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**SUPERIOR COURT OF NEW JERSEY  
OCEAN VICINAGE**

CHAMBERS OF  
JUDGE MARLENE LYNCH FORD  
ASSIGNMENT JUDGE



OCEAN COUNTY COURT HOUSE  
P.O. BOX 2191  
TOMS RIVER, N.J. 08754-2191

December 31, 2015

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**RE: Paff v. Township of Lakewood, et al.**  
Docket No. OCN-L-612-15

Dear Counsel:

The matter came before the Court by way of a complaint in lieu of prerogative writs filed by plaintiff, John Paff, alleging that defendants, Township of Lakewood and Kathryn Cirulli, the Lakewood Township Clerk (collectively Township), violated New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1 to -13 (OPRA) and the common law right of public access.

Paff challenges the Township's denial of access to all writings related to an investigation, disciplinary proceeding and other actions involving allegations of illicit drug use by a Township Police Officer, Matthew Moore. In its opinion rendered May 6, 2015, the Court ordered the Township to furnish a Vaughn index which itemized each document requested by plaintiff and articulated the specific basis for its denial of production of same.

On June 17, 2015, the Township submitted a Vaughn index. On September 21, 2015, the Township declined to produce certain documents on the basis that the documents related to a criminal investigation and were exempt under OPRA.

At the hearing on October 9, 2015, the court directed the Township to submit a certification from an appropriate Township official, setting forth facts to support its position that the requested documents are exempt from production under either OPRA or the common law.

At issue is whether the Township properly denied Paff's request for the documents as exempt under OPRA.

### **Background**

Plaintiff, John Paff, is an open government activist. Defendant, Township of Lakewood, is a government entity subject to the requirements of the Open Public Records Act, hereinafter referred to as OPRA. Defendant, Kathryn Cirulli, the Lakewood Township Clerk, functions as the Records Custodian for the Township.

On or about April 15, 2014, the Lakewood Township Police received credible information that one of its sworn officers, Matthew Moore, was involved in illicit drug use or transactions. The Lakewood Township Police Department immediately commenced an internal affairs investigation and a parallel criminal investigation to determine possible violations of 2C:30-2, misconduct in office, and various violations of 2C:35-1, et seq., the Controlled Dangerous Substances Act.

On April 16, 2014, Lieutenant Glenn Clayton of the LPD interviewed a confidential informant regarding the sale and possession of drugs by Officer Moore.

On April 20, 2014, Lt. Clayton, at the direction of the Township Attorney as well as the Office of the Ocean County Prosecutor, obtained a urine sample from Officer Moore to test for

the presence of illicit substances. The results of that laboratory test were received on or about June 5, 2014 and revealed the presence of metabolites of morphine, consistent with the use of heroin by Officer Moore. The LPD internal affairs division thereafter requested permission from the Ocean County Prosecutor's Office to interview Moore under a *Garrity* waiver, which was granted.

Independent of the criminal and internal investigation being conducted by the LPD in conjunction with the Ocean County Prosecutor's office, the Brick Township Police Department came forward with information it received from a confidential informant about substance abuse by Officer Moore.

On June 10, 2014, the Prosecutor's Office revoked the *Garrity* authorization and commenced its own criminal investigation into the activities of Officer Moore. For reasons that are not clear to the Court or to the parties, the Prosecutor's Office returned the investigation to the Lakewood Township Police Department and did not pursue indictable criminal charges. A disciplinary action was commenced by the Township, and a Preliminary Notice of Disciplinary Action was served upon Officer Moore on or about June 14, 2014; a report of Internal Affairs findings was completed on July 7, 2014, and the Township terminated Moore effective October 8, 2014. Final Notice of Disciplinary Action was filed on or about December 18, 2104, and a final report of the internal affairs division was completed on or about February 25, 2015.

On or about January 30, 2015, plaintiff filed an OPRA request with the Township for the production of "[a]ll writings including but not limited incident reports, investigation reports, supplementary reports, etc. related to Matthew Moore's 'drug use' conduct that resulted in his resignation." On the same day, in response, the Township informed plaintiff that this matter had been forwarded to the Ocean County Prosecutor's Office. On February 2, 2015, the Township's

counsel responded that plaintiff's request was "generic inquiries or questions that require research or investigation." On February 5, 2015, the Township denied plaintiff's request and explained that "the information requested is confidential information under the NJ Attorney General's Guidelines on Internal Affairs [the Attorney General's Guidelines] and cannot be released."

On March 2, 2015, plaintiff filed an order to show cause together with his complaint in lieu of prerogative writs alleging that (1) the Township violated OPRA by denying his access to the requested documents and failing to provide a Vaughn index; and (2) the Township violated plaintiff's common law right of access by refusing to release the requested documents. Plaintiff sought a court order to direct the immediate release of the records requested and an award of counsel fees and costs. On March 12, 2015, the court, in pertinent part of the order to show cause, requested defendants supply internal affairs reports for in camera review. Defendants submitted the documents accordingly.

After in camera review of the documents, the court found that a Vaughn index is necessary for plaintiff to present his case and ordered the Township to furnish a Vaughn index that itemizes each document requested by plaintiff and to articulate the specific basis for its denial of each item. On June 17, 2015, the Township submitted a dated Vaughn index, which, in pertinent part, states as follows:

The following listed documents should not be released for reasons for confidentiality as stated by Attorney General Guidelines for Internal Affairs. As stated on page 42 of the Internal Affairs Policy and Procedures "The information and records of an Internal Investigation shall only be released under the following limited circumstances: . . . Upon the request or at the direction of the county prosecutor or Attorney General, or upon a court order".

- The original and supplemental Internal Affairs reports (finished on February 25, 2015).
- Internal Affairs findings (July 07, 2014).

- PNDA [Preliminary Notice of Discipline Action] (signed June 14, 2014 – sent certified mail June 17, 2014).
- FNDA [Final Notice of Discipline Action] (December 18, 2014).
- Chemist Report (November 06, 2014).
- Steven Secare letter to Dr. Pandina (Chemist) (June 23, 2014).

The following should not be released, or should have information redacted.

- Subpoena to DAG Norma Evans (redact allegation of heroin usage) (September 18, 2014).
- Subpoena to Theresa Ackles; Appeal Examiner, NJ Department of Labor (redact allegation of heroin usage) (September 18, 2014).
- Law Enforcement Drug Testing Chain of Custody Form (redact Social Security Number) (April 21, 2014).
- Certified mailing list (redact address) (June 17, 2014).
- Medical Information Form (As per HIPAA regulations redact the medication the officer was taking, Physicians Name, and Mathew Moore's Social Security Number) (April 20, 2014).

On September 21, 2015, the Township issued a letter confirming denial of the records request by plaintiff on the basis that the requested records were criminal investigatory records and were exempt from production pursuant to N.J.S.A. 47:1A-1. The Township also relied upon the recent Appellate Division decision in North Jersey Media Group, Inc. v. Township of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015).

Noting the absence of any factual record before the Court, at oral argument on October 9, 2015, the court directed the Township to submit a certification setting forth a factual basis for its position that the records were exempt, and permitting the Plaintiff to file a responsive certification. On or about October 19, 2015, the Township submitted the certification and plaintiff responded to the certification on or about November 2, 2015.

### Findings

#### OPRA

OPRA manifests this State's public policy of government transparency. "The purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed

citizenry and to minimize the evils inherent in a secluded process.” Times of Trenton Publ’g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean County Prosecutor’s Office, 374 N.J. Super. 312, 329 (Law Div. 2004)); O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 379 (App. Div. 2009). In OPRA, “[t]he Legislature finds and declares it to be the public policy of this State that:”

government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public’s right of access;

all government records shall be subject to public access unless exempt from such access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order;

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; and nothing contained in P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

[N.J.S.A. 47:1A-1.]

To approach an OPRA request, “[t]he first inquiry is whether the requested documents meet the statutory definition of *government record*, and, if so, whether any exemption established in or recognized by any other law bars disclosure of the requested documents.” Wilson v. Brown, 404 N.J. Super. 557, 571 (App. Div. 2009), cert. denied, 198 N.J. 473 (2009) (emphasis added); O’Shea, supra, 410 N.J. Super. at 380.

OPRA defines “government record” or “record” broadly under N.J.S.A. 47:1A-1.1:

[A]ny paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business . . . or that has been received in the course of his or its official business.

[N.J.S.A. 47:1A-1.1.]

The Township argues that the Appellate Division's decision on North Jersey Media Group, Inc. v. Township of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015) supports the denial of plaintiff's OPRA request of the following documents:

- The original and supplemental Internal Affairs reports (finished on February 25, 2015).
- Internal Affairs findings (July 07, 2014).
- PNDA (signed June 14, 2014 – sent certified mail June 17, 2014).
- FNDA (December 18, 2014).
- Chemist Report (November 06, 2014).
- Steven Secare letter to Dr. Pandina (Chemist) (June 23, 2014).

The Township claims these documents are exempt as criminal investigatory records. These records, the Township argues, were generated concurrent with a criminal investigation of the officer's conduct commenced by both the LPD as well as the Ocean County Prosecutor's office. The Township submitted a certification by Lieutenant Glenn Clayton who confirmed the occurrence of the criminal investigation as well as an internal affairs investigation. In addition, as to the information obtained by way of subpoena from the Township Attorney, the Township argues that such material should be protected by the attorney-client privilege and also fall within the criminal investigatory records exception because they are records that are not required to be maintained in an internal investigation and they pertain to criminal investigation. These documents are:

- Subpocna to DAG Norma Evans (redact allegation of heroin usage) (September 18, 2014).

- Subpoena to Theresa Ackles; Appeal Examiner, NJ Department of Labor (redact allegation of heroin usage) (September 18, 2014).

Plaintiff argues that the Township's certification failed to tie any of the records to the criminal investigatory process. Plaintiff contends that even if the Lyndhurst decision may prevent some records from release under the criminal investigatory records exception, others, like the subpoenas and the like, would still be subject to release. As to the subpoenas, plaintiff asserts that the Lyndhurst decision does not apply because the subpoenas were not part of any criminal investigation. Plaintiff claims that the subpoenas were part of the employment dispute that occurred after the Moore's termination and after the finding of drug use. Moreover, plaintiff argues that attorney-client privilege does not apply to the subpoenas because a subpoena is not a protected confidential communication and it involves no legal advice. Plaintiff also asserts that the criminal investigatory record exception does not apply to the certified mailing list.

In Lyndhurst, the Appellate Decision reversed an order compelling the release of documents pertaining to an ongoing criminal investigation. Lyndhurst, supra, 441 N.J. Super. at 82. The court interpreted the definition of "criminal investigatory record," which is excluded from the definition of "government record" under N.J.S.A. 47:1A-1.1 that provides:

A government record shall not include the following information which is deemed to be confidential for the purposes of P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented: . . . criminal investigatory records.

"Criminal investigatory record" means a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.

[N.J.S.A. 47:1A-1.1.]

The provision raises two issues for analysis: what "pertains to any criminal investigation or related civil enforcement proceeding;" and what satisfies the "required by law" standard.

Lyndhurst, supra, 441 N.J. Super. at 90.



Neither party takes the position that the documents are the type “required by law” and thus subject to disclosure under OPRA. At issue is whether the documents sought “pertain to a criminal investigation or related civil enforcement proceeding.” N.J.S.A. 47:1A-1.1.

Clearly the following documents pertain to a criminal investigation or related civil enforcement proceeding:

- The original and supplemental Internal Affairs reports (finished on February 25, 2015).
- Internal Affairs findings (July 07, 2014).
- PNDA (signed June 14, 2014 – sent certified mail June 17, 2014).
- FNDA (December 18, 2014).
- Chemist Report (November 06, 2014).
- Steven Secare letter to Dr. Pandina (Chemist) (June 23, 2014).

The need for confidentiality in a pending criminal investigation is self-evident. The identity of informants, actual and potential witnesses, statements made and police investigative tactics are considerations of public policy and safety that support denial of such records during the criminal investigation. In this case, however, the investigation is concluded, or the OCPO in the exercise of the prosecutor’s discretion, did not initiate such an investigation. Even in a closed criminal investigative case, attorney work product and legal strategy, as well as the need to protect the identity of confidential informants continue to be facts, necessitating that these documents may remain confidential and protective of OPRA based demands for disclosure. With regard to an internal affairs investigation of police officer misconduct, or related civil or criminal charges, there is also the need to consider that disclosure (even of a closed criminal investigative file) may have a chilling effect upon citizens making confidential reports of police misconduct. “...Even inactive investigatory files may have to be kept confidential in order to convince citizens that they may safely confide in law enforcement officials....” River Edge Savings and Loan Ass’n v. Hyland, 165 N. J. Super. At 545. Although the investigation of

Officer Matthew Moore did not result in criminal charges, the investigation included disclosures by confidential informants. It would be inimical to the public interest in fully investigating allegations of police misconduct if the criminal investigative records were subject to full disclosure. The internal affairs records in this regard are intimately inclusive of the criminal records.

On the other hand, certain of the requested documents do not directly implicate or pertain to the criminal investigation and should be released with required redaction:

- Subpoena to DAG Norma Evans (redact allegation of heroin usage) (September 18, 2014).
- Subpoena to Theresa Ackles; Appeal Examiner, NJ Department of Labor (redact allegation of heroin usage) (September 18, 2014).
- Certified mailing list (redact address) (June 17, 2014).

**N.J.S.A. 47:1A-3(a)**

N.J.S.A. 47:1A-3 provides:

a. Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented, where it shall appear that the record or records which are sought to be inspected, copied, or examined *shall pertain to an investigation in progress by any public agency*, the right of access provided for in P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented may be denied *if the inspection, copying or examination of such record or records shall be inimical to the public interest*; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced. Whenever a public agency, during the course of an investigation, obtains from another public agency a government record that was open for public inspection, examination or copying before the investigation commenced, the investigating agency shall provide the other agency with sufficient access to the record to allow the other agency to comply with requests made pursuant to P.L. 1963, c. 73 (C. 47:1A-1 et seq.).

[N.J.S.A. 47:1A-3 (emphasis added).]

In Lyndhurst, the Appellate Division held that “even if the document does not qualify as a ‘criminal investigatory record’ — for example, because it is a ‘required by law’ document —

the court must consider whether the document may be withheld as a document that ‘pertain[s] to an investigation in progress by any public agency . . . if the inspection, copying or examination of such record or records shall be inimical to the public interest.’ N.J.S.A. 47:1A-3(a). This exception, however, does not apply to a record that was ‘open for public inspection . . . before the investigation commenced.’” Lyndhurst, supra, 441 N.J. Super. at 116. These records are subject to disclosure, with redactions, under OPRA.

### **Common Law Right of Access**

In Count two, plaintiff alleges that the documents sought should have been released under the common law right of access. Plaintiff argues that the documents fall within the scope of documents subject to the common law access because they are created by public officials. Moreover, plaintiff claims that he has a recognizable interest in the records because he is a government watchdog and public access activist and possesses particular interest in the alleged failures of drug policy. Defendant did not directly address the argument of Plaintiff based upon the common law right of access.

“Nothing contained in [OPRA] shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency.” N.J.S.A. 47:1A-8. “[T]he common law right of access remained a viable and legally independent means for a citizen to obtain public information.” Bergen County Imp. Authority v. North Jersey Media Group, Inc., 370 N.J. Super. 504, 516 (App. Div. 2004).

In Keddie v. Rutgers, 148 N.J. 36 (1997), the New Jersey Supreme Court set forth three requirements for the common law right of access to public records:

(1) the records must be common-law public documents; (2) the person seeking access must establish an interest in the subject matter of the material; and (3) the citizen’s right to access must be balanced against the State’s interest in preventing disclosure.

[Keddie, *supra*, 148 N.J. at 50 (citations and internal quotation marks omitted).]

First, “the common law definition of ‘public record’ is broader than the statutory definition of ‘government record’ contained in N.J.S.A. 47:1A-1.1.” Bergen County Imp. Auth. v. North Jersey Media Group, Inc., 370 N.J. Super. 504, 509–10 (App. Div. 2004), *cert. denied*, 182 N.J. 143 (2004). “Common-law records are any records made by public officers in the exercise of public functions.” Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 46 (1995) (quotation omitted). “These materials include almost every document recorded, generated, or produced by public officials whether or not required by law to be made, maintained or kept on file, as required under” OPRA. *Ibid.*

Second, a plaintiff must establish an interest in the public record, including either “a wholesome public interest or a legitimate private interest.” Education Law Center v. N.J. Dept. of Educ., 198 N.J. 274, 302 (2009). When “there is a high degree of need for confidentiality in such materials, more than a showing of good faith and citizen status will be required to overcome the public interest in confidentiality. It does not constitute a clear showing of such public need to say only that there may be something corrupt that should be exposed for the benefit of the public.” Loigman v. Kimmelman, 102 N.J. 98, 108 (1986).

Third, “[b]ecause the common-law right of access to public records is not absolute, one seeking access to such records must establish that the balance of its interest in disclosure against the public interest in maintaining confidentiality weighs in favor of disclosure.” Keddie, *supra*, 148 N.J. 36, 50 (1997) (citations and internal quotation marks omitted). In Loigman v. Kimmelman, 102 N.J. 98, 108 (1986), the New Jersey Supreme Court identified several factors the trial court should consider in balancing the requester’s needs against the public agency’s interest in confidentiality:

(1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decision-making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials. Against these and any other relevant factors should be balanced the importance of the information sought to the plaintiff's vindication of the public interest.

[Loigman, 102 N.J. at 113 (citation omitted).]

Nonetheless, the Loigman factors are not exhaustive. Additionally, “[t]he motivation of the requester is a relevant consideration in the balancing process under the common law.”

Lyndhurst, supra, 441 N.J. Super. at 115. Moreover, “when engaging in the balancing test . . . , a court may look to the exclusions in OPRA as expressions of legislative policy on the subject of confidentiality” without permitting them “to heavily influence the outcome of the analysis.”

Bergen County Imp. Authority v. North Jersey Media Group, Inc., 370 N.J. Super. 504, 520–21 (App. Div. 2004).

“While there is a real need to deny access where there is an ongoing law enforcement investigation, or where the protection of witness information or a witness’s identity is at stake, the same values do not survive a balancing after the investigation is closed.” Shuttleworth v. City of Camden, 258 N.J. Super. 573, 585 (App. Div. 1992). In North Jersey Media Group, Inc. v. Township of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015), the Appellate Division held that “the need for confidentiality in investigative materials may wane after the investigation is concluded.” Lyndhurst, supra, 441 N.J. Super. at 115. Nevertheless, “[e]ven in closed cases, however, attorney work-product and documents containing legal strategies may be entitled to

protection from disclosure. Similarly, some confidential information may be shielded from public disclosure based on the protection afforded by the attorney-client privilege.” Keddie v. Rutgers, 148 N.J. 36, 54 (1997).

After reviewing the requested documents in camera and applying the standards established in the case law to these documents, the court finds that the requested records are common-law public documents, because they were “made by public officers in the exercise of public functions.” Plaintiff has established an interest in the requested public record. After the balancing test, the court finds that in general the need to maintain the confidentiality of criminal investigatory records and internal affairs police investigation records expires upon the closure of the investigations, that is that the need for confidentiality “waned”. In this particular case, however, the internal affairs and criminal investigation by LPD (and Brick Police Department and OCPO) relied upon the statements of confidential informants. With regard to the records relating to the LPD internal affairs investigation and the subsequent disciplinary proceeding the Court finds a continuing public interest to protect the internal affairs process which outweighs the interest of the public in gaining access to those records. The request for the letter from Mr. Secare to Dr. Pandina falls within the category of attorney client privilege as a communication with a potential expert witness. However, the remaining documents as redacted do not invoke the same weighty considerations. The court finds no reasonable basis to conclude that the disclosure of these records would chill any agency functions, or dissuade any citizen from making confidential reports to the police of misconduct or criminal activity. As a result, plaintiff’s interest in disclosure of the requested documents outweighs the State’s interest in non-disclosure. These include: Subpoena to DAG Norma Evans (redact allegation of heroin usage) (September 18, 2014). Subpoena to Theresa Ackles; Appeal Examiner, NJ Department of Labor

(redact allegation of heroin usage) (September 18, 2014). Certified mailing list (redact address) (June 17, 2014).

The court orders that defendant shall redact from the documents all personal identities to witnesses or any person who provided statements to defendant, e.g. employment information, birth date, phone numbers, home address and shall not redact identities and positions of employment of public employees who conducted the investigation. Paff v. Office of the Prosecutor of the County of Warren, et al., 2015 N.J. Super. Unpub. LEXIS 2834, \*4.

#### Other Documents

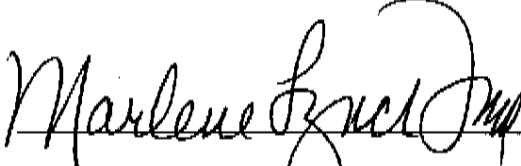
The Township conceded in the Vaughn index to release these documents with information redacted and plaintiff agreed the proposed redactions.

- Law Enforcement Drug Testing Chain of Custody Form (redact Social Security Number) (April 21, 2014)
- Medical Information Form (As per HIPAA regulations redact the medication the officer was taking, Physicians Name, and Mathew Moore's Social Security Number) (April 20, 2014)

For the reasons set forth herein, the court orders the release of documents consistent with this decision with necessary redactions. Mr. Doherty is to prepare the order that comports with the court's ruling.

With regard to counsel fees, Plaintiff shall submit an affidavit of services, and the Defendant shall have the right to respond thereto within 14 days of receipt. The court will rule on the papers without oral argument, unless requested by either party.

Respectfully submitted,

  
MARLENE LYNCHFORD, A.J.S.C.