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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-2570-16T4

LIBERTARIANS FOR TRANSPARENT  
GOVERNMENT,

Plaintiff-Respondent,

v.

WILLIAM PATERSON UNIVERSITY,

Defendant-Appellant.

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Argued March 20, 2018 - Decided April 12, 2018

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey,  
Law Division, Passaic County, Docket No.  
L-1541-16.

Lauren A. Jensen, Deputy Attorney General,  
argued the cause for appellant (Gurbir S.  
Grewal, Attorney General, attorney; Raymond R.  
Chance, III, Assistant Attorney General, of  
counsel; Lauren A. Jensen and Jennifer  
McGruther, Deputy Attorney General, on the  
briefs).

Richard M. Gutman argued the cause for  
respondent (Richard Gutman, PC, attorneys;  
Richard M. Gutman, on the brief).

PER CURIAM

Defendant William Paterson University (WPU) appeals from a January 10, 2017 order awarding attorney's fees and costs to plaintiff Libertarians for Transparent Government (LFTG), and a February 22, 2017 order determining that WPU violated the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. The judge concluded that an unfiled, unexecuted, draft settlement agreement was a public record subject to disclosure under OPRA. We disagree and reverse.

The facts are undisputed. On March 31, 2016, LFTG sent an OPRA request to WPU seeking a copy of a settlement agreement resolving litigation filed against WPU. Alternatively, LFTG requested any "informal agreements, draft agreements, correspondence, e-mails, etc. . . . that disclose the settlement award and/or any other settlement terms." WPU denied the record request as no final agreement existed when LFTG made its OPRA demand. In addition, WPU claimed the draft agreement was exempt from disclosure pursuant to N.J.S.A. 47:1A-9(b).

LFTG pursued its request for the disclosure of the settlement agreement and related communications. WPU agreed to provide a copy of the agreement when it was executed by all parties. On May 11, 2016, WPU gave LFTG a copy of the fully executed agreement.

Unbeknownst to WPU, two weeks earlier, LFTG filed an order to show cause (OTSC) and complaint alleging WPU violated OPRA by failing to provide communications disclosing the settlement terms. The OTSC and complaint were served on WPU the day after WPU sent the fully executed agreement to LFTG.

In addition to filing opposition to the OTSC, WPU filed a motion to dismiss LFTG's complaint. WPU argued the matter was moot because LFTG had a copy of the fully executed agreement. WPU also argued LFTG was not entitled to draft agreements because the documents related to settlement negotiations and were confidential.

When the judge heard oral argument on the applications, he asked WPU to provide copies of the withheld documents for his review in camera. On September 1, 2016, after the judge reviewed the withheld documents and heard additional argument, he determined the draft settlement agreement documents were exempt from disclosure under OPRA. However, the judge found that an unexecuted version of the agreement in an e-mail dated March 30, 2016, was final and should have been produced in response to LFTG's OPRA request. The judge memorialized his decision in an order dated February 22, 2017.

Because the judge determined WPU violated OPRA, LFTG filed a motion for attorney's fees and costs. WPU opposed the motion,

arguing that LFTG was not a prevailing party under OPRA. In the alternative, WPU argued that the amount sought was disproportionate to LFTG's success in obtaining the relief requested. By order dated January 10, 2017, the judge awarded LFTG attorney's fees in the amount of \$30,000 and \$350 in costs.

On appeal, WPU argues the judge mistakenly determined it violated OPRA by failing to disclose an unexecuted, proposed settlement agreement received the day before the OPRA request. WPU further contends the judge abused his discretion in awarding counsel fees and costs to LFTG.

We exercise de novo review of a trial court's legal conclusions concerning access to public records under OPRA. Drinker Biddle & Reath, LLP v. N.J. Dep't of Law and Pub. Safety, 421 N.J. Super. 489, 497 (App. Div. 2011). "[D]eterminations about the applicability of OPRA and its exemptions are legal conclusions" reviewable de novo. Carter v. Doe (In re N.J. Firemen's Ass'n Obligation), 230 N.J. 258, 273-74 (2017) (citing O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 379 (App. Div. 2009)). Our standard of review is plenary with respect to interpretation of OPRA and its exclusions. Asbury Park Press v. Cty. of Monmouth, 406 N.J. Super. 1, 6 (App. Div. 2009), aff'd, 201 N.J. 5 (2010).

We review fee determinations for an abuse of discretion. Rendine v. Pantzer, 141 N.J. 292, 317 (1995). "[F]ee determinations by trial courts will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Ibid.

Settlement of legal disputes is encouraged by our courts, and confidentiality is fundamental to the settlement process. See State v. Williams, 184 N.J. 432, 446 (2005). OPRA does "not abrogate or erode any . . . grant of confidentiality . . . established or recognized by . . . judicial case law, which . . . grant of confidentiality may duly be claimed to restrict public access to a public record or government record." N.J.S.A. 47:1A-9(b).

In this matter, the judge found that documents exchanged in the course of settlement negotiations were exempt from disclosure under OPRA. However, the judge mistakenly concluded that the unexecuted version of the agreement in the March 30 e-mail was a final document and no longer subject to settlement negotiations. The March 30 e-mail contained two versions of the settlement agreement: a red-lined version of the settlement agreement and a clean copy of the settlement agreement.

As of the date of LFTG's OPRA request, no settlement had been reached and no agreement had been signed. LFTG acknowledged that

as of the date of its OPRA request, the matter was "not fully settled" because the parties "hadn't agreed on the language of the red-line material."

Until a settlement agreement is signed, it remains a draft document subject to continued revision and negotiation. See Ciesla v. N.J. Dep't of Health & Senior Servs., 429 N.J. Super. 127, 140 (App. Div. 2012). Because the agreement was not fully executed until April 29, 2016, there was no final agreement as of the date of LFTG's OPRA request. Any documents prior to that date were draft documents, subject the settlement negotiation process, and exempt from disclosure under N.J.S.A. 47:1A-9(b).


Having determined that the judge mistakenly concluded WPU violated OPRA, LFTG was not a prevailing party. See N.J.S.A. 47:1A-6. Therefore, LFTG was not entitled to an award of attorney's fees and costs.

For the sake of completeness, even if LFTG was a prevailing party, the judge failed to state his findings of fact and conclusions of law in awarding attorney's fees and costs. Rule 1:7-4 requires a trial court, "by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon . . . on every motion decided by a written order that is appealable as of right." The failure of a trial court to meet the requirements of the Rule "constitutes a

disservice to the litigants, the attorneys and the appellate court." Curtis v. Finneran, 83 N.J. 563, 569-70 (1980) (quoting Kenwood Assocs. v. Bd. of Adjustment of Engelwood, 141 N.J. Super. 1, 4 (App. Div. 1976)).

Reversed.

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

  
CLERK OF THE APPELLATE DIVISION