course of the "official business" of a public entity. Defendants argue that the Nixle emails are not public records because the emails are maintained by Defendant Everbridge not by the City of Hoboken.

While we agree that the lists of emails are not stored by the City of Hoboken, to say they are not public records because they are stored by a private entity is a

facetious analysis. Records that are generated by private third parties in the course of their work for public entities are public records subject to OPRA. We can readily identify such records. The invoices of outside counsel who represent public entities are public records. The payroll records of public employees that are maintained by payroll companies are public records. Municipal emails and municipal databases maintained on private servers and data companies are public records. The assessments prepared by private valuation companies are public records. We could go on.

At Db23, Defendants concede, as they must, that "courts have determined that the fact that a third-party maintains records does not mean those records are exempt from OPRA." (Db23) (citing Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 512-13 (App. Div. 2010)). The reason why the email lists are public records is because Hoboken pays for the use of the Nixle emergency alert system. Taxpayers fund the collection of the emails and the use of the system. Indeed, when Hoboken transmitted its privacy survey, it did so through Nixle. (Da246). Also, when residents sign up for Hoboken's Nixle alerts, they do so "through the official Hoboken website." (Da091).

Thus, even though Everbridge is a contractor and Hoboken does not physically store the Nixle alert email addresses, those lists were compiled in the course of the official business of Hoboken by Hoboken's agent. Therefore, they are

public records.

The Trial Court below also held that Everbridge is a public entity under the "functional equivalent approach" and "public function" approach. This aspect of the Trial Court's holding has not been appealed by any party and is not before this Court. Defendant Haddon Heights filed a cross-appeal, but the cross-appeal was settled and by correspondence to the Court dated December 15, 2023, that cross-appeal was withdrawn. Defendant Everbridge did not file any cross-appeal. In addition, their brief and appendix was due on January 15, 2024, and they filed no brief and did not request any extension of time.

Regarding City of Hoboken, they listed four issues to be raised on appeal in their notice of appeal located at Da015 to Da016, but none of them specifically challenged the Court's holding that Everbridge was subject to OPRA. Hoboken did state that one of its point headings would be "The Trial Court erred in finding that the requested information was a public record as defined in the Open Public Records Act." (Da015 to Da016). Nowhere does Hoboken state that they intended to appeal the specific finding against Everbridge Issues that are not raised on appeal are waived. Green Knight Capital, LLC v. Calderon, 469 N.J. Super. 390, 396 (App. Div. 2021); Telebright Corp., Inc. v. Director, N.J. Div. of Taxation, 424 N.J. Super. 384, 393 (App. Div. 2012).

If the Court chooses to address this issue as an issue of first impression, the

Court should affirm the Trial Court's finding that Everbridge is a public entity under both the functional equivalent test and the public function test.

As stated by the Trial Court, courts outside of this jurisdiction have adopted a four-factor test regarding whether a private entity may be considered a public agency for purposes of access to public records under the functional equivalent test: "(1) whether a governmental function was performed; (2) the extent of governmental funding; (3) the degree of government involvement or regulation; and (4) whether the government created the entity." (Da098). Three of the four factors are met here. While Hoboken did not create Everbridge, Hoboken funds the emergency alerts and pays Everbridge to provide the emergency alert system. Hoboken is involved in regulating Everbridge to the extent that Hoboken sets the terms of service. And the strongest factor is the first, which is whether Everbridge provides a government function, which is a strong yes. As discussed by the Trial Court, "Hoboken alerts include Covid-19 guidelines, vaccine information for senior citizens, and weather advisories." (Da099). These activities, which are undisputed, certainly show that Everbridge was providing a public governmental function. Based these foregoing factors, the Trial Court correctly held that Everbridge is a public entity.

Everbridge is also a public entity under the "public function" test, which the Trial Court articulated as "(1) whether the private company acted on behalf and at the request of the government; and (2) whether the private company performed a

governmental function." (Da103). Both of these factors are encompassed by the functional equivalent test. Here, it is undisputed that Everbridge acted on behalf of Hoboken by transmitting Nixle alerts for Hoboken. It is also undisputed that Everbridge performed a governmental function by providing emergency alerts.

For these reasons, should the Court reach the issue, the Court should affirm the Trial Court's holding that Everbridge is a public agency.

Finally, regarding the common law right of access, the Court should only reach this issue if the Court reverses the Trial Court's OPRA holdings. If this Court reverses the Trial Court on the Trial Court's OPRA holdings, then it should affirm the Trial Court's holding that the requested records should be disclosed under the common law right of access.

Defendant City of Hoboken claims the emails are not common law records. The emails are common law records because the City of Hoboken authorized Everbridge to make those records. There is no dispute that Hoboken contracted with Everbridge to create the email lists so that Hoboken can utilize the email lists. Thus, this Court should affirm the Trial Court's holding that the email addresses are public records under the common law right of access.

Defendant City of Hoboken also argues that its interest in non-disclosure is greater than Plaintiffs' interest in disclosure. But in its brief Hoboken cites no facts or evidence regarding that interest in non-disclosure. Hoboken simply has not

provided this Court with any evidence or argument to overturn the Trial Court's holding.

For these reasons, if the Court reaches the issue, this Court should affirm the Trial Court's common law right of access holding.

POINT III

THE TRIAL COURT'S AWARD OF COUNSEL FEES SHOULD BE AFFIRMED

Under OPRA, prevailing parties are entitled to reasonable counsel fees if they have secured access to public records. N.J.S.A. 47:1A-6.

Here, Hoboken's arguments regarding prevailing party counsel fees are really just a rehashing of its merits arguments. As is clear from the record, Hoboken contracted with Everbridge to use Everbridge to transmit Nixle alerts. The sign-up for Hoboken's Nixle alerts was on Hoboken's website. (Da091). The Nixle alerts were paid by Hoboken. Hoboken used the Nixle alerts when it wanted to collect data in support of its privacy survey. (Da246). And, most importantly, Hoboken denied access to records.

Plaintiffs are the prevailing party here in the traditional sense: they secured access to records via a consent order or judgment. <u>Mason v. City of Hoboken</u>, 196 N.J. 51, 76 (2008). If the Court affirms the Trial Court's holdings regarding access to records, this Court should also affirm the Trial Court's holding that Plaintiffs are the prevailing party entitled to an award of reasonable counsel fees.

CONCLUSION

For the foregoing reasons, this Court should affirm the Trial Court's opinions and orders in every respect.

Respectfully submitted,

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Attorneys for Plaintiffs Asian Hate Crimes Task Force and Carmine Sodora

/s/ Walter M. Luers
Walter M. Luers

Dated: Feb. 14, 2024

ASIAN HATE CRIMES TASK FORCE, a non-profit organization, PLAINTIFF/RESPONDENT, v. VOORHEES TOWNSHIP, VOORHEES POLICE DEPARTMENT, DEE OBER, in official capacity as records custodian, and EVERBRIDGE, INC. DEFENDANTS/CROSS APPELLANTS/RESPONDENTS.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-002634-22 On Appeal from the Final Decision of the Superior Court of New Jersey, Law Division, Civil Part, Camden County Docket Below: L-4005-21
ASIAN HATE CRIMES TASK FORCE, a non-profit organization, PLAINTIFF/RESPONDENT, v. HADDON HEIGHTS, and KELLY SANTOSUSSO, in his official capacity as records custodian, DEFENDANTS/CROSS APPELLANTS/RESPONDENTS.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-002634-22 On Appeal from the Final Decision of the Superior Court of New Jersey, Law Division, Civil Part, Camden County Docket Below: L-0055-22
CARMINE SODORA, PLAINTIFF/RESPONDENT, V. CITY OF HOBOKEN; JAMES J. FARINA, in his official capacity as records custodian; and EVERBRIDGE, INC.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-002634-22 On Appeal from the Final Decision of the Superior Court of New Jersey, Law Division, Civil Part, Camden County

DEFENDANTS/APPELLANTS/CROSS-RESPONDENTS.	Docket Below: L-0744-22

REPLY BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS-CROSS RESPONDENTS, THE CITY OF HOBOKEN AND JAMES J. FARINA, IN HIS OFFICIAL CAPACITY AS RECORDS CUSTODIAN

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INTRODUCTION

The issue in this matter is whether the e-mail addresses of residents who signed up to receive governmental notifications, including emergency notifications, are subject to disclosure under the Open Public Records Act ("OPRA"). Defendants-Appellants-Cross Respondents, the City of Hoboken and James J. Farina (in his official capacity as records custodian) (hereinafter referred to as "Hoboken" or the "City") have maintained that e-mail addresses in this specific situation should be subject to OPRA's privacy provision, found at N.J.S.A. 47:1A-1 and therefore are not subject to disclosure. Plaintiffs-Appellants Asian Hate Crimes Task Force and Carmine Sodora's (hereinafter referred to as "Plaintiffs") responding brief brings up red herrings but does not persuasively argue in favor of upholding the trial's court determination in this matter.

Plaintiffs' brief argues that the City did not present sufficient proof of actual harm were the e-mail addresses to be disclosed. The City did prepare and send out a survey, which was provided as an attachment to the City's moving brief, that does demonstrate the strong feelings and concerns of the citizenry and the fact that individuals did ask to be removed from the e-mail disclosure list. Da239-251. The City did provide proof that individuals will likely remove themselves from receiving potentially life-saving communications if it is

determined that their e-mail addresses then become public record and can be disseminated to any person, for any reason, without limitation. As to the rest, there is no legal requirement that the City be able to prove something that has not happened yet. The e-mail addresses have not been disclosed yet due to the ongoing legal matter and therefore the City does not have specifics on what harm would occur if the e-mail addresses were to be disclosed. However, the applicable balancing test does not require proof of harm having occurred. The test speaks to the "potential" for harm, which the City has adequately demonstrated through its submissions in this matter.

Plaintiffs also indicate that the City did not prove that there are not adequate ways for individuals to protect themselves from potential harm. Plaintiffs suggest filtering out messages, using a separate e-mail address, or receiving municipal alerts by way of text message instead. These arguments simply ignore the more serious potential for harm addressed in the City's brief, such as the disclosure of the e-mail addresses being used by hackers, who would be privy to one half of the typical information required to login to personal accounts, such as banking accounts. This also ignores the issue in this case- the e-mail addresses are issue were already provided to Everbridge/Nixle and therefore the list was already created. It is too late for individuals to use a different e-mail address or sign up for alerts by way of text instead.

Finally, Plaintiffs claim that the City cannot argue that Everbridge is not a public agency under OPRA because the specific issue was not included in the Notice of Appeal. The law cited by Plaintiffs only speaks to waiving issues that are not **briefed** on appeal. There is no law cited that an issue is waived by not delineating it specifically enough in the Notice of Appeal. Additionally, in making this argument, Plaintiffs seemingly purposely misdirect the issue and fail to respond to the main arguments addressed in the City's brief. The City's brief specifically addressed that the trial court erred in finding that the requested information was public record, partially because the trial court relied on flawed logic and reasoning in interpreting the word "authority" in the OPRA law, and that the e-mail addresses do not fit into the definition of a public record under OPRA. Those points, which were the main points on this topic, were not adequately addressed by Plaintiffs.

LEGAL ARGUMENT

III. THE TRIAL COURT ERRED IN FINDING THAT THE BALANCING TEST OUTLINED IN DOE V. PORITZ WEIGHED IN FAVOR OF DISCLOSURE (Da115)

The City relies upon its original brief in regard to the analysis of the factors outlined in Doe v. Poritz, 142 N.J. 1, 87-88 (1995). Db12-19. Therefore the City will respond only as necessary to the points addressed by Plaintiffs' brief. One of the primary themes throughout Plaintiff's brief is that the City did

not "prove" harm under the third factor of the Doe test. However, potential harm was clearly outlined in the City's submissions despite Plaintiffs' contentions. Additionally, this factor addresses the "potential" for harm and does not require proof of actual harm. Id. The City's moving brief clearly outlined the potential for harm, including citizens being spammed with unwanted communications and solicitations; citizens being unwilling to sign up for important governmental alerts because they do not want their e-mail address to become public record; and the potential for hacking given that e-mail addresses often double as the login information for various personal accounts. Db16. The City also proffered proof that citizens would be dissuaded from signing up for alerts if they knew their e-mail addresses would become public record, and that would prevent them from receiving potentially lifesaving communications. See Da239-251; Db17. Dissuading citizens from signing up for public safety alerts, such as traffic, weather, or other emergency communications clearly represents a potential harm.

Plaintiffs contend that the City only showed that there would be inconvenience and did not "prove" that there was no way to remedy the "inconvenience." Pb12. As to the possibility of remedying the potential "inconvenience", Plaintiffs suggest things such as withdrawing an e-mail address from the list; creating a separate e-mail address just to sign up for alerts;

and signing up for text alerts. Pb12. However, these suggestions all ignore the facts of this case, wherein the e-mail addresses have already been provided to Everbridge/Nixle. If Everbridge/Nixle is ordered to disclose the e-mail addresses that they have for individuals who signed up for their service, there is no way for those individuals to take their names off the list or utilize a different e-mail address or method. The City has suggested previously, and now reiterates, that even if the Court were to find in favor of Plaintiffs, the determination should be only on a going-forward basis, and that citizens should be given the opportunity to remove themselves from the list or sign up with a different e-mail address or method of delivery.

As to the sixth factor, the degree of need, Plaintiffs' brief alleges that the City did not provide a "counterbalance" to the trial court's finding that the "civic purpose" was a sufficient need. Pb15. However, the City's brief did clearly address the fact that just because Plaintiffs allege a "civic purpose" does not mean that they *need* to obtain individuals' personal information from the City by way of an OPRA request. Db18. As discussed in the City's moving brief, there is no shortage of ways for Plaintiffs to obtain contact information from citizens who voluntarily wish to sign up to receive information from them. Plaintiffs also always have the opportunity to attend public meetings to put their positions on local issues on the record. Plaintiffs certainly have not shown a

"need" for the e-mail addresses and the trial court erred in finding that a civic purpose equates to a need. Da113.

Plaintiffs also argue that the decisions of the GRC and unpublished decisions of the Appellate Division addressed in the City's moving brief should be given no weight. Pb17. Given that this is an issue without binding precedent, there is no reason for the Court to ignore persuasive authority. Db19. The Government Records Council is the public body specifically charged with the adjudication of OPRA matters. Additionally, it is nonsensical to suggest that this Court should ignore its own previous decisions on an almost identical issue in the Rise Against Hate v. Cherry Hill Township matter. Da268-269. The primary distinguishing factor between the instant matter and the Rise Against Hate matter is that in this matter, Hoboken does not even have the information in its possession. The information in this case is personal information which was provided to a third party by citizens when signing up for the service. It is not even collected, made, maintained, or kept on file by the City.

On the contrary, Plaintiffs cite other privacy elated OPRA matters, such as Bozzi v. City of Jersey, 248 N.J. 274, 287 (2021) and Brennan v. Bergen County Prosecutor's Off., 185 A.3d 202, 203 (N.J. 2018). Brennan and Bozzi are both clearly distinct from the issue at hand because they involved information contained on records related to a public endeavors, such as owning

a dog or participating in a public auction. Whereas in this instance, using an unlisted private e-mail address to sign up for passive alerts from the government is not an inherently public endeavor.

Plaintiffs also argue that in Brennan and Bozzi demonstrate that categorical exemptions should not be read into OPRA. The City does not argue that a categorical exemption should be made for all e-mail addresses, but that the e-mail addresses in this specific instance should not be subject to disclosure due to the analysis of the Doe balancing test.

II. THE INFORMATION AT ISSUE IN THIS MATTER DOES NOT QUALIFY AS A PUBLIC RECORD UNDER THE DEFINITION IN THE OPRA STATUTE (Da107)

Hoboken's moving brief argued that the requested information was not a public record and that the trial court erred on two (2) bases: 1) in finding that the OPRA statute includes entities acting under the "authority" of the State; and, (2) that the personal information being requested does not constitute a document or record under the OPRA statute. Db21. The City did not argue that a document or record maintained by a third-party on behalf of a governmental entity cannot be a public record. Plaintiffs' response ignores the nuance in the arguments made by the City, and in doing so, fails to address the actual arguments made. Specifically, Plaintiffs do not address the trial court attempting to hold that the OPRA statute includes entities acting under the "authority" of the State, rather

than its clear meaning of an authority of the state such as a redevelopment authority. Db23.

Further, the City argued that personal e-mail addresses collected by a third-party when individuals are signing up for a service do not constitute a document or record with the definition of OPRA. Rather, they are personal information collected by the third-party, private entity in order to perform their function. There is certainly a difference between a third-party creating a document or record on behalf of a public entity, and all information that that the third-party entity maintains in order to perform its functions.

Rather than address these specific arguments, Plaintiffs brief goes into an unnecessary argument regarding the fact that Hoboken did not include in its Notice of Appeal the specific issue of whether Everbridge/Nixle is a public entity subject to OPRA and that the issue is therefore waived. First, none of the legal citations provided by Plaintiffs indicate that every specific argument must be listed in the Notice of Appeal, or they are waived. Further, this argument completely misses the point and nuance of Hoboken's arguments in this regard. Simply put, there is no document or record that was "made, maintained, or kept on file" by the City of Hoboken in response to Plaintiffs' original OPRA request. Rather, there is only personal information that was provided directly to a third party in order to sign up for a service. This information was not "created" or

"prepared" on behalf of or for the City of Hoboken. This information is personal information that was only "created" by the individual person and is used as a way to sign up to passively receive local governmental alerts.

CONCLUSION

For the reasons set forth above and in the City's original brief, the trial court's orders in this matter dated May 26, 2022; July 1, 2022; and March 28, 2023, should be overturned as a matter of law.

City of Hoboken- Office of Corporation Counsel
/s/ *Alyssa L. Wells, Esq.*

Dated: March 5, 2024

FILED, Clerk of the Appellate Division, September 03, 2024, **A-002634-22**

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September 3, 2024

VIA ECOURTS
Clerk
Superior Court – Appellate Division
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

RE: Asian Hate Crimes Task Force, A Nonprofit Organization v. Voorhees Township, Voorhees Township Police Department, Dee Ober, in Official Capacity as Records Custodian, and Everbridge, Inc.

Asian Hate Crimes Task Force, A Nonprofit Organization v. Borough of Haddon Heights, and Kelly Santosusso in Official Capacity as Records Custodian

Carmine Sodora v. City of Hoboken, Michael Mastropasqua, in his Official Capacity as Records Custodian, and Everbridge, Inc. (consolidated)

Civil Action

Docket No. A-002634-22

Docket No. Below: CAM-L-000744-22

On Appeal from a Final Order of the Superior Court, Law Division
Sat Below: Hon. Deborah Silverman Katz, A.J.S.C.
<u>Our File: 41050-2</u>

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Second Reprint of S2930, As Reported by the Senate Budget And Appropriations Committee on May 9, 2024, with Amendments Pa001

Dear Honorable Judges:

In this appeal, we represent Plaintiffs-Respondents Asian Hate Crimes Task Force and Carmine Sodora ("Plaintiffs"). Pursuant to the August 13, 2024 direction of the Court, we submit this letter brief in lieu of a formal brief regarding the impact of the recent amendments to the Open Public Records Act, N.J.S.A. 47:1A-1 ("OPRA" or ("Amendments") (effective Sept. 3, 2024) that became effective today.

For these reasons set forth below, the Court should not apply the Amendments to this appeal. If the Court applies the Amendments to this appeal,

FILED, Clerk of the Appellate Division, September 03, 2024, **A-002634-22**

that application should be limited to whether the email addresses on the mailing lists should be disclosed, and no other issue in the case.

The primary reason this Court should not apply the Amendments retroactively to all complaints and pending appeals is that the March 4, 2024 version of S2930 did have language that would have made the Amendments fully retroactive, including to all filed complaints and appeals, but that language was deleted when S2930 was reported out of the Senate Budget and Appropriations Committee on May 9, 2024, and never made it into the final bill. Retroactivity in the Amendments is limited to OPRA's new requirement that all complaints, including complaints on appeal, include the requestor's full name and mailing address.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this matter have been adequately addressed by the parties in their prior briefs.

LEGAL ARGUMENT

POINT I

THE AMENDMENTS SHOULD NOT BE APPLIED RETROACTIVELY TO THIS APPEAL

We request that the Court decline to give the decision this appeal based on the law that was in effect at the time of the trial court's decision, rather than the Amendments that became effective on September 3, 2024, because the Legislature

considered but ultimately did not expressly state that the Amendments would have full pipeline retroactivity.

Effective September 3, 2024, the following language was added to the list of documents and information that are not public records under OPRA: "that portion of any document that discloses the personal identifying information of any person provided to a public agency for the sole purpose of receiving official notifications[.]" (P.L. 2024, Ch. 16; N.J.S.A. 47:1A-1.1 (effective Sept. 3, 2024). "Personal identifying information" is a defined term. (Id.). Personal identifying information"

> means information that may be used, alone or in conjunction with any other information, to identify a specific individual. Personal identifying information shall include, but shall not be limited to, the following data elements: name, social security number, credit card number, debit card number, bank account information, month and day of birth, any personal email address required by a public agency for government applications, services, or programs, personal telephone number, the street address portion of any person's primary or secondary home address, or driver license number of any person.

[Id.]

We agree that under the Amendments, the names and email addresses of persons on email notification lists that are submitted for the purpose of receiving

official notifications are exempt. However, the Amendments should not be applied retroactively to this appeal.

The "law favors prospective, rather than retroactive, application of new legislation unless a recognized exception applies." Roik v. Roik, 477 N.J. Super. 556, 573 (App. Div. 2024) (citing and quoting Ardan v. Board of Review, 444 N.J. Super. 576, 587 (App. Div. 2016).

To determine retroactivity, the Court "must apply a two-part test to determine whether a statute should be applied retroactively," id., which is: "(1) whether the Legislature intended to give the statute retroactive application; and [if so] (2) whether retroactive application will result in either an unconstitutional interference with vested rights or a manifest injustice." (Id. (citations and internal quotation marks omitted)).

The Amendments are explicitly retroactive in two limited circumstances. The Amendments state that all complaints, including complaints that are on appeal to the Appellate Division or Supreme Court, must contain a requestor's full name and mailing address. If they do not, then within 90 days after the effective date of the Amendments, the public agency may move for dismissal of the complaint with prejudice. (N.J.S.A. 47:1A-7.1(a)). Parties to any such complaints shall have leave

to amend their complaints and answers within 90 days after the effective date of the Amendments. (N.J.S.A. 47:1A-7.1(b)).

Thus, the Legislature made explicit its desire that OPRA complaints contain a requestor's full name and mailing address, and intended that this change in the law have full pipeline retroactivity, meaning that the change applies to all future complaints, all pending complaints, and all appeals. The Legislature also permitted parties to amend their complaints and answers within 90 days after the effective date of the Amendments.

However, no other provisions were made in the Amendments regarding retroactivity. The legislative history of S2930 shows that when S2930 was introduced, that version contained full pipeline retroactivity, but that language was subsequently removed and never made it into the final version of the Amendments that was passed into law.

The original version of S2930 that was introduced on March 4, 2024, Pa001 (attached hereto), which was the Senate version of the Amendments, proposed Amendments that would have retroactively applied the Amendments "to all complaints and appeals pending before the Government Records Council, the Superior Court or the Supreme Court filed prior to the effective date of [this bill]." (See S2930 at pages 31-32, located at Pa031-032 (attached to this Brief).

However, when S2930 was reported out of the Senate Budget and Appropriations Committee, that language was removed. The removal is indicated by bold brackets that surround the pipeline retroactivity language. According to the "explanation" language at the bottom of the second page of S2930, "Matter enclosed in bold-faced brackets **[thus]** in the above bill is not enacted and is intended to be omitted in the law." (Pa002 (in the footer)). Therefore, the pipeline retroactivity language contained in S2930 when it was introduced on March 4, 2024 was eliminated from S2930 when it was reported out of committee on May 9, 2024. (Pa001 (stating the "as reported" date); Pa031 to Pa032 (showing bold-faced brackets around the pipeline retroactivity language, indicating it is "to be omitted in the law")). That language never made it back into S2930, is absent from the Amendments, and never made it into the law.

Therefore, the Legislature did consider giving the Amendments full pipeline retroactivity, including to all pending appeals, but ultimately decided not to do so. Rather, the Legislature only applied a limited change – the change regarding names and mailing addresses – to all pending complaints and all complaints in the pipeline (including on appeal).

Therefore, the Legislature did not intend all of the Amendments to have full pipeline retroactivity. Rather, the Legislature intended prospective application of

the Amendments, except in the one instance where they specifically made one change in the law explicitly retroactive.

Therefore, this Court should not apply the Amendments to complaints filed before September 3, 2024 or to complaints that are on appeal (including this appeal). The Amendments should only be applied to OPRA complaints filed on or after September 3, 2024.

However, if this Court does apply the Amendments to this case, that would only restrict Plaintiffs' access to the names or email addresses of the individuals on the mailing lists under OPRA. Plaintiffs would be no less entitled to the mailing lists under the common law right of access. In addition, nothing in the Amendments implicates the Trial Court's holding that Everbridge is subject to OPRA.

FILED, Clerk of the Appellate Division, September 03, 2024, **A-002634-22**

CONCLUSION

For these reasons, the Court should not consider the Amendments in this appeal. If the Court considers the Amendments, that consideration should only be applied to whether the email addresses on the mailing lists should be disclosed, and no other issue in the case.

Respectfully submitted,

/s/ Walter M. Luers
Walter M. Luers, Esq.

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September 3, 2024

Via eCourts
Superior Court of NJ
Appellate Division
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625-0006

Re: Asian Hate Crimes Task Force v. Vorhees Township, et als.
Docket No. A-002634-22

To Whom it May Concern:

Please accept this letter brief pursuant to *R*. 2:6-2(b) in lieu of a more formal submission of a Supplemental Brief as authorized by the Court on August 13, 2024, to address new developments in the law since the initial briefing.

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PRELIMINARY STATEMENT

The primary issue presented by this appeal is whether e-mail addresses of individuals who signed up to receive local alerts from a municipality through a third-party vendor are required to be disclosed under the Open Public Records Act ("OPRA"). Since the initial briefing schedule, there have been certain developments in the law which further support the City of Hoboken's (hereinafter referred to as the "City" or "Hoboken") position that these records implicate the privacy interests of those individuals who signed up for the local ("Nixle") alerts. Specifically, the OPRA statute, N.J.S.A. 47:1A-1.1 et seq. has since been amended, with an effective date of September 3, 2024, to clarify that personal identifying information (defined to include personal e-mail addresses) is not considered public record when same was provided for the sole purpose of receiving official notifications.

Further, an unreported Appellate Division matter, with almost identical facts to the instant matter, *Rise Against Hate v. Cherry Hill Township*, A-1440-21, 2023 WL 2670720, at *1 (N.J. Super. App. Div. Mar. 29, 2023) (Da268-269) was previously pending before the Supreme Court of New Jersey. This matter was

addressed in the City's original brief. However, as of July 23, 2024, it was determined that Certification was improvidently granted, and the appeal was dismissed. Therefore, this decision is final and the City respectfully submits that although unpublished, this matter should be considered determinative given that it was issued by the same Court and involves a nearly identical factual scenario.

LEGAL ARGUMENT

1. THE DECISION IN RISE AGAINST HATE V. CHERRY HILL SHOULD BE STRONGLY CONSIDERED BY THE COURT AS DETERMINATIVE AS TO THE INSTANT MATTER

At the time of the original briefing schedule, the City included in its legal argument that the Appellate Division had previously found that members of the public who submit their email addresses to receive electronic newsletters and notices from a municipality have an objectively reasonable expectation that their e-mail addresses will not be disclosed to a non-government organization that intends to send unsolicited emails to them to further the organization's political and social objectives. *See Rise Against Hate v. Cherry Hill Township*, A-1440-21, 2023 WL 2670720, at *1 (N.J. Super. App. Div. Mar. 29, 2023) (Da 268-269). The *Rise Against Hate* matter is almost identical in fact to the instant matter, except that the municipalities in that case did maintain the e-mail addresses and therefore did have a responsive document or record. This is compared to the instant matter, where the e-mail addresses are maintained by a third-party whose policy is to not share said

information with the municipality. Therefore, the facts in the instant matter are more persuasive because the City does not even maintain the requested information.

In July of 2023, the *Rise Against Hate* matter was granted Certification by the Supreme Court. However, following oral argument, on July 24, 2024, the Supreme Court determined that Certification had been improvidently granted and dismissed the appeal, leaving the Appellate Division's ruling the final determination in this matter. *Hate v. Cherry Hill Twp*., 2024 N.J. LEXIS 776, at *1 (July 23, 2024). Therefore, the City respectfully submits that the *Rise Against Hate* matter should be considered determinative in this matter in order to maintain consistency.

III. NEW AMENDMENTS TO THE OPRA STATUTE HAVE CLARIFIED THAT THE DOCUMENTS/RECORDS AT ISSUE ARE PRIVATE AND SHOULD NOT BE DISCLOSED

On June 5, 2024, a series of amendments were enacted to the OPRA statute (2024 N.J. S.N. 2930). Among those changes were amendments which specifically clarify the law as it relates to the issues in this case, which became effective September 3, 2024, as follows:

> A government record shall not include the following information which is deemed to be confidential for the purposes of P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented… that portion of any document that discloses the personal identifying information of any person provided to a public agency for the sole purpose of receiving official notifications (N.J.S.A. 47:1A-1.1)
>
> Further, Personal Identifying Information was defined as:

> …means information that may be used, alone or in conjunction with any other information, to identify a specific individual. Personal identifying information shall include, but shall not be limited to, the following data elements: name, social security number, credit card number, debit card number, bank account information, month and day of birth, **any personal email address required by a public agency for government applications, services, or programs**, personal telephone number, the street address portion of any person's primary or secondary home address, or driver license number of any person. (N.J.S.A. 47:1A-1.1, emphasis added)

Therefore, the legislature has now clarified the OPRA law as it relates to the specific issues in this matter. The OPRA statute was previously silent on these issues, however, the City argued strongly that the requested e-mail addresses were subject to OPRA's privacy provision. The new amendments now clarify and confirm the City's arguments that the personal e-mail addresses of residents provided to the municipality to apply for services or programs, such as municipal alerts, are not public records.

CONCLUSION

The City of Hoboken respectfully submits that new developments in the law, including to the OPRA statute itself and a finalization of a factually similar matter heard by the Appellate Division confirm that the requested documents and/or records in this matter (the e-mail addresses of those who signed up for local alerts) should not be considered public records. The City respectfully requests that its appeal be

granted and the determination of the trial court in ordering the disclosure of the requested information and assessing fees against the City be vacated.

Respectfully submitted,

The City of Hoboken

By: *s/Alyssa L. Wells*
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