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

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1179-16T4

LIBERTARIANS FOR TRANSPARENT
GOVERNMENT,

Plaintiff-Appellant,

v.

THE COLLEGE OF NEW JERSEY,

Defendant-Respondent.

Argued March 20, 2018 – Decided April 12, 2018

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Docket No.
L-1534-16.

Richard M. Gutman argued the cause for
appellant.

Lauren A. Jensen, Deputy Attorney General,
argued the cause for respondent (Gurbir S.
Grewal, Attorney General, attorney; Raymond R.
Chance, III, Assistant Attorney General, of
counsel; Geoffrey N. Stark, Deputy Attorney
General, on the brief).

PER CURIAM

Plaintiff Libertarians for Transparent Government (LFTG) appeals from an October 14, 2016 order denying its order to show cause (OTSC) and dismissing its complaint with prejudice. Because the October 14, 2016 order relied on the unsworn, hearsay assertions of counsel for defendant The College of New Jersey (TCNJ), we vacate the order and remand for further proceedings.

The facts are undisputed. TCNJ was involved in litigation entitled Guerrini v. The College of New Jersey. The parties to the Guerrini case reached a settlement in principle. On July 13, 2016, the judge dismissed the Guerrini matter, subject to either party reopening the case within sixty days if the settlement could not be finalized.

Three days after the dismissal of the Guerrini litigation, LFTG filed a request pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, seeking documents related to the Guerrini case, including draft agreements and documents demonstrating the terms of the settlement. TCNJ responded there was no final settlement agreement and denied LFTG's request for documents reflecting ongoing settlement negotiations.

On August 1, 2016, LFTG filed an OTSC and complaint alleging TCNJ violated OPRA. On September 6, 2016, the Guerrini settlement was finalized and Ms. Guerrini signed a release containing the

settlement terms.¹ According to TCNJ's counsel, prior to September 6, 2016, the matter was under negotiation and any settlement terms were tentative.

On September 19, 2016, TCNJ sent the signed Guerrini release to LFTG. That same day, TCNJ filed opposition to the OTSC and requested dismissal of LFTG's complaint. In its brief in opposition to the OTSC, TCNJ's counsel wrote "the only document arguably responsive to [LFTG's] request is a single email message from the Guerrini plaintiff's counsel to TCNJ's counsel proposing a particular term of the proposed settlement." However, TCNJ failed to provide an affidavit or certification that the withheld document was in furtherance of confidential settlement negotiations.

The judge heard argument on October 14, 2016. Relying on N.J.S.A. 47:1A-9(b), the judge found that settlement negotiations and communications in furtherance of settlement are privileged and, thus, protected from disclosure under OPRA. Based on her finding, the judge denied the OTSC and dismissed LFTG's complaint.

LFTG appeals from dismissal of its OPRA litigation. On appeal, LFTG raises several arguments. We need only address LFTG's

¹ The trial court was not given a copy of the release in Guerrini. Nor does the appellate appendix contain a copy of the release.

claim that the judge erred in dismissing its complaint based on an unsworn, hearsay statement made by TCNJ's counsel in opposition to LFTG's OTSC.

OPRA affords requestors the right to bring an action in Superior Court as a summary proceeding. N.J.S.A. 47:1A-6. Under Rule 4:67-5, "[i]f no objection is made by any party, or . . . the affidavits show palpably that there is no genuine issue as to any material fact, the court may try the action on the pleadings and affidavits, and render final judgment thereon." R. 4:67-5.

On appeal, we will not disturb a motion judge's factual findings unless "they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974) (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J.Super. 154, 155 (App. Div. 1963)). However, "determinations about the applicability of OPRA and its exemptions are legal conclusions, and are therefore subject to de novo review." Carter v. Doe (In re N.J. Firemen's Ass'n Obligation), 230 N.J. 258, 273-74 (2017) (citations omitted).

LFTG claims the judge mistakenly dismissed the complaint because TCNJ failed to present competent evidence that settlement negotiations were ongoing when LFTG served the OPRA request. LFTG requests TCNJ be required to disclose all withheld documents,

specifically the e-mail from plaintiff's counsel in Guerrini to TCNJ's counsel. LFTG argues remanding the case for further fact-finding would impermissibly give TCNJ a second chance to argue the document is exempt under OPRA.

TCNJ contends there was sufficient evidence in the record to support the judge's conclusion that the withheld email reflected on-going settlement negotiations. TCNJ argues that because there was no final settlement when LFTG served the OPRA request, any emails pre-dating execution of the agreement could not have reflected a final document.

The record in this case lacks competent evidence reflecting the content and context of the disputed document. Without a full record of exactly what was withheld, the date of the withheld document, and the date the settlement was executed, it is impossible to determine whether TCNJ violated OPRA. "If a motion is based on facts not appearing of record or not judicially noticeable, the court may hear it on affidavits made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify" R. 1:6-6. In reviewing an OPRA determination, if the record below is incomplete, we are constrained to remand for development of a full record. See Kovalcik v. Somerset Cty. Prosecutor's Office, 206 N.J. 581, 595 (2011) ("We . . . are constrained to remand this

matter to the trial court for a further proceeding during which the parties shall be given an adequate opportunity to marshal sufficient proofs as to the nature of the contents of the particular documents").

TCNJ's counsel asserted there was only one document responsive to LFTG's OPRA request, and the document reflected ongoing settlement negotiations. There is no affidavit or other evidence proving negotiations were ongoing when LFTG made the OPRA request.

The judge acknowledged the absence of competent evidence in the record, and expressed her concern regarding "[w]hat [to] do with [a] record that is so bare?" The judge determined that "a[n] email exchange between attorneys after the [Guerrini] case has been noted to be settled . . . , but within the [sixty] day period when either party could reopen the case, is a document that is entitled to protection" as part of settlement negotiations. However, the judge relied on an unsworn representation of counsel despite an admission by TCNJ's attorney that he did "not have the date of the email." The judge also relied on TCNJ's unsworn response to LFTG's OPRA request in concluding that TCNJ did not violate OPRA. Thus, we are compelled to remand the matter for the submission of competent proofs as to the content of the document or documents withheld by TCNJ.

LFTG argues a remand would unfairly benefit TCNJ by affording another chance to defend against its OPRA litigation. Based upon the incomplete record, we cannot summarily compel disclosure of a document or documents that may be exempt from disclosure under OPRA. See Kovalcik, 206 N.J. at 594-95.

Vacated and remanded. We do not retain jurisdiction.

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



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