SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1469-16T4

NORTH JERSEY MEDIA GROUP, INC.,

Plaintiff-Appellant,

v.

CITY OF CLIFTON and NANCY FERRIGNO in her capacity as City Clerk and Custodian of Records for the City of Clifton,

Defendants-Respondents.

Submitted November 29, 2017 – Decided January 11, 2018

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-0543-16.

Pashman Stein Walder Hayden, PC, attorneys for appellant (Samuel J. Samaro and Jennifer A. Borg, of counsel; Samuel J. Samaro, on the brief).

DeCotiis, FitzPatrick, Cole & Giblin, LLP attorneys for respondents (Thomas A. Abbate, of counsel; Gregory J. Hazley, on the brief).

PER CURIAM

Appellant North Jersey Media Group, Inc. (NJMG) appeals from an October 25, 2016 order dismissing its complaint against defendant City of Clifton and its custodian of records, Nancy Ferrigno, seeking production of certain records pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common law right to inspect government records. For the reasons that follow, we affirm.

I.

In 2015, Clifton began exploring a potential transition from paying its employees biweekly to paying them semimonthly. Under its biweekly payroll system, Clifton issued payroll checks every other Friday, yielding twenty-six pay periods per year. In contrast, under a semimonthly system, Clifton would pay its employees on the fifteenth and last day of each month, yielding twenty-four pay periods per year.

Clifton employees contended biweekly pay periods resulted in a shortfall of their annual compensation. Specifically, there are fifty-three Fridays instead of fifty-two approximately every five years. Clifton's biweekly payroll system, however, paid employees as if there were only fifty-two weeks in that fifth year. Employees alleged they were not paid for that first week, leaving them underpaid in those years.

NJMG is the owner of various print and web-based news organizations, including The Record, a general circulation daily newspaper. The Record began investigating and reporting on a potential transition by Clifton to a semi-monthly payroll system due to the allegation that Clifton's biweekly payroll system was shortchanging employees. The investigation revealed that Clifton employees were not being compensated for every day they worked.

In response to the investigation, Clifton hired Lerch, Vinci & Higgins (LVH), an accounting firm, to perform an independent review of its payroll practices. LVH was tasked with analyzing and providing recommendations in connection with Clifton's twenty-six pay period system, as well as the consequences of changing to a twenty-four pay period system. At a June 30, 2015 special meeting, Clifton announced that LVH would be commissioned to determine whether the City was handling the payroll issue properly.

Following its review, LVH prepared a report of its findings. Over the course of five months, LVH revised the report five times in response to questions and comments by Clifton officials. The revisions were requested by Clifton or its attorney to address anticipated issues likely to be raised in the expected grievances and arbitrations. According to Clifton's Chief financial Officer, "[n]umerous discussions were held involving [his] department, the Law Department, outside counsel and the City's expert consultant

as to how to proceed." The six versions of the report were sent to Clifton in July, August, and December 2015.[1] Clifton characterizes each version of the report as a draft and deliberative in nature. NJMG contends that the report was not in draft form, but rather, was commissioned for investigative purposes and contained only factual data.

Following LVH's submission of the August 3, 2015 version of the report, Clifton held a meeting of its governing body on August 15, 2015, and made the decision to convert to semimonthly pay periods. On January 8, 2016, Clifton issued special payroll checks to 439 employees to make up for the shortfall between days previously worked and pay received that resulted from the prior biweekly pay periods. The unions representing the affected employees subsequently filed grievances contesting the amount paid, alleging that the employees were still owed additional back pay. Some of the grievances went to arbitration.[2]

On December 16, 2015, a reporter for The Record submitted a request to Clifton for the following documents pursuant to OPRA and the common law:

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[1] Two versions of the report are dated July 14, 2015 and another two are dated December 3, 2015. The others are dated August 3, 2015 and December 2, 2015.

[2] Some of the grievances were settled through arbitration, while others remained pending when this appeal was filed.

> (1) The audit of Clifton payroll this year performed by Lerch, Vinci & Higgins of Fair Lawn and any recommendations made regarding the payroll and payment to employees.
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> (2) . . . [D]ocuments that explain how the [C]ity determined the amount to be paid to employees at the beginning of January in lump sums to each employee.
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> (4)[3] . . . [M]emos or letters sent out to employees regarding the lump sums they are to receive in January and the calculations made to determine the amount.
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> (5) . . . [D]ocuments showing payments made to employees who were hired in 2015, and the amount of pay they received after Aug[ust] 1 when the city went to a bi-monthly paychecks.

Defendant Nancy Ferrigno, Clifton's designated Custodian of Records, responded to the request on December 28, 2015. Ferrigno provided copies of 490 pages of "interoffice memorandums" that were sent to each of Clifton's affected employees advising them how much they would receive in special payroll. However, Ferrigno withheld the report for the following reasons expressed in an email:

> The report, even once finalized, will not be a public record as it will be used by the City in connection with actual and/or potential litigation related to the grievance and arbitration proceedings. In addition, it will be subject to the deliberative process privilege and will not be subject to a request under OPRA. See Cielsa v. New Jersey Dept. of Health and Senior Services, 429 N.J. Super.

[3] The email did not contain an item number three.

> 127, 57 A.3d 40 ([App. Div.] 2012), which held that the exemption of deliberative materials from [the] definition of a "government record" subject to disclosure under Open Public Records Act (OPRA) is an unqualified one.

On February 8, 2016, NJMG filed a verified complaint against defendants challenging the denial of its request for the LVH report. In count one of the complaint, NJMG demanded access to the requested LVH report under OPRA and asserted that defendants' failure to produce the report was a violation of OPRA. In count two, NJMG alleged that it was entitled to production of the requested report under the common law right of access to public records. Each count also demanded an award of counsel fees and costs.

On February 16, 2016, the trial court issued an order to show cause requiring defendants to show cause why the relief sought in in the complaint should not be granted. Defendants filed an opposition on March 29, 2016. A certification by Clifton's Chief Financial Officer claimed "[n]umerous discussions were held involving [his] department, the Law Department, outside counsel and the City's expert consultant as to how to proceed." Clifton further asserts it intended to use the LVH report in connection with a pending payroll arbitration filed by PBA Local 36.

The parties appeared before the trial court on April 28, 2016. Plaintiff argued the LVH report was investigative in nature

because Clifton was investigating a claim brought to its attention by The Record. NJMG claimed the LVH report must be disclosed to "allow plaintiff and the public to confirm, that [employees] have been properly paid." In contrast, Clifton argued the LVH report was in "draft" form, pre-decisional, deliberative in nature, and was, at the time, being relied upon in considering its response to, and negotiation and settlement of, the employee grievances.

Following oral argument, the trial court ordered Clifton to forward each version of the report for in camera review. On September 21, 2016, the parties appeared before the trial court to receive the court's decision as a result of the in camera review. The court determined the report was deliberative material exempt from disclosure under OPRA. The judge characterized the report as being "mostly just statistical data," but recognized the analysis did not end there. The judge then read the following passage from Educ. Law Ctr. v. N.J. Dep't of Educ. into the record: "pre-decisional documents do not lose their protection from unwarranted public scrutiny merely because they may contain numerical or statistical data or information used in the development of[,] or deliberation on[,] a possible government[al] course of action." 198 N.J. 274, 295 (2009).

The judge found that LVH did not give "advice or [] suggestions as to how to proceed. It just gave them a . . . per

employee statistic as to what they felt . . . was a discrepancy between what they should have been paid and what they in fact were paid, both for the first year and -- and running currently." Although he "didn't see any advice" in the report, he classified the report as "recommendations[] and deliberations comprising part of a process by which [Clifton's] decisions and policies [were] formulated." The judge concluded the "statistical information" in the report "certainly [was] part of the process by which the decisions and the policies of the City [were] formulated."

Recognizing that government records subject to disclosure under OPRA "shall not include inter-agency or intra-agency advisory, consultative or deliberative material[,]" the judge held the six versions of the report were exempt from disclosure under the deliberative process privilege. The decision was memorialized in an order entered on October 25, 2016, which dismissed NJMG's complaint with prejudice.

On appeal, NJMG argues that the LVH report is neither a draft report for deliberative purposes nor an expert report for use in defending the city against grievances. NJMG further argues we should examine the report as part of its review in this matter.

II.

We apply the following standards of review. We exercise de novo review of the trial court's legal conclusions concerning

access to public records under OPRA and the common-law right of access. Drinker Biddle & Reath, LLP v. N.J. Dep't of Law and Pub. Safety, 421 N.J. Super. 489, 497 (App. Div. 2011). "We also conduct plenary review of the trial court's legal conclusion that a privilege exempts the requested records from disclosure[.]" K.L. v. Evesham Twp. Bd. of Ed., 423 N.J. Super. 337, 349 (App. Div. 2011) (citing Paff v. Div. of Law, 412 N.J. Super. 140, 149 (App. Div. 2010); Asbury Park Press v. Cnty. of Monmouth, 406 N.J. Super. 1, 6 (App. Div. 2009), aff'd, 201 N.J. 5 (2010). "We defer to the trial court's factual findings when they are 'supported by adequate, substantial and credible evidence.'" North Jersey Media Grp., Inc. v. State Office of the Governor, 451 N.J. Super. 282, 295-96 (App. Div. 2017) (quoting Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002)).

"We apply a different and deferential standard of review when a court conducts an in camera review of documents and balances competing interests in disclosure and confidentiality in connection with a common-law-based request to inspect public records." North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70, 89 (App. Div. 2015) (citing Shuttleworth v. City of Camden, 258 N.J. Super. 573, 588 (App. Div. 1992)).

III.

NJMG contends the trial court misinterpreted the deliberative process privilege by finding that the report, which contained "mostly just statistical data[,]" was qualified for protection under the privilege even though disclosure would not reveal information about the defendant's deliberations. Clifton contends the report is exempt from disclosure under OPRA because it is incomplete, pre-decisional, deliberative, and is not an investigative report. Clifton maintains the report should not be ordered disclosed even in redacted form.

The general purpose of OPRA is "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) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). To achieve this purpose, OPRA provides that "government 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[.]" N.J.S.A. 47:1A-1. This appeal turns upon one of those codified exceptions.

Although OPRA broadly defines the term "government record," it expressly provides that it "shall not include inter-agency or intra-agency advisory, consultative, or deliberative material."

N.J.S.A. 47:1A-1.1. "This exemption has been construed to encompass the deliberative process privilege, which has its roots in the common law." Ciesla, 429 N.J. Super. at 137 (citing Educ. Law Ctr., 198 N.J. at 284).

The deliberative process privilege allows government entities to "withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which [its] decisions and policies are formulated." In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000) (NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). "[T]he privilege is necessary to ensure free and uninhibited communication within governmental agencies so that the best possible decisions can be reached[.]" Educ. Law Ctr., 198 N.J. at 286. "The 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." Ciesla, 429 N.J. Super. at 137-38 (quoting Educ. Law Ctr., 198 N.J. at 286).

"In order to invoke 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.'" Id.

at 138 (alteration in original) (quoting Integrity, 165 N.J. at 84-85). Here, all six versions of the report predated the decision how to compensate employees for unpaid work time, issuance of special payroll checks to the affected employees, and the filing of the arbitrations. Moreover, the first three drafts of the report predated the August 15, 2015 decision to convert to semimonthly pay periods.

The fact that the report underwent five revisions at Clifton's request bespeaks its ongoing draft status. "By their very nature, draft documents are preliminary and subject to further revision." Ciesla, 429 N.J. Super. at 140. Pre-decisional drafts are protected from disclosure. See id. at 141; State v. Ballard, 331 N.J. Super. 529, 551-53 (App. Div. 2000).

We further find the report to be closely related to Clifton's formulation and exercise of "policy-oriented judgment" to adopt semimonthly pay periods and to decide how and when to remit payment for unpaid work time. See Educ. Law Ctr., 198 N.J. at 295.

The trial court declared the report exempt from disclosure despite the fact that it contained considerable statistical data. We recognize that "[p]urely factual material that does not reflect deliberative processes in any way is not protected by the privilege." Ciesla, 429 N.J. Super. at 138 (citing Integrity, 165 N.J. at 85). However, as explained by the Court in Educ. Law

Ctr., the fact that the report contains statistical data and other factual information does not preclude protection by the privilege.

> Deliberative material need not, in all instances, expressly reflect an overt opinion, recommendation, or advice when a discretionary decision is in development. And, pre-decisional documents do not lose their protection from unwarranted public scrutiny merely because they may contain numerical or statistical data or information used in the development of, or deliberation on, a possible governmental course of action. As the D.C. Circuit Court aptly stated, the deliberative process privilege "was intended to protect not simply deliberative material, but also the deliberative process of agencies."
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> [Educ. Law Ctr., 198 N.J. at 295 (emphasis in original) (quoting Mapother v. Dep't of Justice, 3 F.3d 1535, 1538 (D.C. Cir. 1993).]

Having concluded that the draft, pre-decisional report is deliberative material, it is unqualifiedly exempt from disclosure under OPRA. Ciesla, 429 N.J. Super. at 142-45.

IV.

Clifton further contends that disclosure of the report, which it categorizes as an expert report, is precluded by the work-product doctrine. See R. 4:10-2(c). NJMG contends that the LVH report does not qualify for work-product protection because it was not prepared "in anticipation of litigation," but rather, was used in deciding whether to issue special paychecks to defendant's employees.

The work-product doctrine "protect[s] against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." R. 4:10-2(c). In order for the doctrine to apply, the document must have been "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent)[.]" Ibid. A document "will be considered to have been prepared in anticipation of litigation if the 'dominant purpose' in preparing the document was concern about potential litigation and the anticipation of litigation was 'objectively reasonable.'" Miller v. J.B. Hunt Transport, Inc., 339 N.J. Super. 144, 150 (App. Div. 2001).

Public policies generally shield consultations with expert witnesses in connection with pending or threatened litigation. Those policies apply with equal force to pending or threatened labor grievances and arbitrations.

"Documents that satisfy the OPRA definition of government record are not subject to public access if they fall within the work-product doctrine." O'Boyle v. Borough of Longport, 218 N.J. 168, 188 (2014) (citing Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531 542 (2012); Gannett N.J. Partners, L.P. v. Cnty. of Middlesex, 379 N.J. Super. 205, 218 (App. Div. 2005)).

Clifton's assertion of the work-product privilege is also bolstered by the policies reflected in Rule 4:10-2(d)(1), which was specifically amended in 2002 to insulate draft expert reports as well as related oral and written communication between the attorney and the expert. See Pressler & Verniero, Current N.J. Court Rules, cmt. 5.2.1 on R. 4:10-2(d)(1) (2018). The same principles apply here in the context of the anticipated adversarial proceedings in the form of grievances and arbitrations that Clifton correctly predicted would be filed.

The report was prepared by LVH in its capacity as Clifton's consultant. The information contained in the report would be highly relevant to the issues raised in the grievances and arbitrations filed by the affected employees. The revisions to the report were requested, in large part, for its intended use in the grievance and arbitration process. The report was augmented to address the issues expected to be raised in arbitrations that were then "likely" to be filed by "one or more of the unions." Indeed, following denial of the grievances, a request for arbitration was filed against Clifton on December 7, 2015, only four days after the last draft of the report was issued. For these reasons, we hold that the work-product doctrine provides an independent justification for withholding the report.

V.

In count two of its complaint, NJMG alleges it is entitled to access to the report under the common law right of access to government documents. A citizen may be entitled to access to public records under the common law even though the records are not subject to disclosure under OPRA. Indeed, OPRA provides that it should not be construed as limiting the common law right of access to government records. N.J.S.A. 47:1A-1, -8; see also Bergen Cnty. Improvement Auth. v. North Jersey Media Grp., Inc., 370 N.J. Super. 504, 516 (App. Div. 2004).

NJMG's argument before the trial court did not include any analysis of the right of access to the report under the common law. Similarly, NJMG did not raise the issue of the common law right of access in its notice of appeal. Nor did it brief that issue. The consequence of failing to brief an issue is waiver or abandonment of that issue on appeal. See Gormley v. Wood-El, 218 N.J. 72, 95 n.8 (2014); Drinker Biddle, 421 N.J. Super. at 496 n.5 (holding that claims not addressed in merits brief deemed abandoned); Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived."); DeVane v. DeVane, 280 N.J. Super. 488, 490 n.2 (App. Div. 1995) (considering issues not briefed on appeal to be abandoned); Pressler & Verniero, cmt. 5 on R. 2:6-2 (stating that "an issue

not briefed is deemed waived"). We deem the issue of the common law right of access to the report to be abandoned.

VI.

In summary, we affirm the determination by the trial court that the report is exempt from disclosure.

Affirmed.