

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

JOHN PAFF,)
)
) Plaintiff,)
) v.)
)
) GALLOWAY TOWNSHIP AND)
) THALIA C. KAY in her official capacity)
) as Municipal Clerk and Records)
) Custodian of Galloway Township)
)
) Defendant.)

Transcript
of
Order to Show Cause Hearing

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

Date: January 9, 2014

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

I N D E X

Witnesses: Direct Cross Redir. ReCross

For the Plaintiff:

John Paff 8 9 13

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Colloquy

1 THE COURT: This is the matter of Paff v.
2 Galloway Township, docket number L-5428-13. Counsel,
3 please enter your appearance.

4 MR. LUERS: Good afternoon, Your Honor. Walter
5 Luers appearing on behalf of John Paff. And Mr. Paff is
6 here with us in the gallery today.

7 THE COURT: Hello, Mr. Luers.

8 MR. FITZGERALD: Michael Fitzgerald appearing
9 for the defendant, Township of Galloway, and the
10 custodian, Clerk Kay.

11 THE COURT: Okay. Hello, Mr. Fitzgerald.

12 MR. FITZGERALD: Thank you, Judge.

13 THE COURT: I have looked at the submissions.
14 This is a continuation of a hearing that started back in
15 November. And I think because of everybody's schedules
16 we've wound up adjourning it til today. But we're all
17 here. I've had a chance to review everything. And let
18 me go through some of my notes here and then I'll ask
19 questions as I think appropriate and we'll go from there.
20 My first observation is while the plaintiff has made a
21 specifically defined request, that is June 3rd through
22 June 17th, 2013, it is nonetheless quite broad. And what
23 makes it broad is that the two township offices, namely
24 the clerk and the chief of police, are probably the two
25 busiest offices in the municipality where you would

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1 expect a whole lot of communications. I'm not going to
2 speculate on the number of emails involved. I mean I
3 think Mr. McCarthy said that there was 31,000 electronic
4 messages in 3 months. I'm assuming that's for those two
5 offices. Am I correct?

6 MR. FITZGERALD: That's in total, Your Honor.

7 THE COURT: In total for the township.

8 MR. FITZGERALD: Yes.

9 THE COURT: Okay. All right. But again, those
10 two offices probably get the bulk of the email.

11 MR. FITZGERALD: I would say a lot, Your Honor.
12 I don't have a breakdown though.

13 THE COURT: Yeah, I don't either. But I'm just
14 assuming. They seem to be like the hub of activity in
15 most communities.

16 MR. FITZGERALD: Yeah, I don't --

17 THE COURT: The police department and the
18 township.

19 MR. FITZGERALD: I would say just from my own
20 experience with the clerk's office that the number of
21 emails coming through the clerk's office are, because
22 sometimes we've had to deal with redactions and
23 production of emails, it's very large.

24 THE COURT: So without presuming that
25 plaintiff's request is under the common law as opposed to

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1 the OPRA, I'd like to have some context for the request,
2 namely what was occurring between the dates of June 3rd
3 and June 17th that is of interest to the public. I ask
4 for two reasons. One, knowing that might help the
5 township officials to narrow the scope and say, you know,
6 this is the direction we need to go in and maybe it
7 doesn't include as broad a number of dates as now being
8 requested; and two, it may bring into focus the interests
9 that must be balanced, if I have to balance them, should
10 I find that the compilation of the data requested entails
11 research of records and creation of documents that may be
12 beyond what's contemplated by OPRA. So I guess my first
13 concern, and counsel certainly knows more than I do on
14 this, what was occurring in Galloway Township between
15 June 3rd and June 17th which would interest the plaintiff
16 enough to file a lawsuit concerning it?

17 MR. LUERS: Can I ask him himself?

18 THE COURT: Sure. Sure. And I'm not saying
19 that has to be answered either. If you don't want to
20 answer you don't have to. But I'm trying to --

21 MR. LUERS: May I put, do we need to put Mr.
22 Paff under oath?

23 THE COURT: Sure.

24 MR. LUERS: No, you don't want to do that?

25 MR. PAFF: I don't care. I haven't read the

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1 papers in a while. I'm not sure, that's my only concern.

2 THE COURT: I'm not, I'm not coercing this
3 information from anybody. I'm not requiring it. I'm
4 trying to get a feel for --

5 MR. PAFF: I'm not prepared to answer the
6 questions. I'd rather --

7 MR. LUERS: If you're not prepared to answer --

8 THE COURT: Then he doesn't have to answer it.

9 MR. LUERS: Okay. How about this. Why did you
10 make the OPRA request? Do you remember why you made the
11 OPRA request?

12 MR. PAFF: To get the, to get a log of all the,
13 of the emails that were sent.

14 MR. LUERS: Do you recall why that was
15 important to you at the time?

16 MR. PAFF: Because I felt that it was a public
17 record and I wanted to make sure that I had, I wanted to
18 make sure that they were honoring the spirit of OPRA by
19 providing public records that were previously provided.

20 MR. LUERS: That's what I thought, Judge.
21 That, that, you know, Mr. Paff was aware that in the
22 past --

23 THE COURT: So these dates mean nothing? You
24 just picked, you just picked two dates?

25 MR. PAFF: Pretty much, yeah. Candidly, yes.

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1 I do this mainly because I want to make sure that OPRA is
2 abided by and not undermined and I --

3 THE COURT: I respect that very much.

4 MR. PAFF: -- was not doing it for any
5 particular, looking for any particular smoking gun in
6 Galloway. It's just that I was informed that Galloway
7 was not, they used to provide these records, they're not
8 providing them anymore. And I didn't understand why that
9 was the case.

10 MR. LUERS: That was my understanding as well,
11 Judge. And I thank you for the opportunity because I
12 didn't want to --

13 MR. FITZGERALD: Your Honor, before, could I
14 ask a question?

15 THE COURT: Yeah.

16 MR. FITZGERALD: I understand it's informal at
17 this point but --

18 THE COURT: Mr. Paff, let's administer --

19 MR. FITZGERALD: Maybe he could correct a
20 misunderstanding from our part.

21 THE COURT: Hold on, hold on. Mr. Paff, I'm
22 going to ask you to take the stand briefly. And I didn't
23 plan on taking any testimony today. Believe me I did
24 not. I thought I'd get the answer from counsel. Jack,
25 do you want to administer the oath to this gentleman.

1 **JOHN PAFF, PLAINTIFF, SWORN**

2 THE COURT: All right. Let Mr. Luers ask his
3 questions again. Testimony is under oath. I don't doubt
4 this gentleman's veracity, but we're making a record here
5 because I don't know where we go from here.

6 **DIRECT EXAMINATION BY MR. LUERS:**

7 Q. Mr. Paff, do you recall making an OPRA request
8 to, to the defendants on or about June 28th, 2013?

9 A. Yes.

10 Q. And do you recall asking for, in that OPRA
11 request do you recall asking for a log that shows emails
12 sent by the township clerk between June 3rd, 2013 and
13 June 17, 2013?

14 A. Yes, I do.

15 Q. And do you also recall in that request asking
16 for a log which shows emails sent by the township police
17 chief between June 3rd, 2013 and June 17th, 2013?

18 A. Yes.

19 Q. Do you recall why you made that OPRA request?

20 A. I was, I understood that these logs were previously
21 provided without problems by Galloway Township. And
22 Galloway changed its position prior to that date and said
23 that they would not, and I understood that they would no
24 longer provide those types of logs. I thought that those
25 logs are valuable because they allow people to see the

1 senders and recipients of all emails and the subject line
2 of an email, perhaps, and then that narrows down the
3 search so that a person who is interested in, in looking
4 at the township's business and understanding it can then
5 narrow down their search for the specific contents of the
6 emails by just looking at the, you know, I want this
7 email because this is engaging the subject that I'm
8 interested in. And that enhances transparency because
9 it's difficult when you have all these emails, just a
10 dump of all the emails themselves, it causes some
11 redaction issues for things that you might not really be
12 interested in. And I felt that Galloway's position to
13 change the procedure in doing that was of interest and
14 was of public importance. And that's what I try to do is
15 to try to keep OPRA from getting whittled away. And when
16 I see the public's right to know undermined I like to
17 make a, a case out of it in order to bring it up to find
18 out where OPRA really is and where the law is.

19 MR. LUERS: Nothing further, Your Honor.

20 **CROSS-EXAMINATION BY MR. FITZGERALD:**

21 Q. Mr. Paff, your interest in Galloway Township,
22 was that just happenstance or random?

23 A. No.

24 Q. Was your, this information regarding the past
25 history on Galloway of at one time providing OPRA logs,

1 email logs, was that from a former clerk, Lisa Tilton?

2 A. Yes.

3 Q. Okay. Okay. And she, are you aware that she
4 had made a prior request for the same information that
5 you requested?

6 A. I'm not sure if I, I knew that she made requests for
7 it. I knew that she also did not -- she was the one who
8 informed me of the fact that we used to do it and now
9 Galloway doesn't do it. I don't know exactly, I don't
10 think I remember what request she made or whether I, I
11 think, I believe that I just took a time span, I just
12 figured I would take a fairly tight time span so it
13 wasn't too abusive. And --

14 Q. That's --

15 A. Maybe I didn't understand your question. I'm sorry.

16 Q. But in terms of those dates --

17 A. I don't recall.

18 Q. You don't recall?

19 A. There might be a reason for it. I just, I'm just
20 sitting here today, I just simply don't recall why those
21 dates were chosen. I'm assuming they were just random
22 dates in order to test it. It could be that there were,
23 that something happened with the police or something
24 happened during those dates. There might be a reason for
25 it, I simply can't recall what it is right at this point.

1 Q. Okay. So it's possible those dates were
2 suggested by Lisa Tilton?

3 A. Not likely, but it's possible.

4 Q. Okay.

5 A. Or it's possible that she might have told me about
6 something that happened and then I found that that was of
7 interest to me.

8 Q. Okay.

9 A. I don't know exactly how that happened.

10 Q. Okay. Thank you.

11 **BY THE COURT:**

12 Q. But as we sit here today it isn't like, I think
13 that thing happened on January 10th or January 8th or
14 January 11th and I want to know what they're doing on
15 those dates so you pick, so you just arbitrarily picked
16 these dates?

17 A. I think I did.

18 Q. And again --

19 A. No.

20 Q. The purpose of this questioning is not to put
21 you on the spot. I'm trying to get a feel for the nature
22 of the request because you want to preserve the limits of
23 OPRA, and I think New Jersey as a society wants to
24 preserve the limits of OPRA. So we're not, I'm not
25 challenging that. And I'm not challenging anything. I

1 was just trying to get some context for the request. Did
2 the request involve, well, I know these two dates are
3 safe and I know somewhere within these two dates there
4 ought to be an email or multiple emails that addresses a
5 certain issue that I am particularly interested in. So
6 that's not the situation.

7 A. And I don't know that that's not the situation, Your
8 Honor. When I come to these hearings I usually come as
9 an observer and I had no idea at all that I would be
10 testifying under oath today. It just didn't cross my
11 mind.

12 Q. I understand.

13 A. So --

14 Q. It wasn't my idea.

15 A. -- at this point it was the legal, what I was
16 focused on when I came in here today was the legality of
17 the township's position. I don't remember my
18 motivations. I would be happy to provide a certification
19 when I go back and look at my notes. But right now I
20 don't --

21 Q. If you want to do that that's fine too.

22 A. I mean I don't want to try to be evasive. I just
23 don't, I just don't remember.

24 THE COURT: I don't think you're trying to be
25 evasive. I think you're being candid with us. Any other

1 questions anybody have?

2 MR. FITZGERALD: Your Honor, if I could just
3 very briefly just explore a question.

4 **REXCROSS-EXAMINATION BY MR. FITZGERALD:**

5 Q. Mr. Paff, you indicated you're not quite sure
6 of what the reason would be for that time frame and the
7 reason --

8 A. Yes, sir.

9 Q. -- for the list within that time frame. And
10 the judge indicated, well, maybe if it was narrowed in
11 and a particular date and particular persons to or from.
12 You've had prior requests for emails to Galloway
13 Township, haven't you?

14 A. I believe I have, yes.

15 Q. Yeah. And they've generally been fulfilled?

16 A. For emails themselves, yes.

17 Q. Yes, emails themselves.

18 A. I generally ask, yes.

19 Q. Okay. And in terms of, so is there any reason
20 that you would believe that if you had identified a
21 particular email by date or subject or sender/recipient
22 you would have received it in the ordinary course? You
23 have in the past, haven't you?

24 A. Yeah. Sometimes I have. But sometimes I do make my
25 requests more general than actually targeting because I

1 don't want, I mean I'm just saying generally in towns
2 around the state I file a lot of OPRA requests.

3 A. I -- yes.

4 Q. And I sometimes do not want to give the
5 custodian or his or her employers or elected officials an
6 idea of where I'm going. I lump even then, even though I
7 do know what I'm looking for I don't want to let them
8 know what it is that I'm looking for because I have had
9 instances in some towns, and I'm not suggesting Galloway,
10 where things get subverted or destroyed or deleted or
11 excised somehow from the records request if they know
12 where I'm going.

13 Q. Mr. Paff, I --

14 A. Yeah, I'm not saying that Galloway does that.

15 Q. -- I've been doing municipal work for 30 years
16 and I'm not shocked by that admission.

17 A. Okay. So what I'm saying --

18 MR. LUERS: None of us are.

19 **BY THE WITNESS:**

20 A. -- is that I just don't, I just don't, I don't know
21 if the reason why I asked for those dates is because I
22 did have something on my mind or that it's -- I keep
23 notes. And the reason I keep them is because my memory
24 doesn't always serve me, especially 6, 8 months later, as
25 to exactly why I did something. So I don't have an

1 answer for that.

2 Q. I understand.

3 A. I just don't know.

4 THE COURT: We respect that. And if you want to
5 supplement your testimony with a certification later
6 that's okay, too.

7 **BY MR. FITZGERALD:**

8 Q. Okay. And just one other brief area, Mr. Paff.
9 So you acknowledge that the distinction traditionally
10 between requesting emails which you identify and they're
11 provided or they're redacted or whatever happens with
12 respect to identified emails versus a list of emails.

13 A. There's a distinction between a list of emails and
14 emails, yes.

15 Q. Right. And your goal in this case essentially
16 is to establish the obligation to provide a list of
17 emails.

18 A. That would be my main goal, yes.

19 Q. Okay. What has been your experience, for
20 instance, with the State regarding -- have you ever made
21 a request --

22 A. I don't believe I've made a similar request. This
23 is a probably a test.

24 Q. Okay.

25 A. In order to establish --

1 Q. We've been honored with the --

2 A. Yeah, you've been honored, your taxpayers have been
3 honored with taking care of my curiosity, yes.

4 MR. FITZGERALD: Okay. I wish you had pursued
5 it with the GRC and let them pay the bill, but I
6 appreciate your candor. Thank you.

7 THE COURT: Okay. You can step down. Thank
8 you.

9 THE WITNESS: Thank you.

10 THE COURT: Let me, let me start with this
11 question to Mr. Luers. For purposes of this hearing,
12 this is an order to show cause and you're looking for
13 relief, don't I have to accept the representations of
14 Eric McCarthy as set forth in his certification of
15 November 13th as correctly stating the burden he says
16 plaintiff's request will impose upon the township?

17 MR. LUERS: The answer's yes.

18 THE COURT: Okay. Because, see, when I read
19 his, when I read his certification he raises things that
20 concern him and ought to concern any objective fact
21 finder. He's concerned about the user's email accounts.
22 He said, well, he says that, "Individual user email
23 accounts aren't appropriate and that such requests and
24 retrieval of such information should go through the
25 township server and the police department server." And I

1 think why he's saying that, in fact he uses the word
2 reliability, he's concerned about the reliability because
3 an individual user can manipulate information or the
4 information may be incomplete because there's been
5 deletions. And then at paragraph 6 he says,

6 "The only complete and reliable source of
7 emails is the township's server and the township's police
8 department's server. There the email archival appliance
9 has its sole purpose, the retention of every email sent
10 and received by the servers. All email flowing to and
11 from the servers is archived in a data store and kept in
12 a library file by the date and the time that each email
13 was sent or received. Once the data is archived it
14 cannot be altered or deleted and therefore the integrity
15 of that information is protected. It is, however,
16 important to note that such email messages are not stored
17 by the identity of the individual user who sent or
18 received the email but solely by the date and time it was
19 sent or received. Accordingly creating an email log
20 requires assembling and compiling a list of such email
21 messages grouped with respect to a particular user,
22 unlike on individual users' Microsoft Outlook account
23 there is no sent or received list to print."

24 I mean I think at the last hearing I showed you it was
25 real easy for me, it didn't take me 30 seconds to figure

1 out to print my list of everything that I sent out and
2 everything that came to me for, I think it was a 120 day
3 period. It was about 8 pages --

4 MR. LUERS: Your Honor, I think I was --

5 THE COURT: It was about 8 pages long and it
6 shocked me.

7 MR. LUERS: I was educated about the whole
8 process.

9 THE COURT: Did you go back to your office and
10 try it?

11 MR. LUERS: Yes.

12 THE COURT: Yeah. It's that easy.

13 MR. LUERS: Yeah.

14 THE COURT: But Mr. McCarthy's raising other
15 issues which do have me concerned. Mr. McCarthy
16 continues to discuss a recent purchase of, apparently, I
17 don't know what happened here but there's a new archival
18 appliance which apparently doesn't have the same
19 capability for compiling an email log which the prior
20 system had. If you look at paragraphs --

21 MR. FITZGERALD: Your Honor, if I could
22 explain.

23 THE COURT: Yeah. What happened there?

24 MR. FITZGERALD: Basically there was a common
25 system. But because of the volume of emails and what's

1 being stored and the difficulty the more they're stored
2 of locating and finding things it was separated off with
3 a, with the police department retaining the old one and
4 now a new one for the township. It's --

5 THE COURT: The township has the system that
6 can do this?

7 MR. FITZGERALD: No, the township has the one
8 that it's even harder. It's difficult on the police one,
9 but it's even harder on the new one. It just, and again,
10 Mr. McCarthy is here if there's questions. But as he
11 explained to me --

12 THE COURT: I don't --

13 MR. FITZGERALD: -- and I think it's in the
14 certification, he actually contacted the technical people
15 at the company that provides this, he refers to it as a
16 retrieval appliance. And there's different ones that are
17 set up differently. But this one has no system within it
18 for, for creating a list.

19 THE COURT: That's --

20 UNIDENTIFIED SPEAKER: Your Honor --

21 THE COURT: Pardon me. Pardon me.

22 UNIDENTIFIED SPEAKER: Of course, Judge.

23 THE COURT: You can have a seat.

24 UNIDENTIFIED SPEAKER: Yes, Your Honor.

25 THE COURT: Thank you. When I, you're going to

1 get a chance to say whatever you need to say. What I'm
2 trying to do is make sure I have a foundation here of
3 information so that we know what we're doing going
4 forward. When I look at his paragraphs 8 and 9 of his
5 certification several things pop out at me. One, the
6 volume that we're talking about, it seems enormous. And
7 two, he touches on what Mr. Fitzgerald just touched upon,
8 which is unfortunately the archival system was not
9 designed to be user friendly in the way that Microsoft
10 Outlook is designed. And then paragraph 9 he says in
11 order to create a log of emails to or from an individual
12 user between specific dates would require assembling all
13 of the emails within the server for those dates and then
14 compiling from those emails a list of the emails sent and
15 received by that individual. Now I look at Mr. Luers'
16 letter, and I'm speaking for you here, Mr. Luers, because
17 I'm going to read the last two paragraphs of your
18 letter. "Here in this case email systems in general, and
19 Galloway's in particular, maintains information and
20 emails that are sent or received." We know that. But
21 the question is how are they organized or not organized.
22 "This information is stored in the ordinary course of
23 business." Yes, they are. "Indeed, we believe like all
24 such systems Galloway's system stores this metadata
25 automatically." And that's what we're talking about

1 here. We are talking about metadata because the, I think
2 the plaintiff's own testimony makes it clear that unless
3 there is something in specific that he's looking for it's
4 metadata. He wants to see a compilation of emails
5 without the individual emails but metadata of the,
6 metadata is data of data. That's what he's looking for.

7 MR. FITZGERALD: Your Honor, I do think there
8 needs to be a --

9 THE COURT: Let me finish reading Mr. Luers'
10 letter.

11 MR. FITZGERALD: Okay.

12 THE COURT: "And with a few key strokes as
13 outlined in Galloway's submission, that data may be
14 retrieved in the form of a report although the form is
15 not particularly important for purposes of this analysis.
16 What is important is that the data exists and it can be
17 retrieved using the current technology of the township.
18 If Galloway did not have the ability or technical
19 expertise to perform these searches this case might
20 require a different result. But Galloway has the
21 technology. That is how this Court should square OPRA
22 with developments in technology. Over time public
23 agencies will incorporate technology into their
24 operations. That technology should be used to make
25 public information more accessible, not less." There

1 isn't much I don't agree with here, Mr. Luers. But the
2 question that I have is is it as simple as just a few
3 keystrokes? Because I'm getting the impression from Mr.
4 McCarthy's certification that it ain't as simple as a few
5 keystrokes.

6 MR. LUERS: When you read the, there's two
7 McCarthy certifications.

8 THE COURT: I'm reading the one that was
9 submitted in response to the last hearing.

10 MR. LUERS: All right. There's an October
11 16th.

12 THE COURT: I read that one for the last
13 hearing. Go ahead.

14 MR. LUERS: Yes. And then there's the second
15 one. And the second one makes it sound really
16 complicated to do what we think they ought to be doing.
17 But then you get to this paragraph, it's paragraph 7,
18 last sentence in paragraph 7, "As explained in my prior
19 certification, the various steps described therein must
20 be followed." So we go to the prior certification. The
21 prior certification describes steps A through K, which is
22 a series of keystrokes. And so what, what -- I'm sorry.
23 Sergeant? Captain. I beg your pardon. I don't know the
24 rank of McCarthy, I'll call him Mr. McCarthy. What Mr.
25 McCarthy does is he describes the system. This is the

1 system we have. And the system we had changed. That's
2 what he says. But he's just describing the architecture
3 of the system. The critical issue for the Court is what
4 steps are required to produce this data.

5 THE COURT: Yeah, that is.

6 MR. LUERS: And --

7 THE COURT: And what I don't want to do is
8 unwittingly create an unnecessary burden because Mr.
9 McCarthy's making it look like it's quite burdensome.

10 MR. LUERS: And when he actually gets to the
11 steps in the second certification he says, well, for me
12 to describe the steps just look at my first
13 certification. And the first certification, which I have
14 here, is a series of keystrokes. Logs onto the archival
15 web interface. Clear search criteria from prior
16 searches. Prior searches. So these are searches they
17 make. Okay. So they clear the pre -- quote, "Clear
18 search criteria from previous searches." Okay. So now
19 we know that they use the system to make searches. Step
20 3, enter the desired email address in to and from fields.
21 Well, that's very interesting because in the second
22 McCarthy certification he makes it sound like they can't
23 search for people by name. But in the first McCarthy
24 certification it sounds like they can enter the desired
25 email address in to or from fields. Step D, enter the

1 desired text. Not exactly sure what that means, maybe a
2 search term. Step E, select date range. Well, as we
3 heard from the testimony June 3rd to June 17th. Step F,
4 perform search. So perform the search. It's not paper
5 records, it's just on a keyboard. Step G, results
6 display. So that's not even a really a step, the result
7 come up. H, the results can't be printed so it has to be
8 forwarded. So presumably that's an email. Forwarded to
9 an administrator email account. Then you log on to that
10 account and print the results. Number one, there's no
11 testimony or evidence about how long that takes. But I
12 gotta tell you, Judge, it doesn't sound long, doesn't
13 sound long at all. That sounds like maybe 6 or 7
14 minutes. And if I'm wrong then someone can testify or
15 write a certification as to that. But like I said, it's
16 the difference between describing the system. It sounded
17 pretty complicated to me too.

18 THE COURT: I'm looking at paragraph --

19 MR. LUERS: But in terms of the search --

20 THE COURT: I'm looking at paragraph 6 of the
21 certification from November and he's saying none of the
22 emails are stored by identity of the individual user who
23 sent or received the email.

24 MR. LUERS: I understand that, Judge.

25 THE COURT: So you'd have a bunch of dates.

1 MR. FITZGERALD: Your Honor, maybe I can --

2 THE COURT: And times.

3 MR. FITZGERALD: I may not have made it clear
4 enough in his supplemental certification, but Mr.
5 McCarthy is here and could take a moment to explain --

6 THE COURT: See, I don't see, I don't know if I
7 want to do that either. And here's what I'm getting at.
8 Candidly, Mr. Luers, your legal arguments are very
9 articulate and persuasive, but they do not address,
10 you're addressing them now, okay, but your legal
11 arguments don't address the factual considerations that
12 are raised by Mr. McCarthy's certification or what
13 appears to be the potential for a serious burden on the
14 municipality. And I'm asking myself, you know, before we
15 do anything should there be a certain amount of
16 discovery. You can depose Mr. McCarthy and you can
17 convince me that Mr. McCarthy really overstated the case
18 in his certification, that all his, you know,
19 pronouncements about how difficult it is is a bunch of
20 BS, or maybe you can't, or maybe you'll have an expert
21 that'll say, you know, we know how to get metadata, we've
22 looked at this system, and they're really over playing it
23 because they're stonewalling us, they just don't like
24 doing this, they were able to do it in the past, they can
25 still do it now if they wanted to. I mean in terms of

1 making a record before I'm going to require the township
2 to compile information and produce metadata, I'm thinking
3 out loud, don't I need more of a factual basis?

4 MR. LUERS: Well, if it's anyone's burden to
5 show that a special service charge would be appropriate
6 or if it's anyone's burden to show --

7 THE COURT: Well, his argument is this isn't
8 even a public record.

9 MR. LUERS: Exactly. They haven't --

10 THE COURT: I understand that. And if you look
11 at the, what's the, MAG Entertainment v. ABC, 375 N.J.
12 Super. 534, OPRA doesn't require a municipality to
13 disrupt their operations and pull together information
14 because somebody says, you know, I want thus and such,
15 you know, can you find it for me? That's not what OPRA
16 requires. OPRA requires making it easier for people to
17 get readily identifiable documents. Now we have metadata
18 which I think by its very nature may not be readily, may
19 not be readily identifiable. You've given us dates and
20 you've given us offices. And they're saying, well, guess
21 what, they ain't filed that way. So there's my problem.
22 And I'm not, and I don't know if they're overstating
23 their defense or not. But maybe we need, and I don't
24 think it's fair to either side to simply get this witness
25 on the stand and start asking him questions. It may be

1 unfair to the witness. It may be very unfair to you
2 because you may say, oops, you know, if I had more
3 preparation I would have asked him more intelligent
4 questions. And it may be very unfair to Mike. He may
5 say, you know, why did I let this guy testify under oath
6 without going through his certification again, making
7 sure I understood exactly, you know, what his position
8 was and walk through the computer system together so that
9 everybody would be more prepared. I'm hesitant to put
10 anybody, I was hesitant to put your client on the stand,
11 but your client states his position well. You put your
12 client, your client's position with regards to his
13 understanding and his commitment to OPRA I respect a
14 great deal. My concern is I don't know that any court
15 has been asked to enter an order compelling a
16 municipality over its objections to compile metadata. Is
17 there such a case?

18 MR. LUERS: I'm not aware of any metadata
19 cases.

20 THE COURT: Neither am I.

21 MR. LUERS: There's cases outside the
22 jurisdiction that I cited.

23 THE COURT: And that's what makes me want to go
24 slow here, that's all. So that I don't do, like the Law
25 Division judge did in the MAG case, issued what the

1 Appellate Division thought was too quick and too broad an
2 order and sent it back to do it over again. That's
3 wasting, everybody's time was wasted in that case.

4 MR. FITZGERALD: Your Honor, I don't disagree
5 with that approach because I think it is important for
6 the Court to understand the process and it is, there is a
7 real question, there's a reason, I think, in OPRA and
8 under the common law that it's been practiced, both of
9 them in a way to make the --

10 THE COURT: I don't know if this is a common
11 law document now, because based upon what Mr. Paff said
12 common law may have no application where at all.

13 MR. FITZGERALD: I obviously would agree. I
14 don't think --

15 THE COURT: Okay. So that --

16 MR. FITZGERALD: -- it's a record in any sense.
17 And the Court, you got, or you did I think very tellingly
18 use the word compile in terms of compiling the data.
19 That has very traditionally been not something required
20 under either OPRA or the common law, compiling.
21 Identified records, yes. But compiling? The courts have
22 consistently, as has the GRC, held that there's no
23 obligation on a municipality or a government agency to
24 compile information. I use the analogy, you know, of a
25 filing cabinet. And even though it may be a computer

1 record nevertheless what has to take place, and which Mr.
2 McCarthy would verify, is going through, whether it's
3 automated or mechanical or manual, all the emails because
4 they're not sorted by, in the new email system they're
5 not sorted by anything other than date, exact date and
6 time.

7 THE COURT: Here is the problem. And I think
8 Mr. Luers is very, his last two paragraphs are very
9 articulate. And in fact, articulate in they're telling
10 of where we're going as a society and where we're going,
11 you know, under OPRA. As technology makes things easier
12 to retrieve then doesn't that sort of expand the
13 definition of what's a document? I said to you, back in
14 November before I came on the bench that morning I said,
15 what the hell, let me see if I can print out my emails.
16 Mike, it didn't take me 60 seconds to figure out what to
17 do and I had 8 pages of everything I sent and everything
18 I was receiving. I said, that was pretty easy.

19 MR. LUERS: Pretty easy.

20 THE COURT: Now I'm respecting your position.
21 But what if it is as simple as a few keystrokes?

22 MR. FITZGERALD: Well --

23 THE COURT: Should a citizen be denied that
24 information if it that's simple?

25 MR. FITZGERALD: -- from a, from a legal

1 perspective under what the law requires I would say it's
2 still compiling and it's not therefore record. And I
3 thin that that requirement, if it were to be one that was
4 imposed on municipalities, should be one that comes from
5 the State. If the idea of creating email lists, I
6 understand how valuable that could be for people with an
7 interest in local government to have a list, you can
8 peruse the list and pick and choose what --

9 THE COURT: Finding out how valuable it is for
10 state government, aren't we?

11 MR. FITZGERALD: Yeah.

12 THE COURT: It's as recent as yesterday and
13 today's paper.

14 MR. FITZGERALD: But of course also all of the
15 goings on with Ft. Lee and the state also shows the need
16 to have verified reliable information, because otherwise
17 that information probably would have disappeared, which
18 is the reason to have an archival system like Galloway
19 has, which it has system --

20 THE COURT: See, and that's what has me
21 concerned. They have a system that appears, the only
22 reliable system is the one that's like the button box.
23 Throw it all in there. And the only thing it's organized
24 by is date and time. So how do they get it out to give
25 you everything from the clerk and everything from the

1 police department? How do they get it out?

2 MR. FITZGERALD: Well, Your Honor, if the
3 State --

4 THE COURT: I'm sure that the highway
5 department has email, the recreation department has
6 email. And you can go on and on, the planning board, the
7 zoning board, everybody has email. So if we have a
8 central system that's grappling up everything, well, then
9 how do we pick up the date?

10 MR. FITZGERALD: Well, if there were a --

11 THE COURT: How do we pick up the particular
12 users on those particular dates? I'm not sure.

13 MR. FITZGERALD: Well, as it stands right now
14 we have a system that reliably if a particular email is
15 requested, identified, Mr. McCarthy can find that email
16 and provide it if it's appropriate to provide it, and we
17 know the individual user --

18 THE COURT: Oh, if he wants a particular email.

19 MR. FITZGERALD: Right.

20 THE COURT: Let's say Mr. Paff received an
21 email from the police department. His system crashed, he
22 doesn't have the email anymore but he knows on June 3rd
23 that the chief sent him an email which said, you know,
24 your dog's been barking in the neighborhood and, you
25 know, please put it to an end. You know, not the dog but

1 the barking.

2 MR. FITZGERALD: Or similarly what happens is a
3 request is made for an email from Chief Moran to so and
4 so, a particular date or a particular subject. And those
5 are routinely provided. The problem is that there not
6 having ever been a perceived requirement for the
7 municipality to maintain a list of emails it obtained,
8 installed, paid a lot of money for an archival system
9 that isn't set up to provide that. If that were a state
10 requirement presumably either a different system may have
11 been required or they would have had software for it.

12 THE COURT: See, here's the thing --

13 MR. FITZGERALD: But the state right now is,
14 it's not there, Your Honor.

15 THE COURT: You are correct. But it still cuts
16 both ways. Because what he says in his letter is true.
17 As technology expands and as the capability to gather,
18 I'm not going to say compile, to gather information
19 that's at your fingertips, as that capability expands
20 then so expands the obligation.

21 MR. FITZGERALD: Well, except, Your Honor, as I
22 used that analogy of the filing cabinet, if we had a
23 filing cabinet and maintained a list or similarly here if
24 we had a filing system that maintained a list I
25 acknowledge that would be a public record and we would

1 have to provide it. But for reasons that have nothing to
2 do with this particular request the township doesn't have
3 such a system in place. Now if it had to do it it could
4 presumably buy one, spend the money and do it. But under
5 the current system it has it doesn't, that system doesn't
6 maintain that list.

7 THE COURT: Don't I have to have a more
8 complete factual basis so that I can either agree or
9 disagree with Mr. Luers that it's as simple as a few
10 keystrokes?

11 MR. FITZGERALD: Well, Your Honor, I'm not
12 necessarily willing to concede that it's simply a few
13 keystrokes that should be provided --

14 THE COURT: I'm assuming you aren't.

15 MR. FITZGERALD: No. But I understand that
16 that's really at the heart of the issue. And I'm
17 confident that if we go through that, because I've gone
18 through it with Mr. McCarthy, you know, we can
19 demonstrate, you know, to the plaintiff that it is in
20 fact not a simple system --

21 THE COURT: Well, see --

22 MR. FITZGERALD: -- and then he can get an
23 expert or look at somebody else and --

24 THE COURT: -- that's the other thing that
25 could come out in a deposition. There may be certain

1 facts that you'll be able to stipulate to. And there may
2 be certain facts that you can't stipulate to and he may
3 say, here's my expert. And my expert says that ain't so,
4 this is how they could do it.

5 MR. FITZGERALD: If there was an expert who
6 said that our system actually produces easily such a list
7 that would obviously be a potential game changer. You
8 know, Mr. McCarthy did contact the technical people
9 actually at the manufacturer of this system who told him,
10 and went through and said no, it doesn't, it doesn't.
11 But if someone can show that we don't know something or
12 if there's a different way to do it I'll be open to
13 discussing it. But I think that's really unavoidably the
14 only place we can go is to go through that with our
15 technical expert and have him hopefully satisfy the
16 plaintiff or take us in a different direction.

17 THE COURT: How much time would it take to
18 schedule the deposition between Mr. McCarthy and the two
19 of you? And then who else would be deposed, if anybody?
20 I'm real slow to put him on the stand today because we
21 could all regret it later.

22 MR. FITZGERALD: That's fine, Your Honor. I
23 mean he's generally going to be available and that
24 wouldn't be a problem at all. I would suggest that maybe
25 in hopes of getting this resolved before coming back that

1 enough time should be allowed to let them take his
2 deposition and also perhaps have them look into or
3 consult with someone else from outside.

4 THE COURT: I'm in favor of that too.

5 MR. FITZGERALD: Yeah.

6 THE COURT: I'm very much in favor of that.

7 MR. FITZGERALD: And hopefully then satisfy
8 themselves that what they're being told is in fact
9 correct and fully disclosed and that there is no other
10 way or whatever. So I'd like to hopefully maybe take it
11 to that second level before we come back, Your Honor.

12 THE COURT: I would agree, I would agree.

13 MR. LUERS: 90 days?

14 THE COURT: How much time do we need?

15 MR. LUERS: 90 days, Your Honor?

16 THE COURT: Let me see --

17 MR. FITZGERALD: Your Honor, I think that
18 approximately makes sense because it does parallel --

19 THE COURT: I do, too.

20 MR. FITZGERALD: This is not a, this is an
21 issue of, really of legal principle that Mr. Paff is
22 trying to resolve, it's not a time sensitive
23 investigation that he's trying to conduct on some matter
24 of great public interest, it would appear. So I think
25 enough time to try and work this out and get to a

1 resolution, if possible, I think that makes a lot of
2 sense. And we'll work back with the archival system
3 company and make sure that we understand it correctly and
4 that there is no other way of doing this.

5 THE COURT: So I think I know the two of you
6 well enough, I certainly know Mr. Fitzgerald well enough
7 and I think Mr. Luers I know well enough as well. We
8 don't need to do a detailed management order. The two of
9 you are mature enough and professional enough that if I
10 say any and all discovery and depositions that needs to
11 be done will be done by April 10th, if you run into a
12 problem just give me a call and we'll work it out over
13 the phone, but I'm saying between now and April 10th any
14 discovery, whether, you know, an exchange in documents,
15 or he may hire an expert. I've been through this on a
16 audio problem in a civil personal injury litigation
17 involving the state and the state police where the
18 plaintiff hired an expert to go in and look at the
19 system, it was a digital system, and was then able to
20 testify very differently than the State's witness was
21 testifying, you know. But the jury had to make that
22 call, it wasn't me, in terms of what was available and
23 what wasn't and what had been destroyed and what hadn't
24 been. But I'm saying April 10th everything will be done.
25 Now if there are deposition transcripts I'd like you to

1 mail to me so that I've had the chance to read them
2 before the next hearing. And I'm thinking either the
3 week of April 21st or the week of April 28th. Passover
4 and Easter fall around the same time this year. Do we
5 do, want to get past both those and just simply shoot
6 for, you know, sometime, April 28th, 29th, 30th?

7 MR. LUERS: Perhaps the first week of May, Your
8 Honor?

9 THE COURT: That's fine.

10 MR. LUERS: All right.

11 THE COURT: I will pick a day. It will likely
12 be May 7th or 8th, but we'll, you know --

13 MR. LUERS: Okay.

14 THE COURT: And what we'll do is start it in
15 the morning, like -- you come quite a ways, I know that.
16 So we'll start 10, 10:30?

17 MR. LUERS: That would be great, Your Honor.
18 Thank you.

19 THE COURT: Okay. And then I'll have whatever
20 time we need that entire day and try and get it resolved.
21 I hope, I don't think I'm being overly cautious but when
22 I look at the record of some of the other cases I say to
23 myself, yeah, you do, I need more of a factual basis
24 before I can say the township's wrong or the township's
25 right, before I can say that metadata, because this

1 particular metadata is so easily retrievable, and again
2 I'm not using the word compiled, is so easily retrievable
3 that it's certainly what the legislature had in mind when
4 they said it's a public record. That's his position.
5 And I can't say I disagree with it. If it's that easy to
6 produce then why isn't, I mean when I look at how easy my
7 emails are to produce why isn't that a way, isn't that
8 one of my records.

9 MR. FITZGERALD: I understand your concern,
10 Your Honor. But I think we, in effect, apples and
11 oranges, and I --

12 THE COURT: Oh, I understand that. No, no, no.
13 The volume of the emails alone makes it, makes it a
14 raisin and a grapefruit. I understand that. I mean --

15 MR. FITZGERALD: But that's what we'll address
16 with Mr. McCarthy and whomever else we may be dealing
17 with. And we'll pin that down to get that record for
18 Your Honor.

19 THE COURT: I'll prepare the order, we'll get
20 it out probably tomorrow or Monday, and we will see each
21 other the first week of May. I enjoy the dialogue and
22 the excellent presentations. And this certainly is an
23 area of the law that is going to continue to evolve. We
24 all know that.

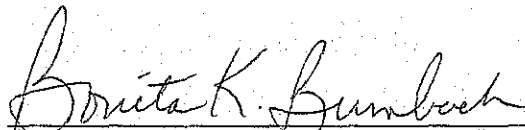
25 MR. LUERS: Thank you, Your Honor.

1 THE COURT: Because technology is going to
2 force it to evolve. And look at yesterday's headlines
3 and today's headlines. It's fascinating what people put
4 in emails.

5 (end of material to be transcribed)

6 **CERTIFICATION**

7 I, **BONITA K. BRUMBACH**, the assigned
8 transcriber, do hereby certify that the foregoing
9 transcript of proceedings heard on January 9, 2014 and
10 digitally recorded from 1:39:51 PM to 2:23:50 PM, is
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16 BONITA K. BRUMBACH, AOC #263
P.O. Box 741
Haddonfield, NJ 08033
(609) 525-2149

August 4, 2014
Date