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MARTIN E. O'BOYLE	:	SUPREME COURT OF NEW JERSEY
	:	DOCKET NO. 070999
	:	
Plaintiff-Appellant,	:	APPELLATE DIV. OF NEW JERSEY
	:	DOCKET NO. : A-2698-10T2
v.	:	
	:	SUPERIOR COURT OF NEW JERSEY
BOROUGH OF LONGPORT	:	DOCKET NO. : L-2591-10
	:	
Defendant-Respondent	:	

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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STATEMENT OF INTEREST OF AMICUS CURIAE

The New Jersey State Bar Association ("NJSBA") is a member organization consisting primarily of New Jersey attorneys, many of whom represent public and private clients statewide. The mission of the NJSBA is to serve, protect, foster and promote the personal and professional interests of its members; to serve as the voice of the New Jersey attorneys with regard to the law, legal profession and legal system; to promote access to the justice system and fairness in its administration; to foster professionalism and pride in the practice of law; to provide educational opportunities to New Jersey attorneys so as to enhance the quality of legal services; and to provide education to the public with respect to the legal system and the legal profession.

The NJSBA's interest in this matter is to assist the Court in fashioning clear rules and guidelines for attorneys and their clients as those attorneys assist and advise public entities and members of the public with respect to the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 et. seq. ("OPRA"), the common law right of access and the joint defense/common defense and work product doctrines. The NJSBA does not seek to abrogate the vast public policy underpinning the statute and common law that

clearly and unequivocally favors the public's right of access to government records.

However, additional matters of interest, acutely pertinent to the NJSBA and its member attorneys, are implicated in the instant litigation and those concerns call out for clear direction from the Court. Indeed, with respect to defending multi-party litigation and coordinating defense strategies with commonality in defenses and interests, attorneys often join together and mount coordinated defenses in the interest of presenting the best advocacy as well as saving resources and reducing burden on the public fisc, as occurred here.

The NJSBA respectfully requests the Court provide the widest berth by which attorneys can advocate for their clients in free and unburdened fashion without fear they are susceptible to having their thoughts and ideas made accessible and used against them by an adversary. It is in this context that the NJSBA respectfully advances that the Court step in to make clear that New Jersey litigants and their respective legal counsel should be reasonably unfettered as they work together toward their clients' mutual interests and common goals without fear that their work product and confidential communications and strategy will be laid bare for opponents to consider and potentially use to do clients harm.

PROCEDURAL HISTORY AND STATEMENT OF THE FACTS

The NJSBA incorporates the history and facts recited by the Appellate Division in its May 21, 2012, opinion, and highlights the following relevant facts that are uncontested.

On April 23, 2010, Plaintiff-Petitioner, Martin E. O'Boyle, made six (6) requests to Defendant-Respondent, Borough of Longport, pursuant to the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 et. seq. and the common law right of access, for copies of government records, (Requests 58A to 75A). On or about May 3, 2010, certain documents were provided and other were not, the latter being the subject of the instant litigation as follows:

1. August 20, 2009, letter from Emmanuel Argentieri, Esq. to David Sufrin, Esq.
2. September 18, 2009, letter from David Sufrin, Esq., to Emmanuel Argentieri, Esq.
3. September 29, 2009, letter from David Sufrin, Esq., to Emmanuel Argentieri, Esq.
4. Undated letter from David Sufrin, Esq., to Emmanuel Argentieri, Esq.
5. September 29, 2009, letter from David Sufrin, Esq., to Emmanuel Argentieri, Esq. together with two (2) Compact Discs (CD's)

6. Undated additional CD containing documents sent by David Sufrin, Esq., to Emmanuel Argentieri, Esq.

The above-noted items were held for a period of time by Longport's special counsel, Mr. Argentieri, Esq., but, prior to the relevant OPRA request was submitted, were turned over, at the request of Mr. Sufrin, Esq., counsel to a private party with a concordant litigation interest, and were apparently never directed to, nor handled by, any government official situated in Longport. The above-noted letters were eventually examined by the trial court *in camera*, but the three (3) CD's listed above were not as they were no longer in the possession of the Borough's counsel and had not been for some time prior to the filing of the OPRA request.

That notwithstanding, the Borough of Longport alleged that the letters and CD's were not government records, and, notwithstanding, were protected from disclosure under OPRA and the common law pursuant to joint defense privilege and work product doctrine. Those claims are disputed by Mr. O'Boyle, who has advanced four Questions Presented that the Court has engaged, paraphrased below:

1. Whether the documents at issue are public records;
2. In invoking work product protections under a Joint Interest Privilege, must the

defense have prepared a written joint defense agreement or some other evidence the parties intended to work together in advance;

3. Should the Court impose a requirement that a party invoking privilege create and produce a comprehensive Vaughn Index; and,

4. Shall a trial court undertake an even more thorough *in camera* review of the documents and attachments than was done in this matter.

ARGUMENT

The issue before the Court is whether documents and CD's provided temporarily to a municipal counsel by the legal counsel representing a person with a concordant interest to the municipality in a litigation matter are government records and, if so, if those are entitled to protection under the joint defense and work product doctrines. This is a query that our common legal sense answers with a simple "yes." In that context, Plaintiff-Petitioner seeks to have the Court impose a largely unnecessary and academic scrutiny that will necessarily require municipalities around the state to incur significant costs and expenses to manage. The facts of this matter clearly evince that the subject documents and CD's, while arguably public records, are entitled to protections from disclosure under New Jersey law, and the basic sense of fairness that informs those doctrines must be reinforced to protect parties' coordinated litigation defenses and activities.

A. The Court Need Not Evaluate The Issues Of Whether The Subject Documents Are Subject To Production Under OPRA or The Common Right of Access as the Trial Court's *In Camera* Review Was Sufficient

The New Jersey Open Public Records Act, N.J.S.A. 47:1A-1, can only be read in favor of the public's open access to government records, requiring "government records . . . be readily accessible for inspection, copying, or examination..."

such that "all government records shall be subject to public access unless exempt from such access" N.J.S.A. 47:1A-1.

OPRA defines government records in a manner that leaves no doubt as to the public's broad and expansive right of access:

any paper, written or printed book, document, . . . information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, . . . or that has been received in the course of his or its official business by any such officer, commission, agency or authority of the State or of any political subdivision thereof

N.J.S.A. 47:1A-1.1. The New Jersey Supreme Court has defined a public record to include a "written memorial . . . made by a public officer . . . authorized by law to make it." Mason v. Hoboken, 196 N.J. 51, 67 (2008) (quoting Nero v. Hyland, 76 N.J. 213, 222 (1978)). OPRA may not affect "the common law right of access to any record" and does "not abrogate or erode any . . . grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record." See N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-8 and N.J.S.A. 47:1A-9.3. Importantly, "any

document...received in the course of the official business of an agency of a political subdivision is a government document." Fair Share Housing Ctr., Inc. v. N.J. State League of Munic., 207 N.J. 489, 508 (2011).

Whether the common law right of access to government records compels production requires a determination of whether the documents are actually public records. Drinker Biddle & Reath LLP v. N.J. Dep't of Law and Pub. Safety, 421 N.J. Super. 489 (App. Div. 2011). That right of access to government records has consistently been held to sweep up a broader range of material than is available under OPRA. See, e.g., Education Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 302 (2009); Keddie v. Rutgers, 148 N.J. 36, 50 (1997) (holding that a document is a public record when it is "created by, or at the behest of, public officers in the exercise of a public function."); Higg-A-Rella, Inc. v. Essex, 141 N.J. 35, 46 (1995); Shuttleworth v. Camden, 258 N.J. Super. 573, 579-80 (App. Div.), certif. denied, 133 N.J. 429 (1992).

Here, under the facts of this matter, the Appellate Division upheld the trial court which found, following an *in camera* review of key aspects of the alleged records at issue, that the items are not subject to production under OPRA. Likewise, the court's holding maintained that under the applicable balancing standard, those items were unavailable to

Plaintiff-Petitioner through the common law right of access. The court carefully laid out the appropriate analysis, necessarily scrutinizing the facts presented in the context of a ruling that goes against the grain of the public policy backdrop of the law favoring disclosure of the alleged records.

The instant matter is distinguishable from Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) which Plaintiff-Petitioner relies upon in seeking broad access to the alleged records. While Burnett required the Gloucester County Board of Chosen Freeholders provide the subject records, each was free of other privilege, work product and joint defense claims, and were created for a public agency in the course of its official business. Burnett, supra, 415 N.J. Super. at 517. They were never held in literal fashion by the governmental entity. Id. The basis for the Burnett court's holding was simply to prevent a public entity from avoiding OPRA and the common law right of access by conveniently maintaining records elsewhere, something clearly not present in this matter. Id.

In the matter at hand, even if the alleged records are held forth as government records subject to disclosure under OPRA and/or the common law, significant matters of public policy and, more importantly case law obviate rigidly away from their being turned over to a requestor under both the work product and joint defense doctrines. Accordingly, the Court need not engage in

the academic discussion associated with evaluating the implications of OPRA or the common law right of access here because the threshold analysis provides that the alleged records were properly held to be protected from disclosure by other means.

B. The Work Product and Joint Defense Doctrines Bar Release of the Subject Documents

It is significant that the documents and CD's that were shared in this matter were provided subject to clear and explicit restrictions that noted actual and pending litigation. Moreover, the attorneys communicated their clear indication that they had a valid interest in fighting a common legal nemesis of the attorneys' respective clients and relied on the reasonable protections provided by well-established case law in that regard. The subject, save one letter that, like the others, was clearly marked as a work product item, were created by a private party and were provided by that private party for a temporary time and shared with the special municipal counsel in the context of working to defeat a mutual foe.

The work product doctrine allows attorneys an ability to conduct themselves, including lending advice, drafting work and developing strategy, with the necessary freedom that fosters creativity "with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."

Hickman v. Taylor, 329 U.S. 495, 510-11 (1947). Rule 4:10-2(c) requires that disclosure of work product materials may not be compelled to the party seeking to acquire the documents without a clear showing that the information cannot be obtained by other means without undue hardship, but even still, disclosure is not available as to the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Hickman, supra, 329 U.S. at 511. See also R. 4:10-2(c). Protected items include "documents, electronically stored information, and tangible things . . . prepared . . . by or for another party" R. 4:10-2(c); Accord Laporta v. Gloucester Cnty. Bd. of Chosen Freeholders, 340 N.J. Super. 254, 259-60 (App. Div. 2001).

As a sibling legal doctrine to work product protections, the common interest rule (treated interchangeably among the pleadings of the parties and *amici* as the joint defense doctrine), "protects communications made to a non-party who shares the client's interests." In re State Comm'n of Investigation Subpoena No. 5441, 226 N.J. Super. 461, 466 (App. Div.), certif. denied, 113 N.J. 382 (1988). It is routinely applied in lockstep fashion along with the attorney-client privilege. The common interest rule necessarily accompanies the broad protection meted out under the work product doctrine and attorneys' communications with their parties. Laporta, supra,

340 N.J. Super. at 262. See also In re Env'tl. Declaratory Judgment Actions, 259 N.J. Super. 308, 315 (App. Div. 1992). Public entities enjoy these same protections in the confidentiality of communications with their legal counsel, especially as relates to litigation. Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010).

As the Appellate Division properly noted, the common interest rule applies only where the disclosure is made due to actual or anticipated litigation, furthers a common interest and is made in a manner not inconsistent with maintaining confidentiality against adverse parties. Laporta, supra, 340 N.J. Super. at 262. Indeed, Laporta stands for the proposition that parties merely must have a "common purpose" and do not even need to have actual and/or articulated identical interests. Id. quoting United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir.), cert. denied, 444 U.S. 833 (1979).

The joint defense doctrine permits an extension of the attorney-client privilege and the work product doctrine to items and information in a manner that exceeds the classic model of the attorney communicating directly with his or her client or preparing alone for an actual or threatened litigation, widening the circle of protection to those with whom it is shared who have the aforementioned common interest. Haines v. Liggett Group, Inc., 975 F. 2d 81 (3rd Cir. 1992) (holding that joint

defense protection allows parties to exchange otherwise privileged and/or attorney work product items and information to "prepare a defense without waiving either privilege.").

Here, the Plaintiff-Petitioner has requested access to items that, on their face and in the most obvious, explicit fashion, fit squarely within the applicable case law and court rules that bar release. Moreover, the NJSBA submits that the joint defense and common interest protections do not, and should not, necessitate a written agreement as the commonality of interest is readily implied by the conduct and situations and should naturally progress much like the underlying privileges and doctrines it seeks to extend.

CONCLUSION

For the foregoing reasons, the NJSBA respectfully requests that the Court uphold the Appellate Division and, where inclined to further address the several doctrines and privileges at issue, that the Court reinforce and, where necessary, enlarge the broad protections and guidelines that allow attorneys to freely, creatively and cooperatively assist clients and those with concordant legal defenses to present the best arguments and analyses before the courts of this state.

Respectfully submitted,



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Dated: