

PASHMAN STEIN WALDER HAYDEN

A Professional Corporation
Court Plaza South
21 Main Street, Suite 200
Hackensack, New Jersey 07601
(201) 488-8200
CJ GRIFFIN, ESQ. (#031422009)

Attorneys for Plaintiff,
Libertarians for a Transparent Government

LIBERTARIANS FOR TRANSPARENT
GOVERNMENT, A NJ NONPROFIT
CORPORATION,

Plaintiff,

v.

COMMERCIAL TOWNSHIP, HANNAH E.
NICHOLS, in her capacity as Township Clerk
and Records Custodian for Commercial
Township, JUDSON MOORE, JR. and JANE
DOE DEFENDANTS 1-4,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CUMBERLAND COUNTY
DOCKET NO.: CUM-L-402-16

Civil Action

**REPLY CERTIFICATION OF
CJ GRIFFIN, ESQ.**

I, **CJ Griffin**, of full age, certify as follows:

1. I am an attorney at law of the State of New Jersey with Pashman Stein Walder Hayden, P.C., counsel for Plaintiff.
2. A true and accurate copy of Executive Order #11 (Bryne, 1974) is attached hereto as Exhibit A.

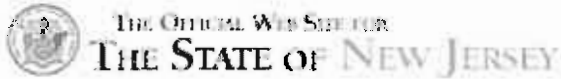
I certify that the foregoing statements made by me are true to the best of my knowledge and belief. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: August 24, 2016

By: _____


CJ GRIFFIN

EXHIBIT A

Governor Chris Christie • Lt Governor Kim Guadagno
Search[NJ Home](#) | [Services A to Z](#) | [Departments/Agencies](#) | [FAQs](#)**State of New Jersey
Executive Order #11****Governor Brendan Byrne**[Return to EO Index](#)

WHEREAS, Chapter 73, P. L. 1963, finds and declares it to be the public policy of this State that public records shall be readily accessible for examination by the citizens of this State for the protection of the public interest except as otherwise provided by said law; and

WHEREAS, Said Chapter 73 provides that all records which are required by law to be made, maintained or kept on file by State and local governmental agencies are to be deemed to be public records, subject to inspection and examination and available for copying, pursuant to said law; and

WHEREAS, Said Chapter 73 provides that records which would otherwise be deemed to be public records, subject to inspection and examination and available for copying, pursuant to the provisions of said law, may be excluded therefrom by Executive Order of the Governor or by any regulation promulgated under the authority of any Executive Order of the Governor; and

WHEREAS, Section 3(b) of 9 issued by Governor Richard J. Hughes in 1963, states that "personnel and pension records which are required to be made, maintained or kept by any State or local governmental agency . . . shall not be deemed to be public records subject to inspection and examination and available for copying pursuant to the provisions of Chapter 73, P. L. 1963;" and

WHEREAS, Disclosure of the name, title and position of persons receiving pensions and of the type and amount of pension being received, is an insignificant invasion of privacy outweighed by the public's right to know who it is employing, what jobs they are filling and the identities of those receiving government pensions;

Now, Therefore, I, Brendan Byrne, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and statutes of this State, do hereby ORDER and DIRECT

1. Section 3 (b) of 9 of Governor Richard J. Hughes is rescinded and any regulations adopted and promulgated thereunder shall be null and void.
2. Except as otherwise provided by law or when essential to the performance of official duties or when authorized by a person in interest, an instrumentality of government shall not disclose to anyone other than a person duly authorized by this State or the United States to inspect such information in connection with his official duties, personnel or pension records of an individual, except that the following shall be public

- a. An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, date of separation from government service and the reason therefor; and the amount and type of pension he is receiving;
- b. Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but in no event shall detailed medical or psychological information be released.


3. This Executive Order shall take effect immediately.

Given, under my hand and seal this 15th day of November, in the year of our Lord, one thousand nine hundred and seventy-four, of the Independence of the United States, the one hundred and ninety- ninth.

/s/ Brendan Byrne
GOVERNOR

Attest:

/s/ Donald Lan,
Executive Secretary to the Governor

[Contact Us](#) | [Privacy Notice](#) | [Legal Statement & Disclaimers](#) | [Accessibility Statement](#) 

Statewide: [NJ Home](#) | [Services A to Z](#) | [Departments/Agencies](#) | [FAQs](#)
Copyright © State of New Jersey, 1996-2010
This site is maintained by the New Jersey Office of Information Technology

CJ GRIFFIN

Counsel

cgriffin@pashmanstein.com

Direct: 201.270.4930

**PashmanStein
WalderHayden**
A Professional Corporation

August 24, 2016

Via Overnight Mail

Hon. Georgia M. Curio, A.J.S.C.
Cumberland County Courthouse
60 West Broad Street, Courtroom 346
Bridgeton, New Jersey 08302

Re: *Libertarians for Transparent Government v. Commercial Township et al.*
Docket No. CUM-L-402-16
Our File No. 1646-004

Dear Judge Curio:

This firm represents Plaintiff, Libertarians for Transparent Government, a NJ Nonprofit Corporation, in the above-captioned matter. Please accept this letter brief, in lieu of a more formal brief, in Reply to Defendant's Opposition to the Order to Show Cause. Plaintiff asks the Court to review all records *in camera* and grant access to redacted versions in accordance with the arguments made below.

LEGAL ARGUMENT

I. THE COURT MUST CONSTRUE ALL OF THE CLAIMED EXEMPTIONS IN FAVOR OF ACCESS

"Where [OPRA] is unclear, the Court has resolved any ambiguities in a manner consistent with its broad purpose." Paff v. Ocean Cty. Prosecutor's Office, ___ N.J. Super. ___ (App. Div. 2016) (citing Fair Share Hous. Ctr., Inc. v. N.J. State League of Municipals, 207 N.J. 489, 502 (2011); Sussex Commons Assocs. v. Rutgers, 210 N.J. 531, 540-41 (2012)). Accord In re New Jersey Firemen's Ass'n Obligation to Provide Relief Applications under Open Pub. Records Act, 443 N.J. Super. 238, 265 (App. Div. 2015) (noting ambiguities should be resolved in favor of disclosure of records). This is because the Legislature has instructed that "OPRA

Court Plaza South
21 Main Street, Suite 200
Hackensack, NJ 07601

Phone: 201.488.8200
Fax: 201.488.5556
www.pashmanstein.com

‘shall be construed in favor of the public's right of access.’” Paff, supra, ___ N.J. Super. ___ (quoting N.J.S.A. 47:1A-1); Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 366 (App. Div. 2003) (noting ambiguities in OPRA “must be resolved ‘in favor of the public's right of access[.]’”). Furthermore, a public agency alone bears the burden of proving that a denial of access is lawful. N.J.S.A. 47:1A-6.

When these standards are applied to this case, it is clear that Defendants cannot meet their burden of proving that withholding the records in their entirety was lawful. Accordingly, the Court should review the records *in camera*¹ and order the release of the records in redacted format to Plaintiff.

II. THE COURT SHOULD CONDUCT AN *IN CAMERA* REVIEW AND THEN COMPEL ACCESS TO THE RECORDS IN REDACTED FORM PURSUANT TO BOTH OPRA AND THE COMMON LAW

As argued in each of the Point Headings below, many of the requested records do not fit squarely within exemptions that Commercial has cited. Plaintiff therefore maintains that the records are accessible under OPRA, but recognizes that OPRA’s privacy provision might exempt portions of the records. See N.J.S.A. 47:1A-1 (“[A] public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.”). In fact, Plaintiff has stated since the beginning that it does not seek the identity of the employees who filed sexual harassment claims. Rather, Plaintiff seeks only to know the *real* reason that Mayor Moore left his employment (versus the public declaration that he resigned because he was too busy) and the types of allegations against him. Accordingly, Plaintiff

¹ Commercial seems to concede that the Court should review the records *in camera* and make a determination as to whether redacted versions, no matter how heavy the redactions, can be released.

believes that the records should be released under both OPRA and the common law, even if they contain heavy redactions.

While Commercial has stated there are only a handful of employees and release of the information might identify the employees who filed complaints, Plaintiff asks the Court to review the records *in camera* and release as much information as possible. Hartz Mountain v. NJSEA, 369 N.J. Super. 175, 183 (App.Div.2004), (“[W]e think it plain that under OPRA . . . the court is obliged, when a claim of confidentiality or privilege is made by a public custodian of the record, to inspect the challenged document in camera to determine the viability of the claim.”) certif. denied, 182 N.J. 147 (2004). It may be true that a bulk of the records must be redacted in order to keep the public from knowing who made the sexual harassment complaints, but certainly portions of the records which merely disclose the type of allegations against Mayor Moore and the *real* reason for his separation from employment may be released. For example, was the allegation that Mayor Moore inappropriately touched the employees? That he made inappropriate comments which rose to the level of sexual harassment? Or was the allegation that he viewed sexually graphic materials on his computer or engaged in some other misconduct? These behaviors often result in the filing of sexual harassment complaints, but as of right now the details are wholly unknown to the public. All the public knows is that the Mayor “resigned,” and now, via a Vaughn Index, the public can infer there were sexual harassment complaints made against him. The public is also in the dark as to the terms of the Memorandum of Understanding/Settlement Agreement that was entered between the parties. Did the Mayor receive compensation to leave? Did the victims receive compensation? The terms and conditions of the Mayor’s departure is currently unknown. Given that Mayor Moore has moved from public

position to public position under questionable circumstances, Plaintiff hopes the Court will release as much detail as possible (while still protecting the identity of the victims).

OPRA favors redaction of records over the complete withholding of records, N.J.S.A. 47:1A-5(g), and compels the Court to construe any limitation in favor of the right of access, including the privacy provision. Plaintiff asks the Court to apply these standards, review the records *in camera*, and release as much information as possible pursuant to OPRA and the common law right of access.

III. DEFENDANTS HAVE VIOLATED OPRA BY DENYING ACCESS TO MINUTES OF THE “SPECIAL MEETING” OF THE TOWNSHIP COUNCIL

Commercial has withheld the full and complete minutes of a “Special Meeting,” arguing that the minutes are exempt pursuant to an exemption for records generated in response to a sexual harassment complaint, N.J.S.A. 47:1A-1.1, or OPRA’s personnel records exemption, N.J.S.A. 47:1A-10. Commercial’s position is without merit for three reasons.

First, the Open Public Meetings Act (“OPMA”), N.J.S.A. 10:4-14, requires prompt disclosure of all meeting minutes of a public body, including closed/executive session minutes. Payton v. N.J. Tpk. Auth., 148 N.J. 524, 557 (1997). The closed/executive session minutes “must contain sufficient facts and information to permit the public to understand and appraise the reasonableness of the public body’s determination[s] made in a non-public session.” South Jersey Pub. Co. Inc. v. N.J. Expressway Auth., 124 N.J. 478, 496 (1991). It is only an “*unusual case*” that would justify total suppression of the closed/executive session minutes; otherwise, they must be submitted in redacted form. Payton, *supra*, 148 N.J. at 551 (“[G]iven the Legislature’s strongly stated intent to effectuate broad public participation in the affairs of governmental bodies, few cases will require even partial nondisclosure.”). Accordingly, Plaintiff

is entitled to redacted versions of the meeting minutes which show at a bare minimum “the time and place, the members present, the subjects considered, the actions taken, [and] the vote of each member.” N.J.S.A. 10:4-14.

Second, while N.J.S.A. 47:1A-1.1 exempts “information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer,” there is no indication that the Legislature intended that provision to exempt closed session meeting minutes which must be made accessible pursuant to OPMA. Nor is there any indication that the Legislature would consider closed session meeting minutes to be “information generated . . . in connection with any sexual harassment complaint.” Instead, the exemption clearly seems to exempt only actual work product of the investigation, such as an investigator’s notes, witness statements, or an investigator’s report. This exemption, like all other exemptions, must be construed narrowly in favor of public access and that means narrowly construing the types of records the exemption renders non-disclosable. See Asbury Park Press v. Cty. of Monmouth, 406 N.J. Super. 1, 8 (App. Div. 2009), aff’d, 201 N.J. 5 (2010) (“Nothing in the statute itself, however, states that the sexual harassment exclusion . . . should be read expansively or broadly. In fact, the statute states the opposite, that ‘any limitations on the right of access . . . shall be construed in favor of the public’s right of access.’”).

Finally, and perhaps most importantly, the closed session meeting minutes reveal Mayor Moore’s “date of separation and reason therefor,” which is information that must be disclosed pursuant to OPRA’s personnel records exemption. N.J.S.A. 47:1A-10. The Supreme Court’s decision is South Jersey Publishing Co., supra, is directly on point. At issue in the case was the voluntary resignation of the executive director of the New Jersey Expressway Authority

following an internal investigation into possible misuse of credit cards. The Court analyzed Executive Order No. 11 (Byrne 1974), which exempted personnel records in general but required disclosure of the “date of separation from the government service and *the reasons therefor.*” Id. at 495. The Court recognized that that public has a legitimate interest in knowing the *real* reasons for a public official’s separation from government employment and that simply stating that he “resigned” does not provide the public with the *actual* “reasons therefor.” In concluding that a disclosure of merely a “voluntary separation” was an insufficient disclosure, the Supreme Court explained:

[T]he court will recognize that the public interest in disclosure is intended to enable the public to make a sound judgment about the reasonableness of the Authority's decision regarding Vass, which authorized the expenditure of public funds to continue his salary and benefits for a substantial period of time after his resignation had become effective. Without disclosure of the reasons for Vass's “voluntary separation” from the Authority, the public cannot intelligently make such an evaluation.

[Id. at 498.]

The Court thus concluded that the results of an internal investigation which led to the voluntary separation would provide the “reasons therefore” and ***accordingly the closed/executive session minutes in which the internal investigation was discussed had to be disclosed.*** Id. at 496 (“As the executive-session minutes undoubtedly include the reasons for Vass's termination of employment, Executive Order No. 11 does not exempt them from disclosure.”).

While South Jersey Publishing Co. was decided under the Right to Know Law (“RTKL”) and not OPRA, its decision is nonetheless still binding on this Court and applicable to OPRA. This is because OPRA’s entire personnel records exemption is drawn almost verbatim from Executive Order No. 11, including the “date of separation” and “reason therefor” provision. (A

copy of Executive Order No. 11 is attached to the Reply Certification of CJ Griffin). “The construction of a statute by the courts, supported by . . . continued use of the same language . . . is evidence that such construction is in accordance with the legislative intent.” North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70, 96 (App. Div.) (holding that Legislature’s use of the phrase “required by law to be made, maintained or kept on file” in OPRA’s criminal investigatory records exemption demonstrated an intent to import previous judicial constructions of that phrase under RTKL case law), leave to appeal granted, 223 N.J. 553 (2015). Accord In re Allen's Estate, 23 N.J. Super. 229 (Ch.1952) (“Where a statute has been construed by a court of last resort and such statute is thereafter revised, but no change has been made as to that part which has been construed, it is a clear indication of the legislature's adoption of such construction.”). Accordingly, when the Legislature adopted OPRA, it was the fact that it continued the use of that language in OPRA “is evidence that such construction is in accordance with the legislative intent.” North Jersey Media Grp., supra, 441 N.J. Super. at 96.

Thus, the Court should grant access to the meeting minutes in at least redacted form (to protect the names of victims) in accordance with Payton and South Jersey Publishing Co., so that Plaintiff can determine when and where the meeting was held, who was present, what action was taken, and Mayor Moore’s “date of separation and reason therefor,” together with any other non-exempt information those minutes might contain.

IV. DEFENDANTS HAVE VIOLATED OPRA BY DENYING ACCESS TO THE “MEMORANDUM OF UNDERSTANDING”

Settlement agreements have long been accessible under OPRA. Asbury Park Press, supra, 406 N.J. Super. 1. This is true even where a settlement agreement contains a confidentiality clause “because the parties' agreement cannot override the public's right of access under OPRA.”

Id. at 9. Additionally, “the policy favoring settlements is far outweighed by the importance of maintaining open government.” Id. at 11. See also Burnett v. County of Gloucester, 415 N.J. Super. 506, 517 (App. Div. 2010) (“We find the public interest in settlements to be a significant one, since such settlements may provide valuable information regarding the conduct of governmental officials and the condition of government property. We reject any narrowing legal position in this matter that would provide grounds for impeding access to such documents.”).

Plaintiff recognizes that in coming to its decision, the Asbury Park Press court relied in part upon the fact that the settlement agreement pertained to publicly filed litigation. There is no lawful basis, however, for otherwise denying access to the MOU/Settlement Agreement that is at issue here. Such a record is not a personnel record, nor is it “information generated . . . in connection with any sexual harassment complaint” unless the Court reads that exemption so broadly that it exempts every record that pertains to someone who is the subject of a complaint. At most, it is ambiguous whether a MOU would be “information generated . . . in connection with any sexual harassment complaint” and thus the exemption must be construed in favor of access. Paff v. Ocean Cty. Prosecutor's Office, supra, ___ N.J. Super. ___ (“Where [OPRA] is unclear, the Court has resolved any ambiguities in a manner consistent with its broad purpose.”).

A decision that exempts a MOU/settlement agreement simply because it resolved a sexual harassment allegation would contradict Section 1’s instruction to construe exemptions narrowly, but would also permit government agencies to settle internal complaints without any transparency whatsoever! Thousands of dollars could be secretly paid to employees who complain about sexual harassment, or even to the harassers themselves, without the public even knowing. In other circumstances, agencies could agree to resolve charges against an employee

who did something wrong (such as misusing public funds) via a settlement agreement in which the employee agrees to resign and the agency agrees to keep the wrongdoing a secret, permitting the employee to move on to another government position and perhaps violate the public trust once again.

Moreover, the MOU certainly contains Mayor Moore's "date of separation" from employment and *real* "reason therefor" and thus it should be released pursuant to N.J.S.A. 47:1A-10. South Jersey Publishing Co. is once again on point. Though the Memorandum of Understanding at issue in that case could not be accessed via the RTKL because the RTKL only pertained to the small category of records that were "required by law to be made, maintained, or kept on file," the Court nonetheless held that the MOU was a public record under the common law. Id. at 498. The Court ordered the lower court to apply the common law balancing test, but directed it to "recognize that the public interest in disclosure is intended to enable the public to make a sound judgment about the reasonableness of the [agency's] decision regarding [the official], which authorized the expenditure of public funds to continue his salary and benefits for a substantial period of time after his resignation had become effective." Ibid. The Court did not consider the MOU a personnel record merely because the agency decided to place it in the official's confidential personnel file. Ibid.

Here, the Court should grant access to the MOU because settlement agreements are not exempt pursuant to any exemption of OPRA. See also Paff v. Township of Chatham, Docket no. MRS-L-1793-14, 2014 WL 7894490 (Superior Ct. December 17, 2014) (attached as Exhibit 1 to the Griffin Cert.). Plaintiff asks the Court to review the MOU *in camera* and permit redactions

only to the information within the MOU which would reveal the identity of those who complained about the sexual harassment.

V. DEFENDANTS HAVE VIOLATED OPRA BY DENYING ACCESS TO LETTER FROM THE MAYOR’S ATTORNEY

Commercial has also denied access to a letter from the Mayor’s attorney,² described as Item 8 in the Vaughn Index as “a letter of representation from the Mayor’s attorney and contains language protected under [OPRA exemption] 8 and 13c.” Exemption 8 is the “attorney-client privilege”—clearly that exemption cannot apply when a communication is sent from an attorney representing a party who is adversarial to the Township. See Gannett New Jersey Partners, LP v. Cty. Of Middlesex, 379 N.J. Super. 205, 221 (App. Div. 2005) (rejecting argument that letter from adversaries to county’s counsel is protected by attorney-client privilege or otherwise exempt). Exemption 13c is for “collective negotiations, including documents and statements of strategy or negotiating position.” Clearly this was not a letter pertaining to collective bargaining. Rather, it was a letter by the Mayor’s attorney informing the Township that he represented the Mayor’s interests. While it may contain information that could be redacted (such as the identities of those who complained against the Mayor), there is no other lawful basis for withholding the letter in its entirety.

Accordingly, Commercial violated OPRA by denying access to the letter in its entirety.

VI. PLAINTIFF IS ENTITLED TO ALL OF THE RECORDS IN REDACTED FORM PURSUANT TO THE COMMON LAW RIGHT OF ACCESS

Plaintiff believes it is entitled to redacted versions of *all* of the records under the common law right of access, although they may be produced in redacted form to protect the identities of

² Commercial released other letters from the Mayor’s attorney, such as Item 36 in the Vaughn Index.

the victims of the alleged harassment. The common law right to access a public record is determined by balancing the requestor's need for the record against the government's need for secrecy. Shuttleworth v. City of Camden, 258 N.J. Super. 573, 583 (App. Div. 1992). Here, the public has a need to review the records to determine whether the investigation into Mayor Moore's conduct was sufficient; whether he was paid monies to leave; whether the Township has contractually agreed to keep his alleged harassment a secret so that he qualifies for other public employment; whether the victims of the alleged harassment were compensated; and whether the Township might face additional liability in the future. The Supreme Court in South Jersey Publishing Co. made it clear that the public is entitled to know the *real reason* an employee leaves and that simply telling the public "resignation" is insufficient. The public policy of this state is transparency, yet Commercial has released no details about this incident—not even the MOU/Settlement Agreement that resolved the claims and might involve the expenditure of public funds! Any legitimate need for confidentiality can be handled by redactions to the public records in lieu of withholding them in their entirety. Accordingly, Plaintiff asks the Court to review all of the records *in camera* and grant access to them under both OPRA and the common law.

Respectfully Submitted,

CJ GRIFFIN

