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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.: Civil Action

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S VERIFIED COMPLAINT

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PRELIMINARY STATEMENT

This case is brought by The New York Times about a matter of critical public interest: whether the current President of the United States received preferential treatment when settling major tax disputes with the State of New Jersey in December 2011. Beginning in 2002, several New Jersey casinos affiliated with Donald J. Trump ("Trump Casinos") failed to pay certain New Jersey State taxes. (See Verified Complaint ¶12; see Exhibit ("Ex.") A to the Certification of Russell Buettner in support of Plaintiff's Verified Complaint (hereinafter "Buettner Cert.")).

Shortly thereafter, the Trump Casinos filed for bankruptcy. By filing claims and objections in the course of these bankruptcy proceedings, the State of New Jersey would spend the next several years attempting to recoup the tax debts. (See Verified Complaint ¶12). In 2011, after seven years of contentious litigation, the State agreed to settle the debt for $5 million dollars—forgiving nearly $25 million in debt—after Chris Christie became Governor. (See Ex. B to the Certification of Jennifer Borg in support of Plaintiff's Verified Complaint (hereinafter "Borg Cert."); see Verified Complaint ¶12).

Specifically, the debt in question arose from a failure to pay a new state corporate tax that went into effect in 2002 and that was designed, in part, to prevent businesses from avoiding taxes through accounting maneuvers. (See Verified Complaint ¶13; see Ex. A to Buettner Cert.) The new tax, called the alternative minimum assessment, raised the state tax liability for most Atlantic City casinos. However, the Trump Casinos never paid the new tax between 2002 and 2004. (Id.)

It was only after the Trump Casinos filed for bankruptcy protection in 2004 for the third time that State officials noticed that the entities had not been filling out the required schedule for the new minimum tax assessment. (See Verified Complaint ¶14). State auditors assessed that the Trump Casinos should have paid a total of $8.8 million in alternative minimum taxes for 2002 and

2003 when these Trump entities only paid a total of $601,500 in state taxes for these two years. (See Verified Complaint ¶15). The State's claims still had not been resolved in 2009 when Trump Casinos filed for bankruptcy again. (See Verified Complaint ¶16). According to the State, the total amount due, with interest, had by then risen to $29.4 million. (Id.) In the course of the bankruptcy proceedings, the State also accused Trump Casinos of filing false reports regarding the amount of taxes that they had paid. (See Verified Complaint ¶17).

For example, as reported by Mr. Buettner:

> In February 2007, Heather Lynn Anderson, a deputy attorney general filed court documents saying auditors had discovered discrepancies that raised 'numerous additional questions regarding the accuracy' of the Trump casinos' tax returns. The company had reported lower revenue figures on its tax returns, for example, than on filings with the State Casino Control Commission. Ms. Anderson also wrote that Mr. Trump's flagship casino, the Taj Mahal, had reported to the casino commission that it paid $2.2 million in alternative minimum assessment tax in 2003, which was not true. The company had paid only $500 in income taxes.

(See Verified Complaint ¶18; see Ex. A to Buettner Cert.).

Mr. Christie's name appeared several times in the bankruptcy cases between 2004 and 2009, while he was the United States Attorney for New Jersey and representing the federal Internal Revenue Service in its own claims against Trump Casinos. (See Verified Complaint ¶19). However, the case was handled by a lawyer for the I.R.S. and not Mr. Christie personally. (Id.) After Chris Christie became Governor in 2010, the State startlingly agreed to settle the roughly $30 million owed to the State for just $5 million—or less than 17 cents on the dollar. (See Verified Complaint ¶21; see Ex. A to Buettner Cert.). Without any explanation, and after several years of dispute, the State forgave $24,400,000 in debt owed to NJ taxpayers.

After Mr. Trump became President, The New York Times reporter Russell Buettner filed fifteen requests under the Open Public Records Act ("OPRA") and the common law seeking specific correspondence between various State agencies and the Trump organizations related to

the 2011 settlement. Defendants responded to Plaintiff's requests by providing some records, withholding others, making redactions to a few of the records, and indicating that certain responsive records did not exist. Plaintiff and counsel for the State have worked together for several months to narrow and amicably resolve the outstanding issues but have not been able to come to a final agreement with respect to two of Plaintiff's requests (#W130116; #W130117)(collectively "Requests"). This lawsuit concerns the State's responses to these two (2) Requests.

In the course of filing the OPRA requests, Mr. Buettner worked closely with the Media Freedom and Information Access Clinic at Yale Law School ("MFIA"). MFIA is a law student clinic that conducts work relating to information access and protecting the rights of newsgatherers. Attorneys and law student interns from MFIA have assisted in drafting the OPRA requests, assisting counsel for The New York Times in working with the State with respect to its responses to the requests, and researching and drafting the pleadings in the instant lawsuit. (See Verified Complaint ¶27; see Borg Cert at ¶2; see the Certification of Sarah Levine in support of Plaintiff's Verified Complaint (hereinafter "Levine Cert." at ¶1).

FACTUAL BACKGROUND

Plaintiff The New York Times is a Pulitzer Prize-winning newspaper with a significant national readership. Russell Buettner is an investigative reporter for The Times. For over two decades, he has investigated and reported on matters of public interest in New Jersey and the tristate area. (See Verified Complaint ¶10; see Buettner Cert. at ¶1). Mr. Buettner has been recognized for his reporting in the public interest, including recognition as a finalist for the Pulitzer Prize for Public Service in 2012. (See Buettner Cert. at ¶1).

As set forth above, Mr. Buettner filed a total of fifteen OPRA requests with various New Jersey agencies in accordance with the Open Public Records Act ("OPRA"), N.J.S.A 47:1A-1 et seq., and the common law. (See Verified Complaint ¶26). The following two requests filed by Mr. Buettner are the subject of this lawsuit:

Plaintiff's OPRA Requests to Division of Taxation of the Department of Treasury, W130116 and W130117

On March 3, 2018, Mr. Buettner submitted a public records request to the Division of Taxation of the Department of Treasury of the State of New Jersey (Request #W130116) (See Verified Complaint ¶28; see Ex. B to Buettner Cert.). Specifically, Plaintiff requested copies of correspondence, dated from September 1, 2011 to December 31, 2011, between certain current or former employees of the Department of Treasury and other specific individuals about the "settlement of Claim No. 1181 and Claim No. 1251 between the Division of Taxation and various Trump organizations in the U.S. Bankruptcy Court for the District of New Jersey with the caption In re TCI 2 Holdings, LLC et al., Case No. 09-13654 (JHW)." (See Verified Complaint ¶29; see Ex. B to Buettner Cert.).

Also on March 3, 2018, Mr. Buettner submitted a second but similar request to the Division of Taxation of the Department of Treasury seeking correspondence between the same current or former employees identified in Request #W130116 but with different individuals concerning the same settlements of Claim No 1181 and Claim No 1251 and during the same time-period (Request #W130117). (See Verified Complaint ¶30; see Ex. C to Buettner Cert.).

On March 20, 2018, Cynthia Jablonski, the Manager of the Government Records Access Unit, sent letters to Mr. Buettner requesting a twenty-day extension, until April 18, 2018, for both of these requests. (See Verified Complaint ¶31; see Ex. D and see Ex. E to Buettner Cert.).

On April 18, 2018, Ms. Jablonski sent Mr. Buettner two letters responding to the two requests. (See Verified Complaint ¶32; see Ex. F and see Ex. G to Buettner Cert.). With respect to Request #W130116, Ms. Jablonski provided three pages of responsive records, one of which contained redactions. Those records provided by Ms. Jablonski are not the subject of this lawsuit. She stated that other responsive records were being withheld on the basis of the attorney-client privilege, settlement negotiations privilege, and deliberative process privilege. (Id.)

With respect to Request #W130117, Ms. Jablonski stated that all responsive documents were being withheld on the basis of the settlement negotiations privilege and the deliberative process privilege. (See Verified Complaint ¶33; see Ex. G to Buettner Cert.).

Between April 24, 2018, and May 24, 2018, Jennifer Borg, counsel for Plaintiff, and Raymond Chance, Assistant Attorney General for the State of New Jersey, were in communication via phone and email regarding Mr. Buettner's requests, and were amicably working to resolve the outstanding disputes. (See Verified Complaint ¶34; see Ex. G to Borg Cert.; see Borg Cert at ¶9). The parties agreed to keep the requests open and pending while they worked to resolve the issues.

On May 24, 2018, Mr. Chance emailed Ms. Borg, stating that in re-reviewing Request #W130116, the State had found an additional responsive document. (See Verified Complaint ¶35; That document (Bates No. 61) was a one-page email thread that contained several redactions for which the confidential settlement negotiations privilege was asserted. (See Verified Complaint ¶35; see Ex. H to Borg Cert.; see Borg Cert at ¶10). The redactions to that document are part of this lawsuit.

Additionally, on May 24, Mr. Chance sent Ms. Borg a document labeled "Privilege Log in response to OPRA request number #W130116 and #W130117 Buettner" ("Privilege Log"). (See Verified Complaint ¶37; see Ex. I to Borg Cert.; see Borg Cert at ¶11). That document is 81 pages

long, and details the date, sender, recipients, and general subject matter of the documents withheld and the redactions made to Bates No. 61. It also included a brief description of the privileges being asserted. (See Ex. I to Borg Cert.). In an effort to assist Plaintiff in its evaluation of the Privilege Log, the State included a list of people whose names were referenced in the Privilege Log and identified them by their job title. This list appears on the last two pages of the Privilege Log. (See Ex. I to Borg Cert. at 80-81).

On June 15, 2018, after reviewing the Privilege Log sent by Mr. Chance, law student intern Jeff Guo from MFIA contacted Mr. Chance on behalf of Mr. Buettner to request further details about the documents being withheld and the privileges asserted. (See Verified Complaint ¶38; see Ex. J to Borg Cert.; see also Ex. K to Borg Cert. for the attachment to that message). First, Plaintiff requested that the State review any records claiming the confidential taxpayer information privilege that involved either high-level officials or others distant from the negotiation. Second, Plaintiff requested the release of any records that date from after the settlement was reached. Third, Plaintiff requested further clarification as to how the "advisory, consultative and deliberative process" and "attorney client" privileges applied to each of the withheld records. Finally, Plaintiff also requested that the non-privileged portions of each document in the Privilege Log be disclosed, and that only the privileged material be redacted. Plaintiff specifically mentioned that having the time that messages were transmitted would be useful to him. (See Verified Complaint ¶38; see Ex. K.).

Between June and August, 2018, Mr. Chance and Plaintiff, through counsel, worked together amicably in an attempt to resolve the remaining issues. On August 26, 2018, Plaintiff, through MFIA attorney Jennifer Pinsof, restated Plaintiff's position with respect to some of Defendants' responses and requested additional time to review the Privilege Log in hopes of

narrowing the issues before the State issued its final decision. (See Verified Complaint ¶39; see Ex. L to Borg Cert.; see Borg Cert at ¶14). Between August and October, Mr. Chance and Plaintiff, through counsel, continued to work together. (See Verified Complaint ¶39; see Borg Cert at ¶ ¶14-5).

On October 5, 2018, law student interns Sarah Levine and Jake van Leer wrote to Mr. Chance on behalf of Mr. Buettner stating that Plaintiff had narrowed the issues down to just 378 of the 641 documents referenced in the Privilege Log. That letter itemized specific documents listed in the Privilege Log, according to their Bates numbers, about which Plaintiff had remaining questions about the privileges asserted. All of the documents disputed were withheld in their entirety with the exception of Bates No. 61, which contained redactions. (See Verified Complaint ¶40; see Ex. M to Borg Cert; see Borg Cert. at ¶15). The letter also included an appendix that detailed which documents were no longer being disputed. (That appendix has been omitted from this lawsuit because it is not relevant.) (See Borg Cert. at ¶15). The letter reiterated Plaintiff's request that the State release records that date from after the settlement was signed between New Jersey and the Trump organizations. The letter also requested a review of documents for which attorney-client privilege was claimed. Specifically, the letter identified documents on which no attorneys were present and documents on which individuals from multiple agencies were present. More broadly, that letter requested further information as to how the attorney-client privilege applied to each of the withheld records. The letter also reiterated Plaintiff's request that the State review any records claiming the confidential taxpayer information privilege that involve either high-level officials or others distant from the negotiation. Finally, Plaintiff again requested that the non-privileged portions of each document in the Privilege Log be disclosed and that only the

privileged material be redacted. (See Verified Complaint ¶40; see Ex. M to Borg Cert; see Borg Cert. at ¶15.

Between October 2018 and February 2019, Mr. Chance and Plaintiff, through counsel, continued to work amicably in an attempt to resolve the remaining issues but have not been able to come to an agreement. (See Verified Complaint ¶42; see Borg Cert. at ¶15). On February 6, 2019, Plaintiff received a letter from The Office of the Attorney General, Department of Law and Public Safety, signed by Heather Lynn Anderson, Deputy Attorney General, reiterating that it stood by the privileges asserted on the Privilege Log and stating that OPRA Requests #W130116 and #W130117 were closed. (See Verified Complaint ¶43; see Ex. N to Borg Cert; see Borg Cert. at ¶16).

LEGAL ARGUMENT

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

OPRA embodies New Jersey's longstanding public policy of ensuring ready public access to government records:

> [G]overnment records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest. And any limitations on the right of access accorded by [OPRA] shall be construed in favor of the public's right of access . . . .

N.J.S.A. 47:1A-1. It is the burden of the custodian of the government record to prove that denial of access is authorized by law. N.J.S.A. 47:1A-6.

Pursuant to OPRA, government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public disclosure unless otherwise exempt. N.J.S.A. 47:1A-1.1. If a custodian cannot comply with a request, OPRA requires the

custodian to indicate the specific legal basis for non-compliance on the request form and promptly return it to the requestor. N.J.S.A. 47:1A-5(g).

Defendants bear the burden of proving that their refusal to disclose information to Plaintiff is in each instance authorized by law. N.J.S.A. 47:1A-6. Any agency "seeking to restrict the public's right of access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality." Courier News v. Hunterdon Cnty. Prosecutor's Office, 358 N.J. Super 373, 382-83 (App. Div. 2003). Absent the necessary proofs, "a citizen's right of access is unfettered." Id. Moreover, in assessing the sufficiency of proof submitted by the agency in support of nondisclosure, "a court must be guided by the overarching public policy in favor of a citizen's right of access." Id. If access has improperly been denied, the record shall be disclosed and the prevailing party is entitled to a reasonable attorney's fees. N.J.S.A. 47:1A-6.

Defendants have invoked multiple privileges without a sufficient legal basis. Established caselaw requires "a party claiming privilege to 'describe the nature of the documents . . . not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." Burke v. Brandes, 429 N.J. Super. 169, 178 (2012) (quoting Paff v. N.J. Dep't of Labor, 379 N.J. Super. 346, 354 (App. Div. 2005)). Defendants have asserted in a conclusory fashion that requested records are facially exempt without providing adequate information to support the applicability of their claimed privileges. A "mere assertion of privilege . . . simply does not suffice." Id. Further, it is apparent that some privileges were asserted where common sense suggests they cannot be properly applied, and others were asserted in contexts that suggest pervasive over-application.

Defendants have also withheld documents in full where limited redactions to protect the privileged information would almost certainly be possible. An agency may not withhold an entire record simply because it contains some exempt information. Rather, it must "delete or excise from a copy of the record that portion which the custodian asserts is exempt from access" and "promptly permit access to the remainder of the record." N.J.S.A. 47:1A-5.g; see also Burnett v. County of Bergen, 198 N.J. 408, 437 (2009) (permitting redaction of social security numbers from requested land title records). 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).

Defendants have violated OPRA's mandate and contravened "the State's long-standing public policy favoring ready access to most public records," as will now be demonstrated. Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 36 (App. Div. 2005) (quoting Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003)).

A. Defendants have invoked the deliberative process and "advisory, consultative or deliberative" privilege where it does not properly apply.

Plaintiff objects to all records that were withheld on the basis of the deliberative process and/or "advisory, consultative and deliberative" ("ACD") privileges. [1] (See Ex. A to Levine Cert.) OPRA exempts "inter-agency or intra-agency advisory, consultative or deliberative material" from disclosure. [2] N.J.S.A. 47:1A-1.1. The ACD exemption incorporates the common law deliberative

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[1] Plaintiff and counsel for the State worked together for several months to narrow the issues in this case and to reduce the number of disputed documents. (See Verified Complaint ¶ ¶27, 32, 35 and 37). The documents that remain in dispute on the basis of the ACD and/or deliberative process privileges are listed for the convenience of the Court in Ex. A to Levine Cert. (See Levine Cert. ¶2; see Verified Complaint ¶37). This exhibit is based on the 81-page Privilege Log provided by Mr. Chance. A full copy of the Privilege Log is available as Ex. I to Borg Cert.

[2] In New Jersey, the ACD privilege incorporates the common-law deliberative process privilege. See Ciesla v. New Jersey Dep't of Health & Sr. Services, 429 N.J. Super. 127, 137 (App. Div. 2012). It is not clear to Plaintiff why the State sometimes invokes ACD, sometimes deliberative process, and, in one

process privilege, which serves to promote "government's full and frank discussion of ideas when developing new policies." Educ. Law Ctr. v. New Jersey Dep't of Educ., 198 N.J. 274, 295 (2009) (emphasis omitted). To properly assert the deliberative process privilege, Defendants must demonstrate that withheld documents are both: "pre-decisional," that is, generated prior to the adoption of an agency policy; and "deliberative" in nature, meaning that their disclosure would reveal "opinions, recommendations, or advice about agency policies." Educ. Law Ctr., 198 N.J. at 286. The State has not met its burden and therefore cannot withhold these documents on the basis of these privileges.

1. Defendants have not shown that withheld documents are deliberative in nature.

Defendants have not shown that the withheld documents reflect protected inter- or intra-agency deliberations about agency policy. The State has asserted the ACD and/or deliberative process privilege for communications purportedly related to the following subjects: "Settlement Discussion," "Settlement Information," "Settlement discussions and analysis," "Settlement discussion/draft stipulation," "Casino alternative minimum assessment (Discussion of various casino gross revenues)," "AC Casino Information (Discussion of various casino gross revenues)," "Tax Audit Discussion," and "Discussion of Policy and Cases." (See Ex. A to Levine Cert.) Plaintiff requests disclosure of all communications (or portions thereof) that do not bear directly on the exercise of policy-oriented judgment.

a. Records are not deliberative because they do not reflect actual policymaking.

Not all agency decision-making is covered by the deliberative process privilege. The State bears the burden of demonstrating that records withheld on the basis of the deliberative process

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instance, both privileges (Bates No. 61). For the purposes of this brief, we will use the terms interchangeably.

privilege contain protected agency communications related to "actual policymaking." Correctional Med. Services v. State, Dep't of Corrections, 426 N.J. Super. 106, 122 (App. Div. 2012). In Correctional Med. Services, the Appellate Division found that the ACD privilege did not apply to decisions regarding the proper administration of a contract and the assessment of damages, because these activities did not constitute policy formulation. The court relied on a series of federal cases to conclude that the "deliberative process privilege . . . is centrally concerned with protecting the process by which policy is formulated." Id (citations omitted). Here, Defendants have failed to articulate how disclosure of the withheld documents would reveal agencies' decision-making processes related to "actual policymaking." Id.

The State has also improperly invoked the deliberative process privilege for records purportedly containing a "Discussion of Policy and Cases" (Bates No. 73). The deliberative process privilege "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (emphasis added). The subject heading provided by the State suggests that these communications relate to existing agency policy and case law, rather than to subjective and prospective opinions.

b. Factual material must be disclosed.

The subject matters listed in the Privilege Log indicate that some withheld records likely contain factual material which must be disclosed. Although New Jersey courts do not always adhere to a strict distinction between facts and opinions in assessing the deliberative nature of a document, "a court must recognize the difference between factual material that is part of the formulation, or exercise, of policy-oriented judgment from factual material that is not." Educ. Law Ctr., 198 N.J., at 295. If a "document contains both deliberative and factual materials, the

deliberative material must be redacted and the factual material disclosed." In re Liquidation of Integrity Ins., 165 N.J. 75, 87 (2000) (citations omitted).

With the exception of Bates No. 61, Defendants have not provided any portion of the records withheld on the basis of the ACD privilege even though portions of these records may indeed contain non-privileged material. For example, documents containing information about the "gross revenues" of Trump Casinos likely reflect "[p]urely factual material that does not reflect deliberative processes," and should therefore be disclosed. In re Liquidation., 165 N.J. at 85 (See, Ex. A (Bates Nos. 109-114) to Levine Cert.). Defendants have also invoked the deliberative process privilege to justify withholding certain records labeled "Settlement Information" and "Settlement Discussion." (See Ex. A to Levine Cert.). Plaintiff respectfully requests that Defendants explain the difference between these subject headings, as the former class of records may contain purely factual material that must be disclosed.

c. Communications with adversaries are not intra-agency or inter-agency.

The State has improperly asserted the ACD privilege for email communications between government employees and two attorneys representing one or more of the Trump entities. (See Ex. A (Bates Nos. 322-30) to Levine Cert.). According to the State's "Persons of Note" list provided at the end of Privilege Log, Michael Guariglia and Jeffrey Testa are attorneys at McCarter & English and counsel to Trump Entertainment Resorts and TCI 2. (See Verified Complaint ¶37; see Ex. I to Borg Cert. at 80-1). 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 outside parties --especially the attorneys representing a client adverse to the State. N.J.S.A. 47:1A-1.1. See Electronic Frontier Foundation v U.S. Dep't of Justice, 826

F. Supp. 2d 157, 171 (D.D.C. 2011) (the deliberative process privilege generally does not apply to communications "between agencies and outside parties").

2. Emails dated after October 5, 2011 are not pre-decisional.

In addition, Defendants have not shown that the withheld documents are pre-decisional. A record is considered pre-decisional if it was "generated before the adoption of an agency's policy or decision." In re Liquidation., 165 N.J. at 84 (citing Coastal States, 617 F.2d at 866). Even if the Court finds that these records are "deliberative" within the meaning of the deliberative process privilege, it must nonetheless determine the exact date on which the settlement was reached in order to assess whether the communications were **pre**-decisional. Any records generated after the settlement terms were agreed to by the State are by definition post-decisional and cannot be governed by the deliberative process privilege.

A settlement is final, and therefore post-decisional, 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 their undertaking." Scheeler v. Galloway Twp., 2017 N.J. Super. Unpub. LEXIS 2847 at *13 (App. Div. 2017)[3] (quoting Comerata v. Chaumont, Inc. 52 N.J. Super. 299, 304 (App. Div. 1958). See also Pascarella v. Bruck, 190 N.J. Super. 118, 126 (App. Div. 1983) ("That the agreement was to be memorialized in writing makes it no less a contract where, as here, the parties concluded an agreement by which they intended to be bound") (emphasis in original); Jennings v. Reed, 381 N.J. Super. 217, 228 (App. Div. 2005) ("[F]ormalization in court is not required" for a settlement agreement to become binding). It follows that if the State and Trump Casinos agreed to the essential terms of the settlement on a date prior to its execution date, then any communications generated after that date are post-decisional.

[3] Pursuant to R. 1:36-3, a copy of this decision is attached to the Borg Cert. as Ex. O

The record reflects that the terms of the settlement were agreed to as early as October 5, 2011. The very next day, Richard Mroz,[4] a private citizen, sent an email to Craig Domalewski, Senior Counsel for the Governor's Office, at 9:40 a.m. with the subject line "Trump AMT," stating: "I am assuming you are aware Div.of Taxation has agreed to a settlement." (See Verified Complaint ¶36; Ex. H to Borg Cert.). If an outside party knew that the State agreed to a settlement as early as the morning of October 6, it is reasonable to infer that the State was no longer engaged in deliberations concerning the settlement after October 5.

Additional evidence suggesting that the settlement was reached on or before October 5 is the fact that the State did not assert the "settlement negotiations" privilege for any documents dated between October 5 and November 28, the signing date. (See Ex. B to Levine Cert.). This suggests that the State had agreed to the terms of the settlement by October 5. If the essential settlement terms remained unchanged between October 5 and the signing date, any records generated after October 5 are post-decisional and therefore must be disclosed.

B. Defendants have improperly invoked the confidential settlement negotiations privilege.

Defendants have also violated OPRA by inappropriately withholding 15 unidentified records on the basis of a "confidential settlement negotiations" privilege without demonstrating that the privilege actually applies to these records. (See Ex. B to Levine Cert.) (listing the documents in question).[5]

First, Defendants fail to provide evidence sufficient to justify a withholding under the confidential settlement negotiations privilege. The State has withheld multiple documents on the

[4] Upon information and belief, Mr. Mroz was a private citizen at the time. (See Verified Complaint at ¶36).

[5] The documents that are being disputed in this lawsuit on the basis of the "confidential settlement negotiations" privilege are listed for the convenience of the Court in Exhibit B to Levine Cert. (See Levine Cert. ¶2).

basis of the settlement negotiations privilege with the subject heading "Settlement negotiations." (See Ex. B (Bates No. 65-6) to Levine Cert.) Under OPRA, records custodians "may not rely upon conclusory and generalized allegations of exemptions, but must provide specific reasons for withholding documents." N. Jersey Media Grp. Inc. v. Bergen Cty. Prosecutor's Office, 447 N.J. Super. 182, 195 (App. Div. 2016) (internal quotations and citations omitted). Subject headings that precisely mimic the privilege asserted cannot suffice. And even if some information contained in these documents does relate to settlement negotiations, the withheld documents likely include some purely factual material which must be disclosed. See N.J.S.A. 47:1A-5(g).

Second, Defendants fail to demonstrate that the withheld documents were generated before settlement negotiations ceased. The confidential settlement negotiations privilege, quite obviously, does not apply to records generated after a settlement is reached (even though such records may be privileged under another basis). As discussed *supra,* Section I-A(2), a settlement is final once both parties agree upon all the essential terms.[6] The record indicates that a settlement between the State and Trump Casinos was reached as early as October 5, 2011. See supra, Section I-A(2). It follows that any communications generated after October 5, 2011 are not subject to the confidential settlement negotiations privilege.

C. Defendants have improperly asserted the attorney-client privilege.

Defendants have misapplied the attorney-client privilege by applying it to communications to which the privilege plainly does not apply. In addition, for many of the withheld records, it

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[6] See Scheeler v. Galloway Twp., 2017 N.J. Super. Unpub. LEXIS 2847 at *13 (App. Div. 2017)(attached as Ex. O to Borg Cert). See also Pascarella v. Bruck, 190 N.J. Super. 118, 126 (App. Div. 1983) ("That the agreement was to be memorialized in writing makes it no less a contract where, as here, the parties concluded an agreement by which they intended to be bound") (emphasis in original); Jennings v. Reed, 381 N.J. Super. 217, 228 (App. Div. 2005) ("[F]ormalization in court is not required" for a settlement agreement to become binding).

appears that the privilege may have been waived. Plaintiff objects to all the records that were withheld on the basis of this privilege.[7]

One category of exemption under OPRA is "any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1. However, the exemption does not permit wholesale withholdings, and Section 5(g) of OPRA requires that if a record contains privileged material, the Custodian must redact that portion of the record containing the privileged material and provide prompt access to the remainder of the record. N.J.S.A. 47:1A-5(g). See also, N.J.S.A. 47:1A-1.1 (granting public access to "attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege"). New Jersey courts adhere to the principles that,

> [d]espite the importance of the privilege, it should be construed strictly: Since 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. The rule of privilege, having a tendency to prevent the full disclosure of the truth, ought to be construed strictly.

Paff v. Division of Law, 412 N.J. Super. 140, 150 (App. Div. 2010) (internal quotations and citations omitted).

1. Attorney-client privilege does not apply where no attorneys are present.

The attorney-client privilege protects only "[c]onfidential communications between a client and his attorney in the course of a professional relationship." O'Boyle v. Borough of Longport, 218 N.J. 168, 185 (2014). Further, "[t]he privilege is 'limited to communications made to the attorney in his professional capacity.'" In re Grand Jury Subpoenas Duces Tecum Served by

[7] The documents that are being disputed in this lawsuit on the basis of the "attorney-client" privilege are listed for the convenience of the Court in Exhibit C to Levine Cert. (See Levine Cert. ¶ 2).

Sussex Cnty., 241 N.J. Super. 28, 30 (App. Div. 1989) (quoting United Jersey Bank v. Wolosolf, 196 N.J. Super. 553, 562 (1984)). Thus, it follows that if there is no person acting in the capacity of an attorney, the attorney-client privilege cannot be invoked.

According to the Privilege Log, several records were withheld under the attorney-client privilege yet it is not clear whether an attorney was part of the communication. Although Defendants provided the job titles for each person listed on the Privilege Log, their job titles alone do not indicate whether they are attorneys or not. (See Ex. C to Levine Cert; see Ex. I to Borg Cert. for the complete Privilege Log). For instance, in support of Defendants' argument that certain records are protected by the privilege, DAG Heather Anderson states that she was a "recipient of the correspondence" listed in Bates No. 39; however, Bates No. 39 includes two separate emails, one of which she is not listed on.

2. Not all communications with any attorney are protected.

Even where an attorney is present on a communication, the communication is not necessarily privileged. The attorney-client privilege protects only "[c]onfidential communications between a client and his attorney in the course of a professional relationship . . . and protects only those communications expected or intended to be confidential." O'Boyle v. Borough of Longport, 218 N.J. 168, 185 (2014). Further, "[t]he privilege is 'limited to communications made to the attorney in his professional capacity.'" In re Grand Jury Subpoenas Duces Tecum Served by Sussex Cnty., 241 N.J. Super. 28, 30 (App. Div. 1989) (quoting United Jersey Bank v. Wolosolf, 196 N.J. Super. at 562)).. "To qualify for the privilege, a party must show that there was a confidential communication 'between lawyer and his client in the course of that relationship and in professional confidence.'" Tractenberg v. Township of West Orange, 416 N.J. Super. 354, 375

(App. Div. 2010) (quoting N.J.R.E. 504(1)) (emphasis added). Confidential communications are only those "communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended." State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989), cert. denied, 121 N.J. 597, 583 (1990).

Defendants fail to provide evidence sufficient to demonstrate that withheld communications were confidential. Defendants provide only a general subject (e.g., "Settlement discussion") (See Ex. C to Levine Cert.). Defendants identified employees of the Division of Law who appear on communications, but the mere fact that an attorney is present on the communication does not suffice to show that the privilege applies. Schubert, 235 N.J. Super. at 220-21. Rather the burden is on defendants to show that the privilege applies based on the expectations and intentions of confidentiality for each communication. On several occasions where there the Privilege Log lists a thread of communication, the initial email(s) are not attorney-client privileged, but as soon as an attorney is added to the thread, the privilege is asserted.[8] This appears to be based on the improper assumption that the presence of an attorney alone makes the communication privileged. Absent such a showing for each individual claim of the privilege, the Court should find that it has been improperly asserted.

[8] For example, consider a series of communications on December 5, 2011 (See Ex. C to Levine Cert.; Bates No 317). Jonathan Simmons emails Denise Lambert-Harding, Michele Bartolomei, Larry Gauges, and Margaret Matthews, which is not attorney-client privileged. The general subject is described as "settlement discussions." In a subsequent email on the same thread, Denise Lambert-Harding replied to the same people, adding Heather Lynn Anderson, of the Division of Law to the "TO" or "CC" line. The subject of the email remained the same, but the attorney-client privilege is now asserted for this and two subsequent emails. There is no further explanation provided, leaving the mere presence of an attorney as the only rationale for asserting the privilege.

3. Where multiple agencies are present on a communication, the attorney-client privilege may not apply or may have been waived.

For certain communications, the attorney-client privilege may be waived, or may not exist at all, due to the presence of representatives of multiple agencies on those communications. In several documents for which the attorney-client privilege is asserted, the parties listed include one or more attorneys from the Attorney General's office and government employees from two or more separate state agencies. Though legal advice communicated to a State agency by the Division of Law is traditionally subject to the attorney-client privilege, it should not be assumed that these attorneys were rendering legal advice or that the communications were made to each attorney in his or her professional capacity. See Paff, 412 N.J. Super. at 151 (App. Div. 2010). For instance, in Payton v New Jersey Turnpike Authority, 148 N.J. 524 (1997), the New Jersey Supreme Court remanded for an in camera inspection of documents to determine whether an attorney was providing legal advice as opposed to merely performing "nonlegal duties". Id at 550-552. That same type of review should be applied here.

D. Defendants have inappropriately asserted the confidential taxpayer information privilege.

Defendants have violated OPRA by inappropriately asserting that the confidential taxpayer information privilege under N.J.S.A. 54: 50-8(a) prohibits the disclosure of certain records responsive to Plaintiff's OPRA requests. Plaintiff objects to all the records that were withheld on the basis of this privilege as well as the redactions made to Bates No. 61 based on this privilege. (See Ex. D to Levine Cert.) (listing the documents in question).[9]

[9] The documents that are being disputed in this lawsuit on the basis of "confidential taxpayer information" are listed for the convenience of the Court in Exhibit D to Levine Cert. (See Levine Cert. ¶ 2)

1. Substantial information regarding Trump Casinos' financials is already public through required disclosures and the bankruptcy litigation

It is likely that at least some portion of the withheld financials under the confidential taxpayer information privilege has already been publicly disclosed through required disclosures and the bankruptcy litigation. The State of New Jersey Department of Law and Safety, Division of Gaming Enforcement requires quarterly financial reports from all instate casino operators. N.J.S.A. 5:12-76-79. These reports are publicly accessible online and include, *inter alia*: balance sheets; statements of income (year to date and quarterly); statements of cash flow, including revenue and liabilities; statement of changes in equity accounts; promotional allowances and expenses and notes to the financial statements (including discussions of the bankruptcy proceedings). (See Ex. D and Ex. E to Borg Cert). In addition, various Trump entities also had SEC financial reporting requirements and many, if not all, of those reports are readily available online. (See Ex. C to Borg Cert. at p. 6 noting SEC requirements). Still more information exists in the public domain via public court filings relating to the bankruptcy litigation pertaining to the Trump Casinos. For example, included in the publicly available Schedule of Assets and Liabilities reported for Trump Casinos in the course of those proceedings is the $492,318,582.00 sum owed by Trump's corporation to secured creditors. (See Verified Complaint at ¶20; see Ex. C to Borg Cert.). The settlement agreement between the State and Trump Casinos also contains publicly-filed financial and tax data. (See Ex. B to Borg Cert.).

The information enclosed in these reports is nothing short of voluminous. In light of these and numerous other disclosures of financial information, Defendants must demonstrate that the information contained in these records is not yet in the public domain and thus properly withheld.

2. State officers may only examine confidential tax information in narrow circumstances.

N.J.S.A. 54:50-8(a) prohibits state officers from examining "records and files . . . respecting the administration of the State Uniform Tax Procedure Law or of any State tax law" unless "necessitated by the performance of official duties." (emphasis added). N.J.A.C. 18:7–11.14 clarifies that this protection applies to tax returns and information contained therein. ("The returns are deemed secret and confidential and New Jersey law prohibits the unauthorized disclosure of information obtained from the returns or the records pertaining thereto." N.J.A.C. 18:7-11.14). Given this high bar for access to confidential taxpayer records, it is unlikely that the withheld records each contain the specific information protected by the taxpayer information privilege. Defendants have failed to identify the nature of the material that they claim contains confidential taxpayer information. Defendants have not identified the taxpayer in question—or even the type of taxpayer—whose information would be disclosed. The documents in question should, as per the OPRA Requests, pertain to a public settlement of debts between the State and Trump Casinos. It is not clear what taxpayer information would have been discussed and accessed under the high bar set by N.J.S.A. 54:50-8(a). Even if all of the withheld material in question does contain some confidential taxpayer information, it is unclear why that information would have been included in these email communications.

In addition, given that only those "necessitated by the performance of official duties" should have access to confidential taxpayer information, it is surprising that so many people are listed on the Privilege Log as having been given such access. For instance, twenty-two individuals were included on Bates No. 88 representing various personnel not only from the Division of Taxation and the Division of Law, but also from the Treasurer's Office, the Division of Revenue, the Division of Risk Management, and the Division of Purchase and Property. (See Ex. D (Bates

No. 88) to Levine Cert.; see Ex. I to Borg Cert.). The communication contained both high-level officials and administrative assistants. (See Ex. I (at 80-1) to Borg Cert.) Officials from seemingly unrelated parts of the State government should not have been party to these communications, if these communications do in fact include highly confidential taxpayer information. The State bears the burden of demonstrating that each of these parties needed access to the confidential information. Absent proof of this fact, it is likely that the withheld documents do not contain the confidential taxpayer information protected by this privilege.

Further, Defendants also claim the confidential taxpayer privilege applies to Bates No. 61 (the only redacted record at issue in this case) (See Ex. H to Borg Cert.). Bates No. 61 consists of four redacted email communications and one released email. Each of the redacted emails is no more than one or two sentences. One of the redacted emails appears to not even contain a full sentence but rather only a few characters. Given the brevity of the communications and the fact that they were exchanged by people seemingly at arm's length from the settlement negotiation, it seems unlikely that this document contains any confidential taxpayer information.

II. Plaintiff Requests Sworn Statements and a More Detailed Vaughn Index.

It is inconceivable that all of the disputed records contain only exempt information and that the majority of the documents contain material that is exempt on the basis of two or more privileges. Plaintiff asks the Court to require Defendants to provide a sworn statement with a more detailed Vaughn Index with sufficient explanation to establish how each asserted privilege properly applies to the specific record. In the alternative, Plaintiff asks the Court to conduct an in camera review of the records to see if the asserted privileges are properly asserted given the above arguments, and compel the production of whole or redacted documents to which a privilege was improperly asserted.

A. Defendants' Privilege Log is deficient because it contains insufficient information and it has not been sworn to.

Plaintiff is appreciative of the fact that the State provided a Privilege Log but it is deficient for several reasons.

First, there is insufficient information in the Privilege Log to identify the nature of the records at issue. Each column listed therein identifies a record with the following information: "Bate Stamp," "Date," "From," "To and CCs," "General Subject," and "Privilege Asserted." However, basic information about each record is absent. While Plaintiff has reason to believe that many of the listed records represent communications such as emails, the nature of each record is not disclosed. For example, it is unclear whether a given record is an email, a written letter, or some other form of electronic record.

Further, and critically, the Privilege Log fails to distinguish between communications such as emails and any documents that might have been attached to those communications. For example, it is reasonable to believe that State representatives should have circulated various draft versions of the settlement agreement that was ultimately reached between Trump Casinos and the State. Yet, the Privilege Log does not identify a single attachment. Plaintiff has no means of determining whether any such draft agreements are represented in the Privilege Log, and therefore has no means of assessing the adequacy of Defendants' searches.

Second, the Privilege Log does not uniquely identify the records at issue. Many records share a Bates Number, presumably because they represent multiple communications in a single thread, such as an ongoing email conversation. (However, no such explanation was provided.) Of the records that share an entry, many of the records also contain the same identifying date. This inadequacy has led to ongoing confusion about which records are in dispute.

Third, the Privilege Log fails to identify certain important aspects of the records at issue. For example, it fails to distinguish between persons who directly received communications (that is, persons whom correspondence was addressed "To") and those who were merely copied on communications ("CCs"). The identity of individuals who were present on certain communications, and the directness of their involvement in those communications, has implications for the legitimacy of several of Defendants' claimed privileges (and waivers of such), and therefore more information is required.

The Court should order Defendants to provide a sworn statement and prepare a Vaughn Index describing the documents responsive to Plaintiff's request and the bases on which they have been withheld. Paff v. Div. of Law, 412 N.J. Super. 140, 161 (App. Div. 2010) (citing Fisher v. Div. of Law, 400 N.J. Super. 61, 76 (App. Div. 2008)). "The purpose of a Vaughn Index is not only to facilitate the decision-maker's review of government records to determine whether they contain privileged material but also to provide the party seeking disclosure with as much information as possible to use in presenting his case." Fisher, 400 N.J. Super. At 76 (citing Halpern v. FBI, 181 F.3d 279, 291 (2d Cir. 1999)) (emphasis added). A proper Vaughn Index is especially necessary in circumstances where, as here, it is evident that some of the information may not in fact be privileged or exempt from access. Paff v. Div. of Law, 412 N.J. Super. At 161.

In Paff v. Dep't. of Labor, the Appellate Division found that when an agency denies access to requested records, a valid response to that records request must include a sworn statement attesting to the following information:

> (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.

392 N.J. Super. 334, 337 (App. Div. 2007).

Defendants have failed "to provide the party seeking disclosure with as much information as possible to use in presenting his case." Fisher, 400 N.J. Super. At 76. Plaintiff is unable to effectively advocate its position before the Court and the Court is not able to properly assess the applicability of the asserted exemptions or meaningfully engage in the balancing test under the common law. Accordingly, this Court should order the production of a Vaughn Index containing the information set forth by the Appellate Division in Paff v. Dep't. of Labor, so Plaintiff and this Court may accurately assess the propriety of Defendants' assertions.

Alternatively, the Court should conduct an in-camera review to see if the claimed privileges are properly asserted. 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." Hartz Mountain Indus., Inc. v. N.J. Sports & Exposition Auth., 369 N.J. Super. 175, 183 (App. Div.), cert. denied, 182 N.J. 147 (2004). Later New Jersey courts have confirmed "the court is obliged when a claim of confidentiality or privilege is made by the public custodian of the record, to inspect the challenged document 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).

B. Defendants should provide sworn testimony as to the date the settlement negotiations ceased or the Court should allow Plaintiff discovery on this issue.

The fact of when the settlement negotiations ceased between Trump Casinos and the State of New Jersey is material to many of Defendants' claimed exemptions in this case. For example, Defendants claim the deliberative process privilege, which applies only to pre-

decisional communications. They also claim the confidential settlement negotiations privilege, which would not apply to communications that occurred after negotiations ceased. Thus, the date on which settlement negotiations ceased is critical to this litigation. We respectfully request that Defendants provide sworn testimony as to the date that settlement negotiations ceased or allow Plaintiff limited discovery on this issue.

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

Even if this Court finds that Plaintiff is not entitled to access the requested records at issue under OPRA, the Court should nevertheless require disclosure of the records in question under the common law right of access. New Jersey courts have recognized that, "[n]othing contained in [OPRA] shall be construed as limiting the common law right of access to a government record." N.J.S.A. 47:1A-8; see also N. Jersey Media Group Inc. v. State, Dep't of Personnel, 389 N.J. Super. 527, 536 (Law. Div. 2006); Bergen County Improvement Auth. V. N. Jersey Media Group, Inc., 370 N.J. Super. 504, 516 (App. Div. 2004). Accordingly, the public's common law right of access to records is even broader than the statutory right of access provided by OPRA. N. Jersey Media Group, 389 N.J. Super. At 537.

The common law right of access applies to the documents at issue in this case. In order for the common law right of access to attach to public records: (1) the records must be common law public documents; (2) the person who seeks access must "establish an interest in the subject matter of the material," South Jersey Publishing Co. v. New Jersey Expressway Auth., 124 N.J. 478, 487 (1991); and (3) the citizen's right to access "must be balanced against the State's interest in preventing disclosure." Higg-A-Rella, Inc., 141 N.J. at 46; see also Keddie v. Rutgers, 148 N.J. 36, 50 (1997) (discussing these three elements). Each of these three factors is satisfied in this case, and therefore the common law right of access demands disclosure of the requested records.

A. The records at issue are common law public records.

The first prong of the common law right of access analysis is satisfied because the records at issue in this case are clearly common law public records. Common law public records "include almost every document recorded, generated, or produced by public officials whether required by law to be made, maintained or kept on file.'" Shuttleworth v. City of Camden, 258 N.J. Super. 573, 582 (App. Div. 1992).[10] Here, the records sought are common law public records because they are all maintained by a public agency. Further, nearly all of the requested records, regardless of their current custodian(s), were generated by public officials. Higg-A-Rella, Inc., 141 N.J. at 46 (defining a common-law record as one that is made by a public official in the exercise of their public function, either because the record was required or directed by law to be made or kept, or because it was filed in a public office).

B. Plaintiff is a press institution and has substantial interest in the subject matter of the records.

The second prong of this common law analysis is similarly easily satisfied because Plaintiff is a press institution and therefore clearly has an interest in the subject matter of the material. See South Jersey Publishing Co., 124 N.J. at 487 ("a newspaper's interest in keeping a watchful eye on the workings of public agencies is sufficient to accord standing under the common law.") (internal citations omitted). Further, New Jersey courts have held that, "[a] citizen, and the press on its behalf, does not have to prove any personal interest in order to satisfy the common law

[10] To provide a more extended definition, to constitute a government record under the common law, the item must be: "[O]ne required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are . . . that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it." S. Jersey Pub. v. N.J. Expressway Auth., 124 N.J. 478, 487-88 (1991) (quoting Nero v. Hyland, 76 N.J. 213, 222 (1978)).

standing requirement." Daily Journal v. Police Dep't of City of Vineland, 351 N.J. Super. 110, 122 (App. Div. 2002).

C. Plaintiff's substantial interest in disclosure and the unique public interest in the subject matter of the records easily outweigh Defendants' interest in confidentiality.

Finally, in order to determine whether the requested records should be disclosed to Plaintiff under the common law right of access, this Court must balance the Plaintiff's interest in disclosure against the Defendants' interest in confidentiality. Plaintiff is a member of the press and therefore has a strong interest in accessing and reporting on information pertaining to the activities of various public officials. This particular settlement has been the source of significant public interest and a number of questions remain regarding the nature of the settlement and the actors involved.

For six years, the State of New Jersey was in litigation against Trump's Casinos regarding the Casino's outstanding tax debts, which amounted to nearly $30 million. (See Verified Complaint ¶¶12, 14, 21; see Ex. A to Buettner Cert.). The Casinos purported that the tax at issue, which was specifically intended to "prevent businesses from avoiding taxes through accounting maneuvers," simply did not apply to them. (See Verified Complaint ¶13). The Casinos refused to pay their debt and the contentious litigation continued through 2011. (See Verified Complaint ¶12 and see Ex. A to Buettner Cert.) (describing how at one point in litigation, the State even accused Trump Casinos of filing false reports with regards to the amount of taxes they had paid). In 2011, the year after Chris Christie took office as Governor, the State and Trump's companies announced they had, at long last, reached a settlement agreement for just $0.17 on each dollar of the substantial debt. (Id.). The settlement required that the Trump Casinos pay only $5 million of the outstanding debt – representing a forgiveness of debt of nearly twenty-five million dollars that was owed to the taxpayers of New Jersey. (Id.)

At the time of the settlement, Mr. Trump and Mr. Christie had already had a long and heavily reported prior relationship. After first meeting in 2002, when Mr. Christie was serving as the United States Attorney for the District of New Jersey, they became close friends. Mr. Christie attended Mr. Trump's third wedding in 2005; Mr. Trump attended Mr. Christie's inauguration in 2010. The two dined together with their wives. Mr. Trump has made sizeable financial contributions to organizations close to Mr. Christie, such as the Republican Governor's Association, (of which Mr. Christie was chairman at the time, and the Drumthwacket Foundation, which sponsors improvements to the New Jersey Governor's residence. Mr. Trump gave his "good and loyal friend" Mr. Christie the role of leading his transition committee. (See Verified Complaint ¶23).

The close pre-existing friendship between Mr. Christie and Mr. Trump had led some to question whether the settlement of Trump organizations' debts in 2011, under Mr. Christie's governorship, could be a result of preferential treatment. (See Ex. A to Buettner Cert.). Professor David Skeel, a bankruptcy Professor from the University of Pennsylvania has stated that, "the steep discount granted to the Trump casinos and the relationship between the two men raise inevitable questions about special treatment." (Id.). Further, he commented that, "it's pretty striking that this [settlement] was written down so much." (Id). The fact that a settlement was reached for so few cents on the dollar of the debt owed is a matter of public interest.

The matter is of further interest due to factual inconsistencies in statements by the Governor, via his spokesperson, about the settlement. Specifically, the Governor has repeatedly denied any knowledge of participation in the settlement process, despite evidence to the contrary.

After the settlement was announced, Brian Murray, then a spokesperson for Mr. Christie, stated that the Governor had not been aware of the tax dispute and therefore could not comment

on the terms of the settlement. (Id.). In 2016, following Mr. Buettner's reporting on the settlement, Mr. Murray stated to a news outlet:

> The New York Times was told repeatedly that the governor was unaware and uninvolved in a bankruptcy matter which began in 2005 while he was United States Attorney and was settled, without the governor's involvement, in 2011 by the New Jersey Department of Treasury and the Office of The Attorney General as a matter of course.

(See Ex. F to Borg Cert.).

Despite these denials by Governor Christie's spokesperson that the Governor had any knowledge of or involvement in the settlement agreement, there is considerable evidence to the contrary. For example, the Privilege Log shows that several people within Mr. Christie's office were looped into emails discussing and analyzing the settlement. As revealed in the Privilege Log, on October 6, 2011, no fewer than three high-ranking members of Mr. Christie's staff were included on a series of communications, each of which was marked in that Privilege Log as having the subject "[s]ettlement discussions and analysis." (See Ex. D to Levine Cert.; see Ex. I to Borg Cert.) (listing Bates No. 61, October 6, 2011). Specifically, Lou Goetting, the Deputy Chief of Staff of the Governor's Office, Craig Domalewski, Senior Counsel of the Governor's Office, and Robert Garrenger, Governor's Senior Special Counsel of Finance, were each involved in these communications, which also included key players in the settlement negotiations for the State, like Andrew Eristoff, whose title is State Treasurer.[11] (Id.). In another instance, the Privilege Log identifies that Regina Egea, Mr. Christie's Chief of Staff, was included on communications identified as responsive to Mr. Buettner's request that were sent from Jennifer D'Autrechy, the Deputy Chief of Staff of the Office of the New Jersey State

[11] The job titles of the individuals listed here were provided by Mr. Chance in the Privilege Log that was delivered to Ms. Borg on May 24, 2018. (See Ex. I to Borg Cert. at 80-81 (identifying "Persons of Note" by their name and job title)).

Treasurer.[12] (Id) (listing Bates No. 71, October 13, 2011). The repeated presence of many high-ranking officials from the Governor's Office on communications identified specifically as "[s]ettlement discussions and analysis" illustrates the implausibility of Mr. Christie's purported ignorance as to the settlement.

Further, Mr. Christie himself was serving at the United States Attorney for the District of New Jersey for several years during the ongoing bankruptcy litigation pertaining to Trump Casinos in United States Bankruptcy Court for the District of New Jersey. Indeed, Mr. Christie's name appears several times in the bankruptcy case between 2004 and 2009, while he was representing the federal Internal Revenue Service in its own claims against the Trump Casinos. However, the case was handled by a lawyer for the I.R.S. and not Mr. Christie personally. (See Verified Complaint ¶19; see Ex. A to Buettner Cert.).

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.

Finally, the settlement at issue in this case involves two figures of extraordinary public import: the current President of the United States and the former Governor of the State of New Jersey. This case involves access to records that will shed light on whether the current President was granted preferential treatment in the settlement of debts of public money. Accordingly, there is significant public interest in knowing whether all the New Jersey public officials involved in the settlement properly performed their official duties in settling Trump's debt for mere cents on the dollar. Given the discounted settlement and the relationship between the President of the United

[12] The job titles of the individuals listed here were provided by Mr. Chance in the Privilege Log that was delivered to Ms. Borg on May 24, 2018. (See Ex. I to Borg Cert. at 80-81 (identifying "Persons of Note" by their name and job title)).

States and the then Governor of New Jersey, the Court should not simply accept the State's claimed privileges at face value. Rather, the Court should require that the State, in accordance with both OPRA and the common law, justify its withholding of the records and its redactions to Bates No 61.

Defendants' interest in non-disclosure, if any, is both minimal and arbitrary. The settlement between the State of New Jersey and Trump organizations, and the protracted litigation that led up to it in bankruptcy court, is already a matter of public record. Further, the settlement in question pertains to the resolution of debts that were owed to the public and not to a private party. In the OPRA context, New Jersey courts have recognized that there is a unique public interest in settlements between the government and private actors, see Burnett v. County of Gloucester, 2 A.3d 1110, 1114 (App. Div. 2010). In Burnett, the court found a "significant" public interest in accessing settlement agreements executed by the government, "since such settlements may provide valuable information regarding the conduct of governmental officials and the condition of government property." 2 A.3d at 1117. In the present case, the public interest strongly favors disclosure of documents related to the settlement agreement, as these documents would undoubtedly shed light on the conduct of governmental officials with regard to public money in the form of unrecouped tax dollars. Accordingly, no reasonable privacy interest could possibly be served by allowing the Defendants to withhold these records.

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

IV. The Court Should Impose Civil Penalties on Defendants for the Knowing and Willful Denial of Access to the Requested Records.

OPRA authorizes the imposition of civil penalties. Pursuant to OPRA,

> A public official, officer, employee or custodian who knowingly and willfully violates [OPRA] as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . . . [The] penalty shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999," P.L. 1999, c. 274 [N.J.S.A. 2A:5810 to -12], and the rules of court governing actions for the collection of civil penalties.

N.J.S.A. 47:1A-11. For the reasons explained at length above, Defendants unreasonably denied access to the records at issue by, in some instances, claiming multiple privileges that are facially not applicable and, in other instances, by failing to provide adequate information to justify claimed exemptions. See Sections I-II. These unreasonable denials of access were knowing and willful. Accordingly, we respectfully request that the Court allow limited discovery to identify which public officials may have engaged in a knowing and willful violation of the statute.

V. Plaintiff is a Prevailing Party and is Entitled to Attorney's Fees.

Plaintiff is statutorily entitled to reasonable attorney's fees and costs. Pursuant to OPRA,

> A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may . . . institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . . . The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6 (emphasis added).

New Jersey law has long recognized the "catalyst theory" in regards to an award of attorneys' fees. Mason v. City of Hoboken, 196 N.J. 51, 73 (2008). A plaintiff is entitled to

attorney's fees if they can demonstrate "1) a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; and 2) that the relief ultimately secured by plaintiffs had a basis in law." Id. at 76. See also Smith v. Hudson Cnty. Register, 422 N.J. Super. 387, 394 (App. Div. 2011) ("A plaintiff may qualify as a prevailing party, and thereby be entitled to a fee award, by taking legal action that provides a 'catalyst' to induce a defendant's compliance with the law.").

Here, Plaintiff made valid OPRA requests for government records and the State unlawfully (i) withheld records; (ii) did not conduct an adequate search for some of the records; and (iii) redacted non-exempt portions of a single government record. This litigation, if successful, will serve as the catalyst for Plaintiff obtaining the unlawfully withheld records. Therefore, Plaintiff is entitled to an award of attorney's fees and costs of suit.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court declare Defendants' actions to be in violation of OPRA and the common law and compel Defendants to identify all records responsive to the request and produce such records to Plaintiff forthwith. Plaintiff further requests that the Court allow limited discovery into the issue of when the settlement negotiations ceased and to determine which public officials may have engaged in a knowing and willful violation. Plaintiff also requests that Defendants be ordered to conduct an adequate search for attachments to the emails (since none were provided or listed on the Privilege Log); pay attorneys' fees and costs in connection with this matter; and provide other and further relief as the Court may deem just and equitable.

Respectfully submitted,

/s _____
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[13] This Verified Complaint 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.