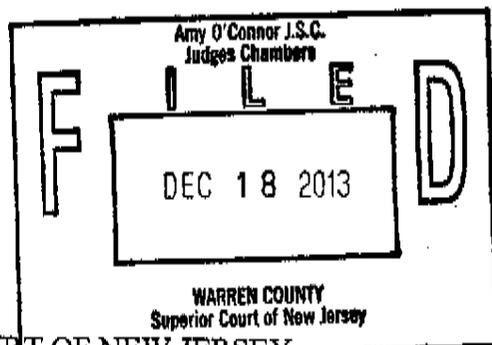


PREPARED BY THE COURT



SUPERIOR COURT OF NEW JERSEY  
 LAW DIVISION - CIVIL PART  
 WARREN COUNTY  
 DOCKET NO.: L-34-13

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JOHN PAFF

Plaintiff,

v.

OFFICE OF THE PROSECUTOR OF THE  
 COUNTY OF WARREN COUNTY, et al

Defendants.

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CIVIL ACTION

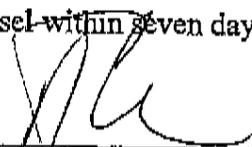
ORDER

**THIS MATTER** having been opened by the court on the application of plaintiff, Walter M. Luers, Esq., appearing, and Joseph J. Bell, IV, Esq., appearing for defendants, and the court having considered all submissions filed and the arguments of counsel, and for good cause shown:

**IT IS ON THIS 18<sup>th</sup> DAY OF DECEMBER, 2013, ORDERED** as follows:

1. That within 60 days, defendants shall serve plaintiff with the documents set forth in the list attached to the within Order. Before serving plaintiff with such documents, defendants shall redact from the documents the names of any person who provided a statement to defendants, as well as his or her position of employment, birth date, home and cellular telephone numbers, home address, and any personal identifier.

2. A copy of this Order shall be served on all counsel ~~within seven days.~~



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Amy O'Connor, JSC

Reasons Attached

**John Paff v. Office of the Prosecutor of the County of Warren, et. al.**

Plaintiff John Paff submitted to defendant Warren County Prosecutor's Office (defendant) a request for documents under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -47:1A-13, and under the common law right of access. In his request plaintiff stated that he had learned from a newspaper article that "jail officers" at the Warren County Correctional Facility used county owned generators for personal use immediately following Superstorm Sandy. The article reported that, after an investigation, the prosecutor concluded that no criminal activity had taken place. In his request, plaintiff claimed to be a citizen concerned that the officers may have "violated the public trust," and that the public should be able to determine whether the decision to not "follow through on this matter" was a reasonable exercise of discretion.

Plaintiff requested from the defendant all documents it made or maintained which pertained to incident. In response, defendant provided two documents but declined to provide thirteen others, on the grounds OPRA and the common law precluded the release of such records. Defendant gave plaintiff a list of the thirteen documents it declined to provide, a copy is attached to this opinion. In a letter response to plaintiff's request, defendant also provided the following information.

On November 14, 2012, the Warren County Prosecutor's Office was contacted by the Warren County Sheriff's Office concerning an internal affairs investigation the Sheriff's Office had commenced in connection with the use of a county owned generator by an employee of the Warren County Correctional Center. On November 15, 2012, the Prosecutor's Office directed that the internal affairs investigation be suspended pending a criminal investigation by the Prosecutor's Office.

On November 19, 2012, a Lieutenant Serafin of the Prosecutor's Office commenced an investigation, at the conclusion of which he recommended, on December 7, 2012, that the

investigation be closed and matter returned to the Sheriff's Department. The prosecutor concurred with the recommendation. As criminal charges were not filed, the matter was returned to the Sheriff's Office. After the receiving the defendant's response to its request for documents, plaintiff filed a verified complaint seeking the thirteen documents which had not been provided. The court ultimately found plaintiff was not entitled to any of the documents under OPRA. The remaining issue was whether plaintiff is entitled to any of the documents under the common law. Following the submission of additional briefs and oral argument, the court finds as follows.

Compared to OPRA, a broader class of documents is available under the common law, although on a qualified basis. Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 46 (1995). Specifically, a citizen has a common law right to inspect public documents if the documents are public records, the citizen has the requisite interest or standing to inspect the records, and the interest in disclosing the documents outweighs the need for confidentiality. Daily Journal v. Police Dept. of City of Vineland, 351 N.J. Super. 110, 122-23 (App. Div. 2002). Defendants have conceded that the documents are public records and that plaintiff has the requisite standing to obtain a copy of the subject documents. The court agrees with the defendants' assessment and observes, with respect to the second factor, that "a citizen's concern about a public problem is a sufficient interest for purposes of standing." Home News v. Dep't of Health, 144 N.J. 446, 454 (1996). Here, plaintiff is concerned public property was used for personal purposes. Such concern confers sufficient standing upon plaintiff. The issue in dispute is the third factor -- whether the plaintiff's right to the documents outweighs the public's interest in the need for confidentiality.

Determining whether to release documents under the common law requires the court to engage in an "exquisite weighing process." Loigman v. Kimmelman, 102 N.J. 98, 108 (1986) (quoting Beck v. Bluestein, 194 N.J. Super. 247, 263 (App. Div. 1984)). In making such determination, "a court must balance the plaintiff's interest in the information against the public

interest in confidentiality of the documents, including a consideration of whether the demand for inspection is premised upon a purpose [that] tends to advance or further a wholesome public interest or a legitimate private interest." S. N.J. Newspapers v. Twp. of Mt. Laurel, 141 N.J. 56, 72 (1995)(quoting S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 488 (1991). The balancing test "must be 'flexible and adaptable to different circumstances and sensitive to the fact that requirements of confidentiality are greater in some situations than in others.'" Daily Journal, supra, 351 N.J. Super. at 127 (quoting Loigman, supra, 102 N.J. at 103). Once a plaintiff has proven a legitimate interest in the subject documents, the burden of proof shifts to the State to demonstrate that its need for nondisclosure outweighs the plaintiff's need for disclosure.

O'Boyle v. Borough of Longport, 426 N.J. Super. 1, 13 (App. Div. 2012)

The Loigman Court provided six, non-exhaustive factors to consider when viewing documents for the purpose of determining whether any or all of such documents can be disclosed, which are:

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

[Loigman, supra, 102 N.J. at 103.]

Although a court must consider the above factors, it may consider other relevant factors when engaging in the balancing process. Ibid. A factor of significance in this matter is that the criminal investigation conducted by the Prosecutor's Office has concluded. "While there is a

real need to deny access where there is an ongoing law enforcement investigation, or where the protection of witness information or a witness's identity is at stake, the same values do not survive a balancing after the investigation is closed.” Shuttleworth v. City of Camden, 258 N.J. Super. 573; 585 (App. Div. 1992). Even if confidentiality of a particular witness or specific information must be maintained, redaction in some circumstances may adequately address such concern. Id. at 585-86.

The court has reviewed the documents in camera. The six Loigman factors are addressed below. Although the court is ordering the release of the records (with the redaction of some information), the court shall be circumspect in making its factual findings and legal conclusions in the event defendants seek an appeal and the court's order is stayed before the documents are in fact turned over to plaintiff.

**(1) The extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government –**

Documents #2, #3, #4, #6, #7, and #9 are witness statements, which provide factual information only, and document #1 is a summary of the factual information provided by the witnesses.

Documents #5, #8 and #11 are administrative records that are routinely executed during an investigation and contain only factual information.

Document #10 contains factual information received by the Sheriff's Office, although the third and fourth "bullet" points on page two contain deliberative information, see In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000), and shall not be disclosed. (For clarification, the third bullet point begins with "11/14/12" and the fourth bullet point begins with "11/15/12.")

Document #12 sets forth handwritten notes that were being jotted down while witnesses were giving their respective statements of facts to the author of document #12; none of the information in document #12 contains deliberative material.

Document #13 is an anonymous letter written by a "concerned citizen."

The disclosure of the records above would not discourage citizens from providing information to the government and thus impede agency functions. Witness statements are routinely given to law enforcement and witnesses are aware any information they provide will be used or at least considered by the agency who receives the information. See Asbury Park Press v. Lakewood Tp. Police Dept., 354 N.J. Super. 146, 166 (Law Div. 2002). There is not any indication that any of the witnesses who provided information would have refrained from doing so if they knew there was a potential for disclosure. Investigating officers have a duty to make the kind of reports which were made in this case and thus this factor is not implicated insofar investigating officers are concerned. See Asbury Park Press, Inc. v. Borough of Seaside Heights, 246 N.J. Super. 62, 70 (Law Div. 1990).

As there is not any indication that disclosure of the thirteen documents would impede any agency functions, this factor favors disclosure.

**(2) The effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed -**

There is not any indication any of the persons who provided information did so in reliance that their identities would not be disclosed. The author of document #13 forwarded his or her letter anonymously and so knew his or her identity could not be disclosed. Accordingly, this factor also favors disclosure.

**(3) The extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure -**

There is not any indication that disclosure would chill decision-making, program improvement or self-critical analysis. The statements would have been obtained and the various reports made regardless whether they would be used for any self-critical analyses.

**(4) The degree to which the information sought includes factual data as opposed to evaluative reports of policy-makers -**

All of the information is factual, with the exception of the portion of document #10 identified above, which contains recommendations presumably reflecting agency policies and thus are considered part of the deliberative process. See In re Liquidation of Integrity Ins. Co., supra, 165 N.J. at 85.

**(5) Whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency -**

No criminal charges were filed; therefore, this factor is not applicable.

**(6) Whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials -**

This factor is not applicable.

After considering the nature of the information contained in the subject documents, the Loigman factors, and the fact that the criminal investigation has concluded, the court finds that the interest in disclosure outweighs the need for confidentiality. As indicated above, while case law recognizes there may well be a need to deny access to records when there is an ongoing law enforcement investigation, such need does not survive a balancing test after an investigation is closed. The information in the documents which is being released is factual, and originates from witnesses who, as a practical matter, are not even precluded from divulging the information in their possession to any person or entity if they so wished. There is not a reasonable basis to conclude that the disclosure of the records would chill any agency functions, including self-

improvement programs. On balance, the public's interest in disclosure is not outweighed by its interest in maintaining the confidentiality of such documents.

There is one additional issue to address. The names of the witnesses who gave statements shall be redacted from the documents. The reason is that none of the individuals who gave statements has been charged with a crime. Further, any information which describes the position of employment a witness holds shall be redacted, as a revelation of the job a witness holds may identify who they are.

In the absence of clear common law direction on a subject, a court may look to the provisions in OPRA as expressions of public policy with respect to whether the public has access to information in a public document. Bergen County Imp. Authority v. North Jersey Media Group, Inc., 370 N.J. Super. 504, 510 (App. Div. 2004). While OPRA permits public access to certain information about a criminal investigation, nothing "requires access to the names of private citizens who are not charged with an offense. In our view, [there] is a clear legislative acknowledgment that a compelling public interest is served by protecting the private interests of such citizens. We deem that legislative declaration to be highly relevant to the 'exquisite weighing process' under the common law." Daily Journal v. Police Dept. of City of Vineland, 351 N.J. Super. 110, 131 (App. Div. 2002). Accordingly, as none of the witnesses who provided information was charged with a crime, the court is ordering that their names and job descriptions be redacted from the copy of the documents being released to plaintiff.

Finally, some of the documents contain the birthdates, home addresses, and home or cellular telephone numbers of the witnesses. The interest in keeping such information from getting into the hands of the public far outweighs the need for disclosure. Such information shall also be redacted from the copy of the documents released to plaintiff.

Accordingly, all of the thirteen documents shall be released to plaintiff, but the information specified above shall be excised from the documents.

## List of Unreleased Documents in IN12-096

1. Warren County Prosecutor's Office Investigation Report prepared by Lt. John Serafin concerning criminal investigation IN#12-096 dated 11/29/12 and approved by Deputy Chief Kirk Trauger containing five pages discussing actions taken by Lt. Serafin to investigate the referral including the interview of six individuals including the target of the investigation. Denied as a criminal investigatory record.
2. Transcribed Statement of Witness #1 taken by Lt. Serafin on November 20, 2012 containing 14 pages. Denied as a criminal investigatory record.
3. Second Transcribed Statement of Witness #1 taken by Lt. Serafin on November 20, 2012 containing five pages. Denied as a criminal investigatory record.
4. Transcribed Statement of Witness #2 taken by Lt. Serafin on November 20, 2012 containing 12 pages. Denied as a criminal investigatory record.
5. Signed Miranda Card of Target dated November 20, 2012 and witnessed by Lt. Serafin containing one page. Denied as criminal investigatory record.
6. Transcribed Statement of Target taken by Lt. Serafin on November 20, 2012 containing 19 pages. Denied as criminal investigatory record.
7. Transcribed Statement of Witness #3 taken by Lt. Serafin on November 26, 2012 containing 8 pages. Denied as a criminal investigatory record.
8. WCPO Evidence and Property Form detailing disposition of recorded statements dated November 27, 2012 containing one page. Denied as a criminal investigatory record.
9. Written Statement of Witness #1 provided to Lt. Serafin on November 26, 2012 containing one page. Denied as a criminal investigatory record.
10. Undated/Unsigned Memo from Undersheriff McCarthy to Sheriff Gallant regarding Internal Affairs Investigation No. 2012-21 regarding an investigation of a jail employee outlining the status of the IA investigation up to the point where the investigation was turned over to the WCPO for investigation containing three pages. Denied as Internal Affairs document and/or criminal investigatory record as it contained potentially inculpatory information.
11. Internal Affairs Complaint Notification Form concerning IA Investigation Case No. 2012-21 signed by target of the investigation on 11/13/12 and witnessed by Undersheriff McCarthy containing one page. Denied as Internal Affairs document.
12. Handwritten Notes of Lt. Serafin containing information obtained from interviews of witnesses and target of the investigation consisting of four pages. Denied as criminal investigatory record and/or fall outside definition of government record.
13. Anonymous letter received by the WCPO on 12/17/12 concerning investigation. Denied as falling outside the definition of Public Record—this is not a record required to be made or maintained by a public agency and was received after the investigation was closed.