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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
ATLANTIC COUNTY, NEW JERSEY
DOCKET NO. ATL-L-7617-12
A.D. #A-001457-13

BRIAN F. JOHNSON)
)
Plaintiff,)
v.)
CITY OF ESTELL MANOR AND)
FERN A. BROWN, CUSTODIAN OF)
RECORDS)
Defendants.)

Transcript
of
Plenary Hearing

Place: Atlantic County Courthouse
1201 Bacharach Boulevard
Atlantic City, NJ 08401

Date: September 5, 2013

BEFORE:

THE HONORABLE NELSON C. JOHNSON, J.S.C.

TRANSCRIPT ORDERED BY:

LITTIE E. RAU, ESQUIRE
Ruderman & Glickman

APPEARANCES:

SALVATORE J. SICILIANO, ESQUIRE
Attorney for the Plaintiff

LITTIE E. RAU, ESQUIRE (Ruderman & Glickman)
Attorney for the Defendants

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Witnesses: Direct Cross Redir. ReCross

For the Defendant:

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|----------------------|---|----|----|--|
| Fern Brown | 7 | 18 | | |
| <u>Argument:</u> | | | | |
| by Ms. Rau | | | 40 | |
| by Mr. Siciliano | | | 46 | |

1 THE COURT: This is the matter of Brian Johnson
2 v. the City of Estell Manor, docket number L-7617-12.
3 Counsel, please enter your appearance.

4 MR. SICILIANO: Good afternoon, Your Honor.
5 For the record, Salvatore Siciliano on behalf of the
6 plaintiff, Brian Johnson. Judge, I'm joined at counsel
7 table by Mr. Johnson. He's asked me to apologize to the
8 Court for his, I won't say informal dress but it's his
9 work dress. He was working this morning, he didn't have
10 an opportunity to go home and --

11 THE COURT: That's fine.

12 MR. SICILIANO: -- and dress appropriately.

13 THE COURT: Not a concern.

14 MS. RAU: Judge Johnson, Little Rau from
15 Ruderman and Glickman on behalf of defendants the City of
16 Estell Manor and Fern Brown, the acting clerk there.

17 THE COURT: Allow me to apologize to you.

18 MS. RAU: No apology needed from you, Judge.

19 THE COURT: Well --

20 MS. RAU: But I accept it nevertheless,
21 whatever it is.

22 THE COURT: What I know is that the equipment
23 that I'm looking at, and I remember that box, is the one
24 we've had for a while. And I'm not sure I understand why
25 it has not been replaced before this. We need better

1 equipment. I -- we had a couple telephone conferences
2 and you never, you never expressed to me --

3 MS. RAU: That's true, Judge. I --

4 THE COURT: I'm acutely sensitive to hearing
5 issues, okay?

6 MS. RAU: Oh. I have two in. I've got what's
7 called a crossover hearing aid because I can't hear on
8 one side so it's supposed to cross over sound. But as
9 you know, the courtrooms in the state of New Jersey are
10 not acoustically very --

11 THE COURT: Some are good, some are lousy.

12 MS. RAU: Yeah. Yours is not as bad as some,
13 so the echo's not too bad.

14 THE COURT: The one I had downstairs was even
15 better than this, and I didn't want to leave it. But --

16 MS. RAU: But here you go.

17 THE COURT: -- this works.

18 MS. RAU: The technology, unfortunately, as I
19 was saying to some people here, the technology has not
20 changed for the better in public accommodations, public
21 buildings for hearing impaired people. Because all it
22 would take is for you to be miked in the old fashioned
23 way frm the 1960's, for me to be miked, a witness to be
24 miked and my adversary to be miked and I would be able to
25 hear without my hearing aids. But they have instead in

1 most of the courtrooms now equipment that really doesn't
2 help my kind of hearing loss and doesn't help other
3 people who have hearing loss like mine, which in fact is
4 one other person in my firm. So we'll do whatever we
5 need to to.

6 THE COURT: Okay. Well, what we're going to
7 make sure is that whoever is speaking is looking at you.
8 so Mr. Siciliano, you're going to have to keep that in
9 mind.

10 MR. SICILIANO: Yes, sir.

11 THE COURT: And the same thing goes for the
12 witnesses. Now all that said, there are occasions when I
13 receive pleadings from attorneys and they answer
14 questions and then they raise new questions. And this is
15 one of those situations. And I thought rather than have
16 another telephone conference call, ask for more
17 submissions, long and short of it is I do need to learn
18 more from Ms. Brown. I'm assuming that's Ms. Brown
19 seated at counsel table with you?

20 MS. RAU: It is, Your Honor.

21 THE COURT: Okay. Ms. Brown, no attempt here
22 to put you on the spot, that's not what this is about.
23 This is about me doing some fact finding so that I have a
24 better understanding of what occurred in connection with
25 the meeting of August 23rd, 2012. What I know from

1 having reviewed the pleadings as well as from having
2 reviewed the transcript, which I have reviewed in camera,
3 is that the city, there was a committee of the city
4 council comprised of Mayor Venezia and Mr. Cunningham and
5 that they conducted an ad hoc meeting on August 23rd,
6 2012. The purpose of that ad hoc meeting was to make
7 inquiries regarding the use of certain city equipment for
8 personal use. As termed by Mr. Glickman at the beginning
9 of the session, quote, "It's a fact finding session,"
10 close quote. I am particularly sensitive whenever people
11 are issued a subpoena and it takes on an air of sobriety,
12 so to speak, and sometimes subpoenas are very good
13 things. But all that said, I need to have a better
14 understanding for what occurred. So I'm going to ask Ms.
15 Brown to take the stand. You know that you need to speak
16 clearly and directly to your counsel so she'll pick up
17 everything you're saying. I'm going to do the same and
18 when Mr. Siciliano -- I'm going to do all the questioning
19 first and then I'm going to permit Ms. Rau to -- am I
20 saying your last name correctly?

21 MS. RAU: You are. It's Rau.

22 THE COURT: Okay. I'm going to permit Ms. Rau
23 to ask questions and then you'll ask questions and then
24 we'll go from there.

25 MR. SICILIANO: Thank you, Judge.

1 THE COURT: Okay. So take the stand, please.

2 **FERN BROWN, DEFENDANT'S WITNESS, SWORN**

3 CLERK: State your full name.

4 THE WITNESS: Fern Arlene Brown.

5 CLERK: Spell your last name.

6 THE WITNESS: B-R-O-W-N.

7 CLERK: You may be seated.

8 **DIRECT EXAMINATION BY THE COURT:**

9 Q. Okay. Now I'm not looking at you, Ms. Brown,
10 and I'm not going to look at you but I'm going to keep my
11 voice up. There'll be no problem you hearing me.

12 A. Okay.

13 Q. And there should be no problem me hearing you.
14 But I want to make sure you look in your counsel's
15 direction so that she picks up everything you say. Okay.
16 What was the date of the city council meeting immediately
17 prior to the committee meeting of August 23rd, 2012? Do
18 you recall or can you look at a calendar that will help
19 you?

20 A. Um --

21 Q. Do you want me to help you with a calendar?

22 A. Yes, that would help. Thank you.

23 Q. That's a 2012 calendar.

24 A. So you're asking the meeting prior to the 23rd.

25 Q. Correct.

1 A. Regular city council meeting.

2 Q. Regular city council meeting.

3 A. Okay. At that time in 2012 we had our regular city
4 council meetings the first Wednesday of the month so I
5 would say it was August 1st.

6 Q. So you did meet on August 1st?

7 A. Correct.

8 Q. Okay. Now was the need for an investigative
9 committee discussed at that time?

10 A. It was not.

11 Q. And did the city council adopt a resolution at
12 that meeting or any time earlier appointing Mayor Venezia
13 and Council Cunningham as the committee to investigate
14 complaints of city equipment used for personal use?

15 A. Could you repeat that, please?

16 Q. Sure. It's really a yes or no answer and I'm
17 not trying to --

18 A. It's okay.

19 Q. I wrote it out so there's no misunderstanding.
20 Did city council adopt a resolution then, meaning August
21 1st, 2013, or any time earlier, meaning any meeting prior
22 to that, appointing Mayor Venezia and Council Cunningham
23 as a committee to investigate complaints of city
24 equipment used for personal use?

25 A. They did not.

1 Q. Okay. Page 2 of your, of the minutes of
2 October 11th, 2012 -- do you have those with you?

3 A. I do not.

4 THE COURT: Can someone provide -- my copy's
5 all marked up. It's a mess.

6 MR. SICILIANO: I have a copy, Judge.

7 THE COURT: Okay.

8 MR. SICILIANO: I don't know if I have an extra
9 copy, I'd be giving you my copy. But page 2 of the
10 October 11th?

11 THE COURT: Yeah. Page 2 of the October 11,
12 2012 meeting.

13 MR. SICILIANO: Judge, these are the entire
14 meeting minutes, 7 pages in all. And that was from
15 Exhibit E of my moving papers.

16 **BY THE COURT:**

17 Q. Okay. Now we're going to -- page 2, we're now,
18 1, 2, 3, 4, 5, 6 paragraphs. And that sentence reads,
19 "Teasenfitz questioned the time line of the
20 accusations which allegedly took place. He
21 stated the concerns were not acted upon
22 immediately and therefore did not seem to be of
23 any urgency. He asked why council was not
24 advised that an investigation was initiated.
25 He also inquired as to why an ad hoc committee

1 was formed to address these concerns as opposed
2 to the personnel committee."

3 And again, my question is is that an accurate statement
4 of the events of that night?

5 A. Yes.

6 Q. Okay. Now, so did -- and then when I go on to
7 page 4, the first full paragraph reads,

8 "Creed Pogue stated an investigation committee
9 appointment requires a resolution of council.
10 He commented on the subpoenas which were issued
11 and the validity of them. Mr. Pogue also made
12 comments regarding the investigative report
13 which was read in public."

14 And my question is did anyone, did legal counsel or
15 anyone address Mr. Pogue's concern regarding the need for
16 an investigative committee to be appointed by resolution
17 of council? Or was that replied to by mister, was the
18 reply that of Mr. Glickman at page 5 where he cited
19 N.J.S.A. 40A:14-68? Take your time. I don't expect you
20 to remember something that happened so long ago.

21 A. Okay. Um, I don't quite understand what you're
22 asking me to confirm.

23 Q. The matters being discussed that you're taking
24 minutes on, it's official business of the public body.
25 One of the members of the, well -- what's Mr. Pogue's

1 status?

2 MR. SICILIANO: Public member, Your Honor.

3 **BY THE COURT:**

4 Q. A member of the public, a member of the
5 committee, Teasenfitz, a member -- I'm going to ask you--

6 MR. SICILIANO: That was me, Judge. I
7 apologize.

8 THE COURT: That's okay. Okay. I was asking
9 her.

10 **BY THE COURT:**

11 Q. Mr. Teasenfitz is a member of the committee.

12 A. At this time he was a council member, correct.

13 Q. Okay. Mr. Teasenfitz, a member of the public
14 body. He's questioning the investigation and the
15 appointment of the committee. And then you have a member
16 of the public who's also questioned it. And what I need
17 to know that during that discussion, because I'm not
18 listening to a verbatim tape and I'm not, you know,
19 reading a transcript, what I want to know is were those
20 concerns addressed by the attorney or, or is it that the
21 attorney's comments at page 5 where he cites a statute,
22 N.J.S.A. 40A:14-68, that that was his reply? And if you
23 don't remember, if you don't know just tell me that.

24 A. I honestly don't remember exactly what was said as
25 far as in response to Mr. Pogue. But um --

1 Q. What was said in response to Mr. Teasenfitz'
2 concerns?

3 A. I don't --

4 Q. Was that ever addressed?

5 A. I don't remember.

6 Q. Okay. Because he seemed to have, he seemed to
7 have a similar concern about the same specificity that
8 Mr. Pogue was raising.

9 A. Correct.

10 Q. So do you recall or not?

11 A. I don't.

12 Q. If you don't you don't. You know, I'm not
13 going to be upset with you if you don't. I'm just trying
14 to, I'm trying to learn as much as you know.

15 A. Right.

16 Q. All right. When I look at your certification
17 of February 12th --

18 THE COURT: Do we have a packet? Can we give
19 her this packet?

20 MS. RAU: Judge, I have that, a copy for her to
21 review if that's acceptable to you.

22 THE COURT: Give her both, give her both her
23 certifications.

24 MS. RAU: I'll give her both.

25 **BY THE COURT:**

1 Q. I want you to look at your first certification.

2 MR. SICILIANO: Judge, if I may.

3 THE COURT: Sure.

4 MR. SICILIANO: I apologize, Judge, for
5 interrupting. If I could just be clear that Ms. Rau
6 indicated that she had a copy for Ms. Brown, for the
7 witness. I just want the record to be clear that it's
8 not highlighted in any way, there's nothing underlined,
9 that she's in fact reviewing a clean copy, no highlights,
10 no -- certainly she's allowed to prepare her witness but
11 I don't want to interfere with the Court's line of
12 questioning to insure --

13 THE COURT: I don't think they will.

14 MR. SICILIANO: -- that they're clean copies.

15 MS. RAU: I'm handing the same copies, other
16 than a stamp on each copy saying copy they are clean
17 copies. and I'm happy to provide them to my adversary.

18 THE COURT: No, he's got them.

19 MR. SICILIANO: I have them. Thank you.

20 THE COURT: All right.

21 MR. SICILIANO: I just wanted to make sure for
22 the record --

23 THE COURT: He doesn't want more copies I'm
24 sure. Okay.

25 **BY THE COURT:**

1 Q. Ms. Brown, paragraph 11. "I was asked to run
2 the audio recording made of the meeting." Paragraph 12,
3 "No minutes were taken of this meeting. As I recall, the
4 mayor advised me that there was no need for any minutes
5 to be taken." Okay.

6 A. I'm sorry. I'm not sure where you're at.

7 Q. Paragraph 11, paragraph 12.

8 A. Of which page?

9 Q. Well, the pages aren't numbered but the
10 paragraphs are.

11 A. Okay. I'm sorry. Okay. Got it. Sorry.

12 Q. Paragraph 11, paragraph 12.

13 A. Okay.

14 Q. Pages are numbered at the very bottom right.

15 A. Okay.

16 Q. Okay. So you were in effect, and don't read
17 anything into it, you were instructed no need to take
18 minutes.

19 A. Correct.

20 Q. So you didn't take minutes like you normally
21 would.

22 A. Yes.

23 Q. Okay. Now in terms of the equipment, that was
24 a digital recording device?

25 A. Yes.

1 Q. Okay. Now what, to the best of your knowledge
2 what's the next thing that you did with the, I guess the
3 disk that got created from this digital recorder?

4 A. Yes. It was a CD.

5 Q. Okay. What was the next thing you did with it
6 after that meeting?

7 A. When we were complete, it was done, I handed the
8 completed copy to Mr. Glickman.

9 Q. Okay.

10 MS. RAU: Could you just speak up just a little
11 bit more, Ms. Brown.

12 **BY THE WITNESS:**

13 A. When the audio was complete, the meeting was over, I
14 then write protected the disk, it was the older system we
15 had than what we have currently. And then I handed the
16 CD to Mr. Glickman.

17 MS. RAU: Thank you.

18 **BY THE COURT:**

19 Q. Okay. And the transcription that I have is by
20 Ms. Brumbach, which is some time, I'm not sure when. I
21 received it a couple of months ago. Did you have any
22 involvement in that at all, in preparing the transcript
23 or ordering it or how did that all come about?

24 A. I ordered the transcript after I was instructed to
25 order the transcript when council authorized, city

1 council authorized legal counsel to represent the city in
2 this matter.

3 Q. Okay. And did Mr. Glickman already have a copy
4 of the transcript at that point?

5 MS. RAU: Judge, I can speak to that.

6 THE COURT: Sure.

7 MS. RAU: Okay. I was the one who requested a
8 transcript after I listened to the CD during the course
9 of this litigation. Mr. Glickman had no involvement with
10 this once the case came to me. And I asked Ms. Brown to
11 have someone transcribe it because it was hard to hear
12 and they, the people who were speaking, although she
13 might know who they are, with the exception of Mr.
14 Glickman's voice I didn't know who was whom and there was
15 no transcript.

16 THE COURT: Okay.

17 MS. RAU: So for ease of understanding what was
18 said and who said it I asked for the transcript to be
19 made.

20 THE COURT: You're filling in the blanks for
21 me. And my next question, because you volunteered that.
22 So we have a meeting, we have a ad hoc meeting on August
23 23rd, 2012. After that Ms. Brown gives Mr. Glickman the
24 CD. The, does anything happen to it at all until this
25 litigation?

1 MS. RAU: To, when you say it what are you
2 referring to?

3 THE COURT: The CD. Did, any use made of that
4 CD prior to this litigation?

5 MS. RAU: Not to my knowledge, but maybe Ms.
6 Brown can also speak to that.

7 **BY THE WITNESS:**

8 A. Mr. Glickman then prepared an investigative report
9 which he gave to council at the October 11th, 2012
10 meeting.

11 Q. And do you know that he made use of the CD to
12 that?

13 A. I do not know.

14 THE COURT: Did he make use of the CD to do
15 that?

16 MS. RAU: Yes, he did. And in fact, his
17 certification speaks to that.

18 THE COURT: Okay. All right. Now -- that may
19 be all I need to know. I want to see what counsel --
20 That may be all I need to know. I want to see what
21 counsels' questions are. Okay. All right. Ms. Rau.

22 MS. RAU: I don't know that I have any other
23 questions.

24 THE COURT: I'm not saying that you should. If
25 you do you're free to ask them. Okay. Mr. Siciliano.

1 MR. SICILIANO: Thank you, Judge. I do have a
2 few questions and I'll try to amplify my voice and I'll
3 try to look to Ms. Rau.

4 **CROSS-EXAMINATION BY MR. SICILIANO:**

5 Q. Ms. Brown, if I could begin with the last point
6 of the judge's inquiry with regard to the audio of the
7 August 23rd, 2012 meeting. Could I focus your attention
8 on that, please?

9 A. Yes.

10 Q. You said --

11 THE COURT: You're not keeping your voice up.
12 I don't want her straining at all.

13 MR. SICILIANO: Okay.

14 MS. RAU: Thank you, Judge. I can hear him so
15 far.

16 THE COURT: Okay.

17 MS. RAU: Thank you.

18 **BY MR. SICILIANO:**

19 Q. You testified in response to the judge's
20 questions that at the conclusion of the August 23rd
21 meeting you write protected the CD. I don't know what
22 that means. Could you explain that to me, please.

23 A. Yes. The best I can. The equipment we had at that
24 time when you were done recording before you stopped the
25 recording you had to write protect it so that it copied

1 it onto the CD. Instead of burning it was called write
2 protect. Once you did that then it was on the, on the
3 audio you would have both notes and audio. But in this
4 case there were only audio because no notes were taken.

5 Q. And what are the notes? I'm sorry, what are
6 they?

7 A. There weren't any notes in this case. But normally
8 I would take notes at a regular council meeting so those
9 notes and the audio would be on one CD as you write
10 protect it.

11 Q. So if I understand your testimony, and I've
12 been in your presence during a council meeting, I believe
13 the October 11, 2012 council meeting, during the course
14 of a meeting if you were instructed to take notes to
15 prepare meeting minutes you would also be entering on a
16 keyboard like this gentleman is doing right here and I
17 can hear him. I heard you during the October meeting.
18 Were those the notes that you're referring to?

19 A. Correct.

20 Q. And this particular instance on August 23rd
21 there were no notations made by you, correct?

22 A. Yes.

23 Q. So that it was simply the audio of the
24 proceedings from beginning to end without any comments or
25 notes from you at all.

1 A. That is correct.

2 Q. So in effect it was purely a verbatim copy of
3 the conversation that took place that evening, correct?

4 A. Yes.

5 Q. There were no comments from you or impressions
6 from you or anything to remember and follow up later,
7 correct?

8 A. Correct.

9 Q. And with regard to right clicking and the
10 preparation of this CD once that CD was generated and
11 handed to Mr. Glickman was that the only copy, audio copy
12 of the proceedings of that evening?

13 A. Is that the only audio copy?

14 Q. Yes, ma'am.

15 A. That was made.

16 Q. Yes, ma'am.

17 A. Correct.

18 Q. The system, is that a yes, that was the only
19 copy?

20 A. Yes.

21 Q. Okay. The system at that time, was the system
22 capable of write protecting or burning to use a popular
23 term, burning another copy of the CD? Was it stored
24 somewhere on a computer or hard drive?

25 A. The audio stays on the hard drive, yes.

1 Q. So the audio was maintained on the hard drive
2 of the computer and then the CD was a copy that was
3 handed to Mr. Glickman, correct?

4 A. Correct.

5 Q. And then what steps, if any, did you as the
6 municipal clerk in your function do or take, what steps
7 did you take with regard to the audio portion of that
8 August 23rd, 2012 meeting?

9 A. The original audio CD was handed to Mr. Glickman.
10 After the litigation or the violation was filed and Ms.
11 Rau represented the city --

12 Q. Could I interrupt you then. Because I think
13 we're jumping too far ahead. I am going to ask you those
14 questions --

15 A. Okay.

16 Q. -- but in a few minutes. That's the litigation
17 being filed, that's in November. But my question
18 specifically is the night of August 23rd, 2012 you as
19 municipal clerk, the CD is made, copy is given to Mr.
20 Glickman. That audio, the original audio that you just
21 testified to a moment ago is maintained on the hard drive
22 of the computer system, correct?

23 A. Yes.

24 Q. And that computer system is a government owned
25 system, it's property of the City of Estell Manor,

1 correct?

2 A. Yes.

3 Q. I'm sorry.

4 A. Yes.

5 Q. Yes. You as the acting city clerk, do you make
6 a notation in any way, do you save that file in any way
7 to indicate that it's an ad hoc committee meeting of
8 August 23rd, 2012?

9 A. Not at that point, no.

10 Q. Okay. Is it stored in any way, in response to
11 the judge's arguments, there was a meeting on August 1st,
12 regular city council meeting. Sequentially on the
13 calendar were there any meetings between August 1st and
14 August 23rd? If you recall.

15 A. I'm not sure. We might have had a special meeting
16 but I'm not definite, I'd have to look --

17 Q. Okay.

18 A. -- at my calendar.

19 Q. The point of my question, though, is in terms
20 of the preserving of these audio files of the meeting
21 there would be the August 1st audio of the council
22 meeting, correct?

23 A. Umhmm.

24 Q. Yes?

25 A. Yes.

1 Q. Okay. There may or may not be an audio file
2 containing a meeting if in fact there was a special
3 meeting between August 1st and August 23rd, correct?

4 A. Correct.

5 Q. There's the August 23rd file, correct?

6 A. Correct.

7 Q. And then thereafter would be the next either
8 special meeting or regular meeting of the city council,
9 correct?

10 A. Yes.

11 Q. And that was safeguarded in the manner that you
12 as the records custodian, as you did with any other audio
13 files of committee meetings, correct?

14 A. Yes.

15 Q. Okay. When -- and I'm sorry, I interrupted you
16 earlier. In response to my questions you testified just
17 a moment ago that after the lawsuit was filed you began
18 to take some steps with regard to that audio file. Could
19 you please consider with your answer as to what steps did
20 you then take with regard to that audio file?

21 A. Okay. I don't remember exactly which came first,
22 which step. But a copy of the audio was made for Ms. Rau
23 as legal representation for the city. And a, I believe
24 it was the October meeting was the, the copy was made for
25 the transcriptionist. I'm not sure of the date.

1 Q. Okay. And again, I'd just like to focus on the
2 August 23rd meeting. That's the subject of the OPRA
3 request that was filed by Mr. Johnson on October 19th,
4 correct?

5 A. I'm sorry. Can you repeat that?

6 Q. The, on October 19th, 2012 Mr. Johnson filed an
7 OPRA request asking for three items, one of which was the
8 audio recording of the August 23rd meeting, correct?

9 A. Yes.

10 Q. And that's where I'd like you to focus your
11 testimony at the moment as opposed to the October 11th
12 audio, which for the purpose of the record were
13 eventually produced. They were produced in December,
14 correct?

15 A. Yes.

16 Q. Okay. So at the time that Mr. Johnson filed
17 his October 19th, OPRA request requesting the audio copy,
18 the audio file from the August 23rd meeting what, if
19 anything, did you do with regard to that particular audio
20 file?

21 A. With the audio file itself?

22 Q. Correct.

23 A. I didn't do anything with it.

24 MS. RAU: Could you speak up just a little bit,
25 Ms. Brown.

1 BY THE WITNESS:

2 A. I did not do anything at that point with the audio
3 file.

4 Q. Did you go back to listen to the file?

5 A. No.

6 Q. Did you make an additional copy of the file at
7 that point? Not --

8 A. I can't say which date I made the additional copy
9 for Ms. Rau. But at some point in time once the
10 violation was filed then a copy of the audio was made.

11 Q. A second --

12 A. But not before.

13 Q. So a second audio copy was then made for Ms.
14 Rau and given to her, correct?

15 A. Correct.

16 Q. Okay. And then with regard to the request of a
17 transcript Ms. Rau in responding to the judge indicated
18 that it was her request that a transcript be prepared,
19 correct?

20 A. I believe so.

21 Q. Okay. And I have not seen that -- Ms. Rau has
22 access to that, the judge has access in camera.
23 Typically when a request is made of a public meeting to
24 be transcribed that is then sent out to a certified
25 shorthand reporter, correct?

1 A. Yes.

2 Q. And in this case was that sent to a
3 transcription service?

4 MS. RAU: Can I just make an objection. I'm
5 not trying to interfere with the questioning.

6 THE COURT: Sure.

7 MS. RAU: But you're presuming there was a
8 public meeting held on August 23rd.

9 MR. SICILIANO: No, I'm not. No, I'm simply,
10 my line of questioning, Your Honor, if I could answer the
11 objection is I'm simply seeking to establish a time line
12 as to when that transcript was prepared because I don't
13 have the benefit of the last page to see which court
14 reporting service prepared it. And typically a certified
15 shorthand reporter would enter a date as to when it was
16 prepared.

17 THE COURT: I don't know the date that this was
18 prepared. But I do know that it was prepared by Bonita
19 K. Brumbach, of Haddonfield, New Jersey.

20 MR. SICILIANO: Certified shorthand reporter,
21 Your Honor?

22 THE COURT: Correct.

23 MR. SICILIANO: Typically on the last page of
24 transcripts there's a date that it was prepared.

25 THE COURT: Hold on. April 15th, 2013. Yeah,

1 April 15th, 2013. And I know I received it I think
2 sometime shortly after that. I don't know exactly when I
3 received it.

4 MR. SICILIANO: Thank you, Your Honor. I
5 appreciate it. That would streamline my questioning.

6 **BY MR. SICILIANO:**

7 Q. Ms. Brown, with regard to the transcript that
8 twas prepared April 15th -- 13?

9 THE COURT: April 15th, 2013.

10 **BY MR. SICILIANO:**

11 Q. -- April 15th of 2013, it was your office that
12 made a copy of the audio file and sent the third copy of
13 the audio file to the transcription service for
14 preparation of the transcript?

15 A. Yes.

16 Q. And was a similar procedure employed where you
17 write protected the CD and then sent it to the
18 transcriptionist?

19 A. I'm not sure. I did not make the actual copy, my
20 assistant did. So I'm not sure what procedure she
21 followed. But I do know we had to send an additional
22 copy because the first one she couldn't read. So there
23 was some difficulty with accessing the information.

24 Q. So then there's --

25 THE COURT: Keep your voice up.

1 THE WITNESS: I'm sorry.

2 BY MR. SICILIANO:

3 Q. So if I understand your answer there's at least
4 four copies of the audio of the August 23rd, 2012
5 meeting, correct?

6 A. Possibly. But I don't know if Ms. Brumbach
7 destroyed the one because she couldn't use it. And then
8 therefore there would only be three. One to Ms. Rau, one
9 Mr. Glickman had which is the original and then one to
10 Ms. Brumbach, the transcriber.

11 Q. Okay. So at least three audio copies are in
12 existence.

13 A. Yes.

14 Q. And at the time that the transcript was
15 prepared did council adopt a resolution or did the
16 government of Estell Manor pay for the preparation of
17 that transcription?

18 A. Yes.

19 Q. Do you have any recollection or approximation
20 as to the cost of that transcription being prepared?

21 A. I want to say it was between \$250 and \$300.

22 Q. And did that appear on a bill list --

23 A. Yes.

24 Q. -- for the governing body? Do you, is it fair
25 to say that that bill then was presented to the governing

1 body sometime in May of 2013?

2 A. Yes.

3 Q. Was there an advance required by the
4 transcription service prior to the final bill?

5 A. No.

6 Q. Okay. If I may then, with regard to the
7 judge's questioning, may I direct your attention to the
8 meeting minutes of October 11th? Do you still have those
9 before you?

10 A. Yes.

11 Q. Ms. Brown, you were present during the October
12 11, 2012 special meeting?

13 A. Yes.

14 Q. You were present in its entirety?

15 A. Yes.

16 Q. And these meeting minutes were prepared by you
17 in your role as acting city clerk.

18 A. Yes.

19 Q. I'm going to mispronounce this gentleman's
20 name. Teasenfitz?

21 A. That's correct.

22 Q. Teasenfitz. When Councilman Teasenfitz
23 inquired as to why the ad hoc committee was formed and
24 the matter was not sent to either the public safety
25 committee or the personnel committee do you recall the

1 answer?

2 A. To Mr. Teasenfitz' question?

3 Q. Yes, ma'am.

4 A. I do not.

5 Q. Ma'am, turning your attention to page 4, the
6 top of the page, the judge inquired as to that first full
7 paragraph and the subpoenas that were issued.

8 A. I'm sorry. Can you tell me which page?

9 Q. Yes. Page 4 of the meeting minutes. And it's
10 the first full paragraph. The sentence reads, "Creed
11 Pogue," that's the beginning. You focused there?

12 A. Yes.

13 Q. Okay. With regard to the subpoenas that were
14 prepared in this instance did you as the city clerk, the
15 acting city clerk for the City of Estell Manor, issue the
16 subpoenas to the individuals who were required to be at
17 the August 23rd meeting?

18 A. Yes.

19 Q. And the subpoenas that were issued, were they
20 mailed from the office of the city clerk?

21 A. Yes.

22 Q. And the subpoenas were sent by certified mail,
23 correct?

24 A. Yes.

25 Q. The monies to pay for the certified mail

1 postage, were those funds taken from the City of Estell
2 Manor?

3 A. Yes.

4 Q. And the subpoenas commanded the appearance of 9
5 individuals that evening, correct?

6 A. I don't remember exactly what it said because I did
7 not read it.

8 THE COURT: Your certification, page 3 of your
9 certification has that.

10 THE WITNESS: Oh, it does state it?

11 THE COURT: Did I take it away from you? Your
12 certification of February 12th. There's 9 names there.

13 **BY THE WITNESS:**

14 A. Yes. But I don't recall exactly what the subpoena
15 stated.

16 Q. No, I understand that. And I'm sorry if I was
17 not clear in my question. Yeah, I wouldn't remember what
18 was stated --

19 THE COURT: Hold on. Why don't we, I got, I
20 was going to go back to the subpoena too. We've got, we
21 have a copy of the subpoena here. Is that a, it's
22 Exhibit A, I think, of Mr. --

23 MR. SICILIANO: Glickman?

24 THE COURT: -- Johnson's certification. A copy
25 of the subpoena served on him.

1 MR. SICILIANO: Thank you, Judge.

2 MS. RAU: It's also at Exhibit 1 of
3 certification of Fern Brown, the February 2013
4 certification.

5 **BY MR. SICILIANO:**

6 Q. So looking at that subpoena, Ms. Brown, the,
7 there's a total of 9 individuals who were subpoenaed and
8 required to be there that evening, correct?

9 A. Yes.

10 Q. And in fact if you look at the subpoena I
11 believe, and I'm paraphrasing, but they were commanded to
12 appear.

13 A. Yes.

14 **BY THE COURT:**

15 Q. Who instructed you to prepare those subpoenas?

16 A. Um, the mayor instructed me to send the subpoenas to
17 the individuals. Mr. Glickman sent me the wording and I
18 printed it out on city letterhead.

19 THE COURT: Okay. That's responsive. Thank
20 you.

21 MR. SICILIANO: Thank you, Judge.

22 **BY MR. SICILIANO:**

23 Q. So on city letterhead the, the subpoenas were
24 mailed to these individuals, correct?

25 A. Yes.

1 Q. Now on that particular evening, ma'am, the
2 August 23rd, 2012 meeting, the ad hoc committee meeting,
3 you attended that meeting as part of your position, your
4 official position as the acting city clerk, correct?

5 A. Yes.

6 Q. You were compensated in some fashion, you were
7 paid for your work that particular evening.

8 A. Yes.

9 Q. Now you indicated in your certification, I
10 believe your February certification, specifically
11 paragraph 12, and I'm reading verbatim, "As I recall, the
12 mayor advised me that there was no need for any minutes
13 to be taken."

14 MS. RAU: That's the second sentence of that
15 paragraph, is that correct?

16 MR. SICILIANO: Yes. Yes.

17 **BY MR. SICILIANO:**

18 Q. Is that correct, ma'am? Did I read that
19 correctly?

20 A. Can you read it again?

21 Q. Sure. And I'm reading, for the record I'm
22 reading from your certification which is dated February
23 of 2013, page 3, paragraph 12. I'll read it in its
24 entirety. Paragraph 12 reads, "No minutes were taken of
25 this meeting. As I recall, the mayor advised me that

1 there was no need for any minutes to be taken." Did I
2 read that correctly?

3 A. Yes.

4 Q. Now Mr. Johnson filed an OPRA request on
5 October 19th and requested meeting minutes of the August
6 23rd meeting, correct?

7 A. Yes.

8 Q. And this document, this February 2013
9 certification, was the first time that you had advised
10 formally that there was no meeting minutes at all, none
11 were created, correct?

12 A. Can you repeat that again?

13 Q. Sure. This document, this affidavit was the
14 first time that there was any notification to Mr.
15 Johnson, the requestor, that there were no meeting
16 minutes.

17 A. That's not true.

18 Q. That's not true? Was there a date previous to
19 this document that you advised Mr. Johnson that no
20 meeting minutes were created?

21 A. Yes. When we met in my office on October 26th.

22 Q. So on October 26th when Mr. Johnson came to
23 your office and asked about the status of his OPRA
24 request which he had filed on the 19th it's your
25 testimony that you advised him at that point that there

1 was no meeting minutes.

2 A. Correct.

3 Q. And that was oral testimony, correct?

4 A. Yes.

5 Q. You never, you reduced that -- you never put
6 that in writing at all.

7 A. Right. Yes.

8 Q. In fact, the first time there was any writing
9 at all was in November, November 9th.

10 A. If that's what it says on the certification,
11 correct.

12 Q. Well --

13 A. I'm not definite on the dates so --

14 Q. Take a moment. We'd like you to be definite.

15 A. Okay.

16 Q. I'm not trying to trick you, I promise.

17 A. That's okay.

18 MS. RAU: I'm sorry. I didn't understand the
19 question. Are you asking is the first written response
20 to Mr. Johnson from Ms. Brown on November 9th?

21 MR. SICILIANO: Correct.

22 MS. RAU: I think she certified to that.

23 MR. SICILIANO: I'm clarifying.

24 MS. RAU: Okay.

25 **BY THE WITNESS:**

1 A. Yes. In paragraph 11. Said I responded in writing
2 to the plaintiff's OPRA request on November 9th and on
3 December 7th. Yes, that is correct.

4 Q. I'm sorry. Which paragraph are you referring
5 to?

6 A. 11.

7 Q. Of your certification?

8 MS. RAU: Of which certification?

9 **BY THE WITNESS:**

10 A. the one dated February -- excuse me -- April 2013.

11 Q. Your supplemental certification.

12 A. Paragraph 11. It says, "I responded in writing to
13 plaintiff's OPRA request on both November 9th, 2012 and
14 on December 7th, 2012."

15 Q. So that was the first written response,
16 correct?

17 A. Correct. It's also in the first certification dated
18 February. Paragraph 22. Excuse me -- page --

19 Q. Do you have a copy of your November 9th, 2012
20 letter to Mr. Johnson?

21 A. Not, not with me, no.

22 Q. Okay.

23 MR. SICILIANO: Judge, may I?

24 THE COURT: Sure.

25 MS. RAU: Are these the attachments to her

1 cert?

2 MR. SICILIANO: I believe so, yes.

3 MS. RAU: Okay. Do you have the whole cert to
4 show her with the attachments?

5 MR. SICILIANO: I do not. She has the
6 certification. I'm only asking with regard to the
7 letters.

8 MS. RAU: All right.

9 THE COURT: Well, Joe, you want to give her the
10 letter?

11 MR. SICILIANO: Thank you, Judge.

12 **BY MR. SICILIANO:**

13 Q. Ms. Brown, you're being presented two
14 documents. I'd like you to focus your attention on the
15 first document which is dated November 9, 2012.

16 MS. RAU: And just for the record, the document
17 that counsel has shown me that has been handed to Ms.
18 Brown also says Exhibit 3 on the bottom, which would have
19 been a third exhibit to Ms. Brown's certification of
20 February 2013.

21 THE COURT: And the reason I haven't had any of
22 these marked into evidence at this proceeding is because
23 we're all dealing with the same documents. They're an
24 attachment to somebody's certification somewhere in these
25 pleadings. And I know what we're talking about, and we

1 all do.

2 MS. RAU: Fair enough, Judge.

3 MR. SICILIANO: Thank you, Judge.

4 **BY MR. SICILIANO:**

5 Q. Take a moment and read that letter. And when
6 you're ready let me know, please.

7 A. Okay.

8 Q. Anywhere in this letter of November 9th, Ms.
9 Brown, does it indicate that no meeting minutes exist
10 from the August 23rd, 2012 meeting?

11 A. No.

12 Q. Do you have before you the next document, a
13 letter dated December 7th, 2012 that I believe has your
14 signature at the bottom?

15 A. Yes.

16 Q. Take a moment and review that letter, please.

17 A. Okay.

18 Q. Anywhere in that document of December 7, 2012
19 is there a statement that there are no meeting minutes
20 from the August 23rd, 2012 meeting?

21 A. No.

22 Q. Ms. Brown, I may have asked you this question
23 -- and Judge, I'm just about done -- as part of your
24 attendance at the August 23rd, 2012 meeting you, you
25 attended that meeting as part of your regular job

1 functions, correct?

2 A. Yes.

3 MR. SICILIANO: Judge, I think that's all the
4 questions I have based on the Court's questions.

5 THE COURT: Okay. Ms. Rau, any questions?

6 MS. RAU: I do not, Judge.

7 THE COURT: Okay. You may step down.

8 THE WITNESS: Should I leave these or give them
9 back to Mr. Siciliano?

10 THE COURT: You can give them back to Mr.
11 Siciliano. Okay. I thought it important to hear
12 directly from the city clerk because she is the person
13 who day in, day out has the responsibility to make sure,
14 I won't say she has responsibility to make sure things
15 get done correctly, but she has responsibility to make
16 sure she knows what happened, you know, because she's the
17 official repository of minutes, of resolutions, of
18 ordinances and all those things. And when I was going
19 through his submission some time ago I had the questions
20 that I asked her today because those questions caused me
21 serious concern. New Jersey Statutes Annotated 40:48-25
22 reads in pertinent part,

23 "When the governing body of a municipality
24 shall have appointed a committee of its members
25 upon any subject or matter within its

1 jurisdiction, the committee may issue a
2 subpoena ad testificandum, or subpoena duces
3 tecum, to any person within the state, to
4 appear before it to give testimony or
5 information required. The subpoenas may be
6 served by any police officer or constable of
7 the municipality."

8 I questioned Ms. Brown about the meetings that took place
9 beforehand to see if it was discussed, if somebody had
10 adopted a resolution. And I don't see how. Maybe I'm
11 missing something. I don't see how this committee was
12 authorized by law to proceed.

13 MS. RAU: Judge, you're looking at me so I'm
14 assuming that you want me to respond.

15 THE COURT: You're the attorney for the City.
16 I'm not making any findings, but see --

17 MS. RAU: Judge --

18 THE COURT: -- the question comes to my mind,
19 how are they doing this? How is a subpoena being issued
20 by a committee that wasn't authorized by the governing
21 body?

22 MS. RAU: Judge, it's a very good question.
23 Except that's not why we're here.

24 THE COURT: Ah --

25 MS. RAU: The --

1 THE COURT: -- but wait a minute, wait a
2 minute, wait a minute.

3 MS. RAU: The next --

4 THE COURT: Wait a minute. Wait, wait, wait,
5 wait, wait. It is why we're here in part because the,
6 one of the people that was subpoenaed is saying I want
7 the record of the meeting that I was in attendance at.
8 And it appears that he may have been compelled in
9 violation of the law to be there.

10 MS. RAU: Okay. And if he wants a copy of that
11 for some purpose, through OPRA --

12 THE COURT: Filed suit. Filed suit.

13 MS. RAU: Then he --

14 THE COURT: Obviously he wants a copy, he filed
15 suit.

16 MS. RAU: Yeah, he did. But he filed suit
17 under OPRA. What he wants to do with that copy is his
18 business. Why he wants, you know, why --

19 THE COURT: I agree.

20 MS. RAU: Whatever are his grievances, his
21 carps, his -- whatever he wants to address is not my
22 issue. The only question that I'm here to address is did
23 they do it right or did they do it wrong? I don't know.
24 Because it doesn't matter under OPRA. What does matter
25 under OPRA is the recording that was taken of a meeting

1 that is indisputably not a public meeting, and is that
2 document, as I would say, not a document that is
3 disclosable under OPRA because it's an exemption and has
4 confidentiality irrespective of whether or not the means
5 by which the people came to the meeting was lawful or
6 not, irrespective of whether or not they could have
7 brought counsel, irrespective of whether or not they
8 could have brought their own tape recording, irrespective
9 of whether or not they answered any questions, which as
10 you know, Mr. Johnson never did, irrespective of whether
11 or not he could have brought a video tape and video taped
12 it and put it on the internet. Just completely not the
13 question at issue. The question as issue --

14 THE COURT: I ask the questions. I ask the
15 questions. You don't ask the questions. I ask the
16 questions. And here's a question I'm asking you. You
17 want me to wear blinders?

18 MS. RAU: I'm not asking you to wear blinders.

19 THE COURT: Do you want me to ignore a
20 violation of the law? Is that what you're, you're asking
21 me, are you asking me to wear blinders? That's the
22 question I'm asking you.

23 MS. RAU: No, Judge. I'm not asking you --

24 THE COURT: I can't wear blinders.

25 MS. RAU: I'm not asking you to wear blinders.

1 I'm saying the issue before the Court in this litigation
2 is whether or not a particular document, in this case an
3 audio recording, must have been disclosed under OPRA or
4 the common law.

5 THE COURT: And compliance with the law is
6 always before the Court.

7 MS. RAU: I understand that. But that's not,
8 that's not what the complaint, you know is about, that's
9 not what this litigation is about. If what you're
10 saying --

11 THE COURT: You've made your point clearly as
12 to what you think this litigation is about. And when I
13 read the pleadings what you've said so far is correct.
14 But when I read the record here I get concerns. And the
15 concerns are that I read a member of the governing body
16 saying, what's this about? Why are we doing this? How
17 did this happen? A subpoena is a very powerful tool. It
18 cannot be misused in my presence. I won't permit it to
19 be misused in my presence.

20 MS. RAU: And Judge, whether or not there are
21 some sanctions that should or could or will be levied
22 either against the governing body, against their counsel
23 for that particular alleged violation, if that's in fact
24 what it is, I of course am not here to speak on that
25 issue. I'm only here to speak on the issue for which I'm

1 defending the city and Ms. Brown.

2 THE COURT: Let's follow this through. Let's
3 follow this through. I have before me a gentleman who
4 says I want a copy of the proceeding where I was
5 compelled to attend by subpoena. I notice that the
6 subpoena may have been issued improperly. Does not that
7 gentleman have an interest in preserving the record of a
8 proceeding where he was forced to appear and it was
9 conducted improperly in violation of the law?

10 MS. RAU: Okay. Well, I would ask, and again
11 this isn't something --

12 THE COURT: OPRA at this point right now is
13 secondary to me.

14 MS. RAU: Let me --

15 THE COURT: You're interrupting me. You need
16 to stop. I'm going to ask you to have a seat.

17 MS. RAU: Absolutely, Judge. I apologize.

18 THE COURT: And when I wish to hear from you I
19 will let you know.

20 MS. RAU: Absolutely, Judge.

21 THE COURT: I'm thinking of the rights of a
22 citizen, the rights of a citizen who's been served with a
23 very official looking document signed by the mayor saying
24 you must appear on August 23rd, 2012 and I'm commanding
25 you to be here to give testimony. That gentleman shows

1 up. In reading the transcript what I learn is that he's
2 so concerned about what's going on there that he decides
3 he's taking the Fifth Amendment. Now when I look at this
4 gentleman's rights to have a record of the proceeding to
5 which he was compelled to appear I say under the common
6 law they're over and above anything that OPRA's talking
7 about because we have an act that appears, and I'm not
8 making any finding because you may want to write a brief
9 telling me I got it all wrong and I'll be glad to listen
10 to you, what appears is we have an ultra vires act. The
11 ultra vires act was the issuance of the subpoena. It
12 appears that we have an ultra vires proceeding which was
13 the conducting of an investigation and compelling sworn
14 testimony in violation of the statute. As I read
15 N.J.S.A. 40:48-25 and as I read the case law interpreting
16 it -- you may want to look at Board of Trustees v. Union
17 City, 112 N.J. Super. 484, you may want to read Traino v.
18 McCoy, 187 N.J. Super 638. There's only one way, as I
19 read the statute and as the Appellate Division reads the
20 statute, there's only one way that a subpoena can be
21 issued by a committee of a governing body, and that is
22 for the governing body to appoint that committee to go
23 forward and act. So my focus right now is the common law
24 rights of this gentleman who was what appears to be in
25 violation of the law compelled to appear before an

1 illegal proceeding. I would think that that gentleman
2 has an interest in preserving, if he wants to, preserving
3 the record of that proceeding. Mr. Siciliano, what do
4 you think?

5 MR. SICILIANO: Judge, I mean I don't want to
6 amplify or clarify. I agree with the Court's comments.
7 You're arguing my position.

8 THE COURT: I'm not arguing anybody's position.

9 MR. SICILIANO: Well, I'm making the argument,
10 Your Honor. I believe the Court is succinctly and
11 correctly stating the law, which I have sought through
12 the briefs to argue, which is that this proceeding, this
13 ad hoc committee, this star chamber, if you will, was
14 improper and illegal from the beginning. And my client,
15 not only as an employee of the city -- he doesn't reside
16 in the city but he's a taxpayer within the city, he owns
17 property -- received a subpoena which compelled and
18 commanded his appearance at this official proceeding
19 where there were uniformed members of New Jersey State
20 Police, they were outside posted with a list of names,
21 checking those individuals to come in. And only after
22 his name was checked on the list, and in fact someone had
23 to verify him because he didn't have his identification,
24 he entered, appeared and this star chamber proceeding was
25 conducted. Albeit it was characterized as a fact finder,

1 his request is very simply, and I understand the Court's
2 focus on his rights, his substantive rights, all the
3 request ever was, Judge, was for the audio recording of
4 those proceedings and/or minutes which we just found out
5 recently don't exist.

6 THE COURT: Well, why would there be minutes if
7 you have a verbatim recording? Think that one through.

8 MR. SICILIANO: Well, I agree, Judge, but I
9 think --

10 THE COURT: You have minutes of governing
11 body's meeting with a verbatim recording because you want
12 the members of the governing body to confirm what
13 happened at the prior meeting, whether a resolution
14 occurred, whatever, whatever. But this is a special
15 committee of two people. And if they had been properly
16 authorized I don't think it would have mattered whether
17 there was minutes or not --

18 MR. SICILIANO: Well, I --

19 THE COURT: -- because she had an audio
20 verbatim recording.

21 MR. SICILIANO: And I don't disagree with Your
22 Honor. But I think it speaks more to the, to the
23 propriety and the official nature of this ad hoc
24 committee meeting, the fact that there was a recording
25 made with the purpose being so that either Mr. Glickman

1 could use this recording later, which we know that he
2 did --

3 THE COURT: I think Ms. Rau's comments in her
4 brief at page, and I had a question on this but I no
5 longer do, page 11 where she says, "In short, the audio
6 tape was the functional equivalent of Mr. Glickman's
7 having taken personal notes that he relied upon to write
8 his report." As I listened to the testimony of Ms.
9 Brown, that's just what it was. And she had every, you
10 know, he had every right to make use of that to prepare
11 his report. How else was he going to accurately advise
12 the governing body if he didn't have access?

13 MR. SICILIANO: And I understand that, Judge.

14 THE COURT: -- and

15 MR. SICILIANO: And I apologize for speaking
16 over you. But there are cases, again, this is not our
17 request here, but there are cases within this state, I
18 believe one involved Gannett Newspapers, I don't have the
19 citations, it's in my brief, where an individual's notes,
20 handwritten personal notes were ordered to be disclosed
21 by the Appellate Division in our state subject to
22 redactions. And again, we're not even asking for that,
23 because then that moves into work product or deliberative
24 material. Again, the sole request is for the audio
25 recording from beginning to end, that my client, Mr.

1 Johnson, in addition to at least a dozen and perhaps 15
2 people were all present and all heard. We know that 9
3 people were subpoenaed. One gentleman was away on
4 vacation in Maine so 8 appeared. That's the force of the
5 subpoena and the language, that 8 responded. There were
6 4 people, the mayor, Councilman Cunningham, Mr. Glickman
7 and Ms. Brown, that's 4, that's 12. And I'm a poor
8 mathematician, Judge, but somewhere there was a
9 contingent of New Jersey State Troopers, some up to 4, at
10 least 3. So there's a total of 15 people. Maybe the
11 troopers exited at some point in time. But where is,
12 where is the privilege? Where is the secrecy in simply
13 the audio verbatim transcript as to what happened when my
14 client was being questioned? And I remained in my seat,
15 Judge, because I didn't want to interrupt the Court, but
16 I did take issue with Ms. Rau's comments that my client
17 invoked his Fifth Amendment privilege under the United
18 States Constitution as well as that privilege which is
19 accorded to him through the New Jersey Constitution.
20 That is his right.

21 THE COURT: I mentioned it too, that this
22 proceeding was serious enough to him that he felt the
23 need to do that. And certainly that's his right.

24 MR. SICILIANO: Yeah. I mean, but what
25 troubles me greatly, Your Honor, as I stand before you,

1 is that the negative inference that was being drawn --

2 THE COURT: I don't think --

3 MR. SICILIANO: Not by Your Honor. No, no, not
4 by the court. No, no.

5 THE COURT: I don't think Ms. Rau meant a
6 negative inference by that either. He's got a right to
7 take the Fifth Amendment. We're all lawyers. We all
8 know that.

9 MR. SICILIANO: But I think, and the lawyers
10 have the benefit of that, Judge, and we can separate it
11 and parse that out. But where the negative inference
12 came into play was that the, the, this committee, this ad
13 hoc committee, and to my knowledge I don't believe the
14 mayor nor Mr. Cunningham are lawyers or have any legal
15 training, but clearly they drew some negative inference
16 from that. They drew some negative inference from Mr.
17 Johnson's invocation of his rights and privileges under
18 the Fifth Amendment. And that was used against him. It
19 clearly was used against him.

20 THE COURT: Well, that's another story. Ms.
21 Rau, let's hear from you.

22 MS. RAU: Well, I'm not really sure what to say
23 except that if you or your client inferred some negative
24 connotation by your client's right to invoke whatever
25 privilege he had then I apologize. Um -- (pause) -- I

1 guess I have a question for the Court --

2 THE COURT: Sure.

3 MS. RAU: -- with respect to the statute. I
4 think you said, was it 40A:14-25?

5 THE COURT: No, 40:48-25. There is no A.

6 MS. RAU: 48-25?

7 THE COURT: 40, 4-0, colon.

8 MS. RAU: Yes.

9 THE COURT: 48.

10 MS. RAU: Dash --

11 THE COURT: 25.

12 MS. RAU: Okay.

13 THE COURT: Now I want to point out to you that
14 at the hearing, Mr. Glickman, or at the meeting of
15 October 11th Mr. Glickman made reference to 40A:14-68.
16 But when you look at that what it addresses is the
17 authority of the governing body to supervise and control
18 and the fire company. It doesn't go to the issue of a
19 subpoena. A subpoena is a very powerful tool. And most
20 municipalities and even planning boards and zoning boards
21 have the power of subpoena, but I have yet to see a
22 subpoena that was not issued according to law be
23 effective. If he had, if he had rejected that subpoena
24 -- based upon what I'm seeing here if he had ignored that
25 subpoena and the city had moved to enforce it the city

1 would have failed. In my court they would have failed.
2 If he had made a motion to quash that subpoena in my
3 court I don't see how the city would have been able to
4 enforce it. The statute's pretty clear. And again, I'm
5 going to give you an opportunity to tell me whatever you
6 want to tell me on it, but when I look at the statute the
7 municipality shall have appointed a committee. That's
8 why I asked Ms. Brown, did the governing body appoint the
9 mayor and Mr. Cunningham to be this committee to
10 investigate these issues? Her answer was no. There's my
11 problem.

12 MS. RAU: All right. I'm just going to try to
13 clarify for myself, um, what I think I hear you saying.
14 If the subpoena letter is not a proper subpoena and if
15 people showed as a result of that and they didn't have to
16 show but they didn't know that they didn't have to show
17 and there was a recording made, okay, are, is it sort of
18 the fruit of the poisonous tree kind of thing but on a
19 civil level? Is that kind of where I --

20 THE COURT: Let me, let me try to help you.
21 I'm of a mind that if a citizen is compelled to be at a
22 place that they otherwise wouldn't have been there that
23 night, all right, and then they and their activities are
24 discussed and they're asked questions, and in this
25 instance he exercised his right not to answer those

1 questions, I would think that any one of those 9 people,
2 and I'm not talking about -- my focus now is not the rest
3 of the public, okay, if any one of those 9 people says I
4 want a record of what happened that night. I was there.
5 I was subpoenaed to be there and I want a record of what
6 happened that night how in God's name under the common
7 law of New Jersey or the United States can I say, oh, on,
8 you can't have that? How can I say that? His rights were
9 violated and we're supposed to just let the proceeding
10 take place and say, oh, well, it's confidential. The
11 lawyers needed it to prepare their report and you're
12 never going to see it. I believe that gentleman under
13 New Jersey common law is entitled to know with
14 specificity everything that occurred at that meeting.
15 Despite the fact that he was there, he's entitled to a
16 record of it. Because his rights appear to have been
17 violated by an improperly issued subpoena. His rights
18 appear to have been violated by being compelled to attend
19 a proceeding that was not conducted according to the law.
20 There's my problem. And that's got nothing, that's got
21 nothing to do with OPRA. It's bigger than OPRA.

22 MS. RAU: Okay. And so then does it have
23 something to do with the common law right to know?

24 THE COURT: Sure it does. Sure it does. That
25 as well. But put yourself in his position. His rights

1 have been violated.

2 MS. RAU: In what way?

3 THE COURT: And he's not entitled, he's not
4 entitled to a, an available record of that proceeding?

5 MS. RAU: Judge, what right of his has been
6 violated?

7 THE COURT: He was compelled to leave his home
8 pursuant to threat of arrest with a subpoena and he
9 showed up. His rights were violated. Any time, any time
10 a government official makes you do something that they're
11 not allowed to make you do and you do it your rights have
12 been violated.

13 MS. RAU: Okay. Um, I believe my, counsel said
14 that someone didn't show as a result of this subpoena
15 because they were on vacation.

16 THE COURT: That may be.

17 MS. RAU: Okay.

18 THE COURT: That may be.

19 MS. RAU: So would that person under your
20 perception as you're explaining it to me now, would they
21 have a right to have a copy?

22 THE COURT: I would think, I would lean towards
23 no. But I'd want to hear what they had to say. They're
24 not before me. Who's before me is Mr. Johnson who was
25 served with what appears to be an improper subpoena.

1 MS. RAU: Okay. So if he had not shown and had
2 made this request under OPRA and it had been denied then
3 is it the Court's thinking or analysis on this that he
4 would then be entitled to it under the common law right
5 to know?

6 THE COURT: You said he hadn't shown? You
7 know, I get to ask hypothetical questions, you don't.

8 MS. RAU: I apologize, Judge.

9 THE COURT: Okay?

10 MS. RAU: I'm just trying to understand.

11 THE COURT: Okay. I'm not going to sit here
12 and answer your hypothetical questions. That's not my
13 job. Do you think I'm going to answer your hypothetical
14 questions? I'm not. All right. I invite you to give me
15 whatever you want to show me that my preliminary analysis
16 of the law is incorrect. I'm willing to hear from you.
17 I don't see how under the statute that this meeting could
18 have been conducted and I don't see how subpoenas should
19 have been issued. The city clerk will know in the future
20 that, and I'm telling her right now. She's here. And
21 this is, I'm not scolding you, I'm giving you the heads
22 up for the future. When someone asks you to issue a
23 subpoena make sure you know that they have the authority
24 to get you to issue that subpoena. In this instance it
25 appears to me, and I'm not making a final finding, but it

1 appears to me that whoever instructed you to issue the
2 subpoena didn't have the authority under the law to do
3 so. And that causes me -- subpoenas -- I'm saying it
4 again for probably the fifth or sixth time, subpoena's a
5 very powerful tool. I represented many governing bodies
6 and I was always very hesitant to permit my client to
7 issue a subpoena. I would say let's get on the phone.
8 Let's see if they'll come in cooperatively. Issuing a
9 subpoena is an order. And you violate the order you run
10 the risk of all sorts of things. So this gentleman felt
11 compelled to be there that night and he was there that
12 night. Mr. Siciliano reminded me, because I recall
13 reading this earlier on in the proceedings, there were
14 uniformed officers there, which again adds to, you know,
15 big injection of sobriety and seriousness to the entire
16 proceedings, which the average person is going to be a
17 little taken aback by. Say, wow, what's going on here?
18 What did I do? So he shows up, he invokes his Fifth
19 Amendment right, and now he says, I want a record of that
20 proceeding because I'm unhappy with what happened to me
21 that night. And I want a record of it. I can't imagine
22 any way under New Jersey common law, and I could probably
23 and we could all look at it together, I could probably
24 look at Article I of New Jersey Constitution and probably
25 find two or three paragraphs that would apply to this

1 situation, looking at them very generally. His rights
2 appear to have been violated you know, in a way that
3 should not have occurred. So if, Ms. Rau, you wish to
4 furnish me a letter brief addressing my concerns
5 regarding what appears to be a violation under N.J.S.A.
6 40:48-25, and you may want to look at the case law
7 interpreting that statute, if you want to address that
8 I'll be glad to give you 10 days to do so. And then, Mr.
9 Siciliano, you'll have 10 days to reply. And depending
10 upon what Ms. Rau has to say we'll have another hearing.
11 Won't be any need for testimony. And I'll make my ruling
12 based upon the motions. You have filed cross motions
13 here so I'll make my ruling based upon the cross motions.
14 But I do want to give the city every opportunity to
15 explain why the city believes the subpoenas were properly
16 issued. Again, going back to Ms. Rau's brief, page 11, I
17 think that statement's made in very good faith and I
18 think that's what Mr. Glickman, you know, believes he was
19 doing and you believe that's what he was doing. And I'm
20 not impugning any improper conduct on the part of counsel
21 or the city clerk. There are people in government who
22 from time to time assume they have powers they don't
23 have. And the power to issue a subpoena is very special.
24 And if you look at the case law, not just on this statute
25 but on other case law dealing with subpoenas basically

1 what the court says if you're going to issue a subpoena
2 do it right or don't do it at all. And that's why when I
3 represented municipalities over the years we did
4 everything we could do to avoid issuing a subpoena for
5 two reasons: One, because you're always worried about
6 screwing it up and doing it wrong and have somebody
7 nitpick it and throw it in your face; and then, two, it's
8 been my experience that a witness who appears voluntarily
9 without the need to force them to appear is more likely
10 to be candid and more likely to be open and responsive to
11 questions than someone who shows up feeling threatened.
12 Because then they're really going to be on their guard,
13 and maybe they do what this witness does, which is took
14 the Fifth Amendment saying, ooh, when in doubt don't say
15 anything, shut my mouth. So I always thought it was best
16 to try to get people's cooperation voluntarily. Issuing
17 subpoenas is, it's really a heavy hammer, it really is.
18 And in this instance I don't see how under the statute it
19 was done properly. And so you, and I know what you, I
20 think I know what you were trying to say and I don't
21 disagree with it. You know, the fruit of the tainted
22 tree, sort of that. He's entitled to say I want the
23 whole record of everything that happened there that night
24 because I was, I was subjected to a tainted proceeding.
25 And I think he's entitled to it. I'm willing to hear

1 from you on that issue. I think your pleadings, both of
2 you so far, the pleadings that you have presented on
3 behalf of your clients have been excellent. But as I
4 read Ms. Brown's certification and as I read the
5 attachments to he certification I just kept getting more
6 questions. And as I looked at the statutes and I looked
7 at the answers that came from those statutes I started
8 getting very concerned and saying to myself this
9 gentleman's rights to have a record of a proceeding at
10 which his rights may have been violated, that right's
11 bigger than OPRA. That's a common law right as a
12 citizen. And I believe you'll find, you can both look at
13 it and I believe you'll find sections in the New Jersey
14 Constitution that address it. So that's where I am.
15 I'll give you 10 days to furnish me whatever you like.
16 Mr. Siciliano, you have 10 days to reply. And I'll be in
17 touch with both of you as soon as I receive his reply
18 brief.

19 MR. SICILIANO: Thank you, Your Honor.

20 THE COURT: Okay.

21 MS. RAU: Thank you, Your Honor.

22 THE COURT: Thank you everyone for your time.

23 Ms. Rau, sorry to inconvenience you. Appreciate you
24 being here.

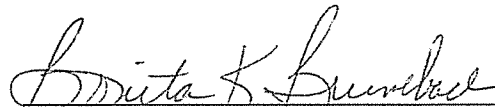
25 MS. RAU: Not a problem. Not an inconvenience,

1 Judge.

2 THE COURT: Thank you.

3
4
5 CERTIFICATION

6 I, **BONITA K. BRUMBACH**, the assigned
7 transcriber, do hereby certify that the foregoing
8 transcript of proceedings heard on September 5, 2013 and
9 digitally recorded from 1:47:50 PM to 3:03:48 PM, is
10 prepared in full compliance with the current Transcript
11 Format for Judicial Proceedings and is a true and
12 accurate non-compressed transcript of the proceedings as
13 recorded.

14 
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December 23, 2013
Date