

SUPREME COURT OF NEW JERSEY
DOCKET NO. 63,765

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THOMAS WILSON, :
Plaintiff-Petitioner, : Civil Action
 :
v. : On Appeal from a Final
 : Judgment of the Superior Court,
WILLIAM C. BROWN, Senior : Appellate Division
Associate Governor's Counsel, :
in his official capacity as :
Custodian of Records, :
 :
Defendant-Respondent, : Sat Below
 :
and : Hon. Mary Catherine Cuff, P.J.A.D.
 : Hon. Clarkson S. Fisher, Jr., J.A.D.
 : Hon. Linda G. Baxter, J.A.D.
CARLA KATZ; and COMMUNICATIONS :
WORKERS OF AMERICA, LOCAL 1034, :
 :
Intervenors-Respondents, :
and :
 :
COMMUNICATIONS WORKERS OF :
AMERICA, AFL-CIO, :
 :
Intervenor-Respondent. :
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BRIEF ON BEHALF OF DEFENDANT-RESPONDENT WILLIAM C. BROWN
IN OPPOSITION TO PETITION FOR CERTIFICATION

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PRELIMINARY STATEMENT

This Court has long recognized the critical importance of a robust executive privilege and its underlying policies promoting the Governor's ability to receive, consider, and participate in candid communications. The privilege, rooted in the constitutional separation of powers, "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).

Relying on this Court's decision in Nero, the Appellate Division reversed a lower court's unprecedented orders requiring an in camera inspection and disclosure of confidential communications of the Governor and his senior staff. After careful analysis and application of this Court's precedents, the appellate court concluded that the executive privilege shielded these communications from disclosure under both the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. (OPRA), and the common law right to know. In so holding, the court rejected the lower court's artificial distinction between gubernatorial communications with advisors and those with adversaries. Instead, the appellate court recognized that communications with adversaries and advisors alike allow the governor to access a

broad range of information and to obtain both solicited and unsolicited advice that enables him to fulfill his constitutional responsibilities.

The Appellate Division also rightly concluded that the requestor Thomas Wilson had failed to identify a sufficient reason to overcome the privilege. After weighing the significant constitutional and public policy interests favoring non-disclosure against the speculative and unfocused rationale offered by Wilson in support of release, the Appellate Division determined that the executive privilege shielded the communications from disclosure. Indeed, the court found the requestor's articulated interest so speculative that even an in camera inspection of the documents was not justified.

Because the Appellate Division's decision faithfully and thoroughly applied well-established principles and guiding legal precedents, review by this Court is not warranted, and the Petition for Certification should be denied.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

On March 27, 2007, Thomas Wilson, Chairman of the New Jersey Republican State Committee, submitted a sweeping request under the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. (OPRA) and

¹The procedural history and facts of this case are interrelated and have therefore been combined to avoid repetition and for the convenience of the Court.

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).² The purported objective of Wilson's request was to investigate whether Governor Corzine privately negotiated a collective bargaining agreement with Ms. Katz while formal labor negotiations were ongoing between September 20, 2006 and February 21, 2007. (Da19). Ms. Katz, who serves as the President of Local 1034 of the Communications Workers of America ("CWA"), a labor union representing about 8,000 State employees, and Governor Corzine were previously in a personal relationship, which ended before Mr. Corzine became Governor. (Da12). On April 5, 2007, William Brown, the designated Custodian of Records for the Office of the Governor, denied Wilson's request. (Da49-Da50).

On May 8, 2007, the Governor's Advisory Ethics Panel, composed of former Supreme Court Justice Daniel J. O'Hern and former Attorney General John J. Farmer, Jr., 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 Panel based its report on

² "Da" refers to Brown's appendix filed in the Appellate Division; "Pa" refers to Wilson's appendix filed with the Petition for Certification; "Pb" refers to Wilson's Petition.

interviews with relevant parties, internal emails, and materials relating to the collective bargaining process. (Da11-Da12).

On May 31, 2007, Wilson filed a Verified Complaint seeking release of all documents, including emails. (Da1-Da7, Da56-Da60). On June 20, 2007, Katz and Local 1034 moved to intervene. The lower 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 lower court denied Brown's motion to dismiss the Verified Complaint and announced it would undertake an in camera review of the emails responsive to Wilson's OPRA request. (Da109-Da111). On May 29, 2008, the lower court issued a written opinion. (Da146-Da164). In its opinion, the court recognized that the "executive privilege is firmly established in New Jersey," (Da155), and that the Governor's reliance on the Advisory Ethics Panel did not waive the privilege. (Da160-Da161). The lower court, however, granted access to gubernatorial communications under OPRA and the common law without appropriate consideration of executive privilege or the serious separation of powers issues at stake. Nor did the lower court vigorously evaluate whether Wilson had made a sufficient showing of need for access to the communications. The lower court

compounded these errors by contriving a distinction between gubernatorial communications with advisors and those with adversaries, holding that the latter communications are not protected.

On June 27, 2008, the lower court entered a Final Judgment and Order directing Brown to produce to Wilson all documents submitted to the court for in camera inspection, with limited exceptions. Brown appealed.

On January 12, 2009, the Appellate Division, in a unanimous decision, reversed the lower court's orders requiring an in camera inspection of the documents and disclosure of the communications. In reaching its decision, the appellate court thoroughly considered and then rejected every one of Wilson's arguments and the lower court's errors.

The Appellate Division recognized that the Governor's broad constitutional authority requires that he "have available a broad range of information and the ability to obtain solicited and unsolicited advice." Wilson v. Brown, ___ N.J. Super. ___ (App. Div. 2009), slip op. at 25-26. Consequently, a court faced with a request for access to privileged materials must "proceed in a manner which respects the foundations of the privilege and the executive's decision to invoke the privilege." Id. at 20.

The appellate court went on to reject the lower court's strained distinction between communications with advisors and those with adversaries and found that such communications fall squarely within the privilege. Id. at 25. The court correctly recognized that communications with adversaries, like communications with advisors, enable the Governor to "receive a broad range of information from diverse sources to discharge the executive function." Id. at 23.

Next, the Appellate Division weighed the Governor's interest in non-disclosure against Wilson's purported interest in disclosure. Id. at 29. Rejecting the lower court's limited analysis, the Appellate Division concluded that Wilson had failed to articulate or identify a sufficient reason to overcome the privilege. Id. at 31. Rather than a specific or focused demonstration of need, Wilson instead presented only general, "ill-defined and speculative" claims. Ibid. Indeed, these claims were so insufficient, the appellate court found that the lower court erred in ordering an in camera inspection. Id. at 3, 31.³

³The court declined to address whether Wilson's request was overly broad or whether the communications between the Governor and Katz can be considered information obtained in connection with collective negotiations and, hence, not government records. Slip op. at 37.

The Appellate Division's decision was correct and consistent with decisions of this Court, and thus, certification should be denied.

ARGUMENT

CERTIFICATION SHOULD BE DENIED BECAUSE THE APPELLATE DIVISION'S DECISION IS IN ACCORD WITH THIS COURT'S LONG-STANDING PRECEDENTS GOVERNING THE EXECUTIVE PRIVILEGE AND ACCESS TO GOVERNMENT RECORDS.

This Court will generally decline to accept an appeal that does not present an unsettled question of general public importance. R. 2:12-4; In re Contract for Route 280, 89 N.J. 1 (1982). Where the lower court decision results from the application of traditional, well-understood principles in areas of law that are long settled, certification is unwarranted. Mahony v. Danis, 95 N.J. 50, 52 (1983) (Handler, J., concurring). In addition, this Court will normally deny review if the "rights of innocent persons, or an unwary public, are not jeopardized," unless to do so would leave intact a decision that is "palpably wrong, unfair" or an "egregious miscarriage of justice." Ibid.

Certification is not justified here. Although the executive privilege is important, the Appellate Division's decision is in harmony with long-standing precedents of this Court and reached a just result.

A. The Appellate Division Correctly Determined That The Executive Privilege Shielded the Gubernatorial Communications from Disclosure under OPRA.

The reasoning and result of the Appellate Division's decision are rooted in precedent and long established constitutional principles. OPRA does not "abrogate or erode" the executive privilege established or recognized by the State Constitution, statute, court rule or judicial precedent. N.J.S.A. 47:1A-9b. Moreover, it is firmly established that the privilege may be claimed to restrict public access to a government record. Ibid. The appellate court's extensive analysis of the executive privilege is on all fours with this Court's decision in Nero and federal precedent construing the chief executive privilege, to which this Court analogized the executive privilege. Just as importantly, the Appellate Division's decision is also consonant with the public policy objectives to be achieved by the privilege. Indeed, the appellate court painstakingly applied principles taken from several of this Court's decisions concerning access to public records generally and, more particularly, the analysis to be undertaken when the government asserts a privilege.

In rendering its decision, the Appellate Division cited this Court's determination that the executive privilege "furthers a

primary objective of the 1947 Constitutional convention, namely the creation of a strong executive." Nero, supra, 76 N.J. at 226. Confidentiality protects government sources of information, enhances investigative techniques and procedures, and most significantly "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." Id. at 225-26. Thus, the privilege serves a "vital public interest" in ensuring "the effectiveness of the decision-making and investigatory duties of the executive" and promotes "the effective discharge of these constitutional duties." Id. at 226. This interest is particularly important in New Jersey where the Governor's constitutional powers make him one of the strongest chief executives in the nation. See Jack M. Sabatino, Assertion and Self-Restraint: The Exercise of Governmental Powers Distributed Under the 1947 New Jersey Constitution, 29 Rutgers L.J. 799, 803 (1998).

The Nero decision and relevant federal precedent led the Appellate Division to the correct conclusion that executive privilege protects a diverse array of communications between the chief executive and third parties, affording the Governor access to formal and informal advice, both solicited and unsolicited, to enhance his or her ability to fulfill constitutional

responsibilities. Slip op. at 23-24. Recognizing that communications with adversaries "can constitute an effective and important part of a Governor's decisionmaking process," the appellate court rejected Katz's role as "adversary" in public employee issues or the informal nature of her advice as bases for overcoming the privilege. Slip op. at 25; see N. Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9, 17 (1992). The appellate court then properly focused on whether Wilson had articulated a need sufficient to overcome the privilege and found he had not.

Wilson described 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 citizens." Slip op. at 28-29. This "interest" is based on pure speculation. Wilson has absolutely no evidence to support his suspicions. He merely hypothesizes that -- notwithstanding the Advisory Ethics Panel's findings to the contrary (Da43-Da45) -- there may be something inappropriate contained in the requested communications.

Moreover, Wilson's interest is so general it could be raised in connection with nearly all gubernatorial communications. As the Appellate Division aptly found, allowing the privilege to be pierced on this basis would chill the flow of information to the Governor and his senior staff and thwart the Governor's ability to carry out his sensitive decisional and consultative functions.

Contrary to Wilson's inaccurate assertion that the Appellate Division construed the executive privilege as "presumptive" or "absolute," (Pb6-7), the Appellate Division, in fact, employed the balancing test adopted by this Court in Nero. Slip op. at 17, 26. Weighing Wilson's interests would have been unnecessary if, as Wilson contends, the court applied the privilege presumptively. In evaluating whether Wilson's interest outweighed the public's interest in confidentiality, the Appellate Division closely examined whether Wilson had presented a "focused demonstration of need" to overcome the privilege. United States v. Nixon, 418 U.S. 683, 713, 94 S. Ct. 3090, 3110, 41 L. Ed. 2d 1039, 1067 (1974); see also In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 85 (2000) ("As with any privilege, the party seeking such documents bears the burden of showing a substantial or compelling need for them.") The appellate court found that neither Wilson's general assertion of need, Nero, supra, 76 N.J. at 216-17, nor his "vaguely defined

specter of misconduct" was sufficiently specific or focused to overcome the executive privilege. Slip. op. at 29.

In an effort to shift this Court's focus away from his speculative and ill-defined interests, Wilson repeatedly characterizes the communications as "back-channel" negotiations. This characterization disregards the Advisory Ethics Panel's unequivocal determination that, although they discussed the bargaining process, the Governor and Katz had not engaged in collective negotiations, (Da43-45), the Appellate Division's acknowledgment that some of the communications included discussions of public issues unrelated to the bargaining process, slip op. at 31, and the publicly available information that affords Wilson and the public substantially everything necessary to evaluate the outcome of the bargaining process. See N. Jersey Newspapers, supra, 127 N.J. at 18.⁴

As the Appellate Division concluded, Wilson's general, ill-defined and speculative assertion of need is insufficient to pierce the executive privilege. Because this Court's precedents

⁴ Although the Appellate Division suggests the privilege log was publicly available, slip op. at 34, the log was filed with the lower court under seal. Nevertheless, as the appellate court noted, there was substantial information publicly available including the fact the communications took place, the Advisory Panel's report, the Governor's goals for the collective negotiations, and the outcome of those negotiations.

are the foundation of the Appellate Division's decision, this Court need not grant certification.

B. The Appellate Division Properly Concluded That the Executive Privilege Shielded the Communications from Disclosure Under the Common Law Right to Know.

The Appellate Division decision does not plow new ground in its analysis of the applicability of the executive privilege to a document request under the common law right to know. Applying a long line of this Court's cases establishing the parameters for balancing competing interests surrounding access to public records, the Appellate Division correctly concluded that Wilson's interests were so speculative that he could not overcome the public's interest in preventing disclosure of documents protected by executive privilege.

This Court has determined that requestors seeking access to documents under the common law right to know must make a "greater showing than required under OPRA." Mason v. City of Hoboken, 196 N.J. 51, 67 (2008). The person must establish an interest in the subject matter, ibid., and the court must balance the person's interest in obtaining access against the State's interest in non-disclosure. Id. at 67-68; Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 47-48 (1995); South Jersey Publishing Co. v. N.J. Expressway, 124 N.J. 478, 488 (1991). As with his OPRA request,

the Appellate Division found Wilson's asserted interest in the documents insufficient to overcome the privilege.

This Court has held, "[w]here a claim of confidentiality is asserted, the applicant's interest in disclosure is more closely scrutinized." Keddie v. Rutgers, 148 N.J. 36, 49 (1997). The Appellate Division concluded that the lower court erred because it failed to consider Wilson's interest in light of the assertion of executive privilege. Slip op. at 33. A requestor must make more than a "showing of good faith and citizen status" to overcome the public interest in confidentiality, Loigman v. Kimmelman, 102 N.J. 98, 105-06 (1986), and must instead demonstrate a "particularized need that outweighs the public interest." McClain v. College Hosp., 99 N.J. 346, 351 (1985). To establish this particularized need, the court must consider "(1) the extent to which the information may be available from other sources; (2) the degree of harm that the litigant will suffer from its unavailability; and (3) the possible prejudice to the agency's investigation." Ibid. If a particularized need is established, it must then be balanced against the government's interest in confidentiality using factors this Court enumerated in Loigman. 102 N.J. at 113.

Here, employing the McClain analysis, the Appellate Division properly concluded Wilson failed to establish a particularized

need for the communications. The court recognized that substantial information relating to the communications was already available to the public to permit it to "measure what, if any, influence the relationship between the Governor and Katz, and any communications between them during the collective negotiations process, may have had against the Governor's stated goals at the commencement of the negotiations process and the final result." Slip. op. at 35.

Indeed, the Governor publicly declared his goals for the collective negotiations, stating "his commitment to achieve State employee pension and health benefit reforms." Slip op. at 3-4. During the collective bargaining process, Katz and other Local presidents publicly advocated against a change in the retirement age, opposed increased worker contributions to the pension system and employee contribution for health benefits. Id. at 4. Ultimately, the outcome of the negotiations was favorable to the State. (Da43-Da44). The agreement contained benefit concessions, including employee contributions to the cost of health insurance, increased pension contributions and an increase in the retirement age for new employees from fifty five to sixty years of age. Slip op. at 5.

Moreover, as the Appellate Division noted, even if Wilson had been able to establish a particularized need, his expressed

interest did not outweigh the public's interest in confidentiality. The court carefully considered the ramifications of release of the documents, finding that "[s]everal [of the Loigman] factors weigh heavily in favor of non-disclosure," including the need to protect government sources of information and to preclude the chilling effect that release of the documents would have on future communications. Slip op. at 36. Ironically, Wilson contends that the Appellate Division did not define the public's interest in confidentiality. (Pb10,14). However, the court recognized the public's interest in a strong executive who can discharge his executive functions "freely and effectively under a mantle of privacy and security." Nero, supra, 76 N.J. at 225-26, as well as the need to safeguard the free flow of information to the Governor.

Acknowledging Nero's directive that the Governor be "accorded a qualified power to protect the confidentiality of communications pertaining to the executive function," 76 N.J. at 225, the Appellate Division found that "Wilson's limited interest in obtaining the documents pales against the public's strong need for confidentiality essential to the Governor's responsibilities." Slip op. at 36-37. Because the Appellate Division accurately applied this Court's precedents in its

analysis of Wilson's common law request, its decision does not warrant review.

C. The Appellate Division Applied the Correct Standard for In Camera Review.

The lower court failed to evaluate thoroughly whether Wilson had established a sufficient need for the documents before ordering an in camera inspection. Relying on guidance provided by this Court, the Appellate Division properly reversed the lower court's order directing in camera review.

This Court has stated that New Jersey law is in accord with federal precedent construing the chief executive communications privilege recognized in Nixon, supra, 418 U.S. at 708, 94 S. Ct. at 3107, 41 L. Ed. 2d at 1063-64. Nero, supra, 76 N.J. at 225-26. In Nero, this Court held that the Governor's qualified power "to protect the confidentiality of communications pertaining to the executive function" 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). Consequently, the Appellate Division rightly looked to federal law to evaluate when an in camera inspection is appropriate in a case involving the assertion of the executive privilege.

Citing, as this Court has, federal precedents construing the chief executive privilege, the Appellate Division appropriately concluded that a court considering a request for access to executive communications "must proceed in a manner that respects the foundations of the privilege and the executive's decision to invoke the privilege," and should not conduct an in camera inspection of the communications "unless it determines that the requesting party has demonstrated adequate need." Slip op. at 20; see Nixon, supra, 418 U.S. at 708; In re Sealed Case, 121 F.3d 729, 744-45 (D.C. Cir. 1997); see also Cheney v. United States District Court, 542 U.S. 367, 380, 124 S. Ct. 2576, 2586, 159 L. Ed. 2d 459, 477 (2004).

Wilson failed to establish an adequate need here. Indeed, the Appellate Division found that his asserted interest was so speculative, involving only his vague suspicions, that the lower court should not have conducted an in camera inspection. The Appellate Division recognized that only in the relatively unique circumstances when the requestor 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.⁵

Such an approach is entirely consistent with this Court's decision in Loigman, supra. In Loigman, this Court recognized that the trial court must weigh the requestor's interest in the information against the need for confidentiality before proceeding to an in camera review of the materials. 102 N.J. at 105-06. This Court recognized the dilemma facing a court seeking to perform the weighing process "in the sensitive area of executive privilege if it calls for an immediate in camera review of the documents. That act alone may jeopardize the legitimate interests of the government . . . in the confidentiality of the withheld documents." Id. at 108. This Court then fashioned a two step process in which the trial court first balances the need for confidentiality against the public interest asserted by the requestor to determine whether an in camera inspection is even appropriate. Id. at 112-13. If the court concludes that in camera inspection is necessary, it must again weigh the expressed interest against the government's interest in confidentiality.

⁵Wilson argues that the Appellate Division erred because it failed to conduct an in camera inspection of the communications. (Pb19). However, it is undisputed that the Appellate Division had the entire record, including the communications and privilege log submitted under seal to both the lower court and the Appellate Division.

Id. at 113; see also In re Liquidation of Integrity Ins. Co., supra, 165 N.J. at 85 (two step inquiry in court's evaluation of assertion of deliberative process privilege--first whether requestor has advanced sufficient need for disclosure, then trial court conducts balancing test after in camera review of documents). Thus, the Appellate Division's analysis is consonant with this Court's rulings.

CONCLUSION

The Appellate Division's decision was correct, did not explore new or unsettled areas of law and reached a just conclusion. Thus, the Petition for Certification should be denied.

Respectfully submitted,

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Attorney General of New Jersey



Dated: February 26, 2009