

# **OPRA Request**

## **Borough of South Bound Brook**

***Submitted on 05/24/10 via E-Mail to DKazar@SouthBoundBrook.com***

**To the Custodian of Records:** Please accept this as my request for government records. Please note that the Open Public Records Act (OPRA) is not the only basis for my request. I claim entitlement to the records sought under both OPRA and the Common Law right of access.

**Requestor's Name:** John Paff  
**Address:** DO NOT use regular mail either for replying to this request or or sending me the responsive records.  
**Please use e-mail or fax instead.**  
**Phone:** 732-873-1251  
**FAX:** 908-325-0129  
**E-Mail:** paff@pobox.com

### **Background**

I am informed by postings on a public forum that a) Robert Verry recently requested from the Borough of South Bound Brook the "Investigation Report including, but not limited to, Property / Evidence Report, Miranda Warning(s), and all Supplemental Reports associated with Docket No. 09-2178."

The forum postings further inform me that the Borough has advised Mr. Verry that there is a record responsive to his request(s) but that it would cost \$375 to have the Borough Attorney redact it. I am further informed that Mr. Verry has filed two complaints with the Government Records Council (GRC) in order to challenge the Borough's handling of his requests.

In his postings, Mr. Verry states that the Borough's reluctance to provide the requested records suggests that the subject of the police investigation is "someone involved in local government." He also states that "the longer it takes to get the 'Police Investigation File' the longer this subject will be out there for discussion."

This is a perfect example of a situation I've encountered many times: Where a government agency's apparent stonewalling raises a public perception that something is being covered up. Since Mr. Verry elected to file his complaints with the GRC instead of the Superior Court, and since the GRC typically takes a year to eighteen months to adjudicate a complaint, the cloud of suspicion regarding whether the Borough is engaged in a cover-up will be part of the public discourse for some time to come.

In my experience in similar cases, when the records are finally made available, it often becomes evident that there was no cover-up. The net results, however, are a) the taxpayers have paid their agency's lawyer (and perhaps the requestor's lawyer) substantial legal fees arising out of the Open Public Records Act (OPRA) enforcement action and b) every agency official has needlessly lived under a cloud of suspicion that they or a member of their family were the target of a police investigation.

I certainly can't blame Mr. Verry for making the request or for enforcing his rights under the OPRA. Since we all live in New Jersey, we have grown accustomed to public officials who actually do engage in cover-ups (just read the newspapers on any given day). But, it seems that there ought to be a more reasonable and less expensive way for the public to be able to satisfy itself that nothing nefarious is going on (or to confirm that something nefarious IS actually going on) than going through a long and expensive GRC proceeding.

Thus, I wish to request a smaller, and hopefully less expensive, set of records which will enable the public to determine the identities of the subject(s) of the police investigation bearing Docket No. 09-2178, or at least the nature of the investigation. I will begin with the following request, and if this one does not bear fruit, I will make subsequent requests.

**RECORDS REQUESTED:**

For whatever record or set of records that the Borough asserts is responsive to Mr. Verry's recent request (i.e. the records that relate to Docket No. 09-2178 and for which the Borough is seeking \$375 to redact), I wish to obtain copies of all pages of that record or set of records that are NOT in need of any redaction.

To: "Donal Kazar" <DKazar@SouthBoundBrook.com>  
From: John Paff <paff@pobox.com>  
Subject: RE: OPRA request  
Cc:  
Bcc:  
Attached:

Don:

Thanks, I'll wait to hear from Mr. Cooper.

John

At 01:31 PM 5/24/2010, Donal Kazar wrote:  
John,

I received the request and see that you already sent it to Mr. Cooper and I will allow Mr. Cooper response to this request. For the record, Mr. Verry has filed many times for the same request. This was an active investigation with the Somerset County Prosecutor's Office and just recently it was released from that office. The investigation involved the Mayor's Wife's family but the Prosecutor's found no case. Now what Mr. Verry is requesting a report which involves a minor and that information has to be retracted from the report. I don't know anything about police reports or what should be retracted as it's involves a minor. So that is why I'm using Mr. Cooper to review the report and make the necessary retractions. Without reviewing the 100 +/- pages there is no way to tell where the minor was mentioned in the report. I think I'm doing the right thing and is charging for the cost of the attorney to do that. I need to protect the minor as I don't want to accused of releasing information that shouldn't have been. Why should the taxpayers be responsible for that cost for someone who wants the records.

Thanks

Donald E. Kazar  
Borough Clerk  
Borough of South Bound Brook  
12 Main Street  
So.Bound Brook. NJ 08880  
Office: 732-356-0258 ext. 13  
Fax: 732-560-1524  
Email: Dkazar@SouthBoundBrook.com

-----Original Message-----  
From: John Paff [<mailto:paff@pobox.com>]  
Sent: Monday, May 24, 2010 12:20 PM  
To: Donal Kazar

Cc: WTCEsq2@aol.com  
Subject: OPRA request

Dear Don:

Would you please acknowledge your receipt of the attached records request?

Thank you.

John

cc. Bill Cooper

No virus found in this incoming message.

Checked by AVG - [www.avg.com](http://www.avg.com)

Version: 9.0.819 / Virus Database: 271.1.1/2893 - Release Date: 05/24/10 02:26:00

To: wtcesq2@aol.com  
From: John Paff <paff@pobox.com>  
Subject: Re: OPRA request  
Cc:  
Bcc:  
Attached:

Bill:

The Borough, for each record that is within the scope of the request, is burdened with satisfying both prongs of the criminal investigatory (CI) exception: 1) that the record must "not be required by law to be made," and b) that the record must "pertain[ ] to any criminal investigation or related civil enforcement proceeding." O'Shea v. Township of West Milford 410 N.J.Super. 371, 380-81 (A.D.,2009).

For example, suppose that among the perhaps hundreds of pages of responsive records is a photograph taken from a local convenience store's surveillance camera showing a person vandalizing a car in the store's parking lot. I would argue that the CI exception does not apply to that photo because it doesn't "pertain" to a criminal investigation. ("Pertain," depending on how you define it, could either mean that the record was created by the police as part of the investigation or that the record merely was used during the investigation. Since OPRA has to be interpreted in favor of access, Renna v. County of Union, 407 N.J.Super. 230, 238-39 (App. Div. 2009), OPRA's use of the word "pertains" must be construed to mean a record that refers to, or was created as part of, an investigation. Since the hypothetical photo at issue was created prior to any infestation and was taken by a non-governmental camera that routinely monitors the parking lot, it would not come under the CI exception.)

However, if the South Bound Brook Police had set up the camera in order to catch the person who was reportedly vandalizing cars, then the photo may very well fall under the CI exception.

Similarly, suppose that among the perhaps hundreds of pages of records is a report that, although not required by law to be kept, is required by an Attorney General directive or policy to be kept. Then, the record would not be exempt as CI because it satisfies OPRA's "required by law" standard in the same way that the Use of Force Reports did in O'Shea.

So, without knowing the nature of the records within the scope of Mr. Verry's request, it is impossible for me to tell whether the CI exception applies.

But, it may be that it is not even necessary to evaluate OPRA's CI exception because a common law analysis may be dispositive. OPRA expressly states, "[n]othing contained in [OPRA] shall be construed as limiting the common law right of access to a government record, including CRIMINAL INVESTIGATORY RECORDS of a law enforcement agency" (emphasis added). N.J.S.A. 47:1A-8.

In a 01:31 PM, 5/24/2010 e-mail to me, Clerk Kazar wrote that the requested records relate to "an active investigation with the Somerset County Prosecutor's Office" that "involved the Mayor's Wife's family" and resulted in the prosecutor filing no charges.

This, at least arguably, suggests the possibility of preferential treatment, thus making the public's interest in the records greater than had the person investigated been someone with fewer political connections. (See, for example, Shuttleworth v. City of Camden, 258 N.J.Super. 573, 595 (App. Div. 1992) in which the court released an autopsy report of an arrestee who was shot while in police custody. The Court said that "in the absence of any ongoing homicide investigation, and indeed

precisely because the investigation was closed without the filing of charges, we agree with the trial judge's conclusion that the public interest would be served by release of the autopsy report.")

So, what compelling reason can the Borough articulate for confidentiality that would override the public's legitimate need to know whether or not a member of the Mayor's wife family was not treated preferentially by the police and prosecutor?

Remember, I'm looking only for those pages of the records within the scope of Mr. Verry's request that do not need to be redacted. So, if there are any pages that don't need to be redacted, I believe that I ought to have a common law right, and perhaps a statutory right, to access some of them.

John.

At 01:22 PM 5/25/2010, wtcesq2@aol.com wrote:

John,

Please note that this is not the Boro's official response.

I have looked at this issue from several positions and I keep returning to the general proposition that police investigatory records fall under a general exception to NJSA 47:1A-1. I am relying in part on O'Shea v Tp of W. Milford, 410 NJS 371 (AD 2009). My reading of that case leaves me with the conclusion that these materials would not be available. I believe my correspondence to Mr Verry may have been in error on this point.

I would appreciate it your input on this point before I commit Don Kazar and/ or the Boro to a specific position.

Thanks

Bill Cooper

-----Original Message-----

From: John Paff <paff@pobox.com>  
To: DKazar@SouthBoundBrook.com  
Cc: WTCESQ2@aol.com  
Sent: Mon, May 24, 2010 12:19 pm  
Subject: OPRA request

Dear Don:

Would you please acknowledge your receipt of the attached records request?

Thank you.

John

cc. Bill Cooper

No virus found in this incoming message.

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Version: 9.0.819 / Virus Database: 271.1.1/2895 - Release Date: 05/25/10 02:26:00

May 28, 2010

Mr. John Paff  
via e-mail - [paff@pobox.com](mailto:paff@pobox.com)

**Re: OPRA Request dated May 25, 2010**

Dear Mr. Paff:

This correspondence will acknowledge receipt of the above referenced OPRA request. The requested materials involve criminal investigatory records which are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Please be advised that the Borough takes this position after a careful review and due consideration.

Should you have any questions regarding this response, please feel free to contact this office.

Very truly yours,

WILLIAM T. COOPER, III

WTC/jh

cc: Mr. Donald E. Kazar

# OPRA Request

## Borough of South Bound Brook

*Submitted on 05/28/10 via E-Mail to DKazar@SouthBoundBrook.com*

**To the Custodian of Records:** Please accept this as my request for government records. Please note that the Open Public Records Act (OPRA) is not the only basis for my request. I claim entitlement to the records sought under both OPRA and the Common Law right of access.

**Requestor's Name:** John Paff  
**Address:** DO NOT use regular mail  
**Phone:** 732-873-1251  
**FAX:** 908-325-0129  
**E-Mail:** paff@pobox.com

### **RECORDS REQUESTED:**

An on-site inspection of whatever records the Borough previously determined to be responsive to Mr. Verry's recent OPRA request (i.e. the records that relate to Docket No. 09-2178 and for which the Borough is seeking \$375 to redact).

# John Paff

P.O. Box 5424  
Somerset, NJ 08875-5424  
E-mail – paff@pobox.com  
May 28, 2010

Telephone – 732-873-1251

Fax – 908-325-0129

William T. Cooper, III, Esq.  
25 W High St  
Somerville, NJ 08876 (via e-mail to [wtcesq2@aol.com](mailto:wtcesq2@aol.com) )

Dear Mr. Cooper:

I am in receipt of your letter of today advising me that my May 24, 2010<sup>1</sup> records request is being denied in its entirety because "[t]he requested materials involve criminal investigatory records which are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1."

Please note, however, that my request was made not only under the Open Public Records Act (OPRA), but also under the common law right of access. Even if OPRA's "criminal investigatory record" exemption applies, I may still have a right of access under the common law<sup>2</sup>.

Attached is another records request that seeks a broader category of records than the one previously submitted. In responding, would you please let me know that you've considered my request under both OPRA and the common law?

In his May 24, 2010 e-mail to me, Clerk Donald Kazar revealed five important details:

1. That the records Mr. Verry requested "involved the Mayor's Wife's family."
2. That the records pertained to a matter that "**was** an active investigation with the Somerset County Prosecutor's Office" (i.e. the investigation is now apparently closed).
3. The Prosecutor's Office, after its investigation, elected to file no charges.
4. The records responsive to Mr. Verry's request consisted of "100 +/- pages."
5. The responsive records make reference to a minor. (It is unknown whether the minor is the person being investigated, the victim of the alleged illegal activity or something else.)

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<sup>1</sup> Received by the Borough on May 25, 2010.

<sup>2</sup> Nothing [in OPRA] shall be construed as limiting the common law right of access to a government record, **including criminal investigatory records of a law enforcement agency**. N.J.S.A. 47:1A-8 (emphasis supplied).

So, it looks to me as if a member of the "Mayor's Wife's family" (perhaps the Mayor himself?) was accused of some sort of illegality and that the Somerset County Prosecutor's office investigated but decided not to file charges.

Now, I'm looking to see some of the investigation's underlying records so that I can satisfy what I believe is the public's legitimate need to know whether the prosecutor's decision to not press charges was reasonable and not result of preferential treatment. No matter what I learn from reviewing these records, I will place it on the nj.com South Bound Brook forum in response to Mr. Verry's postings on the same investigation. If something important is revealed, I would also contact the media.

Attached to this letter is the very recent unpublished Appellate Division case of Rosenberg v. Norcross. This case shows that courts, when determining a requestor's common law right to access records, are "to provide specific reasons, on a document-by-document basis, explaining why each document was protected, or not protected, from disclosure." So, when responding to the attached request, please do not provide general, conclusory reasons for denying any records that you feel should not be disclosed. Rather, provide me with something specific enough to allow me to determine whether your denial is justified. Also, I would appreciate it if you would identify the records that make up the "100 +/- pages" that are the subject of this request and for which access is denied.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to be 'John Paff', written in a cursive style.

John Paff

cc. Donald Kazar, Clerk, w/ encl. (via e-mail to [DKazar@SouthBoundBrook.com](mailto:DKazar@SouthBoundBrook.com) )

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-6440-08T3

TED M. ROSENBERG,

Plaintiff-Appellant,

and

GEORGE E. NORCROSS, III; MARK  
NEISSER; HENRY CHUDZINSKI; R.  
LOUIS GALLAGHER, II; JCA  
ASSOCIATES, INC.; PHILADELPHIA  
NEWSPAPERS, INC.; NEWARK MORNING  
LEDGER COMPANY, publisher of  
The Star Ledger; NEW YORK TIMES  
COMPANY; RECORD OF BERGEN COUNTY;  
BURLINGTON COUNTY TIMES and  
COURIER-POST,

Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY DEPARTMENT  
OF LAW AND PUBLIC SAFETY, DIVISION  
OF CRIMINAL JUSTICE and STATE OF  
NEW JERSEY,

Defendant-Respondent.

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Argued May 3, 2010 - Decided May 26, 2010

Before Judges Lisa, Baxter and Coburn.

On appeal from the Superior Court of New  
Jersey, Law Division, Burlington County,  
Docket No. L-147-05.

Ted M. Rosenberg, appellant, argued the cause pro se.

Lisa Sarnoff Gochman, Deputy Attorney General, argued the cause for respondent State of New Jersey (Paula T. Dow, Attorney General, attorney; Ms. Gochman, of counsel and on the brief).

PER CURIAM

In Rosenberg v. New Jersey Department of Law and Public Safety, Division of Criminal Justice, 396 N.J. Super. 565, 581 (App. Div. 2007) (Rosenberg I), we remanded to the Law Division with instructions that the court should review anew the documents plaintiff Ted M. Rosenberg had sought from defendant, New Jersey Department of Law and Public Safety, Division of Criminal Justice (DCJ). We concluded that the judge's August 28, 2006 letter opinion upholding DCJ's refusal to provide the documents lacked specific factual findings and was so conclusory as to frustrate appellate review. Ibid. Consequently, we directed the judge upon remand to make detailed findings of fact concerning the contents of the documents, to apply the Loigman v. Kimmelman, 102 N.J. 98, 113 (1986), factors, and to provide specific reasons, on a document-by-document basis, explaining why each document was protected, or not protected, from disclosure. Rosenberg I, supra, 396 N.J. Super. at 581.

We agree with plaintiff's contention that the remand opinion issued on February 25, 2009, and adopted by order of

August 11, 2009, falls short of satisfying the instructions we issued in Rosenberg I. Consequently, we remand again and direct the Law Division to issue an opinion that satisfies those instructions.

I.

In our opinion in Rosenberg I, we set forth in considerable detail the events leading up to plaintiff's document request, made under the common law right to know doctrine, as well as DCJ's response to that request. Supra, 396 N.J. Super. at 570-75. We incorporate that discussion by reference here. For present purposes, it is sufficient to note that in 2000, plaintiff ran unsuccessfully for the position of Chair of the Burlington County Democratic Party. Id. at 570. At the time of the election, plaintiff was Solicitor of the Borough of Palmyra. Ibid. After the election, John J. Gural, Jr., a Palmyra councilman, notified plaintiff that he was being subjected to considerable pressure from two colleagues at the Moorestown engineering firm at which he worked to refuse to reappoint plaintiff as Palmyra Borough Solicitor when plaintiff's term expired. Ibid. Gural reported these events to DCJ and provided DCJ attorneys with secretly made tape recordings that supported his allegations. Ibid. DCJ's investigation, which spanned several years, ultimately resulted in the two initial targets of

the investigation pleading guilty, but only to tax evasion. Id. at 571. The wider criminal investigation into whether highly placed political operatives in the Burlington County Democratic Party had engaged in a conspiracy to deny plaintiff reappointment as Solicitor was ultimately closed in February 2005, id. at 573, amid claims by the United States Attorney that DCJ had severely bungled the investigation, id. at 575.

On December 22, 2004, plaintiff served a written request upon DCJ's Records Custodian under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, for "'[a]ny and all recordings and transcripts of such recordings made by [DCJ] . . . of conversations between . . . Gural . . . and'" various individuals. Id. at 572 (second alteration added). Relying on N.J.S.A. 47:1A-1.1, DCJ denied the request on January 4, 2005. Ibid.

On January 11, 2005, plaintiff modified his request for the Gural tapes, seeking access under the common law "right to know" doctrine. Ibid. DCJ denied this request on January 18, 2005, as plaintiff had "failed to show an interest in the records requested" and because state and federal litigation was pending regarding the records. Ibid.

On January 12, 2005, plaintiff filed, in state court, a verified complaint in lieu of prerogative writs and order to

show cause for production of the documents he had requested from DCJ. Ibid. Plaintiff requested both the Gural tapes and "[a]ny and all investigative records, documents, or other information made or kept by DCJ relating to any criminal investigations involving the appointment of the Solicitor in Palmyra for the year 2001."

On March 4, 2005, the Law Division ordered DCJ to turn over the Gural tapes to plaintiff. The judge found that the tapes were common law public documents; that plaintiff possessed the requisite interest in the tapes as he was the primary focus of and reason for making the tapes; and that plaintiff's interest in the disclosure of the tapes outweighed the State's interest in non-disclosure because there was no ongoing investigation. Id. at 573.

On March 18, 2005, DCJ moved for reconsideration of the March 4, 2005 order. DCJ supported its motion by providing the judge with a Vaughn index<sup>1</sup> that listed the participants in each of the transcripts made from the Gural tapes. DCJ also provided the judge with a transcript of each of the taped conversations for in camera review. Ibid.

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<sup>1</sup> Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974).

In a March 31, 2005 order, the judge granted intervenor status as plaintiffs to George Norcross III, Mark Neisser, Henry Chudzinski, R. Louis Gallagher II, and JCA Associates, Inc. for the purpose of obtaining the Gural tapes and transcripts should the court ultimately order them to be turned over to plaintiff. Ibid. The March 31, 2005 order also denied DCJ's motion for reconsideration and ordered DCJ to "produce all of the recordings and transcripts to the [p]laintiff . . . and to all interven[o]rs by 4:00 p.m. on March 31, 2005."

On May 12, 2005, by leave granted, we reversed the portions of the March 31, 2005 order that had required release of the tapes. We stated:

The State's claims of need to protect innocent third parties and criminal investigative methods and techniques . . . are remanded to the trial judge for an in camera proceeding limited to those claims. The proceeding shall consist of a review of the Vaughn indices and transcripts which have been provided by the State.

On September 9, 2005, plaintiff filed the motion that is the subject of this appeal, seeking to compel DCJ to provide him with its entire investigatory file concerning the Palmyra Solicitor matter. In response to that motion, DCJ produced an expanded Vaughn index on December 2, 2005, which listed all documents alleged to be privileged and confidential. Id. at 575. The judge ordered DCJ to provide copies of the expanded

Vaughn index to plaintiff and to intervenors. Ibid. DCJ simultaneously released to plaintiff copies of files it did not deem privileged, including correspondence between DCJ and plaintiff; plea agreements for Neisser, Chudzinski, and William Vukoder; legal research; and newspapers and internet articles. Ibid.

In response to our May 12, 2005 order, on August 28, 2006, the judge issued a preliminary letter opinion in which he listed the types of documents that were included in the box of materials DCJ had provided to him for in camera review. Included were emails, evidence vouchers, newspaper articles, notes of interviews and telephone calls, Gural recordings, legal memoranda, reports from DCJ detectives, reports of interviews and personal impressions, transcripts of previously released tape recordings made while Gural was wearing a body wire, correspondence between counsel, and numerous pages downloaded from NJPolitics.com. Id. at 576. On September 29, 2006, the judge issued a letter opinion in which he concluded that each of the items was protected from disclosure by one or more specific privileges. The judge reasoned:

Every document reviewed contained, in whole or in part, personal impressions, opinions, or observations of the authors and/or police investigative protocols or techniques, all of which were so intertwined with other factual material as to render

redaction of the former an impossible task if some semblance of meaning were to remain for the unredacted portion of the document or set of documents.

. . . .

Based upon my in camera review of the documents, I am convinced that a clear showing of advancement of the public interest has not been made such as to warrant disclosure. That conclusion results from consideration of the factors enumerated in [Loigman, supra, 102 N.J. at 113]: (1) that disclosure of the written material in this case could easily impede the primary functions of the DCJ by discouraging witnesses from reporting actual or potential criminal activities; (2) that such witnesses could be subject to ridicule and unwarranted legal actions by those whose names and activities were reported; (3) that many of the documents contained self-critical analyses and recommendations for improved investigative procedures which, if released, will be subjected to a chilling effect; (4) that, as noted, the factual data contained in the material sought is so intertwined with personal observations, impressions and strategies that meaningful redaction is made virtually impossible; and (5) that the investigation by the Attorney General's office was the subject of a report from the Office of Governmental Integrity that this court also declined to disclose for basically the same reasons that disclosure is deemed improper here.

To release the documents sought by plaintiff would, in this court's opinion, be the functional equivalent of allowing the plaintiff to participate with employees of the Attorney General's office in the actual investigation. Separation of facts from opinions cannot be accomplished in any meaningful way.

In our opinion in Rosenberg I, we held that the judge's September 29, 2006 letter opinion was insufficient and we remanded for "a more detailed articulation of reasons, focusing on either individual documents or groups of documents designated by Bates number in the privilege log (Vaughn Index) filed under seal by the State." Supra, 396 N.J. Super. at 569. We held:

[T]he judge restated, in a conclusory fashion, the five Loigman factors he found applied, without referencing particular documents by Bates numbers<sup>2</sup> to which a particular factor applied, or making specific factual findings why the factor applied to the contents of particular documents. We, therefore, remand the matter to the trial court with the directions to review anew the documents contained in the Vaughn index and render a decision making specific reference to particular documents or group of documents and provide his factual findings, if necessary, in the form of a separate sealed decision.

[Id. at 581.]

We essentially held that without these factual findings, we were unable to determine whether the judge had abused his discretion in not releasing the documents plaintiff requested. Ibid. We therefore remanded for the preparation of a detailed statement of reasons. Ibid.

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<sup>2</sup> The term "Bates numbers" refers to a numbering system commonly used for voluminous medical, commercial and legal documents, in which a sequential number is stamped on each page for ease of reference.

In the interim, the judge who issued the September 29, 2006 opinion had retired. Consequently, the task of preparing the remand opinion was assigned to a second judge, who filed a written opinion on February 25, 2009. The February 25, 2009 opinion began with a list, in the most general of terms, describing each of the documents he reviewed.<sup>3</sup>

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<sup>3</sup> The list of documents included:

1. Hand written and typed versions of the notes of the Deputy Attorney General Susan Kase.
2. Hand written and typed versions of the notes of Deputy Attorney General Tony Piccone.
3. Hand written notes from an unidentified Deputy Attorney General or Division of Criminal Justice Investigator.
4. Hand written notes of Former Chief Investigator [Redacted].
5. Internal memoranda from investigators and deputy attorneys general to Andrea Rossner, Deputy Director of Criminal Justice.
6. Internal memoranda from investigators and deputy attorneys general to Melanie Campbell, Deputy Attorney General/Government Integrity Bureau.
7. Internal investigative reports from Senior Investigator [Redacted], Investigator [Redacted], Senior Investigator [Redacted] and Senior Investigator [Redacted].

(continued)

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(continued)

8. Internal memoranda from investigators and deputy attorneys general to Louise Lester, Chief of the Special Prosecutions Unit.

9. Correspondence:

A. Letter dated May 8, 2001 to Mike Pinsky, Esq[.] from John Musarra, Deputy Attorney General.

B. Letter dated June 12, 2001 to Mike Pinsky, Esq. from John Musarra, Deputy Attorney General.

C. Two unsigned letters dated April 2, 2004 . . . to Kevin Marino, Esq. from Louise Lester, Chief of the Special Prosecutions Unit.

D. Letter dated April 8, 2004 to Kevin Marino, Esq. from Louise Lester, Chief of the Special Prosecutions Unit.

E. Letter dated June 24, 2004 to Robert Agre, Esq. from Susan Kase, Deputy Attorney General. Attached to this correspondence is an investigative report from Investigator [Redacted].

F. Facsimile dated October 18[, ] 2001 to Tony Zar[r]illo from Michael Critchley, Esq. Attached to this correspondence are references to various taped conversations.

G. Letter dated November 18, 2003 to Thomas Goan Jr. Deputy Attorney General from Mike Pinsky, Esq. Attached to this correspondence is a letter dated June 12, 2001 from Mike Pinsky Esq. to John Musarra, Deputy Attorney General.

H. Facsimile dated November 18, 2003 to John Goan, Deputy Attorney General from Mike

(continued)

After listing the eleven items, the judge made the following findings of fact and conclusions of law about the documents in groups one through eight and ten and eleven. We quote his findings in their entirety:

It is this court's opinion that after a review of the above mentioned documents, the plaintiff has not established that his interests in public disclosure outweigh the state's interest in maintaining confidentiality. Loigman, supra, 102 N.J.

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(continued)

Pinsky, Esq. Attached is a letter dated November 18, 2003 to John Goan, Deputy Attorney General from Mike Pinsky, Esq.

I. Facsimile dated April 21, 2004 from Kevin Mari[no], Esq. to Anthony Picione, Esq. Deputy Attorney General. Attached is a letter dated April 21, 2004 to Louise Lester, Esq. Chief, Special Prosecutions Unit from Kevin Marino.

J. Facsimile dated April 13, 2004 to Louise Lester, Chief Special Prosecutions Bureau from Kevin Marino, Esq. Attached is a letter dated April 13, 2004 to Louise Lester, Esq., Chief Special Prosecutions Bureau from Kevin Marino, Esq.

10. An unsigned and undated Affidavit of Application of Investigator [Redacted] for a Communications Data Warrant (CDW).

11. The remaining documents consist of notes taken during a review of various taped conversations. Also included is legal research conducted by the individuals who were reviewing the taped conversations.

at 112. The documents or groups of documents contained in 1-8 and 10 and 11 above consist of internal memorand[a] of various members of the Division of Criminal Justice. Disclosure of these documents would discourage witnesses from reporting actual or potential criminal activities, reveal self-critical analyses and recommendations which would result in a chilling effect on future agency activities, and most importantly as far as this court is concerned, the information sought could not be separated from personal observations, impressions, and strategies because this information is so intertwined so as to make redaction virtually impossible. The court therefore finds that disclosure of this internal information should not be ordered.

As to the documents in group nine, which consisted of correspondence, the judge made a separate finding, which we set forth in its entirety:

The court also finds that the correspondence should not be disclosed because it pertains to individuals other than the plaintiff, and it is privileged, absent a waiver of the privilege. The information should not be disclosed. N.J.R.E. 504.

On August 11, 2009, because the second judge had also retired, a third judge issued an order adopting the second judge's February 25, 2009 opinion. It is from that opinion and order that plaintiff now appeals, raising a single argument. He contends that on remand, the trial judge failed to comply with this court's directive to review anew the documents contained within the Vaughn index and to make specific factual findings as

to the applicability of the Loigman factors. In particular, plaintiff argues that the February 25, 2009 opinion fails to comply with this Court's directive in Rosenberg I because, in his written opinion, the judge made only "general, conclusory observations" and failed to "refer to specific documents by Bates numbers[,] . . . failed to render an opinion making the necessary findings of fact[,] . . . [and] failed to explain the rationale for each document he deemed privileged."

DCJ argues that the February 2009 opinion satisfied this Court's instructions in Rosenberg I because it provides far more detail than the earlier 2006 opinion. In particular, according to DCJ, the 2009 opinion lists the documents reviewed and then applies the Loigman factors to each document or category listed.

## II.

A citizen requesting disclosure of documents pursuant to the common law right to know doctrine must satisfy three requirements: "(1) the records must be common-law public documents; (2) the person seeking access must establish an interest in the subject matter of the material; and (3) the citizen's right to access must be balanced against the State's interest in preventing disclosure." Keddie v. Rutgers, 148 N.J. 36, 50 (1997) (internal quotations and citations omitted). When evaluating prong three, the trial court should consider the six

factors set forth in Loigman, supra, 102 N.J. at 113. These factors are:

(1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.

[Ibid.]

The Loigman factors, however, are not exhaustive and other criteria may be examined. Educ. Law Ctr. ex rel. Burke v. N.J. Dep't of Educ., 396 N.J. Super. 634, 644 (App. Div. 2007), rev'd on other grounds, 198 N.J. 274 (2009).

In making a decision whether to disclose the documents, the "trial court must examine each document individually and make factual findings with regard to why [a plaintiff's] interest in disclosure is or is not outweighed by [the State's] interest in non-disclosure." Keddie, supra, 148 N.J. at 54. Further, the

trial court should "make specific determinations regarding plaintiff's access to [the records], including an expression of reasons for the court's rulings. The trial court must examine each document individually, and explain as to each document deemed privileged why it has so ruled." Seacoast Builders Corp. v. Rutgers, 358 N.J. Super. 524, 542 (App. Div. 2003) (internal quotations and citations omitted).

With these principles in mind, we turn to an analysis of the judge's February 25, 2009 opinion. As we have noted, DCJ urges us to affirm the order because, in keeping with our decision in Rosenberg I, the judge made reference to the specific documents he received. We reject DCJ's argument for several reasons.

First, as is evident from the judge's opinion, although the judge divided the documents into eleven groups, he made no effort to analyze the documents individually. Instead, he merely discussed them in the aggregate, commenting that "[t]he documents or groups of documents contained in 1 [through] 8 and 10 and 11 above consist of internal memorand[a] of various members of [DCJ]." Without an individualized discussion of each document, the February 2009 decision falls far short of the "document-by-document" analysis we required in Rosenberg I, supra, 396 N.J. Super. at 569. DCJ relies on the portion of our

opinion that permitted the judge on remand to render a decision "making specific reference to particular documents or group of documents." Id. at 581 (emphasis added). However, DCJ's approach is not only unduly mechanical, but also takes the language of our opinion out of context.

As is evident from our opinion in Rosenberg I, we criticized the first judge for issuing an opinion that "referred generally to all the documents rather than a particular document by Bates number," id. at 580, and for restating the Loigman factors "in a conclusory fashion . . . without referencing particular documents by Bates numbers to which a particular factor applied," id. at 581 (emphasis added). Thus, DCJ's argument that the judge discussed the documents in the groups that we authorized in Rosenberg I elevates form over substance. We authorized the judge to refer to documents by "groups," but only if the documents shared common characteristics. Aggregating dozens of documents into one group, as the judge did in his February 2009 opinion, does not satisfy our instruction in Rosenberg I, ibid., that an individualized assessment be made of each document.

Second, by referring to documents as "1 [to] 8 and 10 and 11," the judge lumped together an enormous multitude of documents. The judge's approach caused DCJ, in its appellate

brief, to devote nearly two single-spaced pages in a footnote to cross-referencing all of these documents to the Vaughn index, which is something the judge himself should have done. As but one example, DCJ's brief explains that group seven consists of "58 separate investigative reports by various criminal investigators," which "are found at page 37, row 2, through page 38, row 3." Group seven of the Vaughn index alone consumes pages 221-232 of plaintiff's appendix.

The Vaughn index itself is sixty-two pages long. It contains a total of 312 separate entries. It is highly unlikely that the same Loigman factors ("[d]isclosure . . . would discourage witnesses from reporting . . . criminal activities, reveal self-critical analyses and . . . [cause] a chilling effect on future agency activities") could possibly apply with equal force to 312 documents. For these reasons, we reject DCJ's contention that because the judge listed the documents he had reviewed, he complied with our instruction to conduct an individualized assessment of each document.

Another problem with the judge's February 2009 opinion is the absence of any description of the contents of the 312 documents the judge reviewed. Although the judge identified the author and the recipient of each letter or facsimile, he has told us nothing about their content. DCJ urges us to read the

judge's list of documents in conjunction with the Vaughn index, because the Vaughn index provides more information about the documents. However, the only additional, substantive information provided by the Vaughn index is the identity of third parties who were mentioned in the document and which privilege DCJ was asserting as to the document; the Vaughn index provides no further insight into the content of the documents themselves. Without knowing more about the content, this court is unable to conduct any review, much less a thorough review, of plaintiff's claims.

In particular, and as an example, without knowing the content of the "internal investigative reports" referenced in group seven or of the "internal memoranda" from DCJ investigators to deputy attorneys general referenced in group six, our review of the judge's conclusions is impossible. How can we affirm or reverse the judge's conclusions that disclosure would "reveal self-critical analyses," thereby causing a "chilling" effect on future agency activities, or that disclosure would "discourage witnesses from reporting . . . criminal activities" if we are left completely in the dark about the content of the actual documents?<sup>4</sup>

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<sup>4</sup> The documents themselves are not part of the record on appeal, and we therefore have no way to evaluate the soundness of the  
(continued)

It was for this very reason, relying on Seacoast, supra, 358 N.J. Super. at 542, that we rejected the first judge's conclusory opinion in Rosenberg I. Supra, 396 N.J. Super. at 581. The February 2009 opinion suffers from identical shortcomings. It provides us with no description of the contents of the documents that were reviewed in camera on a document-by-document basis; it fails to explain which Loigman factors apply to which documents; and it fails to balance plaintiff's right of access against the State's purported interest in avoiding disclosure.

We note that DCJ has spent a substantial portion of its brief arguing that the judge's decision not to release the documents was not an abuse of discretion because plaintiff's interests in disclosure did not outweigh the State's interest in maintaining confidentiality. This issue is not before us given the posture of the present appeal. Plaintiff has appealed only as to the form of the judge's opinion and has argued that the judge failed to follow the directive of Rosenberg I. No argument has been made by plaintiff as to whether the

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(continued)

judge's legal determinations or his application of the Loigman factors. Should there be any further appeal, the party filing the appeal should arrange for the delivery to us of a copy of each of the documents the Law Division reviewed in camera. R. 2:5-4(a) and (d).

substantive holding, that the documents should not be released, constitutes an abuse of discretion. Moreover, this issue is not currently ripe for this court's review in light of the deficiencies in the judge's February 2009 opinion that we have already discussed, and the absence of the documents from the record on appeal. Without the factual findings and rationales required by Rosenberg I, this court cannot proceed to the next stage of determining whether an abuse of discretion has occurred. See Shuttleworth v. City of Camden, 258 N.J. Super. 573, 588 (App. Div.) (observing that a judge's decision on release of documents is reviewed for an abuse of discretion), certif. denied, 133 N.J. 429 (1992).

We reverse the August 11, 2009 order that adopted the February 25, 2009 opinion. We remand for the issuance of the opinion we required in Rosenberg I.

Reversed and remanded.

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

  
CLERK OF THE APPELLATE DIVISION

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June 14, 2010

Mr. John Paff  
Via e-mail

Re: OPRA Request dated May 28, 2010

Dear Mr. Paff:

This correspondence will acknowledge receipt of the above-referenced OPRA request.

It is noted that the requested materials are the same as were addressed in an OPRA request dated May 25, 2010. That request was denied as it involves criminal investigation records. Such records are specifically exempt from disclosure pursuant to NJSA 57:1A-1.1.

This request is submitted under the common law right to access. It is readily acknowledged that the common law right to access is broad; however, that right is not absolute. Where there is a legitimate reason for confidentiality of investigation records, then the public's right to access can be denied.

The materials requested include a total of seventy-nine (79) pages all of which are contained in a South Bound Brook Police Department investigation file. Seventy-four (74) pages are various reports, photos, and other investigative records. Five (5) pages are copies of letters from the Somerset County Prosecutor's Office advising all persons involved that no criminal prosecution would be instituted. A complete index of this file is submitted herewith.

The Borough's position remains unchanged. The records request is denied in its entirety because this was a criminal investigation matter.

Very truly yours,



WILLIAM T. COOPER, III

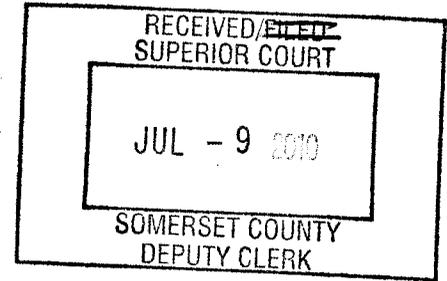
WTC:jmg

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Confidential Information NJ Victim Notification form dated 12/8/09; name omitted	1 page
Confidential Information NJ Victim Notification form dated 12/8/09; name omitted	1 page
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South Bound Brook Police Dept supplementary investigation report prepared by Lt. Jeffrey Titus dated 4/20/10	1 page
South Bound Brook Police Dept. supplementary investigation report prepared by Sgt. Edward McGovern dated 3/30/10	1 page

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SUPERIOR COURT OF NJ  
SOMERSET COUNTY



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Attorneys for John Paff

2010 JUL 20 AM 8:43

DEPUTY CLERK  
CIVIL DIVISION

<p>JOHN PAFF,  Plaintiff,  v.  BOROUGH OF SOUTH BOUND BROOK, and DONALD E. KAZAR in his official capacity as the Custodian of Records,  Defendants.</p>	<p><b>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SOMERSET COUNTY</b>  DOCKET NO. <u>L-12/2-10</u>  <b>CIVIL ACTION</b>  <b>COMPLAINT IN LIEU OF PREROGATIVE WRITS</b></p>
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Plaintiff John Paff, through his undersigned counsel Law Offices of Walter M. Luers, LLC, complaining of the Defendant, allege as follows:

1. This is an action alleging a violation Open Public Records Act, *N.J.S.A.* 47:1A-1, *et seq.* ("OPRA") and the common law right of access.
2. This action is being brought because the Defendants have denied access to a closed criminal investigatory file regarding the family of the wife of the Mayor of the Borough of South Bound Brook.

**THE PARTIES**

3. Plaintiff Paff is a citizen of the State of New Jersey and a resident of Somerset, New Jersey.
4. Defendant Borough of Bound Brook ("Borough") is a public agency whose principal office is located at 12 Main Street, South Bound Brook, New Jersey 08880, and it may be served there.

5. Defendant Borough is a “public agency” as that term is defined by OPRA, *N.J.S.A. 47:1A-1.1*.

6. Defendant Kazar is the “Custodian of a government record” for Defendant Borough of South Bound Brook as that term is defined by OPRA, *N.J.S.A. 47:1A-1.1*.

7. Defendant Kazar’s principal office is located at 12 Main Street, South Bound Brook, New Jersey 08880, and he may be served there.

### **JURISDICTION AND VENUE**

8. The Court has subject matter jurisdiction of this action pursuant to *N.J.S.A. 47:1A-6*, New Jersey Court Rule 4:69-1 and the common law.

9. Venue is proper in this Court pursuant to *R. 4:3-2(a)(2)* because the Defendant Borough is a public agency located in Somerset County, and all of the events described herein occurred in Somerset County.

### **FACTUAL ALLEGATIONS**

10. On May 24, 2010, Mr. Paff submitted a written request for copies of public records pursuant to the Open Public Records Act and the common law (hereinafter “May 24 Request”).

11. The May 24 Request called for copies of an investigatory file maintained by the municipal Police Department of the Borough of South Bound Brook, including but not limited to “any property/evidence report, Miranda warning(s), and all Supplemental Reports associated with Docket No. 09-2178.” Mr. Paff limited his request to the pages of the Investigation that would not require any redactions.

12. On May 24, 2010 Defendant Kazar advised Mr. Paff that (1) his request had been forwarded to counsel for the Borough; (2) the investigation “involved the Mayor’s

Wife's family"; (3) the Somerset County Prosecutor's Office had conducted an investigation but declined to file charges; and (4) a minor was involved in the investigation.

13. On May 25, 2010, counsel for the Borough wrote an email to Mr. Paff, in which counsel stated that although that particular email did not constitute the Borough's "official response" to Mr. Paff's OPRA request, counsel was inclined to deny access to the investigatory records based on the criminal investigatory records exception contained in *N.J.S.A. 47:1A-1*. Mr. Paff returned the email, in which he emphasized that his right to access the requested records must be analyzed under both the Open Public Records Act and the common law right of access.

14. On May 28, 2010, counsel for the Borough denied Mr. Paff's May 24 Request.

15. After receiving that denial, on May 28, 2010 Mr. Paff submitted a second OPRA request. Mr. Paff requested the entire investigatory file for Docket No. 09-2178 (hereinafter "May 28 Request"). While the May 24 Request only asked for the pages of the investigatory file that did not require any redactions, the May 28 Request asked for the entire criminal investigatory file.

16. Mr. Paff's May 28 Request was made pursuant to both the Open Public Records Act and the common law right of access.

17. On June 14, 2010, Defendants (through counsel) again denied access to the investigatory file for Docket No. 09-2178. Defendants identified 24 documents and categories of documents that were responsive to Mr. Paff's May 28 Request, including investigation reports, voluntary statement forms, supplemental investigation reports, Miranda warning, preliminary arrest report, juvenile complaint, photographs and correspondence.

18. The records requested by Mr. Paff are “public records” as defined by the Open Public Records Act and the common law right of access.

19. Mr. Paff has a strong interest in the investigatory records. The investigation concerns the family of the wife of the Mayor of South Bound Brook.

20. The investigation may have been directed at a member of the Mayor’s family. The public has a right to know how the Mayor’s family was involved and whether members of his family were targets of the investigation. The Somerset County Prosecutor’s Office declined to press charges. If a member of the Mayor’s family was the target of the investigation, Mr. Paff and the public are entitled to determine for themselves whether the Somerset County Prosecutor Office’s handled the matter in a reasonable manner, and did not accord any special or deferential treatment to the Mayor’s family.

21. Mr. Paff’s interest in gaining access to the investigatory file outweighs any interest in confidentiality that the Defendants may have in keeping the file secret.

**COUNT I: VIOLATION OF OPRA**

22. Plaintiff repeats and incorporates by reference each and every allegation contained in paragraphs 1-21 of Plaintiff’s Complaint as though fully set forth at length herein.

23. Defendants have violated OPRA by not providing copies of the documents requested by Plaintiff in his May 28 Request.

**COUNT II: VIOLATION OF COMMON LAW RIGHT OF ACCESS**

24. Plaintiff repeats and incorporates by reference each and every allegation contained in paragraphs 1-23 of Plaintiff’s Complaint as though fully set forth at length herein.

25. Plaintiff has a common law right of access to receive copies of the documents requested in his May 28 Request.

26. Plaintiff has a legitimate private interest in the requested records.

27. Defendants have no legitimate interest in maintaining the secrecy of these documents.

28. Therefore, Defendants have violated Plaintiff's common law right of access.

**WHEREFORE**, Plaintiffs respectfully request that this Court enter Judgment against the Defendants:

- A. Ordering Defendants to provide copies of the documents requested by Mr. Paff on May 28, 2010, subject to any redactions that may be required by the Court;
- B. Awarding Plaintiff costs and reasonable attorneys' fees; and
- C. For such other or further relief as this Court deems just and equitable.

**CERTIFICATION PURSUANT TO R. 4:5-1**

I certify that the dispute about which I am suing is not the subject of any other action pending in any other court or a pending arbitration proceeding to the best of my knowledge and belief. Also, to the best of my knowledge and belief no other action or arbitration proceeding is contemplated. Further, other than the parties set forth in this complaint, I know of no other parties that should be made a part of this lawsuit. In addition, I recognize my continuing obligation to file and serve on all parties and the Court an amended certification if there is a change in the facts stated in this original certification.

**CERTIFICATION PURSUANT TO R. 1:38-7(b)**

I certify that confidential personal identifiers have been redacted from documents now submitted to the Court, and will be redacted from all documents submitted in the future.

**DESIGNATION OF TRIAL COUNSEL**

Pursuant to R. 4:25-4, Walter M. Luers, Esq. is designated as trial counsel on behalf of Plaintiff.

Respectfully submitted,

LAW OFFICES OF WALTER M. LUERS, LLC

By: 

DATED: July 7, 2010

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