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GANNETT SATELLITE INFORMATION NETWORK, INC. d/b/a GANNETT NEW JERSEY NEWSPAPERS/COURIER NEWS,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NUMBER: A-3999-13T1
Plaintiff-Respondent,	:	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY
vs.	:	LAW DIVISION SOMERSET COUNTY
BOROUGH OF RARITAN,	:	DOCKET NUMBER: SOM-L-1798-09
Defendant-Appellant/ Third-Party Plaintiff,	:	**Sat Below:** Hon. Yolanda Ciccone, A.J.S.C.
vs.	:	
ACTION DATA SERVICES, INC.,	:	
Third-Party Defendant.	:	

DEFENDANT-APPELLANT/IHIRD-PARTY PLAINTIFF BOROUGH OF RARITAN'S BRIEF IN OPPOSITION TO PLAINTIFF-RESPONDENT'S CROSS APPEAL AND IN REPLY TO PLAINTIFF-RESPONDENT'S OPPOSITION TO THE APPEAL

Mark S. Anderson
Robyn D. Wright
On the Brief

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PRELIMINARY STATEMENT

1. Gannett continues to perpetuate its myth that its OPRA request was for an existing government record. What it asked for was clearly a special report, which Gannett described in its own initial brief as a report. See Da12; Da28 (acknowledging that the Borough offered the "requested report" subject to the service charge). The trial court ordered the production of a report, and that is what Raritan had its payroll vendor, ADS, prepare. See Da447; Da20, ¶ 4. Gannett described the report prepared by ADS as what it had requested. See Da708. Gannett has done a good job of obfuscating the issues, but what it asked for was not an existing record.

2. Gannett's claim has morphed from its request for a special report, a "master payroll list" with specific identified information, to computer backup files maintained by Raritan's payroll vendor, ADS. See Points II A, IV *infra*. Gannett has not explained how Raritan was supposed to guess that Gannett's request was actually for computer backup files maintained by ADS.

3. Gannett did not ask for "print files", "payroll master files" or anything identified as backup information from ADS. Any discussion of what is in ADS's computer files obscures that they were not identified in Gannett's request.

4. The case is not about a legitimate desire for information. Raritan stood ready from the very beginning to provide from the information it had all of the payroll information sought. See Da14; Db13-15.

5. The case is not about PDF or non-PDF. The request for "non-PDF" is simply part of a request for a special report. See Point I B, *infra*.

6. The case has become about Gannet's focus on monumental attorneys' fees, instead of Gannett's OPRA request and Raritan's response that Gannett should pay a $1,100 fee, the amount required by ADS to produce the special report. Since Raritan reasonably requested $1,100, it complied with OPRA and the attorneys' fee issue should be a non-issue.

7. The case has been made complex by Gannett's and the trial court's focus on the wrong issues. At heart, it is primarily a question of whether Raritan could charge an amount accurately estimated by ADS for the production of a special report with contents and a format acceptable to Gannett.

8. In its preliminary statement, Gannett quotes a self-serving editorial in its own newspaper in which its editor thanked the trial court for its decision. Pb3. The inclusion of this statement is completely inappropriate, not least because it is not part of the record below. However, it reveals how Gannett has used this case to create newspaper copy and how it misuses its position as a newspaper publisher in an attempt to manipulate public opinion and pander to the trial court. Gannett wants the public (and this Court) to believe that this case is about concealment of information rather than about Gannett's attempt to custom order a report of information while refusing to pay a reasonable service charge. It is Raritan that is protecting the

public by maintaining that requestors should bear the costs for requests that require substantial programming or extensive service from an outside vendor.

LEGAL ARGUMENT

I. GANNETT MISCHARACTERIZES RARITAN'S OPRA RESPONSE. (Responding to Point I).

A. Gannett requested a custom report requiring a fee.

Gannett's brief, and indeed, its entire position, is based on a strategy of confusing the issues and mischaracterizing Raritan's response to Gannett's OPRA request. Gannett sought a report of information in "[d]igital (non-PDF)" format, requiring specific fields and times to be included. Da12.

Raritan responded to the request on October 2, 2009. Da14. The then-Borough attorney said that "the Borough" did not maintain the records "in the requested format, digital (non-PDF)" and that providing the information in the requested format would cost $1,100.00. Da14. He also said that "[i]f you wish immediate access, you may visit Borough Hall to review the information in the format in which it is kept. If you wish the information to be in the format as requested, payment must be made." Da14.

Subsequent discovery proved that Raritan's letter was correct. Raritan's payroll vendor, Action Data Services, Inc. ("ADS") only provided payroll reports to Raritan in paper and electronic PDF format. Da94:14-18; Pa17. Thus, Raritan did not maintain the information in non-PDF format. Pa17. It is also undisputed that

in 2009, ADS required a fee of $1,100 to prepare the requested report in non-PDF format. Da33.

The lawsuit was filed on October 6, 2009. Clearly, even before then, Gannett understood the basis for Raritan's response. In its Brief in Support of Order to Show Cause ("OSC"), filed with its complaint, Gannett made clear its understanding that "the Borough's payroll vendor, ADS, could provide the requested report, but that the newspaper would have to pay an $1,100 special service charge as a pre-condition to providing the records in the digital format requested." Da28.

On October 29, 2009, Raritan submitted to the trial court a certification with a memorandum from ADS further detailing the basis for the $1,100 charge. Da33. The ADS memo explained that the report sought by Gannett was "not readily available to us in the requested format" and had to be "customized for the periods of time requested." Da33. ADS also explained that "custom programming" would be required to produce the report. Da33.

As subsequent events proved, this memo was also accurate. When, in 2012, ADS produced the report sought by Gannett, it had to retrieve 39 separate payroll files from the archives and restore them to production. Da541-542. Each of the 39 files "were converted into ASCII text files" and "imported into an Access database." Da542. That process alone took almost four hours. Da542. The ADS programmer then had to "write queries against database data." Da542. The fields demanded by Gannett were not fields used in the Raritan payroll process. Da542. For

example, Gannett demanded fields labeled "base pay" and "total pay." Da542. The programmer had to match the fields requested against the fields that actually existed in the database. Da542.

Moreover, every file containing payroll information also contained Social Security numbers ("SS#s"), which, although not requested by Gannett, had to be excluded from the production. 3T106 -6 through -14; *N.J.S.A.* 47:1A-5a; Burnett v. County of Bergen, 198 N.J. 408, 437 (2009) (SS#s are private and must be redacted before public records are produced). After receiving the report, Gannett told the Special Master that these were the "exact records" that Gannett "sought in the form that it sought them." Da708.

B. The case is not really about PDF or non-PDF.

From the beginning in 2009, Gannett understood that ADS was not making a blanket statement that payroll "information" did not exist in non-PDF format. In its initial brief, Gannett argued that ADS was not denying that the information existed in non-PDF:

> More important, ***the hearsay memorandum upon which Ms. Huefner apparently relies does not even support the conclusion that ADS does not maintain the requested information in non-PDF format***! The memorandum provides:
>
> > ... ADS currently produces an earnings record report which, [sic], **can be** customized for the periods of time requested and **provided in a PDF format** on a C.D.
>
> Huefner Cert., attached Exhibit (emphasis added). Significantly then, the memorandum does not represent that the Borough's data is maintained or stored by ADS only in PDF format, the memorandum simply provides that the report ***can be provided*** in a PDF format.

Da39-40 (all emphasis in original). Thus, from the very beginning of this case, Gannett understood that as the outside

payroll vendor, only ADS could make accurate representations about the status of payroll information on its computer system, and that ADS was not denying that payroll information existed on its system in non-PDF format. See Dra3.

However, it is one thing to say that payroll "information" or "data" exists in non-PDF format on a computer system and another to say that the report described in Gannett's request exists, or that something exists that ADS could simply copy and provide, without requiring programmer labor. Gannett wants it both ways. It wants to custom order a report of "electronically stored information" with specific fields of time and information, Pb59, Da12, and then argue that that report already "exists" in non-PDF format on ADS's system simply because the information necessary to create the report exists on that system.

Payroll information existed in non-PDF format, but the specific report sought had to be created by extracting information, while excluding confidential information such as SS#s. Da33; 3T103 -22 through -25; 3T104 - 1 through - 25; 3T105-1 through -5; 3T106-6 through -14.

When a public record request seeks non-exempt information that is combined in a computer database with exempt information, the agency may extract the non-exempt information and require the requestor to pay programming charges, especially when an outside vendor imposes such charges on the agency. See Burnett, 198 N.J. at 438 (OPRA provides that requestors must pay costs if substantial manipulation is involved and citing *N.J.S.A.* 47:1A-5c

and d); Bd. of Educ. of Newark v. N.J. Dep't. of Treasury, 145 N.J. 269, 281 (1996) (under common law, requestor must pay cost of "selective copying" from computer database). See State ex rel. Gambill v. Opperman, 135 Ohio St. 3d 298, 303-05, 986 N.E.2d 931, 937-38 (Ohio S. Ct. 2013) (requestor should pay cost where outside vendor must separate exempt from nonexempt information); Hartford Courant Co. v. Freedom of Info. Comm., 261 Conn. 86, 94-95, 801 A.2d 759, 765 (2002) (where agency lacks ability to separate exempt from non-exempt information, it may retain outside programmer and pass on cost to requestor); State ex. Rel. Stephan v. Harder, 230 Kan. 573, 589-590, 641 P.2d 366, 378-379 (1982) (requestor must pay the cost of extraction of non-exempt information from database). See also Pictometry Int'l Corp. v. Freedom of Info., 307 Conn. 648, 688, 59 A.2d 172, 195 (2013) (where agency "itself would be required to incur the fee" from an outside vendor by providing copyrighted materials to requestor, agency could require the requestor to pay the fee, even in the absence of explicit statutory authorization). In this case, Raritan had no control over ADS's computer system, lacked the expertise to manipulate the data, and reasonably believed that ADS would require a programming fee. It was legally authorized to pass that fee onto Gannett.

C. Gannett argues that only Raritan's pre-litigation response is relevant, yet selectively cites later statements out of context as evidence of an OPRA violation.

At the motion *in limine*, Gannett convinced the trial court that Raritan was "stuck" with the position it advanced prior to

initiation of this action. 3T6-1 through -3; Pb17. Clearly, Raritan raised the issue of the service charge earlier. Da14; Da20,¶ 6;Da28. Yet, the trial court barred Raritan from presenting evidence on that issue. 3T11-9 through -13.

Although Gannett contends that only Raritan's pre-litigation OPRA response was relevant, in support of its argument that Raritan denied the records improperly, Gannett cites numerous documents that were created and submitted after the start of the lawsuit. Pb17-18. If the Court is going to consider statements by Raritan and ADS made after the start of this lawsuit in evaluating the sufficiency of Raritan's response, it should consider all such evidence, including the statements of ADS personnel acknowledging that payroll data existed in non-PDF format, but explaining that programming was required to respond to Gannett's request. Da43, ¶ 8; Da45; Da220:24-25; Da221:6-13. Moreover, Gannett cites documents out of context. For example:

1. In its brief, Gannett cites from a November 11, 2009 letter from ADS employee Robert Barker "[t]he Earnings Records [Report] is a PDF file only." Pb14; Da45. The letter was after Mr. Barker's deposition, and it is obvious that by "Earnings Records [Report]," he is referring to the report to Raritan, which was provided only in PDF format. See Da93:1-17; Da94:4-7.

2. Gannett cites a November 17, 2009 letter from the then-Borough Attorney Rizzo "Mr. Barker has never claimed that raw payroll data is maintained in non-PDF format." Da315. However, Rizzo did not claim to have personal knowledge about payroll

information on the ADS system. As the letter makes clear, he was characterizing Barker's statement about payroll information. Moreover, he made that statement without seeing Mr. Barker's deposition transcript, which Gannett had not supplied. Da314-315. Gannett only provided that transcript on November 18, 2009, as an attachment to a certification. Da67-68. Further, Rizzo was not a party to the telephone conversation between Gannett's counsel and Barker during which Mr. Barker allegedly told Gannett's counsel that payroll information was kept in raw data in non-PDF format. Da315. (Gannett's counsel failed to disclose to Rizzo that she intended to speak to Barker about the subject matter of the action.) Da315.

3. Gannett cites from a Raritan brief from October 30, 2009, "[t]he Borough of Raritan does not maintain its records in non-PDF ...." Da332. This was accurate. Gannett has never disproved this statement and cannot show that Raritan itself maintained records in a non-PDF format. Da94:14-18; Pa17. Raritan and ADS are distinct entities, they are adverse in this action, Raritan has no control over ADS'S computer system, and ADS made clear that it would charge for creating the report demanded by Gannett. Da31-33. Gannett's counsel even spoke to Barker about the subject matter of this action outside the presence of Raritan's counsel, which would have been a clear ethics violation if ADS and Raritan were the same entity. Da315; R.P.C. 4.2. Moreover, even ADS did not have on its system the custom report demanded by Gannett. Da12; Da541-Da542.

4. Gannett then cites two sections of a Raritan brief of August 10, 2010, in which Raritan stated that it "did not and does not maintain the records in any non-PDF format," Pb18; Da358, and that it "does not make, maintain or keep on file, nor has it received, the format requested." Da361. These are both true statements, and merely point out that Raritan itself does not have the report in non-PDF format, and can only obtain it in non-PDF format from ADS at a cost of $1,100.

5. Gannett also cites a portion of the same brief in which Raritan argued that "Gannett's assertion that ADS allegedly maintains the requested records in the non-PDF format preferred by Gannett is not supported by the record below." Da369. However, saying that ADS did not have the "requested records" in the "format preferred by Gannett" is not the same as saying that "payroll information" does not exist. The report sought by Gannett had to be created by ADS by extracting the requested information while excluding SS#s. This statement was also made by counsel after the commencement of this lawsuit and after the Barker deposition. Further, counsel was making a legal argument that the custom report sought by Gannett was not an existing "record." Only ADS could represent what payroll information was on its system.

6. Gannett cites communications from Raritan's counsel dated January 28, 2010, in which counsel argued that Gannett had not met the standard for a Motion for Reconsideration, Da319, and a letter dated May 7, 2010, in which Raritan's counsel argued that

ADS did not keep the records "in the type of non-PDF format requested by Gannett," but rather "in a format decipherable by ADS programmers and converted to PDF format for Raritan. Raritan, upon receipt of the information from ADS maintains the files in PDF format only." Da324. In fact, print files, which Gannett now maintains are responsive to its request, were kept in undecipherable format, Da213:22-25; Da214:1-23, and not formatted with the specific fields sought by Gannett. Da541-542.

Raritan's statements made after the filing of the lawsuit and that are cited out of context do not establish an OPRA violation. Gannett glides over the actual basis of Raritan's OPRA response, which is that Raritan did not have the information in non-PDF format and would be charged a fee by ADS to produce the information in that format. Da14; Da20; Da28. Moreover, at the beginning of this action, Gannett deposed Barker, Da69, and was well aware that "information" "existed" in "non-PDF format" on the ADS system, but argued, wrongly, that Raritan could not charge for programming. 1T5-12 through -21; Da40.

D. The Trial Court Erred by Granting the Motion in Limine.

At the hearing, the trial court granted a motion *in limine* excluding evidence on critical issues of the case, whether Raritan had a right to request the $1,100 service charge before providing the requested report and whether Raritan had to exclude SS#s from the report. 3T11-1 through -16.

Gannett had argued that Raritan is "stuck, for better or for worse, with the position they advanced when they denied the

request." 3T6-1 through -3. The trial court granted the motion *in limine*, saying that "[t]he issues of redaction, Gannett's common law right of access, and whether the conversion fee is an excessive 'special service charge' were specifically not considered at the initial Order to Show Cause ..." Da434. The trial court found an OPRA violation and awarded attorneys' fees even though it reserved the issues of redaction, 3T11-8 through -11, and service charge, Da447, ¶ 4, for later proceedings.

This was clearly wrong, as the issue of the service charge was raised in Raritan's letter of October 2, 2009, prior to the initiation of the lawsuit, Da14, and the issue of redaction was specifically raised in Raritan's answer to the complaint, Da35 ¶ 7, and in its brief in opposition to the OSC. Da334. Further, at the hearing for the OSC, Raritan's then-attorney explicitly argued that the $1,100 fee was "what the Borough's vendor needs in order to hire programmers to write programs to produce it in non-PDF," 1T7-7 through -9, and that "[w]hether it's stored in non-PDF or not, it cannot be generated in non-PDF without specific written programs." 1T10-17 through -19. Gannett itself addressed the issue of the service fee at the OSC hearing, arguing that Raritan could not charge the fee even if responding to Gannett's request required programming. 1T6-1 through -19.

Raritan was not required to raise the issue of redaction in its letter of October 2, 2009 because Gannett was seeking an extraction of information, and specifically did not seek SS#s, which had no purpose in its research. 3T77-3 through -19; 3T78-

12 through 13; Pb59. "[T]he electronic records requested did not include a request for social security information," and thus, there was "no 'redaction' to be done." Pb59-60. It was only after Gannett contended that it sought complete files that SS#s were implicated.

It was error for the trial court to conclude that Raritan violated OPRA and to award attorneys fees on that basis without first considering whether Raritan was authorized to request the $1,100 service charge. Da447. If the fee was authorized by OPRA, then Raritan did not violate OPRA and should not be held liable for attorneys' fees. Spectraserv, Inc. v. Middlesex County Utilities Auth., 416 N.J. Super. 565, 583 (App. Div. 2010) (requestor is not entitled to legal fees where "its OPRA request was improper and [the agency's] response was reasonable"); N.J.B.A. v. N.J. COAH, 390 N.J. Super. 166, 182 (App. Div. 2007) (finding that attorneys' fees under OPRA were not warranted when the agency proposed a "reasonable solution" to the request).

At the hearing, the trial court reserved the issues of redaction and the special service charge for a later date. 3T11-5 through -13; Da434; Da447, ¶4. Yet, the trial court concluded that Raritan violated OPRA and ordered Raritan to pay counsel fees before it decided whether Raritan was justified in requesting a special service charge. Da447. (It never decided the issue on the merits at all. Da553.) This is putting the cart before the horse.

Gannett argues that because *in limine* motions are evidentiary rulings, they must be reviewed under an abuse of discretion standard. Pb20. However, the Appellate Division does not "defer to discretionary rulings that are 'inconsistent with applicable law.'" Wellinghorst v. Arnott, 2013 N.J. Super. Unpub. LEXIS 529 *6 (App. Div. 2013)(Dra10). Motions *in limine* should not be granted where they "have the potential to summarily dispose of the case ...." Wellinghorst, *supra*, at *7 (Dra11). A motion *in limine* is not a substitute for a summary judgment motion. See Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1070 (3rd Cir. 1990). By granting Gannett's motion, the trial court prevented Raritan from demonstrating that it had not violated OPRA.

II. ADS DID NOT HAVE THE REQUESTED REPORT, AND EVERY FILE WITH PAYROLL INFORMATION ALSO HAD SS#s. (Responding to Point II).

A. Even if Raritan had the burdens, it met those burdens.

Gannett convinced the trial court to bar evidence concerning the basis for the special service charge and the need for redaction. 3T11-5 through -13; Da434. It now claims that Raritan failed to meet its burden of proof and persuasion at the hearing. Raritan did not have those burdens because it did not deny the request, it only required a $1,100 service charge to prepare a report in the format requested, the fee that ADS said that it would impose. See Mason v. City of Hoboken, 196 N.J. 51, 57 (2008) (requestor has burden of proving entitlement to legal fees unless agency has not responded at all). However, even if Raritan did have those burdens, it satisfied them by showing that a record specifically responsive to Gannett's request did not

exist on ADS'S system: Raritan did not have a file with the specific fields and time periods sought by Gannett and every file that contained payroll information also contained SS#s requiring redaction and thus programming. 3T106-2 through -14.

Gannett denies that it sought a customized report, and contends that it was seeking copies of entire files. Therefore, it is worth noting Gannett's actual OPRA request:

> Digital (non-PDF) computerized copy of the following:
>
> 1) Master payroll list of all employees paid in 2008 showing: Last name, first name, MI, department, section, hire date, job title date, job title, base pay at the end of 2008, total overtime pay for 2008, and total pay for 2008. The list should include all employees, even those who left in 2008-anyone who received a W-2 statement.
>
> 2) All of the above information but for the following time frame: Jan. 1, 2008 through June 1, 2008. This will show all the above fields but overtime and total pay would be restricted to the first six months of 2008.
>
> 3) Same as request #2, but for the time frame of Jan. 1, 2009 through June 1, 2009.
>
> 4) Please include any code sheets and field maps, if necessary.

Da12. And note that Gannett itself characterized what it "requested" as a "report" in its initial OSC brief. Da28.

At the hearing, Gannett admitted that it was not seeking entire computer files, but rather only specific portions of such files. Its representative testified that "[w]e were simply asking for a copy of the public portion of the payroll records that they maintain." 3T78-12 through 13. Gannett said that it was not seeking SS#s in its request. 3T77-3 through -14. It admitted that it only sought "[s]pecific parts of the payroll

records" rather than complete files. See 3T78-12 through -17. It expected that because the information was in a "digital format" that Raritan could "set the limitation to it," 3T54-8 through -14, and "output those records for a certain period of time for the fields that we request." 3T56-1 through -7. Gannett's request specified what the list "should include" and demanded information in time periods and with fields of information not necessarily used by Raritan. Da12; 3T137-23 through -25; 3T138-1 through -8; Da541-542.

Gannett now contends that two types of files should have been identified and produced in response to its request. The first is the "payroll master files" of raw payroll data, and their backup tapes; the second is the "print files" and their backup tapes.

1. Payroll Master Files.

As ADS manager Frank Baccaro explained, the payroll master file is "just basic raw data. It's got no information as to how much money that represents or anything in that respect; it's just pay the man 40 hours in earnings number whatever. One happens to be regular earnings. It's just indicating in the system what to do during its processing." Da204:21-25; Da205:1. At the hearing, Gannett's expert did not dispute this assertion, and admitted that ADS'S "payroll master file" likely contained "only preprocessing information" 3T117-18 through -25, 3T118-11 through -15, rather than the final categories and fields requested by Gannett or provided to Raritan. The back up tapes were simply copies of these raw data files. Pa18.

The payroll master file did not have the specific fields requested by Gannett. Moreover, the payroll master file included SS#s which could not be produced to Gannett because they are confidential. 3T103-22 through -25; 3T104-1 through -25; 3T105-1 through -5; 3T106-6 through -14 (Gannett's expert admitting that every single file included SS#s and that responsive information could be "extracted" from the files). Programmer labor was required to extract the public portions of the information and the fields sought by Gannett, while excluding SS#s.

Gannett submitted a report by its expert in which he contended that Baccaro of ADS admitted that the payroll master file contained "calculated" values. Pa37. The values may have been calculated, but that does not mean the payroll master file had the specific fields of information demanded by Gannett. Da204:21-25; Da205:1. Gannett's expert relied on Baccaro's report in reaching his conclusions and did not dispute his assertion that the payroll master file was preprocessed. 3T117-18 through -25, 3T118-11 through -15. Further, Gannett's expert report simply ignores the issues of redaction and special service charge. Pa38. The expert's conclusion that ADS could simply and inexpensively copy those files onto a disc is thus wrong, and contradicted by his own testimony that every file included SS#s.

2. Print Files.

The second type of file that Gannett claims is responsive to its request is print files and back up tapes. These are intermediate files which are "meant to instruct a printer on how

to lay out the information on a piece of paper." 3T94-5 through -7. The "only use of" the print file "is if [ADS wants to] physically send it to a printer off [the] main frame." Da214:1-2. "It's got special characters in it for headings and spaces and line controls." Da214:5-7. "[I]t's not a data file so to speak that you would use it for anything else other than printing." Da214:20-23.

A copy of a print file is included in Gannett's appendix at Pa25-Pa28. One imagines that if Raritan had produced such an unreadable file in response to a request, it would be accused of trying to conceal information from the public. In any event, as Gannett's expert admitted, print files also included SS#s, which required programming labor to exclude. 3T103-22 through -25; 3T104-1 through -25; 3T106-6 through -14. The fields and time periods specifically requested by Gannett also did not conform to the actual fields and time periods used in the print files. Da12; 3T137-23 through -25; 3T138-1 through -8; Da541-542.

Gannett requested a report of information, and its request was interpreted as such by ADS. To respond to Gannett's request, ADS testified that it would have to "*pull the data that's being specifically requested* --- and again, you're saying year-to-date information --- and place it into some specified format that is acceptable to the receiver." Da223:19-22 (emphasis added).

Thus, Raritan showed that ADS did not have on its system the custom report demanded by Gannett and that every single file that Gannett claimed was responsive to its request included SS#s that

had to be redacted. Programmer labor was required to extract the data demanded by Gannett while excluding SS#s. Raritan was barred from presenting evidence on the issues of the service charge and redaction, but nevertheless proved its case.

B. ADS did not say that it had a responsive report.

In its Point II B, Gannett argues that "ADS admitted that the non-PDF information Gannett requested did, in fact, exist and was stored and maintained by ADS." Pb22. Again, Gannett is confusing the issues. ADS acknowledged that it had payroll data on its system in non-PDF format, but repeatedly stated that responding to Gannett's request would require programming. Da221:6-13; Da114:14-25; Da115:1-2.

Gannett also argues that ADS could simply have provided the payroll master file to Gannett and Gannett could extract data from it. Pb23. However, once again, Gannett simply ignores the fact that every single file with payroll data also included confidential Social Security information. 3T106-6 through -14. Thus, even if Gannett had actually asked for complete files rather than for a customized report, ADS could not simply copy and hand over those files. See Burnett, *supra*, 198 N.J. at 437.

C. Hitchcock said that there was no responsive record.

In Point II C, Gannett argues that Raritan's expert John Hitchcock admitted that "the non-PDF information Gannett requested did, in fact, exist and was stored and maintained by ADS in at least three different locations." Pb23. This is a distortion of what Hitchcock actually said in his report:

> ADS has file[s] from which the information contemplated could be extracted, but neither Raritan nor ADS possesses an existing electronic file responsive to the request. I have also concluded that the ADS file from which the information contemplated by the request could be extracted is not amenable to redaction of confidential information by ordinary means without conversion to a different format.

Pa14. Thus, while payroll information existed on the ADS system in non-PDF format, ADS could not provide a response to Gannett's request without extensive programmer labor.

Hitchcock also explained that "'print files' contain all of the information that is ultimately printed, but are not generated for human use and are not readily human readable due to the embedded PCL code used to output a formatted paper and PDF document in the ADS payroll process used by Raritan." Pa20. He explained that a print file is not useful to a typical person because they would be unable to view the file or "extract a useful report of information." Pa22. Hitchcock stated that a copy of a print file is attached as an Exhibit A to his report. Pa25-Pa28.

Gannett argues that its request for information in "non-PDF" format should be construed as a request for print files. Gannett does not explain how a request for one thing should be understood as a request for something else.

As Hitchcock explained, a request in "non-PDF" format "tells me that the requestor does not want a particular type of file, PDF, but it does not tell me what the requestor does want." Pa19. He added that "[t]here is an endless variety of computer

file formats, so a request for 'non-PDF' is meaningless beyond the exclusion of the PDF file format." Pa19.

A proper request under OPRA must identify with reasonable clarity those documents that are desired. See Bent v. Township of Stafford, 381 N.J. Super. 30, 37 (App. Div. 2005). The requirement of reasonable clarity must be assessed on a case-by-case basis. See, e.g., Mag Entm't LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 547 (App. Div. 2005). The specific menu of information that Gannett actually requested, Da12, is not consistent with its later contention that it was seeking entire files of information. It also requested files in "non-PDF" which is exclusive and not inclusive, and which ADS reasonably assumed meant files that were understandable to an ordinary people without special programs.

Gannett argues that the intermediate print files are "exactly what Gannett requested and exactly what Raritan said did not exist." Pb25. This statement is wrong. It directly contradicts the testimony of Gannett's own representative Paul D'Ambrosio who testified that "[w]e were simply asking for a copy of the public portion of the payroll records that they maintain." 3T78-12 through 13 (emphasis added). Gannett admitted that it only sought "[s]pecific parts of the payroll records" rather than complete files. See 3T78-12 through -16. Gannett said repeatedly that it was not seeking SS#s in its OPRA request. 3T77-3 through -14. Gannett admitted that SS#s are

"confidential" and "had no purpose in our research." 3T77-13 through -14.

Yet both experts agreed that every single print file (and its backup tapes) included confidential SS#s. 3T104-1 through -25; 3T105-1 through -5; 3T106-6 through -14. Therefore, the print files were not the exact files that Gannett sought. They did not contain only the public portion of payroll records, which Gannett claims it sought. They did contain confidential SS#s, which Gannett claimed has no purpose its research, which required redaction, and which Gannett explicitly said it did not seek.

III. GANNETT DID NOT SHOW THAT ADS HAD THE REPORT REQUESTED OR A FILE THAT ADS COULD COPY AND SUPPLY; EVERY FILE WITH PAYROLL DATA ALSO INCLUDED SOCIAL SECURITY NUMBERS. (Responding to Point III).

In its Point III, Gannett once again argues that because payroll "information" existed on the ADS system in non-PDF format that a record responsive to its request existed, and implies that Raritan had a duty to copy every file that had responsive information and turn it over to Gannett. Raritan refers the Court to Points I and II of this brief, in which it explains why it could not do so and why the fact that "information" existed in the data base does not mean that ADS had either a report with the fields of information demanded by Gannett or a copy of a file that it could simply copy and provide to Gannett without incurring programmer labor.

IV. GANNETT ARGUES BOTH THAT "RAW DATA" AND "PRINT FILES" WERE THE "RECORDS" IT SOUGHT, AND THAT THE "INFORMATION" WITHIN THE FILES WAS THE "RECORDS". (Responding to Point IV).

Gannett denies that it requested a "report." It claims, rather, that it "requested non-PDF payroll information, which, in and of itself, constitutes a 'government record' under OPRA." Pb27. It argues that "electronically stored information is different from other material falling within the definition of a 'government record.'" Pb59. It claims that "it is the information itself that is the government record." Pb59.

Thus, at times Gannett argues that the "government records" are the complete payroll master files and the print files, and at other times it argues that the information within those files is the record. To compare to the non-electronic realm, is the piece of paper in the filing cabinet the record or is specific information on the piece of paper the record?

Even at the hearing, Gannett's attorney was tripped up, arguing that the issue in the case was,"[d]id they maintain the record, as we -- the document -- the information that we requested, did they have that?" 3T8-3 through 5. Gannett constantly uses the terms "record" and "information" interchangeably.

Once again, Gannett wants it both ways, depending on the context. At times, it denies that it sought a report of information extracted from the ADS'S database, and instead argues that Raritan had a duty to copy and produce entire files containing any of the payroll information sought. It ignores the

fact that Raritan could not do so because every file included SS#s, which Raritan is required to redact.

Then Gannett tries to evade the issue of SS#s by arguing that the information within the file is the public record, and not the file itself; that because Gannett only sought public information, there was no need for redaction. E.g. Pb59-60. It assumed that Raritan could simply "output" the fields that it requested. 3T56-1 through -7.

It is clear from the actual wording of Gannett's request that it was seeking an extraction of the information that it specifically requested. Da12. When it realized that programmer labor was required, Gannett shifted its position and argued that it wanted a copy of a complete file, regardless of whether it was included the specific fields of information sought. However, when Raritan points out the issue with SS#s, Gannett reverts back to its original position, which is that the individual pieces of information are the record, and that it did not ask for SS#s.

Gannett argues that it is a strange coincidence that Raritan seeks the same $1,100 fee, regardless of whether the request was for complete files or a report of information. Nothing is strange about this. The fee was always for the special report, for programmer labor required to extract the information that Gannett specifically requested while excluding SS#s. See Harder, 230 Kan. at 598, 641 P.2d at 378 (for record requests, "extraction" of public information is the "customary procedure where the bulk of the data is stored on computer tapes" with

confidential information). When ADS actually provided "the exact records" that Gannett "sought in the form that it sought them," Da708, more than four hours of labor was required, even though the fee was discounted and ultimately waived. Da494, ¶ K; Da541-542; Da543.

V. RARITAN RAISED THE ISSUE OF SPECIAL SERVICE CHARGE BEFORE LITIGATION, BUT REDACTION WAS NOT AN ISSUE AT THAT POINT. (Responding to Point V, Introduction).

Incredibly, in its Point V, Gannett argues that Raritan did not raise the issue of the special service charge until after the "initiation of litigation." Pb29-30. This assertion is plainly contradicted by the evidence. On October 2, 2009, prior to the initiation of the lawsuit, Raritan stated that "the Borough" did not maintain the records in the requested format, and that it required a $1,100 service charge for "the project" to produce a special report. Da14. In its Verified Complaint, Gannett acknowledged that it could have the report if it paid the service charge. Da20, ¶6. Gannett's claim that Raritan only raised the issue of the service charge after the initiation of the lawsuit denies the evidence and attempts to confuse the issues.

Gannett also claims that Raritan did not raise the issue of redaction until after the commencement of the lawsuit. However, Gannett cannot have it both ways. At the hearing, it said that it was only seeking specific parts of files, and expected Raritan to output the public portion of payroll records. 3T78-12 through 16. In its brief, Gannett said that "[a]s the electronic records requested did not include a request for social security

information, there [was] no 'redaction' to be done of the government records requested." Pb59-60. Thus, Raritan had no reason to raise the issue of redaction in response to Gannett's request for only the public portion of payroll files. There was, however, a need for ADS to retain a programmer to extract the information sought. Da33.

In its attempt to confuse the issues, in the heading for Point I of its brief, Gannett argues that "Raritan denied access to the requested non-PDF payroll information on the ground that the records did not exist", yet in Point V of its brief, it argues that it was only after the lawsuit began that Raritan argued that "the requested non-PDF information was not an identifiable record." Pb29. Having so severely distorted the evidentiary record, Gannett is now tangled in its own web and contradicts itself.

Gannett also claims that after the lawsuit was filed, Raritan asserted as a basis for its OPRA response that it "never denied access to the requested records". Pb29. This statement is true, as Raritan always offered the information to Gannett, even in the requested format, subject to the service charge. Moreover, this is not a "*post hoc* reason" for denial, as alleged by Gannett, but rather a defense to the allegations in Gannett's lawsuit.

The other arguments that Gannett alleges were made after the lawsuit was filed were raised in response to Gannett's shifting position. Gannett requested a specific report of information and then, after suit was filed, contended that it sought entire print

files, and it did so without even amending its OPRA request. The trial court allowed Gannett to litigate this case based on the notion that it wanted entire payroll files in non-PDF format, a position only taken by Gannett after the commencement of this lawsuit, but then precluded Raritan from explaining why it could not produce such entire files without incurring a fee from its outside vendor for exclusion of SS#s. 3T10; 3T11.

A. Gannett expected ADS to extract the information and expected Raritan to pay for the labor. (Responding to Point V A).

In its Point V A, Gannett denies that it sought a "customized" report and argues that it "did not request that the information be segregated or extracted from any other information existing in any responsive records. It simply requested that the non-PDF information be provided, regardless of the existence of any additional information." Pb31-32.

This is not what Gannett requested. It sought only specific portions of payroll records and only the non-public portions thereof. Da12; 3T77-9 through -14; 3T78-12 through 16. Because every file contained SS#s, and because SS#s had to be redacted, Raritan could not simply copy and hand over print or payroll master files. 3T103 -22 through -25; 3T104 -1 through -25; 3T105 -1 through -5; 3T106-6 through -14.

In its brief in support of the OSC, Gannett acknowledged that it sought "retrieval" of specific information from a data base, using the term "retrieval" as a synonym for "extraction." Dra7. In that brief, Gannett stated that:

> While ADS may be required to retrieve the information from its computer data base, that process cannot reasonably be characterized as the creation of a new record. The process of search and retrieval is no less a part of the retrieval process than locating a document in a file through an index, and retrieving it.
>
> The Connecticut Supreme Court aptly ruled that any programming or indexing necessary to extract the information requested from other information stored in the same data base is merely a part of the retrieval and formatting or reformatting process, and cannot reasonably be characterized as creating a new record. Hartford Courant Company v. Freedom of Information Commission, *supra*, 801 A.2d at 763-765. The New Jersey Supreme Court has also declined to characterize the process needed to extract information from a computer data base as the creation of a new record, instead referring to this retrieval process as a "selective copying from the ... existing data base." Bd. of Education of Newark v. New Jersey Dept. of the Treasury, *supra*, 145 N.J. at 281.

Dra6-7.

Thus, in its initial brief in this case, Gannett acknowledged that its request could be construed as for "selective copying" of the specific fields of electronic information sought in its OPRA request from ADS's data base. See also 1T6-1 through -6 (arguing that the Borough could not charge for programming from its vendor).

It is worth examining the two cases cited by Gannett in this early brief. In Bd. of Educ. of Newark, *supra* 145 N.J. 269 the New Jersey Supreme Court recognized that if responding to a request for electronic records requires "retrieving" or "extracting" information from an existing data base, the "cost of extracting the information" should be borne by the requestor and that "[n]o added burden" should be placed upon the agency. 145 N.J. at 281.

That is simply what Raritan tried to do in this case, impose on Gannett the cost that ADS would charge Raritan for extracting the information and creating the report requested by Gannett.

Similarly, in Hartford Courant Co., *supra*, 261 Conn. 86, the plaintiff sought a copy of "the public portion of the department's data base containing *all* adult criminal convictions." 261 Conn. at 101 (emphasis in original). The plaintiff requested "a digital copy of all of the fields of information typically produced on a Bureau of Information rap sheet for every adult within the data base" either on a tape or CD-ROM. Id. at 89. (Compare this to Gannett's request for specific fields and time periods, its specification about what the response "should include" and its refusal to accept the response as offered by Raritan. Da12).

The Connecticut Supreme Court held that the agency had to produce the information sought, but that when an "agency cannot comply with a request for information because it does not have the technological capability to separate exempt from nonexempt data," the "disclosing agency must comply with such a request either by developing a program or contracting with an outside entity to develop a program, provided that the requesting party is willing to bear the attendant costs." 261 Conn. at 94-95 (emphasis added). Raritan's OPRA response is consistent with this result.

The present case is clearly distinguishable from ACLU v. N.J. Div. of Crim. Justice, 435 N.J. Super. 533, 536 (App. Div. 2014),

upon which Gannett relies in support of its argument. In ACLU, in the course of producing records, the public agency physically blacked out information that was not requested. However, "the public agency conced[ed] the information it withheld is not supported by any claim of privilege or any other recognized exemption to disclosure in OPRA or under our State's common law right of access." 435 N.J. Super. at 534. Further, the requestor was not seeking a retrieval of specific fields of information from a computer data base, but rather copies of records in whatever format they were held. 435 N.J. at 537. The ACLU case stands for the straightforward proposition that an agency cannot redact extraneous information from records that it produces in response to an OPRA request unless there is a legal basis for redaction.

By contrast, the present case involves a request for a report of information from a computer database for specific time periods and specific fields of information. Every single file included confidential SS#s. 3T106-6 through -14. The Supreme Court has held that New Jersey citizens have a reasonable expectation of privacy in their SS#s and that those numbers must be redacted from public documents before they are produced under OPRA. Burnett, *supra*, 198 N.J. at 437. In Burnett, the Supreme Court noted that "SSNs are unique identifiers. They are closely tied to a person's financial affairs and their disclosure presents a great risk of harm." 198 N.J. at 431. "'[T]he harm that can be inflicted from the disclosure of a SSN to an unscrupulous

individual is alarming and potentially financially ruinous.'" 198 N.J. at 431-432 (quoting Greidinger v. Davis, 988 F.2d 1344, 1354-55 (4th Cir. 1993)).

Gannett claims that Raritan admitted in its answer that Gannett was seeking a government record. However, Raritan has always acknowledged that it could not withhold payroll information from the public, and admitted that the payroll reports received from ADS are public records. Da35 ¶ 12. When it filed its answer, Raritan did not know that Gannett would later claim that print files on ADS'S system were government records under OPRA.

Gannett also contends that because Raritan offered the payroll information that it had in its possession, there was no need for ADS to create a report and that it could simply hand over the non-PDF versions of reports that Raritan offered. Pb35. Once again, Gannett simply ignores the fact that every single file on ADS'S system had SS#s, which required redaction or exclusion by trained personnel. Moreover, Gannett assumes that the print files on ADS's system for the specific dates and the specific fields requested were as easily retrievable as paper copies and PDF files provided to Raritan. In fact, this was not the case, as was indisputably shown when ADS actually provided Gannett with the information ordered by the Court. Da541-542.

Next, Gannett employs a straw man tactic and responds to an argument that Raritan did not actually make. Gannett argues that Raritan claims that it "did not know what information was being

requested" or did not know what "data was 'responsive'" to Gannett's request. Pb36. Raritan made no such claim. Rather it argues that Gannett's request was confusing, complex and inconsistent because it requested a specific menu of information, to be retrieved or extracted from an electronic database, but thereafter, in an attempt to avoid paying the service charge, Gannett expected Raritan and ADS to construe its request as seeking complete files. Gannett also generally sought information in "non-PDF" format, leading ADS to reasonably conclude that it wanted the information in an understandable format.

Gannett asserts that it had no duty to negotiate with Raritan. However, it did have a duty to identify with reasonable clarity what it wanted. See Bent, *supra*, 381 N.J. Super. at 37. OPRA "encourages compromise and efforts to work through certain problematic requests." Mason, *supra*, 196 N.J. at 76. Gannett refuses to acknowledge the problematic nature of its request and that if it seeks entire files, it should request such files, rather than a menu of specifics. OPRA "does not afford the custodian time to speculate about what the requestor seeks, research, survey agency employees to determine what they considered or used, or generate new documents that provide information sought." N.J.B.A., *supra*, 390 N.J. Super. at 178. Instead of working with Raritan to clarify its request, Gannett threatened to "file suit if the requested records are not immediately provided ...." Da13. However, Gannett chose the

wrong case for a "test case" because its request was poorly written, and Raritan, in fact, could not provide the report in the requested format without incurring a fee from its vendor.

B. Raritan offered the information free as maintained, and for $1,100 exactly as requested. (Responding to V B).

The trial court was clearly wrong when it held that "the Borough unequivocally 'denied' Gannett's request for 'digital (non-PDF)' copies of the master payroll list based on the premise that the files simply did not exist." Da434. In reaching this conclusion, the trial court ignored Raritan's letter of October 2, 2009, in which it explained that it would provide the information in the format in which it was maintained as well as in the requested format subject to the service charge that Raritan's outside vendor would impose. Da14. The trial court also ignored Gannett's acknowledgement in the complaint that the issue of the service charge was raised prior to the lawsuit. Da20,¶ 6. Further, by granting the motion *in limine*, the trial court prevented Raritan from offering evidence with respect to that service charge. The trial court's refusal to consider all of the evidence with respect to Raritan's OPRA response led to the wrong conclusion and to a holding that must be reversed.

C. This Court should find that intermediate, machine-readable files on an outside vendor's computer system are not "government records". (Responding to Points V C 1 and 2).

1. It does not serve the purposes of OPRA to find that print files are government records.

Point V C of Gannett's brief addresses the issue of whether print files are government records. Raritan has argued that the

print files are indecipherable, intermediate files on the ADS computer system that Raritan did not even know existed, intended to communicate information to printers rather than to people, and that print files should not be considered government records.

There is no case in New Jersey that directly addresses this issue, and the statute defining "government record" is ambiguous, because the term "electronically stored information" can have different meanings. Db34-36. The Court must determine whether every intermediate file on every computer system used to create a government record is itself a government record, even if the agency does not see it and does not know it exists, and even if the same information is available to the requestor in the final record. The Court must decide whether such files are "made, maintained or kept on file" in the course of the agency's "official business." *N.J.S.A.* 47:1A-1.1.

Ultimately, this is an issue of legislative intent. In the hearings for OPRA, Senator Robertson observed that "there are going to be a whole host of things that we couldn't possibly anticipate, so what we should be sure to do is to maintain the right of a court to engage in that logical, sensible balancing, and if we abandon that, then I think we will have created something that will have many, many unintended results." Issues Dealing with Public Access to Government Records: Hearing on S.161, S.351, S. 573 and S. 866 Before the S. Judiciary Comm., 209th Leg. (N.J. 2000) (hereafter "Hearing"),pp. 10-11 (Pdf, pp. 16-17(www.njleg.state.nj.us/legislativepub/pubhear/030900gg.pdf).

a. Transparency in government.

The purpose of OPRA is "'to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Mason, 196 N.J. at 64 (citation omitted). It does not serve the purpose of transparency in government to hold that machine-readable intermediate files on an outside vendor's computer system are public records when if the agency does not know that they exist and they play no role in governing.

In the present case, Gannett claims that it wanted "to review and analyze the payrolls for all municipalities in a five-county area in order to understand exactly how taxpayer money was being spent, including overtime paid." Pb15. Gannett claims that there was "a propensity of local municipalities to pay high salaries to top officials through overtime, bonuses and other such means." Pb15. Raritan offered Gannett the information it needed to investigate this issue and write its story. Raritan offered Gannett "immediate access" to the payroll records that it had in its possession. Da14. Yet, Gannett did not even bother to visit Borough Hall to obtain those records. 3T71-13 through -16. Gannett did not want the information, it wanted a lawsuit. Given that payroll information was available to Gannett, it does not serve the purposes of OPRA to hold that print files on the ADS computer system are public records when Raritan did not know they existed and they played no role in governing.

Moreover, it does not serve the goal of transparency in government to require municipalities to construe requests for reports in "non-PDF" format as seeking print files. If a citizen requests information in "non-PDF" format, can an agency provide that record in Printer Control Language ("PCL"), something that the citizen cannot read and that seems indecipherable? Pa21. A citizen would assume the agency was trying to hide information.

Would it have been reasonable for Raritan or ADS to interpret Gannett's request, Da12, as seeking such print files instead of as seeking a list of specific information in readable form, such as Excel? If a requestor wants information in a format as esoteric as PCL, should not he or she have to ask for that format specifically?

b. Ease of Compliance.

Another goal of OPRA was to ease the burden on public agencies (and the public) by making compliance with record requests easier. Senator Martin explained that "it's not my thought that most municipal officials deliberately defy the law. <u>One of the intentions of my legislation is to try and make life easier and clearer</u>. I think the issues are complex, frequently, as they have a lot of law that they have to try and comply with. And I truly believe that ... this legislation ... will make clerks' jobs easier because it will make the law more clear, in terms of what they have to provide and what they don't." Hearing, pg. 68 (PDF version, pg. 74) (emphasis added).

The result in this case completely undermines that goal. Raritan is held liable for attorneys fees of over half a million dollars because its attorney did not identify print files on ADS'S Wang VS6000 computer system as responsive to Gannett's record request. Instead, the attorney stated only what he knew, which is that Raritan itself did not have a record in non-PDF format. "Research is not among the custodian's responsibilities." N.J.B.A., *supra*, 390 N.J. Super. at 177.

Adopting Gannett's construction of OPRA, any computer language used by an outside vendor as an intermediate step in creating final government records would be deemed a computer language used by the agency itself to maintain records. Municipalities would have to identify intermediate files on outside vendors' systems written in those languages, even when they hire outside vendors precisely because they lack expertise with complex computer systems. They would be responsible for identifying every intermediate computer file on the system of every outside vendor that is used to create a record that is ultimately provided to the agency just because it contains the same "information" as that record. They would also have to identify such files on their own systems, even if there is no programmer on staff to help them. These burdens will send compliance costs skyrocketing, and will provide a field day for lawyers, who can submit complex requests for electronically stored information, use discovery to try to uncover such intermediate files that the

agency failed to identify, and reap a bonanza in fees on the ground that the agency violated OPRA.

In analyzing a similar situation, the Florida Attorney General recognized that "'[a]s part of the task of manipulating data from input file to output file, any number of 'intermediate' files may be generated ... as 'tools' used to create the final intended product that represents final evidence of the knowledge to be recorded." Advisory Legal Opinion-AGO 85-87, www.myfloridalegal.com/ago.nsf/opinions/9D83E924AA819970852565760 0599FBA. The "contents" of such files "are rarely if ever reviewed by any person" and the municipal agencies may not even know that they exist. The Attorney General opined that such files are not public records. The Attorney General opinion is sensible and consistent with the result in O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534 (App. Div. 2007), discussed in more detail below.

2. Government agencies have no duty to identify whether there are outside programs that can decipher intermediate computer files and, in any event, the testimony on that issue was a net opinion. (Responding to Point V C 2).

Gannett claims that there are programs that can decipher the print files, but an agency does not have a duty to investigate such programs. See N.J.B.A., *supra*, 390 N.J. Super. at 177. Agencies have a right to assume that by "non-PDF," requestors want information in a format that is readable and understandable.

Gannet wanted non-PDF for its own convenience and claims it could have purchased a program to interpret the print files. However, Gannett could also have converted print or electronic

PDF files to non-PDF format, but rejected that option as unreliable. 3T76-3 through -13. It offered no evidence that the programs that convert PCL into readable form are any more reliable. Its expert merely claimed to have made a Google search and gave a net opinion. 4T115-12 through -17. Even if Gannett had established that there are reliable outside programs that could convert the print files into readable form, that fact is irrelevant because Raritan had no duty to investigate the existence of such files.

3. Hitchcock was familiar with print files, qualified to offer an opinion, and Gannett's expert did not dispute that they are not readable without special programs and that every print file contained Social Security numbers. (Responding to Point V C 3).

In its Point V C 3, Gannett objects to the testimony of Raritan expert John Hitchcock on the ground that he did not examine a CD of Raritan's print file at the hearing. Pb45. However, the trial court allowed Hitchcock's testimony and allowed a surrebuttal in which he stated that his opinion would not change regardless of whether the actual CD he examined was a print file or a payroll master file. 4T118-4T123. Moreover, Hitchcock testified that he is very familiar with print files and with PCL. Pa20. In any event, it was not disputed that neither type of file was readable without another program.

The "net opinion" rule provides that an expert's bare conclusion, unsupported by factual evidence, is inadmissible. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). However, Hitchcock's conclusions were based upon facts. The testimony was undisputed that the print files were written in PCL. Hitchcock

is familiar with print files, Pa20, and Baccaro testified that the print files were not understandable to an ordinary user. Da213:22-25; Da214:1-3;5-7;18-23. Moreover, Gannett's expert did not dispute Hitchcock's conclusions that print files are not understandable by themselves, and include embedded characters and are written in PCL. Pa38.

D. Intermediate files and other files kept only by ADS are not government records. (Responding to Point V D).

1. Raritan is not required to maintain payroll records in non-PDF format. (Responding to Point V D 1).

In its Point V D 1, Gannett argues that Raritan is required by law to maintain and process its payroll information pursuant to N.J.A.C. 12:16-2.1. Therefore, it concludes that the print files and payroll master files on ADS'S system are records "made, maintained or kept on file" by Raritan in the course of its "official business." *N.J.S.A.* 47:1A-1.1.

Raritan does not dispute that it is required to keep payroll records. However, Raritan is not required to make, maintain or keep on file payroll records in non-PDF format, either by OPRA or any other statute or regulation. It is undisputed that Raritan maintained its payroll records in paper and PDF format, as it had every right to do, and it offered those records to Gannett. Da14. Since Raritan is not required to maintain payroll records in non-PDF format, it had no obligation to identify such information on the computer system of its outside vendor. "[E]ven if the requested documents ... exist in the files of outside" parties, that does not mean that "they were, by law,

required to be 'made, maintained or kept on file' by the custodian so as to justify any relief or remedy under OPRA." Bent, *supra*, 381 N.J. Super. at 39.

This is not a case where Raritan secreted non-PDF records with a third-party in order to keep those records from the public. Raritan was paying for a service from an outside vendor and was not required to understand the workings of that vendor's computer system.

2. The print and payroll master files were created as part of ADS's business, not Raritan's. (Responding to Point V D 2).

In its Point V D 2, Gannett argues that the print and preprocessed payroll files at issue are part of Raritan's "official business." However, these are created internally by ADS as a part of ADS's business of processing payroll information. 3T95-3 through -6. The files presumably serve ADS's business purposes, but they do not serve any "official business" of Rartan. Therefore, they do not meet the "made, maintained or kept on file in the course of ... official business" test in the OPRA definition of "Government Record". *N.J.S.A.* 47:1A-1.1.

It is one thing to say, as this Court did in Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), that an agency cannot hide public information by delegating its creation and retention to a third party. The Court in that case was clearly concerned with promoting the "policy of transparency that underlies OPRA" and ensuring that agencies do not use third

parties to withhold information that the public should have. 415 N.J. Super. at 517.

It is quite another thing, however, to say that any computer language used by an outside vendor to provide services to the agency is also a computer language used by the agency, and that any intermediate file on an outside vendor's system used to create the record provided to the government is itself a government record.

Clearly, ADS is not an instrumentality of government or a public agency within the meaning of OPRA. Paff v. Atl. City Alliance, Inc., 2013 N.J. Super. Unpub. LEXIS 2127 at *9 (App. Div. 2013)(Dral4). ADS is a private entity. There is no suggestion that it receives public funds other than for providing a service; its internal computer files play no role whatsoever in Raritan's decision making process; Raritan does not control ADS; Raritan did not create ADS; and ADS functions for its own purposes rather than for the public. While Raritan cannot use ADS to hide public information, that did not happen here. The Court should not expand the holding in County of Gloucester to find that every file that ADS used to create the reports that it provided to Raritan is itself a public record and that every language ADS uses in its Wang VS6000 system is also a language used by Raritan to maintain records.

3. The holding of O'Shea applies; it is Raritan's file that constitutes the government record. (Responding to Point V D 3).

In its Point V D 3, Gannett misstates the holding of O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534 (App. Div. 2007).

Gannett argues that O'Shea is distinguishable from this case because it involved consultative material. Pb54. However, while the Court recognized that the handwritten notes at issue "might be considered 'intra-agency consultative material'", it also concluded that "they are not 'government records' at all." 391 N.J. Super. at 538. The Court wanted to avoid "absurd results" that were not "contemplated or required by OPRA." 391 N.J. Super. at 538-539. It would be equally absurd to require Raritan's attorney to identify intermediate, indecipherable print files on the ADS system that he did not even know existed as responsive to Gannett's request.

Gannett denies that print files and payroll master files are intermediate files, but it is hard to describe them as anything else. They are intermediate steps between the information that is input at Borough Hall and the PDF files that are output and actually provided to Raritan, as even Gannett's expert admits. See Pa36.

E. It was proper to request a $1,100 charge pursuant to *N.J.S.A.* 47:1A-5c, 47:1A-5d and the common law. (Responding to V E).

In its heading for point V E, Gannett argues that "[t]he trial court correctly rejected Raritan's argument" that it was entitled to a service charge. Pb56. This is a misstatement of what actually occurred. In fact, the trial court never considered on the merits whether Raritan had the right to request the charge when it responded to the OPRA request. 3T11-5 through -13; Da434; Da447, ¶ 4.

Gannett also claims Raritan "ignores" *N.J.S.A.* 47:1A-5b, which provides that "access to electronic records" shall be provided free of charge. Raritan did not "ignore" the statute; it simply has no bearing on the present facts. That statute is intended to ensure that agencies do not profit when providing access to electronic information. It does not address whether the agency may recover when programming or manipulation of computer information is required. It also does not address the issue of whether taxpayers or requestors bear the cost when an outside vendor charges the agency for programming. Moreover, even *N.J.S.A.* 47:1A-5b reflects the legislative intent that the agency recover its "actual costs" in responding to an OPRA request.

The statute that does explicitly address the issue of programming and manipulation of information technology is *N.J.S.A.* 47:1A-5d. A statute with language that specifically addresses an issue takes precedence over a statute with more general language. Wilson v. Unsatisfied Claim & Judgment Fund Bd., 109 N.J. 271, 278 (1988). Because *N.J.S.A.* 47:1A-5d specifically addresses the issue of programming, it takes precedence over section 5b. Section 5d plainly allows agencies to require a service charge when a request requires "a substantial amount of manipulation or programming of information technology."

Next, Gannett argues that *N.J.S.A.* 47:1A-5d does not apply because the information sought "already exist[ed] in electronic format" and thus, did not have to be "converted" to "paper,

microfilm, audio tape, or otherwise." Pb59. However, while Raritan had the information in an electronic medium, the format in which the information was held was PDF, which Gannett rejected, instead demanding non-PDF, which required programmer labor to provide.

Then Gannett denies that the programming required was substantial or extraordinary. However, responding to Gannett's request required significant labor by an experienced programmer. Da541-542. In the context of public records laws, a request that requires at least four hours of programmer time is substantial, extraordinary and involves "extensive use of information technology resources." See e.g. Fla. Stat. § 119.07 (4)(d)(2014) (allowing a "special service charge" for requests requiring "extensive use of information technology resources"); Board of County Com'rs v. Colby, 976 So.2d 31, 35 (Fla. 2d DCA 2008) (upholding a special service charge for "extensive use of information technology resources" where County defined "extensive" as a request that "will take more than 15 minutes to locate, review for confidential information, copy and refile the requested material"); Ga. Code Ann. § 50-18-71(c)(1) (2014)(Georgia statute allowing "a reasonable charge" for "search, retrieval, or redaction of records" exceeding one quarter of an hour); N.D.Cent.Code § 44-04-18.3(2014) (North Dakota statute allowing a public agency to charge the "actual cost" if request "requires extensive use of information

technology resources" and defining "extensive" as requiring more than one hour).

Moreover, requiring an agency to pay an outside programmer to manipulate data to respond to a request is also "substantial" and "extraordinary." E.g. Burnett, *supra*, 198 N.J. at 438. This policy is also consistent with the laws of other states, which require requestors, rather than taxpayers, to assume the costs of outside vendors. E.g. Hartford Courant Co., *supra*, 261 Conn. at 94-95, 801 A.2d at 765(2002) ("where an agency cannot comply with a request for information because it does not have the technological capability to separate exempt from nonexempt data" the agency must "comply with such a request either by developing a program or contracting with an outside entity to develop a program, provided that the requesting party is willing to bear the attendant costs"); Neb. Rev. Stat. § 84-712(3)(b)(2014) (allowing agency to charge a fee for "computer run time, any necessary analysis and programming by ... [a] third-party information technology services company contracted to provide computer services"); Office of Open Records Counsel of Tennessee, Schedule of Reasonable Charges for Copies of Public Records, http://www.comptroller.tn.gov/repository/OpenRecords/FormsSchedulePoliciesGuidelines/ScheduleOfReasonableCharges.pdf (allowing agency to recover costs charged by an "outside vendor to produce copies of requested records" where "the custodian is legitimately unable to produce the copies in his/her office" and allowing agency to assess the requestor the cost where the agency "is

assessed a charge to retrieve requested records from archives or any other entity having possession of requested records"); N.Y. Pub. Off. Law § 87.1(c)(iii)(iv); § 89.3(a)(2014) (allowing agency to pass on the "actual cost to the agency of engaging an outside professional service to prepare a copy of a record" which includes the cost of engaging "an outside professional service to provide copying, programming or other services required to provide the copy"). See also Pictometry Intern., *supra*, 307 Conn. at 195 (where "agency itself would be required to incur [a] fee" from an outside vendor to respond to a request, agency can charge requestor for the fee, even in the absence of statutory authorization); State ex. Rel. Gambill, *supra*, 135 Ohio St. 3d. at 305, 986 N.E.2d at 937-38(allowing agency to charge plaintiff where "requested data ... was intertwined with exempt software ... [and agency] would be charged by a private company to extract the requested data").

In passing N.J.S.A 47:1A-5d, the Legislature recognized that there are costs involved in programming and manipulation of computers, and that agencies should recoup those costs from requestors where the labor is substantial. This is standard practice in public records laws. E.g. Cal. Gov't Code § 6253.9(b)(2)(2014) (requestor shall bear the cost of "programming and computer services" when the request requires "compilation, extraction, or programming" to produce the record); Mo.Rev.Stat. § 610-026.1(2)(2014) ("[i]f programming is required beyond the customary and usual level to comply with a request for records or

information, the fees for compliance may include the actual costs of such programming"); Mont. Code Ann. § 2-6-110(2)(b)(2014) (allowing agency to charge "expenses incurred by the agency as a result of mainframe and midtier processing charges"); N.M. Stat. Ann. § 14-3-15.1 (F)(2014) (requiring fee if "information contained in a database is searched, manipulated or retrieved"); Or. Rev. Stat. § 192.440(4)(a)(2013)(allowing fees "reasonably calculated to reimburse the public body" for the actual cost of "summarizing, compiling or tailoring the public records, either in organization or media, to meet the person's request"); Tex. Gov't Code Ann. § 552.231 (a)(2) (allowing agency to charge fee when request requires "programming or manipulation of data" to provide record in the requested form); Utah Code Ann. § 63G-2-203 (2)(allowing a fee for "compiling, formatting, manipulating, packaging, summarizing, or tailoring the record" when the record is compiled in a form other than that normally maintained by the government agency); Wyo. Stat. § 16-4-202(d)(i)(2014)(the "party making the request" shall bear the cost "of constructing the record, including the cost of programming and computer services").

Like New Jersey, those states are committed to full and open access to public records. However, like New Jersey, they avoid having their taxpayers subsidize requests from data miners, media corporations and the like that require extensive programming. It begs credulity to believe that the New Jersey Legislature intended to place yet another financial burden on the backs of

its beleaguered taxpayers by forcing them to subsidize the costs of extensive programming. It will wreak havoc on municipal budgets if this Court upholds a decision that: (1) requires agencies to locate files not identified in a request; (2) requires agencies to identify print and other intermediate files on outside vendors' computer systems; (3) requires agencies to manipulate data in a computer system with which they lack expertise; and (4) prevents the agency from recouping the costs of that manipulation.

Our Supreme Court has recognized that the Legislature intended that requestors bear the costs of requests requiring extensive time and effort:

> OPRA provides that costs may be passed on to requestors. The statute allows for recovery of actual duplication costs. *N.J.S.A.* 47:1A-5b. In addition, requestors may be assessed costs for preparation work involved in responding to a request. *See N.J.S.A.* 47:1A-5c (allowing reasonable special service charge when records cannot be reproduced using ordinary equipment or reproduction involves extraordinary expenditure of time and effort); *N.J.S.A.* 47:1A-5d (allowing reasonable special charge if "a substantial amount of manipulation" is required).

Burnett, *supra*, 198 N.J. at 438.

N.J.S.A. 47:1A-5d expressly allows agencies to provide service charges for substantial programming labor. Because the programming and manipulation required in the present case was substantial, this Court should find that Raritan was legally authorized to request the $1,100 fee and reverse the trial court's decision below. Indeed, while paragraph 5d explicitly allows service charges for requests involving substantial

programming, *N.J.S.A.* 47:1A-5c should also be construed to allow a charge in this instance.

In Burnett, the Supreme Court's approach to interpreting OPRA was instructive. The Court was forced to reconcile a specific provision of OPRA, *N.J.S.A.* 47:1A-5a, which explicitly required the disclosure of SS#s in certain cases, with the policy of protecting reasonable expectations of privacy. *N.J.S.A.* 47:1A-1. The Court rejected a literal reading of *N.J.S.A.* 47:1A-5a because it conflicted with the intent of the Legislature:

> Ordinarily, specific language in a statute takes precedent over more general language. Wilson v. Unsatisfied Claim & Judgment Fund Bd. 109 N.J. 271, 278 , 536 A.2d 752 (1988). Under that common approach to statutory construction, section 5's precise language about SSN's would prevail over section 1's more broadly worded privacy warning. However, because a literal reading of section 5 could lead to absurd results, we cannot stop at its plain language. See M.S. v. Millburn Police Dep't, 197 N.J. 236, 250, 962 A.2d 515 (2008).

Burnett, 198 N.J. at 424-425.

The Supreme Court relied on *N.J.S.A.* 47:1A-5c as well as d in finding that a requestor had to pay the cost of redacting SS#s from microfilm, a cost that stretched into the six figures. If 5c only applies to the traditional definition of "printed matter," then it would not have applied in Burnett, because technically microfilm is not printed matter. See e.g. 37 CFR Part 202, App. B (distinguishing between microform and printed matter). Yet, the Court recognized the policy and intent of OPRA in having requestors bear the cost of extraordinary requests and substantial programming. The Legislature did not intend the

bizarre result that requestors pay for extraordinary expenses only for printed matter, but taxpayers assume the costs of programming and manipulation of information technology.

VI and VII. SUMMARY JUDGMENT FOR GANNETT AND DENIAL OF SUMMARY JUDGMENT FOR RARITAN MUST BE REVERSED BECAUSE SERVICE CHARGE AND REDACTION WERE NOT MOOT. (Responding to Points VI and VII).

A. The service charge.

In 2009, ADS told Raritan it would impose an $1,100 service charge to provide the information in non-PDF format. Da33. Raritan then passed that charge onto Gannett. The legality of Raritan's OPRA response must be judged by its conduct in 2009, not three years later, in 2012, when ADS mysteriously decided to waive the charge. Da540; Spectraserv, Inc., *supra*, 416 N.J. Super. at 583 (requestor is not entitled to legal fees where "its OPRA request was improper and [the agency's] response was reasonable"); N.J.B.A, *supra*, 390 N.J. Super. at 182 (finding that attorneys' fees under OPRA were not warranted when the agency proposed a "reasonable solution" to the request).

Yet, the trial court granted summary judgment to Gannett on the issue of the service charge because in 2012, three years after Gannett's request, ADS waived its service charge. Da553. This is absurd, and completely inconsistent with the position that Raritan's response must be evaluated by its pre-litigation posture. Raritan could not possibly have known in 2009 that ADS would waive the fee in 2012. Gannett argues that Raritan will gain a "windfall" of $1,100 if the grant of summary judgment is reversed, but as Raritan made clear in its brief, Raritan is not

asking for a check for $1,100, but rather a finding that Raritan's OPRA response was reasonable.

It is well settled that statutes must be read to avoid absurd and impractical results, even when doing so is in contrast to the literal meaning of the statute. Burnett, *supra*, 198 N.J. at 424-425; M.S. v. Millburn Police Dep't, 197 N.J. 236, 250 (2008). See also O'Shea, *supra*, 391 N.J. Super. at 538-539 (rejecting an interpretation of OPRA that would lead to absurd results). Statutes must be read "sensibly rather than literally." Schierstead v. Brigantine, 29 N.J. 220, 230 (1959). The grant of summary judgment led to an absurd, impractical result that punishes Raritan for not predicting in 2009 that ADS would waive the service charge in 2012.

B. Raritan's summary judgment motion.

The trial court also denied Raritan's cross motion for summary judgment on the issue of redaction, finding that the issue was "moot" because Raritan excluded SS#s when it complied with the Court's order of November 13, 2012. Da555. However, the issue of whether in 2009, ADS could simply copy and hand over an entire file without excluding SS#s is a genuine controversy that bears directly on the existing controversy over attorney fees. See Greenfield v. N.J. Dept. of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006)(issue is moot where it can have no practical effect on existing controversy). The trial court excluded the issue of redaction at the hearing, 3T11-8 through -13; ordered Raritan to provide the report to Gannett before it

addressed the issue of redaction, Da446-447; and then held that the issue was moot because in complying with the order, Raritan excluded SS#s. Da555. This is also an absurd and impractical result. Obviously, the issue of redaction bore on whether Raritan was justified in requesting the service charge. Therefore, the trial court should not have dismissed the issue as moot, and should have granted Raritan's motion.

IX. THE AWARD OF ATTORNEYS' FEES MUST BE REVERSED.

A. Gannett is responsible for its fees, and the trial court's award of $590,051.07 is wrong. (Responding to Point IX A).

Gannett accuses Raritan of a "scorched earth" strategy in this case, as though Raritan is to blame for its exorbitant fees. Pb3. It is worth noting therefore the myriad ways in which Gannett caused fees to increase. It submitted a request for a report of information, then denied that it did so. Rather than amend its request or cooperate with Raritan, it filed a lawsuit four days after making its request. It filed an action in court rather than before the Government Records Council. It hired expensive attorneys and regularly overstaffed the case. Da711; Da714. It filed an interlocutory appeal that this Court determined was improper. Da138. It convinced the trial court to exclude evidence on critical issues at the beginning of the hearing, and then to grant summary judgment and never decide those issues at all.

B. The Amount of Fees Awarded is Unreasonable.

1. Expert reports are not required for attorney fee applications.

In its Point IX B 1, Gannett argues that Raritan only provided its counsel's uncertified opinion in challenging the award of legal fees. However, expert opinions are not required in attorney fee disputes. Wolosky v. Sparta, 2012 N.J. Super. Unpub. LEXIS 2722 (App. Div. 2012) (Da871,873). Rather, "[t]he court, either trial or appellate, is itself an expert on the question [of attorneys fees] and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses to value." Campbell v. Green, 112 F.2d 143, 144 (5th Cir. 1940). A "request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

Raritan submitted its counsel's certification. Da604. He is clearly qualified to opine on the issue of reasonable attorney's fees, and, as the Special Master recognized, contended that $140 per hour "should be used as a benchmark." Da695. Raritan provided sufficient evidence with respect to reasonable fees, and, in any event, did not have the burden of proof.

2. The hourly rates charged by Gannett were excessive.

Gannett argues that Raritan "did not provide a single certified statement identifying a reasonable hourly rate ...." Pb71. This is the same argument answered above. (See response to Point IX B 1 above). Da604, ¶2; Da676-677. The Special

Master and the trial court are not required to accept the certifications submitted by the so-called "prevailing party," but may use their own expertise to determine when rates are excessive.

In support of its argument that its hourly rate was reasonable, Gannett cites a transcript of an oral decision in another case. Pa215. Notably, in that case, the trial court also found that Gannett's hours were "unreasonable" and reduced them. Pa217. The total fees in that case were $26,909 a far cry from the almost $600,000 in fees awarded in this case. Pa217. Moreover, in that case, Gannett's conduct in causing the increase in fees may not have been as egregious as in this case.

Gannett also cites M&J Comprelli Realty, Inc. v. Town of Harrison, 2012 N.J. Super. Unpub. LEXIS 1964 (App. Div. 2012) (Pa225). There, the total amount awarded in an OPRA case seeking voluminous documents and several requests was $28,951.36. Pa228. Plaintiff had originally sought $67,365.50, plus $1,897.86 in costs and disbursements. Pa228. Moreover, in that case, the requestor worked with the town to narrow its request instead of rushing to the courthouse to rack up legal fees.

The cases cited by Gannett prove how outlandish its fee award is, especially when Gannett's legal maneuvering convinced the trial court hear this case in a piecemeal fashion and then to avoid addressing the critical issues.

C. Gannett's fees should be reduced to reflect its limited success. (Responding to Points IX C and F).

Gannett forced both parties to incur unnecessary fees by filing an unsuccessful interlocutory appeal. The Court must exclude hours that are unnecessary, and consider the extent to which a party's action have caused any excess expenses to be incurred. Szczepanski v. Newcomb Medical Ctr., 141 N.J. 346, 366 (1995); Rendine v. Pantzer, 141 N.J. 292, 335 (1995). "Fees should not be awarded against a party for time expended by an obstructing party, especially where the obstructed party may as a result fail to succeed in establishing his or her position." Yueh v. Yueh, 329 N.J. Super. 447, 465 (App. Div. 2000). Gannett was awarded fees for applications that it lost or partially lost. The trial court abused its discretion in failing to consider these issues.

D. The Special Master and trial court abused their discretion by not considering "the amount involved" in this action.

In its appellate brief, Raritan argued that the Special Master erred in failing to consider the "amount involved" in this action. Db52. R.P.C. 1.5(a)(4) clearly provides that the amount involved is a factor in determining reasonable attorney fees. Gannett ignores both the Rule and the cases cited by Raritan in support of its position. It argues that fee awards do not have to be strictly proportional to the amount in dispute. However, while fees need not be "strictly proportional," the "amount involved" is a factor in an attorneys' fee dispute that must be considered. NJDPM v. New Jersey Dep't of Correct., 185 N.J. 137,

155 (2005) ("the court also should consider the factors enumerated in RPC 1.5(a)" in OPRA cases). The Special Master failed to consider the "amount involved" at all in this dispute. Da710-711.

E. Taxpayers should not have to subsidize Gannett's decision to hire expensive attorneys to pursue its corporate interests.

The Special Master found that "Gannett's substantial legal fee expenditure in this case was not just to win this case about a single town's records. Gannett was (and is) trying to establish legal precedent that it can use for years to come to access New Jersey government records in 'digital (non-PDF) computerized' form without paying a service charge." Da701.

Yet, the Special Master also found that "what may be a reasonable expenditure of legal fees by Gannett to meet its corporate objectives of establishing precedent ... is not necessarily a reasonable hourly rate or a reasonable amount of hours in a fee shifting OPRA case, dealing with one town's records." Da701.

The Special Master failed to reduce the fees enough to account for the fact that Raritan taxpayers are being forced to subsidize Gannett's corporate interests. Contrary to Gannett's argument that the attorney fee award was a "cost of law enforcement," Pb75, the fee in this case is a transfer from taxpayers to Gannett to help it establish a precedent that it can custom order reports of information without paying a service charge.

F. Addressed in Point C above.

G. It is outrageous to award Gannett over $70,000 just for its fee application.

The fee award for the fee application is almost 17% of the fee award for the underlying case. Da835. Gannett cites cases stating that time spent on the fee application is "compensable," but it does not address the argument that such applications do not justify the same rates as work on the substantive issues in the case. Robb v. Ridgewood Bd. of Educ.. 269 N.J. Super. 394, 411 (Ch. Div. 1993). Neither the trial court nor the Special Master reduced the rate for time spent working on the fee application.

"[A] fee award for hours devoted to the preparation of a fee application should be reduced when plaintiffs do not achieve complete success on the fee petition." Robb, *supra*, 269 N.J. Super. at 412. Yet, Gannett's fees were not reduced to account for its failure to achieve an enhancement or to recoup 100% of its fees. It did not achieve complete success on its attorney fee application, as it sought $992,933.62 in fees, Da681, but was awarded $501,471 from the Special Master and an additional $46,989.30 from the trial court, exclusive of costs.

H. The fees should have been reduced because this was a test case.

Raritan does not repeat here the arguments made in IX E above addressing the impropriety of forcing Raritan taxpayers to subsidize Gannett's corporate interests.

Gannett argues that it needed the information requested to investigate "the spending habits of government entities in New

Jersey." Pb78. Yet, it never even followed up on Raritan's offer to provide the records in the format in which they were maintained. 3T71-13 through -16. Clearly, this was a test case.

Gannett argues that "it would have cost Gannett an exorbitant amount of money" if every other town responded by charging $1,100 for payroll records. Pb79. This assumes that other towns, like Raritan, do not keep records in non-PDF format, an assumption dispelled by Gannett's testimony at the hearing. 3T51-5 through -10 (acknowledging that some towns produced files in Excel). Moreover, at the hearing itself, Gannett argued that "if every one of those 86 municipalities" from whom it requested records charged what Raritan did, then it "would have cost Gannett $94,600 ...." 3T19 -5through-7; 3T19-14 through -15. Thus, Gannett seeks about a million dollars in legal fees (including its original request and the enhancement) when by its own admission at most $94,600 was at stake. Yet, it claims its fees are reasonable and that Raritan should pay them.

X. THE UNFUNDED MANDATES ACT APPLIES. (Responding to Point X).

Gannett argues that the Unfunded Mandates Act, *N.J.S.A.* 52:13H-1 to 22 (the "Act") does not apply to OPRA because it only applies to provisions enacted on or after January 17, 1996. Pb81. However, OPRA replaced the Right-to-Know Law in 2001. Mag Ent't, *supra*, 375 N.J. Super. at 544 n.2. The provision limiting attorneys' fees to $500 was replaced by a provision allowing "reasonable" attorneys' fees to the prevailing party. *N.J.S.A.* 47:1A-6. Moreover, by its own language, the Act applies to any

"provision of a law" enacted after on or after January 17, 1996. *N.J.S.A.* 52:13H-2. Because the provision allowing uncapped "reasonable" fees to a prevailing party was adopted after January 17, 1996, the Act applies.

Gannett next denies that the Act imposes an unfunded mandate. If this Court allows requestors to demand custom reports of information from agencies and then requires agencies to pay for the cost of programming or redaction that those demands entail, it will most certainly cost extra money to municipalities. Gannett ignores this issue in its brief.

Finally, Gannett argues that Raritan has not exhausted its administrative remedies. However, the doctrine of exhaustion is relaxed where the interests of justice require and to avoid needless delay. Nolan v. Fitzpatrick, 9 N.J. 477, 485 (1952). See also Elizabeth Educ. Ass'n v. Board of Educ., 2011 N.J. Super. Unpub. LEXIS 3065 (App. Div. 2011) (Dra15) (issuing decision under the Act even though plaintiff had not submitted claim to Council on Local Mandates). It would cause needless delay to force Raritan to bring this issue before the Council on Local Mandates.

GANNETT'S CROSS APPEAL

XI. GANNETT'S REQUEST FOR AN ENHANCEMENT WAS PROPERLY DENIED. (Responding to Point XI).

In its cross appeal, Gannett claims that an award of $590,051.07 in fees and costs is not sufficient compensation and seeks a 50% enhancement as well.

Gannett's attorneys were well paid for their time and there was no risk of nonpayment. There is no reason to transfer yet more money from Raritan taxpayers to either Gannett or its attorneys. Gannett's request for an enhancement is unseemly, and undermines any claim that it is acting in the best interests of taxpayers.

The purpose of an enhancement of legal fees is to compensate for the risk of nonpayment when the attorney's payment is entirely or substantially contingent on a successful outcome. Rendine, *supra*, 141 N.J. at 338. In deciding to whether to grant an enhancement, the court's job "simply will be to determine whether a case was taken on a contingent basis, whether the attorney was able to mitigate the risk of nonpayment in any way, and whether other economic risks were aggravated by the contingency of payment ...." Rendine, *supra*, 141 N.J. at 339(citation omitted).

It is only in exceptional circumstances that enhancements are granted in OPRA cases. "Ordinarily, the facts of an OPRA case will not warrant enhancement of the lodestar because the economic risk in securing access to a particular government record will be

minimal." NJDPM, *supra*, 185 N.J. at 157. There will be, however, "unusual circumstances [that] occasionally may justify an upward adjustment of the lodestar." Id.

The Special Master distinguished NJDPM and rejected Gannett's request for an enhancement because he found that there was no risk of nonpayment to Gannett:

> Gannett's attorneys billed their client monthly and were promptly paid. Consequently, there was no risk to Gannett's lawyers of not being paid if they lost the case. Gannett's attorneys were highly qualified, were part of large law firms, and billed at market rates. Gannett itself had a net income of $622M as of December 26, 2010. (Anderson Cert., Ex. A). In contrast to Gannett and its counsel, NJDPM was an "unincorporated grassroots association" that was attempting to effect change in New Jersey's use of the death penalty. It procured the services of a lawyer (Mr. Walsh) who worked for free for NJDPM on the OPRA request, mostly at night and on weekends, as he had another job. His ultimate fee request as a prevailing party under OPRA was a lodestar of 89.5 hours of work at $155 an hour. Here, Gannett's lodestar request is for an amount almost a hundred times the amount in NJDPM.

Da690-691. Moreover, it is not clear whether the enhancement would be paid to Gannett or to its attorneys. Gannett has already paid the attorneys the full amount agreed upon. Da690. On the other hand, as the Special Master pointed out, if the enhancement were paid to Gannett, then it would "profit" from its OPRA fee application, which is contrary to the intent of OPRA. Da691.

There is no claim by Gannett that any part of its attorneys' fee was contingent upon a successful outcome. Furthermore, given the amounts Gannett was willing to pay its attorney, "[t]his is not a case where the denial of the fee enhancement would discourage future attorneys in OPRA cases from working for

Gannett or any other large, well-funded, corporate media entity." Da691.

Moreover, Gannett's risk of failure in securing the requested documents was not high. As the Special Master acknowledged, "Raritan was always willing to provide the documents to Gannett ...." Da690. Gannett could have easily obtained the documents and, using its own resources, converted them into whatever format it desired. For an $1,100 fee, Gannett could even have obtained the report from ADS in non-PDF format. Any elevated risks of failure fall squarely on Gannett. It chose to make this a test case, spending hundreds of thousands of dollars.

Gannett argues that the public importance of this case justifies an enhancement. However, all OPRA cases involve public documents, and presumably matters of public importance. Yet, only in "unusual" cases is a fee enhancement warranted. NJDPM, *supra*, 195 N.J. at 157. Allowing an enhancement in this case would suggest that every case of first impression under OPRA would warrant enhancement. This result is not contemplated by the legislature.

Finally, Gannett argues that it should have been awarded 100% of its fees and costs. Pb85. The Special Master correctly recommended a reduction of fees because the time spent was excessive, the case was overstaffed, and Gannett improperly tried to bill Raritan taxpayers for its attorneys' overhead. Da713-715. The fees should have been reduced by much more.

CONCLUSION

For the foregoing reasons, Raritan respectfully requests that this Court reverse the decision below and find that Raritan's response to the OPRA request was legal and authorized.

WOOLSON SUTPHEN ANDERSON, P.C.

Dated: October 9, 2014

By: 
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