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THE NEW YORK TIMES COMPANY, Plaintiff, v. DIVISION OF TAXATION OF THE DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY; JOHN OR JANE DOE, in their capacity as OPRA Custodian for the Department of Treasury; DIVISION OF ADMINISTRATION OF THE DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY; and CYNTHIA JABLONSKI, in her capacity as Manager of the Government Records Access Unit of the Division of the Administration of the Department of the Treasury, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MERCER COUNTY Docket No.: MER-L-000519-19 Civil Action

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF'S VERIFIED COMPLAINT

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PRELIMINARY STATEMENT

This case involves communications relating to a financial settlement that the State of New Jersey entered into with casinos formerly owned by the sitting President of the United States. It also involves questions as to whether New Jersey's executive branch was involved or participated in that settlement and what role it may have played in its outcome.

The inquiry as to whether the settlement was a fair, reasonable, and arms-length transaction was a precursor to an exhaustive investigation by The New York Times debunking the President's claims of self-made worth and exposing that his business empire was riddled with tax dodges. Accordingly, there can be no doubt that there is a substantial public interest in the withheld records and Plaintiff's efforts to educate the public on government actions, especially those that involve New Jersey's highest public official and his administration.

Defendants' attempt to build a wall of secrecy around the executive and his administration runs counter to the democratic principles that OPRA was enacted to promote: opening agency action to the light of public scrutiny. And, because New Jersey recognizes that the principles of transparency and government accountability are so important to democracy, its common law independently provides access to records even where OPRA does not.

With these principles in mind, the Appellate Division reminds courts that they "must always maintain a sharp focus on the purpose of OPRA and resist attempts to limit its scope, absent a clear showing that one of its exemptions or exceptions incorporated in the statute by reference is applicable to the requested disclosure." Tractenberg v. Township of West Orange, 416 N.J. Super. 354, 378-9 (App. Div. 2010) (emphasis original) (citations omitted). Defendants have not made a "clear showing" that the records contain material that is exempt from OPRA. Their revised Vaughn Index and the Certification of Deputy Attorney General Heather Lynn

Anderson ("Anderson Certification" or "Certification") do fill in some of the gaps, but they continue to widely miss the mark. For the reasons explained below, and as more fully set forth in Plaintiff's Memorandum of Law in Support of Plaintiff's Verified Complaint ("Moving Brief"), Defendants have not met their heavy burden and, therefore, Plaintiff's right of access is "unfettered." See Matter of N.J. Firemen's Ass'n Obligation to Provide Relief Applications Under the Open Public Records Act, 230 N.J. 258, 277 (2017) ("Absent such [specific reliable evidence], a citizen's right of access is unfettered.") (emphasis added).

ARGUMENT

I. Defendants Still Have Not Met Their Burden Under OPRA of Demonstrating that the Privileges Invoked Properly Apply to the Withheld Documents.

Defendants' opposition papers fail to meet the heavy burden OPRA places on agencies that withhold public records. Both the revised Vaughn Index[1] and the Anderson Certification do not contain the requisite detail and specificity needed to allow the Court to independently assess whether the records may properly be withheld. Defendants are required to provide detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply. See Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 162 (App. Div. 2011); see also N.J.S.A. 47:1A–5(g). An agency can only meet its burden by making a "clear showing" that an exemption applies. Asbury Park Press v. Ocean Cty. Prosecutor's Office, 372 N.J. Super 312, 329 (Law Div. 2004).

As set forth in more detail below, Defendants rely entirely upon insufficient conclusory assertions of privilege, and also fail to provide what the Third Circuit has aptly named the

[1] See Anderson Cert. ¶4. This revised Vaughn Index was not listed as an exhibit, but was attached to the Anderson Cert.

"'connective tissue' between the document, the deletion, the exemption and the explanation." Davin v. U.S. Dep't of Justice, 60 F.3d 1043, 1051 (3d Cir. 1995). Defendants have failed to detail why the withheld material fits within the claimed exemption. See McDonnell v. U.S., 4 F.3d 1227, 1241 (3d Cir. 1993) (An "agency may meet [its] burden by filing affidavits describing the materials withheld and detailing why it fits within the claimed exemption.") (emphasis added).

The Court's role in independently assessing Defendants' evidence is key in OPRA cases. While a court may show deference to an agency's uncontroverted factual assertions made in sworn statements, it should not defer to an agency's legal conclusions as to whether the privileges apply. As noted in a federal FOIA case, the statutory delegation of de novo judicial review over an agency's refusal to release documents "clearly establish[es] that judicial deference to agency classification of its own documents is inappropriate." A.C.L.U. v. Brown, 609 F.2d 277, 284 n.1 (7th Cir. 1979) (Cummings, J. concurring in part and dissenting in part). See also, Raytheon Aircraft Co. v. U.S. Army Corps of Eng'rs, 183 F.Supp.2d 1280, 1283 (D. Kansas 2001) ("[w]hile the underlying factual allegations are given considerable weight, the [agency's] decisions not to release the requested information is accorded no deference due to the strong presumption FOIA places upon disclosure").

When the Court independently assesses Defendants' revised Vaughn Index and the Certification, the Court will find that Defendants' factual statements do not sufficiently describe or identify the purportedly exempt material; that Defendants have failed to properly link the asserted exemptions to the withheld material; and, that Defendants' factual assertion that the settlement negotiations ceased on December 5, 2011 is contradicted by other evidence in the record.

A. Defendants do not meet their burden to withhold records under the Advisory, Consultative, or Deliberative privilege.

The State has failed to provide the Court with the information it needs to assess whether the Advisory, Consultative, or Deliberative privilege ("ACD privilege") has been properly asserted. As set forth more fully in the Moving Brief, the ACD privilege requires that the material be both: 1) "pre-decisional," meaning that it was generated prior to the adoption of the agency's policy or decision; and 2) "deliberative," meaning that it "contain[s] opinions, recommendations, or advice about agency policies." Educ. Law Ctr. v. New Jersey Dep't of Educ., 198 N.J. 274, 286 (2009) (emphasis added). See also Moving Br. at 10-11. The ACD privilege is a fact-intensive privilege. Federal courts have noted that when the analogous deliberative process privilege is at issue, "the need to describe each withheld document … is particularly acute because the deliberative process privilege is so dependent on the individual document and the role it plays in the administrative process." Animal Legal Def. Fund v. Dep't of Air Force, 44 F.Supp.2d 295, 299 (D.D.C. 1999) (internal citation omitted). See also Citizens for Responsibility and Ethics in Washington v. Nat. Archives & Records Admin., 583 F.Supp.2d 146, 161 (D.D.C. 2008) (requiring in camera review when it was not clear from the Vaughn Index "what role the documents played in the administrative process"); Edmonds Institute v. Dept. of Interior, 383 F.Supp.2d 105, 108 n1 (D.D.C. 2005) ("A detailed description of the withheld documents is of particular importance…where the agency is claiming that the documents are protected by the deliberative process privilege.").

Exhibit A attached to the Certification of Yolanda Espiritu ("Espiritu Cert."), filed in connection with this Reply Memorandum, reflects all sixty-eight (68) documents disputed on the

basis of the ACD privilege.[2] Defendants have not sufficiently explained how the ACD privilege applies to any of these 68 records. They also fail to demonstrate that non-exempt material is so "inextricably intertwined" with exempt portions that it cannot be segregated. Educ. Law Ctr., 198 N.J. at 296. Rather, where the ACD privilege is claimed, Defendants have withheld all but one record in full without even addressing the possibility of redaction.

1. Discussions regarding the settlement are not policy formulation and are therefore not covered by the ACD privilege.

Defendants' position appears to be that so long as the records relate to the settlement, they are protected by the ACD privilege. They are mistaken. Not all decisions or decision-making is protected by the privilege, and Defendants have failed to define the decision-making process they want to protect. New Jersey courts emphasize that "[t]he deliberative process privilege … is centrally concerned with protecting the process by which policy is formulated." Corr. Med. Servs., Inc. v. Dep't of Corr., 426 N.J. Super. 106, 122 (App. Div. 2012) (emphasis original) (citation omitted). Even if a document technically precedes some form of "decision," it is not necessarily the type of decision-making that the privilege protects.

The Appellate Division's decision in Correctional Medical Services is instructive. In this case, plaintiff, a government contractor, sought "communications between [] agents and employees of the State involved on the issue of the plaintiff's alleged breach of the contract and the assessment of liquidated damages." 426 N.J. Super. at 115. Defendants objected to the disclosure of the records because they contained "exchanges of ideas, suggestions, and opinions regarding the [State's] audit and the later assessment, calculation and collection of liquidated damages." Id. at 124. The State further explained that if the staff were "discouraged from

[2] See Espiritu Cert.; Ex. A: Bates Nos. 61, 95-6; 100-01; 104-6; 109, 111-15; 117-19; 152-54; 190-93; 228-31; 266-69; 304-11; 314-19; 322-330; 331-32; 336-39; 341-46; and 350-51.

contributing their ideas and suggestions …by the threat of public scrutiny, the Director's ability to develop informed policies and decisions would be hampered." Id. at 125.

Despite these justifications, the panel held that the State had failed to adequately define the decision-making process that it was trying to protect. Id. The court could not determine, with any accuracy, "what 'decision' [was] the focus of defendants' concern since no substantive articulation [was] presented." Id. The court continued, "the deliberative process privilege…protects only those documents involved in policy formulation." Id. at 123 (internal citation omitted). The communications at issue were not covered by the privilege, since they "d[id] not go to any generalized governmental policy, but relate[d] directly to the relationship of the parties to the contract." Id. at 115. See also Educ. Law. Center, 198 N.J. at 295 ("the key to identifying deliberative material must be how closely the material … relates to the formulation or exercise of policy-oriented judgment or to the process by which policy is formulated") (internal citation omitted); Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975) ("Vaughn II")("[T]o come within the privilege…the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.").

Defendants' Certification fails to provide an adequate justification for asserting ACD privilege since it does not address any policy-formulation or explain how specific records are exempt under the ACD privilege. In fact, there is no mention of any advisory, consultative or deliberative discussion before December 5, the date that Settlement Agreement was filed in court. See Anderson Cert. ¶¶16-19. For records dated after December 5, Defendants merely state that DAG Anderson provided certain "legal counsel to the Division on various issues related to the settlement and the audit of the Trump entities." Anderson Cert. ¶20. Defendants also attempt to justify the use of the privilege using a single, vague sentence: "[I]n addition, the Division

continued to discuss, internally, various issues regarding implementation of the settlement and the remaining audit assessments." Anderson Cert. ¶21. However, the Certification is silent with respect to any specific discussions regarding a policy or opinions, recommendations or advice concerning policy-formulation. Furthermore, the Brief on Behalf of Defendants in Opposition of Plaintiff's Order to Show Cause ("Defendants' Brief") merely contains an unsworn, vague and conclusory statement that the majority of documents created before December 5 "involve employees of the Division discussing, analyzing, and implementing a settlement." Def. Br. at 26.

Similarly, the explanations provided in the revised Vaughn Index do not adequately justify the assertion of the ACD privilege. To start, for every record for which ACD is asserted, Defendants have asserted at least one additional privilege. Yet, in the majority of instances, the explanation provided for a specific document addresses only one of the asserted privileges. For some documents, the "EXPLANATION OF PRIVILEGE" purports to address why the document has been withheld under the "confidential taxpayer information" privilege ("CTI")[3], with no explanation provided that could justify the ACD privilege.[4] For example, for Bates No. 100, the only justification provided for either the ACD or CTI privilege is: "Auditor Simmons provides tax information regarding the Trump Entities." See Espiritu Cert.; Ex. A: Bates No. 100. This vague explanation, while potentially justifying the CTI privilege, does nothing to support the assertion of the ACD privilege. For other documents, the "EXPLANATION OF PRIVILEGE" purports to address why the document has been withheld under the attorney-client

[3] Also referred to as the "taxpayer confidentiality privilege."

[4] Fourteen (14) documents merely describe that someone requested, provided or discussed tax information regarding the Trump Entities or various taxpayers. See Espiritu Cert.; Ex. A: Bates Nos. 100, 105-06, 109, 111-15, 117-18, 152-53. While these vague descriptions may "explain" why the material is exempt under the CTI privilege, they do not support a finding that the materials are exempt under the ACD privilege. Nor is it clear how a request for tax information contains any exempt information.

privilege, with no description of the role the information played in a deliberative or policy-making process.[5] For example, for Bates 118, the "explanation" provided simply states: "DD Lambert-Harding asks DAG Anderson for legal advice." See Espiritu Cert.; Ex. A: Bates No. 118. It does not explain how this request for legal advice constitutes pre-decisional deliberation.

Where the State has provided "explanations" for applying the ACD privilege, they are still plainly insufficient. The revised Vaughn Index lists a total of twelve (12) documents for which the explanation merely states that a person "asks for policy advice"; "requests policy advice"; "requests policy advice regarding the audit" or "requests policy advice regarding the settlement and audit."[6] These descriptions are inadequate for purposes of justifying the ACD privilege. There is nothing in the "EXPLANATION OF PRIVILEGE" column identifying the specific policy. Nothing explains whether the advice being sought reflects the "agency give-and-take of the deliberative process by which the decision itself is made," or whether they are simply straightforward explanations of established agency policy. Vaughn II, 523 F.2d at 1144. For the same reason, Defendants do not meet their burden with respect to the six (6) documents identified as replying to a request for policy advice,[7] "providing policy guidance…regarding the settlement,"[8] or "discussions concerning the audit or audit policy."[9] There is no way for Plaintiff or the Court to determine whether the discussions concerned established policies or included

[5] Forty-four (44) documents describe someone either asking or receiving legal advice. See Espiritu Cert.; Ex. A: Bates Nos. 96, 118-19; 152-54; 190-93; 228-31, 266-69; 305-09; 311, 314-19; 336-39, 341-46; 350-51. Two (2) documents indicate someone "discusses the settlement and the legal implications thereof." See Espiritu Cert.; Ex. A: Bates Nos. 95, 100. While those explanations may potentially justify withholding the records on the basis of attorney-client privilege (a privilege to which Plaintiff does not object for this subset of records) they do not provide any explanation as to how those records are exempt under the ACD privilege. Defendants do not meet their burden by simply stating that someone "requested legal advice regarding the settlement," as this does not demonstrate the link between the asserted privilege and the record itself.

[6] See Espiritu Cert.; Ex. A: Bates Nos. 95, 100, 119, 154, 191, 193, 230, 267-68; 310, 338, and 346.

[7] See Espiritu Cert.; Ex. A: Bates Nos. 95, 100, and 230.

[8] See Espiritu Cert.; Ex. A: Bates Nos. 190 and 191.

[9] See Espiritu Cert.; Ex. A: Bates No. 316.

factual information that can be segregated from opinions or recommendations. See In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 85 (2000) ("Purely factual material that does not reflect deliberative process is not protected").

Further, Defendants have listed twenty-four (24) documents that either "provide an update on the audit," "answer questions regarding the audit," "provide audit information," or discuss the audit, audit details, or audit information.[10] Two (2) of the records request information or ask questions about the audit[11]. At least one court found that a Vaughn Index that used even more specific language than that used here—"Email contains pre-decisional information related to legal advice between attorney and client regarding AJD legal and policy review" and "Emails contain pre-decisional information for agency official regarding information for AJD legal and policy review"—to be "broad and vague," and lacked the requisite description of "function or significance." Hunton & Williams LLP v. U.S. Environmental Protection Agency, 248 F.Supp.3d 220, 244 (D.D.C. 2017).

Additionally, Defendants have not addressed Plaintiff's showing that the ACD privilege does not apply to communications with adversaries because such communications are not "inter-agency or intra-agency communications." See Moving Br. at 13-14 (discussing Bates Nos. 322-30). The "explanation" for this group of documents is "Draft proposed settlement agreement"—which is confusing, since Defendants did not identify these emails as containing any attachments. See Espiritu Cert.; Ex. B: Bates Nos. 322-30. For the purpose of this litigation, Plaintiff is not claiming it is entitled to a draft agreement, but rather that Defendants have not met their burden of showing that email communications with adversaries are covered by the

[10] See Espiritu Cert.; Ex. A: Bates Nos. 96, 101, 152, 191, 192, 228-30; 267-8; 304-5; 308, 310; 316-8; 331, 336-8; 344-45, and 350.
[11] See Espiritu Cert.; Ex. A: Bates Nos. 338 and redacted 61.

ACD privilege. Given that the ACD privilege applies only to "inter-agency and intra-agency" communications, the State cannot invoke this privilege to withhold communications between agency officials and counsel to Trump Entities, as it attempts to do so here. See N.J.S.A. 47:1A-1.1.

2. The State applies ACD privilege to records that are not pre-decisional.

To fall under the ACD privilege, in addition to being "deliberative" a document must also be "pre-decisional." Educ. Law Ctr., 198 N.J. at 286; see also, N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975) (Because "the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions," it only protects "communications received by the decision-maker on the subject of the decision prior to the time the decision is made."). Even assuming arguendo that Defendant is correct that all documents concerning the settlement are deliberative, the disputed documents are not pre-decisional. The operative date for determining whether records are pre- or post-decisional is as early as October 6, 2011 or as late as November 28, 2011, but certainly not December 5, 2011.[12]

Defendants assert that "there can be no dispute as to the timeframe of the settlement negotiations." Def. Br. at 22. They claim to lay out "a clear and unambiguous timeline," Def. Br. at 23, but the timeline Defendants provide in their Certification and in their Brief contain multiple contradictions and obvious errors.

To start, Defendants' own certification unequivocally states that "[t]he parties continued to negotiate the terms of the Stipulation of Settlement until November 28, 2011." Anderson Cert. at ¶18 (emphasis added). This is further supported in Defendants' Brief, which states that the Vaughn Index "does not assert confidentiality for settlement negotiations for any document

[12] With the exception of Bates No. 61 and Bates Nos. 322-330, every document to which Defendants assert ACD privilege is dated December 1 or later.

dated after November 28, 2011." Def. Br. at 23 (citing Borg Cert., Ex. I.). In plain contradiction to the above statements, Defendants twice state in their brief that settlement negotiations ceased on December 5. First, on page 22, Defendants' Brief states that "there can be no dispute as to the timeframe of the settlement negotiations. They concluded on December 5, 2011." Def. Br. at 22 (citing DAG Anderson Cert. ¶21; Local Rule 9013-3; Borg Cert., Ex. B, p.6.). Then again, on page 23, the brief states, "Settlement negotiations ceased on December 5, 2011." Def. Br. at 23 (citing DAG Anderson Cert. ¶21.).

Beyond their own conflicting statements, the evidence provided completely fails to support the claim that settlement negotiations ended on December 5. Defendants cite to paragraph 21 of the Anderson Certification, but this paragraph does not state that negotiations continued until December 5. It reads, in full: "In addition, the Division continued to discuss, internally, various issues regarding implementation of the settlement and the remaining audit assessments." (Anderson Cert. ¶21)(emphasis added).

Defendants go on to argue that settlement negotiations continued through December 5 because that is when the stipulation was signed. See Def. Br. at 21-22 ("[O]n December 5, 2011...the parties signed the settlement agreement."). However, these unsworn statements in Defendants' Brief are contradicted by the Stipulation itself, which was signed by DAG Anderson on November 28, 2011, and by Charles A. Stanziale of McCarter and English (counsel for the Trump Entities) on November 30, 2011. See Supplemental Certification of Jennifer Borg In Support of Plaintiff's Reply Memorandum ("Borg Cert."); Ex. 1. This evidence actually establishes that December 5 is not, in fact, when settlement negotiations concluded.

The dates on which communications between the Defendants and Trump Entities' bankruptcy counsel occurred are also telling. As stated in Defendants' Brief, "all

communications with the Trump Entities bankruptcy counsel occurred prior to the effectuation of the settlement on Dec. 5, 2011." Def. Br. at 22. Defendants further assert that communications with the Trump Entities "date from October 6, 2011 through November 22, 2011." Def. Br. at 22 (citing Borg Cert.; Ex. I.). However, a close examination of the revised Vaughn Index shows no communication between Defendants and Trump Entities' counsel between October 7, 2011 and November 27, 2011. DAG Anderson does certify that the parties finalized the payment terms "on or about November 22" (Anderson Cert. ¶18), but, as previously stated, there are no emails on record between October 6 and November 22.[13] The only communication that occurred after October 6 was on November 28, 2011, on which there are eight (8) records listed as a "draft proposed settlement."[14] The fact that there are no emails with Trump counsel between October 7 and November 27, and then on November 28 the parties email drafts of the proposed agreement, strongly suggests that essential terms of the agreement had been reached by October 6 and that on November 28 the parties were merely papering the terms of that agreement.[15] If negotiations were taking place up through November 28, or even December 5, one would expect to see email exchanges up through those dates as well. With the single exception of the email exchanges for the draft settlement on November 28, there are no emails with Trump counsel after October 6.

On the disclosures provided by Defendants, it is impossible to state with any certainty the dates the settlement negations ceased. But the conclusory, unsworn statements in Defendants'

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[13] If payment terms were being negotiated until November 22, one would expect to see emails with Trump Entities' counsel after October 6, up through and including November 22. However, there are none.

[14] See Espiritu Cert.; Ex. A: Bates Nos. 322-330. What's more, Plaintiff finds it odd that Defendants do not identify any attachments for Bates Nos. 322-330 even though the "explanation" is "draft proposed settlement agreement." Surely a draft proposal would be attached to the emails, and not in the body of the emails themselves.

[15] As further set out in Plaintiff's Moving Brief, a settlement is final once both parties "agree upon all the essential terms of the contract…even though they contemplate the execution later of a formal document to memorialize the undertaking." Scheeler v. Galloway Twp., 2017 N.J. Super. Unpub. LEXIS 2847 at *13 (App. Div. 2017) (see Borg Cert. Ex. 2), quoting Comerata v. Chaumont, Inc. 52 N.J. Super. 299, 304 (App. Div. 1958) (see Moving Br. at 14).

Brief that settlement negotiations ceased on December 5 is directly contradicted by Defendants' certification stating that the end date was November 28 and controverted by the lack of any emails with Trump counsel between October 7 and November 27. This issue can only properly be resolved through an in camera review to determine whether the withheld documents are actually a part of continuing settlement negotiations.

3. At a minimum, Plaintiff is entitled to documents created after December 5, 2011.

Even if the Court were to find that the ACD privilege properly applies to records dated on or before December 5, 2011, Plaintiff is entitled to documents dated after December 5. The Stipulation was entered by the court on December 5, making any documents created after that date, by definition, post-decisional. See supra section I-A(2)).

Defendants assert, vaguely and in a conclusory fashion, that, after December 5 the Division continued to discuss, internally, various issues regarding implementation of the settlement and remaining audit assessments. See Anderson Cert. ¶20. Further, DAG Anderson certified that after December 5, she continued to provide legal counsel to the Division "on various issues related to the settlement and the audit … including … the implementation of the settlement and incorporation into the Division's record keeping … processing and handling of settlement payments, and … resolution of the audit." Anderson Cert. ¶20.

While Plaintiff understands that DAG Anderson may have been providing legal advice after the Stipulation was entered by the Court on December 5, she has failed to connect this legal advice to any policy-making decisions or formulation. A general reference in the Certification to the Division discussing the "implementation of the settlement" does not suffice to meet Defendants' burden. The vague reference to discussions mentioned in the Certification (implementation, record keeping, processing and handling) are exactly the kind of ministerial

and administrative work that courts have said are exempt from the privilege. For example, in Correctional Medical Services, the court held that the communications were not exempt because they related to the agency's decision-making process regarding the administration of a contract and that such decisions, which are "ministerial in nature," are "not of the sort warranting protection from disclosure." 426 N.J. Super at 123, 126. The court found that merely effectuating a contract's terms is post-decisional—noting it was "difficult to cast any 'decisions' following contract formation as fitting into the deliberative mold." Id. at 125.

Numerous other courts across the nation have refused to apply the deliberative process privilege to documents that relate to merely ministerial or administrative decisions. See, e.g., Fox News Network, LLC v. U.S. Dep't of Treasury, 911 F.Supp.2d 261, 281 (S.D.N.Y. 2012) (a "ministerial directive is not the sort of information that the deliberative process privilege is intended to protect."); Resident Advisory Bd. v. Rizzo, 97 F.R.D. 749, 753 (E.D. Pa. 1983) ("the material sought to be protected … concerns primarily legal and administrative tasks … and policies already formulated. [T]hese appear ministerial in character and [are] not protected by the deliberative process privilege."); Jordan v. United States Dep't of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978) ("Communications that occur after a policy has already been settled upon—for example, a communication promulgating or implementing an established policy—are not privileged.") (emphasis added, original emphasis omitted).

Nor does the revised Vaughn Index support a finding that a policy was being formulated after the Stipulation was filed on December 5. All the records dated December 6 or later merely reference the seeking or providing of legal advice; requesting, providing or discussing taxpayer information; and requesting, providing or discussing information regarding the audit. See Espiritu Cert.; Ex. A. Three documents reference, in vague and general terms, someone

requesting, discussing or providing policy advice or guidance regarding the settlement or audit policy.[16] The specific policy is not identified and, given that these discussions occurred after December 5, it is more likely that these discussed explanations of established agency policy. See Vaughn II, 523 F.2d at 1144. All three are dated December 7, strongly suggesting that the guidance and discussion concerned a policy already formulated. Accordingly, at a minimum, Plaintiff is entitled to the thirty-six (36) emails dated after December 5.

4. Defendants' redactions to Bates No. 61 are wholly unsupported.

Defendants' explanation for the redactions made to Bates No. 61 is so implausible that it is not surprising that DAG Anderson chose not to provide sworn statements about them in her certification and that Defendants' Brief failed to address them. A brief review of this one-page document is warranted and, for the convenience of the Court, the document is attached as Exhibit 3 to the Borg Cert.

Defendants list the subject matter for these redactions as "Settlement discussions and analysis" see Espiritu Cert.; Ex. A: Bates No. 61, (emphasis added), although even a cursory review of this document shows that neither a settlement discussion nor a settlement analysis was likely to have occurred. Defendants also assert that all the redacted material contains both ACD and CTI privileged material, but none of Defendants' explanations support either privilege, much less show that all the redacted material is covered by both privileges. This is particularly true with the redactions made to the emails involving members of the Governor's office. Given that Mr. Domalewski, Mr. Goetting and Mr. Garrenger's names do not appear on the hundreds of emails listed on Defendant's revised Vaughn Index (other than for this single, one-page, redacted

[16] See Espiritu Cert.; Ex. A: Bates Nos. 191, 267, and 316. Bates No. 191 describes "request[ing]" and "provid[ing] policy guidance regarding the settlement"; Bates 267 describes " request[ing] policy advice regarding the audit"; and Bates 316 describes "discussing audit policy."

document), it is difficult to understand how they were in a position to possess or relay confidential taxpayer information or deliberative material.

The only unredacted email on Bates 61 is from Mr. Mroz, a private citizen, who emails a public official in the Governor's Office informing him that the Division of Taxation had agreed to a settlement. Plaintiff submits that Mr. Domalewski, the recipient of this email, did not know that a settlement had been reached and/or was surprised to learn that Mr. Mroz had such information/misinformation. Defendants conceded in their brief that it was "unclear why this private citizen thought there was a settlement" as early as October 6th since he was not involved in the settlement or the litigation. Def. Br. at 23. Mr. Domaleski then forwarded Mroz's email to two other Governor's Office officials "regarding Mr. Mroz's claim that the litigation ... was settled." Espiritu Cert.; Ex. A: Bates No. 61. The recipient of that email presumably could not shed light on the issues for he did not respond but rather forwarded the email to the Treasurer with "questions regarding the alleged settlement." Id. The Treasurer, in turn, did not respond, but forwarded the email to the Director with "questions." Id. The Director apparently did have the answers. Although we do not know to whom he sent his email, Defendants describe that the content "discuss[ed] the claim of settlement and the ongoing audit of the Trump Entities." Id.

With the exception of Mr. Mroz's email, all the statements that accompany the forwarded emails are redacted. See Borg Cert.; Ex 3. The first redacted email is only a few characters in length, and the "explanation" provided in the revised Vaughn Index is that the Senior Counsel in the Governor's Office contacted two other officials in the Governor's office regarding Richard Mroz's claim that the litigation with the Trump Casinos was settled. See Espiritu Cert.; Ex. A: Bates No. 61. Plaintiff does not dispute that description. What Plaintiff disputes is that the redacted material is protected by both the ACD and CTI privileges and that it contained any type

of "settlement analysis," as referenced in the "GENERAL SUBJECT" column of the revised Vaughn Index. Given that Mr. Domaleski forwarded the Mroz email to Messrs. Goetting and Garrenger, and it is Mr. Domaleki's comments (consisting of only a few characters) that are redacted, it is more likely that he was commenting or inquiring about what Mroz knew or how he knew it. Rather, plaintiff posits that the redacted material contains material that may be embarrassing, but that is not covered by the CTI or ACD privileges.

The same is true for the other emails redacted in Bates 61. Mr. Goetting receives Mr. Domalewski's email and then forwards it the Treasurer and Mr. Domaleski. Mr. Goetting's statements are redacted and the explanation for the redactions is that Mr. Goetting contacted Treasurer Eristoff "with questions regarding the alleged settlement." Espiritu Cert.; Ex. A: Bates No. 61. This description does not support Defendants' contention that the general subject matter involved "Settlement discussions and analysis" (emphasis added), nor does it support a finding of material protected by the ACD or CTI privileges. Treasurer Eristoff then forwards the email, and his statements are redacted on the basis that he asked Director Bryan "questions about the audit and the alleged settlement." Id.

Defendants' "explanations" do not support a finding of privilege and contradict their contention that the redactions involve settlement "analysis." Contacting others with questions as to whether a settlement had been reached and/or how Mr. Mroz had learned that a settlement had been reached does not support a finding of any privilege -- particularly here, where the evidence shows that certain officials were not part of the settlement discussions -- and were unlikely to have confidential taxpayer information. Moreover, the fact that only a few words (or at most a sentence or two) were redacted makes it highly unlikely that any recommendations, opinions, deliberations or policy-formulation was being discussed. Defendants have merely asserted in a

conclusory fashion that the redactions are exempt without providing adequate information to support the applicability of the claimed privileges. See Hall v U.S. Dep't of Justice, 552 F.Supp.2d 23, 29 (D.D.C. 2008) (agency's justification for withholding portions of emails because they "reflect[ed] the deliberative process regarding the progress of and procedure used in … investigation" was insufficient, and agency was ordered "to identify the content of each e-mail with more specificity as well as the role the e-mails played in the… investigation."). For these reasons, an in camera review of the redactions is warranted.

B. Defendants do not meet their burden to withhold records under the attorney-client privilege.

Plaintiff has only objected to the claim of attorney-client privilege with respect to four (4) records.[17] The first two emails of Bates 87 are between Jennifer D'Autrechy and Michael Bryan. See Espiritu Cert.; Ex. C: Bates No. 87. Neither of these individuals have been identified as attorneys by Defendants, notwithstanding the fact that the revised Vaughn Index and the Anderson Certification identify other personnel as attorneys and, in footnote 3 of Defendants' Brief, they claim that "all documents for which the attorney-client privilege is claimed includes at least one attorney from the Office of the Attorney General." Def. Br. at 18. As federal courts have found, "[i]t goes without saying that 'attorney-client privilege only covers confidential communications between an attorney and his client.'" Pub. Emps. For Envtl. Responsibility v. Envtl. Prot. Agency, 213 F.Supp.3d 1, 20 (D.D.C. 2016) (emphasis original) (quoting Mead Data Cent., Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977)).

Upon information and belief, the failure of Defendants to identify either of these individuals as an attorney was mentioned by Plaintiff's counsel during the Case Management

[17] See Espiritu Cert.; Ex. C: Bates Nos. 87-88; 93-94. These 4 records contain a total of 8 individual emails.

Call on April 18, 2019, yet Defendants have failed to cure this deficiency. The revised Vaughn Index lists Ms. D'Autrechy's title as "Deputy Chief of Staff, Office of New Jersey State Treasury" and Mr. Bryan's title as "Director, Division of Taxation." (See revised Vaughn Index attached to Anderson Cert at 99-100). Defendants certify Director Bryan's title and job description (see Anderson Cert. at ¶38) but do not certify Ms. D'Autrechy's title. Defendants' apparent refusal to simply confirm whether one or both of these two individuals are attorneys and whether they were acting in their professional capacity on the two emails identified on Bates No. 87 is puzzling.

As to the remaining records disputed on the basis of the attorney-client privilege, Plaintiff has only objected to emails where the "explanations" fail to reference the words "legal" or "advice," even though one or more attorneys are listed as having been sent or copied on the emails and, in one instance, the attorney is the sender.[18]

New Jersey courts have held that attorney-client privilege must be construed narrowly. See Paff v. Division of Law, 412 N.J. Super. 140, 150 (App. Div. 2010). It is curious that these disputed records do not mention legal advice even though approximately forty-four (44) other records (to which Plaintiff has not disputed the attorney-client privilege) do. (See supra p. 8 n1). The mere carbon copying of an attorney on an email is not enough to justify withholding it under attorney-client privilege. See Hunton & Williams LLP v. U.S. Environmental Protection Agency, 248 F.Supp.3d at 254 (determining that emails did not fall under attorney-client privilege where the Vaughn Index did "not sufficiently explain the application of attorney-client privilege [to withheld emails], given that the context makes it clear that the attorney was only a participant in the email chain as a carbon-copy."); Judicial Watch v. Dep't of State, No. CV 14-1242, 2019

[18] See Espiritu Cert.; Ex. C: last email of Bates No. 87 and all emails contained on Bates Nos. 88, 93, and 94.

WL 2452325, at *6 (D.D.C. June 12, 2019)[19] (Finding that for an email on which an attorney has been carbon-copied to fall under attorney-client privilege, "the attorney must play a role in the description of a legal problem or the dissemination of legal advice."). See also American Immigration Council v. Dep't of Homeland Sec., 21 F.Supp.3d 60, 79 (D.D.C. 2014) (communications from an agency lawyer "will only be protected to the extent that they involve his or her professional, legal capacity."); Cause of Action Inst. v. Dep't of Justice, 330 F.Supp.3d 336, 347 (D.D.C. 2018) (to invoke attorney-client privilege, the agency must "establish that securing legal advice was a primary purpose of the agency's communication.") (internal punctuation omitted); Mead Data Cent., 566 F.2d at 253 ("The privilege does not allow the withholding of documents simply because they are the product of an attorney-client relationship.").

Moreover, it is Defendants' burden to prove that the government attorneys were providing legal, and not regulatory or policy, advice. See e.g., Whitaker v. Cent. Intelligence Agency, 31 F.Supp.3d 40 (D.D.C. 2014) ("a government attorney's advice on political, strategic, or policy issues, valuable as it may be, would not be shielded from disclosure by the attorney-client privilege.") (internal punctuation and citation omitted); Gulf Oil Corp. v Schlesinger, 465 F. Supp. 913, 917 (E.D.P.A. 1979) (defendants did not meet burden of showing attorney-client privilege applied to communications of government attorney where he was not only a legal advisor to the agency but was also responsible for promulgation and interpretation of regulations).

Defendants' revised Vaughn Index simply does not provide enough detailed and specific information to meet the burden of proof that an attorney was in fact engaged in an attorney-client

[19] See Borg Cert.; Ex. 4.

privileged communication, that all the contents of these emails are protected by the privilege, or even that Mr. Bryan and Ms. D'Autrechy are in fact attorneys. An in camera review of the documents in question is therefore necessary.

C. Defendants do not meet their burden to withhold records under the confidential taxpayer privilege.

Plaintiff concedes that it is not entitled to confidential taxpayer information; however, Defendants have failed to specifically identify what confidential taxpayer information is contained in each record and/or do not properly explain how the material is covered by the privilege. The records disputed on the basis of CTI are reflected in Exhibit A of the Espiritu Cert., which includes records disputed on the basis of both ACD and CTI; those reflected in Exhibit C of the Espiritu Cert., which contain records disputed on the basis of both attorney-client privilege and CTI; and those set forth on Exhibit D of the Espiritu Cert., which contain records disputed on the basis of CTI only.

Plaintiff objects to the redactions made to Bates 61 on the basis of CTI for the reasons set forth supra, Section I-A(4). Plaintiff objects to all the records listed in Exhibits A, C and D of the Espiritu Cert. for the reasons set forth below:

1. Requesting and providing legal advice[20]

Plaintiff objects to records on which CTI has been asserted where the only explanation addresses that someone asked for or provided legal advice or guidance. These explanations make no mention of CTI. The references to the "audit," "settlement negotiations" or the "settlement"

[20] See Espiritu Cert.; Ex A: Bates Nos. 96, 118-19, 152-54, 190-93, 228- 31, 266-69, 305-09, 311, 314-19, 332; 336-39; 341-46; 350-351; Espiritu Cert.; Ex. D: Bates Nos. 69, 71, 82-84; 96, 155, 193; 231, 269, 270, 319, 332-33; 339-340, 347. Two (2) documents indicate someone "discusses the settlement and the legal implications thereof." See Espiritu Cert.; Ex. A: Bates Nos. 95, 100.

in some of these emails does not specifically identify the privileged material and there is no way to ascertain whether the request for the legal advice actually included protected CTI.

2. Requesting policy advice and responding to those requests[21]

Plaintiff objects to records where the only explanation for asserting a privilege is that someone "asks for policy advice" or "replies to" a request for policy advice." Defendants have not identified the policy or advice that was sought. However, all the records are dated in December, after the parties had agreed to a settlement number. More significantly, there is no reference to any CTI.

3. Requesting, discussing or providing tax information on the Trump Entities or various taxpayers[22]

Plaintiff objects to records where the only explanation is that someone requests, discusses, or provides tax information on the Trump Entities or other taxpayers. Defendants have not shown that these emails include taxpayer information protected by the statute. For instance, the request may simply have been for the tax returns for a competing casino. If that were the case, the name of the casino could readily be redacted and no CTI would be revealed by providing the remainder of the request.

4. Requests for information about the audit[23]

Plaintiff objects to records where the only explanation is that someone "requests information about the audit." Defendants have not shown that the request for information about the audit included information protected by the statute. For instance, the request may simply have been for the 2010 audit of a competing casino. If that were the case, the name of the casino

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[21] See Espiritu Cert.; Ex. A: Bates Nos. 95, 100, 119, 154, 190-93; 230, 267-68; 310, 338, 346; Espiritu Cert.; Ex. C: Bates No. 87-8; Espiritu Cert.; Ex.D: Bates Nos. 74, 83, 84, 89, 90.
[22] See Espiritu Cert.; Ex. A: Bates Nos. 100, 105-6; 109, 111-15; 117-18; 152-53; Espiritu Cert.; Ex. C: Bates No. 87-8; Espiritu Cert.; Ex.D: Bates Nos. 106-07; 109-12; 115-16.
[23] See Espiritu Cert.; Ex. A: Bates No. 338; Espiritu Cert.; Ex. D: Bates Nos. 97, 102, 120-2.

could readily be redacted and no CTI would be revealed by providing the remainder of the request.

5. Provides audit information, including workpapers and financial information[24]

Defendants did not identify these records as containing any attachments, so Plaintiff is confused as to the meaning of "workpapers."[25] The Court should be guided by a FOIA decision in which the IRS invoked a section of the Internal Revenue Code that, similar to the statute cited by Defendants here, treats tax returns, as well as return information as confidential. The Fifth Circuit found the description of "certain Examination Workpapers, including information from public and private sources" to be so "broad [and] conclusory" that it did not allow the court an opportunity to "meaningfully review the applicability of the claimed exemptions." Batton v. Evers, 598 F.3d 169, 181 (5th Cir. 2010) (citations omitted). The mere reference to "audit information, including workpapers and financial information" here is likewise too vague a description to allow the Court to make a factual finding that the material is exempt or contains information that is segregable.

6. Remaining categories of records[26]

The remaining records for which Plaintiff objects to on the basis of CTI are those where the explanations make vague reference to someone discussing or providing an update or information about the settlement negotiations, the audit, or other taxpayer information and asking or answering questions about the settlement negotiations. Defendants have not met their burden of showing that these records actually contain information protected by the statute. There is no reference at all to protected CTI and merely referencing an "audit" does not mean that the

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[24] See Espiritu Cert.; Ex. A: Bates Nos.101, 152, 191-2; 228, 267, 308, 316, 344-45; 350; Espiritu Cert.; Ex. D: Bates Nos. 79-80; 85-6; 90-1; 101, 103, 120-51; 154, 156-189; 193-227; 232-265; 270-303; 320, 334-35.
[25] The Court's April 18th Order required Defendants to identify all attachments.
[26] See generally: Espiritu Cert.; Exs. A, C, and D.

material actually contains protected information such as material from a tax return or Audited Financials.

There are a few references that the emails contain "financial data."[27] Plaintiff does not dispute DAG Anderson's testimony that this financial information is protected by the privilege because it was not previously released to the public (see Anderson Cert. at ¶7), but Defendants have wholly ignored their obligation to explain why this information could not merely be redacted. The fact that "financial data" is only referenced in some but not all of the withheld records suggests that the remaining records do not contain financial data. Yet, Defendants have failed to identify what types of data is being protected for these remaining records. For instance, Defendants could have identified certain emails as containing protected tax return information but they did not.

II. In Camera Review is Warranted.

If the Court determines that the records withheld by the State are potentially privileged, "the court is obliged. . . to inspect the challenged documents in camera to determine the viability of the claim." MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 551 (App. Div. 2005) (citing Hartz Mountain Indus., Inc. v. N.J. Sports & Exposition Auth., 369 N.J. Super. 175, 183 (App. Div.)). Here, Defendants have failed to provide the Court with the information it needs to determine that the claimed privileges have been properly asserted and that the withheld documents have no segregable information. An in camera review is therefore necessary.

[27] See Espiritu Cert.; Ex. D: Bates Nos. 78-80; 85-86; 90-91; 101, 103, 108, 121-151, 156-189; 194-227; 233-265; 271-303; 320, 334-5.

A. An in camera review is necessary to determine if the claimed privileges have been properly asserted.

Under OPRA, Defendants have the heavy burden of demonstrating that the claimed privileges have been properly asserted. See N.J.S.A. 47:1A-5(g). Defendants have failed to meet this burden. The additional "explanations" listed on the revised Vaughn Index and the updated Anderson Certification do not explain or demonstrate the applicability of the privileges asserted.

When an agency seeks to withhold information, "the custodian shall indicate the specific basis" for withholding each and every responsive record. N.J.S.A. 47:1A-5(g). See also Heffernan v. Azar, 317 F.Supp.3d 94, 116–17 (D.D.C. 2018) (Defendants must "provid[e] a relatively detailed justification, specifically identif[y] the reasons why a particular exemption is relevant[,] and correlate[e] those claims with the particular part of a withheld document to which they apply.")(internal citation omitted). Here, the revised Vaughn Index fails to specifically link asserted exemptions to rationales for withholding and makes blanket assertions for multiple exemptions, and improperly relies on conclusory, boilerplate reasons to justify its withholdings. See supra, Section I-A(1). Such "[c]onclusory assertions of the privilege or exemption claims will not suffice to carry the defendant's burden of establishing the right to withhold disclosure." Cohen v. City of Englewood, BER-L-7144-17 2017 WL 6597244, at *7 (Law Div. Bergen Co., Dec. 21, 2017).[28]

Courts must undertake in camera review where, as here, "it is not possible to determine with any accuracy, what information, if any, is privileged or exempt." Cohen v. City of Englewood, 2017 WL 6597244, at *7. In several cases, after conducting an independent in camera review, courts have determined that defendants have improperly and overly asserted privileges. See, e.g., N.J. Media Grp. Inc. v. Dep't of Pers., 389 N.J. Super. 527, 537 (Law. Div.

[28] See Borg Cert.; Ex. 5.

2006) (rejecting the government's assertions of privilege and ordering defendant to provide properly redacted copies of withheld documents."); Gannett New Jersey Partners, LP v. Cty. Of Middlesex, 379 N.J. Super. 205, 220 (App. Div. 2005) (finding that the lower court "should have conducted an appropriate in camera hearing" and rejecting the government's assertions of deliberative processes over factual materials.). See also Judicial Watch v. Dep't of State, 2019 WL 2452325, at *6[29] (rejecting the government's assertions of attorney-client privilege and work-product privilege in multiple documents after completing an in camera review). This further highlights the importance of an independent, in camera assessment.

Given the paucity of evidence, the Court cannot properly assess the applicability of the asserted exemptions under OPRA or meaningfully engage in the balancing test under the common law. Accordingly, the Court should conduct an in camera review to see if the claimed privileges are properly asserted.

B. An in camera review is necessary to determine if redacted material can be provided.

Moreover, the State has failed to provide the Court with the information it needs to determine that the withheld documents have no segregable information. Under OPRA, Defendants have the burden of redacting privileged portions of all responsive records and providing the remainder, or providing an explanation as to why, for each document withheld in full, no redactions were possible. See N.J.S.A. 47:1A-5(g). Defendants have clearly failed to meet their burden by withholding, in their entirety, nearly every document responsive to Plaintiff's request.[30] What's more, Defendants have withheld these records without even addressing the possibility of redaction, much less providing a sufficient explanation.

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[29] See Borg Cert.; Ex. 4.

[30] The State provided a single partially-redacted document. See Bates No. 61, discussed supra section I-A(4). See Bates No. 61 attached as Ex. 3 to Borg Cert..

Defendants cannot simply deny access to these records in their entirety if only a portion of those records are exempt; rather, pursuant to N.J.S.A. 47:1A-5(g), they must be directed to produce each responsive record, with redactions as appropriate. See Commc'ns Workers of Am. v. Rousseau, 417 N.J. Super. 341, 368 (App. Div. 2010) (noting generally that N.J.S.A. 47:1A-5(g) requires custodians to "delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record."); North Jersey Media Grp. Inc. v. State, Dep't of Personnel, 389 N.J. Super. 527, 539 (Law Div., Mercer Co., July 21. 2006) (holding the requester had a right the requested record in redacted form, noting "all concerns regarding the disclosure of [ ] private information [could] be resolved by redacting that information."); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 207 (Law. Div., Burlington Co., Oct. 28, 2002) (recognizing the general need to redact "classified, confidential or privileged material" from the public records at issue, namely attorney invoices, while contemplating the fees therefore); Atlantic Cnty. SPCA v. City of Absecon, No. A-3047-07T3, 2009 WL 1562967 *7 (App. Div. 2009)[31] (noting "the custodian should redact that part of the [requested records] containing information which is expressly prohibited from disclosure by OPRA"). See also Atlantic City Convention Ctr. Auth. v. S. Jersey Publ'g Co., 135 N.J. 53, 70 (1994) (remanding to the trial court to determine, in part, what portions of a public record "could be released without interfering with the deliberative processes of the agency [or] without interfering with the privacy interests of the employee[s]" involved). Redaction is also favored when access is sought under common law right to know. See, e.g., S. Jersey Publishing Co. v. N.J. Expressway Auth., 124 N.J. 478, 488-89 (1991).

[31] See Borg Cert;. Ex. 6.

In addition to producing properly redacted documents, Defendants must "give plaintiff an explanation of the nature of the information that was redacted" and provide "reasons for making the redactions." Mason v. City of Hoboken, No. A-3992-06T2, 2008 WL 833927, at *2 (Law Div. Hudson Co., Mar. 31, 2008).[32] An agency must show with "reasonable specificity" why each withheld document could not be further segregated. Armstrong v. Exec. Office of the President 97 F.3d 575, 578 (D.C. Cir. 1996). See also N.J.S.A. 47:1A-5(g) ("[T]he custodian shall indicate the specific basis" for withholdings.)(emphasis added); Spectraserv., Inc. v Middlesex County Utilities Auth., 416 N.J. Super. 565, 576 (App. Div. 2010) (requiring the "government custodian" to "locate and redact [the requested] documents, isolate exempt documents … and, when unable to comply with a request, 'indicate the specific basis.'") (emphasis added) (internal citation omitted); Gannett New Jersey Partners, LP v. Cty. Of Middlesex, 379 N.J. Super. at 215 (the burden is on "the custodian of a public record to state the specific basis for the denial of access.") (internal citation omitted). Non-exempt portions of a document must be disclosed unless they are "inextricably intertwined with exempt portions." Educ. Law Center v. New Jersey Dept. of Educ., 198 N.J. at 289. This is true even if an agency believes non-exempt portions are "outside the scope of the request." ACLU of N.J. v. New Jersey Div. of Criminal Justice, 435 N.J. Super. 533, 536 (App. Div. 2014).

An in camera review is especially crucial in this case given the number of times Defendants have invoked the deliberative process privilege.[33] The need to provide "precisely tailored explanations for each withheld record at issue" is "particularly acute" when the deliberative process privilege is invoked. Heffernan v. Azar, 317 F. Supp. 3d at 119; Commc'ns Workers of Am. v. McCormack, 417 N.J. Super. 412, 444 (Ch. Div. 2008) (holding court has

[32] See Borg Cert.; Ex. 7.
[33] Defendants have asserted the ACD privilege to over sixty-eight (68) documents. See Espiritu Cert.; Ex. A.

obligation to review documents in camera and produce redacted advisory, consultative, or deliberative material). The deliberative process privilege does not extend to "purely factual material that does not reflect deliberative processes. Therefore, if a document contains both deliberative and factual materials, the deliberative materials must be redacted and the factual materials disclosed." Gannett New Jersey Partners, LP v. Cty. Of Middlesex, 379 N.J. Super. at 219 (internal citations omitted).

Here, Defendants have provided absolutely no evidence with respect to its burden to identify segregable portions of material that can be released. The State did not even address the issue of segregability other than to provide a single partially-redacted document.[34] Defendants have withheld documents in full where limited redactions to protect the privileged information would almost certainly be possible. An in camera review is therefore necessary to see if redacted material can be provided. Because Defendants have not addressed redactions, much less met their burden to explain why the documents are not further segregable, Plaintiff posits that an in camera review is warranted on all records discussed supra, as well as those which were objected to on the basis of the settlement negotiations privilege.[35]

III. The Common Law Right of Access Demands Disclosure of the Requested Records.

Defendants concede that the first two prongs of the common law balancing test are met. Def. Br. at 28. In support of their assertion that Plaintiff has failed to demonstrate that its interest in disclosure outweighs the State's interest in non-disclosure, Defendants raise three arguments: (i) "[i]f files and records of the Director were released to the public, many citizens and businesses may be disinclined to provide such information or may not cooperate with audits"

[34] See Borg Cert,: Ex. 3
[35] See Espiritu Cert.; Ex. B: Bates Nos. 4-6; 12-13; 17-19; 28-29; 65-66; 322-330.

(Def. br. at 29) which would hinder the Division's operation; (ii) disclosure of "tax information" may have a devastating effect upon filing citizens and businesses" (Def. br. at 29-30) and (iii) disclosure of the records may affect the Division's ability to consider and weight settlement for the fear of inappropriate disclosure." Def Br. at 30. Defendants argument concludes that because N.J.S.A. 54:50-8 exempts certain records, those records should likewise be exempt under the common law. Def Br. at 31.

Defendants' common law arguments only address the confidentiality provision of N.J.S.A. 54:50-8 and indicate an overbroad interpretation of the types of records or information that is covered by that provision. The statute protects "the records and files of the director" and, as Defendants argue, the purpose of the confidentiality provision is "to assure every taxpayer making returns that the information therein contained will remain confidential." Def. Br. at 13 citing Monmouth Airlines, Inc. v. Div. of Taxation, 2 N.J. Tax 47, 54 (Tax 1980). Plaintiff is not asking the Court to pierce the confidentiality provision and give it access to taxpayers records. In fact, based on the vague descriptions referenced in the revised Vaughn Index, it is not even clear if any of the withheld records are actual taxpayers' records. Further, Plaintiff is not seeking confidential taxpayer information that may be contained in the emails. Rather, it disputes that each of the records actually contain confidential taxpayer information because Defendants have not identified the protected information contained within the records. In addition, Defendants have made no argument as how the disclosure of information protected by the attorney-client or ACD privileges outweighs Plaintiff's interest in disclosure and therefore their objections should be considered waived or abandoned.

Defendants assertions of harm to the taxpayers or the operations of the Division are speculative and unavailing. In Bergen Cty. Improvement Auth. v. N. Jersey Media Grp., the

plaintiff was seeking access to audited financial statements of a private company that contracted with a public hospital to provide various management and administrative services. The hospital argued that future companies would be discouraged from entering into private/public ventures if their financial details would be disclosed and that releasing the financials would put them at a competitive disadvantage. Bergen Cty. Improvement Auth. v. N. Jersey Media Grp., Inc., 370 N.J. Super 504, 519, 522 (App. Div 2004). The Appellate Division affirmed the trial court's finding that such claims were "speculative and far from self-evident" and, significantly, found the public's interest in the financial records to be self-evident. Id. at 522 (emphasis added). The court granted access under the common law finding that the citizens "of this State have an unquestioned interest in ensuring that public funds, in the form of preferential reimbursement rates, are being spent wisely, efficiently and consistent with the Medical Center's mission." Id. at 523. Such is the case here, which involves the sitting President of the United States and the administration of the former Governor of the State of New Jersey concerning whether the current President was granted preferential treatment in the settlement of debts of public money.

The importance of Bates No. 61 and Bates No. 73 also bears emphasis.[36] Both of these were created in October before the settlement was made public and filed with the Bankruptcy Court on December 5, 2011. The Governor, through his then spokesman, repeatedly denied any knowledge of or participation in the settlement process, despite evidence to the contrary. See Certification of Jennifer Borg in support of Plaintiff's Verified Complaint, filed March 14, 2019; Ex. F. Both Bates No. 61 and No. 73 involve communications with high-ranking officials in the Governor's Office. Bates No. 61 was provided in redacted form, and based on the disclosed information, Defendants' contention that the redacted portions contain CTI or ACD material is

[36] Bates no. 73 was misstated as Bates no. 71 in Plaintiff's Moving Brief. (See Moving Br. p. 31).

highly implausible. See supra, Section I-A(4). The subject matter for this document is listed on the revised Vaughn Index as "settlement discussions and analysis." Espiritu Cert.; Ex. A: Bates No. 61. With respect to Bates No. 73, the email to Regina Egea, the Governor's Chief of Staff, the "explanation" provided in the revised Vaughn Index expressly states that an official from Treasury was asking Ms. Egea (and others) for an update on the "ongoing settlement negotiations." Espiritu Cert.; Ex. D: Bates No. 73. These factual discrepancies implicate the integrity of the Governor, his office, and of the settlement agreement itself, and therefore are of substantial interest to Plaintiff and members of the public. Given that the central purpose of OPRA and the common law is transparency, not secrecy, and "knowing what our government is up to," the public has a right to see if these records shed light on such seemingly false denials.

The State forgave a debt of nearly $25 million when it settled with the Trump Entities. The public certainly has a substantial interest in knowing whether the settlement was fair and reasonable particularly given the former Governor's relationship with Trump and the conflicting evidence as to whether his office had any prior knowledge of the settlement. The public interest in shedding light on agency action strongly outweighs any interest in non-disclosure, particularly since the Trump Entities no longer exist and their former representatives declined an opportunity to be heard in this matter.

For these reasons, it is respectfully submitted that the Court find that the common law right of access demands access to requested records.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court declare Defendants' actions to be in violation of OPRA and the common law and compel Defendants to produce the records to Plaintiff forthwith. Plaintiff further requests that, in the event the Court finds that Defendants have violated OPRA, that the Court order Defendants to pay attorneys' fees and costs in connection with this matter and that the Court consider whether Defendants' actions constituted a "knowing and willful" violation. Plaintiff also requests that the Court provide other and further relief as the Court may deem just and equitable.

Respectfully submitted,

/s _____
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[37] This Reply Memorandum has been prepared in part by a clinic associated with the Abrams Institute for Freedom of Expression and the Information Society Project at Yale Law School, but does not purport to present the school's institutional views, if any.