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

JOHN PAFF,	)	
Plaintiff,	)	**Transcript**
v.	)	**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	)	
Defendant.	)	

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

Date: **June 2, 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

1 **I N D E X**

Witnesses:	Direct	Cross	Redir.	ReCross
For the Plaintiff:				
John Paff	29			
For the Defendant:				
Eric McCarthy	4			26
Recalled	42	46		

Evidence:	Ident.	Evid
P-1 Binder containing 7 Exhibits	17	

Argument:	
by Mr. Luers	34
by Mr. Fitzgerald	48

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. On
5 behalf of the plaintiff Walter Luers appearing.
6 THE COURT: Hello, Mr. Luers.
7 MR. LUERS: Hello, Your Honor.
8 MR. FITZGERALD: Michael Fitzgerald of
9 Fitzgerald, McGroarty and Malinsky appearing on behalf of
10 the Township of Galloway and the Clerk, T.C. Kay.
11 THE COURT: Hello, Mr. Fitzgerald. Okay. Let
12 the record reflect that counsel and I had a conversation
13 some time ago. And the last hearing got adjourned
14 because of the trial I was in. But what we talked about
15 during that conversation was that because an order to
16 show cause has been entered it's my practice at these
17 hearings when I'm going to hear testimony is to permit
18 the defendant, the party against whom the order has been
19 issued, to show cause. And so, Mr. Fitzgerald, you may
20 proceed.
21 MR. FITZGERALD: I'd like to call Mr. Eric
22 McCarthy to the stand, please.
23 THE COURT: Okay. Hello, Mr. McCarthy.
24 MR. McCARTHY: Good afternoon, Your Honor.
25 THE COURT: Jack, you want to administer the

1 oath to this gentleman.

2 **ERIC McCARTHY, DEFENDANT'S WITNESS, SWORN**

3 MR. SAMMONS: State your last name for the

4 record, please.

5 THE WITNESS: McCarthy.

6 MR. SAMMONS: Spell it, please.

7 THE WITNESS: M-C-C-A-R-T-H-Y.

8 MR. SAMMONS: Thank you.

9 THE COURT: Okay. Have a seat. Right here is

10 good. You may proceed, Mr. Fitzgerald.

11 **DIRECT EXAMINATION BY MR. FITZGERALD:**

12 Q. Mr. McCarthy, what's your position, your

13 employment?

14 A. I am the IT technician for the Township of Galloway.

15 Q. And how long have you had that position?

16 A. It'll be 8 years this May.

17 Q. And what are your responsibilities in that

18 regard?

19 A. I receive maintenance and upkeep of full technology

20 systems, computers, printers, servers, such.

21 Q. And what's your experience besides with the

22 township?

23 A. I've been in the field for about 20 years now.

24 Worked with a company doing similar, similar, you know,

25 job duties for 10 years before the township.

1 **BY THE COURT:**
2 Q. With the township 10 years and 10 years with
3 somebody else?
4 A. No, 10 years before, 8 years with the township.
5 Q. Okay.
6 **BY MR. FITZGERALD:**
7 Q. As you're aware, you signed two certifications,
8 at issue here is the email archiving by the township and
9 the systems used for that. Could you give a brief, a
10 very brief explanation of what basically an email
11 archiving system is.
12 A. The archival appliance basically captures all email
13 as they're sent and received and chronologically stores
14 them in a data store. They're uncompromised. Almost
15 like in a vault.
16 Q. And what's the reason for doing that as opposed
17 to just, let's say, having the Outlook version that each
18 employee has?
19 MR. LUERS: Objection, Your Honor. While the
20 witness may or may not be qualified to discuss the
21 reasons a foundation should be laid.
22 THE COURT: I'm going to permit the question
23 and answer.
24 MR. LUERS: Yes, Your Honor.
25 **BY MR. FITZGERALD:**

1 Q. What's the reason for --
2 THE COURT: You're going to get ample
3 opportunity to do cross-examination.
4 MR. LUERS: Yes, Your Honor.
5 THE COURT: And there's no jury here so
6 nobody's going to get confused by it. And I'm curious to
7 know the answer, too.
8 MR. FITZGERALD: Thank you, Judge.
9 **BY MR. FITZGERALD:**
10 Q. What's the reason for having an archive system?
11 A. I believe it's the law. We need to retain emails
12 sent and received.
13 Q. And you mentioned, used the word uncompromised.
14 What does that mean in this context?
15 A. Nobody has access to the data storage besides
16 myself. emails cannot be deleted, they can't be
17 modified, they can be pulled per request by date and
18 time.
19 Q. Can the, what system does the township
20 currently have for archiving emails?
21 A. We have one that is provided by the Data Storage
22 Corporation. It's called Inboxer anti-risk appliance.
23 The township and the police department were both on those
24 for 6 years. And the township was moved off of that one
25 onto a product called Mail Archiva provided by Ipswich

1 Corporation, which also supplies our email.
2 Q. When did that change --
3 **BY THE COURT:**
4 Q. When did that happen?
5 A. June 2013 the township moved to that one. The
6 police department is still on the previous one.
7 Q. What was the reason at the time for making the
8 change?
9 A. Both email servers, or I should say both the
10 township and the police department were on the same email
11 server, physical server, and we decided to separate them.
12 Basically an Attorney General guideline said they
13 preferred the police department to have their own
14 physical server in a secure location.
15 Q. Okay. The prior system, the one that is still
16 being partially used, were you fully satisfied with that
17 system, with that equipment?
18 MR. LUERS: Objection, Your Honor. The
19 witness' opinion regarding whether or not he's satisfied
20 with equipment is not relevant or material.
21 THE COURT: Well, I'm going to permit the
22 question and answer. Again, you can -- understand, I
23 permit very broad cross-examination, especially when
24 there's no jury. So you'll have, you'll have a chance to
25 challenge him on his opinions and anything else you think

1 is relevant.
2 MR. LUERS: And I will tailor my objections
3 appropriately.
4 THE COURT: Okay.
5 **BY MR. FITZGERALD:**
6 Q. Okay. Let's back up.
7 A. Sure.
8 Q. When the township decided, and who made this
9 decision to go to two separate systems?
10 A. It was kind of a collaboration of the chief of
11 police and the township manager.
12 Q. Okay. And why, was there a reason you didn't
13 simply get the same system you had been using before?
14 A. Yes.
15 Q. Okay.
16 A. I believe so.
17 Q. Were you familiar with the use of the prior
18 system?
19 A. Yes.
20 Q. Okay. And were you primarily responsible for
21 obtaining the new system?
22 A. Yes.
23 Q. And what were the reasons for going with a
24 different system?
25 A. Um, the new system works hand in hand and is

1 provided by the email vendor. It's a solution they
2 provided. The cost was more in our range we were looking
3 for. We became a little frustrated with the service for
4 the old archival system, they started growing
5 unresponsive to service requests. And the functionality
6 was, the functionality and the price of the old system
7 was just a little overkill for us.
8 Q. What technical considerations were considered
9 in obtaining, looking for and obtaining a new system?
10 A. There were minimum requirements. We just, we needed
11 a lot of space. We receive maybe 25,000 emails a month
12 on the township side. So we just needed ample space,
13 didn't need much computing, didn't need to meet computing
14 requirements, just data storage.
15 Q. Was the ability to create email lists, was that
16 a consideration one way or the other?
17 A. It wasn't. Um, I guess in a way we almost assumed
18 because the old one did that the new one would.
19 Q. And what's the status of the system now being
20 used by the police department, what are the future plans
21 for it?
22 A. It's chugging along. It's old. But it works well.
23 But when it does have problems it's tough to get support
24 on it.
25 Q. How many emails are stored on the system

1 approximately? Do you have an idea?
2 A. Yeah. About three-quarter of a million.
3 **BY THE COURT:**
4 Q. How many are stored between the dates of June
5 3rd through June 17th, 2013? A quarter of a million's
6 interesting but it's not really relevant to our concern.
7 MR. FITZGERALD: No, Your Honor. I'm just
8 going as to why a new system was being used, not to the
9 particular search involved here.
10 **BY THE COURT:**
11 Q. But can you tell us how many are stored between
12 the dates of June 3rd through June 17th of 2013?
13 A. A two week period with all employees, I couldn't.
14 **BY MR. FITZGERALD:**
15 Q. The average, what's the average use, you said
16 perm month. What's the average per month?
17 A. About 25,000.
18 Q. Per month. so ordinarily could you break that
19 down and divide by four.
20 A. Yeah. Some users obviously are triple, quadruple
21 what other users are.
22 Q. But in terms of the total system that number is
23 about a reasonable average?
24 A. It is.
25 THE COURT: Go ahead. Pardon the interruption.

1 **BY MR. FITZGERALD:**
2 Q. You mentioned the storing of emails as they
3 come in. How are they stored in the mail, you call it
4 the appliance?
5 A. As they're received and sent chronologically. If an
6 email comes in it goes, another one comes in right behind
7 it it's stacked right on top of it. If one is sent in
8 between it's just chronological, date and time received
9 or sent.
10 Q. Are they organized in any fashion within the
11 system?
12 A. Only by date and time.
13 Q. In one of your, in your certification you had
14 used an analogy of, could you explain what that analogy
15 was and how it helps to understand how the mail archive
16 system works?
17 A. I believe we were comparing it to a filing cabinet,
18 if you were to take each email and place them into a file
19 as they were sent or received each maybe cabinet
20 representing a day or a week time, just one right after
21 another.
22 Q. Now if the request for a list of emails on the
23 data storage system, generally how, walk through that
24 process just so the Court can understand it clearly.
25 You've laid it out in two certifications but I'd like you

1 to take us through it again from the beginning to the
2 end. What's, again, just start at the beginning. What's
3 the first thing you would do?
4 A. I would have to log, use a web browser to log onto
5 the appliance.
6 Q. Okay. And then what do you see on the screen
7 at that point?
8 A. It's a user interface with user defined and
9 appliance defined fields.
10 Q. And what options or choices does it give me at
11 that point?
12 A. It allows you to choose who the email was sent by,
13 who the email was sent to, date range, and key word
14 search. And there's three or four other categories that
15 we don't use. There's a category called category and,
16 like I said, a few others that I'm just not familiar
17 with, we don't use them.
18 Q. Now if you're dealing with the, the search
19 requested here by Mr. Paff for a list of emails from the
20 chief of police during a two week period of time how
21 would you go about then specifically doing that search?
22 A. Um, I would put the chief's email address in the
23 sent by field and then choose the date range, complete
24 the search, and forward the results to the administrator
25 email account. Then go back, put the chief's email in

1 the received field, leave the date range, perform a
2 search and also forward that to the administrator email
3 account.
4 Q. How long would you estimate this particular
5 search would take you?
6 A. 2 to 3 minutes.
7 Q. Okay.
8 A. From beginning to end.
9 Q. Would that time vary depending upon the
10 particular request?
11 A. Sure.
12 Q. What are some of the other options that would
13 be available in terms of creating an email list, other
14 than just the person and time?
15 A. A key word search. A key word search will search
16 the entire email, including attachments, subject line,
17 text, the body of the email itself for that keyword.
18 Q. Okay. Take it back to the analogy regarding
19 searching through a filing cabinet to create a list. How
20 does this email appliance actually then search? You
21 mentioned you're putting in various parameters, is that
22 correct?
23 A. Yes.
24 Q. How does that relate to or is it similar to
25 searching a filing cabinet?

1 A. Well, we go through it and we pull based on the
2 criteria. Imagine it first goes to that date range and
3 then would pull emails from the chief himself if he was
4 the person we were looking for. Compile them. Create,
5 you know, the results. And then like I said, I would
6 forward those results. And then it would go back and do
7 the exact opposite and pull the received file for that
8 date range.
9 Q. In your certification and in your testimony
10 today are you trying to argue that creating this list is
11 particularly burdensome or difficult?
12 A. No.
13 MR. LUERS: I heard an answer, but objection.
14 THE COURT: It's okay. He said no, it's not.
15 So let's --
16 MR. LUERS: Yes, Your Honor.
17 THE COURT: -- let's see where that goes.
18 **BY MR. FITZGERALD:**
19 Q. You said 2 to 3 minutes? Is it correct on the
20 other --
21 A. Per search.
22 Q. -- other searches would --
23 A. Depending on the date range too.
24 Q. -- take a few minutes more but generally in
25 that range?

1 A. Yeah.
2 Q. Okay. What about if the search results are
3 particularly numerous or broad in terms of number? Is
4 there a limit of how many can be searched?
5 A. If the results come back over 500 messages the
6 search has to be done again. It only brings back a
7 maximum 500, so at that point you have to go to the last
8 message, find the date on that message and start the
9 search again from that point.
10 Q. Okay. Okay. Other than the type of search
11 here, a list of emails for an individual in the date
12 range I think you indicated, am I correct, that other
13 types of searches could also be produced and a list
14 produced in the system?
15 A. Yes.
16 Q. Depending on the criteria that you put in.
17 A. Correct.
18 MR. FITZGERALD: Okay. Your Honor, I have
19 nothing from Mr. McCarthy.
20 THE COURT: Okay. Mr. Luers.
21 MR. LUERS: Your Honor, we have copies of trial
22 notebooks, of documents that may or may not come into
23 play during this examination or other examinations. May
24 I hand a book to the clerk that's been, the exhibits
25 aren't numbered but they've been tabbed.

1 THE COURT: As long as he knows what it is.
2 MR. LUERS: I have a copy for everything.
3 there's nothing new in it.
4 MR. F1TZGERALD: Are these from the deposition?
5 THE COURT: As long as he knows what it is I'm
6 okay with it.
7 MR. LUERS: It's the, well, there's a table of
8 contents in the first page. It's the complaint, it's the
9 answer, it's Mr. McCarthy's two certifications, it's
10 defendant's answers to interrogatories, it's Mr.
11 McCarthy's deposition transcript, and that's it. And
12 again, not introducing anything into evidence. I don't
13 know how it's going to come into play. It probably won't
14 based on what I heard before, but --
15 THE COURT: Okay.
16 MR. FITZGERALD: Your Honor, I have no
17 objection. These are documents we're aware of.
18 THE COURT: As long as there's no surprises I'm
19 fine.
20 MR. F1TZGERALD: They're just very nicely
21 organized now.
22 MR. LUERS: So each document here is both
23 tabbed and the first page has an exhibit sticker but it's
24 blank.
25 THE COURT: So why don't we just call it P-1.

1 **PLAINTIFF'S EXHIBIT #P-1 MARKED FOR IDENTIFICATION**
2 MR. LUERS: And that is Your Honor's.
3 THE COURT: Okay. P-1 contains 25 different
4 exhibits.
5 MR. LUERS: Well, Your Honor, no, it's -- look
6 at the table of contents.
7 THE COURT: Yeah, you're right.
8 MR. LUERS: We put in the extra tabs just in
9 case.
10 MR. FITZGERALD: Just in case.
11 THE COURT: P-1 contains 7 exhibits.
12 MR. FITZGERALD: I hope we don't get to 25.
13 THE COURT: I doubt it.
14 MR. LUERS: I would be surprised. May I?
15 Thank you, Judge.
16 **CROSS-EXAMINATION BY MR. LUERS:**
17 Q. Good afternoon, Mr. McCarthy.
18 A. Good afternoon.
19 Q. With respect to the mail archive system that
20 was being used by the township in June 2013, what was the
21 name of that system?
22 A. It is the Inbox or anti-risk appliance provided by
23 Data Storage Corporation. Actually Data Storage
24 Corporation bought the company that originally supplied
25 us with it.

1 Q. May I refer to that archive system as the Data
2 Storage system?
3 A. Sure.
4 Q. Is that fair?
5 A. Sure.
6 Q. So when did the municipality switch over from
7 the Data Storage system to the new mail archival system?
8 A. It was June or July. It may have been early July
9 2013, but it's possibly late June.
10 Q. Well, is it fair to say that I've heard you
11 testify on direct that you said June 2013?
12 A. Yes.
13 Q. Do you remember whether it's June or July 2013?
14 A. I don't remember the exact date. We have it written
15 down on the white board in the office actually.
16 Q. Okay. Do you remember your deposition being
17 taken in this case?
18 A. I do.
19 Q. And do you remember at the beginning of the
20 deposition you were sworn in under oath?
21 A. I do.
22 Q. And of course you told the truth during that
23 deposition.
24 A. I did.
25 Q. Do you recall --

1 MR. LUERS: Your Honor, we're going to be
2 referring to tab 6, page 20.
3 **BY MR. LUERS:**
4 Q. Mr. McCarthy, do you recall being asked this
5 question and giving this answer:
6 "Q. And it's my understanding that municipal
7 switched over from the Data Storage Corporation tool to
8 the Mail Archiva tool in July 2013.
9 A. Correct."
10 A. Sure.
11 Q. So it would be fair to say that the switch
12 occurred in July 2013, correct?
13 A. Yes.
14 Q. With respect to Mr. Paff's other requests have
15 you had a chance to review them?
16 A. His particular requests, no.
17 Q. Have you run -- beg your pardon?
18 A. The actual request itself I have not seen.
19 Q. Have you run a search using Mr. Paff's
20 parameters?
21 A. Yes.
22 Q. And what were the results of that search?
23 A. The results I would expect, the emails sent and
24 received by the subject in that date period.
25 Q. And how many emails did you get? How many

1 hits?
2 A. I don't recall.
3 Q. Was it more or less than 100?
4 A. I don't recall.
5 Q. Can you give us any inkling of the size of the
6 result?
7 A. Guessing, with the chief's email usage I'd say --
8 THE COURT: I'd rather you didn't guess. I
9 don't like guesses at all.
10 THE WITNESS: Okay.
11 **BY MR. LUERS:**
12 Q. The answer is you don't know.
13 A. No.
14 Q. When did you run the search of Mr. Paff's,
15 using Mr. Paff's parameters?
16 A. I don't know. I'd imagine it was sometime within
17 the couple weeks that we received his request, or I was
18 notified of his request.
19 Q. Did you do anything with the results of the
20 search?
21 A. No.
22 Q. Mr. McCarthy, is it fair to say that with
23 respect to the steps to run the search, I think we talked
24 about it a little bit on direct, it's fair to say that
25 the amount of time you would have to take to prepare the

1 search would be 2 to 3 minutes?
2 A. Yes.
3 Q. In terms of, in terms of requests for logs that
4 Galloway has received in the past how many of those
5 requests have you fulfilled?
6 A. Many.
7 Q. More than 100?
8 A. I would say 100 is a good estimate.
9 Q. And that's based on your experience in
10 personally fulfilling these logs, correct?
11 A. Yes.
12 Q. Can you perform, can you perform the search
13 requested by Mr. Paff today?
14 A. Yes.
15 Q. And why is that?
16 A. Why can I?
17 Q. Yes.
18 A. Do it? You mean from here?
19 Q. No, not from here.
20 A. Right. If I go back and run it.
21 Q. If you were at your computer in Galloway
22 Township could you run Mr. Paff's search today?
23 A. Yes.
24 Q. And why is that?
25 A. The appliance is still archiving for the police

1 department. It's still an active appliance.
2 Q. And isn't it true --
3 THE COURT: Pardon me. What did you say?
4 THE WITNESS: It's still archiving for the
5 police department.
6 THE COURT: Okay. Go ahead.
7 **BY MR. LUERS:**
8 Q. And isn't it true that the Data Storage
9 Corporation tool is also still active and retaining the
10 emails, Miss Thalia's emails up until July 2013, correct?
11 A. Yes.
12 Q. And they're required, Miss Thalia's required to
13 continue to retain those emails, correct?
14 A. Yes. I'm not familiar with how long, but it's set
15 for infinite retention right now, yes.
16 Q. And isn't it true that the retention period for
17 emails currently for the township is 7 years?
18 A. I don't know that.
19 Q. But currently if you were asked to retrieve the
20 data requested by Mr. Paff you would be able to do so
21 today, correct?
22 A. Yes.
23 Q. In terms of the data that's actually stored on
24 the Data Services Corporation tool, does that include
25 metadata?

1 A. As far as I know, yeah.
2 Q. When the logs are created in your experience in
3 the past is the function that's being performed, is the
4 metadata being searched and retrieved on the server?
5 A. I don't know. I'm an end user of the product. I
6 didn't design it, implement it, or even install it. So
7 as far as the technicalities of how the searches are
8 done, I use a user interface to perform those searches so
9 the inner workings of it I couldn't tell you if it
10 touches the metadata or not.
11 Q. So you would not know how to characterize the
12 data in an email?
13 A. Not the way it's stored by this particular
14 appliance, no.
15 Q. However you are able to retrieve the data in
16 the email.
17 A. Yes. Using their user interface.
18 Q. And you're able to retrieve the data of an
19 email and call -- you're able to retrieve emails that are
20 sent on a particular day by a particular individual,
21 correct?
22 A. Yes.
23 Q. And your ability to do that today remains the
24 same as your ability to do that in June 2013 when Mr.
25 Paff's OPRA request came in, correct?

1 A. Correct.
2 MR. LUERS: Nothing further, Your Honor.
3 THE COURT: Mr. Fitzgerald.
4 MR. FITZGERALD: I have nothing further, Judge.
5 **BY THE COURT:**
6 Q. Mr. Luers asked you, could you retrieve all of
7 the emails from and to the chief between June 3rd and
8 June 17th, 2013?
9 A. Yes, I could.
10 Q. And without guessing, do you know how many that
11 is?
12 A. I don't, Your Honor. I don't want to guess.
13 Q. Okay.
14 A. The chief sends and receives quite a few emails.
15 Q. I would assume so. I would assume so. And
16 what about the clerk's office. Could you retrieve all
17 those emails between June 3rd and June 17th?
18 A. Yes, sir.
19 Q. Okay. And again, you don't know how many that
20 would be.
21 A. I don't.
22 Q. Did you ever make the effort to retrieve the
23 emails, either one, for the chief or the clerk's office
24 between the dates of June 3rd and June 17th?
25 A. I ran the search to, um, that creates the logs --

1 Q. Go ahead.
2 A. -- that basically tells me how many --
3 Q. Go ahead.
4 A. I didn't retrieve any specific emails.
5 Q. So you ran the search for each request of the
6 clerk's office and the chief of police office between
7 June 3rd and June 17th. You did run that search?
8 A. Yes.
9 Q. All right. Was anything produced as a result
10 of that?
11 A. Yeah. The log was in its native form before it's
12 forwarded as a report.
13 Q. Did you print it out?
14 A. No.
15 Q. Why not?
16 A. I --
17 Q. You weren't curious what it looked like?
18 A. Well, I saw the results right in front of me. I
19 don't know how many it was. Like I said, I don't want to
20 guess how many it was because it was a while ago.
21 Q. Okay.
22 A. I think we just ran it to see what the results were.
23 Q. I understand. But why wasn't, why wasn't a log
24 printed out? Too much paper?
25 A. No, because like I said, it does have to be

1 forwarded and then from there it's printed.
2 Q. All right. Did you forward it?
3 A. No.
4 THE COURT: Okay. Maybe I'm missing something.
5 **REDIRECT BY MR. FITZGERALD:**
6 Q. Was the purpose, when you ran this was it just
7 for your own curiosity?
8 A. I think we were just trying to find out how many it
9 was.
10 Q. The range of the number?
11 A. Yeah.
12 Q. And it was below 500?
13 A. Pretty sure it was, yeah.
14 MR. FITZGERALD: Your Honor, there was simply
15 no reason for the township to go through the exercise of
16 actually printing it because we don't believe that
17 there's any obligation to produce it. If we have to deal
18 with potentially releasing it --
19 THE COURT: I guess --
20 MR. FITZGERALD: -- we would then have to look
21 at it.
22 THE COURT: Part of your argument is that it's
23 burdensome.
24 MR. FITZGERALD: No, it's not, Your Honor. We
25 do not believe it's burdensome. We just don't believe

1 it's an obligation under OPRA to produce it. We don't
2 claim it's burdensome. As Mr. McCarthy indicated, it
3 takes a couple minutes. Burdensome is not the point.
4 Difficult is not the point. It's not burdensome, it's
5 not technical, it can be done. We don't dispute it can
6 be done. It can continue to be done on the old system.
7 And it can be done for emails of that era indefinitely
8 because it's being kept indefinitely. That's not our
9 point, Your Honor. Our point is that that record, the
10 list doesn't --
11 THE COURT: The metadata, the metadata is not
12 discoverable is what you're saying.
13 MR. FITZGERALD: No, Your Honor, we -- Your
14 Honor metadata is --
15 THE COURT: Data of data.
16 MR. FITZGERALD: No, no. It's the information
17 associated with a record. If the request is for an email
18 we don't dispute that the metadata associated with the
19 email may be discoverable. What is not required to be
20 produced is to create a list of emails and provide it on
21 request under OPRA. It's not a record that exists.
22 Metadata for a particular email exists. That's a
23 different issue. It's been addressed by federal courts,
24 United States courts, and probably will be addressed by
25 New Jersey at some point. But that's not our issue,

1 Judge. The metadata is the information, the background
2 information for a particular electronic document.
3 **BY MR. FITZGERALD:**
4 Q. My understanding is correct, Mr. McCarthy?
5 A. Yes, sir.
6 MR. FITZGERALD: This case is not about,
7 although it's been thrown into the mix, metadata is not
8 relevant to this issue. Metadata is associated with a
9 particular record. What we're talking about is a
10 creation of a list, of a log of emails. That's not
11 metadata, that's a listing created by the archive system
12 of emails. It's not metadata associated with particular
13 emails. If we were talking about that we'd be talking
14 about individual particular emails and whether or not
15 that metadata, who it was from, when it was created, was
16 it amended, revised, altered, changed before it was sent,
17 that would all be relevant. That's not what we're
18 talking about in this case, Judge.
19 THE COURT: All right. So this is an easy
20 thing for the township to do.
21 MR. FITZGERALD: We don't dispute, and
22 plaintiff would never claim it's difficult or burdensome.
23 We just dispute that it's a record under OPRA.
24 THE COURT: Okay. I understand. Anything
25 else, Mr. Luers?

1 MR. LUERS: Oh, for this witness, Your Honor?
2 No, Your Honor.
3 THE COURT: Okay. You can step down, sir.
4 THE WITNESS: Thank you, Your Honor.
5 THE COURT: Okay. Mr. Fitzgerald, what next?
6 MR. FITZGERALD: That's all I have, Your Honor.
7 We have the briefs we submitted, the certifications we
8 previously submitted. They're all before the Court.
9 There's nothing further that I, I think we need to
10 address.
11 THE COURT: Mr. Luers.
12 MR. LUERS: Your Honor, I'd like to call
13 plaintiff briefly.
14 THE COURT: Okay. Sure. You call him.
15 **JOHN PAFF, PLAINTIFF, SWORN**
16 MR. SAMMONS: State your last name for the
17 record, please.
18 THE WITNESS: Paff, P-A-F-F.
19 MR. SAMMONS: Thank you. Have a seat.
20 **DIRECT EXAMINATION BY MR. LUERS:**
21 Q. Good afternoon, Mr. Paff.
22 A. Good afternoon.
23 Q. What do you do for a living?
24 A. I'm a landlord.
25 Q. Do you have any other interests?

1 A. Yes. I'm an advocate for open government
2 transparency.
3 Q. And why do you do that?
4 A. I'm a life long resident of New Jersey and I, I
5 believe that there is a nexus between a lack of
6 transparency and an abundance of corruption. And I
7 believe that through transparency, through increasing
8 transparency one can diminish the amount of corruption.
9 Q. Do you recall making an OPRA request to
10 Galloway Township around May/June 2013?
11 A. Yes, I do.
12 MR. LUERS: I would refer the Court to tab 4 of
13 P-1. Your Honor, may I approach the witness?
14 THE COURT: Yes, you may.
15 **BY MR. LUERS:**
16 Q. Mr. Paff, I've placed in front of you a binder
17 that's been marked for identification as Plaintiff's P-1
18 and I've opened it to tab 4. What is, please take a
19 moment to review tab 4 and tell us what it is.
20 A. Well, I can see it's a, it's my certification from
21 August 16th, 2013.
22 Q. Does the certification have any attachments?
23 A. I see PA-1 and PA-2 and PA-3. Maybe some more. PA-
24 4 apparently.
25 Q. And what are, please describe those attachments

1 to the Court.
2 A. Well, PA-1 is my OPRA request, my records request of
3 June 28th; PA-2 is what I attached to the records request
4 to show Galloway that they were able to, that there was a
5 history of producing these logs; PA-3 is Ms. Kay's July
6 8th, 2013 response to my request, and that also extends
7 onto PA-4, it's a two page response.
8 Q. With respect to PA-1, did you prepare that OPRA
9 request?
10 A. Yes, I did
11 Q. And what specifically did you request?
12 A. I asked for a record similar to the log attached
13 that shows emails sent by the township clerk on one and
14 township police chief on one, between dates of June 3rd
15 of 2013 and June 17th, 2013.
16 Q. And did you transmit that OPRA request to the
17 township?
18 A. Yes, via fax.
19 Q. And did you receive a response?
20 A. Yes, I did.
21 Q. And is the response part of your certification?
22 A. Yes, it is.
23 Q. And what was the township's response?
24 A. The township's response was they for each one, it
25 looks to be identical response, that they're, that IT is

1 unable to produce the logs, therefore no records
2 responsive exist. And then it goes on to say that the
3 GRC and the courts have held that they're, you're not
4 required, the custodian is not required to create new
5 records. If a record does not already exist the
6 custodian may deny access on the basis that no record,
7 responsive records exist. And then it goes on to, I
8 could read the whole thing, but it goes on to --
9 Q. Well, you, I don't mean to interrupt you, but
10 you received that.
11 A. Yes.
12 Q. That's the response that you received.
13 A. That's the response I received, yes.
14 Q. And it was a denial, correct?
15 A. It was a denial, yes.
16 MR. LUERS: Your Honor, I'm not sure how formal
17 I have to be in the context of this hearing for order to
18 show cause, but I would move the OPRA request and the
19 ORPA response into evidence.
20 THE COURT: Sure. Everything's going to be
21 part of the record. And I know whatever I rule
22 somebody's going to appeal. I'm not worried about that.
23 And we'll make as clear a record as we can, and my
24 opinion will reference the various documents by date and
25 who sent what to whom. And then I'll also make clear

1 that if as part of your appeal you wish to present
2 something that's been presented in this courtroom go
3 ahead. I may not reference everything that you think's
4 important, but the record's going to be very clear that
5 you can make use of whatever you, whatever's been
6 presented to me or given to me. Only thing I don't like
7 is surprises, that's all. As long as everybody knows
8 what we're dealing with then have at it is my, you know,
9 my perspective.
10 MR. FITZGERALD: Your Honor obviously had no
11 problem with anything that's been in any prior, the
12 complaint, certifications.
13 THE COURT: I'm sure you wouldn't either.
14 Yeah. That's all I'm saying. The only --
15 MR. FITZGERALD: As far as I'm concerned
16 they're all part of the record.
17 THE COURT: Do not concern yourself with
18 someone saying, oh, well, you know, that wasn't formally
19 admitted into evidence at the time of the plenary hearing
20 and the Appellate Division shouldn't hear it because I'm
21 stating right here on the record that we all know what's
22 in play here. We had certifications from McCarthy, we
23 had certifications from Doyle, we had certifications from
24 Paff, we have responses to various, you know, requests.
25 And everything that is germane to this lawsuit I say is

1 part of the record. Now which one of those will I
2 reference in my opinion? The ones I think I need to
3 reference. But that doesn't mean that I've got it right
4 and if there's something else you want to point out to an
5 appellate tribunal or he wants to point out to an
6 appellate tribunal you'll be able to.
7 MR. LUERS: Thank you, Your Honor.
8 THE COURT: I mean I think that's clear?
9 MR. LUERS: Yes, Your Honor.
10 THE COURT: Good. Okay.
11 MR. LUERS: I have nothing further for this
12 witness, Your Honor.
13 THE COURT: Okay. Mr. Fitzgerald?
14 MR. FITZGERALD: Nothing, Your Honor.
15 THE COURT: Okay. Well, I've got a lot to
16 think about and I certainly respect everybody's
17 arguments. Why don't we hear from Mr. Luers first
18 telling me why his client's entitled to relief, then
19 we'll hear from Mr. Fitzgerald. And then we will adjourn
20 because I have a draft of a ruling started, it just had
21 to do with facts, you know, not findings. So Mr. Luers.
22 MR. LUERS: Thank you, Your Honor. Your Honor,
23 this case is about the retrieval of data. I can't make
24 it any clearer than that in my own mind. What's the
25 theory of our case? The theory of our case is that

1 through an OPRA request Mr. Paff asks the defendants to
2 retrieve data. And there's no dispute presently, I think
3 in the past there was a dispute as to burden and there
4 were references to burden previously but it sounds like
5 that argument has been abandoned, there's no dispute that
6 burden is an issue. Burden is not an issue. And I'm
7 glad that we've got that clarified today.
8 THE COURT: Yeah. Because I think one of your
9 other affidavits, I did get the impression that burden
10 was an issue.
11 MR. FITZGERALD: No, Your Honor. I think that
12 was perhaps interpretation that was taken of the list
13 that was addressed, laid out by Mr. McCarthy. But in one
14 of our certifications --
15 THE COURT: You want me to read it to you?
16 MR. FITZGERALD: Yes, Your Honor.
17 THE COURT: Okay. Paragraph 8 of Eric
18 McCarthy's certification of October 16th, 2013:
19 "Not only is an email log not an existing
20 record and instead one which needs to be created, the
21 creation of this particular involvement involves more
22 than a simple pushing of buttons as plaintiff seems to
23 imply. First, before beginning the actual creation of an
24 email log on the email archival system an administrative
25 account must be created on the email server and

1 designated to receive the searches. Once the
2 administrative account has been created the following
3 steps must be undertaken on the email archival system."
4 Then it's A through K.
5 MR. FITZGERALD: Well, Your Honor, that was
6 intended, if you recall we had a discussion here in the
7 courtroom regarding Outlook and how you can pull up on
8 your screen --
9 THE COURT: Yeah, I can do it right now.
10 MR. FITZGERALD: Right. And hit the button on
11 outlook and print an email list.
12 THE COURT: Right.
13 MR. FITZGERALD: Our intent wasn't that it's
14 that difficult, it takes that long, but rather that that
15 document, that record, that list doesn't exist in the
16 archive system.
17 THE COURT: I do understand that.
18 MR. FITZGERALD: And needs to be created by
19 going through a search and going through the creation of
20 the document and then the printing of the document. It's
21 not something that you pull up the archive system and
22 it's there, it has to be assembled --
23 THE COURT: I do understand that.
24 MR. FITZGERALD: -- in the archive system. It
25 has to be compiled and then a report produced. Which is

1 a different, different than the way it would be on a, our
2 individual computer. That was the point, not that it
3 takes that long, Your Honor, because we don't dispute it
4 only takes a couple minutes, but rather it takes steps,
5 it takes the creation of the document is what we're
6 really trying to get at, Judge.
7 THE COURT: Okay. Let's let Mr. Luers finish
8 and then we'll hear from you. Go ahead, Mr. Luers.
9 MR. LUERS: Thank you, Judge. And I share the
10 Court's impression about burden, but I think that once we
11 read, once we deposed Mr. McCarthy and we heard the
12 testimony today of Mr. McCarthy, which I think we all
13 found credible, the burden, burden apparently is not the
14 argument. In terms of creation, again the theory of the
15 case is not that we're asking a document to be created,
16 we're asking for data to be retrieved. OPRA does allow
17 the requestor to define the medium in which his results
18 are to be given. And when we're talking about paper
19 records, we're talking about, well, do you want a
20 physical copy or do you want a PDF. When we talk about
21 emails and PDFs and Word documents, do you want them
22 printed for you or do you want them emailed to you? Here
23 we're talking about data. And we are entitled to data.
24 I think I've made this analogy before. Payroll records,
25 payroll records are, you know, again, this is outside of

1 the record, but payroll records are electronic. I don't
2 think we need to have a full blown hearing on how payroll
3 records aren't electronic anymore. Payroll records are
4 electronic. And OPRA I think, I think the people who
5 crafted OPRA implicitly understood that because if you
6 read N.J.S.A. 47:1A-10, which is the personnel records
7 exception, it says that personnel files are not public
8 records except that the following information shall be
9 public records, that's payroll records. OPRA actually
10 uses the words information. If you look at OPRA in its
11 entirety sometimes it talks about documents, other times
12 it talks about information because it's not just a
13 physical document that could be subject to OPRA,
14 information can be subject to OPRA. So that's why we
15 talk about retrieval. We're retrieving information. And
16 for better or for worse the township's system allows
17 people to retrieve that data. In the new system they
18 don't have that capability and it sounds like a policy
19 choice was made where they elected not to have that
20 capability. But in the Data Storage Corporation tool,
21 which we heard today they're still using because the
22 archive, the emails are still, from the responsive emails
23 from June 2013 are still being maintained, again, we
24 heard that today, it's just, it's the data that's being
25 requested. And I'm not sure how to put it any other way.

1 I think that, I think that if we asked for the first
2 email sent by the police chief on alternating Tuesdays
3 we'd be pulling records, we'd be pulling all those
4 records together. I think it's the same thing. But
5 instead of asking for a specific email we're asking for
6 the data of emails. I think it's similar to asking for,
7 the best analogy I can think of is the payroll record
8 analogy. It would be a proper ORPA request to ask what
9 was the salary of every single Galloway Township employee
10 for 2013. That is a legitimate OPRA request. But is
11 there a document in the clerk's office that lists the
12 payroll and lists the salary? I'd be surprised if there
13 were because we know how salaries are adjusted, they're
14 done by resolution. And then the data is sent to either
15 the CFO or whoever handles payroll, whether it's an
16 outside service or handled in-house. But if I asked for
17 a document, I said what was the gross compensation for
18 all township employees in 2013 including benefits and
19 overtime that's a record that we get. And that's
20 probably a record that would have to be created because
21 we don't, they usually don't have the list. And same
22 thing for pensions and benefits. If you wanted to know
23 somebody's accrued pension benefit you're requesting
24 information. And so this is the same thing. I don't
25 even think this case has got much of a reach, Judge. I

1 don't, I understand that there's no specific case dealing
2 with metadata in this jurisdiction, but it feels like
3 such a long time ago, we cited a couple cases from
4 outside the jurisdiction regarding metadata and those
5 cases did hold that metadata was a public record. And
6 although I did try to question Mr. McCarthy on what was
7 and wasn't metadata, frankly, his, his answer, his answer
8 to my question about whether this dealt with metadata was
9 the only time I felt he was being a little evasive. And
10 I know I'm speaking --
11 MR. FITZGERALD: Your Honor --
12 MR. LUERS: I'm allowed to comment on --
13 THE COURT: Hold on, hold on.
14 MR. FITZGERALD: No, if there's questions from,
15 regarding Mr. McCarthy I'd be glad to have him take the
16 stand again and clarify.
17 THE COURT: I, my -- but I don't really like to
18 see anybody interrupt anybody else's --
19 MR. F1TZGERALD: But I don't like having Mr.
20 McCarthy insulted in that fashion, Your Honor.
21 THE COURT: Well, you can wait til he's
22 through.
23 MR. FITZGERALD: Okay.
24 THE COURT: And then say whatever you'd like to
25 say and call Mr. McCarthy or offer him, whatever.

1 MR. LUERS: I'm permitted --
2 THE COURT: Understand what you may find
3 offensive anything said, and this is for the benefit of
4 everybody who doesn't know it, anything said in a
5 judicial proceeding is a privileged communication. You
6 know, you can get up and say anything you want in my
7 courtroom and you're immune from liability for it. So go
8 ahead.
9 MR. LUERS: Yes, Your Honor. And when I say
10 this I'm permitted to request the Court to make findings
11 about credibility. And I found, or urge the Court to
12 find that Mr. McCarthy's statement that he had no
13 knowledge of whether the information at issue was
14 metadata, frankly, that's the only statement I didn't
15 find credible. Again, credibility is fair game. We're
16 not trying to insult anyone. But again, this is about
17 metadata, this is about the retrieval of metadata. We
18 get metadata all the time. If you, if one makes an OPRA
19 request for a Word document or a PDF document unless the
20 sender is using technology to cleanse the document, like
21 sort of scrub it of the metadata you get the metadata.
22 So here I think the Court should hold that there was a
23 proper OPRA request, I don't think that's at issue; that
24 the OPRA request was valid because it was requesting
25 information which is a public record; and that because

1 the information being requested is a public record the
2 proper response in this case back in June 2013 would have
3 been to provide exactly the same kind of log that had
4 been provided, we're referencing the sworn testimony,
5 that had been provided previously at least 100 times.
6 And unless Your Honor has any questions I don't have
7 anything further.
8 THE COURT: I'm good. Mr. Fitzgerald.
9 MR. FITZGERALD: Um, I'd like to call Mr.
10 McCarthy back to the stand, please.
11 THE COURT: Yes, you may.
12 MR. FITZGERALD: Have a little discussion about
13 metadata.
14 THE COURT: Mr. McCarthy, you remain under
15 oath.
16 **ERIC McCARTHY, DEFENDANT'S WITNESS, RECALLED PREVIOUSLY**
17 **SWORN**
18 **DIRECT EXAMINATION BY MR. FITZGERALD:**
19 Q. Mr. McCarthy, could you please go back and
20 explain your prior answer regarding your lack of
21 knowledge regarding the archive system and metadata?
22 A. I guess I came across wrong. How the company
23 itself, the inner workings of the appliance and how it
24 retrieves that data is what I was thinking Mr. Luers was
25 talking about. That particular metadata that it hits as

1 you do the search is what I'm aware of.
2 Q. Okay. Regarding, if a particular email is
3 requested with its associated metadata are you able to
4 produce that?
5 A. Yes.
6 Q. Okay. Could you explain your understanding of
7 what metadata is in relation to emails?
8 A. With a particular email it would be the series of
9 events that take place as the email is sent. It'll show
10 the internet provider information, IP addresses, if it's
11 sent through a train of different servers, which a lot of
12 times is the case if you're using one of the more popular
13 emails, Hotmail or Gmail, something like that it'll get
14 tossed to different servers before it gets to the final
15 destination. And it will list those servers.
16 Q. Okay. Is the creation of an email list or log,
17 how does metadata relate to that?
18 THE COURT: I'm going to, you save it for
19 cross-examination.
20 MR. LUERS: Yes, Your Honor.
21 **BY THE WITNESS:**
22 A. I believe the only metadata that the search results
23 would touch in creating a log would be the date and time
24 or the fields that we actually put information into.
25 THE COURT: Why don't you refer him to the

1 plaintiff's attachment to the certification, PA-2.
2 **BY THE COURT:**
3 Q. Is that metadata?
4 A. No, sir. That's --
5 Q. Okay.
6 A. That's the actual created log.
7 Q. What would metadata be, in addition to this or
8 less than this?
9 A. The metadata, as I understand it, on this appliance
10 would be the information about each particular email. So
11 if you did a search between a date range it would touch
12 the metadata of each email to see if it met that
13 requirement for the search.
14 THE COURT: Okay. All right.
15 MR. FITZGERALD: I mean that's, I apologize for
16 I guess my frustration about this issue of metadata, but
17 I truly believe it's a red herring, Your Honor. Metadata
18 is not the issue.
19 THE COURT: Hold on. I don't think we have a
20 common definition of metadata. As I looked at it I just
21 think metadata is data about data. Now how broad or
22 narrow that data is --
23 MR. LUERS: Your Honor --
24 THE COURT: Hold it.
25 MR. FITZGERALD: Metadata, which I've

1 unfortunately had to do some reading about --
2 THE COURT: Go ahead.
3 MR. FITZGERALD: -- and including the cases
4 that have been cited by plaintiff, they all have to do
5 with, as Mr. Luers indicated, the background information
6 on a particular email. One of the cases --
7 THE COURT: That's not what's being sought
8 anyway though.
9 MR. FITZGERALD: No, no. I mean that's not --
10 and if a request is made for an email and it's associated
11 metadata we would have to address that issue then. But
12 that's not the issue here --
13 THE COURT: It's not the issue here.
14 MR. FITZGERALD: -- and all the federal cases--
15 THE COURT: Let me define it. What's at issue
16 here is this type of list.
17 MR. FITZGERALD: There isn't, I think we all
18 agree that in the computer, in the mail archive system is
19 a lot of information, a lot of data, including data about
20 particular emails. And there's data there about who sent
21 it, the dates, who it went to, all of that is part of the
22 background information on that email. And if Mr. Luers'
23 client wants the background -- the other part of the
24 definition I think Mr. McCarthy just indicated is it's
25 data, background data associated with an email, it's not

1 separate information. What we get on this list is a
2 list.
3 THE COURT: This is just a compilation of all
4 emails between certain dates.
5 MR. FITZGERALD: Yes.
6 THE COURT: Is that --
7 MR. FITZGERALD: I have nothing further.
8 THE COURT: -- what was requested, though?
9 MR. FITZGERALD: Mr. Luers.
10 **CROSS-EXAMINATION BY MR. LUERS:**
11 Q. Is the, the date of an email metadata?
12 A. Technically it is, yes.
13 Q. Is the sender of an email metadata?
14 A. Yes.
15 Q. Is the recipient of an email metadata?
16 A. Yes.
17 MR. LUERS: Thank you. Thank you, Your Honor.
18 THE COURT: Okay. You can step down.
19 THE WITNESS: Thanks.
20 THE COURT: All right. Mr. Fitzgerald, do you
21 want to finish? No, he -- you can finish your argument.
22 MR. LUERS: If he wants to continue --
23 THE COURT: And I'm not going to cut you off
24 but as part of his argument he reintroduced Mr. McCarthy.
25 Now if you want to respond to that, go ahead, and then

1 Mr. Fitzgerald gets the last say.
2 MR. LUERS: Yes, Your Honor. I could either
3 comment on what we just heard or I could save it for
4 when, for a brief rebuttal.
5 THE COURT: Why don't you comment on what we
6 just heard.
7 MR. LUERS: Your Honor, in the second iteration
8 we heard the answers that I expected to get when I asked
9 Mr. McCarthy the questions about metadata the first time
10 around. And that's why I said what I said about
11 credibility, because now we got the answers that I
12 expected, which is the name is metadata, the date is
13 metadata, and the sender and recipient's metadata. Well,
14 guess what we want? We want a list of the name of the
15 sender, the recipient and the date. So that is what I
16 expected to hear and that's why I was talking about
17 metadata. Because we were talking, my theme is the
18 retrieval of metadata. And so I would ask that Your
19 Honor rely on the testimony. Again, I found Mr. McCarthy
20 to be very credible on the whole, and I ask that Your
21 Honor rely on the testimony that we just heard in making
22 a finding that this case is about retrieving data, not
23 creating documents. Thank you, Judge. Thank you for the
24 opportunity.
25 THE COURT: Okay.

1 MR. FITZGERALD: Your Honor, well, first let me
2 just get something out of the way. The, trying to tie
3 this into payroll records, payroll records are
4 specifically addressed in OPRA in terms of providing that
5 data because it's commonly known that it's retained in
6 computer form and there's not necessarily a report. So
7 there's, OPRA deals with that specifically. But all of
8 the case law under OPRA consistently has said there is no
9 obligation on the part of a public entity to correlate,
10 compile, assemble data or information for a requestor.
11 There is a requirement to produce a record. If the
12 record exists they're entitled to the record. If they
13 want an email with associated metadata, which is, again,
14 just basically the background information on that email,
15 date, time, place, to, and so forth, alterations that may
16 have taken place, that's a different issue. We can't get
17 away from the fact that what's being requested is a
18 compilation of the data in the archive system and the
19 creation of a report, the creation of a document that
20 doesn't exist. It's a new document. And that's simply
21 not required by OPRA. It may be a nice idea, it may be
22 very helpful to Mr. Paff. And also let me just say I
23 don't want to disparage at all the efforts that Mr. Paff
24 undertakes across the state. I actually for a long time
25 have been a reader of his blog. I think a lot more open

1 government is a good thing. But we're also working with
2 a statute. And the statute has requirements, it imposes
3 requirements on government, including Galloway Township.
4 And the obligation of the Township is to follow the law
5 and to produce what's required to be produced, whether it
6 wants to provide additional documents, records,
7 information, that's voluntary. It's not required by
8 OPRA. If OPRA should require the creation of lists of
9 logs of emails, that should come out of the state
10 legislature, which is looking at, you know, many other
11 changes currently in OPRA. That's where it should come
12 from because it's not in the law currently. Metadata is
13 not the issue here. If the Court goes back and takes a
14 look at the cases that were cited by Mr. Paff it's
15 simply, it's background information. We don't dispute
16 that that information is there in the computer in the
17 archive system, what we dispute is the obligation to
18 compile it, to assemble it and to create a report. I use
19 the word create very deliberately because OPRA doesn't
20 require the creation of a record. Mr. Luers, in fact,
21 has used the word create. And I think that's very
22 telling about what we're talking about. We're not
23 talking about a record, we're talking about creation of a
24 report or a record that doesn't exist.
25 THE COURT: Might the common law require you to

1 create a record?
2 MR. FITZGERALD: But then we would have to get
3 into a balancing issue which in his prior testimony Mr.
4 Paff admitted he had no particular reasons for these
5 dates and why he was looking for them. It was simply a
6 test of the township's willingness to do so. So if we
7 already have on the record in terms of that balancing a
8 lack of interest. Now if Mr. Paff could indicate a
9 reason for a particular set of dates for creating a list
10 of emails we might have to deal with that under the
11 common law because the common law definition of records
12 is broader than under OPRA. But we're not there, and I
13 thought we'd moved well past that issue, Judge.
14 THE COURT: I think we have too.
15 MR. FITZGERALD: That's all I have, Your Honor.
16 THE COURT: Mr. Luers, is there anything else?
17 MR. LUERS: No, Your Honor.
18 THE COURT: Okay. I do not procrastinate. You
19 will hear from me soon. I have begun a draft of a memo
20 and when I have it done I'll send it to both of you by
21 email.
22 MR. FITZGERALD: Thank you, Your Honor.
23 MR. LUERS: Thank you, Your Honor.
24 (end of material to be transcribed)
25

1 **CERTIFICATION**

2 I, **BONITA K. BRUMBACH**, the assigned
3 transcriber, do hereby certify that the foregoing
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BONITA K. BRUMBACH, AOC #263 Date
P.O. Box 741
Haddonfield, NJ 08033
(609) 525-2149