SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.

THOMAS WILSON, Plaintiff-Respondent, v. WILLIAM C. BROWN, Senior Associate Governor's Counsel, in his official capacity as Custodian of Records, Defendant-Appellant, And CARLA KATZ; and COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1034, Intervenors, And COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Amicus Curiae.	:	Civil Action On Appeal From a Final Order and Judgment Sat Below: Honorable Paul Innes, J.S.C.

BRIEF ON BEHALF OF APPELLANT WILLIAM C. BROWN

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS AND PROCEDURAL HISTORY 4

ARGUMENT

I. NEW JERSEY LAW PROTECTS GUBERNATORIAL COMMUNICATIONS INTEGRAL TO THE EXECUTIVE FUNCTION, INCLUDING COMMUNICATIONS BETWEEN THE GOVERNOR, HIS SENIOR ADVISORS AND INDIVIDUALS OUTSIDE GOVERNMENT 9

A. The Executive Privilege Derives from Our Constitutional Structure and Is Vital to the Public Interest 11

B. The Executive Privilege Protects All Gubernatorial Communications Pertaining to the Governor's Executive Functions and Extends to Confidential Communications with Individuals Outside Government, Even When They Are Adversarial 16

II. OPRA AND THE COMMON LAW RIGHT OF ACCESS PRESERVE THE EXECUTIVE PRIVILEGE AND CANNOT BE CONSTRUED, CONSISTENT WITH THE CONSTITUTION, TO ALLOW A PRIVATE PARTY ACCESS TO THE EMAIL COMMUNICATIONS OF THE GOVERNOR AND HIGH-RANKING STAFF 24

A. OPRA Expressly Preserves the Executive Privilege and Does Not Allow a Requester to Obtain Privileged Communications 25

B. Though Executive Privilege Can Be Overcome by the Compelling Need of a Coordinate Branch of Government, Allowing a Private Party to Vitiate the Privilege Would Violate the Separation of Powers, Impair the Functioning of the Executive Branch, and Entangle the

Judiciary in the Inner Workings of the Executive 29

III. EVEN IF A PRIVATE PARTY COULD, IN SOME CIRCUMSTANCES, PIERCE THE PRIVILEGE UNDER OPRA OR THE COMMON LAW, WILSON HAS FAILED TO DEMONSTRATE COMPELLING OR SUBSTANTIAL NEED FOR DISCLOSURE HERE 41

A. Wilson Does Not Have a Sufficient Interest or Need to Invade the Privilege 42

B. Wilson's Request Was Overly Broad 44

CONCLUSION 47

APPENDIX

Verified Complaint, dated May 31, 2007 ..... 1a

Order to Show Cause, filed June 4, 2007 ..... 56a

Exhibits A to D attached to Memorandum of Law in Support of Order to Show Cause, dated May 1, 2007 ..... 61a

Answer of Defendant William C. Brown, filed September 4, 2007 ..... 100a

Consent Order to Amend Caption, filed August 3, 2007 ..... 107a

Order Dismissing Motion to Dismiss and Requiring Defendant to Submit Documents for In Camera Review, filed August 21, 2007 ..... 109a

Affidavit of William C. Brown Filed in Compliance with the Court's Order, filed September 4, 2007 ..... 112a

Consent Order on Plaintiff's September 11, 2007 Motion, filed October 26, 2007 ..... 121a

Certification of Gary K. Mayer Filed in Compliance With the Consent Order dated October 26, 2007 ..... 125a

Supplemental Certification of William C. Brown Filed in Compliance With the Consent Order Dated October 26, 2007 ..... 137a

Opinion of the Superior Court of New Jersey, Law Division, Mercer County, decided May 29, 2007 ..... 144a

Order Denying Redaction and Denying Stay of the Superior Court of New Jersey, Law Division, filed May 30, 2007 ..... 165a

Order of the Appellate Division Denying Stay of the Law Division Denying Defendant's Request for Redaction, dated May 30, 2007 ..... 167a

Final Order and Judgment of the Law Division, Mercer County, filed June 27, 2007 ..... 169a

CONFIDENTIAL APPENDIX

Privilege Log Submitted In Camera to Court Below. 1ca

Emails Submitted In Camera to Court Below. 55ca

Confidential Appendix to Ex Parte Brief Filed Below. 852ca

TABLE OF AUTHORITIES

CASES CITED

Bergen County Improvement Auth., 370 N.J. Super. 523 (App. Div. 2004) 26,29

Bullet Hole, Inc. v. Dunbar, 335 N.J. Super. 562 (App. Div. 2000) 13

Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, 40 F.R.D. 318, aff'd 384 F.2d 979 (D.C. Cir. 1967) aff'd sub nom V.E.B. Carl Zeiss v. Clark, 384 F.2d 979 (D.C. Cir. 1967) 15,18

Cheney v. United States District Court, 542 U.S. 367 (2004) 12,15,17,28,33,36,37,39,41,42,45,46

Communications Workers of Am. v. Florio, 130 N.J. 439 (1992) 13,14

Democratic Nat'l Comm. v. Dep't of Justice, 539 F.Supp.2d 363 (D.D.C. 2008) 35

Gannett N.J. Partners, LP. v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) 19,21,29,42

In Re Liquidation of Integrity Ins. Co., 165 N.J. 75 (2000) 41

In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997) 12,17,19

Irval Realty, Inc. v. Board of Public Utils., 61 N.J. 366 (1972) 29

Judicial Watch, Inc. v. Dep't of Justice, 365 F.3d 1108 (D.C. Cir. 2004) 20,35

Kenny v. Byrne, 144 N.J. Super. 243 (App. Div. 1976), aff'd o.b., 75 N.J. 458 (1978) 13

Loigman v. Kimmelman, 102 N.J. 98 (1986) 37,40

Loving v. Dep't of Defense, 496 F.Supp.2d 101 (D.D.C. 2007)...35

Marbury v. Madison, 5 U.S. (1 Cranch) 137 1803).....11

MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005).....25,26

Nero v. Hyland, 76 N.J 213 (1978) 1,10,12,13,14,15,17,18,23,28,35,36

Nixon v. Administrator of General Services (GSA), 433 U.S. 425 (1977).....15

Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).....30

North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9 (1992).....20,21,41

Russo v. Governor, 22 N.J. 156 (1956).....14

Senate Select Committee v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).....31

Serrano v. S. Brunswick Twp., 358 N.J. Super. 352 (App. Div. 2003).....25

Southern New Jersey Newspapers, Inc. v. Township of Mt. Laurel, 141 N.J. 56 (1995).....29

United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807).....12

United States v. Nixon, 418 U.S. 683 (1974).....12,15,18,32,34,36,38,40,45

STATUTES CITED

N.J.S.A. 47:1A-1 et seq..... 1

N.J.S.A. 47:1A-1.1.....18,25

N.J.S.A. 47:1A-8.....30

N.J.S.A. 47:1A-9(a).....27

N.J.S.A. 47:1A-9(b).....18,26,27

RULES CITED

R. 4:67-1(a).....5

OTHER AUTHORITIES CITED

Mark J. Rozell, Executive Privilege and the Modern Presidents: In Nixon's Shadow, 83 Minn. L. Rev. 1069 (1999).....11

Jack M. Sabatino, Assertion and Self Restraint: The Exercise of Governmental Powers Distributed Under the 1947 New Jersey Constitution, 29 Rutgers L.J. 799 (1998).....13

Report of the Committee on Executive Militia and Civil Officers, 2 Proceedings of the Constitutional Convention of 1947, 1121, 1122.
Report of the Committee of the New Jersey Constitution.....13

Robert F. Williams, *The New Jersey State Constitution: A Reference Guide*, 91-91 (1990).....14

PRELIMINARY STATEMENT

This case presents fundamental separation of powers questions arising from the superior court's unprecedented order that the confidential email communications of the Governor and his high-ranking staff be released pursuant to a request under the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 et seq., and the common law right to know. The court's ruling has no basis in statutory text or judicial precedent and is inconsistent with the Constitution of the State of New Jersey. If allowed to stand, the ruling would transform a statute and a common law right designed to provide access to nonprivileged governmental records into a general warrant to search the email conversations of the Governor on any issue of interest to anyone who asks. Such a result would both impair the effective functioning of the executive and judicial branches and violate long-standing principles of separation of powers.

An executive privilege that protects the confidential communications of the chief executive has been recognized for centuries. The privilege is rooted in the constitutional separation of powers and, in New Jersey, reflects the unusually strong executive authority granted to the Governor. As the Supreme Court of New Jersey has

recognized, for the executive branch to function effectively, the chief executive must be free to receive consider, and participate in candid communications. The Governor "must be accorded a qualified power to protect the confidentiality of communications pertaining to the executive function. . . . [T]his executive privilege protects and insulates the sensitive decisional and consultative responsibilities of the Governor which can only be discharged freely and effectively under a mantle of privacy and security." Nero v. Hyland, 76 N.J. 213, 225-26 (1978).

The court below recognized that the executive privilege is firmly established under New Jersey law, but held that the majority of the communications at issue here are not protected because the privilege does not reach communications with adversaries. This conclusion flatly contradicts precedent and misconstrues the basic purpose and nature of the privilege. In fact, communications with adversaries, like communications with advisors, enable the chief executive to carry out the executive function by exploring alternatives in the process of consultation, shaping policies, or making decisions. Such communications fall squarely within the privilege.

The lower court, building on its fundamental error,

granted Thomas Wilson's sweeping request for gubernatorial communications under OPRA and the common law right to know—without appropriate regard to executive privilege or the serious separation of powers issues at stake. But neither OPRA nor the common law right to know provides a private party with the right to examine the confidential communications of the Governor and his high-ranking staff, such as the email communications at issue here.

Under well-established precedent, and under fundamental principles of separation of powers, the executive privilege that applies to the communications of the Governor may be overcome only in exceptional circumstances, such as when a criminal or congressional investigation demonstrates a compelling need. Wilson, a private individual making a public records request, simply cannot abrogate the privilege. To allow access to the Governor's email communications here would eviscerate the executive privilege, impair the functioning of the executive branch, and impermissibly entangle the judiciary in the inner workings of the executive. This Court should reverse the court below and rule that none of the communications requested by Wilson are subject to release under OPRA or the common law.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Thomas Wilson is Chairman of the New Jersey Republican State Committee. On March 27, 2007, Wilson made a broad disclosure request under OPRA and the common law for "any and all documents, correspondence and/or email communications between the Governor and/or any member of the Governor's staff and Ms. Carla Katz," including emails sent to personal accounts. (Da47).[1] The purported objective of Wilson's request was to investigate whether Governor Corzine privately negotiated a collective bargaining agreement with Ms. Katz, who serves as the President of Local 1034 of the Communications Workers of America ("CWA"), a labor union representing State employees. Local 1034 represents about 8,000 State employees and is the largest CWA local. (Da21). Ms. Katz and Governor Corzine were previously in a personal relationship, which ended before Mr. Corzine became Governor. (Da12).

The labor negotiations that were the purported objective of the OPRA request took place between September 20, 2006 and February 21, 2007. (Da19). However, Wilson's request covered the entire period from the beginning of Governor Corzine's term on January 17, 2006, to the date of the request (March 27, 2007) and contained no limitation on

[1] "Da" refers to appellant's appendix filed herewith.

the subject matter of the records being requested other than a reference to the statutory definition of "government record." (Da47). On April 5, 2007, Defendant Brown, the custodian of records of the Governor's Office, denied Chairman Wilson's request, asserting the executive and other privileges and noting the privacy provisions of Executive Order No. 26 (2002). (Da49-Da50).

On May 8, 2007, the Governor's Advisory Ethics Panel issued a report concluding that the Governor had not engaged in collective negotiations with Ms. Katz and had not violated any ethical rule during bargaining. (Da43-Da45). The report, drafted by former Supreme Court Justice Daniel J. O'Hern and former Attorney General John J. Farmer, Jr., was based on interviews with relevant parties, internal emails, and materials relating to the collective bargaining process. (Da11-Da12). It stated, unequivocally, that "[t]here was no conflict of interest in the Governor's handling of the CWA labor negotiations" because he did not engage in collective negotiations with Ms. Katz and "did not allow his relationship with Ms. Katz to compromise his judgment." (Da13).

Despite the Ethics Advisory Panel report, on May 31, 2007, Wilson filed a Verified Complaint seeking, via summary action, R.4:67-1(a), release of all documents,

including emails, and an Order to Show Cause on June 4, 2007. (Da1-Da7, Da56-Da60). On June 20, 2007, Katz and Local 1034 moved to intervene. The court subsequently granted that motion. (Da107-Da108) The lower court also later allowed the international union, the Communications Workers of America, AFL-CIO, to participate as an amicus curiae.

On August 21, 2007, the court denied defendant's motion to dismiss the Verified Complaint and announced it would undertake an in camera review of the emails responsive to plaintiff's OPRA request. (Da109-Da111). The court ordered defendants to file the documents, a log, and a brief under seal for in camera review. (Da109-Da111). The court also permitted the intervenors and plaintiff to file supplemental memoranda of law. (Da110). Finally, the court ordered the defendant and plaintiff to brief the issue whether the Governor's Advisory Ethics Panel, which was created pursuant to Executive Order No. 1 (2006), is subject to OPRA. (Da111). The in camera submissions and the supplemental briefs were thereafter filed in September 2007.[2] Defendant also submitted

[2] The documents and the privilege log have been submitted to this Court in a confidential, sealed appendix.

certifications concerning the search for responsive documents. (Da112-Da120; Da125-Da143).

On May 30, 2008, the lower court issued a written opinion setting forth its decision in this matter. (Da 146-Da164). In its opinion, the court recognized that the "executive privilege is firmly established in New Jersey." (Da155). It further recognized that the Governor's reliance on the Advisory Ethics Panel did not waive the privilege. (Da160-Da161). Yet, with little analysis and almost no citation to case law, the court concluded that any communications between the Governor and Ms. Katz on issues affecting public employees would not be covered by the executive privilege, even assuming Katz served as an advisor to the Governor. (Da155-Da156). The court reasoned that because Katz's union position placed her in an adversarial position to the Governor, communications between Katz and the Governor's Office related to public employees fell outside the ambit of the executive privilege. (Da156). The court also held that these communications did not fall under the privacy protections of OPRA or Executive Order No. 26, ¶ 2(c) (2002). (Da153-Da154). In addition, the court rejected the argument by Katz and Local 1034 that the emails were protected from disclosure under the collective bargaining

exception to OPRA. (Da158-Da159). Finally, without any mention of executive privilege, the court concluded that the communications were subject to disclosure under the common law right of access. (Da161-Da163).

On June 27, 2008, the lower court issued a Final Order and Judgment ordering that, pursuant to the court's opinion of May 30, 2008, defendant was to produce to plaintiff all documents submitted to the court for in camera inspection, except those identified in the court's May 30, 2008 opinion.[3] The court also awarded attorneys' fees and costs. Finally, the court stayed the release of any documents and payments of fees and costs pending the final resolution of all appeals.

Defendant appeals from the portion of the lower court's order of August 21, 2007 directing an in camera review and the portion of the June 27, 2008 Final Order and Judgment ordering the release of the email communications and awarding fees and costs.

[3] The lower court's opinion disclosed that there were 796 pages of documents submitted for in camera review. (Da164). To avoid the inaccurate perception that there were 796 emails, defendant requested that that part of the court's opinion be revised. The lower court denied that request and an emergent panel of the Appellate Division denied a motion to revise the opinion. (Da165-Da168).

ARGUMENT

I. NEW JERSEY LAW PROTECTS GUBERNATORIAL COMMUNICATIONS INTEGRAL TO THE EXECUTIVE FUNCTION, INCLUDING COMMUNICATIONS BETWEEN THE GOVERNOR, HIS SENIOR ADVISORS AND INDIVIDUALS OUTSIDE GOVERNMENT.

The chief executive's privilege is firmly established by judicial precedent and rooted in the separation of powers and the constitutional prerogatives of the executive. It shields executive communication and deliberation from public review and from the interference of the other branches, and enables the Governor to consult with and seek and receive information and advice from individuals inside and outside government. Without the privilege, the specter of general disclosure would chill such communication and lead those with whom the Governor communicates to temper their candor.

At issue here are email communications relating to official State business, exchanged in confidence, between Governor Corzine, his high-level staffers, and the head of CWA Local 1034, the largest CWA local union, representing 8,000 State workers.[4] Nothing in OPRA or the common law right to know allows Wilson -- a private citizen and political opponent -- access to those email conversations.

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[4] The lower court's Order of August 21, 2007, required that defendant submit for in camera review all emails "which in any way involve or touch upon State business." (Da110).

To the contrary, OPRA and the common law expressly recognize and preserve the executive privilege. Although the executive privilege that applies to the confidential communications of the Governor may be pierced in exceptional circumstances, such as when a criminal or congressional investigation demonstrates a compelling need, Wilson, a private party making a records request, cannot vitiate the privilege. To allow access to the email communications at issue here would impair the functioning of the executive branch and impermissibly entangle the judiciary in the inner workings of the executive branch.

For decades, New Jersey courts have recognized the executive privilege as an essential component of the Governor's ability to maintain a free exchange of information in the course of official business. The privilege allows the Governor, as chief executive, to protect the "confidentiality of communications pertaining to the executive function," including in the exercise of his "sensitive decisional and consultative responsibilities." Nero v. Hyland, 76 N.J. 213, 225-26 (1978). The privilege is necessary because the Governor's responsibilities "can only be discharged freely and effectively under a mantle of privacy and security." See id. at 226. Like the "analogous" federal presidential

communications privilege, see id. at 225, the privilege that attaches to the communications of the Governor extends to all the Governor's executive functions and covers communications with individuals outside government, including adversaries.

A. The Executive Privilege Derives from Our Constitutional Structure and Is Vital to the Public Interest.

The executive privilege is both firmly rooted in our constitutional system and vital to the public interest. First invoked in 1792 when President Washington considered a request by Congress for information and testimony from presidential staff related to a failed military expedition, the privilege has long been recognized as inherent in the separation of powers. See Mark J. Rozell, Executive Privilege and the Modern Presidents: In Nixon's Shadow, 83 Minn. L. Rev. 1069 (1999). In 1803, for example, the United States Supreme Court emphasized the importance of the privilege in Marbury v. Madison, noting that to intrude "into the secrets of the cabinet" would give the appearance of "intermeddl[ing] with the prerogatives of the executive." 5 U.S. (1 Cranch) 137, 170 (1803). Chief Justice Marshall again recognized the privilege in 1807. At the request of former Vice President Aaron Burr, who was on trial for treason, Marshall issued a subpoena for a

letter sent to President Jefferson, but he explained that if the letter "contain[s] any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed." United States v. Burr, 25 F. Cas. 30, 37 (C.C.D. Va. 1807).

In more recent years, the United States Supreme Court has repeatedly made clear that the presidential executive privilege "derive[s] from the supremacy of each branch within its own assigned area of constitutional duties." United States v. Nixon, 418 U.S. 683, 705 (1974); In re Sealed Case, 121 F.3d 729, 743 (D.C. Cir. 1997) (noting that the privilege has "constitutional origins"). "[T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." Cheney v. U.S. Dist. Court for the Dist. of Columbia, 542 U.S. 367, 382 (2004) (internal quotation marks and citation omitted).

Like the "analogous" federal privilege, New Jersey's executive privilege is "'fundamental to the operation of government and inextricably rooted in the separation of powers.'" Nero, supra, 76 N.J. at 225 (quoting Nixon, 418 U.S. at 708); see N.J. Const. art. III, ¶ 1 (expressly

protecting the separation of powers). As the New Jersey Supreme Court has stated, the privilege "promotes the effective discharge of the[] [executive's] constitutional duties" in the context of New Jersey's "governmental structure." See Nero, supra, 76 N.J. at 226 (citing Report of the Committee on Executive Militia and Civil Officers, 2 Proceedings of the Constitutional Convention of 1947, 1121-22; Report of the Committee on Revision of the New Jersey Constitution at 421-23).

Indeed, the executive privilege is particularly important and robust in New Jersey because "[t]he framers of the 1947 Constitution intended to create a 'strong executive.'" Bullet Hole, Inc. v. Dunbar, 335 N.J. Super. 562, 573 (App. Div. 2000)(quoting Kenny v. Byrne, 144 N.J. Super. 243, 251 (App. Div. 1976), aff'd o.b., 75 N.J. 458 (1978)); see also Commc'ns Workers of Am. v. Florio, 130 N.J. 439, 455 (1992); Jack M. Sabatino, Assertion and Self-Restraint: The Exercise of Governmental Powers Distributed Under the 1947 New Jersey Constitution, 29 Rutgers L.J. 799, 825 (1998). The New Jersey Governor is, at least functionally, the most powerful chief executive in the nation. See Sabatino, supra, 29 Rutgers L.J. at 825.[5]

[5] For example, the New Jersey Constitution is the only state constitution under which the Governor is the only official

Executive privilege thus "furthers a primary objective of the 1947 Constitutional Convention, namely, the creation of a strong executive." Nero, supra, 76 N.J. at 226; see also Russo v. Governor, 22 N.J. 156, 166 (1956) (the 1947 Constitution invested the Governor with authority commensurate to his responsibilities).

Executive privilege is not only mandated by New Jersey's constitutional structure, it also serves a "vital public interest"—"the effectiveness of the decision-making and investigatory duties of the executive." Nero, supra, 76 N.J. at 226. The privilege enables the chief executive to "explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be

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elected on a statewide basis. See N.J. Const. art. V; see also Commc'ns Workers of Am., supra, 130 N.J. at 455 ("'This pinpoints responsibility for executive branch operations in the Governor's Office and adds to his power.'") (quoting Robert F. Williams, The New Jersey State Constitution: A Reference Guide, 91-92 (1990)). Indeed, an amendment to the New Jersey Constitution that will take effect next year creates the position of Lieutenant Governor, thereby changing the system of gubernatorial succession and emphasizing the importance of the role of the Governor. Moreover, Article V allocates all executive and administrative functions to no more than 20 principal departments under the Governor's supervision, and individual department heads serve at the pleasure of the Governor, except for the Attorney General and the Secretary of State, who serve during the term of the Governor. Cabinet officers and all members of the Supreme Court and the Superior Court are appointed by the Governor, with the advice and consent of the Senate. Also, Article IV bars the Senate or General Assembly from appointing any executive, administrative or judicial officers.

unwilling to express except privately." Nixon, supra, 418 U.S. at 708. It preserves the free flow of "candid, objective, and even blunt or harsh opinions," ibid., and ensures "the full and frank submissions of facts and opinions upon which effective discharge of [the executive's] duties depends." Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 449 (1977). Without the privilege, the executive would be severely hampered in his ability to do his job. See Cheney, supra, 542 U.S. at 382. As the Supreme Court observed in United States v. Nixon, "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." 418 U.S. at 705; see also Nero, supra, 76 N.J. at 226.

This same principle underlies the confidentiality afforded to the decisionmaking processes of the judiciary. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena, 40 F.R.D. 318, 326 (D.D.C. 1996), aff'd sub nom V.E.B. Carl Seiss v. Clark, 384 F.2d 979 (D.C. Cir. 1967). Final judicial decisions and opinions must of course be made public. However, the public may not demand access to the deliberations and consultations behind each decision. Nor does the public have a right to scrutinize the role played

by the work of law clerks. Indeed, "[n]o judge could tolerate an inquisition into the elements comprising his decision." Id. [6]

Judicial and executive branch confidentiality serve a common purpose: to arrive at more prudent decisions, thereby strengthening our democracy. In each case, the end result is subject to scrutiny. Moreover, with respect to the executive branch, the democratic process provides for accountability. The chief executive is able to govern more effectively with the benefit of the executive privilege, and is held accountable for his decisions by the public through the electoral system.

B. The Executive Privilege Protects All Gubernatorial Communications Pertaining to the Governor's Executive Functions and Extends to Confidential Communications with Individuals Outside Government, Even When They Are Adversarial.

In this case, the court below appropriately recognized that the executive privilege is "firmly established in New Jersey" and that it protects communications among the Governor, his high-ranking staff, and individuals outside the executive branch. (Da156, Da165). The court, however, went on to hold that, because Ms. Katz was in an

[6] Similarly, legislative deliberations are afforded confidentiality in order to enable the legislative branch to deliberate with candor.

adversarial position by virtue of her representation of public employees, any emails sent between her and the Governor's Office on matters related to public employees were not protected. (Da157, Da165). This conclusion reflects a misunderstanding of the basic purpose and nature of the executive privilege and also flatly contradicts binding precedent.[7]

Because the Governor's executive privilege is rooted in the separation of powers and serves to protect the entirety of the Governor's executive responsibilities, Nero, supra, 76 N.J. at 226, it is broader than the deliberative process privilege that attaches to certain communications of other executive branch officials, see Cheney, supra, 542 U.S. at 385; see also In re Sealed Case, supra, 121 F.3d at 745 (distinguishing the presidential communications privilege from the deliberative process privilege that applies to other executive branch officials). Unlike the deliberative process privilege, which applies to lower level officials and covers only

[7] To the extent the court below relied on Governor Corzine's former personal relationship with Ms. Katz, such reliance is misplaced. (Da154). The personal nature of a relationship is irrelevant to the executive privilege analysis. Chief executives routinely communicate with individuals with whom they have a personal relationship. It cannot be the case that such communications are entitled to any less protection than other executive communications.

documents that are both predecisional and deliberative, id. at 737, the chief executive's privilege covers all "communications pertaining to the executive function." Nero, supra, 76 N.J. at 225; see also Nixon, supra, 418 U.S. at 708 (executive privilege applies to all communications made "in the process of shaping policies and making decisions"). Thus, while the distinction drawn by the court below between advisers and adversaries arguably may be relevant to application of the deliberative process privilege, that distinction is not relevant to application of the much broader executive privilege.[8]

The broad reach of the executive privilege is essential, for the Governor's responsibilities can only be "discharged freely and effectively under a mantle of privacy and security." Nero, supra, 76 N.J. at 225-26. Thus, the privilege "forecloses investigation into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others." Carl Zeiss Stiftung, supra, 40 F.R.D. at 325-26. For example, New Jersey decisions have

[8] The distinction between the two privileges is expressly recognized in OPRA, which contains a provision recognizing and preserving executive privilege as a basis to deny an OPRA request, N.J.S.A. 47:1A-9(b), and a separate provision excluding from the definition of "government record" material that is "advisory, consultative, or deliberative," N.J.S.A. 47:1A-1.1.

held that executive privilege shields the release of appointment calendars and daily schedules, without regard to the identifies of the participants or to whether the information contained therein pertained to specific decisions. See Gannett N.J. Partners, LP. V. County of Middlesex, 379 N.J. Super. 205, 216, 217-28 (App. Div. 2005) (affirming the denial of a request under OPRA for the appointment calendar of a County Counsel because the calendar "reveals the identity of persons with whom County Counsel planned to meet and the purpose of the meetings"); Shearn v. Office of Governor, GRC Case No. 2003-53 (Feb. 28, 2004) (denying an OPRA request for Governor McGreevey's meeting schedule, finding that it had "no legal basis to inquire of the purpose for each private appointment of the Governor and should, instead, consider the information subject to executive privilege and, therefore, confidential").

The executive privilege also covers "communications made by presidential advisors in the course of preparing advice for the President . . . even when these communications are not made directly to the President." In re Sealed Case, supra, 121 F.3d at 752. This extension of the privilege to senior aides is necessary to "provide

sufficient elbow room for advisers to obtain information from all knowledgeable sources." Ibid.

Furthermore, because "executive privilege exists to aid the governmental decisionmaking process," id. at 741 (internal quotation marks and citations omitted), it extends not only to communications among the chief executive and his senior staff, but also between them and members of the public. Such communications enable the executive "to explore alternatives in the process of shaping policies and making decisions," Nixon, supra, 418 U.S. at 708, and thus receive the same protection as other executive communications. See also Judicial Watch, Inc. v. U.S. Dep't of Justice, 365 F.3d 1108, 1114 (D.C. Cir. 2004) (privilege covers "documents solicited and received by the President or his immediate White House advisors" in the course of their official duties (internal quotation marks and citation omitted)).

Indeed, under New Jersey precedent, even lower-level officials have a protected interest in maintaining the confidentiality of their communications with individuals outside government. In North Jersey Newspapers Co. v. Passaic County Board of Chosen Freeholders, for example, the court held that that detailed telephone billing records of County Freeholders were not subject to public disclosure

under the common law because any interest in disclosure was outweighed by the governmental interest in preserving the confidentiality of communications between high-level public officials and the private parties to whom they speak by telephone in the course of official business. 127 N.J. 9 (1992); see also Gannett N.J. Partners, supra, 379 N.J. Super. at 216 (holding that the exception under OPRA for telephone billing records protects the free flow of information from individuals to high-level public officials in the course of official business without fear of public disclosure of the contents and frequency of these important exchanges).

In this case, the lower court recognized that the executive privilege extends to email communications with individuals outside the executive branch. (Da155-Da164). Nonetheless, the court determined that, to the extent communications are adversarial in nature, they are not protected by the privilege. (Da156). This conclusion is flatly at odds with precedent. As the Supreme Court recognized in North Jersey Newspapers, communications with adverse parties can serve a valuable function in executive decisionmaking:

> [T]here may be times - and they may be the most critical times - when a government official will have to make a telephone call that has an

> arguable claim to confidentiality - times when, for example, a mayor might need to call a city council member from an opposing political party on a most highly sensitive community issue to enlist that person's support; or times when a mayor might need to call a community activist to calm troubled waters, without causing disruption that might result from appearing to negotiate with a dissident who may, at the moment, be perceived as a lawbreaker.
> [127 N.J. at 17].

Indeed, in order for the Governor to govern effectively, he must be able to receive information from, and communicate and consult with people with whom he disagrees. Consider, for example, a situation in which there is a public crisis, such as an increase in crime, where members of a party opposing the Governor have proposed various responses that would vastly restrict civil liberties. If a member of the opposition, either a public official or even a community leader, wished to consult with the Governor and to express politically unpopular views that might contribute to reaching a compromise, confidentiality would be paramount.

For the same reasons, the privilege extends to both solicited and unsolicited communications. Unsolicited advice, like solicited advice, from advisors and adversaries alike, functions to provide the Governor with a diverse array of viewpoints and information critical to

"the effectiveness of the decision-making . . . of the executive." Nero, supra, 76 N.J. at 226.

Thus, the requested email communications in this matter clearly fall within the ambit of the executive privilege. They are communications between the Governor, his senior staff, and the head of the largest State worker local union pertaining to "official State business" and thus necessarily relate to the executive function.[9] That Ms. Katz was an adversary of the Governor's Office on some issues has absolutely no bearing on whether the communications are covered by the executive privilege. If allowed to stand, the lower court's ruling would chill all communications with adversaries, significantly hampering the ability of the chief executive to reach out to opponents and achieve political compromise—in violation of the executive's constitutional duties and prerogatives.

The negative impact of the lower court's ruling is particularly acute with regard to the ability of a Governor and his high-ranking staff to use email, which functions in the modern technological era as the equivalent of in-person or telephonic communication, as a means of communication. While email automatically generates an electronic record

[9] To the extent the emails are personal and not related to policy issues, all parties agree they are not subject to disclosure. (Da148-Da149).

that can be the subject of a public records request, email conversations are no more inherently "public" than in-person or telephone conversations or the telephone logs that were protected from disclosure in North Jersey Newspapers. The parties to in-person and telephone conversations expect that their conversations will remain shielded from public view by curious third parties. Eliminating that expectation with respect to email conversations involving the Governor and his high-ranking staff would seriously limit their ability to communicate efficiently using a means of private communication that is now in near universal use. This outcome would impair the functioning of the executive branch.

II. OPRA AND THE COMMON LAW RIGHT OF ACCESS PRESERVE THE EXECUTIVE PRIVILEGE AND CANNOT BE CONSTRUED, CONSISTENT WITH THE CONSTITUTION, TO ALLOW A PRIVATE PARTY ACCESS TO THE EMAIL COMMUNICATIONS OF THE GOVERNOR AND HIGH-RANKING STAFF.

Because the trial court erroneously determined that the vast majority of the email communications at issue were not covered by the privilege, it treated this case as a routine OPRA or common law right-to-know case. The court applied the usual presumptions and balancing tests and ordered disclosure. In fact, neither OPRA nor the common law right to know provides a private plaintiff with the right to examine the communications of the Governor and his

high-ranking staff. Rather, the executive privilege—as it applies to the communications of the Governor and his staff—may be overcome only in the face of a compelling need on the part of a coordinate branch of government. Wilson, as a private party in civil litigation asserting a general right to know, cannot pierce the privilege. To conclude otherwise would undermine the effective functioning of executive branch and impermissibly involve the judiciary in the internal workings of a coequal branch through a burdensome review of countless disclosure requests.

A. OPRA Expressly Preserves the Executive Privilege and Does Not Allow a Requester to Obtain Privileged Communications.

OPRA defines a "government record" as information either "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 that has been received in the course of his or its official business." N.J.S.A. 47:1A-1.1. It provides the public "the right to inspect and copy governmental records . . . without limitation as to the reasons for which the access is undertaken." MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 545 (App. Div. 2005); see also Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003) (OPRA embodies "the State's longstanding

public policy favoring ready access to most public records."). However, the statute "affirmatively excludes from [the] definition [of government records] twenty-one separate categories of information, thereby 'significantly reduc[ing] the universe of publicly-accessible information.'" MAG Entm't, supra, 375 N.J. Super. at 546 (quoting Bergen County Improvement Auth. v. N. Jersey Media Group, Inc., 370 N.J. Super. 504, 516-17 (App. Div. 2004).

Among the government records affirmatively excluded from OPRA's reach are communications covered by the executive privilege. Indeed, the Legislature expressly provided that OPRA does not "abrogate or erode any executive or legislative privilege or grant of confidentiality" that "may be duly claimed to restrict public access to a public record or government record." N.J.S.A. 47:1A-9(b). In so doing, the Legislature respected the separation of powers and preserved the ability of the executive branch to function effectively. Without an executive privilege exception – the Legislature implicitly recognized – OPRA would threaten the very ability of the executive to undertake its business. It would enable any private plaintiff to search the confidential written communications of the Governor's Office.

The Legislature's judgment that the public should not have access under OPRA to the confidential communications of the Governor's Office was subsequently bolstered by Executive Order. See N.J.S.A. 47:1A-9(a) (providing that disclosure under OPRA may be further limited by "Executive Order of the Governor"). Executive Order No. 26, adopted by Governor McGreevey in 2002 shortly after OPRA took effect, makes it clear that "[a]ny record made, maintained or kept on file or received by the Office of the Governor in the course of its official business which is subject to an executive privilege" is exempt from disclosure under OPRA. Executive Order No. 26, ¶ 2(a) (2002).

In this case, the lower court's analysis was flawed. The court first looked at whether the requested documents were "government records" under OPRA and then asked "whether the documents were exempt from disclosure by the Act, Executive Order, or Executive Privilege." (Da152). OPRA, Executive Order No. 26, and the case law concerning the executive privilege are clear that if documents are within the executive privilege, they are excluded from the definition of "government records" under OPRA. See N.J.S.A. 47:1A-9(b). See also MAG Entertainment, supra, 375 N.J. Super. at 546. Accordingly, the court below should have first reviewed the claim of executive

privilege. If the privilege attaches, the documents never come within the reach of OPRA. The lower court compounded its analytical error by then applying OPRA's presumption in favor of access. (Da152, Da154). The well-established jurisprudence concerning the executive privilege teaches the opposite; that is, there is a time-tested and sound principle conferring confidentiality to executive communications so as to allow the executive to work effectively. As a consequence, the presumption is against invading the privilege. See e.g., Nixon, supra, 418 U.S. at 705; Cheney, supra, 542 U.S. at 382. See also Nero, supra, 76 N.J. at 226.

In short, OPRA provides a means of access to government documents only to the extent those documents are not exempted from its reach. MAG Entm't, supra, 375 N.J. Super. at 546. Both the text of OPRA and the supplemental Executive Order make clear that documents that are covered by the executive privilege are beyond the reach of the statute. Critically, other than the ruling of the court below, there has never been a ruling ordering the release of communications of the chief executive in the face of an assertion of executive privilege solely to satisfy a request for disclosure under OPRA. See Shearn v. Office of Governor, supra, GRC Case No. 2003-53 (Feb. 28, 2004)

(denying ORPA request); see also Gannett N.J. Partners, supra, 379 N.J. Super. at 216. Wilson simply is not entitled to the requested documents under OPRA.

B. Though Executive Privilege Can Be Overcome by the Compelling Need of a Coordinate Branch of Government, Allowing a Private Party to Vitiate the Privilege Would Violate the Separation of Powers, Impair the Functioning of the Executive Branch, and Entangle the Judiciary in the Inner Workings of the Executive.

Wilson has also demanded disclosure of the electronic conversations under the common law right of access. See Bergen County Improvement Auth., supra, 370 N.J. Super. at 516 (common law right survives OPRA); see also N.J.S.A. 47:1A-8. Under the common law, the threshold condition for access to a public record is that the requester establish an interest in the subject matter of the material he or she is seeking. See Irval Realty, Inc. v. Bd. of Pub. Util. Comm'rs, 61 N.J. 366, 372 (1972). The court must then determine whether: 1) the individual has standing to make the request; 2) the documents are public records; and 3) the requestor's interest in the information outweighs the public interest in maintaining the confidentiality of the documents. See S. N.J. Newspapers, Inc. v. Twp. of Mt. Laurel, 141 N.J. 56, 70-71 (1995); accord Bergen County Improvement Auth., supra, 370 N.J. Super. at 523-24.

The court below analyzed Wilson's common law request without regard to executive privilege or the important separation of powers issues at stake. Thus, the court erroneously concluded that Wilson's interest in the information outweighed the public interest in maintaining the confidentiality of the documents. (Da161-Da163). In fact, the chief executive's privilege can only be outweighed by a compelling need on the part of another branch of government. Allowing a private plaintiff's right-to-know claim to trump the chief executive's privilege threatens to impair seriously the Governor's ability to seek unvarnished exchanges from the wide array of sources with information on matters of public concern; it also would involve the judiciary in a burdensome and impermissible review of internal executive branch decisionmaking. Such a result is contrary to the separation of powers established by our constitutional system.

Considerable federal precedent holds that a court cannot compel release of the type of communications at issue here, unless there is a compelling showing of need by a coequal branch of government. For example, in Nixon v. Sirica, 487 F.2d 700, 704-05 (D.C. Cir. 1973), a Special Prosecutor conducting a criminal investigation subpoenaed

tape recordings of meetings and phone calls between the President and his advisors. President Nixon asserted that his communications were absolutely immune from disclosure under executive privilege and could be released solely at his own discretion. Id. at 708. The Court of Appeals disagreed and ordered production for in camera review. But in so doing, the appellate court made clear that such review was appropriate only because of the "uniquely powerful showing" that the needs of a constitutionally equal branch of government were at stake. Id. at 717. The court reasoned that the grand jury, itself a creation of the Constitution, and the Prosecutor's particularized proffer that the tapes "contain evidence peculiarly necessary to the carrying out of this vital function - evidence for which no effective substitute is available," weighed in favor of production. Ibid. Critically, the grand jury was not engaged in a "fishing expedition," but rather, "investigations that [we]re entirely within the proper scope of its authority," ibid., that is, a criminal investigation.

Shortly thereafter, in Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974), the Court of Appeals reviewed a conflict between President Nixon and Congress, and again emphasized

the limited circumstances under which the President's executive privilege could be overcome. In considering whether to force President Nixon to comply with a subpoena from a Senate Committee, the court reaffirmed that the presidential communications privilege "can be defeated only by a strong showing of need by another institution of government." Id. at 730. With such strict limits on the abrogation of executive privilege, the court reasoned, the "effective functioning of the presidential office will not be impaired." Ibid.; see also id. at 731. Applying its test, the court rejected the Senate Committee's subpoena. The court reasoned that because the material sought was cumulative of information already submitted to the House Judiciary Committee, and because the Senate Committee failed to show that it needed immediate access of its own, there was no strong showing of need by a coequal branch of government. Id. at 733.

The Supreme Court's subsequent opinion in United States v. Nixon confirmed that a compelling need on the part of a coordinate branch of government must exist before the chief executive's privilege can be vitiated. In that case, a grand jury indicted seven former Nixon Administration officials and others for conspiracy and obstruction of justice. The Special Prosecutor issued a

subpoena duces tecum to the President directing him to produce tape recordings and documents of his conversations with various aides and advisors. President Nixon sought to quash the subpoena.

On review, the Supreme Court held that there was a "valid need for protection of communications between high Government officials and those who advise and assist them" that derived "from the supremacy of each branch within its own assigned area of constitutional duties." 418 U.S. at 705. Nevertheless, the Court concluded that in the unusual context of a criminal investigation—where the fair administration of justice and "the basic function of the courts" were at stake—the executive privilege could be overcome. Id. at 712. Even then, the prosecutor must demonstrate a "specific need for evidence in a pending criminal trial." Id. at 713. Moreover, the Court made plain that its opinion did not apply to "civil litigation." Id. at 712 n.19.

In Cheney, supra, 542 U.S. 367, the Court removed any doubt that broad information requests by private citizens -- like the requests at issue here -- do not provide a basis for piercing the chief executive privilege. In that case, private plaintiffs alleged that the Vice President headed an energy policy development group that was comprised of

public officials and private citizens and that he violated federal law by failing to comply with a federal statute applicable to such hybrid groups. Plaintiffs sought to conduct limited discovery to determine the structure and membership of the policy group. Id. at 373. In reviewing plaintiffs' request, the Supreme Court held that an assertion of executive privilege by the chief executive in the civil context must be treated differently than an assertion of the privilege in the criminal arena. The Court reasoned:

> [T]he need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in Nixon. As Nixon recognized, the right to production of relevant evidence in civil proceedings does not have the same constitutional dimensions. [542 U.S. at 384 (citing Nixon, 418 U.S. at 711)].

The Court explained that the primary rationale for requiring disclosure of otherwise privileged material in the criminal context is to avoid the "impairment of the 'essential functions of [another] branch'" of government. Id. (citation omitted). In the criminal context, "a court's ability to fulfill its constitutional responsibility to resolve cases and controversies within its jurisdiction hinges on the availability of certain indispensable information." Id. at 384 (citation omitted).

In contrast, withholding documents requested in civil discovery "does not hamper another branch's ability to perform its 'essential functions' in quite the same way." Ibid. Even if one were to assume that the federal law governing the committee embodies important objectives, "the only consequence from respondents' inability to obtain the discovery they seek is that it would be more difficult for private complainants to vindicate Congress' policy objectives under" the federal law. Id. at 384-85. This interest, the Court held, is simply insufficient to overcome the constitutionally based executive privilege. Id.; see also Judicial Watch, 365 F.3d at 1114-15; Democratic Nat'l Comm. v. U.S. Dep't of Justice, 539 F.Supp.2d 363, 365-68 (D.D.C. 2008); Loving v. U.S. Dep't of Defense, 496 F.Supp.2d 101, 104, 106-09 (D.D.C. 2007).

New Jersey courts have rarely had the opportunity to consider a sweeping request for the chief executive's communications of the sort at issue here. Nevertheless, our Supreme Court has indicated that New Jersey law is in accord with federal precedent. See Nero, supra, 76 N.J. at 225-26. In Nero, the Court held that "the Governor, as chief executive, must be accorded a qualified power to protect the confidentiality of communications pertaining to the executive function" and that this power is "analogous

to the qualified constitutionally-based privilege of the President." Id. at 225; see also id. at 225-26 (relying on numerous federal cases in discussing the contours of the Governor's executive privilege). The Nero Court held that, because of the executive privilege, an individual who had been considered for a gubernatorial appointment could not have access to the investigatory reports received by the Governor from the Attorney General concerning the individual's background, notwithstanding the individual's cognizable interest in those documents. Id. at 226. In short, in the context of a civil right-to-know suit demanding the chief executive's confidential documents, the Court held that the constitutional interest in the separation of powers and the functioning of the executive branch outweighed the private litigant's right. Id. at 226-27.

In this case, as in Nero and Cheney, the constitutional and public interest in confidentiality necessarily and unequivocally outweighs the private party's right to disclosure. The privilege at issue here, like the privilege invoked in Nixon, Cheney, and Nero, belongs to the chief executive and his senior staff. Reliance on cases involving lower level executive officials and agencies "is altogether misplaced." Cheney, supra, 542

U.S. at 385. "[S]pecial considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." Ibid. While cases involving the deliberative process privilege and the executive privilege of lower level officials may be instructive, see, e.g., Loigman v. Kimmelman, 102 N.J. 98 (1986), the special constitutional status of the chief executive gives rise to a more robust privilege—one that cannot be vitiated but for a compelling need on the part of a coordinate branch of government. See Cheney, supra, 542 U.S. at 385.

Only when nondisclosure threatens to impair the "'essential functions of [another] branch'" of government, id. at 384 (quoting Nixon, 418 U.S. at 707), can a court invade the prerogatives of the chief executive. Here, no compelling need of a coequal branch of government exists. This action was not brought by a criminal prosecutor or by a committee of the New Jersey Legislature, but by an individual plaintiff (and political opponent). Indeed, here Wilson does not even need the documents for a civil suit.

As the Supreme Court recognized in Cheney, extraordinary burdens would result from allowing civil

litigation disclosure requests to overcome the chief executive's privilege. Civil complaints, unlike criminal actions, can be filed by anyone; plaintiffs are not subject to the same checks as public prosecutors:

> The observation in Nixon that production of confidential information would not disrupt the functioning of the Executive Branch cannot be applied in a mechanistic fashion to civil litigation. In the criminal justice system, there are various constraints, albeit imperfect, to filter out insubstantial legal claims. The decision to prosecute a criminal case, for example, is made by a publicly accountable prosecutor subject to budgetary considerations and under an ethical obligation, not only to win and zealously to advocate for his client, but also to serve the cause of justice. The rigors of the penal system are also mitigated by the responsible exercise of prosecutorial discretion. In contrast, there are no analogous checks in the civil discovery process here.
> [542 U.S. at 386].

Indeed, it is hard to imagine conditions better calculated to damage the Governor's power to communicate than to subject his Office to countless requests and resulting civil lawsuits that could open up all of his written communications to the public.

Moreover, to involve the judiciary in a case-by-case weighing of the strength of the Governor's interest in confidentiality every time a private party makes a request for communications would significantly burden the judicial

system.[10] Courts would become the ultimate arbiter of every assertion of executive privilege. This process would both impede the administration of the judicial system and impermissibly entangle the judicial branch in the inner workings of the executive—in violation of the separation of powers. The judiciary would be repeatedly "forced into the difficult task of balancing the need for information" with the chief executive's prerogatives; this inquiry would place "courts in the awkward position of evaluating the Executive's claims of confidentiality and autonomy, and [would] push[] to the fore difficult questions of separation of powers and checks and balances." See Cheney, supra, 542 U.S. at 389.

Because the occasion "'for constitutional confrontation . . . should be avoided whenever possible," id. at 389-90 (quoting Nixon, 418 U.S. at 692), this Court should make clear that the chief executive's privilege cannot be vitiated unless non-disclosure threatens to impair the "'essential functions of [another] branch'" of

[10] The proceedings below illustrate how time-consuming and burdensome this process would be. Before addressing the ultimate privilege question, the lower court held numerous hearings and issued multiple orders on issues ranging from the intervention and amicus rights of Ms. Katz and the CWA; the scope of the search performed by Brown; and the propriety of an in camera review. In total, the case was pending before the Superior Court for more than a year.

government, id. at 384 (quoting Nixon, 418 U.S. at 707). Given the unique position of the Governor in our constitutional scheme, the executive privilege necessarily outweighs a private party's common law right of access.

Indeed, the court should not undertake an in camera review to balance the interests unless there has been a prima facie showing that a coordinate branch of government has a compelling interest in disclosure. The requester must do more than simply allege a speculative interest in disclosure. Only in the relatively unique circumstances when the requester demonstrates, with supporting evidence, that a compelling interest in disclosure exists should the court then conduct an in camera review to balance the parties' interests and determine whether the requested materials should be disclosed. Accord Loigman, supra, 102 N.J. at 105-06 (holding that where "reasons for maintaining a high degree of confidentiality" are present, in camera review should rarely be conducted).[11]

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[11] Thus, although defendant has provided the emails in question to the court under seal, defendant continues to maintain that in camera review is inappropriate. The determination whether a requesting party has made a sufficient showing of need must be made prior to an in camera review. Loigman, supra, 102 N.J. at 105-106. In the context of executive privilege, even the threat of in camera review by a court will chill communications with the Governor and his senior staff, as the prospect of judicial inspection of conversations will hinder open exchanges and

III. EVEN IF A PRIVATE PARTY COULD, IN SOME CIRCUMSTANCES, PIERCE THE PRIVILEGE UNDER OPRA OR THE COMMON LAW, WILSON HAS FAILED TO DEMONSTRATE A COMPELLING OR SUBSTANTIAL NEED FOR DISCLOSURE HERE.

Even assuming, arguendo, that the Governor's privilege can be overcome by a private party, i.e., without a compelling need on the part of a coordinate branch of government, and that the same case-by-case balancing test applies here as applies to the communications of lower level executive officials, but see Cheney, supra, 542 U.S. at 385, Wilson has failed to meet his burden.

In the context of the deliberative process privilege, the New Jersey Supreme Court has held that "[a]s with any privilege, the party seeking such documents bears the burden of showing a substantial or compelling need for them." In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 85 (2000). Because the government's interest in candor is paramount, the balance is "struck in favor of non-disclosure." Ibid. Applying this test, New Jersey courts have repeatedly refused to compel disclosure of executive officials' privileged materials. See N. Jersey Newspapers

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prevent some communications altogether. Moreover, for the reasons discussed above, a rule allowing in camera review of privileged documents requested by a private plaintiff under OPRA or the common law would threaten the efficient administration of justice and violate the separation of powers.

Co., supra, 127 N.J. 9; Gannett N.J. Partners, 379 N.J. Super. at 216.

A. Wilson Does Not Have a Sufficient Interest or Need to Invade the Privilege.

Wilson describes his interest in disclosure as a desire to determine whether "the Governor and Ms. Katz reached an agreement on the terms of the State employees' contract outside the collective bargaining negotiations or whether the prior personal relationship between the Governor and Ms. Katz influenced the bargaining process to the detriment of New Jersey." This "interest" is based on pure speculation. Wilson has absolutely no evidence to support his allegations. He merely hypothesizes that—notwithstanding the Advisory Ethics Panel's findings to the contrary—there may be something inappropriate contained in the requested communications. Such fishing expeditions are precisely the circumstances where the privilege must be sustained. See Cheney, supra, 542 U.S. at 386.

Indeed, Wilson's hypothesis that Carla Katz and the Governor engaged in collective bargaining was found to be without basis by the Advisory Ethics Panel. (Da148-Da149). The court below failed to consider the Advisory Ethics Panel's report as part of its OPRA and common law review. (Da163-Da164). The report is relevant, however, because it

demonstrates that Wilson's alleged concerns are without basis. A bipartisan ethics panel consisting of retired Supreme Court Justice Daniel J. O'Hern and former Attorney General John J. Farmer, Jr., with appropriate authority, conducted a review and found no evidence to support Wilson's speculation. Indeed, the facts squarely contradict Wilson's speculation.[12]

Furthermore, although Wilson identifies a general interest in the requested information, he has not demonstrated a particularized need for the information. He does not seek these communications in connection with an ongoing court proceeding or to vindicate an important constitutional right. Cf. Senate Committee, supra, 498 F.2d at 731 (showing of need in connection with a request for documents pertaining to presidential communications depends upon the extent to which subpoenaed evidence is necessary for government institution to fulfill its responsibility, not on type of conduct evidence may reveal). Thus, the disclosure ordered here was "not to

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[12] The Panel concluded that the union's three lead negotiators, Chris Shelton, Steve Weissman, and Bob Masters, negotiated the contract, not Ms. Katz. (Da35). Moreover, the pension and benefit reforms achieved through the contract negotiations received bipartisan praise from legislative leaders and editorial support as well (Da43-Da44).

remedy known statutory violations," but to allow a private citizen to ascertain whether some unknown violation might have occurred.

Indeed, Wilson's interest is so general it could be raised in connection with nearly all gubernatorial communications. To allow the privilege to be overcome on this basis would render it a nullity, chilling the flow of information to the Governor and his senior staff and thwarting the Governor's ability to carry out his sensitive decisional and consultative functions. The purported interest asserted by Wilson does not justify this risk. The public's interest in safeguarding the free flow of information to the Governor and his senior staff is paramount—and constitutionally based. It cannot yield to the general interest asserted by plaintiff.

B. **Wilson's Request Was Overly Broad.**

Wilson's request covers the period from when the Governor took office, January 17, 2006, to the date of Wilson's request, March 27, 2007. The collective bargaining negotiations with the CWA, however, took place between September 20, 2006 and February 21, 2007. (Da19). The court below never addressed this overbreadth issue despite acknowledging that there were many communications that did not relate to the collective bargaining process

(Da163). Instead, the lower court ordered disclosure of most of the communications, reasoning that almost any executive decision by the Governor can affect state union employees and Katz was adverse to the Governor on such union employee issues. (Da156).

There are two fundamental flaws with the lower court's reasoning. First, an invasion of the privilege should be narrowly tailored to the asserted interest. See Nixon, supra, 418 U.S. at 700 (even in connection with a criminal subpoena, Court carefully scrutinized the asserted need for the requested information). Here, the lower court not only failed to scrutinize the particularized need, but ordered the disclosure of documents that do not even relate to or address Wilson's purported interest in these documents.

Second, the flawed reasoning of the lower court would encourage fishing expeditions. Despite the fact that Wilson did not offer a need or interest in topics unrelated to the collective bargaining process, the court below granted access to such documents regardless. Such a result encourages precisely what the executive privilege is designed to prevent, unwarranted intrusions into the inner workings of the executive function. As in Cheney, Wilson's sweeping request reaches far beyond any conceivable need. The lower court effectively granted Wilson access to

"everything under the sky." Cheney, supra, 542 U.S. at 387. See also id. at 386 (explaining that the "narrow subpoena orders in Nixon stand on an altogether different footing from the overly broad [disclosure] requests approved by the [trial court] in this case"). Consequently, this Court should correct the errors of the lower court by reversing its decision, clarifying the correct standard for attempts to pierce the executive privilege, and ruling that all communications at issue here are protected by that privilege.

CONCLUSION

Defendant respectfully requests that this Court reverse the lower court and rule that the lower court erred in conducting an in camera review, in ordering the disclosure of the documents and in awarding attorneys' fees and costs. This Court should then clarify the standard for reviewing claims of executive privilege and rule that all the documents sought by plaintiff in this matter are protected from release.

Respectfully submitted,

ANNE MILGRAM
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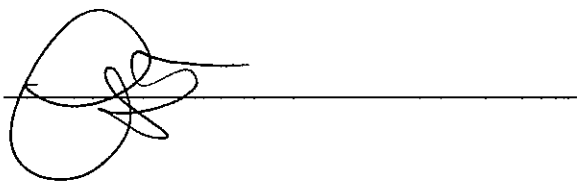
By: 

Date: August 8, 2008