STEVEN WRONKO, Plaintiff, v. BOROUGH OF CARTERET and KATHLEEN M. BARNEY, in her official capacity as records custodian for the Borough of Carteret, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY DOCKET NO. MID-L-005499-18 Civil Action

BRIEF ON BEHALF OF DEFENDANTS BOROUGH OF CARTERET AND KATHLEEN M. BARNEY IN OPPOSITION TO ORDER TO SHOW CAUSE

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PRELIMINARY STATEMENT

This brief is respectfully submitted in opposition to plaintiff's Verified Complaint and Order to Show Cause, presently returnable on December 14, 2018, seeking certain documents and other purported government records from the Borough of Carteret and its Clerk, Kathleen M. Barney, pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 et seq. ("OPRA"). While the Verified Complaint facially challenges the withholding of four distinct categories of requested records, as of the date of this submission Defendants believe that there is no longer a justiciable dispute with respect to two out of those four categories[1]. Accordingly, this brief focuses on the two remaining categories of records sought by the Plaintiff.

The two outstanding records at issue are: (1) "a copy of the banned list" for non-party Mayor Daniel J. Reiman's Facebook page; and (2) "a copy of all deleted comments" from the Mayor's Facebook page. Without regard to the actual or potential existence of responsive documents, the Borough properly denied Plaintiff's requests as a matter of law. First, content from the Mayor's Facebook page is not subject to public disclosure under OPRA because it does not fall within the statutory definition of a "government record". The Mayor's Facebook page is simply a social media site maintained exclusively by Mayor Reiman in his personal capacity to express his political and personal views, as well as to promote his re-election campaign and profile as an elected official.

Mayor Reiman's Facebook page is not used to conduct official business of the Borough, the Borough does not have custody or control over the page, no government funds are expended on maintaining the site, and the Borough maintains a separate website and social media account,

[1] In the event Plaintiff's two requests for access to: (1) Police Department Standard Operating Procedures; and (2) applications and resumes for successful firefighter candidates are not resolved as a consequence of discussions with Plaintiff's counsel, then the Borough would reserve the right to file supplemental papers addressing its position.

including a Facebook page, to conduct its official business and inform members of the public of municipal affairs. Mayor Reiman's Facebook page belongs to and is controlled by Mayor Reiman alone, in his personal capacity, and not by the Borough or its records custodian.

Furthermore, Mayor Reiman has a personal, protected privacy interest in the content and management of his own social media site that countervails any legitimate interest in public access. If Mayor Reiman were to accept a friend request, post a comment, delete a comment, or block a user from commenting, he would be exercising his own First Amendment right to do so through an inherent feature of a private social media site that is granted to all users, and which is entirely independent of his public office or official function. The decision whether to accept or reject a comment on a social media site, or to allegedly banish a user is an act which is imbued with expressive content and within the fundamental personal liberties granted under the First Amendment. Mayor Reiman's personal liberties simply supersede any interest Plaintiff may wish to assert in seeking access under OPRA.

For these, and the additional reasons set for the below, the Court should deny the relief sought in the Order to Show Cause, and dismiss the Verified Complaint with prejudice.

STATEMENT OF FACTS

On September 17, 2018, Plaintiff Steven Wronko ("Plaintiff" or "Wronko"), who represents himself to be a "concerned taxpayer and open government activist" (Pb. at 3) filed a Verified Complaint and Order to Show Cause against the Borough of Carteret ("the Borough") and Kathleen M. Barney, in her official capacity as records custodian and as the Clerk for the Borough (collectively "Defendants") alleging violations of OPRA.

A. Plaintiff's OPRA Request to the Borough.

This matter arises out of a single OPRA request issued by Plaintiff to the Borough in July of this year. Plaintiff's original request, which was filed under the pseudonym "John Freeman," and dated July 18, 2018, sought the following seven categories of documents from the Borough pursuant to OPRA:

1. I would like a copy of the banned list for the mayor's Facebook page that is most current as of July 18, 2018;

2. I would like a copy of all applications and resumes for the fire department from January 1, 2018 through July 18, 2018;

3. I would like a copy of all applicants' civil service test scores for the fire department from January 1, 2018 through July 18, 2018;

4. I would like a copy of the banned list for the Facebook page for Jon Salonis that is most current as of July 18, 2018;

5. I would like a copy of all deleted comments from the mayor's Facebook page from January 1, 2018 through July 18, 2018;

6. I would like a copy of all litigation settlement agreements from the town from January 1, 2015 through July 18, 2018; and

7. I would like a copy of the police department's standard operating procedures and policies that are active and current as of July 18, 2018.

[Comp., Exh. B].

On August 2, 2018, the Borough responded to Plaintiff's request and stated it would need until August 13, 2018 to respond. (Comp. ¶9 Exh. B). On August 13, 2018, the Borough responded to Plaintiff's OPRA request as follows:

1. I would like a copy of the banned list for the mayor's Facebook page that is most current as of July 18, 2018

   Response: There is no such Government record

2. I would like a copy of all applications and resumes for the fire department from January 1, 2018 through July 18, 2018;

   Response: The only information available under OPRA for Municipal Employees is their name, date of hire/termination, position and salary. (please see attachment)

3. I would like a copy of all applicants civil service test scores for the fire department from January 1, 2018 through July 18, 2018;

   Response: There is no such Government record

4. I would like a copy of the banned list for the Facebook page for Jon Salonis that is most current as of July 18, 2018;

   Response: There is no such Government record

5. I would like a copy of all deleted comments from the mayor's Facebook page from January 1, 2018 through July 18, 2018;

   Response: There is no such Government record

6. I would like a copy of all litigation settlement agreements from the town from January 1, 2015 through July 18, 2018.

   Response: Please see attachment

7. I would like a copy of the police department's standard operating procedures and policies that are active and current as of July 18, 2018.

   Response: Your request for the Police Department's Standard Operating Procedures is overly broad, it must be an identifiable, specific record.

[Comp., Exh. B]

The Borough provided documents responsive to Request #6 (litigation settlement agreements), informed Plaintiff that Request #7, for Police Department Standard Operating Procedures, was overly broad, and also partially responded to Request #2. The Borough denied access as to Request ## 1, 3, 4, and 5, because the Facebook pages requested, and their attendant privacy settings, are not pubic records as that term is defined by OPRA, stating that "there is no such Government record." (Compl., Exh. C).

Plaintiff wrote a further email dated August 14, 2018, requesting the Borough to "please produce the print out of the page which shows that no one is banned" from Mayor Reiman's Facebook page. (Compl. ¶19). The Borough did not respond to this email as it had already stated that "there is no such Government record."

B. Plaintiff Files Suit Under OPRA.

Dissatisfied with the Borough's responses to some of his requests, on September 17, 2018, Plaintiff filed the instant Verified Complaint and Order to Show Cause seeking access under OPRA to:

- Deleted comments and banned commenters on Mayor Reiman's Facebook Page (Request ##1 and 5);
- Redacted firefighter resumes and applications (Request #2);
- The Carteret Police Department's Standard Operating Procedures (Request #7).

All of the Borough's other responses to the original OPRA request were apparently deemed satisfactory to Plaintiff and are not in dispute in this denial of access suit.

Furthermore, after the filing of this suit, the Borough provided supplemental responses to Request ##2 and 7 based upon Plaintiff's modified requests. First, as to Request #2 – for resumes and applications of all firefighter candidates for the calendar year – the Borough properly produced only the name, date of hire, position and salary for hired candidates in the

calendar year and denied access to the application and resume materials of all candidates. After filing suit, Plaintiff acknowledged in his supporting brief in this litigation that existing case law prohibits public disclosure of the entirety of the application and resume of a candidate for this position, and only permits disclosure of the name, signature page, and evidence of satisfaction of the minimum educational requirements for the position in question, and even then only for candidates who were actually hired. Plaintiff agreed to modify and reframe his request to comply with the law, and in response the Borough produced applications and resumes for the hired firefighter candidates with this information included.

With regard to Request #7 – for the Carteret P.D.'s "Standard Operating Procedures" – the Borough properly denied the request as overbroad and because it did not refer to a definable government record. In post-suit discussions, the Borough explained that the Carteret P.D. does not maintain "Standard Operating Procedures" and is not required to do so. To the extent the Carteret P.D. does memorialize the types of information commonly recorded by other municipal police departments in a document entitled Standard Operating Procedures, it does so through a system of "General Orders" that are issued seriatim over a period of years by the Chief of Police. General Orders can address both transient issues within Police Department and policy matters of long-standing applicability. Moreover, General Orders may intersect, supersede or modify previous General Orders, but there is no regularly maintained index of policy-related General Orders. Therefore, Plaintiff's request did not seek a definable government record, and would have required the Police Department to review and index all of the General Orders for the history of the Police Department to determine which were still effective or otherwise relating to policy, rather than transient or routine administrative issues.

After the lawsuit was filed, the Borough offered to produce a listing of those policy-related General Orders which, after a reasonable search, it had determined were still effective

and likely to be of interest to Plaintiff. The Borough happened to be in possession of this list because these types of documents were already the subject of a discovery request in a recent civil rights suit to which the Borough is a named defendant. Therefore, since additional research was not required, the Borough allowed Plaintiff to review a list of these General Orders, and produced certain of those records based upon Plaintiff's selection from the list.

The Borough's position is that it properly denied Request ##2 and 7, and produced records after this suit was filed after Plaintiff modified the requests to comply with law, and after the Borough voluntarily took it upon itself in good faith to educate Plaintiff as to how the Police Department keeps and maintains policy documents. As of the date of filing of this opposition, the Borough has produced records to Plaintiff that are responsive to the requests, as modified. In the event that Plaintiff continues to object to the Borough's response, then further briefing on these issues may be necessary. From the Borough's perspective the only issues that remain in dispute, and which are addressed herein, are Plaintiff's request for access to Mayor Reiman's Facebook account history, to the extent Plaintiff seeks a record of blocked comments and users. As explained below, Plaintiff's requests do not seek prima facie government records, and the Verified Complaint should accordingly be dismissed with prejudice.

LEGAL ARGUMENT

POINT ONE

THE BOROUGH HAS NOT VIOLATED THE OPEN PUBLIC RECORDS ACT

Although the Borough has produced all public records to which Plaintiff is lawfully entitled, Plaintiff insists that he is also entitled to immediate disclosure of Mayor Reiman's Facebook account information. As explained below, Plaintiff's claim is misplaced as a politician's personal Facebook page does not constitute a "government record" as a matter of law, and thus is not subject to generalized public disclosure without regard to the existence of any other applicable statutory exemption from access.

It is well-settled that OPRA was enacted to further the public policy for an informed citizenry. O'Shea v. Tp. of W. Milford, 410 N.J. Super. 371, 379 (App. Div. 2009). Thus, as a general matter, OPRA provides that the public must be given access to "government records" as that term is defined in the statute. Id. That is, the right to inspect government records is not absolute. Rather, OPRA establishes a right to inspect and copy documents that meet the definition of a "government record," provided that the request is issued in conformance with certain statutory procedures. See N.J.S.A. 47:1A-1.1. No right of inspection exists if a document falls outside the statutory definition of "government record," or is exempted from disclosure by the express terms of OPRA or controlling legal authority. See Press of Atlantic City v. Ocean County Joint Ins. Fund, 337 N.J. Super. 480, 490-91 (Law Div. 2000).

OPRA further preserves extrinsic sources of authority for non-disclosure of documents, and provides that it "shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to … 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; Rules of Court; any federal law; federal regulation; or federal order." N.J.S.A. 47:1A-9.

OPRA excludes at least 21 categories of information from public disclosure. Education Law Center v. N.J. Dept. of Education, 198 N.J. 274, 284 (2009); Mason v. City of Hoboken, 196 N.J. 51, 65 (2008) (same). Specifically, N.J.S.A. 47:lA-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.

The New Jersey Supreme Court also has noted that "records within the attorney-client privilege or any executive or legislative privilege, as well as items exempted from disclosure by any statute, legislative resolution. executive order, or court rule" are excluded. Mason, supra, 196 N.J. at 65; see N.J.S.A. 47:1A-9a (mandating OPRA "shall not abrogate any exemption of a public record or government record from public access ... [by] any other statute … [or] Executive Order of the Governor).

As such, a records custodian may rightfully deny a request if the record belongs to one of the enumerated categories of exemptions or was created by another statute or Executive Order which "significantly reduces the universe of publicly-accessible information. As the Legislature acknowledged in N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-8, the only countervailing relief mechanism for those seeking access to a statutorily excluded document is the common law right of access." Bergen Cnty. Imp. Auth. v. N. Jersey Media Group, Inc., 370 N.J. Super. 504, 516-17 (App. Div.), certif. denied, 182 N.J. 143 (2004). It should be noted that this lawsuit only seeks disclosure of the purported government records under OPRA, and not under the common law right of access.

A. The Mayor's Individually Controlled Facebook Account is Not a Government Record As a Matter of Law and Accordingly is Not Subject to OPRA.

Mayor Reiman's Facebook account information is not subject to public disclosure because it is not a government record within the meaning of OPRA. Plaintiff seeks these records in the absence of any controlling legal authority, and rather, the requestor himself has relied only on an unpublished, non-precedential trial court decision from Bergen County.

OPRA defines a "government record" as:

> any 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] (emphasis added).

Necessarily, if a public official or public entity has not made, maintained, kept or received a document in the course of his or its official business, a document is not a "government record" subject to production under OPRA. Michelson v. Wyatt, 379 N.J. Super. 611, 619 (App. Div. 2005). Also, a public agency or entity is not required to produce a document or to compile information contained in other government documents, if the public employee or public agency is not required by law to maintain such information. Id. at 619.

By way of background, the Court may take judicial notice that Facebook is a widely used social-networking site that is available via website, mobile phone or desktop computer application. The site provides a digital medium that allows users to connect and communicate with each other. Every Facebook user must create a profile which is intended to convey

information about the user. Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 961 F. Supp. 2d 659, 662 (D.N.J. 2013). The user profile can include the user's contact information; pictures; biographical information, such as the user's birthday, hometown, educational background, work history, family members, and relationship status; and lists of places, musicians, movies, books, businesses, and products that the user likes. Id.

A Facebook user can connect with other users by adding them as "Facebook friends." Facebook users can have dozens, hundreds, or even thousands of Facebook friends. In addition to having a profile, each user can review information posted by others via the news feed. The news feed aggregates information that has recently been shared by the user's Facebook friends. Facebook pages can be made public such that all Facebook users regardless of whether they are friends of the user can view the content on the page. However, Facebook has customizable privacy settings that allow users to restrict access to their Facebook content. Access can be limited to the user's Facebook friends, to particular groups or individuals, or to just the user. Ehling, supra, 961 F. Supp. 2d at 662. See also Kinbook, LLC v. Microsoft Corp., 866 F. Supp. 2d 453, 459 n.3 (E.D. Pa. 2012), aff'd, 490 Fed. Appx. 491 (3d Cir. 2013) (Facebook is a social networking service and web site where users can create a personal profile, add other users as friends, and exchange messages, photos, or videos). Thus, the social media site allows an account holder to block access to all or portions of their Facebook page to a defined set or class of other users.

Mayor Reiman's Facebook page is public in the sense that by default he freely permits all Facebook users to view the content on, and follow his page, but his personal account settings, including the list of any alleged blocked users and deleted comments, are private and not open to the public. Although the Mayor freely choses to make the content on his page public, the social media account of an individual who happens to also be an elected official is clearly not a

government record that is subject to public disclosure, and the Legislature clearly could not have intended that an individual's decision to engage in public service operates as a forfeiture of the right to personal privacy. While there is no published New Jersey Supreme Court or Appellate Division decision directly on point, the direction of the lower court cases from New Jersey and other jurisdictions, is clearly to protect the private social media accounts of public officials when those accounts are not used to conduct official government business. That is certainly the case here.

There are two unpublished decisions in this State, from the same Law Division judge, addressing the public disclosure of an elected official's Facebook page under OPRA. First, in Gelber v. City of Hackensack, Superior Court of New Jersey, Law Division, Bergen County, Docket No.: BER-L-005007-18 (Decided September 11, 2018) (See Certification of Thomas A. Abbate, Exhibit A, attached hereto), Plaintiff sought to compel production of a list of users who had been blocked from viewing a Facebook page, entitled "Labrosse Team for Lower Taxes and Honest Government," as well as a list of all administrators of that same Facebook account. The account in question belonged to several elected members of the City of Hackensack's governing body.

The Law Division judge in the Gelber case found that the listing of the blocked users from the Facebook page were not government records, and therefore were not subject to public disclosure under OPRA. In so holding, the Court started from the uncontroversial proposition that "undoubtedly, an elected official's purely personal Facebook account is not likely subject to OPRA" (Abbate Cert., Exh, A, at pg. 9). However, in the Gelber case, the account at issue was not purely personal but, rather, the page was posted after the election of Mayor Labrosse and the four other City Council members in May of 2017, was political in nature and linked to a political campaign team's website. Also, the email address linked to the Facebook account was a Gmail

address for the campaign, and not an official City of Hackensack email address for any member of the City Council. (Abbate Cert., Exh, A, at pg. 11).

The Court undertook a fact sensitive review of the Facebook page and concluded that since the account was political in nature and formed in advance of the election to be a campaign/political account, did not directly link to the official City of Hackensack website, was not used as a means for the governing body or Council members to conduct official business of the City, it was not a government record within the meaning of OPRA. (Id. at 12-13). The Court aptly noted that it is not absolute that simply because "a politician who is also a duly elected official, using a campaign Facebook account as a means of self-promotion, or to seek the input of her/his supporters on various topics relating to government business, transforms the Facebook account into a government record." (Id. at 11).

Contrariwise, in Larkin v. Borough of Glen Rock, Superior Court of New Jersey, Law Division, Bergen County, Docket No.: BER-L-2573-18 (Decided, June 15, 2018) (Abbate Cert., Exh, B), the same Court reached the opposite conclusion and found the Facebook pages at issue were government records where the overwhelming evidence established the pages were used primarily to conduct official business of the municipality. In Larkin, Plaintiff sought to compel production of a list of blocked users on the Facebook pages of several duly elected members of Glen Rock's governing body. (Abbate Cert., Exh. B, at pg. 2).

The Court there engaged in a fact sensitive analysis and based the holding upon the following. First, the Facebook pages at issue were established by the elected officials after the individuals' respective elections to public office, identified their status as an elected official of the Borough of Glen Rock, and used pages at issue to: (1) discuss matters directly pending before the Council, such as ordinances, resolutions and budgets; (2) disseminate and discuss official business done by the committees on which each Council member was serving; and (3)

answer questions and interact with constituents and the public at large about the Borough's official business. (Abbate Cert., Exh B, at 11).

The Court also noted that the Mayor's page described it as the best place to get accurate information about events and issues facing the Borough of Glen Rock and contained direct links to the Borough's website. (Abbate Cert., Exh B, at 12-13). Those pages were also used to post dialogue with constituents on important issues facing the Borough. (Id. at 14). In sum, the Court found that qualitatively the social media pages were used to conduct official government business, and accordingly were government records under OPRA.

Defendants are also aware of at least two out of state cases that are persuasive on the issue of whether a Facebook page is a public record and notably, they both find that the personal social media accounts of public officials are not "public" records. First, in West v. Puyallup, 410 P.3d 1197, 1199 (Wash. Ct. App. 2018), the court held that a public official's posts on a personal Facebook page were not prepared within the scope of her official capacity as a City Council member because the page was not associated with the City and was not characterized as an official City Council member page. Instead, the Facebook page was associated with the "Friends of Julie Door," which was used to provide information to her political supporters. Id. at 1204.

Furthermore, the court noted that the official was not conducting public business on the Facebook page, and the posts did not contain specific details of the official's work as a City Council member, or regarding City Council discussions, decisions, or other official actions of the government. Rather, the posts merely provided general information about City activities and occasionally about the official's own activities. Id. Notably, the court found that while purely informational posts about City activities may have furthered the City's interests to some minimal extent, this tangential benefit to the City was not sufficient to establish that the public official was acting in her official capacity.

Second, in Pacheco v. Hudson, 415 P.3d 505, 511 (N.M. 2018), the New Mexico Supreme Court held that a judge did not act in an official capacity in establishing or maintaining a personal election campaign Facebook page. The court noted that the page was private and not public because the judge did not use the page "to conduct judicial business" or "perform[ ] ... public functions," rather, it was a campaign account. Id. at 512. The court found it dispositive that there was no evidence that the judge was acting on behalf of the court or any other public body, no government funding was involved in maintenance of the Facebook site or any of its activities, nor was the judge conducting public business through the site. Id.

Just as in Gelber, Pacheco and Puyallup, supra, here, there can simply be no doubt that Mayor Reiman intended for his Facebook page to be for personal and political use. First, although he established his Facebook page in 2011, after he became Mayor in 2002, that fact is not dispositive in this case because Facebook was not even created until 2004, and did not become available to individuals who were not otherwise students at Harvard University until 2006. Though a certain age segment of our population may not recall a life without Facebook, the site did not become widely used as a means of mass communication until around the time Mayor Reiman started using the site in 2011.

Even a cursory review of the Facebook page reveals it is used primarily to express Mayor Reiman's personal and political opinions. See Abbate Cert., Exh. C[2]. The page is in no way

[2] The case presents certain evidentiary issues with respect to providing the Court with the means necessary to adjudicate the facts. There is no mechanism available to readily download or make available the *entirety* of the page in documentary or electronic form for submission to the Court. The page dates back to 2011 and has been continuously updated. We would offer that the Court may, without objection, view Mayor Reiman's entire Facebook page in camera at: https://www.facebook.com/pg/danieljreiman/about/?ref=page_internal. Relevant excerpts from the page are attached as Exhibit C.

utilized to conduct official Borough business. Indeed, under the "About" Section, it states that Mayor Reiman is the "Treasurer of the Middlesex County Democratic Organization. County & Local Committeeman. Trustee to IBT Local 97 Health Fund. Mayor of my hometown." Further, under the "About Me" Section, it specifically states "This is my personal page. If you would like to view the official page of Carteret, visit the 'My Carteret' page." The Borough of Carteret does, in fact, have a separate official "My Carteret" Facebook page and social media presence that is maintained by Borough officials. The "My Carteret" website and Facebook pages, respectively, are cross-linked to each other and contain similar information of an official nature.

Moreover, Mayor Reiman does not identify his Facebook page as the "Mayor's" page and in fact, lists his other political positions with the County Democratic party. Mr. Reiman does not conduct official business from his Facebook page and only occasionally posts, or shares public announcements from the Borough's official Facebook page for informational purposes. Finally, Mayor Reiman uses his personal email account, and not the Mayor's official Borough email as a point of contact on the page, and he also has personal photographs posted. Id.

Mayor Reiman has carefully delineated the line between official Borough business and his personal or political capacities. In this regard, on May 14, 2012, shortly after creating the Facebook page, Mayor Reiman sought and obtained an advisory opinion received from the New Jersey Department of Community Affairs, Division of Local Government Services. (Abbate Cert., Exh. D). The advisory opinion sought advice as to whether it was appropriate under the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., for him to place a link to his Facebook and Twitter accounts on the Borough of Carteret's website. Mayor Reiman indicated

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The content of the page, is, in fact, public in nature, but the account settings in dispute are private and can only be viewed by Mayor Reiman. Alternatively, the parties can present excerpts from the page on a screen at oral argument, if the Court so desires.

in his advisory opinion request that he intended to use the social media sites to express "personal and political opinion on all topics." (Id. at Exh. D) (emphasis added).

In response, on June 9, 2012, the Department of Community Affairs issued Advisory Opinion #FLB-12-009. It concluded that sharing social media sites is akin to sharing a personal phone number and that the Local Government Ethics Law would not prohibit him from providing a link on the Borough's website to personal social media websites. (Id. at Exh. D). This opinion underscores, and serves as contemporaneous proof that Mayor Reiman always maintained a subjective belief that his Facebook page is a personal, and not an official social media account. For all of these reasons, the weight of authority strongly militates in favor of finding that Mayor Reiman's Facebook page is wholly personal and political in nature, and is not being used for an official governmental purpose and, as such is not a government record as a matter of law.

As a last note on this point, it should be noted that OPRA does not require a custodian to perform research. See MAG Entertainment, LLC v. Division of Alcohol Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). Here, the records requested by the Plaintiff do not require the custodian to simply search for, identify and retrieve government records. Rather, it requires the custodian to perform research by reviewing an outside site, to which the custodian does not even have access, and analyze its content, including its privacy settings, in order to render an opinion as to whether the custodian believes it to be personal and political, or whether it is used for governmental purposes.

Furthermore, the records custodian would be required to search the entire history of the Mayor's Facebook site to review all postings and identify whether he deleted any comments.[3]

[3] The court in Larkin, relies on the decision in Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 549 (S.D.N.Y. 2018), in order to rebut defendant's argument that

Importantly, the records custodian does not even have access to the Mayor's Facebook page, does not possess the Mayor's login credentials and if injunctive relief is sought, it cannot be enforced against an absent party. Given that social media is by definition a fluid and ever changing method of communication, this would place unworkable burdens on a municipal clerk to obtain access to, preserve and maintain from a chain of custody perspective, an elected official's social media site. To require that these communications flow through the municipal clerk would undermine the intended dynamic and instantaneous method of communication that social media represents. This would also present records preservation issues that are quite difficult to address, unlike, for an instance, email communications where a copy of an outgoing message is captured and maintained on the Borough's email server for later retrieval in the event of a request. The request is accordingly defective for this reason alone.

B. Even if Mayor Reiman's Facebook Page is a Prima Facie Government Record, His Privacy Interest and His Constitutional Right to Free Speech Outweighs Disclosure.

For the reasons set forth in Part A, supra, Mayor Reiman's private Facebook page is not a government record under OPRA. However, even if this Court finds to the contrary as a facial matter, Mayor Reiman's personal privacy interests nonetheless outweighs public disclosure. OPRA makes clear that concurrent with the right of the public to obtain government records is the right of citizens to a "reasonable expectation of privacy." See N.J.S.A. 47:1A-1. The New Jersey Supreme Court noted in Burnett v. County of Bergen, 198 N.J. 408 (2009), that a citizen's

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they lack custody of the accounts. Importantly, and distinguishing Larkin from the instant case, is that in Larkin, the key finding made by the court was that the accounts focused "entirely on the official business of the Borough." (Op. at 21) (emphasis added). It is axiomatic that Mayor Reiman's page is not used to conduct official Carteret business. Thus, the decision in Knight, which held that a public official may not "block" a person from a Twitter account in response to the political views that person has expressed, is inapplicable and based upon the court's characterization of the Twitter account as a public forum. Id. at 580. Moreover, and at any rate, that matter is currently being appealed to the Second Circuit Court of Appeals.

right to privacy is of a constitutional dimension pursuant to Article I, Section l of the New Jersey Constitution.

New Jersey courts have adopted a seven-factor balancing test to weigh the public's right of access against the individual's expectation of privacy. This test, as set forth in Burnett, supra, 198 N.J. at 426-27 and in Doe v. Poritz, 142 N.J. 1, 82-86 (1995), balances the: (1) type of record requested; (2) information it does or might contain; (3) potential for harm in any subsequent nonconsensual disclosure; (4) injury from disclosure to the relationship in which the record was generated; (5) adequacy of safeguards to prevent unauthorized disclosure; (6) degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

For all of the reasons set forth in Point I, A, supra, the interests of the requestor here, a "taxpayer and open government activist," do not outweigh the reasonable privacy interest of Mayor Reiman in those portions of his Facebook page which he has reasonably maintained as private, and which the Mayor uses to express his personal and political views as well as to support his campaign goals.

Moreover, the only logical conclusion to be drawn from this lawsuit is that it is intended to restrain the Mayor from deleting comments or banning users from his page, if he chooses to do so. There is, of course, a threshold defect with this intention. If Plaintiff wishes to transform the Mayor's Facebook page to an open public forum, he would be required to show that the forum he seeks access to is owned or controlled by the government, West Farms Assocs. v. State Traffic Comm'n, 951 F.2d 469, 473 (2d Cir. 1991), cert. denied 503 U.S. 985 (1992) and that the decision to exclude individuals was an exercise of governmental, rather than private authority, Flagg v. Yonkers Sav. & Loan Ass'n, 396 F.3d 178, 186 (2d Cir.), cert. denied 546 U.S. 817 (2005) ("[A] litigant claiming that his constitutional rights have been violated must first establish

that the challenged conduct constitutes 'state action.'").

Plaintiff, however, cannot show that the Mayor's decision to block certain individuals or to delete certain comments from his Facebook page, if at all, is an exercise of governmental authority. Indeed, the First Amendment does not require private property owners to allow the general public access to their property, nor does it forbid them from excluding particular members of the public that express messages that the property owners personally oppose. See, e.g., Hudgens v. NLRB, 424 U.S. 507, 513, 520-21 (1976) (holding that picketers do not have a First Amendment right to enter a privately-owned shopping center to advertise their strike against a company). The "constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." See Hudgens, supra, 424 U.S. at 513 and Harris v. Quinn, 134 S. Ct. 2618, 2628 n.4 (2014) ("[T]he First Amendment does not restrict private conduct."). Here, the Mayor's Facebook page, and its privacy settings, however, are not a public forum, for all of the reasons set forth in Point I, A, supra.

Finally, the Mayor has a strong and protected countervailing interest in being able to express his own views. Plaintiff's effort to seek public disclosure of these intimately personal decisions infringes upon Mayor Reiman's own constitutional right to free speech. His decision who to permit to comment, or not comment on his social media site is imbued with expressive content that is squarely protected under the First Amendment.

Forcing Mayor Reiman to disclose this information by virtue of a court order, on pain of causing his municipality to incur defense costs and potentially a fee award, undoubtedly would impermissibly have a chilling effect upon his own exercise of free speech. See Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 78-79 (2014) (the New Jersey Constitution guarantees a broad affirmative right to free speech: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to

restrain or abridge the liberty of speech or of the press."; citing N.J. Const. art. I, ¶ 6.; and noting that that guarantee is one of the broadest in the nation). Political speech is particularly favored. See McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 191-92 (2014) (the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office.").

Since the Facebook page is not a public forum, the Mayor has no right or obligation to permit his private page to be subject to potentially derogatory comments or ideas that are in contravention of his political aims, nor should his expressive right to determine who comments on his site be subject to public disclosure. See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 573 (1995) (a speaker has the right to tailor speech, including to statements of fact the speaker would rather avoid). Based upon the aforementioned, the speech on Mayor's Reiman's Facebook page is not a governmental or public forum, and thus Plaintiff has no right to either infringe on the Mayor's right to free speech, nor does he have a right pursuant to OPRA to the confidential and private information contained in the Mayor's personal social media sites.

POINT TWO

ATTORNEY'S FEES ARE UNWARRANTED BECAUSE THE BOROUGH HAS ACTED IN GOOD FAITH AT ALL TIMES, AND HAS NOT WRONGFULLY DENIED ACCESS TO ANY RECORDS

In an argument that is both premature and presumptuous, Plaintiff seeks an award of attorney's fees under OPRA for his effort in filing suit against the Borough. Pursuant to N.J.S.A. 47:1A-6, a "requestor who prevails in any proceeding" brought to challenge a records custodian's decision "shall be entitled to a reasonable attorney's fee." Consideration of a fee request is premature unless Plaintiff has first attained "prevailing party" status. Manifestly, Plaintiff has not prevailed on the merits at this time. Accordingly, any fee application should be rejected as premature and is lacking in substance in its own right.

Plaintiff evidently operates on the assumption that if the Borough turns over any documents after initiation of the suit, they are entitled to fees. This is not so. In Mason v. City of Hoboken, 196 N.J. 51, 71 (2008), the Court held that a requestor was not entitled to attorney's fees where a municipality disclosed documents beyond OPRA's statutory seven day limit and after suit had been filed. Indeed, the Supreme Court categorically rejected the proposition that the requestor had "prevailed" simply because the records custodian produced additional records after the suit was initiated.

The Appellate Division has likewise held that the mere fact that a requestor has prevailed on *some* aspect of an OPRA claim does not create a per se right to attorney's fees where other issues have been resolved in the records custodian's favor. See Burnett v. County of Bergen, 402 N.J. Super. 319, 346 (App. Div. 2008), aff'd in part, rev'd in part, 198 N.J. 408 (2009) (holding that the trial judge properly denied attorney's fees where the court's ruling "rendered plaintiff a non-prevailing party with respect to most of the issues raised by him in the order to

show cause."); see also North Jersey Media Group, Inc. v. State, Dept. of Personnel, 389 N.J. Super. 527, 540 (Law Div. 2006) (requestor that obtained order directing disclosure of redacted document was not a prevailing party where its original OPRA request had sought the document in unredacted form and the requestor had not sought full enforcement of its request in litigation).

Here, the Borough has acted at all times in good faith, and has expended considerable resources in promptly complying with Plaintiff's seven OPRA requests. The Borough has released all of the responsive documents, in whole or in part, to the maximum extent permitted by law. In those cases where compelled to do so, the Borough has denied access in reliance upon its good faith interpretation of the law. The Borough has correctly interpreted OPRA, and believes that its decisions will be sustained by this Court on the merits. In any event, that is a question that must await another day.

For present purposes, the Borough maintains that its denials of Request ##2 (firefighter applications and resumes) and 7 (law enforcement "Standard Operating Procedures"), initially at issue in this lawsuit, were entirely appropriate and mandated by law. As to the firefighter applications, Plaintiff concedes in his papers that he initially, impermissibly sought the entire application packages of *all* applicants, but case law only permits the Borough to disclose the name, signature and educational experience of hired candidates. When Plaintiff re-framed his request to comply with the law, which he acknowledges is correct, the Borough promptly complied. As to the Request #7, the Borough simply does not maintain Standard Operating Procedures and could have ended the matter there, but took the time to voluntarily and in good faith explain to Plaintiff that alternative documents, in the form of General Orders, do exist, and voluntarily presented Plaintiff with an index of policy-related General Orders in its possession.

In both cases, Plaintiff's requests were facially objectionable and the Borough fashioned an alternative solution voluntarily, though it was not obligated to do so, and not in response to the litigation. The litigation was not a catalyst for the production of records, rather, the production of records was motivated by Plaintiff re-framing his requests to comply with the appropriate legal parameters. Lastly, as explained above, Plaintiff is not entitled to access to the Mayor's Facebook page as a matter of law because the page is not a government record. Plaintiff simply does not have prevailing party status, and is thus not entitled a fee award.

CONCLUSION

For all of the reasons set forth herein, the relief sought in the Order to Show Cause and Verified Complaint should be denied and Plaintiff's Complaint should be dismissed with prejudice.

Respectfully submitted,

DECOTIIS, FITZPATRICK, COLE & GIBLIN LLP

By: s/Thomas A. Abbate
Thomas A. Abbate

Dated: November 30, 2018