



## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	i
I. CMCPO Has Not Entered Any Evidence to Satisfy its OPRA Burden of Proof; Nor Would an in Chambers Inspection Substitute .....	1
II. CMCPO Has Failed to Establish That the Records are Exempt Under the Deliberative Process Privilege .....	2
III. CMCPO Has Failed to Establish That the Records are Exempt Under the Criminal Investigatory Record Exemption .....	3
IV. CMCPO Has Failed to Establish That the Records are Exempt Under the Personnel Exemption .....	3
V. CMCPO Is Silent Regarding Paff’s Common Law Right to the Records .....	4

## TABLE OF AUTHORITIES

### Cases

<u>Asbury Park Press v. County of Monmouth</u> , 406 <u>N.J.Super.</u> 1 (App. Div. 2009) .....	4
<u>Brady v. Maryland</u> , 373 <u>U.S.</u> 83, 83 <u>S.Ct.</u> 1194, 10 <u>L.Ed.2d</u> 215 (1963) .....	3
<u>Courier News v. Hunterdon County Prosecutor’s Office</u> , 358 <u>N.J.Super.</u> 373 (App. Div. 2003) .....	2
<u>Paff v. New Jersey Department of Labor, Board of Review</u> , 379 <u>N.J.Super.</u> 346 (App. Div. 2005) .....	2
<u>Risko v. Thompson Muller</u> , 206 <u>N.J.</u> 506 (2011) .....	1

### Statutes

<u>N.J.S.A.</u> 47:1A-1.1 .....	2-3,4
<u>N.J.S.A.</u> 47:1A-6 .....	1
<u>N.J.S.A.</u> 47:1A-10 .....	3-4

## **I. CMCPO Has Not Entered Any Evidence to Satisfy its OPRA Burden of Proof; Nor Would an in Chambers Inspection Substitute**

In his opening brief, John Paff explained OPRA's burden of proof.

Because of those policy considerations, OPRA expressly places the burden of proof upon a government agency denying access to records. "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. The government agency in possession of the requested record bears the burden of proof because only the government agency knows the facts as to the content of the record and the surrounding factual circumstances. (Pb3.)

Despite Paff's explanation and OPRA citation and quotation regarding CMCPO's burden of proof, CMCPO boldly asserts that "the CMCPO's finding that such documents are exempt from OPRA as ACD material, criminal investigatory records, or personnel material are sufficient to support denial of access to Paff." (Db4 n.1.) CMCPO has made no effort to satisfy its burden of proof. It has filed no certification, affidavit or any other evidence. But, assertions of a party's attorney in a brief or at oral argument are not evidence. Risko v. Thompson Muller, 206 N.J. 506, 522 (2011). Thus, CMCPO has completely failed to demonstrate that any of the three claimed OPRA exemptions apply to the records at issue.

In addition to being inadmissible as evidence, the CMCPO's brief is vague. Indeed, the CMCPO itself repeatedly acknowledges that its description of the records is "vague." (Db3,5.) First, the CMCPO's brief presents its record descriptions in an unusual, tentative manner. The CMCPO states, "any such responsive documents which may exist might be the result of an investigation of matters by the CMCPO for a determination of criminal wrongdoing and may include the CMCPO's findings and analysis thereof" (emphasis added). (Db4.) And again, "[i]f potentially responsive records exist, they may not be classified as "Brady letters" as described by the Paff request" (emphasis added). (Db3.)

In addition to being oddly noncommittal, CMCPD is vague in that it fails to even allege the basic factual conditions necessary to establish any of the three claimed exemptions, as is explained in the following sections that assume for purposes of argument that CMCPD's argument is evidence and CMCPD's insinuations are assertions. Courier News v. Hunterdon County Prosecutor's Office, 358 N.J.Super. 373, 382-3 (App. Div. 2003) (public agency must produce "specific reliable evidence sufficient to meet a statutory recognized basis for confidentiality").

In its final paragraph before its Conclusion, CMCPD suggests that its admitted "vague-ness]" be remedied by this Court's in chambers inspection. (Db5.) Such a procedure would eliminate the Plaintiff's role, contrary to our adversary process. As in the adjudication of discovery privileges, a public agency in OPRA litigation is required to have served upon the record requestor plaintiff a description of the nature of the withheld documents sufficiently detailed to "enable other parties to assess the applicability of the privilege." Paff v. New Jersey Department of Labor, Board of Review, 379 N.J.Super. 346, 354 (App. Div. 2005). In proposing that Plaintiff Paff be denied an admissible and sufficient description of the records and how they purportedly qualify for the asserted OPRA exemptions, CMCPD would deprive Plaintiff Paff of his due process rights and deprive the Court of Plaintiff Paff's potential contribution to the adjudication process.

## **II. CMCPD Has Failed to Establish That the Records are Exempt Under the Deliberative Process Privilege**

Assuming for purposes of argument that the assertions and insinuations of CMCPD's brief are evidence, (Db3-4), they do not establish the requirements for the Deliberative Process Privilege.

First, as regards the "inter-agency, intra-agency" requirement, CMCPD merely suggests that the records may be communications from CMCPD to another government entity.(Db3.)

CMCPO did not even assert that those records have not already, or will be, transmitted by CMCPO or the other government entity to a criminal defendant.

Second, as regards the decision-making process requirement, CMCPO characterizes the records as outlining the “results” and “conclusions” of CMCPO’s review. (Db3-4.) Under the CMCPO’s own characterization, the records describe a decision of CMCPO, not a contribution to a decision-making process.

Third as regards the fact-opinion distinction, CMCPO has not even alleged that the records do not include factual information.

Thus, CMCPO has failed to even assert that the records are part of a decision-making process and will not be disseminate outside of government. Thus, the records are not exempt under OPRA’s exemption for deliberative process information.<sup>1</sup>

### **III. CMCPO Has Failed to Establish That the Records are Exempt Under the Criminal Investigatory Record Exemption**

In his opening brief, John Paff noted that OPRA’s exemption for “criminal investigatory records” excludes records “required by law to be made, maintained or kept on file” and that the U.S. Constitution and the New Jersey Rules of Criminal Practice require the prosecutor to transmit exculpatory evidence to criminal defendants. (Pb2,5-6.) CMCPO failed to even deny that the requested records were made and/or maintained because of the Brady requirements.

### **IV. CMCPO Has Failed to Establish That the Records are Exempt Under the Personnel Exemption**

CMCPO asserts that the requested records are exempt under OPRA’s Section 10 Personnel Exemption because of the Prosecutor’s supervisory powers over municipal police

---

<sup>1</sup> In its Footnote 1, (Db4), CMCPO asserts that Paff has no standing to assert a criminal defendant’s right to the records under Brady. But, Paff is not asserting a criminal defendant’s right to the records under Brady. Paff is asserting his own right to the records under OPRA.

personnel.

First, CMCPO is attempting to switch the claimed exemption. Its May 5, 2014, denial of access invoked OPRA's exemption for "Records generated on behalf of a public employee concerning a grievance by or against an employee." (Paff Cert., Page 2a.) The words "generated . . . on behalf of . . . public employees" are found in the Public Employee Related Exemption in N.J.S.A. 47:1A-1.1., not the Personnel Exemption in N.J.S.A. 47:1A-10. CMCPO has waived the Personnel Exemption by not invoking it in its May 5, 2014, denial of access.

Second, while the Prosecutor may have supervisory authority over municipal police officers, the relationship is not one of employer and employee. Therefore, records created by the Prosecutor regarding municipal police officers are not personnel records.

Third, the reference to "grievance filed by or against an individual" in OPRA's Personal Privacy Exemption, N.J.S.A. 47:1A-10, has the same meaning as the term "grievance filed by or against an individual" in OPRA's Public Employee Related Exemption, N.J.S.A. 47:1A-1.1. As explained in Paff's opening brief, "grievance" means a formal complaint filed by an employee or the employee's union representative alleging violation of the employee's rights under a collective-bargaining agreement. Asbury Park Press v. County of Monmouth, 406 N.J. Super. 1, 8-9 (App. Div. 2009). It does not apply to a county prosecutor's conclusions regarding the possible criminality or misconduct of a municipal police officer.

## **V. CMCPO Is Silent Regarding Paff's Common Law Right to the Records**

CMCPO is silent regarding Paff's common law right to the requested records.

Respectfully submitted,

Richard Gutman