SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2647-20

ASSOCIATION FOR GOVERNMENTAL RESPONSIBILITY, ETHICS AND TRANSPARENCY, and TARA KUMOR,

Plaintiffs-Appellants,

v.

STATE OF NEW JERSEY, OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF LAW, OCTAVIA BAKER, and VALENTINA M. DIPIPPO, Deputy Attorney General, as Custodian of Records,

Defendants-Respondents.

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Submitted November 30, 2022 – Decided February 1, 2023

Before Judges Vernoia and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1355-20.

Law Office of Donald F. Burke, attorneys for appellants (Donald F. Burke and Donald F. Burke, Jr., on the brief).

Matthew J. Platkin, Attorney General, attorney for respondents (Melissa H. Raksa, Assistant Attorney General, of counsel; Sara M. Gregory, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiffs Association for Governmental Responsibility, Ethics and Transparency (AGREAT) and Tara Kumor appeal from an order denying their Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, requests for documents maintained by defendant State of New Jersey Office of the Attorney General (OAG), Department of Law and Public Safety, Division of Law (DOL) (collectively referred to as defendant)[1] relating to its former temporary employee Kumor. AGREAT submitted an OPRA request seeking records related to Kumor, who previously filed a wrongful termination, New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to -50, and retaliation complaint against defendant and other defendants, which was pending when the OPRA matter was filed.

[1] Defendants Octavia Baker and Valentina M. DiPippo are referred to in their individual capacities in this opinion.

Former Assignment Judge Mary C. Jacobson concluded the records are exempt under OPRA as personnel records, N.J.S.A. 47:1A-10, and that they contain advisory, consultative, deliberative, or attorney-client communications under N.J.S.A. 47:1A-1.1. The judge also found plaintiffs did not establish common law right of access to the documents and dismissed their complaint with prejudice. We affirm.

I.

On August 31, 2015, Kumor was assigned by ACRO Service Corporation (ACRO), a temporary staffing agency, to work for defendant as a temporary legal secretary. Starting in February 2016, Kumor contends her co-workers, Diane Davis and Terisa Miller, harassed her due to mental health issues she was experiencing. Specifically, Kumor claimed Miller called her "crazy" and "yell[ed] at [her] in a very hostile and intimidating manner." After Kumor reported this conduct to three of her supervisors, one of the supervisors, Lena Riccitiello, held a meeting to address the situation. Kumor, Riccitiello, Davis, and Miller attended the meeting. Kumor alleged Miller called her "crazy" again at the meeting, and Kumor left in tears. Riccitiello reported the incident, and an investigation was initiated.

On March 4, 2016, Kumor asked ACRO about receiving temporary disability benefits in light of her mental health issues. From March 5 to March 11, 2016, Kumor was admitted to Capital Health of New Jersey for a mental health evaluation and treatment. On March 14, Kumor returned to work and advised four of defendant's employees, including Riccitiello, that she was taking new medication. Kumor requested an accommodation to modify her work schedule—starting at 9:30 a.m. instead of 9:00 a.m. and staying until 5:30 p.m. instead of 5:00 p.m.—so she could adjust to her new medication. That same day, Kumor filed an Equal Employment Opportunity (EEO) complaint against defendant regarding "her unlawful and discriminatory treatment." Two days later, Kumor again requested defendant provide her with an accommodation, but defendant denied her accommodation request.

On March 21, Kumor and ten other employees were required by defendant to attend a mandatory "Managing Stress in the Workplace" seminar. On the same day, Kumor learned she may have been inactivated from ACRO's timekeeping system seventeen days earlier. After Kumor sent an email to an ACRO employee asking why she was terminated by ACRO, the employee stated she was told Kumor's last day was March 4 because she was receiving medical

care. However, the ACRO employee acknowledged she was working on resolving the issue in the system.

Kumor also emailed Linda Munter in defendant's Human Resources Department (HR), and the Americans with Disabilities Act (ADA) coordinator, Mary Jane Chiacchio, explaining that she was terminated by ACRO while hospitalized, and she requested to work at a different agency within defendant's organization. Then, Kumor received an email from Riccitiello, confirming that HR advised Kumor she was to work thirty-five hours per week, 9:00 a.m. to 5:00 p.m., with a one-hour lunch break. In response, Kumor sent an email to defendant's EEO investigator, Joseph Carbone, complaining that her ACRO "contract was terminated" and defendant was "scrambling to get it back in order."

The next day, Kumor sent another email to the Munter, Chiacchio, and Carbone, stating she "will just show up and do [her] best as [her] agency ACRO has advised [her] to do." Nevertheless, defendant's Deputy HR Director Ann Sczerbowicz shortly thereafter emailed Kumor "not [to] report to . . . [work] tomorrow." On March 23, Sczerbowicz emailed Carbone inquiring about the status of Kumor's EEO complaint and ADA accommodation request but noted Kumor's "future at [defendant] appears to be cloudy."

On March 29, ACRO requested Kumor provide a doctor's note stating that she is fit for work with or without a reasonable accommodation. Kumor complied with ACRO's request. The next day, Staci Dodson, the HR Director at ACRO, emailed Carbone and Sczerbowicz asking when Kumor "should report back and to whom she should report." Dodson sent subsequent emails checking the status of Kumor's potential return. On April 6, Sczerbowicz emailed Dodson stating defendant "do[es] not have a need for [Kumor]."

In April 2016, another unidentified employment staffing company requested Kumor apply for a paralegal position with the State. However, the State declined her application. Meanwhile, Carbone was conducting the investigation regarding Kumor's internal EEO complaint. On November 23, 2016, defendant's EEO Director issued a final determination letter, concluding that Kumor's contract "was terminated because of problems with her performance[,] and[] therefore, [the Commission] would not open a formal EEO investigation of her complaint."

In June 2017, Kumor filed her Law Division employment discrimination complaint against ACRO, defendant, and other defendants.[2] During the discovery period in that case, Kumor requested records, including sign-in sheets

[2] Docket number MER-L-1331-17.

for employee workshops, and emails exchanged between defendant and ACRO. In March 2019, defendant moved for a protective order under Rule 4:10-3 and submitted a privilege log in response to Kumor's requests for production of documents. The judge assigned to that matter granted defendant's motion and issued a protective order on August 21, 2019, requiring the redaction of "[a]ll references or identifying information related to State employees other than the individual defendants." The documents produced were subject to a confidentiality order, which had been previously issued on August 10, 2018, to protect the privacy of non-party employees.

On March 7, 2020, AGREAT sought the same records at issue from defendant pursuant to an OPRA request and under the common law right of access. The documents AGREAT sought were set forth in separate requests, numbered one through eleven, as follows:

> (1) Email from . . . Riccitiello to Agnes Carson dated March 15, 201[6][,] 1:00 [p.m.] and email chains of which this is a part.
>
> (2) Sign[-]in Sheets for Managing Stress in the Workplace workshops held on March 21, 2016 and March 23, 2016[,] and syllabus/instructional material/handouts.
>
> (3) Email from . . . Carson to Susan [Olgiati] dated March 22, 2016[,] 3:38 [p.m.] and email chains of which this is a part.

(4) Email from . . . [Olgiati] to . . . Carson dated March 22, 2016[,] 5:05 [p.m.] Subject: 'FW: . . . Kumor FW: NO response because bipolar people are basically insignificant' and email chains of which this is a part.

(5) Email from Michelle Serenelli to . . . Sczerbowicz dated [March 22, 2016][,] 2:22 [p.m.] Subject 'FW: . . . Kumar—[Defendant's] temp employee' and email chains of which this is a part.

(6) Email from Emily Samuels to . . . Chiacchio, . . . Olgiati, and . . . Sczerbowicz dated March 22, 2016[,] and email chains of which this is a part.

(7) Email from . . . Sczerbowicz to . . . Dodson and Mirella Bednar Subject: RE: . . . Kumor FW: NO response because bipolar people are basically insignificant dated March 23, 2016[,] 11:11 [a.m.] and email chains of which this is a part.

(8) Email from . . . Sczerbowicz to . . . Dodson and . . . Bednar Subject: RE: . . . Kumor FW: NO response because bipolar people are basically insignificant dated April 6, 2016[,] 6:16 [p.m.] (Including attachments Images attached described as Image 001.jpg, Image 002.jpg, Image 003.jpg Image 004.jpg[)] as well as email chains of which this is a part.

(9) Email From: Trisha Smith To: . . . Sczerbowicz CC: Ryan Atkinson, Subject: FW: OPRA Request W116348, Sent [December 27, 2016][,] and email chains of which this is a part.

(10) Email from . . . Carbone to Alia Grimes dated March 23, 2016[,] Subject: Update on investigation and email chains of which this is a part.

> (11) Email from . . . Kumor dated Tuesday, March 22, 2016[,] To: . . . Kumor; . . . Munter cc: . . . Chiacchio, Subject: Re: hours and email chains of which this is a part.

AGREAT also requested defendant provide a Vaughn[3] index for records it claims were exempt from disclosure. Counsel for AGREAT also represented Kumor in the employment discrimination case but did not disclose this fact.

On March 9, 2020, defendant's records custodian, Octavia Baker, requested AGREAT specify its common law right of access interest. AGREAT responded it is "an association that's dedicated to governmental responsibility, ethics, and transparency and we seek these records to ensure regularity in governmental affairs." Kumor's name was not mentioned. Simultaneously, in the employment discrimination case, Kumor filed a motion to compel the production of documents, which were withheld based on attorney-client privilege and the court's August 21, 2019 protective order. Defendant opposed the motion, contending it provided a privilege log and redacted all privileged

[3] Vaughn v. Rosen, 484 F.2d 820, 826-27 (D.C. Cir. 1973). A Vaughn index is a privilege log "containing a 'relatively detailed' justification for the claim of privilege being asserted for each document. The judge analyzes the index to determine, on a document-by-document basis, whether each such claim of privilege should be accepted or rejected." Paff v. Div. of L., 412 N.J. Super. 140, 161 n.9 (App. Div. 2010) (citing Vaughn, 484 F.2d at 826-27).

information. Additionally, defendant asserted that the protective order stated, "[a]ll references or identifying information related to State employees other than the individual defendants must be redacted."

On March 31, 2020, Baker emailed AGREAT that its request under OPRA was denied because "the requested records are personnel records, which are exempt from disclosure pursuant to N.J.S.A. 47:1A-10." Defendant also denied AGREAT's request under the common law right of access because AGREAT's "purported [generalized] interest is insufficient to overcome the strong presumption of confidentiality accorded to personnel records." The next day, AGREAT sought a Vaughn index, a Paff[4] certification, and defendant's

[4] In Paff v. New Jersey Department of Labor, 392 N.J. Super. 334, 341 (App. Div. 2007), we required the public agency to produce an affidavit detailing the following information concerning its search for records in response to an OPRA request:

> (1) the search undertaken to satisfy the request;
>
> (2) the documents found that are responsive to the request;
>
> (3) the determination of whether the document or any part thereof is confidential and the source of the confidential information;
>
> (4) a statement of the agency's document retention/destruction policy and the last date on which documents that may have been responsive to the request were destroyed.

explanation for withholding the documents under the common law right of access. On June 26, 2020, Valentina M. DiPippo, as counsel for defendant, not as its custodian of records, advised AGREAT that defendant had not changed its position.

In July 2020, AGREAT filed a verified complaint and thereafter filed an order to show cause (OTSC) seeking relief by way of a summary action under Rule 4:67-1(a), challenging defendant's denial of its request under OPRA and the common law right of access. AGREAT was originally named as the sole plaintiff. Counsel of record attached a Rule 4:5-1 certification to the verified complaint, stating that at the time of the filing of the pleading, "the matter and controversy is not the subject of any other action pending in any [c]ourt," and made no mention of Kumor's already pending employment discrimination suit.

Judge Jacobson entered an OTSC directing defendant to show cause as to why the requested records should not be released to AGREAT with "lawful redactions" or alternatively, be submitted to the court for an in camera review. Defendant opposed the OTSC and moved to dismiss the complaint. In her certification in opposition to AGREAT's OTSC, Deputy Attorney General (DAG) Elizabeth Tillou certified that each of AGREAT's requests for documents corresponded to identical records requested by Kumor in her motion to compel

documents filed against defendant in her pending employment discrimination case. Tillou identified each item AGREAT requested under OPRA with its corresponding bate stamped number in Kumor's employment discrimination case. Similarly, Christine P. O'Hearn, also serving as counsel for defendant, certified that all of AGREAT's requested documents under OPRA are the same records that were produced with redactions in Kumor's employment discrimination case on December 18, 2018.

AGREAT then filed a notice of cross-motion for leave to file and serve an amended complaint to name Kumor as a plaintiff in the OPRA action. On December 8, 2020, oral argument was conducted before Judge Jacobson regarding AGREAT's cross-motion for leave to file and serve an amended complaint, and the OTSC. That same day, the judge handling the employment discrimination case denied Kumor's motion to compel documents because the names of nonparties were kept confidential pursuant to the court's August 21, 2019 protective order, and because defendant had properly asserted the attorney-client privilege. The judge reasoned:

> [t]he majority of the unredacted documents [Kumor] requests are court ordered to remain redacted because the redactions are names of non-parties to the suit, and therefore unredacted versions of these documents should not be produced. As to the remaining unredacted documents [Kumor] requests, [defendant]

> argues these documents are classified under attorney[-] client privilege, and that therefore they should not be produced.
>
> [Kumor] allege[s] that [defendant] do[es not] provide enough information about the context of the redacted documents sufficient for the court to ascertain the basis for the redaction. (e.g. numerous communications are marked 'emails with counsel'). However, in [defendant's] opposition, it went into more detail regarding the specifics, by grouping [b]ates numbers together and further explaining why said documents were privileged, for example, explaining that certain [b]ates numbers were communications between counsel and client regarding the issues in the complaint. Even though [Kumor] continued to allege this wasn't enough detail for the [c]ourt to ascertain whether the documents should remain privileged, it shouldn't be so detailed to render the purpose of the privilege moot.
>
> It should also be noted that if the [c]ourt has any hesitation towards compelling the production of the documents, that both parties agree to an in[]camera review to determine if the redactions are appropriate. At this juncture this is not ordered, the [c]ourt does not compel production.

The next day, Judge Jacobson granted AGREAT's cross-motion to amend its complaint to add Kumor as a plaintiff and remanded AGREAT's request to defendant "to conduct an analysis of . . . Kumor's interests in the records requested under OPRA and the common law." AGREAT's request consisted of eleven items, namely, ten email chains and two employee workshop sign-in sheets. Judge Jacobson ordered that, after defendant conducted its assessment,

it must "provide copies of any records that [it] determine[s] can be released to . . . Kumor." "For any of the [eleven items] that remain redacted in whole or in part after the supplemental review," the judge ordered defendant to submit "a more detailed privilege log describing" them.

On December 21, 2020, defendant submitted a letter to Judge Jacobson stating it released twenty-four pages pursuant to plaintiffs' request. Defendant enclosed a Vaughn index for these redacted records. Defendant also provided the documents in unredacted formats for an in camera review by the judge. The record shows the index only memorialized records that required redactions. Therefore, the index's numbers differ from AGREAT's document request numbers. And, several documents that are related are grouped together into a single request number in the index. The index also cross-referenced the bate stamped numbers of each document produced in Kumor's employment discrimination case. Defendant's Vaughn index contained the following:[5]

> (1) March 22, 2016 Email between Carson and Olgiati regarding an employment matter;
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> (2) March 21 and 23, 2016 Sign-in Sheets for Managing Stress in the Workplace course;

[5] For ease of readability, we altered the formatting and punctuation of defendant's Vaughn index. Also, the parties' appendices neither contain any of AGREAT's requested documents, nor do they indicate which of the Vaughn index's request numbers match with AGREAT's document request numbers.

> (3) March 22, 2016 Email between Olgiati and Carson memorializing events pertaining to Kumor;
>
> (4) March 22, 2016 Email between Chiacchio, Olgiati, Sczerbowicz, and Samuels regarding message received by Kumor;
>
> (5) March 22, 2016 Emails between Samuels, Peter Traum, Melica Blige, Gregory Spellmeyer, Olgiati, and Mirella Bednar regarding an employment matter;
>
> (7) March 23, 2016 Email between Dodson, Sczerbowicz, Virginia Lu, and Jennifer Zinn memorializing status of employment matter; and
>
> (10) March 23, 2016 Email between Carbone and Grimes discussing the status of an EEO investigation.

Defendant claimed: (1) plaintiffs' OPRA and the common law right of access argument was moot because Kumor already had the requested documents, which were produced in her employment discrimination case; and (2) AGREAT's OPRA request "was clearly designated as a subterfuge to obtain records that AGREAT's attorneys had been denied" in Kumor's employment discrimination case.

In response, plaintiffs submitted a letter to the judge stating that the index was insufficient, and they could not ascertain the reason the records were exempt from OPRA and the common law right of access. Ultimately, Judge Jacobson conducted a meticulous in camera review of each document request included in

the index. In her comprehensive oral decision rendered on April 12, 2021, the judge dismissed the amended complaint with prejudice. The judge found that under OPRA, the first, third, fifth, seventh, and tenth requested items in the index fall under the advisory, consultative, or deliberate exemption under N.J.S.A. 47:1A-1.1; the fourth, fifth, and tenth requested items are protected by the attorney-client privilege; and the second requested item, sign-in sheets for the training course, are personnel records shielded from disclosure.

The judge highlighted that AGREAT's original complaint did not reference Kumor's employment discrimination case against defendant, which only came to light after defendant became involved in the OPRA matter. The judge found AGREAT only had a "generalized" interest in transparency that was insufficient to vault the statutory exemptions. And, although N.J.S.A. 47:1A-10 allows an individual with an "interest" to waive the confidentiality of their own personnel records, this waiver does not permit the release of records subject to another privilege, such as the attorney-client privilege. A memorializing order was entered.

This appeal followed. Plaintiffs raise the following point with subparts for our consideration:

> THE TRIAL COURT DISREGARDED THE PRESUMPTION OF OPENNESS AND

TRANSPARENCY AND THE BURDENS PLACED ON THE CUSTODIAN OF RECORDS PURSUANT TO [OPRA].

1. The Standard Of Review Is De Novo.

2. OPRA Places The Burden To Justify A Denial Of Access Of Government Records On The Custodian Of Records [A]nd, Unless Exempted, Records Must Be Readily Accessible To Citizens Of New Jersey For The Protection Of The Public Interest.

3. After Suit Was Filed, [Defendant] Altered Its Position And Asserted, In Addition To Its Claim, That The Records Were Exempt As Personnel Records, That [Six] Of The [Eleven] Records Requested Were Also Exempt As "Advisory Consultative Deliberative; Deliberative-Process Privilege" And [Four] Of The [Eleven] Records Requested Were Exempt Pursuant To The "Attorney[-]Client Privilege."

4. The Motion Judge Erred By Concluding That The Court Considering Discovery Issues In [Kumor's] NJLAD Lawsuit Had Ruled In Favor Of The [Defendant] Precluding Discovery Because It Did Not.

5. Even If A Court Considering Discovery Issues In The NJLAD Matter Had Ruled That . . . Kumor Was Not Entitled To The Records Requested Under Rule 4:10, The Standard For Discovery Under Rule 4:10 Is Different Than The Standard Applicable Under OPRA And The Common Law And Not Preclusive.

6. The Motion Judge Erred In Concluding The Emails Requested In Items [One], [Three], [Five], [Seven], And [Ten] Are Exempt Under The Advisory Consultative Or Deliberative Privilege.

7. The Motion Judge Erred In Concluding The Emails Sought Under Items [Four], [Five], And [Ten] Are Exempt Under The Attorney[-]Client Communication Privilege.

8. The Motion Judge Erred In Concluding The Sign-In Sheets For A Workshop Called "Managing Stress In The Workplace" Were Exempt From Disclosure As Personnel Records And Not Disclosable Under The Common Law Balancing.

9. The Motion Judge Failed To Analyze Plaintiffs' Request Number [Eight] And Number [Nine].

II.

A "trial court's determinations with respect to the applicability of OPRA are legal conclusions subject to de novo review." K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 349 (App. Div. 2011) (quoting O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 379 (App. Div. 2009)); accord MAG Ent., LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 543 (App. Div. 2005). We exercise plenary review regarding a trial court's interpretation of OPRA and its exclusions. Am. Civ. Liberties Union of N.J. v. Cnty. Prosecutors of N.J., ___ N.J. Super. ___ (App. Div. 2022) (slip op. at 12).

"OPRA was enacted 'to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Scheeler v. Off. of the Governor, 448 N.J. Super. 333, 342

(App. Div. 2017) (quoting Mason v. City of Hoboken, 196 N.J. 51, 64 (2008)). The statute mandates that "government records shall be readily accessible for inspection, copying, or examination by the citizens of [New Jersey], with certain exceptions, for the protection of the public interest, and any limitations on the right of access . . . shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1; see also Libertarians for Transparent Gov't v. Cumberland Cnty., 250 N.J. 46, 54 (2022) (citing Burnett v. Cnty. of Bergen, 198 N.J. 408, 414 (2009)). Government records are defined as:

> [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 [their] 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 [their] 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 right to access to government records under OPRA is not absolute. Kovalcik v. Somerset Cty. Prosecutor's Off., 206 N.J. 581, 588 (2011) (citing

Educ. L. Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 284 (2009)). OPRA "excludes twenty-one categories of information from the definition of a 'government record.'" Scheeler, 448 N.J. Super. at 343 (citing N.J.S.A. 47:1A-1.1).

In addition, N.J.S.A. 47:1A-10 exempts employee personnel and pension records from "government records" that must be provided under OPRA. The statute provides that "[n]otwithstanding the provisions of [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record and shall not be made available for public access." N.J.S.A. 47:1A-10. Thus, under N.J.S.A. 47:1A-10, "personnel records are, by definition, not classified as government records at all." Kovalcik, 206 N.J. at 592. "[D]ocuments that qualif[y] as personnel record[s are] not subject to being disclosed notwithstanding" OPRA's other provisions. Ibid.

N.J.S.A. 47:1A-10, however, provides the following three exceptions to the exemption of personnel records from OPRA's definition of government records:

> [(1)] an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;

> [(2)] personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
>
> [(3)] data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.
>
> [N.J.S.A. 47:1A-10.]

Moreover, the attorney-client privilege protects government records from inspection or production under OPRA. O'Boyle v. Borough of Longport, 218 N.J. 168, 185 (2014); N.J.S.A. 47:1A:1-1. The "privilege has been codified in New Jersey, by both statute and rule, the terms of which are identical." Paff, 412 N.J. Super. at 150. "To qualify for the privilege, a party must show that there was a confidential communication 'between [a] lawyer and [their] client in the course of that relationship and in professional confidence[.]'" Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 375 (App. Div. 2010) (third alteration in original) (quoting N.J.R.E. 504(1)).

"Confidential communications are only those 'communications which the client either expressly made confidential or which [they] could reasonably

assume under the circumstances would be understood by the attorney as so intended.'" Ibid. (quoting State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989)). "[A] mere showing . . . the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear." Ibid. (alterations in original) (quoting Schubert, 235 N.J. Super. at 220-21). Further, "[t]he attorney-client privilege is not restricted to legal advice, though '[t]he privilege is limited to those situations in which lawful legal advice is the object of the relationship.'" Rivard v. Am. Home Prods., Inc., 391 N.J. Super. 129, 154 (App. Div. 2007) (second alteration in original) (quoting In re Gonnella, 238 N.J. Super. 509, 512 (Law Div. 1989)).

"The purpose of the attorney-client privilege is 'to encourage clients to make full disclosure to their attorneys.'" Tractenberg, 416 N.J. Super. at 375 (quoting Macey v. Rollins Env't Servs. (N.J.), Inc., 179 N.J. Super. 535, 539 (App. Div. 1981)). "The policy underlying this privilege is to promote full and free discussion between a client [and their] attorney . . . . [I]t is essential that a client be able to protect [their] discussions with [their] attorney from disclosure." Paff, 412 N.J. Super. at 150 (second and third alterations in original) (quoting Macey, 179 N.J. Super. at 539).

However, "[s]ince the recognition of the privileged communication between attorney and client rests in the suppression of the truth[,] the privilege should be strictly construed in accordance with its object. The privilege is an anomaly and ought not to be extended." Id. at 150-51 (quoting In re Selser, 15 N.J. 393, 405-06 (1954)). Thus, "[t]he determination whether a communication between a client and an attorney is protected must be made 'on the basis of the purposes for which the privilege exists and the reasons for its assertion in the context of the particular case.'" In re Custodian of Recs., Crim. Div. Manager, Morris Cnty., 420 N.J. Super. 182, 187 (App. Div. 2011) (quoting Fellerman v. Bradley, 99 N.J. 493, 502 (1985)).

It is well-established "that the [attorney-client] privilege is fully applicable to communications between a public body and an attorney retained to represent it." Paff, 412 N.J. Super. at 152 (alteration in original) (quoting In re Grand Jury Subpoenas Duces Tecum Served by Sussex Cnty., 241 N.J. Super. 18, 28 (App. Div. 1989)). Further, the privilege is not limited to communications made directly between an attorney and client; the privilege "also extends to 'the necessary intermediaries and agents through whom the communications are made.'" Tractenberg, 416 N.J. Super. at 376 (quoting State v. Kociolek, 23 N.J. 400, 413 (1957)).

"[A] client's privileged communications are 'permanently protected from disclosure by [itself], or by the legal advisor, or by the agent of either confidentially used to transmit the communications.'" State v. Davis, 116 N.J. 341, 361 (1989), superseded by constitutional amendment on other grounds, N.J. Const. art. I, ¶ 12. "Such 'necessary intermediaries' have been held to include a psychiatrist retained by defense counsel, arson experts hired by defense counsel, a handwriting expert employed by defense counsel, and an engineering firm hired as a consultant for litigation assistance." Tractenberg, 416 N.J. Super. at 376 (citations omitted).

Here, Judge Jacobson provided specific rulings as to each document listed in the Vaughn index.[6] The first requested item contained a March 22, 2016 email between defendant's Deputy Chief of Staff and the Chief of Staff concerning whether Kumor should continue working for defendant. Plaintiffs argue the judge failed to appreciate the email's context in relation to Kumor's employment discrimination case, since she was requesting an accommodation, and she was discharged shortly thereafter. Having reviewed the documents submitted to the

[6] In the judge's April 12, 2021 oral opinion and subsequent order, she referred to each of the requested item numbers pursuant to the Vaughn index. For ease of clarity, this opinion will refer to each of the requested item numbers in the same manner.

trial court in camera, we agree with the judge's determination that the email satisfied the pre-decisional and deliberative prongs of the deliberative process privilege, and therefore, the email was exempt under OPRA. See Libertarians for Transparent Gov't v. Gov't Recs. Council, 453 N.J. Super. 83, 89-90 (App. Div. 2018).

For the deliberative process privilege to apply, the judge must find the record is "(1) 'pre-decisional,' meaning it was 'generated before the adoption of an agency's policy or decision;' and (2) deliberative, in that it 'contain[s] opinions, recommendations, or advice about agency policies.'" Ibid. (quoting Educ. Law Ctr., 198 N.J. at 286). Since the email was sent "around the time the decision was being made about [Kumor's] continued employment," the document was pre-decisional. The document was also deliberative because it was a "candid exchange of views" regarding Kumor's job performance. The judge correctly concluded plaintiffs' waiver of confidentiality could address "the personnel aspects of [Kumor's] documents," but not the "deliberative aspects."

Similarly, the second requested item contained sign-in sheets for the "Managing Stress in the Workplace" course that Kumor apparently attended. This record was submitted to confirm Kumor's attendance for the course. However, the judge found the names of the other employees contain personnel

information, which is exempted from OPRA, and the judge upheld the "redaction of the names from the sign[-]in sheet of the other employees." She also found each of the other employees maintain their own interest in preserving the confidentiality of their own personnel record, and AGREAT had no interest in discovering who else attended the training sessions. The judge was correct in her analysis.

In Kovalcik, our Supreme Court found that a document pertaining to a detective's "preemployment training and education is a personnel record." 206 N.J. at 593. The Court explained that the record is confidential unless the record fits within an exception to the personnel record exemption of OPRA. Ibid. Further, the Court found an exception applies "if [the record] discloses, and only to the extent that it discloses, that [the detective] had completed specific training or education that was required for her employment as a detective with the Prosecutor's Office." Id. at 594 (emphases added).

While Kumor readily waived the personnel record exemption pertaining to her own name on the sign-in sheet record, N.J.S.A. 47:1A-10, she had no reason to expect that the other employees would waive their personnel record exemption. Therefore, the other employee's names on the sign-in sheets were properly redacted and should remain redacted.

The third requested item is an email between defendant's Deputy Chief of Staff and the Chief of Staff "memorializing events" pertaining to Kumor. Plaintiffs claim the email revolved around the factual nature of Kumor working for the defendant; thus, OPRA's exemptions do not apply. See Ciesla v. N.J. Dep't of Health and Senior Servs., 429 N.J. Super 127, 138 (App. Div. 2012) ("Purely factual material that does not reflect deliberative processes in any way is not protected by the privilege."). Despite the factual content in the email, the communication was also part of a confidential internal exchange between defendant's supervisors, depicting their "dynamic nature of opinions" regarding Kumor's job status. See Educ. L. Ctr., 198 N.J. at 287. Hence, we agree with the judge's ordering of the redactions because the email falls under the deliberative exemption under OPRA, "as the discussion reflects facts being considered by supervisors before making any final decisions about the continued employment of . . . Kumor."

The fourth requested item contained an email between defendant's ADA Program Monitor, Chief of Staff, and a DAG, outlining their "candid exchanges regarding emails that had been provided to [the] staff by . . . Kumor." The judge correctly concluded this email was protected as attorney-client communications under OPRA because the DAG focused on the legal significance of the ADA

vis-a-vis Kumor's complaints. The attorney-client privilege provides that "communications between a lawyer and [their] client in the course of that relationship and in professional confidence" are protected from disclosure. N.J.S.A. 2A:84A-20(1); N.J.R.E. 504(1). Here, the email outlined confidential legal advice pertaining to issues related to Kumor's status as a temporary employee.

Additionally, the judge found the fifth requested item, emails between a DAG, Special Investigator for the Department of Law and Public Safety, defendant's Chief of Staff, Employee Relations Administrator, Director of HR, and an Assistant Attorney General, protected under the attorney-client privilege. The emails involved attorneys providing advice concerning the legal ramifications of facts provided by Kumor's supervisors pertaining to her temp position. The judge also pointed out these emails are protected under the deliberative process privilege, since supervisors "were making a decision" about Kumor.

We agree with the judge's finding regarding the fifth requested item. The attorney-client and deliberative privileges embrace personnel matters such as those that were at issue here and public interest in full disclosure is unwarranted. See Paff, 412 N.J. at 154 (holding the "attorney-client privilege applies

whenever confidential legal advice is rendered to state agencies," whether by private counsel or the DOL); Educ. L. Ctr., 198 N.J. at 295 (recognizing the deliberative process privilege promotes the "government's full and frank discussion of ideas when developing new policies, or in examining existing policies and procedures, and . . . such activities constitute a process of policy examination and evaluation").

The seventh requested item consisted of an email from ACRO's HR Director and the OAG's Deputy HR Director concerning Kumor. Although the communication involved ACRO, a private employment staffing agency, the judge found nevertheless that it was a personnel record and protected under the deliberative process privilege because it was a "candid evaluation of what had been happening regarding Kumor [and issues with her performance], and it was provided . . . to the [HR] supervisor." The email closely "relates to the formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated," Ciesla, 429 N.J. at 138 (alteration in the original) (quoting McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 619-20 (App. Div. 2010)), and was "plainly integral" to defendant's process of deliberation, Educ. L. Ctr., 198 N.J. at 300. The judge's findings are supported by the record.

Lastly, the tenth requested item is an email between the DAG and defendant's investigator discussing the EEO investigation initiated by Kumor. The judge found this document is protected under the attorney-client privilege, and noted the deliberative nature of the record, since it is an "internal communication regarding sensitive issues" and "possible termination." Simply because plaintiffs claim the email involves "sensitive issues" does not lead to the conclusion that defendant weighed alternatives in making a decision. Thus, the requested item does not fit into any of OPRA's exemptions.

However, there is no basis to negate the judge's findings on the deliberative process and attorney-client privilege here. The DAG, acting as an attorney for defendant, was communicating with the investigator about the legal implications regarding Kumor's EEO complaint, which launched the investigation. See Payton v. N.J. Turnpike Auth., 148 N.J. 524, 551 (1997) (holding that if the purpose of the various components of an employment investigation "was to provide legal advice or to prepare for litigation," then the privilege applies).

Moreover, the communications were created before Kumor was terminated, thereby rendering them pre-decisional in nature. And, the communications contained opinions regarding how defendant should handle

Kumor's future with defendant. Consequently, the email was "clearly part of a 'process leading to [a] formulation' of a decision" and "'expose[d] the deliberative aspects of that process' by spelling out the cumulative formulation of ideas." McGee, 416 N.J. Super. at 621 (quoting Educ. L. Ctr., 198 N.J. at 295).

Based upon our de novo review, we conclude the first, third, fifth, seventh, and tenth requested items satisfy both prongs of the deliberative process privilege; thus, they are exempted from OPRA. The second requested item satisfies the personnel record exemption. The fourth, fifth, and tenth requested items are shielded by the attorney-client privilege. Judge Jacobson carefully considered the validity of each of plaintiffs' claims. We reject plaintiffs' contention that the judge failed to consider Payton, 148 N.J. at 550-51, in the context of defendant's attorney providing legal services to state agencies and employees. DiPippo clearly acted in her capacity as counsel for defendant, and not as defendant's custodian of records. See Paff, 412 N.J. Super. at 151.

III.

Plaintiffs also contend the judge erred in finding defendant's interests in nondisclosure outweigh their interest in obtaining the documents, thereby making the records not exempt under the common law right of access to public

records. "The common law right can reach a wider array of documents than" those available under OPRA. Educ. L. Ctr., 198 N.J. at 302. A person seeking public records under the common law right of access "must explain why [they] seek[] access to the requested documents" and the person's interest in obtaining the documents "must be balanced against the State's interest in preventing disclosure." O'Boyle, 218 N.J. at 196 (quoting Educ. L. Ctr., 198 N.J. at 302).

"[T]o determine whether the common law right of access applies to a particular set of records, a court must follow a three-step test." Ibid. The court must first "determine whether the documents in question are 'public records.'" Ibid. (quoting Atl. City Convention Ctr. Auth. v. S. Jersey Publ'g Co., 135 N.J. 53, 59 (1994)). "Second, the party seeking disclosure must show that [they have] an interest in the public record. More specifically, if the plaintiff is seeking 'disclosure of privileged records,' . . . [they] must show [a] 'particularized need.'" Ibid. (citation omitted) (quoting Wilson v. Brown, 404 N.J. Super. 557, 583 (App. Div. 2009))

In order to "determin[e] whether a party has articulated a particularized need," courts must analyze: "(1) the extent to which the information may be available from other sources, (2) the degree of harm the litigant will suffer from

its unavailability, and (3) the possible prejudice to the agency's investigation." Id. at 196-97 (quoting McClain v. Coll. Hosp., 99 N.J. 346, 351 (1985)).

The third and final step in the analysis "requires the court to 'balance the plaintiff's interest in the information against the public interest in confidentiality of the documents, including a consideration of whether the demand for inspection is premised upon a purpose [that] tends to advance or further a wholesome public interest or a legitimate private interest.'" Drinker Biddle & Reath LLP v. N.J. Dep't of L. & Pub. Safety, Div. of Law, 421 N.J. Super. 489, 500 (App. Div. 2011) (quoting S. N.J. Newspapers, Inc. v. Twp. of Mt. Laurel, 141 N.J. 56, 72 (1995)).

"Where 'reasons for maintaining a high degree of confidentiality in the public records are present, even when the citizen asserts a public interest in the information, more than [the] citizen's status and good faith are necessary to call for production of the documents.'" Ibid. (alteration in original) (quoting S. N.J. Newspapers, Inc., 141 N.J. at 72). The pertinent factors for courts to consider in determining the balance under the third prong are:

> (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to

> which agency self-evaluation, program improvement, or other decision[-]making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.
>
> [Loigman v. Kimmelman, 102 N.J. 98, 113 (1986).]

"Against these and any other relevant factors should be balanced the importance of the information sought to the plaintiff's vindication of the public interest." Ibid. Finally, "once the plaintiff's interest in the public record has been established, the burden shifts to the public entity to establish that its need for non-disclosure outweighs the plaintiff's need for disclosure." Ibid. (citing Educ. L. Ctr., 198 N.J. at 303).

Here, Judge Jacobson addressed plaintiffs' cause of action under the common law right of access to public records. In our assessment of the claim, we see no reason to differ from our conclusions reached under OPRA. Nevertheless, we will analyze the requested items in the Vaughn index pursuant to the three-step test regarding the common law right of access articulated in O'Boyle, 218 N.J. at 196.

As a preliminary matter, this court finds all of the requested documents included the Vaughn index are public records. See S. N.J. Newspapers, 141 N.J. at 71 (stating "a common[]law public record is a record made by public officers in the exercise of public functions"). The emails were "made by (or at the behest of)" State workers in carrying out their various job responsibilities. Higg-A-Rella, Inc. v. Cty of Essex, 141 N.J. 35, 47 (1995).

Initially, we observe that the judge found the first, third, fifth, seventh, and tenth requested items in the Vaughn index are deliberative matters under the common law.[7] In balancing plaintiffs' interests for disclosure against defendant's need for confidentiality, as the judge found, AGREAT's particularized interest "cannot" and "does not" outweigh defendant's "need to keep confidential candid exchanges among supervisors regarding an employee." While the judge noted Kumor's "strong" particularized interest in the record

[7] The first item is an email between defendant's Deputy Chief of Staff and Chief of Staff pertaining to an employment matter; the third item contains an email between defendant's Deputy Chief of Staff and Chief of Staff, detailing events relating to Kumor; the fifth item contains emails between the DAG, Special Investigator for Law and Public Safety, defendant Chief of Staff, Employee Relations Administrator, HR Director, and AAG pertaining to an employment matter; the seventh item is an email between the HR Director of ACRO and the Deputy HR Director at the OAG describing the status of the employment matter; and the tenth item is an email between defendant's investigator and DAG regarding the EEO investigation.

since it pertains to her employment discrimination case, it is "something that's already been addressed by . . . a [j]udge in the [c]ivil [d]ivision, who is handling . . . the substantive matter."

We agree these requested items should not be disclosed. The balancing of Kumor's and defendant's interests had already been completed in the employment discrimination case. Because the civil division judge "has a much better and wider understanding of . . . what's at stake in the employment [discrimination] case," Judge Jacobson deferred to her ruling that Kumor's interest was outweighed by defendant's interest. The judge emphasized, and we concur, that Kumor "is really seeking a second bite at the apple by a judge of co-equal . . . authority."

Moreover, we agree with Judge Jacobson's conclusion that defendant's interest outweighs AGREAT's because there is a robust need to prevent chilling of government deliberative decision-making. See Educ. L. Ctr., 198 N.J. at 301. She noted the matter involved "a very sensitive decision[-]making process, and the [c]ourt, at least from a public records point of view, favors . . . defendants." The release of these records would undermine the common law deliberative process privilege, which exists to promote the open flow of communication during the policy-making process. McGee, 416 N.J. at 620 ("Allowing the

public eye too far into the innerworkings of policy formulation, the Court reasoned, could prevent the best possible decision from being reached.").

And, since these requested items are exempted from OPRA as deliberative material, as analyzed above, they also satisfy the common law deliberative process privilege. Id. at 618 (noting that deliberative process exemption in OPRA encompasses the common law deliberative process privilege).

Next, the second requested item contained sign-in sheets for the "Managing Stress in the Workplace" workshop. In weighing plaintiffs' interests in disclosure, Judge Jacobson found AGREAT and Kumor have "no particularized interest" in finding out who, other than Kumor, attended the training course. In contrast, defendant had a compelling interest in preventing disclosure of the personnel records of its other employees since they have a confidentiality interest in preserving their own personnel records. Notably, since Kumor waived her own confidentiality interest from the employment discrimination case, she was already provided with her record. Again, Judge Jacobson correctly emphasized she was not going to second guess the Law Division judge's decision in protecting the names of the other individuals who attended the course because "[t]hat's something between them and their employer."

Finally, as to requested item numbers four, five, and ten, Judge Jacobson properly found the attorney-client privilege applied under the common law.[8] "The common law right of access recognizes privileges, such as the attorney-client privilege, although the privilege may be overcome by a showing of particularized need." O'Boyle, 218 N.J. at 200. The judge noted the "very strong circle" regarding the attorney-client privilege in this case. As mentioned above, plaintiffs' showing of a particularized need for disclosure does not outweigh the defendant's overriding interest in preserving the confidentiality of its communications with its counsel. Based upon our review of the record, we are convinced Judge Jacobson did not err in analyzing each requested item in the Vaughn index pursuant to the common law.

IV.

Lastly, plaintiffs claim Judge Jacobson mistakenly did not analyze AGREAT's requested item numbers one, five, eight, nine, and eleven. Defendant's Vaughn index only included documents that contained redactions for the in camera review, which seemingly correlated to AGREAT's requested item numbers two, three, four, six, seven, and ten. Plaintiffs' argument lacks

[8] The fourth item is an email between the ADA program monitor, defendant's Chief of Staff, and DAG about a message received by Kumor. The fifth and tenth items are identified in the preceding footnote.

merit. According to Tillou's certification, each of AGREAT's OPRA requested items were either produced with redactions or withheld entirely pursuant to the December 8, 2020 order denying Kumor's motion to compel in the employment discrimination case. In O'Hearn's certification, she represented that all of the documents produced with redactions by defendant in the OPRA case, as detailed in the Vaughn index, were the same documents produced with redactions previously in the employment discrimination case.

We conclude plaintiffs improperly tried to utilize OPRA and common law right of access to obtain documents that they were denied in the employment discrimination case. We have made clear that the "policies underlying OPRA and the common law right of public access to government records have little to do with an individual's right to obtain discovery." Constantine v. Twp. of Bass River, 406 N.J. Super. 305, 324 (App. Div. 2009). Further, we highlighted "OPRA is a public disclosure statute and is not intended to replace or supplement the discovery of private litigants. Its purpose is to inform the public about agency action, not necessarily to benefit private litigants." Ibid. (quoting MAG Ent., LLC, 375 N.J. Super. at 545).

After Judge Jacobson asked plaintiffs' counsel why they filed the OPRA case while Kumor's employment discrimination case was still pending, they

admitted to being dissatisfied with the rulings of the judge in the employment discrimination case. Plaintiffs' counsel believed they were stonewalled "in terms of obtaining all the records [they] thought would be appropriate in civil discovery." The judge also noted that typically when "a plaintiff in an OPRA case requests emails, they don't know what emails that they had. They'll ask for emails in a certain time period between certain individuals."

Judge Jacobson refrained from second guessing the judge's rulings in the employment discrimination case, who was much more familiar with the matter. Plaintiffs' remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.