

PASHMAN STEIN

A Professional Corporation
Court Plaza South
21 Main Street, Suite 200
Hackensack, New Jersey 07601
(201) 488-8200

SAMUEL J. SAMARO, ESQ. (#029631988)
CJ GRIFFIN, ESQ. (#031422009)

Co-Counsel for Plaintiff,
North Jersey Media Group Inc.

FILED
MAY 17 2016
BONNIE J. MIZDOL, A.J.S.C.

NORTH JERSEY MEDIA GROUP INC.

1 Garret Mountain Plaza
P.O. Box 471
Woodland Park, New Jersey 07424
(973) 569-7685

Jennifer A. Borg, Esq. (#035131990)
Kiliaen V. Strong, Esq. (#175752015)

Co-Counsel for Plaintiff
North Jersey Media Group Inc.

NORTH JERSEY MEDIA GROUP INC.,

Plaintiff,

v.

TOWNSHIP OF TEANECK, and ISSA
ABBASI, in his official capacity as Township
Clerk and Custodian of Records for the
Township of Teaneck.

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO.: BER-L-2889-16

Civil Action

ORDER

THIS MATTER being brought before the court by Pashman Stein, a Professional Corporation, attorneys for Plaintiff North Jersey Media Group, (CJ Griffin, Esq and Jennifer Borg, Esq., General Counsel of North Jersey Media Group, appearing), seeking relief by way of summary action pursuant to R. 4:67-1(a), on notice to Genova Burns, LLC, counsel for

Township of Teaneck and Issa Abbasi, (Jennifer Borek, Esq. appearing), and the Court having reviewed the pleadings and briefs submitted by the parties, and having considered the oral argument of counsel on May 17, 2016, and for good cause shown:

IT IS on this 17th day of May 2016:

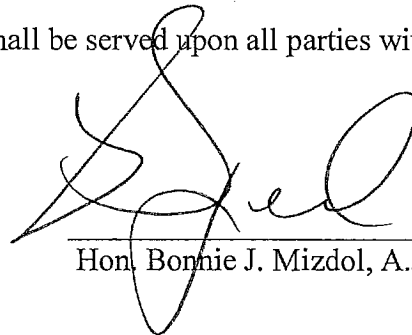
ORDERED, that Defendants violated OPRA by unlawfully redacting the list of township employees who opt out of health care coverage and the amounts they received for the months of December 2015, January 2016, and February 2016; and it is further

ORDERED, that Defendants shall release ^a ~~an un-redacted~~ list of township employees who opt out of health care coverage and the amounts they received for the months of December 2015, January 2016, and February 2016; *WITH PERSONAL INFORMATION PURSUANT TO N.J.S.A. 47:1A-1.1 REDACTED.*

ORDERED, that Defendants shall provide the list of township employees who receive health coverage and the cost of their coverage for the months of December 2015, January 2016, and February 2016 pursuant to the common law; and it is further

ORDERED, in accordance with N.J.S.A. 47:1A-6, Plaintiff is deemed a prevailing party entitled to an award of reasonable attorneys' fees and costs of suit.* The Parties try to amicably resolve the amount of attorneys' fees and costs owed. If the Parties are unable to agree, Plaintiff shall submit a fee application in due course; and it is further

ORDERED, that a copy of this Order shall be served upon all parties within 3 days.



Hon. Bonnie J. Mizdol, A.J.S.C.

Opposed
 Unopposed

** FEES ARE LIMITED TO THE OPT-OUT OPRA DISCLOSURES AND NOT APPLICABLE TO THE COMMON LAW DISCLOSURES WHICH SHALL BE GOVERNED BY THE AMERICAN RULE.*

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

NORTH JERSEY MEDIA GROUP
INC.,

Plaintiff,

v.

TOWNSHIP OF TEANECK and ISSA
ABBASI, in his capacity as the
Custodian of Records and Township
Clerk for the Township of Teaneck,

Defendants.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

BERGEN COUNTY

DOCKET NO. BER-L-2889-16

CIVIL ACTION

OPINION

FILED
MAY 17 2016
BONNIE J. MIZDOL, A.J.S.C.

Argued: May 17, 2016

Decided: May 17, 2016

Honorable Bonnie J. Mizdol, A.J.S.C.

Samuel J. Samaro, Esq., of Pashman Stein P.C., and Jennifer Borg, Esq., on behalf of the plaintiff, North Jersey Media Group Inc.

Jennifer Borek, Esq., of Genova Burns, L.L.C., on behalf of defendants, Township of Teaneck and Issa Abbasi, in his capacity as Custodian of Records and Township Clerk for the Township of Teaneck.

Introduction

North Jersey Media Group, Inc. (“NJMG” or the “Plaintiff”) is a well-established independent media company based in Northern New Jersey, and is best known for its flagship publication “The Record.” NJMG also publishes a second daily newspaper, “The Herald,” approximately forty (40) weekly community newspapers and operates three (3)

websites, including www.NorthJersey.com. As news reporting on controversial stories and access to government records go hand in hand, NJMG is no stranger to seeking relief under the Open Public Records Act (“OPRA” or the “Act”) and the common law right of access to government records.

On February 15, 2016, Mary Diduch (“Diduch”), Staff Writer for The Record, filed an OPRA request with Teaneck seeking (1) a list of Township employees who opt out of health care coverage and what amount they received for opting out and (2) a list of Township employees who receive health care coverage and the cost of their coverage. The request was specific to December 2015, January 2016, and February 2016. On February 25, 2016, Issa Abbasi (“Abbasi”) responded via an email with four (4) attachments. The attachments are heavily redacted of nearly all information. The email stated the records were redacted pursuant to the Privacy Rule of Health Insurance Portability and Accountability Act of 1996, 42 USC 1320(d) *et seq.*, 45 C.F.R. 160.102; 160.103, 164.502(a) & (d) (“HIPAA”), and N.J.A.C. 17:9-1.2, as well as numerous additional state laws and executive orders.

Facts and Procedural Posture

For several months, Diduch has covered an ongoing story relating to Teaneck’s opt-out payments to its employees and officials who waive coverage under Teaneck’s group health plan. Specifically, on July 20, 2015, the Record published a story detailing the numerous alleged financial violations and other problems that were identified in Teaneck’s 2014 annual audit, specifically focusing on seventeen (17) employees who were allegedly paid more than the allowable \$5,000 for waiving health coverage, and eighteen (18) employees who received payments but were ineligible to receive same.

To acquire more information about the health coverage waivers, Diduch filed an OPRA request with Teaneck on February 15, 2016, seeking (1) “[a] list detailing the township employees who opt[ed] out of health care coverage and what amount they receive in lieu of opting out, for the months of December 2015, January 2016, and February 2016,” (hereinafter referred to as Item 1) and (2) “[a] list detailing the township employees who receive health coverage and the cost of their coverage, for the months of December 2015, January 2016, and February 2016” (hereinafter referred to as Item 2).

Abbasi responded to NJMG’s OPRA request on February 25, 2016, via email, with four (4) attachments accompanying the email, stating “[a]ttached are documents in response to your request.” The initial three attachments were responsive to Item 2; each attachment is a printout from the State Department of Treasury, Division of Pensions & Benefits, containing a cover sheet with the total amount of monthly charges Teaneck accrued. Attached to each cover sheet was a series of pages entitled Division of Pensions and Benefits, State Health Information Processing System, Teaneck Township, with the following categories listed: Name, SSN, DOB, Health, RX, Dental, Service Effective Date and Cost. All of the information under each of these categories was entirely redacted. (Plaintiffs’ Exhibit H). Accompanying the redacted attachments was the following explanation:

Redactions made pursuant to the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996, 42 USC §1320(d) et seq. and the regulations adopted thereunder 45 C.F.R. §§160.102; 160.103; 164.502(a) & (d); and the New Jersey Administrative Code regarding State Health Benefits Program which states that “records considered confidential include all matters related to the coverage of individual participants and their families, mailing addresses of active and retired participants and individual files related to claims.” N.J.A.C. 17:9-1.2; Governor James

McGreevey's Executive Order No. 26 providing that "the following records shall not be considered to be government records subject to access pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented...Information relating to medical, psychiatric or psychological. History, diagnosis, treatment or evaluation..."; N.J.S.A. 47:1A-1.10 (personnel and pension information other than a person's name, title, position, salary, payroll record, length of service, date of separation and type and amount of pension); N.J.S.A. 47:1A-1.1 (information gathered by a municipal employer for transmission to its insurance carrier); and N.J.S.A. 47:1A-1.9a ("the provisions of OPRA shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to OPRA; any other statute, resolution of either or both Houses of the legislature, regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order...")[.] see also Michelson v. Wyatt and City of Plainfield, 379 N.J. Super. 611 (App. Div. 2005)[.] Also the following decision of the Government Records Council: John Fox v. Township of Parsippany-Troy Hills Custodian of Record, GRC Complaint 2005-109; Irvin Beaver v. Township of Middletown Custodian of Record, GRC Complaint 205-243; Richard S. Gelber v. City of Hackensack Custodian of Record, GRC Complaint 2011-216; Robert Brown v. Ocean City Board of Education Custodian of Record, GRC Complaint 2011-271; ken Schilling v. Township of Little Egg Harbor Custodian of Record, GRC Complaint 2011-293.

[Plaintiff's Exhibit H.]

The fourth and final attachment to Abbasi's email was responsive to Item 1, seeking a list of employees receiving opt-out payments for waiving health care coverage. Defendants produced payroll records, however the names of the employees receiving opt-out payments and payment amounts were entirely redacted. (Plaintiff's Exhibit I).

A. Pleadings

On April 8, 2016, Plaintiff's filed an order to show cause and verified complaint against Defendants Abbasi and Township of Teaneck. Plaintiff seeks to permit access to the non-exempted portions of the records that were unlawfully redacted.

On May 2, 2016, Defendants filed an answer and letter brief in opposition to Plaintiff's order to show cause. On May 6, 2016, Plaintiff filed a reply brief in further support of Plaintiff's order to show cause.

This Court entertained oral argument on May 17, 2016.

Law

A. OPRA

a. Generally

The purpose of OPRA, N.J.S.A. 47:1A-1 to -13, is plainly set forth in the statute: "to insure that government records, unless exempted, are readily accessible to citizens of New Jersey for the protection of the public interest." Mason v. City of Hoboken, 196 N.J. 51, 57 (2008) (citing N.J.S.A. 47:1A-1). The Act replaced the former Right to Know Law, N.J.S.A. 47:1A-1 to -4 (repealed 2002), and perpetuates "the State's long-standing public policy favoring ready access to most public records." Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 36 (App. Div. 2005) (quoting Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003)). To accomplish that objective, OPRA establishes a comprehensive framework for access to public records. Mason, supra, 196 N.J. at 57. Specifically, the statute requires, among other things, prompt disclosure of records and provides different procedures to challenge a custodian's decision denying access. Ibid.

OPRA mandates “all government records shall be subject to public access unless exempt.” N.J.S.A. 47:1A-1. Therefore, records must be covered by a specific exclusion to prevent disclosure. Ibid. The Act defines “government record” as follows:

[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, including subordinate boards 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, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[N.J.S.A. 47:1A-1.1.]

The OPRA framework contemplates a swift timeline for disclosure of government records. Mason, supra, 196 N.J. at 57. Unless a shorter time period is prescribed by statute, regulation or executive order, a records custodian must grant or deny access to a government record “as soon as possible, but not later than seven (7) business days after receiving the request.” N.J.S.A. 47:1A-5(i). Failure to respond within seven (7) business days “shall be deemed a denial of the request.” Ibid. If the record is in storage or archived, the custodian must report that information within seven (7) business days and advise when the record will be made available. Ibid.

If access to a government record is denied by the custodian, the requestor may challenge that decision by filing an action in Superior Court or a complaint with the Government Records Council (“GRC”). N.J.S.A. 47:1A-6. The right to institute any proceeding under this section, however, belongs solely to the requestor. Ibid. If the

requestor elects to file an action in Superior Court, the application must be brought within forty-five (45) days of the denial. See Mason, supra, 196 N.J. at 70 (holding, explicitly, a 45-day statute of limitations applies to OPRA actions). The Act, however, specifically provides “a decision of the [GRC] shall not have value as precedent for any case initiated in Superior Court,” N.J.S.A. 47:1A-7, though such decisions are normally considered unless “arbitrary, capricious or unreasonable, or [violative of] legislative policies expressed or implied in the act governing the agency.” Serrano, supra, 358 N.J. Super. at 362 (citing Campbell v. Dep’t of Civil Service, 39 N.J. 556, 562 (1963)).

In OPRA actions, the public agency bears the burden of proving the denial of access is authorized by law. N.J.S.A. 47:1A-6. As such, an agency “seeking to restrict the public’s right of access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality.” Courier News v. Hunterdon Cnty. Prosecutor’s Office, 358 N.J. Super. 373, 382–83 (App. Div. 2003). Absent the necessary proofs, “a citizen’s right of access is unfettered.” Ibid. In assessing the sufficiency of the proofs submitted by the agency in support of its claim for nondisclosure, “a court must be guided by the overarching public policy in favor of a citizen’s right of access.” Ibid. If it is determined access has been improperly denied, such access shall be granted, and a prevailing party shall be entitled to a reasonable attorney’s fee. N.J.S.A. 47:1A-6.

b. OPRA Exemptions

Although OPRA defines “government record” broadly, the public’s right of access is not absolute. Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 284 (2009) (citing Mason, supra, 196 N.J. at 65). The statute specifically exempts twenty-one (21) categories

of information from disclosure and bars release of documents deemed confidential by any other statute. Mason, *supra*, 196 N.J. at 65. In addition, N.J.S.A. 47:1A-1 provides:

[A]ll government records shall be subject to public access unless exempt from such access by: [other provisions of OPRA]; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order.

c. OPRA Fees

Pursuant to N.J.S.A. 47:1A-6, “[i]f it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.” The Supreme Court of New Jersey held “OPRA mandate[s], rather than permit[s], an award of fees to a prevailing party.” Mason v. City of Hoboken, *supra*, N.J. 51 at 75.

As the mandatory fee-shifting provision of OPRA is triggered only when a requesting party prevails, there must be a determination of what constitutes a “prevailing party.” The Supreme Court in Mason held “‘prevailing party’ is a legal term of art that refers to a ‘party in whose favor a judgment is rendered.’” (quoting Buckhannon Bd. & Care Home v. W. Va. Dep’t of Health & Human Res., 532 U.S. 598, 603 (2001)).

Additionally, “a two-pronged test has been established to determine when a party seeking fee shifting has been a prevailing party.” N. Bergen Rex Transp. v. Trailer Leasing Co., 158 N.J. 561, 570 (1999); see Singer v. State, 95 N.J. 487, 494 (1984).

The first prong requires that the litigant seeking fees establish that the lawsuit was causally related to securing the relief obtained; a fee award is justified if [the party's] efforts are a necessary and important factor in obtaining the relief. . . . That prong requires the party seeking fees to demonstrate

a. factual nexus between the pleading and the relief ultimately recovered.

...
The second prong involves a factual and legal determination, requiring the party seeking fees to prove that “the relief granted has some basis in law.” The party seeking fees need not obtain all relief sought, but there must be a resolution of some dispute that affected the defendant's behavior towards the prevailing plaintiff.

[Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (internal citations omitted).]

B. New Jersey Common Law

In addition to OPRA, disclosure can be sought under the common law. The Act provides “[n]othing contained in [OPRA] shall be construed as limiting the common law right of access to a government record.” N.J.S.A. 47:1A-8. Thus, even if the information requested falls within one of the exceptions to access under the statutory construct of OPRA, requestors may still prevail by resorting to the common law right to access public records. To constitute a government record under the common law, the item must be:

[O]ne required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are * * * that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it.

[S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 487-88 (1991) (quoting Nero v. Hyland, 76 N.J. 213, 222 (1978)).]

To reach this broader class of documents, requestors must satisfy a higher burden than required under OPRA: “(1) the person seeking access must establish an interest in the subject matter of the material; and (2) the citizen’s right to access must be balanced against

the State's interest in preventing disclosure." Mason, supra, 196 N.J. at 67-68 (quoting Keddie v. Rutgers, 148 N.J. 36, 50 (1997)) (internal quotations and citations omitted). The Supreme Court has articulated several factors for a court to consider in performing its balancing:

(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.

[S. Jersey Pub., supra, 124 N.J. at 488 (quoting Loigman v. Kimmelman, 102 N.J. 98, 113 (1986)).

Analysis

Plaintiff seeks a list of "township employees who opt[ed] out of health care coverage" including the "amount they receive[d] [for] opting out" pursuant to OPRA and the common law right of access. (Plaintiff's Exhibit "F"). Additionally, Plaintiff seeks "[a] list detailing the township employees who receive health coverage and the cost of their coverage" pursuant to the common law right of access only. Ibid. Each request is addressed, in turn, below.

A. OPRA – Payroll Records

In response to Plaintiff's first request for production of documents, this Court finds that Plaintiff is entitled to payroll records which include a list of employees receiving opt-out payments¹ paid for waiving health care coverage along with the dollar amount of same, with appropriate personally identifiable information redacted pursuant to N.J.S.A. 47:1A-1.1.

In order to trigger OPRA's disclosure requirements, the information sought must qualify as a "government record." N.J.S.A. 47:1A-1. The legislature has adopted an expansive definition of government records that include "all documents and similar materials, and all information and data, including electronically stored data, that have been made or received by government in its official business." Asbury Park Press v. Cty. of Monmouth, 406 N.J. Super. 1, 7 (App. Div. 2009), aff'd, 201 N.J. 5 (2010); N.J.S.A. 47:1A-1.1. Particularly relevant here, payroll records qualify as government records subject to production under OPRA. N.J.S.A. 47:1A-10 provides:

"the personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record and shall not be made available for public access, except that: an individual's name, title, position, salary, **payroll record**, length of service, date of separation

¹ N.J.S.A. 40A:10-17.1 provides:

a county [or] municipality . . . may allow any employee who is eligible for other health care coverage to waive coverage under the county's [or] municipality's . . . [health care] plan. [The] county [or] municipality . . . may pay to the employee annually an amount . . . which shall not exceed 50% of the amount saved by the county [or] municipality . . . because of the employee's waiver of coverage, and, for a waiver filed on or after the effective date [May 21, 2010] . . . which shall not exceed 25%, or \$5,000, whichever is less, of the amount saved by the county [or] municipality . . . because of the employees waiver of coverage.

[ibid.]

and the reason therefor, and the amount and type of any pension received shall be a government record”

[Ibid. (emphasis added).]

The Appellate Division notes that “[a]lthough ‘payroll record’ is not defined in OPRA, it elsewhere has been defined to include more than salary” such as “[t]otal remuneration paid in each pay period showing separately cash, including commissions and bonuses . . . gratuities received regularly . . . [and] special payments, such as bonuses and gifts” In re New Jersey Firemen’s Ass’n Obligation to Provide Relief Applications under Open Pub. Records Act, 443 N.J. Super. 238, 265 n. 13 (App. Div. 2015) quoting N.J.A.C. 12:2, Appx. A (“In re Firemen’s Ass’n”).

Although OPRA’s definition of government records is broad, the public’s right of access is not absolute. Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 284 (2009) (citing Mason, supra, 196 N.J. at 65). When access is denied or a record is redacted, the public agency bears the burden of proving the denial of access is authorized by law. N.J.S.A. 47:1A-6. OPRA allows for denial of access when the record is exempt under OPRA and when production is barred by the confidentiality provisions of “any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order.” N.J.S.A. 47:1A-1.

Defendants assert the opt-out payment information contained within its payroll records is equivalent to confidential health information, and is, therefore, exempt from disclosure under OPRA as articulated by the Appellate Division in Michelson v. Wyatt and City of Plainfield, 379 N.J. Super. 611 (App. Div. 2005); and pursuant to the Privacy Rule

of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”); N.J.A.C. 17:9-12; and Governor James McGreevey’s Executive Order No. 26 (“Executive Order No. 26”). For the reasons stated below, this Court disagrees.

In Michelson the Appellate Division considered a request for records comprising the “name of every person who receives health benefits through the City, the justification or reason health benefits are provided to each person, the type of coverage each receives . . . the names of persons designated by an employee or retiree as a dependent, and the claims history.” Michelson, supra, 379 N.J. Super. at 620-21. Michelson held the requested records constituted personnel records which were exempt from disclosure pursuant to OPRA provision N.J.S.A. 47:1A-10, and as “information gathered by a municipal employer for transmission to its insurance carrier” exempt from disclosure pursuant to OPRA provision N.J.S.A. 47:1A-1.1 Ibid.

Here, the records sought are different than those sought in Michelson. Plaintiff herein is seeking payroll records which include opt-out payments made to individuals who waived health insurance coverage, not particular information regarding the particular health coverage plan selected by a particular employee, which of the employee’s family members may or may not be covered by the plan, what health-related issues may exist, or what benefits, if any, have been paid or denied by the Defendants’ group health insurance provider to the employee.

The request is limited and not protected by any exemption under OPRA. In fact, payroll records are included in the definition of government records subject to disclosure under N.J.S.A. 47:1A-10. Payroll records comprise not just salary, but total remuneration including “special payments” made to the payee. This Court finds that the health insurance

opt-out payments are clearly payroll records as they are taxable payments made to employees. Further, opt-out payments do not constitute “information gathered by a municipal employer for transmission to its insurance carrier.” The holding in Michelson does not extend to shield from disclosure payments made to individuals who do not participate in an agency’s health insurance program. Accordingly, opt-out payments are part of Defendants’ payroll records and subject to disclosure under OPRA.

Defendants assert that HIPAA’s privacy restrictions apply to Teaneck, arguing that “a decision to waive coverage is still connected to an individual’s healthcare and, thus, constitutes protected information. (Defendants’ Brief at 16). Assuming arguendo that HIPAA’s privacy restrictions apply to Defendants, here, the requested information does not relate to the physical or mental health condition of an individual, nor the provision of healthcare to the individual. Rather, Plaintiff’s request is limited to those who have declined coverage which is akin to a purely economic inquiry. The information sought is not of the type that HIPAA seeks to protect.

N.J.A.C. 17:9-1.2(b) provides: “To protect the personal privacy of individual participants and their families, the mailing addresses of active and retired participants and all matters related to an individual’s files relating to an individual’s coverage and claims shall be maintained as confidential.” Ibid. Payroll records, which include opt-out payments made to individuals who waived health insurance coverage, are not the type of record protected by N.J.A.C. 17:9-1.2(b), as the personal privacy of individual participants or their families is not implicated.

Finally, Executive Order No. 26 protects “[i]nformation relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.” Payroll records,

which include opt-out payments made to individuals who waived health insurance coverage, are not the type of record protected by Executive Order No. 26, as the payroll recording featuring opt-out information does not contain information relating to an individual's medical, psychiatric, or psychological diagnosis, treatment or evaluation.

Therefore, as no applicable exemption serves to bar production, this Court finds that Defendants' redactions to its payroll records are in contravention of OPRA. The very purpose of OPRA is to allow "citizens and the media [to] play a watchful role in curbing wasteful government spending and guarding against corruption," and Plaintiff's request for payroll records listing health insurance opt-out payments implicate, precisely, this underlying principle behind OPRA's enactment. Sussex Commons Associates, LLC v. Rutgers, 210 N.J. 531, 541 (2012). Accordingly, Plaintiff is entitled to payroll records that include a list of employees receiving opt-out payments containing the dollar amount of same. Under OPRA, "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. This Court finds Plaintiff to be a prevailing party under OPRA. Plaintiff is, therefore, entitled to reasonable attorney's fees.²

B. Common Law – Township Employees Receiving Healthcare Coverage

Plaintiff's second request for documents seeks access to the list of employees receiving health coverage along with the cost of their coverage pursuant to the common law, conceding that Michelson bars production to same under OPRA.

To constitute a government record under the common law, the item must be:

[O]ne required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law

² Because Plaintiff has prevailed under OPRA, this Court does not reach the issue of production of payroll records pursuant to the common law right of access. Asbury Park Press v. Cnty. of Monmouth, 406 N.J. Super. 1, 4 (App. Div. 2009) (holding that if the Court finds for disclosure of the requested record under OPRA, the Court does not reach the issue regarding the common law right of access).

to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are * * * that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it.

[S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 487-88 (1991) (quoting Nero v. Hyland, 76 N.J. 213, 222 (1978)).]

To reach this broader class of documents, requestors must satisfy a higher burden than required under OPRA: “(1) the person seeking access must establish an interest in the subject matter of the material; and (2) the citizen’s right to access must be balanced against the State’s interest in preventing disclosure.” Mason v. City of Hoboken, 196 N.J. 51, 67-68 (2008) (quoting Keddie v. Rutgers, 148 N.J. 36, 50 (1997)) (internal quotations and citations omitted).

As noted above, Michelson concerned a request for the “name of every person who receives health benefits through the City, the justification or reason health benefits are provided to each person, the type of coverage each receives . . . , the names of persons designated by an employee or retiree as a dependent, and the claims history.” Michelson, supra, 379 N.J. Super. at 620-21. Michelson held the requested records constituted personnel records which were exempt from disclosure pursuant to N.J.S.A. 47:1A-10 and N.J.S.A. 47:1A-1.1 as “information gathered by a municipal employer for transmission to its insurance carrier.” Ibid. However, the court held “that plaintiff has a common law right to access public records that reveal the type of coverage elected by eligible employees, officials, and retirees.” Id. at 626. The court reasoned that “[d]isclosure of this information is no more invasive than the personnel information that is expressly allowed pursuant to

OPRA” and “disclosure of the type of coverage elected by an eligible employee, official or retiree assists vindication of the citizen’s interest in the detection and elimination of waste or fraud in public employee benefit plans.” Ibid.

The crux of the matter is whether Plaintiff’s interest in the record outweighs the Defendants’ interest in preventing disclosure. Mason, supra, 196 N.J. at 67–68. Here, Plaintiff “is the chief purveyor of news in North Jersey and serves as the ‘eyes and ears’ of the public.” (Plaintiff’s Reply Brief at 13 quoting Home News v. State Dep’t of Health, 144 N.J. 446, 454 (1996).). Defendants assert Plaintiff is merely “a news business seeking fodder for high profile pieces.” (Defendants’ Brief at 18). This Court finds Plaintiff, as a news organization, has a robust interest in “the detection and elimination of waste or fraud in public employee benefit plans.” Michelson, supra, 379 N.J. Super. at 426. Plaintiff’s interest in disclosure outweighs Defendants’ interest in preventing disclosure as “[d]isclosure of this information is no more invasive than the personnel information that is expressly allowed pursuant to OPRA.” Ibid.

Accordingly, Plaintiff’s request for list of employees receiving health coverage pursuant to the common law right to access is granted.

Conclusion

For the foregoing reasons, Plaintiff’s request for payroll records that include a list of employees receiving opt-out payments containing the dollar amount paid to each is granted with personal information pursuant to N.J.S.A. 47:1A-1.1 redacted. Further, Plaintiff’s request for a list of employees receiving health coverage is granted pursuant to the common law right to access.

Plaintiff is a prevailing party under OPRA as to the production of payroll records; therefore, Plaintiff's request for attorney's fees is granted. Counsel shall attempt to agree upon a reasonable quantum of fees. Failing to accomplish same, counsel for Plaintiff shall submit a certification of services with the Court.

The appropriate order has been executed.