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 ADMINSITRATION 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**

BRIEF ON BEHALF OF DEFENDANTS IN OPPOSITION TO PLAINTIFF'S ORDER TO SHOW CAUSE

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market Street
PO BOX 106
Trenton, NJ 08625-0106

Heather Lynn Anderson (15962003)
Deputy Attorney General
On the Brief

PRELIMINARY STATEMENT

The New Jersey Division of Taxation ("Division") properly denied access to the records sought by Plaintiff under the New Jersey Open Public Records Act ("OPRA") because disclosure of the information requested is barred by the tax information confidentiality statute, N.J.S.A. 54:50-8, the attorney client privilege, the deliberative process privilege, the advisory, consultative or deliberative exemption, and the confidentiality of settlement negotiations. Ordering the Division to release the records would impermissibly encroach on taxpayers' reasonable expectation of privacy. Nor does Plaintiff's interest in receiving the information outweigh these exemptions or the confidentiality required by N.J.S.A. 54:50-8, and thus Plaintiff is not entitled to the documents under the Common Law Right of Access.

Plaintiff brings the instant matter before the Superior Court of New Jersey contending that the Division has unreasonably denied it access to government records sought under OPRA. Plaintiff further asserts that, in so doing, the Division's records custodian knowingly and willfully violated the provisions of OPRA. Plaintiff fails to recognize, however, the longstanding policy behind the confidentiality requirements of N.J.S.A. 54:50-8 and the attorney-client privilege. In addition, the Division worked diligently with Plaintiff to accommodate its requests by providing

an extensive and detailed Vaughn Index as well as repeatedly answering questions regarding the claimed exemptions from release. Thus, the actions of the custodian do not constitute a knowing and willful violation of OPRA and Plaintiff is not a prevailing party entitled to attorneys' fees.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

On November 21, 2004, the Trump Entities[1] filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code in the District of New Jersey, Camden Vicinage. Bankr. Case No. 04-46898 through 04-46928. Certification of Deputy Attorney General Heather Lynn Anderson ("DAG Anderson Cert.")[2], ¶11. On October 28, 2005, the Division filed a Priority Proof of Claim in the amount of $21,707,515.16, which was docketed as Claim No. 2280. Anderson Cert., ¶12. The liabilities included in the Proof of Claim resulted from an ongoing audit of the Trump Entities by the Division of Taxation. Ibid. The Trump Entities objected to the Division of Taxation's Priority Proof of Claim. DAG Anderson

[1] Various Trump casinos, including but not limited to Trump Hotels and Casino Resorts, Trump Entertainment Resorts, and TCI2.

[2] Paragraphs 11-27 of the DAG Anderson Certification filed with this brief were included in a prior certification filed with the court on April 12, 2019. The prior certification has been incorporated into the current certification for convenience of the court.

Cert., ¶13. In January 2007, the Trump Entities and the Division of Taxation entered into a Consent Order amending Claim No. 2280 to the amount of $11,636,136.00. DAG Anderson Cert., ¶14. The Trump Entities retained their right to object to the Priority Proof of Claim in the Consent Order. Ibid.

On February 17, 2009, the Trump Entities filed another voluntary petition under Chapter 11 of the United States Bankruptcy Code in the District of New Jersey, Camden Vicinage. Bankr. Case No. 09-13654. DAG Anderson Cert., ¶15. On June 1, 2009, the Division filed a Priority Proof of Claim against the Trump Entities in the amount of $29,443,612.18 that was docketed as Claim No. 1181. DAG Anderson Cert., ¶16. The liabilities included in the Proof of Claim resulted from the ongoing audit of the Trump Entities by the Division of Taxation. Ibid. The Trump Entities once again objected to the Division's Priority Proof of Claim. DAG Anderson Cert., ¶17.

In September 2011, the parties commenced settlement negotiations regarding the Division's Priority Proof of Claim. DAG Anderson Cert., ¶18. The parties agreed tentatively to a settlement number on or about October 6, 2011. DAG Anderson Cert., ¶19. However, the parties continued to negotiate payment terms and the terms of the Stipulation of Settlement. Ibid. The parties finalized the payment terms on or about November 22, 2011. DAG

Anderson Cert., ¶20. The parties continued to negotiate the terms of the Stipulation of Settlement until November 28, 2011. Ibid.

The Stipulation of Settlement was formalized and entered by the Bankruptcy Court on December 5, 2011. Certification of Jennifer Borg ("Borg Cert."), Ex. B. After the Stipulation of Settlement was entered by the Bankruptcy Court, the Division continued to require legal advice regarding the settlement as well as the underlying audit assessments that formed the basis of the Division's filed proof of claim. DAG Anderson Cert., ¶22.

On March 3, 2018, Russell Buettner, a reporter from the New York Times, submitted a request under the OPRA to the Division, designated as request #W130116. Certification of Russell Buettner ("Buettner Cert."), Ex. B. Request #W130116 sought:

> Correspondence (including but not limited to emails and all attachments) dated during the time-period of 9/1/11 and 12/31/11 by, between and among Michael Bryan and/or Denise Lambert-Harding (current or former employees of Treasury) any of the following individuals with the subject matter being the settlement of Claim No. 1181 and Claim No. 1251 between the Division of Taxation and various Trump organizations in the US Bankruptcy Court for the District of New Jersey with the caption: In re TCI 2 Holdings, LLC et al., Case No. 09-13654 (JHW).
>
> ? Paula Dow (former Attorney General)
> ? Heather Lynn Anderson (Deputy Attorney General)
> ? Charles McKenna (former Counsel to the Governor)

> ? Sharon Anne Harrington (Casino Control Commission)
> ? Linda M. Kassekert (Casino Control Commission)
> ? Chris Christie (former Governor)
> ? Michele Brown (formerly of the Governor?s Office)
> ? Richard Bagger (formerly of the Governor?s Office)
> ? Jeffrey Chiesa (former Counsel in the Governor?s Office)
> ? Matthew Levinson (formerly with Casino Control Commission)
> ? Diana Williams-Fauntleroy (Casino Control Commission)
> ? David Scanlon (currently or formerly with Casino Control Commission)
> ? Alisa Cooper (Casino Control Commission)
> ? Edward Fanelle (formerly with the Casino Control Commission)
> ? David Rebuck (Division of Gaming Enforcement and formerly AG?s office)
> ? Robert Lougy (formerly of the Division of Law)
>
> [Ibid.]

Also on March 3, 2018, Mr. Buettner submitted a second request under OPRA to the Division, designated as request #W130117. Buettner Cert., Ex. C. Request #W130117 sought:

> Correspondence (including but not limited to emails and all attachments) dated during the time-period of 9/1/11 and 12/31/11 by, between and among Michael Bryan and/or Denise Lambert-Harding (current or former employees of Treasury) any of the following individuals with the subject matter being the settlement of Claim No. 1181 and Claim No. 1251 between the Division of Taxation and various Trump organizations in the US Bankruptcy Court for the District of New Jersey with the caption: In re TCI 2 Holdings, LLC et al., Case No. 09-

13654 (JHW):

? Charles A. Stanziale, Jr. (McCarter & English, LLP)
? Jeffrey T. Testa (McCarter & English, LLP)
? Michael A. Guariglia (McCarter & English, LLP)
? Joseph Lubertazzi (McCarter & English, LLP)
? Lisa Bonsell (McCarter & English, LLP)
? Kristopher Hansen (Stroock & Stroock & Lavan LLP)
? Curtis Mechling (Stroock & Stroock & Lavan LLP)
? Erez Gilad (Stroock & Stroock & Lavan LLP)
? Matthew Garofalo (Stroock & Stroock & Lavan LLP)
? Michael Walsh (Weil, Gotshal & Manges LLP)
? Philip Rosen (Weil, Gotshal & Manges LLP)
? Ted Waksam (Weil, Gotshal & Manges LLP)
? David Friedman (Kasowitz, Benson Torres & Friedman LLP)
? Robert Novick (Kasowitz, Benson Torres & Friedman LLP)
? Daniel Zinman (Kasowitz, Benson Torres & Friedman LLP)
? Paul DeFilippo (Wollmuth Maher & Deutsch LLP)
? Richard Mroz (Archer Public Affairs LLC)
? Alan Garten (affiliated with Donald Trump)
? Jason Greenblatt (affiliated with Donald Trump)

[Ibid.]

On April 18, 2018, the Division, through the New Jersey Department of Treasury's Government Records Access Unit, responded to Mr. Buettner's request W130116. Buettner Cert., Ex. F.

Specifically, the Division provided three pages of documents, and explained that the remaining documents are subject to various privileges, such as the attorney client privilege, confidential settlement negotiations, and the advisory, consultative or deliberative process exemption. Ibid. The Division also reserved the right to supplement the reasons for withholding as determined to apply. Ibid. Also on April 18, 2018, the Division, through the New Jersey Department of Treasury's Government Records Access Unit, responded to Mr. Buettner's request W130117. Buettner Cert., Ex. G. Specifically, the Division provided three pages of documents, and explained that the remaining documents are subject to various privileges, such as the attorney client privilege, confidential settlement negotiations, and the advisory, consultative or deliberative process exemption. Ibid. The Division also reserved the right to supplement the reasons for withholding as determined to apply. Ibid.

On April 24, 2018, Mr. Buettner's counsel, Jennifer Borg, Esq., contacted Assistant Attorney General Raymond R. Chance, III ("AAG Chance"), regarding OPRA requests W130116 and W130117. Borg Cert., Ex. G. Specifically, Ms. Borg sought a privilege log for any withheld documents. Ibid.

On May 24, 2018, the Division, through counsel Deputy Attorney General Heather Lynn Anderson ("DAG Anderson"), provided

Plaintiff with a privilege log identifying each document responsive to requests W130116 and W130117. Ibid. The Division also provided Plaintiff with a fourth page responsive to Mr. Buettner's requests. Ibid.; Borg Cert., Ex. H. The privilege log provided to Plaintiff on May 24, 2018, included such comprehensive information as: a bates stamp number for each page, the date of each email or document, who created or wrote the email or document, who received the email or document including persons copied on emails, the general subject of the email or document, and a brief description of the privilege or exemption claimed for withholding. See Borg Cert., Ex. I. In addition, a description of the job title of each person referenced in the privilege log was appended to the end of the privilege log. Ibid.

On October 5, 2018, law students Sarah Levine and Jake van Leer from the Media Freedom and Information Access Clinic at Yale Law School ("MFIA") sent a letter to AAG Chance disputing the privileges claimed by the Division for 378 documents. Borg Cert., Ex. M. Ms. Levine and Mr. van Leer also questioned the applicability of the confidentiality provision of N.J.S.A. 54:50-8. Ibid. In response, on February 6, 2019, DAG Anderson sent a letter, on behalf of the Division, to Ms. Levine and Mr. van Leer explaining, in detail, why each privilege is applicable, especially the confidentiality afforded settlement negotiations

and the attorney client privilege. Borg Cert., Ex. N. DAG Anderson also explained in detail the basis of the confidentiality provision of N.J.S.A. 54:50-8 and why it applied to many documents withheld from release. Ibid.

On March 14, 2019, Plaintiff filed the instant Verified Complaint and Order to Show Cause contesting the withholding of documents by the Division. See Verified Compl. As part of the Order to Show Cause, Plaintiff sought limited discovery and a more detailed Vaughn Index. Ibid. On March 18, 2019, this court entered the Order to Show Cause ("OTSC"), scheduling a hearing for July 2, 2019. The OTSC requested the Division to provide a letter to the court addressing Plaintiff's request for limited discovery and a more detailed Vaughn Index. The Division submitted a letter and certification responsive to the court's Order on April 12, 2019. Plaintiff responded to the Division's letter on April 17, 2019. On April 18, 2019, this court held a telephonic scheduling conference to discuss Plaintiff's request for limited discovery and a more detailed Vaughn Index.

On April 18, 2019, this court entered a Case Management Order ("CMO"). The CMO reaffirmed the hearing date of this matter for July 2, 2019. The CMO also denied Plaintiff's request for limited discovery, ordered the Division to specify in its Vaughn Index each document that included attachments, and denied

Plaintiff's request for a more detailed Vaughn Index other than identifying attachments.

The Division now submits this brief in opposition to Plaintiff's Order to Show Cause, and requests this court dismiss Plaintiff's Verified Complaint with prejudice, and without costs or fees.

ARGUMENT

POINT I

DEFENDANTS PROPERLY WITHHELD RECORDS THAT ARE PRIVILEGED OR CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER THE OPEN PUBLIC RECORDS ACT.

OPRA was enacted with the purpose to "maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (citation omitted). OPRA promotes this policy by making "government records" publicly accessible. N.J.S.A. 47:1A-1.1.

However, "the public's right of access [is] not absolute." Educ. Law Ctr. v. N.J. Dept. of Educ., 198 N.J. 274, 284 (2009). From its inception, OPRA has recognized that there is a balance between the public's right to obtain information and a public entity's need for confidentiality to allow government to

function, as demonstrated by the thirty exceptions and multiple exemptions to the right of access under OPRA. Paff v. Galloway, 229 N.J. at 358 (citing N.J.S.A. 47:1A-1.1); see also Burnett v. Cty. of Bergen, 198 N.J. 408, 414 (2009)(describing the twin aims of OPRA as providing ready access to government records and protecting privacy). The concern that disclosure will impede agency functions by discouraging citizens from providing information to the government or chill agency self-evaluation, program improvement, or other decision-making forms the basis for OPRA's confidentiality-based exemptions. See Loigman v. Kimmelman, 102 N.J. 98, 113 (1986); Ciesla v. New Jersey Dep't of Health & Sr. Servs., 429 N.J. Super. 127, 137 (App. Div. 2012); Educ. Law Ctr., 198 N.J. at 284.

As discussed below, Defendants properly withheld records as exempt from disclosure under the tax information confidentiality statute N.J.S.A. 54:50-8, the attorney client privilege, the deliberative process privilege, the advisory, consultative or deliberative exemption, and the confidentiality of settlement negotiations.

A. N.J.S.A. 54:50-8 PROVIDES A BLANKET EXEMPTION FROM DISCLOSURE ALL TAX INFORMATION IN THE POSSESSION OF THE DIVISION OF TAXATION.

The confidentiality of most of the documents at issue is

controlled by the State Uniform Tax Procedure Law, N.J.S.A. 54:48-1 to 54:54-6, which provides that all records of the Director of the Division of Taxation are confidential. OPRA recognizes the confidentiality provisions found in statutes, such as N.J.S.A. 54:50-8, by specifically excluding from disclosure "all government records . . . exempt from such access by: any other statute." N.J.S.A. 47:1A-1. Further, N.J.S.A. 47:1A-9(a) states that OPRA "shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to . . . any other statute."

The tax information confidentiality statute states that:

> [t]he records and files of the director respecting the administration of the State Uniform Tax Procedure Law or of any State tax law shall be considered confidential and privileged and neither the director nor any employee engaged in the administration thereof . . . shall divulge, disclose, use for their own personal advantage, or examine for any reason other than a reason necessitated by the performance of official duties any information obtained from the said records . . . Neither the director nor any employee . . . shall be required to produce any of them for the inspection of any person or for use in any action or proceeding except when the records or files or the facts shown thereby are directly involved in an action or proceeding under the provisions of the State Uniform Tax Procedure Law.
>
> [N.J.S.A. 54:50-8(a).]

Our courts have held this confidentiality provision to be

sacrosanct. Courts have routinely declined to release tax information when not specifically exempted from confidentiality under this provision. Monmouth Airlines, Inc. v. Dir., Div. of Taxation, 2 N.J. Tax 47, 54 (Tax 1980). Specifically, the court held that "[i]n strictly limiting access to tax records the court is mindful not only of the administrative necessity of protecting such records to promote our system of voluntary reporting, but also of the growth of legal protection of the right of privacy." Ibid. The Appellate Division has recognized the importance of confidentiality, holding that "the Director of the Division of Taxation is required to keep tax returns and other tax records confidential." Petition of Nigris, 242 N.J. Super. 623, 361 (App. Div. 1990). Similarly, the court in First Nat'l City Bank v. Dir., Div. of Taxation, 5 N.J. Tax 310, 320 (Tax 1983) held that the "names and activities of other taxpayers" was confidential and privileged. In United Parcel Service General Services Co. v. Dir., Div. of Taxation, 25 N.J. Tax 1, 47 (Tax 2009), aff'd 430 N.J. Super. 1 (App. Div. 2013), aff'd 220 N.J. 90 (2014), the court recognized the "confidentiality of information obtained in the [tax] audit process."

The purpose of the confidentiality provision is "to assure every taxpayer making returns that the information therein contained will remain confidential." Monmouth Airlines, 2 N.J.

Tax at 54. Thus, N.J.S.A. 54:50-8 represents a legislative determination that such information should not be used or released for any purpose other than tax administration. The reason for such strict confidentiality is "the potential for ethical abuses . . . over the use of Division of Taxation records and files for private purposes." State, Office of Employee Relations v. Comm'n Workers of America, 267 N.J. Super. 582, 589 n 4 (App. Div. 1993).

Here, many of the documents at issue involve the confidential tax information of taxpayers, namely, the Trump Entities. Although some tax information was made public through the Proofs of Claim filed by the Division and the Stipulation of Settlement entered between the Division and the Trump Entities, the withheld documents contain additional information and details that were not made public. The withheld documents contain detailed information about the Trump Entities' tax returns, information gathered from those returns, detailed information regarding the audit of the Trump Entities, or detailed discussions regarding the audit of the Trump Entities. DAG Anderson Cert., ¶¶6-9. A careful review of these documents, comparing the information contained in these documents to the information publicly available, shows that none of the information withheld under N.J.S.A. 54:50-8 was previously released by the Division in connection with the bankruptcy actions or other publicly available sources. Ibid. As

evidenced by the volume of documents listed on the Vaughn Index, there is substantial confidential tax information at issue.

Therefore, Plaintiff's argument that the confidentiality provisions of N.J.S.A. 54:50-8 should not apply because "at least some portion of the withheld financials under the confidential taxpayer privilege has already been publicly disclosed through required disclosures and the bankruptcy litigation," Pb21, is assertion is factually incorrect. Thus, contrary to Plaintiff's contention, this information must remain confidential pursuant to N.J.S.A. 54:50-8.

Similarly, Plaintiff's argument, that because multiple people were recipients of emails where the taxpayer confidentiality privilege is claimed, these documents cannot include confidential information, must fail. Pb22. The vast majority of the documents where N.J.S.A. 54:50-8 has been asserted as the basis for confidentiality include only a few recipients, usually the Auditor, his supervisors, and/or the Deputy Attorney General assigned to represent the Division. DAG Anderson Cert., ¶¶29-40. In a few emails, employees of the Department of the Treasury were included and were authorized by N.J.S.A. 54:50-9(e) to access the records. DAG Anderson Cert., ¶42-44.

Consequently, the confidentiality of N.J.S.A. 54:50-8 stands, and is a blanket exception to release under OPRA. Thus,

Plaintiff is not entitled to access these documents under OPRA, the Division's denial of access should be affirmed, and Plaintiff's Verified Complaint should be dismissed with prejudice.

B. THE RECORDS AT ISSUE INVOLVE PROTECTED COMMUNICATIONS BEWTEEN THE ATTORNEY GENERAL AND ITS CLIENTS, AND FALL WITHIN THE ATTORNEY CLIENT PRIVILEGE.

The attorney-client privilege has long been held to be sacrosanct. OPRA exempts from disclosure "any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1. It is "well-settled that there exists an attorney-client relationship between the Division [of Law] and the state agencies to which it provides legal advice." Paff v. Div. of Law, 412 N.J. Super. 140, 151 (App. Div.), certif. den. 202 N.J. 45 (2010). Our courts have consistently held that "it is beyond dispute that the attorney-client privilege applies whenever confidential legal advice is rendered to state agencies, whether by private . . . or by the Division [of Law]." Id. at 154.

New Jersey law is settled that the attorney-client privilege is fully applicable to communications between a public body and the attorney who represents it. Payton v. N.J. Turnpike Auth., 148 N.J. 524, 550 (1997). The attorney-client privilege indisputably covers the legal advice issued by the Attorney General, through the Division of Law, to State Officials and

agencies. Paff, 412 N.J. Super. at 151. This is because the "Attorney General, acting through the Division of Law, is the 'sole legal advisor' for all state agencies, boards and authorities, and is also responsible for 'interpreting all statutes and legal documents' for those clients." Paff, 412 N.J. Super. at 145 (citing N.J.S.A. 52:17A-4(e)).

Our courts have held that "[s]o long as the attorney is providing 'confidential communications' to an administrative agency client 'within the context of the strict relation of attorney and client,' a 'shield of secrecy' protects that legal advice from disclosure." Paff, 412 N.J. Super. at 157 (citing Grand Jury Subpoenas Deuces Tecum Served by Sussex County, 241 N.J. Super. 18, 30 (App. Div. 1989)). The court draws "no distinction . . . between an attorneys role in formulating the law to be applied to others . . . and the more traditional role of an attorney who represents a client in a litigated matter." Paff, 412 N.J. Super. at 157. In fact, so long as the attorney is "providing legal advice in some form" the privilege will apply. Payton, 148 N.J. at 550.

Here, many of the documents responsive to the request contained attorney-client privileged information. DAG Anderson Cert., ¶10. To support this exemption, Defendants identified the job titles of each person on each item of email correspondence as

part of the Vaughn Index. Borg Cert., Ex. I. Plaintiff cannot reasonably argue that it is unable to determine whether a "Deputy Attorney General," "Senior Deputy Attorney General," or "Assistant Attorney General" is an attorney at the Division of Law. Pb18. To further dispel any confusion regarding Defendants' assertions of attorney-client privilege, the other DAsG, SDAsG, and AAsG referenced in the Vaughn Index supervised DAG Anderson during her representation of the Division in connection with the Trump Entities' bankruptcy actions. DAG Anderson Cert., ¶¶24-27.

Plaintiff now argues[3] that the attorney-client privilege was waived. Pb17. Plaintiff rests its argument "due to the presence of multiple agencies on those communications." Pb20. Plaintiff incorrectly presumes that only the Division is entitled to representation by the Attorney General of New Jersey. However, our courts have routinely recognized that the "Attorney General, acting through the Division of Law, is the 'sole legal advisor' for all state agencies, boards and authorities, and is also responsible for 'interpreting all statutes and legal documents'

[3] Plaintiff argues that the attorney-client privilege cannot apply where no attorneys are present. Pb17. There was one document for which the attorney-client privilege was claimed where no attorneys were present. This was a typographical error, which has since been rectified. A close review of the current Vaughn Index, submitted with this brief, shows that all documents for which the attorney-client privilege is claimed includes at least one attorney from the Office of the Attorney General.

for those clients." Paff, 412 N.J. Super. at 145 (citing N.J.S.A. 52:17A-4(e)).

Here, the communications in question involve employees from the Department of the Treasury, which is the agency in charge of overseeing the Division of Taxation. N.J.S.A. 52:18A-3. Thus, the Director of the Division of Taxation reports directly to the State Treasurer. Ibid.; DAG Anderson Cert., ¶¶39-41. Thus, it is consistent that an attorney representing and counseling the Division of Taxation would simultaneously counsel and represent the Department of the Treasury. Contrary to Plaintiff's claims, this dual representation does not limit or invalidate the attorney-client privilege. Nor does Plaintiff cite to any support for such an argument. Furthermore, a careful review of the documentation at issue showed that all of the communications between the Department of the Treasury, the Division, and the Attorney General's Office pertained to either the audit of the Trump Entities and/or the settlement of the assessed liability and are, therefore, subject to the attorney-client privilege. DAG Anderson Cert., ¶10. Consequently, Plaintiff is not entitled to the documents subject to the attorney-client privilege.

Therefore, the confidentiality of the attorney-client privilege remains in this matter and documents which include attorney-client privileged communications are exempted from

release under OPRA. Thus, Plaintiff is not entitled to access these documents under OPRA, the Division's denial of access should be affirmed, and Plaintiff's its Verified Complaint should be dismissed with prejudice.

C. THE DIVISION OF TAXATION PROPERLY WITHHELD DOCUMENTS CONTAINING CONFIDENTIAL SETTLEMENT NEGOTIATIONS.

Documents and communications reflecting settlement negotiations are exempt from public access under OPRA. See N.J.S.A. 47:1A-9(b); Libertarians for Transparent Gov't v. William Paterson Univ., No. A-2570-16, 2018 N.J. Super. Unpub. LEXIS 843 (App. Div. April 12, 2018)[4]; Brown v. Pica, 360 N.J. Super. 565 (Law Div. 2001); Lynch v. Clymer, 282 N.J. Super. 301 (App. Div. 1995), certif. granted, remanded, 142 N.J. 441 (1995). In Libertarians, the plaintiff filed an OPRA request with the University seeking all settlement agreements resolving litigation against the University. Id. at *2. The University responded that it had no responsive documents, because no final agreement existed at the time the OPRA request was made, and further asserted that the draft settlement agreement was exempt from disclosure. Ibid. The trial court agreed that the draft agreements were exempt from

[4] In accordance with Rule 1:36-3, a copy of this unpublished opinion is attached to the DAG Anderson Cert.

disclosure under OPRA, but held that an unsigned and unexecuted version of the settlement agreement was "final" and "should have been produced." Id. at *3.

On appeal, the Appellate Division reversed, holding that "[u]ntil a settlement agreement is signed, it remains a draft document subject to continued revision and negotiation." Id. at *5 (citing Ciesla, 429 N.J. Super. at 140). Thus, because the agreement was not "fully executed until [after the request], there was no final agreement as of the date of [plaintiff's] request. Any documents prior to that date were draft documents, subject to the settlement negotiations process, and exempt from disclosure under N.J.S.A. 47:1A-9(b)." Ibid. Similarly, in Libertarians for Transparent Gov't v. Coll. of N.J., A-1179-16, 2018 N.J. Super. Unpub. LEXIS 851 at *1-2 (App. Div. Apr. 12, 2018)[5], the Appellate Division held that records reflecting negotiations conducted while a settlement in principle had been reported to the federal district court would be exempt from disclosure, but remanded the matter to confirm whether the withheld email reflected ongoing settlement negotiations.

Here, unlike the factual issue on remand in Libertarians for Transparent Gov't v. Coll. of N.J., as set forth in the

[5] In accordance with Rule 1:36-3, a copy of this unpublished opinion is attached to the DAG Anderson Cert.

certification of DAG Anderson, there can be no dispute as to the timeframe of the settlement negotiations. They concluded on December 5, 2011, when the parties signed the settlement agreement and the United States Bankruptcy Court entered the Stipulation and Consent Order. DAG Anderson Cert. at ¶21; Local Rule 9013-3; Borg Cert., Ex. B, p6. As set forth in the State Defendants' Vaughn Index, all communications with the Trump Entities' bankruptcy counsel occurred prior to the effectuation of the settlement on Dec. 5, 2011 as follows:

- Bates Stamped Documents 4-6, 12, 13, 17-19, 28, 29, and 30-37 involve communications between the Trump Entities' bankruptcy counsel, the Division of Taxation, and DAG Anderson negotiating the final settlement number. DAG Anderson Cert., ¶18-19. These communications date from September 12, 2011 through October 6, 2011. Borg Cert., Ex. I.

- Bates Stamped Documents 65 and 66 involve communications between the Trump Entities' bankruptcy counsel, the Division of Taxation, and DAG Anderson negotiating the payment terms of the settlement. DAG Anderson Cert., ¶19-20. These communications date from October 6, 2011 through November 22, 2011. Borg Cert., Ex. I.

- Bates Stamped Documents 322-330 involve communications between the Trump Entities' bankruptcy counsel and DAG Anderson negotiating the terms of the Stipulation of Settlement. DAG Anderson Cert., ¶20-21. These communications date from November 22, 2011 through November 28, 2011. Borg Cert., Ex. I.

Settlement negotiations ceased on December 5, 2011. DAG Anderson Cert., ¶21. The Privilege Log does not assert confidentiality for settlement negotiations for any documents dated after November 28, 2011. See Borg Cert., Ex. I.

Despite this clear and unambiguous timeline, Plaintiff still argues that the confidentiality afforded settlement negotiations does not apply. It bases its argument on a released document wherein a "private citizen emailed certain public officials in the morning [of October 6] telling them that a settlement had in fact been reached." Pb9.

Plaintiff's reliance on information from this private citizen is misplaced. It is clear from a comprehensive review of all of the documents responsive to the request that this private citizen was not involved in the litigation or the settlement negotiations in any manner. It is unclear why this private citizen thought there was a settlement between the parties, but the timeline provided by the attorney involved in the case clearly shows otherwise. DAG Anderson Cert., ¶¶18-21.

Furthermore, simply because the parties agreed on a settlement number does not mean that all settlement negotiations are completed. As discussed above, the parties continued to negotiate payment terms and the terms of the actual Stipulation of Settlement for several weeks following their initial agreement as

to the amount of the settlement. DAG Anderson Cert., ¶¶18-21. Plaintiff cannot argue that negotiating the payment terms and terms of the stipulation of settlement do not constitute "settlement negotiations." In fact, Plaintiff seemingly recognizes its mistake when it states that "[i]f 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." Pb15. It is clear from the Vaughn Index, however, that "the essential settlement terms" were not agreed to by October 5, and that, in fact, several "essential settlement terms" continued to be negotiated after October 5. DAG Anderson Cert., ¶¶18-21.

Consequently, the documents involving the settlement negotiations between the Trump Entities and the Division remain confidential and are not subject to release under OPRA. Thus, Plaintiff is not entitled to access these documents under OPRA, the Division's denial of access should be affirmed, and Plaintiff's its Verified Complaint should be dismissed with prejudice.

D. THE DIVISION OF TAXATION PROPERLY DENIED THE RELEASE OF DOCUMENTS EXEMPT FROM DISCLOSURE AS ADVISORY, CONSULTATIVE, OR DELIBERATIVE OR SUBJECT TO THE DELIBERATIVE PROCESS PRIVILEGE.

OPRA exempts material that is "inter-agency or intra-

agency advisory, consultative, or deliberative" from the definition of a government record. N.J.S.A. 47:1A-1.1. The closely related deliberative process privilege allows "the government to 'withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which [its] decisions and policies are formulated.'" Ibid. (quoting In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000)). The deliberative process privilege "bars the 'disclosure of proposed policies before they have been fully vetted and adopted by a government agency,' thereby ensuring that an agency is not judged by a policy that was merely considered.'" Id. at 137-38 (quoting Educ. Law Ctr., 198 N.J. at 286).

To assert the deliberative process privilege, "an agency must initially prove that a document is 'pre-decisional,' i.e., 'generated before the adoption of an agency's policy or decision,' and also 'deliberative,' in that it 'contain[s] opinions, recommendations or advice about agency policies.'" Ciesla, 429 N.J. Super. at 138 (quoting In re Liquidation of Integrity Ins. Co., 165 N.J. at 83).

In Education Law Center, the New Jersey Supreme Court more specifically defined what constitutes deliberative material. With regard to all government records, the Court held that a record is confidential under as deliberative material when "used in the

decision-making process and its disclosure would reveal the nature of the deliberations that occurred during that process." Id. at 301. In addition, a document containing factual information that would expose an agency's deliberations is entitled to protection under the deliberative process privilege and exempt from release under OPRA. Ibid.

Here, the documents in question involve employees of the Division discussing, analyzing, and implementing a settlement. DAG Anderson Cert. The majority of the documents were created prior to the settlement negotiations completion (December 5, 2011), as evidenced in the Vaughn Index. DAG Anderson Cert., ¶¶18-21. These documents are generally between Auditor Simmons and those in his chain of command. DAG Anderson Cert.

A few documents were created after December 5, 2011. Ibid. However, those documents created after December 5, 2011, are still deliberative material exempt from disclosure.[6] After the settlement was finalized, the Division still needed to decide (a) how to implement the settlement, (b) how to process payments, (c) how to resolve the outstanding audit, and (d) other issues regarding this taxpayer. DAG Anderson Cert., ¶22. Thus, the

[6] As reflected in the Vaughn Index, simultaneously filed with this court, the additional exemptions under N.J.S.A. 54:50-8 and the attorney-client privilege still apply as well.

Division properly denied Plaintiff's request for access to these documents because they are "advisory, consultative, or deliberative material." N.J.S.A. 47:1A-1.1.

POINT II

PLAINTIFF IS NOT ENTITLED TO THE RECORDS UNDER THE COMMON LAW.

Defendants' interest in protecting taxpayer information, privileged records, and confidential settlement negotiations far outweighs any interest that Plaintiff may have in accessing the records at issue. Although a citizen's common law right of access to public records is potentially broader than the statutory right to a "government record" under OPRA, "[t]he trade-off is that, '[u]nlike a citizen's absolute statutory right of access, a plaintiff's common-law right of access must be balanced against the State's interest in preventing disclosure.'" Educ. Law Ctr., 198 N.J. at 302 (second alteration in original) (quoting Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 46 (1995)). The right to access common law records "is a qualified one." Keddie v. Rutgers, 148 N.J. 36, 49-50 (1997). Three requirements must be met before documents within a public agency's domain may be acquired under the common law. Id. at 50. First, the records must be common law public documents. Second, the person or

commercial entity seeking access must establish an interest in the subject matter of the material. Third, the citizen's or entity's right to access must be balanced against the State's interest in preventing disclosure. Ibid.; see also Higg-A-Rella, 141 N.J. at 46. Failure to satisfy any one of the three prongs justifies denial of the request for disclosure.

Defendants do not dispute that the first two prongs of the test are met. However, Plaintiff has failed to demonstrate that its interest in disclosure of the documents outweighs the State's interest in non-disclosure. Educ. Law Ctr., 198 N.J. at 303. The court should deny the claim of access to a record "when the public interest in confidentiality is greater." Loigman, 102 N.J. at 105. In making that determination, courts are to consider the following factors:

> (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decision-making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory

> proceedings have arisen that may circumscribe the individual's asserted need for the materials.
>
> [Loigman, 102 N.J. at 113.]

While Loigman factors four (4), five (5), and six (6) are of limited use in this case, factors one (1), two (2), and three (3) weigh heavily in favor of non-disclosure.

For the reasons discussed above, factor one (1), the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government, is strongly implicated here. To fulfill its mission, the Division of Taxation requires individual citizens and businesses to accurately, freely, and truthfully disclose sensitive financial information, and to cooperate with audits performed by Division employees. If the files and records of the Director were released to the public, many citizens and businesses may be disinclined to provide such confidential information, or may not cooperate with audits. As the agency charged with enforcing the taxing laws of this State, release of these documents would drastically hinder the Division's operations. Given the Division's important function, this factor weighs very strongly in favor of non-disclosure.

Factor two (2) is also strongly implicated here. As discussed above, disclosure of tax information may have a devastating effect

upon filing citizens and businesses. Our courts have held that "the object of the secrecy provisions is to assure every taxpayer making returns that the information therein contained will remain confidential and will be used only for the purpose of computing his tax. [N.J.S.A. 54:50-8] indicates a legislative determination that such returns shall not be . . . employed for any purpose other than that stated in the statute." Monmouth Airlines, 2 N.J. Tax at 54. "[H]eightened protection was intended with regard to tax information, in order to encourage the full, voluntary self-assessment of taxes." Church of Scientology of Cal. v. IRS, 792 F.2d 153, 158-159 (D.C. Cir. 1986), aff'd 484 U.S. 9 (1987).

Finally, factor three (3) weighs heavily in favor of non-disclosure. Disclosure of the records may affect the Division's ability to consider and weigh settlements for the fear of inappropriate disclosure. Likewise, disclosure will hinder the Division's ability to discuss matters with its counsel without concern of its privileged information being released. And in fact, the Division may prohibit internal communications between employees regarding ongoing tax matters without the fear of inappropriate disclosure.

Furthermore, when engaging in the balancing test required under the common law, a court may look to the exemptions in OPRA as expressions of legislative policy on the subject of

confidentiality. Bergen County Improvement Auth. v. N. Jersey Media Group, 370 N.J. Super. 504, 520 (App. Div. 2004). "[W]hen the requested material appears on its face to encompass legislatively recognized confidentiality concerns, a court should presume that the release of the government record is not in the public interest." Michelson v. Wyatt, 379 N.J. Super. 611, 621 (App. Div. 2005). As OPRA expressly exempts from production records under N.J.S.A. 54:50-8, the same should be exempt under the common law.

Because Plaintiff's interest in the information sought does not outweigh the interests in maintaining confidentiality of the information, this court should dismiss Plaintiff's claim for the records under the common law.

POINT III

THE ACTIONS OF DEFENDANTS' RECORDS CUSTODIAN WERE NOT A KNOWING AND WILFUL VIOLATION OF OPRA.

Issuance of a civil penalty for violating OPRA is a severe sanction that should only be imposed on the most egregious cases. There is no basis for doing so in this case. As set forth herein, Defendants were justified in withholding records in its response pursuant to OPRA exceptions, and their actions were consistent with the law. The Division worked diligently with

Plaintiff, providing a detailed and extensive Vaughn Index, repeatedly reviewing the documents for non-confidential information, and answering any and all additional questions posted by Plaintiff. Thus, while this court has the authority to determine whether Defendants' actions rise to the level of a "knowing and willful" violation of OPRA, there is no basis to do so here. N.J.S.A. 47:1A-11.

To find a knowing and willful violation, an individual's must have amounted to much more than mere negligent conduct. Alston v. City of Camden, 168 N.J. 170, 185 (2001). The evidence must prove that the individual had some knowledge that his actions were wrongful. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008). The Custodian's actions must also have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

In the present case, the Director responded to the Plaintiff's OPRA requests as soon as possible, in light of the extensive number of documents requiring review, and advised Plaintiff (through Mr. Buettner) of the Division's sound legal basis for denying the requests. Buettner, Ex. F and G. Therefore, based upon the facts of this case and the Division's prompt and proper response to Plaintiff, the actions of the Division in this

matter do not rise to the level of a knowing and willful violation of OPRA. Nor were the Division's actions negligent, heedless or reckless. Rather, the Division reasonably responded to Plaintiff's OPRA request as evidenced by the facts and circumstances of record.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the court dismiss Plaintiff's Verified Complaint and Order to Show Cause with prejudice.

Respectfully submitted,

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Heather Lynn Anderson _
Heather Lynn Anderson
Deputy Attorney General

Dated: May 31, 2019