SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART ATLANTIC COUNTY, NEW JERSEY DOCKET NO. ATL-L-5428-13

JOHN PAFF,)

Plaintiff.

Transcript

of Order to Show Cause Hearing

GALLOWAY TOWNSHIP AND)

THALIA C. KAY in her official capacity

as Municipal Clerk and Records Custodian of Galloway Township

v.

Defendant.

Place:

Atlantic County Courthouse

1201 Bacharach Boulevard Atlantic City, NJ 08401

Date:

November 1, 2013

BEFORE:

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

TRANSCRIPT ORDERED BY:

MICHAEL J. FITZGERALD, ESQUIRE Fitzgerald, McGroarty & Malinsky

APPEARANCES:

WALTER LUERS, ESQUIRE Attorney for the Plaintiff

MICHAEL J. FITZGERALD, ESQUIRE (Fitzgerald, McGroarty & Malinsky) Attorney for the Defendants

TRANSCRIBER: BONITA K. BRUMBACH, CAD/T

P.O. Box 741

HADDONFIELD, NJ 08033 PHONE: (609) 525-2149

DIGITAL RECORDING

RECORDING OPERATOR: JACK SAMMONS

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THE COURT: This is the matter of Paff v. 1 2 Galloway Township. I'm looking for a docket number. I think you, Mr. Luers, I think you put one 3 docket number on one thing and another docket number on 5 another thing. 6 MR. LUERS: That wouldn't surprise me. 7 THE COURT: You confused me. That's okay. I'm 8 easily confused but I get straightened out. I think this 9 is L --10 MR. LUERS: 5428-13, Your Honor. 11 THE COURT: Okay. 12 MR. LUERS: And I'm using Mr Fitzgerald's brief 13 so I know it's right. One of the pleadings you put 14 THE COURT: Oh. 15 Cape May County on it too, and we're in Atlantic. 16 not doing that to pick on you. I'm just --17 MR. FITZGERALD: I did. 18 THE COURT: Oh, no. You said Cape May. 19 MR. FITZGERALD: I apologize. 20 THE COURT: You said Cape May. 21 MR. LUERS: You can't trust either of us, 22 Judge. 23 THE COURT: Of course. Do we know that we have 24 the right docket number before we get started? Because

if you look at these papers there's a couple different

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docket numbers. I think the docket is, and the reason I'm saying is it's staff's handwriting, L-5428-13. Am I right?

MR. FITZGERALD: Yes, Your Honor. 5428-13.

THE COURT: All right.

MR. FITZGERALD: 5248-13.

THE COURT: So we got the right case, we're on the record. Gentlemen, please enter your appearance.

MR. LUERS: Good morning, Your Honor.

Appearing on behalf of John Paff, who's here with us today in the gallery, Walter Luers.

MR. FITZGERALD: And Michael Fitzgerald, Fitzgerald, McGroarty and Malinsky, appearing for Galloway Township. And I have the clerk here, T.C. Kay.

It's a pleasure dealing with two such capable attorneys, and it's a pleasure chewing on an issue like this.

Because I think when we get through we may have more questions because I may see this a little bit differently than both of you see it. But the defendant always has the duty of going first on an order to show cause because you're here to show cause why he shouldn't have these documents, right, Mr. Fitzgerald.

MR. FITZGERALD: Yes, Your Honor.

THE COURT: Okay. So show us cause why.

MR. FITZGERALD: I do have to say that I was honored to have Galloway Township be the target of this lawsuit. But I would have declined the honor if I had the opportunity. I would have preferred that they go after the GRC or some other state agency and let them foot the bill, but --

THE COURT: GRC's no fun.

MR. FITZGERALD: -- here we are. Yeah. Or some other state agency. Could have made the same request to many people. I mean the basic concept to get back to is that a log is a list and a list is not a document or record that exists in the township. And that's been the consistent --

THE COURT: I'm going to interrupt you.

MR. FITZGERALD: Yes, Your Honor.

THE COURT: I'm going to interrupt you because in his pleadings I want to make sure, I always like agreeing upon whatever we can agree upon ---

MR. FITZGERALD: Okay.

THE COURT: -- and then worry about the fights later. And that's proven to be a pretty good approach towards most things over the years. He uses the term metadata.

MR. FITZGERALD: Absolutely, Your Honor, not applicable. If you --

THE COURT: Well, hold on. Let's make sure we understand what we're talking about when we use the term metadata. Because I see it as, in a colloquialism, then giving you a very simplistic metaphor, I think metadata is information about information if you were to define the term. Is that --

MR. LUERS: That's exactly, exactly what it is.

THE COURT: Do we agree upon that?

MR. FITZGERALD: To that --

THE COURT: It's information about information.

MR. FITZGERALD: Up to that point.

THE COURT: Sort of like going into the library and, you know, libraries the way they used to be when we were young, I don't know -- you're not as old as him and me. But going into a library and going to a card catalog. Isn't a card catalog of a library metadata?

It's got the name --

MR. FITZGERALD: Your Honor --

THE COURT: It doesn't have the book, but it's got the name of the author, it's got the title, it's got the date of publication, it's got this overview of all that stuff that's in the stacks.

MR. FITZGERALD: Your Honor, metadata has to, as in the cases from Washington and the other ones that were cited, also the federal discovery cases, in those

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there was a document and the request was for the document with the associated, the embedded metadata in the document, not for providing a --

THE COURT: I'm not worried about the case law right now. I'm going to see if the three of us can have a workable definition going forward of what is metadata.

MR. FITZGERALD: Metadata --

THE COURT: It's information about information.

MR. FITZGERALD: Up to that point, Your Honor. But then you have to look at how does it apply to emails. And the way it's used in emails.

THE COURT: No, you're getting, you're faster than me. I'm just trying to agree upon the term, that's all.

MR. FITZGERALD: Okay. Data about data.

THE COURT: I mean do you think -- correct, it's data about data, information about information. And you think my card catalog analogy works? I think it's sort of what we're talking about.

MR. FITZGERALD: Only because if that information is in the document itself as well, in the book if you want to use that analogy.

THE COURT: That information is in the book, yeah. Yeah.

MR. FITZGERALD: Yes.

THE COURT: The author, the title, the publisher is in the book.

MR. FITZGERALD: Right. So when --

THE COURT: The card catalog takes all that stuff, sort of skims it, skims out that stuff and says, here.

MR. FITZGERALD: Okay.

THE COURT: Go look for it.

MR. FITZGERALD: Except the fact that if you open up the back of more library books and I, frankly I haven't been in the library and pulled a book out of a library in many, many years.

THE COURT: You need to.

MR. FITZGERALD: But as I recall, that card in the back and the slip, generally they would have the, you know, the filing information in the book itself. And so if you're using it in the OPRA context you would ask for the book and you would also get that information that goes with the book. In the electronic sense it's the information, the data embedded in the document, be it an email, an electronic contract, a resolution, whatever the document there's embedded data with respect to that particular document, that record. And that's what those cases deal with. Because otherwise you're, in effect you're syphoning information if, you can't make a

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request, let's say, to the librarian to go and find me all the books that deal with a particular subject.

That's not an appropriate use --

THE COURT: That depends upon the librarian. Some of them are more cooperative than others.

MR. FITZGERALD: Some of them are very cooperative. But if you want an analogize it to OPRA you have to identify documents. And OPRA has been very consistent for years that you have to identify, if it's an email, give information about the email. As cases cited in New Jersey it's not a tool used for research, it's not something that you go through and ask the custodian to syphon off information for you. You get a document. And the question is an interesting one for New Jersey because I don't believe it's ever been addressed. You ask for an email, are you entitled to the background, the meta data for that document? Who it came to, when it was revised, all of that.

THE COURT: You're putting your thumb on one of the issues that I think is going to have to be looked at carefully. OPRA is intended to give the public full and free access to government records as defined by the statute. The common law is expressly preserved in OPRA so we have areas that go beyond what OPRA does depending upon how you balance things. But in any balancing, in

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any consideration I do have to focus on the mission of the governmental agency that's being asked to provide things. And the mission of the police department is to look after the safety of the community and the mission of the clerk's office is to run the township in an efficient manner. And if a request gets made that unnecessarily diverts them from their mission then you have to be concerned about, well how much of a distraction does this come, become for the public agency and what are we doing here? Are we turning public employees into research assistants? So, you know, those questions are real, those questions are very real. But --

MR. FITZGERALD: Your Honor --

THE COURT: -- on this . . .

(TRANSCRIBER'S NOTE: FAULT IN RECORDING SYSTEM. NO SOUND RECORDED FROM 9:22:32 AM TO 9:39:53 AM.)

MR. SAMMONS: Okay, Judge, I'm sorry.

THE COURT: Hey, the blue man's up. So go ahead, Mr. Luers, give us the tail end of what you said. I think we may have lost about a minute.

MR. LUERS: Actually Your Honor was asking me, you know, Mr. Luers, what about the city, maybe a couple of minutes ago.

THE COURT: Okay. Let's, okay. A realtor goes into a tax assessor's office. He gives them three block

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numbers on the tax map and he says I want to know all of the lot numbers of all of the properties that are zoned for commercial use and I want to know the assessed value of all of them. And he might even throw in, and I want to know the date of the last transfer of the properties, because all that information is in the tax assessor's files, okay? And all that information is public. How should the municipality respond to that?

MR. LUERS: If their system is capable of producing a report, of producing that data they're obligated to do it.

THE COURT: What if they aren't?

MR. LUERS: If they're not then we go to the special service charge inquiry.

THE COURT: Correct. And you may, we may be there, too, because when I look at Eric McCarthy's -- and we're going to have to talk more about this because when I read Eric McCarthy's certification it was almost like, you know, what's the expression, MEGO, my eyes glaze over. A through K, man. You know, bam, bam, bam. But let me cut to the chase. I got through reading this and I said to myself on the judiciary's primitive computer system, which it is pretty primitive compared to what's going on in the rest of the world, we have difficulty keeping pace because of funding, I went to my

email and I said how difficult would it be for me to print out a log of all of my emails to the rest of the world given a certain time period. I'm here to report that it didn't take me 30 seconds. And I have a listing of all my emails that I sent out between the dates of October 31st and September, I don't know why I kept all those, September 3rd, between those, printed out just like that.

MR. LUERS: And what's missing from the McCarthy certification --

THE COURT: But here's my question. Here's my question. We had, we have Microsoft Outlook. And in my limited experiences, and I've worked with a couple other email systems in private practice and then here on the bench I think this is the second or third different one in the last 8 years, I think this has always been available. I think for each user, for each user if they go and they look at the menu of documents that can be prepared I think you can get everything that was sent to you, you can get everything that you sent to somebody else. And unless you delete then, you know — they say nothing is ever deleted, I don't know about that or not.

MR. LUERS: Until it's overwritten, I guess.

THE COURT: Yeah. I don't know. People have tried to explain it to me. They said it's sort of like,

you know, the book is on the shelf and when you delete it all you're doing is taking the label off of it but it's still there and if you, and if somebody really wants to find it they'll find it. So I don't know if that's good or bad. As I said, it's a blessing or a curse. had no difficulty at all. I mean when I read mister, and I'm not challenging Mr. McCarthy's, you know, credibility in his rendition of A through K at paragraph 8, but when I read that I was like, whew, really? And I, and before I even asked for assistance from my assistant to just try to do this I said let me see if I can do this myself. And I sat down at the computer and I started looking at the little menu at the left-hand side up top and it said sent items. So I said let me click on this. The list of things comes up. And I said, my God, why didn't I get rid of those before? So then I figured out how to print it and I have every email that I sent out from September 3rd to yesterday, and it took me no time at all, Mr. Fitzgerald.

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MR. FITZGERALD: Your Honor, with all due respect, that's not the question. The question is whether or not --

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THE COURT: Then why am I being told A through

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K?

MR. FITZGERALD: Because --

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him walk through on the township's system. If I, you know, the Township keeps an OPRA log. There's no problem providing OPRA logs to the public because they maintain an OPRA log. If people wanted emails they can ask for an email. If they want to identify an email they get it. They get the data associated with the email, the metadata with the email. But what you're looking for, and going back to the fundamental case on this whole issue, the MAG Entertainment, it's not up to the custodian to do a, to do research.

THE COURT: I agree.

MR. FITZGERALD: They do a search --

THE COURT: I happen to agree with that.

MR. FITZGERALD: -- for a document.

THE COURT: I happen to agree with that.

MR. FITZGERALD: And if there's a document, and a report is a document, if it's there and it exists then the township has to provide it. I agree with that. But if it has to be created even if creation is not difficult, the clerk, and she deals with this all the time, people come and they ask questions rather than asking for a document. And unless she's in a particularly good mood and doesn't have anything else to do that day she tells them that you have to make a request for a document, you can't just ask me a question.

In effect, asking for this list you're asking a question, What were the emails in this time frame this person. If you want to identify and ask for the emails from chief of, Police Chief Moran to a certain person or on a certain date or time frame you can ask for that. But you can't ask the township to make up a list and give it to you. I acknowledge it would be a great convenience for people like Mr. Paff to have a list all the time of emails. It would be a convenience, but that doesn't make it a responsibility of the town under OPRA. It's very clear that that amounts, even though it may be minimal, it amounts to research, putting together, or as one case said, syphoning information.

enough to have an opinion on what you just said because in my system it would appear to be a document, it would appear to be something that all I have to do is click on it and print it out. So whether the computer put it together for me, I didn't have any big work to do. And so I'm reading all this A through K at paragraph 8 of Mr. McCarthy's certification and I'm asking myself, he has all these steps listed, but isn't, might not that be what the computer itself is doing for you?

MR. FITZGERALD: Well, whether he has a computer doing a search, because in effect this is what

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it is, it's a form of a search. And this is, I don't know that the township's computer system is unique but it's probably not the same as my home computer, my office computer.

THE COURT: What, I'm probably going to have to know, what is the email system that the township and the police department use. It could be different. What are the systems that they use?

MR. FITZGERALD: I don't know. Do you know?

MS. KAY: I know that we have two servers, one on the police side, one on the township side.

THE COURT: Two separate servers?

MS. KAY: Or they're at least --

THE COURT: Well, hold on, hold on, hold on. We have to administer the oath.

THALIA C. KAY, DEFENDANT'S WITNESS, SWORN DIRECT EXAMINATION BY THE COURT:

Q. Okay. Thank you. You can have a seat. And I appreciate your being here. But I'm, I know that there are different systems for sending email and we have Microsoft Outlook. But I also know --

THE COURT: What was the one we had, Jack, before they gave us this one?

MR. SAMMONS: Lotus Notes.

THE COURT: What?

MR. SAMMONS: Lotus Notes, Your Honor.

BY THE COURT:

- Q. Yeah. We had Lotus Notes before that. And then there was another one before that. But in all of those I think there's a means by which you can simply look at email that you received, look at email that you sent, look at email that you stored, look at, you know, whatever, and it's there. You simply, you know, print it out. Now do we know what the township system is, how it works?
- A. I know that I have Microsoft Outlook.
 - O. You do?
- A. As my email. I do knot know what the police side uses because that's why we have two different people handle OPRA's because the police side because of its integrity and the laws regarding --
- Q. I think they should have their own separate system, yeah.
- A. They have their own separate system. And I've not worked with it so I cannot tell you exactly what they use. I can only tell you what Eric has had to do when we have created, and I use the word created, an email log. And when Mr. Luers mentioned the statement of special service charges, the last request I got for an email log I did do the 14 point analysis for special service

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Q. Ms. Kay, if you need to find an email in the Microsoft Outlook system what do you do to find it?

charges, including time for Eric, time for myself. Both of them were under charged what we gave an estimate for and the requester refused to pay the special services charge.

- Q. Well, they didn't want it all that bad then.
- A. Hmm?
 - Q. They didn't want it all that bad.
- A. So I mean that's the situation that we have run into before because it does take Eric with the system that we use that amount of time to filter them out and bring them down and then print them off.

MR. LUERS: Your Honor, may I ask her one or two questions related to --

THE COURT: I'm going to, under the circumstances I'm going to permit it.

MR. LUERS: Okay.

THE COURT: Because this is, it's an order to show cause hearing but it's also a fact finding hearing because I'm trying to learn as much about this as I can.

CROSS-EXAMINATION BY MR. LUERS:

- Q. Ms. Kay, you said moments ago that you use the Microsoft Outlook for your email?
- A. Yes.

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A. For me?

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Q. Yes.

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question.

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Q. Let's say -- of course.

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THE COURT: And that's a fair reply.

In regards to what? You need to clarify your

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BY MR. LUERS:

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Q. Let's say that you're looking for a particular email sent to you from the mayor 10 days ago. What would

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you do to find that?

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A. Well, if I had who the sender was and I had the date

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I would, because I keep all of my email correspondence

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live on my computer, I would go down and scroll and see

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if I could find it. But I would have had to have had who

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the sender was and the date.

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Q. Can you sort your emails by the sender?

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A. Yes.

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Q. Can you sort your emails by the, by a date range?

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A. Let me go back to your question about can I sort it by sender. I can sort by, alphabetically.

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Q. Yes. Absolutely.

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A. Alphabetically. But that does not necessarily give me the sender's name. It may be a number, it could be

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something else. So I can't guarantee who the sender

would be.

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Q. You can -- were you finished with your answer? Okay.

- Q. You can sort by name alphabetically, correct?
- A. Correct.
- Q. Can you perform searches for individual words that may appear in emails?
- A. I can go by subject.
- Q. When you say by subject do you mean you can search the words that appear in the subject line for emails?
- A. Yes.

THE COURT: I don't know if you can sort individual words in an email or not, like every time somebody may have used the word special in an email. I don't think you can do that. You can search the subject and the subject might be Smith v. Jones, but can you cite the word special where the lawyer said this is really a special case. I don't know that you can do that.

MR. LUERS: It depends on the capabilities of the specific system.

THE COURT: I mean I don't think I can.

MR. LUERS: Yeah, you -- one can, but it depends on the specific system.

THE COURT: If I had the capability I still

can't, so.

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BY THE WITNESS:

A. But again you're asking me to search. You're asking me to look for, you're not giving me a specific document to find.

BY THE COURT:

- Q. No, but let's what would be the steps that you would go through here, which is June 3rd to June 17th, all the emails you sent? How would you do that?
- A. I would basically ask Eric to do a printout for it.
- Q. You would ask him to do it. Okay. You wouldn't think you could do it yourself?
- A. I would not do it myself, no.

REDIRECT EXAMINATION BY MR. FITZGERALD:

- Q. Would one of the concerns be whether or not it's done properly and accurately?
- A. Well, that would be correct because how would you actually know if what I printed off was actually what I had totally received? It's authenticity if it comes from Eric.

THE COURT: That's a good question too. That is definitely a concern.

BY THE WITNESS:

A. Not that I would try to hide anything, but it is possible when you're looking through a great number of

documents to inadvertently omit something and not realize you did it.

THE COURT: I don't get the feeling that the township's trying to hide anything. I think the township's in a situation where in recent past they've had experiences that have required them to say, you know, we're going to follow the letter of the law and no more because, you know, we've been overwhelmed in the past and we don't want to be overwhelmed in the future. And I respect that. I'm trying to get a handle on just how hard all this is because in my own foray into trying to do something like this I had no difficulty.

MR. FITZGERALD: Your Honor, we don't say it's difficult. But we say it's not an existing record. Everything that's on the computers, everything that's in the server, any document, resolutions, all the documents that are in the computer system, this would mean that people don't have to ask for particular records, they could ask the clerk to do a search, to find me a resolution that deals with such and such over whatever years or period, or search for this word in documents. That's not what OPRA requires. It requires there to be a record. If there's a list of resolutions you can get the list of resolutions. You can't ask the clerk to research through the resolutions and find ones that deal with a

particular subject matter or were signed by a particular person. That's not what OPRA requires of the clerk.

THE COURT: What about if we look at this through the lens of the common law. What do you say to that? I'm not saying that you should. I'm asking you what if we did? What if we looked at all these facts and his request through the lens of the common law? Where does that --

MR. FITZGERALD: Fundamentally the threshold question remains it has to be a record, has to be a document, not something that's created, a list that's created. Lists, unless they exist, are, unless they're created by the municipality for their own use or for the benefit of the public it's a created list. And that's not required under common law either. That's still, the threshold question is there a record. And if it's created it's not a record.

THE COURT: Mr. Luers.

MR. LUERS: Well, in response to Your Honor's recent inquiry, I agree that there is a threshold question of whether it's a public record under the common law right of access, so I think we're kind of stuck in the same place. Once you get past that threshold issue then you perform a balancing test and then we might have to deal with some of the, the Captain Doyle issues, which

is fine. That's what happens in OPRA cases, sometimes you have to deal with exceptions that are related to specific emails. That's fine. But you know, broader, from a broader perspective this data, this data question, you know conceptually we asked, we ask for search terms all the time. We ask for data all the time. Data, information being stored and datas is where everything is going. A great example is payroll records. Notice how OPRA doesn't define a payroll record. They say a payroll record is a public record. We all know that under N.J.S.A. 47:1A-10. It doesn't define a payroll record. I think one of the reasons why it didn't is because payroll records can be in many forms.

THE COURT: I was about to say they could be in so many different forms.

MR. LUERS: You know, the smaller municipalities, sure, they write out checks, do direct deposit. You get to some large cities you've got ADP doing it. They've got payroll. And you know that that is a hundred percent, the town says, the town shoots a file, shoots a file to ADP, ADP then makes calculations based on the file and they do direct deposits for the checks and they withhold the money. And so when you're asking for a payroll record from a place like, say, Phillipsburg or Elizabeth they're pulling data, they're

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pulling data. How much overtime did so and so make in 2012? That's a public record. That's data. There's not going to be a paper record in some jurisdictions.

THE COURT: That, I, I'm going to let Ms. Kay respond to that.

CONTINUED REDIRECT EXAMINATION OF MS. KAY BY THE COURT: BY THE WITNESS:

- A. I beg to differ on the issue of payroll. In Galloway Township, now granted we're not as big as Elizabeth, we're probably as big as Phillipsburg if not a little bigger, all of our payroll records are also paper. We make paper hard copies of what our -- and I can attest to the fact that under OPRA payroll records are immediately released. They are under that category that when they are asked for they must be supplied.
 - Q. You're correct.
- A. -- within a 24 hour period.
- Q. But let's go to another thing. The township pays money to vendors.
- A. Our purchase orders are immediately --
 - Q. That takes different forms, doesn't it?
- A. It's immediately, it's, they are paper.
 - Q. But it takes different forms.
- A. It's different forms, but they're all paper filed.
 They're all kept under, it's not longer DARM, I believe

it's now --

- Q. You pay him differently than you pay the people who may have been contracted out to come in and repair a piece of furniture.
- A. Well --
- Q. And you pay that person differently than maybe you pay the person is the insurance carrier.
- A. But those are all --
 - Q. -- for your township.
- A. Those are all --
 - Q. All three of those get paid differently.
- A. Those are all vendors. They all have numbers, they all have purchase orders. And they are under OPRA immediately releasable. The only thing that I need to do before I release them, because they're released from my office, is I must go through them and redact any information that I feel is an exception under the 24 exceptions. Usually the bills that are pulled most often are attorney's bills because people --
- Q. Everybody wants to know what the lawyers are making.
- A. Not what they're making, what they are doing to earn their fee.
 - Q. That's true.
- A. And under the statute they are to be as explicit as

they can. So I find that often times Mr. Fitzgerald is very nice to me, he sends me a set of redacted bills with his original bill. Other attorneys do not. And so a lot of times I find myself that after the RE: it's a redaction, and I have to put down it's attorney-client privilege. If there's correspondence or telephone conversation I have to redact who it was between because again it's attorney-client privilege. That's the only thing, and then I create an index that goes on top of that saying --

- Q. It's a pretty hands on process, though, isn't it? And the document that's finally produced isn't one that existed. You had to massage it.
- A. Oh, no. No. It existed. I have just taken it out of the file. I photocopy the original and before I do the redactions so that the document stays whole. Then it becomes a redacted document, then it's sent to the person who asked for it through OPRA. And the reason they ask for it electronically is so that they don't have to pay a nickel a page nor come to my office and request it.

THE COURT: Mr. Luers, what were you thinking?

MR. LUERS: Your Honor, I appreciate that
information is helpful. We're not asking for paper
records. And we could probably think there's probably
myriad ways that Galloway and other agencies maintain

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their information. And certainly I would agree with Ms. Kay that plenty of information is probably maintained in a paper record but not their, not their emails. So we do, we're still back with the email question, the data question. I was thinking a more, a better analogy might be pension records. One of the things we're entitled to under OPRA is the amount of a person's pension. So when we want to request that we put in a request to Trenton and Trenton doesn't give us a document, they give us a report. And the report reflects data because the actual amount of a pension, that's data that's floating around in the money manager's system, in PERS. But we're entitled to that. And they use a service. If someone's been in the system for 17 years we make that request and we're provided, we're provided with a report and that's They don't, there's not a building or a data base data. that has these reports, it's all data. And we say, okay, we want public employee number one's pension contribution or pension benefit, and we're given a report. So I quess I, we deal in data all the time with OPRA requests, whether it's payroll or pension.

THE COURT: I --

MR. LUERS: I think you understand, Your Honor.
THE COURT: Yeah. And they recognize that too.

I mean I'm sure that they do.

MR. LUERS: And it's, it was interesting when my colleague described --

THE COURT: Let me ask you this. I am not trying to state your positions for you, nor is this any sort of window into my mind, I'm just trying to try it out on the table. I guess Mr. Fitzgerald wants me to take a strict reading of the definition and you want me to take an expansive reading of the definition.

MR. LUERS: Well, I, I think yes. Although I think that --

THE COURT: That's not, this is not a trick question.

MR. LUERS: I understand, I understand. I think that if you have any doubt about which way to go OPRA tells us to favor access. That's sort of my fall back position.

THE COURT: See, I guess, I guess what's troubling me is that we know this information exists in the township's system. We know it's there, okay. And what, and I know I don't have to convince Mr. Fitzgerald, but I can remember years ago having to convince certain people in government that everything they do is public. You know, you can talk to me about confidential but you can't talk to me about private. I'll listen to confidential, I'll never listen to private. And every

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now and then I get a lawyer that tells me, well, that's private. No, it's not private, it's public. The question is is it confidential or is it accessible? You know.

MR. FITZGERALD: They have learned all those lessons, Your Honor.

THE COURT: I know they have. I know they have. And --

MR. FITZGERALD: No email accounts, no private telephone calls, everything through the business, everything on record.

THE COURT: And in a case that I was involved in on the fringes, it kept popping up in my brain and I had my law clerk find it, and I'm sure the two of you are familiar with it, there's no reason that you would have cited it in your brief, but I want to touch on it for a moment because I think it may be where we have to take our conversation. It's Higg-a-Rella, Inc. v. County of Essex, 141 N.J. 35. It's a 1995 decision. And the court—

MR. LUERS: Sure, Judge, that's the data tapes for the county assessment.

THE COURT: Yeah. And --

MR. LUERS: Absolutely.

THE COURT: And the court at fairly great

length goes into a discussion of the common law and goes into a discussion of our society's response to the change that — this is, I mean our kids would call this, you know, from the stone age because it's not, it's not, you know a media. This is a decision from 1995. But I still think it expresses what the court's role has to be. One of the quotes is, the conceptual models — and this is before OPRA, this decision. "The conceptual models of our right to know law do not seem readily adaptable to data collected in this information age." And, but the information age keeps evolving. And I think government and the courts have a responsibility to adapt to that evolution. And later on the court says that,

"Our previous definition of a common law record was drawn from sources that spoke in terms of traces of ink on paper does not limit its scope. The essence of the common law is its adaptability to changing circumstances. Likewise we find that in view of rapidly advancing technological changes in storing information electronically computer tapes --" and we were talking about computer tapes in this situation, of tax records "-- also can be common law public records."

And I'm saying to myself, and again I'm not trying to make this easier than it is, but I'm wondering just how difficult is it when we know all that information is

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right there somewhere. How difficult is it? And now you're going to say it doesn't matter how difficult it is, right?

MR. FITZGERALD: Your Honor, okay.

THE COURT: See, if it doesn't matter at all how difficult it is and we know it can be done quickly then what are we doing here?

MR. FITZGERALD: I hate to use the slippery slope, you know, argument --

THE COURT: Go ahead.

MR. FITZGERALD: -- but the data, data, there's huge amounts of data, obviously on the township's computer server.

THE COURT: It's amazing what we have done to ourselves.

MR. FITZGERALD: All sorts of documents. So are we now converting OPRA into people can ask the clerk to do research for them through the computer system to find things that have to do with this subject or that subject? That's, might be a nice idea, might be a great convenience, but it's not what OPRA was designed for or what it covers. Where would you draw the line at if they have to provide, if they create a log which they don't have, a list of those emails, but should provide all the emails for a day, all the emails for a certain person,

whatever that context is, but to say go back and search through the emails and identify -- even if the computer's doing the searching it's a search through. Would it be any different than searching resolutions?

THE COURT: See, I understand that. Here's my, my concern is --

MR. FITZGERALD: You can search every document, Your Honor, that's in their system. You could put a search on for anything by subject matter, by date range, by all sorts of things.

THE COURT: Provided your software permits it, yeah --

MR. FITZGERALD: Right.

THE COURT: -- of course you could. What's wrong with that?

MR. FITZGERALD: Nothing's wrong with it but it's not what OPRA requires.

THE COURT: Yeah, but that -- I can see from what Mr. Luers is saying --

MR. FITZGERALD: I can see --

THE COURT: Mr. Luers is saying all that data is public information. All that data is part of the big record that's there.

MR. FITZGERALD: And if you want to ask for the data in the form of a record you get it.

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THE COURT: Yeah, but see, what's a record may very well, what's a record as you are defining it may very well depend upon what you decided to make a record.

MR. FITZGERALD: Well, yes, Your Honor --

THE COURT: Right?

MR. FITZGERALD: -- it does.

THE COURT: Okay.

MR. FITZGERALD: So --

and this is what I do not have the answer to, the question is does the law, and I'm not saying Higg-a-Rella is some big dispositive case but I'm thinking it's a pretty good articulation of what the court thinks is government, municipalities, the court's responsibility to adapt to the evolution that's occurring in technology.

MR. FITZGERALD: Absolutely, Your Honor. And if you want to really focus on that metadata issue, which I think is a, obviously it's a very up and coming issue, frankly until I read the reply brief I never heard of metadata, didn't have a clue what it was. And I thought, oh, boy, and you have to provide metadata.

MR. LUERS: That's, I'm sorry to interrupt you.

That's a very interesting statement, because in federal discovery practice --

MR. FITZGERALD: I don't --

THE COURT: That's okay.

MR. LUERS: -- I mean maybe that's one of the reasons why --

MR. FITZGERALD: I don't deal in federal discovery practice.

MR. LUERS: Metadata though --

THE COURT: Yeah, and you --

MR. LUERS: - I think I cited some of the cases.

MR. FITZGERALD: But then I looked at those cases.

THE COURT: That's okay. No, he, he's giving you an honest position.

MR. FITZGERALD: The point is when I looked at the cases that were cited they're dealing with metadata associated with a record, with a document. You want an email, the question was are you entitled to metadata embedded in the email in electronic form. You have a custodian who says, okay, here's a copy of the email. Here's a printout of the email, and the person says, well, no, I want to know the background embedded information on that, the data associated with that email. Who did it go through? When was it changed? That's the metadata that all of those cases are dealing with. They're not dealing with providing, making up a list.

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They're saying if you get an electronic, if the document is stored in electronic form you're entitled to the entire document in electronic form, including the background embedded metadata. Not that you create something different.

THE COURT: I, I, I believe that the spirit of the law as articulated by Higg-a-Rella makes answering this question harder than meets the eye. That, I think I have it in my office, about 4 or 5, 5, 6 months ago, in Foreign Affairs, of all places, there was an essay by a gentleman who had written a book. And the title I think of the book and the title of the essay was "Big Data". And the essay in Foreign Affairs talked about just what you were saying, we got so much stuff that we have preserved electronically. And this is corporations, this is governments, this is various agencies. We got all this stuff that we have and are going to continue to preserve into infinity, I guess, as long as the electric works, right? We'll continue to preserve all this stuff. And what they're saying about big data is that how you search it really matters because that's going to help you get whatever value is in all that data. And it's sort of what the plaintiff is seeking to do. I mean again, I'm not looking at what the next step in this process may be but the police department seems to be pretty candid,

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These dates ain't random. So obviously there's something being pursued here. Doesn't interest us at this point. But what does interest me is all this information. take an expansive view all this information is a public record and it's your problem to organize it. And if it turns out that it's a cost to organize it he's going to have to pay the cost of organizing it. Because it may not be as simple as organizing it. But what I think and need help from both of you on, and I simply mention Higga-Rella because it came to my mind. And when I reread it it said all the things that I recalled it saying. And there's plenty of other case law. You know, I need help from you in telling me my role in adapting to technology and just how expansive or restrictive I need to be in defining what's a public record, because lord knows, all that data that's on, that's in the email system of the clerk and it is in the email system of the police department, all that data's public stuff.

MR. FITZGERALD: Your Honor --

THE COURT: None of it's private.

MR. FITZGERALD: -- I don't disagree with that.

And pre-computers when all the records were on paper in filing cabinets they were also all public records.

THE COURT: Yeah.

MR. FITZGERALD: Everything that's in there.

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But you couldn't come into the clerk and say find me documents dealing with such and such. You have to say I want this bill from that attorney, I want the --

THE COURT: You're saying in the old system.

MR. FITZGERALD: In the old, the paper system.

THE COURT: Yeah, but we're not dealing with the old system anymore. We're dealing with today's world. And that's what the Supreme Court says in higg-a-Rella, it says in a lot of other cases, which is we have to have modern technology.

MR. FITZGERALD: If you've got the record you've got to provide it, be it on a computer, on a computer tape, be it on a disc, whatever form it's in you have to provide it. But -- and you want assessment records, you're entitled to the assessment records subject only to cost issues. We don't disagree with that if that's maintained that way. If you want to get all of the emails that were done by the clerk's office over the course of a month we'll give you all the emails, with a service charge I would have to say. But what they're asking for is select and pick out of that, that we don't have records, information, not a record but information about records.

THE COURT: And see, this one might be easy, and I do respect your concern about the slippery slope.

I do respect your concern about that. But I still need some input from the two of you on what you think OPRA's role, the definition of a public record, whether under OPRA or under the common law is and the Court's responsibility in looking at a question like this in terms of how far do I say the municipality has to go in adapting to technology.

MR. FITZGERALD: Your Honor, you indicate, you know, the concern about the slippery slope, and I think it's very real.

THE COURT: It's real.

MR. FITZGERALD: I'm not sure --

THE COURT: I'm not making light of it.

MR. FITZGERALD: Yeah. I'm not sure there's intellectually you can draw a distinction.

THE COURT: Yeah, but going all the way back to Lloydman, it's all about balancing, right?

MR. FITZGERALD: Okay. But you --

THE COURT: In this one balancing might not be hard, Mr. Fitzgerald.

MR. FITZGERALD: If you have to create a, if the computer system doesn't contain a list of emails and you have to create a list and you have to do a search to get that list why would it be any different from a search of all of the resolutions that have been adopted by the

municipality or all of the contracts, do a data search through the computer system? That might be a very helpful thing for the public, and it could obviously be done on the computer system. But that's not what OPRA requires. I mean if that, if OPRA were to be expanded in that regard it should be something done by the legislature, frankly.

THE COURT: Well, I need your help and I'm going to ask that you give me briefs within, tell me how much time you need, 10 days, 2 weeks?

MR. FITZGERALD: 2 weeks.

MR. LUERS: 2 weeks, please, Your Honor.

THE COURT: Because what we'll do, and I'm going to have to get my calendar, what we'll do is schedule this for another nonmotion day Friday so I'll have, I'll have a little bit more time and make sure they don't bring — on nonmotion day Fridays they try to fill up our days with bringing in a bunch of, you know, insurance adjusters and PI lawyers and you know, settle these cases, you know. And our batting average is not really good. I'm not sure why they're making us do that, but, because they either wind up getting settled on their own or they wind up going to a jury. So we'll schedule this for a nonmotion day Friday. Get me your briefs within the next 2 weeks, file them directly with me. And

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my staff will be in touch with you either by phone or email. We'll set up a continuation of this discussion on a nonmotion day Friday. I think I've expressed to you what my concerns are concerning just what is the Court's role in trying to adapt to, you know, what our Supreme Court has said in different cases. And I only cited Higg-a-Rella because that's the one that came to my mind. But the need for the Court to be flexible and adaptable to different circumstances. And I really do see that's the Court's responsibility. Society changes and the Court has to respond to it. And you know, and technology is just one of the things that the Court has to respond to. But when I look at these questions I say to myself, man, they're not so simple because he does have a slippery slope that he has to worry about. Giving you this list of emails for 14 days, right, the 3rd through the 17th, wasn't it? Yeah. Because I remember the 16th, it was the 3rd through the 17th of June, aren't those the dates?

MR. FITZGERALD: Your Honor, actually I suspect, I'm not sure plaintiff really even at this point needs those particular emails. I'm not sure that's even an issue. I think it's more the issue of the obligation to provide the email log that's really at the heart of this. I don't know if he really actually needs them or

if we have to deal through the confidentiality issues when we reach that.

MR. LUERS: We --

THE COURT: Right now, right now they want the log. Because when you look at the log then you may say, okay, now I want these particular emails. I understand that.

MR. FITZGERALD: I just want to make sure -
THE COURT: Let me ask you this. That's where
this is headed, is it not?

MR. LUERS: If we come to the point where the actual email log is an issue then we're going to have to deal with redaction and confidentiality issues regarding that email log. That's just, I just want to make sure that, that's why I want to preserve and protect that issue, because we would have to deal with that depending upon the status at that point of the internal investigation and how, where it stands at that point.

THE COURT: I don't disagree with anything you just said.

MR. FITZGERALD: And actually in that regard, yeah, I think we're probably only dealing with the, the police emails in that regard when it comes to -- I don't think the clerk's are relevant, I don't believe. But --

THE COURT: No, no. You're telling me, and I

guess what's his name --

MR. FITZGERALD: Captain Doyle?

THE COURT: Doyle is telling me that some of this is involving an IA investigation. And if that's the case we certainly have to respect everybody's privacy. Want to give this back to -- I don't want to see you waste an envelope.

MR. LUERS: Oh, we're going to use it, Judge. I assure you.

MR. FITZGERALD: Your Honor, do you want Captain Doyle here?

THE COURT: Um, let me read your next submission.

MR. FITZGERALD: Okay.

THE COURT: There's a good chance I will.

MR. FITZGERALD: Okay. If so let us know and we can obviously --

THE COURT: Yeah, there's a good chance that I will.

MR. FITZGERALD: Perfect.

THE COURT: Let me make myself a note. Two weeks supplemental briefs. Hearing nonmotion day Friday. Okay. Gentleman, as always it's a pleasure dealing with both of you.

MR. LUERS: Likewise. Thank you, Your Honor.

MR. FITZGERALD: Thank you, Your Honor. And as I said, this is an interesting case and it is nice when you're dealing with a lot of boring things every day to have something that's unusual and interesting. And I'm sure --

THE COURT: I can't believe Galloway Township is ever boring.

MR. FITZGERALD: And I'm sure, no, actually it's pretty interesting. But I would have, the Court may enjoy this issue. I would have preferred to have passed on this honor.

THE COURT: Well --

MR. FITZGERALD: But we have to deal with what we have to deal with.

THE COURT: -- government can always be interesting and this is an interesting issue. And it's a pleasure having two good lawyers to work on it with.

MR. LUERS: Thank you, Your Honor.

THE COURT: Thank you.

(off the record; end of material to be transcribed)

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CERTIFICATION

I, BONITA K. BRUMBACH, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings heard on November 1, 2013 and digitally recorded from 9:14:12 AM to 9:22:32 AM and from 9:39:59 AM to 10:22:45 AM, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

P.O. Box 741

Haddonfield, NJ 08033

(609) 525-2149