NEW JERSEY SUPERIOR COURT
APPELLATE DIVISION
A-001466-23

ALEX ROSETTI,	:
	:
Plaintiff-Appellant,	:
	: On Appeal from:
v.	: New Jersey Superior Court
	: Trial Docket: BER-L-1383-23
RAMAPO-INDIAN HILLS REGIONAL	:
BOARD OF EDUCATION and THOMAS	: Sat Below:
LAMBE, IN HIS OFFICIAL CAPACITY	: THE HONORABLE
AS RECORDS CUSTODIAN,	: Carol V. Novey Catuogno,AJSC
	:
Defendant-Respondent.	:

PLAINTIFF-APPELLANT'S

BRIEF
IN SUPPORT OF APPEAL

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PRELIMINARY STATEMENT

If you don't want a house built, hide the nails and wood. If you don't want a man unhappy politically, don't give him two sides to a question to worry him; give him one. Better yet, give him none. - Guy Montag[1]

FACTS

The Ramapo-Indian Hills Regional High School Board of Education[2] (the "Board") came into its reorganization meeting with a massive and sweeping agenda and minimal debate, leading Plaintiff-Appellant Alex Rosetti to suspect that there had to have been pre-meeting discussions over the epic changes. *See*, PA-10 to PA-12 To exercise his right to ascertain how this government body was operating and coming to its decisions without any real debate or discussions, he filed an OPRA request with the Board and its Business Administrator/Records Custodian Thomas Lambe on January 24, 2023 seeking....

All comments submitted by the public comments form received by the Board from August 1, 2022 through to the date fo the response. The response should include the name, email, town and the question or comment of the sender.

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[1] Fahrenheit 451, pg. 116 Ray Bradbury, pub. 1/3/2006 by Plaza y Janes (1st pub. 10/19/52) ISBN 0307347974

[2] Some of the pleadings and documents misspell "Ramapo" as "Rampapo". The trial court opinion and Order both contain the correct spelling.

Email logs of all past and current Board members for all email accounts in which they have conducted or discussed Board of Education matters or business during the time frame of November 1, 2022 through to the date of the response. The email log should contain the sender, recipient, those copied ("cc") or blind copied ("bcc"), the date, time, subject and identify the existence and name of any attachment.(PA-4)

The Board did not respond within the time frame permitted under the Open Public Records Act and Plaintiff ultimately filed suit on March 14, 2023 to compel a response.(PA-1)

Defense counsel's involvement as a result of the filed suit brought about a swift resolution to the first part of the request, seeking the public comments. Defense counsel also supplied logs of the Board members' **government-issued** email accounts (ie., such as JoeSmith@RIH.org). The government-issued email logs clearly showed that Board members were also conducting Board business on their private email accounts (ie, JoeSmith@gmail.com or JoeSmith@yahoo.com). (PA-9, ¶4; PA-13) Defendants did not dispute this.

The parties agreed to leave the resolution of the applicability of OPRA's provisions to the private email accounts and the extent of the custodian's obligations to obtain logs for the private email accounts to the trial court as the sole question to be addressed.(PA-15, ¶3)

The trial court's answer: OPRA's provisions do not apply and the records

custodian is not obligated to obtain email logs or Paff certifications for the private email accounts being used to transact government business.(PA-20)

PROCEDURAL HISTORY[3]

Plaintiff-Appellant filed his Verified Complaint on March 14, 2023.(PA-1) The Order to Show Cause was signed on March 15, 2023.(PA-5) The Defendants filed their Answer on May 16, 2023.(PA-7) The parties resolved all issues except those surrounding the use of private email accounts to conduct government business shortly thereafter, memorializing their agreement by Consent Order on July 19, 2023.(PA-14) Oral argument entertained on August 18, 2023. The trial court order and opinion issued December 4, 2023. (PA-19, PA-21)

This appeal followed on January 18, 2024 (PA-36) and the transcript was filed February 2, 2024.(PA-52)

[3] T= transcript of August 18, 2023

LEGAL ARGUMENT

The Trial Court Erred In Determining That Logs of Private Email Accounts Being Used For Government Business Were Not Accessible Under OPRA (PA-19;PA-30-34)

Plaintiff-Appellants's premise is that the Open Public Records Act (N.J.S.A. 47:1A-1, et. seq.) requires records custodians to obtain email logs of privately-owned email accounts being used to conduct government business. This **must** be true. Otherwise OPRA and all of New Jersey's long-held commands for open government will be reduced to ashes.

"OPRA provides for ready access to government records by the citizens of this State." Burnett v. Cty. of Bergen, 198 N.J. 408, 421-22 (2009)(citing Mason v. City of Hoboken, 196 N.J. 51, 64-65(2008)). The purpose of OPRA "is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean Cty. Pros. Off., 374 N.J. Super. 312, 329(Law Div. 2004))

Accordingly, OPRA directs that "all government records shall be subject to public access unless exempt," and "any limitations on the right of access...shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1. "Government

records" are defined extremely broadly in keeping with the mandates of OPRA. *See*, N.J.S.A. 47:1A-1.1

"Emails" are the individual electronic communications someone has sent or received. "Email **logs**" are the list of the emails with sender, recipient, subject, date, attachments, etc... Without a log it is nigh-impossible for a requester to seek specific emails or often even formulate a request that is specific enough to obtain the emails they may ultimately be seeking. Our Supreme Court has said that even if the government does not regularly create an email log, the information that comprises it is already a government record. Paff v. Galloway, 229 N.J. 340, 353 (2017)

An "email log" lists the date, the sender, the recipient, anyone copied ("cc") or blind copied ("bcc"), the subject line of the email and that if anything is attached. *See generally*, PA-13

The email logs are particularly important, because under the GRC-established criteria announced in *Elcavage v. West Milford Twp.(Passaic)*, GRC Complaint No.2009-07 (April 2010) which is adhered to by ***all*** courts - not by force of precedent, but simply the sensible logic - requiring that a valid request for a specific email must contain:

(1) the content and/or subject of the email,
(2) the specific date or range of dates during which the email(s) were transmitted, and
(3) the identity of the sender and/or the recipient thereof.

Without an email log, knowing the details of specific emails in order to make a request is just not possible.

The threshold question in an OPRA claim is whether the plaintiff has requested "government records" pursuant to the statute. O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 380 (App. Div.2009) And the term government record...

> *.....means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been* ***made, maintained or kept on file*** *in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof,* ***or that has been received in the course of his or its official business*** *by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. N.J.S.A.47:1A-1.1*

The Supreme Court has determined that email logs are government records and must be supplied under OPRA. Paff v. Galloway, 229 N.J. 340 (2017)

Where the trial court went awry was making the determination that whether

or not the email accounts were privately-held or government-supplied was a relevant determining factor. While Paff v. Galloway involved government-issued email accounts, that was not a controlling facet of the case; the operative point - indeed the operative point of all OPRA cases - is whether or not a "government record" is involved. A "government record" is a government record not by the mechanism or machination that created it. A government record is a government record ***SOLELY*** by virtue of who creates it, keeps it or stores it. If that "who" is a government official acting on behalf of government, that record is a "government record". And there was no dispute that the Board member's private email accounts were used to undertake/discuss government business (and/or to store/maintain government records).

The trial court's concern that the private email accounts were not maintained within the control of Board's custodian is unavailing.

First, the definition of a government record ***is not*** that a record was "made, maintained *and* kept on file" in the course of government business. Rather, a government record is one "made, maintained ***or*** kept on file". N.J.S.A. 47:1-1.1 The Legislature included a disjunctive "or" where it could have used a conjunctive "and" and the reason is important. The status of something being a government record is not dependant upon who owned the pen that wrote it or the email account

that created it. Government record status is determined by who produced it and if a government official made it, obtained it or stored it, that material is a government record no matter its genesis.

Our courts have also long rejected the potential for mischief inherent in allowing government records access somehow being beholden to the government's actual possession of the record. Burnett v. Gloucester County, 415 N.J. Super. 506, 517 (App. Div. 2010), clearly outlined the obligation to recover records no matter who possessed them or where they were located. The court ruled that it is the record's nature, not its situs, that determined when OPRA was triggered *AND ALSO* clearly foresaw gamesmanship would ensue if the ruling had gone any other way. ...

> *"Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA."*

Thus, the question of whether a governmental agency is required to retrieve records responsive to an OPRA request turns on the nature of the records, not their physical location, situs, who may possess them or if the government official put them in within only their private reach. Central to the holding in Burnett is that "documents accessible to the public which are generated on behalf of a public

agency in the course of its official business are subject to disclosure no matter where they are located, even if they were never in the possession of the governmental entity." O'Boyle v. Borough of Longport, 426 N.J. Super. 1, 14 (App. Div. 2012) Otherwise, OPRA is but a cartoon of itself and its purpose.

Equally unavailing is the trial court's determination that having to recover an email log from a privately-held email account was somehow onerous or renders the request unduly burdensome. For one, there is no in-depth premise explaining how such would be so hard or so difficult. The Chang certification only states that he thinks he cannot make such a log from a gMail account[4] and that he does not have administrative rights to access the other accounts.

It is misconstruing the law to hold that the custodian alone must be able to possess or exercise dominion over the record in a simplified fashion. As noted in footnote 4 below, there are less efficient ways to create a log that are still "not difficult". But this Court cannot lose sight of the simple fact that whatever difficulties or inefficiencies are encountered, this is a problem that is completely

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[4] The undersigned is currently involved in 2 cases in Bergen County before another judge where gMail account logs have been generated - one by cutting-and-pasting and another by simply taking screen shots of the inbox and outboxes.

I am aware of a third case in Bergen where a judge appointed a forensic technician to ascertain what has been deleted as well and I believe Google is being consulted in that matter.

self-created.[5] While Plaintiff-Appellant is not unappreciative of the fact that this request may take a more concentrated effort on the part of the Board to fulfill, this is a complication of the Board's own making, as it allows for commingling of government records with non-government records by permitting Board members to conduct government business on non-government email accounts.

Further, administrative control over the accounts is not necessary or a parameter set forth in the law or in OPRA procedures in practice. As the first step to responding to this request, Defendant Lambe should have simply asked Board members to compile the logs and, if necessary, provide certifications explaining why they could not do so. These certifications are so routine in OPRA practice that they have their own nomenclature - Paff certifications. The practice is derived from Paff v. New Jersey Department of Labor, 393 N.J. Super. 334, 341 (App. Div. 2007) and involves sworn statements by agency personnel setting forth in detail the information that would include at least:

(1) the search undertaken to satisfy the request;

(2) the documents found that are responsive to the request;

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[5] Do not be distracted by the technological framework of this case. Suppose the Board did not use file cabinets and simply threw everything in a pile in the basement. What would Your Honors do when the Defendants claimed it was too difficult to locate a record that was requested?

There is no logical or substantive difference.

(3) the determination of whether the document or any part thereof is confidential and the source of the confidential information;

(4) a statement of the agency's document retention and destruction policy and the last date on which documents that may have been responsive to the request were destroyed.

These Paff certifications are required of all the "moving parts" of the OPRA process. The Records Custodian is often not in control or possession of records that are sought as the police department has their materials, the building department has their records, etc.. What records a custodian may actually routinely exercise dominion over (either by law or in practice) is very often limited[6]; the Paff certification acts to protect the custodian by demonstrating that whomever has the records has conducted an adequate search for them. And commensurately, liability, sanctions or penalty potential shifts from the custodian to Board members, police chief or building code official if documents are not provided and the search is inadequate. In this case, Defendants never even asked the Board members to compile a log or otherwise explain the parameters of their private email use for government business. From there it can be evaluated if the

[6] For example, the OPRA statute renders the municipal clerk the custodian for a municipal body but the municipal clerk typically has no control or involvement over police reports or building permits. The "record custodian" is merely the person "on point" and the vessel through which the ultimate responsive records will flow. The Paff certification mechanism clearly facilitates this practical constraint.

individual Board members must

be subject to subpoena or other processes to compel compliance. There is no defense for the government to simply assert that "in theory" it does not have access to the records, particularly without even trying to obtain access and possession. The trial court's Order bars any exploration or explanation of the private email account usage simply because the Board does not control it.

CONCLUSION

There are no equities inherent in the Defendants' position or the trial court ruling. Should the ruling stand, government officials, particularly the ones with ill motives or a deceitful heart (and whom should be under greater scrutiny) will simply cease using government-issued accounts. There is no legitimate reason for officials to be communicating about government activities or business outside of the official government-issued email channels.

However, even without an intent of malfeasance, government records will simply be beyond the public reach and lost or destroyed in violation of the records destruction laws. OPMA, OPRA and the First Amendment Right to Petition Government are rendered worthless if one does not know what the government is doing.

Paff v. Galloway was not fact-specific to government-issued email account logs. The current, long-standing and litigation-tested practice inherent in the use of Paff certifications means that all Defendant Lambe had to do was ask and the onus shifted - properly - to Board members using their personal email accounts to produce logs for them.

The trial court ruling in this matter cannot stand and must be reversed.

Respectfully submitted,

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ALEX ROSETTI, Plaintiff/Appellant, v. RAMAPO-INDIAN HILLS REGIONAL BOARD OF EDUCATION and THOMAS LAMBE, IN HIS OFFICIAL CAPACITY AS RECORDS CUSTODIAN, Defendants/Respondents.	NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION Docket No. A-1466-23 Civil Action ON APPEAL FROM BERGEN COUNTY SUPERIOR COURT, LAW DIVISION DOCKET NO.: BER-L-1383-23 *Sat below:* *Hon. Carol V. Novey Catuogno, A.J.S.C*

DEFENDANTS/RESPONDENTS RAMAPO-INDIAN HILLS REGIONAL BOARD OF EDUCATION AND THOMAS LAMBES' APPELLATE RESPONSE BRIEF

Of Counsel and On the Brief:

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PRELIMINARY STATEMENT

The sole issue presently before this Court is whether a public entity, in this case the Defendants/Appellants Ramapo-Indian Hills Regional Board of Education and Thomas Lambe ("Defendants"), must be compelled to produce to requestor Plaintiff/Appellant Alex Rosetti ("Plaintiff") private email logs under the Open Public Records Act ("OPRA"). The logs in question would have to be generated from the personal email accounts of elected officials. Plaintiff's argument is premised on the theory that, merely because those officials had forwarded, sent or received an email message on a personal service that could relate to the public function of the entity for which they were elected to serve, their private email services must generate logs that constitute government records. This is a novel issue that is not the subject of any reported case cited by the parties in this matter.

Paff v. Galloway Township, 229 N.J. 340 (2017), established the principle that under OPRA email logs maintained on the official government server by a municipality (and therefore other government entity) constitute public records even if they must be generated based on stored electronic data from the government-controlled email accounts. Plaintiff, having failed at the trial court level, is asking for the Appellate Division to expand the Supreme Court's holding to compel government entities to set aside all technological and logistical obstacles necessary to generate logs from web-based email accounts or else violate OPRA.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

The pertinent facts and procedural history were set out in Plaintiff's brief. Pb at 1-3. Those "facts", however, failed to acknowledge the significant import to which the trial court judge ascribed to a certification the District filed below from its Information Technology ("IT") Director John Chang. Chang's Certification rebuts Plaintiff's argument that it does not matter how difficult it is to generate the type of log Plaintiff seeks and differentiates this case from Galloway. (Pa16-19; Pa32-34) ("Pa" refers to Plaintiff's Appendix).

Chang, who had served as the District's IT Director for the previous 16 years, explained that during his tenure "the District has always provided to its Board members and employees District-issued email addresses and accounts." (Pa16 at ¶3). The IT Director's responsibilities include "managing and administering the [District-controlled] email services and accounts." (Id.). As the administrator for the District's email services, Chang certified that he has "access to tools which permit [him] to easily and expeditiously extract data from the District-controlled Google Workspace ('Workspace') accounts, including for the purpose of fulfilling OPRA requests such as ones for email logs." (Pa17 at ¶4). In connection with this case, Chang generated a log from the District's governmental

[1] Because they are interwoven, Defendants combine the procedural history and facts into one section in order to avoid repetition.

email system of approximately 6,000 rows that was submitted by Defendants to Plaintiff as part of the parties' bifurcated settlement agreement. (Id.).

Plaintiff's request that logs be generated from private, generally web-based and cloud-based, email accounts of Board members presents technological challenges that Chang has certified he would not "encounter when creating logs from the District's email service." (Pa17 at ¶5). According to Chang, "[e]ach of the proprietary email services have their own administrative settings, many of which make it impossible or extraordinarily time consuming to create logs of any kind." (Pa17 at ¶6). Chang provided as an example his personal Gmail account, which does not permit the user to "generate logs of the type requested by Plaintiff that would be limited to showing sender, recipient, cc's, and date/time." (Pa17 at ¶7). Chang certified that, "[a]lthough Gmail is the most popular private email service … Board members could have used many other proprietary email services, including but not limited to cable and phone providers such as AT&T, Verizon, Sprint, Comcast and Optimum"; "cloud-based services in competition with Gmail such as AOL, Hotmail and the like"; "encrypted services that are becoming more popular such as Proton Mail"; and "email servers belonging to their primary employers." (Pa17 at ¶8).

Chang explained in his Certification that "[i]n most if not all cases, the users themselves do not have administrative rights that would permit them to generate

logs or reports," which means that even if the individual Board members provided him with their usernames and passwords he still "could not generate logs or reports from their personal accounts." (Pa17 at ¶9). According to Chang, if he could nevertheless "figure out how to generate a log for some of these email services," it would take him hours to construct each log and he would be unable to ensure the integrity of the data maintained by the private email vendor. (Pa17 at ¶10). Mr. Chang summarized by explaining that "[t]he difference between generating al log from the District's email services and from private email accounts is stark." (Pa17 at ¶11). Although Chang certified that he could generate logs from "the District's Workspace service with relative ease, it will be difficult if not impossible to generate logs from most if not all of the many private email accounts which are used by Board members." (Id.).

The trial court judge found, based on Chang's Certification, that "Defendants do not possess the legal authority, administrative right, or technological capability to generate email logs from the personal email accounts of its Board members." (Pa32). "There is no substantial amount of manipulation of information technology that would cause the email logs, that are not within the custody or control of the Defendants, to be generated," and that "[t]he compelled production of the requested records would require Defendants [to] conduct a search for [documents] not within its custody or control and manually compile and collate

information to create a log." (Id.). The trial court concluded that "OPRA does not authorize" nor can courts compel this "arduous task." (Pa32-33).

LEGAL ARGUMENT

POINT I

THE APPELLATE DIVISION SHOULD AFFIRM THE TRIAL COURT'S DECISION THAT OPRA DOES NOT REQUIRE THE PRODUCTION OF EMAIL LOGS STORED ON PRIVATE NON-GOVERNMENT ACCOUNTS (Pa35)

Plaintiff disregards the trial court's findings and repeats his rejected argument that it should not be "so hard or difficult" for the District to create email logs from the private email accounts belonging to the District's Board members[2], but if it is "difficult" then it is Defendants' fault and they should be compelled to produce the logs anyway. Pb[3] at 9-10. Plaintiff's legal contention is premised on a definition of government record for OPRA purposes that strays from the Supreme Court's interpretation in Galloway that "OPRA makes clear that government records consist of not only hard-copy books and paper documents housed in file cabinets or on shelves, but also 'information stored or maintained electronically' in a database **on a municipality's server**." 229 N.J. at 353

[2] Defendants hereby preserve the argument that to the extent that Plaintiff seeks email logs from Board members before they were sworn in (e.g. between November 2022 and January 2023), certain portions of the email logs would not be government records for the additional reason that the Board members were private citizens until the day they were sworn into office.

[3] "Pb" refers to Plaintiff's amended appellate brief filed April 17, 2024.

(emphasis added). The parties in this case do not contest the undisputed fact that private email accounts of Board members – whether on Yahoo, Gmail or their private employer's server – are not maintained on the Ramapo-Indian Hills Regional High School District's server.

Plaintiff's argument that it cannot be "so hard or difficult" for the District to provide the logs in question has been conclusively refuted by the District's IT Director, John Chang. Plaintiff minimizes or altogether ignores the importance to the New Jersey Supreme Court ruling in Galloway that the IT Specialist in that case "testified that providing the fields of information requested [was] not a burden and would consume no more than two to three minutes of time." Id. at 354. To the extent that Plaintiff is aware of the technological realities that make it nearly impossible to obtain email logs from personal accounts on services like Gmail, he somehow blames the District for the proprietary policies of these email services.

Plaintiff compares the Board's arguments regarding the "technological framework of this case" to the absurd hypothetical of Defendants having difficulty locating a record because they "threw everything in a pile in the basement" rather than using file cabinets. Pb at 10, n. 5. The Board has already proven by producing to Plaintiff an email log in excess of 6000 lines from the District's Workspace account that it dutifully maintains its own email data in the governmental server. (Pa9 at ¶3). The Board, however, has no control over

administrative procedures and technological features utilized by corporations as Google, Yahoo, AOL, AT&T or Proton Mail with respect to their popular email accounts offered, generally for free, to private users such as the District's Board members.

Plaintiff, in his appellate brief, criticizes the Defendants for not providing evidence that they "even asked the Board members to compile a log or otherwise explain the parameters of their private email use for government business." Pb at 11. Plaintiff's argument blithely ignores Defendants' legal position that the email logs he seeks are not government records. If Defendants' legal position is correct then the Board members are under no obligation under OPRA to search for the non-government records or explain how frequently or infrequently they used or did not use private email services to conduct government business. Plaintiff's legal contentions are inextricably tied to his public policy arguments, which were addressed and determined to be inappropriate for consideration by the trial court:

> Plaintiff's counsel argues that disallowing plaintiff[']s request will create an avenue for government officials to evade OPRA by use of their private email addresses. While this is surely not acceptable, that potential outcome, alone, does not allow the court to interpret the plain reading of the Open Public Records Act to include an email log maintained on a private company's server, as a public record.
>
> [Pa34].

The trial court's ruling is consistent with the New Jersey Supreme Court's directive that the role of courts is limited to reviewing plain statutory language rather than modifying laws to address public policy concerns. Courts "construe the words of a statute 'in context with related provisions so as to give sense to the legislation as a whole.'" Spade v. Select Comfort Corp., 232 N.J. 504, 515, 181 A.3d 969 (2018), quoting N. Jersey Media Grp., Inc. v. Tp. of Lyndhurst, 229 N.J. 541, 570, 163 A.3d 887 (2017). If the plain language leads to a clear and unambiguous result, the court's job is complete, Matter of Commitment of W.W., 245 N.J. 438, 449 (2021), and the court applies "the law as written." Kaminskas v. Off. of the Attorney Gen., 236 N.J. 415, 422, 200 A.3d 389 (2019). Courts "turn to extrinsic tools to discern legislative intent . . . only when the statute is ambiguous, the plain language leads to a result inconsistent with any legitimate public policy objective, or it is at odds with a general statutory scheme." Shelton v. Restaurant.com, Inc., 214 N.J. 419, 429, 70 A.3d 544 (2013). The statute, in this case, is not ambiguous insofar as OPRA only applies to government records.

Plaintiff suggests in a footnote that Defendants could have satisfied his OPRA request by producing email "logs" cut and pasted from screenshots of cloud-based email pages. Pb at 9, n. 4. Plaintiff made a similar argument during the August 18, 2023 oral argument below in which his attorney stated that it would be "very easy to merely printout those in-boxes, out-boxes and take a Sharpie to

them." 1T6:10-13. The underlying OPRA request, however, does not seek printouts but rather "[e]mail logs", which have a fixed definition established by the Galloway case. (Pa4). Defense counsel at oral argument responded to Plaintiff's "printout" argument as follows:

> Really briefly, before I forget, this notion that while if it's so hard to get email logs on [G]mail, Yahoo, what have you, [then the Board should just] print [it] out[.] [T]hat's been used in my experience as a . . . way to kind of settle a case, because an email log [] from your OPRA setting, everyone is thinking Paff versus Galloway Township. . .
>
> [I]f Mr. Rosetti had requested a printout of private [] [G]mail pages, et cetera, that would be a different request. That's not what [he] requested. [He] requested a log, and a log has the meaning as decided by the Supreme Court in the Paff versus Galloway Township case, and that's, I think, how everybody took it and how everybody takes it statewide when you get those requests. [1T15:21-16:14].

Plaintiff alternatively suggests in his reply brief that the individual Board members may be able to "subpoena" private email services to obtain email logs. Pb at 12. New Jersey courts have made clear that "OPRA does not require records custodians to conduct research". MAG Entertainment, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546-47 (App. Div. 2005). That being the case, courts could not conceivably require that to fulfill an OPRA request a jurisdiction must issue a subpoena to a technology company to force it to generate an email log that a trained IT Director is unable to construct due to proprietary limits instituted by the company on its proprietary technology. Plaintiff requests

relief that, based on the legal research of both parties, has never been ordered by any New Jersey court in a published decision and should not be ordered here.

POINT II

THE APPELLATE DIVISION SHOULD NOT EXPAND THE DEFINITION OF GOVERNMENT RECORDS UNDER OPRA TO INCLUDE PROPRIETARY EMAIL SERVICES USED BY INDIVIDUAL MEMBERS OF AN ELECTED BODY (PA31-32)

Plaintiff relies on Burnett v. Gloucester County, 415 N.J. Super. 506 (App. Div. 2010) for the principle that government agencies have "the obligation to recover records no matter who possessed them or where they were located." Pb at 8-9. Burnett does not stand for such a broad proposition and is clearly distinguishable from this case. At best, Burnett reiterates that under OPRA law a government entity is deemed to be in possession of a document that a third-party vendor with which it contracts maintains on behalf of the government entity. The Appellate Division's decision in Burnett does not discuss the applicability of OPRA to alleged government records that are maintained by private companies which provide proprietary services used by members of the public that just so happen to be used by elected officials or government employees, such as Gmail, Yahoo, AOL, Proton Mail and the like.

In Burnett, the Appellate Division considered whether a county government was compelled to obtain from its insurance company settlement documents which

resulted in payment of public funds to a claimant. The panel concluded in that case that "the settlement agreements at issue [] were 'made' by or on behalf of the Board in the course of its official business." Id. at 517. In this case, Plaintiff does not contend that Gmail or Yahoo or AOL were doing the bidding of Defendants when one or more Board member may have purposely or mistakenly sent, forwarded or received an email on a personal account that may have implicated a matter concerning District business. Although an insurance company hired by a municipality clearly falls within the ambit as an agent of the government entity, a cloud-based email service that has no relationship with the government entity does not. Plaintiff's reliance on Burnett is thus misplaced and does not provide a basis for this Court to reach the unprecedented conclusion[4] that the Board must subpoena email logs or file suit against private technology corporations to obtain documents that simply do not exist and are not available to the government agency.

The trial court therefore correctly relied on this Court's finding in Bent v. Township of Stafford Police Dept., 381 N.J. Super. 30, 38-39 (App. Div. 2005), for the proposition that a records "custodian was under no obligation to search for [government records] beyond the township's files." (Pa31-32). The trial court noted that in this case, "like in Bent, there has been no showing that the email logs

[4] Plaintiff's tactic of alluding to unreported decisions in which his attorney was involved, and in support of which Plaintiff made no attempt to comply with R. 1:36-3, cannot overcome his failure to cite to any precedential opinion on this subject. See Pb at 9, n. 4.

from the personal accounts of government officials are required to be made, maintained, or kept on file during the course of official business." (Pa32). "In fact," the trial court correctly held, "no provision of OPRA obligates Defendants to produce the requested email logs." (Id.). The court below recognized the difference between identifiable emails that are located on a private server and can be printed by the government official as opposed to email logs that cannot be generated except by a private party with whom the government has no relationship. "While it is undeniable that Plaintiff has a right to the email correspondences from the private email accounts of the Board members, that right cannot be extended to include email logs from personal, non-Board-issued email accounts." (Id.).

Plaintiff is free to request specific emails that can be printed from a private server belonging to an official in which government business is discussed. He may not, however, redefine under OPRA an email log that can be generated only using proprietary systems of a private cloud-based email server as a government record.

CONCLUSION

The Appellate Court should affirm the decision that the Defendants were not required by OPRA to generate or disclose to Plaintiff email logs from the private email accounts of the District's Board of Education members.

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By: */s/ Jonathan F. Cohen*
Jonathan F. Cohen

Dated: May 17, 2024

NEW JERSEY SUPERIOR COURT
APPELLATE DIVISION
A-001466-23

ALEX ROSETTI,	:
	:
Plaintiff-Appellant,	:
	: On Appeal from:
v.	: New Jersey Superior Court
	: Trial Docket: BER-L-1383-23
RAMAPO-INDIAN HILLS REGIONAL	:
BOARD OF EDUCATION and THOMAS	: Sat Below:
LAMBE, IN HIS OFFICIAL CAPACITY	: THE HONORABLE
AS RECORDS CUSTODIAN,	: Carol V. Novey Catuogno,AJSC
	:
Defendant-Respondent.	:

PLAINTIFF-APPELLANT'S

RELY BRIEF

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FACTS

No additional relevant facts beyond the original brief are required.

PROCEDURAL HISTORY

There is no dispute as to the procedural history.

LEGAL ARGUMENT

The Defendant-Respondent's Ramapo-Indian Hills Regional Board of Education (RIHRBOE) arguments run counter to existing OPRA law and the policies surrounding the disclosure of government records. This Appellate Panel must not ignore the statutory language, Supreme Court precedent and the policies behind OPRA.

I. The definition of "government record" only requires that a government official made (or received) the record and there is no additional requirement that the government maintain the record or own the storage medium to trigger the disclosure obligation.

The crux of the trial court ruling and the linchpin to the RIHRBOE position here is that the email logs of the accounts containing government-business emails sought here are not "government records" because the RIHRBOE does not own or control the email accounts from which the government officials sent (or received) the emails in question that formulate the logs. To accept this position, this Court would have to reject the express terms of the statute and Supreme Court and

appellate rulings.

If government officials use their personal email accounts to communicate about government business, that communication does not lose it status as a government record because the account was personally owned. "Government record" status is not determined by who owns the pen that wrote it or the email account that sent it. Otherwise, OPRA would be a toothless statute of little worth if it were so easily circumvented. What renders a communication (or any other record) a "government record" within OPRA's disclosure obligation turns on whether it was "*made, maintained or kept on file*" in the course of a government official engaging in government business "*or...received*" in the course conducting government business. N.J.S.A. 47:1A-1.1 ***Ownership or direct control over the medium or the storage method is not required***. And numerous cases point out the obvious pitfalls of allowing the disclosure of records to be dependant on where the records are located.[1]

The trial court here mistakenly held that the government has to "make *and* maintain" or "receive *and* maintain" the records at issue for OPRA to apply. The

[1] Even though the government records are maintained in private email accounts, the government officials still exercise dominion over them. The Paff certification methodology discussed in the opening brief and the subpoena power both operate as mechanisms to ensure records custodians are not held responsible for officials that do not cooperate.

New Jersey Supreme Court has already rejected such a reading of OPRA.

In Simmons v. Mercado, the Millville Police Department asserted it did not have to produce CDR-1 summonses violations because even though the police *made* the records, is was the judicial branch (exempt from OPRA) that *maintained* them electronically. Thus because the police no longer had control of the electronic record, they contended they did not have to produce it under OPRA. The argument is **identical** to what is advanced here. And the Supreme Court refused to breath life into it....

Any reliance here on the maintenance of the records is misplaced because it completely ignores the fact that MPD officers "make" the information by inputting substantive data about the arrests into eCDR, as noted above. The plain language of the statutory provision at issue here is clear: if a government official makes, maintains, or keeps on file electronic information in the course of his or her official business, it is a "government record" subject to OPRA. See N.J.S.A. 47:1A-1.1. ***The use of "or" plainly indicates that any of those three listed actions is sufficient to satisfy the statutory definition.*** *See, e.g., State v. Frank, 445 N.J. Super. 98, 106, 136 A.3d 429 (App. Div. 2016) (noting that the word "or" in a statute generally indicates an alternative and that, "where items in a list are joined by a comma, with an "or" preceding the last item, the items are disjunctive, meaning distinct and separate from each other" (alterations and quotations omitted)).* ***Thus, regardless of who maintains the files, the fact that MPD "makes" the CDR-1s means that it can be called upon to disclose those government records.***" Simmons v. Mercado, 247 N.J. 24, 41 (2021) [emphasis added]

The trial court ruling and the RIHRBOE position simply cannot be squared with this unambiguous analysis. A government record is a such because it was

made, **or** *maintained* **or** *kept* on file by a government official in the course government business **or** *received* by a government official in the course of government business. There is no requirement that the agency that is the subject of the OPRA request "make *and* maintain" or "receive *and* maintain". If the record was made in the course of government business that is enough to require production. If the record was received in the course of government business that is enough to require production.

Then, echoing the ***exact same concerns*** pointed out by the appellate division way back when in Burnett v. Gloucester County, 415, N.J. Super. 506, 517 (App. Div. 2010)[2], the Court doubled down on refusing to provide any avenue for government officials to game OPRA and obstruct an informed citizenry....

"Were we to engraft upon OPRA an exception for when a government agency has created but no longer maintains a record, it would create a perverse incentive for officials to relinquish electronic records to a third party in order to prevent their public disclosure." Simmons v. Mercado, 247 N.J. 24, 42 (2021)

The contention that the RIHRBOE does not maintain the email accounts in question and thus does not control the accounts from where the logs would

[2] *"Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA."*

emanate cannot be given any credence. It is not logically possible that the position could be so roundly condemned and then relied upon here to defend against disclosure - or even having to look for the records.

The purpose in enacting OPRA was "to promote transparency in the operation of government." Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 541 (2012). "Any analysis of OPRA must begin with the recognition that the Legislature created OPRA intending to make government records 'readily accessible' to the state's citizens 'with certain exceptions for the protection of the public interest.'" Gilleran v. Twp. of Bloomfield, 227 N.J. 159, 170 (2016) (quoting N.J.S.A. 47:1A-1) OPRA's core premise is that "society as a whole suffers....when governmental bodies are permitted to operate in secrecy." Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (App. Div. 2004). These foundational principles of access are essential in creating and maintaining a transparent, accountable, corruption-free democracy that serves New Jersey's citizens. **All** of these plaudits of open government and the aspirational interpretations for broad public access to records are completely meaningless if all the government officials have to do to is send their government

emails over Yahoo or Google to circumvent disclosure.[3]

OPRA is to be interpreted broadly. Once the government official made or received a communication about government business it is government record accessible under OPRA regardless of who owns the server or the service that routed it.

II. The authority of Paff v. Galloway is not limited to information on government-owned servers.

Next, the RIHRBOE seeks to have this Court parse the Paff v. Galloway Twp., 229 N.J. 340 (2017) decision down to one word: the use of the term "municipality" when describing who owned the server at issue in that case.

The argument goes that the Paff decision in discussing electronic information referenced obtaining it from a "municipality's server". The term is used just once and it is used in a descriptive - not in a defining or limiting - fashion. And notably, the very next sentence points to the logic that unwinds the RIHRBOE's reliance on that simple descriptive turn of phrase, as *"[t]he*

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[3] The RIHRBOE persists there is some issue with who is a "government official" because the some of the communicating parties were elected but not yet sworn in. (Reply brief, Fn 2) This is - or should be - irrelevant.

While the email of people elected-but-not-yet-sworn-in may or may not be "government records" (and there is no need to decide that here), when the email lands in the inbox of those in office who they are corresponding with, they become government records. And those are the email logs Mr. Rosetti sought.

Legislature, pointedly, declined to limit accessibility to electronic records by not adopting a more restrictive formulation of government record." Id. at 353 (2017)

And the Legislature also declined to limit the definition to means and methods and devices owned or controlled by the municipality.

ONLY the most crabbed possible reading of OPRA and Paff could begin to be twisted in an argument that the Supreme Court intended that government officials use should private email accounts to subvert public records disclosure. The statements in Burnett and Simmons recognizing the imprudence of creating loopholes dependant merely upon who holds the government record must force one to abandon the idea that the courts should be looking for ways to have government officials evading OPRA. Nor is it possible the Supreme Court intended such a twist on the use of a one-word description in one sentence in an opinion that discusses the availability of electronic data under OPRA in broad and sweeping terms for some 20 pages to be the reason government officials can evade OPRA by using Google their old AOL account.

Here again, nothing in OPRA supports the idea that a government record must be on a government server. The statute itself certainly says nothing of the sort and the only authority the Supreme Court relied on was the definition plainly written in the statute. N.J.S.A. 47:1A-1.1 And the direct holding of Paff draws no

distinction or references to "who" owns "what".

"*We conclude that the requested fields of information from the identified emails constitute "information stored or maintained electronically," N.J.S.A. 47:1A–1.1, and are therefore "government records" under OPRA.*" Paff v. Galloway Twp., 229 N.J. 340, 359 (2017)

There is no construct that can square this court's obligation to interpret OPRA broadly in favor of access and that duty being met by focusing upon one descriptive word in a sweeping decision that would then destroy the entire policy behind the statute and as well as dire warnings of potential malfeasance both before and after Paff.

III. There is no hardship demonstrated rendering it impossible to provide the email logs and there are alternate solutions in law and practice that render this concern, to the extent that may exist, easily addressed.

[A]ny 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 ; *see also* N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 555 (2017) This core precept of OPRA must give this Panel great pause before making the sweeping declaration that records that *may* be "too difficult" to produce because of the actions taken by government officials themselves to keep secret materials from the public. Both Burnett v. Gloucester County, 415 N.J. Super. 506, 517 (App. Div. 2010) and Simmons v. Mercado, 247 N.J. 24, 42 (2021) expressly warn of creating the perverse incentive

to "outsource" records maintenance/storage and making them more difficult to access. And yet now the RIHRBOE is seeking have this Court *reward* them for doing exactly that. **There should be outrage** that the RIHRBOE is allowing this practice. **There should be condemnation** that the RIHRBOE may even be allowing government records to be lost or compromised in violation of the Records Destruction Act. N.J.S.A. 47:1-14[4]

As to the assertions regarding the level of difficulty that would be encountered if the RIHRBOE were to even try and provide the requested logs, all the Defendants put forth is the Chang certification. What does it *really* say? Any objective view can only reach the answer: not much. There are no specifics about the difficulties with each different type of email service (ie., Yahoo, Google, etc.), how any such issues could be addressed (or not addressed). It says, basically, "this could be hard, but I have no specifics and it is not as easy as accessing the municipal server". None of this is a basis to issue a sweeping edict that allows public officials to avoid OPRA.

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[4] *"No official responsible for maintaining public records or the custodian thereof shall destroy, obliterate or dispose of any paper, document, instrument, or index which shall have been recorded, filed, registered or indexed except as specifically permitted by law. No law, statute or regulation shall be construed to permit the destruction, obliteration or disposal of any such records by implication.*

But even supposing it is difficult, how much concern should this Court have? After all, **the RIHRBOE created this problem by not limiting Board members to communicating through "official" or "government" channels.** It is the very definition of a self-created hardship. The RIHRBOE is essentially "[t]he man who murdered his parents, and then pleaded for mercy on the grounds that he was an orphan."[5]

There is nothing for any court to conclude that creating the logs is impossible and, as represented in the original brief, there are other means to provide a requester with a copy of an email log.

The RIHRBOE has focused on its ability to corral the metadata to formulate the logs but other methods - like the printout and screen shots of in- and out-boxes, etc... are acceptable options available pursuant to the ability to change mediums to meet the needs of requesters. *See*, N.J.S.A. 47:1A-5(d) ("*.....If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.....*") And the GRC *Handbook for*

[5] Abraham Lincoln commenting on hypocrisy.

Custodians, 7th Edition, November 2022, page 19[6] also provides similar guidance...

13. Do I have to provide records in a specific medium?

Yes. OPRA provides that a custodian must permit access to a government record and provide a copy of the record(s) in the medium requested, if the public agency maintains the record in that medium. If the custodian does not maintain the record in the medium requested, he/she must:

Convert the record to the medium requested; ***or***

Provide the record in some other meaningful medium *(meaningful to the requestor).* (emphasis added)

All Mr. Rosetti sought were email logs. He had no specific demand as to format. So insomuch as the Chang certification alludes to the *possible* difficulty[7] with making logs and to the extent that such may be true, OPRA obligates the RIHRBOE to at least attempt to supply them in other formats, just as other courts have directed be done. Mason v. City of Hoboken, 196 N.J. 51, 78 (2008) sought for the parties to strive for collaborative efforts in records production and alternate

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[6] nj.gov/grc/custodians/handbook/Custodians%20Handbook%20(Seventh%20Edition%20-%20Nov%202022)(Final).pdf

[7] Recall that ***no one even tried*** because the argument relied upon and accepted by the trial court was that email logs of private accounts were not government records so they should not even have to look for the records.

mediums - if there is an **actual specific demonstrated** hardship[8] - is the proper solution as opposed to just relying on a pronouncement that "something might be too hard". Our trial courts are well suited to explore these matters. This is not a circumstance where the records were burned or otherwise destroyed. The government officials have them, they are just claiming they should not even have to look for them or attempt to provide them because they are in/from private email accounts. And that is outrageous.

CONCLUSION

Paff does not limit email logs to just those from email accounts maintained on government servers. The very definition of a "government record" was mistaken by the trial court when it held that the government must "make" (or "receive") *AND* "maintain" the record for it to be a government record. And the

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[8] And what might be such a hardship? Like Justice Potter Stewart's take on pornography, OPRA judges will know it when they see it. I am aware that T-Mobile auto-deletes materials after 18 months, so that *could* be one.

Certainly "hardship" it ***is not*** going to be "we have to send a subpoena to Yahoo's IT department because our Board communicates outside official channels".

And after the clear and dire warnings in Burnett and Simmons, there should be no sympathy for reasonable steps to have to be undertaken to make the requester record available. There is no contention that RIHRBOE has to do the impossible but all that is presented here is "harder than if it was on municipal server".

exact criticisms and dire warnings from this court in Burnett and the Supreme Court in Simmons are now before this Panel ***as a defense*** to providing records. The RIHRBOE made whatever this mess *may* be and continues to allow it to fester. Every day, more and more government records are being put beyond the public eye because of this. This Panel cannot endorse this conduct and relieve them of having to take reasonable steps to unwind the knots in which they have tied themselves. If the RIHRBOE has to engage in some extra steps to get the materials, maybe they will be motivated to end this circumventing of OPRA. Rarely does the law reward the cheater and it surely should never encourage it.

All this Appellate Panel needs to hold is the statute is read in the disjunctive, as Simmons says it is, and that "government records" remain "government records" no matter who owns the server where they may be situated.

The trial court decision must be reversed, the RIHRBOE's further arguments must be rejected and this matter remanded.

Respectfully submitted,
Donald M. Doherty, Jr.
Donald M. Doherty, Jr.