

2017-18 UPDATE ON OPEN PUBLIC RECORDS ACT CASES

NEW JERSEY STATE LEAGUE OF MUNICIPALITIES

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With appreciation to the New Jersey Institute of Local Government Attorneys and its Local Government Law Review

The past year plus has been particularly busy in the New Jersey Courts for cases under the Open Public Records Act and its analog, the Common Law Right of Access. This presentation will highlight the most significant issues litigated, with pertinent summaries of the decisions, both reported and unreported.

1. Electronic Information and Internet Media.

North Jersey Media Group, Inc. v. Township of Lyndhurst, 229 N.J.541 (2017)

North Jersey Media Group (NJMG) sought access to police dash cam recordings, use of force reports, investigative reports and witness statements under OPRA and the common law, related to a high speed chase and shooting of the driver that resulted in his death. The Supreme Court ruled that the use of force report was releasable under OPRA and the dash cam video was available under the common law, but the other investigative records were not subject to disclosure at the outset of the investigation.

Attorney General Law Enforcement Directive No. 2018-1 (February 26, 2018)

Attorney General Grewal, in a directive to all law enforcement Chief Executive Officers, set forth an analysis and guidance to police departments and law enforcement agencies throughout the State regarding the handling of the public's requests for video footage from body-worn cameras (BWCs) and patrol vehicle dashboard-mounted cameras (dash-cams) once the initial investigation of the use-of-force incident is substantially complete. Such responses should occur within 20 days of the actual incident. This guidance is issued in response to the North Jersey Media Group v. Tp. of Lyndhurst case which determined that OPRA did not entitle requesters to the videos, but that the common law right of access most likely would. The guidance is limited to use of force that resulted in death or serious injury. The Directive sets forth how the determination to release a video is to be made, i.e. on a case-by-case basis by the

County Prosecutor or the Director of the Div. of Criminal Justice. Unless there are specific and compelling reasons to delay the release, the video is to be disclosed publicly by (1) upon substantial completion of the initial investigation and (2) upon formal request by a member of the public or the media pursuant to the common law right of access. Further, there is to be consultation with persons depicted in a recording or their families, editing to protect privacy rights.

Paff v. Ocean County Prosecutor's Office, 235 N.J. 1, 2018 WL 3825737 (2018)
https://scholar.google.com/scholar_case?case=13043934012242136604

Plaintiff filed a request pursuant to Open Public Records Act (OPRA), N.J.S.A.47:1A-1 to -13, and the common law right of access for a copy of a video of a traffic stop captured by the dashcam in a police vehicle. The Ocean County Prosecutor's Office denied the request and plaintiff appealed. Both the trial court and the appellate court held that the dash cam video was not a criminal investigatory record exempt from disclosure under OPRA. The Supreme Court overturned those decisions, holding that the dash cam video was an exempt criminal investigatory record because it was not required to be made by law, but it did pertain to a criminal investigation. A general order from the police chief requiring dash cams to be turned on during traffic stops was not deemed to be a requirement of law.

Brennan v. Middlesex County Prosecutor's Office (Unpub. App. Div. Aug. 29, 2018)
https://scholar.google.com/scholar_case?case=3041604022083458067

The Appellate Division, relying on Paff v. Ocean County Prosecutor's Office, 235 N.J. 1, 2018 WL3825737 (2018), upheld the action of the Middlesex County Prosecutor's Office in denying a request under the Open Public Records Act (OPRA), N.J.S.A.47:1A-1 to -13, for the production of mobile video recordings (MVRs) of all New Brunswick Police Department pursuits from "January 2004 to present. "The court found that the request by its terms sought criminal investigatory records, and that such records were not, at the time, required by law to be made. The court also denied the plaintiff's right to the MVRs under the common law because plaintiff failed to articulate any interest in the recordings other than as a taxpayer.

Conley v. New Jersey Department of Corrections, Docket No. A-4754-14T3 (App. Div., Jan. 12, 2018)

Conley, an inmate at New Jersey State Prison in Trenton, formally requested the Department of Corrections Custodian of Records ("DOC") to provide copies of Monthly Statistical Reports together with a Monthly Remedy Log, all as required to be prepared by the DOC pursuant to federal and State regulations. DOC responded that it had begun "utilizing a

new database system in which the above requested reports (as provided to [appellant] in previous requests) are no longer generated or available,” arguing that DOC was not required to create any document in order to respond to a request. The Court concluded that the specific information requested was a “government record” as information “made, maintained or kept on file” by a government agency “in the course of its official business” or information that has been “received” by a government agency “in the course of its official business.” It further concluded that the DOC’s argument was based solely on the manner in which DOC chose to store or maintain this public information. Thus, while government agencies are not required to conduct research in response to a vague or poorly worded request, they cannot erect barriers to deny access to government records previously available under OPRA.

Larkin v. Borough of Glen Rock, Docket No. BER-L-2573-18 (Law Div., June 15, 2018)

Plaintiff, claiming that he had been blocked from viewing or participating in public dialogue on the Facebook pages of several Borough Council members, submitted an OPRA request demanding the “list of Facebook accounts blocked or removed” for the listed members of the governing body. The request was denied on the basis that the requested items were private accounts not linked to public pages over which the Borough lacked custody or control. The court, finding that the Mayor and five council members established the Facebook pages after their respective elections, concluded that the accounts were intended to discuss matters directly pending before the Council, official business by the committees on which the members served and to answer questions and interact with constituents and the public at large about the Borough’s official business. These accounts which were used exclusively for municipal matters, were admittedly designed to be separate from their personal accounts. Because the accounts were used for governmental functions, they were accordingly governmental in nature and therefore subject to release under OPRA. The court concluded that even though the accounts were privately maintained, due to the nature of their use, they constituted a writing stored or maintained electronically for purposes of OPRA.

Gelber v. City of Hackensack, Docket No. BER-L-005007-18 (Law Div. Sep. 11, 2018)

As a contrast to *Larkin*, above, here, the plaintiff submitted a request for access to twenty-nine separate items under OPRA and the common law right of access. Two of the requests related to a Facebook account titled “Labrosse Team for Lower Taxes and Honest Government”. The issue was whether that account was a campaign account of a government record. The court found that the account had been created nearly six months prior to the election

and was designed to serve as Mayor Labrosse's and four City Council members' official campaign organization. Its title indicated its political nature, contained the "paid for" disclosure as required by New Jersey campaign finance law and was not linked to any municipal government accounts. Further, the Mayor and each member of the Council had their own official City-issued email addresses which were publicly known and used by them to communicate with the public. The Court concluded that the Facebook account was political in nature and therefore exempt from OPRA. It also determined that given the nature of its use it did not fit within the definition of a public document under the common law right of access, inasmuch as it did not contain a record required to be kept or a written memorial of a public act required to be made.

2. Access to 911 Call Records; Domestic Violence.

North Jersey Media Group Inc. v. Passaic County Prosecutor's Office (Unpub. App. Div. Aug. 17, 2018)

https://scholar.google.com/scholar_case?case1=6499496333127860962

The Appellate Division, in a case brought by North Jersey Media Group under the Open Public Records Act (OPRA), N.J.S.A.47:1A-1 to -13, held that the Passaic County Prosecutor's Office could properly withhold a 911 tape from disclosure on privacy grounds, but should have released a redacted version under N.J.S.A. 47:1A-5(g) that eliminated the privacy objections. To that extent only, the custodian violated OPRA, and the court awarded counsel fees only as to the failure to release a redacted version of the tape. The correctness of the custodian's actions at the time they were made was unaffected by the court's release of the entire tape under the common law during the court proceedings, to which the parties had consented. The court upheld the custodian's refusal to provide a domestic violence offense report in response to the OPRA request because a domestic violence offense report is privileged and not to be made public under the Domestic Violence Act, N.J.S.A. 2C:25-33.

3. Public Agency Subject To OPRA

Wronko v. New Jersey Soc'y for the Prevention of Cruelty to Animals, 453 N.J. Super. 73, 2018 WL 564504 (App. Div. 2018)

https://scholar.google.com/scholar_case?case=6033043111310667819

The New Jersey Society for the Prevention of Cruelty to Animals (NJSPCA) was created by the legislature, is controlled by the State, performs government functions and receives funding indirectly from the public. The Appellate Division held that NJSPCA is a "public agency" required to comply with the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -](#)

13. The court also upheld a fee award made because NJSPCA had failed to respond to an OPRA request, finding that the award was not an abuse of discretion by the trial court.

4. Redactions, Confidentiality, Privacy

Brennan v. Bergen County Prosecutor's Office, 233 N.J. 330, 2018 WL2324326 (2018) https://scholar.google.com/scholar_case?case=3506276843807516039

The Bergen County Prosecutor's office (BCPO) conducted an auction of seized sports memorabilia. Plaintiff filed a request under the Open Public Records Act (OPRA), N.J.S.A.47:1A-1 to -13, for information about the bidders, including their names and addresses. The BCPO provided some of the information requested but redacted the names and addresses of the bidders. The Appellate Division, relying on the factors in *Doe v. Poritz*, 142 N.J. 1 (1995), reversed a trial court order, also applying *Doe*, that required production of the names and addresses. The Supreme Court in turn reversed the Appellate Division. The Court found that bidders at a public auction do not have a reasonable expectation of privacy in the auction records (including their names and addresses), and the BCPO had not presented a "colorable" question as to whether they did. It was therefore not necessary to examine all of the *Doe* factors under the Court's precedent in *Asbury Park Press v. County of Monmouth*, 201 N.J.5 (2010).

Middlesex County Prosecutor's Office v. NJ Advance Media, LLC (Unpub. App. Div. March 2, 2018)
https://scholar.google.com/scholar_case?case=4163714784343401875

Two newspapers made a request under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, to the Middlesex County Prosecutor's Office (MCPO) for 911 recordings about a fatal Old Bridge shooting. The MCPO denied the request based on the investigative and privacy exemptions in the definition of a "public record" in OPRA. Before the newspapers could begin suit, MCPO filed a motion with the trial court under Rule 4:10-3 for a protective order ruling that the 911 tape was exempt from disclosure and seeking an *in camera* review by the court. The trial court denied the protective order in a ruling made prior to the Supreme Court decision in *Carter v. Doe (In re N.J. Firemen's Association Obligation)*, 230 N.J. 258 (2017), which confirmed that "OPRA clearly and unambiguously confers the right to initiate a suit after a public agency's denial of access only upon the requestor." One of the newspapers filed suit and the MCPO immediately provided a disc to both newspapers containing a redacted copy of the 911 call, but no Vaughn Index. The MCPO prevailed on the issue of redaction after being

ordered to provide a Vaughn Index because the court found that the call contained “incredibly private, passionate, heart-wrenching” statements made during the call, which revealed “[a] horrific tragedy that this [c]ourt could not imagine before hearing the tape.” The Appellate Division upheld, as reasonable and appropriate, the award of counsel fees to the newspapers because it was the catalyst for production of the redacted recording and because the motion for a protective order by MCPO was not permitted under OPRA.

New Jersey Second Amendment Society v. Division of State Police (Unpub. App. Div. June 19, 2018)

https://scholar.google.com/scholar_case?case=894042946779064581

The Appellate Division upheld redactions by the state police in response to a request under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, for the state police guide for the investigation of firearms applicants. The state police argued that the redacted portions were exempt pursuant to N.J.A.C. 13:1E-3.2(a). The trial court and the Appellate Division agreed that disclosure of the redacted material would allow the applicant to manipulate and circumvent the investigative process, which would interfere with the ability to effectively conduct firearms investigations. The redactions were therefore permitted. Plaintiff also claimed that it was entitled to certain communications from counsel attached to the guide and argued that dissemination of the guide to various law-enforcement agencies with the opinions attached was a waiver of the attorney-client privilege. The court found that the “common interest exception” might shield the materials from disclosure, but that it had an insufficient factual record on that issue. It therefore remanded the matter to the trial court to develop a record.

Parsons Infrastructure and Env’t Group, Inc. v. State (Unpub. App. Div. Feb. 26, 2018)

https://scholar.google.com/scholar_case?case=12513938256551232824

The Appellate Division affirmed a comprehensive determination of Judge Jacobson, holding that the State Department of Treasury for the Motor Vehicle Commission (MVC) had justifiably redacted, or refused to produce, documents that were protected by the “computer security” and “trade secrets” exemptions to the definition of “public records” in N.J.S.A. 47:1A-1.1 of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. Plaintiff was the incumbent contractor for computer hardware and software used in the MVC vehicle inspection system and was ranked third overall in a bidding process. Plaintiff made an OPRA request for other bidders’ submissions as well as the state’s ranking evaluation records. The state notified the other bidders of the request and asked for their redactions. It then provided numerous redacted

documents but did not produce other documents and accompanied its disclosure with a highly specific and detailed explanation for each redaction and unproduced document. In addition to upholding the state's actions, with one exception, under OPRA, both the trial court and the Appellate Division found that the rejected bidder was not entitled to production under the common law. Because plaintiff had prevailed on only a minor portion of the request, the counsel fee awarded was properly limited.

Paff v. Bergen County, Docket No. A-1839-14T1 (App. Div. March 13, 2017)

Paff requested a log of internal affairs complaints filed against Bergen County Corrections officers under both the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common law right of access. The County Sheriff's officers released records in a redacted form, excluding the names of the complainants and individual officers subject to complaints. Paff challenged the redactions, and the county asserted that the redacted information was exempt from disclosure as confidential, in compliance with the Attorney General's Internal Affairs Policies and Procedures (the Guidelines), adopted by the Bergen County Sheriff's Office. The court held that the Guidelines were adopted pursuant to a statutory mandate and that officers must comply with them. Thus, Paff was not entitled to receive the names of the complainants and officers subject to complaints. Although the county officers had inadvertently neglected to explain the basis of their redactions as required by OPRA, the court rejected Paff's demand for attorney's fees, saying that there was no "unjustifiable denial of access," and that "[f]ees are awarded when the records response is ignored, trammeling OPRA's objective of a transparent government." Applying the six-part balancing test of *Loigman v. Kimmelman*, 102 N.J. 98, (1986), the court also found that Paff was not entitled to the records under the common law.

Wolosky v. Somerset County, Docket No. A-1024-15T4 (App. Div., March 30, 2017)

Plaintiff sought copies of records requests made by citizens under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*. The county provided the documents, but redacted the requestors' phone numbers, street addresses and email addresses from the documents it produced. The Appellate Division upheld the Law Division's decision sustaining the county's redactions, finding that a requestor for public records did not relinquish its right to privacy in the phone numbers and addresses. The Court also ruled that plaintiff had failed to sustain his claim to the unredacted information under the common law right of access.

Wolosky v. Borough of Washington (Unpub. Nov. 17, 2017)

https://scholar.google.com/scholar_case?case=18195300445363262477

In response to a request under the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#), for the 2015 year-end payroll record for the municipal clerk, the Borough of Washington provided the requested document but redacted the deductions for pension contributions, pension loan payments, and health insurance payments. The court upheld the redactions as personnel or pension records exempt from disclosure under [N.J.S.A. 47:1A-10](#). The court determined that these three items are not a required part of an employee's payroll record pursuant to the New Jersey Department of Labor and Workforce Development's definition of the term in [N.J.A.C. 12:16-2.1\(a\)](#), and therefore, were not subject to disclosure under OPRA.

Coombs v. Borough of Westwood (Docket No. BER-L-447-18, Law Div. Mar. 13, 2018)

Complainant requested payroll records for all employees of Westwood for 2017, including the records for all minor, temporary employees of the Borough. All payroll records were produced, including those of the 47 minor employees, whose names were redacted due to their age and "to maintain of their reasonable expectation of privacy". A revised list was subsequently produced that included the names of all minors who were now over 18, but provided only the initials of the remaining 13 who were under 18. The municipality relied on Exemption #24 in the Handbook for Records Custodians and the practice followed when redacting information for minors in such instances as police reports. The Court, distinguishing various cases protecting the identity of minors in school and recreational situations, concluded that there was no expectation of privacy, that OPRA mandated release of the names of the minors as government records and ordered release of the minors full names.

5. Confidentiality Provisions in Settlement Agreement; Sealed Settlement Documents.

Scheeler v. Galloway, (Unpub. App. Div. Nov. 15, 2017)

https://scholar.google.com/scholar_case?case=11962160494889841604

Galloway Township denied access to a settlement agreement requested under the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#). Prior to the OPRA request, all terms of the settlement had been agreed to by the attorneys and there were no further negotiations after the request; stipulations of dismissal had been executed and exchanged; the township's records contained a release executed by the plaintiff; and Galloway had issued checks pursuant to the terms of the agreement. The Government Records Council (GRC) had

dismissed the requestor's complaint on the grounds that the settlement agreement was unsigned and therefore was not final. The Appellate Division reversed the GRC's decision as not supported by substantial credible evidence. The court further held that even though Galloway had not executed the release, the release nevertheless constituted an enforceable contract. Galloway therefore violated OPRA by not providing the requestor immediate access to the signed release, as required by [N.J.S.A. 47:1A-5\(e\)](#), but, instead waited seven days to produce it.

Evening Journal Association v. City of Bayonne (Unpub. Law Div., Hudson, Docket No. HUDL-2103-17, March 15, 2018, D'Allesandro, J.S.C.)

<https://www.dropbox.com/s/03mh0ymb12g6gp4/Evening%20Journal%20v%20City%20of%20Bayonne.pdf?dl=0>

Judge D'Allesandro decided, as an matter of first impression, that under the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#), a New Jersey court cannot, as a matter of comity, compel the disclosure of a settlement between individual plaintiffs and Bayonne that had been sealed by the federal court on a joint application. The judge ordered Bayonne to move to unseal the settlement before the federal court, but stayed the order pending an appeal to the Appellate Division. When plaintiff, the Evening Journal, thereafter wrote to the federal judge who had sealed the settlement, the federal judge ordered that only the names of the infant defendants be sealed. Consequently, Judge D'Allesandro ordered that a redacted settlement agreement be produced. The court's opinion also said, "when a settlement with a New Jersey public entity is made in another jurisdiction that the settlement documents shall inform the parties and the court in that jurisdiction that the settlement may be subject to disclosure under OPRA."

6. Criminal Investigatory Records; Vaughn Index

Paff v. New Jersey State Police, Docket No. A-2877-15T2 (App. Div., Aug. 7, 2017)

Paff filed a request under the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#), for State Police investigative records about an alleged sexual misconduct investigation of a county sheriff, which request was denied. In his complaint, Paff requested access to the documents only under the common law right to know, or, in the alternative, a "Vaughn Index" of the withheld documents. The Appellate Division upheld the denial of access under the common law because plaintiff's general interest in a matter that might involve a public official did not outweigh the confidentiality of a criminal investigation, protection of witnesses, or the privacy interests of the sheriff or others involved. Moreover, there was no requirement to provide a Vaughn Index, because the index itself could create the same issues. The court distinguished this request from one for production of dash-cam videos. Note: compare to the dash-cam cases cited

above.

Lynn v. Middlesex County Prosecutor's Office (Unpub. App. Div. Feb. 16, 2018)
https://scholar.google.com/scholar_case?case=5041298986374004717

The Appellate Division upheld a decision by Government Records Council (GRC) to deny plaintiff — an inmate convicted of homicide — access to the entire file of the Middlesex County Prosecutor, including crime scene photos, related to his own homicide investigation. Plaintiff made the request under the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#), and the common law right to know. The court held that the records were exempt criminal investigatory records even though the investigation and trial had been completed, because Attorney General Guidelines require such records to be kept confidential until expiration of the offender's sentence. In addition, Executive Order No. 69 specifically declares that crime scene photos are not public records.

7. Draft Documents; Deliberative Process and Attorney Work Product Privileges

Libertarians for Transparent Gov't v. The College of New Jersey (Unpub. App. Div. Apr. 12, 2018) https://scholar.google.com/scholar_case?case=10386977770092209870

An individual named Guerrini and The College of New Jersey (TCNJ) settled a court case in principle, subject to the matter being reopened if they did not enter into a settlement agreement within sixty days. Plaintiff here then filed a request under the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#), for drafts of the settlement agreement and documents reflecting ongoing settlement negotiations in the Guerrini case. The request was denied and plaintiff filed an order to show cause (OTSC) challenging the denial. While the OTSC was pending, Guerrini signed a release setting forth the terms of the settlement with TCNJ, which TCNJ then provided to plaintiff. TCNJ's attorney asserted in opposition papers and in court that at the time of plaintiff's request, the only potentially responsive document — an email from Guerrini's counsel to TCNJ's attorney - reflected ongoing settlement discussions and thus was protected from disclosure. The attorney did not, however, submit an affidavit or other evidence to support his assertion that negotiations were ongoing when plaintiff made the OPRA request. The Appellate Division held that the trial court erred in relying on TCNJ's unsworn response to plaintiff's OPRA request in concluding that TCNJ did not violate OPRA. The court remanded the matter to allow TCNJ to submit competent proofs as to the content of the document or documents it withheld.

Libertarians for Transparent Gov't v. William Paterson Univ. (Unpub. App. Div. Apr. 12, 2018) https://scholar.google.com/scholar_case?case=12012155380602182609

Under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*, a settlement agreement remains a draft document until it is signed. The Appellate Division therefore reversed the trial court's conclusion that William Paterson University violated OPRA by withholding a finalized, but unexecuted, settlement agreement. Plaintiff made an OPRA request for a draft settlement agreement, which was denied. After plaintiff filed its complaint, the university produced the fully signed settlement agreement. The Appellate Division held that it was error for the trial court to have also required the University to produce a finalized, but unsigned draft of the agreement.

Libertarians for Transparent Gov't v. Government Records Council, 453 N.J. Super. 83, 2018 WL 564535 (App. Div. 2018)
https://scholar.google.com/scholar_case?case=13506555586004486721

The Government Records Council (GRC) properly denied plaintiff's request under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*, and common law for the draft minutes of one of the GRC's meetings. The draft minutes were pre-decisional and deliberative, and satisfied the two-prong test for exemption under OPRA. The court rejected plaintiff's argument that the draft was merely a summary of what had occurred and could be redacted. Because the draft minutes were not yet a public record, the GRC was not required to produce them with redactions.

Paff v. Township of Moorestown (Unpub. App. Div. July 11, 2018)
https://scholar.google.com/scholar_case?case=15662991638266371434

In December 2015, John Paff filed a request under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*, for the agenda, minutes, and notices of the Moorestown Ethical Standards Board meeting of October 2012. At the time of the request, the minutes were only available in draft form, but were subsequently approved in March 2016. The Appellate Division held that the draft minutes were not subject to disclosure under OPRA because they were "advisory, consultative, deliberative material" under *N.J.S.A. 47:1A-1.1*; but the board's failure to release the minutes more than three years after the meeting was a violation of the requirement of the Open Public Meetings Act (OPMA), *N.J.S.A. 10:4-6 et seq.*, that minutes from public meetings be "promptly available." *N.J.S.A. 10:4-14*. The court also held that the OPMA violation, unlike an OPRA violation, did not trigger an award of counsel fees.

North Jersey Media Group, Inc. v. City of Clifton (Unpub. App. Div. Jan. 11, 2018)
https://scholar.google.com/scholar_case?case=3565938779092359271

The Appellate Division held that a report made by an accounting firm hired by Clifton to examine its payroll practices was exempt from disclosure under the Open Public Records Act(OPRA), N.J.S.A. 47:1A-1 to -13, because it was subject to the deliberative process exception. Deliberative records do not lose their deliberative nature merely because they contain statistical or other fact-based data, nor are they deemed non-deliberative if they do not express an overt opinion or recommendation on a discretionary decision. Further, because there was a grievance pending about the pay due to members of a bargaining unit, the records were also protected under the work product doctrine.

L.R., Etc. v. Camden City Public School District / L.R., Etc. v. Parsippany-Troy Hills Township Public School District, et al. / The Innisfree Foundation v. Hillsborough township Board of Education / The Innisfree Foundation v. Cherry Hill Board of Education, 452 N.J. Super. 56 (App. Div., Oct. 17, 2017)

The App. Div. consolidated these four related appeals in which the various plaintiffs sought to obtain from the defendant school districts copies of settlement agreements and records dealing with the provision of special services to other qualified children. The plaintiffs included a nonprofit advocacy organization for disabled children and the mother of a disabled student in the Camden Schools. The respective school districts refused to provide the requested documents citing statutory and regulatory provisions that protect the privacy of school students. The App. Div. determined that the plaintiffs were entitled to the documents, although in redacted form so that the identity of the students remained confidential. On remand the App. Div. directed that the documents could only be disclosed to the advocacy groups, as redacted, if (1) the requester was a “bona fide researcher” within the intended scope of N.J.A.C. 6A:32-7.5(e)(16) or (2) could obtain a court order authorizing such access under N.J.A.C. 6A:32-7.5(e)(15); and further provided that such records shall not be turned over until the districts shall have provided reasonable notice to the affected student’s parents or guardians. As to the Camden case, the App. Div. remanded for further proceedings with respect to the documents sought, but affirmed the trial court’s grant of access concerning records that exclusively mentioned the requestor’s child. The App. Div. stayed its decision to allow the parties to appeal to the Supreme Court.

8. Executive Privilege

Geiger v. Borough of Englewood Cliffs (Unpub. Law Div., Bergen County., Docket No. BER-L-7240-17, Jan. 19, 2018, Contillo, P.J. Ch.)

<https://www.dropbox.com/s/5nezmtmjz40dkeb/Geiger%20v%20Englewood.pdf?dl=0>

Mayor Kranjac of Englewood Cliffs wrote an email on the Borough's email system to a reporter at North Jersey.com, a division of the Bergen Record and USA Today, agreeing with a decision of the governing body not to terminate the services of a police officer by disciplinary proceedings and calling the disciplinary proceedings a "witch hunt" by the police department. The email was quoted in a published news article. Under the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#), plaintiff sought all emails to and from the mayor related to that subject, but the clerk did not produce the email quoted in the media, stating instead that the mayor was speaking in his individual capacity and not as part of his official duties. Judge Contillo ordered the email produced and invited a filing for attorneys' fees by the plaintiff. The court rejected the contention that the email in question was not a public record. He also rejected a contention that the email was covered by "executive privilege" because the mayor was a "weak mayor" under the borough form of government, and because he was commenting on actions taken by the governing body without either soliciting formal or informal advice or exploring possibilities that would shape municipal policies. Finally, the court rejected the borough's contention that the email was protected by the "Shield Law" ([N.J.S.A. 2A:84A-21](#)) because the privilege afforded to "newspapermen" under that act belongs only to the reporter and not to a source such as the mayor.

9. Personnel Records

Libertarians for Transparent Gov't v. Ocean County Prosecutor's Office (Unpub. App. Div. Jan. 4, 2018)

https://scholar.google.com/scholar_case?case=16569571961796162950

The Appellate Division remanded a matter requiring the custodian of public records in the Ocean County Prosecutor's Office to make a search beyond the personnel file and to file an affidavit required by *Paff v. New Jersey Dept. of Labor*, 392 N.J. Super. 334 (App. Div. 2007), in connection with a request for documents and information that were required to be disclosed about an individual employee pursuant to [N.J.S.A. 47:1A-10](#). The Libertarians for Transparent Government, having an anonymous tip that a prosecutor's employee had been terminated for drug use, made a public records request seeking all documents related an "individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor,

and the amount and type of any pension received.” The custodian produced material from the employee’s personnel file, including a memorandum that said merely that the employee had resigned but did not give a reason. The Appellate Division required that a more extensive search be made to determine whether there were any other public records that expressed the reason for the resignation.

Scheeler v. State of New Jersey Dept. of Children and Families (Unpub. App. Div. Dec. 21, 2017) https://scholar.google.com/scholar_case?case=9491518187604666715

Plaintiff filed a request with the State Department of Children and Families under the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#). The request sought employee records, including resumes. The agency produced redacted resumes. Plaintiff claimed that the redactions violated OPRA and [Executive Order 26](#) (Aug. 13, 2002, 34 *N.J.R.* 3043(b)(EO 26). [N.J.S.A. 47:1A-10](#) generally exempts personnel files from disclosure, but states that “personnel or pension records of any individual shall be accessible when required to be disclosed by another law.” The Appellate Division held that an executive order is not “another law” that would require the disclosure of employee personnel records contrary to the Legislature’s specific exemption of such documents in OPRA.

10. Confidentiality of Medical and Mental Health Records

Spillane v. N.J. State Parole Board (Unpub. App. Div. Sept. 21, 2017)
https://scholar.google.com/scholar_case?case=7370146177586053719

Under the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#), a requestor sought access to his own mental health evaluation report submitted to the parole board. The Appellate Division upheld a decision of the Government Records Council (GRC) based on Executive Order No. 26, which excludes mental health records as a class of public records subject to disclosure. Additionally, [N.J.A.C. 10A:71-2.2](#) allows for non-disclosure of records retained by the State Parole Board. The court concluded that the GRC properly relied on both the statute and the regulation. The court found no reason to make an exception where the requestor is asking for a record pertaining specifically to himself, because OPRA regulates the right of the public and citizens in general, not of particular individuals. If the public or citizens in general are not entitled to the record under OPRA, then the requestor is not entitled to it. The court expressed no opinion about the requestor’s ability to access the record through Parole Board procedures or by other means in litigation.

Benedetto v. Russo (Unpub. App. Div. June 4, 2018)

https://scholar.google.com/scholar_case?case=11272547255771284554

The Appellate Division agreed with the trial court that the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*, requires the release of seven years of incident reports of suicides and drug overdoses in the Union County Correctional Facility with personal identifiers redacted. *N.J.A.C. 10A:31-6.10*, which designates inmates' medical and psychiatric records as confidential, does not exempt the redacted incident reports from disclosure under OPRA.

11. Overbroad, Excessive or Abusive Requests

O'Boyle v. DiLorenzo (Unpub. App. Div. July 25, 2018)

https://scholar.google.com/scholar_case?case=146846858231807097

Plaintiff appealed the grant of summary judgment and other adverse rulings on his complaint alleging invasion of privacy, assault, harassment and equal protection violations by officials of the Borough of Longport and others. Plaintiff had filed over nine hundred requests under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*, and videotaped borough employees at work, leading to the borough filing an order to show cause against him. The order to show cause permitted plaintiff to continue making requests but relaxed the time for the borough to respond to those requests because of the burden on the staff, some of whom had quit because of the burdensome requests. The Appellate Division affirmed summary judgment in favor of the defendants on all counts of the complaint substantially for the reasons set forth in a ninety-five-page opinion by Judge J. Christopher Gibson.

Carter v. Franklin Fire District No. 2, (Unpub. App. Div. Nov. 20, 2017)

https://scholar.google.com/scholar_case?case=7467646235118570918

Franklin Fire District No. 2 received a request under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*, seeking all purchase orders, vouchers, and warrants, including invoices/attachments for each record, about financial software used by the district to process its monetary disbursements (including any reasonably construed variation thereof). The district did not respond at all. The Government Records Council presumed this to be a denial. However, the council, affirmed by the Appellate Division, held that the denial was appropriate because the request failed to include such things as date ranges, a clear subject matter, and recognizable parties. Such a blanket request for access to records over an unlimited period of time without specific identifiers was improper. The GRC entered an interim order directing the custodian to respond to the requestor's complaint with a statement of information (which the district also ignored), but that, alone, did not make the requestor a "prevailing party" entitled to counsel fees.

Wronko v. Township of Jackson (Unpub. App. Div. Dec. 12, 2017)
https://scholar.google.com/scholar_case?case=4192168443388607191

Under the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#), a requestor sought all attorney invoices submitted to Jackson Township during a one-year period and all settlement agreements that Jackson had entered into during a five-year period. The trial court ruled that the request had been properly denied because it was not specific enough and would require the production of a large number of documents. The Appellate Division concluded that the request was sufficiently specific to satisfy OPRA's requirements and, accordingly, reversed.

12. Access To Third-Party OPRA Requests

Scheeler v. Office of the Governor, 448 N.J. Super. 333 (App. Div. 2017)

Requests under the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#), are themselves public records subject to disclosure under OPRA. The requestor sought copies of OPRA requests submitted to the Governor's Office and other State agencies about Bridgegate. The Appellate Division found that OPRA requests are themselves government records because they are received and maintained by public entities and because there is no statutory or regulatory exemption for them. The court ruled that broad language to the contrary in *Gannett NJ Partners, LP v. County of Middlesex*, [379 N.J. Super. 205 \(App. Div. 2005\)](#), was misplaced because the language in that opinion was merely dicta and that case never directly addressed the issue before the court here.

13. Willful Violations

North Jersey Media Group, Inc. v. State, Office of the Governor, 451 N.J. Super. 282 (App. Div. 2017)

The Appellate Division held that a trial court has the statutory authority to impose civil penalties for a willful violation of the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#). The court further held that the trial court erred in denying a request for relief in aid of litigants' rights. Over the course of a number of months, North Jersey Media Group, Inc. (Media), publisher of the Bergen Record, filed a number of requests under OPRA and the common law, for records concerning the so-called Bridgegate matter. The failure of the Office of the Governor to produce any records resulted in various complaints seeking turnover of the records, legal fees and other penalties. In remanding the matter to the trial court, the Appellate Division found that the Governor's Office had violated a prior court order by failing to provide a certification by someone with personal knowledge about the search for documents and the trial

court was therefore obligated to grant Media's motion for relief in aid of litigants' rights under [Rule 1:10-3](#). Further, the court determined that pursuant to [N.J.S.A. 47:1A-11](#), the trial court has the same authority as the Government Records Council to impose civil penalties when, under the totality of the circumstances presented, there is a knowing and willful violation of OPRA and an unreasonable denial of access to public records.

Valentin v. Borough of Penns Grove (Unpub. App. Div. May 2, 2018)

https://scholar.google.com/scholar_case?case=1894836684483657310

In a matter under the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#), the Appellate Division *affirmed* an award of sanctions against the plaintiff under [Rule 1:4-8](#). When plaintiff submitted an OPRA request, the municipal clerk made a timely response via telephone and email advising that the records were too voluminous to be emailed and were available for pickup instead. The plaintiff did not respond to the phone call or email but, instead filed an order to show cause alleging that the municipality failed to respond to his OPRA request. Municipal counsel sent the requisite notice asserting frivolity to plaintiff's counsel under [Rule 1:4-8](#), which notice again advised that the documents were available to be picked up. The plaintiff picked up the documents, but then refused to withdraw the complaint, asserting that the documents did not satisfy his OPRA request. His counsel then failed to appear at the order to show cause hearing. Even though the appeal from the sanctions order was untimely, the Appellate Division exercised its discretion to review the order and found it to be appropriate.

Carter v. Franklin Fire Dist. No. 1 (Unpub. App. Div. Nov. 20, 2017)

https://scholar.google.com/scholar_case?case=6442210597803193605

Franklin Fire District No. 1 received a request under the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#), from the same requestor as in [Carter v. Franklin Fire Distr. No. 2, supra](#), for all annual financial disclosure statements filed by its commissioners from 2000 to 2011. The district, through its attorney, denied the request, explaining that the documents requested were not maintained by the district but were instead available through the Franklin Township municipal clerk's office. Carter then requested the documents from the clerk and they were duly received. Even though a later email revealed that the documents for one of the years in question were actually in possession of the district, the Government Records Council concluded that the fire district's custodian had not knowingly and willfully violated OPRA and that her mistake in denying the OPRA request was merely negligent. The Appellate Division affirmed. By forwarding the documents to counsel for response, the custodian rebutted any contention by the requestor of a knowing and willful attempt to shroud possible wrongdoing from the public's

view or to deny access to government records. Moreover, the requestor was never denied the documents because he obtained them from the municipal clerk.

14. Mootness

Stop & Shop Supermarket Co., LLC v. Bergen County Planning Board, 450 N.J. Super. 286 App. Div. 2017)

Stop & Shop filed a request with Bergen County under the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#), for documents in connection with a County Planning Board proceeding to which it was a competitor-objector. It received the documents, but shortly thereafter filed a declaratory judgment action seeking the documents and to argue that a delay in the production of documents deprived it of a fair hearing and due process in its appeal of the planning board action to the Board of Freeholders. The court determined that any action on the OPRA request was moot because plaintiff had already received the documents, and a declaratory judgment action was not appropriate because there was no case or controversy. No legal fees under OPRA were due because plaintiff had received the documents before beginning suit and, therefore, it was neither a prevailing party nor a catalyst. In 38 Local Government Law Review 37 (January 2015) we summarized the Law Division opinion in this case. The Appellate Division affirmed in a published decision. The published opinion omitted discussion of facts and conclusions in a related case between the same parties that was appealed separately. The unpublished decision of the Appellate Division can be found at https://scholar.google.com/scholar_case?case=3332883790304370105.

15. Attorneys Fees.

Rivera v. Middlesex County Prosecutor's Office (Unpub. App. Div. March 20, 2018) https://scholar.google.com/scholar_case?case=1094076039469933606

The Appellate Division affirmed the trial court's award of fees and costs to plaintiffs under the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#), finding no abuse of discretion in the trial court's determination that plaintiffs had met the "prevailing party" test under OPRA or in its calculation of the lodestar fee amount. The prosecutor argued that the plaintiffs had sought unredacted records but had only been granted access by the court to redacted records, and therefore were not the prevailing parties. The court found that the contention was neither factually nor legally valid.

Kennedy v. Montclair Ctr. Corp. Bus. Improvement Distr. (Unpub. App. Div. Nov. 27, 2017) https://scholar.google.com/scholar_case?case=18167079902621126090

The Appellate Division held that a requestor pursuing a declaratory judgment under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*, is not entitled to attorney's fees for legal work performed after receipt of the requested records. Plaintiff filed suit after the Montclair Business Improvement District denied him access to its records on the basis that it was not a public agency subject to OPRA. Shortly thereafter, however, the district provided the requested records to the plaintiff at the copying rate that plaintiff demanded, but continued to maintain that it was not a public agency. Plaintiff persisted in the litigation, and the Appellate Division ultimately declared that defendant was a public agency subject to OPRA. On remand, the trial court found that the plaintiff was not entitled to an award of fees under *N.J.S.A. 47:1A-6* for work performed after receipt of the requested records. The Appellate Division relied on the plain language of the section, the policies embodied in OPRA and prior judicial decisions to find that fees may only be awarded only to "requestors" in denial of access cases. Extending the requirement of counsel fees to those who are granted access but persist in seeking declaratory judgment that the entity is a public agency would contravene to the goals of a cooperative process and swift public access.

16. Out of State Requester.

Scheeler v. Atlantic County Mun. Joint Ins. Fund, 454 N.J.Super. 621, 2018 WL2223748 (App. Div. 2018) [https://scholar.google.com/scholar_case=13399914074261546739](https://scholar.google.com/scholar_case?case=13399914074261546739)

A person who is not a citizen of New Jersey has standing to make a request for documents under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*. The Appellate Division held that even though the Legislature did use the word "citizen" in the statute's statement of purpose (see *N.J.S.A. 47:1A-1*), its use of "person" or "requestor" in the operative sections of the law meant that it did not intend to foreclose nonresidents from seeking or obtaining public records. The court also relied on the many judicial interpretations of OPRA that emphasized its remedial purpose and its broad scope.

17. Common Law Access; Loigman Factors

Paff v. Cape May County Prosecutor's Office (Unpub. App. Div. March 9, 2018)
https://scholar.google.com/scholar_case?case=10425801486177124217

Under both the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#), and the common law right to know, John Paff filed a public records request with the Cape May County Prosecutor's Office for certain letters related to a criminal matter. The Appellate Division upheld the denial of production under OPRA but reversed a trial court order to produce the records under the common law. The court said that, on remand, the trial court should base its decision on all six factors set forth by the Supreme Court in *Loigman v. Kimmelman*, [102 N.J. 98 \(1986\)](#), and should provide a detailed opinion setting forth specific factual findings as to each of those factors.

New York Public Radio v. Office of the Governor (Unpub. App. Div. Dec. 19, 2017)
https://scholar.google.com/scholar_case?case=14832182550266241352

The Appellate Division affirmed the trial court's decision holding that the common law right of access does not compel disclosure of "Town Priority Lists" used by Gov. Christie's office to build support for the governor by focusing on certain municipalities. In reviewing whether plaintiff's right to the documents outweighed the defendant's interest in preventing disclosure, the court agreed with the trial court's analysis that disclosure of agency communications that were part of the agency's decision-making process would have a chilling effect on the free flow of communication within the agency and would nullify the "deliberative process" privilege.

18. Anonymous OPRA Requests; Retaliation

Wronko v. Howell Township (Unpub. D.N.J. Jan. 23, 2018)
https://scholar.google.com/scholar_case?case=12935800585132206079

Plaintiffs made anonymous requests to the Howell police department under the Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1 to -13](#), and, in some cases, videoed their interaction with the police in connection with those requests. The police chief of Howell Township issued a memorandum to his department making suggestions as to how the officers should act if a requestor refused to present proper identification credentials. The Howell chief also communicated with the chief of another municipality that was experiencing similar requests and sent his memo to the Monmouth County Police Chiefs. An officer of the Howell Police Department then accessed the New Jersey Motor Vehicle Online Access to Motor Vehicle Records database and obtained information and pictures of the plaintiffs. The Howell chief and

two other officers created posters using this information and posted them in the township offices. Plaintiffs filed an action against the township, the chief and the police officers, claiming a violation of [42 U.S.C. § 1983](#). The district court found that chief and officers had not violated the Driver's Privacy Protection Act (DPPA), [18 U.S.C. §§ 2721-2725](#), because that law did not apply to public entities. The court also held that there is no general right to privacy protected by [42 U.S.C. § 1983](#) so, in all, the complaint failed to state a claim and was dismissed. The court also found insufficient facts to state a claim against Howell under *Monell v. Dep't of Social Services*, [436 U.S. 658 \(1978\)](#).

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