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THE APPROVAL OF THE COMMITTEE ON OPINIONS

CARIN GEIGER

Plaintiffs,

v.

BOROUGH OF ENGLEWOOD
CLIFFS

and LISETTE M DUFFY in her official
capacity as Records Custodian for the
Borough of Englewood Cliffs,

Defendant.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: BERGEN COUNTY

DOCKET No. BER-L-7240-17

CIVIL ACTION

DECISION

Argued: January 18, 2018

Decided: January 19, 2018

Honorable Robert P. Contillo, P.J.Ch.

Walter M. Luers, Jr., Esq. appearing on behalf of the plaintiff, Carin Geiger (Law Offices of Walter M. Luers, LLC).

Ronald P. Mondello, Esq. appearing on behalf of the defendant, Borough of Englewood Cliffs and Lisette M. Duffy. (Ronald P. Mondello, P.C.).

OPINION

Introduction

On October 24, 2017, Carin Geiger (“Plaintiff”), filed a Verified Complaint and Order to Show Cause against the Borough of Englewood Cliffs (“Borough”) and Lisette M. Duffy (the “Borough Clerk”) in her official capacity as Records Custodian for the Borough of Englewood Cliffs (“Defendants” when referred to collectively) alleging violations of N.J.S.A. 47:1A-1 (“OPRA”) and the common law right to access to public records. The Defendants filed in opposition on December 22, 2017. Plaintiff filed a reply on January 5, 2018. The matter was argued on January 18, 2018, and the Court reserved decision.

Plaintiff seeks to compel the production of an email written by Mayor Mario Kranjac (“Mayor Kranjac”) to the NorthJersey.com/Bergen Record/S. Janonski regarding a report written by the Hon. Robert Guida (ret.) pertaining to Lieutenant Scott Mura, (“Lt. Mura”), or any other issue relating to the Borough of Englewood Cliffs between August 1, 2017, and August 16, 2017.

Facts and Posture

On August 11, 2017, northjersey.com, a division of the Bergen Record and USA Today published an article by Steven Janoski concerning an article about the Borough Council's decision to dismiss the charges against Lt. Mura, in contrast to the recommendation of the hearing officer, retired Judge Robert Guida. The story contained quotes from an email by Borough Mayor Mario Kranjac (“Mayor Kranjac”) stating “[u]nlike the chief and his political supporters, I will not convict or discipline... anyone unless the evidence and process are clear and pure in all respects – which clearly was not the case in the tainted Mura matter,” Steve Janoski, Report: Englewood Cliffs Officer

Should Have Been Disciplined, Northjersey.com, Aug. 11, 2017, <http://www.northjersey.com/story/news/bergen/englewood-cliffs/2017/08/11/report-englewood-cliffs-officer-should-have-been-disciplined/561315001/>. Mayor Kranjac further stated the Englewood Cliffs police department “went on a witch hunt of their own[.]” *Id.* Plaintiff asserts that the email was sent from Mayor Kranjac’s official email address.

On August 16, 2017, Plaintiff made an OPRA/common law request seeking: “Email or other correspondence from Mario Kranjac to NorthJersey.com/Bergen Record/ S. Janonski regarding Guida reports on Lt. Mura or any other issue relating to the Borough of Englewood Cliffs between August 1 and August 16, 2017.” On August 18, 2017, Defendants response to the request did not include the requested email. Plaintiff was informed the response would be provided by August 29, 2017. On August 29, 2017, Plaintiff again requested the email. The Borough Clerk sought an extension for the request until September 5, 2017, to allow for the Borough Attorney’s review of the request. On September 5, 2017, the Borough Clerk stated the Borough Attorney had given no response.

On September 26, 2017, Plaintiff’s request was denied. The Borough Clerk stated “[t]he email by Mayor Kranjac to the newspaper was written in his individual political capacity and not part of his official mayoral or Borough duties.”

Plaintiff’s Argument

On October 24, 2017, Plaintiff filed a letter brief in setting forth three arguments support of her Verified Complaint.

Argument One- Matter Should Proceed Summarily

Plaintiff asserts that once a party who has been denied access to a government records by the custodian of records files an action in Superior Court, “any such proceeding shall proceed under the procedures in Rule 4:67.” Currier News v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 373, 378 (App. Div. 2003). In this matter OPRA allows actions to proceed summarily and should be granted and proceed under R. 4:67-2(a).

Argument Two- Email from Mayor to The Record is a Public Record

Plaintiff argues that Mayor Kranjac is, by virtue of his position as a duly elected member of the Borough of Englewood Cliffs, an officer of the Borough. His communication was an email to the Bergen Record concerning the official business of the Borough and the document is stored on the Borough’s server thus making the document a government record subject to disclosure under OPRA and the common law.

Plaintiff argues the Borough’s denial of her request was improper. Mayor Kranjac’s email concerned matters within his official duties as a member of the Borough Council. The matters concerned official business of the Borough, specifically the council’s powers as the disciplinary hearing board for the Borough’s police department.

Next, Plaintiff argues that should the Borough claim executive privilege, such an argument should fail. In Wilson v Brown, 404- N.J. Super 577 (App. Div. 2009), the court found executive privilege derives from the New Jersey Constitution’s goal of creating a strong executive.

The mayoral position in the Borough is not a strong executive. The General Ordinances of Englewood Cliffs § 2-4 provides, the mayor may only vote when there is a tie among council members, and the city council may appoint any city official over the

mayor's objections. Plaintiff contends this set of officers are precluded from a constitutional invocation of the privilege. Argument Three- Common Law Right of Access

Plaintiff asserts that in the event the Court denies access to the requested record under OPRA, access should be granted under the common law right of access. Common law public records "include almost every document recorded, generated, or produced by public officials whether or not 'required by law to be made, maintained or kept on file.'" Shuttleworth v. City of Camden, 258 N.J. Super. 573, 582 (App. Div. 1992).

When Plaintiff's interest in disclosure is balanced against the Borough's interest in confidentiality, Plaintiff interest prevails and the document should be released.

Defendant's Opposition

On December 22, 2017, Defendants filed their opposition. Three arguments are set forth therein as to why the requested documents were properly withheld were set forth therein.

Argument One- Non-disclosure was proper due to the "Shield Law"

"Shield Law", N.J.S.A. 2A:84A-21, provides:

Subject to Rule 37, a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.

a. The source, author, means, agency or person from or through whom any information was procured, obtained,

supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and

b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated.

N.J.S.A. § 2A:84A-21.

The Borough argues the Shield Law protects confidential sources, the editorial process, notes, memoranda, editorial comments and other similar information. Additionally, the Borough argues the law protects sources such as employees and officials of the Borough because “[a] reporter or editor, aware that his thoughts might have to be justified in a court of law, would often be discouraged and dissuaded from creative verbal testing, probing, and discussion of hypotheses and alternatives which are the sine qua non of responsible journalism.” Herbert v. Lando, 441 U.S. 153, 193 (1979) (quoting Herbert v. Lando, 568 F.2d 974, 993-94 (2d. Cir. 1999) (Oakes, J. concurring).

The Borough contends that the statutory evidentiary privilege limits the common law right to compel testimony, and that the request in-and-of-itself is a request to compel the “testimony” of the reporter Steve Janoski, which therefore allows the Shield Law to extend to public officials/ employees of a public entity speaking to, or corresponding with a reporter.

The Borough asserts that Steve Janoski’s publication of Mayor Kranjac’s emails was not a waiver of the Shield Law privilege. If the Court determines the email should be disclosed, redactions of portions of the email not published should be redacted. Moreover, Plaintiff argues the document is available from another source, Steve Janoski.

Argument Two- OPRA Prevents Disclosure of Records Sought

The Borough asserts Mayor Kranjac's email to the reporter is not a government document. The mayor has specific authority to break a tie among council members, to make appointments with advice and consent of the council, and to veto ordinances. That form of government is considered a "weak" Mayor form of government. The Borough's form of government does not authorize Mayor Kranjac to speak on behalf of the council, or the governing body in general. As such, Mayor Kranjac's email to the reporter is characterized as being his own opinion, not an official government document subject to OPRA disclosure.

Next, the Borough argues, that if the Court finds Mayor Kranjac's email was maintained or kept on file in the course of his official business as mayor, the email falls within the executive privilege, or "official information" privilege within N.J.S.A. 47:1A-9b and remains exempt from disclosure.

The Borough maintains that although in the Borough of Englewood Cliffs form of government, the mayor is "weak", executive privilege, which was recognized by our Supreme Court in Nero v Hyland, 76 N.J. 213, 225 (1978), may be invoked. Despite admission the Borough's form of government does not provide for a strong executive, Defendants argue the position maintains strong executive functions because the Mayor has all those powers designated by general law, presides over all meetings, approves or disapproves the ordinances created by the council, nominates all subordinate officers of the borough, enforces all of the laws of the State and municipal ordinances, maintains peace and good order, and has the power to suppress all riots and tumultuous assemblies in the borough.

The Borough argues the United States Supreme Court in United States v. Nixon, 418 U.S. 683, 708 (1974), held a “presumptive privilege” attached to executive communications, which could be overcome by a focused demonstration of need, which Plaintiff has not demonstrated.

Further, the Borough asserts on balance of the “Doe Factors”, Plaintiff should not be granted access to the record sought. The “Doe Factors” set forth in Burnett v. County of Bergen, 198 N.J. 408, 427 (2009), balances OPRA’s interests in privacy and access to government records. Addressing each factor the Borough explains: 1) the record request is an email by Mayor Kranjac to a reporter stating his personal belief, which deserves a high degree of protection because it deals with thoughts and feelings revealed to a reporter who may have been instructed to keep certain things confidential; 2) the information contains Mayor Kranjac’s personal opinion about an investigation, which the article summarized; 3) the potential for harm in any subsequent nonconsensual disclosure is Mayor Kranjac’s political foes using the information to gain an unfair advantage or spread negativity about him; 4) disclosure of the record sought could damage Mayor Kranjac’s relationship with the reporter; 5) there are no safeguards to prevent unauthorized disclosure because Plaintiff will use the information as she sees fit; 6) the degree of need for access is low because Mayor Kranjac’s shared his thoughts and feelings in a personal capacity not in his public capacity.

Argument Three- Common Law Right of Access

The Borough maintains the documents sought are not subject to disclosure under the common law. Personal emails are not required to be kept by law, nor is Mayor Kranjac authorized to speak on behalf of the governing body. The Borough asserts that

the communication is not a writing just because it is on a computer. Further, Defendants argue Plaintiff as not established an interest in the document, and production of the document would not further a public interest as required by the common law.

Certification of Lisette M. Duffy

On December 22, 2017, Borough Clerk Lisette M. Duffy submitted a certification. Therein, she asserts that upon receiving Plaintiff's OPRA request, she inquired of Mayor Kranjac as to whether a response to the OPRA request would be forthcoming on August 24, 2017. On September 6, 2017, the Borough Clerk emailed the Borough Attorney with the subject line "Past Due OPRA Request" seeking a response to the above OPRA request. On September 11, 2017, she emailed the Borough Administrator indicating that she was awaiting a response to the OPRA request from the Borough Attorney.

The Borough Clerk states that on September 26, 2017, upon the advice of counsel, she was instructed to respond to Plaintiff's OPRA request as follows: "The email by Mario Kranjac to the newspaper was written in his individual political capacity and is not part of mayoral or Borough duties." The Borough Clerk's full response to Plaintiff stated:

Pursuant to your original OPRA submitted to us on August 16, requesting the Mayor's email and or correspondence to NorthJersey.com/Bergen Record/S. Janoski is denied.
Please note the following:
The email by Mario Kranjac to the newspaper was written in his individual political capacity and is not part of mayoral or Borough duties.

Plaintiff's Reply

On January 5, 2017, Plaintiff filed her reply to Defendant's opposition. Therein, Plaintiff makes four arguments.

Argument One- The Shield Law Cannot be Invoked by Defendant

Plaintiff argues that neither Mayor Kranjac nor the Borough is "a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing, or dissemination new for the general public," N.J.S.A. 2A:84A-21, and they do not work for someone who does. Further, a government record does not become exempt from disclosure because of transmission to a newsperson.

Plaintiff asserts the privilege only belongs to a newsperson, not to the source. Defendant did not cite a case wherein the Shield Law was applied to OPRA, or permit a source to assert the Shield Law privilege.

Argument Two- Email Constitutes Official Business of Mayor

Plaintiff contends Defendant's provided no evidence that Mayor Kranjac's email was not sent in his official capacity. It is the agency "seeking to restrict the public's right of access to government records [to] produce specific reliable evidence sufficient to meet a statutory recognized basis for confidentiality." Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003).

Plaintiff notes Mayor Kranjac was quoted in the article in his capacity as Mayor of the Borough of Englewood Cliffs, not as a private citizen. Therein Mayor Kranjac was quoted as saying: "Unlike the chief and his political supporters, I will not convict or discipline..." thus discussing his view of the matter involving the Council's determination not to proceed further with respect to the allegations regarding Lt. Mura.

Argument Three- Executive Privilege Does Not Apply

Plaintiff argues executive privilege applies to sensitive decisional and consultative responsibilities of an executive, which aid in their decision to fulfill their official obligations. Here, there is no evidence that the email by Mayor Kranjac was anything other than a comment on the record for publication rather than soliciting feedback, or advice on a sensitive issue. The reporter was not involved in any decision making.

Argument Four- Defendant's Remain Arguments are Unpersuasive

Plaintiff argues the email should not be afforded a high degree of protection. Mayor Kranjac's email was on the record and thus is ineligible to invoke a reasonable expectation of privacy. Defendants did not state what specific harm disclosure would provide to the Mayor or the Borough.

With respect to common law right of access, the facts asserted by Defendant's opposition are not in any certification. Defendants have not stated any interest in non-disclosure. The Borough Clerk's certification merely stated that her actions were based on the instruction of counsel. Any claim of non-disclosure is not supported by any evidence.

Law

A. OPRA

a. Generally

The purpose of OPRA, N.J.S.A. 47:1A-1 to -13, is plainly set forth in the statute: "to insure that government records, unless exempted, are readily accessible to citizens of New Jersey for the protection of the public interest." Mason v. City of Hoboken, 196 N.J. 51, 57 (2008) (citing N.J.S.A. 47:1A-1). The Act replaced the former Right to Know

Law, N.J.S.A. 47:1A-1 to -4 (repealed 2002), and perpetuates “the State’s long-standing public policy favoring ready access to most public records.” Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 36 (App. Div. 2005) (quoting Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003)). To accomplish that objective, OPRA establishes a comprehensive framework for access to public records. Mason, supra, 196 N.J. at 57. Specifically, the statute requires, among other things, prompt disclosure of records and provides different procedures to challenge a custodian’s decision denying access. Ibid.

OPRA mandates “all government records shall be subject to public access unless exempt.” N.J.S.A. 47:1A-1. Therefore, records must be covered by a specific exclusion to prevent disclosure. Ibid. The Act defines “government record” as follows:

[A]ny 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.

[N.J.S.A. 47:1A-1.1.]

The OPRA framework contemplates a swift timeline for disclosure of government records. Mason, supra, 196 N.J. at 57. Unless a shorter time period is prescribed by statute, regulation or executive order, a records custodian must grant or deny access to a government record “as soon as possible, but not later than seven business days after

receiving the request.” N.J.S.A. 47:1A-5(i). Failure to respond within seven business days “shall be deemed a denial of the request.” Ibid. If the record is in storage or archived, the custodian must report that information within seven business days and advise when the record will be made available. Ibid. Courts have repeatedly found that providing redacted documents is also a denial and each redaction must have an exemption. See e.g., Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 148 (App. Div. 2011) (holding the redacted portions of the records must be disclosed as they did not meet the trade secret exemption).

If access to a government record is denied by the custodian, the requestor may challenge that decision by filing an action in Superior Court or a complaint with the Government Records Council (“GRC”). N.J.S.A. 47:1A-6. If the requestor elects to file an action in Superior Court, the application must be brought within forty-five days of the denial. See Mason, supra, 196 N.J. at 70 (holding, explicitly, a 45-day statute of limitations applies to OPRA actions). The Act, however, specifically provides “a decision of the [GRC] shall not have value as precedent for any case initiated in Superior Court,” N.J.S.A. 47:1A-7, though such decisions are normally considered unless “arbitrary, capricious or unreasonable, or [violative of] legislative policies expressed or implied in the act governing the agency.” Serrano, supra, 358 N.J. Super. at 362 (citing Campbell v. Dep’t of Civil Service, 39 N.J. 556, 562 (1963)).

In OPRA actions, the public agency bears the burden of proving the denial of access is authorized by law. N.J.S.A. 47:1A-6. As such, an agency “seeking to restrict the public’s right of access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality.” Courier News v.

Hunterdon Cnty. Prosecutor's Office, 358 N.J. Super. 373, 382–83 (App. Div. 2003). Absent the necessary proofs, “a citizen’s right of access is unfettered.” Ibid. In assessing the sufficiency of the proofs submitted by the agency in support of its claim for nondisclosure, “a court must be guided by the overarching public policy in favor of a citizen’s right of access.” Ibid. If it is determined access has been improperly denied, such access shall be granted, and a prevailing party shall be entitled to a reasonable attorney’s fee. N.J.S.A. 47:1A-6.

b. OPRA Exemptions

Although OPRA defines “government record” broadly, the public’s right of access is not absolute. Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 284 (2009) (citing Mason, supra, 196 N.J. at 65). The statute excludes twenty-one categories of information, which are exempt from disclosure. Mason, supra, 196 N.J. at 65. Specifically, N.J.S.A. 47:1A-1 provides:

[A]ll government records shall be subject to public access unless exempt from such access by: [other provisions of OPRA]; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order.

Our Supreme Court also noted, “records within the attorney-client privilege or any executive or legislative privilege, as well as items exempted from disclosure by any statute, legislative resolution, executive order, or court rule”, are excluded. O’Boyle v. Borough of Longport, 218 N.J. 168, 176 (2014); see N.J.S.A. 47:1A-9a (mandating OPRA “shall not abrogate any exemption of a public record or government record from public access . . . [by] any other statute . . . [or] Executive Order of the Governor”).

As such, a records custodian may rightfully deny a request if the record belongs to one of the enumerated categories of exemptions or was created by another statute or Executive Order, which “significantly reduces the universe of publicly-accessible information. As the Legislature acknowledged in N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-8, the only countervailing relief mechanism for those seeking access to a statutorily excluded document is the common law right of access.” Bergen Cnty. Imp. Auth. v. N. Jersey Media Grp., Inc., 370 N.J. Super. 504, 516–17 (App. Div. 2004), certif. denied, 182 N.J. 143 (2004).

i. Executive Privilege

Government Records subject to Executive Privilege are exempt from disclosure. In Wilson v. Brown, 404 N.J. Super. 557 (App. Div. 2009), the court, citing United States v. Nixon, 418 U.S. 683, 708 (1974), stated: “[t]he [Supreme] Court recognized a ‘presumptive privilege for Presidential communications’ that was ‘rooted in the separation of powers under the Constitution.’” Id. at 573.

“A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications.” United States v. Nixon, 418 U.S. 683 at 708. Our Supreme Court has acknowledged the Governor of New Jersey is afforded executive privilege.

The Court held that the privilege, in the context of New Jersey's governmental structure, “further[s] a primary objective of the 1947 Constitutional Convention, namely, the creation of a strong executive.” (*Internal citation omitted.*) “[T]he Governor, as chief executive, must be accorded a qualified power to protect the confidentiality of

communications pertaining to the executive function." (*Internal citation omitted.*) "Confidentiality is vital not only because it serves to protect government sources of information ... but also because it enhances the effectiveness of investigative techniques and procedures." (*Internal citation omitted.*) "More importantly ... executive privilege protects and insulates the sensitive decisional and consultative responsibilities of the Governor which can only be discharged freely and effectively under a mantle of privacy and security." (*Internal citation omitted.*)

Wilson v. Brown, 404 N.J. Super. 557, 572 (App. Div. 2009) (citing Nero v. Hyland, 76 N.J. 213 (1978.))

"[E]xecutive privilege extends to a variety of communications between the chief executive and third parties and that the information exchanged need not be in the nature of formal advice to garner the protection afforded by the privilege." Wilson v. Brown, 404 N.J. Super. 557 at 576. "A broad executive communications privilege applies to documents in their entirety, covering 'final and post-decisional materials as well as pre-deliberative ones.'" Id. (citing In Re Sealed Case, 121 F.3d 729, 745 (D.C. Cir. 1997.)) "Therefore, it is essential that the Governor have available a broad range of information and the ability to obtain solicited and unsolicited advice. Indeed, the Court [in Nero v. Hyland,] held that the executive privilege 'insulates the sensitive decisional and consultative responsibilities of the Governor..." Wilson, supra, 404 N.J. at 577 (citing Nero, supra, 76 N.J. at 225-26.)

Enforcement of executive privilege may be overcome by a showing of need.

B. Shield Law

N.J.S.A. 2A:84A-21 (the "Shield Law") anachronistically titled the "Newspaperman's Privilege" in pertinent part provides:

Subject to [N.J.R.E. 530], a person engaged on, engaged in, connected with, or employed by news media for the

purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.

a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and

b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated.

N.J.S.A. 2A:84A-21.

The Shield Law flows from the right to free expression and freedom of the press. The statute promotes and protects the ability of newsmen to gather and communicate information to the public.

C. New Jersey Common Law

In addition to OPRA, disclosure can be sought under the common law. The Act provides “[n]othing contained in [OPRA] shall be construed as limiting the common law right of access to a government record.” N.J.S.A. 47:1A-8. Thus, even if the information requested falls within one of the exceptions to access under the statutory construct of OPRA, requestors may still prevail by resorting to the common law right to access public records. To constitute a government record under the common law, the item must be:

[O]ne required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are * * * that it be a written memorial, that

it be made by a public officer, and that the officer be authorized by law to make it.

[S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 487–88 (1991) (quoting Nero v. Hyland, 76 N.J. 213, 222 (1978)).]

To reach this broader class of documents, requestors must satisfy a higher burden 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.” Mason, supra, 196 N.J. at 67–68 (quoting Keddie v. Rutgers, 148 N.J. 36, 50 (1997)) (internal quotations and citations omitted). The Supreme Court has articulated several factors for a court to consider in performing its balancing:

(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.

[S. Jersey Pub., supra, 124 N.J. at 488 (quoting Loigman v. Kimmelman, 102 N.J. 98, 113 (1986)).]

Legal Analysis

Government Record

Defendant argues the email sought by Plaintiff does not constitute a government record. The Borough Clerk's denial of Plaintiff's request stated the email "... to the newspaper was written in [Mayor Kranjac's] individual political capacity and is not part of mayoral or Borough duties." Our Supreme Court has ruled that:

Despite the expansive definition of government record, not all documents prepared by public employees are considered government records pursuant to OPRA. (*Internal citation omitted*). For example, a board of education secretary's informal, handwritten notes taken during a board meeting to assist her preparation of formal minutes of the board meeting are not subject to public access pursuant to OPRA.

O'Boyle v. Borough of Longport, 218 N.J. 168, 184 (2014).

An agency "seeking to restrict the public's right to access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality." Currier News v Hunterdon County Prosecutor's Office, 358 N.J.Super. 373, 382-83 (App. Div. 2003).

It is not disputed that the email was sent by Mayor Kranjac from Mayor Kranjac's government email account. The email pertained to government business. It concerned the Lt. Mura's disciplinary matter. Those facts alone establish the email is a government

record. Defendants have not offered any evidence to suggest Mayor Kranjac's email meets a statutorily recognized basis for confidentiality, in whole or in part.

The subject matter of the article was a report of a disciplinary officer hired by the borough, which concluded that six (6) of nine (9) administrative charges brought against borough police Lt. Scott Mura should have resulted in municipal punishment. The dismissal of the charges was defended by Mayor Kranjac in the article. The article in part provides as follows:

The council dismissed the administrative charges because the Englewood Cliffs police department "went on a witch hunt of one of their own" rather than address the issue Mura had raised – namely, that of ticket fixing, Mayor Mario Kranjac wrote in an email on Friday. Other allegations against Mura lacked proof, Kranjac wrote.

"Unlike the chief and his political supporters, I will not convict or discipline... anyone unless the evidence and process are clear and pure in all respects - which clearly was not the case in the tainted Mura matter," Kranjac wrote.

Kranjac also wrote Guida was not provided with a recording of a phone call in which Cioffi ordered the ticket in question to be voided.

It is noted that Mayor Kranjac was quoted in the newspaper article as the Mayor of the Borough of Englewood Cliffs, not as an individual citizen. Mayor Kranjac's value to the article was his elected position within the Borough. Whether or not Mayor Kranjac is specifically authorized to speak on behalf of the Borough or the Council is immaterial. The Mayor is authorized to speak on behalf of the Mayor, and did so, to a reporter, via an email sent by the Mayor from his municipal email account, not his personal account, regarding official town business. That Englewood Cliffs has a "weak" mayor form of government is irrelevant. The fact that there is a political dispute over this issue of

official town business does not transform this public record into something else. The email sent concerned official business and qualifies as a government document.

Executive Privilege

Defendants next argue that if the email constitutes a government record, the email should not be released as Executive Privilege should apply.

“[E]xecutive privilege extends to a variety of communications between the chief executive and third parties and that the information exchanged need not be in the nature of formal advice to garner the protection afforded by the privilege.” Wilson v. Brown, 404 N.J. Super. 557 at 576. “A broad executive communications privilege applies to documents in their entirety, covering ‘final and post-decisional materials as well as pre-deliberative ones.’” Id. (citing In Re Sealed Case, 121 F.3d 729, 745 (D.C. Cir. 1997.))

The purpose of the Executive privilege is to allow an executive the freedom to make the most informed decisions possible relating to their constitutional, or statutory duties. “A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.” United States v. Nixon, *supra*, at 708.

Here, it is not asserted that the email soliciting formal or informal advice. Mayor Kranjac was commenting on actions taken by the Borough Council. His comments defended those actions and explained why he as Mayor agreed with said actions. Such comments cannot be cloaked under the umbrella of executive privilege, nor can they be categorized as exploring possibilities that would shape municipal policies.

As such, the email cannot be granted Executive Privilege.

Shield Law

Alternatively, Defendant argues the Shield Law prevents the disclosure. The Shield Law flows from the right to free expression and freedom of the press. The statute promotes and protects the ability of newsmen to gather and communicate information to the public.

The Court finds this argument to be inapplicable and misplaced. In the second sentence of Too Much Media, LLC v Hale, 206 N.J. 209 (2011), which Defendant sets forth as the seminal case on the Shield Law, Chief Justice Stuart Rabner described the Shield Law as “a statute that allows news reporters to protect the confidentiality of sources and news or information gathered during the course of their work.” Too Much Media, LLC v. Hale, 206 N.J. 209, 216 (2011). The Court went on to say, “New Jersey’s Shield Law provides broad protection to the **news media** (emphasis added) and is not limited to traditional news outlets like newspapers and magazines. Id. “[T]he **privilege belongs to the newsmen, not the source.** (Emphasis added). It is designed to protect the newsgathering process, not the source’s expectations.” Id. at 239.

Defendant does not have the authority to assert the Shield Law. Neither Mayor Kranjac nor the Defendants are a “person engaged on, engaged in, connected with, or employed by the new media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public,” nor do they work for someone who does. Mayor Kranjac was a quoted source in the August 11, 2017, article. Plaintiff is not, and need not seek a copy of the email from the reporter. She is requesting it from Mayor Kranjac, who was the author. As such, the Shield Law privilege does not apply to him and is not available to Defendants.

The Court must therefore reject the asserted applicability of the Shield Law.

No further analysis is required to establish that the email is a public record not privileged from disclosure under OPRA. The requested document must be turned over within twenty (20) day of this judgment.

Plaintiff is the prevailing party under OPRA and is therefore entitled to an award of reasonable attorney fees and costs. If the parties are unable to resolve the quantum, Plaintiff should submit an application to the court within ten (10) days, to which Defendants may respond within twenty (20) days of receipt.

An Order is accompanied to this decision.

ROBERT P. CONTILLO, P.J.CH.