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This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2514-16T4

CONRAD J. BENEDETTO,

Plaintiff-Respondent,

v.

MARLENA RUSSO¹ and COUNTY OF
UNION,

Defendants-Appellants.

Argued May 15, 2018 – Decided June 4, 2018

Before Judges Reisner and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Docket No.
L-3323-16.

April C. Bauknight, Assistant County Counsel,
argued the cause for appellants (Robert E.
Barry, Union County Counsel, attorney; April
C. Bauknight, on the briefs).

Walter M. Luers argued the cause for
respondent.

PER CURIAM

¹ Marlena Russo is the Open Public Records Act compliance manager for Union County.

Defendants Marlina Russo and County of Union (County) appeal from a February 6, 2017 order denying reconsideration of a January 3, 2017 order compelling the County to provide documents pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -18. We affirm.

On June 6, 2016, plaintiff Conrad J. Benedetto submitted an OPRA request to the County for "all [i]ncident reports of any [s]uicide within the County Correctional Facility from January 1, 2009 to present" and "all [i]ncident reports of any suspicious death within the County Correctional Facility from January 1, 2009 to present." The County sought clarification of the term "suspicious." Plaintiff replied that "suspicious" deaths included "suicides and drug overdose[s]."

The County denied plaintiff's OPRA request. The County asserted that "N.J.S.A. 47:1A-9; N.J.S.A. 47:1A-1.1 et seq.; Executive Order 26 (2002), paragraph 4b.1; and N.J.A.C. 10A:31-6.10" exempted the documents from OPRA disclosure.

On July 18, 2016, plaintiff responded by explaining why the County's cited exemptions did not apply to the requested documents. Plaintiff asked the County to reconsider its denial, stating that if the County declined to re-examine its position, plaintiff intended to file an OPRA complaint.

When the County failed to reconsider, plaintiff filed a verified complaint and order to show cause (OTSC) seeking the release of the documents under OPRA. Defendants filed an answer.

At the OTSC hearing, the County relied on N.J.A.C. 10A:31-6.10 as the basis for exempting disclosure of the documents. This regulation designates inmates' medical and psychiatric records as confidential and exempt from disclosure under OPRA. The judge found the cited regulation did not bar disclosure of the information sought by plaintiff as he was seeking incident reports, not medical records. In addition, the judge enlarged the forty-five day limitation period for plaintiff's OPRA action based on the public interest in the matter and an emergent medical issue requiring substitution of plaintiff's counsel. In a January 3, 2017 order, the judge directed defendants to release the records, with the redaction of personal identifiers, in accordance with OPRA.

Defendants filed a motion for reconsideration of the January 3, 2017 order. The County repeated its argument that N.J.A.C. 10A:31-6.10 precluded disclosure of the records. On reconsideration, defense counsel claimed for the first time that the County did not maintain logs or records of inmate deaths and such information was contained only in each inmate's medical

record. The County failed to provide an affidavit or certification in support of its asserted claim.

On February 6, 2017, the judge denied defendants' reconsideration motion, finding the County's disagreement with her prior ruling was insufficient and no new evidence or case law was presented. The judge also expressed disbelief that the County Correctional Facility did not maintain records related to inmates who died in jail.

Defendants appeal from the February 6, 2017 order denying reconsideration.² Defendants argue the judge erred by (1) declining to deem the documents exempt from disclosure under N.J.A.C. 10A:31-6.10, and (2) extending the forty-five day time period for the filing of plaintiff's OPRA complaint.³

Plaintiff requests we limit our review to defendants' appeal from the February 6, 2017 order. See R. 2:5-1(f)(3)(A); ("[I]t is clear that it is only the judgments or orders or parts thereof designated in the notice of appeal which are subject to the appeal

² Defendants did not appeal from the January 3, 2017 order.

³ Defendants did not include the portion of the judge's decision enlarging the time period for filing an OPRA complaint in their motion for reconsideration. Therefore, defendants waived any claim concerning that issue on appeal. See State ex rel. Comm'r of Transp. v. Marlton Plaza Assocs., 426 N.J. Super. 337, 357 (App. Div. 2012).

process and review." Pressler & Verniero, Current N.J. Court Rules, cmt. 6.1 on R. 2:5-1(a) (2018)).

Where the order appealed from is substantively related to or premised upon an earlier, non-designated order, we may choose to address the merits of the underlying order. See, e.g., N. Jersey Neurosurgical Assocs., PA v. Clarendon Nat'l Ins. Co., 401 N.J. Super. 186, 196 (App. Div. 2008). This is particularly true if the respondent does not object to such review. See W.H. Indus., Inc. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 458-59 (App. Div. 2008).

We choose to consider defendants' appellate arguments related to the merits of the January 3, 2017 order because the arguments on reconsideration, resulting in the February 6, 2017 order, were substantively the same as the arguments related to the earlier order. In addition, we note that plaintiff fully briefed the January 3, 2017 order in his merits brief.

A trial court's "determinations about the applicability of OPRA and its exemptions are legal conclusions, and are therefore subject to de novo review." Carter v. Doe (In re N.J. Firemen's Ass'n Obligation), 230 N.J. 258, 273-74 (2017) (citations omitted); see also N. Jersey Media Grp., Inc. v. State, Office of Governor, 451 N.J. Super. 282, 301 (App. Div. 2017).

Defendants argue the judge erred in compelling disclosure of the documents under OPRA because the documents are exempt under N.J.A.C. 10A:31-6.10. According to defendants, the cited regulation precludes disclosure because "[i]nformation about a suicide contains a medical, psychiatric or psychological history, diagnosis, treatment or evaluation" and thus is exempt pursuant to N.J.A.C. 10A:31-6.10(a)(4). Defendants further argue information relating to drug overdoses falls within the exemption for "alcohol, drugs or other substance abuse information, testing, assessment, evaluation report, summary, history, recommendation or treatment" pursuant to N.J.A.C. 10A:31-6.10(a)(3).

While defendants maintain the requested information is exempt as a medical record, there is no supporting affidavit or certification to substantiate that claim. Defense counsel's brief states "those who commit suicide have attempted to commit suicide in the past," and "an inmate who may have suffered a drug overdose often has information within their records pertaining to medical, psychiatric or psychological history, diagnosis, treatment or evaluation." Neither assertion in defendants' appeal brief is supported by legally competent evidence in the trial court record. Rule 1:6-6 requires that "facts not appearing of record or not judicially noticeable," may be considered "on affidavits made on personal knowledge, setting forth only facts which are admissible

in evidence to which the affiant is competent to testify." R. 1:6-6. Because defendants did not support their asserted OPRA exemption with legally competent evidence, the trial court properly rejected it.

In this case, plaintiff sought "incident reports" identifying "suspicious" deaths at the County Correctional Facility for a seven year period. Plaintiff never requested inmate medical records. Having reviewed the record, we find the judge properly compelled disclosure of the requested documents in accordance with OPRA because defendants' claimed exemption was inapplicable plaintiff's requested information.

We next address defendants' motion for reconsideration. Reconsideration is a matter within the sound discretion of the trial court, which we review for abuse of discretion. See Palombi v. Palombi, 414 N.J. Super. 274, 288-89 (App. Div. 2010). Reconsideration "is not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue a motion." In re Estate of Brown, 448 N.J. Super. 252, 268 (App. Div. 2017) (quoting Palombi, 414 N.J. Super. at 288). Reconsideration is applicable only when "the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or . . . it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent

evidence." Ibid. (first and third alterations in original) (quoting Palombi, 414 N.J. Super. at 288).

Defendants failed to proffer any basis for the judge's reconsideration of her January 3, 2017, other than their disagreement with the decision. We discern no abuse of discretion in the judge's denial of defendants' reconsideration motion under the circumstances.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION