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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3567-22T4

AAKASH DALAL,

Plaintiff-Appellant,

Vs.

HUDSON COUNTY PROSECUTOR'S  
OFFICE,

Defendant-Respondent.

Civil Action

On Appeal From a Judgment of  
Conviction in the Superior Court  
of New Jersey, Law Division,  
Hudson County

Docket No.: HUD-L-3384-21

Sat Below: Hon. Joseph A. Turula,  
P.J.Cv.

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**BRIEF ON BEHALF OF APPELLANT AAKASH DALAL**

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Aakash Dalal,  
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PRELIMINARY STATEMENT

Plaintiff-Appellant Aakash Dalal ("Mr. Dalal" or "Plaintiff") brought suit against Defendant-Respondent Hudson County Prosecutor's Office ("HCPO" or "Defendant") for violating the common law right of access to public records by withholding documents regarding the agency's mishandling public corruption charges successfully brought by Mr. Dalal against disgraced, former Superior Court Judge Liliana DeAvila-Silebi ("Silebi"). The trial court erroneously granted the HCPO judgment and dismissed Mr. Dalal's complaint with prejudice, ruling that criminal investigatory records are exempt from disclosure under the common law right of access because they are purportedly not required to be made or maintained. It is submitted that the trial court erroneously superimposed a provision of the Open Public Records Act onto the common law right of access and failed to conduct the requisite balancing test weighing the public and private interest in disclosure and the agency's interest in confidentiality. Accordingly, the trial court's decision must be reversed.

The trial court further erred by denying Mr. Dalal's motion to compel discovery and granting the New Jersey Division of Criminal Justice's ("DCJ") motion to quash Mr. Dalal's subpoena. After the HCPO was exposed for blatantly lying to Mr. Dalal and the trial court about the existence of emails between HCPO and the DCJ regarding the criminal charges against Silebi, Mr. Dalal sought discovery regarding records unlawfully concealed by the HCPO. It is

submitted that Mr. Dalal demonstrated sufficient bad faith by the agency to permit discovery in the public records matter and the trial court's orders should be reversed.

**PROCEDURAL HISTORY**<sup>1</sup>

On August 19, 2021, Mr. Dalal filed a Complaint in the Superior Court of New Jersey, Hudson County Vicinage against Defendant HCPO. (Pa-16).

On March 4, 2022, during a hearing, the Hon. Joseph A. Turula, P.J.Cv. dismissed the Complaint without prejudice. 1T.

On May 17, 2022, Mr. Dalal filed a Verified Amended Complaint. (Pa-27). Thereafter, on July 25, 2022, Defendant HCPO filed an Answer. (Pa-87).

On January 17, 2023, during a hearing, Judge Turula denied Mr. Dalal's motion to compel discovery and granted the DCJ's motion to quash Mr. Dalal's subpoena duces tecum. 2T

On July 5, 2023, during a hearing, Judge Turula dismissed the Verified Amended Complaint with prejudice. 3T; Pa-9.

On July 14, 2023, Mr. Dalal filed a Notice of Appeal with the Appellate Division of the Superior Court of New Jersey. (Pa-1)

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<sup>1</sup> The transcripts are referenced as follows:

1T March 4, 2022 Oral Argument - Motion to Dismiss  
2T January 17, 2023 Oral Argument - Motion to Compel Discovery  
3T July 5, 2023 Oral Argument - Plenary Hearing

STATEMENT OF FACTS

**I. The Removal Proceedings Against Bergen County Criminal Presiding Judge Liliana DeAvila-Silebi**

Silebi was employed by the Bergen County Prosecutor's Office as an assistant prosecutor for over 15 years prior to her appointment as a Superior Court judge in 2008. *October 24, 2017 Presentment, In re Liliana DeAvila-Silebi, Advisory Committee on Judicial Conduct ("ACJC") Docket No.: ACJC 2016-001 ("ACJC Presentment")*. In 2010, Silebi became the Presiding Judge of the Criminal Part of the Bergen County Vicinage of the Superior Court. On May 1, 2015, at her own request, Silebi was reassigned to the Civil Division of the Passaic County Vicinage of the Superior Court and ceased to be a judge in Bergen County. *Id.*

On October 20, 2016 the New Jersey Supreme Court's Advisory Committee on Judicial Conduct ("ACJC") issued an ethics complaint against Silebi. *Id.* On October 24, 2017, the ACJC recommended Silebi's removal from the bench. *Id.*

The ACJC found by clear and convincing evidence that on May 9, 2015, Silebi called the Fort Lee, New Jersey Police Department ("FLPD") and provided a sergeant there with a false report and other false information for the purpose of obtaining a benefit for her friend. *Id.* Specifically, the ACJC found that Silebi falsely claimed to be a Bergen County Judge, falsely claimed to have a nonexistent court order, and unlawfully intervened in a child



custody dispute in Essex County and had a child removed from her friend's husband's home and into her friend's custody. *Id.*

The ACJC determined that Silebi "knowingly and purposefully abused her judicial office" and "in furtherance of this misconduct, made material misrepresentations of fact to the FLPD to induce it to act." Significantly, the committee determined that the fact that Silebi's friend "obtained a benefit" as a result of Silebi's misconduct is "irrefutable." *Id.*

The ACJC ultimately held that Silebi's "false swearing permeated the entirety of these proceedings," that Silebi's "attempts to conceal her misconduct before this Committee with false and misleading testimony renders her abuse of judicial office markedly more egregious than that of prior judicial disciplinary matters involving the misuse of the judicial office," and that her removal from office was required. *Id.*

In a June 2018 decision, a three-judge panel appointed by the New Jersey Supreme Court recommended Silebi's permanent removal from judicial office. *June 19, 2018 Panel Report, In re Liliana DeAvila-Silebi, Supreme Court of New Jersey Docket No.: 080232* ("Panel Report"). The Supreme Court panel found beyond a reasonable doubt that Silebi committed the unethical and criminal acts as previously determined by the ACJC, and further revealed that Silebi submitted fabricated phone records to ACJC and to the panel. *Id.*

The panel found "beyond a reasonable doubt" that "[Silebi] intentionally misused her office to advantage another, thereby

violating the public trust and compromising the integrity and independence of the judiciary." *Id.* Critically, this language almost mirrors that of New Jersey's official misconduct statute, N.J.S. 2C:30-2. The panel held "[Silebi]'s misrepresentations to FLPD were numerous and, in at least one instance, admitted." See *Panel Report*.

Silebi's "conduct on May 9, 2015, demonstrated dishonesty, perversion of her judicial authority and betrayal of the public trust" and her "intercession ... represented a patent abuse of her office." *Id.* In reference to fabricated cellular phone records produced by Silebi and entered into evidence before the panel, the panel found beyond a reasonable doubt that "it is obvious that some alteration occurred in the voluntarily produced phone bill." *Id.* The actual phone records, which were subpoenaed from Verizon, "prove beyond any doubt that far from being strangers, [Silebi and her friend] were in frequent communications during the months leading up to [Silebi]'s May 9, 2015 call to FLPD ... The false statements [Silebi] made to FLPD Sergeant Ferraro on May 9, 2015, induced police to act on behalf of her former intern. *Id.* [Silebi] repeated those false assertions, in one form or another, at every opportunity before the ACJC." *Id.* The panel concluded that "[Silebi]'s decision to supply less than truthful ... testimony before the ACJC and obviously altered telephone records to this panel, demonstrates a lack of respect for the law." *Id.*

On September 26, 2018, the New Jersey Supreme Court "having found beyond a reasonable doubt that [Silebi] violated ... the Code of Judicial Conduct by misusing her judicial office to advance the private interests of a litigant, by making false statements under oath before the ACJC, and by submitting altered telephone records to the panel to perpetuate her prior false statements" ordered Silebi "removed from judicial office and [ ] permanently barred from holding judicial office in this State..." Pa-47; In re DeAvila-Silebi, 235 N.J., 218, 219 (2018)

**II. The Criminal Charges Against Silebi**

On October 29, 2019, after it became apparent that state prosecutors would allow the statute of limitations to run on the charges against Silebi, Plaintiff filed a citizen complaint against Silebi in the Municipal Court of Fort Lee. Pa-32.

On November 21, 2019, Hudson County Chief Municipal Judge Frank Carpenter found there was probable cause that Silebi committed numerous crimes and issued a Complaint-Warrant for Silebi's arrest on all four charges requested by Plaintiff: (a) 2<sup>nd</sup>-degree official misconduct in violation of N.J.S. 2C:30-2(a); (b) 4<sup>th</sup>-degree obstructing administration of law in violation of N.J.S. 2C:29-1(a); (c) 3<sup>rd</sup>-degree false report to law enforcement in violation of N.J.S. 2C:28-4(a); and (d) 4<sup>th</sup>-degree fictitious report to law enforcement in violation of N.J.S. 2C:28-4(b). Pa-49 to 52. On February 20, 2020, based on Plaintiff's same complaint, the

Municipal Court of Fort Lee issued Complaint-Summonses against Silebi charging her with the same offenses. *Pa-54 to 64.*

The New Jersey Attorney General's Office of Public Integrity and Accountability advised the HCPO that it would not "take on" Plaintiff's charges and referred the prosecution to the HCPO. *Pa-115.* The criminal investigation and prosecution of *State v. Liliana DeAvila-Silebi* were then assigned to the HCPO. *Pa-33 to 34; 74 to 78; 115.* According to HCPO Civil Litigation Chief John P. Libretti ("Libretti"), "The complaints remained the responsibility of the HCPO to prosecute or dismiss.". *Pa-115.* The HCPO's investigation and prosecution in *State v. Liliana DeAvila-Silebi* were supervised by HCPO Deputy First Assistant Prosecutor Peter Stoma ("Stoma"). *Pa-33 to 34.*

On May 6, 2021, Stoma chose to administratively dismiss Plaintiff's charges against Silebi *Pa-121, 122* based on "Insufficient Evidence" and the following claim:

"The underlying incident was evaluated at the highest levels of the NJ Attorney general's Office and they determined that a criminal prosecution was not warranted. The interest of justice dictates that this Office not revisit that decision."

*Pa-122, 123.*

Prior to dismissing the case, HCPO employees exchanged 52-pages of emails with New Jersey Division of Criminal Justice employees regarding the charges in the case of *State v. Liliana DeAvila-Silebi*. *Pa-80 to 86.*

As Judge Turula acknowledged, Hudson County Prosecutor Esther Suarez and HCPO First Assistant Prosecutor Wayne Mello were Silebi's former colleagues. 1718-14 to -18.

### **III. Plaintiff's Public Records Request and Lawsuit**

On July 26, 2021, Plaintiff submitted a request for records pursuant to the Open Public Records Act ("OPRA") and the common law right of access to public records to Defendant HCPO. Pa-39 to 40. The request seeks all documents related to the HCPO's investigation or prosecution of the criminal case of State of New Jersey v. Liliana DeAvila-Silebi, Complaint-Warrant No.: W-0219-2019-000669 and any court filings by the HCPO in that matter. Id. The request further seeks communications between the Hudson County Prosecutor's Office and the New Jersey Division of Criminal Justice and the Bergen County Prosecutor's Office regarding the case. Id.

The HCPO denied the request in an August 9, 2021 dated response by Libretti stating, "The HCPO is making it very clear, that to the best of its knowledge, information and belief, except for the records it disclosed to you in its November 5, 2020 response, it possesses no other records responsive to your current request." Pa-42 to 43. In response to the previous request, the Libretti disclosed a summons and stated, "[t]he HCPO possesses no other records in response to your request." Pa-69, 70.

Subsequently, on August 19, 2021, Plaintiff filed a Verified Complaint in the Superior Court of New Jersey, Hudson County

Vicinage claiming the HCPO violated his common law right of access to public records. Pa-16 to 26.

**IV. The Trial Court's Dismissal of the Complaint Without Prejudice**

On March 4, 2022, Judge Turula heard arguments on the HCPO's motion to dismiss the Verified Complaint. 1T. The HCPO relied entirely on Libretti's October 12, 2021 certification, claiming, "it is submitted that there are no other records to disclose and that Plaintiff's case should be dismissed with prejudice for failure to state a claim." Pa-77. The HCPO's attorney, Hudson County First Assistant County Counsel Michael L. Dermody ("Dermody") reiterated this position stating:

"An attorney at that office, John libretti, supplied documents that they had. I think it was one document, and it was a summons and a complaint against the former judge, to Mr. Dalal. And he represented that that's the only document they have. So having complied with the OPRA request, there's no reason for the lawsuit."

1T4-13 to -19.

Dermody continued to insist that the HCPO had no other records stating, "[a]nd that's the only document that they had. ... You can't produce what you don't have. ... And [Libretti] tells me he made inquiry and that no one in his office had anything else ... whoever he made the inquiry of, the appropriate prosecutor, or the appropriate people in the Prosecutor's Office, they had - they told him they had nothing else." 1T4-9 to 8-4. Finally, to support these contentions, Dermody against relied on Libretti stating, "Well, I mean, Mr. Libretti is an attorney. And I'd like to think that he -

you know, he's bound ethically to act in good faith. And I'm sure he did here in terms of attempt to find out what the Prosecutor's Office had." 1T9-14 to -18.

Plaintiff then explained that the HCPO had completely failed to meet the requirements set forth by the Appellate Division in Paff v. New Jersey Dep't. of Labor, 392 N.J. Super. 334, 341 (App. Div. 2007):

"MR. DALAL: Sure. And, you know, the Appellate Division has required that in these OPRA cases that the agency is required to submit an affidavit describing the nature of the search that was conducted. And we have nothing. We don't know how they conducted the search for records. We don't - again we don't know if all databases were searched. So I would submit that their request - their motion to dismiss should be denied just on that basis alone. The Appellate Division has made it clear that under the Paff decision a description of a search is required."

1T11-17 to 12-2.

After that, Plaintiff noted that he had presented evidence from the New Jersey Division of Criminal Justice that there did exist some emails between the DCJ and the HCPO that had not been disclosed. 1T16-16 to 24.

Judge Turula then dismissed the complaint without prejudice for the following reasons:

"I find that the Hudson County Prosecutor's Office did submit the documents per the request of Mr. Dalal. And that there is nothing more that could be done. They didn't - Hudson County argues that they did not conceal and information provided, they comply with what was required of them. And they say they disclosed the requirements under Paff. And there is nothing else that they have."

1T21-11 to 18; Pa-14.

### V. Plaintiff's Discovery Requests and Motions

On May 2, 2022, Plaintiff obtained a certification from New Jersey Attorney General's Office Lieutenant Edward Augustyn attesting to the fact that there were 52-pages of emails between HCPO employees, Bergen County Prosecutor's Office employees, and New Jersey Division of Criminal Justice ("DCJ") employees regarding Plaintiff's charges against Silebi. *Pa-80 to 86.*

On May 17, 2022, Plaintiff filed a Verified Amended Complaint attaching Lt. Augustyn's certification. *Pa-27.* On June 22, 2022, Judge Turula "granted plaintiff's motion to amend his complaint which included new facts that support the defendant's falsely denied the existence of emails." *2T11-23 to 12-1.* Defendant HCPO then filed an Answer, but did not file any dispositive motions. *Pa-87.*

On August 3, 2022, Plaintiff served a set of interrogatories and requests for production on Defendant HCPO that were specifically designed to ferret out what other responsive records the agency possessed. *Pa-97.* On September 12, 2022, Plaintiff served a subpoena duces tecum on the DCJ similarly seeking to determine what responsive records existed. *Pa-92.*

On January 17, 2023, Judge Turula heard oral argument on Plaintiff's motion to compel discovery against the HCPO and the DCJ's motion to quash Plaintiff's subpoena. *2T.* Plaintiff argued that, given that the HCPO lied about the existence of records, including emails, discovery was necessary to determine the scope of



responsive records that the agency possessed. 2T4-9 to 4-24; 2T13-15 to 18.

Judge Turula granted the DCJ's and the HCPO's motion to quash Plaintiff's subpoena, *Pa-10*, and denied Plaintiff's motion to compel discovery. *Pa-12*. The trial court placed the following reasons on the record:

"While plaintiff argues that his requested discovery is necessary to determine what records the HCPO actually possesses allowing plaintiff to compel the same documents from his denied OPRA request would have the same effect as if the court found the plaintiff - for plaintiff on the merits. ... Since plaintiff's discovery request is identical to the information plaintiff seeks to access under the OPRA and common law right of access, the Court shall not enlarge plaintiff's right to those documents simply because plaintiff is now a litigant."

2T16-14 to 17-11.

#### **VI. The Trial Court's Dismissal of the Complaint With Prejudice**

On July 5, 2023, a third hearing was held and Judge Turula dismissed Plaintiff's Verified Amended Complaint with prejudice for the following reasons:

"But the Court also shall not order defendant to disclose the requested records pursuant to the common law right of access because they are not common law public documents. To succeed in this claim, plaintiff must demonstrate that the records he sought were common law public documents. That's (1), (2), that he had an interest in the subject matter of the material, and 93) his right to access is balance against defendant's interest in preventing disclosure. That's *Keddie*, again at 30 - at 50.

Like the language in OPRA, the definition for criminal investigatory records and common law public document is one that is required by law to - made, maintain or kept on file. However again, the Court could not find, nor did the parties find any law - or case law that requires agency emails to be made, maintained, or kept on file. For this reason the records

sought by plaintiff are not common law public documents. The Court need not address the other two requirements, such as the requirement of the common law to access in all three criterias that are required. So, if one doesn't - if you don't have one you don't have to proceed to the other two. And then, therefore, plaintiff fails to meet the burden of the first.

Thus, the Court shall not order the defendant to disclose the records pursuant to the plaintiff's common law right of access and the application is designed[.]”

3T19-12 to 20-14.

In his Order, Judge Turula stated, “Plaintiff is not entitled under the common-law right to access as the records are not required by law to be made, maintained, or kept on file, as enumerated on the record on July 5, 2023, at 10:45AM.” Pa-9.

LEGAL ARGUMENT

POINT I:

**THE TRIAL COURT ERRONEOUS DETERMINED THAT CRIMINAL INVESTIGATORY RECORDS ARE EXEMPT FROM THE COMMON LAW RIGHT OF ACCESS TO PUBLIC RECORDS (raised below, Pa-9; 3T9-4 to 10-4; 3T17-9 to -12)**

The responsive emails and other documents related to the HCPO's handling of official misconduct charges against Silebi fall under the definition of common law records and the trial court erroneously ruled otherwise. After failing to require the HCPO to provide the affidavit and information required by Paff and failing to require the agency to produce a Vaughn Index, the trial court finally dismissed the complaint with prejudice by again distorting the law. It achieved this by (1) contorting and misapplying the language in Keddie which defines a common law record as "one that is made by a public official in the exercise of his or her public function, either because the record was required or directed by law to be made or kept, or because it was filed in a public office." Keddie v. Rutgers, 148 N.J. 36, 49 (1997) and (2) transposing OPRA's criminal investigatory records exception onto the common law right of access.

It is apparent the trial court improperly narrowed the definition of a common law record when it held that "Like the language in OPRA, the definition for criminal investigatory records and common law public document is one that is required by law to - made, maintain or kept on file." 3T19-22 to 24. Common-law records, however, are any "records 'made by public officers in the exercise

of public functions.'" Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 46 (1995). "'These materials include almost every document recorded, generated, or produced by public officials whether or not 'required by law to be made, maintained or kept on file,' as required under" the Right-to-Know Law." Id. (emphasis added) (quoting Shuttleworth v. City of Camden, 258 N.J. Super. 573, 582 (App. Div.), cert. denied, 133 N.J. 429 (1992)).

Furthermore, OPRA's criminal investigatory records exception does not apply to the common law right of access to public records. N.J.S. 47:1A-8 ("Nothing contained in [OPRA] shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency.") The trial court erroneously lifted the definition of "criminal investigatory record" in OPRA, which is "a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding", N.J.S. 47:1A-1.1, and imposed it on the common law right of access. As the Supreme Court has repeatedly held, "OPRA does not limit the right of access to government records under the common law" and "[t]he definition of a public record under the common law is broader than under OPRA." Rivera v. Union County Prosecutor's Office, 250 N.J. 124, 143 (2022).

The emails between the HCPO and the Attorney General's Office regarding the Silebi's prosecution were made by public officials

exercising their public functions and were kept on file in a public office. Simply put, they constitute common law public records and the trial court's ruling must be reversed.

POINT II:

**THE TRIAL COURT ERRONEOUSLY DENIED DISCLOSURE OF THE RESPONSIVE RECORDS UNDER THE COMMON LAW RIGHT OF ACCESS TO PUBLIC RECORDS (raised below, Pa-9; 3T4-5 to 6-16).**

The Court should exercise original jurisdiction, balance the Loigman and Rivera factors, and order disclosure of the responsive records. R. 2:10-5. Plaintiff recognizes that the common law balancing test is one that is ordinarily conducted by trial courts, Rivera, 250 N.J. at 145-147, but remanding this case to the same trial judge for a fourth hearing and yet another opportunity to misapply the law would be an exercise in futility and a waste of time and resources. What occurred below was not a mistake or confusion over a complex area of law: This is public records case and the trial judge is the Presiding Civil Judge. Public records cases are to be conducted in a summary and expedited manner. This Court can and should invoke original jurisdiction "to eliminate unnecessary further litigation," State v. Santos, 210 N.J. 129, 142 (2012), and because the public interest favors "an expeditious disposition of [a] significant issue[]," Karins v. City of Atlantic City, 152 N.J. 532, 540-41 (1998).

A balancing of the relevant factors the court must consider in evaluating a common law right of access claim requires the release

of all records responsive to Mr. Dalal's request regarding the HCPO's failure to prosecute former judge Silebi after a judge found probable cause to issue public corruption charges against her. The public deserves to know why the HCPO actually declined to prosecute a corrupt public official and the records requested by Mr. Dalal will shed light on the reasons underlying the HCPO's and the Attorney General's Office's decision. The Court should consider the lack of an open investigation, the closure of the case, the fact that it was Mr. Dalal who initiated the charges against Silebi, rather than some person who wishes to maintain their confidentiality, the seriousness of the charges against Silebi, the substantial evidence against Silebi, and the relationships between HCPO prosecutors and Silebi in weighing whether to order disclosure of responsive records.

**A. The Common Law Right of Access Balancing Test**

The definition of a public record under the common law is broader than under OPRA. Mason v. City of Hoboken, 196 N.J. 51, 67 (2008). To constitute a common law public record, an item must "be a written memorial . . . made by a public officer, and . . . the officer [must] be authorized by law to make it." Nero v. Hyland, 76 N.J. 213, 222 (1978).

To obtain records under "this broader class of materials ... (1) 'the person seeking access must establish an interest in the subject matter of the material'; and (2) 'the [person's] right to access must be balanced against the State's interest in preventing

disclosure.'" North Jersey Media Group, Inc. v. Township of Lyndhurst, 229 N.J. 541, 578 (2017) (quoting Mason, 196 N.J. at 67-68).

In Loigman v. Kimmelman, the New Jersey Supreme Court identified six factors courts must consider in balancing these competing interests. 102 N.J. 98, 108 (1985). Recently, the New Jersey Supreme Court noted that "[t]he Loigman factors are not a complete list of relevant considerations[.]" Rivera, 250 N.J. at 147. The Loigman factors "largely examine only one side of the balancing test -- the need for confidentiality." Id. Furthermore, the six Loigman factors "should be balanced against the importance of the information sought to the plaintiff's vindication of the public interest." Id.

Importantly, "[a]s the considerations justifying confidentiality become less relevant, a party asserting a need for the materials will have a lesser burden in showing justification." Techniscan v. Passaic Valley Water, 113 N.J. 233, 236 (1988). "If the reasons for maintaining confidentiality do not apply at all in a given situation, or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a compelling need." Id.

**B. Records Regarding the Public Corruption Investigation and Prosecution of a Superior Court Judge Should be Disclosed**

1. **Mr. Dalal has a both a private and public interest in responsive records.**

As previously noted, a plaintiff must demonstrate an interest in the requested records. "The requisite interest necessary to accord a plaintiff standing to obtain copies of public records may be either 'a wholesome public interest or a legitimate private interest.'" Higg-A-Rella, Inc., 141 N.J. at 47. As the Supreme Court has noted, "[t]he interest does not have to be purely personal, but rather '[a]s one citizen or taxpayer out of many, concerned with a public problem or issue, he might demand and be accorded access to public records bearing upon the problem, even though his individual interest may [be] slight.'" South Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 487 (1991) (quoting Irval Realty, Inc. v. Board of Pub. Util. Comm'rs, 61 N.J. 366, 372 (1972)).

Plaintiff brought four criminal charges, including charges of second-degree official misconduct against a corrupt former judge after government prosecutors failed to do so. Upon reviewing a citizen complaint and evidence submitted by Mr. Dalal, Hudson County Chief Municipal Judge Frank Carpenter found probable cause to issue a warrant for the arrest of the former judge. The New Jersey Attorney General's Office of Public Integrity and Accountability, however, declined to "take on" the criminal charges and referred the prosecution to the HCPO. The HCPO in turn declined to prosecute Silebi. Prosecutors in the HCPO and the Attorney General's Office of Public Integrity and Accountability had a mountain of evidence with which to charge and convict Silebi,



including findings by multiple Supreme Court panels that Silebi committed criminal conduct beyond a reasonable doubt.

Plaintiff clearly has a personal interest in the records generated as a result of the criminal charges he brought. Beyond this personal interest, Plaintiff has an interest as a citizen in ensuring that the state's laws are uniformly enforced and that corrupt public officials are investigated and prosecuted. The public shares this interest as well and deserves to know why this corrupt judge was not ultimately prosecuted for public corruption charges where a judge found probable cause to issue a warrant for her arrest. The charges brought by Mr. Dalal exposed Silebi to a total of 18 years of prison, but were dismissed by the HCPO for questionable reasons. While the HCPO claims there was "insufficient evidence", two Supreme Court panels found beyond a reasonable doubt that Silebi engaged in certain misconduct which also violates the criminal code.

Significantly, there exists the specter of a coverup in this case further heightening the public interest given the prior professional relationships between the Hudson County Prosecutor, HCPO First Assistant Prosecutor, and Silebi. These ties are likely to have influenced the HCPO's decision not to prosecute Silebi.

**2. The Rivera factors weigh in favor of disclosure.**

In Rivera, the Supreme Court recently held that "[t]he public interest in transparency may be heightened in certain situations depending on a number of considerations" and set forth a list of

five factors courts must consider in evaluating the public interest in disclosure of agency records. Rivera, 250 N.J. at 148. The records here concern a prosecutor's office's failure to prosecute and cover-up of public corruption charges brought against a former Superior Court judge, who engaged in serious misconduct. All five factors auger in favor of disclosure under the facts of this case.

The public has an interest in (a) ensuring that New Jersey's criminal laws are uniformly enforced; (b) determining whether judges and former prosecutors like Silebi receive preferential treatment from the Attorney General, the DCJ, or county prosecutors; and (c) determining whether any political considerations played a role in the prosecution or lack thereof of Silebi.

- (1) *the nature and seriousness of the misconduct. Serious misconduct gives rise to a greater interest in disclosure. For example, misconduct that involves the use of excessive or deadly force, discrimination or bias, domestic or sexual violence, concealment or fabrication of evidence or reports, criminal behavior, or abuse of the public trust can all erode confidence in law enforcement and weigh in favor of public disclosure;*

Chief Hudson County Municipal Judge Frank Carpenter found probable cause to issue a complaint-warrant against Silebi for four separate criminal charges, including a 2<sup>nd</sup>-degree charge of official misconduct, which exposed Silebi to 18 years in prison. This was based on irrefutable evidence of Silebi's statements to the Fort Lee Police Department falsely claiming that she was a judge on emergent duty, falsely claiming to have a court order, and

misleading police into kidnapping a child in order to benefit her friend.

A Supreme Court panel found "beyond a reasonable doubt" that "[Silebi] intentionally misused her office to advantage another, thereby violating the public trust and compromising the integrity and independence of the judiciary." The panel held "[Silebi]'s misrepresentations to FLPD were numerous and, in at least one instance, admitted." Silebi's "conduct on May 9, 2015, demonstrated dishonesty, perversion of her judicial authority and betrayal of the public trust" and her "intercession ... represented a patent abuse of her office."

In the face of this, the HCPO failed to prosecute Silebi.

*(2) Whether the alleged misconduct was substantiated.  
Unsubstantiated or frivolous allegations of misconduct  
present a less compelling basis for disclosure;*

Here, two separate Supreme Court panels found beyond a reasonable doubt that Silebi engaged in conduct that violated the Judicial Code of Conduct. The Advisory Committee on Judicial Conduct found that Silebi "knowingly and purposefully abused her judicial office". Another three-judge panel found "beyond a reasonable doubt" that "[Silebi] intentionally misused her office to advantage another, thereby violating the public trust and compromising the integrity and independence of the judiciary." Hudson County's top municipal judge found probable cause to issue warrants for Silebi's arrest on four criminal charges. Against despite these circumstances, the HCPO declined to prosecute Silebi.

*(3) the nature of the discipline imposed. Investigations that result in more serious discipline, like an officer's termination, resignation, reduction in rank, or suspension for a substantial period of time, favor disclosure.*

Here, the nature of discipline imposed on Silebi was extraordinarily serious because the Supreme Court ultimately ordered Silebi "removed from judicial office and permanently barred from holding judicial office in this State." The Supreme Court also suspended Silebi from the practice of law for a period of three years. In re Silebi, 249 N.J. 3 (2021).

*(4) the nature of the official's position. Wrongdoing by high-level officials can impair the work of the department as a whole, including the functioning of the internal affairs process;*

Here, Silebi was the Presiding Judge of the Criminal Part of the Bergen County Vicinage of the Superior Court of New Jersey. In other words, Silebi was the top criminal judge in the most populous county in the state. Prior to that, Silebi was an assistant prosecutor for 15 years. Consequently, in criminal charges involving a defendant-judge of this magnitude, it is likely that the individuals involved in the decision not to prosecute Silebi were the highest-ranking officials in the HCPO.

*(5) the individual's record of misconduct. The public's interest in disclosure extends to all officers -- regardless of rank -- whose serious or repeated misconduct may pose a danger to the public.*

Silebi's misconduct was prolific rather than isolated.

"[Silebi]'s misrepresentations to [the police] were numerous and,

in at least one instance, admitted." "[Silebi] repeated those false assertions, in one form or another, at every opportunity before the ACJC." Silebi further submitted fabricated and altered phone records to a three-judge Supreme Court panel. While Silebi has been removed from office, there is no question that dishonesty is in her nature and she will continue to pose a threat to the public whatever profession she pursues next.

**3. The Loigman factors weigh in favor of disclosure.**

An evaluation of the Loigman factors further requires the disclosure of documents, including emails, concerning the HCPO's investigation and decision to decline to prosecute Silebi. Each of the six factors, when applied to the facts of this case, weigh in favor of the public interest in disclosure of records and information concerning the HCPO's failure to prosecute public corruption charges against a former judge. Loigman, 102 N.J. at 113.

Most importantly, because the HCPO's investigation of the matter is over and that the HCPO has made it clear that it has declined to prosecute Silebi, there is no need for confidentiality. "The timing of a request may affect the balancing process" because "the need for confidentiality in investigative materials may wane after the investigation is concluded." NJMG, 229 N.J. at 580 n.10. "While there is a real need to deny access where there is an ongoing law enforcement investigation, or where the protection of witness information or a witness's identity is at stake, the same

values do not survive a balancing after the investigation is closed." Shuttleworth, 258 N.J. Super. at 585.

- (1) *the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government;*

Here, the HCPO failed to prosecute public corruption charges that Mr. Dalal procured against a corrupt former judge. A judge found probable cause to issue a warrant for the judge's arrest on four criminal charges after Mr. Dalal presented evidence to him. Disclosure of documents, including emails, concerning the HCPO's failure to prosecute these serious criminal charges would not discourage citizens from providing information to the government. In fact, disclosure would have the opposite effect. Citizens will be encouraged to provide information to the government if the documents reveal a fair and unbiased decision making process.

- (2) *the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed;*

Regarding the first two Loigman factors, here, it was Mr. Dalal who brought the criminal charges against Silebi and this case for access to records regarding the HCPO's failure to ultimately prosecute Silebi. These two factors plainly weigh in favor of disclosure because disclosure of the records would not discourage Mr. Dalal or other citizens from pursuing criminal charges against corrupt public officials. Furthermore, when citizens like Mr. Dalal bypass county prosecutors and directly bring criminal charges, they

must file public certifications and swear an oath before a judge.

R. 7:2-1(a). Therefore, there are no issues of witness or complainant confidentiality.

3. *the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure;*

With regard to the third Loigman factor, there is nothing to indicate that the responsive records contain any information regarding agency self-evaluation or program improvement. Furthermore, there is nothing to indicate that the HCPO's decisionmaking would be chilled by disclosure. Here, two Supreme Court panels already found proof beyond a reasonable doubt that Silebi committed the acts underlying the criminal charges Mr. Dalal ultimately brought. Another judge found probable cause to issue a warrant for Silebi's arrest on these public corruption charges. If anything, the HCPO's decision not to prosecute Silebi in light of the weight of evidence raises questions about the HCPO's integrity and the corruption of its decisionmaking process.

- (4) *the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers;*

As to factor 4, the HCPO has failed to provide any evidence that the responsive records contain evaluative reports of policymakers. Even if the records contain evaluative reports, there is an appearance that the HCPO's evaluative process here was corrupted. A judge found probable cause to issued warrants for the

arrest of Silebi on public corruption charges, but the HCPO nevertheless declined to prosecute her. Any ordinary citizen would have been prosecuted under such circumstances. In this case, the disclosure of both factual and evaluative information would be in the public interest.

*(5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and*

Loigman factor 5 further weighs in favor of disclosure because a judge has found probable cause for the issuance of a warrant for Silebi's arrest on official misconduct charges, but the HCPO has failed to take remedial measures in response. Indeed, Mr. Dalal seeks records regarding the agency's failure to prosecute charges for which there was substantial evidence.

*(6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.*

As to Loigman factor 6, there are no agency disciplinary or investigatory proceedings related to the HCPO that may circumscribe Mr. Dalal's, and consequently the public's, need for responsive records. The ethics proceedings against Silebi have long ended and the charges at issue arose out of those proceedings rather than vice versa. Regardless, there is nothing to suggest these proceedings would circumscribe access to records.



POINT III:

**THE TRIAL COURT ERRONEOUSLY DENIED MR. DALAL'S MOTION TO COMPEL DISCOVERY AND ERRONEOUSLY GRANTED THE DCJ'S MOTION TO QUASH MR. DALAL'S SUBPOENA. (raised below, 2T16-14 to 17-11; Pa-10, 12)**

The trial court erroneously denied Plaintiff's motion to compel discovery and granted the HCPO's and the DCJ's motion to quash Plaintiff's subpoenas in the face of a factual dispute regarding the HCPO's concealment of responsive records. The HCPO's Civil Litigation Chief, John P. Libretti, repeatedly lied in sworn certification and his responses to Plaintiff's records request that there existed no responsive records beyond a Summons<sup>2</sup>. His lies were exposed after Plaintiff obtained a certification from a high ranking DCJ official stating there were at least 52-pages of emails between the HCPO and the DCJ regarding the charges against Silebi. The discovery requests and subpoenas therefore were specifically designed to uncover the existence of responsive records and given the demonstrably false statements by the agency's records custodian, should have been allowed to proceed.

Under certain circumstances, discovery is appropriate in public records cases. For example, in Newark Morning Ledger Co. v. New Jersey Sports & Exposition Authority, depositions were conducted in the OPRA case. 423 N.J. Super. 140, 174-175 (App. Div. 2011). The Appellate Division has left the door open for discovery

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<sup>2</sup> Libretti's character and credibility are highly questionable. The New Jersey Supreme Court publicly reprimanded Libretti for gross negligence and other violations of the Rules of Professional Conduct. In re Libretti, 134 N.J. 123 (1993).

where a "legitimate need" for such discovery has been established. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 552 (App. Div. 2005). Federal courts have permitted discovery in Freedom of Information Act lawsuits where the plaintiff-requestor has made a "showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations." Carney v. United States Dep't of Justice, 19 F.3d 807, 812 (2nd Cir. 1994); In re Clinton, 973 F.3d 106, 113-114 (D.C. Cir. 2020). Importantly, there is no authority prohibiting discovery with regard to common law right of access to public records claims.

Here, Mr. Dalal demonstrated both a legitimate need for discovery and a show of bad faith on the part of the HCPO sufficient to impugn the agency's certifications. The HCPO's Civil Chief John Libretti and First Assistant Hudson County Counsel Michael Dermody both falsely claimed that the only document the HCPO possessed that was responsive to Mr. Dalal's records request was a Summons. Now, as both the HCPO and the DCJ admit, that was false. While it is now known that there exist 52-pages of emails between the HCPO and the DCJ, Plaintiff also sought the following items regarding the Silebi case:

- All memoranda, reports, and notes;
- All emails and letters between HCPO employees;
- All emails and letters between HCPO employees and county prosecutors or county prosecutors' employees;
- All emails and letters between HCPO employees and Silebi or her attorneys;

- All agreements not to prosecute Silebi;

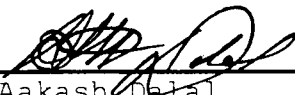
Pa-39, 40.

Under R. 4:10-2(a), the records sought through Plaintiff's subpoena must be disclosed, as it remains unknown what additional responsive documents and emails the HCPO possesses that are responsive to Plaintiff's records request. Contrary to Judge Turula's claim that the discovery requests were identical to the underlying records requests, a review of these discovery requests demonstrates that they were specifically designed to ferret out the scope of responsive records in the HCPO's possession. Pa-97. This course of action was necessary due to both the HCPO's false certifications and the trial court's failure to hold the HCPO to the requirements set forth by this Court in Paff.

**CONCLUSION**

For the foregoing reasons, the judgment and orders below should be reversed.

Respectfully submitted:

  
\_\_\_\_\_  
Aakash Dalal  
Appellant, pro se

Dated: February 26, 2024

**AAKASH DALAL,**

**Plaintiff/Appellant,**

**V.**

**HUDSON COUNTY  
PROSECUTOR'S OFFICE,**

**Defendant/Respondent.**

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3567-22T4**

**Civil Action**

**On Appeal From:  
Superior Court of New Jersey  
Law Division: Hudson County  
Docket No: HUD-L-3384-21**

**Sat Below:  
Hon. Joseph A. Turula, P.J.Cv.**

**Submitted On: May 8, 2024**

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**BRIEF AND APPENDIX (Da1-Da67) ON BEHALF OF  
DEFENDANT/RESPONDENT HUDSON COUNTY PROSECUTOR'S  
OFFICE**

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**Dated: February 26, 2020**  
**(Omitted - same as Da1)**

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**Filed: February 1, 2023..... Da61**

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<sup>1</sup> This document is included in defendant's appellate Appendix because it is expressly incorporated by reference in the Custodian of Records' Statement of Information in response to item # 12 which requests "all facts and legal arguments in support of the Custodian's actions ..." (Pa85)



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## PRELIMINARY STATEMENT

Plaintiff/appellant Aakash Dalal filed suit against defendant/respondent Hudson County Prosecutor's Office ("HCPO") for alleged violation of the common law right of access to public records. Specifically, Dalal claimed that the HCPO withheld documents related to charges brought by Dalal against former Superior Court Judge Liliana DeAvila-Silebi ("Silebi").

Dalal is presently serving a 35-year prison term at South Woods State Prison in Bridgeton, NJ for terrorism, arson, and other crimes, after he orchestrated and firebombed multiple Jewish congregations. While on the bench in 2016, Silebi, then-Presiding Judge of the Criminal Division in Bergen County, issued decisions on Dalal's bail and suppression motions. In 2019, two years after Dalal was convicted and sentenced, he learned that Silebi had been removed from her judicial post for reasons unrelated to his case. He filed a citizen's Municipal Court Complaint against her based on her conduct in the unrelated matter. Dalal's Complaint was referred to the Attorney General's Office, Office of Public Integrity ("OPI") which, in turn, referred the matter to the HCPO for investigation. After a thorough investigation, the HCPO determined not to prosecute Silebi for the charges brought by Dalal.

Dissatisfied with the result, Dalal conducted a scorched-earth campaign to attempt to dig up "dirt" on the former judge. He submitted OPRA/common

law right of access requests to the HCPO and the Attorney General's Office, Division of Criminal Justice ("DCJ"), seeking email communications between the HCPO, the Bergen County Prosecutor's Office ("BCPO"), and the Attorney General's Office as well as documents pertaining to the investigation. The HCPO provided Dalal with an 11-page Complaint but indicated that it possessed no other responsive documents. The DCJ's response echoed the HCPO's. Dalal filed an OPRA/common law right of access Complaint against the HCPO in the Superior Court of New Jersey, Hudson Vicinage. The HCPO filed a Motion to dismiss Dalal's Complaint, citing OPRA's investigatory and deliberative process exceptions, which the trial court granted by Order on March 4, 2022.

Dalal then filed a challenge/Complaint with the Government Records Council ("GRC"). The GRC indicated that 52 pages of email communications existed, but Dalal did not have any entitlement to them under OPRA. In an attempt to resurrect his OPRA Complaint, Dalal filed an Order to Show Cause in Superior Court, claiming that the HCPO falsely denied the existence of responsive records and sought various relief, including leave to amend his Complaint. The trial court denied all of Dalal's requested relief but allowed amendment of the Complaint.

Dalal attempted to serve discovery, typically unavailable in a summary proceeding, to obtain the same records from the DCJ and HCPO which the trial

court determined were properly withheld under OPRA. The HCPO, again, responded that no responsive records existed. Dalal filed a Motion to Compel and the HCPO filed a Motion to Quash. The court below entered Orders on January 17, 2023 denying Dalal's Motion and granting the HCPO's request to quash the discovery requests.

After Dalal moved for summary judgment, the HCPO cross-moved, arguing that Dalal has no entitlement to the requested records under the common law right of access. On July 5, 2023 the trial court denied Dalal's Motion and entered an Order granting summary judgment in favor of the HCPO, finding that the records requested were not "public records" subject to disclosure under the common law right of access.

On appeal, Dalal challenges the dismissal of his Complaint on July 5, 2023, as well as the intermediate January 17, 2023 Orders quashing his discovery requests. The trial court properly concluded that any email communications regarding the investigation were not "public records" subject to disclosure under the common law right of access, and even if they were, Dalal cannot show that his interest in disclosure of the records outweighs the HCPO's interest in non-disclosure/maintaining confidentiality. Dalal was not entitled to discovery in a summary proceeding, and the trial court properly denied his Motion to compel.

## PROCEDURAL HISTORY AND STATEMENT OF FACTS<sup>1</sup>

### Background

In 2012, Dalal was charged with numerous crimes related to the firebombing of four synagogues and a Jewish Community Center. The 29 Count indictment included allegations of criminal mischief, conspiracy, arson, attempted arson, bias intimidation, and weapons offenses. State v. Dalal, 221 N.J. 601, 603 (2015). Former Judge Silebi, then the Presiding Judge of the Criminal Division, initially set bail for Dalal at \$2.5 million. Id. The following month, a different judge denied Dalal's request to reduce his bail. Id.

While Dalal was in custody, law enforcement discovered evidence that Dalal listed Silebi as a "high profile enemy" and labeled the assistant prosecutor assigned to his case as a "tactical" enemy. Id. at 603-604. Dalal was charged and indicted for conspiracy to murder the assistant prosecutor, conspiracy to possess a firearm, and terroristic threats. Id. at 604.

Dalal was eventually convicted of multiple crimes, including first-degree terrorism, first-degree aggravated arson, first-degree conspiracy to commit arson, and first-degree bias intimidation. State v. Dalal, 467 N.J. Super. 261, 267-68 (App. Div. 2021) He was sentenced to an aggregate term of 35 years in

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<sup>1</sup> The Procedural History and Statement of Facts are intertwined and have been combined for convenience of the court.



prison, with 30 years of parole ineligibility. Id. He is presently incarcerated at South Woods State Prison in Bridgeton, NJ.

**Dalal's Municipal Court Complaint against Silebi**

For reasons unrelated to Dalal's case, former Judge DeAvila-Silebi was transferred from Bergen County to another vicinage and later removed from the Judiciary. In re DeAvila-Silebi, 235 N.J. 218 (2018). Dalal first became aware of Silebi's "misconduct" sometime in 2018-2019 after the Supreme Court entered an Order with respect to Silebi. (Pa47; Pa116); see In re DeAvila-Silebi, id.

In October 2019, Dalal filed a citizen's Complaint in Fort Lee Municipal Court against Silebi, charging her with official misconduct, obstruction of administration of the law, false reports to law enforcement and fictitious reports to law enforcement concerning an incident involving Silebi when she was a Bergen County Superior Court Judge in May 2015, and unrelated to any matter involving Dalal. (Pa49; Pa115)

On October 29, 2019, Dalal filed a probable cause certification in the Fort Lee Municipal Court. (Id.) On November 12, 2019, Dalal's Complaint against Silebi was transferred to the HCPO for review for potential prosecution. On February 20, 2020, Hudson County Presiding Municipal Judge Frank Carpenter found probable cause for Dalal's charges against Silebi. (Pa115) Dalal's

OPRA/common law right of access lawsuit relates to the HCPO's investigation with respect to his citizen's Complaint against Silebi.

**Dalal's OPRA/Common Law Right of Access Requests**

On or about February 26, 2020, Dalal sent an OPRA and common law right of access request to the DCJ for records purportedly pertaining to his citizen's Complaint filed against Silebi. (Da1) Dalal specifically requested: (1) emails and letters between the DCJ and the BCPO between November 8, 2019 and the present concerning State of New Jersey v. Liliana S. DeAvila-Silebi, Complaint-Warrant Number W-0219-2019- 000669; (2) emails and letters between the DCJ and the HCPO between November 8, 2019 and the present concerning State of New Jersey v. Liliana S. DeAvila-Silebi, Complaint-Warrant Number W-0219-2019-000669; and (3) all documents filed in the Superior Court of New Jersey by the DCJ in State of New Jersey v. Liliana S. DeAvila-Silebi, Complaint Warrant Number W-0219-2019-000669. (Id.)

On August 7, 2020, the DCJ Custodian denied requests (1) and (2) as inter/intra agency advisory, consultative, or deliberative material, and as criminal investigatory records. (Da2) The Custodian denied request (3) as records not made, maintained, filed or received by the Division. (Id.) On or about March 7, 2022, Dalal filed a Denial of Access Complaint with the GRC alleging that the DCJ Custodian unlawfully denied requests (1) and (2) because there was no indication from DCJ

that an investigation was conducted and that any communications were not pre-decisional. (Pa80)

On October 8, 2020, Dalal submitted an OPRA and common law right of access request to the HCPO which is virtually identical to his DCJ request. (Pa66) On November 5, 2020, the HCPO served a response, which attached a copy of the 11-page Complaint and indicated that it possessed no other responsive records. (Pa69) Dalal requested reconsideration of the response, which the HCPO declined by letter, dated December 10, 2020. (Pa73-74)

Dalal filed another request on July 26, 2021 which was virtually identical to his October 8, 2020 request. (Pa39; Pa66) The HCPO submitted a response on August 9, 2021, stating that, in November 5, 2020, it had forwarded all records concerning the matter and reiterated that it possessed no other responsive records. (Pa42)

### **The Instant Lawsuit**

Dalal filed a Complaint against the HCPO on August 19, 2021 in the Superior Court of New Jersey, Law Division, Hudson County, alleging violation of the common law right of access. (Pa16) On January 24, 2022, the HCPO moved for a dismissal of the Complaint. The Hon. Joseph A. Turula, P.J.Cv. dismissed the Complaint by Order entered on March 4, 2022. (Pa14) In its oral decision, the trial court held:

I find that the Hudson County Prosecutor's Office did submit the documents per the request of Mr. Dalal. And that there is nothing more that could be done. They didn't -- Hudson County argues that they did not conceal any information provided, they compl[ied] with what was required of them. And they say they disclosed the requirement under Paff. And there is nothing else that they have.

(1T, 21-11 to 18; Pa-14)<sup>2</sup>

Thereafter, on March 7, 2022, Dalal filed a Denial of Access Complaint/Statement of Information Request with the Government Records Council, No. 2022-55 alleging that DCJ unlawfully denied items 1 and 2 of his request. (Pa80) On May 2, 2022, the DCJ filed a response to the GRC Complaint, claiming to have responsive emails but asserting that Dalal was not entitled to the records as they are criminal investigatory and inter/intra agency advisory, consultative, or deliberative materials.<sup>3</sup> (Id.)

On May 23, 2023, based on the GRC response and in an attempt to reinstate his Complaint, Dalal filed an Order to Show Cause declaring that the HCPO falsely represented to the trial court that it had no documents other than the Complaint previously supplied to Dalal, seeking to hold the HCPO and its Chief of Civil

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<sup>2</sup> 1T refers to the transcript dated March 4, 2022.

2T refers to the transcript dated January 17, 2023.

3T refers to the transcript dated July 5, 2023.

<sup>3</sup> The HCPO was not aware of the OPRA request to or a response by the DCJ until it reviewed the response in May 2022. (Pa115)

Litigation John Libretti in contempt, and requesting permission to file an Amended Complaint. (Da4) On June 2, 2022, the trial court entered an Order denying Dalal's request for relief but permitted Dalal to amend his Complaint. (Da7) While Dalal included a copy of his proposed Amended Complaint with his Order to Show Cause and included a copy in his appellate Appendix (Pa27), review of the eCourts docket reveals that it was never actually filed. The Amended Complaint purports to add an allegation that the HCPO withheld responsive documents. (Pa27) On July 25, 2022, the HCPO filed an Answer. (Pa87) The HCPO submitted an Amended Answer on October 17, 2022. (Da10)

On August 3, 2022, Dalal improperly served interrogatories and a request for production on the HCPO aimed at determining what, if any, responsive records the agency possessed. (Pa97) On September 12, 2022, Dalal served a subpoena duces tecum on the DCJ similarly seeking to determine the existence of any responsive records. (Pa92)

On October 14, 2022, the HCPO filed a Motion to quash Dalal's discovery requests, which included Certifications of Assistant County Counsel Alberico DePierro and HCPO Chief of Civil Litigation Libretti. (Da19; Da21 and Pa114) The DCJ joined the HCPO's Motion. (Da23) Dalal filed a Motion to Compel discovery against the HCPO on November 17, 2022, arguing that the requests are proper on a common law right of access theory – separate and apart from

OPRA. (Da59)

The trial court entered an Order on January 17, 2023 granting the HCPO's Motion to quash Dalal's subpoena and a separate Order denying Dalal's Motion to compel discovery. (Pa10; Pa12) In his oral decision, the trial judge found:

While plaintiff argues that his requested discovery is necessary to determine what records the HCPO actually possesses allowing plaintiff to compel the same documents from his denied OPRA request would have the same effect as if the court found the plaintiff - for plaintiff on the merits ...

Since plaintiff's discovery request is identical to the information plaintiff seeks to access under the OPRA and common law right of access, the Court shall not enlarge plaintiff's right to those documents simply because plaintiff is now a litigant.

(2T, 16-14 to 17-11)

Dalal filed a Motion for Summary Judgment on February 1, 2023. (Da61)  
The HCPO filed an opposition/Cross-Motion on March 13, 2023. (Da63; Pa119)  
The trial court entered an Order on July 5, 2023 granting summary judgment in favor of the HCPO. (Pa9) In his oral decision, the trial court found the following:

But the Court also shall not order defendant to disclose the requested records pursuant to the common law right of access because they are not common law public documents. To succeed in this claim, plaintiff must demonstrate that the records he sought were common law public documents. That's (1), (2), that he had an interest in the subject matter of the material, and (3) his right to access is balance[d] against defendant's interest in preventing disclosure. That's Keddie, again at 30 - at

50.

Like the language in OPRA, the definition for criminal investigatory records and common law public document is one that is required by law to -- made, maintain or kept on file. However again, the Court could not find, nor did the parties find any law -- or case law that requires agency emails to be made, maintained, or kept on file. For this reason the records sought by plaintiff are not common law public documents. The Court need not address the other two requirements, such as the requirement of the common law to access in all three criterias that are required. So, if one doesn't - - if you don't have one you don't have to proceed to the other two. And then, therefore, plaintiff fails to meet the burden of the first.

Thus, the Court shall not order the defendant to disclose the records pursuant to the plaintiff's common law right of access and the application is designed ...

The applied is denied and this matter is dismissed with prejudice.

(3T, 19-12 to 20-22)

The trial court entered a corresponding Order on July 5, 2023, concluding that "Plaintiff is not entitled under the common-law right to access as the records are not required by law to be made, maintained, or kept on file, as enumerated on the record on July 5, 2023, at 10:45AM." (Pa9)

Dalal filed a Notice of Appeal on July 14, 2023. (Pa1) Dalal filed an Amended Notice of Appeal on October 3, 2023. (Da65)

## LEGAL ARGUMENT

### POINT I

#### **THE TRIAL COURT’S GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE HCPO WAS PROPER AND SHOULD BE AFFIRMED ON APPEAL.**

This Court reviews a “determination regarding the common law right of access de novo.”<sup>4</sup> N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Off., 447 N.J. Super. 182, 194 (App. Div. 2016). An appellate court will not disturb a trial judge's factual findings “if they are ‘supported by adequate, substantial[,] and credible evidence.’” N. Jersey Media Grp., Inc. v. State, Off. of Governor, 451 N.J. Super. 282, 295 (App. Div. 2017) (quoting Zaman v. Felton, 219 N.J. 199, 215 (2014)).

A common law right of access to public records exists independently of OPRA. Gannett Satellite Info. Network, LLC v. Township of Neptune, 254 N.J. 242, 256 (2023) At common law, a citizen has “an enforceable right to require custodians of public records to make them available for reasonable inspection and examination.” ACLU of N.J. v. Cnty. Prosecutors Ass'n of N.J., 474 N.J.

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<sup>4</sup> Dalal suggests that this court should “exercise original jurisdiction” and decide the common law right of access issue to avoid further litigation. (Pb16) He cites no authority for this request. Rather, he bases this request solely on his dissatisfaction with the disposition of this matter by the court below and his skepticism regarding the trial court’s ability to apply the law properly. (Id.)



Super. 243, 268 (App. Div. 2022) (quoting Irval Realty Inc. v. Bd. of Pub. Util. Comm'rs, 61 N.J. 366, 372 (1972)). While “[t]he definition of a public record under the common law is broader than under OPRA,” Rivera v. Union Cnty. Prosecutor's Off., 250 N.J. 124, 143 (2022), “[t]o obtain records under ‘this broader class of materials, [a] requestor must make a greater showing than OPRA requires.’” Id. at 144 (second alteration in original) (quoting N. Jersey Media Grp., Inc. v. Township of Lyndhurst, 229 N.J. 541, 578 (2017)).

“[T]he common[ ]law right of access ... is not absolute.” Keddie v. Rutgers, 148 N.J. 36, 50 (1997). Under the common law, records may be disclosed if: (1) the records are common-law public documents; (2) the requestor has “an interest in the subject matter of the material”; and (3) the requestor's right to access outweighs “the State's interest in preventing disclosure.” Rivera, 250 N.J. at 143-44, quoting N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 578-79 (2017).

**A. The Trial Court’s Finding that Criminal Investigatory Records Are Exempt from Disclosure Was Proper.**

The threshold question under the common law right to access is whether the requested records are “public records.” See O’Shea v. Township of W. Milford, 410 N.J. Super. 371, 386-87 (App. Div. 2009). “To constitute a common law public record, an item must ‘be a written memorial ... made by a public officer, and ... the officer [must] be authorized by law to make it.’” ACLU

v. County Prosecutors Association of New Jersey, \_\_ N.J. \_\_ (slip op. at 27) (2024), quoting Rivera, 250 N.J. 124, 143-44 (2022) (alteration and omissions in original). A public record under the common law “is one that is made by a public official in the exercise of [the official’s] public function, either because the record was required by law to be made or kept, or because it was filed in a public office.” Id., citing Keddie, 148 N.J. at 49.

“[U]nder the common law ... ‘the focus must always be on “the character of the materials sought to be disclosed.”’” Home News v. Dep’t of Health, 144 N.J. 446, 455 (1996), quoting Loigman v. Kimmelman, 102 N.J. 98, 112 (1986). “Above all, the process is flexible, and ‘sensitive to the fact that the requirements of confidentiality are greater in some situations than in others.’” Home News, 144 N.J. at 455, quoting McClain v. Coll. Hosp., 99 N.J. 346, 362 (1985).

“When there is a confidentiality claim, the ‘applicant’s interest in disclosure is more closely scrutinized.’” In the Matter of the New Jersey Firemen’s Association Obligation to Provide Relief Applications under the Open Public Records Act, 230 N.J. 258, 282 (2017), quoting Keddie, 148 N.J. at 51. Courts are to “consider whether the claim of confidentiality is ‘premised upon a purpose which tends to advance or further a wholesome public interest or legitimate private interest.’” Keddie, 148 N.J. at 51, quoting Loigman, 102

N.J. at 112. “[W]hen the requested material appears on its face to encompass legislatively recognized confidentiality concerns, a court should presume that the release of the government record is not in the public interest.” Michelson v. Wyatt, 379 N.J. Super. 611, 621 (App. Div. 2005).

As noted by the court below:

But the Court also shall not order defendant to disclose the requested records pursuant to the common law right of access because they are not common law public documents.

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Like the language in OPRA, the definition for criminal investigatory records and common law public document is one that is required by law to [be]-- made, maintain[ed] or kept on file. However again, the Court could not find, nor did the parties find any law -- or case law that requires agency emails to be made, maintained, or kept on file. For this reason the records sought by plaintiff are not common law public documents.

(3T, 19-12 to 20-5)

On appeal, Dalal does not attempt to identify any statute, regulation, or other mandate requiring the HCPO to create or maintain the documents in dispute. He suggests no statutory or regulatory mandates of any kind addressing the records at issue. Indeed, none exists. Importantly, the type of records sought – email communications between law enforcement officials regarding a criminal investigation – are of the confidential nature which warrant erring on the side of

non-disclosure. Michelson, 379 N.J. Super. at 621.

**B. The Common Law Right of Access Balancing Test Weighs Heavily in Favor of Non-Disclosure.**

Even if the records qualified as common law public documents – which they do not – Dalal, as the requestor, would still need to show an interest in the subject matter of the material and that his right of access outweighs the HCPO’s interest in preventing disclosure. Dalal cannot meet his burden.

Dalal has an insufficient private and public interest in the records. He claims an interest because he brought a citizen’s complaint in Municipal Court against a former judge that he labels as “corrupt” “after government prosecutors failed to do so,” but utterly fails to connect Silebi’s alleged corruption to any conduct affecting him. (Pb1, 17-21, 24-27) He repeatedly cites that a Municipal Court judge found probable cause to issue a warrant (Pb6, 19, and 21) but neglects to acknowledge that, after this, the New Jersey Attorney General’s Office of Public Integrity declined to pursue criminal charges. Rather, the OPI referred the matter to the HCPO for investigation. His claim that he seeks these records “in the public interest” strains credulity. (Pb20)

On its review of the evidence, the HCPO determined not to prosecute Silebi. Dalal suggests that the HCPO and AG “had a mountain of evidence with which to charge and convict Silebi” including findings by multiple Supreme Court panels that Silebi committed “criminal conduct beyond a reasonable doubt.” (Pb19-20) Not only

is this speculative and hyperbolic, but it is also incorrect. The Supreme Court made findings related to Silebi's character and fitness as a member of the Judiciary. Silebi did not face criminal indictment, and no such adjudication was undertaken by the Supreme Court.

Under the second requirement, the "interest" of the party seeking the records can be "a wholesome public interest or a legitimate private interest." Higg-A-Rella, Inc. v. Cnty. of Essex, 141 N.J. 35, 47 (1995), quoting Loigman, 102 N.J. at 112.

Dalal's "interest in the records" could not be less wholesome – it is clear that he has a personal vendetta against this judge. Dissatisfied with Judge Silebi's involvement and rulings in his case, Dalal sets out on a labored, self-serving campaign against her. Query as to what end? Even if Dalal's citizen's Complaint resulted in a criminal conviction, he does not articulate what – if any – impact this has on his criminal case and 35 year incarceration. He merely accuses and laments about a fictitious scheme of corruption for which he has no proof or facts. Importantly, under the case law, Dalal "must show a 'particularized need that outweighs the public interest in confidentiality of the investigative proceeding.'" Wilson v. Brown, 404 N.J. Super. 557, 583 (App. Div. 2009), quoting McClain v. Coll. Hosp., 99 N.J. 346, 351 (1985). He cannot and does not make a showing of need to outweigh the public's interest in

maintaining confidentiality when it comes to law enforcement investigations and particularly related to members of the Judiciary.

Only if the public record and public/private interests requirements are satisfied – which they are not here – does the burden shift to the HCPO to demonstrate that its need for confidentiality outweighed Dalal’s need for disclosure. Rivera, 250 N.J. at 147. In Rivera, Id. at 148, the Supreme Court outlined the factors to be considered when evaluating the heightened interest for public disclosure:

(1) the nature and seriousness of the misconduct. Serious misconduct gives rise to a greater interest in disclosure. For example, misconduct that involves the use of excessive or deadly force, discrimination or bias, domestic or sexual violence, concealment or fabrication of evidence or reports, criminal behavior, or abuse of the public trust can all erode confidence in law enforcement and weigh in favor of public disclosure;

(2) whether the alleged misconduct was substantiated. Unsubstantiated or frivolous allegations of misconduct present a less compelling basis for disclosure;

(3) the nature of the discipline imposed. Investigations that result in more serious discipline, like an officer's termination, resignation, reduction in rank, or suspension for a substantial period of time, favor disclosure.

(4) the nature of the official's position. Wrongdoing by high-level officials can impair the work of the department as a whole, including the functioning of the [IA] process; and

(5) the individual's record of misconduct. The public's interest in disclosure extends to all officers — regardless of rank — whose serious or repeated misconduct may pose a danger to the public.

(Citations omitted.)

The Rivera Court confirmed that a court should continue to assess the following factors established under Loigman in determining the interest in confidentiality:

- (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government;
- (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed;
- (3) the extent to which agency self-evaluation, program improvement, or other decision[ ]making will be chilled by disclosure;
- (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers;
- (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and
- (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.

Id. at 144, quoting Loigman, 102 N.J. at 113). [

Applying these factors leads to the following inexorable conclusion.

Judge Silebi was removed from the Superior Court bench as the result of a disciplinary action heard and determined by the New Jersey Supreme Court. The matter has been concluded. Mr. Dalal's desire to mete out further punishment against Silebi, in the form of a criminal complaint, does not overcome his burden to show that the records he seeks (emails between law enforcement agencies) render the information a "public record." His self-proclaimed desire to surface public corruption rings hollow in light of his current long term incarceration and his obvious desire for personal revenge against this former judge. The determination to prevent disclosure to Mr. Dalal is supported by the record below and should not be disturbed by this Court.

The July 5, 2023 Order granting summary judgment in favor of the Hudson County Prosecutor's should be affirmed. The court below properly concluded that the investigatory email communications were not "public records" subject to disclosure under the common law right of access. Even if they were, Dalal has not demonstrated that his interest in disclosure of the emails (which the HCPO has certified that it is not aware of and cannot locate) (Pal 19-120) outweighs the HCPO's interest in maintaining their confidentiality.



## POINT II

### **THE COURT BELOW CORRECTLY GRANTED THE HCPO'S MOTION TO QUASH AND DENIED DALAL'S MOTION TO COMPEL DISCOVERY.**

Dalal's subpoenas to DCJ improperly sought records identical to those unsuccessfully sought by way of OPRA request. Dalal's request was not only duplicative, but it was improper in a summary proceeding, where discovery is generally unavailable. Dalal's common law right of access claim is subject to a summary proceeding in which discovery is not permitted absent a showing of legitimate need. MAG Entertainment LLC v. Div. of Alcohol Bev. Ctrl., 375 N.J. Super 534, 551-53 (App. Div. 2005). Withdrawal of his OPRA claim in favor of the common law right of access cannot transform the summary proceeding into a plenary proceeding that would allow for discovery nor does it retroactively cure Dalal's prior, improper discovery requests.

To prevail, Dalal would have had to satisfy the prerequisites of R. 4:67-5, which requires a showing of good cause at the hearing or upon motion to convert a case before the court on Order to Show Cause into a plenary action. See Cent. State Bank v. Hudik-Ross Co., 164 N.J. Super. 317, 324 (App. Div. 1978). He did neither. Common law requests for records can properly proceed as summary proceedings under R. 4:67 and are generally reviewed in summary proceedings alongside OPRA claims. See, e.g., Rivera, 250 N.J. at 135 (reviewing the

accessibility of internal affairs reports under OPRA and the common law side-by-side); see also Court Directive #21-17, Memo from Acting Administrative Director Glenn A. Grant dated July 11, 2017 (stating that the best practices for handling of common law right of access requests for dashcam video recordings in fatal police shootings is to proceed in a summary manner under R. 4:67). Dalal has advanced no legitimate need, let alone good cause, for discovery to proceed. His subpoenas were properly quashed.

The trial court's denial of Dalal's Motion to Compel was also correct. "[A] trial court's factual findings in support of granting or denying a motion to [compel] must be upheld when 'those findings are supported by sufficient credible evidence in the record.'" State v. C.J.L., 471 N.J. Super. 477, 483 (App. Div. 2022), quoting State v. Gamble, 218 N.J. 412, 424 (2014).

Since plaintiff's discovery request is identical to the information plaintiff seeks to access under the OPRA and common law right of access, the Court shall not enlarge plaintiff's right to those documents simply because plaintiff is now a litigant. The Court must decide on the merits after a full briefing and oral argument whether plaintiff has a right to the requested records. Thus, defendants' motion to quash is granted and the plaintiff's motion to compel is denied.

(2T, 17- 2 to 11)

Dalal's subpoenas to DCJ and his discovery requests to the HCPO sought documents concerning criminal investigations of former Judge DeAvila-Silebi,

including emails between the HCPO and DCJ regarding Dalal's criminal complaints against the former judge. Despite abandoning his OPRA claims in favor of his common law right of access claims, which are subject to a summary proceeding and where discovery is not permitted absent a showing of legitimate need, Dalal again sought to compel the production of the records. The Court below properly denied his request.

**CONCLUSION**

For the foregoing reasons, the HCPO respectfully requests that this Court affirm the July 5, 2023 Order granting summary judgment in favor of the HCPO and dismissing Dalal's Complaint and all other intermediate Orders on appeal.

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**Cindy Nan Vogelman**

**Dated: May 8, 2024**