SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2287-19

KEVIN MALANGA,

Plaintiff-Appellant,

v.

TOWNSHIP OF WEST ORANGE and KAREN J. CARNEVALE in her official capacity as Municipal Clerk and Records Custodian of the Township of West Orange,

Defendants-Respondents.

Submitted October 12, 2021 - Decided May 3, 2022

Before Judges Fasciale and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-2761-19.

Walter M. Luers, attorney for appellant.

Trenk Isabel, PC, attorneys for respondents (Richard D. Trenk, on the brief).

PER CURIAM

Plaintiff Kevin Malanga filed a verified complaint claiming defendants Township of West Orange and Karen J. Carnevale, in her official capacity as the Township's municipal clerk and custodian of records, violated the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to - 13, and his common law right of access to government records by denying his request for unredacted copies of thirty-three emails. The Township claimed the emails are protected from disclosure under the attorney-client privilege and the advisory, consultative, and deliberative exception to the definition of government records under OPRA. Plaintiff appeals from a December 27, 2019 order granting defendants summary judgment dismissal of the complaint and denying his cross-motion for summary judgment. We reverse in part the court's order granting defendants summary judgment, vacate in part the court's order granting defendants summary judgment, affirm the court's order denying plaintiff's cross-motion for summary judgment, and remand for further proceedings.

I.

We glean the following undisputed material facts from the parties' respective statements of material fact submitted in accordance with Rule 4:46-2(a) and (b) in support of their respective summary judgment motions.[1]

Plaintiff is a resident and property owner in the Township. The Township "is a 'public agency'" under OPRA. See N.J.S.A. 47:1A-1.1 (defining "public agency" in part to include "any political subdivision of the State"); see also Fair Share Hous. Ctr. Inc. v. N.J. State League of Municipalities, 207 N.J. 489, 504 (2011) (noting municipalities are "political subdivisions" of the State). "The law firm of McManimon, Scotland & Baumann, LLC, through its attorneys, Richard D. Trenk, Esq.[,] . . . Mark Y. Moon, Esq.[,] . . . and Tiena M. Cofoni, Esq.[,] . . . act[ed] as" the Township's counsel at all times pertinent to plaintiff's claims. Defendant Karen "Carnevale is the [m]unicipal [c]lerk of the Township and, in that capacity, is the designated records custodian of the Township for purposes of OPRA." See N.J.S.A. 47:1A-1.1 ("'Custodian of a government

[1] Plaintiff admitted each of the facts in defendants' statement of material facts supporting their summary judgment motion. Defendants admitted three of the seven assertions of fact set forth in plaintiff's counterstatement of material facts that was submitted in opposition to defendants' motion and in support of plaintiff's cross-motion. In our view, the disputed facts are not material to the disposition of the issues presented on appeal.

record' or 'custodian' means in the case of a municipality, the municipal clerk . . . .").

In separate resolutions adopted by the Township Council on November 27, 2018, and January 8, 2019, the Township directed the West Orange planning board (planning board) "to conduct a preliminary investigation . . . to determine whether [the Township's public library] should be designated as an area in need of redevelopment" pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -89. See N.J.S.A. 40A:12A-5 (outlining the criteria under which "[a] delineated area may be determined to be in need of redevelopment").

In the November 27, 2018 resolution, the Township authorized the planning board to retain Heyer, Gruel & Associates (HGA) — a professional planning firm — to prepare a report concerning whether the Township library "met the criteria of an area in need of redevelopment."[2] "Jack Baree . . . and Susan Gruel . . . are professional planners employed by HGA."

[2] The record on appeal does not include the Township Council's November 27, 2018 resolution authorizing the planning Board to retain HGA to prepare the report. The transcript of the November 27, 2018 Township council meeting includes a discussion of the resolution and, during the meeting, the Township's attorney Richard D. Trenk explains the Township is permitted to authorize the planning board to hire HGA to provide the planning board with the "tools to"

In a March 12, 2019 resolution, the planning board noted HGA had been "engaged to conduct a study and make recommendations as to whether the [library] met the criteria as an area in need of redevelopment." The planning board's resolution further stated HGA "conduct[ed] a study and prepare[d] a report dated February 6, 2019," and that, based on the report and testimony provided by Susan Gruel, the planning board recommended the Township Council designate the library as an area in need of development.

One week later, the Township Council adopted a March 19, 2019 resolution explaining it had directed the planning board to conduct a preliminary investigation as to whether the library was an area in need of redevelopment and finding HGA had presented its study to the planning board "for its consideration in determining whether the [library] should be designated an [a]rea in [n]eed of [d]evelopment." The Township Council's March 19, 2019 resolution further stated the planning board had completed its investigation, conducted a hearing, and recommended the Township Council find the library was an area in need of redevelopment, and that the Township Council accepted the planning board's recommendation.

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perform its function of considering, and making a recommendation, whether the library was an area in need of redevelopment.

Following the issuance of the HGA report, but prior to the planning board's March 12, 2019 resolution and the Township Council's March 19, 2019 resolution, plaintiff submitted an OPRA request to the Township seeking "[a] copy of all reports pertaining to the designation of the . . . library as an area in need of redevelopment," and "[a] copy of all letters, emails, memoranda, and any other forms of correspondence for the period January 1, 2018[,] to February 11, 2019[,] pertaining to the designation of the . . . library as an area in need of redevelopment."

In a February 25, 2019 letter to plaintiff, the Township clerk's office "produced 124 pages of documents." The letter also advised plaintiff "that certain communications do not constitute 'government records' as defined under OPRA as they are confidential and/or privilege[d] under the [a]ttorney-[c]lient privilege and/or advisory, consultative and deliberative exception under OPRA." The letter provided plaintiff with a list of thirty-two emails the Township claimed were either privileged or within an exception from the disclosure required under OPRA.

On appeal defendants claim there are thirty-three emails at issue.[3] Thirty of the emails were exchanged between HGA representative Baree and counsel for the Township. Two of the emails were exchanged between counsel for the Township, with copies sent to Baree.[4] The remaining email is between Mark Y. Moon, one of the Township's attorneys, planning board chairman Ron Weston,

[3] In the February 25, 2019 letter to plaintiff, the Township included a list of thirty-two emails it claimed were exempt from disclosure under OPRA. The list included eight emails dated November 19, 2018. In his complaint and cross-motion, plaintiff sought a judgment requiring disclosure of the thirty-two emails listed in the Township's letter. In their motion for summary judgment, defendants sought an order dismissing plaintiff's complaint seeking production of the thirty-two emails identified in the Township's February 25, 2019 letter. On appeal, however, defendants' confidential appendix identifies and provides thirty-three emails it claims are exempt from disclosure and for which we should affirm the court's summary judgment order. The emails provided in the confidential appendix include nine emails dated November 19, 2018, and it therefore appears the Township included for the first time on appeal an additional November 9, 2018 email it contends is exempt from disclosure. Given the general descriptions of the emails included in the February 25, 2019 letter, it is not possible to determine which November 19, 2018 email included in the confidential appendix was not presented to the motion court and was added by defendants on appeal. In any event, because we reverse in part the court's order granting defendants' motion and remand for further proceedings, we need not address the particulars of each of the emails. As we explain, any issues concerning exemptions or privileges applicable to the emails must be addressed anew by the trial court on remand.

[4] Two December 12, 2018 emails are exchanged between the Township's attorneys Mark Y. Moon and Richard D. Trenk. Copies of the emails were sent to HGA representative Barre.

and planning board attorney Pat Dwyer, with copies of the email also sent to Jack Sayers, the Township Administrator, Carnevale, and Richard D. Trenk.[5]

Plaintiff filed a complaint and order to show cause "challenging the withholding of the [c]onfidential [c]ommunications" and asserting claims under OPRA and the common law right of access to public records. Plaintiff sought a judgment requiring the Township to "disclose to [p]laintiff copies of the [confidential] communications . . . requested," and ordering the Township to pay "[p]laintiff['s] costs and reasonable attorneys' fees."

The Township filed an answer to the complaint and subsequently moved for summary judgment. Plaintiff filed a cross-motion for summary judgment. The Township later submitted the emails it claimed are privileged and exempt from disclosure to the court for its in camera review.[6]

The court heard oral argument on the motions and later issued a written statement of reasons and order granting the Township's summary judgment motion and denying plaintiff's cross-motion. The court found the emails "are

[5] The email from Mark Y. Moon to Weston and Dwyer is dated February 6, 2019.

[6] The summary judgment record does not reflect whether defendants provided the motion court with the thirty-two emails referenced in the Township's February 25, 2019 letter to plaintiff or the thirty-three emails defendants included in their confidential appendix on appeal.

protected by both the attorney client privilege and the [advisory, consultative and deliberative] exception[s] to the OPRA statute." The court found "HGA was retained as a consultant by the Township Council and [p]lanning [b]oard specifically to investigate the merits of designating the [library] as an area in need of redevelopment . . . and that in that role, . . . Baree was a necessary intermediary who communicated with the Township and [p]lanning [b]oard attorneys on these issues." Thus, the court reasoned the emails "revealed only communications between the counsel and a necessary intermediary." The court granted defendants summary judgment on plaintiff's OPRA and common law right of access claims.

Plaintiff appeals from the court's December 27, 2019 order granting the Township's motion for summary judgment and denying his cross-motion.

II.

We conduct a de novo review of a court's order granting or denying a summary judgment motion, "applying the same standard as the trial court." Abboud v. Nat'l Union Fire Ins. Co., 450 N.J. Super. 400, 406 (App. Div. 2017). This standard mandates the granting of summary judgment "if the pleadings, depositions, answers to interrogatories[,] and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c).

We also review de novo a court's decision concerning the applicability of OPRA and its exemptions. In re N.J. Fireman's Ass'n Obligation, 230 N.J. 258, 273-74 (2017); see also K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 349 (App. Div. 2011) ("We . . . conduct [a] plenary review of the trial court's legal conclusion that a privilege exempts the requested records from disclosure."). We "apply a . . . 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." N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70, 89 (App. Div. 2015). "However, 'to the extent [the appellate court] can be said to be reviewing essentially a legal determination, [it] can review the documents which'" are being requested. Id. at 89-90 (alterations in original) (quoting Shuttleworth v. City of Camden, 258 N.J. Super. 573, 588 (App. Div. 1992)).

In enacting OPRA, the New Jersey "Legislature . . . declare[d] it to be the public policy of this State 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, and any limitations on the right of access . . . shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1. "In keeping with that goal of transparency," Paff v. Galloway Twp., 229 N.J. 340, 352 (2017), OPRA defines a "government record" as

> [a]ny paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed 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.
>
> [Id. at 352-353 (quoting N.J.S.A. 47:1A-1.1).]

The public's right to access government records is not absolute. See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9. OPRA excludes various types of information from the definition of government record, see N.J.S.A. 47:1A-1.1, and courts "must always maintain a sharp focus on the purpose of OPRA and resist attempts to limit its scope, absent a clear showing that one of its exemptions or exceptions incorporated in the statute by reference is applicable to the requested disclosure." Tractenberg v. Township of West Orange, 416 N.J.

Super. 354, 378-79 (App. Div. 2010) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)).

OPRA expressly exempts from its definition of "government record" "inter-agency or intra-agency advisory, consultative, or deliberative material," and "any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1. Here, defendants claimed, and the court found, the requested emails were exempt under OPRA because they fell within these two statutory exemptions.[7] We address the claimed exemptions, and their application to the emails at issue, in turn.

"The attorney-client privilege has been codified in New Jersey, by both statute and rule, the terms of which are identical." Paff v. Div. of Law, 412 N.J. Super. 140 150 (App. Div. 2010). "To qualify for the privilege, a party must show that there was a confidential communication 'between [a] lawyer and his [or her] client in the course of that relationship and in professional confidence[.]" Tractenberg, 416 N.J. Super. at 375 (third alteration in original) (quoting N.J.R.E. 504(1)); N.J.S.A. 2A:84A-20(1). "Confidential communications are only those 'communications which the client either

[7] We limit our discussion to the exemptions relied on by defendants in the February 25, 2019 letter to plaintiff and asserted by defendants before the motion court.

expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended.'" Ibid. (quoting State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989)). "[A] mere showing . . . the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear." Ibid. (alterations in original) (quoting Schubert, 235 N.J. Super. at 220-21). Further, "[t]he attorney-client privilege is not restricted to legal advice, though '[t]he privilege is limited to those situations in which lawful legal advice is the object of the relationship.'" Rivard v. Am. Home Prods., Inc., 391 N.J. Super. 129, 154 (App. Div. 2007) (second alteration in original) (quoting In re Gonnella, 238 N.J. Super. 509, 512 (Law Div. 1989)).

"The purpose of the attorney-client privilege is 'to encourage clients to make full disclosure to their attorneys.'" Tractenberg, 416 N.J. Super. at 375 (quoting Macey v. Rollins Env't Servs. (N.J.), Inc., 179 N.J. Super. 535, 539 (App. Div. 1981)). "The policy underlying this privilege is to promote full and free discussion between a client [and his or her] attorney . . . . [I]t is essential that a client be able to protect his [or her] discussions with his [or her] attorney from disclosure." Paff, 412 N.J. Super. at 150 (second and third alterations in original) (quoting Macey, 179 N.J. Super. at 539). However, "[s]ince the

recognition of the privileged communication between attorney and client rests in the suppression of the truth[,] the privilege should be strictly construed in accordance with its object. The privilege is an anomaly and ought not to be extended." Id. at 150-51 (quoting In re Selser, 15 N.J. 393, 405-06 (1954)). Thus, "[t]he determination whether a communication between a client and an attorney is protected must be made 'on the basis of the purposes for which the privilege exists and the reasons for its assertion in the context of the particular case.'" In re Custodian of Recs., Crim. Div. Manager, 420 N.J. Super. 182, 187 (App. Div. 2011) (quoting Fellerman v. Bradley, 99 N.J. 493, 502 (1985)).

It is well-established "that the [attorney-client] privilege is fully applicable to communications between a public body and an attorney retained to represent it." Paff, 412 N.J. Super. at 152 (alteration in original) (quoting In re Grand Jury Subpoenas Duces Tecum Served by Sussex Cnty., 241 N.J. Super. 18, 28 (App. Div. 1989)). Further, the privilege is not limited to communications made directly between an attorney and client; the privilege "also extends to 'the necessary intermediaries and agents through whom the communications are made.'" Tractenberg, 416 N.J. Super. at 376 (State v. Kociolek, 23 N.J. 400, 413 (1957)). "[A] client's privileged communications are 'permanently protected from disclosure by [itself], or the legal advisor, or by the

agent of either confidentially used to transmit the communications . . . .'" State v. Davis, 116 N.J. 341, 361 (1989), superseded by constitutional amendment on other grounds, N.J. Const. art. I, ¶ 12, as stated in State v. Cruz, 163 N.J. 403, 411 (2000). "Such 'necessary intermediaries' have been held to include a psychiatrist retained by defense counsel, arson experts hired by defense counsel, a handwriting expert employed by defense counsel, and an engineering firm hired as a consultant for litigation assistance." Tractenberg, 416 N.J. Super. at 376 (citations omitted).

Plaintiff argues the emails at issue are not privileged "because the attorneys for [d]efendant Township did not have an attorney[-]client relationship with the [p]lanning [b]oard," which plaintiff asserts "retained [HGA]." Plaintiff claims that "because no attorney-client relationship existed between [the Township's] attorneys and the [p]lanning [b]oard," the Township's counsel's "communications with [HGA] could not be privileged." Plaintiff also correctly notes "[a]lmost all of the [confidential communications — thirty-one out of thirty-two emails —] were between [HGA] and [d]efendant Township's lawyers, not the [p]lanning [b]oard's lawyer."

The burden of proving a communication is protected by the attorney-client privilege rests with "the person . . . asserting the privilege." Hedden v. Kean

Univ., 434 N.J. Super. 1, 12 (App. Div. 2013). Thus, in the first instance defendants had the burden of establishing the emails constituted privileged attorney-client communications for those communications to fall within the OPRA exemption.

Based on our de novo review of the summary judgment record, we are not convinced the undisputed material facts established defendants were entitled to a judgment as a matter of law that the emails constitute privileged attorney-client communications. None of the emails at issue are between the Township's attorneys and their client, the Township. Thus, none of the emails are a direct communication between the Township, as the client, and its counsel. Instead, all but one of the emails is between the Township's counsel and HGA. And the remaining email is between the Township's counsel and the planning board's chairman and the planning board's counsel.

Nonetheless, defendants argue all the emails fall within the attorney client privilege because HGA is a necessary intermediary for the Township's communications with the Township's counsel. The Township's argument is premised on the factual contention that HGA acted as the Township's agent when it was retained to provide the study and report as to whether the Township Library fell within an area in need of redevelopment. That is, defendants argue

the communications constituted attorney client communications because they were between the Township's counsel and the Township's agent, HGA, which served as a necessary intermediary for the Township in its communications with its counsel.

The summary judgment record does not support defendants' claim. There is no evidence establishing as a matter of undisputed fact that HGA served as an agent, or necessary intermediary, of the Township, and the record suggests that was not the case. The summary judgment record is devoid of any evidence the Township retained HGA to serve as its agent or intermediary. To the contrary, the transcript of the Township Council November 27, 2018 meeting reflects the Township authorized the planning board to appoint HGA to serve as its expert to conduct a study that the planning board would utilize, and later did utilize, to make its recommendation to the Township about whether the library was an area in need of development. As the Township's attorney explained at the November 27, 2018 meeting, the Township Council authorized the planning board's use of HGA as a "tool" for the planning board to utilize in making its determination whether to recommend that the Township Library is an area in need of redevelopment.

The Township's counsel could not properly also function as counsel for the planning board, In re Opinion 452, 87 N.J. 45, 51 (1981); N.J.S.A. 40:55D-24, and there is no evidence the Township's attorneys did so here. The summary judgment record establishes the attorneys from McManimon, Scotland & Baumann, LLC law firm represented the Township only, and the planning board was separately represented by different counsel, Pat Dwyer. Thus, to the extent HGA was retained as the planning board's expert, the record summary judgment record does not support a determination that HGA served as a necessary intermediary for the purposes of engaging in privileged communications between the Township's counsel and its client, the Township.

For those reasons, we conclude defendants failed to sustain their burden of demonstrating the undisputed facts established they were entitled to judgment as a matter of law on their claim the emails are protected by the attorney client privilege because its email exchanges with Baree were with a necessary intermediary. The motion court found HGA served as a necessary intermediary for the Township and the planning board because "HGA was retained as a consultant by the Township Counsel and the [p]lanning [b]oard," but, as noted, the summary judgment record does not support that finding such that it can be determined as a matter of law the emails constituted privileged attorney client

communications between the Township's counsel with a necessary intermediary of the Township. We therefore reverse the court's summary judgment determination the emails exchanged between the Township's counsel and HGA are exempt from disclosure under OPRA, as well as plaintiff's common law entitlement to disclosure of public records, based on the attorney client privilege.

As noted, there is a single email – sent at 3:31 p.m. on February 6, 2019 – between the Township's counsel and the chairman of the planning board and the planning board's counsel. We discern no basis to conclude that email constitutes an attorney client privileged communication because the planning board was not, and could not properly have been, the Township's counsel's client. See In re Opinion 452, 87 N.J. at 51. Additionally, the Township does not argue, and there is no evidential support for a finding, the planning board chairman and counsel constituted necessary intermediaries of the Township such that the email constitutes a privileged attorney client communication on that basis. We therefore also reverse the court's determination the email constitutes

a privileged attorney-client communication because it was exchanged with a necessary intermediary of the Township.[8]

We further note that the two emails exchanged between the Township's attorneys Mark Y. Moon and Richard D. Trenk are copied to Baree. For the reasons we have explained, the summary judgment record does not permit a finding as a matter of law that those emails, which counsel for the Township shared with a third-party Baree, are protected by the attorney-client privilege because he was a necessary intermediary for the Township. We therefore reverse the court's summary judgment award finding the thirty-three emails constitute attorney-client communications based on its legal conclusion the emails were exchanged between the Township's attorneys and necessary intermediaries of the Township.[9]

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[8] We do not consider or address whether the email might otherwise be privileged under the "[t]he common interest exception to a waiver of confidential attorney-client communications or work product due to disclosure to third parties [that] applies to communications between attorneys for different parties if the disclosure is made due to actual or anticipated litigation for the purpose of furthering a common interest," O'Boyle v. Borough of Longport, 218 N.J. 168, 198-99 (2014), or any other privilege or exemption. Defendants have never asserted the email, or any others, fall within those privileges.

[9] As noted, our determination is limited to a finding the summary judgment record does not support a determination that, as a matter of law, the emails are privileged attorney-client communications with a necessary intermediary of the

The court also found the emails were exempt from disclosure under OPRA because they constituted "inter-agency or intra-agency advisory, consultative, or deliberative material." See N.J.S.A. 47:1A-1.1. The "exemption has been construed to encompass the deliberative process privilege, which has its roots in the common law." Ciesla v. N.J. Dep't of Health and Human Servs., 429 N.J. Super. 127, 137 (App. Div. 2012). "[T]he deliberative process privilege . . . allow[s] 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. (fourth alteration in original) (quoting In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000)).

"[T]he deliberative process privilege is governed by a two-prong test." Libertarians for Transparent Gov't v. Gov't Recs. Council, 453 N.J. Super. 83,

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Township's attorneys' client, the Township. On remand, subject to any defenses that may be available to plaintiff, the Township is not precluded from presenting evidence establishing that as a matter of fact and law the emails are privileged communications on that basis, or any other basis supporting a finding the emails are protected from disclosure by the attorney-client privilege or any other privilege or exemption available under OPRA or in response to a request for public records under the common law right of access to public records. See, e.g., O'Boyle, 218 N.J. at 186-88 (discussing the common interest rule, joint defense agreements, and the work product doctrine as bases supporting a finding that communications between attorneys and third parties are protected from disclosure under the attorney-client privilege).

89 (App. Div. 2018). For a document to fall within the privilege, the court must find that the document is both "(1) 'pre-decisional,' meaning it was 'generated before the adoption of an agency's policy or decision;' and (2) deliberative, in that it 'contain[s] opinions, recommendations, or advice about agency policies'" or decisions. Id. at 89-90 (alteration in original) (quoting Educ. Law. Ctr. v. Dep't of Educ., 198 N.J. 274, 286 (2009)). "To satisfy the second prong, the document must be shown to be closely related to 'the formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated.'" Id. at 91 (alterations in original) (quoting Ciesla, 429 N.J. Super. at 138).

Here, although the record does not establish the Township retained HGA as its agent at the November 27, 2018 meeting or at any time prior to February 6, 2019, the date of the exchange of the last of the thirty-three emails at issue, it is undisputed that on November 27, 2018, the Township Council decided to appoint HGA to serve as the planning board's expert and agent. Thus, the seventeen emails exchanged prior to a 2:29 p.m., November 27, 2018 email between Mark Y. Moon and Baree, were exchanged prior to the Township's November 27, 2018 decision appointing HGA as the planning board's agent and

expert.[10] Those emails therefore satisfy the pre-decisional prong of the standard for the deliberative process privilege. Libertarians for Transparent Gov't, 453 N.J. Super. at 90.

Similarly, the record shows eight emails were exchanged concerning the Township Council's consideration of an amended resolution authorizing the planning board to consider and determine whether the library was an area in need of redevelopment. The emails consist of a consecutive series of communications, the first of which was exchanged at 3:34 p.m. on December 12, 2018, and the last at 12:00 p.m. on December 20, 2018. Those emails are therefore pre-decisional – exchanged prior to any decision by the Township's Council concerning the revised resolution – under the deliberative process privilege standard. See Ibid.

There are eight additional emails for which the summary judgment record does not permit a finding the information exchanged was as part of a decision-making or deliberative process. Those emails include exchanges at 2:29 p.m. and 2:31 p.m. on November 29, 2018, and at 4:13 p.m. on December 11, 2018.

[10] The confidential appendix includes seventeen emails that were exchanged prior to the Township Council's adoption of the resolution appointing HGA as the planning board's expert and agent. The last of those emails was exchanged at 1:12 p.m. on November 27, 2018.

In addition, there are five emails, the first of which was exchanged at 2:41 p.m. on January 17, 2019, and the last of which was exchanged at 2:52 p.m. on February 6, 2019, that appear to concern the HGA's redevelopment study, and resolutions concerning the Township's referral to the planning board. The summary judgment record, however, does not demonstrate whether those emails are related to any pre-decisional, advisory, deliberative or consultative process of the Township. As a result, the summary judgment record does not permit a determination those eight emails satisfied the first prong of the deliberative process privilege standard. We therefore reverse the court's order granting defendants summary judgment on plaintiff's claim he is entitled to access to those eight emails under OPRA and his common law right of access to public records based on the Township's claim they are protected by the advisory, deliberative, or consultative privilege.

For the twenty-five emails that appear to satisfy the first-prong of the deliberative process privilege, the motion court did not make any findings of fact or conclusions of law addressed to the second prong of the standard. That is, the court did not consider or make any findings whether the pre-decisional emails "contain opinions, recommendations, or advice about agency policies[,]" Educ. Law Ctr., 198 N.J. at 286, or if the emails are related to the "formulation

or exercise" of a policy or decision-orientated judgment or the process by which the policy or decision was formulated, Ciesla, 429 N.J. Super. at 138.

Although we review the motion court's summary judgment order de novo, "our function as an appellate court is to review the decision of the trial court, not to decide the motion tabula rosa." Est. of Doerfler v. Federal Ins. Co., 454 N.J. Super. 298, 302 (App. Div. 2018); see also R. 1:7-4(a). Therefore, with regard to the twenty-five emails for which the summary judgment record establishes defendants satisfied only the pre-decisional prong of the deliberative process privilege standard, we vacate the court's order granting defendants summary judgment dismissing plaintiff's claimed entitlement to those emails under OPRA and the common law right of access and remand for the court to separately consider each of the emails and make findings and conclusions of law as to whether the summary judgment record supports a determination the emails satisfy the second prong of the deliberative process privilege standard as a matter of law.[11]

[11] To the extent the court finds that the summary judgment record permits a determination that any of the twenty-four emails are privileged under the deliberative process privilege as a matter of law, the court shall also consider, decide, and make appropriate findings as to whether the summary judgment record permits a determination as to whether plaintiff is entitled to disclosure of the otherwise privileged emails based "upon a showing that the need for the

We also observe the motion court recognized plaintiff asserted a cause of action for access to the emails under the common law right of access to public records. The court made no findings concerning the claim because it concluded the emails were otherwise privileged.

"The common law right can reach a wider array of documents than" those available under OPRA. Educ. Law Ctr., 198 N.J. at 302. A person seeking public records under the common law right of access "must explain why he seeks access to the requested documents" and the person's interest in obtaining the documents "must be balanced against the State's interest in preventing disclosure." O'Boyle, 218 N.J. at 196 (quoting Educ. Law Ctr., 198 N.J. at 302).

"[T]o determine whether the common law right of access applies to a particular set of records, a court must follow a three-step test." Id. at 196. The court must first "determine whether the documents in question are 'public records.'" Ibid. (quoting Atl. City Convention Ctr. Auth. v. S. Jersey Publ'g Co.,

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materials overrides the government's interest in confidentiality." Educ. Law Ctr., 198 N.J. at 287; see also ibid. (explaining a litigant may obtain documents otherwise privileged under the deliberative process privilege by demonstrating a compelling need, which is determined by considering "(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions" (quoting Integrity Ins. Co., 165 N.J. at 85-86)).

135 N.J. 53, 59 (1994)). "Second, the party seeking disclosure must show that he has an interest in the public record. More specifically, if the plaintiff is seeking 'disclosure of privileged records,' . . . he [or she] must show [a] 'particularized need.'" Ibid. (citation omitted) (quoting Wilson v. Brown, 404 N.J. Super. 557, 583 (App. Div. 2009)). To "determine[e] whether a party has articulated a particularized need," ibid., courts must analyze: "1) the extent to which the information may be available from other sources, 2) the degree of harm the litigant will suffer from its unavailability, and 3) the possible prejudice to the agency's investigation," id. at 196-97 (quoting McClain v. Coll. Hosp., 99 N.J. 346, 351 (1985)). Finally, "once the plaintiff's interest in the public record has been established, the burden shifts to the public entity to establish that its need for non-disclosure outweighs the plaintiff's need for disclosure." Ibid.

This final step "requires the court to 'balance the plaintiff's interest in the information against the public interest in confidentiality of the documents, including a consideration of whether the demand for inspection is premised upon a purpose [that] tends to advance or further a wholesome public interest or a legitimate private interest.'" Drinker Biddle & Reath LLP v. N.J. Dep't of Law & Pub. Safety, Div. of Law, 421 N.J. Super. 489, 500 (App. Div. 2011) (quoting S. N.J. Newspapers, Inc. v. Twp. of Mt. Laurel, 141 N.J. 56, 72 (1995)). "Where

'reasons for maintaining a high degree of confidentiality in the public records are present, even when the citizen asserts a public interest in the information, more than [the] citizen's status and good faith are necessary to call for production of the documents.'" Ibid. (alteration in original) (quoting S. N.J. Newspapers, Inc., 141 N.J. at 72). The pertinent factors for courts to consider in determining the balance under the third prong are:

> (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.
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> [Loigman v. Kimmelman, 102 N.J. 98, 113 (1986).]

"Against these and any other relevant factors should be balanced the importance of the information sought to the plaintiff's vindication of the public interest." Ibid.

The motion court found the emails were privileged but then did not consider or make any findings as to whether plaintiff demonstrated a particularized need for the documents and otherwise satisfied his burden of establishing an entitlement to the documents under the common law right of access standard. See O'Boyle, 218 N.J. at 196. As a result, the court did not consider or determine whether there were issues of material fact precluding a determination of plaintiff's common law right of access claim or supporting defendants' argument plaintiff could not sustain the claim as a matter of law. Again, it is not our role to decide those issues for the first instance on appeal, see Est. of Doerfler, 454 N.J. Super. at 302, and we therefore vacate the court's order granting summary judgment to defendants on plaintiff's common law right of access claim, and remand for the court to reconsider its decision and make findings of fact and conclusions of law, see R. 1:7-4(a), supporting its determination based on the summary judgment record presented.

Because a determination of the validity of plaintiff's claims must be first made by the trial court, we do not reach plaintiff's claim he is entitled to an award of attorneys' fees and costs based on defendants' alleged failure to honor their legal obligation to produce the requested emails. Any award of counsel fees shall abide the disposition of plaintiff's claims on remand. Due to the extant

factual and other issues related to the disposition of defendants' summary judgment motion, we are also convinced the summary judgment record presents issues of material fact precluding plaintiff's cross-motion. We therefore affirm the court's denial of plaintiff's cross-motion.

Our determinations are based solely on the summary judgment record presented. We do not offer an opinion on the merits of the parties' claims or arguments that may only properly be decided based on a complete review of the evidence and fact findings and conclusions of law founded on a complete record.

Affirmed in part, vacated in part, and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.