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

Re: John Paff v. Cape May County Prosecutor's Office  
Docket No. CPM-L-265-14

Dear Judge Johnson:

Please accept this letter in support of my position regarding disclosure. I apologize for sending this a few days late. This case arose from a disciplinary investigation initiated by the Cape May County Prosecutor's Office. The Prosecutor's Office declined to prosecute and referred the case to the Borough of Wildwood Crest for an administrative, disciplinary investigation. A retired Major of the New Jersey State Police, James Fallon, completed the investigation for the Borough. My client, retired Captain David Mayer, has not seen the investigation report of Mr. Fallon. Rather, my client and his attorney, D. William Subin, Esquire, met with the labor attorney for the Borough, William G. Blaney, Esquire. As a result of negotiations, a settlement agreement was reached. It called for Captain Mayer to terminate his service to the Borough as of May 21, 2014. The investigation of Captain Mayer, while it did not lead to criminal charges, did lead to resignation and separation in lieu of any formal disciplinary action. Indeed, this was a disciplinary matter involving a member of the Wildwood Crest Police Department that was confidentially concluded without a hearing, a decision sustaining the subject of the investigation, or a decision finding the allegations to be without merit.

It is respectfully submitted that this case comes within the purview of the Open Public Meetings Act, *N.J.S.A. 10:4-12*. Captain Mayer comes under the protective umbrella of *N.J.S.A. 10: 4-12 b.(8)* allowing the exclusion of the public from public meetings for matters involving employment, termination of employment, or discipline of an employee. Concurrently, *N.J.S.A. 40A:14-147* governs the procedure for police disciplinary actions. In the case before the court, a confidential investigation both by the County Prosecutor and Borough's investigator led to a decision to resign with an Agreement between the Borough and the officer. Clearly, the disciplinary allegation had its desired effect, that is, terminating Captain Mayer's employment with the Borough. The so-called Brady letter sealed the disposition by alerting the Borough that if the captain remained, the Prosecutor would be "compelled" to reveal the subject matter of the investigation. Resignation eliminated the issue.

The issue of discipline and the requisite decision-making in the context of police officers and other public employees and inspection by plaintiff or others has been addressed by our courts. In *Della Serra v. Borough of Mountainside*, 196 N.J. Super. 6 (App. Div. 1984), Judge King considered presentations from pillars of the legal community regarding the issue where an officer facing discipline wanted a public hearing, but the Borough declined. The Borough relied on *N.J.S.A. 10: 4-12(b)(9)*, which, like section eight, is an exception to public discourse and deliberations. The court held that a public hearing still must yield to private deliberation. *Id. at 10-11:*

The personnel exception to "government under glass", *N.J.S.A. 10:4-12(b)(8)*, expressly permits discussion of personnel matters at public meetings, upon waiver by the employee. But subsection (b)(8) nowhere speaks of how "deliberations" are to be conducted. Thus, in respect of the conduct of "deliberations," subsection (b)(8) must yield to the more specific exemption in subsection (b)(9) which permits deliberations in executive session where a civil penalty is contemplated.

We read against the background of the enactment of the legislation as exempting the quasi-judicial deliberations of a governing body when, as here, it decides the fate of the career of a public employee. Nothing in our traditions, the wording of the Act, or the legislative history suggests otherwise.

*See also Jamison v. Morris School District Board of Education, 198 N.J. Super. 411 (App. Div. 1985).*

Thus, the deliberations involved in the referral of the matter from the Cape May County Prosecutor's Office, the deliberations of the Borough of Wildwood Crest, their representatives, and Captain Mayer were all encompassed by the two sections of *N.J.S.A. 10: 4-12 (b)(8) and (9)*. The entirety of the case must be kept confidential. Our Supreme Court recognized the importance of confidentiality in *McClain v. College Hospital, 99 N.J. 346(1985)*, deciding that our right to know law is not as broad as a common law right to know. The right to know is not absolute, but requires balancing on a case by case basis. *Id. at 354-55*. The Court articulated a weighing process with law enforcement and investigatory and intra-agency materials on one scale and "a high degree of necessity", a "compelling need" for disclosure, on the other. *Id. at 362-63*.

Plaintiff, in the case before the court, should well understand this tension and how it should be resolved against him from his participation in *Paff v. Director, Office of Attorney Ethics, 399 N.J. Super. 632 (Law Div. 2007)*, a case involving the intersection of public access and confidentiality as framed by Rule 1:38(d) and Rule 1:20-9(a) and Mr. Paff's right to the investigative materials surrounding a disbarment by consent and a criminal investigation that did not lead to prosecution. In that case, Judge Feinberg followed the Supreme Court in holding that the records were not to be disclosed, noting further that a balancing test was inappropriate, citing *Nero v. Hyland, 76 N.J. 213 (1978)*. *Id. at 641*. Accord, *Burnett v. County of Gloucester, 409 N.J. Super. 219, 233 (App. Div. 2009)*, and adding the explanation that public access is "tempered"

by the exception to the Open Public Meetings Act, especially in the area of ongoing litigation and settlement.

Finally, it must be remembered that courts have tended to “favor the protection of employee confidentiality”. *McGee v. Township of East Amwell*, 416 N.J. Super. 602, 615 (App. Div. 2010), citing *North Jersey Media Group, Inc. v. Bergen County Prosecutor's Office*, 405 N.J. Super 386, 291 (App. Div. 2009).

For the foregoing reasons and authorities cited, it is respectfully submitted that David Mayer would be irreparably harmed by an order requiring the Cape May County Prosecutor, or any other entity, to reveal the investigation leading to the so-called Brady letter, or any other details of a disciplinary investigation, one that led to Mr. Mayer's resignation from the police force. To hold otherwise would result in consequence to him never anticipated and, if contemplated, he would have challenged the allegations, a course that is now barred by time and the settlement.

Most respectfully,

Joseph J. Rodgers

**SENT VIA FAX AND MAIL**

JJR:sk

cc: Richard Gutman, Esquire  
Michael J. Donohue, Esquire  
William G. Blaney, Esquire  
James B. Arsenault, Jr., Esquire  
Mr. David J. Mayer