

DASTI, MURPHY, McGUCKIN, ULAKY, KOUTSOURIS & CONNORS

JERRY J. DASTI
GEORGE F. MURPHY, JR. † ♦
GREGORY P. McGUCKIN
ROBERT E. ULAKY † >
CHRISTOPHER J. CONNORS
CHRISTOPHER K. KOUTSOURIS Δ ∞
CHRISTOPHER J. DASTI
TIMOTHY J. McNICHOLS >
MARTIN J. BUCKLEY

A Professional Corporation
COUNSELLORS AT LAW
THE CLOCK TOWER BUILDING
620 WEST LACEY ROAD
POST OFFICE BOX 1057
FORKED RIVER, NEW JERSEY 08731
WEBSITE: www.dmmlawfirm.com
E-MAIL: FORKEDRIVER@DMMLAWFIRM.COM

Fed Id #22-3450668

TELEPHONE NUMBERS

(609) 971-1010
(609) 693-4100
(732) 349-2446
(732) 295-3000
(609) 918-1292

Of Counsel

ELIZABETH MACKOLIN DASTI >

WRITER'S E-MAIL: mjb@dmmlawfirm.com

† CERTIFIED CIVIL TRIAL ATTY
∞ CERTIFIED MUNICIPAL COURT
LAW ATTORNEY
‡ MEMBER, NATIONAL ACADEMY OF
ELDER LAW ATTORNEYS, INC
◊ MEMBER NJ AND FLA BAR
> MEMBER NJ AND PA BAR
Δ MEMBER NJ AND NY BAR

December 12, 2017

FACSIMILE NUMBERS

(609) 971-7093
(732) 349-1590
Real Estate: (609) 971-6176

PLEASE REFER TO:

Libenschek v Stafford Township
GL-26640

Via Email

James Moran, Administrator
Township of Stafford
260 E. Bay Avenue
Manahawkin, NJ 08050

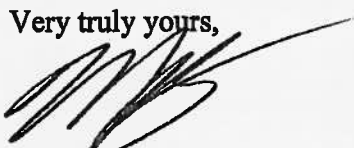
RE: Libenschek v. Township of Stafford and Linda Martin
Docket No: OCN-L-3156-17

Dear Mr. Moran:

Enclosed please find the Reply Brief with regard to the above referenced matter. Should you have any questions, please do not hesitate to call or write

Thank you.

Very truly yours,


Martin J. Buckley

MJB/ba
(w/ encl.)

cc: Linda Martin, Clerk, Safford Township (w/ encl. – via e-mail)
John Spodofoa, Mayor (w/ encl. – via e-mail)

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Δ MEMBER NJ AND NY BAR

December 5, 2017

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(609) 971-7093
(732) 349-1590
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PLEASE REFER TO:
GL-26640

Honorable Marlene Lynch Ford
Ocean County Courthouse
118 Washington Street
Toms River, NJ 08753

Re: Libenschek v. Township of Stafford and Linda Martin
Docket No: OCN-L-3156-17

Dear Judge Ford:

This office represents the Township of Stafford and Linda Martin in her official capacity as Municipal Clerk and Records Custodian of the Township of Stafford (hereinafter referred to as the "Township"). Please accept this Letter Brief in lieu of a more formal brief in opposition of this action filed under the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1, which has been opened to the Court via a Verified Complaint and Order to Show Cause.

STATEMENT OF FACTS

On September 28, 2017, Plaintiff Eric Libenschek submitted a written OPRA request to the Township in which he asked for copies of "an email log generated from the Township Outlook Exchange Server for John Spodofora's official Township email address for the period of July 1, 2017 to present. Please include sender, recipient, date, time, subject [sic]. I am not requesting the email contents, only the metadata stated above."

Shortly thereafter, on September 29, 2017, Plaintiff received a written denial to this metadata from the Township as the Township does not have the ability to provide email logs. The requested information is not something kept by the Township as the current system does not have a logging function because it would grind the Township's servers to a halt. See Certification of James Moran; See Certification of Christopher Smith. The current system does not archive emails unless they are specifically saved by the user, any email deleted from the system by the sender or receiver cannot be retrieved. See Certification of James Moran.

In an effort to comply, Plaintiff was supplied with the emails that were left on the system at that time. Id. Plaintiff was also informed that the Township does not have the capability to provide the information that he was looking for. Id. The Township is now looking to upgrade their system to a "Cloud based solution" in order to give the Township the capacity and capability to comply with these requests in the future. This would give the Township the ability to retrieve the type of "Metadata" requested by the Plaintiff. Presently the Township absolutely has no ability to do so. Id.

LEGAL ARGUMENT

POINT I

THE REQUESTED INFORMATION IS NOT A RECORD KEPT BY THE TOWNSHIP AS THEIR CURRENT SYSTEM IS INCAPABLE

The Township does not have the ability to completely comply with the Plaintiff's request pursuant to OPRA. Plaintiff relies in part on Paff v. Galloway Twp., 229 N.J. 340 (2017) in an effort to show the requested information is a public record. Electronically stored information extracted from an e-mail is not the creation of a new record or new information, but rather, is a government record under the Open Public Records Act (OPRA). OPRA makes clear that government records consist of not only hard-copy books and paper documents housed in file cabinets or on shelves, but also "information stored or maintained electronically" in a database on a municipality's server. Paff, 229 N.J. at 353.

However, the information requested by Plaintiff is not kept or stored anywhere on the Township's servers. In Paff, the Court stated, "[a] records request must be well defined so that the custodian knows precisely what records are sought. The request should not require the records custodian to undertake a subjective analysis to understand the nature of the request. Seeking particular information from the custodian is permissible; expecting the custodian to do research is not." Furthermore, in Paff, Galloway Township denied Paff's request because the Township contended that only the emails – not specific information embedded within them were "government records subject to disclosure under OPRA. Id. at 343.

Trial Courts have defined a "government record" as "information stored or maintained electronically" by a municipality. Id., quoting N.J.S.A. 47:1A-1.1. To that end, N.J.S.A. 47:1A-1.1 provides that a government record includes "information stored or maintained electronically." The information sought by Paff was clearly defined and circumscribed; was stored electronically; and, by the Township's own admission, could have been produced within minutes. Id., 229 N.J. at 344.

The matter before Your Honor is completely distinguishable from Paff. The information the Plaintiff seeks is not stored by the Township and cannot be produced. See Certification of James Moran; See also Certification of Chris Smith. For these reasons, although the Township would be able to produce this information after it switches to the "cloud based" system, at this time it is impossible for them to comply and therefore, the Plaintiff's request was correctly denied.

POINT II

THE REQUESTED DOCUMENTS WOULD NECESSITATE A BURDENSOME DISRUPTION ON THE TOWNSHIP'S SYSTEM

Due to the ruling in Paff, it is clear that if the requested "metadata" is readily available and stored, the Township must provide the data to the requestor. However, the Paff Court made sure to distinguish this from instances where the information is not stored or not readily available. In Paff, the Government

Honorable Marlene Lynch Ford
December 5, 2017
Page 4

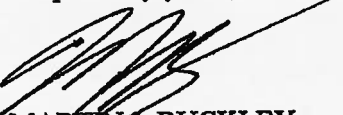
Records Council (GRC) the panel conceded that the request for an email log in this case "might not present a burdensome task," it envisioned "requests of a similar nature that would present a serious burden." Paff v. Galloway Township, 444 N.J.Super. 495, 505-06 (App. Div. 2016). In the panel's view, any obligation imposed on "governmental entities to produce lists and compilations that do not otherwise exist" must come from the Legislature. Id. at 506.

In this matter, the information does not exist. The Township does not store this information because it would halt the system. See Certification of James Moran. The Townships server, in its current condition, would not survive and it would create a burdensome disruption. Furthermore, the Supreme Court in Paff clearly stated that a requirement to produce or compile such a list must come from Legislature (Emphasis added). It is not this Court's place to require the Township to produce or compile such a list when it is not stored or available. When or if the Township switches to a cloud based system where the information is stored and available, the narrative will change. But as the current system operates, the Township has complied with the OPRA request to the best of its ability and therefore the denial of any additional information by the Township was proper.

CONCLUSION

For the aforementioned reasons, the Township has fully complied with the Plaintiff's request and the denial of the specific metadata that was requested was proper.

Respectfully yours,

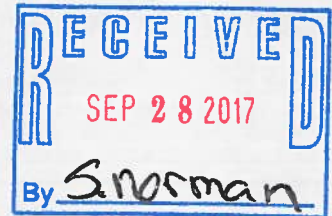


MARTIN J. BUCKLEY

MJB/ba
Enclosure

RESPONSE TO
unable to process 9/29/17

STAFFORD TOWNSHIP
OPEN PUBLIC RECORDS ACT REQUEST FORM
260 E. BAY AVENUE, MANAHAWKIN, NJ 08050
809-597-1000 fax 809-597-4911
clerk@staffordnj.gov



Important Notice

The last page of this form contains important information related to your rights concerning government records. Please read it carefully.

Requestor Information - Please Print

First Name ERIC MI R Last Name LIBENSCHKE

E-mail Address ERUDOLPH67@COMCAST.NET

Mailing Address 159 TOPSAIL LANE

City MANAHAWKIN State NJ Zip 08050

Telephone 609 978 6628

FAX

Preferred Delivery: Pick Up ☐ US Mail ☐ On-Site Inspect ☐ Fax ☐ E-mail ☒

If you are requesting records containing personal information, please circle one: Under penalty of N.J.S.A. 2C:28-3, I certify that I HAVE (HAVE NOT) been convicted of any indictable offense under the laws of New Jersey, any other state, or the United States.

Signature [Signature] Date 9/28/17

Payment Information

Maximum Authorization Cost \$

Select Payment Method

Cash ☐ Check ☐ Money Order ☐

Fees: Letter size pages - \$0.05 per page
Legal size pages - \$0.07 per page
Other materials (CD, DVD, etc) - actual cost of material
Delivery: Delivery / postage fees additional depending upon delivery type.

Extras: Special service charge dependent upon request.

Record Request Information: Please be as specific as possible in describing the records being requested. Also, please note that your preferred method of delivery will only be accommodated if the custodian has the technological means and the integrity of the records will not be jeopardized by such method of delivery.

PLEASE PROVIDE AN E-MAIL LOG GENERATED FROM
THE TOWNSHIP OUTLOOK EXCHANGE SERVER
FOR JOHN SPUDOFORA'S OFFICIAL TOWNSHIP E-MAIL ADDRESS
FOR THE PERIOD JULY 1, 2017 TO PRESENT
PLEASE INCLUDE SENDER, RECIPIENT, DATE, TIME, SUBJECT
I AM NOT REQUESTING THE EMAIL CONTENTS
ONLY THE METADATA STATED ABOVE.

AGENCY USE ONLY

Est. Document Cost _____
Est. Delivery Cost _____
Est. Extras Cost _____
Total Est. Cost _____
Deposit Amount _____
Estimated Balance _____

Deposit Date _____

AGENCY USE ONLY

Disposition Notes
Custodian: If any part of request cannot be delivered in seven business days, detail reasons here.

In Progress - Open _____
Denied - Closed _____
Filled - Closed _____
Partial - Closed _____

AGENCY USE ONLY

Tracking Information		Final Cost	
Tracking #	_____	Total	_____
Rec'd Date	_____	Deposit	_____
Ready Date	_____	Balance Due	_____
Total Pages	_____	Balance Paid	_____

Records Provided

Custodian Signature

Date

DEPOSITS

The custodian may require a deposit against costs for reproducing documents sought through an anonymous request whenever the custodian anticipates that the documents requested will cost in excess of \$5 to reproduce.

Where a special service charge is warranted under OPRA, that amount will be communicated to you as required under the statute. You have the opportunity to review and object to the charge prior to it being incurred. If, however, you approve of the fact and amount of the special service charge, you may be required to pay a deposit or pay in full prior to reproduction of the documents.

YOUR REQUEST FOR RECORDS IS DENIED FOR THE FOLLOWING REASON(S):

(To be completed by the Custodian of Records – check the box of the numbered exemption(s) as they apply to the records requested. If multiple records are requested, be specific as to which exemption(s) apply to each record. Response is due to requestor as soon as possible, but no later than seven business days.)

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

- ☐ Inter-agency or intra-agency advisory, consultative or deliberative material
- ☐ Legislative records
- ☐ Law enforcement records:
 - ☐ Medical examiner photos
 - ☐ Criminal investigatory records (however, N.J.S.A. 47:1A-3.b. lists specific criminal investigatory information which must be disclosed)
 - ☐ Victims' records
- ☐ Trade secrets and proprietary commercial or financial information
- ☐ Any record within the attorney-client privilege
- ☐ Administrative or technical information regarding computer hardware, software and networks which, if disclosed would jeopardize computer security
- ☐ Emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein
- ☐ Security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software
- ☐ Information which, if disclosed, would give an advantage to competitors or bidders
- ☐ Information generated by or on behalf of public employers or public employees in connection with:
 - ☐ Any sexual harassment complaint filed with a public employer
 - ☐ Any grievance filed by or against an employee
 - ☐ Collective negotiations documents and statements of strategy or negotiating
- ☐ Information that is a communication between a public agency and its insurance carrier, administrative service organization or risk management office
- ☐ Information that is to be kept confidential pursuant to court order
- ☐ Certificate of honorable discharge issued by the United States government (Form DD-214) filed with a public agency
- ☐ Social security numbers
- ☐ Credit card numbers
- ☐ Unlisted telephone numbers
- ☐ Drivers' license numbers
- ☐ Certain records of higher education institutions:
 - ☐ Research records
 - ☐ Questions or scores for exam for employment or academics
 - ☐ Charitable contribution information
 - ☐ Rare book collections gifted for limited access
 - ☐ Admission applications
 - ☐ Student records, grievances or disciplinary proceedings revealing a students' identification
- ☐ Biotechnology trade secrets N.J.S.A. 47:1A-1.2
- ☐ Convicts requesting their victims' records N.J.S.A. 47:1A-2.2
- ☐ Ongoing investigations of non-law enforcement agencies (must prove disclosure is inimical to the public interest) N.J.S.A. 47:1A-3.a.
- ☐ Public defender records N.J.S.A. 47:1A-5.k.
- ☐ Upholds exemptions contained in other State or federal statutes and regulations, Executive Orders, Rules of Court, and privileges created by State Constitution, statute, court rule or judicial case law N.J.S.A. 47:1A-9
- ☐ Personnel and pension records (however, the following information must be disclosed:
 - ☐ An individual's name, title, position, salary, payroll record, length of service, date of separation and the reason for such separation, and the amount and type of any pension received
 - ☐ When required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the US, or when authorized by an individual in interest
 - ☐ 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 not including any detailed medical or psychological information N.J.S.A. 47:1A-10

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."

Burnett v. County of Bergen, 198 N.J. 408 (2009). Without ambiguity, the court held that the privacy provision "is neither a preface nor a preamble." Rather, "the very language expressed in the privacy clause reveals its substantive nature; it does not offer reasons why OPRA was adopted, as preambles typically do; instead, it focuses on the law's implementation." "Specifically, it imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests."

Executive Order No. 21 (McGreevey 2002)

- ☐ Records where inspection, examination or copying would substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism.
- ☐ Records exempted from disclosure by State agencies' proposed rules.

Executive Order No. 26 (McGreevey 2002)

- ☐ Certain records maintained by the Office of the Governor
- ☐ Resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing
- ☐ Records of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments

- ☐ Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation
- ☐ Information in a personal income or other tax return
- ☐ Information describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed
- ☐ Test questions, scoring keys and other examination data pertaining to the administration of an examination for public employment or licensing
- ☐ Records in the possession of another department (including NJ Office of Information Technology or State Archives) when those records are made confidential by regulation or EO 9.

Other Exemption(s) contained in a State statute, resolution of either or both House of the Legislature, regulation, Executive Order, Rules of Court, any federal law, federal regulation or federal order pursuant to N.J.S.A. 47:1A-9.a.
 (Please provide detailed information regarding the exemption from disclosure for which you are relying to deny access to government records. If multiple records are requested, be specific as to which exemption(s) apply to each record.)

REQUEST FOR RECORDS UNDER THE COMMON LAW

If, in addition to requesting records under OPRA, you are also requesting the government records under the common law, please check the box below.

A public record under the common law is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it.

☒ Yes, I am also requesting the documents under common law.

If the information requested is a "public record" under common law and the requestor has a legally recognized interest in the subject matter contained in the material, then the material must be disclosed if the individual's right of access outweighs the State's interest in preventing disclosure.

Please set forth your interest in the subject matter contained in the requested material:

Note that any challenge to a denial of a request for records under the common law cannot be made to the Government Records Council, as the Government Records Council only has jurisdiction to adjudicate challenges to denials of OPRA requests. A challenge to the denial of access under the common law can be made by filing an action in Superior Court.

1. All government records are subject to public access under the Open Public Records Act ("OPRA"), unless specifically exempt.
2. A request for access to a government record under OPRA must be in writing, hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian. N.J.S.A. 47:1A-5.g. The seven (7) business day response time does not commence until the records custodian receives the request form. If you submit the request form to any other officer or employee of the Township of Stafford, that officer or employee must either forward the request to the appropriate custodian, or direct you to the appropriate custodian. N.J.S.A. 47:1A-5.h.
3. Requestors may submit requests anonymously. If you elect not to provide a name, address, or telephone number, or other means of contact, the custodian is not required to respond until you reappear before the custodian seeking a response to the original request.
4. The fees for duplication of a government record in printed form are listed on the front of this form. We will notify you of any special service charges or other additional charges authorized by State law or regulation before processing your request. Payment shall be made by cash, check or money order payable to the Township of Stafford.
5. You may be charged a 50% or other deposit when a request for copies exceeds \$25. The Township of Stafford custodian will contact you and advise you of any deposit requirements. You agree to pay the balance due upon delivery of the records. Anonymous requests in excess of \$5.00 require a deposit of 100% of estimated fees.
6. Under OPRA, a custodian must deny access to a person who has been convicted of an indictable offense in New Jersey, any other state, or the United States, and who is seeking government records containing personal information pertaining to the person's victim or the victim's family. This includes anonymous requests for said information.
7. By law, the Township of Stafford must notify you that it grants or denies a request for access to government records within seven (7) business days after the agency custodian of records receives the request. If the record requested is not currently available or is in storage, the custodian will advise you within seven (7) business days after receipt of the request when the record can be made available and the estimated cost for reproduction.
8. You may be denied access to a government record if your request would substantially disrupt agency operations and the custodian is unable to reach a reasonable solution with you.
9. If the Township of Stafford is unable to comply with your request for access to a government record, the custodian will indicate the reasons for denial on the request form or other written correspondence and send you a signed and dated copy.
10. Except as otherwise provided by law or by agreement with the requester, if the agency custodian of records fails to respond to you within seven (7) business days of receiving a request, the failure to respond is a deemed denial of your request.
11. If your request for access to a government record has been denied or unfilled within the seven (7) business days required by law, you have a right to challenge the decision by the Township of Stafford to deny access. At your option, you may either institute a proceeding in the Superior Court of New Jersey or file a complaint with the Government Records Council ("GRC") by completing the Denial of Access Complaint Form. You may contact the GRC by toll-free telephone at 866-850-0511, by mail at PO Box 819, Trenton, NJ, 08625, by e-mail at gro@dca.state.nj.us, or at their web site at www.state.nj.us/grc. The Council can also answer other questions about the law. All questions regarding complaints filed in Superior Court should be directed to the Court Clerk in your County.
12. Information provided on this form may be subject to disclosure under the Open Public Records Act.

Telephone
(609) 597-1000 Ext. 8510

♦ TOWNSHIP OF STAFFORD ♦

OCEAN COUNTY

260 EAST BAY AVE • MANAHAWKIN, NEW JERSEY • 08050-3329

Refer To:
Municipal
Clerk's
Office

September 29, 2017

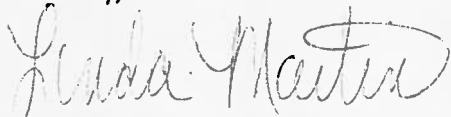
Eric Libenschek
159 Topsail Lane
Manahawkin, NJ 08050

Re: 09/28/2017 OPRA request-Email logs for Mayor John Spodofora

Dear Mr. Libenschek,

I am in receipt of your OPRA request dated 09/28/2017. Please be advised that after concurring with the Township Administrator I was advised that Stafford Township does not maintain an e-mail log or is required to do so. Therefore, I am unable to fulfill your request.

Sincerely,



Linda Martin
Acting Municipal Clerk

/lam