

## **New Jersey Supreme Court Adopts Common Interest Rule for Attorney-Client Communications and Attorney Work Product**

On July 21, 2014, the Supreme Court of New Jersey issued its decision in *Martin E. O'Boyle v. Borough of Longport*,<sup>1</sup> a case that examined the interplay of the common interest rule, attorney-client privilege, and work product protection on the one hand and the New Jersey Open Public Records Act (“OPRA”) and the common law right to access government records on the other. The court ruled that the attorney-client privilege and work product doctrine shield the disclosure of documents otherwise accessible under OPRA. The court further held that a showing of “particularized need” must be made to obtain privileged documents under the common law right of access. *O'Boyle* was the first time the Supreme Court of New Jersey addressed the common interest rule.

### **I. Background and Procedural History**

Plaintiff Martin E. O'Boyle sought to compel Defendants Borough of Longport and Longport's Clerk and Custodian of Records to produce certain letters and CDs pursuant to OPRA and the common law right of access. The underlying dispute arose when Plaintiff filed several complaints against the Borough and its public officials regarding governance of the Borough. The public officials hired a private attorney, and the Borough retained a municipal attorney. The private attorney and the municipal attorney agreed to cooperate with one another in the defense of litigation filed or to be filed by Plaintiff. To that end, the private attorney prepared a joint strategy memorandum and a compilation of documents contained on CDs and sent them to the municipal attorney. Plaintiff submitted OPRA and common law right of access requests to the Borough Clerk to obtain, *inter alia*, documents exchanged between the two attorneys. Defendants filed a timely response, producing all but six documents exchanged between the two attorneys on the grounds that those documents were privileged. Plaintiff filed a complaint in the Superior Court to obtain the withheld documents.

The Superior Court dismissed the complaint, holding that the documents were not public records subject to production pursuant to OPRA or the common law right of access. On appeal, the Appellate Division assumed that the withheld documents constituted work product of the private attorney and held that they were shielded from disclosure. The Appellate Division invoked the common interest rule, finding that the Borough and the public officials shared a common interest that permitted the documents to be withheld. The court recognized that the common interest rule applied with equal force to communications protected by the attorney-client privilege and the work product doctrine. Finally, the Appellate Division concluded that the withheld documents were not subject to production pursuant to the common law right of access because Plaintiff's interest in access to the documents did not overcome the Borough's interest in withholding documents prepared by its attorney in anticipation of litigation.

### **II. The New Jersey Supreme Court's Decision**

The New Jersey Supreme Court affirmed the decision of the Appellate Division, concluding that the attorney-client privilege and work product doctrine shielded disclosure of documents otherwise accessible under OPRA. The New Jersey Supreme Court held that the Appellate Division properly determined that the Borough and the public officials shared a common interest and that Plaintiff failed to show a “particularized need” sufficient to obtain privileged documents under the common law right of access. Thus, the court concluded, neither OPRA nor the common law permitted access to the shared work product that Plaintiff sought.

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<sup>1</sup> *Martin E. O'Boyle v. Borough of Longport*, No. A-16-12, 070999, slip op. (N.J. July 21, 2014), available at <http://www.judiciary.state.nj.us/opinions/140721/A-16-12.pdf>.

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The New Jersey Supreme Court expressly adopted the common interest rule articulated in *LaPorta v. Gloucester County Board of Chosen Freeholders*.<sup>2</sup> The Supreme Court stated that the common interest rule will extend the protections of the work product doctrine and attorney-client privilege over documents shared among counsel for different parties if the disclosure is made (1) due to actual or anticipated litigation, (2) to further a common interest, and (3) in a manner to preserve the confidentiality of the disclosed materials and to prevent disclosure to adverse parties. Under *LaPorta* and *O'Boyle*, the disclosure may occur before the start of litigation; the common interest need not be identical; and communications between counsel for one party and a representative of another party with a common interest will preserve protection over the disclosed information. Here, the court concluded that the private attorney's work product remained protected despite disclosure to the municipal attorney because the materials were shared in anticipation of litigation to further a common interest and in a manner calculated to preserve their confidentiality.

Finally, the New Jersey Supreme Court held that the common law right of access to public records was unavailable because Plaintiff failed to show a "particularized need" for the privileged materials sought. The court stated that to determine whether the common law right of access applies to a particular set of records, a court must first determine whether the documents in question are "public records." Second, the party seeking disclosure must show he has an interest in the public records. If the records are privileged, the requesting party must articulate a "particularized need." Finally, once the requestor's interest is shown, the burden shifts to the public entity to establish that its need for protection outweighs the requestor's need for disclosure. Here, the court declined to determine whether the materials at issue were public records. Instead, the court concluded that Plaintiff failed to express a particularized need for the documents. Thus, Plaintiff failed to satisfy the common law standard for right of access to these documents.

### III. Significance of the Decision

The common interest rule adopted by the New Jersey Supreme Court in *O'Boyle v. Borough of Longport* allows the free flow of information among attorneys who represent multiple parties who share a common interest while affording the parties represented by such counsel the ability to invoke the rule to limit full disclosure of shared information to adverse third parties.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or [cgilman@cahill.com](mailto:cgilman@cahill.com); Joel Kurtzberg at 212.701.3120 or [jkurtzberg@cahill.com](mailto:jkurtzberg@cahill.com); Jon Mark at 212.701.3100 or [jmark@cahill.com](mailto:jmark@cahill.com); John Schuster at 212.701.3323 or [jschuster@cahill.com](mailto:jschuster@cahill.com); or Maryana Lyakhovetsky at 212.701.3684 or [mlyakhovetsky@cahill.com](mailto:mlyakhovetsky@cahill.com).

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<sup>2</sup> *LaPorta v. Gloucester County Board of Chosen Freeholders*, 340 N.J. Super. 254 (App. Div. 2001).