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Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0968-16T3

NEW YORK PUBLIC RADIO  
d/b/a NEW JERSEY PUBLIC  
RADIO,

Plaintiff-Appellant,

v.

OFFICE OF THE GOVERNOR,

Defendant-Respondent,

and

ANDREW J. MCNALLY, custodian;  
N.J. DEPARTMENT OF COMMUNITY  
AFFAIRS; CUSTODIAN OF RECORDS  
FOR THE N.J. DEPARTMENT OF  
COMMUNITY AFFAIRS; N.J.  
DEPARTMENT OF LAW AND PUBLIC  
SAFETY, DIVISION OF STATE  
POLICE; CUSTODIAN OF RECORDS  
FOR THE N.J. DEPARTMENT OF  
LAW AND PUBLIC SAFETY, DIVISION  
OF STATE POLICE; N.J. TRANSIT;  
CUSTODIAN OF RECORDS FOR N.J.  
TRANSIT,

Defendants.

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Submitted November 14, 2017 – Decided December 19, 2017

Before Judges Hoffman and Gilson.

On appeal from Superior Court of New Jersey,  
Law Division, Mercer County, Docket No. L-  
1345-14.

McCusker, Anselmi, Rosen & Carvelli, James  
Rosenfeld and Jeremy Chase (Davis Wright  
Tremaine) of the New York bar, admitted pro  
hac vice, attorneys for appellant (Bruce S.  
Rosen, James Rosenfeld and Jeremy Chase, on  
the briefs).

Christopher S. Porrino, Attorney General,  
attorney for respondent (Raymond R. Chance,  
III, Assistant Attorney General, of counsel;  
Matthew T. Kelly, Deputy Attorney General, on  
the brief).

PER CURIAM

In this opinion, we address the sole remaining issue from a  
complaint filed in July 2014 by plaintiff, New York Public Radio,  
d/b/a New Jersey Public Radio, seeking various documents,  
including defendant's Town Priority Lists (TPL), under the Open  
Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common  
law right of access. In a prior opinion, we vacated the trial  
court's order compelling production of defendant's TPL, holding  
the TPL were not subject to disclosure under OPRA's deliberative  
process privilege. N.J.S.A. 47:1A-1.1. N.Y. Pub. Radio v. Office  
of the Governor, No. A-0565-15 (App. Div. July 13, 2016) (slip op.  
at 13). Because the trial court did not address whether the common  
law right of access required disclosure of the TPL, we remanded

this matter for the trial court to decide that issue. Id., slip op. at 16.

On remand, the Law Division applied the common law right of access balancing test and held the TPL were not subject to production. Plaintiff appealed, and presents three arguments for reversal: (1) the trial court failed to properly credit its significant public interest in obtaining the TPL; (2) the trial court improperly applied the factors set forth in Loigman v. Kimmelman, 102 N.J. 98, 113 (1986); and (3) this court's prior OPRA ruling did not foreclose plaintiff's ability to obtain the TPL under the common law right of access. For the reasons that follow, we affirm.

I

We review a trial judge's legal conclusions concerning access to public records de novo. Drinker Biddle & Reath LLP v. N.J. Dep't of Law & Pub. Safety, 421 N.J. Super. 489, 497 (App. Div. 2011). We will not disturb factual findings as long as they are "supported by adequate, substantial and credible evidence." Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 475 (1988) (citing Rova Farms Resort v. Inv'rs Ins. Co., 65 N.J. 474, 483-84 (1974)).

The common law right of access provides broader access to government records than under OPRA. Mason v. City of Hoboken, 196

N.J. 51, 67 (2008). Nonetheless, that right must be balanced against the State's interest. Higg-A-Rella, Inc. v. Cty. of Essex, 141 N.J. 35, 46 (1995).

To prevail under the common law, a plaintiff must satisfy the following requirements: "(1) the records must be common-law public documents; (2) the person seeking access must establish an interest in the subject matter of the material; and (3) [plaintiff's] right of access must be balanced against the State's interest in preventing disclosure." Keddie v. Rutgers, 148 N.J. 36, 50 (1997) (citations and internal quotation marks omitted). In this matter, the parties do not dispute that the documents are public records and plaintiff has the requisite standing to seek the records. Accordingly, we need only review the third factor: whether plaintiff's right to the documents outweighs defendant's interest in preventing disclosure.

In weighing the parties' interests, our Supreme Court has set forth 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.]

Applying these standards, we find no basis to disturb any aspect of the order under review. We find no error in the way the trial judge treated plaintiff in terms of its interest in obtaining the TPL. Furthermore, the trial judge satisfactorily addressed and weighed the relevant Loigman factors, and adequately explained her findings and conclusions. We add the following comments.

Plaintiff contends the common law balance of interest test weighs in favor of disclosing the TPL. Namely, plaintiff asserts it "is inherently speculative" that disclosing the TPL would chill agency communication because the TPL "are likely no longer in use, and the agency" at issue "has been abolished."

Plaintiff's argument lacks persuasion. Regarding the third Loigman factor – whether disclosure would chill agency decision-making – we concur with the trial judge's reasoning and analysis. As the trial judge found, "If communication that formed part of an agency's pre-decisional process could be disclosed after the decision has been released, one of the major justifications for

the privilege in the first place, maintaining the free flow of communication within an agency, would be rendered meaningless." To wit: merely because the TPL are no longer in use does not strip them of protection from unwarranted public scrutiny. See Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 294-95 (2009). Moreover, we agree with the trial judge's comments emphasizing "the importance of promoting government's" ability to engage in "full and frank discussions of ideas when developing new policies and taking action." See id. at 295.

## II

We further find no merit in plaintiff's contention that the trial court erroneously reasoned "this Court's prior ruling that the deliberative process privilege exempted the [TPL] from disclosure under OPRA forecloses a different result under the common law." Plaintiff fails to demonstrate the trial judge based her analysis on anything other than the requisite common law balancing test.

We note that under the common law, a document's meeting the threshold requirements for the deliberative process privilege invokes a presumption against its disclosure. In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 85 (2000). However, a plaintiff can overcome that presumption by demonstrating a compelling need substantial enough to "override the government's

significant interest in non-disclosure." Ibid. Moreover, when a document is deliberative, the first four Loigman factors weigh more heavily in favor of non-disclosure. See Educ. Law Ctr., 198 N.J. at 304. Here, the trial judge accurately found, and the parties agree, the third and fourth Loigman factors are most applicable to the instant action.

The record reflects the trial judge appropriately applied the common law balancing test and found plaintiff failed to demonstrate a sufficiently compelling need to overcome defendant's interest in non-disclosure. We are satisfied the trial judge recognized our previous holding that the TPL were deliberative under OPRA did not foreclose a different common law result.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION