

# Superior Court of New Jersey



CHAMBERS OF  
JUDGE VINCENT J. GRASSO  
ASSIGNMENT JUDGE

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

May 26, 2015

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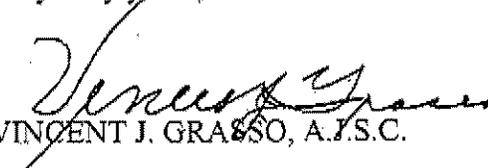
RE: Paff v Stafford Twp. and Bernadette Park, etc.  
Docket No. OCN-L-852-15

Dear Counsel:

The court has now had the opportunity to review the submissions of the parties in the above matter, which is returnable this Friday, May 29, 2015 at 9:00 a.m. The several exchanges by and between counsel have satisfied this court that the only appropriate way to proceed is for the defendant, Township, to provide a Vaughn index as outlined in the enclosed letter opinion from the court. Upon receipt by the Township of the Vaughn index, the matter can be relisted for summary disposition, if appropriate. As a result, there is no need for counsel to appear this Friday.

If counsel have any questions concerning the letter opinion, a phone conference with the court can be arranged.

Very truly yours,

  
VINCENT J. GRASSO, A.J.S.C.

VJG/bmm  
Enc.

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**RE: Paff v Stafford Twp.**  
Docket No. OCN-L-852-15

## Summary

The matter before the court is an order to show cause filed by plaintiff, John Paff, seeking the court find that defendants, Township of Stafford (Township) and records custodian for the Township, Bernadette Park, violated the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13 by unlawfully denying plaintiff access to the documents requested. At issue is plaintiff's three OPRA requests dated on February 9, 16, and 21, 2015 respectively: (1) any writings, including but not limited to a CDR or other form of complaint, that describe any unlawful acts committed by Officer Neil McKenna; (2) any writings that describe or reference any unlawful acts committed by Officer McKenna; (3) all documents within the file of Officer McKenna's

Internal Affairs investigation that was referenced in the township counsel's letter of February 20, 2015. The issue before the court is whether the Township is required under OPRA to identify records that are responsive to plaintiff's request and to state the specific lawful basis for denying access to each and every record.

### **Background**

Plaintiff, John Paff, is a self-described open government activist who operates multiple internet blogs commenting on New Jersey government transparency issues. Defendant, Township of Stafford, is a government entity in the State of New Jersey and subject to OPRA. Defendant, Bernadette Park, functions as the records custodian for the Township.

On February 9, 2015, plaintiff submitted an OPRA request to the Township for documents pertaining to a lawsuit by the Township's police officers against the Township and its Police Chief alleging an improper promotion and examination process for Sergeant position(s), Smith. et al. v. Stafford Township, et al., Docket No. CIV. A. No. 3:14-cv-05945-FLW-DEA. In the complaint, the plaintiff officers alleged that Officer Neil McKenna was ineligible for the promotion and the Police Chief was aware that "McKenna admitted to committing unlawful acts." At issue is plaintiff's third request:

3. Para 68 of Smith's and McVey's suit against the Township (Case 3:14-cv-0594) [sic] states that Neil "McKenna admitted to committing unlawful acts." I would like a copy of any writing, including but not limited to a CDR or other form of complaint, that describe any "unlawful acts" committed by McKenna.

On February 12, 2015, the township attorney, Christopher J. Dasti, responded plaintiff's request. In his response to the third request, he stated:

Finally, you have requested copies of criminal charges, criminal complaints, etc., with regard to Officer Neil McKenna. Please advised that no documents exist which are responsive to this request.

On February 16, 2015, plaintiff replied to the Township and clarified his third request as to the following:

I would like a copy of any writings that describe or otherwise reference any "unlawful acts" committed by Officer Neil McKenna.

Moreover, plaintiff requested "if there are no documents responsive to my request, please so state. If there are, please at least identify the documents by author, recipient and date."

On February 20, 2015, Dasti responded to plaintiff's February 16<sup>th</sup> follow-up request by stating that any documents relating to an allegation of unlawful acts by Officer McKenna would be contained in an internal affairs file for this officer and "[t]here was an internal affairs investigation for [Officer McKenna] which begin in 2013. However, such documents are confidential and exempt from disclosure." Dasti cited the personnel record exemption pursuant to N.J.S.A. 47:1A-10 as the legal basis to protect police department internal affairs records from disclosure. He also stated that the New Jersey Attorney General Guidelines on Internal Affairs Policy and Procedures (Attorney General's Guidelines) indicate that internal affairs records and reports are confidential information and shall not be released to the public.

On February 21, 2015, plaintiff responded to Dasti's February 20<sup>th</sup> letter. In the letter, plaintiff requested "[a]ll documents within the file of Neil McKenna' Internal Affairs investigation that was referenced in Mr. Dasti's February 20<sup>th</sup> letter." Again, plaintiff requested the Township to identify "each record that exists and then give me a detailed explanation as to why the Township can't provide me with even a redacted version of it." On February 27, 2015, Dasti wrote to plaintiff and again stated "the internal affairs records are exempt from disclosure under OPRA."

On or about March 24, 2015, plaintiff filed a verified complaint and order to show cause alleging that the Township violated OPRA and the common law right of access to public records by denying plaintiff access to government records requested.

On April 1, 2015, Dasti sent a letter to plaintiff's counsel advising that plaintiff's litigation was frivolous and defendants would seek an award of attorney's fees and costs if plaintiff did not withdraw the complaint. On April 7, 2015, plaintiff's counsel, CJ Griffin, responded that plaintiff would not withdraw the verified complaint and again requested the Township to provide a privilege log that identified which responsive records exist so that plaintiff could determine whether he had a cognizable claim to them under OPRA or the common law.

On April 8, 2015, Dasti responded to Griffin by stating without certification that "no records exist in which Officer McKenna admitted to 'coming unlawful acts. . . . To the extent that your client now seeks access to the internal affairs file[s] related to Officer McKenna, no documents which are in that file were created prior to the investigation."

In Griffin's April 9<sup>th</sup>, 2015 response to Dasti, she pointed out that Dasti, in his previous responses, did not inform plaintiff that there were no records responsive to plaintiff's request and instead, he took the position that the records are confidential and exempt as internal affairs records and will not be released. Plaintiff indicated that should defendants submit a certification to the court that there are no records responsive to plaintiff's OPRA request, plaintiff will move for attorneys' fees based on defendants' change in position as to the basis for denying access to the records.

On or about April 14, 2015, defendants submitted their cross-motion to dismiss in lieu of answer and opposition to plaintiff's order to show cause. Defendants attached the certification of

Captain Thomas Dellane, stating that “Plaintiff requested documents in which Officer McKenna admitted to committing ‘unlawful acts.’ The Stafford Township Police Department has no documents that are responsive to this request nor does it have any records in its possession pertaining to any criminal charges or convictions against Officer McKenna.”

## Findings

### I. Vaughn Index

OPRA manifests New Jersey’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. Township of West Milford, 410 N.J. Super. 371, 379 (App. Div. 2009). Thus, OPRA directs 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 . . . shall be construed in favor of the public’s right of access[.]

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

To serve this policy and purpose, OPRA provides that “[t]he public agency shall have the burden of proving that the denial of access is authorized by law.” N.J.S.A. 47:1A-6. As such, the agency “must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. Absent such a showing, a citizen’s right of access is unfettered.” Courier News v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 373, 383 (App. Div. 2003).

In the instant case, the Township in its brief and responses to plaintiff’s requests denied plaintiff’s request by claiming that the requested internal affairs and discipline records are

exempt from disclosure pursuant to the personnel records exemption under N.J.S.A. 47:1A-10 and the N.J.S.A. 47:1A-9 exemptions made pursuant to N.J.A.C. 13:1E-3.2(a)4 and the Attorney General's Guidelines. The Township, however, did not identify what records exist, which are responsive to plaintiff's request, but exempt from the disclosure.

In plaintiff's response to defendants' opposition to order to show cause, plaintiff narrows down the issue to whether OPRA requires a public agency to identify records that are responsive to a request and to state the specific lawful basis for denying access to each and every record. Plaintiff claims that the Township's refusal to do so deprives plaintiff the opportunity to determine whether plaintiff has a recognizable claim to the records pursuant to OPRA or the common law. Plaintiff requests the court to compel the Township to produce a privilege log in which each and every responsive record is identified, as well as the lawful basis for denying access to each record.

N.J.S.A. 47:1A-5(g) mandates that a custodian of records is required to provide a specific lawful basis for the denial of access to public records. In pertinent part, it states as follows:

... A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. *If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.* The custodian shall sign and date the form and provide the requestor with a copy thereof. If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record. If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to promptly make available a copy of the record. If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.

[N.J.S.A. 47:1A-5(g) (emphasis added).]

A Vaughn index is “a detailed affidavit correlating the withheld documents with the claimed exemptions.” Cozen O’Connor v. United States Dep’t of Treasury, 570 F. Supp. 2d 749, 765 (E.D. Pa. 2008) (citing Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973)). “To pass muster, a Vaughn index must consist of one comprehensive document, adequately describe each withheld document or redaction, state the exemption claimed, and explain why each exemption applies.” Afshar v. Dep’t of State, 702 F.2d 1125, 1144–45 (D.C. Cir. 1983) (quoting Founding Church of Scientology, Inc. v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979)). Recently, New Jersey courts have adopted this procedure in the context of OPRA requests. Hausmann v. N. Valley Reg’l Bd. of Educ., No. BER-L-7151-13 (Law Div. Nov. 7, 2013).

The Appellate Division in Fisher v. Division of Law, 400 N.J. Super. 61 (App. Div. 2008) found that:

The purpose of a *Vaughn* index is not only to facilitate the decision-maker’s review of governmental records to determine whether they contain privileged material but also to provide the party seeking disclosure with as much information as possible to use in presenting his case. Halpern v. FBI, 181 F.3d 279, 291 (2d Cir.1999). A decision-maker’s *in camera* review of the withheld documents is not ordinarily an adequate substitute for production of a proper *Vaughn* index because it does not afford the party seeking disclosure the opportunity to effectively advocate its position. Wiener v. FBI, 943 F.2d 972, 979 (9th Cir.1991). However, “when the facts in [the requestor’s] possession are sufficient to allow an effective presentation of its case, an itemized and indexed justification of the specificity contemplated by *Vaughn* may be unnecessary.” Brown v. FBI, 658 F.2d 71, 74 (2d Cir.1981).

[Fisher, *supra*, 400 N.J. Super. at 76.]

Moreover, the Appellate Division, in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), instructed how a records custodian shall respond to an OPRA request “[w]here a statutorily-recognized basis for confidentiality is being asserted to withhold a government record:”

an agency need not reveal the contents and should be guided by the standard included in R. 4:10-2(e), which permits a party claiming privilege to “describe the nature of the documents . . . not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.”

[Burke v. Brandes, *supra*, 429 N.J. Super. at 178 (quoting Paff v. N.J. Dep’t of Labor, 379 N.J. Super. 346, 354 (App. Div. 2005).]

As to the common law right of access, the Appellate Division held that “[d]etermining whether the requestor should be granted access to the records requires a case-by-case, and in fact, document-by-document balancing of the requestor’s interest against the public agency’s interest in confidentiality.” K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 360 (App. Div. 2011).

In light of the obligation of a records custodian mandated by the statute and the well-established case law, the court finds that a Vaughn index is necessary for plaintiff to advocate his case under both OPRA and the common law. The Township provided no information about the documents that it withheld from disclosure, but merely arguing the confidentiality requirements under the personnel record exemption pursuant to N.J.S.A. 47:1A-10 and the N.J.S.A. 47:1A-9 exemptions made pursuant to N.J.A.C. 13:1E-3.2(a)4 and the Attorney General’s Guidelines. Consequently, plaintiff has no information nor opportunity to effectively advocate his position and assess whether he has a recognizable claim to the records pursuant to OPRA or the common law. Therefore, the court orders the Township to furnish a Vaughn index that itemizes each document requested by plaintiff and articulates the specific basis for its denial of each item.

For the reasons set forth herein, the court finds that plaintiff has a legitimate basis for his litigation and his claim cannot be dismissed as frivolous as this juncture. The court, therefore, dismisses defendants’ cross-motion to dismiss. The court will carry the return date currently

scheduled for May 29, 2015 pending the receiving of the Vaughn index provided by the Township within thirty (30) days. If the counsel need to set up a telephone conference in regard to this opinion, please kindly contact the chambers. CJ Griffin is to prepare the order that comports with the court's ruling. The matter will be relisted upon receipt by defendants of the Vaughn index.

Respectfully submitted,



VINCENT J. GRASSO, A.J.S.C.

VJG/bmm