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<tr><td>PATRICK DUFF,

Plaintiff-Respondent,
v.

STOCKTON UNIVERSITY, AND BRIAN KOWALSKI, IN HIS OFFICIAL CAPACITY AS RECORDS CUSTODIAN FOR STOCKTON UNIVERSITY,

Defendants-Appellants.</td><td>SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NUMBER: A-0087-23

<u>CIVIL ACTION</u>

ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION

Trial Docket No. ATL-L-385-23

Sat Below: Hon. Danielle Walcoff, J.S.C.</td></tr>
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BRIEF AND APPENDIX ON BEHALF OF APPELLANTS STOCKTON UNIVERSITY AND BRIAN KOWALSKI, IN HIS OFFICIAL CAPACITY AS RECORDS CUSTODIAN FOR STOCKTON UNIVERSITY

Date Submitted: December 27, 2023

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PRELIMINARY STATEMENT

Government agencies need to be able to function. While the public has a right to request and receive government records, that right is not without its limits, particularly to the extent it affects an agency's ability to carry out its core mission. For this reason, our courts have consistently recognized that requests under New Jersey's Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, must articulate with "reasonable clarity" the documents they are seeking by identifying a discrete and limited subject matter. OPRA's earliest case law establishes that requestors cannot avoid this obligation by simply requesting all of an agency's records, or an agency's entire file. Thus, just as OPRA's plain text places guardrails on requests to limit the outer boundaries of custodians' obligations, including by allowing agencies to charge special service charges or deny requests as substantially disruptive, so too does this canon of well-developed case law define these parameters by permitting agencies to deny "overbroad" or "improper" requests.

The trial court's decision in this case, which upholds the validity of Respondent Patrick Duff's OPRA request for <u>all</u> emails sent or received by Appellant Stockton University's Interim Provost, turns this well-settled law on its head. This decision—if permitted to stand—will allow requestors to submit the very types of blanket requests that have been rejected again and again. And

while the trial court purported to rely on a through-line of cases beginning in 2012 with Burke v. Brandes, 429 N.J. Super. 167 (App. Div. 2012), and ending with the Supreme Court's decision in Paff v. Galloway Township, 229 N.J. 340 (2017), its legal analysis was fundamentally flawed. Not only did it misapprehend the scope of the Court's decision in Paff v. Galloway Township, including the ultimate outcome of that appeal, it also plainly ignored the building blocks that led to Burke's requirement that requests for records articulate a discrete and limited subject matter. In short, by drawing a line where none exists, the trial court improperly expanded OPRA well beyond the bounds set by the Legislature and confirmed by the courts.

The effects of the trial court's decision will be felt not just by the parties here, but by all government agencies responsible for responding to OPRA requests. If required to field blanket requests seeking "all" of an employee's emails that do not identify any subject matter, let alone a discrete and limited one, agencies will be regularly forced to redeploy personnel to review and redact tens of thousands of emails, without regard for the time, sensitivity, or expertise needed to determine what is privileged and what is not. The consequences do not stop there. While ostensibly limited to electronic inboxes or outboxes, there is no principled way of reconciling the decision in this case with well-settled precedent denying requests that seek "all" of an agency's records, or an agency's

"entire file." After all, a request seeking an employee's inbox or outbox on a single day is hardly distinct from a request seeking that same employee's entire "correspondence file," or even their entire litigation or project file, even though such requests have been squarely foreclosed for nearly twenty years.

Last, and most importantly, allowing a requestor to engage in an unbridled search of an employee's inbox and outbox, even if limited to a particular time period, will inevitably chill communication and grind agency operations to a halt. OPRA was designed to maximize transparency, but it is equally well-settled that government needs to operate with some degree of privacy to allow the free flow of communications, ideas, and discussion to arrive at decisions that are in the public's best interests. The ability to withhold or redact records based on applicable privileges is not the panacea to this problem, either. Fulfilling a request like the one at issue here not only allows a requestor to fish through an agency's records in a way that has never been countenanced, it also places a significant practical burden on agencies and their custodians—particularly where, as here, the records at issue belong to an employee at the highest level of the entity, responsible for discharging sensitive student and personnel matters. For these reasons, and because the trial court's decision was legally incorrect and failed to consider any of these consequences, its decision should be reversed and Duff's complaint dismissed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Appellant Stockton University ("Stockton") is a public university in New Jersey. (Da1).[2] On January 11, 2023, Respondent Patrick Duff submitted a request under OPRA and the common law right of access to Stockton seeking "[a]ll emails sent and received by interim Provost Michelle McDonald from September 24th 2020 through October 3rd 2020." (Da2; Da10).

During the time period identified in Duff's request, McDonald served as the Interim Provost and Vice President of Academic Affairs within Stockton. (Da42).[3] In this role, McDonald was a member of Stockton's executive staff and her duties included, but were not limited to, collaborating with the other executive and administrative staff to "provide leadership and academic vision" to the University; "overseeing all aspects of faculty recruitment, professional development, and promotion and tenure processes;" overseeing all "undergraduate and graduate academic programs;" participating in collective negotiations with professional and academic bargaining units; and "serving as

---

[1] The procedural history and counterstatement of facts are closely related in this matter and have been combined to avoid repetition and for the court's convenience.

[2] "Da" refers to Stockton's Appendix. "1T" refers to the transcript of the June 15, 2023 Order to Show Cause hearing.

[3] McDonald served as Interim Provost and Vice President of Academic Affairs from January through November 2020. (Da42).

the University's Accreditation Liaison Officer to Middle States Commission on Higher Education." (Da43). As to undergraduate and graduate academic programs specifically, McDonald's duties included oversight of all academic programs, administrative units, and centers and institutes within the Division of Academic Affairs. Ibid. Additionally, McDonald worked to build and strengthen connections between the University and local and regional employers "for the purposes of internships, clinical and practicum positions, and employment opportunities." (Da44). And McDonald also "assisted in ensuring the University's compliance with state and federal regulations and university policies on academic matters." Ibid.

Stockton acknowledged receipt of Duff's request on January 12, 2023. (Da3; Da12-13). Despite the request not containing a subject matter, Stockton conducted an initial search for all emails sent or received by McDonald during the ten-day time period in the request and identified 3,125 emails. (Da40). On January 13, 2023, Stockton sent notice to Duff, explaining that:

> The University has determined that your request under OPRA is overly broad and invalid under OPRA and the common law right of access to government records. Please provide the required information as identified below.
>
> Your request is invalid under OPRA as it fails to specify the content and/or subject of the emails sought. The Government Records Council ("GRC") has

established specific criteria deemed necessary under OPRA to request an e-mail communication. See Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-08 (Apr. 8, 2010) (stating that a proper request for email correspondence must contain "(1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the emails were transmitted, and (3) a valid e-mail request must identify the sender and/or the recipient thereof"). The Council has previously determined that a request failing to contain all appropriate criteria set forth in Elcavage, GRC 2009-07, was invalid. See e.g., Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010) (invalid request omitting the "subject and/or content").

Your request is similarly invalid under the common law right of access to government records. "A person seeking public records under the common law right of access 'must explain why he seeks access to the requested documents' and the person's interest in obtaining the documents "must be balanced against the State's interest in preventing disclosure." Malanga v. Twp. of W. Orange, No. A-2287-19, 2022 WL 1320327, at *9 (N.J. Super. Ct. App. Div. May 3, 2022) (quoting O'Boyle v. Borough of Longport, 218 N.J. 168, 196 (2014) (internal citations omitted). Your request does not explain why you seek access to the requested documents therefore the University cannot perform the required common law balancing analysis.

For your request under OPRA, please identify the specific content and/or subject of the emails sought. For your request under the common law, please set forth your interest in the subject matter contained in the requested material.

> The University will not take any further action with regard to this request until you provide the required information. Please respond in writing within three (3) business days, by January 19, 2023, or your request will be denied and closed as invalid.
>
> [Da3-4; Da16-17.]

Stockton's response invited Duff to submit a narrowly tailored OPRA request that specified the "content and/or subject of the emails sought." (Da4; Da17).

In response, Duff submitted an updated OPRA request on the same date that narrowed only the scope of time for which the records were sought. (Da4; Da19). Specifically, Duff's January 13, 2023 request stated "I want every single email sent or received. That is very clear. I will shorten the time frame to the 27th through the 29th, but I want every email sent [or] received for that period of time as well as all attachments." (Da4; Da19). Stockton acknowledged receipt of the amended request on January 17, 2023. (Da4).

Stockton again conducted an initial search for all emails sent or received by McDonald from September 27, 2020 through September 29, 2020, despite Duff failing to provide a subject matter for a second time, and identified 1,004 emails. (Da40). But because Duff's request failed to provide a specific content or subject matter sought, Stockton denied the request on January 24, 2023. (Da4; Da23). In denying the request, Stockton explained that the "request [was] denied as an invalid request" under OPRA for "failure to supply the subject or

content of the emails sought." (Da33). Stockton further stated that the request was "overly broad" and that review of the records was "substantially disruptive and overly burdensome" to the University's operations. (Da34).

Duff responded on January 24, 2023, asserting that the denial was "unlawful." (Da4; Da36). Duff also threatened to "file suit with the courts" if Stockton failed to provide the requested records. (Da4; Da36). On January 25, 2023, Stockton advised Duff that it was unable to fulfill his requests for the reasons it had previously outlined in its January 13 and 24, 2023 communications. (Da5; Da38).

On February 16, 2023, Duff filed a verified complaint and order to show cause alleging Stockton had improperly denied his request for all of McDonald's emails in violation of OPRA and the common law right of access. (Da1; Da47). Stockton filed a motion to dismiss the verified complaint on May 5, 2023. (Da48). The trial court issued an oral decision on June 15, 2023, denying Stockton's motion to dismiss, finding that Stockton had improperly denied Duff's OPRA request, and ordering Stockton to produce the all emails sent or received by McDonald for the date range requested. (Da45; 1T19:15-21). The trial court explained that in reaching its decision, it drew a line from this court's precedent in <u>Burke v. Brandes</u>, 429 N.J. Super. 167 (App. Div. 2012), to the Supreme Court's decision in <u>Paff v. Galloway Twp.</u>, 229 N.J. 340 (2017).

(T16:5-11; T17:21-23). Based on this line of precedent, the trial court held that Duff's January 13, 2023 request was "as specific as it needs to be" and that it was not "vague or overly broad[.]" (T17:3-8). The trial court further stated that, under Paff, there is "no requirement that [] specific subject matter needs to be put in" an OPRA request. (T17:21-25; T19:3-14).

On January 15, 2023, the court supplemented its decision with a written order and memorandum of decision. (Da46). In its written decision, the court framed the "test [as] whether the request requires the custodian to engage in any subjective analysis to identify records or correlate data from a variety of sources to satisfy Plaintiff's OPRA request." (Da52). Relying both on Stockton's ability to identify the responsive 1,004 emails and again on Paff, where "[t]he New Jersey Supreme Court held . . . that the requestor was entitled to all emails sent by two government employees over a two week period," it found that Plaintiff's OPRA request "for all emails to and from the interim provost for three days was well within OPRA's scope and valid." (Da52-53). Indeed, despite acknowledging that Duff's request did not contain a subject matter, the court nevertheless deemed the request valid because it was circumscribed to a very narrow time period and identified the one person whose emails he sought, (Da53), and ordered Stockton to grant access to the responsive emails with an

accompanying Vaughn Index to explain any emails withheld or redacted, (Da55). This appeal followed.

ARGUMENT

POINT I

THE TRIAL COURT'S DECISION FAILED TO CONSIDER WELL-SETTLED LAW REQUIRING OPRA REQUESTORS TO IDENTIFY THE DOCUMENTS THEY ARE SEEKING WITH REASONABLE CLARITY AND PROHIBITING REQUESTS FOR ALL OF AN AGENCY'S RECORDS. (Da45; Da56).

The court's decision deeming Duff's request valid under OPRA was based on a clear misunderstanding and misapprehension of the law. Its misplaced extension of Paff ignored longstanding precedent requiring OPRA requestors to describe the documents they are seeking with reasonable clarity—and prohibiting end-runs around this requirement by requesting all of an agency's records—and must be reversed.

The issue of "whether access to public records under OPRA and the manner of its effectuation are warranted" is reviewed de novo. Burke v. Brandes, 429 N.J. Super 169, 173 (App. Div. 2012) (quoting MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 543 (App. Div. 2005)) (internal quotation marks omitted). In particular, this court "owe[s] no deference to a trial court's interpretation of the law[.]" Cumberland Farms, Inc.

v. N.J. Dep't of Env't Prot., 447 N.J. Super. 423, 438 (App. Div. 2016); see also Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.").

OPRA was enacted to "maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (citation omitted). Adopted to replace the former Right to Know Law, N.J.S.A. 47:1A-2 to -4, it "continues 'the State's long-standing public policy favoring ready access to most public records.'" Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 36 (App. Div. 2005) (quoting Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003)). To this end, the custodian of a government record has the burden to prove that a denial of access is authorized by law, ibid., and, generally, "any limitation on the 'public's right of access' must be construed in favor of access[,]" Paff v. Galloway Twp., 229 N.J. 340, 344 (2017) (citing N.J.S.A. 47:1A-1).

That said, the right to access is "not absolute[.]" Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 284 (2009). Designed "both to promote prompt access to government records and to encourage requestors and agencies to work together toward that end by accommodating one another[,]" OPRA strives to

create a "cooperative balance" that weighs the public's right to access on one hand with agencies' obligations and abilities to identify and provide responsive records on the other. Mason, 196 N.J. at 78. An agency's ability to seek reasonable extensions; to charge special, reasonable service charges where requests "involve[] an extraordinary expenditure of time and effort" under N.J.S.A. 47:1A-5(c); or to deny requests that are unduly burdensome after attempting to reach a reasonable solution with the requestor under N.J.S.A. 47:1A-5(g) are bedrock, plain-text examples of OPRA's attempt to achieve this important balance. Ibid.

But these are not the only examples. Soon after OPRA's passage in 2002, this court was quickly confronted with questions about its marginal edges. In 2005, this court used for the first time in a published decision the term "overbroad" when upholding an agency's denial of a records request. MAG Entm't, LLC, 375 N.J. Super. at 547. Relying on cases from Michigan, Washington, Ohio, New York, and cases interpreting the permissible scope of requests for government records under the Freedom of Information Act (FOIA), this court concluded that "[u]nder OPRA, agencies are required to disclose only 'identifiable' governmental records not otherwise exempt" and that "OPRA does not countenance open-ended searches of an agency's files." Id. at 547-49. In so holding, this court cited with approval the Washington Supreme Court's

holding in Hangartner v. City of Seattle, 90 P.3 26, 28 (2004), that "a proper request . . . 'must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.'" Id. at 547 (emphasis added).

This court's rejection of overbroad and improper requests that attempt to avoid OPRA's parameters by requesting an agency's entire file, or all of an agency's records, quickly became part of OPRA's lexicon. Seven months after MAG, this court reaffirmed in Bent that "a party requesting access to a public record under OPRA must specifically describe the document sought." 381 N.J. Super. at 37 (citing MAG, 375 N.J. Super. at 546-49)); see also ibid. (holding that OPRA "'does not authorize a party to make a blanket request for every document' a public agency has on file") (quoting Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005)). Adopting the MAG court's reliance on Hangartner, this court in Bent likewise cautioned that "a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents." Ibid. And, expanding MAG, the Bent court also found that "OPRA does not authorize unbridled searches of an agency's property." Ibid.

In 2010, this court again reaffirmed the requirement that OPRA requestors

must identify the documents they are seeking with reasonable clarity and that this obligation cannot be circumvented by simply requesting all of an agency's records. In Spectraserv, Inc. v. Middlesex Cnty. Utils. Auth., 416 N.J. Super. 565 (App. Div. 2010), this court again reiterated Bent's holding that "OPRA does not countenance . . . open-ended demands 'for every document a public agency has on file.'" Id. at 576 (quoting Bent, 381 N.J. Super. at 37); see also ibid. ("Rather, 'OPRA requires a party requesting access to a public record to specifically describe the document sought[.]'") (quoting Gannett v. Cnty. of Middlesex, 379 N.J. Super. at 212). Relying on this by-then well-developed canon of case law, this court found that Spectraserv's request, which sought "the agency's 'entire project file'" was "overly broad and generalized and therefore improper under OPRA." Id. at 578.

In 2012, this court decided Burke. 429 N.J. Super. at 171. There, the court considered a request submitted to the Governor's Office seeking "all . . . correspondence between the Office of the Governor . . . and the Port Authority" regarding "EZ Pass benefits afforded to retirees of the Port Authority." Id. at 172. After the Governor's Office denied Burke's request as overbroad and the Law Division affirmed the denial, Burke appealed. Id. at 174. This court again recognized both that proper OPRA requests "'must identify with reasonable clarity those documents that are desired'" and, to this end, that "'OPRA does

not countenance open-ended searches of an agency's files.'" Ibid. (quoting Bent, 381 N.J. Super. at 37; MAG, 375 N.J. Super. at 549). Through this lens, and considering Burke's assertions both before the Law Division and this court that he was specifically seeking "written or electronic correspondence between the Governor's Office and the Port Authority" on specific EZ Pass benefits, this court reversed the trial court's dismissal of his complaint and found that the request was proper because it "described the records sought with the requisite specificity and narrowed the scope of the inquiry to a discrete and limited subject matter[.]" Id. at 176-78.

Burke, built on the shoulders of MAG, Bent, and Spectraserv, remains good law today. See Simmons v. Mercado, 247 N.J. 24,43 (2021) ("To avoid submitting a broad request outside the scope of OPRA, the requestor must 'describe[] the records sought with the requisite specificity and narrow[] the scope of the inquiry to a discrete and limited subject matter.'") (quoting Burke, 429 N.J. Super. at 177-78). Here, the trial court's analysis ran astray of this precedent when it characterized the "test" as solely whether Stockton needed to engage in research or subjective analysis when responding to Duff's request. (Aa52). To be sure, these cases contemplate whether an OPRA request requires a custodian "'to conduct research among its records . . . correlate data from various government records in the custodian's possession.'" Bent, 381 N.J.

Super. at 37 (quoting MAG, 375 N.J. Super. at 546-49).

But equally present in all of these holdings is the reaffirmance that a requestor is obliged to identify with "reasonable clarity" the documents sought by way of a "discrete and limited subject matter" and that he or she must avoid doing so by resorting to a request for "all of an agency's records." Burke, 429 N.J. Super. at 174, 177. Put another way, while Burke and its predecessors demonstrate that one way to establish overbreadth is to demonstrate that the request requires an agency to conduct research or subjectively analyze documents for responsiveness, they also recognize that OPRA's "cooperative balance" obligates a requestor to identify what records they are seeking on a particular topic, without doing so by requesting an agency's entire file.

On this latter point, Duff's request fails. Even the trial court recognized that a request for "all emails" sent to or from the Provost "does not contain a subject." (Da53). But its justification of this lapse by reference to the short time period in question and identification of the Provost as the sender or recipient is misplaced. Ibid. By deeming Duff's request proper, the trial court opinion upholds a request directly at odds with the circuitous approach this court struck down in MAG—and has continued to strike down since—which is to allow requestors to circumvent the identification of a record with "reasonable clarity" by requesting "all of an agency's documents" instead. Burke, 429 N.J.

Super. at 174, 177. Through this lens, a request for all emails sent or received during any time period by a particular person is no different—and is in fact worse—than a request for all records in a particular drawer in a filing cabinet or for an agency's entire project file, the latter of which this court has clearly rejected as improper. Spectraserv, 416 N.J. Super. at 578. At least in the case of a request for an "entire project file," the requestor has made some effort to identify a subject matter. Not so here.

The court's reliance on Paff v. Galloway Township to support its reasoning fares no better. (Da52; Da55-56). There, the requestor sought specific information in emails, including the "sender," "recipient," "date," and "subject" fields from the defendant. 229 N.J. at 343. The custodian denied the request, asserting that it would require the town to create a record, which is not required under OPRA. Id. at 344-45. The Court, in overturning the Appellate Division's decision to uphold the denial, issued a narrowly-confined decision on the issue of whether a request for an email log was improper because it required the custodian to "create" a record. Id. at 347–49. While it ultimately held that the request was one for information stored in a database and, as such, did not require the creation of a record, id. at 359, in no way did it find that Paff "was entitled to all emails sent by two government employees over a two week period," as the trial court here wrongly held, (Da52).

In fact, the Court in Paff v. Galloway Township made abundantly clear that its decision did "not end the inquiry." Id. at 357. Noting that OPRA "carves out thirty exceptions to the definition of government record . . . and lists multiple exemptions to the right to access[,]" Justice Albin's decision went on to note that "[t]his Court is not the proper forum to resolve whether exceptions or exemptions apply to the information requested, and we offer no opinion on the issue. If the Township wishes to contest the disclosure of the information on grounds other than those raised in this appeal, it must present evidence and arguments to the trial court, and Paff must be given the opportunity to respond." Id. at 358. In this same vein, the Court also recognized that while it might take an IT specialist "two or three minutes" to create the log, it would take the custodian "considerably longer" to determine whether release of the information in the log "may intrude on privacy rights or raise public-safety concerns." Id. at 357. In short, because the record before the Court was not sufficiently fulsome to address issues outside the question of whether the log required Galloway Township to create a record, the case was remanded for further consideration of any applicable OPRA exemptions. Id. at 358.

For these reasons, even aside from the trial court's inaccurate characterization of what the request in Paff v. Galloway Township actually requested (an email log versus two weeks of emails) and what the Court actually

ordered (a remand for consideration versus an order to produce), its reliance on the Court's decision to support its conclusion on Stockton's overbroad denial is misplaced. Duff's obligation was to identify records with reasonable clarity by way of reference to a discrete and limited subject without seeking all of Stockton's records. Simmons, 247 N.J. at 43; Bent, 381 N.J. Super. at 37; Burke, 429 N.J. Super. at 174; Spectraserv, 416 N.J. Super. at 576; MAG, 375 N.J. Super. at 547. Because his request for all emails sent to or from the Provost between September 27 and 29, 2020 indisputably does not identify any discrete or limited subject matter, and in effect seeks the Provost's entire "correspondence file" for that same time period to avoid having to do so, the trial court's decision deeming it valid under OPRA should be reversed.

POINT II

REQUIRING PUBLIC ENTITIES TO RESPOND TO BROAD REQUESTS FOR ANY AND ALL RECORDS ON FILE WOULD WREAK HAVOC ON AGENCY OPERATIONS. (Da45; Da56).

Even ignoring the plain legal error in the trial court's decision, if its expansive reading of Paff is permitted to stand, and taking this decision to its logical conclusion, the outcome would wreak havoc by resulting in impractical, illogical, and devastating consequences to government functioning.

First, the practical consequences. In reaching its decision, the trial court held that, under Paff, there is "no requirement that [] specific subject matter needs to be put in" an OPRA request. (1T17:21-25; 1T19:3-14). The court also ordered Stockton to produce a Vaughn index detailing what emails were redacted or withheld within fourteen days. (Da55). This court has recognized that a requestor's "failure . . . to clearly specify the documents sought" may necessitate the deployment of potentially limited agency resources to sift through, redact, and produce responsive records. Spectraserv, 416 N.J. Super. at 578. Likewise, in Paff v. Galloway Township, the Court recognized that while production of the email log would have taken only a few minutes, it would "take considerably longer for the Township Clerk and Chief of Police to determine whether the requested information in each email may intrude on privacy rights or raise public-safety concerns." 229 N.J. at 357. Requiring agencies to dedicate in many circumstances limited resources to siphoning wholesale requests for email correspondence, while still processing other, appropriate requests within OPRA's demanding timeframes, will place strain on already-burdened agencies across this state. It will also come at the expense of other, more appropriate OPRA requests that do focus on a discrete and limited subject matter, particularly if the overbroad requestor has the resources to litigate, resulting in courts ordering agencies to prioritize their improper requests.

Where, as here, the employee whose emails are sought is charged with making extremely sensitive, high-level decisions, the consequences are greater and the strain is higher. McDonald, who served as Stockton's Interim Provost and Vice President of Academic Affairs and was the subject of Duff's request, was responsible for collaborating with the other executive and administrative staff to "provide leadership and academic vision" to the University; "overseeing all aspects of faculty recruitment, professional development, and promotion and tenure processes;" overseeing all "undergraduate and graduate academic programs;" participating in collective negotiations with professional and academic bargaining units; and "serving as the University's Accreditation Liaison Officer to Middle States Commission on Higher Education." (Da43). She also had oversight over all academic programs, administrative units, and centers and institutes within the Division of Academic Affairs and "assisted in ensuring the University's compliance with state and federal regulations and university policies on academic matters." (Da43-44).

Given these responsibilities, there can be no legitimate dispute that a wholesale request for her emails would implicate emails subject to any number of OPRA exemptions, including but not limited to "information concerning student records or grievance or disciplinary proceedings against a student," records containing "advisory, consultative, or deliberative" material, or even

attorney-client privileged communications. N.J.S.A. 47:1A-1.1. Likewise, it is difficult to conceive of how Stockton's custodian, who is expected to discharge a "ministerial" duty, would be in a position to know which of these emails are privileged and which are not. Mason, 196 N.J. at 61; see also Lagerkvist v. Office of the Gov'r, 443 N.J. Super. 230, 234 (App. Div. 2015) (recognizing the scope of a custodian's "'routine ministerial'" function).

This court has already recognized that there are circumstances where this decision-making necessarily requires a higher level of understanding, familiarity, or skill than a custodian can reasonably be expected to exercise. Fisher v. Div. of Law, 400 N.J. Super. 61, 65 (App. Div. 2008). In many circumstances, like the one here, this will require high-ranking officials to divert their time from discharging important agency business to review and redact hundreds or even thousands of pages of records, an outcome that runs counter to important public policy considerations. See, e.g., Buono v. City of Newark, 249 F.R.D. 469, 470 n.2 (D.N.J. 2008) (recognizing the "public policy interest in ensuring that high level government officials are permitted to perform their official tasks without disruption or diversion"); accord Hyland v. Smollok, 137 N.J. Super. 456, 460 (App. Div. 1975) ("[H]igh-level government officials, should not be deposed, absent a showing of first-hand knowledge or direct involvement in the events giving rise to an action, or absent a showing that such

deposition is essential to prevent injustice.").[4] And, in some circumstances, the records at issue may contain discussions of matters so sensitive—like internal affairs issues—that release even to the custodian for purposes of review intrudes on their confidentiality. See New Jersey Internal Affairs Policy and Procedures ("IAPP") Manual § 9.5.1 and .2 (requiring "[t]he list of those authorized to access these files must be kept to a minimum").

These concerns are only exacerbated by the trial court's order requiring Stockton to produce a Vaughn index detailing all emails redacted or withheld. Our Supreme Court has readily recognized that there are circumstances where even the production of a Vaughn index would be problematic and reveal privileged information. See N. Jersey Media Group v. Bergen Cnty. Pros. Office, 447 N.J. Super. 182, 192 n.2 (App. Div. 2016) (citing Loigman v. Kimmelman, 102 N.J. 98, 111 (1986)). Providing a log with the subject or a description of all of the Provost's emails, particularly those that are deemed privileged, would by definition risk revealing the existence of sensitive matters that would not otherwise be subject to disclosure. Take, for example, the Provost's responsibility to address student discipline, where the identities of students would not even be subject to acknowledgement under OPRA or federal

[4] There is also nothing to stop a requestor with an animus toward a particular public official from exploiting this to satisfy a personal agenda.

law. (Da43-44). This is to say nothing of requests implicating emails sent or received by heads of law enforcement agencies across this State, responsible for the oversight of (sometimes highly confidential or sensitive) criminal investigations involving inflammatory allegations; confidential informants; grand jury secrecy; internal affairs matters; and more.

A log would also readily permit an OPRA requestor to circumvent this court's recognition that there exists an expectation of privacy in individuals "who call or are called by public officials." Gannett v. Cnty. of Middlesex, 379 N.J. Super. at 217-18; accord N. Jersey Newspapers Co. v. Passaic Cnty. Bd. of Chosen Freeholders, 127 N.J. 9, 16-18 (1992). Requiring an agency to create a Vaughn index that effectively monitors each and every keystroke taken by a public official throughout the day threatens not only the privacy of these third-party individuals by exposing their identities or interests to public scrutiny, it also interferes with the ability of the official to deal fairly and effectively with the public at large. Indeed, allowing even the best-intentioned requestor insight into what type of business an employee is handling at every moment of the day—whether that includes confidential student discussions, highly-sensitized law enforcement business, delicate discussions surrounding policy-making, or even attorney-client privileged interactions—invites a level of intrusion into the public sphere that our courts have never before countenanced.

The ability to redact or withhold emails or even to assert substantial disruption is not enough to tip the scales. As to the former, as the Court recognized in Paff v. Galloway Township, redacting emails requires not only considerable time, energy, and care, but also raises important issues of privacy and other privileges that "must be addressed." 229 N.J. at 357. As to the latter, while an agency may assert that a request would substantially disrupt agency operations under N.J.S.A. 47:1A-5, there is nothing to prevent a requestor from narrowing their request to a single day of emails, or a few days, as Duff did here, but then resubmitting that request daily or weekly. Multiplied by requests for all employees for days, weeks, or even months, it is not difficult to conceive of how an agency could soon become overwhelmed by responding to a single newly-minted category of appropriate requests, while still attempting to balance other responsibilities. In short, OPRA's existing "outs" do not compensate for the trial court's relaxation of one of its most seminal requirements.

Second, the illogical consequences. By characterizing Duff's OPRA request as proper because it identified a sender or recipient and was limited in time period, the trial court's decision stripped requestors of their obligation to identify records with reasonable clarity without resorting to a request for all of an agency's records. While the trial court's decision is ostensibly limited to email inbox or outbox requests, there is no principled way of reconciling its

holding with this court's precedent expressly finding that requests for an agency's "entire file" are improper under OPRA. Spectraserv, 416 N.J. Super. at 578 (rejecting a request that sought the agency's "entire project file" as "overly broad and generalized and therefore improper under OPRA"); Bent, 381 N.J. Super. at 33-34 (affirming the denial of a request seeking the requestor's "entire [criminal] file," including the factual basis for his charges). After all, there is little difference between "every email sent or received" during a certain time period and requests for entire litigation files, project files, correspondence files, or even drawers of filing cabinets. Allowing the trial court's decision to stand will necessarily call into question the through-line of cases beginning with MAG and continuing through Simmons.

Finally, the disastrous consequences. It is undisputed that OPRA was designed to maximize transparency in an effort to promote the public good. See Mason, 196 N.J. at 64. But, by the same token, our courts have also recognized the importance of promoting the free flow of communications within an agency. Educ. Law Ctr., 198 N.J. at 300-01 ("If communication that formed part of an agency's pre-decisional process could be disclosed after the decision has been released, one of the major justifications for the [deliberative process] privilege in the first place—maintaining the free flow of communication within an agency—would be rendered meaningless."); id. at 304 (explaining that "the

detrimental impact that disclosure" of privileged information "would impede agency functions by discouraging open and frank discussion and recommendations from agency employees to those higher up in [the agency's] hierarchy now and in the future."). Likewise, while framed within the common law right of access and not OPRA, factor three in the Loigman v. Kimmelman balancing test contemplates "the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure." 102 N.J. 98, 113 (1986).

Here, the degree of decision-making and communication chilled by the trial court's decision is too high to quantify. If a requestor is permitted to simply ask for each and every document an agency has on file—whether email, fax, letter, or an "entire file"—inter-and-intra-agency discussions would effectively be chilled, with employees either too afraid to put their thoughts or recommendations into writing for fear of reprisal. Alternatively, these very same employees would be burdened with reviewing each document for privilege and unable to resume their normal responsibilities.

Government agencies need to be able to function. The trial court's decision sets a dangerous precedent that departs from well-settled law by permitting and even encouraging unbridled requests for each and every document in an agency's possession. These requests can hardly avoid

substantially disrupting agency operations; would require the undoing of two decades of precedent to sustain; and would risk chilling or grinding to a halt government operations. For all of these reasons, this court should reject the trial court's attempt to forge new ground and instead reaffirm that a requestor must identify the documents they are seeking with "reasonable clarity" by way of reference to a "discrete and limited subject matter," and that they cannot resort to a request for all of an agency's documents to avoid doing so.

CONCLUSION

For these reasons, this court should reverse the trial court's decision.

Respectfully submitted,

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PATRICK DUFF, Plaintiff/Respondent, v. STOCKTON UNIVERSITY, AND BRIAN KOWALSKI, IN HIS OFFICIAL CAPACITY AS RECORDS CUSTODIAN FOR STOCKTON UNIVERSITY, Defendant/ Appellants,	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, Docket No. A- 000087-23T4 A Civil Action On Appeal from Docket No. ATL-L-385-23 Sat Below: Hon. Danielle Walcoff, J.S.C.

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PRELIMINARY STATEMENT

Under the Open Public Records Act (OPRA), a requestor is obligated to identify the records he seeks with reasonable clarity. A high degree of specificity is not needed because requestors are at an informational disadvantage—they have not seen the records that the government possesses and often know little about their contents. Although Stockton's brief airs many grievances about being tasked with complying with OPRA, it fails to establish that Plaintiff's request for a mere three days' worth of emails from a single government employee's account insufficiently identifies the records sought. Stockton cannot make that argument because the custodian certified that they located the responsive emails. There is no ambiguity about precisely which records Plaintiff seeks—Stockton simply needs to comply with the trial court's order to review the emails, redact them, and produce those records that are not exempt.

Despite having located the records, Stockton perplexingly continues to insist that Plaintiff was not specific enough in his request and that his request should be denied for not meeting the hurdles to access it has created. It cites case law involving drastically different types of requests to justify its position. For example, it cites decisions which have held that a requestor cannot request "all of an agency's documents" or the agency's "entire project file," especially

when no date range was provided. Plaintiff did not, as Stockton claims, request "any and all records on file." Rather, he sought a single type of record (emails) for a discrete date range (three days). This court and the Supreme Court have found requests for "all" records of a single type—i.e., all settlement agreements, all complaint-summonses, all OPRA requests—to be valid. No further narrowing is required.

As Stockton concedes, New Jersey's case law on specificity requirements borrows from case law interpreting the federal Freedom of Information Act (FOIA). Federal courts have held that a valid FOIA request for emails does not require a subject or keyword, and courts have found violations of FOIA when agencies require that level of specificity beyond what the statute demands. Federal courts have also cautioned that although requestors must reasonably describe the records they seek, specificity requirements are not to be a used as a "loophole through which federal agencies can deny the public access to legitimate information." That is exactly what Stockton is doing in this case.

Stockton's brief makes clear its disdain for the fact that email communications are subject to OPRA and thus Stockton wants to make it as difficult as possible for a requestor to obtain emails. It asserts that "government needs to operate with some degree of privacy" and labels Plaintiff's request an

"intrusion." It not only demands far more specificity than is required by OPRA, but it also seeks to re-litigate issues that the New Jersey Supreme Court has already decided—i.e., whether email logs are subject to OPRA. Stockton's goal seems clear: to do everything possible to make it harder to obtain a public official's communications.

Public access to email communications has made many important news stories possible. Emails have revealed that government officials warned nursing home staff not to wear masks in the early days of the COVID-19 virus or that government officials have sent homophobic or racist emails. And there is, of course, the most notorious email sent by government officials in New Jersey—"time for some traffic problems in Fort Lee"—which sparked the Bridgegate investigation Reporters and the public must be able to easily access emails to hold the government accountable. The standard Stockton advocates is not supported by case law and should be rejected.

The trial court correctly concluded that Plaintiff's request sufficiently identified the records he seeks and rightly compelled Stockton to comply with the request by producing those emails it has already located, subject to any redaction or claimed exemption. This Court should affirm the trial court's ruling.

STATEMENT OF FACTS & PROCEDURAL HISTORY[1]

A. Plaintiff's OPRA Requests[2]

Plaintiff Duff is a journalist, community organizer, and activist. Plaintiff publishes Rabblerouser Blog, www.rabblerouser.blog, an online publication devoted to exposing government corruption and wrongdoing. (Da2).

On January 11, 2023, Plaintiff filed an OPRA request with Stockton, seeking "[a]ll emails sent and received by interim Provost Michelle McDonald from September 24th, 2020 through October 3rd, 2020." Ibid.

Despite having evidently already searched and located the responsive emails, Stockton nonetheless denied Plaintiff's request by asserting that it was "invalid" because it "fails to specify the content and/or subject matter of the emails." (Da3). Stockton did not indicate how many responsive emails there were or otherwise try to accommodate Plaintiff's request—it simply denied access and demanded more specificity.

Although Plaintiff disagreed with Stockton's position, he narrowed his request by narrowing the timeframe. He stated he wanted all emails within just a three-day time period: September 27, 2020, to September 29, 2020. (Da4).

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[1] The Statement of Facts and Procedural History are intricately related and thus combined in this brief.
[2] Da = Stockton's Appendix; 1T = June 15, 2023 hearing transcript.

A certification filed in this case by Deputy Attorney General Ellen Bailey later confirmed that Stockton's Information Technology (IT) Department had in fact again searched McDonald's emails and located the responsive emails, but Stockton nonetheless denied the amended request on January 24, 2023, and insisted that Plaintiff provide the "content and/or subject matter" of the emails. (Da33). The response letter again failed to inform Plaintiff how many responsive records there were, nor did it seek to accommodate his request in any way.

B. Plaintiff's Lawsuit

On February 16, 2023, Plaintiff filed a verified complaint. Stockton responded by filing a motion to dismiss; Bailey's certification explaining that it had twice searched and located the responsive records (Da39-Da40); and McDonald's certification describing her duties at Stockton. (Da42-Da44).

The trial court heard argument and rejected Stockton's claims that Plaintiff's OPRA request did not sufficiently identify the records he seeks. (1T; Da45). It applied published precedent and noted that IT had said there were 1,004 responsive records, and, as such, Stockton "does know how to locate them and it did locate them." (Da52).

To date, Stockton has not produced the emails that it has already located. Instead, it filed this appeal.

LEGAL ARGUMENT

I. STOCKTON VIOLATED OPRA BY DENYING PLAINTIFF'S OPRA REQUEST AND DEMANDING THAT HE PROVIDE A SUBJECT MATTER OR KEYWORD

"An informed citizenry is essential to a well-functioning democracy." Paff v. Twp. of Galloway, 229 N.J. 340, 357 (2017). This State has a long "history of commitment to public participation in government" and a "tradition favoring the public's right to be informed about governmental actions." South Jersey Pub. Co. Inc. v. N.J. Expressway Auth., 124 N.J. 478, 487 (1991). OPRA's promise of accessible records enables "citizens and the media [to] play a watchful role in curbing wasteful government spending and guarding against corruption and misconduct." Sussex Commons Assoc., LLC v. Rutgers, 210 N.J. 531, 541 (2012) (quoting Burnett v. Cnty. of Bergen, 198 N.J. 408, 414 (2009). In fact, OPRA's "bedrock principle" is that "our government works best when its activities are well-known to the public it serves." Burnett, 198 N.J. at 414.

OPRA provides that "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 (emphasis added). At all times, the public agency bears the burden of proving that its response to an OPRA request is lawful. N.J.S.A. 47:1A-6. As argued further below, Stockton cannot meet its heavy burden of proof in this case.

A. Plaintiff's Request is Valid Pursuant to Published Case Law

A proper OPRA request "must identify with reasonable clarity those documents that are desired." Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005). An OPRA request "should not require the records custodian to undertake a subjective analysis to understand the nature of the request" or what is being sought. Paff v. Galloway Twp., 229 N.J. at 355. Put another way, "[s]eeking particular information from the custodian is permissible; expecting the custodian to do research is not." Ibid. Thus, the measuring stick of determining whether a records request is overbroad depends on whether it "require[s] the record custodian to exercise subjective judgment in determining which records must be produced." Simmons v. Mercado, 247 N.J. 24, 43 (2021).

Stockton is correct that a requestor may not request "any and all records on file," but Plaintiff's OPRA request does no such thing—it seeks a specific type of record (emails) during a very narrow time frame (three days). The requests at issue in the Appellate Division cases to which Stockton cites in support of its argument are a far cry from the request at issue in this case.[3] For

[3] Similarly, the requests at issue in the out-of-state cases that Stockton alludes to are equally factually distinct. See Hangartner v. City of Seattle, 151 Wash. 2d 439 (2004) ("all books, records, [and] documents of every kind" related to a

example, in MAG Entm't, LLC v. Div. of Alcoholic Bev. Control, 375 N.J. Super. 534 (App. Div. 2005), the request was made by a company who was facing administrative charges by the Division on Alcoholic Beverage Control (ABC) and sought "all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident." Id. at 539. The request did not contain a date range. The Appellate Division found the request was invalid because:

> MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. . . . Simply put, the Division was asked to do the very research and investigation MAG needed to do in the administrative proceeding in order to establish a "colorable claim" of selective enforcement before being

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transportation project); Bader v. Bove, 273 A.D.2d 466 (2000) (the request "would require the village clerk to manually search through every document filed with the village for the past 45 years"); Capitol Info Ass'n v. Ann Arbor Police, 138 Mich App 655, 658 (1984) (the request did not name any email account to be searched and required the agency to "search their files for correspondence with a wide spectrum of federal agencies dealing with any of more than 100,000 persons during an extensive period of time").

> entitled to pre-trial discovery as to its defense in that forum.
>
> [Id. at 549-50.]

In Bent, 381 N.J. Super. 30, the requestor sought the "entire file" of a criminal investigation into him by the Stafford Township Police Department (STPD), the U.S. Attorney, and the Internal Revenue Service, as well as "the factual basis underlying documented action and advice to third parties to act against my interest [having] been credited to SPD under a Federal Grand Jury credit card investigation." Id. at 33-34. Contrary to Stockton's assertion, the Appellate Division suggested that the request for the "entire file" was valid, but it noted those records had already been produced by the agency to him and thus there was no OPRA violation. Id. at 38 ("[T]o the extent Bent's request was for discrete records of the 1992 criminal investigation conducted by the STPD, the undisputed evidence is that there was full disclosure of all such documents in the custodian's possession."). The "balance of [his] request" was found to be invalid because it amounted to a request for "the custodian's response to his allegation of police misconduct, borne of his belief that certain unidentified and unnamed documents on file with the township were wrongfully concealed or withheld from him." Id. at 39.

In Spectraserv, Inc. v. Middlesex Cnty. Utils. Auth., 416 N.J. Super. 565

(App. Div. 2010), another case where OPRA was being used as a discovery tool by a plaintiff who was adverse to the agency in litigation, the Appellate Division found the request was invalid because

> Thirteen of Spectraserv's sixteen requests with multiple subparts sought "any and all" documents from the MCUA. Of those, several requests failed to specify a specific document by date, title, and author and instead sought records that "reflect," "explain," "detail," or "demonstrate" the "rationale," "decision," or "purpose" of, among other things, various chemical processes of a highly technical and complex nature. As if this were not sufficiently inclusive, Spectraserv's last request sought the agency's "entire project file."
>
> [Id. at 578.]

Stockton cites Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), but that case is both factually distinguishable and favorable to Plaintiff. The requestor in that case sought "correspondence," which included "written or electronic correspondence" between unnamed employees of two very large government agencies—the Governor's Office and the Port Authority of New York and New Jersey. Id. at 176-77. Thus, the requestor did not limit his request to only emails, nor did he identify an employee whose email account should be searched or provide any date range. But the request was limited to correspondence relating to the subject matter of "EZ Pass benefits provided to Port Authority retirees," narrowing the universe of responsive documents substantially from

every written communication ever sent by thousands of employees to a discrete subset of communications sent by particular employees during the specified time frame. Consequently, the request was neither vague nor overbroad. Had there been no subject matter provided, every communication between any employee of one agency to any employee of the other agency since the beginning of time would have been responsive. That would have clearly been impermissible per MAG, and it could have resulted in tens of thousands of responsive documents or more.

Importantly, the Appellate Division found that "the fact that the custodian of records in this case actually performed a search and was able to locate and identify records responsive to plaintiff's request belies any assertion that the request was lacking in specificity or was overbroad." Id. at 177 (emphasis added). The same is true here—the custodian certified that she twice "determine[d] precisely what records were being requested and . . . locate[d] them successfully." Ibid. That belies any assertion that his request was "lacking in specificity or was overbroad." Ibid. Stockton has located the responsive records, it simply needs to review them, make any necessary redactions, and produce those that are not exempt. That is what OPRA obligates it to do.

Plaintiff's OPRA request instead closely mirrors the request in Paff v. Galloway, 229 N.J. 340. There, the requestor sought a log (with the sender,

recipient, date, and subject fields) of all emails sent by the Township Clerk and the Township Police Chief between June 3 and June 17, 2013. Id. at 344. The agency denied the request, arguing it was invalid pursuant to MAG and required the custodian to perform research. The Supreme Court disagreed, noting that the requestor:

> Circumscribed his request to a two-week period and identified the discrete information he sought. The records custodian did not have to make a subjective judgment to determine the nature of the information covered by the request. The custodian simply had to search for—not research the identity of—the records requested. Therefore, the Township's, as well as the Appellate Division's, reliance on MAG is misplaced here.
>
> [Paff, 229 N.J. at 356-57.]

Stockton tries to distinguish Paff, arguing that it is limited to a log of emails only.[4] But the analysis regarding the level of specificity required is the same for the email themselves—Plaintiff's request was discrete and Stockton's custodian "did not have to make a subjective judgment to determine the nature of the information covered by his request." Id. at 356. She instead "simply had to search for" his records, ibid., and she did—they were located, but Stockton refuses to

[4] Stockton also argues the Court's decision was limited to whether the request was improper because it required the custodian to create a record, but the Court's decision clearly applied MAG and addressed the agency's specificity argument.

produce them. Moreover, Stockton's position is nonsensical. Per Paff, Plaintiff could request a log of the three days' worth of McDonald's emails, then turn around and file an OPRA request for every email in the log.[5] Such a process would simply create more work for the custodian, who has already identified the responsive records and just needs to review them for exemptions.

The Paff decision comports with other published decisions, which have held that requests for "all" of a certain type of document during a specified time frame. See, e.g., Simmons, 247 N.J. 24, 43 (2021) (finding a request for all DWI, drug possession, and drug paraphernalia complaints summons for a 20-month period to be valid); Scheeler v. Office of the Gov., 448 N.J. Super. 333, 344 (App. Div. 2017) (rejecting State's argument that plaintiff's request was not specific enough where he requested all OPRA requests filed with the State during specific time frames); Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) (distinguishing MAG and finding request for all settlement agreements during a specific timeframe to be valid, even if requestor did not identify the specific legal matter to which the agreement related).

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[5] Point II of Stockton's brief complains about Paff's holding, which is not the first time the Attorney General's office has attempted to re-litigate Paff. If Stockton or the Attorney General wanted to weigh in, it could have filed amicus briefs at the Supreme Court. They did not do so, and the Supreme Court's decision is binding on this court.

There is no dispute that Stockton knows precisely which records Plaintiff seeks because it located the responsive records. In Paff, the Supreme Court found the request to be valid, but acknowledged that exemptions may apply to the responsive records. The trial court in this case also acknowledged that exemptions may apply. It ordered Stockton to produce the responsive records, along with a Vaughn Index[6] that explained any emails that are redacted or withheld. (Pa45). And it retained jurisdiction should Plaintiff challenge any of those redactions or denials. This Court should affirm that order.

B. Plaintiff's Request is Valid Under the FOIA Standards Upon Which New Jersey Courts Rely

Stockton acknowledges that our state's case law on specificity requirements is largely borrowed from federal FOIA. See, e.g., MAG, 375 N.J. Super. at 548. Federal courts interpreting FOIA have found that a request for emails is valid even where a subject matter or keyword is not provided. In Muckrock, LLC v. Cent. Intelligence Agency, 300 F. Supp. 3d 108, 114 (D.D.C. 2018), a FOIA requestor filed a request with the Central Intelligence Agency (CIA) seeking "'[a]ll email messages (and attachments) sent to the CIO–IMS–

[6] Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) (requiring an index to determine the validity of the agency's withholdings in the case).

STAFF or CIO–IMS–ALL mailing lists by the Director or Deputy Director of IMS' during four different time periods that correspond with the quarters of the 2013 fiscal year." Id. at 114. The CIA denied the request, stating "[w]e require requesters seeking any form of 'electronic communications' such as emails, to provide the specific 'to' and 'from' recipients, time frame and subject." Ibid. The requestor filed a lawsuit, arguing that the "CIA's purported 'per se' policy of refusing to process any FOIA request for email records that does not contain four specific pieces of information" violates FOIA. Id. at 112.

Then U.S. District Judge Ketanji Brown Jackson ruled in favor of the requestor, "easily" finding that the CIA's policy of requiring requests for emails to contain the to, from, time frame, and subject "per se . . . violates the FOIA." Id. at 136. The court held that a request is valid and sufficiently identifies the records sought where "a professional employee of the agency who was familiar with the subject area of the request [could] locate the record with a reasonable amount of effort." Ibid. (citing Kenney v. U.S. Dep't of Justice, 603 F.Supp.2d 184, 188 (D.D.C. 2009)). "And in the context of the instant dispute, the CIA has done nothing to demonstrate that the agency's employees need all four pieces of information—the sender, recipient, subject, and time frame—in order to locate email records in the agency's information systems." Ibid. Judge Jackson noted

that the CIA acknowledged that it "can often determine what email records are being sought, and can conduct a search for those records, without having all four pieces of information[.]" Ibid.

In Am. Oversight v. United States Env't. Prot. Agency, 386 F. Supp. 3d 1, 9–12 (D.D.C. 2019), requestor similarly alleged that the Environmental Protection Agency (EPA) maintained a per se policy of "refusing to process any request for communications records unless it provides a subject matter or keyword for the search." Id. at 3. The court agreed that there is "no doubt" that "categorically refusing to process any request for communications records unless that request provided a keyword or search term would violate FOIA." Id. at 9 ("The Court sees no reason, and the EPA provides none, why a request for emails or other communications records necessarily must include a key word or subject matter for an agency to determine 'precisely what records are being requested.'"). The court found the record did not establish that the EPA had any such per se policy because there was proof it had fulfilled some requests without requiring a keyword. Id. at 14. Nonetheless, the court found that the request for "[a]ll emails between Scott Pruitt and Ryan Jackson (Chief of Staff), John Reeder (Deputy Chief of Staff), or Mike Flynn (Acting Deputy Administrator) from June 1, 2017, to June 15, 2017" sufficiently identified the records sought

with reasonable clarity. Id. at 4, 10 ("[T]he EPA has not explained why it could not reasonably discern the records sought and process the request when [plaintiff] sought all email records for a particular account across a two-week span. And the Court fails to see why, as the EPA insists, a subject matter or keyword was necessary.").

Like under OPRA, a requestor under FOIA need only "reasonably describe" the records he seeks to have his request found valid. Pub. Employees for Env't. Responsibility v. U.S. Env't. Prot. Agency, 314 F. Supp. 3d 68, 74 (D.D.C. 2018). Because FOIA is to be construed "liberally," ibid., federal courts have cautioned that this requirement should not become "a loophole through which federal agencies can deny the public access to legitimate information." Ibid. (citing Yagman v. Pompeo, 868 F.3d 1075, 1081 (9th Cir. 1978). OPRA is also to be construed liberally, N.J.S.A. 47:1A-6, and New Jersey courts have frequently held that agencies may not impose unreasonable obstacles to access. See, e.g., Am. Civil Liberties Union of New Jersey v. New Jersey Div. of Criminal Justice, 435 N.J. Super. 533, 536 (App. Div. 2014) (holding agency could not impose an "extra hurdle" to gain access to records by requiring requestor to object to redactions before suing); Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006) (holding a policy

simply is not "legally sustainable" under OPRA where the "only discernable rationale . . . is to discourage the public from requesting the information[.]"); Livecchia v. Borough of Mount Arlington, 421 N.J. Super. 24, 40 (App. Div. 2011) (holding agency cannot impose a service fee to discourage access); Smith v. Hudson Cnty. Register, 411 N.J. Super. 538, 570 (App. Div. 2010) (holding photocopying fees "must be reasonable, and cannot be used as a tool to discourage access.").

There is no reason to depart from FOIA case law regarding what level of specificity is required to request emails, which comports with case law interpreting OPRA. See Point I(A).

C. Easy Access to Emails Helps Reporters and the Public Guard Against Corruption and Waste

Access to email communications is key to combatting corruption and waste and apprising the public about government officials' actions. OPRA requests for emails exposed that supervisors prohibited staff from wearing masks in the veteran's nursing homes during the COVID-19 pandemic;[7] that the ELEC executive director sent problematic emails about LGBTQ people;[8] that a Palisades Park councilman

[7] After NorthJersey.com Request Over Veterans Homes Mask Issue, NJ Sends Redacted Emails, The Record, Jan. 25, 2021.
[8] Emails From Election Watchdog Reveal Fixation on LGBTQ Community, N.J. Monitor, Mar. 24, 2023.

sent racist emails;[9] that a political boss leveraged "extraordinary influence over the state's tax break program" by crafting rules and regulations that advanced the interests of clients and friends,[10] and so many other important stories.

Today, where so much local government work is done via email, easy access to emails is more important than ever. Agencies sadly put up a fight over emails—they do not want the public to see them. They deny requests they claim are not "specific" enough, even when they know exactly how to locate the responsive records. That is precisely what happened in this case, and it is harmful to the public's interest.

Moreover, a reporter shouldn't be required to provide a keyword where the records custodian can readily identify and locate the records. Reporters need to be able to investigate issues by seeking email communications, without giving a keyword that might tip the agency off as to what they are looking for. Too often agencies will over-redact information that should be public.

Point II of Stockton's brief makes it clear that it is disgruntled that email communications are public records. It goes so far as arguing that access to an email

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[9] Palisades Park Councilman Sent Racist, Sexist Chain Letters to Friends, Bergen Record, Nov. 30, 2018.
[10] Emails Show How Much Pull Political Bosses Had Over State Tax Breaks, ProPublica, Mar. 11, 2024.

log—something the Supreme Court has unequivocally made public—should be denied because disclosure of an agency's communications "invites a level of intrusion into the public sphere" and agencies need to be able to discuss things in private. OPRA, though, makes those communications public unless an exemption applies. To the extent that Stockton believes any of the exemptions it mentions in its brief are confidential, the trial court gave it authority to redact or withhold them so long as the lawful basis for each redaction is provided. But Stockton cannot avoid that disclosure requirement by making it impossible to request its emails in the first place.

CONCLUSION

For all the reasons argued above, this Court should affirm. The Court should also award Plaintiff reasonable attorneys' fees pursuant to N.J.S.A. 47:1A-6 for prevailing in this appeal.

Respectfully Submitted,

Pashman Stein Walder Hayden,

/s/ CJ Griffin

FILED, Clerk of the Appellate Division, April 08, 2024, **A-000087-23**

PATRICK DUFF,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Respondent,	:	DOCKET NUMBER: A-0087-23
v.	:	CIVIL ACTION
STOCKTON UNIVERSITY, AND BRIAN KOWALSKI, IN HIS OFFICIAL CAPACITY AS RECORDS CUSTODIAN FOR STOCKTON UNIVERSITY,	:	ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, CIVIL DIVISION
	:	Trial Docket No. ATL-L-385-23
Appellants.	:	Sat Below: Hon. Danielle Walcoff, JSC

REPLY BRIEF ON BEHALF OF APPELLANTS STOCKTON UNIVERSITY AND BRIAN KOWALSKI, IN HIS OFFICIAL CAPACITY AS RECORDS CUSTODIAN FOR STOCKTON UNIVERSITY

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PRELIMINARY STATEMENT

The issue before this court is simple and straightforward: whether a discrete and limited subject matter is required for a valid request under New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1.1 to -13 ("OPRA"). Stockton simply asks this court to apply the law consistent with longstanding New Jersey precedent holding that under OPRA, a requestor is entitled to access government records, but only to the extent they submit a proper request. For a request to be valid, the requestor is obligated to identify records with reasonable clarity and identify a discrete and limited subject matter. A requestor cannot circumvent this requirement by seeking all of an agency's records.

Duff, by contrast, seeks to throw out nearly two decades of precedent. He asks the court to adopt a new test that does not exist in our jurisprudence and would not require a requestor identify the records he or she seeks with any level of clarity so long as the records custodian is able to ascertain where the records are located. In so doing, Duff parrots the trial court's reliance on a through-line of cases beginning in 2012 with Burke v. Brandes, 429 N.J. Super. 167 (App. Div. 2012), and ending with the Supreme Court's decision in Paff v. Galloway Township, 229 N.J. 340 (2017). But the Court in Paff v. Galloway Township did not address the question of whether a subject matter is necessary in a request for records. In fact, it did not address a request for emails at all. Nor did the

Court alter Burke's requirement that requests for records articulate a discrete and limited subject matter. In short, by drawing a line where none exists, the trial court and Duff seek to expand OPRA well beyond the bounds set by the Legislature and confirmed by the courts.

Stockton does not seek to shield all forms of government records, keeping them hidden from the public's view. But the public's right to view is not absolute. For good reason, the plain text of OPRA and this court's well-developed case law strike a careful balance between access to public records and ensuring a custodian's ability to identify and respond to specific requests. Allowing a requestor to ask for all of an agency's files, or all of an employee's emails, without identifying any subject matter, will chill communications and grind agency operations to a halt. In the first instance, agencies will be forced to divert limited resources and manpower to review and redact thousands of pages of documents. More chillingly, if government employees or agencies are aware that every keystroke they make is in a fishbowl, they will undoubtedly hesitate to engage in precisely the type of communication and free-flow of ideas that this court has always reaffirmed is necessary for agencies to reach decisions that are in the public's interest.

This is not what the Legislature intended when it enacted OPRA, nor what this court has ever condoned. For all of these reasons, and because the trial court

and Duff seek to bend OPRA well past the point of breaking by advancing a test that has no basis in law or precedent, this court should reverse the trial court's decision and uphold Stockton's denial of Duff's request.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Stockton relies on the procedural history and statement of facts set forth in its merits brief filed on December 27, 2023. (Db4-10).[2]

ARGUMENT

POINT I

THE TRIAL COURT'S DECISION FAILED TO CONSIDER WELL-SETTLED LAW REQUIRING OPRA REQUESTORS TO IDENTIFY A DISCRETE AND LIMITED SUBJECT MATTER AND PROHIBITING REQUESTS FOR ALL OF AN AGENCY'S RECORDS. (Da45; Da56).

The trial court's decision finding Duff's request valid under OPRA was based on a clear misunderstanding and misapplication of the law. Duff doubles down on the trial court's errors and asks this court to relieve requestors of their obligations to identify records using a discrete and limited subject matter, and

[1] The procedural history and statement of facts are closely related in this matter and have been combined to avoid repetition and for the court's convenience.

[2] "Db" refers to Stockton's merits brief; "Pb" refers to Duff's brief; "Da" refers to Stockton's Appendix; and "1T" refers to the transcript of the June 15, 2023 Order to Show Cause hearing.

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to instead establish a new test that would compel production so long as custodians can ascertain the location of even broad classes of documents. Essentially, Duff asks this court to ratify wholesale requests for all records of an agency. Because longstanding precedent requires OPRA requestors to describe the documents they are seeking with reasonable clarity, using a discrete and limited subject matter, this court should reject Duff's radical approach and reverse the trial court's decision.

OPRA was enacted to "maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (citation omitted). But while OPRA makes government records readily accessible, the right to access is "not absolute[.]" Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 284 (2009). Designed "both to promote prompt access to government records and to encourage requestors and agencies to work together toward that end by accommodating one another[,]" OPRA strives to create a "cooperative balance" that weighs the public's right to access on one hand with agencies' obligations and abilities to identify and provide responsive records on the other. Mason, 196 N.J. at 78.

In striking this important balance, our courts have repeatedly reaffirmed OPRA's parameters and defined its outer bounds. As Stockton's opening brief

in this case detailed, and Duff's brief hardly refutes, this jurisprudence traces back nineteen years to when OPRA was in its early stages of infancy. As this court found in MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), "[u]nder OPRA, agencies are required to disclose only 'identifiable' governmental records not otherwise exempt," and that "OPRA does not countenance open-ended searches of an agency's files." Id. at 547-49. In so holding, this court rejected the notion that a requestor can satisfy its obligation by requesting "a broad generic description of a brand or type" of record. Id. at 549.

From 2005 through 2012, this line of reasoning continued uninterrupted. From Bent v. Twp. of Stafford Police Dep't, where this court reaffirmed its earlier holding and held that a requestor "must reasonably identify a record" and cannot "make a blanket request for every document a public agency has on file," 381 N.J. Super. 30, 37 (App. Div. 2005) (quoting Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005)), to Spectraserv, Inc. v. Middlesex Cnty. Utils. Auth., where this court again reiterated that a requestor must "specifically describe the document sought" and cannot rely on "open-ended demands" for all of an agency's files, 416 N.J. Super. 565, 576 (App. Div. 2010), to Burke v. Brandes, which emphasized not only the importance of a requestor's obligation to "identify with reasonable clarity those

documents that are desired," but also that "OPRA does not countenance open-ended searches of an agency's files," 429 N.J. Super. 169, 174 (App. Div. 2012), this court's repeated through-line required requestors to identify with specificity, and through reference to a "discrete and limited subject matter," the records they desired.

Taken together, MAG, Bent, Spectraserv, and Burke illustrate OPRA's "cooperative balance" and establish that a requestor is entitled to government records only after they have identified the documents sought with "reasonable clarity" by way of a "discrete and limited subject matter," and that a requestor must avoid requesting "all of an agency's records." Id. at 174, 177. Duff initially appears to recognize this obligation, accepting that absent the specific subject matter provided in Burke, the request "would have clearly been impermissible[.]" (Pb11). But he quickly shifts position and paints Burke as establishing a different, new standard—that so long as a custodian can locate records the request is valid. Ibid. On this point, Duff's argument fails.

To be sure, the custodian's ability to locate the requested records is an important and necessary step in determining whether an OPRA request is overbroad. Burke, 429 N.J. Super. at 177. But, in attempting to eliminate the remainder of Burke's reasoning, Duff also ignores the clear restriction first set by this court in MAG and built upon through Burke prohibiting a requestor from

simply seeking all of an agency's records. Said another way, just because a custodian may be able to locate records does not mean the request is not overbroad at the same time.

For example, a requestor could request every document contained in a public employee's filing cabinet. While the custodian could easily locate the filing cabinet, the request would still be an impermissible open-ended request for all records on file—which themselves may contain any number of different types of records, including copies of correspondence, contracts, personnel files, health records, or draft reports. So too here: while Stockton has never hidden the fact that its custodian could physically retrieve the emails, that does not obviate Duff of his obligation to identify with specificity the records he seeks. Otherwise, a request for "all emails to or from" a government employee—which is necessarily also a request for correspondence, draft letters and retainer agreements, contracts, settlement agreements, and any number of other possible email attachments—bears a striking resemblance to one for the entire drawer of a filing cabinet, or even an entire "project file"—which this court has explicitly deemed inappropriate. See Spectraserv, 416 N.J. Super. at 578.

The trial court's and Duff's reliance on Paff v. Galloway Township to salvage his overbroad request is misplaced. According to Duff, his request here "closely mirrors the request" in that case. (Pb11). But the OPRA request in

Paff v. Galloway Township had nothing to do with the production of emails at all. Instead, the requestor sought a log of specific information in emails, including the "sender," "recipient," "date," and "subject" fields. 229 N.J. at 343. The Court, in overturning the Appellate Division's decision to affirm denial of the request, agreed that Paff had submitted a carefully "circumscribed" request that "identified the discrete information he sought," id. at 356, and did not require the creation of a record, id. at 359. But the Court stopped far short of finding that Paff was entitled to all of the emails that the information in the log was derived from, instead making it abundantly clear that its decision "did not end the inquiry," and that it "offer[ed] no opinion" on whether the emails could, or should, be released. Id. at 457-58. Thus, contrary to Duff's claims, the Court was not tasked with nor did it determine whether a requestor is required to include a subject when submitting an OPRA request for emails.

Perhaps recognizing this clear distinction, Duff drastically overstates Stockton's reliance on the Freedom of Information Act (FOIA), 5 U.S.C. § 552. (Pb14). Stockton's passing reference to FOIA was only in the context of noting that this court in MAG looked to both federal and other state's law in announcing that "agencies are required to disclose only 'identifiable' governmental records" and prohibiting "overbroad" requests. (Db12-13); 375 N.J. Super. at 547-49. But that decision was issued nearly nineteen years ago. Since then, a robust line

of New Jersey precedents developed the parameters for proper OPRA requests consistent with the law's purpose, and consistent with the line of cases set forth both in Stockton's opening brief and here.

It is precisely for this reason that use of federal courts to "predict[] the direction of state law" is a "serious problem[]." Huddell v. Levin, 537 F.2d 726, 738 (3d Cir. 1976). Federal courts "themselves have recognized, in fact, that the trial and intermediate appellate courts of a state are better able to predict the state's law than are any of the federal courts." Packard v. Provident Nat'l Bank 994 F.2d 1039, 1046-47 (3d Cir. 1993). And it is easy to understand why; while related, OPRA and FOIA are different laws with unique requirements and exemptions. See Commc'ns Workers of Am. v. Rousseau, 417 N.J. Super. 341, 358 (App. Div. 2010) (identifying differences between OPRA and FOIA and finding that, because of these differences, references to FOIA may be "of limited value"). While Duff's citations may, for argument's sake, accurately reflect the status of FOIA case law,[3] that case law is irrelevant where there is direct New

[3] Stockton does not concede that Duff's characterization of the status of FOIA case law with respect these issues is accurate, nor that it represents a complete canvasing of what FOIA does and does not permit. Indeed, while Duff highlights Am. Oversight v. United States EPA, 386 F. Supp. 3d 1 (D.D.C. 2019), in support of his claim that requests under OPRA need not include reference to a subject matter (Pb16-17), he does not mention the D.C. Circuit's cautionary note in the same case that agencies under FOIA need not honor requests that "'would require the agency '"to locate, review, redact, and arrange for inspection a vast quantity of material,'" as "'FOIA was not intended to

Jersey precedent on point.

Stockton, far from attempting to escape responsibility under OPRA as Duff suggests, merely urges this court to apply well-settled precedent that balances a requestor's right to access with the need to limit the effects on an agency's daily operations. Under this line of cases, Duff's obligation was to identify records with reasonable clarity by way of reference to a discrete and limited subject without seeking all of Stockton's records. Bent, 381 N.J. Super. at 37; Burke, 429 N.J. Super. at 174; Spectraserv, 416 N.J. Super. at 576; MAG, 375 N.J. Super. at 547. His request does not satisfy these parameters. Because the trial court's decision, and Duff's arguments in support of it, ask this court to reinterpret OPRA in a manner that would rewrite custodian obligations set firmly in place over the last two decades, this court should reverse the trial court's decision and deem Duff's request invalid.

POINT II

AFFIRMING THE TRIAL COURT'S DECISION WILL PAVE THE WAY FOR REQUESTORS TO SEEK "ALL OF AN AGENCY'S RECORDS."

Duff spills considerable ink pointing out the importance of access to government records, a fact that Stockton does not dispute. (Pb18-20). But such

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reduce government agencies to full-time investigators on behalf of requesters,'" id. at 15 (quoting Sack v. CIA, 53 F. Supp. 3d 154, 163 (D.D.C. 2014)).

single-minded focus disregards not only the sensitive balancing act that OPRA and its exemptions was designed to strike, but also the significant consequences that accompany forced exposure of governmental decision-making at the highest levels. Because there is no principled way to apply the standard Duff urges this court to now articulate without opening the floodgates to wholesale requests for entire agency files or records, affirming the trial court decision in this case will inevitably wreak havoc on government functioning.

First, the trial court's focus on whether the custodian could identify and gather the records requested totally disregards the precedent this would set. Because Stockton has already explained how a request for "all emails sent to or from" a government employee on a particular day is fundamentally no different from "all records contained in an agency's filing cabinet," or "all records in a particular project file," see supra at p. 6-7, this court must consider the consequences of reversing course and permitting these latter requests.

If requestors are permitted to submit broad, unfocused requests like Duff's, agencies will be forced to divert significant resources from fielding other, valid OPRA requests to siphoning, reviewing, and redacting wholesale requests for email correspondence, filing cabinets, or project files. And, even worse, these resources will also be diverted from performing essential government functions, which in turn will eventually impact the public in

numerous and negative ways. Accord Buono v. City of Newark, 249 F.R.D. 469, 470 n.2 (D.N.J. 2008) (recognizing the "public policy interest in ensuring that high level government officials are permitted to perform their official tasks without disruption or diversion"). After all, a custodian tasked with performing their "ministerial" function could hardly be expected to open a drawer of a filing cabinet and ascertain immediately whether each piece of paper contained within it is privileged or release under OPRA. Lagerkvist v. Office of the Gov'r, 443 N.J. Super. 230, 234-37 (App. Div. 2015) (limiting the scope of a custodian's obligations to "routine ministerial" functions); Fisher v. Div. of Law, 400 N.J. Super. 61, 65 (App. Div. 2008) (recognizing that certain OPRA requests will require dedication of high-level officials who better understand the issues at play).

Particularly here, where the request implicates the entire mailbox of an official charged with making extraordinarily sensitive decisions related to student records, personnel or disciplinary proceedings, or collective negotiations, see (Da43-44)—all of which would be exempt from disclosure, N.J.S.A. 47:1A-1.1—it is beyond dispute that Stockton's custodian would not be in a position to review these records unilaterally, even if it were proper for the custodian to review those emails in the first instance. Fisher, 400 N.J. Super. at 73 ("[A]ttorney e-mails may involve highly sensitive materials that should

not be seen even by other employees of the public agency. This would be particularly true of e-mails dealing with personnel and other internal matters prepared by deputy and assistant attorneys general occupying supervisory positions within the Division of Law.”).

Second, and more importantly, even if the task of reviewing the records could easily be overcome, the chill on employee decision-making, discussion, and interaction if this OPRA request is permitted to stand cannot be overstated. While OPRA is construed in favor of public access, see (Db6) (citing N.J.S.A. 47:1A-1), our courts have repeatedly recognized the importance of promoting the free flow of communications within an agency, emphasizing that the government cannot be forced to operate “in a fishbowl[,]” Educ. Law Ctr., 198 N.J. at 288; see also id. at 300-01 (“If communication that formed part of an agency’s pre-decisional process could be disclosed after the decision has been released, one of the major justifications for the [deliberative process] privilege in the first place—maintaining the free flow of communication within an agency—would be rendered meaningless.”). Employees at all levels of government must be able and willing to engage in candid discussion to reach the best decisions for the sake of the public. Allowing a requestor to harass a particular employee or agency with daily requests for every email sent or received each day will indisputably cause that same employee to think twice

before sending an email, regardless of whether that exchange of ideas is necessary to fully inform the agency's ultimate decision. This outcome in no way serves the public's interest.

As Stockton's opening brief already explained, government agencies must be able to function. Duff's single-minded focus on fishing for possible matters of interest through his request for all of the Interim Provost's emails risks not only compromising Stockton's functioning but also undoing two decades of precedent that was built, brick by brick, to balance the integrity of agency operations against the public's right to know. All Stockton asks is for this court to maintain that balance by reiterating, once more, that requestors must seek records by reference to a "discrete and limited subject matter" and that they cannot circumvent that requirement by asking for all of an agency's records instead. For this reason, the trial court's decision should be reversed.

CONCLUSION

For these reasons, this court should reverse the trial court's decision.

Respectfully submitted,

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