

Donald M. Doherty, Jr., Esq. - Id. # 051981994  
**The Law Office of Donald M. Doherty, Jr.**  
 125 North Route 73  
 West Berlin, NJ 08091  
 (609) 336-1297  
**Attorney for the Plaintiff**

**FILED**

NOV 10 2014

NELSON C. JOHNSON, J.S.C

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John Paff,	:	NEW JERSEY SUPERIOR COURT
<i>Plaintiff,</i>	:	Atlantic County- LAW DIV.
	:	DOCKET NO. ATL-L-5747-14
vs.	:	
	:	Civil Action
Atlantic County Prosecutor's Office & Kathleen E. Bond,	:	<b>Order to Show Cause</b>
Records Custodian,	:	
	:	
<i>Defendants.</i>	:	

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This matter having been open to the court by Donald M Doherty, Jr., Esq., attorney for the Plaintiff John Paff, and seeking relief by way of summary action pursuant to rule 4:67-1 (a) based upon the facts set forth in the verified complaint and supporting papers filed here with; and the Court having determined this matter may be commenced by order show cause as a summary proceeding pursuant to N.J.S.A. 47:1A-6 and for other good cause shown,

IT IS on this 10<sup>th</sup> day of November, 2014 **ORDERED** that Defendants Atlantic County Prosecutor's Office & Kathleen E. Bond, Records Custodian, appear and show cause on the 15<sup>th</sup> day of December, 2014 before The Honorable Nelson Johnson, JSC, in the Atlantic County Civil Courthouse, 1201 Bacharach Blvd., Atlantic City, NJ 08401 at 10:00 o'clock or soon thereafter as counsel can be heard, why judgment should not be entered as follows:

- A. Ordering the Defendants to provide plaintiff with immediate access to the requested;
- B. Awarding plaintiff reasonable counsel fees and costs of suit;
- C. Awarding other such relief as the court would deem fair and equitable.

And it is *further ORDERED* that:

- 1. A copy of this order to show cause, verified complaint and all supporting certifications and other documents submitted in support of this application be served upon the defendants personally or by certified mail, return receipt requested, within 5 days of the date hereof, in accordance with R. 4:4-3 and R. 4:4-4, this being original process.
- 2. The plaintiff was file with this court proof of service of the pleadings on the defendants no later

than three days before the return date.

3. Defendants shall file and serve a written answer and opposition papers to this order to show cause and the relief requested in the verified complaint by 12/8, 2014. The answering opposition papers must be filed with the clerk of the Superior Court in the County listed above and a copy of the papers must be sent directly to the chambers of the judge.
4. Plaintiff must file any written reply to the defendants' opposition by 12/12, 2014. The reply papers must be filed with the clerk of Superior Court in the County listed above a copy of the reply papers must be sent directly to the chambers of the judge.
5. If the defendants do not file and serve opposition to this order to show cause, the application will be decided on the papers on the return date and relief may be granted by default, provided that the plaintiff files a proof of service and a proposed form of order at least three days prior to the return date.
6. If the plaintiff has not already done so, a proposed form of order address addressing the relief sought on the return date (along with a self-addressed return envelope would return address and postage) must be submitted to the court no later than three days before the return date.
7. Defendants take notice: the plaintiff has filed a lawsuit against you in the New Jersey Superior Court. The verified complaint attached to this order to show cause states the basis of the lawsuit. If you dispute this complaint, you, or your attorney, must file a written answer and opposition papers and proof of service before the return date of the order to show cause. Paragraph 3 outlines the date by which you are required to respond. These documents must be filed with the clerk of the Superior Court in the County listed above. You must also send a copy of your answer and opposition papers to the plaintiff's attorney whose name and address appears above. A telephone call will not protect your rights; you must file and serve your answer and opposition papers (with the fee) or judgment may be entered against you by default.
8. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live. If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services.
9. The court will entertain argument, but not testimony, on the return date of the order to show cause, unless the court and parties are advised the contrary no later than 3 days before the return date.

  
\_\_\_\_\_  
THE HONORABLE NELSON JOHNSON, JSC

Donald M. Doherty, Jr., Esq. - Id. # 051981994  
**The Law Office of Donald M. Doherty, Jr.**  
125 North Route 73  
West Berlin, NJ 08091  
(609) 336-1297  
**Attorney for the Plaintiff**

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John Paff,	:	NEW JERSEY SUPERIOR COURT
<i>Plaintiff,</i>	:	Atlantic County- LAW DIV.
	:	DOCKET NO. ATL-L-
vs.	:	
	:	Civil Action
Atlantic County Prosecutor's Office & Kathleen E. Bond,	:	<b>Verified COMPLAINT</b>
Custodian of Records	:	<b>Open Public Records Act (OPRA)</b>
<i>Defendants.</i>	:	

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Plaintiff, John Paff, complains against the Defendants as follows:

**Background**

1. Plaintiff John Paff sought government records from the Atlantic County Prosecutor's Office.
2. a. Defendant Atlantic County Prosecutor's Office (ACPO) is a government entity or department located in New Jersey and subject to the Open Public Records Act.  
b. Defendant Kathleen E. Bond is the Records Custodian for the ACPO.
3. Plaintiff is an open government activist, well known for his efforts in obtaining, and assisting others in obtaining, government records.
4. In such a role, Plaintiff is often informed of or "tipped" to scandalous activities taking place within the government, presumably with the idea that Plaintiff will assist in obtaining records demonstrating improprieties involving or orchestrated by government officials.
5. One such "tip" Plaintiff received was that a firefighter employed by Margate City engaged in the theft of funds from the FMBA Local chapter. This was accomplished through forged checks or other unauthorized use of FMBA bank account(s). The sum taken was approximately \$50,000.00. Approximately \$40,000 has been repaid and there is support within the department to advocate for the position that if the money is repaid the firefighter would not lose his job or have his pension adversely affected.
6. With those "tipped" facts, Plaintiff first made a request to Margate for documents it possessed regarding the theft. Margate asserted it had no documentation and that the ACPO was the entity investigating. Plaintiff then turned to the Prosecutor's Office, requesting records regarding the incident about which he was "tipped". Plaintiff's request is attached as Exhibit 1.
7. On August 18, 2014, the Defendants denied the request in totality, refusing to provide even the minimal information mandated by N.J.S.A. 47:1A-3. (Ex. 2) Defendants even refused to provide a Vaughn index of the materials they possessed but would not disclose.

**COUNT ONE**  
(OPRA)

8. The records sought by the Plaintiff are government records pursuant to N.J.S.A. 487:1A-1 (et. seq.
9. The complete and total denial of access - and even a Vaughn index - is a violation of OPRA and its interpretive case law.

**COUNT TWO**  
(Common Law Right of Access Violation)

10. Plaintiff is an open government activist, well known for his efforts in obtaining, and assisting others in obtaining, government records.
11. As part of his ongoing research efforts regarding the efficiency and efficacy of New Jersey government, Plaintiff routinely conducts inquiries into excessive force claims, officer malfeasance, favoritism/nepotism/cronyism, targeted scapegoating and other activities that bring liability and expense to New Jersey taxpayers.
12. The records sought are relevant to newsworthy events, and legislative and law enforcement actions the public would typically desire to learn about. Plaintiff through his positions in New Jersey politics, various government-policing websites and organizations and connections with the news media has the ability to expose the events to news coverage for public education and benefit.
13. The records sought are items relevant to newsworthy events and public and political discourse, to wit, New Jersey public employees manipulating the pension and employment system, as well as the criminal process.
14. There is a legitimate and wholesome public interest, shared by the Plaintiff, in learning the full scope of the circumstances surrounding these events and reporting them to the public.

*WHEREFORE*, Plaintiff requests judgement as follows:

- a. Directing the immediate release of the records sought;
- b. Awarding counsel fees and costs of suit;
- c. Awarding other such relief as may be fair, equitable and necessary.

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DONALD M. DOHERTY, JR., Esq.

**RULE 4:5-1 CERTIFICATION**

The undersigned hereby certifies that the matter in controversy is not the subject of any other pending action or arbitration proceeding. The undersigned does not know of the names of any other parties who should be joined in the action.

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DONALD M. DOHERTY, JR., Esq.



John Paff &lt;opengovtissues@gmail.com&gt;

**OPRA request to Atlantic County Prosecutor's Office**

1 message

John Paff &lt;paff@pobox.com&gt;

Wed, Aug 13, 2014 at 2:47 PM

To: Bond\_k@acpo.org

Please accept this e-mail/fax as my request for government records pursuant to the Open Public Records Act and the common law right of access. Please respond to this request and send all responsive documents to me at [paff@pobox.com](mailto:paff@pobox.com). Thank you.

**Background:**

I heard that a person who is a Margate Firefighter and who was probably also the former Treasurer of the FMBA Local, allegedly forged checks or otherwise misappropriated some money from the Local. I am further informed that this individual is represented by an attorney named Swift, probably from the Swift law firm in Northfield.

I sent an OPRA request to the City of Margate. In his 07/30/14 response, Margate City Solicitor John Scott Abbott stated:

Pursuant to our discussion of today your request has been forwarded to me for response. Your information is correct that there is currently an investigation being conducted by the Atlantic County Prosecutor's office re a Margate Firefighter. No charges have been filed to date. Margate Police have not handled the investigation. I am familiar with the incident. There are no documents in the possession of the City of Margate to provide to you.

You have advised you will contact the Prosecutors office. I would appreciate confirmation of receipt of this email.

**Records requested:**

1. If a crime that meets the description in "Background" has been committed but for which no arrest has yet made, I would like a record that discloses "information as to the type of crime, time, location and type of weapon, if any." N.J.S.A. 47:1A-3.
2. If a crime that meets the description in "Background" has been committed and an arrest has been made, I would like the CDR or other form of complaint that was issued to the defendant.
3. I would like all police incident and investigative reports concerning the incident described in "Background" above.
4. I would like all correspondence between the city, or any department or official thereof, and any attorney named Swift related to the incident described in "Background" above.
5. If the person referred to in "Background" above has made any reimbursements to the fund that was allegedly pilfered, I would like copies of checks or other record referencing that such a reimbursement had been made.

If you deny access, please confirm whether documents responsive to this request exist and for each one in existence, please describe in as much detail as possible.

*John Paff*  
P.O. Box 5424  
Somerset, NJ 08875  
Voice: 732-873-1251  
Fax: 908-325-0129  
e-mail: [paff@pobox.com](mailto:paff@pobox.com)



John Paff &lt;opengovtissues@gmail.com&gt;

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**RE: John Paff OPRA request**

1 message

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**John Scott Abbott** <jsabbottlawoffice@comcast.net>

Wed, Jul 30, 2014 at 2:45 PM

To: Paff@pobox.com

Cc: Rosie Freed &lt;Rfreed@margate-nj.com&gt;, tom hiltner &lt;hiltnerd@aol.com&gt;, Anthony Tabasso &lt;tabasso\_anthony@margate-nj.com&gt;, David Wolfson &lt;wolfson\_david@margate-nj.com&gt;, mike becker &lt;mayorbecker@margate-nj.com&gt;, Richard Deaney &lt;Deaney\_Richard@margate-nj.com&gt;

Mr. Paff Pursuant to our discussion of today your request has been forwarded to me for response. Your information is correct that there is currently an investigation being conducted by the Atlantic County Prosecutor's office re a Margate Firefighter. No charges have been filed to date. Margate Police have not handled the investigation. I am familiar with the incident. There are no documents in the possession of the City of Margate to provide to you.

You have advised you will contact the Prosecutors office. I would appreciate confirmation of receipt of this email.

John Scott Abbott-Margate City Solicitor

John Scott Abbott, Esquire

9 South Washington Avenue

Margate, NJ 08402-2301

Phone: 609-823-4495

Fax: 609-823-0707

E-Mail: [jsabbottlawoffice@comcast.net](mailto:jsabbottlawoffice@comcast.net)

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**From:** Rosie Freed [<mailto:Rfreed@margate-nj.com>]**Sent:** Wednesday, July 30, 2014 10:04 AM**To:** john scott ABBOTT**Cc:** tom hiltner; Anthony Tabasso; David Wolfson; mike becker; Richard Deaney**Subject:** John Paff OPRA request

Scott: As discussed please see the above regarding a Margate Firefighter and alleged misappropriation of funds and forged checks. Please respond in accordance with the law and copy me for the official OPRA log as this office is the Custodian of Records.

I did contact Mr. Paff directly and explained that this is the first I am seeing this request. He understood and was fine with it being logged in as of today.

As always, thank you.

Rosemarie A. Freed, RMC

Deputy City Clerk

[609-822-2605](tel:609-822-2605)



**James P. McClain**  
*Prosecutor*

**OFFICE OF THE  
PROSECUTOR**  
County of Atlantic

4997 Unami Boulevard  
P.O. Box 2002  
Mays Landing, NJ 08330

**(609) 909-7800 • Fax: (609) 909-7802**

August 18, 2014

John Paff  
P.O. Box 5424  
Somerset, NJ 08875  
paff@pobox.com

RE: Open Public Records Act Request  
*Request for records pertaining to the Margate Fire Department*

Dear Mr. Paff:

Please allow the following letter and enclosed open public records request response form to serve as the response by the Atlantic County Prosecutor's Office to your OPRA request dated August 13, 2014.

I have conducted a review of all records maintained by this agency in connection with your request. The Atlantic County Prosecutor's Office does not possess any discoverable documents responsive to your inquiry, nor can this Office confirm or deny the existence of such an investigation. Additionally, please be advised that, to the extent any additional information responsive to your request should exist, it would remain confidential pursuant to N.J.S.A. 47:1A-1 et seq., as the release of investigatory information, prior to the filing of criminal charges, is inimical to the public interest and may serve to harm the reputation of all involved parties.

In the event that you disagree with our determination in this matter, you may appeal our decision to the Government Records Council or the New Jersey Superior Court as provided by N.J.S.A. 47:1A-6 and 7.

If you have any questions concerning this matter, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink that reads "Kathleen E. Bond". The signature is written in a cursive, slightly slanted style.

Kathleen E. Bond  
Assistant Prosecutor  
Custodian of Records

*The Law Office of*  
**Donald M. Doherty, Jr.**

125 North Route 73  
West Berlin, NJ 08091  
*Licensed in NJ, FL & PA*

(609) 336-1297 T  
(609) 784-7815 F

September 16, 2014

The Honorable Nelson C. Johnson, JSC  
Atlantic County Civil Courthouse  
1201 Bacaharach Blvd.  
Atlantic City, NJ 08401

Re: Paff v. Atlantic County Prosecutor's Office, et. als.  
Docket #: t/b/a, filed as OSC

Dear Judge Johnson:

Please accept this letter brief in lieu of a more formally briefing in support of this public records access case.

FACTS

Plaintiff John Paff is a party whose open government activism is likely well-known to this Court. As part of his efforts seeking to keep government bathed in the sunshine and its actions known to the public, Plaintiff operates a number of web sites commenting on such activities, is involved in numerous panels and education boards and aids community activists in their pursuits of truth. As part of those endeavors, Plaintiff is routinely "tipped" to government scandals that may interest his website followers and the writers and reporters that regularly seek him out for information and commentary.

Plaintiff was "tipped" to some possible shenanigans going on in Margate and the Atlantic County Prosecutor's Office in the following fashion:

*Well margate [sic] City is up to no good. A city fire LT. who is also a LT of the beach patrol is under investigation. Name is [omitted]. Prosecutors [sic] office is involved but city is trying to keep it hush hush not wanting the paper to get hold of it. [Omitted] who was the treasurer of the FMBA forged checks and stole 50K out of the funds. He is using an attorney last name Swift who is very connected and who's brother is the ex public safety commissioner. Since last week they had him pay the FMBA back 40,000 and do not want him to be disciplinplined [sic] which is a crock of crap. Thought you might like to run with that and the press might be interested. Also the city police chief's brother is under federal indictment for fraud and rumors are he knew about alot [sic] of the wrongdoings.....*

Plaintiff first sought ferret out what material Margate possessed. Margate's solicitor acknowledged that there was a situation as alleged above being investigated by the Atlantic County Prosecutor's Office. However, Margate contended it possessed no documents to turn over and directed Plaintiff to the Prosecutor's Office. Ver. Comp. Ex. 1-1

Plaintiff submitted a request to the Atlantic County Prosecutor's Office (Ver. Comp. Ex. 1-2) that described the background of the incident and the confirmation of the incident by Margate, along with a records request seeking....

Records requested:

1. If a crime that meets the description in "Background" has been committed but for which no arrest has yet made, I would like a record that discloses "information as to the type of crime, time, location and type of weapon, if any." N.J.S.A. 47:1A-3.
2. If a crime that meets the description in "Background" has been committed and an arrest has been made, I would like the CDR or other form of complaint that was issued to the defendant.
3. I would like all police incident and investigative reports concerning the incident described in "Background" above.
4. I would like all correspondence between the city, or any department or official thereof, and any attorney named Swift related to the incident described in "Background" above.
5. If the person referred to in "Background" above has made any reimbursements to the fund that was allegedly pilfered, I would like copies of checks or other record referencing that such a reimbursement had been made.

If you deny access, please confirm whether documents responsive to this request exist and for each one in existence, please describe in as much detail as possible.

The Prosecutor denied all components of the request and this lawsuit timely follows.  
Ver. Comp. Ex. 2

### OPRA Basics

OPRA was specifically designed 'to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 160 (App. Div. 2011). (quoting Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 588 (2011)). "The legislative purpose in enacting OPRA was to assure ready access to government records 'for inspection, copying, or examination by the citizens . . .'" Bozzi v. City of Atl. City, 434 N.J. Super. 326, 332 (App. Div. 2014) (quoting N.J.S.A. 47:1A-1). OPRA replaced the former Right to Know Law, N.J.S.A. 47:1A-2 to -4, "and continues the State's

longstanding public policy favoring ready access to most public records." Bent v. Twp. of Stafford Police Dep't, Custodian of Records, 381 N.J. Super. 30, 36 (App.Div. 2005).

OPRA's critical directive is "all government records shall be subject to public access unless exempt . . . ." N.J.S.A. 47:1A-1. Therefore, records must be subject to a specific exclusion to preclude release. N.J.S.A. 47:1A-1.1 includes the categories of documents falling outside the expansive definition of government records that are "deemed to be confidential." This includes the provisions of N.J.S.A. 47:1A-3 (records of a public agency's investigation in progress). Nonetheless, a governmental agency denying a request for access "shall have the burden of proving . . . denial of access is authorized by law." N.J.S.A. 47:1A-6.

### OPRA and This Case

As mentioned briefly above, N.J.S.A. 47:1A-3 does indeed exempt records of an investigation in progress from disclosure- but only some of them. And the ACPO cannot meet the standards applicable to with holding all records in this instance.

Foremost, there is a requirement that is completely ignored by the ACPO and it makes this case more complicated than it need be. The Defendants' rationale should have been disclosed as part of a Vaughn index. The term is derived from Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), which centered around claims of "privilege" regarding records sought in the context of the federal Freedom of Information Act. New Jersey has adopted this concept in the context of asserted privileges in litigation for years; important to this case is that its adherence has been specifically commanded by the appellate division in OPRA matters. Paff v. NJ Dept. of Labor, 392 N.J. Super. 334, 341 (App. Div. 2007)

Plaintiff cannot even effectively comment of the redactions (except for the argument above), a circumstance OPRA sought to specifically prevent with N.J.S.A. 47:1A-5(g), which requires the denial basis to be specific. If information is redacted, Paff obligates Defendants to specifically outline "why". The GRC's own website has a special section entitled "OPRA for Records Custodians" and it states:

### **Explaining Why A Redaction is Made**

When redactions are made to a record, the custodian can use either the request form to explain why those elements of a record are redacted, or use a separate document, depending on the circumstances, but also referring to the OPRA exception being claimed. This principle also applies if pages of information are redacted. Sometimes it is clear from inspection (a entry called "Social Security Number" has a black out over where the number would appear). **The bottom line is that the requester has a right to know the reason for the redaction, and the custodian has the responsibility to provide a reasonable explanation.**

So what EXACTLY the Defendant possesses is unknown and thus all but impossible for Plaintiff to address the case on a document-by-document basis. And when Your Honor directs them to supply such an index, the Plaintiff will be a prevailing party under N.J.S.A. 47:1A-6.

However, Plaintiff did file this case to get a list of records he cannot have anyway. Taking the Defendants' at their word that no arrest has been made yet, Plaintiff specifically sought records pursuant to N.J.S.A. 47:1A-3. In relevant part, it clearly states.....

b. Notwithstanding the provisions of P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, the following information concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such information:

where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;

Defendants refused to abide this statute. And the only rationales they proffered was the unexplained claim that releasing information was "inimical to the public interest". That is the standard applicable to N.J.S.A. 47:1A-3(a) and even then it requires an explanation, it is not the explanation unto itself.

Under section (b), there is a different standard. The information can be withheld only if it will jeopardize the safety of a person or the investigation. Further, any such rationale "shall be narrowly construed to prevent disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety." No such contention was proffered. The only rationale provided at all was that revealing an investigation exists may harm the reputation of those involved. That is not the standard. Nor could it ever be or else no information about any investigation would ever be released. If redactions are proper and justified, they may be made provided there is a "bona fide" law enforcement purpose. Protecting the reputation of someone who took money, put it back and escapes punishment as a result is not a "bona fide law enforcement purpose".

The "criminal investigatory record" exception does not create a blanket exemption just because there is an investigation. As the Appellate Court concisely observed when rejecting the argument that all records regarding a crime subject to prosecution are exempt as Criminal Investigatory Records "...would seal every government record associated with a criminal investigation until the trial has been completed and all potential appeals have been exhausted. Such a prospect would directly contravene the citizen's right of access to government records embodied in OPRA." Courier News v. Hunterdon, 358 N.J. Super. 373 (App. Div. 2003) The purpose behind the criminal investigatory records exception is best understood as the difference between "facts" and "ideas, impressions, thoughts or hunches". Our Supreme Court has recognized that a factual record that becomes part of an

investigation is not covered by the investigatory exemption. In McClain v. College Hospital, 99 N.J. 346 (1985), the Court held the investigative exemption applied only where “access would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” Id. at 357 The Court concluded the investigative exemption to public records laws covered “the opinions, conclusions, sources of information and investigative techniques of the agency,” Id. at 359, but not the “raw data.” Id. at 358. The Court then required disclosure of the “factual information.” Id. at 363-64 Reputation management and political damage control are not relevant considerations.

#### AN AWARD OF ATTORNEYS’ FEES IS MANDATED BY OPRA

If the Court orders Defendants to produce any documents relevant to the request, the Court must also find that Plaintiff is a prevailing party. Even if the Court does not order records but only an explanation of why Mr. Paff is not getting them, he is still a ‘prevailing party’. Under OPRA’s fees-shifting provisions, a plaintiff must be awarded a reasonable attorney’s fee and costs. N.J.S.A. 47:1A-6 mandates an award of attorney’s fees in “any proceeding” where the requester is successful.

Counsel fee awards are mandatory so as to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to “even the fight” when citizens challenge a public entity. New Jerseyans for a Death Penalty Moratorium v. N.J. Dept. of Corrections, 185 N.J. 137, 153 (2005)

#### The Common Law Right of Access and This Case

Even if the Court has denies Paff access to any/some/all records from the Defendants under the Open Public Records Act, “[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.” N.J.S.A. 47:1A- 8; see also North Jersey Media Group Inc. v. State, Dep’t of Personnel, 389 N.J. Super. 527, 536 (Law. Div. 2006)

The common law right of access has three elements: (1) the records must be common law public documents; (2) the person who seeks access must “establish an interest in the subject matter of the material,” South Jersey Publishing Co. v. New Jersey Expressway Auth., 124 N.J. 478, 487 (1991), and (3) the citizen’s right to access “must be balanced against the State’s interest in preventing disclosure.” Keddie v. Rutgers, The State University, 148 N.J. 36, 50 (1997)

Common law public records “include almost every document recorded, generated, or produced by public officials whether or not 'required by law to be made, maintained or kept

on file.” Shuttleworth v. City of Camden, 258 N.J. Super. 573, 582 (App. Div. 1992). Here, the records sought here are public records because they are kept by a public agency, the ACPO (and it appears records may have emanated from public officials in Margate as well). This analysis prong does appear to be subject to serious challenge.

Plaintiff has standing to request these documents under the common law, a requirement that is easily met. “A citizen, and the press on its behalf, does not have to prove any personal interest in order to satisfy the common law standing requirement.” Daily Journal v. Police Dep’t of City of Vineland, 351 N.J. Super. 110, 122 (App. Div. 2002).

The interest necessary to determine standing to obtain copies of public records may be either “a wholesome public interest or a legitimate private interest.” Loigman v. Kimmelman, 102 N.J. 98, 112 (1986) Paff’s interest, use of the materials for research and commentary in his role as a political figure (Libertarian Party) and public commentator (numerous websites and seminar panels) falls into the realm of “wholesome public interest” and he is required to demonstrate nothing more. Further still, there is the public interest in assessing if there are problem public employees being coddled or maintained on the payroll to the detriment of taxpayers.

The interest in public records must be balanced against the public entity’s interest maintaining confidentiality. Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 46 (1995). This standard is flexible. Loigman v. Kimmelman, 102 N.J. at 103. In weighing the interests, the Supreme Court as instructed trial courts that the following factors may be considered:

- 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 policy makers;
- 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 individuals’ asserted need for the materials.

Id. at 113. Further, “the trial court must examine each document individually and make factual findings with regard to why [a party’s] interest in disclosure is or is not outweighed by

[the State's] interest in non-disclosure." Keddie v. Rutgers, 148 N.J. 36, 50 (1997).

Until the Defendants respond, it is unknown what their rationale could purport to be. However, some insight that may be helpful is that witness statements are routinely given to law enforcement and witnesses are aware any information they provide will be used or at least considered by the agency who receives the information. See Asbury Park Press v. Lakewood Tp. Police Dept., 354 N.J. Super. 146, 166 (Law Div. 2006). There is not any indication that any of the witnesses who provided information would have refrained from doing so if they knew there was a potential for disclosure. Investigating officers have a duty to make the kind of reports which were likely made in this case and so do the public employees - Margate firemen - that are trustees of the FMBA. Even if they would not have voluntarily come forward with this information, their positions obligate them to do so and thus factor (1) is not implicated. See Asbury Park Press, Inc. v. Borough of Seaside Heights, 246 N.J. Super. 62, 70 (Law Div. 1990).

### Conclusion

"Absent a legally recognized exception to disclosure, a citizen's right of access to public information is unfettered." Courier News v. Hunterdon Cty. Prosecutor's Office, 358 N.J. Super. 373, 383 (App. Div. 2003) Asserting the records of an investigation are exempt because there is an investigation is both circular reasoning and a non-starter of an argument. Unknown founded assertions about reputation issues are likewise not recognized as an exemption to disclosure. What took/is taking place is not a performance review of someone's job. It is a criminal investigation involving theft by a trusted municipal employee. The claims are already "out there", as is the assessment that something is taking place to sweep it under the proverbial rug.

Respectfully submitted,



Dennis Levinson  
County Executive

# Atlantic County

## Department of Law

James F. Ferguson  
Department Head  
County Counsel

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### TELECOPIER TRANSMISSION SHEET

DATE: December 8, 2014

# OF PAGES: 21, including cover

TO: Donald Doherty, Jr. Esq.

FAX #: 609-784-7815

FROM: Elizabeth D'Amico, Esq.

RE: Paff v. Acpo, et al  
ATL-L-5747-14

MESSAGE: Donald - I called you a few times - then  
found your fax # on your brief. Please  
call me if there are any problems  
- Elizabeth

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# Atlantic County

## Department of Law

Dennis Levinson  
*County Executive*

James F. Ferguson  
*Department Head  
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December 8, 2014

Superior Court of New Jersey  
Law Division-Direct Filing  
1201 Bacharach Blvd.  
Atlantic City, NJ 08401

**Re: Paff v. Atlantic County Prosecutor's Office, Kathleen Bond, Records Custodian**  
**Docket No: ATL-L-5747-14**

Dear Sir or Madam:

Enclosed please find original and one copy of:

1. Defendants' Motion to Dismiss Plaintiff's Complaint in Lieu of Answer;
2. Brief;
3. Proposed Order; and
4. Proof of Service.

Would you please file and return a copy to me in the envelope enclosed for your convenience.  
Please charge our Superior Court Account (#0002911) with the cost of filing same.

Thank you for your cooperation.

Very truly yours,

Elizabeth C. D'Ancona  
Assistant County Counsel

ECD/

Enclosures

cc: Donald M. Doherty, Esquire – via facsimile at (609) 784-7815



## ATLANTIC COUNTY LAW DEPARTMENT

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Atlantic City, NJ 08401

Phone: (609) 343-2279

Fax: (609) 343-2373

Elizabeth C. D'Ancona, Assistant County Counsel

State Bar ID: 000842011

Attorney for Defendants Atlantic County Prosecutor's Office and Kathleen Bond

John Paff,

Plaintiff,

v.

ATLANTIC COUNTY PROSECUTOR'S  
OFFICE, and KATHLEEN BOND, Custodian  
of Records

Defendants

SUPERIOR COURT OF NEW JERSEY  
ATLANTIC COUNTY  
LAW DIVISION

DOCKET NO.: ATL-L-5747-14

**Civil Action****NOTICE OF MOTION TO DISMISS  
PLAINTIFF'S COMPLAINT IN LIEU OF  
ANSWER**TO: Donald M. Doherty, Jr., Esquire  
Law Office of Donald M. Doherty, Jr.  
125 North Route 73  
West Berlin, NJ 08091

**PLEASE TAKE NOTICE** that on Monday, December 15, 2014, or as soon thereafter as counsel may be heard, the undersigned will apply to the Superior Court of New Jersey, Law Division, Atlantic County, for an Order dismissing Plaintiff's Complaint against Defendants Atlantic County Prosecutor's Office, and Kathleen Bond, Records Custodian.

**TAKE FURTHER NOTICE** that at the time and place aforesaid, defendant shall rely upon the attached Brief.

**PLEASE TAKE FURTHER NOTICE** that this application is being submitted pursuant to Rule 1:6-2 with the request that this matter be submitted to the Court for ruling on the moving

papers. A copy of the proposed form of Order sought is annexed hereto. Unless you file answering papers or request oral argument, the Court may enter the Order as submitted; amend the Order, or direct oral argument.

A proposed form of Order is attached.

ATLANTIC COUNTY DEPARTMENT OF LAW

By:   
Elizabeth C. D'Ancona, Assistant County Counsel

Dated: December 5, 2014

ATLANTIC COUNTY LAW DEPARTMENT  
 1333 Atlantic Avenue, 8<sup>th</sup> Floor  
 Atlantic City, NJ 08401  
 Phone: (609) 343-2279  
 Fax: (609) 343-2373  
 Elizabeth C. D'Ancona, Assistant County Counsel  
 State Bar ID: 000842011  
 Attorney for Defendants Atlantic County Prosecutor's Office and Kathleen Bond

John Paff,

Plaintiff,

v.

ATLANTIC COUNTY PROSECUTOR'S  
 OFFICE, and KATHLEEN BOND, Custodian  
 of Records

Defendants

SUPERIOR COURT OF NEW JERSEY  
 ATLANTIC COUNTY  
 LAW DIVISION

DOCKET NO.: ATL-L-5747-14

**Civil Action**

**ORDER DISMISSING PLAINTIFF'S  
 COMPLAINT**

**THIS MATTER** having been opened to the Court by Donald M. Doherty, Jr., Esq. on behalf of Plaintiff, John Paff, the Court having considered the pleadings filed herein, and opposition thereto, and good cause being shown;

IT IS on this \_\_\_\_\_ day of \_\_\_\_\_, 2014 **ORDERED AND ADJUDGED** that:

1. The Verified Complaint, any cross-claims and any and all other claims against Atlantic County Prosecutor's Office, and Kathleen Bond are hereby dismissed with prejudice; and
2. A copy of this Order will be sent to all counsel within seven days of the above date.

Opposed  
 Unopposed

\_\_\_\_\_  
 HON. NELSON C. JOHNSON, J.S.C.

## ATLANTIC COUNTY LAW DEPARTMENT

1333 Atlantic Avenue, 8<sup>th</sup> Floor

Atlantic City, NJ 08401

Phone: (609) 343-2279

Fax: (609) 343-2373

Elizabeth C. D'Ancona, Assistant County Counsel

State Bar ID: 000842011

Attorney for Defendants Atlantic County Prosecutor's Office and Kathleen Bond

John Paff,

Plaintiff,

v.

ATLANTIC COUNTY PROSECUTOR'S  
OFFICE, and KATHLEEN BOND, Custodian  
of Records

Defendants

SUPERIOR COURT OF NEW JERSEY  
ATLANTIC COUNTY  
LAW DIVISION

DOCKET NO.: ATL-L-5747-14

Civil Action

CERTIFICATION OF SERVICE

I, the undersigned, am employed by the County of Atlantic, Department of Law, Elizabeth C. D'Ancona, Assistant County Counsel and attorney of record for Defendants Atlantic County Prosecutor's Office and Kathleen Bond.

With respect to the above captioned matter, on December 8, 2014, Defendant's Notice of Motion to Dismiss Plaintiff's Complaint in Lieu of Answer was faxed to Donald M. Doherty, Jr., Esq., 125 North Route 73, West Berlin, NJ 08091 at (609) 784-7815.

On December 8, 2014, these same documents were hand delivered to the Superior Court of New Jersey, Direct Filing, 1201 Bacharach Boulevard, Atlantic City, NJ 08401.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



---

Toni Florio

Dated: December 8, 2014



Dennis Levinson  
County Executive

# Atlantic County

## Department of Law

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December 5, 2014

### VIA HAND-DELIVERY

Honorable Nelson C. Johnson, J.S.C.  
Superior Court of New Jersey  
1201 Bacharach Blvd.  
Atlantic City, NJ 08401

**RE: Paff v. Atlantic County Prosecutor's Office, Kathleen Bond, Records Custodian**  
**Docket No: ATL-L-5747-14**

Dear Judge Johnson:

Please be advised that this office represents Defendants Atlantic County Prosecutor's Office and Kathleen Bond in the above-referenced action. Please accept this letter brief in lieu of a more formal brief in support of Defendants' Motion to Dismiss Plaintiff's Complaint. The hearing in this matter is currently scheduled for December 15, 2014.

Records pertaining to criminal investigations, especially those which are ongoing at the time of an OPRA request, are given special consideration by the OPRA statute. This is, of course, because an ongoing investigation into criminal conduct - with witnesses being interviewed, their statements taken and compared, and the collection of evidence at the early stages - would be jeopardized by a premature public announcement that the matter is being investigated at all.

Based upon Plaintiff's own OPRA request, attached to Plaintiff's Verified Complaint, we know that Plaintiff was made aware that there was "*currently* an investigation being conducted by the Atlantic County Prosecutor's Office" into a Margate firefighter. (Emphasis added).



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Plaintiff also knew that “no charges have been filed to date.” Therefore, at the time of his OPRA request, Plaintiff was aware that the investigation was ongoing, and that N.J.S.A. 47:1A-3, the OPRA provision dealing with ongoing investigations, would apply. Indeed, Plaintiff acknowledges that he “did file this case to get a list of records *he cannot have anyway.*” Plaintiff’s brief, P4, (emphasis added). This is because where an investigation is ongoing, a request for records “may be denied” if it shall be “inimical to the public interest.” N.J.S.A. 47:1A-3.

Therefore, it appears from Plaintiff’s own brief that he is aware, and was aware at the time of his request, that he was not entitled to the records he is seeking. Indeed, Kate Bond’s letter to Plaintiff dated August 18, 2014 (also attached to Plaintiff’s Verified Complaint), states that the “release of investigatory information, prior to the filing of criminal charges, is inimical to the public interest.” So Plaintiff cannot argue that he was not aware that the ongoing investigation exemption would apply to this case. What he now wants is an index of the records in the possession of the Prosecutor’s Office. However, the OPRA statute does not require such an index to be produced, because the index is an alternative to an *in camera* review, not a requirement of a Custodian’s response. As an *in camera* review of the documents is not required to prove that the investigation is ongoing, a Vaughn index would not be appropriate in this case.

**I. OPRA’S CRIMINAL INVESTIGATORY EXEMPTION AND INVESTIGATION IN PROGRESS EXEMPTION GOVERN THESE REQUESTS IN THEIR ENTIRETY, AND PLAINTIFF ACKNOWLEDGES SAME**

Plaintiff’s brief states “Plaintiff did file this case to get a list of records he cannot have anyway.” Plaintiff’s brief, P4. This statement acknowledges that if an arrest has not yet been made, Plaintiff is not entitled to any records under N.J.S.A. 47:1A-3. All he would be entitled to would be “information as to the type of crime, location and type of weapon, if any.” However,

N.J.S.A. 47:1A-3 allows a law enforcement agency to withhold even that information, if it would “jeopardize an investigation in progress or may be otherwise inappropriate to release.”

N.J.S.A. 47:1A-3 states, in relevant part:

**[W]here it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest;** provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.

b. Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.), as amended and supplemented, the following information concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such information:

where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;

....

**Notwithstanding any other provision of this subsection, where it shall appear that the information requested or to be examined will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release, such information may be withheld.** This exception shall be narrowly construed to prevent disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety. Whenever a law enforcement official determines that it is necessary to withhold information, the official shall issue a brief statement explaining the decision.

Simply stated, where records are requested for an investigation which is in progress, that request may be denied, and the information as to the type of crime, location, etc. may also be withheld if the release of such information would jeopardize the investigation, or may be otherwise inappropriate to release. As such, the Prosecutor’s response as it pertains to all of Plaintiff’s five separately numbered requests was statutorily appropriate.

There are a host of reasons why disclosure of information at the inception of a criminal investigation would be harmful to the overall success of the investigation. Of course, the Prosecutor's Office routinely issues press releases when information as to the type of crime, location, date, weapon, etc. can be disclosed without harm to the investigation. Indeed, disclosing that information also necessarily discloses the fact that there is a pending investigation into the crime. However, this was the case of an "anonymous tip" to a member of the public, of circumstances which might have proven to be criminal once investigated, on a matter which was not common knowledge to even those closely associated with the involved parties. Premature public dissemination that the matter is being investigated by the County Prosecutor could bring the investigation to a screeching halt, because the element of surprise has been eliminated. The New Jersey Legislature did not want that to happen, so for investigations that are ongoing, where the investigation would be jeopardized or the information would be "otherwise inappropriate" to release, law enforcement agencies are not required to release it. N.J.S.A. 47:1A-3.

Not only does the ongoing investigation exemption apply, but the general criminal investigatory exemption also applies. OPRA states that a "government record shall not include" records which are "deemed to be confidential." One such category is "criminal investigatory records," defined as "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. The documents in the possession of the Atlantic County Prosecutor's Office regarding this investigation fall into both the ongoing criminal investigation exemption and the general criminal investigatory exemption, and as such, the request was appropriately denied.

Plaintiff has cited only two cases which he argues limit the applicability of the criminal investigatory exemption. He cites to McClain v. College Hospital, 99 N.J. 346 (1985), which does not even concern criminal investigatory records, and was decided 17 years before the OPRA statute was passed. Plaintiff's other case, Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373 (App. Div. 2003) concerned a 911 tape which was being withheld in a case in which the criminal defendant had already been indicted and was awaiting trial. Such a case is hardly comparable to the instant case, in which the investigation is still ongoing, and no arrest has been made to date.

Since Plaintiff concedes that he is not entitled to these records because no arrest has been made, I turn now to the inappropriateness of a Vaughn index in this case.

**II. A VAUGHN INDEX IS NOT APPROPRIATE AS IT IS AN ALTERNATIVE TO AN *IN CAMERA* REVIEW, THE FILE IS NOT VOLUMINOUS, REDACTIONS ARE NOT AT ISSUE, AND THE APPLICABLE EXEMPTIONS ARE CLEAR.**

Plaintiff has submitted no case law which would compel Defendant to create a Vaughn index either now or at the time of the request, because no such authority exists. An important question where a Vaughn index is concerned in this case is the following: if N.J.S.A. 47:1A-3 allows a custodian to withhold *even the type of crime* from a requestor if it would jeopardize the ongoing investigation, how could an *index of every document* in the file be required? Such an index is not required, and if ordered, would jeopardize this investigation tremendously.

A Vaughn index is an alternative to an *in camera* review, where it may not be clear whether exemptions apply, or where multiple exemptions may apply to various parts of large documents, and the Court may need the aid of opposing counsel to argue against the applicability of certain exemptions. Therefore, **because Plaintiff has already conceded that the ongoing investigation exemption applies, there is no reason to (1) have an *in camera* review or (2)**

order a Vaughn index to determine whether the exemption applies. Before I get into more of the reasons why such an index would hamper the ongoing investigation, I have prepared the following "index" of caselaw with regard to the Vaughn index, to demonstrate why an order instructing Defendants to prepare one in this case would be inappropriate:

CASE	COURT'S REASONING	OUR CASE
<p><u>Vaughn v. Rosen</u> 484 F.2d 820 (D.C. Cir. 1973)</p>	<p>"[T]he trial court, as the trier of fact, may and often does, examine the document <i>in camera</i> to determine whether the Government has properly characterized the information as exempt." "In theory, it is possible that a trial court could examine a document in sufficient depth to test the accuracy of a government characterization, particularly where the information is not extensive. But where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case. <i>Id.</i> at 825.</p>	<p>An in camera review would do nothing to aid the Court in determining whether the ongoing investigation exemption applies. The Certification of Kate Bond, indicating that the investigation is ongoing, is all the Court needs. Additionally, regarding the help an interested party would give to the trial court in analyzing the documents, <b>Plaintiff has already conceded that the applicable exemption applies.</b></p>
<p><u>Paff v. NJDOL</u>, 379 N.J. Super. 346, 355 (App. Div. 2005)</p>	<p>"We do not imply that an <i>in camera</i> review is required in a case in which the document is per se exempt from access under OPRA. <i>See, e.g., N.J.S.A.</i> 47:1A-1.1 (defining government records to exclude, among other things, criminal investigatory records and emergency procedures for buildings."</p>	<p>These documents are per se exempt under the exact exemption which the Appellate Division noted here – the criminal investigatory exemption.</p>
<p><u>Paff v. Division of Law</u>, 412 N.J. Super. 140 (App. Div. 2010)</p>	<p>"A Vaughn index is used in circumstances where it is evident that some of the documents may not in fact be privileged. The Law Division's order here (ordering defendant to prepare a list of documents withheld) was not appropriate because the judge had already determined that each of the AAA's (Administrative Agency Advice letters) was privileged." <b>*Also note – "the judge erred by ordering the Division to provide such a list. That being so, the judge's conclusion that plaintiff was a prevailing party entitled to counsel fees was in error."</b> <i>Id.</i> at 144-45.</p>	<p>Because the ongoing investigation exemption applies, and the documents are rendered confidential and not accessible under the statute, ordering a list of the documents would be inappropriate, and according to <u>Paff</u>, reversible error.</p>

The binding precedent set by our Appellate Division directs that (1) if the documents are per se exempt, no *in camera* or Vaughn index is required; (2) to order a Vaughn index of documents which are exempt is reversible error; and (3) the whole point of a Vaughn index is to help the trial court in inspecting the documents to determine whether the exemption applies (like in the case of the advisory, consultative, or deliberative exemption being claimed). By Plaintiff conceding that if no arrest has been made, he is not entitled to the documents, he is also necessarily conceding that he is not entitled to an index of those documents, by the caselaw that he himself created.

There is a criminal investigatory exemption and an ongoing criminal investigatory exemption for a reason: because criminal investigations cannot be hampered or handicapped by the release of information prematurely. If N.J.S.A. 47:1A-3 allows a law enforcement agency to withhold even the most basic information about an investigation if the release of that information would jeopardize the investigation, it would run counter to those objectives to release an index of every document in the file with a description of same. The statute doesn't require it, there is no caselaw requiring it, and Plaintiff is certainly not entitled to attorney's fees even if it were to be ordered (just as he would not be entitled to attorney's fees if an *in camera* review were ordered).

Lastly, if Plaintiff were to argue that a certification from the Records Custodian was required, as discussed in the case of Paff v. NJDOL, 392 N.J. Super. 334 (App. Div. 2007), it is clear that such certifications are only required when some documents are turned over, and some are not, as a measure to ensure the completeness of the response.

### III. THE PUBLIC INTEREST IN CONFIDENTIALTY OUTWEIGHS PLAINTIFF'S INDIVIDUAL INTEREST IN DISCLOSURE UNDER THE *LOIGMAN* FACTORS

In the alternative to his OPRA argument, Plaintiff argues that he is entitled to the materials under the common law right of access. "For records to be disclosed under the common law, requestors must make a greater showing than required under OPRA, specifically: (1) the person seeking access must establish an interest in the subject matter of the material; and (2) the citizen's right to access must be balanced against the State's interest in preventing disclosure." Mason at 67-68. Plaintiff cites to Loigman v. Kimmelman, 102 N.J. 98 (1986) to support his argument that he is entitled to these records under the common law right of access. Though it is true that the common law right of access is broader than OPRA, the New Jersey Supreme Court, in Loigman, identified limitations on that right when it comes to certain public records; specifically, investigatory records. "When 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 a citizen's status and good faith are necessary to call for production of the documents. Id. at 105. There is no higher degree of confidentiality when an ongoing criminal investigation is concerned.

The Loigman decision provides much guidance to courts on access to investigatory records in general, and the process that courts must undertake in evaluating an individual's right to such records. The Court identified various privileges concerning access to investigatory material, including the agency privilege of self-examination and the oft-cited Freedom of Information Act (FOIA) exemption for investigatory material. The Court concluded that:

Each of these privileges concerning access to investigatory material is premised upon the government's need to conduct such affairs with skill, with sensitivity to the privacy interests involved, and in an **atmosphere of confidentiality that**

**encourages the utmost candor.** That need is made explicit in N.J. Executive Order No. 48 (1968), reprinted in 1968 N.J. Laws 1718-19, directing that State Police investigative files or their contents are not to be turned over or divulged, absent court or executive order, so that the vital public interest in, among other things, the success of criminal prosecutions and the protection of potential witnesses and informants may be safeguarded. Id. at 1719. **Since there is a high degree of need for confidentiality in such materials, more than a showing of good faith and citizen status will be required to overcome the public interest in confidentiality. It does not constitute a clear showing of such public need to say only that there may be something corrupt that should be exposed for the benefit of the public.**

Id. at 105, emphasis added.

As can be gleaned from the last sentence of Plaintiff's brief, he obviously believes that there is an effort to sweep the circumstances of this investigation "under the rug." This kind of unfounded belief that "there may be something corrupt that should be exposed" is *exactly* what the New Jersey Supreme Court directed is not enough to establish a clear showing of public need.

The Loigman factors, which Plaintiff cites on the sixth page of his brief, are those factors which a court would consider during an *in camera* inspection of the documents, once the court determines that such an inspection is appropriate. I have already addressed the reasons why the confidentiality of these documents was important enough to the New Jersey Legislature to allow for law enforcement agencies to withhold them. I will address each of these factors in turn.

The first consideration that a court must examine is the "extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government." Id. at 113. The second consideration ties in with the first, in that courts should also consider 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." Id. In terms of an ongoing investigation, which may have just begun, premature release of information may lead to

the (1) loss of cooperation of witnesses, or the cooperation of the criminal defendant; (2) would remove the element of surprise which is beneficial to law enforcement in speaking to witnesses or future suspects; (3) would tip off suspects that there is an investigation going on, leading to flight; (4) could jeopardize the safety of the victim or defendant depending on the type of crime reported; (5) may lead to an inaccurate release of the type of crime reported, as the investigation may reveal that no crime was actually committed, or a crime of a lesser or greater degree was committed; (6) may destroy the reputations of the victim and/or suspect, if it were to be found that the crime reported or complaint which was made was not credible in the first place; (7) may increase public hysteria at a stage of the investigation where cooperation from members of the public may be necessary to the investigation; (8) may discourage private citizens or public official witnesses from coming forward with information which may further future investigation(s); (9) persons with information may fail to come forward or cooperate with law enforcement for fear of reprisal by members of the public.

The third factor is the "extent to which agency self-evaluation, program improvement, or other decision-making will be chilled by disclosure." *Id.* This factor also weighs heavily in favor of non-disclosure. The secrecy with which prosecuting agencies are allowed to work, in developing a case, is crucial to the success of criminal investigations. If courts were to all of a sudden order that information about an ongoing investigation must be turned over to the public, even if ordered under the common law, it would result in fewer arrests, convictions, and more criminals on the streets.

The fourth factor is "the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers." The fifth factor is "whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the

investigative agency.” The sixth factor is “whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual’s asserted need for the materials.” These factors all apply, in various degrees, to ongoing criminal investigations, especially one in which a public employee is involved.

Lastly, Plaintiff would not be entitled to an award of attorney’s fees under OPRA or the common law, as he is not a prevailing party under either.

**IV. FOR THE FOREGOING REASONS, PLAINTIFF’S COMPLAINT SHOULD BE DISMISSED AS IT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED**

Pursuant to R.4:6-2(e), dismissal of a Complaint is appropriate when no basis for relief is stated and discovery would not provide one. Energy Rec. v. Department of Environmental Protection, 320 N.J. Super. 59, 64 (App. Div. 1999); Holman v. TRW Inc., 330 N.J. Super. 30, 32 (App. Div. 2000), *aff’d* 167 N.J. 205 (2001).

This action was brought in summary manner pursuant to R. 4:67-1(a). N.J.S.A. 47:1A-6 requires that a proceeding challenging a custodian’s decision to deny access “shall proceed in a summary or expedited manner.” This statutory language requires a trial court to proceed under the procedures prescribed in R. 4:67-1. The Comment to R. 4:67-1 states that, “[a] summary action is, of course, not a summary judgment proceeding. In a summary action, findings of fact must be made, and a party is not entitled to favorable inferences such as are afforded to the respondent on a summary judgment motion for purposes of defeating the motion.” O’Connell v. NJM, 306 N.J. Super. 166 (App. Div. 1997). Additionally, the court in MAG, supra at 550, stated that proceedings under OPRA are to be conducted in a “summary or expedited manner,” and the court must try the case at the return date of the order to show cause or on such short day as it fixes.” As such, I respectfully submit that this Court has everything before it that it needs to

render final judgment on the return date of the motion. Plaintiff is aware that the ongoing investigation applies; and was aware at the time of the filing of the Complaint. There is no authority under the law for Plaintiff to have filed this action in order to get an index of document which are per se exempt under the OPRA statute. As such, not only is he not entitled to same, but he is also not entitled to attorney's fees, and the Verified Complaint should be dismissed with prejudice.

**Conclusion**

Based on the foregoing, Defendants respectfully request that this Court enter an Order dismissing Plaintiff's Verified Complaint with prejudice.

Respectfully submitted,



---

Elizabeth C. D'Ancona  
Assistant County Counsel

ECD/

cc: Donald M. Doherty, Jr., Esquire

## ATLANTIC COUNTY LAW DEPARTMENT

1333 Atlantic Avenue, 8<sup>th</sup> Floor

Atlantic City, NJ 08401

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Elizabeth C. D'Ancona, Assistant County Counsel

State Bar ID: 000842011

Attorney for Defendants Atlantic County Prosecutor's Office and Kathleen Bond

John Paff,

Plaintiff,

v.

ATLANTIC COUNTY PROSECUTOR'S  
OFFICE, and KATHLEEN BOND, Custodian  
of Records

Defendants

SUPERIOR COURT OF NEW JERSEY  
ATLANTIC COUNTY  
LAW DIVISION

DOCKET NO.: ATL-L-5747-14

Civil Action

CERTIFICATION OF COUNSEL

I, Elizabeth C. D'Ancona, Assistant County Counsel, on behalf of Defendant Atlantic County Prosecutor's Office and Kathleen Bond, of full age, certify that:

1. I am an attorney admitted to practice law in the state of New Jersey; Assistant County Counsel, Atlantic County, Atlantic County Department of Law, 1333 Atlantic Avenue, 8<sup>th</sup> Floor, Atlantic City, New Jersey. I am appearing on behalf of Defendants, Atlantic County Prosecutor's Office and Kathleen Bond.

2. Attached as Exhibit A is a true and correct copy of the Certification of Kathleen Bond.

I certify that foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment

By:



Elizabeth C. D'Ancona, Assistant County Counsel  
For Defendants, Atlantic County Prosecutor's Office  
and Assistant Prosecutor Kathleen Bond

Dated: December 5, 2014

# **EXHIBIT A**

## ATLANTIC COUNTY LAW DEPARTMENT

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State Bar ID: 000842011

Attorney for Defendants Atlantic County Prosecutor's Office and Kathleen Bond

John Paff,

Plaintiff,

v.

ATLANTIC COUNTY PROSECUTOR'S  
OFFICE, and KATHLEEN BOND, Custodian  
of Records

Defendants

SUPERIOR COURT OF NEW JERSEY  
ATLANTIC COUNTY  
LAW DIVISION

DOCKET NO.: ATL-L-5747-14

Civil Action

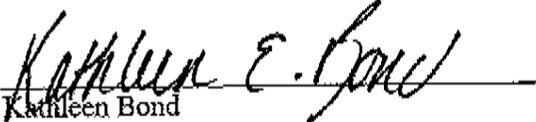
CERTIFICATION OF  
KATHLEEN BOND

I, Kathleen Bond, Assistant Prosecutor, of full age, certify that:

1. I am the Records Custodian for the Atlantic County Prosecutor's Office.
2. No arrest has yet been made regarding the allegations Mr. Paff references in his OPRA request.

3. As such, this is still an ongoing investigation.

I certify that foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

By:   
Kathleen Bond

Dated: December 8, 2014

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December 11, 2014

Via FedEx & Fax  
The Honorable Nelson Johnson, JSC  
Civil Court House  
1201 Bacharach Blvd.  
Atlantic City, NJ 08401

Re: Paff v. ACPO, et. als.  
Docket No. ATL-L-5747-14  
OSC hearing date 12/15/14

Dear Judge Johnson:

I am sure Your Honor already knew, or perhaps you could guess by reading the opposition, but the ACPO does not release records about any criminal investigations ever, unless they want to do so for reasons of their own choosing. And that is exactly the argument proffered here. Read even casually, the arguments are absent of specifics and long on “what ifs” and “may be”. Public access will never yield to the deliberately imprecise.

OPRA

Here, the ACPO contends that Plaintiff conceded he is not entitled to records. I am not sure how one comes to that conclusion given that a lawsuit was filed. The premise of the opposition, faulty one that it is, seems to be that the release of all records is barred by the “investigatory records exception” found under N.J.S.A. 47:1A-3. The Defendants offer no specifics how releasing any of the material sought jeopardizes

THIS investigation. Like Ramses in The Ten Commandments decreeing “so it shall be written, so it shall be done”, Defendants think the law is what they want it to be. It does not work that way in New Jersey 2014.

The only possible way Your Honor could ever rule completely in Defendants favor would be to ignore N.J.S.A. 47:1-3(b) (but Plaintiff’s case has legs under both sections, as will be demonstrated below). What is filed here prevents the Court from ruling in their favor on anything.

Defendants position is that every investigation is jeopardized by the release of any information. Given that the Court is bound to apply any exception to disclosure narrowly as a general rule under N.J.S.A. 47:1A-1 should be enough to defeat the ACPO here because of the lack of specificity. But the legislature took additional steps under N.J.S.A. 47:1A-3, rendering their position even more tenuous:

.....(a) exempts from access records relating to investigations in progress when such access would be inimical to the public interest. The provision sets forth, “*where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access . . . may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest.*” The statute goes on to state, “*this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.*” Ibid. Accordingly, to assert this exemption, Defendants must show both there is a pending investigation and the disclosure would be inimical to the public interest. Importantly, though, records open to public access prior to commencement of investigation remain open despite the existence of subsequent investigation.

In Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 356 (App. Div. 2003) the appellate division specifically rejected the “investigation in progress” exemption to access based on the limiting language of the statute, noting the 911 tape was created hours before the police investigation began. “If it was public record when created, then it would remain accessible to the public under N.J.S.A. 47:1A-3(a) even if its release would be inimical to the public interest.” See also, Asbury Park Press v. Lakewood Twp. Police Dep’t., 354 N.J. Super. 146, 157 (Law Div. 2002) observing, “...it cannot be said that the [9-1-1] tapes are produced for investigation purposes in the same sense as the other documents listed in the Executive Order. They are made because they are required by law to be made and maintained and they are generally made at a time when no investigation has commenced.”

Accordingly, the “investigation in progress” exemption cannot be asserted as to materials created prior to any investigation of the incident. And without a Vaughn index, no one has any idea what records there are - but in the least, anything sent from Margate or the Margate fire department predates the investigation. That is an “easy” call.

Also, the ACPO has simply stated that revealing anything it has is inimical to the public interest. Defendants did not say “what” it possesses or “why” releasing a given document particularly affronts the public interest. Instead it proffers a wide range of hypothetical reasons why various things cannot be released for various reasons in various cases. The ACPO filing lacks any specifics tying arguments to this case. And it is undeniably required to do so to get any traction at all under the statute. The ACPO has the burden of proving the denial is authorized by law. N.J.S.A. 47:1A-6. As such, it “must produce specific reliable evidence sufficient to meet a statutorily recognized

basis for confidentiality. Absent such a showing, a citizen's right of access is unfettered.” Courier News v. Hunterdon, 358 N.J. Super. 373, 383 (App. Div. 2003)

.....(b) also allows for the release of materials of the type sought here. Please appreciate that Plaintiff never limited his case to this point; it was only presented in the OSC to demonstrate Plaintiff would likely win this point and there was a colorable case for Your Honor to consider signing an OSC to proceed. Without the ACPO delineating a rationale in the denial, it was unknown exactly what its real position was/would be. Even its brief now fails to specify any particulars but at least it addresses parts of the statute.

The least Plaintiff should ever get - which is more than the “nothing” he got - in the nature of the crime and how it was accomplished. The sole caveat is that it can be withheld if it will jeopardize a person or investigation. And that sole exception is subject to “narrow construction”. “Narrow construction” obviously entails that “every investigation/all the time” will not suffice as a reason because then the exception will have swallowed the rule. Defendants’ interpretation of this provision effectively swallows the mandate in N.J.S.A. 47:A-3(b), rendering it meaningless. This is contrary to the rules of statutory interpretation. “Fundamental rules of statutory construction militate against an interpretation of a statute that requires a court to assume a provision is surplusage; the presumption is ‘that every word in a statute has meaning.’” Fletcher v. Cessna Aircraft Co., 412 N.J. Super. 530, 536 (App. Div. 2010) (quoting In re Att’y Gen.’s “Directive on Exit Polling: Media & Non-Partisan Pub. Interest Groups,” 200 N.J. 283, 298 (2009)). When interpreting a statute, the “goal is to interpret the statute consistent with the intent of the Legislature.” Oberhand v. Dir., Div. of Taxation, 193 N.J. 558, 568 (2008). Interpretation begins with consideration of the plain language of

the statute. Ibid. Each word of the statute should be given its proper effect, and the court “should not assume the Legislature used meaningless language.” Med. Soc’y of N.J. v. N.J. Dept. of Law and Pub. Safety, 120 N.J. 18, 26 (1990). Interpreting statutes in a way that would “render any part . . . inoperative, superfluous or meaningless” is to be avoided. Hoffman v. Hock, 8 N.J. 397, 406 (1952). The ACPO is required to demonstrate just how the release of the material becomes problematic for this investigation. It does not. And it cannot.

One must examine the facts as known - and since the Plaintiff is the only one that provided facts, that is all Your Honor has to work with. At the time the request was made here is what was known and none of it is disputed by the ACPO:

1. A Margate fire department lieutenant embezzled, defalcated or otherwise somehow took money from the Fireman’s Benevolent Association.
2. Margate and city staff know about it. The City Attorney even acknowledges the circumstances when directing the Plaintiff to the ACPO for further information.
3. The alleged criminal knows that he is being investigated. We know this because Margate passed the investigation off the ACPO, the accused has secured an attorney and he has started (and probably by now completed) making restitution.

From the above, releasing materials, including but not limited to those that outlined the nature of the crime, cannot possibly jeopardize an investigation. The (alleged) perpetrator is already known. Therefore it is not as if he is getting tipped off that the law is on to him and he will flee before the long arm of justice secures him. And we know he knows because he got a lawyer and had begun paying the money back. So there is no risk that the perpetrator will flee BECAUSE the information is released. He may flee for other reasons, but that has nothing to do with the request.

We also know that the crime involves checks and banking accounts. Typically,

this means it is a “paper trail” case. In contrast if this were an unresolved murder and the murder weapon is unique, it could be destroyed and not recovered if a yet-to-be-caught perpetrator were to learn the police were looking for a WWII-era Luger .45. That is not an analysis structure that works here. The (alleged) criminal cannot really cover his tracks in a forged check/bank account related case. If he threw the checkbook into the Atlantic all one has to do is call up Ocean City Home Bank and get another copy of the statements and checks.

The Vaughn index also dovetails into the response by the ACPO. Neither I, nor Your Honor know what documents the ACPO possesses. We do not know what documents predate the investigation - although we can be certain some do. We do not know what documents describe the type of crime and how it was committed - but we know some do. The Court should order those materials to be produced. Whatever is possessed that does not fall into one of those categories should be included on a Vaughn index supplied to me and complete documents supplied to Your Honor for an in chambers review. Even in the response the ACPO does not specify what it has, when it was created, whom was the creator and a specific exemption that would apply.

The ONLY time a Vaughn index or in camera review are not required is if the records are per se exempt. For example, if Paff asked for the health history of opposing counsel, that is per se exempt and there is no reason to look at it. Here, the ACPO has simply stated it determined all records are per se exempt. Their view does not make it so. Will some records be exempt? Very likely. Will all of them be exempt? Impossible. Your Honor does not merely accept the Defendants’ determination that what is sought is exempt. You have to evaluate the record and the asserted exemption. “[W]hen a claim of confidentiality or privilege is made by the public custodian of the record” the

court must “inspect the challenged document in-camera to determine the viability of the claim.” MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 551 (App. Div. 2005). The Vaughn index is a tool that assists if the records are voluminous.

### The Common Law Right of Access

While the arguments made by the ACPO regarding OPRA are devoid of any specificity, the analysis of the common law is even more thoroughly faulty as it lacks any analysis whatsoever. The Defendants merely spew a litany reasons why some records are not to be released in some cases. It is impossible to fight such a theoretical hypothetical. However, what I can point out is that the courts overseeing common law claims require some type of concrete proof. Note that in Courier News the Appellate Division rejected theories that releasing records would jeopardize juror selection and cause juror confusion, faulting the lack of any evidence to support such arguments. And the same judge that allowed access to 9-1-1 tapes in Asbury Park Press v. Lakewood Twp. Police Dep’t., 354 N.J. Super. 146 (Law Div. 2002) when Lakewood could not marshal a factually-specific justification, denied access to 9-1-1 tapes when the factual showing of privacy and trauma were shown. Asbury Park Press v. Ocean County Prosecutor’s Office, 374 N.J. Super. 312, 315 (Law Div. 2004)

The bottom line is that Defendants’ blanket argument, like its blanket policy from it springs, fails because Your Honor cannot weigh the balance of anything when no specifics are provided. Without any facts or a record to look at, how is Your Honor supposed to balance anything with this argument:

~~These factors all apply, in various degrees, to ongoing criminal investigations, especially one in which a public employee is involved.~~

Def. Brief, page 11 It takes a heap of intellectual arrogance to simply point out the Loigman factors and state they all apply and mitigate against release. Who is supposed to figure that out? I thought it was the Defendant. I certainly don't know if a document will cause a witness to flee. I don't even know if there is a witness. If Your Honor wants to debate theory, we can find a bar and get a beer. But the purpose of opposition is to give Your Honor something about this case to address. There is nothing here. For all I know - but I do suspect - the analysis may be similar to OPRA and total failure to address any substantive argument is meaningless. But the burden is on them, not you or I to do that.

#### Conclusion

Devoid of analysis, lacking in specificity and simply deeming the records exempt is not a proper public records case opposition. In fact, the very nature of proceeding in such a fashion demonstrates how and why Mr. Paff wins. As the Defendants have failed to justify the withholding of anything with specificity required under N.J.S.A. 47:1A-6 they should lose and be forced to turn the entire file over. But I know Your Honor will not do that. At this point, the Court must at least compel the release of all pre-investigation commencement materials and materials which explain the nature of the crime and how it occurred. From there, the ACPO must be sent back to list the documents it possess, prepare a Vaughn index for me along with a rationale for withholding a particular record and provide the records to Your Honor to review.

Respectfully,