

I N D E X

April 30, 2010

ARGUMENT

By: Mr. Gutman 22,44,60,74,80,91
By: Mr. Renaud 32,51,6,69

THE COURT

PAGE

Decision 53,72,94,96,97,107,138

1 THE COURT: Good Morning.

2 MR. GUTMAN: Good Morning, Your Honor.

3 MR. RENAUD: Good Morning, Your Honor.

4 THE CLERK: This is the matter of Paff v.
5 Borough of Garwood, Docket Number L-1089-10. Your
6 appearances, please.

7 MR. GUTMAN: Richard Gutman for the
8 plaintiff, John Paff.

9 MR. RENAUD: Robert F. Renaud, Borough
10 Attorney for the Borough Garwood, Palumbo & Renaud.

11 THE COURT: Okay. Have a seat. Today is the
12 return day of an Order to Show Cause, well the
13 adjourned date of an Order to Show Cause, why a
14 judgment shouldn't be entered declaring that the
15 Borough of Garwood violated the Open Public Records Act
16 and the common law right of access to public records by
17 refusing to provide Mr. Paff with a videotape, and the
18 facts -- and an order giving him the access with cost
19 and fees.

20 Okay, so the facts are that on September 3rd,
21 2009, the Garwood Municipal Court issued against a
22 Garwood Police Officer, Gennaro Mirabello, two
23 complaints for Disorderly Persons offenses. One is
24 N.J.S. 2C:17-3A-2 for criminal mischief for tampering
25 with a currency to coin changers of a Laundromat on

1 August 18th, 2009, and N.J.S. 2C:18-3A, unlicensed
2 entry into structures for trespassing into the locked
3 Garwood Clerk's Office and opening the desk drawers of
4 the Garwood Chief Financial Officer. And both of these
5 violations were recorded by video surveillance cameras,
6 although they were different locations and different
7 cameras.

8 So on 9/22/09 the Borough and Mr. Mirabello
9 agreed that he would resign in good standing and the
10 charges were dropped on the four... -- October 14th,
11 2009. So on February 9th, 2010, Mr. Paff requested a
12 copy of the videotapes of the two incidents which were
13 the subject of the complaints. And the record
14 custodian on February 12th gave him access to the
15 videotape of the incident in the Laundromat but denied
16 access to the videotape of the incident in the Clerk's
17 Office on the grounds that the videotape in the Clerk's
18 Office is a criminal investigatory record as provided
19 in N.J.S.A. 47:1A.1 for which disclosure may jeopardize
20 security measures and surveillance techniques which if
21 disclosed would create a risk to the safety of persons,
22 property, or electronic data or software or both.

23 On February 15th of 2010, Mr. Paff wrote to
24 the custodian saying he would not, he could not
25 understand why granting access to the Clerk's Office

1 videotape would endanger security measures and
2 surveillance techniques, since the existence of the
3 Clerk's Office video security surveillance was already
4 public knowledge and also asked some questions of the
5 custodian. And on February 17th, 2010, the custodian
6 refused to answer Mr. Paff's questions.

7 And on February 25th, 2010, Mr. Paff's
8 attorney faxed and emailed the custodian explaining why
9 he thought the requested videotape was not covered by
10 the OPRA exemptions for criminal investigatory records
11 and security measures/surveillance techniques.

12 And then on March the 1st, 2010, the
13 custodian responded repeating her belief that both
14 exemptions applied in refusing to explain to plaintiffs
15 as to why the security measures surveillance technique
16 exemption applied to publicly known surveillance.

17 Okay. So the response -- the Borough is, is
18 relying -- first of all, the OPRA places the burden on
19 the custodian of the record to prove that the denial
20 access is authorized by law, and that's N.J.S.A.
21 47:1A-6. And the first inquiry in a claim under OPRA
22 is whether the requested document meets the statutory
23 definition of a government record and if so whether any
24 exception applies. And that's more -- most recently
25 stated in a, in an Appellate Division case called

1 O'Shea v. Township of West Milford 410 N.J. Super. 371.
2 It's Appellate Division from 2009 at page 380. And it
3 says the -- with respect to criminal investigatory
4 reports, the defendant has to meet two prongs for the
5 documents to be inaccessible. It has to be not
6 required by law to be made and must pertain to any
7 criminal investigation or related civil enforcement
8 proceeding.

9 So we have the certification of the chief.
10 And I guess I'm wondering is this investigation set up
11 to try to get him or just anybody who happened to come
12 in there and do something? When the chief says there's
13 an investigation in a certification, it's a little
14 light on details, I think.

15 MR. RENAUD: Well, I don't think -- frankly,
16 Your Honor, for the court's determination, I don't know
17 that it makes a difference whether they're trying to
18 get obviously him or someone else.

19 THE COURT: I guess what I'm worried about
20 the credibility of just saying we keep a tape, we run a
21 camera in there all the time.

22 MR. RENAUD: No, he didn't say --

23 THE COURT: And we want to call that an
24 investi... --

25 MR. RENAUD: No, he didn't say that at all.

1 THE COURT: No, he didn't. But I'm --

2 MR. RENAUD: No. He said I set it up for a
3 criminal investigation. That's what he said. You know
4 one of the -- this is, you know, the plaintiff in this
5 case made a complaint about not giving him a whole back
6 and forth dialogue about why this is going on. And to
7 be perfectly honest with you, Your Honor, I'm not
8 comfortable in open court explaining what the, what the
9 investigation is. The chief says --

10 THE COURT: All he has to say is there is
11 one.

12 MR. RENAUD: -- I set it up because it's a
13 criminal investigation. Does somebody think that the
14 chief is lying, that he didn't set it up because it's
15 -- because he's conducting a criminal investigation?
16 What difference does it make whether --

17 THE COURT: Well, it's your burden to prove
18 that there --

19 MR. RENAUD: It's -- let's put it this way,
20 it's --

21 THE COURT: There was an investigation going
22 when this happened.

23 MR. RENAUD: Yes.

24 THE COURT: When it picked up what --

25 MR. RENAUD: He was making a criminal

1 investigation. It's not a surveillance device which is

2 --

3 THE COURT: Like the Laundromat --

4 MR. RENAUD: Like the Laundromat.

5 THE COURT: -- where they were just running
6 the camera at the Laundromat and whatever they see they
7 see.

8 MR. RENAUD: Or like in the unreported case
9 that I see that the court looked at, Higgins v.
10 Hopewell Township, where apparently there's a videotape
11 going ongoing of what's going on in the Council
12 chambers. This was set up to --

13 THE COURT: Well, the judge said that one
14 was.

15 MR. RENAUD: No that, -- well, and I'm --
16 there's three, three reasons why that case has nothing
17 to do with this case.

18 THE COURT: Okay.

19 MR. RENAUD: But we'll get to that.

20 THE COURT: All right.

21 MR. RENAUD: But the, the chief said I set
22 this up to conduct a criminal investigation.

23 THE COURT: Before it picked up --

24 MR. RENAUD: Before it -- yes.

25 THE COURT: -- this particular activity.

1 MR. RENAUD: Correct.

2 THE COURT: So that's one. And the other is?

3 MR. RENAUD: Do you -- I don't know who was
4 going to start, Judge? Are you gonna have --? If Mr.
5 Gutman's *gonna start, then I'll go. I'll be -- I'm
6 more than happy to talk.

7 THE COURT: Well I have to decide that it's
8 a, it's a government record. And --

9 MR. RENAUD: Right.

10 MR. GUTMAN: Right.

11 THE COURT: And you're saying it's not.

12 MR. RENAUD: Shall I start? I'm happy to
13 start.

14 MR. GUTMAN: Can I respond, please?

15 THE COURT: It's their burden to prove that
16 it's not.

17 MR. GUTMAN: Oh yes; it's their burden and we
18 think it's, they're just vague and conclusory
19 statements in an uncertified certification.

20 THE COURT: An uncertified certification.

21 MR. GUTMAN: It is. It's uncertified.

22 MR. RENAUD: Why is it uncertified?

23 THE COURT: Which we had to ask for. Well
24 that's okay -- that's you can --

25 MR. GUTMAN: And it's also --

1 THE COURT: Just let me ask Mr., Mr. Renaud
2 if he's finished making his point about why it is not a
3 government markup?

4 MR. RENAUD: No, did we forget to attach a
5 certification from the chief?

6 MR. GUTMAN: Your Honor, I pointed that out
7 in my reply brief.

8 THE COURT: Uh, actually --

9 MR. RENAUD: I apologize you're right. I --
10 I --

11 THE COURT: We, we called up because we, you
12 know, it said it's attached and it wasn't.

13 MR. RENAUD: Right. I don't know how that
14 happened.

15 THE COURT: And then it was shipped in. Good
16 point, Mr. -- I'm sorry I didn't pick it up either. I
17 should have.

18 MR. RENAUD: Well, at that -- if that's a
19 point, Your Honor, I'd ask that we adjourn the hearing.
20 Obviously, I need to submit a certification because if
21 that's an issue that the chief's statement is not
22 certified --

23 THE COURT: Well, it needs to be.

24 MR. RENAUD: Yes, it does. I mean he, he did
25 it as though it was certified and I apologize. I don't

1 know how that happened.

2 MR. GUTMAN: Your Honor, we object to any
3 continuous.* OPRA is supposed to be decided promptly.
4 We pointed that out in --

5 THE COURT: Well, we already had one
6 extension here.

7 MR. GUTMAN: Pardon me?

8 THE COURT: We already had one.

9 MR. GUTMAN: But we had one -- we pointed it
10 out in a reply brief. And it's not just that it's not
11 certified. It's vague and conclusory. They say he
12 says he was investigating some crime. But it doesn't
13 even say what crime it is. That's vague.

14 THE COURT: Well I guess the question is, is
15 he required to? And, and I don't --

16 MR. GUTMAN: Well --

17 THE COURT: I mean I looked at it; I thought
18 he could just say that. You know? I'm not, I'm not
19 saying he's lying. I'm just saying any police chief
20 could say that. And would that, would that be
21 sufficient?

22 MR. GUTMAN: Your Honor, that's --

23 THE COURT: You can't probe that at all?

24 MR. RENAUD: But what if, I mean, what if he
25 said I received a complaint that somebody was wandering

1 around the Municipal Building.

2 THE COURT: Well, I think that would help a
3 lot. I invest..., I started an investigation based on
4 facts. You know? And I started it on this day. What
5 I had down was when and why it could be gen..., you know.
6 And I have could be gen..., but just what you said.
7 Based on a complaint I got from somebody, I launched
8 this investigation on thus and so day. And it was
9 continuing at the time that it picked up what it picked
10 up.

11 MR. GUTMAN: Your Honor, but they're claiming
12 they were investigating some vague unidentified crime
13 other than this thing which is not a crime, it's a
14 petty offense. So then he makes this vague allegation,
15 uncert..., --

16 THE COURT: Well, you can investigate a crime
17 that later gets -- they decide not to prosecute.

18 MR. GUTMAN: Right, but --

19 THE COURT: Or downgrade or whatever.

20 MR. GUTMAN: But, but you investigate for
21 some reason. They, they don't even specify what crime
22 in contrast to this offense, which is not a crime, they
23 were investigating. How could you be more vague than
24 that? They don't even identify this alleged crime.
25 And they don't state what the basis of it is. That

1 doesn't set -- they have the burden of proof.

2 THE COURT: They do.

3 MR. GUTMAN: They know what happened. They
4 know why they investigated this person. And they
5 expressly say they're not gonna tell us. In the --

6 THE COURT: Well actually I had the thought,
7 I thought well they suspect this guy for a while and it
8 was him they were looking for? I don't know. But Mr.
9 Renaud is saying it's not, doesn't matter.

10 MR. GUTMAN: They have the burden of proof,
11 Your Honor.

12 MR. RENAUD: I guess what I'm saying, Judge,
13 is there's a reason why criminal --

14 THE COURT: Investigatory --

15 MR. RENAUD: -- records are not discloseable.
16 I mean am I -- is the --

17 THE COURT: But that's the tape. Not here's
18 why I'm entitled to the conclusion that it really, you
19 know, the judge should find that I'm right.

20 MR. RENAUD: Well I, I -- let's, let's forget
21 about the fact that it's not a certification, for which
22 I apologize.

23 THE COURT: Which could be fixed.

24 MR. RENAUD: I did not understand Mr.
25 Gutman's comment in his, in his reply brief to mean

1 that we forgot to put the certification language in.

2 THE COURT: Well the --

3 MR. RENAUD: And I assume the court didn't
4 pick that up either.

5 THE COURT: I didn't.

6 MR. RENAUD: So --

7 MR. GUTMAN: Your Honor, I said it was
8 uncertified.

9 THE COURT: I'm sure you did. I'm not saying
10 that.

11 MR. RENAUD: I --

12 THE COURT: I was focusing on more like
13 whether they, this thing's a record or it's not.

14 MR. RENAUD: Right.

15 THE COURT: A government record.

16 MR. RENAUD: So --

17 THE COURT: But the next question is if he's,
18 if he does a certification, shouldn't he say something
19 that lends some, some credence to the idea that it was
20 an investigation that was, that was ongoing other than
21 just he said it?

22 MR. GUTMAN: Well there, -- Judge, there's
23 no, there is no -- we don't have video surveillance in
24 the Clerk's Office. I mean it's not set up for --

25 THE COURT: Well that's part of the

1 certification. We do not, you know, as a matter of
2 course --

3 MR. GUTMAN: Right.

4 THE COURT: We don't have it in the Clerk's
5 Office in Garwood.

6 MR. GUTMAN: Okay.

7 THE COURT: I got a complaint from somebody
8 and about something, you know, and therefore I launched
9 this investigation on x day and put the camera in there
10 as part of it.

11 MR. RENAUD: I'm sorry, Judge, I, I have to
12 tell you that I didn't anticipate that either counsel
13 or the court would suggest that the Chief of Police is
14 not telling the truth when he says I set this up for a
15 criminal investigation. I didn't anticipate that.
16 What --

17 THE COURT: Well --

18 MR. RENAUD: What -- what is his motivation
19 for making that up?

20 MR. GUTMAN: Your Honor.

21 THE COURT: They don't, they don't want to
22 give it up.

23 MR. GUTMAN: Your Honor.

24 THE COURT: I'm not saying he's lying. I
25 just -- we could -- I never said that.

1 MR. RENAUD: Well he made a statement, I set
2 it up for a criminal investigation. He's either
3 telling the truth or he's lying. I didn't anticipate
4 that the court and counsel were going to suggest that
5 the Chief of Police would lie about saying I set this
6 up for a criminal investigation.

7 MR. GUTMAN: Your Honor, this is a Red --
8 this is a Red Herring.

9 THE COURT: Could you, could we just calm
10 down for a minute? I don't think we have any cases
11 about -- you know like the Hunter..., the tape in
12 Hunterdon was, was not -- it didn't fall under this
13 particular, it wasn't an investigatory record. It was
14 part of an investigation, when it's over it should be,
15 you know, released. And so it doesn't, it isn't the
16 same as this case. That case was stale by then and
17 they didn't need -- they let it go.

18 MR. GUTMAN: Well, Your Honor, --

19 MR. RENAUD: That's not --

20 MR. GUTMAN: They didn't conduct that
21 investigation --

22 MR. RENAUD: Let me --

23 THE COURT: It's really not, the real thing
24 here is whether or not they are entitled to a finding
25 by me that it's, that it's not a government record

1 because it doesn't fit the definition under 47:1A-1.1.
2 And all I'm saying is it would have, it would have been
3 easier to make the conclusion, I guess, if there were a
4 little more meat on the bones of that certification.

5 MR. GUTMAN: Your Honor.

6 MR. RENAUD: Well what --?

7 THE COURT: That no we do not have it in the,
8 we don't keep a surveillance in that place. We just,
9 we started it, I authorized it on thus and so day
10 because of some, whatever* you usually say it. Because
11 of some information that came to my attention even.

12 MR. RENAUD: Okay, Judge, could we get
13 straight who's talking, cause every time I got to
14 speak, Mr. Gutman talks. And if we're both gonna stand
15 here and jump in it's going to be very confusing.

16 THE COURT: No, we're not going to do that.
17 We'll never be done. But I'm just responding to your,
18 you know, am I really impugning the Chief of Police?
19 No. I'm just saying it would be easier to conclude
20 that this is separate from a surveillance, you know, a
21 camera that they just kept in Garwood in the Clerk's
22 Office. Cause the safe was in there.

23 MR. RENAUD: Okay. We said that that didn't
24 happen. I mean that's in the certification. It's not
25 set up all the time. It was set up for a criminal

1 investigation. Do I have to tell the court what
2 criminal investigation? And if that's, and I'm gonna
3 put that in the certification and I'm gonna file it
4 with the court, then what's the purpose of the
5 exemption for criminal investigatory records. I, I'm
6 not, I'm, I'm a little, I questioned myself as to
7 whether I should attach the things that I attached to
8 the, to the certification or give -- there's a, there's
9 a reason for a -- why criminal investigatory records
10 are not discloseable and --

11 THE COURT: Correct.

12 MR. RENAUD: And I -- so if I --

13 THE COURT: I don't want a bunch of details.
14 It just occurred to me that --

15 MR. RENAUD: What I'm saying, okay. Well he
16 said for -- what else could I say? What else could he
17 say other than it's for a criminal investigation? If I
18 give you anymore detail than that, am I not disclosing
19 what the criminal investigation is?

20 Suppose for example we were checking up on
21 the CFO to see if she was stealing money.

22 THE COURT: Hmm.

23 MR. RENAUD: Okay? Would I -- do you want me
24 to say that here in open court?

25 THE COURT: No.

1 MR. RENAUD: Well that's what I'm saying.
2 That's why I can't put that in. That's a -- it's a
3 criminal investigatory record. It doesn't matter.
4 Now, why doesn't this case matter? I, you know, I
5 appreciate the fact that the court is going out and
6 finding its own cases but neither of us cited it --

7 THE COURT: Well I was looking at 1A:3.

8 MR. RENAUD: But it has nothing to do with
9 this case for several reasons. We -- Mr. Gutman and I
10 both know because we're both very familiar with this
11 law, because we both deal with it everyday that
12 something is -- you can't make something a criminal
13 investigatory record. It's either a criminal
14 investigatory record when it's created or it's not.

15 THE COURT: Or it's not.

16 MR. RENAUD: And that's Serano for example.
17 If it's a 9-1-1 tape, it wasn't a criminal
18 investigatory record --

19 THE COURT: No.

20 MR. RENAUD: -- when it was made, it's not a
21 criminal investigatory record. If you, if you happen
22 to catch somebody in the videotape of the Hopewell
23 Township Municipal Building --

24 THE COURT: At the Laundromat.

25 MR. RENAUD: It's not a criminal

1 investigatory record. If you happen to catch somebody
2 on the videotape of the Laundromat, it's not a criminal
3 investigatory record. And that's why I gave that up.
4 I didn't give it up. That's why we give it up. Why we
5 --

6 THE COURT: You advised your client to give
7 it up.

8 MR. RENAUD: Why we as the Borough give up
9 that record because we know the difference between a
10 criminal investigatory record and not a criminal
11 investigatory record. That was not a criminal
12 investigatory record on the day that it was made. We
13 can't make it into one. So that's the first reason why
14 this has nothing to do with it. The second reason is
15 and we'll -- I'm gonna switch to one of the other
16 grounds is this is a --

17 THE COURT: What? Shouldn't wait -- if I
18 decide that, wouldn't I just move on to the Right to
19 Know Act?

20 MR. RENAUD: I suppose. But I like to have a
21 belt and suspenders so I've got lots of reasons why,
22 why it's not discloseable. Um, it's, it's --

23 THE COURT: I don't know that he has to say
24 more. I'm just telling you when I read it I thought
25 couldn't have just said it.

1 MR. RENAUD: Well that's --

2 THE COURT: Something came up and he started
3 it on thus and so day and a few more details.

4 MR. RENAUD: You know and I, and I gave you
5 an example of why and I just don't think that, I just
6 --

7 THE COURT: So would you say that in order to
8 have some kind of hearing about it they would have to
9 have some kind of, some, some certification that had
10 enough in it to cast doubt on it before I shouldn't
11 rely on it?

12 MR. RENAUD: I think so.

13 THE COURT: Well, so then we should --

14 MR. RENAUD: I mean if yes, if they said oh
15 we found out that you had a contract where you let out
16 a contract for somebody to put a security system --

17 THE COURT: In the --

18 MR. RENAUD: In the Clerk's Office. Yeah.

19 THE COURT: All the time.

20 MR. RENAUD: Right, all the time.

21 THE COURT: Or we started in January and you
22 just decided you're gonna watch, put in a camera.

23 MR. RENAUD: Correct.

24 THE COURT: So, I think we should stop and
25 address the issue of whether it's a criminal

1 investigatory record.

2 MR. GUTMAN: Okay. Thank you, Your Honor.

3 THE COURT: And before I say that, I'll
4 interrupt myself. Part of why I thought that case was
5 interesting is that they thought of the video as a
6 criminal investigatory record which this is a video.
7 There aren't too many video cases. In fact I don't
8 know of any.

9 MR. GUTMAN: Your Honor, I guess the
10 Government Records Council has reason in the Glen Blue
11 (phonetic) case.

12 THE COURT: The what? In the Glen Blue case?

13 MR. GUTMAN: The Glen Blue case. They, they
14 reasoned that to be a criminal investigative record,
15 you have to be investigating a crime.

16 THE COURT: Um hmm.

17 MR. GUTMAN: If it's not a crime, then it's
18 not a criminal investigative record. I mean it's
19 indisputable by that --

20 THE COURT: So you want the chief to say what
21 crime he was investigating.

22 MR. GUTMAN: Well --

23 THE COURT: That he happened, and then he
24 happened to catch this guy doing what he did which was
25 charged as a DP and then it was dropped. And then the

1 charges were --

2 MR. GUTMAN: More, yeah, I mean we know --

3 THE COURT: Expunged. But you want that --
4 don't you? That's measured from when you launch it.
5 Not what the result was.

6 MR. GUTMAN: We know what the result was.

7 THE COURT: For this guy.

8 MR. GUTMAN: Yeah, for this guy.

9 THE COURT: But that's what got me thinking
10 about well why did he hook this up? You know to catch
11 this guy?

12 MR. GUTMAN: We don't know.

13 THE COURT: But as this point is to, -- the
14 information that a crime -- that caused him to launch a
15 criminal investigation. It doesn't have to be what he
16 happened to, what the video happened to pick up.

17 MR. GUTMAN: Yes. But if the video picked up
18 something and they charge something, then there's a
19 presumption that that's what the investigation was
20 about.

21 THE COURT: I don't know about that at all.

22 MR. GUTMAN: But they have the burden of
23 proof.

24 THE COURT: I just, it just -- cause I
25 thought you know it would have helped if there was some

1 more detail here.

2 MR. GUTMAN: Okay.

3 THE COURT: On a thus and so day, you know,
4 this is when I started it. Because I got some
5 information that --

6 MR. GUTMAN: But they --

7 THE COURT: So you think he should be, he
8 should certify what crime he, you know, what the crime
9 was that was being investigated. Not who or whatever
10 --

11 MR. GUTMAN: I think he should have because
12 we're having a hearing today. They have the burden of
13 proof. Opposing counsel is very familiar with the law.
14 They have to oppose it. The burden of proof. And
15 these are vague and conclusory assertion, even assuming
16 it had been certified. He said we know what was
17 charged. He said well we were investigating crimes,
18 meaning not this.

19 THE COURT: I don't know.

20 MR. GUTMAN: But he doesn't say what the
21 crime is and he doesn't show there's any bas..., any --
22 what the factual basis was. That's a vague and
23 conclusory statement. It doesn't satisfy the burden of
24 proof of showing that this was an investigation of a
25 crime and not an investigation of what was charged.

1 This is a case about burden of proof,
2 vagueness and conclusory assertions.

3 THE COURT: I was just, I was just looking
4 for the Glen, the government records case that -- and
5 that was DWI, right?

6 MR. GUTMAN: Oh the one about the
7 expungement?

8 THE COURT: No, the government records case,
9 the council --

10 MR. GUTMAN: Oh the government records case,
11 yes.

12 THE COURT: Was attached to the --

13 MR. GUTMAN: Right. It was attached by reply
14 brief. And the principle there was criminal
15 investigative records only apply to investigations of
16 crimes. They don't, that exemption does not apply to
17 investigation to something other than crimes.

18 THE COURT: Right.

19 MR. GUTMAN: In that case, there is a motor
20 vehicle which is not a crime. In this case, it's
21 Disorderly Persons offense which the statute says by
22 definition Disorderly Persons offense, of course I'm
23 quoting 2C:1-4B, "Disorderly Persons offense is a petty
24 offense. It is not a crime." It's right here --

25 THE COURT: No, I looked it up in the code

1 too.

2 MR. GUTMAN: Yeah, so, so --

3 THE COURT: It's not.

4 MR. GUTMAN: So we have the principle --

5 THE COURT: But the point is where are you
6 looking from? When the investigation is launched? Or
7 what came out of it?

8 MR. GUTMAN: Well, they have the burden of
9 proof of persuading, of demonstrating --

10 THE COURT: No, I'm talking about how should
11 the definition of it be --

12 MR. GUTMAN: How should it have been done?

13 THE COURT: How should the definition be
14 measured?

15 MR. GUTMAN: It's all measured by what were
16 they -- you don't investigate someone, I mean people
17 don't just investigate for no reason. They have a
18 reason to investigate. There's a --

19 THE COURT: Yes.

20 MR. GUTMAN: -- basis for investigation where
21 -- so the question is --

22 THE COURT: We don't know if it was this
23 officer.

24 MR. GUTMAN: We don't know anything because
25 they refuse to satisfy their burden of proof. But as

1 to what they should do, is they have to demonstrate --
2 if they're claiming that the invest..., they were
3 investigating something other than what they cherished*
4 which was not a crime, then they have the burden of
5 proof of demonstrating what were they investigating and
6 --

7 THE COURT: Well what crime were they
8 investigating?

9 MR. GUTMAN: What crime, what crime, was
10 there a crime they were investigating? What is it?
11 What's the name of it and what was the basis for it?

12 THE COURT: Well.

13 MR. GUTMAN: They can't just say I was
14 investigating a crime. That's a conclusory statement.
15 They know what they -- they know why they did the
16 investigation. We don't know why they did. They did
17 it.

18 THE COURT: Well it may be none of our
19 business. Because that's why it's, you know.

20 MR. GUTMAN: They, they can reveal that
21 without revealing confidential information. They don't
22 have to name nam..., name of a person. But they should
23 be able to name the, the alleged crime and something
24 about the basis.

25 THE COURT: And have it be a crime.

1 MR. GUTMAN: Pardon me?

2 THE COURT: And have it be a crime.

3 MR. GUTMAN: Yeah. I mean if they have the

4 --

5 THE COURT: Not a Disorderly Persons.

6 MR. RENAUD: Let me, let me make that one
7 simple.

8 MR. GUTMAN: Wait a second. Now you're
9 interrupting me.

10 THE COURT: Now you are. In a minute we'll
11 be back.

12 MR. RENAUD: Okay, fine.

13 MR. GUTMAN: Um.

14 MR. RENAUD: Just trying to make it easy.

15 MR. GUTMAN: Um, they -- you investigate
16 based on some evidence, making you suspicious of some
17 person. So they have to demonstrate that they were
18 carrying out investigation of a suspicion of a crime.
19 They have to name the crime; they can't be vague and
20 say a criminal investigation. And they have to show
21 some evidence that, that this, that there was some,
22 that that's what they were investigating and not just
23 saying it. They have the burden of proof. They don't
24 have --

25 THE COURT: They do, but the question is what

1 should we be looking at for this to be the standard to
2 measure it by?

3 MR. GUTMAN: Naming, naming the crime that
4 they were investigating. A crime, not a petty offense.
5 And indicating that there really was a basis for the
6 investigation, so we know that there was an
7 investigation of that type.

8 THE COURT: Well and this other one --

9 MR. GUTMAN: And they have the burden of
10 proof and they didn't do it.

11 THE COURT: -- the Hopewell Township one they
12 were investigating theft.

13 MR. GUTMAN: Right.

14 THE COURT: An alleged theft.

15 MR. GUTMAN: Theft is a crime.

16 THE COURT: By one committee member -- well
17 it could be, could be a DP, or rather fourth degree,
18 well there* some.

19 MR. RENAUD: That's what I was gonna suggest
20 but --

21 THE COURT: It's fourth degree. Could be,
22 did you --

23 MR. GUTMAN: Well this was, this was
24 trespassing, a petty offense. In that other case they
25 were investigating --

1 THE COURT: No, what I'm focusing on is where
2 should I be looking? At what it was that the -- you
3 know when the chief says it was a criminal, it's a
4 criminal investigatory record, we had a criminal
5 investigation going, what am I supposed to do besides
6 just say okay you swore it's true; that's enough? Or I
7 don't think you can measure it by what came out of it.

8 MR. GUTMAN: No, that's not the -- that it
9 suggests --

10 THE COURT: So but that's what you want. You
11 want me to -- well what you're doing is saying it must
12 have been this officer they were looking, trying to
13 catch.

14 MR. GUTMAN: No, I'm saying --

15 THE COURT: And you know it turned out to be
16 a DP.

17 MR. RENAUD: Can I --

18 MR. GUTMAN: No, you --

19 THE COURT: What, what?

20 MR. GUTMAN: Excuse me for interrupting.

21 THE COURT: In a minute I'm gonna --

22 MR. GUTMAN: No, I'm not --

23 THE COURT: Are you or are you not saying
24 look at what came out of it?

25 MR. GUTMAN: No, I'm saying that they have

1 the burden of proof under Section 6 of OPRA.

2 THE COURT: They absolutely do.

3 MR. GUTMAN: Okay. And I don't have to
4 persuade you as to what the investigation was. I don't
5 even have to say look who they, look who they charged.

6 THE COURT: No.

7 MR. GUTMAN: They have the burden of showing
8 that it was a crime, that they were investigating a
9 crime. And at the very minimum they have to name a
10 potential criminal offense. You can investigate
11 someone for criminal offense and nobody's charged.

12 THE COURT: Right.

13 MR. GUTMAN: You can decide the crime didn't
14 occur. But they have to name, what was he
15 investigating?

16 THE COURT: So your position is he, his
17 certification is, he should say what the crime was that
18 was being investigated.

19 MR. GUTMAN: And what --

20 THE COURT: Or possible crimes --

21 MR. GUTMAN: Right. Possible crime that they
22 suspected and what --

23 THE COURT: That caused him to have a camera
24 put in there.

25 MR. GUTMAN: Other than trespassing.

1 THE COURT: And when he put it there to prove
2 that it was before, you know, that they don't have it
3 in there all the time.

4 MR. GUTMAN: And there was -- and what was
5 the basis for the investigation.

6 THE COURT: Okay.

7 MR. GUTMAN: I mean, oh I'm investigating --

8 THE COURT: But you are not saying look at,
9 look at the result. You are saying when you launch it
10 you need a -- it needs to be about a crime. And a
11 DO..., and a DP is not a crime. And you're right. And
12 driving with a, you know, under the influence isn't
13 either. And that was, that's what this Glen Blue case
14 is about.

15 MR. GUTMAN: Right.

16 THE COURT: So now I'm gonna ask Mr. Renaud
17 if he agrees that it should be looked at from the time
18 that the investigation is launched and shouldn't we
19 know that it was a, it was indeed a crime?

20 MR. RENAUD: Okay. I, for some reason the
21 light bulb is only just going off in my head now on
22 what it is that you're talking about which is that the
23 criminal, it's the criminal part of the criminal
24 investigatory record that you're saying is conclusory.
25 I'm not relying on that. Okay? I'm not relying on

1 that he's --

2 THE COURT: He's just saying it is.

3 MR. RENAUD: He's investigating something
4 other than what occurred. Okay? It's not, our point
5 is this, and I thought I made this clear enough in my
6 brief. And perhaps I didn't. I don't agree at all
7 with the proposition that a, if there was an
8 investigation of a Disorderly Persons offense that that
9 is not a criminal investigatory record. Okay?

10 THE COURT: Well, we have a definition,
11 right?

12 MR. RENAUD: That's -- and I, I gave --

13 THE COURT: Here we go. This is the
14 definition in the statute, 47:1A-1.1.

15 "Criminal investigatory record means a record
16 which is not required by law to be made, maintained or
17 kept on file that is held by a law enforcement agency
18 which pertains to any criminal investigation or related
19 civil enforcement proceeding."

20 That's the definition.

21 MR. RENAUD: Right. Now if you put those
22 together, criminal investigation --

23 THE COURT: Or civil.

24 MR. RENAUD: Or civil enforcement --

25 THE COURT: Related, related civil.

1 MR. RENAUD: Meaning it's, it's, there's --
2 you don't have to have an indictable offense for
3 something to be a criminal investigation.

4 THE COURT: What makes you think so?

5 MR. RENAUD: Well, let me give, let --

6 THE COURT: Cause you just think this is
7 wrongly -- that the -- when the Government Records
8 Council's thinking of it's not a crime.

9 MR. RENAUD: No, because Title 39 is entirely
10 different.

11 THE COURT: It is.

12 MR. RENAUD: It's -- a disorderly person's
13 offense is contained in Title 2C. All the definitions
14 in Title 2C pertain to Disorderly Person's offenses.
15 The expunge statute, for example, that's in 2C pertains
16 to crimes, that is indictable offenses, and non-
17 indictable offenses. Everything in 2C is colloquially
18 considered to be criminal.

19 Let's give you an exam..., let me give you an
20 example, okay? Some -- we won't use a vid..., a DVD,
21 this is a DVD by the way I should say not a videotape.

22 THE COURT: Oh okay.

23 MR. RENAUD: But let's say the police are
24 called to the scene of an altercation or some kind and
25 there's an assault is reported.

1 THE COURT: Reported.

2 MR. RENAUD: Reported. There's a, there's a
3 -- people don't call up and say there's an assault.
4 They call up and say --

5 THE COURT: But I mean it could be a, it
6 could be indictable. It could be non-indictable.

7 MR. RENAUD: -- somebody's beating somebody
8 up. Okay? So now they come and interview people,
9 okay?

10 THE COURT: And they're running a tape.

11 MR. RENAUD: Right. They're -- good, they're
12 running a tape. Now is whether that criminal
13 investigation is going to be disclosable, is that going
14 to be determined by whether the prosecutor's office
15 decides that they're going to charge an aggravated
16 assault as a --

17 THE COURT: No.

18 MR. RENAUD: Or as a, or as a --

19 THE COURT: Simple.

20 MR. RENAUD: Disorderly Persons simple
21 assault. It's, it's -- the investigation is one of
22 what happened. That's what, that's what it is. So
23 here we have -- let me just take a look because I real,
24 honestly, I really don't think that this is the, the
25 issue in the case. I, you know, a -- even if it were

1 only something and I -- you know it's hard to think of
2 something that's a Disorderly Persons offense that if
3 it doesn't involve more money or more severe conduct
4 which is gonna be something judgmental. Whether it's a
5 theft offense, a fraud offense, an assault offense.

6 THE COURT: Well that, that, that case there
7 that I, that could be a small theft like the
8 Laundromat.

9 MR. RENAUD: Right.

10 THE COURT: Taking quarters of the
11 Laundromat.

12 MR. RENAUD: Well he didn't take quarters out
13 of the Laundromat. He jammed business cards into the
14 thing and no money came out.

15 THE COURT: I'm just -- you're talking,
16 you're talking about what is a hypothetical.

17 MR. RENAUD: Yes.

18 THE COURT: If what was brought to your
19 attention is somebody's you know stealing quarters out
20 of the machine.

21 MR. RENAUD: Yeah.

22 THE COURT: And you put the video in to get
23 them.

24 MR. RENAUD: Right.

25 THE COURT: I guess you are investigating a

1 DP.

2 MR. RENAUD: Right. And if you're not right

3 --

4 THE COURT: Until you know it does for days
5 after days after days.

6 MR. RENAUD: If there's not enough quarters,
7 it's a DP. That's right. So I, I, I just -- there is
8 -- Mr. Gutman makes this proposition as though this is
9 the law. There is no case nowhere, no how that says
10 that a Disorderly Persons, an investigation of a
11 Disorderly Persons offense is not a criminal
12 investigation.

13 THE COURT: No, there isn't.

14 MR. RENAUD: Or that --

15 THE COURT: This is the case where we're
16 gonna decide that.

17 MR. RENAUD: Or that it depends, or that it
18 depends on whether the prosecutors are. Remember this
19 case is one where he sent this stuff, this is in the,
20 in our papers where he sent the stuff to the
21 prosecutor's office --

22 THE COURT: Right. And it came back.

23 MR. RENAUD: And then the prosecutor's office
24 says I'm not prosecuting this. We'll send it back to
25 you, you deal with it in municipal court. So is, if

1 the prosecutor's office had decided to -- let's say
2 they decided to indict, okay? Is that -- is it now --
3 how does it go from not being a criminal investigatory
4 record to a criminal investigatory record?

5 THE COURT: Yeah but we don't know that, that
6 he put the camera in there because of this guy. That
7 it's the complaint about this guy that caused the
8 camera to be put in there. We don't know that. It's
9 never been made clear that somebody complained about
10 this, this officer and that's why he put a camera in
11 there.

12 MR. RENAUD: Okay, why, why would it matter?
13 I guess I go back to the first point.

14 THE COURT: I don't know that it would. I
15 thought you said a while back, fifteen minutes ago that
16 he, you know, it could -- somebody brought it to his --
17 some situation was brought to his attention --

18 MR. RENAUD: To his attention and so --

19 THE COURT: -- which caused him to put a
20 camera. Put something.

21 MR. RENAUD: Right.

22 THE COURT: A video camera in there.

23 MR. RENAUD: Right. Let's forget that I said,
24 let's forget his conclusory statement about it being a
25 criminal investigation.

1 THE COURT: We, we have no proof that this,
2 this was a -- you know designed to trap this, you know,
3 catch this guy at something somebody said was a
4 problem.

5 MR. RENAUD: Well is it -- does it have to be
6 designed, does it matter if it's him?

7 THE COURT: This guy?

8 MR. RENAUD: Suppose there's a -- just a --

9 THE COURT: I don't know that it does.

10 MR. RENAUD: Listen, well that was my point.
11 Suppose there's a complaint --

12 THE COURT: I thought I accepted that a while
13 ago.

14 MR. RENAUD: Suppose there's a complaint --

15 THE COURT: We're on whether it had to be
16 criminal in the first place.

17 MR. RENAUD: Right. Suppose there's a
18 complaint. We think somebody may be wandering around
19 the Municipal Building.

20 THE COURT: Um hmm.

21 MR. RENAUD: Okay, so what's the difference?
22 I, I still, I still say, Judge, what's the difference?
23 I mean, I understand if we, if this is something that's
24 set up and everybody knows about it. It's not a
25 criminal investigatory record because it's not there to

1 find the -- an offense. But unless you don't believe
2 that part of the chief's, I'll call it certification if
3 I may, if -- unless you don't believe that part, and I
4 can't imagine why you wouldn't, it doesn't matter. It
5 doesn't matter if he's focused in on this particular
6 guy or if he's just looking to see if somebody's
7 wandering around the Municipal Building. Or in fact if
8 he took it because there was some rumor that some
9 employee was pilfering stuff. It doesn't make any
10 difference. It's set up. It's not a permanent thing.
11 It's --

12 THE COURT: So you're really thinking if
13 it's, if it's suspicious activity that could be
14 illegal, that's enough.

15 MR. RENAUD: Right. Whatever it is for
16 whatever reason and, you know, it doesn't, it just
17 doesn't matter. It doesn't matter if somebody's
18 stealing nickels, and he's investigating a theft of
19 nickels. It doesn't, it doesn't matter. That's why,
20 that's why I didn't put it in. I mean it doesn't, I
21 think we're off in totally the wrong direction. It
22 matters not. He set it up for the purposes of
23 investigating something.

24 THE COURT: Well, he got, you know, he
25 produced a government records case about DWI and they

1 in, -- true, that is a different title.

2 MR. RENAUD: Right.

3 THE COURT: But I thought the -- and they
4 didn't quite adopt --

5 MR. RENAUD: I mean just --

6 THE COURT: -- what the executive director
7 wrote. But the executive director said --

8 MR. RENAUD: I'll give you another example if
9 I might.

10 THE COURT: It is, it is recommended the
11 Council order that all requested documents related to
12 any noncriminal arrest be provided to the requester
13 subject to OPRA redactions and they didn't, they didn't
14 quite go that far but --

15 MR. RENAUD: To give you an example, you
16 can't expunge a Title 39 offense for example.

17 THE COURT: I know.

18 MR. RENAUD: So since you can't, you can't
19 ex..., why can't you expunge a Title 39 offense? Because
20 the expungement statute that contained in 2C --

21 THE COURT: Doesn't cover it.

22 MR. RENAUD: Doesn't cover it. It only
23 covers those offenses. But you can expunge a
24 Disorderly Persons offense. You can expunge a petty
25 Disorderly Persons offense. Motor vehicle offenses are

1 not considered anything like 2C offenses. So --

2 THE COURT: So if, if what -- the information
3 provided to the chief that causes him to, to launch the
4 investigation could be criminal.

5 MR. RENAUD: Somebody stealing jelly beans.

6 THE COURT: Could be well that's illegal I
7 suppose, it's not --

8 MR. RENAUD: Well but it's a petty Disorderly
9 Persons offense because assuming it's a bag of jelly
10 beans that costs a buck and a half it's that's what
11 he's investigating, stealing jelly beans.

12 THE COURT: But see from a public perspec...,
13 you know public policy perspective I think you're right
14 because the whole point of the thing is they want to
15 protect, you know, they're trying to protect the
16 investigatory action of the law enforcement agency. So
17 if it's, if it's jelly beans or a million dollars, the
18 same policy of why we are not gonna, you know, give
19 this out seems to be the same really.

20 MR. RENAUD: Yes. Well I don't disagree.

21 THE COURT: That if they're only
22 investigating Disorderly Persons offenses, then
23 everybody should have it if they want it. And if
24 they're, if they were investigating a murder, you know,
25 somebody they thought somebody was gonna murder

1 somebody and they put the camera in there when they did
2 it, it just doesn't make sense.

3 MR. RENAUD: Well, Judge, you know what --

4 THE COURT: Because they're supposed, their
5 job is to investigate suspicious act..., you know, if
6 somebody gives them some cause --

7 MR. RENAUD: Um hmm.

8 THE COURT: Their -- it's their job to
9 investigate. And where it leads is where it leads.
10 But -- so I think you're right.

11 MR. RENAUD: Okay. Yes. My -- our, yeah our
12 position is if he had received a complaint that
13 somebody's stealing my jellybeans and he puts up a
14 camera to find out who's stealing the jellybeans and it
15 finds somebody stealing the jellybeans, that's a,
16 that's a criminal investigation. Where, where is the
17 Disorderly Persons, where are those offenses found?
18 They're found in 2C. What's the name of Title 2C?

19 THE COURT: Criminal code.

20 MR. RENAUD: Code of Criminal Justice. Is it
21 not? I mean if you're the Legislature and --

22 THE COURT: I'm, I'm more focused on the job
23 of the chief to, to investigate what people tell him,
24 you know, that could be a crime. And it's his job to
25 go check it out and you know get the evidence against

1 somebody if it's, if it is. So part of that job is to
2 go stick that camera there. And if it produces a
3 little fish or a, you know, a little problem --

4 MR. RENAUD: Um hmm.

5 THE COURT: -- or a big one, it's still the
6 same, the same duty to go out there and investigate
7 possible crimes that is being protected by this
8 criminal, you know, this statute saying criminal
9 investigatory records are not government records.

10 MR. RENAUD: Yes. I agree.

11 THE COURT: So, okay so what would you like
12 to say to --

13 MR. GUTMAN: Yeah, Your Honor.

14 THE COURT: To combat that.

15 MR. GUTMAN: I think the, the point is not
16 whether it's a legitimate or desirable activity. The
17 question is does the public have a right to know.

18 OPRA has a section 3B that covers ongoing
19 investigations.

20 THE COURT: Yes.

21 MR. GUTMAN: Whether it's criminal or non-
22 criminal. In addition -- so any ongoing investigation
23 is not public. There is another separate section in
24 1.1 that covers criminal investigations and goes
25 further.

1 THE COURT: Right.

2 MR. RENAUD: Because it goes further it's
3 limited in its subject matter and OPRA expressly states
4 that any limitations on the right of access shall be
5 construed in favor of access. So in addition to this
6 absolute secrecy about all ongoing investigations,
7 whether criminal, not criminal or whatever, this other
8 provision that covers investigations after they're over
9 permanently should be limited to criminal
10 investigations because it's not a question about
11 whether it's necessary.

12 THE COURT: What happened?

13 MR. GUTMAN: It's a question the pub..., --

14 THE COURT: Well --

15 MR. GUTMAN: Whether the public have a right
16 to know?

17 THE COURT: If the Laundromat gave the tape
18 to them as part of an investigation, then when they're
19 done, you get the Laundromat tape.

20 MR. GUTMAN: We got the Laundromat tape.

21 THE COURT: I know. But that's the
22 difference. This is the police department's document
23 or whatever you want to call it, piece of -- what would
24 you think is a good label for a DVD?

25 MR. GUTMAN: DVD.

1 MR. RENAUD: Criminal investigatory record.

2 MR. GUTMAN: DVD.

3 THE COURT: Record. Yes, I know.

4 MR. GUTMAN: DVD of petty offenses.

5 THE COURT: This DVD is not something that
6 people, you know, that people gave them like the 911
7 tape or some other thing that they used and then they
8 don't need it anymore because they're done with their
9 investigation. That's the 1A:3. But this is the, this
10 -- these records will never be handed out, right? If
11 it's a criminal investigatory record, if they're done,
12 it doesn't matter.

13 MR. GUTMAN: But it's not. Your Honor, the
14 thing left out is the public's right to know and the
15 principle the public has the right to know all
16 government records unless there's an exemption and they
17 satisfy their burden of proof.

18 THE COURT: And the sta..., and the Legislature
19 says this is criminal investigatory records are not
20 government records.

21 MR. GUTMAN: But --

22 THE COURT: So the public doesn't have a
23 right to get it under the OPRA.

24 MR. GUTMAN: But the issue is whether it is a
25 criminal --

1 THE COURT: I know.

2 MR. GUTMAN: What we're discussing is whether
3 or not it's a criminal investigative record.

4 THE COURT: And if you want the three judge
5 panel to say what, you know, if they're looking for,
6 you know, if they were told jellybeans and they put the
7 camera up, that one is supposed -- it's determined by
8 what the nature of the fact -- of the information that
9 was provided to the police is the determining factor,
10 then we need to know that. But I'm saying I think when
11 you look at why do they do this, it's to protect the
12 police in doing their duty to investigate what people
13 tell them is, might, might be criminal activity. So
14 then they put the camera there, and they may get
15 something little or nothing or you know something bad.
16 But to have to say, -- I don't think it's correct to
17 have to say that the police chief has to satisfy the
18 court that what he had, what he was about to, you know
19 the reason that he put it in there, the information
20 was, would have constituted a crime as opposed to a DP.
21 Because there are just too many things about -- well in
22 this case I imagine they probably could have indicted
23 him if they wanted to, they wouldn't have -- if they
24 sent it to the prosecutor; they decided not to.

25 MR. GUTMAN: But --

1 THE COURT: But I don't, I don't think that
2 the court is supposed to get into deciding, you know,
3 knowing the nuan..., not the nuances but the details and
4 then deciding whether or not those facts if, if it's
5 borne out would have been a crime. And it's -- and
6 therefore you can't have it or those facts if borne out
7 would have been a DP and therefore you could.

8 MR. GUTMAN: But --

9 THE COURT: If you can.

10 MR. GUTMAN: But, Your Honor, OPRA expressly
11 states that all limitations on the right of access
12 should be interpreted in favor of access. So if
13 something's ambiguous it should be interpreted in favor
14 of an access.

15 THE COURT: Yes but -- but if the thing is
16 not a record --

17 MR. GUTMAN: Well it is a record.

18 THE COURT: Not a government record.

19 MR. GUTMAN: Um.

20 THE COURT: It's their burden to prove it's a
21 government, it's not a government record.

22 MR. GUTMAN: Right, I think --

23 THE COURT: -- because that's what they're,
24 they're arguing. So they have to arg..., that's their
25 reason for not giving it to you. So they do have the

1 burden to prove it's not a government record. So the
2 statute it says that criminal investigatory records are
3 not included.

4 MR. GUTMAN: I think the issue is, is the
5 criminal investigative record exemption limited to
6 crimes? That is the issue.

7 THE COURT: Okay, but if it is, how am I
8 supposed to measure that? If you're right. So we have
9 a record here for the Appellate Division. What, what
10 should I be looking for?

11 MR. GUTMAN: They have to, they have to
12 identify the crime they investigated and submit
13 evidence --

14 THE COURT: And, and cite the statutory
15 section in their certification in order to prevail.

16 MR. GUTMAN: Well they were investigating for
17 some reason. They've been keeping that secret. But
18 they don't investigate people at random for no reason.
19 They, they had certain information that led them to
20 investigate someone for some offense. And they're
21 keeping that secret because I think they were
22 investigating this person for trespassing probably.
23 And if they were investigating -- I mean opposing
24 counsel you know his, his major point is not that they
25 were investigating for some time but that it doesn't

1 matter what they were investigating for.

2 THE COURT: No they can't just call it that.
3 They have to have some facts from somebody to justify
4 putting the cam..., the DVD in there.

5 MR. GUTMAN: But it has to be of a crime,
6 that's why it's called a criminal investigative record.
7 And it goes beyond the other exemption. It covers all
8 investigations. The other one covers all
9 investigations. This one covers only certain limited
10 investigations because it's forever. So you've got,
11 you got, you got to look at it in the context. If it
12 was the on..., you know there are two, these two
13 provisions about investigations. And they, and each
14 has to be looked in the context of the other.

15 THE COURT: Well it clearly wasn't required
16 by law to be ma..., maintained and kept on file. Right?

17 MR. GUTMAN: No, it wasn't required by law.

18 THE COURT: Right?

19 MR. GUTMAN: Not but that's not at issue.

20 THE COURT: And he says it pertains to
21 criminal investigation. So all we're on is could it --

22 MR. RENAUD: And assume that the -- I didn't
23 mean by --

24 THE COURT: Can it be illegal activity that
25 might fall somewhere in the criminal code of ju..., you

1 know the criminal code?

2 MR. RENAUD: Yes. That's, that's my point.
3 And I didn't -- and I apologize; I did not mean for
4 that to be a conclusory statement that it's an
5 indictable offense. What my point --

6 THE COURT: No, some place in the Code of
7 Criminal Justice.

8 MR. RENAUD: Yes, that's it. And if, and
9 I'll even, I'll give Mr. Gutman this point. If, if
10 his, he says we think that they were investigating this
11 person for trespassing, that's the kind of thing that I
12 would argue if that's the case, it's a criminal
13 investigatory record under the statute.

14 THE COURT: Because --

15 MR. RENAUD: That's, that's the point that
16 I'm trying to make. That's why we're -- I think we're
17 arguing about something that is not, is not our
18 argument. Our argument is if he's got a complaint and
19 he's investigating it, it doesn't matter if it's
20 trespassing or jellybeans or nickels or quarters --

21 THE COURT: Stealing jellybeans.

22 MR. RENAUD: Or hundred dollar bills or
23 thousand dollar bills. It doesn't matter.

24 MR. GUTMAN: But that's 3B. 3B doesn't
25 matter.

1 THE COURT: 3B?

2 MR. GUTMAN: Section 3B of OPRA. That says
3 you can investigate --

4 THE COURT: Oh. You're talking about the
5 code.

6 MR. GUTMAN: Well --

7 THE COURT: Of criminal justice.

8 MR. GUTMAN: Section 3B of OPRA says an
9 ongoing investigation, it doesn't matter what kind of
10 investigation, it doesn't matter if you're
11 investigating jellybeans or anything else. Any kind of
12 investigation.

13 THE COURT: And when it's over, it's over and
14 you can have it.

15 MR. GUTMAN: Yeah.

16 THE COURT: We're not, that's what we're not
17 focus..., --

18 MR. GUTMAN: Right.

19 THE COURT: The case is not that. That's why
20 you got the Laundromat that's important that is why you
21 got the Laundromat tape. They are done with that and
22 it's not theirs. It wasn't, they didn't set up
23 something in the Laundromat. Those, that's the
24 Laundromat's camera taking those pictures.

25 MR. GUTMAN: But 3, 3B was applied to all

1 investigations. The section we're referring to is
2 limited to certain limited investigations.

3 THE COURT: Correct.

4 MR. GUTMAN: That's the whole purpose of it.

5 THE COURT: And I think you're gonna have to
6 get something from the App. Div. about, you know, look
7 at that case from governor -- Government Records
8 Council about the DWI and that's Title 39 and whether
9 or not, you know, when they, when the chief launches an
10 investigation he needs facts that, that if proven
11 would, would amount to something, some offense or crime
12 covered by the Code of Criminal Justice. But it
13 doesn't have to be an indictable offense to be
14 included. And that's my finding and you can ask, you
15 know, you can certainly ask them because it sure isn't
16 clear. They haven't said that. And the fact that they
17 will -- it says the civil enforcement has to be related
18 to the criminal but they will let you also do, you
19 know, if they can also cover a civil, a related civil
20 enforcement proceeding that's related to a criminal
21 investigation so, you know, I just think the whole
22 public policy reason that they have exempted this
23 covers illegal activity covered by the Code Of Criminal
24 Justice even if it's not indictable. And that's my
25 reason is the, you know, the public -- why are, why do

1 -- have they done this as opposed to any kind of clear
2 statement from anybody that if it's a D..., you know if
3 it's not indictable that somehow the chief -- I just,
4 it doesn't, -- it doesn't seem correct from a point of
5 view of them doing their duty to investigate tips that
6 they get or other information. That only if it's
7 really serious must -- does this apply. It doesn't, --
8 and that would be the way you would prevail is if, if
9 the Appellate Division thought it had to be really
10 serious before you could, you know, they could keep it
11 from you. Serious in the sense of a -- the facts that
12 led him to, or the information that led him to start
13 the investigation would have amounted to an indictable
14 offense as opposed to these examples that we're giving
15 in the first place. And that, and if that were true
16 then the chief would have to, you know, hit that
17 standard in order to, to meet the definition. But I
18 don't think that's correct. I could be wrong. So that
19 would -- if, so if I, I he has to -- still he has to do
20 this certification now --

21 MR. RENAUD: Yeah, I'll --

22 THE COURT: I can't really sign this thing.
23 I can't sign this order until he does.

24 MR. RENAUD: I'll do that right away, Judge.
25 Yes. And I do apologize.

1 THE COURT: So assuming he does --

2 MR. RENAUD: Um hmm.

3 THE COURT: And I find it is a criminal
4 investigatory record, then what? Then we move on to
5 the right to know, right?

6 MR. GUTMAN: Common law, common law right.

7 MR. RENAUD: Well actually I think we --
8 don't we, I think we first have to do the security.

9 THE COURT: Just to make sure we've covered
10 all the bases?

11 MR. RENAUD: I think so. As long as there's
12 no point, as long as we're talking about the Appellate
13 Division we might as well cover all the arguments so --

14 THE COURT: All right. And the security is
15 based on the, the executive order?

16 MR. RENAUD: The executive order and the, and
17 the statute. Basically what, what is depicted on the
18 DVD is an interior area of the, I'll call it the
19 Borough Clerk's Office. But it's partly her office and
20 the CFO and Tax Collector and so forth. It's a non-
21 public --

22 THE COURT: And you want this as an
23 independent basis?

24 MR. RENAUD: Yes. Yes. It's a -- even if
25 this were not a criminal investigatory record, it would

1 not be disclosed. It's a DVD which depicts the inside,
2 a non-public area in the Clerk's Office. It, it
3 depicts the location, for example, and I don't even
4 like saying this, depicts the location of the Borough's
5 safe.

6 THE COURT: Well that's your big point.
7 That's his big concern, but it's not the specs, it's
8 not a building. You know, it's not the plan of the
9 office. He's concerned about the safe I think.

10 MR. RENAUD: Yes. Well -- but I, no I think
11 it pertains to, you know, the both issues and it falls
12 within the statute. And he also mentioned in his
13 certification that it, it pertains to where if he were
14 investigating he would set up. There's no, nobody
15 would -- since it's not something that's there all the
16 time, this is something that apparently he finds a
17 place that's not readily visible where this camera can
18 see into the Clerk's Office and take the video footage
19 that he wants to take. Now if we disclose what it
20 shows, that also happens to disclose for anybody in the
21 world --

22 THE COURT: Where the camera is.

23 MR. RENAUD: Where the camera is and that we
24 would submit is a, -- it, it's a disclosure under both
25 exceptions, both of which say they're not government

1 record, emergency or security information or procedures
2 for any building or facility which if disclosed would
3 jeopardize security of the building or facility or
4 persons therein. People know for example whether there
5 is or is not some other security device inside the
6 Clerk's Office. I mean there's all kinds of things
7 that, that --

8 THE COURT: But you want this considered as
9 if it weren't in there for a criminal investigation.

10 MR. RENAUD: Yes.

11 THE COURT: Independently.

12 MR. RENAUD: Yes.

13 THE COURT: It's if they had just put it
14 there.

15 MR. RENAUD: Yes. And, and what it shows,
16 it's two independent things. One how it's done and the
17 second is what it shows. It shows -- this is the
18 second one; security measures and surveillance tech...,
19 techniques which if disclosed would create a risk to
20 the safety of persons, property, electronic data or
21 software.

22 Now I, I don't mean to denigrate the purpose
23 for which the plaintiff seeks this information in any
24 way. But and it really shouldn't matter because
25 anybody who gets government records that they're

1 entitled to is entitled to do this. But everything
2 that's been provided, I'm told I don't go looking for
3 this stuff, but I'm told has been posted on the
4 internet. So I assume that what the plaintiff wants to
5 do is to take this DVD and put the private, secure
6 areas, unpublic areas, nobody in the public goes in
7 here. This is the back office on the internet for the
8 every --

9 THE COURT: We have to assume it's possible
10 they would.

11 MR. RENAUD: Yes, you have to assume it's
12 possible. So for every burglar in the world to see
13 anybody who's interested in planting a bomb or for
14 whatever reason. So that's exactly and I gave you
15 some, you know, things about the building. This is,
16 this is exactly the same as building plans. There's --

17 THE COURT: Well we're looking at Bulletin
18 03-3 from July 2003 that was enacted by the State of
19 New Jersey, Department of Community Affairs, Division
20 of Codes and Standards in order to more fully implement
21 Executive order 21 and 26. And you are reading off
22 some of the, from the guidelines to be followed in
23 responding to a request for a review of building plans
24 or specs, specifications.

25 MR. RENAUD: Well actually what I was reading

1 from was the statute, Your Honor, from the definitions.

2 THE COURT: Oh all right.

3 MR. RENAUD: contained in 47:1A-1.1 but they
4 are quoted in that order. But the -- those provisions
5 that I --

6 THE COURT: All right.

7 MR. RENAUD: Just quoted are contained in the
8 statute as not government records.

9 THE COURT: Government records. Secur...,
10 security measures and surveillance techniques which if
11 disclosed would create a risk to the safety, that one.
12 Right?

13 MR. RENAUD: Yes. And the, and the one
14 before it, emergency or security information or
15 procedures.

16 THE COURT: For any buildings or facility
17 which if disclosed would jeopardize security of the
18 building or facility of persons therein?

19 MR. RENAUD: Yes.

20 THE COURT: And again, you know, they, -- the
21 statute doesn't really say that if -- it looks like if
22 the person gives that reason, unless you have some
23 good, unless you have some contrary evidence, the
24 reason prevails. I just don't know of any, any basis
25 for having a debate about whether they're, you know,

1 conducting a hearing about whether they're right.

2 MR. GUTMAN: Can I respond, Your Honor?

3 THE COURT: Yeah, sure.

4 MR. GUTMAN: Um, the Appellate court has
5 ruled that conclusory assertions are insufficient. In
6 that Paff case that Mr. Paff has previously had, they
7 can't just say this is a matter of security. They
8 can't just say this application applies. That's Paff
9 v. Department of Labor. They have the burden of proof,
10 they have to demonstrate that, that a exemption
11 applies. They can't just make a conclusory statement.

12 THE COURT: Well they did make, they did give
13 reasons in this case. They didn't just say this is it.
14 They're saying this is not a part of this building
15 where the public goes. And if you, you know, you can
16 by looking at it you know where the camera is and you
17 can see where the safe is.

18 MR. GUTMAN: Okay, Your Honor.

19 THE COURT: And so if that's on the net
20 anybody who wants to know where to, how to, you know,
21 they know it's -- what the layout of that part of the
22 municipal building is.

23 MR. GUTMAN: Well first of all as to the
24 provisions about building plans, those are directed and
25 I think expressly to enabling someone to get into a

1 building. So this is in one room. It's not how to get
2 into the Municipal Building. So those don't apply.
3 Then as to the camera, they have said the camera's not
4 up there anymore. So I mean they say that. The camera
5 is not up, it was only up during this, for this person
6 and it's gone. It's not up. So they have not
7 satisfied their burden of showing that it's ever gonna
8 be up again. That's speculation.

9 THE COURT: Yeah but have they changed the
10 way they, they configure the room? Since the camera
11 came down?

12 MR. GUTMAN: They haven't demonstrated that
13 one) the camera would be used again for that room. Or,
14 B) that they would have the same location for which it,
15 which the camera was shooting from. So they have the
16 burden to prove that.

17 THE COURT: No, it's what, I think it's what
18 the people who see the video learn about the -- that
19 part of the office.

20 MR. GUTMAN: Okay, Your Honor, they'll be a
21 video of a room and some guy walking around. I mean
22 they'll be desks and chairs --

23 THE COURT: And a, and a safe.

24 MR. GUTMAN: And a safe, okay. But we know
25 that because they have stated publicly there is a safe

1 there and it's, it's in plain sight so the camera you
2 can see it. So we already know that. So what's the
3 security big concern about showing an office with
4 desks, chairs and a safe that's already known?

5 THE COURT: Well he told you. The people
6 will -- if they, if they're interested they know its
7 there.

8 MR. GUTMAN: But we already know it's --

9 THE COURT: Which they wouldn't know as a
10 member of the public.

11 MR. GUTMAN: Well I think we're talking about
12 the Chief Financial Officer so I think there's sort of
13 an assumption that there is money involved and checks
14 and there would be a safe.

15 THE COURT: Well see that helps, that helps
16 their argument.

17 MR. GUTMAN: I don't think so because I think
18 that's general knowledge. I don't this cam..., this
19 video is going to show people anything that they don't
20 --

21 THE COURT: Until you watch the video, you
22 don't know where that is in Garwood, right?

23 MR. GUTMAN: But it's somewhere in plain
24 sight because the camera is not hidden somewhere. It's
25 not behind a door or --

1 THE COURT: No, he's saying the public
2 wouldn't know that unless they watched this video
3 because when you walk into the public part you don't
4 see that.

5 MR. GUTMAN: Your Honor, I don't think that
6 the fact that there is a safe in plain view in, in a
7 office, a closed office, is a matter that justifies
8 withholding records from the public of a police officer
9 engaging in misconduct.

10 THE COURT: It's a question of whether or not
11 it fits this definition. For this, it's a weighing
12 process for a right to know, this, if it doesn't fit
13 this definition. And we're talking about a risk to the
14 safety of property basically I think. I don't think
15 there's a -- it's just a risk to property.

16 MR. GUTMAN: I don't think that that creates
17 a risk to property.

18 THE COURT: You don't?

19 MR. GUTMAN: No.

20 THE COURT: You don't think the fact --

21 MR. GUTMAN: The fact that there is a safe
22 and --

23 THE COURT: Now we know where the safe is if
24 they want to find it.

25 MR. GUTMAN: No because I think its common

1 knowledge that there are safes in the vicinity or in
2 the office of --

3 THE COURT: See that one is more on. The
4 emergency or security information for buildings or
5 facilities which if disclosed would jeopardize the
6 security of the building, I think is what you were
7 talking about at the beginning, how to get in there.

8 MR. GUTMAN: Well they cited some regulation
9 that talked about information allows someone to get
10 into a building. They cited this --

11 THE COURT: I know but I'm just saying this
12 video is not gonna help them get in the building.

13 MR. GUTMAN: No, it's not. Nor is it in use
14 --

15 THE COURT: It's -- and it's a surveillance
16 technique. So the security measures and surveillance
17 techniques which if disclosed would create a risk to
18 the safety of persons, property, electronic data or
19 software. So now they took the camera down but the
20 point is what do you learn about that hidden area of
21 the Clerk's Office if you watch that video?

22 MR. GUTMAN: I think you learn very mundane
23 things that are public knowledge.

24 THE COURT: Well --

25 MR. GUTMAN: And, Your Honor, --

1 THE COURT: But we don't know cause we
2 haven't seen it.

3 MR. GUTMAN: Well, Your Honor, OPRA expressly
4 says that exemptions should be interpreted in favor of
5 access. And I don't --

6 THE COURT: In favor of what?

7 MR. GUTMAN: Access. That if something
8 ambiguous that the public right should be triumphant.
9 And that's what the first sentence in OPRA says.

10 THE COURT: Well, I don't think it's
11 ambiguous. It's a question of is it enough? Is it
12 sufficient? What it, what he's saying, you know, --

13 MR. GUTMAN: Well.

14 THE COURT: -- the safe is not, you know,
15 it's pretty, pretty low on the list of things but I
16 don't know how much money they keep in that safe and
17 whether somebody would be --

18 MR. GUTMAN: The question is whether showing
19 a video or DVD of an office where there is a safe of a
20 Chief Financial Officer creates a risk that doesn't
21 already exist to the safety of persons, property -- ?

22 THE COURT: Well I think it does because
23 nobody's seen that yet.

24 MR. RENAUD: Judge, if I, I'm sorry, may I?

25 THE COURT: All right.

1 MR. RENAUD: If I sent a letter, let's say I
2 sent an OPRA request to the state treasurer's office
3 and I said send me a copy of your records that show
4 where in your private office your safe is located.
5 What do you think I would get for an answer?

6 THE COURT: You'd get security measures
7 disclosed.

8 MR. RENAUD: Yes. I mean it's, it's, you
9 know, whether or not Mr., Mr. Gutman likes it, that's,
10 that's what the answer is. There's a safe and nobody
11 knows where it is --

12 THE COURT: Until they watch the video.

13 MR. RENAUD: Because they're not allowed in
14 until they see the video and then everybody's gonna --
15 maybe somebody's gonna drill in through the roof; I
16 don't know. You know this way they'll know where to
17 drill. You know?

18 MR. GUTMAN: Except they know there's a safe
19 there in --

20 THE COURT: Well people assume that. And now
21 we know it because you brought this case and he had to
22 write a certification.

23 MR. RENAUD: That's right and that's part of
24 the, this is part of the problem I'm trying to express
25 is I'm trying not to te..., I can't.

1 THE COURT: Tell too much.

2 MR. RENAUD: You know I'm trying to argue
3 this without telling everything that we're not supposed
4 to be telling, that we're supposed to be not
5 disclosing.

6 MR. GUTMAN: Your Honor, just that, I mean
7 the fact that it was once under videotape I think, I
8 don't think that burglars are gonna be encouraged to go
9 somewhere which was a one time under video
10 surveillance.

11 THE COURT: Well, the point is if you put it
12 on the internet somebody might which is why they --
13 that, that ana..., you know the hypothetical that Mr.
14 Renaud just raised about if you wrote and asked for, if
15 you asked for it straightforward for what it is they
16 wouldn't give it to you. It's only because of, you
17 want it for a reason and the, and if you get it, it
18 will provide the same information that if you asked for
19 that information straight out they would tell you you
20 can't have it for this reason.

21 So that makes a lot of sense that it's only
22 because of what's in there but we have to accept their
23 certification that that's what it is and not just
24 here's, you know, we say it's not just conclusory.
25 He's given enough, he has given enough information on

1 this one about why they think it's a problem. And, and
2 absolutely if you said I want the tape of where your
3 Chief Financial Officer, you know, keeps their money,
4 they would tell you no. And it's, it's indirect
5 because that's what's in the videotape.

6 And it's not that, you know, the fact that
7 the camera's not there anymore is, isn't determinative.
8 It's what the camera took a picture of before is what
9 the problem is. And once they, when they give it to
10 you, you will have it and you can do whatever you want
11 with it. And that's what this is designed to prevent.
12 So yes, I find that this, the security measures and
13 surveillance techniques, which if disclosed would
14 create a risk to the safety in this case of property
15 applies.

16 Okay. So now what the next one is right to
17 know, right?

18 MR. GUTMAN: The common --

19 MR. RENAUD: Common law.

20 MR. GUTMAN: Common law right to know.

21 THE COURT: Okay. Which involves a weighing
22 process, does it not? Your right to know versus their
23 concerns about security and criminal invest..., well
24 criminal investigation's over.

25 So Mr. Renaud, you want to say why you think

1 you should prevail on that?

2 MR. RENAUD: Yes, Your Honor, very, very,
3 very briefly.

4 There is a weighing process. I, we did argue
5 this so I'm not gonna go into it at length --

6 THE COURT: Well, make a record.

7 MR. RENAUD: Unless the court has questions.
8 But we've, we really touched on some of these things in
9 reviewing. But what, for what reason does the
10 plaintiff need this information? Doesn't have a
11 personal interest, doesn't have a personal reason and
12 I'm not gonna argue the members of the public in some
13 cases are not entitled to records just because they're
14 members of the public and they're curious or because
15 they want to know something. No, I'm not making that
16 argument. But there is a distinction between somebody
17 who has a need or a personal interest in the record and
18 somebody who has no personal interest in the record.

19 Now, we -- they already know what's on the
20 videotape or the DVD because it says what's on the DVD
21 in the complaint which they have. That's at least the
22 part that they claim that they're interested in which
23 is the police officer's misconduct. So we know that.
24 We know that he resigned over it. So --

25 THE COURT: And we know that the offenses

1 that with which he was charged have been expunged now.

2 MR. RENAUD: Yes. And --

3 THE COURT: So, and you raised the point of
4 nobody's -- he was not, you know, he wasn't given any
5 notice of this. About what he thinks about the idea of
6 releasing this tape.

7 MR. RENAUD: So in view of -- well I was
8 gonna save that one for last actually but it --

9 THE COURT: I know but I think its part of
10 this weighing.

11 MR. RENAUD: Right but in -- so in view of
12 the fact that the facts of what's in the videotape are
13 already known, because they're in the complaint or the
14 D-- I keep saying videotape like everybody else. It's
15 a DVD.

16 THE COURT: The DVD.

17 MR. RENAUD: And, and given the security
18 concerns that we expressed, and given the general
19 policy against the disclosure of criminal investigatory
20 records, there's no -- when you do the weighing there's
21 just nothing to put on the scale on the side of the
22 plaintiff other than a general want to see. That's --
23 we've -- so we put plaintiff wants to see on one side
24 and then all of the reasons why this document or this
25 DVD is not disclosable on the other side. And when you

1 finish up with the weighing, there's the feather on the
2 plaintiff's side and there is some substance on the, on
3 the defendant's side.

4 And as long as we're on the expungement I, I
5 regard that as really the third issue which is I don't
6 -- it's expunged. And counsel's suggestion that
7 because they asked for it before the expungement order
8 was entered and they didn't get it, I don't think makes
9 it now subject to ignoring the expungement and --

10 THE COURT: Except that when you look at
11 what's included in the expungement that isn't one of
12 the things. Under the, under the --

13 MR. RENAUD: Well I, what I would say with
14 respect to that is at the very least I don't see how
15 even if you had decided under all these other grounds
16 that it should be disclosed, that without having given
17 notice to the person with the expungement order how,
18 how this could possibly be disclosed.

19 THE COURT: 2C:52-1B says:

20 "Expunged records shall include complaints,
21 warrants, arrests, commitments, processing records,
22 fingerprints, photographs, index cards, rap sheets, and
23 judicial docket records."

24 I, I am concluding that photographs are like
25 the photographs they take of the person who got

1 arrested.

2 MR. RENAUD: I was just gonna say I'm not
3 sure of that. I mean I, you know, I don't know.

4 THE COURT: But, but and it doesn't say not
5 limited to. It says shall include so and I -- I don't
6 think this particular tape would be something that they
7 have to, that is covered by 2C:52-1B. But the fact
8 that the, that the whole thing, you know, the offense
9 -- the things with which he was charged have been
10 expunged, I think weighs a lot on the side of not
11 having it out there on the internet. But -- giving,
12 I'm sorry, what you do with it is what you do with it
13 when you get it. But I'm not disclosing it. But I
14 don't think it is, it is one of the records that's, you
15 know, included in the expungement. So that's why I
16 think it goes more with this weighing process than as a
17 separate argument that it can't have it cause it's
18 included in the records that are expunged under the
19 statute.

20 MR. RENAUD: Well I, you know, the statute
21 says one thing, Judge. And I, you know, I have to
22 confess that expungements are not necessarily my strong
23 point but --

24 THE COURT: But the, but the order, the order
25 may be a little broader.

1 MR. RENAUD: But the order is broader. The
2 order says --

3 THE COURT: I know; I read that.

4 MR. RENAUD: Any records were filed which is
5 maintained by a judicial or law enforcement agency and
6 it says --

7 THE COURT: But they're not maintaining a
8 record here. This is --

9 MR. RENAUD: This is a re..., this is a
10 record. I --

11 THE COURT: Didn't they keep it forever.

12 MR. RENAUD: I think so or almost forever.
13 As long as forever is. Ordered, it's ordered that any
14 records or information pursuant to this order shall be
15 deemed expunged. I mean the order is -- appears --

16 THE COURT: The order is broader than it
17 seems like it could include more than the statute but
18 --

19 MR. RENAUD: Right. And ba..., you know, what
20 I'm saying is that certainly if there was any
21 consideration of releasing anything after, you know,
22 we've been served with this order that certainly the,
23 the --

24 THE COURT: The person involved would have to
25 --

1 MR. RENAUD: The person involved would have
2 to get notice and an opportunity to argue on behalf of
3 whether or not the record should be disclosed or not.
4 The -- cause we've got a specific order. The chief
5 does, he says that's a concern of mine. I've got a
6 specific order that says to me don't release any
7 records, so.

8 THE COURT: You think he should be notified?

9 MR. GUTMAN: Um, no Your Honor because
10 expungement on its face, expungement order on its face
11 Page 2 attached to the police chief's uncertified
12 certification says, "records..." I'm reading from the
13 third line from the top Page 2.

14 THE COURT: Yeah. I have yellow highlighter
15 on that too.

16 MR. GUTMAN: "Records which include
17 information relating to the charges filed against the
18 petitioners" and then several lines lower "or to the
19 detention or conviction of petitioner." The DVD --

20 THE COURT: But how can they, how can they
21 have a broader order than the statute? Because the
22 judge agreed to it?

23 MR. GUTMAN: I don't think it is broader,
24 Your Honor, I think the statute permits expungement of
25 records regarding the arrest, charges, prosecution or

1 conviction. The statute says that. And that's what
2 this covers. And the DVD does not indicate anything
3 about charges, prosecutions, convictions or detention.
4 It's before any of that happened. So it obviously
5 doesn't apply to some record that occurred before there
6 was an arrest. You could release that and no one would
7 know that there was an arrest, a prosecution, a
8 conviction. So, Your Honor, it doesn't --

9 THE COURT: Well, the possessed record it
10 says -- which is by the provisions of 52, let's see,
11 title -- which possessed records which include
12 information relating to the charges filed against the
13 petitioner for violation of those statutes or the
14 detention or conviction of the petitioner including but
15 not limited to photographs, fingerprints, rap sheets,
16 index or docket entries, reports, and statements and
17 the only thing that they did was put not limited to
18 where the statute has the list of how many things
19 should be included but they put included but not
20 limited to.

21 MR. GUTMAN: But both are limited to criminal
22 records. Records --

23 THE COURT: I know it. I don't think it's the
24 tape.

25 MR. GUTMAN: And, and this is not private

1 criminal record.

2 THE COURT: I don't think it's the DVD.

3 MR. RENAUD: Judge --

4 THE COURT: It doesn't say evidence that was
5 gathered in support of the -- of the defense.

6 MR. RENAUD: Judge, if we had like, I think
7 we've got to get practical, Judge. The whole idea of
8 an expungement is that the municipality doesn't give
9 out any records. I mean we get these all the time.

10 THE COURT: Correct.

11 MR. RENAUD: Somebody there's, -- let's say
12 there's a kid is 19 years old that is convicted of a
13 marijuana offense and there's, there's a DVD of that.
14 Okay? Now it's 20 years later and that kid has the,
15 the conviction expunged.

16 THE COURT: Is the governor of New Jersey
17 cause he, and he --

18 MR. RENAUD: Okay? So now they send in,
19 somebody sends in a record, --

20 THE COURT: Of a request --

21 MR. RENAUD: A request to the chief police,
22 the chief of police and says --

23 THE COURT: Or he's running for governor and
24 they want it.

25 MR. RENAUD: Give me a copy of any of your

1 records pertaining to any charges, arrests,
2 investigation whatever pertaining to Governor Christy.

3 THE COURT: Well I'm just saying if somebody
4 --

5 MR. RENAUD: Whatever.

6 THE COURT: Did that and then they wanted it,
7 you know, in the campaign --

8 MR. RENAUD: Right. Whoever they are.

9 THE COURT: They would figure out.

10 MR. RENAUD: Is the Chief of Police supposed
11 to say we have no record, which is what he's supposed
12 to say, but we do have this DVD showing the kid smoking
13 marijuana. Would you like that? I mean what, what
14 sort of sense would that make? None is the answer.

15 THE COURT: It wouldn't. It wouldn't. But
16 it doesn't mean that the statute that talks about
17 expunged records includes it. It just means under
18 these other arguments that you're making it shouldn't
19 be given up.

20 MR. RENAUD: I don't think so. I think the
21 expungement is intended so that when they send the
22 letter --

23 THE COURT: Every piece of evidence.

24 MR. RENAUD: Everything that's there, you say
25 we have no record. That's --

1 THE COURT: Everything they have in the
2 property room about this case.

3 MR. RENAUD: We have no record. That's,
4 that's what the intention of the expungement is. That
5 there's no record of the, of the offense, the
6 conviction, the arrest, the booking, evidence,
7 anything.

8 THE COURT: Evidence but it doesn't say
9 evidence.

10 MR. RENAUD: I don't, I don't, I don't, I
11 think that's how it's under -- taken.

12 THE COURT: But you say what's the point?
13 You say what's the point if you, if you don't --

14 MR. RENAUD: Right, if you're gonna give them
15 the DVD that shows the kid smoking the marijuana.

16 THE COURT: You give them the evidence and
17 they can figure out what they want and they put that on
18 TV.

19 MR. RENAUD: Right, correct.

20 THE COURT: Well, that does make sense. But
21 it does not say the evidence related to the offense --

22 MR. GUTMAN: Well we did cite a published
23 court decision stating in regard expungement of MX --

24 THE COURT: That was for domestic violence,
25 right?

1 MR. GUTMAN: Yeah, and they said that
2 domestic violence records are not expunged even though
3 they refer to the disturbance --

4 THE COURT: Right but this isn't domestic
5 violence.

6 MR. RENAUD: Right.

7 MR. GUTMAN: But it's --

8 THE COURT: You can't get it ex..., right?
9 Your -- the case --

10 MR. GUTMAN: Well it's not because it's
11 domestic violence. It's because it didn't reveal an
12 arrest or a prosecution. And if it's not an arrest or
13 prosecution or conviction or charge then it's not, it's
14 not expugnable. But should I go on to common law
15 balancing?

16 THE COURT: Well, I want to finish that point
17 that you just made about the expungement of a criminal
18 record on MDZ which is 286 N.J. Super. 82, Appellate
19 Division '95. The court affirmed the order granting
20 petitioner's application only as to the criminal
21 charges. The court held that the statutory policy of
22 expunging records connected with criminal charges or
23 convictions doesn't extend to non-criminal matters such
24 as domestic violence or matrimonial and probably Title
25 39, which I mean, not probably definitely. So that

1 doesn't help with the idea of whether the evidence is
2 part of it. It makes sense to me that it should be
3 because otherwise it'd defeat the whole purpose of it
4 cause who cares about the paperwork from the public's
5 point of view if they can see the video of the person
6 doing what looks like violating the law, that would,
7 you know, that would defeat the whole purpose of the
8 expungement. So I guess, so I agree with that anal...,
9 that analysis that you can't -- the police department
10 cannot give out the evidence after the conviction's
11 been expunged because it defeats the whole purpose of
12 the process. But you can, now you can finish the
13 weighing.

14 MR. GUTMAN: Pardon me?

15 THE COURT: Yeah, you can finish the weighing
16 part now on the right to know.

17 MR. GUTMAN: Um, contrary to what opposing
18 counsel said, the weighing process does not involve
19 merely the personal interest of the requester. It
20 involves the personal interest of requester or the
21 public interest or the public. And in this case if you
22 look into the strong public interest in knowing about
23 police misconduct and that's what the DVD shows, police
24 misconduct which is a matter of great concern.

25 THE COURT: Despite the expungement.

1 MR. GUTMAN: Well, we're --

2 THE COURT: This may be particular because --

3 MR. GUTMAN: I think, I think this is
4 separate from the expungement.

5 THE COURT: You want people, you think that
6 -- no, I'm just saying, is the idea that people should
7 know that this is how this was handled. That this all
8 just -- they let him retire and, and resign and they
9 dismissed his charges? Isn't that the point?

10 MR. GUTMAN: They should also know what the
11 police officer did.

12 THE COURT: That the public should know what
13 he, what evidence there was and this, how they handled
14 it.

15 MR. GUTMAN: Right. And they, the complaint
16 describes somewhat the offense, but it's no substitute
17 for actually seeing what the police officer did. A
18 picture is worth a thousand words.

19 THE COURT: Right. True.

20 MR. GUTMAN: And a video is worth is ten
21 thousand words. That's not, -- so there's still a
22 value in seeing, actually seeing what the police
23 officer did which was the basis for the charges.

24 THE COURT: In just the fact that you know
25 about it doesn't mean that you see how it looks. Or

1 that you know how it -- what's on there, you just --

2 MR. GUTMAN: But you don't know exactly what
3 he did. I mean people have a right to verify that, you
4 know, what he did. They have a right to know.

5 Now in terms of the government's interest,
6 the investigation is over. The surveillance is over
7 and that limits the need for secrecy certainly.

8 Thank you, Your Honor.

9 THE COURT: Except for the whatever weight
10 should be given to the reasons why the statute has
11 those exceptions.

12 MR. RENAUD: Um, I don't know whether you
13 want to do this or not, Judge. But I do have the DVD
14 if you want to take a look at it?

15 THE COURT: I thought of that but then I
16 thought maybe that's not really --

17 MR. RENAUD: Just, I have it and I offer it.
18 So --

19 THE COURT: To, -- for the weighing process
20 or the, or what?

21 MR. RENAUD: I guess for the --

22 THE COURT: The security thing I thought of
23 it.

24 MR. RENAUD: I guess for the weighing or the
25 security if you wanted. Cause it only takes about a

1 minute, it's up to you.

2 THE COURT: But --

3 MR. RENAUD: It's not very long nor is it
4 very interesting, quite frankly.

5 THE COURT: Well I thought about that but as
6 I say I, there really isn't any development in the ca...,
7 of what the standard is to start either doing in-camera
8 review or having factual evidentiary, I mean they did
9 have an evidentiary hearing about whether or not they
10 -- something was over or not. But, yeah the
11 investigation's over.

12 MR. RENAUD: Yes.

13 THE COURT: No, I, I don't think there's
14 enough there for me. I understand their point that
15 even if they know what's on it, seeing it is really
16 important. They want to see, you know, like what was
17 he actually doing that caused them to --

18 MR. RENAUD: Well maybe in the weighing part
19 you should take a look at it and you're gonna be very
20 unimpressed. I can assure you. It would take a
21 minute. I brought a portable DVD player if you want to
22 look at it.

23 THE COURT: Well, what do you think the
24 standard is? If the Judge thinks that the public, I
25 mean well --

1 MR. RENAUD: I, I, I, --

2 THE COURT: I see you laughing but it's like

3 --

4 MR. RENAUD: From a legal point of view, I
5 tend to agree with you that it doesn't matter.

6 THE COURT: Usually the judge looks at it to
7 see if what's somebody's concerned about is on there
8 and I was thinking more about the safe and this room
9 and you know.

10 MR. RENAUD: Right.

11 THE COURT: But I, I, I'm convinced that if
12 those things are in the tape, the security thing, the
13 security section of the statute --

14 MR. RENAUD: It's up to you.

15 THE COURT: -- that says it's not a
16 government record applies, I don't need to see how the
17 safe looks in the room and all of that. And this is
18 not, you know, whether or not they would -- I'm
19 substituting my own thought --

20 MR. RENAUD: Um hmm. Well here's what I --

21 THE COURT: About what it shows to what they
22 would think of what it shows.

23 MR. RENAUD: This is the only reason I
24 suggest this. The plaintiff and the people affiliated
25 with the plaintiff, they think there's something

1 horrendous on this, and the reason why this is the only
2 piece of evidence that we haven't given rather than the
3 reasons that we've given which is we looked at the
4 statute and we said you get these things, you don't get
5 these things, they think there's something horrible on
6 here that the municipality is covering up. That's what
7 the, basically what the claim is.

8 THE COURT: You think I should look at it?

9 MR. GUTMAN: Pardon me?

10 THE COURT: Do you think I should look at it?

11 MR. GUTMAN: Yes.

12 THE COURT: All right. We got a player.

13 MR. GUTMAN: Can I, can I see it too?

14 THE COURT: I don't know.

15 MR. RENAUD: I don't know, are we gonna have
16 a confidentiality order? If not, then I would say no.

17 MR. GUTMAN: I obviously would be agreeing to
18 not disclose it to my client.

19 THE COURT: You'd have to. You'd have to.
20 But, but I, because it's like what would I make of it?
21 That's what bothers me. Is what would I think of it
22 versus what would his client think of it is not quite
23 the same. And it's not like looking to see if it's
24 there at all. It's like what would be thought of it.

25 MR. GUTMAN: That's why my participation

1 would be helpful.

2 THE COURT: Okay. So all right and you're
3 gonna come too and see -- watch us to make sure we do
4 it right.

5 MR. RENAUD: Right.

6 THE COURT: So we go in the jury room?

7 SERGEANT-AT-ARMS: You said you have a
8 portable DVD player?

9 THE COURT: Well we have that one.

10 MR. RENAUD: Okay. If you've got one you can
11 put it on, I brought one with me.

12 THE COURT: Oh your own. You know it works
13 on yours. Okay well let's go in the jury room and
14 watch it.

15 MR. RENAUD: Okay.

16 THE CLERK: Judge, you gonna use the
17 extension?

18 THE COURT: Hmm?

19 THE CLERK: You gonna use the extension?

20 THE COURT: An extension?

21 THE CLERK: An extension cord?

22 THE COURT: Oh maybe.

23 MR. RENAUD: Well let's see.

24 MR. GUTMAN: Well if it's a portable one it
25 probably --

1 THE COURT: Well we have it; why don't you
2 get it because we don't want to, yeah why don't you get
3 my cord out of there.

4 MR. RENAUD: Watch it won't play now. It
5 played in the office.

6 THE COURT: That clock is off.

7 MR. GUTMAN: Oh. I was just getting ready to
8 say.

9 (Judge and attorneys go to jury room to watch
10 DVD at 12:16:30; off the record; on the
11 record at 12:22:30)

12 THE COURT: Okay. So the record should
13 reflect that I and counsel for both sides have watched
14 the videotape in the jury room, or the DVD, for less
15 than five minutes of a section of what -- what the room
16 looked like. Then the light comes on, the person comes
17 in and goes around, then he leaves. Puts the light on
18 and goes around and leaves. Looks at a few things, to
19 be honest, he doesn't just look in the room. He looks
20 at a few things and opens a door, you know, I would not
21 put any significance on the door that's on the left
22 side of the screen unless somebody told me because it's
23 a door, like a door to a closet or a room.

24 But you don't, you don't see anything. To
25 me, I don't see anything except him checking, you know,

1 looking in a, maybe in a folder and opening a door.
2 And importantly nothing that looks like a safe which
3 causes me to rethink the idea about the security, not
4 the criminal investigations part but the security.
5 Because it's, you know, it's -- for office furniture.
6 What you're looking at is office furniture. And I
7 guess somebody in the public would realize that they
8 have furniture in this place but I don't, you wouldn't
9 know how to get there from looking at that video.

10 MR. RENAUD: Well, I would disagree, Your
11 Honor. I mean it's, it's a private, again it's a
12 private nonpublic office.

13 THE COURT: True, absolutely.

14 MR. RENAUD: Of a public building.

15 THE COURT: It is.

16 MR. RENAUD: There, I mean maybe because I
17 know where the safe is and the chief knows where the
18 safe is, I indicate that it shows the safe, the safe is
19 shown. The door to the safe is shown.

20 THE COURT: A door, a door and counsel --

21 MR. RENAUD: Well, you might not know but
22 somebody else may. It doesn't really matter and
23 there's file cabinets and --

24 THE COURT: But to tell the truth, Counsel,
25 you said to me that's the safe and I wouldn't have

1 known that if I didn't know that behind that door is
2 the safe. It's a door to some space that the safe is
3 in.

4 MR. RENAUD: Well as I've said, it's a
5 nonpublic area --

6 THE COURT: True.

7 MR. RENAUD: -- of the Clerk's Office and
8 what's in the file cabinets or whatever, it's just it's
9 not -- as I said, if you went for a -- to use another
10 example, if you said I want to go in the, you know, in
11 the Governor's office and look around and --

12 THE COURT: You'd have to be I'd like to see
13 that partic..., I'd like to see a video, you know, I'd
14 like to see a photograph or a moving picture of that
15 room in your Borough office. And --

16 MR. RENAUD: Well, it's a nonpublic area
17 that's, -- I mean it's not, you would want it to --
18 then I would, then it would wind up being part of the
19 public record which is the problem that I keep
20 suggesting is a problem. I'm now gonna give you a, an
21 architectural drawing of the municipal building so that
22 it's --

23 THE COURT: But it can't be because I'll know
24 where the safe is. It has to be because you know this
25 is some place the public doesn't come and they really

1 shouldn't, there's no reason why they should -- it's
2 not a, -- we're now weighing. It could just, where is
3 that exception? It has to do with the security that
4 people will know about this piece of the building that
5 otherwise they would never know anything about. Which
6 is the Clerk's Office? That is what's that's called?

7 MR. RENAUD: It's the Clerk's Office, the CFO
8 office and the Tax Collector Office. They're sort of
9 grouped together.

10 THE COURT: Well, so it --

11 MR. RENAUD: I mean the clerk has it --

12 THE COURT: So most people would, you know,
13 would think there was money in there, I guess. That
14 would make sense.

15 MR. RENAUD: I, I, I --

16 THE COURT: But it isn't about you can see
17 the safe. Cause you can't.

18 MR. RENAUD: Well, you can't see --

19 THE COURT: He opens a door --

20 MR. RENAUD: He opens a door --

21 THE COURT: And who knows what's behind it.

22 MR. RENAUD: Well, I guess now they know
23 what's behind it?

24 THE COURT: If they order the, who's gonna
25 give them the transcript of this? Did you want to be

1 heard about the security?

2 MR. GUTMAN: Yes, Your Honor.

3 THE COURT: Okay fine; go ahead. Cause we
4 got to be focused now and get done.

5 MR. GUTMAN: Yeah in the, in the police
6 chief's uncertified certification he stated and I
7 quote, "The borough's safe is depicted in the video."
8 Your Honor, that's a false statement.

9 THE COURT: Okay. I find that it's not
10 correct.

11 MR. GUTMAN: Okay, okay, so --

12 THE COURT: So now based on what's in there,
13 what about it?

14 MR. GUTMAN: It's just a typical office. It
15 shows some chairs and tables, a drinking fountain.

16 THE COURT: A lot of filing cabinets. A lot
17 of filing --

18 MR. GUTMAN: Filing cabinets, well --

19 THE COURT: -- boxes it looks like.

20 MR. GUTMAN: It tells you nothing about that
21 office that's not common knowledge of what, you know,
22 the fact --

23 THE COURT: Well common knowledge of what?
24 The common --

25 MR. GUTMAN: Common knowledge of what's in an

1 office. A room with desks and tables and a water
2 fountain. There's nothing, that's not security
3 matters. That's not confidential. I, I mean they,
4 they base on this will show you the safe and you know
5 there's a safe there. But it doesn't show a safe. It
6 doesn't show a safe at all. It shows a door to a room
7 and you don't know what's in the room.

8 THE COURT: Till somebody tells you.

9 MR. GUTMAN: So --

10 THE COURT: Security measures and
11 surveillance techniques which if disclosed would create
12 a risk to the safety of persons, property, electronic
13 data or so.

14 MR. GUTMAN: But I don't think that provision
15 applies to every picture of every office, government
16 office.

17 THE COURT: Room that the public doesn't go
18 into.

19 MR. GUTMAN: That the government -- I don't
20 think that's what that provision, that exemption was
21 meant to mean was every private office is secret
22 because it's a security measure. It has to have
23 something to do that really increase the risk.

24 THE COURT: Well it's a, and it was a
25 surveillance technique at the time.

1 MR. GUTMAN: Well, well I'm talking about
2 just showing, this video showing the room. The room,
3 what the video shows. And as to the video, the fact
4 that it's a video, the video surveillance is no longer
5 going on and they have not satisfied their burden of
6 proof that it ever would occur again or that it would
7 come from the same place. And by the way I couldn't
8 tell where it was coming from by looking at the video.
9 But this is not a, this is not what security exemptions
10 were meant to protect. And anyway they're supposed to
11 be interpreted in favor of access. But this, they're
12 supposed to show something like plan -- how to break
13 into a building or something like that.

14 THE COURT: Or how to get in perhaps. That's
15 the one that -- that's ahead of it. That's the one
16 before this.

17 MR. GUTMAN: Get in but this is not get in.
18 The guy already got in through, with the key. He
19 didn't break in.

20 THE COURT: Well, the only, in this case it
21 would have, it would be any instant -- if that were
22 true, a video of any inside municipal office would be
23 covered.

24 MR. GUTMAN: Right. Right, Your Honor.

25 THE COURT: And I just I can't, I can't say

1 that any -- letting the person have the information
2 which they might show to the public about what the
3 inside of a, of a office in a municipality that the
4 public doesn't already look at when they walk through
5 the door just on it's own creates a risk of safety to
6 persons, property, electronic data or software just
7 isn't true.

8 When the safe was in there I had the
9 concerns. But it just isn't there. And I would have
10 no idea. I thought it would, maybe it was a closet.
11 Cause it opens, you know, the door opens and it shuts.
12 No clue what's behind there. So I'm, I reconsider and
13 do not find that that particular surveillance of that
14 office, even though it's not available to the public
15 would, if that were released that would create a risk
16 to the safety of persons, property, electronic data, or
17 software. But it's still a criminal investigatory
18 record.

19 Okay, so we -- and the expungement I find
20 that it just, it doesn't make any sense that you can,
21 you can give away the evidence and, and be -- that just
22 because they haven't said the evidence which we had to
23 support this offense isn't covered by the expungement
24 statute it means that you can give it out if you're
25 asked by the public. When as, as counsel said, their

1 response is supposed to be we don't have any records.
2 So it can't, it can't be given out because that's the
3 other ground. Because this particular offense has been
4 -- there's an order of expungement. But there's still
5 this issue about weighing. And you knew that it was
6 gonna be trespassing in this office when you filed your
7 complaint because you asked for it --

8 MR. GUTMAN: We --

9 THE COURT: And as you say a picture's worth
10 a thousand words and now we've seen it. And --

11 MR. GUTMAN: But what's the harm of showing
12 it?

13 THE COURT: And what the criminal
14 investigation's over.

15 MR. GUTMAN: And the surveillance is over in
16 the noncriminal investigation.

17 THE COURT: And the security really isn't
18 much of an argument because, because the safe isn't
19 there.

20 MR. GUTMAN: And the complaint is public. So
21 there's nothing confidential about it. Cause it
22 doesn't, it doesn't --

23 THE COURT: The complaint is public? What
24 complaint is public?

25 MR. GUTMAN: Well the complaint against this

1 police officer. They filed a complaint for this petty
2 offense. I'm talking about the petty offense.

3 THE COURT: Originally, which is expunged.

4 MR. GUTMAN: Right, that's expunged. That's
5 expunged; that's gone.

6 THE COURT: So, if I --

7 MR. GUTMAN: But the investigation's over.

8 THE COURT: If it's not, if it's not
9 available under OPRA, it could be available under Right
10 to Know, in the weighing process.

11 MR. GUTMAN: The common law. That's what
12 OPRA says. It has no, in the common law.

13 THE COURT: Doesn't necessary --

14 MR. GUTMAN: It said including criminal
15 investigatory records. That's what OPRA says. That
16 the fact that something is not available under OPRA
17 including "both criminal investigative records does not
18 mean that it's not available under the common law."
19 That's a quote from OPRA.

20 THE COURT: Okay. So then Mr. Renaud needs
21 to address why in this case under, under the Right to
22 Know Act it's, on the weighing process security and the
23 fact that it did, it is a criminal investigatory record
24 should prevail and I shouldn't give it up under the
25 statute.

1 There's nothing dramatic; I make that
2 finding. There's nothing dramatic about the video at
3 all. It is very boring. You said it would be. It is.
4 He's walking around an office. And he's looking at a
5 few things and he walks out. He's, the issue that they
6 -- thing is that he's trespassing and he shouldn't have
7 been there and he was I guess. That's why there's an
8 issue.

9 MR. RENAUD: So what -- I guess my rhetorical
10 question which I don't really need an answer to but
11 I'll just ask it rhetorically which is what is the,
12 what are we gonna put on the scale in favor of the
13 plaintiff as seeking, as a member of the public seeking
14 records who has a right to seek the records but has to
15 have, that we gotta, we have to put something on that
16 scale because it's weighing? They want to see what's
17 there, okay?

18 THE COURT: They want to see what the guy
19 did. They want to see what the guy did.

20 MR. RENAUD: So on the other side it is in
21 fact a criminal investigatory record. Again, we can't
22 disclose it anyway because it's been ordered to be
23 expunged.

24 THE COURT: Well, that's on your side of the
25 scale.

1 MR. RENAUD: Yes, that's what I'm saying.
2 That's why I'm, I'm filling up my side of the scale.

3 THE COURT: Okay.

4 MR. RENAUD: So it's a criminal investigatory
5 record and although they may be disclosed, there is
6 certainly some public interest. You know there's a
7 couple, I should say there's a couple of public
8 interests here. There's a public interest in making
9 available public records that should be made available.
10 And there's also a public interest in not making
11 available public records that shouldn't be available.
12 So it's not as though there's only one public interest.
13 There's two.

14 THE COURT: So it has to be a fact sensitive
15 analysis in this case.

16 MR. RENAUD: Yes. So --

17 THE COURT: About whether other than Know,
18 Right to Know Act.

19 MR. RENAUD: Yeah it's not Right to Know,
20 this, the OPRA really replaced the Right to Know Act,
21 it doesn't exist. There's a common law --

22 THE COURT: I'm sorry.

23 MR. RENAUD: That's okay. There's a common,
24 there is a common --

25 THE COURT: Common law Right to Know.

1 MR. RENAUD: I'm not gonna dispute this cause
2 there is a common law Right to Know.

3 THE COURT: Okay. The Common Law Right to
4 Know.

5 MR. RENAUD: There's no question. But it's
6 not the Common Law Act, it's a, there's a Common Law
7 Right. And, and Mr. Gutman has stated the, you know,
8 the legal propositions correctly which is that there's,
9 you know, he has a, as a member of the public he has
10 some interest. Somebody that has, and I think I have
11 stated them correctly also. There's somebody has a
12 personal interest that they can show, that's more to
13 put on their side. Now they don't have that. So we
14 got to weigh the public interest in not, nondisclosure
15 against whatever interest we want to put on the side.
16 And that's why I wanted you to see the videotape.

17 THE COURT: And should we consider why --

18 MR. RENAUD: Because if there was something
19 on that, on the DVD, and we found that there was some
20 horrible thing that was done that was covered up as the
21 plaintiff suggests, then you might say you know what?
22 I think the public needs to see this because they
23 should know. But that's not --

24 THE COURT: But they shouldn't have just did
25 what they did.

1 MR. RENAUD: Right, that's right. This is
2 just what you said, there's a guy walking around,
3 looking around, he comes in, comes out and leaves.

4 THE COURT: Trespass, -- well alleged, you
5 know, it could be trespassing.

6 MR. RENAUD: Yes, and that's it. That's what
7 he did. So that's what we've got and I would submit I
8 know that you've ruled but I --

9 THE COURT: Not on this part.

10 MR RENAUD: I would ask you to at least put
11 on, on the side on our side I think that there's a big
12 difference between what people get to see of what goes
13 on here for example in this courtroom and what they get
14 to see that goes on next door in the, in the room
15 that's marked private chambers. That --

16 THE COURT: There is. There is. But the
17 question is whether it fits this definition which I
18 don't think it does. There certainly is a difference.

19 MR. RENAUD: And I, I disagree, but that's
20 okay. Your, you get to make those rulings and I only
21 get to argue them. So I think that, you know, where,
22 where things are kept, for example, if you keep
23 evidence. I don't know when you did criminal cases if
24 they, you know, --

25 THE COURT: Well you have -- no we have

1 things that are, that are supposed to be sealed.

2 MR. RENAUD: -- if we want to know where,
3 where things are kept I don't think that those, those
4 things are, there are security issues.

5 THE COURT: But if they took a video, they
6 wouldn't know where that was. Just like we don't know
7 where the safe is.

8 MR. RENAUD: Well your, your, I think you're
9 again making, you know, if for example let's take the,
10 the records that --

11 THE COURT: No, I think for this part of this
12 decision I have to do this case, these facts because
13 I'm supposed to weigh.

14 MR. RENAUD: That's right.

15 THE COURT: It isn't categorical. The other
16 was.

17 MR. RENAUD: Yes.

18 THE COURT: Does it fit the category or not?

19 MR. RENAUD: That's right.

20 THE COURT: And the expungent, the
21 expungement part I agree with you, the evidence should
22 be not, you know, given even though it doesn't say in
23 the statute that evi..., the evidence we have against you
24 is also --

25 MR. RENAUD: And I don't think that anything

1 else I'm gonna say is gonna help the court in making
2 that determination this way.

3 THE COURT: Not to be disclosed. But no, you
4 won on that. The point is whether you win on, on this
5 one.

6 MR. RENAUD: Right.

7 THE COURT: And, and I have to weigh that if
8 I said you won on this one, what does it do to the
9 other two that count? That there has to be, I have to
10 have something about this set of facts that is so
11 important that it overcomes on this weighing process
12 the other two grounds which apply. And, and what I'd
13 like to know too from you for this record is should I
14 be considering the interest of the individual who's
15 having, whose had this thing expunged in having all
16 this stuff out there. Should, should I consider that
17 when he's been granted an expungement? And, and he's
18 not a public official anymore either. Cause he
19 resigned.

20 MR. GUTMAN: Okay to answer that directly,
21 when he did it, he was a uniformed police officer.

22 THE COURT: He was.

23 MR. GUTMAN: So it was not a private matter.

24 THE COURT: No, it isn't.

25 MR. GUTMAN: It's a public matter because

1 he's a uniformed police officer. And I don't think
2 there are few things that are more important for the
3 public to know about than possible misconduct by
4 uniformed police officers. Police officers have a
5 right to shoot, they have a right to arrest and it's,
6 I've cited a number of decisions where the Appellate
7 Court and other courts have said that even though
8 there's -- doesn't apply under the statute, there's a
9 right to know about police misconduct under the
10 balancing. In fact, that's what the common law is for,
11 that even though there might be some exemption under a
12 statute it might not apply, and in those cases it
13 didn't. That because misconduct by uniformed police
14 officers is so important that the public should get
15 that. That's the whole purpose of the common law. I
16 mean --

17 THE COURT: But what you and I looked at
18 with, with counsel for the defense is, was not
19 something surprising that the public should know that
20 somehow, you know, a really serious offense was treated
21 like a little teeny DP. It's the guy is walking around
22 the room, right? That's what he's doing. And he's
23 looking at, you know, he's looking at a few things.

24 MR. GUTMAN: Well he's --

25 THE COURT: So the idea that you, I need on a

1 weighing process, the public needs to know what this
2 shows because they need to realize what's really there
3 as compared to how it was treated, I don't think holds
4 a lot of water.

5 MR. GUTMAN: Your Honor.

6 THE COURT: Because it was treated like it
7 looks. Like a, like a -- he shouldn't have been in the
8 room, and there he was. I don't know what he thought
9 he was doing but --

10 MR. GUTMAN: Well, Your Honor, --

11 THE COURT: He was in there and he wasn't
12 supposed to be there, that's it.

13 MR. GUTMAN: I mean there are newspaper
14 articles have been published now about this case, so
15 it's been a public knowledge what happened to him. And
16 I think the public has a right to know, to see exactly
17 what he did and whether he received special treatment
18 by not being fired, by, by -- and it helps them to make
19 that evaluation if they can see what he did. I mean
20 what he was charged with is a matter of public record.
21 But the public can thus evaluate that, the fact that he
22 was allowed to resign and could, whatever they call, um
23 --

24 THE COURT: Get, have the charges dropped.

25 MR. GUTMAN: Right. Charges were dropped,

1 the charges, -- if I was caught inside that office at
2 two a.m. walking into some door would they have dropped
3 charges against me? I don't think so.

4 THE COURT: So I didn't, I didn't think about
5 that, that the public already knows about it cause it
6 was in the paper?

7 MR. GUTMAN: Oh yes, Your Honor, there was a,
8 in fact there was a bit of a controversy about the fact
9 -- it was raised at council meetings by residents that
10 he, he was, he's the brother of the, one of the Union
11 County Commissioners.

12 THE COURT: Hhm.

13 MR. GUTMAN: And the question was did he get
14 special treatment because he's the brother -- I mean I
15 can submit the newspaper articles so you can see it's a
16 matter of controversy.

17 THE COURT: Well I'm thinking maybe I should
18 give that some thought. I have to wait for the
19 certification, but maybe I should because then what is,
20 what have they got -- it's a little like the, in a way
21 like the 9/11 tape. It's over the dam everybody knows
22 it now. You know the --

23 MR. GUTMAN: There's nothing confiden...,
24 confidential. I can submit the newspaper articles
25 about that this was raised at council meetings and the

1 fact that the penalty was con..., allegedly was
2 considered unusually light either because he was a
3 police officer and a brother of a Union County
4 Commissioner.

5 THE COURT: Okay.

6 MR. GUTMAN: Freeholder.

7 THE COURT: Well and of course it would be
8 nice if we could find something that distinguished an
9 investigative record that, you know, I think it has to
10 be, I have to, the only way you could have the
11 investigatory records, criminal investigatory records
12 released under the common law as a -- is to get the
13 facts of this case to have the weighing --

14 MR. GUTMAN: Right.

15 THE COURT: Come out in your favor.

16 MR. GUTMAN: I think the distinction is it's
17 a police officer. I mean if it's a common person, I
18 mean not common person, but non pol..., a civilian, you
19 don't have the public need to know about the -- that I
20 committed a crime.

21 THE COURT: That you walked around in there.

22 MR. GUTMAN: That I walked around in is not
23 that important to the public that a uniformed police
24 officer did it.

25 THE COURT: Okay.

1 MR. GUTMAN: Um, in violation of --

2 THE COURT: All right.

3 MR. GUTMAN: And that it resulted, -- that
4 resulted in this proceeding and him being able to
5 resign without being charged even though there was a
6 big controversy and the public has the right to --

7 THE COURT: Okay. All right. I'll, I'll
8 hold off on that one because it's a weighing process
9 and if, you know, they already know about it and
10 security's not a big issue. Well I've said security's
11 not a big issue. And the privacy of the individual, I
12 mean the, the effect on the individual is pretty light
13 because the paper already has all this stuff in it.
14 Maybe I will.

15 MR. RENAUD: Well I'll, -- just let me
16 address that. I mean what your, what is being
17 suggested is that if somebody wants records about
18 something that would not otherwise be disclosed, they'd
19 send some letters to the editor of newspapers and now
20 it's a matter of, now it's a public controversy. Which
21 is --

22 THE COURT: No. The public's interest in the
23 fact that it was a police officer and that he was, the
24 way he was treated. And that they seem to know about
25 it anyway.

1 MR. RENAUD: Right.

2 THE COURT: The public knows --

3 MR. RENAUD: Right.

4 THE COURT: -- about it anyway, not the
5 plaintiff.

6 MR. RENAUD: Right. Well what we're, what
7 we're talking about is the DVD. I mean none of, none
8 of any of this stuff is, is private or was withheld.
9 None of -- any of it. In other words there, all of the
10 complaints and all the other stuff was withheld. I
11 mean the issue is what's, what is the interest of the
12 public in the DVD as opposed to the interest of the
13 municipality and its citizens with respect to -- don't
14 forget the surveillance. You know, I meant, I know
15 that you, that you may have rethought the security
16 because the -- instead of being front on that the safe
17 is on the side. I don't, I don't --

18 THE COURT: You know that. I could never
19 know there was a safe in there.

20 MR. RENAUD: Well, you know I'm having a
21 problem again with explaining things because every time
22 I explain something it seems to play somehow into the
23 plaintiff's side in that since if I don't say anything,
24 then I'm withholding and I'm not carrying out the
25 burden of proof.

1 THE COURT: No, the record should reflect
2 that you offered the tape.

3 MR. RENAUD: Right.

4 THE COURT: The DVD and we watched it.

5 MR. RENAUD: That's right.

6 THE COURT: And while we were watching it, he
7 opened a door.

8 MR. RENAUD: Right.

9 THE COURT: And I expected to see or
10 whatever.

11 MR. RENAUD: And you said where's the safe?
12 And I said it's, and I explained where it was so, you
13 know. But, but how do I -- the more that I provide,
14 this is exactly what I started to say in the beginning.
15 The more information that we provide, the more the, the
16 tendency is to say well we know this, so why can't we
17 know this. We have this information, so why not give
18 that.

19 THE COURT: Why not the rest? Give us the
20 whole thing.

21 MR. RENAUD: That's right.

22 THE COURT: Which is the nature of the beast

23 --

24 MR. RENAUD: That's right.

25 THE COURT: Because we're trying to get the

1 information.

2 MR. RENAUD: And I think that that the court
3 should recognize that if the municipality's position
4 was correct, that the fact that we've had a hearing at
5 which we're compelled to make some disclosures doesn't,
6 doesn't denigrate the municipality's rea... -- in other
7 words, the municipality's reason doesn't get worse
8 because of the fact that the plaintiff has filed this
9 suit and we've had a hearing.

10 THE COURT: No, but we saw, we looked at it
11 and we couldn't find the safe. So to the extent that
12 we're relying on the safe as the issue --

13 MR. RENAUD: Okay, it's to the extent that
14 you're --

15 THE COURT: Yeah.

16 MR. RENAUD: -- relying on the safe that you
17 didn't see the safe.

18 THE COURT: Yeah. So we need this, the
19 question is whether we need two cycles to get this done
20 in order to, you know, get the papers in order.

21 MR. RENAUD: And just one other point and I'm
22 not sure that I understand what the court's thought is
23 on this. So I would again repeat that I don't believe
24 that the, the weighing part trumps the expungement part
25 where there's an order. So that I think there's a

1 third. We went over OPRA, the Open Public Records Act.

2 We went over the common law --

3 THE COURT: You win on OPRA, you win on
4 expungement on the statute.

5 MR. RENAUD: Right. Okay.

6 THE COURT: The question is what to do with
7 that in the weighing process on the Right to Know.

8 MR. RENAUD: Okay.

9 THE COURT: And it could have a lot to do --

10 MR. RENAUD: Just that the, the weighing
11 under the Right to Know is not gonna trump the
12 expungement. In other words, OPRA I --

13 THE COURT: I don't know.

14 MR. RENAUD: Yes.

15 THE COURT: I don't know. That's one reason
16 why maybe it shouldn't but --

17 MR. RENAUD: Well, that's why I'm suggesting
18 and I think it's a third ground. You see the, the -- I
19 again unfortunately I have to agree with Mr. Gutman
20 when I, -- when he's correct I'm going to agree with
21 him. I think.

22 THE COURT: You agree that he's correct.

23 MR. GUTMAN: Those few instances.

24 MR. RENAUD: Under --

25 THE COURT: Well no, no.

1 MR. RENAUD: If -- he can lose the OPRA
2 argument and get the DVD.

3 THE COURT: I know.

4 MR. RENAUD: If he wins on the common law.

5 THE COURT: Common law.

6 MR. RENAUD: And what I'm suggesting is, is
7 that even if he were to win on the common law, which I
8 would strongly urge that you not find, that he still
9 loses because of the expungement.

10 THE COURT: Oh.

11 MR. RENAUD: That the expungement doesn't go
12 into the weighing and then that takes care of the
13 expungement issue.

14 THE COURT: Okay.

15 MR. RENAUD: The expungement is an entirely
16 separate proposition which you may consider as part of
17 the weighing, but it's a, it's a third hurdle so it's
18 --

19 THE COURT: So if, if, if he were to get it,
20 if there weren't an expungement, and he were to get it
21 on common law, should the expungement trump that
22 decision?

23 MR. RENAUD: Correct. And I don't even think
24 you could make that decision without the affected
25 person and his attorney, or I assume he'd contact his

1 attorney having notice of the issue. How could, how
2 could you possibly have an ord..., --

3 THE COURT: I think we should do that since
4 we have the time. I think we should do it. It may be
5 overkill, the Appellate Division may say we don't have
6 to, but I certainly would not want, you know, let it go
7 and then have them say what are you doing? You never
8 told us.

9 MR. GUTMAN: Your Honor, um, the police
10 chief's certification points out that the expungement
11 statute says that a court can order expunged material
12 released. And there's a reason here to order it
13 released, Open Public Records Act. The other thing I
14 --

15 THE COURT: That's part of the trumping
16 issue. That --

17 MR. GUTMAN: Under common law.

18 THE COURT: If I could, if you, if I would
19 give it to you under common law --

20 MR. GUTMAN: Common law.

21 THE COURT: Should that mean, does that mean
22 that I should reopen that, you know, to the -- well not
23 reopen but modify the expungement to the extent that I
24 said I thought the evidence that applies to the charge
25 is covered too and say okay, you know, --

1 MR. GUTMAN: Well the expungement order says
2 you can do that.

3 THE COURT: I know.

4 MR. GUTMAN: It says the judge, yeah.

5 THE COURT: I know, but that still would be
6 this issue of if you are otherwise weighing things
7 entitled to it, what is the -- does the, should I be
8 reopening or you know using that, that part of the
9 expungement statute to say okay you can have it, you
10 can have it anyway even though there was an
11 expungement? Or should I be saying, no, the
12 expungement trumps your right to get it.

13 MR. GUTMAN: I don't think it trumps it.

14 THE COURT: Under common law.

15 MR. GUTMAN: It's a consideration and one
16 should also think that this, -- as I said, this is not
17 evidence of conviction, arrest, blah, blah, blah. It's
18 --

19 THE COURT: I know it. It's just that --

20 MR. GUTMAN: So it's not the same type --

21 THE COURT: I agree with them that if you
22 let, if you let that out you def..., you know, you've
23 completely defeated the idea of an expungement where
24 people can go forward without, as if it never was.

25 MR. GUTMAN: Well I'm just saying that, that

1 expungement statute itself permits a judge to order
2 release. I'm not --

3 THE COURT: Okay. But as I think about it
4 more, I think that's the, that's the reason why it has
5 to be a factor in the weighing process. That if I let
6 it go, the expungement is pretty useless. Except for
7 telling employers in the future.

8 MR. GUTMAN: Well I don't think it's pretty,
9 I don't think it's pretty useless. I mean this is in
10 the context of --

11 THE COURT: I mean he can say he never, he
12 doesn't have a record. But, but they could always show
13 the video.

14 MR. GUTMAN: But this is in the context of
15 the common law right of access to records of a police,
16 uniformed police officer doing something that's a
17 matter of controversy. So it def..., that doesn't apply
18 to every evidence regarding my crimes with, -- it's a
19 special situation and the court has to weigh those
20 facts.

21 THE COURT: Okay.

22 MR. GUTMAN: The -- one final thing. I think
23 this case epitomizes the reason why OPRA puts the
24 burden of proof on the defendant and prohibits them to
25 just make conclusory assertions such as this films

1 shows the safe, that you can't rely on just conclusory
2 statements. And there was the conclusory statement --

3 THE COURT: Okay. So maybe the thought I had
4 when I read these papers in the first place that I
5 ought to do an in-camera review wasn't so bad.

6 MR. GUTMAN: No. That was a good idea.

7 THE COURT: I did have that thought. And
8 actually to coun..., counsel's credit, he offered it to
9 us.

10 MR. RENAUD: Yeah and I, and you know I --

11 MR. GUTMAN: I agree.

12 MR. RENAUD: Just want to --

13 THE COURT: So, but we got --

14 MR. RENAUD: I can't let that last comment
15 go. Just on the, on the safe --

16 THE COURT: Which?

17 MR. RENAUD: I mean I know where the safe is,
18 the chief knows where the safe is, the clerk knows
19 where the safe is. We know that the safe is shown on
20 the videotape. So maybe, maybe, I don't know what else
21 we would have said to be perfectly honest with you.
22 But the ch..., the chief knows that the safe is shown on
23 the videotape.

24 THE COURT: The door? The door?

25 MR. RENAUD: To the door to the safe. I

1 mean.

2 MR. GUTMAN: That's not the door to the safe.
3 The door to the room in which the safe is.

4 THE COURT: It's a big difference.

5 MR. RENAUD: No, that's the door in front of
6 the safe. I mean it's the safe is built in the wall.

7 THE COURT: Yes, but the argument was that
8 you, that anybody who looked at it would know where to,
9 where the safe, you know, could just say that's the
10 safe which it can't be done.

11 MR. GUTMAN: And the, and the kind of safe.

12 THE COURT: I'm not saying anybody, I'm not
13 making any kind of --

14 MR. RENAUD: Right.

15 THE COURT: -- that somebody misled me or
16 anything like that.

17 MR. RENAUD: Okay.

18 THE COURT: I'm just saying having looked at
19 it and saw the door and thinking what's he doing, and
20 somebody says the safe is in there, you wouldn't know
21 unless somebody, I would not know until --

22 MR. RENAUD: Okay.

23 THE COURT: -- somebody told me. I would not
24 know that. Okay, so, but I think it needs two cycles
25 because people want to reply, right? So who's gonna

1 know to notify the -- you want to? Mr. Renaud you want
2 to notify the gentleman?

3 MR. RENAUD: Um, I think -- see I'm troubled,
4 --

5 THE COURT: He needs to?

6 MR. RENAUD: I have to tell you I'm troubled
7 by this Judge. I think that if, if the plaintiff wants
8 to, I'm sorry, --

9 THE COURT: I should direct him to --

10 MR. RENAUD: To modify that expungement
11 order, --

12 THE COURT: He should, he should notify.

13 MR. RENAUD: No, I think he's got to go to
14 the judge that entered the order and do it in that
15 cause.

16 THE COURT: Oh.

17 MR. RENAUD: I don't think you can just do it
18 in some collateral way.

19 THE COURT: Oh.

20 MR. RENAUD: I mean I don't think they can do
21 it in this proceeding at all. I think they've got --
22 it's not a matter of saying hey we're having a hearing.
23 I think they've got to go in that matter. You can't
24 collaterally attack an order like that.

25 THE COURT: Good point. How do I, you know,

1 the civil Judge tell, you know, do something -- Judge
2 Perfilio's the one who gave that order.

3 MR. GUTMAN: Your Honor, our position is the
4 expungement order does not apply here as you know.
5 Because it --

6 THE COURT: So I have to decide that again.

7 MR. RENAUD: What's, I don't know what --
8 yes?

9 THE COURT: That the expungement order
10 doesn't apply.

11 MR. GUTMAN: But that doesn't, what does that
12 have to do with notifying this police officer to put in
13 his --

14 THE COURT: No your argument, your argument
15 is that I should use the part of the statute that says
16 I, I can modify the order. And he's, he's right about
17 that. That's not me, that's Judge Perfilio. I think
18 I'm weighing if I let this go, does it basically defeat
19 the purpose of the expungement as a, as a factor
20 without me doing something to Judge Perfilio's order?
21 I'm just, I'm not just, I am weighing what it would
22 mean to give it to you when there is an expungement
23 order. That this whole idea that somehow I would
24 effect that order, he's right, I can't do that.

25 MR. GUTMAN: Well --

1 THE COURT: But, but the gentleman should be
2 able to be hard about whether or not I should let it
3 go.

4 MR. GUTMAN: Your Honor, I, Your Honor, I
5 don't think the expungement order says that only the
6 judge who issued the order can issue any order
7 requiring the record. I think the purpose of it is if
8 some judge has a legitimate reason under some statute
9 to get access --

10 THE COURT: Well --

11 MR. GUTMAN: Let's say there's another
12 repeated crime and that stuff becomes relevant, --

13 THE COURT: Do we have, have you looked at
14 cases when it was exercised? That provision and how it
15 was exercised? I would have to do that.

16 MR. GUTMAN: No because I --

17 THE COURT: That when it was ever granted,
18 how it was granted in an application to the same
19 criminal judge. I'm su..., -- it may not be the same
20 judge but it would be the probably the criminal
21 division. Not me as an -- sitting talking about OPRA.
22 But I could, -- I think it's just --

23 MR. GUTMAN: Judge, the --

24 THE COURT: I think it's the issue of should
25 I just, should I consider one of the expunged records

1 or should I consider that if it isn't listed in the
2 statute and, and if you let this evidence go, what does
3 that do to the effect, to the fact that the, the
4 gentleman's been granted an expungement as opposed to
5 saying yes it is part of the expungement order and I'm
6 gonna take that, you know, modify the order to let it
7 go which sounds like Judge Perfilio's job.

8 MR. RENAUD: All right it would be, it would
9 be --

10 THE COURT: But I'd certainly talk to him.

11 MR. RENAUD: What counsel is suggesting is a
12 collateral attack on an order that was entered without
13 an appeal and without going back in the cause. I mean
14 it's not, -- frankly if you ordered this under the
15 common law, I, Your Honor, I don't know what, I don't
16 know what I would recommend to the chief. The chief
17 has an order that says in, in his opinion, and mine
18 quite frankly, don't give up any records pertaining to
19 this case. And then we get an order that says give up
20 the records I guess. I mean I, I just --

21 THE COURT: That's why, I mean I hate to be
22 putting all these thoughts without me getting to a
23 final conclusion on it.

24 MR. RENAUD: Um hmm.

25 THE COURT: But I think we are talking about

1 how does the evidence related to the crime that has,
2 the offense that, the not offense, the complaint. I
3 mean he never, he never, it's just, it's just the
4 complaint against him. He never, it was dismissed. So
5 how does the evidence related to the complaints fit?
6 And does it really fit under the expungement statute?
7 Or is it something -- ?

8 MR. RENAUD: And I'm not at all sure that
9 the, the provisions of the expungement statute that
10 talk about modifying the order are intended to pertain
11 to OPRA requests. Because if that were the case, then
12 any, any expungement could be defeated --

13 THE COURT: By just asking for the evidence.

14 MR. RENAUD: By an OPRA request.

15 THE COURT: It could.

16 MR. RENAUD: Well how bout, why not just
17 evidence? Why not everything else? I, I don't, -- I
18 took the position with Mr. Gutman frankly that he, that
19 he can't, -- I'd send him the expungement order when I
20 got it and said why don't you drop this because even if
21 you win you're not getting what you asked for.

22 MR. GUTMAN: Your Honor, it doesn't --

23 THE COURT: Well my staff definitely has to
24 eat. So the point is, you know, what are we doing? I
25 think this man to make sure that we have covered that

1 base, this man should know what day and if he wishes to
2 be heard. Whether, -- I don't know whether it's
3 mandatory, you know, that it's required but I don't
4 want to be found wanton for not letting him know. You
5 think, you thinking that I should let him know?

6 MR. RENAUD: I think it's up to --

7 MR. GUTMAN: Your Honor --

8 MR. RENAUD: I, -- my feeling is that it
9 would be up to the plaintiff to make some application
10 in the expungement clause for a modification or
11 whatever of the expungement order.

12 THE COURT: If he wants that. But if he
13 doesn't really want that and he wants to argue that
14 it's really not covered by that statute, and he wants
15 to, me to let it go under common, the common law,
16 shouldn't the person who has the expungement order be
17 made, you know, given some notice that that might
18 happen?

19 MR. RENAUD: Well regardless, regardless of
20 what the statute says and none of us. I don't think Mr.
21 Gutman's a criminal lawyer either. I don't know. But
22 --

23 MR. GUTMAN: I, I read the statute.

24 MR. RENAUD: So did I. But I mean regardless
25 of what, what we may know about the statute, --

1 THE COURT: Who represented him this time.

2 MR. RENAUD: There is a, there is an order
3 which certainly encompasses these records. And I
4 believe that, that if that order is to be modified --

5 THE COURT: Yes.

6 MR. RENAUD: That, -- that an application has
7 to be made not to you, but to in that cause. You
8 don't, -- you can't, I don't know how to say this any
9 differently.

10 THE COURT: Really I agree.

11 MR. RENAUD: You can't collaterally attack
12 the order.

13 THE COURT: If he wants to modify the order,
14 he has to ask there.

15 MR. RENAUD: Right.

16 THE COURT: So what I could do, is --

17 MR. GUTMAN: Can I respond, Your Honor?

18 THE COURT: Ask Judge, well.

19 MR. GUTMAN: First of all about notifying
20 this individual. They're the ones that are asserting
21 his right under the expungement.

22 THE COURT: Well I don't know. He's --
23 they're asserting the government, their own right.

24 MR. RENAUD: I'm asserting that I, my chief,
25 has a court order that says don't release those

1 records.

2 MR. GUTMAN: No. But they're, they're
3 withholding the record based on the expungement. So
4 they have a responsibility to contact this individual
5 if they want to assert the expungement. As to us
6 having to change the --

7 THE COURT: They don't want to change the
8 expungement. They're glad. It gives them another
9 reason.

10 MR. GUTMAN: No, I'm not saying, no I'm not
11 talking about the -- there's two different things here.
12 One is changing the expungement over. And the other
13 one is giving this individual an opportunity to object.

14 THE COURT: To the common law, -- mean,
15 releasing it pursuant to the common law --

16 MR. GUTMAN: To the common law right.

17 THE COURT: And doing nothing with his
18 expungement order.

19 MR. GUTMAN: So I'm talking about the, --
20 yeah, right I'm talking about that. They're claiming
21 that that's on their side on the common law business.

22 THE COURT: In the, in the weighing.

23 MR. GUTMAN: So they should notify him if
24 they want him to come in to support their common law
25 side. And as to the, the modification of the

1 expungement order, there's a provision that says it can
2 be changed. I mean there could be judges in many
3 different --

4 THE COURT: Yes, but who do you ask is the
5 question?

6 MR. GUTMAN: Any judge. And we're not
7 asking. It doesn't override OPRA because OPRA says
8 that any orders must be filed. So if there's an
9 expungement order, then OPRA, that's an exemption to
10 OPRA. I'm talking, we're talking about the common law,
11 the common law right. And it doesn't -- in that case
12 it's balancing and expressly provides that, that it can
13 be, any expunged records can be made available pursuant
14 to court order. That could be anything. That could be
15 a person is later charged as an expungement. But his
16 alleged, his previous crimes become relevant to some
17 future criminal activity. Then the judge can --

18 THE COURT: That's why I have to look some
19 more about how one invokes that section. Where do you
20 go and what do you ask for?

21 MR. GUTMAN: And this is, this is another
22 matter to which disclosure is necessary for some other
23 reason.

24 THE COURT: Okay. And the issue part of it
25 is besides the interest of the, of Garwood and the

1 interest of the public, how much weight am I supposed
2 to give to the interest of the third party who's
3 directly involved? I don't know. I haven't, I don't
4 know what, if anybody's ever raised that in any of
5 these.

6 MR. GUTMAN: Well, Your Honor, in many of
7 OPRA cases, there are records about third parties.

8 THE COURT: And they don't --

9 MR. GUTMAN: They, they have a right to
10 intervene, but there's no --

11 THE COURT: If they know. If they know.

12 MR. GUTMAN: They, -- no, I'm not aware of
13 any New Jersey court saying that there is a
14 responsibility in an OPRA case or a common law right to
15 notify, for anyone to notify the individual who is the
16 subject of a record kept by the government.

17 THE COURT: Seems fair. Seems like a good
18 idea.

19 MR. RENAUD: It does but I, I would, I agree,
20 I hate to keep agreeing, but I agree that if there were
21 no expungement order, that there's no responsibility to
22 notify someone who is the subject --

23 THE COURT: The subject.

24 MR. RENAUD: -- of the records. It would be
25 nice but I agree that it's not a requirement. But

1 where there is an expungement order that that person
2 has gotten, that you absolutely cannot modify that
3 order without going back in the expungement clause and
4 asking the judge who is assigned to expungements,
5 whether Judge Perfilio or somebody else, to modify it
6 by making a motion or some application to modify it.
7 You can't --

8 THE COURT: Well and if he knew that that's
9 what the relief was, he could come in here and give his
10 speech about, you know, have the lawyer that got him
11 the expungement and say --

12 MR. RENAUD: Right.

13 THE COURT: Don't you dare do that.

14 MR. RENAUD: Right or I suppose, I don't even
15 know if you can consolidate such a thing but if the, if
16 the plaintiff had moved to consolidate the expungement
17 with this and then notify the person affected then, you
18 know, that would be a way to do it. But I, -- you
19 just, you can't affect somebody's rights where, that
20 they've gone and litigated and gotten an order without
21 the person who wants to change that order or modify it
22 or affect them going there.

23 THE COURT: So all I need, all I'm pointing
24 out is should I write a letter with the complaint in
25 there in the Order to Show Cause and --

1 MR. GUTMAN: But you're not, you would not be
2 modifying the order.

3 THE COURT: Or you have to -- no, to let them
4 know, let him know that one of the things you want to
5 do is have the expungement modified.

6 MR. GUTMAN: But the defendants are claiming
7 that on their side of the balance then they have the
8 burden of producing that.

9 THE COURT: We're gonna be here all
10 afternoon. I think they should know. You know what?
11 I'm gonna talk to Judge Perfilio. I'm not gonna be
12 gone next week but I'm gonna talk to him about it.

13 MR. GUTMAN: Well wait a second, do they want
14 us to notify him?

15 THE COURT: Somebody needs to and I'm not
16 against, I'm not, you know, I could.

17 MR. GUTMAN: Well I can notify him if they
18 tell me, give me an address.

19 THE COURT: Are you willing to?

20 MR. GUTMAN: Yes. I don't think it's legally
21 required.

22 THE COURT: No, well that's, I know it.

23 MR. GUTMAN: But I'll do it.

24 THE COURT: But, you know, we're setting
25 something up and if, you know, when we you go up maybe

1 we'll find out the answer to that too.

2 MR. GUTMAN: If I'm, -- if we're given a
3 manner of contacting --

4 THE COURT: And that they can do whatever
5 they, you know, if they want to get involved but that
6 they would know.

7 Okay so we need a certification, a
8 certification from the chief. That, that motion day
9 that has Memorial Day after it, I don't know if that's,
10 I mean that's about when it would be. But we wouldn't
11 be doing it that day.

12 MR. RENAUD: I don't want to do that; Friday
13 before Memorial Day; no thank you, Judge.

14 THE COURT: No. Every, -- well, the next
15 one's the 11th. Or it's returnable that day and then
16 we find a time. Maybe that would be better. Get the
17 papers in. Could be returnable the 28th but heard on
18 an off day or returnable on the 11th of June.

19 MR. GUTMAN: So the question is --

20 MR. RENAUD: I don't have any motions that
21 day yet so I --

22 THE COURT: 06/11's okay?

23 MR. GUTMAN: What?

24 MR. RENAUD: Yeah.

25 THE COURT: So there's gonna be a

1 certification from the chief, there's gonna be -- the
2 plaintiff's lawyer has agreed to notify --

3 MR. GUTMAN: If I'm told how to do it. I
4 need a contact, I don't know where this guy lives.

5 THE COURT: Oh. Well how about his lawyer?

6 MR. RENAUD: Right.

7 THE COURT: For the, for the exempt for the
8 expungement order?

9 MR. RENAUD: I'll give a --

10 THE COURT: It's on the order, isn't it?

11 MR. RENAUD: Yes, it is. Yes.

12 THE COURT: I think you should, it isn't, I
13 don't know if it's 45 days but really the person who
14 got him the expungement, and I guess if that person
15 wanted, maybe you could call him and see what he wants
16 to do.

17 MR. RENAUD: Right.

18 THE COURT: But at least the lawyer.

19 MR. RENAUD: Correct.

20 THE COURT: The lawyer for the expungement
21 and, um, --

22 MR. RENAUD: I think you have to give him the
23 pleadings and the briefs and so forth.

24 MR. GUTMAN: So is that on the expungement
25 order?

1 THE COURT: Well, if he, if he gets
2 interested or, well you have to give him the pleading,
3 yes, you -- he wouldn't know about the expungement
4 unless you send him the papers.

5 MR. GUTMAN: Was that, -- that's Camarada
6 (phonetic)?

7 MR. RENAUD: Yes.

8 THE COURT: Yeah. If I were you, I'd call
9 him first to see if he wants both. He may think that
10 he's not representing him anymore. I don't know. The
11 attorn..., the attorney and the officer.

12 MR. GUTMAN: So -- just so I'm clear about
13 what I'm supposed to do. I'm supposed to wait to hear
14 from opposing counsel?

15 THE COURT: Well I think you should call Mr.
16 Camarada.

17 MR. GUTMAN: I should? Oh.

18 THE COURT: And say the judge wants, the
19 judge, you know, isn't sure it's required but thinks
20 that your client should know that this, there's this
21 proceeding out here to release that tape and that it
22 might, it might affect his expungement order and do
23 they want to be involved?

24 MR. GUTMAN: Okay.

25 THE COURT: And I guess if he, if the lawyer

1 is like I'm not the lawyer anymore or whatever, then
2 the least he could do is give you the address so you
3 could send it to him. So if you could do that within
4 about two weeks, then it would be enough time for them
5 to do whatever they're going to do. Now should, do you
6 want to have the, whatever papers you want to send in
7 on weighing go with a cycle for June 11th? That the
8 plaintiff, you know, the plaintiff --

9 MR. GUTMAN: The publicity that's already
10 occurred. So that's due June 11th?

11 THE COURT: Well, not June 11th. For the
12 June 11th cycle.

13 MR. GUTMAN: Oh.

14 THE COURT: The 16 days before is June 11th
15 is, is the 26th of June, of May.

16 MR. GUTMAN: You mean May?

17 THE COURT: May 26th.

18 MR. GUTMAN: Oh, May 26th.

19 THE COURT: I can see if I can get this order
20 done in the next two hours.

21 MR. GUTMAN: Oh that's next month. I mean it
22 wouldn't take me very long. I mean it's already been
23 published.

24 THE COURT: Well if you know -- hmm?

25 MR. GUTMAN: It would not take me very long.

1 THE COURT: No but I thought maybe once you
2 had it you might like to do a little memo about
3 weighing and whether or not there are any cases out
4 there that support you on, on an investigatory criminal
5 record from the common law point of view being given
6 out even though OPRA wouldn't have done it. I mean
7 that would be perfect if you could find something like
8 that. When is it? I mean my gut is when the facts
9 when weighed, you know, make it come out on the side of
10 the public, under the statute.

11 MR. GUTMAN: Well that won't take me long
12 either cause I already cited several cases where that
13 happened.

14 THE COURT: So maybe you're almost done. If
15 you want to do it sooner then that it's okay too, Mr.
16 Gutman.

17 MR. GUTMAN: Okay so before the 26th.

18 THE COURT: It's just that the Memorial Day
19 weekend Friday is not too good.

20 MR. GUTMAN: So you want it before May 26th?

21 THE COURT: At the latest May 26th. On or
22 bef..., you know, on or before.

23 MR. GUTMAN: I'm usually pretty prompt.

24 THE COURT: I know. And then Mr. Renaud can
25 re..., respond. But it, it'll change if the, if they get

1 involved and want to, and start filing papers.

2 MR. GUTMAN: So the pub..., --

3 THE COURT: That's another reasons to give it
4 six weeks but --

5 MR. GUTMAN: So I would ask that the order
6 say that we submit publicity not be..., may be some
7 publicity in addition to the newspapers but other
8 publicity about.

9 THE COURT: Well submit proofs that --

10 MR. GUTMAN: It's a matter of --

11 THE COURT: That it's a matter of public
12 knowledge.

13 MR. GUTMAN: Yeah. And public controversy.

14 THE COURT: Oh.

15 MR. GUTMAN: Or knowledge or --

16 MR. RENAUD: You know, we could save a whole
17 lot of paper, Judge. I mean I could tell you that
18 there are articles that the plaintiff and other people
19 have submitted. There's, there's letters to the
20 editor. There is, they've put all this stuff on the
21 internet. I mean I, it's not, I don't think that's --
22 I mean the question is what is the legal effect of
23 that?

24 THE COURT: Yeah.

25 MR. RENAUD: Let's not, let's not kill

1 anymore trees than necessary.

2 THE COURT: What's the legal effect of that?

3 MR. RENAUD: I'm willing to stipulate that
4 they've made a big issue of it.

5 THE COURT: Okay.

6 MR. GUTMAN: Well, we would like that in the
7 record, Your Honor.

8 MR. RENAUD: I just said it. It's on the
9 record.

10 THE COURT: Your tree. If you want to do
11 that, it's your tree.

12 MR. GUTMAN: Okay. It will be on my
13 conscience.

14 THE COURT: But we're really down to weigh...,
15 weighing. So you'd like a case management order that
16 says this. You know what? Maybe I could do it in
17 handwriting and be done with it now.

18 MR. GUTMAN: So are we supposed to be in
19 court on June 11th?

20 MR. RENAUD: June 11th, yeah. Actually, I
21 don't know. That's the return date. I don't know if
22 she's actually said she's gonna have the hearing then.

23 MR. GUTMAN: But it's the return, return, so
24 we, we have to leave it open.

25 MR. RENAUD: Right. Are you, just, Your

1 Honor, we were just talking here.

2 THE COURT: Actually I'm gonna --

3 MR. RENAUD: Are you thinking of having the
4 hearing on the 11th or are you just gonna make that the
5 return date?

6 THE COURT: That's the return date.

7 MR. RENAUD: Okay, and then we'll decide when
8 we're actually gonna do it.

9 THE COURT: Yeah. I'll, I'll do it. I'm
10 gonna go do it on, I don't wanna -- I'll go type it
11 out.

12 MR. RENAUD: If we could do it on a day other
13 than Friday in the summer that would be good for me.

14 THE COURT: It'd just be returnable.

15 MR. GUTMAN: I have no objection to it being
16 on Friday.

17 THE COURT: All right. I'm gonna go, I'm
18 gonna go do it on the word processor and send it out in
19 an hour or so.

20 MR. RENAUD: I know you have to be here but I
21 don't.

22 THE COURT: No you don't. And most of the
23 conferences they want to do by phone from somewhere.
24 Okay? I think I have the raw material. You know, I
25 don't really want to be done... -- I know it's not, the

1 criminal investigatory records I'm solid on. But the
2 inner play between that expungement and the right, the
3 common law right, I don't really want to say I've
4 decided the expungement thing for sure. Because, you
5 know, my thought process was what good is the
6 expungement if we can give out the evidence but maybe
7 it's really that's why you don't give out the evidence
8 under the common law. That could be the reason cause
9 it defeats the purpose. But it's not really covered by
10 the statute cause it isn't. It isn't listed in there.
11 I'm thinking about it but I'm just saying I don't, I
12 don't think -- I'm not solid. I want to think some
13 more about the ruling that it's covered by the
14 expungement statute cause I don't think it, I don't
15 think it is, it isn't mentioned there. But if you give
16 out the evidence, what does that do to the expungement?

17 MR. GUTMAN: Cause we also argued that there
18 was no expungement order when they denied access.

19 THE COURT: Correct. But now there is. So
20 I'm rethinking that one still. All right. Well Mr.
21 Gutman never let it be said that you are not an able
22 maker of New Jersey, you know, start the ball rolling
23 to make New Jersey law here.

24 MR. GUTMAN: Well, it's Mr. Paff actually,
25 I'm just his mouthpiece.

1 THE COURT: I know. Yeah well and Tina and I
2 don't know who else but --

3 MR. GUTMAN: Mainly Mr. Paff.

4 THE COURT: You win enough to make it
5 worthwhile. Okay.

6 MR. GUTMAN: Well, I wouldn't be here unless
7 I -- so --

8 THE COURT: Okay. I'm gonna go do the order.
9 But don't wait for it. We'll fax it out after that.
10 Okay? Cause I'm gonna type it up. I'm gonna type it
11 up.

12 MR. GUTMAN: Okay, thank you.

13 MR. RENAUD: You'll send it to us? Okay.
14 All right so we should go?

15 THE COURT: Yes, you should.

16 MR. RENAUD: Okay.

17 THE COURT: (Inaudible).

18 MR. RENAUD: Thank you, Judge.

19 MR. GUTMAN: Thank you, Your Honor.

20 * * *

21 (Whereupon, proceedings of 4-30-10 concluded)

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CERTIFICATION

I, Lynn Cohen-Moore, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the matter of JOHN PAFF V. BOROUGH OF GARWOOD heard in the Union County Superior Court, Law Division, Civil Part, April 30, 2010, C-D dated April 30, 2010, Index #10:48:11 to 1:16:25, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

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BY: Lynn Cohen-Moore

Lynn Cohen-Moore

A.O.C. #368

Dated: July 26, 2010