

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION, CIVIL PART  
MERCER COUNTY, NEW JERSEY  
DOCKET NO. MER-L-1984-15  
A.D. # A-002877-15T2

**FILED**  
**APPELLATE DIVISION**  
APR 13 2016  
GLASSBORO

JOHN PAFF, )  
 )  
Plaintiff, ) TRANSCRIPT  
 )  
v. ) OF  
 )  
 ) ORDER TO SHOW CAUSE  
NEW JERSEY STATE POLICE, )  
ET AL., )  
 )  
Defendants. )

Place: Mercer County Criminal  
Courtthouse  
400 S. Warren Street  
Trenton, NJ 08608

Date: December 8, 2015

BEFORE:

THE HON. MARY C. JACOBSON, J.S.C.

TRANSCRIPT ORDERED BY:

C. J. GRIFFIN, ESQ., (Pashman, Stein, PC)

APPEARANCES:

MEGAN COHEN, ESQ., (Pashman, Stein, PC)  
Attorney for the Plaintiff

SUZANNE DAVIES, ESQ. (Deputy Attorney General)  
RYAN ATKINSON, ESQ. (Deputy Attorney General)  
Attorney for the Defendant

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1 (Call to Order of the Court)

2 THE COURT: This is the return of an OPRA,  
3 public records -- actually, it's not an OPRA case.  
4 It's only a common law, the return date on the order to  
5 show cause, and it's the matter of John Paff versus New  
6 Jersey State Police, et al., Docket Number MER-L-1984-  
7 15. If I could have the appearance of counsel for the  
8 record, please.

9 MS. COHEN: Good morning, Your Honor. Megan  
10 Cohen, from Pashman Stein, representing plaintiff, John  
11 Paff.

12 THE COURT: Okay. And for the defendants.

13 MS. DAVIES: Good morning, Your Honor.  
14 Suzanne Davies, Deputy Attorney General, on behalf of  
15 New Jersey State Police and Division of Criminal  
16 Justice.

17 MR. ATKINSON: Good morning, Your Honor.  
18 Ryan Atkinson, Deputy Attorney General, on behalf of  
19 the defendants.

20 THE COURT: Okay. In this case the John  
21 Paff, who is -- I think he calls him a public watchdog  
22 and makes a lot of requests for various public records  
23 against state and municipal entities. He's seeking an  
24 investigative file that is connected to, I think it was  
25 a Sheriff Schaffer, and when it was denied under OPRA

1 there was also a request for the common law, and this  
2 complaint is seeking the documents, seeking the file  
3 under the common law.

4 And one of the things when you focus on the  
5 common law, you do look to see if there is an OPRA  
6 privilege or exemption. And here, the criminal  
7 investigatory exemption shows the legislature's concern  
8 about investigative records.

9 But that doesn't answer the question, because  
10 the common law is much broader than OPRA. But my only  
11 point is that I think the parties should focus on  
12 whether or not under the common law, either of the  
13 defendants should be required to provide a Vaughn index  
14 to the Court, as suggested in the Loigman case, and the  
15 Loigman case I believe also says it can be done in  
16 camera, or whether the Court should order an in camera  
17 review, or, as the defendants say, the blanket denial  
18 was as appropriate under the common law as it was under  
19 OPRA.

20 So I just wanted to say that I am not going  
21 to order that the documents be provided at this stage.  
22 What we're really here about is a detailed Vaughn index  
23 or in camera review, and whether or not even that is  
24 required under all the facts and circumstances that we  
25 know of this case, which is fairly limited. So I'll

1 hear from counsel for the plaintiff first. And  
2 welcome. I don't think you've been before. Have you  
3 been before me before?

4 MS. COHEN: No, I have not, Your Honor.  
5 Would you like me to go --

6 THE COURT: I allow the counsel to choose  
7 whichever you prefer.

8 MS. COHEN: Okay. I'll stay. I'll stay here  
9 for now. Thank you so much. As Your Honor has  
10 expressed, and clearly, you are quite familiar with the  
11 facts at issue here, of great concern is whether there  
12 remains a confidentiality aspect of these investigatory  
13 records, and I think Your Honor is spot on with the  
14 suggestion that in this case there either needs to be a  
15 Vaughn index produced explaining what the documents  
16 are, because as is seen in defendants' opposition  
17 papers, there's not really much to go on.

18 There's, looking at the Loigman factors, you  
19 know, the language in defendants' opposition used his  
20 words, such as, it may hamper future witness  
21 cooperation with their office; there could be witness  
22 identity or witness information at stake.

23 THE COURT: Now, haven't you taken the  
24 position in your brief that any personal, identifying  
25 information, even the name of witnesses, is not what

1 you're seeking and that they -- did I understand that  
2 correctly, that all names could be redacted?

3 MS. COHEN: Yes, Your Honor. That's exactly  
4 what we're asking for. Really, what plaintiff is  
5 looking for is to see whether this investigation was  
6 conducted thoroughly, whether there was self-  
7 evaluation. We take the position that by releasing the  
8 records to show that an investigation occurred in  
9 accordance with the defendants' own procedures and  
10 processes that they are bound by, that that provides to  
11 the public some form of accountability and  
12 transparency.

13 Whether or not they release the names,  
14 that's, again, we're really just looking for the  
15 records to make sure that an investigation occurred in  
16 accordance with the requirements here, especially in  
17 this matter where there have been allegations of sexual  
18 misconduct, and defendants' opposition doesn't deny  
19 that there was an investigation.

20 It seems a little unfair. It seems like they  
21 are implying that an investigation occurred, that no  
22 charges were filed and, therefore, that should be the  
23 end of it. But under the common law right of access,  
24 the public has a right to know that that investigation  
25 occurred properly.

1 THE COURT: Well, there's no blanket right.

2 MS. COHEN: Right.

3 THE COURT: I mean, the common law is --  
4 requires a balancing, and while I'm positing the  
5 possibility of a Vaughn index or in camera review, you  
6 still have to show that you're entitled to an in camera  
7 review.

8 Loigman itself, that decision that is one of  
9 the key ones for this case, said that there's no  
10 automatic right to an in camera review. And in fact,  
11 they went, at least as I read the case, they directed  
12 that there be a Vaughn index prepared for the trial  
13 judge to, you know, to review.

14 But the defendants are saying that Mr. Paff's  
15 interest in this case is so weak.

16 MS. COHEN: Right.

17 THE COURT: Because it's not particularized  
18 in any way, and that I don't even have to get to a  
19 Vaughn index or in camera review because of the, you  
20 know, the criminal investigatory records, the  
21 legislature's recognized high level of confidentiality  
22 and when you balance that high level of  
23 confidentiality, even -- which you're entitled to do  
24 under the case law as one of the factors under the  
25 common law, when he's -- you know -- he doesn't have

1 any particularized interest. They're saying the Court  
2 shouldn't even go to the Vaughn index.

3 MS. COHEN: Right. And I believe that the  
4 defendants have characterized it as a personal interest  
5 that he's taken in it. I think plaintiff is someone  
6 who rallies for public information, for public  
7 disclosure, for transparency and accountability.

8 And the New Jersey Supreme Court has stated  
9 that to satisfy the standing requirement here under the  
10 common law right of access, "The applicant's interest  
11 need not be personal. Thus, a citizen's concern about  
12 a public problem is sufficient interest for purposes of  
13 standing here."

14 THE COURT: And Mr. Loigman himself was an  
15 attorney, and he had a general interest in making sure  
16 the Prosecutor's Office was spending its money  
17 properly. And they said there, no automatic in camera  
18 review, but at least as I read the case, it seemed as  
19 if they were sending it back to say, you can do -- you  
20 know -- you should do the Vaughn index so the Trial  
21 Court could evaluate it.

22 So you know, to me the biggest issue was  
23 really the balancing test. But you know, you do --  
24 part of the balancing is to see if the interest is --  
25 to me, it's enough for standing.

1 MS. COHEN: Um-hum.

2 THE COURT: So that really pushes you down to  
3 the balancing test of looking at the two interests.

4 MS. COHEN: Right.

5 THE COURT: Because really, under the common  
6 law, standing is, you know, is pretty easy to meet.  
7 And Mr. Paff has, in his complaint, and has established  
8 himself as a -- certainly, as a blogger. And so  
9 there's some analogy to newspapers.

10 MS. COHEN: Right.

11 THE COURT: Because the whole point of his  
12 blog, as I understand it, he has many cases before me,  
13 a number of them still open. The point of his blog is  
14 to make public to anyone who's interested whatever  
15 facts he can obtain through these OPRA -- well, he does  
16 that -- OPRA or common law requests.

17 MS. COHEN: Both.

18 THE COURT: So to shed some light on issues,  
19 government proceedings that raise issues that he's  
20 concerned about.

21 MS. COHEN: Right. And that is absolutely  
22 right, Your Honor. And here, where there are  
23 allegations of sexual misconduct of someone in the  
24 position of Cape May County Sheriff, I think the public  
25 has a tremendous right to know whether that was

1 investigated thoroughly.

2 Whether it resulted in criminal charges  
3 against Sheriff Schaffer or not, the public has a right  
4 to know that someone who is overseeing their community  
5 engaged in conduct that was allegedly inappropriate.

6 THE COURT: You know, it sort of bothered me  
7 that the whole case was based on rumors, and I think  
8 the article that you've cited in your papers was based  
9 on the rumors that Mr. Paff raised. So it wasn't as if  
10 it was, you know, I mean, so I was concerned when we're  
11 looking at, you know, at the balancing to see if I even  
12 need to do -- or require the defendants to provide a  
13 Vaughn index, I was sort of -- I had some reluctance --

14 MS. COHEN: Right.

15 THE COURT: -- when I saw that it was rumors.  
16 Is there anything in the record to suggest it's more  
17 than a rumor?

18 MS. COHEN: Not that I am aware of, Your  
19 Honor, not -- certainly not that we submitted with our  
20 verified complaint. I believe there are a number of  
21 smaller news sources that picked up on that story.  
22 Whether it was after Paff filed his complaint or  
23 before, I'm -- or his request, I'm not entirely sure.

24 THE COURT: But the one thing I was thinking  
25 about is that a request was made to the Ocean County

1 Prosecutor's Office, and at least it was represented in  
2 the papers. I don't know if it's actually firmed up in  
3 the papers.

4 MS. COHEN: Um-hum.

5 THE COURT: And I thought that there was some  
6 -- and you can correct me if I'm wrong -- the response  
7 seemed to be one that assumed that there was an  
8 investigation into Sheriff Schaffer. And so if there  
9 was an investigation, the existence of that would be  
10 more than a rumor of it.

11 And whether it -- so I was concerned about  
12 that. And then there was, I don't know if it was the  
13 state police's response, or I recall something from the  
14 record that Mr. Paff was told there are two  
15 investigative reports and they've been transferred  
16 maybe to the state police, and maybe that came from the  
17 Ocean County Prosecutor's Office. I'm not sure.

18 And so that suggested to me that there was at  
19 least an implicit confirmation that an investigation  
20 had occurred into a public figure, into a law  
21 enforcement public figure. And I don't know if you can  
22 tell me if the record substantiates that or not.

23 MS. COHEN: Yes. When Mr. Paff first sent in  
24 his request he was informed that there was a conflict  
25 of interest with the investigation into the allegations

1 against Sheriff Schaffer.

2 THE COURT: By Cape May.

3 MS. COHEN: By Cape -- yes.

4 THE COURT: Cape May prosecutors.

5 MS. COHEN: Cape May Prosecutor's Office.

6 And then he was told that the matter was passed to the  
7 Ocean County Prosecutor's Office, which Your Honor has  
8 suggested. And after that point -- I'm sorry. I just  
9 want to find my place and make sure I'm quoting the  
10 correct part.

11 He was told by the Cape May Prosecutor's  
12 Office that it had been given to the New Jersey State  
13 Police after the police began investigating the  
14 allegations against Sheriff Schaffer.

15 THE COURT: So you know, that to me was more  
16 than just a rumor. So I mean, at least the record you  
17 have. One other thing is that your adversaries are  
18 arguing that the sheriff is entitled to be treated the  
19 same way as a member of the public.

20 But he's a public law enforcement figure. So  
21 he clearly has all -- you know -- his -- he clearly  
22 has, you know, he has all his constitutional rights,  
23 the same as any person.

24 MS. COHEN: Right.

25 THE COURT: But I wondered whether you agreed

1 with their assertion that he should be treated the same  
2 way as a member of the public in terms of public  
3 records.

4 MS. COHEN: In terms of public records and in  
5 terms of being a public official and a public official  
6 holding a heightened place within Cape May County, no,  
7 I don't believe he has the same interest and privacy  
8 that an average citizen would have in their criminal  
9 investigatory records.

10 He's assumed a position as the Cape May  
11 County -- excuse me, not prosecutor -- Cape May County  
12 Sheriff. Additionally, the --

13 THE COURT: And that is an elected position.

14 MS. COHEN: Yes.

15 THE COURT: So he not only -- you know -- I  
16 mean, he has to be out front with the public and  
17 responsible to the public, because people are voting  
18 for him or against him.

19 MS. COHEN: Right. And on top of that, Your  
20 Honor, the allegations that were alleged or the  
21 allegations at issue here were while he was acting in  
22 his official authority as the sheriff in a training  
23 that I believe took place at the Ocean County Aquatic  
24 Center, and then there were allegations additionally at  
25 the Police Training Academy.

1 So it wasn't like these allegation occurred  
2 in his private life while he was not acting within the  
3 scope of his authority as a sheriff. These allegations  
4 are suggested to have occurred while he was in his  
5 official capacity, which I think only raises the issue  
6 more that he has a lessened idea or position of privacy  
7 in those investigatory records.

8 THE COURT: And why would that be important  
9 in a common law balancing?

10 MS. COHEN: Well, because under the common  
11 law where the Court is cast with balancing whether the  
12 public has a right to know versus the government  
13 interests in confidentiality, here, the public has  
14 elected this official.

15 The allegations occurred while he was acting  
16 within his official capacity. I think that those two  
17 factors are certainly enough to tilt the scale in favor  
18 of disclosure, on top of, there have been no  
19 suggestions by the defendants that there are witness  
20 identities at risk, that there were confidential  
21 informants.

22 THE COURT: Well, there may be. We don't  
23 know.

24 MS. COHEN: Right. There may be.

25 THE COURT: Which is one of the reasons why I

1 wouldn't give the --

2 MS. COHEN: Right.

3 THE COURT: There's no way I believe I could  
4 appropriately grant access to any criminal  
5 investigatory records, really, without at least a  
6 Vaughn index, if not an in camera review.

7 MS. COHEN: Absolutely. And I would agree,  
8 especially if there are witness identities at risk or  
9 confidential informants, that does open the door to an  
10 in camera review, and that certainly is information  
11 that the Court should review before being disclosed to  
12 the public.

13 Again, the interest here is public disclosure  
14 to know whether an investigation occurred properly into  
15 such serious allegations against Sheriff Schaffer.

16 THE COURT: One of the things that, you know,  
17 strikes me is that I think your adversaries raised  
18 issues of privacy, and a public figure is not just like  
19 a member of the public, because their expectation of  
20 privacy is diminished, particularly some -- you know --  
21 an official, certainly, and then someone who's an  
22 elected official.

23 So the privacy is different, and but there's  
24 still a privacy concern for Sheriff Schaffer, because  
25 typically, and I think your adversary quoted this in

1 the brief, if a criminal investigation leads to no  
2 public -- there's nothing public, there's no  
3 indictment, there's no complaint, you know, could have  
4 been lower than an indictment even, the person who was  
5 the subject of the investigation has a right not to  
6 have the fact of the investigation publicized.

7 And the wrinkle here is that you came forward  
8 with a name. So this is not just -- you know -- I have  
9 had instances where there's a concern without it -- you  
10 know -- the identity of certain individuals is not  
11 known.

12 And particularly when you, you know, I also  
13 do State Grand Jury cases, and some of the OPRA cases  
14 mention the Doliner standard for State Grand Jury  
15 privacy. And there, there is a very heightened need to  
16 keep names of possible targets confidential when there  
17 is no indictment, because you don't want to -- you  
18 know, if their reputational interest is very high.

19 Here, you've identified a name and there  
20 seems to have been some confirmation from the record  
21 you described of investigation into Sheriff Schaffer.  
22 Does that mean he has no privacy interest in this  
23 investigation? I don't think so. I mean, he still has  
24 a privacy interest.

25 And your adversaries are focusing mostly on



1 the institutional law enforcement interest in keeping  
2 investigations confidential, both while they're ongoing  
3 and after they're concluded. But I think they also  
4 mention the privacy of Sheriff Schaffer.

5 So when I'm taking those things into account  
6 why do you say the balance should, at the very least,  
7 require a Vaughn index, if not an in camera review?  
8 Those are some significant concerns that the defendants  
9 have raised.

10 MS. COHEN: Yes, they are certainly very  
11 serious, especially given the allegations. To have  
12 one's name tied to such allegations, I certainly  
13 understand, is very serious in nature. However, here  
14 where he is an elected official, where he was acting  
15 within the scope of his official capacity at the time  
16 the allegations were raised and where the allegations  
17 transpired, where defendants have confirmed that an  
18 investigation did in fact occur, the records --

19 THE COURT: I'm not sure these defendants  
20 confirmed it.

21 MS. COHEN: Yeah.

22 THE COURT: I mean, perhaps, you know, I  
23 don't know --

24 MS. COHEN: True. Very true, Your Honor.

25 THE COURT: -- I don't know if there's

1 anything -- perhaps they did.

2 MS. COHEN: Yeah. I think here where an  
3 investigation is seemingly closed there is a difference  
4 between when an investigation is ongoing versus when an  
5 investigation has closed. And here, it appears that  
6 the investigation has closed.

7 THE COURT: One distinction I want to make,  
8 and you know, we don't know whether it's closed or not  
9 is in my experience the distinction might be  
10 active/inactive. It's been my experience that law  
11 enforcement may be somewhat reluctant to close an  
12 investigation.

13 But whether it's active, you know, would seem  
14 to me to be ongoing, and if it's inactive it certainly  
15 would be close to closed. But my experience is  
16 sometimes they don't officially close an investigation.  
17 Maybe, you know, I think a lot of times they do, but I  
18 just wanted to note that I've seen instances where  
19 cases remained open for a number of years.

20 And so the passage of time doesn't always  
21 mean it's closed. We frankly don't know. That's one  
22 thing that we might learn, if there is a Vaughn index  
23 or in camera review. And I think you've said it's very  
24 difficult to make the blanket argument when it's not  
25 clear on the -- that they're making --

1 MS. COHEN: Um-hum.

2 THE COURT: -- blanket nondisclosure when you  
3 don't have a knowledge of whether it's ongoing or not,  
4 because the interest in confidentiality goes way down  
5 from what the case law says if it's a closed  
6 investigation.

7 MS. COHEN: Right. And I think here where  
8 the responses or the application of the Loigman factors  
9 that have at least been presented in the opposition  
10 papers do not make it clear that the scale should tip  
11 in the favor of nondisclosure.

12 I think the application of the factors tend  
13 to or seem to be speculative. They do not give a clear  
14 indication that there is a concern about witness  
15 identification. There are confidential informants.  
16 They don't even go in so much to explain how self  
17 evaluation would be chilled, which is the third Loigman  
18 requirement.

19 They don't apply the policy-making or policy  
20 standard that is enumerated in factor four. They don't  
21 even apply factors five and six, which I think is  
22 another reason why the Court has a very legitimate  
23 interest in reviewing the files, either requiring  
24 defendants to produce a Vaughn index, or reviewing the  
25 files in camera and determining that there is an

1 outweighing interest in confidentiality here.

2 THE COURT: I know that you've gone over the  
3 factors in your brief, but what do you believe are the  
4 strongest considerations? And the Loigman factors, you  
5 may have pointed this out, too, or your colleague in  
6 the brief that was filed, we're not limited by the  
7 Loigman factors.

8 But you know, what aspects of this do you  
9 believe are the strongest to at least go to the next  
10 step in this case, because your plaintiff has general  
11 interest in good government and transparency.

12 MS. COHEN: Um-hum.

13 THE COURT: And he's -- you know -- I equate  
14 -- you know -- I think the newspapers might be upset if  
15 he was equated with a journalist, but he's on that  
16 continuum, okay, and that I do view it in light of all  
17 that he's represented to me.

18 MS. COHEN: Um-hum.

19 THE COURT: But what do you think are the  
20 strongest arguments from what you know as to why the  
21 Court should go to the next step?

22 MS. COHEN: I think in light of plaintiff's  
23 interests here, and as Your Honor has stated, he's a  
24 blogger. He has an interest in open government. I  
25 think factor three, "The extent to which agency's self

1 evaluation, program improvement or other decision-  
2 making will be chilled by disclosure," there's no  
3 indication here that by showing that they have complied  
4 with their own process of investigating criminal  
5 allegations, it's unclear how that would chill self-  
6 evaluation.

7 Self-evaluation is to be promoted, especially  
8 in these times where you have agencies such as the NYPD  
9 re-hauling and restructuring their entire process of  
10 self-evaluation. Self-evaluation here is tremendously  
11 important and it's important for the public to know  
12 that self-evaluation is happening.

13 And so it's -- they have not made clear how  
14 self-evaluation here would be chilled. I think --

15 THE COURT: I know, and it's sort of hard,  
16 you know, I'm trying to think. I never was a  
17 prosecutor. So I was trying to think of what might be  
18 in the file and how, you know, how some of these -- you  
19 know -- I think your adversary's posited witness  
20 statements would be here.

21 We know two investigative reports, what are  
22 likely to be in the file, because the Ocean County  
23 Prosecutor said they were transferred to the state  
24 police.

25 MS. COHEN: Um-hum.

1 THE COURT: And an investigative file would,  
2 expect would have references to witness statements.  
3 And that may be, for this kind of claim, that may be  
4 the most important evidence, you know. I don't know.  
5 So when you're talking about, you know, self-  
6 evaluation, in the Loigman case this was an audit.

7 MS. COHEN: Um-hum.

8 THE COURT: And so the audit had implicit,  
9 self-evaluation in a sense. I mean, you're monitoring  
10 yourself to make sure that the money's spent correctly.  
11 I wasn't sure how an investigatory file would  
12 necessarily show this agency's self-evaluation.

13 MS. COHEN: Right.

14 THE COURT: I wasn't sure how it applied.

15 MS. COHEN: Well, there are instances where  
16 police officers or members of the New Jersey State  
17 Police are member sheriff's officers. In that case  
18 they are required to report on uses of force. They are  
19 required to make reports when any incidents are filed  
20 against them.

21 And here, where allegations have been raised  
22 against Sheriff Schaffer, there would certainly be a  
23 mechanism within the Cape May Sheriff's Office to  
24 pursue those allegations, to investigate those  
25 allegations.

1                   And so here the disclosure would be to make  
2                   sure that that mechanism was initiated properly, was --

3                   THE COURT: Yes. I mean, you know, one thing  
4                   that occurs to me is whether or not these broad claims,  
5                   do they amount to criminal conduct. You know, they --  
6                   and it sounded almost more like an employment kind of  
7                   situation, but he is the elected official.

8                   And so you know, it's not that there is  
9                   someone -- I mean, I didn't know how you'd do an  
10                  employment, exactly, and maybe the county exec -- I  
11                  mean, I don't know. But there's the whole issue of  
12                  whether it would be criminal conduct or not.

13                  When you say sexual misbehavior or something  
14                  like that, you know, there might be civil remedies that  
15                  a victim could bring. But you know, I was trying to  
16                  figure out, again, and we have -- you know -- the judge  
17                  and the plaintiff's counsel know the least in this  
18                  situation, and that's always, you know, it's the way.

19                  I just was trying to get a better grasp on it  
20                  by imagining what might be in the file. So you don't  
21                  think that -- you know -- let's just say an  
22                  investigatory report, a detective listing all the  
23                  people he spoke to, what their statements were, whether  
24                  it was voluntary or whether they had to be, you know,  
25                  go back number of times and that sort of thing.

1                   You know, your adversaries said they're very  
2                   concerned about witnesses, possible retribution against  
3                   witnesses, possible chilling the cooperation of  
4                   witnesses in the future if this came out. So what do  
5                   you think the common law would -- picturing  
6                   investigative reports with numerous witness statements  
7                   and their concerns, what -- why wouldn't this first  
8                   factor go in favor of nondisclosure?

9                   MS. COHEN: I think that the first factor  
10                  could certainly go in favor of nondisclosure. I just  
11                  think that the way it has been asserted that the first  
12                  factor weighs in defendants' favor here, weighs in  
13                  favor of disclosure because it was an incomplete  
14                  analysis, at least in the opposition papers.

15                  The first factor, "The extent to which  
16                  disclosure will impede agency function by discouraging  
17                  citizens from providing information to the government,"  
18                  defendant's application stated, "Releasing  
19                  investigative files may contain unsubstantiated  
20                  allegations, names of witnesses," and it's speculative,  
21                  and speculation would be a blanket issue instead of  
22                  nondisclosure here, which they are not permitted to do  
23                  under the common law.

24                  There needs to be some substantiation that  
25                  there is witness information, or if there is, then

1 produce a Vaughn index, redact certain names, redact  
2 witness information that they feel would be  
3 inappropriate to release and provide a Vaughn index  
4 with it.

5 THE COURT: And what about the second? You  
6 know, I mean, one of my concerns is even if you redact  
7 the name there may be certain facts in which release  
8 that could lead certain people to be able to identify  
9 that person, and there may be a very legitimate concern  
10 about, you know, protecting witnesses.

11 And I'm trying to think, one of the cases, I  
12 don't know if it was Shuttleworth or not, but one of  
13 the cases spoke about they didn't -- the Court didn't  
14 think witnesses needed to be protected because, you  
15 know, it was the same -- they made an analogy to a  
16 witness to a car accident, and that there would be  
17 nothing to, you know, diminish the interest, you know,  
18 to frustrate the interest of a witness in responding to  
19 the police for a car accident. But you know, would  
20 that be the same here?

21 MS. COHEN: I believe that was Shuttleworth,  
22 Your Honor, and here, under the second factor the if  
23 position plaintiff has taken is that it does not apply  
24 to unknown or undisclosed people who may or may not at  
25 some point disclose information.

1 And again, it goes to the issue we were  
2 discussing earlier of whether this investigation is  
3 active or inactive. If the investigation is active,  
4 then there certainly could be an argument that  
5 disclosure would have a negative impact.

6 But if the investigation is closed, as  
7 suggested by the opposition papers, that impact -- it's  
8 unclear what impact that would have on hypothetical  
9 witnesses who would possibly come forward in the future  
10 after the investigation is closed.

11 THE COURT: Well, one of the claims that  
12 you've, you know, posited is that it's an investigation  
13 into sexual misconduct. So it's a very sensitive  
14 topic.

15 MS. COHEN: Right.

16 THE COURT: And whether a witness, you know,  
17 a witness may have provided information on the basis  
18 that the identity would not be disclosed. Okay. Self-  
19 evaluation. Facts in evaluation we don't -- we really  
20 don't know.

21 That would be -- you would expect an  
22 investigative report might have some, I don't know if  
23 it's the investigator that would conclude this or if  
24 there's anything, you know, suppose it was reviewed by  
25 one of the prosecutors or a deputy attorney general.

1           They would be analyzing it to say whether or  
2 not the conduct that -- you know -- any conduct that  
3 could be verified was of a criminal nature, and that  
4 seems to me, I mean, you got attorney/client -- I don't  
5 know if it's attorney/client, but you certainly have  
6 attorney work product.

7           And you know, they've issued a blanket  
8 denial, but as you get down into this, you know,  
9 thinking about investigative reports and the whatever,  
10 you know, whatever -- however you get to the final  
11 decision if there was a final decision, there could  
12 very well be a lot of deliberative type attorney/work  
13 product. You know, there's so much discretion that's  
14 given to --

15           MS. COHEN: Right.

16           THE COURT: -- law enforce -- to prosecutor  
17 to weigh. You know, you may have proof that something  
18 occurred, but it may not amount to criminal action, or  
19 you may not have reliable enough information, you know,  
20 to use your resources to bring a case that you think  
21 you're going to lose because you can't prove it beyond  
22 a reasonable doubt.

23           So you know, there's so much discretion there  
24 and that, you know, if Mr. Paff wants to try to put  
25 himself in the view, you know, in the position of judge

1           somehow over the exercise of discretion of the  
2 prosecutor and, you know, whether or not that -- you  
3 know -- that a lot of that ultimate deliberation and  
4 decision-making is something that would be confidential  
5 under a number of different privileges. I mean, and  
6 the fact that they haven't raised them because they've  
7 done a blanket denial, but it wouldn't deny them, you  
8 know, when they do a Vaughn index from explaining why  
9 they believe that confidentiality outweighs any -- this  
10 -- you know -- it's really a somewhat low interest on  
11 behalf of Mr. Paff except that there's a public figure  
12 involved and there is -- you know -- that some of the  
13 cases mention the -- I think Shuttleworth in particular  
14 mentions the concern for making sure that law  
15 enforcement has acted appropriately.

16           MS. COHEN: Right. And requiring defendants,  
17 however, to produce a Vaughn index would satisfy the  
18 request of Mr. Paff in that he has requested  
19 information on the investigation to know whether an  
20 investigation occurred properly.

21           So producing a Vaughn index would, even if it  
22 says information is confidential, it's not the salient  
23 details of the allegations that are at issue. It's  
24 knowing that an investigation occurred properly.

25           THE COURT: Yes. And well, this one issue,

1 too, as to whether or not a Vaughn index could be  
2 prepared that could be released to Mr. Paff, or whether  
3 portions could be released, or whether or not, as  
4 Loigman noted, there might be some circumstances where  
5 a Vaughn index itself would have to be kept  
6 confidential. I've had instances where I've kept  
7 confidential Vaughn indexes and also certifications  
8 that if the Vaughn index doesn't make clear that the  
9 investigation's over, I might also require a  
10 certification to, you know, to further explain it,  
11 although under -- if you follow Loigman --

12 MS. COHEN: Right.

13 THE COURT: -- it gives you pretty detailed  
14 description of what you need to do in a Vaughn index.  
15 It's not just list of documents.

16 MS. COHEN: Right.

17 THE COURT: They have to justify why they  
18 should not be disclosed. So I could envision that  
19 there could be some sort of Vaughn index that could be  
20 turned over, but anything that was detailed would  
21 probably fall --

22 MS. COHEN: Right.

23 THE COURT: -- possibly fall within the  
24 nondisclosure.

25 MS. COHEN: But that's absolutely what the

1 common law requires, is some type of disclosure to know  
2 that an investigation occurred. If it redacts  
3 confidential information or if there's confidential  
4 information that can't be disclosed, Loigman leaves out  
5 that the Vaughn index is the appropriate avenue of  
6 disclosing even the framework for an investigation  
7 here.

8 THE COURT: Okay. Thanks very much.

9 MS. COHEN: Thank you, Your Honor.

10 THE COURT: Okay. We'll hear from your  
11 adversary.

12 MS. DAVIES: Good morning, Your Honor.

13 THE COURT: Yes, good morning.

14 MS. DAVIES: The state maintains that the  
15 denial of Mr. Paff's request under the common law was  
16 proper and that a Vaughn index and an in camera review  
17 is not even necessary in this case, just because Mr.  
18 Paff's stated interest is so low.

19 As Your Honor stated, his stated interest in  
20 this case is that he heard a rumor. The only thing  
21 that has been confirmed in this case is that there was  
22 an investigation through his common law request denials  
23 by the Ocean City -- or the Ocean County Prosecutor's  
24 Office and the New Jersey State Police.

25 Nothing else has been confirmed. Besides

1 that, Mr. Paff's only interest is he wants to decide  
2 whether a fair investigation was conducted. He doesn't  
3 even make allegations that there was something wrong  
4 with the investigation.

5 THE COURT: Well, he couldn't, because he  
6 doesn't know.

7 MS. DAVIES: Right. However, under the  
8 common law, under Lindhurst, I believe it is, the idea  
9 that there may be some type of public corruption, in  
10 and of itself, is insufficient to -- only that there is  
11 something corrupt that should be exposed for the  
12 benefit of the public is an insufficient interest under  
13 the common law to --

14 THE COURT: And you know, and but if you look  
15 at Shuttleworth, which is also an Appellate Division  
16 case, you know, the point there was -- you know, I  
17 mean, frankly, when you have a public figure, you know,  
18 I mean, Shuttleworth was something where, you know, it  
19 was similar to what's been going on in a lot of places  
20 around the country now. An individual was shot to  
21 death by police and there was no complaint filed  
22 against the police.

23 And this was a newspaper, Shuttleworth was a  
24 reporter, and so it's -- I mean, there's a heightened  
25 public interest in that scenario, but the Court there I

1 believe did require an in camera review, and did  
2 highlight concerns that the public would have because  
3 of the sensitivity of the substance of the case.

4 So you know, it seems as if there's a couple,  
5 you know, there's more than one strand of law on that,  
6 you know.

7 MS. DAVIES: Well, at this point we feel the  
8 plaintiff doesn't need a Vaughn index. They can  
9 already ascertain what it's going to contain, our  
10 denial, which would -- our exemption would be utilized  
11 for each one would be the criminal investigatory  
12 records exemption.

13 So at this point I'm not sure how the  
14 plaintiff would benefit from a Vaughn index in this  
15 case.

16 THE COURT: Well, it was really under  
17 Loigman, I mean, Loigman itself. I mean, now that was  
18 not a criminal investigatory record. The criminal  
19 investigatory record under OPRA I usually -- I mean,  
20 apply blanketly as the denial under OPRA has not even  
21 been challenged here.

22 MS. DAVIES: Correct.

23 THE COURT: But it's, you know, it's really  
24 under the common law and, you know, the -- it's tough  
25 to do common law balancing without knowing what, you



1 know, what the documents are. And so it's, you know,  
2 the Loigman sets it out and does note that there was a  
3 high degree of confidentiality in criminal  
4 investigatory materials, because I think they were  
5 talking about the government's need to conduct its  
6 affairs with skill and sensitivity.

7 So even though it came up looking for the --  
8 in regard to the audit, they looked at case law that  
9 went beyond it. And you know, there's this quote there  
10 that, "Since there's a high degree of need for  
11 confidentiality in such materials, more than a showing  
12 of good faith and citizen status will be required to  
13 overcome the public interest in confidentiality."

14 And then there's the quote that you relied  
15 on, "It does not constitute a clear showing of such  
16 public need to say only that there may be something  
17 corrupt that should be exposed for the benefit of the  
18 public."

19 And then they talk about this exquisite  
20 weighing, and a judge has to be convinced of a clear  
21 showing of advancement of the public interest to  
22 warrant disclosure. But then I believe they went ahead  
23 and required the Vaughn index. So I don't -- do you  
24 want to comment on that or comment on any of the  
25 Loigman factors.

1 MS. DAVIES: Well, the state feels that even  
2 without a Vaughn index the Loigman factors, just  
3 because of the inherent confidentiality of all  
4 investigative files, of all investigative reports,  
5 weigh in our favor.

6 The first factor, "Disclosure of  
7 investigative files that don't result in the filing of  
8 criminal charges would impede agency functions." The  
9 New Jersey State Police and other law enforcement  
10 agencies, they rely on complainants coming forward.  
11 They rely on witnesses coming forward. They rely on  
12 their investigation techniques, and to disclose  
13 investigative records, which by their nature may  
14 contain these things just because they are  
15 investigative files, might impede witnesses and  
16 complainants coming forward.

17 The same for the second factor, because  
18 disclosure of the files would have a negative effect on  
19 the target of the investigation and on those who gave  
20 information. The third factor, Judge Dooling found in  
21 New Jersey Media Group v. Bergen County Prosecutors  
22 weighed in favor of nondisclosure when it came to  
23 investigatory files. Again --

24 THE COURT: Well, was the situation there, I  
25 mean, that's what I referred to in my colloquy with

1 your adversary. I thought that the situation there was  
2 where the target was not known.

3 MS. DAVIES: He was not a public employee, if  
4 that's what Your Honor --

5 THE COURT: No. I just didn't -- was his  
6 name Nunn?

7 MS. DAVIES: I believe it was.

8 THE COURT: Yes.

9 MS. DAVIES: Yes, it was.

10 THE COURT: Okay.

11 MS. DAVIES: And Judge Dooling found that  
12 this favor weighed -- this factor weighed in favor of  
13 nondisclosure because of the negative impact that it  
14 would have on that individual's life.

15 THE COURT: Yes. It's like that privacy  
16 interest we were discussing.

17 MS. DAVIES: Right.

18 THE COURT: And you know, then the question  
19 to you is where you have a public figure such as a  
20 sheriff, what's the -- you know -- that certainly  
21 lessens the expectation of -- does it? Or does it  
22 lessen the expectation of privacy?

23 MS. DAVIES: I don't believe it lessens the  
24 issue of confidentiality of investigative reports.  
25 Whether or not it's a public employee being

1 investigated, whether or not it's a private citizen  
2 being investigated.

3 Investigative files contain techniques of  
4 police. They contain witness statements. They contain  
5 informants.

6 THE COURT: Right. But that --

7 MS. DAVIES: Which is --

8 THE COURT: -- that could be, you know,  
9 redacted if, you know, following an in camera review.  
10 But I don't know what would be left then.

11 MS. DAVIES: It could be redacted. It still  
12 leaves the possibility that the witnesses can still be  
13 linked back to the investigation, which may discourage  
14 other witnesses from coming forward in the same case or  
15 a different case.

16 It may impede further witness cooperation in  
17 cases such as that. I believe the third factor also  
18 goes to the decision-making of the New Jersey State  
19 Police and other law enforcement agencies who conduct  
20 these investigations under the policy that the  
21 investigative reports remain confidential.

22 The fourth factor, obviously, an  
23 investigative report would contain more than just  
24 factual data. It would contain an evaluation of the  
25 evidence provided during an investigation, and again,

1 public harm and stigma can result from being the target  
2 of a criminal investigation, even when the allegations  
3 are unsubstantiated.

4 Regarding the factors five and six, these  
5 were found inapplicable in the same case by Judge  
6 Dooling in the New Jersey Media Group v. Bergen County  
7 Prosecutor's Office. The state feels they're  
8 inapplicable. They don't weigh in either favor in this  
9 case.

10 THE COURT: Well, on disciplinary action, as  
11 I said, it's -- you know -- there must be some sort of  
12 mechanism, I guess, that -- I mean, there certainly are  
13 other mechanisms. Elected officials can be removed,  
14 but often it requires a criminal -- you know -- a  
15 criminal conviction.

16 MS. COHEN: Right.

17 THE COURT: But you know, there could be a  
18 civil case, as I've said. So what is your view on  
19 Shuttleworth, then, in terms of the, you know, the  
20 concerns that the Court had there? You know, where  
21 they -- I can't recall.

22 I think it was remanded. There were certain  
23 things that were not disclosed, but that got into the  
24 autopsy report. I mean, are you suggesting your  
25 situation is different from Shuttleworth, I mean, what

1 we know of the facts here are different?

2 You know, it says, "Given the need for  
3 inspection and review of items on the Vaughn index, we  
4 remand for further proceedings," and that was an  
5 investigatory file related to the shooting death of  
6 someone who was shot in police custody.

7 MS. DAVIES: We don't believe even under the  
8 Shuttleworth that a Vaughn index is required. However,  
9 if Your Honor believes it's necessary, we would comply  
10 and provide one.

11 THE COURT: And is that something you'd want,  
12 you think you could do without, you know, without  
13 making it confidential, or would it have to be  
14 confidential? You're not sure at this point?

15 MS. DAVIES: At this --

16 THE COURT: You know, sometimes you can do  
17 two versions, you know. I've had briefs submitted by  
18 the AG's Office, for example, that redact, you know, if  
19 there's been a confidential certification they redact  
20 the portions of, you know, of the brief.

21 MS. DAVIES: At this point I'm unsure, but  
22 it's something that I can definitely look into and get  
23 back to Your Honor.

24 THE COURT: But why don't you just, you know,  
25 if there's -- I had your adversary tell me what she

1 thought the strongest points were under the Loigman  
2 criteria. One of the problems here is that we know so  
3 little that so much has to be sort of speculative, but  
4 based on the, you know, the quality, the kind of things  
5 you'd expect to be in criminal investigatory records.

6 MS. DAVIES: Right. Which do I feel weighs  
7 most in our favor? I believe it's the first factor,  
8 impeding agency function. The courts have made it very  
9 clear in Loigman and Lindhurst that by disclosing  
10 investigatory files there's a very real chance that  
11 agency functions would be disrupted by witnesses not  
12 coming forward, complainants not coming forward.

13 Again, the law enforcement agencies operate  
14 their investigations under the idea and under the  
15 policy that investigative files are kept confidential.  
16 To subject these files to disclosure based on such a  
17 minimal interest that Mr. Paff has stated might change  
18 the way that these law enforcement agencies have to  
19 function.

20 It may discourage people from coming forward,  
21 knowing that no matter what the outcome of the  
22 investigation is, anything that they report to police,  
23 anything that they say to the police, any way that they  
24 cooperate with police would be subject to disclosure.

25 THE COURT: I had another question that's

1 just sort of gone out of my mind. Oh, I know. It's  
2 the -- assuming the -- let's just assume for this  
3 question that the investigation is closed.

4 MS. DAVIES: Correct.

5 THE COURT: You know, are the interests that  
6 you've pointed to, you know, are they still  
7 significant?

8 MS. DAVIES: I believe they are and the case  
9 law states that although the interest in  
10 confidentiality may decrease if a case is closed, it  
11 doesn't completely disappear. And the confidentiality  
12 issues that we're concerned about are issues that are  
13 present in every single investigation that would be  
14 conducted by a law enforcement agency.

15 We're talking about, you know, techniques,  
16 evaluations made by police, which would all be subject  
17 to disclosure.

18 THE COURT: I know that in Lindhurst there --  
19 if I remember correctly, a chase was involved and there  
20 was violent activity. So there was a lot of concern  
21 that even if the -- that you could compromise the  
22 investigation. Here, it doesn't seem quite as  
23 compelling. I don't know if you want -- because you've  
24 relied on Lindhurst and the facts here are quite  
25 different.

1 MS. DAVIES: Right. We rely on Lindhurst  
2 mostly for the proposition that a stated interest has  
3 to be more than there may be public corruption, because  
4 of the inherent confidentiality issues present in all  
5 police investigations, regardless of what the  
6 investigation was into.

7 THE COURT: Okay. Anything else?

8 MS. DAVIES: No, Your Honor.

9 THE COURT: Okay. Thanks. Any response?  
10 It's not necessary, just if you wanted to.

11 MS. COHEN: No, Your Honor. Thank you.

12 THE COURT: Okay. Is the state in any  
13 position to state whether the investigation is open or  
14 closed?

15 MS. COHEN: Not at this time, Your Honor.

16 THE COURT: Okay. This is the -- John Paff's  
17 application under the common law for the release of  
18 criminal investigatory records relating to what -- his  
19 concern about Sheriff Gary Schaffer of the Cape May  
20 County Sheriff's Office, and allegations that he  
21 committed sexual misconduct.

22 And to date, there's been no indictment of  
23 complaint issued that's been made known to the Court.  
24 John Paff is an open government activist for the -- and  
25 the defendants are the New Jersey State Police and the

1 New Jersey Division of Criminal Justice and their  
2 records custodians.

3 In 2014 Paff became aware of rumors that Cape  
4 May County Sheriff Gary Schaffer had committed sexual  
5 misconduct while at the Police Training Academy and the  
6 Ocean City Aquatics Center. The matter had been  
7 referred to the Ocean County Prosecutor's Office, and  
8 but in May of 2014 Mr. Paff requested from the Cape May  
9 County Prosecutor's Office contents of an investigative  
10 file of the alleged misconduct.

11 That request was denied, but it apparently  
12 was made known to Mr. Paff that the New Jersey State  
13 Police had taken over the investigation and took  
14 control of all reports, and the plaintiff then  
15 requested the files from the New Jersey State Police.

16 They denied the files under the Criminal  
17 Investigatory Records Exemption under OPRA, NJSA  
18 47:1(a)-1, and Mr. Paff waited a year and didn't see  
19 anything in the paper about any indictment, and made a  
20 similar request based upon his support [sic] that for  
21 the -- based upon his supposition, I'm sorry, that the  
22 investigation was likely to be over.

23 And he made the request again to the state  
24 police and to the Division of Criminal Justice. When  
25 they were denied based upon Executive Order Number 48,

1 which says, "No person having custody of state police  
2 files shall turn over the same to any other person  
3 who's not a member of a duly recognized law enforcement  
4 agency unless ordered to do so by a court of competent  
5 jurisdiction or by the governor of the State of New  
6 Jersey."

7 And also, they relied upon the criminal  
8 investigatory records, and -- exemption -- and there  
9 was also a blanket denial under the common law. This  
10 lawsuit followed. And plaintiff asserts that he's  
11 entitled to get documents contained in the  
12 investigatory file or at the very least, a Vaughn index  
13 or an in camera review done by the Court to review the  
14 file.

15 And it's clear from the case law that OPRA  
16 does not limit the common law right of access to  
17 government records. It's clear in the statute at NJSA  
18 47:1(a)-8. So when disclosure of the information is  
19 warranted by the common law, OPRA provisions cannot be  
20 invoked to defeat a citizen's right of access.

21 And that's mentioned in Bergen County  
22 Improvement Authority v. North Jersey Media Group, 370  
23 N.J. Super. 504, at page 510, an Appellate Division  
24 decision from 2004. But in the absence of clear,  
25 common law direction on the subject, a court may look

1 to OPRA provisions as expressions of public policy on  
2 the question of public access to information.

3 And common law access has a three-part test.  
4 You have to show the common law public documents. The  
5 person seeking access has to establish an interest in  
6 the subject matter of the material and the citizen's  
7 right to access must be balanced against the state's  
8 interest in preventing disclosure.

9 That's at Fourth and Teddy v. Rutgers, 148  
10 N.J. 36 from 1997. The common law right of access  
11 definition of public record is broader than OPRA's  
12 access -- OPRA's definition of government record.  
13 That's made clear in Mason v. City of Hoboken, 196 N.J.  
14 51, from 2008.

15 The common law does not have automatic  
16 exemptions the way OPRA does, which is why we're here,  
17 because OPRA -- these documents are criminal  
18 investigatory records and OPRA doesn't even distinguish  
19 between ongoing or closed investigations.

20 They're all closed and, certainly, that shows  
21 a significant public policy supporting nondisclosure of  
22 these records. And but the definition of the public  
23 record for the common law is, really, any records made  
24 by public officers in the exercise of their functions  
25 as set forth in Wilson v. Brown, 404 N.J. Super. 557,

1 certification denied 198, N.J. 473 in 2009, and they're  
2 any documents filed in a public office or in the  
3 possession of a public agency, even if they were  
4 prepared by a third party.

5 And one of the issues here is the second  
6 prong, and that is really the standing prong, and in  
7 order to raise a common law public record case the  
8 plaintiff has to show either a wholesome public  
9 interest or a legitimate private interest.

10 Higg-a-Rella v. County of Essex is one of the cases to  
11 say that, at least at page 141 N.J. at page 46.

12 And I think as your -- well, as Ms. Cohen  
13 said, the interest need not be purely personal, but an  
14 interest can be one citizen or a taxpayer out of many  
15 concerned with a public problem or issue, even though  
16 his individual interest may be slight, and that's set  
17 forth in Irval Realty v. Board of Public Utility  
18 Commissioner, 61 N.J. 366.

19 And the courts have affirmed the newspapers'  
20 interest in keeping a watchful eye on the workings of  
21 public agencies sufficient to accord standing under the  
22 common law. One of the cases to say that is Red Bank  
23 Register v. Board of Education, 207 N.J. Super. 1, an  
24 Appellate Division case from 1987.

25 And it was interesting, too, in Michelson v.

1 Wyatt, 379 N.J. Super. 611, Appellate Division from  
2 2005, that had to do I believe with sort of health  
3 records and looking -- you know -- that the plaintiff's  
4 interest was in identifying waste and fraud in  
5 government, and that was found to be sufficient to  
6 support the common law right, but there, the  
7 plaintiff's interest was outweighed by the privacy  
8 interests of city employees who were trying to shield  
9 their health, you know, information about their health  
10 benefits.

11 And you know, so in this case, you know, I  
12 really -- obviously, the standing issue, the defendants  
13 didn't seek to dismiss the case based on lack of  
14 standing, and to me, it really goes into the third  
15 prong, because the interest of the plaintiff is enough  
16 to get standing.

17 But is it enough when balanced against a very  
18 significant confidentiality interests of, you know, of  
19 the defendants in the criminal investigatory records?  
20 And you know, so I think, really, we're into the third  
21 factor.

22 And we have the -- you have to balance the  
23 plaintiff's interest against the public's interest in  
24 confidentiality and nondisclosure. And you've gone  
25 over the, you know, both in the briefs and here the

1 Loigman factors, the extent to which disclosure will  
2 impede agency functions by discouraging citizens from  
3 providing information to the government, the effect  
4 disclosure may have upon persons who have given such  
5 information and whether they did so on reliance that  
6 their identities would not be disclosed, the self-  
7 evaluation piece, the degree to which information  
8 includes factual data as opposed to evaluative reports  
9 of policy-makers, and the other -- the last two, not  
10 having that much in terms of -- not being that relevant  
11 here.

12 With Loigman, the factors I think are at 102  
13 N.J. 898, I think of maybe 105 and 106. Also, there's  
14 some helpful analysis in McClain v. College Hospital,  
15 99 N.J. 346. The Court set forth three factors for  
16 disclosure.

17 You know, is the information available from  
18 other sources? That doesn't seem to be so here, except  
19 for whatever the rumor information was. The degree of  
20 harm that the plaintiff would suffer, and that really  
21 gets to the plaintiff's interest, because sometimes you  
22 have plaintiffs who want to file lawsuits and have a  
23 personal interest beyond just exposing a general  
24 concern about corruption and the possible prejudice to  
25 the agency's investigation.

1 The claim came up in the context of a civil  
2 investigatory file, but it's been cited in other cases,  
3 as well. O'Boyle v. Borough of Longport, one of them,  
4 426 N.J. Super. 1, an Appellate Division case from  
5 2012, in which the McClain factors were used to  
6 determine whether a party has a particularized need to  
7 access material that's privileged.

8 And also, Wilson v. Brown, 404 N.J. Super.  
9 557, an Appellate Division case from 2009. It says,  
10 "Where the inquiry relates to disclosure of privileged  
11 records, the parties seeking disclosure must show a  
12 particularized need that outweighs the public interest  
13 in confidentiality of the investigative proceeding."

14 But McClain did note that, you know, that as  
15 considerations justifying confidentiality become less  
16 relevant the burden begins to -- you know -- the burden  
17 on a plaintiff becomes a little bit lower, and then can  
18 shift the balance.

19 And so you're getting to the possibility of  
20 if it is a closed investigation, you know, it would  
21 have -- plaintiff would have a somewhat lower burden,  
22 but not -- but it wouldn't eviscerate the burden at  
23 all, because the needs that -- or the concerns that the  
24 defendants have raised about closed -- keeping even  
25 closed criminal investigatory records confidential has



1 been recognized even as recently as the Lindhurst, as  
2 the defendants noted.

3 So you really have to look at the interest of  
4 both sides to determine whether or not a Vaughn index  
5 or in camera review is necessary. So you know, here  
6 it's really -- I think the analysis has to focus on the  
7 balancing, and really, perhaps the first two factors  
8 are among the more important, "The extent to which  
9 disclosure would impede agency functions by  
10 discouraging citizens from providing information and  
11 the effect disclosure may have upon persons who've  
12 given such information."

13 You know, it's very hard to, you know, decide  
14 these blanket denial cases, particularly under the  
15 common law, because I haven't seen the documents. But  
16 we've been talking about what is likely to be in  
17 criminal investigatory files, and we know that there  
18 were at least two investigative reports that went from  
19 County Prosecutor Office to the State Division of  
20 Criminal Justice or to the state police.

21 And investigation reports in a sensitive  
22 situation where there are claims of sexual misconduct  
23 against a public law enforcement like a sheriff are  
24 very sensitive. And there's a real concern that there  
25 are needs to keep records like this confidential to

1 make sure that the law enforcement is not chilled in  
2 investigations in the future, because particularly -- I  
3 mean, it wasn't identified as Internal Affairs, because  
4 you have the -- this is the chief.

5 But this is similar to an Internal Affairs  
6 investigation. You're looking at a sheriff, a county  
7 sheriff, and the claims that at least to date have not  
8 been, you know, have not led to any public charges.  
9 And so it is cloaked with sensitivity and it is -- you  
10 would expect that there would be witness statements.

11 And there may be, as well, you know, the  
12 investigative reports, the investigator decides what  
13 questions to ask, what leads to pursue, and these are  
14 the kind of things that would not be released based  
15 upon the, you know, just a general need for, you know,  
16 concern that the investigation was carried out in a  
17 proper way.

18 And seems to me there could also be  
19 significant affect on people who gave information. I  
20 mean, if it's sexual misconduct, this is something  
21 that's really sensitive and you don't want to prevent  
22 witnesses in the future from coming forward with  
23 information.

24 And so I think that these two first parts of  
25 the O'Boyle v. Borough of Longport test really weigh in

1 favor of nondisclosure. You know, I asked plaintiff's  
2 counsel a lot of questions and I am sensitive to, you  
3 know, the concern that law enforcement be held to a  
4 high standard and that there's the whole, you know,  
5 blue code of silence that you're not going to have  
6 people giving testimony against each other or providing  
7 information each other.

8 And you have a law enforcement prosecutor  
9 that could be sympathetic with the sheriff.  
10 Apparently, this may have been transferred to the state  
11 police because of trying to avoid a somewhat conflict  
12 of interest.

13 But law enforcement needs to have the  
14 flexibility to operate within a broad confidential  
15 area, and you know, particularly where, you know,  
16 plaintiff admits that his interest started with rumors,  
17 and we don't know that it's led to -- there's been  
18 no -- if there was an indictment, it's public. If  
19 there's a complaint, it's also public.

20 So it just -- this area is very, very  
21 sensitive. And so when you're doing the balance there  
22 are a lot of public concerns, a lot of public policy  
23 concerns that really underscore keeping this kind of  
24 information confidential.

25 And you know, here, you know, plaintiff is a

1 watchdog. He looks at -- you know -- he tries to get  
2 information to shed light on, you know, on various --  
3 certainly, police settlements. I know he's known for  
4 posting settlements of, you know, in regard -- civil  
5 cases regarding police misconduct.

6 But once you get into the area of criminal  
7 investigatory records, you know, it's tougher to -- you  
8 know -- to start giving, you know, giving access to  
9 these records when the public interest in making sure  
10 that law enforcement can operate effectively is at  
11 issue.

12 And you know, as I mentioned earlier on, at  
13 least in that one Bergen County case, OPRA requires all  
14 criminal investigatory records to be shielded, whether  
15 the investigation's been closed or not. And most  
16 recently, in the Appellate Division in the Lindhurst  
17 case they noted that there could be, you know, a very  
18 good reason for keeping the records confidential, that  
19 based on the -- you know -- even after an investigation  
20 is closed.

21 As I said here, it's easy to posit witness  
22 statements on very sensitive topics, and this is not  
23 the kind of thing that you would not even consider  
24 releasing unless there was a stronger public interest  
25 than what the plaintiff has articulated here.

1 I think the state also had cited River Edge  
2 Savings and Loan Association v. Highland, 165 N.J.  
3 Super. 540, an Appellate Division case from 1979. I  
4 think that might have come up in the context of  
5 discovery.

6 But there, the Court said, "The receipt by  
7 appropriate law enforcement officials of information  
8 concerning the existence or occurrence of criminal  
9 activities is critical to the uncovering and the  
10 prosecution of criminal offenses, and is thus crucial  
11 to effective law enforcement. Even inactive  
12 investigatory files may have to be kept confidential in  
13 order to convince citizens that they may safely confide  
14 in law enforcement."

15 And of course, the issue here is do you say  
16 this without doing the -- requiring the Vaughn index or  
17 an in camera review, and that goes back to looking at  
18 the interest of the plaintiff and the defendant. And  
19 as I mentioned earlier, that Bergen County Improvement  
20 case, when engaging in the balancing test under the  
21 common law you can look at the legislative policy on  
22 the subject of confidentiality, which here is a blanket  
23 nondisclosure for criminal investigatory records.

24 And when you, you know, what's to balance  
25 here. It's plaintiff's, you know, argument that the

1 public has a general need to look at these  
2 investigatory document to insure that a proper  
3 investigation was done.

4 You know, and we have the Loigman case, which  
5 is clear in saying that there is no automatic right to  
6 an in camera review. And even though there wasn't a  
7 Vaughn index there, it wasn't a criminal investigatory  
8 record. As I mentioned, it was an audit.

9 And you know, Loigman said that, "Where the  
10 reasons for maintaining a high degree of  
11 confidentiality in the public records are present, even  
12 when the citizens asserts a public interest in the  
13 information, more than citizen status and good faith  
14 are necessary to call for the production of the  
15 documents."

16 And it just requires this implicit weighing  
17 of the need for confidentiality versus the public  
18 interest. And you know, I was also struck at, in  
19 Loigman, that they said there was -- no automatic, in  
20 camera inspection is, you know, it's not -- just by  
21 making a common law claim you don't automatically get  
22 an in camera review.

23 And in Loigman they went over, you know,  
24 various privileges that pertain to criminal  
25 investigatory records and noted the government's need

1 to conduct investigatory affairs with skill,  
2 sensitivity to privacy interests involved, an  
3 atmosphere of confidentiality that encourages the  
4 utmost candor.

5 Those are really important public interests.  
6 And their public interests, they said, were underscored  
7 by Executive Order Number 48, you know, really  
8 constricting when state police files can be divulged.  
9 And you know, that also is an indication of public  
10 policy because it underscores the vital public interest  
11 in the success of criminal prosecutions, the protection  
12 of potential witnesses and informants, and a high  
13 degree of confidentiality in such materials, again,  
14 more than a showing of good faith and citizen status,  
15 will be required to overcome the public interest in  
16 confidentiality.

17 And again, it does not constitute a clear  
18 showing of such public need to say only that there may  
19 be something corrupt that should be exposed for the  
20 benefit of the public. And the Lindhurst case I think  
21 picked up with that theme.

22 You know, and in this case the plaintiff has  
23 established his bona fides, certainly before me, on  
24 many occasions and there is a real value to seeking an  
25 open process. But as Loigman said, you know, the rumor

1 that there was this misconduct, and even though we, you  
2 know, it seems to have been confirmed by the existence  
3 of an investigation, I can't say that that's enough.

4 We don't have the kind of situation that we  
5 had in Shuttleworth, which is a very public police  
6 shooting, you know, with a lot of attention. We have a  
7 rumor and the newspaper article was based upon the  
8 rumors that, you know, that Mr. Paff heard.

9 And I'm also cognizant of the fact that there  
10 is a clear interest of privacy here for Sheriff  
11 Schaffer, and possibly also for witnesses and third  
12 parties who came forward. As Judge Dooling noted in  
13 the case that was cited by the defendants, "A person  
14 has a significant privacy interest if there is no  
15 resulting indictment."

16 Here, there was no arrest. There was no, you  
17 know, you don't have any of the public information that  
18 has to be turned over if there was an arrest. There  
19 were allegations, apparently. There were rumors,  
20 surely, but there's a privacy interest for the  
21 individual, and I believe sensitive privacy interests  
22 for any witnesses that might have given, you know,  
23 might have given information to, you know, to  
24 investigators.

25 So when I weight Mr. Paff's general interest

1 in, you know, a possible -- you know -- possible  
2 corruption, or actually, it wasn't -- didn't even rise  
3 to that here, and he wants to make sure there was an  
4 appropriate process.

5 His interest in whether an appropriate  
6 process was done when -- versus the law enforcement  
7 interests, I've reviewed and are set forth in the  
8 defendants' brief, and the privacy interests of Mr.  
9 Schaffer, who when there is no -- you know -- no -- so  
10 far, anyway, no criminal indictment or complaint, he  
11 has that right not to have that -- any of the  
12 investigative materials exposed if the determination  
13 was not to -- you know -- not to indict or not to issue  
14 a complaint.

15 You know, whether or not in any other case,  
16 you know, certainly, Shuttleworth, and you think about  
17 what's been going on in other places throughout the  
18 country, it may not -- this may not always be the  
19 result when criminal investigatory records are sought  
20 under the common law.

21 But the Court is persuaded here that the  
22 interest of the plaintiff is -- when weighed against  
23 the significant confidentiality interests of the  
24 Division of Criminal Justice, the state police,  
25 Mr. Schaffer, any witnesses who gave testimony in the

1 investigation, which could very well be other law  
2 enforcement officers or victims of sexual harassment.

3 Those are all cloaked with significant  
4 privacy, and so to me, a Vaughn index, which is the  
5 main thing I was considering here, a Vaughn index is  
6 not even warranted, because the balance tips so heavily  
7 in favor of the law enforcement defendants in this  
8 case.

9 But I want to thank the attorneys for their  
10 argument this morning, and the Court will issue an  
11 order, which denies the relief sought by the plaintiff  
12 and dismisses the complaint with prejudice. Thank you  
13 very much.

14 ALL COUNSEL: Thank you, Your Honor.

15 (Whereupon, at 11:56 a.m., the hearing in the  
16 above-entitled matter concluded.)

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C E R T I F I C A T I O N

I, ELIZABETH REID-GRIGSBY, a certified electronic transcriber, certify that the foregoing is a correct transcript, to the best of the transcriber's ability, from the official electronic sound recording of the proceedings in the above-entitled matter.

*Elizabeth Reid-Grigsby* Date: 4-10-16  
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