

# Superior Court of New Jersey

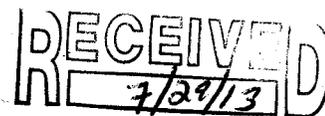


CHAMBERS OF  
JUDGE VINCENT J. GRASSO  
ASSIGNMENT JUDGE

(732)-929-2176

OCEAN COUNTY COURT HOUSE  
P.O. BOX 2191  
TOMS RIVER, NJ 08754-2191

July 26, 2013



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RE: Grossman v Office of the County Prosecutor, etc., et al  
Docket No. OCN-L-533-13

Dear Counsel:

Plaintiff, Alan Grossman, brings this action under the Open Public Records Act, N.J.S.A. § 47:1A-1 et seq. (OPRA), seeking to compel the Ocean County Prosecutor's Office to disclose and release documents in its possession relating to the investigation and prosecution of a matter entitled State v. Brandon C. Jackson, under Ind. #09-04-733. Following a jury trial, said defendant, Jackson, was found guilty on several counts of aggravated assault and possession of a weapon for an unlawful purpose and sentenced in the Ocean County Superior Court on June 5, 2012 to a term of imprisonment of eight years under NERA and a consecutive term of four years. The matter is currently on appeal. A principal issue in this case involves the "criminal investigatory records" exemption under OPRA and its application following a criminal trial.

On December 5, 2012, plaintiff submitted a written OPRA request to defendants seeking records pertaining to the criminal case against Jackson. Plaintiff's request, which was formatted as follows, sought:

I. "Statistical Reports:

- A. Your 12 (twelve) most recent Statistical Reports – Monthly;
- B. Your 3 (three) most recent Statistical Reports – Yearly;

II. Concerning the above-referenced case (whether paper, digital or otherwise):

- A. Evidence Records;
- B. Grand Jury Case File, including but not limited to (1) complaints, (2) police reports, (3) criminal histories, (4) synopsis sheets, (5) disorderly persons reports, (6) voting records, (7) subpoenas, and (8) search warrants;
- C. Intelligence File;
- D. Investigation Report File; including but not limited to (1) all reports and memoranda concerning the investigation done by the Prosecutor's Office itself, (2) all special squad reports; and (3) search warrants;
- E. Lab Reports;
- F. Prosecution Case File, including but not limited to (1) Indictments, (2) Accusations, (3) Statements, (4) Dismissals, (5) lab reports, (6) expunged cases, (7) Extradition Records; and (8) search warrants;
- G. Wiretap Records File – Wiretap Tapes;
- H. Civil Action Case File."

By letter dated January 3, 2013, defendant, Patrick Sheehan (Sheehan), assistant Ocean County prosecutor and custodian of records, provided plaintiff with the prosecutor's office three most recent statistical reports filed for the years 2009-2011 but denied the remainder of plaintiff's request in its entirety, indicating:

"I will address the items requested under your number II. This concerns the case against Brandon Jackson which is now on appeal. These records are criminal investigatory records and

exempt from release under the Open Public Records Act, NJS 47:1A-1.1. The New Jersey Government Records Council has held that such records remain exempt under the Act even after the case is concluded, *Janezcko v. Division of Criminal Justice and Division of State Police* (2002-79 and 80).”

“Therefore the request under the New Jersey Open Public Records Act is denied in its entirety. This Office reserves the right to revisit this request in the event a public or private interest is demonstrable.”

On January 22, 2013, plaintiff wrote a follow-up letter to defendants further detailing why the records sought should be disclosed. In this letter, plaintiff indicated that the Ocean County Prosecutor’s response was unsatisfactory and offered various statutes and case law in support of its position. Moreover, plaintiff requested more specific reasons for the denial by the prosecutor’s office.

At the time the complaint was filed on February 19, 2012, defendant had failed to respond to plaintiff’s letter. However, after the complaint was filed on February 21, 2013, Sheehan responded setting forth more specific reasons for his denial. This letter indicated that because plaintiff had no particularized interest in the criminal case against Brandon C. Jackson, there was no proper justification for release of the records which Sheehan reiterated were exempt under OPRA. In addition, the prosecutor’s office stated that the request was vague, overly broad and failed to name specific documents to be released, in violation of OPRA. Each specific request was denied as being either overly broad or falling within the criminal investigatory records exemption of OPRA at N.J.S.A. § 47:1A-1.1.

The court finds that plaintiff’s initial requests for documents within the “Grand Jury case file,” “investigation report file,” “lab reports,” and “the prosecution case file” were sufficiently identifiable so as to require disclosure under OPRA. See Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2012). These requests were confined to a specific subject matter, namely, specific documents relating to the criminal case against Jackson. Responsive records “could have

been identified, located and produced from a routine search of files pertaining to a very narrowly specified topic.” Brandes, 429 N.J. Super. at 177. With regard to plaintiff’s initial request for “evidence records” and the “intelligence file,” the court finds that the prosecutor’s office lawfully denied these requests as being vague and overly broad. A proper request under OPRA must identify with reasonable clarity those documents that are desired. A party cannot satisfy this requirement by simply requesting *all* of an agency’s documents. See Bent v. Stafford Twp. Police Dept’s, 381 N.J. Super. 30, 37 (App. Div. 2005)(emphasis added); MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005). But see Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2012) (holding that requests confined to a specific subject matter, described with sufficient identifying information and limited to particularized identifiable government records should have been disclosed under OPRA).

However, the court considers the critical issue here is whether, following a public trial in a criminal matter, a law enforcement agency or, as in this case, the County prosecutor’s office, can lawfully withhold disclosure of documents and records in its case file on the basis that same are exempt as “criminal investigatory records.”

Prior to the return date on June 18, 2013, plaintiff certified that, during the course of its research, it acquired copies of the minute entry log of the court clerk for Jackson’s case. The entry log demonstrated the existence of various documents referenced by the prosecutor’s office, entered into evidence or marked for identification at the criminal trial. Plaintiff indicated the following class of documents referenced by the entry log that plaintiff maintains should be disclosed: (1) prosecution and defense exhibits marked for identification or entered into evidence at the Jackson trial; (2) photographs and the crime scene video; (3) statements made by witnesses, victims and the defendant; (4) interview statements and audio recordings of interview of the defendant; (5) evidence report; (6) medical records, DNA reports and lab reports; (7)

police reports, CIU materials, evidence reports, and reports of meetings in connection with the criminal case; (8) correspondence between the prosecutor and defense counsel; (9) jury charge, verdict form and jury questionnaires.

Since the initial request, plaintiff has been provided with: (1) Ocean County's prosecution statistics for 2009, 2010, and 2011 and a certification that the prosecutor's office does not maintain statistical reports on a monthly basis; (2) copies of some documents entered into evidence at Jackson's trial at the court's direction; (3) the criminal complaint; (4) the indictment; (5) the judgment of conviction; (6) the order for commitment to the Department of Corrections; and (7) Order denying motion for a new trial. With regard to the wiretap records file and the civil action case file, the prosecutor's office certified that there are no wiretap tapes pertaining to the Jackson criminal investigation and that, although a civil action may have been filed against Jackson, no civil file was in the possession of the prosecutor's office.

After oral argument of the matter on June 18, 2013, plaintiff was given additional time to determine which specific documents were still outstanding and then submit this list to the court. In conjunction with this directive, plaintiff was advised by the court to obtain the ledger of the Jackson trial exhibits through the courts. Plaintiff advised that, after diligent inquiry and an in-person examination of the court's records that the Jackson trial exhibits were not in the possession of the court. As a result, plaintiff reasserted its OPRA request as the only available avenue to obtain access to these documents. Plaintiff also submitted that the photographs and CD it received did not indicate which exhibits they represented and sought clarification of the exhibits. Plaintiff requested the defendant prepare a Vaughn index indicating specific reasons for denying access to certain documents.<sup>1</sup>

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<sup>1</sup> The term "Vaughn index" comes from Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973), in which the court held that the party that is claiming privilege or confidentiality submits affidavits that contain a "relatively detailed" justification for the claim of privilege that is being asserted for each document. The necessity for a Vaughn index was explained and utilized in Paff v. Division of Law, 412 N.J. Super. 140, 161 n.9 (App. Div. 2010).

The remaining issues before the court include the following specific documents as outlined in plaintiff's moving papers:

**Evidence Records:**

1. Prosecutor's original and updated exhibit list (referenced at the trial transcript on March 13, 2013 and March 22, 2012).
2. Exhibits S1 through S48, most of which are photos entered into evidence or marked for identification at trial.
3. S49, which is the report of Detective Robert Johnson marked at trial. (S50-S55 were provided on June 18, 2013).
4. S56, which is the Defendant's statement marked at trial.
5. Defense's exhibit list.
6. Defense's exhibits admitted into evidence or marked for identification at trial.
7. Logs, recordings and transcripts of 911 calls and calls to the police, at least one of which was referenced at trial.
8. Reports or evidence referred to by the Assistant Prosecutor at trial as "potential 404(b) evidence," including evidence of prior incidents between the defendant and the victim, a witness's claim to have seen the defendant wielding a knife on another occasion, and Lieutenant Morgan's report regarding the victim's claim that he had been stabbed previously by the defendant.
9. Certain other victims' medical records in the possession of the prosecutor which have not already been produced to the plaintiff in this case, specifically those showing Scott Madej's condition at the crime scene and upon arrival at Jersey Shore Medical Center on October 22, 2006, such as an EMS trip sheet, patient care report, trauma admission form, and trauma chart, and in particular with a description of his wounds and a diagram showing the location of his wounds; and John Fels's condition upon arrival at Kimball Medical Center on October 22, 2006, in particular a description of his wounds and a diagram showing the location of his wounds.

**Grand Jury Case File:**

1. Police reports: We continue to seek all police reports in the Prosecutor's file, including the November 2, 2006 Detective Rubio report.
2. Criminal Investigation Unit Reports, including D36 referenced at trial; the Master CIU evidence sheet referenced at trial; CIU task exhibit sheets, referenced at trial; CIU "total chain of custody logs" referenced at trial; the Evidence Report or "evidence log" referenced at trial.
3. We continue to seek the criminal histories of the defendants, victims and witnesses that are in the Prosecutor's file.
4. We continue to seek the subpoenas that are in the Prosecutor's file.
5. We also continue to see all search warrants and all returns of evidence in the Prosecutor's file, including the October 22, 2006 search warrant regarding 220 Bartley Road and the D35 Search Warrant and Return of Evidence.

**Investigation File:** Plaintiff continues to seek the entirety of the Prosecutor's investigation file (to the extent not already disclosed), including all reports prepared by Lieutenant Morgan and all reports referenced at trial; Detective Johnson reports referenced during the trial; two "supplemental police officer reports" referenced at trial' and reports authored by Detective Krause, including D36 and other such reports that were referenced at trial.

**Lab Reports:** Plaintiff has received the DNA lab reports entered into evidence as S50, S51, S52 and S53. However, they have not received the prosecutor's August 12, 2011 request letter that is referred to in S50. In addition, they have not received S32, which was referenced at trial, as well as S33 and S34. They are also requesting related worksheets and electropherograms and the report of Allison Lane of the State Police that were referenced at trial, as well as lab reports and documents in the prosecutor's file bearing the Jackson case file number, which is DNA Lab No. C10-002000.

**Prosecution Case File:** On June 18, 2013, the court directed the defendants to provide to plaintiff copies of witness statements and victims' statements that were admitted into evidence or referenced at the Jackson trial, and copies of defendant's statements that were admitted into evidence or referenced at the Jackson trial (including recorded statements of the defendant that were played at pre-trial hearings). In addition to the documents that the court has already

ordered be disclosed, plaintiff continues to seek witness and victim statements that were referenced at trial or are in the possession of the prosecutor that were not entered into evidence, although marked for identification. These include one or more statements by James Debow, Caitlin Lewis, Cristalle Cromey, Neil Loukides, Chase Ruggerio and all other witnesses.

In responding to plaintiff's supplemental submission, the prosecutor's office reasserted its prior position that plaintiff's requests are overly broad, fall under the criminal investigatory records exemption of OPRA, are privileged under HIPAA, and/or not required to be disclosed under the Rules regarding grand jury proceedings.

**Open Public Records Act:**

New Jersey's Open Public Records Act (OPRA) is the manifestation of the State's public policy favoring transparency in government and disclosure of government documents. See N.J.S.A. § 47:1A-1 (“[G]overnment records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access . . . shall be construed in favor of the public's right of access . . .”). OPRA's purpose is to “maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.” Mason v. City of Hoboken, 196 N.J. 51, 64-65 *citing* Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004). Pursuant to N.J.S.A. § 47:1A-1.1, if a document is a government record, it must be disclosed unless it is excluded from disclosure by other statutory provisions or executive orders, N.J.S.A. § 47:1A-9(a), or exempt based on a privilege or confidentiality established or recognized by the State Constitution, statute, court rule, judicial decision, or OPRA itself. OPRA defines a “government record” as:

[A]ny paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its

official business . . . or that has been received in the course of his or its official business . . . N.J.S.A. § 47:1A-1.1

While the statute broadly defines “government record,” it specifies twenty-one categories of information that are excluded from the definition for purposes of the statute. N.J.S.A. § 47:1A-1.1. Thus, before determining whether the information should be disclosed, it must be determined (1) whether it is a government record and (2) whether it falls under any of the exemptions to disclosure found in the body of the statute. With regard to these questions, the law provides for a presumption of disclosure: “The public agency shall have the burden of proving that the denial of access is authorized by law.” N.J.S.A. § 47:1A-6. Moreover, “N.J.S.A. § 47:1A-5(g) generally places the burden upon the custodian of a public record to state the ‘specific basis’ for the denial of access . . .” Gannett New Jersey Partners v. County of Middlesex, 379 N.J. Super. 205, 215 (App. Div. 2005).

**Criminal Investigatory Records Exemption – DARM Applicability:**

The prosecutor’s office maintains that most of the documents sought are “criminal investigatory records,” rendering them exempt from the disclosure requirements of OPRA. See N.J.S.A. § 47:1A-1.1. According to OPRA, a criminal investigatory record is a record “which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.” N.J.S.A. § 47:1A-1.1. It is the defendant’s burden to establish that the criminal investigatory reports exception applies to an OPRA request. To do so, defendant must demonstrate that the documents sought are “not required by law to be made,” and that they “pertain to any criminal investigation or related civil enforcement proceeding.” O’Shea v. Township of West Milford, 410 N.J. Super. 371, 381-82 (App. Div. 2009).

At the inception of this litigation, plaintiff maintained that the criminal investigatory records exemption is inapplicable to the present matter, as the documents requested are required

to be made or maintained pursuant to New Jersey Division of Archives and Records Management (DARM) records retention schedule, C310000-003.<sup>2</sup> The prosecutor's office responds that DARM's retention policy, which must be approved by the State Records Committee, does not constitute legal authority and does not have the force of law. In so doing, defendants cite Woojin Hwang v. Bergen County Prosecutor's Office, GRC Complaint No. 2011-348, final decision, (January 29, 2013) and West Solloway v. Bergen County Prosecutor's Office, GRC Complaint No. 2011-39, final decision, (January 29, 2013).

A court is "in no way bound by an agency's interpretation of a statute or its determination of a strictly legal issue." Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973). Nevertheless, the court agrees with the rationale of the GRC decisions cited by defendant and finds that DARM's record retention policy does not operate to "require by law to be made, maintained or kept on file" documents pertaining to a criminal investigation which would require disclosure and release under OPRA. DARM's retention schedule applies to a multitude of documents that could be classified as criminal investigatory records. To hold that DARM has the force of law as plaintiff contends could potentially remove all documents from the criminal investigatory records exemption set forth by OPRA and "would therefore render the exemption meaningless." Woojin Hwang v. Bergen County Prosecutor's Office, GRC Complaint No. 2011-348 and West Solloway v. Bergen County Prosecutor's Office, GRC Complaint No. 2011-39. Courts have disfavored statutory constructions that render portions of a statute superfluous. See e.g. N.J. Ass'n of School Administrators v. Schundler, 211 N.J. 535, 553 (2012) (legislative

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<sup>2</sup> DARM requires a prosecutor's office to retain certain documents for a specified period of time. A failure to create or properly maintain such documents in accordance with the retention schedule established by DARM is a violation of the Destruction of Public Records Law, N.J.S.A. § 47:3-8 through 19. Records covered by DARM's retention schedule may not be destroyed without the approval of DARM. N.J.S.A. § 47:3-17; New Jersey Land Title Ass'n v. State Records Committee, 315 N.J. Super. 17, 23 (App. Div. 1998). Each of the documents sought by plaintiff is covered under DARM's retention policy.

language must not, if reasonably avoidable, be found to be inoperative, superfluous or meaningless).

This approach is supported by the Supreme Court's holding in State v. Marshall, 148 N.J. 89, 272 (1997). In Marshall, the Supreme Court in ruling on a disclosure request pursuant to the Right to Know Law (RTKL) concluded that no law or regulation requires that the law enforcement records sought in that case be made, maintained or kept. Marshall, 148 N.J. at 272 citing River Edge Sav. & Loan Assoc. v. Hyland, 165 N.J. Super. 540, 545 (App. Div. 1978) (holding that research has failed to disclose any law which requires the making, maintaining or keeping on file law enforcement investigation files). At that time, DARM's retention schedule was in effect and was not found to operate as the force of law mandating the maintenance of records by law enforcement so as to require disclosure under the RTKL.

Under the RTKL, OPRA's predecessor, several cases addressed whether records made and maintained by law enforcement are public records and, therefore, available for inspection by New Jersey citizens. A discussion of the case law is found in Daily Journal v. Police Dep't of the City of Vineland, 351 N.J. Super. 110, 123 (App. Div. 2002), where the Appellate Division at page 120 noted:

We have found no case holding that criminal investigation reports are public records under the RTKL. Indeed, the courts have held to the contrary, on the basis that no law or regulation requires the making, maintaining or keeping on file the results of a criminal investigation by a law enforcement officer or agency. See State v. Marshall, 148 N.J. 89, 272, 690 A.2d 1 (holding that no law or regulation requires that law enforcement files be made, maintained or kept), *cert. denied*, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997); accord River Edge Sav. & Loan Ass'n v. Hyland, 165 N.J. Super. 540, 545, 398 A.2d 912 (App. Div.) (holding that "research . . . has failed to disclose, any law which requires the making, maintaining or keeping on file the results of an investigation by a law enforcement official or agency into the alleged commission of a criminal offense"), *certif. denied*, 81 N.J. 58, 404 A.2d 1157 (1979); see also Shuttleworth v. City of Camden, 258 N.J. Super. 573, 580-81, 610 A.2d 903 (App. Div.) (same), *certif. denied*, 133 N.J. 429, 627 A.2d 1135 (1992); Asbury Park Press, Inc. v. Borough of Seaside Heights, 246 N.J. Super. 62, 66-68, 586 A.2d 870 (Law Div. 1990) (same).

In a footnote in Daily Journal, decided May 17, 2002, the Appellate Division noted that the RTKL had been repealed and, effective July 2002, the definition of government record[s], subject to public access excepts “criminal investigatory record[s] from the definition of “government records.” A discussion of the legislative history which provides guidance to this court is contained in a decision of the GRC part of Hwang, GRC Complaint No. 2011-348, as follows:

This background framed the legislature’s passage of OPRA in 2002. The bills originally introduced in the Assembly and Senate did not contain a general exemption for “criminal investigatory records.” Senate No. 2003, 209th Sess. (N.J. 2000); Assembly No. 1309, 209th Sess. (N.J. 2000). However, at a public hearing on March 9, 2000 before the Senate Judiciary Committee, several witnesses expressed concern over the lack of clarity in the original OPRA legislation as to whether, as a general matter, prior exemptions that had been enacted by Executive Order or through case law under the Right-to-Know law would survive the passage of OPRA. *See, e.g.*, Transcript of Public Hearing on Senate Bill Nos. 161, 351, 573, and 866, at 23 (Mar. 9, 2000), *available at* <http://www.njleg.state.nj.us/legislativepub/Pubhear/030900gg.PDF> (statement of William J. Kearns, Esq., N.J. State League of Municipalities). The Judiciary Committee members unequivocally suggested that these exemptions would survive or would be provided for in a contemporaneously passed Executive Order. *Id.* at 29-30 (“In other words, we contemplated this as all of those protections that are provided in statutes, in legislative resolutions, and executive orders would remain in place.”)(statement of Sen. Martin).

The exemption from disclosure for “criminal investigatory records” was then introduced in a May 3, 2001 floor amendment to the Senate bill by OPRA’s co-sponsor, Senator Martin, and remains in that form in the law. In Senator Martin’s statement accompanying the floor amendment he noted that “[t]he amendments *exempt criminal investigatory records of a law enforcement agency from the statutory right of access.* However, a common law right of access could be asserted to these and other records not accessible under the statute.” (Emphasis added.) Statement to Senate No. 2003, 209th Sess. (N.J. May 3, 2011). This statement was reflected in the final structure of OPRA, which provided an exemption for “criminal investigatory records,” but noted that “[n]othing contained in [OPRA] ... shall be ... construed as limiting the common law right of access to a government record, *including criminal investigatory records of a law enforcement agency.*” (Emphasis added.) N.J.S.A. 47:1A-8.

In addition, the May 3, 2001 floor amendment adopted the definition of “criminal investigatory records” in terms that mimicked the language used by the prior Right-to-Know Law. Specifically, a “criminal investigatory record” was defined to entail “a record *which is not required by law to be made, maintained or kept on file* that is held by a law enforcement agency which pertains to any

criminal investigation or related civil enforcement proceeding.” (Emphasis added.) Senate No. 2003 § 2, 209th Sess. (N.J. as amended, May 3, 2011).

Finally, in his message upon signing the final version of OPRA, Governor McGreevey mentioned only limited exemptions explicitly but included “exemptions for victims’ records, emergency and security information, *criminal investigatory records and other appropriate areas that warrant confidentiality.*” (Emphasis added.) Statement of Gov. James E. McGreevey upon passage of OPRA at 1 (Aug. 13, 2002).

The Legislature’s specific statement that the floor amendment was intended to keep criminal investigatory records as exempt from disclosure and its mimicking of the Right-to-Know Law in the definition of “criminal investigatory records” strongly suggests its intent to maintain the prior exemption as defined by the courts.

The case law as well as the legislative history compels the finding here that the documents sought to be disclosed under the headings of “Evidence Records,” “Investigation File,” “Lab Reports,” and “Prosecution Case File” were created in relation to a criminal investigation proceeding and are not “required by law to be made, maintained or kept on file” rendering them exempt from disclosure pursuant to the criminal investigatory records exception of OPRA. N.J.S.A. § 47:1A-1.1.

**Criminal Investigatory Records Exemption – Effect of Public Trial:**

With this determination, the court’s focus turns to the effect, if any, of a public trial in a criminal matter on a law enforcement agency’s reliance on the “criminal investigatory records” exemption. In this case, the criminal case against Jackson at the trial level has been completed and, presumably, so has the investigation. Nevertheless, the court finds that the exemption for “criminal investigatory records” does not dissipate merely because a criminal matter proceeds to a conclusion following a trial. It is the court’s view that the assertion of the exemption by a law enforcement agency is not governed by the procedural posture of a matter provided that the record or records fall within the statutory definition of N.J.S.A. § 47:1A-1.1. Therefore, with the exception of those documents and records provided by the Ocean County Prosecutor’s Office,

their denial of the remaining records or documents on the basis that same are “criminal investigatory records” cannot be found by this court to be an unlawful denial under OPRA. The exemption can still be properly asserted in this case despite the fact that the investigation and Jackson’s criminal trial have been completed. With regard to the “Grand Jury case file” disclosure of such documents is governed by the Rules of Court and will be addressed separately as well as the prosecutor’s general assertion that privacy laws prohibit the release of “lab reports” or similar documents that do not relate to the criminal defendant.

**Common Law Right of Access:**

Plaintiff also seeks disclosure under the common law right of access. At the outset, the court notes that OPRA does not limit the common law right of access to government records. See N.J.S.A. § 47:1A-8. N.J.S.A. § 47:1A-8 emphasizes that nothing contained in OPRA “shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency.”

To be entitled to records pursuant to the common law right of access, the party seeking the records must demonstrate: (1) the records are common-law public documents; (2) the person seeking access has an interest in the subject matter of the material; and (3) the citizen’s right to access outweighs the State’s interest in preventing disclosure. Keddie v. Rutgers, 148 N.J. 36, 49 (1997). Though the common law allows access to a broader class of documents, requestors must make a greater showing than required under OPRA. Keddie, 148 N.J. at 67-68.

Plaintiff seeks specific documents relating to “Evidence Records,” “Investigation File,” “Grand Jury Case File,” “Lab Reports,” and “Prosecution Case File.” These are “records made by public officers in the exercise of public functions” and constitute public records under the common law’s broad definition. See Shuttleworth v. City of Camden, 258 N.J. Super. at 582-83 (noting that police investigative files and reports are public records under the common law).

Plaintiff also has a legitimate interest in the subject matter of the material. See Keddie, 148 N.J. at 50. "The requisite interest necessary to accord a plaintiff standing to obtain copies of public records may be either a wholesome public interest or a legitimate private interest." Id. at 51. "The applicant's interest need not be personal; thus, a citizen's concern about a public problem is a sufficient interest for purposes of standing." Id. Here, plaintiff's interest extends to learning (a) how the New Jersey justice system works in general; (b) how it handles cases like this one, which involve ordinary citizens, but which raise complex social, legal, and scientific issues; and (c) why Brandon Jackson in particular is in prison. These interests are sufficient to confer plaintiff standing under the common law.

The court must also balance the plaintiff's interest in the information against the public interest in confidentiality. Generally, the public's interest in nondisclosure is based on the need to keep the information confidential. Where a claim of confidentiality is asserted, the applicant's interest in disclosure is more closely scrutinized. In that context, courts consider whether the claim of confidentiality is "premised upon a purpose which tends to advance or further a wholesome public interest or a legitimate private interest." Loigman v. Kimmelman, 102 N.J. 98, 112 (1986). "Where 'reasons for maintaining a high degree of confidentiality in the public records are present, even when the citizen asserts a public interest in the information, more than the citizen's status and good faith are necessary to call for production of the documents.'" Loigman, 102 N.J. at 106.

In making its determination under the final step of the analysis, the court must consider the following factors: "(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." Id. at 113. The court should balance against these and any other relevant factors and evaluate carefully the public interest that plaintiff seeks to vindicate in requesting those documents and the relevance of the information sought to plaintiff's vindication of that public interest. The information that the court releases will depend on plaintiff's actual interest in obtaining access to that information. Drinker Biddle & Reath LLP v. New Jersey Dept. of Law, 421 N.J. Super. 489, 501 (App. Div. 2011).

As noted earlier, plaintiff's purposes for seeking disclosure of the documents relate to (a) how the New Jersey justice system works in general; (b) how it handles cases like this one, which involve ordinary citizens, but which raise complex social, legal, and scientific issues; and (c) why Brandon Jackson in particular is in prison. The prosecutor's office argues that plaintiff's expressed purpose for seeking disclosure of these documents, namely the public's interest in knowing how the criminal justice system works, can be obtained by statistical reports which have already been provided. With regard to why Jackson is in prison, the prosecutor maintains that the documents already provided to plaintiff explain these reasons fully. It is the prosecutor's position that its interest outweighs that of the plaintiff and to support its position, the prosecutor cites generally the purposes for maintaining confidentiality of investigatory files, including the fact that in many criminal cases confidential informants are involved as well as undercover police officers. Such records could also potentially provide insight as to the criminal investigative methods used by law enforcement. However, defendant sets forth no reasons for

denial pertaining to the Jackson file in particular. The only reason for denial relating to the Jackson file provided by defendant is that there are two victims involved and disclosure of the records could potentially impact their privacy rights for reasons which are not articulated.

Plaintiff maintains that the defendant's concern do not outweigh its right to access the information requested and argues that there is no threat to a pending or ongoing criminal investigation. The events in question took place more than six years ago, the investigation ended several years ago, and the trial concluded nearly a year ago, with a conviction and sentencing. Even in the event that the conviction were overturned, further investigation would not be likely at this date, with or without disclosure. "As the considerations justifying secrecy become less relevant..." a party seeking disclosure will have a lesser burden in showing justification. State v. Doliner, 96 N.J. 236, 251 (1984). 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. See Shuttleworth, 258 N.J. Super. at 585 (noting that our case law has, with increasing frequency, expanded the right of victims and some other persons with particular interest to gain access to such material after completion of the criminal case). The plaintiff submits, and the court in this case agrees, that even if there were a possibility of further investigation in this case, which is unlikely, the public has a legitimate and wholesome interest in the criminal processes that brought a particular individual trial.

Insofar as documents specified under plaintiff's "Evidence Records" request were utilized at the criminal trial, whether formally entered into evidence or marked for identification, these should be produced to the plaintiffs. See Keddie, 148 N.J. at 51 *citing* Hammock v. Hoffmann-LaRoche, Inc., 142 N.J. 356, 375-82 (1995) (indicating that unsealed records and documents filed with courts and agencies that are relevant to the disposition of the matter must

be disclosed under the common law right of access). This request includes all documents used or referenced at trial relating to "Evidence Records," the "Investigation File," "Lab Reports," and the "Prosecution Case File." Such documents do not implicate any privacy or confidentiality issues as they have been used at a public forum and have not been sealed. Id. The prosecutor's office no longer retains any expectation of privacy in them. Id. However, the court finds that disclosure may be limited only to those documents used or relied on at trial that the prosecutor's office provided to the criminal defendant in accordance with its discovery obligations under the Rules of Court. In Marshall, the Court noted the differences in policies underlying the common law right of access and those underlying discovery in criminal proceedings as follows:

In our view, the policies that inspire the common-law right of inspection of public documents are different from the considerations that govern discovery in criminal proceedings. The interests at stake in criminal proceedings require a different analysis and a balancing of different interests. The appropriate analysis and balancing of interests is reflected in our criminal discovery rules. *See R. 3:13-2 to -4.* Moreover, we note that no court in this State has relied on the common-law right to inspect in granting a criminal defendant discovery beyond that authorized by the *Rules Governing Criminal Practice*. We endorse that result and hold that the common-law right to inspect public documents may not be invoked in a pending criminal case by a defendant seeking discovery rights beyond those granted by *Rule 3:13-2 to -4.* *See State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83, 89, 92 (1994) (reversing prior interpretation of state records law that allowed criminal defendants to use records law to obtain discovery in addition to that provided by criminal procedure rules, because prior practice brought about "interminable delay" and "chaos" in criminal trials and state's discovery rules had "virtually been rendered meaningless").

Marshall, 148 N.J. at 274.

The court finds that the rationale of the Court in Marshall is equally applicable to the present matter. To permit the plaintiff in this case access to the entirety of the prosecutor's offices files relating to its case against Jackson while an appeal is pending would conflict with the rules governing criminal practice and the policies underlying discovery in criminal proceedings. This is especially so where the criminal defendant himself would not be entitled to utilize such a tool in order to broaden the scope of discovery. To allow a requestor under the

common law to access such documents would essentially nullify the discovery rules which are applicable to criminal proceedings. See also N.J.S.A. § 47:1A-9(a), which provides that the provisions of OPRA “shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L. 1963, c. 73 (C. 47:1A-1 et seq.); any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; *Rules of Court*; any federal law; federal regulation; or federal order.” (emphasis added). A contrary holding would do just that. Accordingly, plaintiff is entitled to access records limited to those documents used at trial and/or released to the criminal defendant in accordance with the Rules Governing Criminal Practice.

**Grand Jury Records:**

The disclosure of documents relating to grand jury proceedings is controlled by R. 3:6-7 and R. 1:38-3(c)(4) of the New Jersey Court Rules. The authority to disclose such documents rests with the Assignment Judge. While a number of documents of the grand jury case file were released to plaintiff, including the complaint and synopsis sheets, the defendant argues that the remainder of documents sought within this file, including police reports, criminal histories, disorderly persons’ reports, subpoenas and search warrants must remain confidential as required by R. 3:13-3.

The rule which requires maintaining the secrecy of grand jury proceedings is subject to R. 3:13-3 which permits discovery. It has long been recognized that the proper function of our grand jury system depends upon the secrecy of the proceedings. Daily journal, 351 N.J. Super. at 123 *citing* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979). As the United States Supreme Court noted in Douglas Oil, there are “several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if pre-indictment proceedings

were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements.” Douglas Oil, 441 U.S. at 218-19.

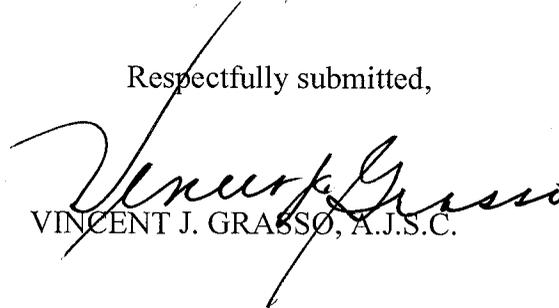
Another reason for confidentiality is to protect innocent persons whose names have been mentioned but have not been charged. State v. Kearney, 109 N.J. Super. 502, 506 (Law Div.1970). Consequently, there must be a "strong showing of particularized need" before grand jury material is disclosed. See Daily Journal, 351 N.J. Super. at 123 *citing* State v. Doliner, 96 N.J. 236, 245 (1984). The court finds that plaintiff has failed to demonstrate a particularized need that would justify disclosure of the grand jury records. Presumably, a number of these records would have been used at the criminal trial, which the court has already determined should be disclosed. Therefore, the remainder of plaintiff's requests for the Grand Jury file is denied by this court.

#### **HIPAA Protections:**

The prosecutor's office maintains that certain documents within its files relating to the case against Jackson contain victims' medical records that were not introduced into evidence at trial. Defendants maintain that such records are exempt pursuant to HIPAA laws and N.J.S.A. § 47:1A-9, which provides that OPRA does not abrogate other exemptions, privacy or confidentiality laws. Defendant also cites the Crime Victim Bill of Rights, N.J.S.A. § 52:4B-36(r) to support its position that prior to disclosure of such documents, the victims are required to be provided with notice and an opportunity to be heard because plaintiff's request implicates the victim's privacy rights. N.J.S.A. § 52:4B-36(r) states, "To appear in any court before which a proceeding implicating the rights of the victim is being held, with standing to file a motion or present argument on a motion filed to enforce any right conferred herein or by Article I,

paragraph 22 of the New Jersey Constitution, and to receive an adjudicative decision by the court on any such motion.” The court finds only those medical records, if any, of the victims introduced and entered into evidence in the criminal trial can be released by the prosecutor’s office. However, such records will be provided to the court for an in camera review with an opportunity by the prosecutor’s office to submit further argument. Ms. Lidaka is to prepare an order that comports with the within ruling.

Respectfully submitted,



VINCENT J. GRASSO, A.J.S.C.

VJG/bmm