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April 1, 2025

Heather Joy Baker, Clerk
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 970
Trenton, NJ 08625

Re: ASSOCIATION FOR GOVERMENTAL RESPONSIBILITY, ETHICS AND TRANSPARENCY V. BOROUGH OF MANTOLOKING

On Petition for Certification of a Final Judgment of the Superior Court, Appellate Division, Docket No. A-002395-22
Sat Below:
Hon. Lisa Rose, J.A.D.
Hon. Morris Smith, J.A.D.
Hon. Lisa Perez Friscia, J.A.D.

Letter Brief on behalf of the Respondent Borough of Mantoloking in Opposition to Petition for Certification
By: Robin La Bue, Esq.; Atty ID #021872009

Dear Ms. Baker:

Please accept this letter on behalf of the respondent Borough of Mantoloking in opposition to the petition for certification filed by Association for Governmental Responsibility, Ethics and Transparency (hereinafter

"Petitioner"). In addition, please find four copies of the brief filed by the Respondent with the Appellate Division.

PRELIMINARY STATEMENT

The Petition for Certification should be denied as there are no special reasons that would warrant Certification and there is no question of general public importance that requires settlement by the Supreme Court.

Petitioner seeks certification from the well-reasoned and comprehensive decision of the Appellate Division upholding the trial court's determination that a private email between a conflict municipal prosecutor and her colleague was not a public document subject to disclosure under the Open Public Records Act.

Elizabeth Leahey was appointed by the Borough of Mantoloking for representation on a single municipal court matter in 2021. The State v. Burke matter became unnecessarily and unusually complex and particularly contentious due in large part to the lengthy history between the Defendant, Mr. Burke and the Complainant, that goes far beyond the event in Mantoloking and involves several different litigation matters in various courts. A witness in the matter had a previous criminal incident expunged from his record and the Defendant Mr. Burke, desired to utilize the subject matter of the expungement

and the expungement itself to impeach the witness. Ms. Leahey reached out to a colleague to generally discuss their experience with the handling of expungements in Municipal Court. Ms. Leahey did not bill the Court for the receipt or review of the email or any of her conversations with her friend.

During the Law Division Motion for Leave to Appeal before Judge Michael T. Collins, J.S.C., Ms. Leahey handed the print out of the email from her friend with the senders name/email address redacted to Mr. Burke.

On October 24, 2022, the Borough Clerk of the Borough of Mantoloking received an OPRA request that had been sent via email at 6:57 PM on Sunday October 24, 2022. The request sought specifically: "an email of Elizabeth Leahey dated November 17, 2021 at 10:08 a.m."

Ms. Leahey responded she had no such email; the Borough informed the requestor that there are no responsive documents. The requestor then clarified his request specifically including screen grabs from the specific document he was requesting as the plaintiff was already in possession of the very email he was requesting.

On October 31, 2022, the plaintiff's request was denied on the basis that the requested document is not a public record. The plaintiff refused to accept

the Borough Attorney's denial saying he would "wait until tomorrow for a direct response from the Municipal Clerk." On November 1, 2022 the Borough Attorney responded again, denying access to the record.

Access to the document was denied not under a claim of privilege but on the basis that a private email from a private attorney to her colleague seeking advice about an upcoming proceeding is not a government record.

Thereafter, Petitioner filed a two-count verified complaint and order to show cause seeking relief via a summary action pursuant to R. 4:67-1(a). Petitioner challenged the denial of its request under OPRA and the common law right of access. Defendants answered and included Leahey's January 27, 2023 certification explaining the circumstances surrounding the November 17 email. Leahey asserted, in pertinent part:

1. I was appointed as the Conflict Municipal Prosecutor for the Borough of Mantoloking for the purposes of representing the state in the matter of State v. Burke.
2. I do not practice municipal law full time. I maintain a private law practice in which I concentrate on real estate transactions, family law, estate law and municipal court work.
3. The State v. Burke matter has been unusually complex and particularly contentious due to the lengthy history between the Defendant, Mr. Burke, and the Complainant that goes well beyond the event in Mantoloking, and involves several different litigation matters in the Superior Court and Appellate Division.
4. A witness in this matter had a previous criminal incident

> expunged from his record and the Defendant Mr. Burke desired to utilize the subject matter of the expungement and the expungement itself to impeach the witness.
> 5. I reached out to a colleague to generally discuss his experience with the handling of expungements in Municipal Court. I did not bill the Borough . . . for the receipt or review of this email, or any of my conversations with my friend. . . .
> 6. During the Law Division motion . . . I had the email in my hand and Mr. Burke asked to see it. I handed him my copy of the email with the sender's name/email address crossed out.
> 7. Mr. Burke has a copy of this document in its entirety, he only wants the name or email address of my friend, presumably to subject my friend to harassment or to involve my friend in litigation in some way. During summary proceedings before the motion judge on March 3, 2023, the parties maintained their positions regarding production of the November 17email.

Following argument, Judge Hodgson rendered an oral decision, finding the email was "sent as advice," the judge concluded the email "was a private communication" that "does not come within a government record definition" under OPRA.

The Appellate Division appropriately held that the use of the document by Leahey in open court did not transform the email into a public document and that the document is not subject to disclosure under OPRA or under the common law.

GROUNDS FOR DENIAL OF CERTIFICATION

Certification should only be granted in limited instances. R. 2:12-4 sets the standard for justification of review by the Supreme Court:

> Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons.

In exercising its discretionary authority to decide whether to grant certification to review a final judgment of the Appellate Division, the Supreme Court is governed by the standards set forth in R. 2:12-4. Mahony v. Danis, 95 N.J. 50, 51 (1983)(Handler, J., concurring). R. 2:12-4 states that certification will be allowed on final judgments of the Appellate Division "if the interest of justice requires." *See*, Bandel v. Friederich, 122 N.J. 235, 237-238 (1991).

The questions proffered by the petitioner can be boiled down to essentially three claims: (1) whether the email is a government record; (2) whether the interest of the Borough in protecting the privacy of the sender outweighs the interests in the public; and (3) whether the Appellate Division's Common Law analysis was sufficient.

None of these questions implicate the interests of justice. It bears repeating that the Petitioner has received the email in question. The only information that has not been released to the requestor is the identity of the sender. The interests of justice do not weigh in favor of disclosure of the identity of the Prosecutor's friend.

Moreover, despite the Petitioner's outlandish assertions concerning the need for transparency and conspiratorial intent, the Appellate Division even remarked that it was "difficult to conclude AGREAT's public interest is 'wholesome' or its private interest is 'legitimate'," in light of the lengthy and acrimonious record in this matter.

THE EMAIL IS NOT A GOVERNMENT RECORD SUBJECT TO DISCLOSURE UNDER OPRA OR THE COMMON LAW

The requested email is not a government record under OPRA. Documents do not constitute government records under OPRA "merely because they were 'made' by a government official." O'Shea v. W. Milford Bd. of Educ., 391 N.J. Super. 534, 538 (App. Div. 2007), finding that, if that were so, "every yellow-sticky note penned by a government official to help him or her remember

a work-related task would be a public record. Such absurd results were not contemplated or required by OPRA." Id. at 539.

As a municipal prosecutor, Leahey was charged with representing the Borough and "handling all phases of the prosecution of an offense, including but not limited to discovery, pretrial and post-trial hearings, motions, [and] dismissals." N.J.S.A. 2B:25-5(a). The contents of the November 17 email furthered Leahey's duties and responsibilities by serving as an aid in court during her argument concerning expunged records. The November 17 email was akin to "a script on how to make an argument" with citation to the pertinent statutes. Had Leahey simply not turned over the document, Burke would not have been entitled to any of the information thereon, including the statutes and the name of the colleague.

The Appellate Division, in its analysis, compared the attorney notes to that which is explicitly withheld from access under N.J.S.A. 47:1A-1.1 as "interagency or intraagency advisory [or] consultative . . . material," which authorizes the withholding of "documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which

governmental decisions and policies are formulated." In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000).

Therefore, the November 17 email is not a government record as defined in N.J.S.A. 47:1A-1.1 and, as such, the sender's name and address are not subject to disclosure under OPRA.

Under the common law, a public record is a record "made by public officers in the exercise of public functions", either because the record was required or directed by law to be made or kept, or because it was filed in a public office. North Jersey Newspapers Co. v. Passaic County Bd. Of Chosen Freeholders, 127 N.J. 9, 13(1992); Higg–A–Rella, Inc. v. County of Essex, 141 N.J. 35, 46 (1995). The common law definition of a public record is more inclusive than the definition contained in OPRA. Bergen County Improvement Auth. v. N. Jersey Media Group, Inc., 370 N.J. Super. 504, 509–10, (App. Div.), *certif. denied,* 182 N.J. 143 (2004). To constitute a public record under the common law, the 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 access this broader class of documents, requestors must make a greater showing than required under OPRA: (1) "the person seeking

access must 'establish an interest in the subject matter of the material' "; and (2) "the citizen's right to access 'must be balanced against the State's interest in preventing disclosure.'" Keddie v. Rutgers, State University, 148 N.J. 36, 50 (1997).

The common law right can reach a wider array of documents than its statutory counterpart. Higg–A–Rella, *supra,* 141 N.J. at 46 (1995). The common law right of access involves a two-step inquiry; first, a litigant must establish an interest in the public record. N. Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9, 13 (1992). Second, a plaintiff's interest in disclosure of the relevant documents must outweigh the State's interest in non-disclosure Higg–A–Rella, *supra,* 141 N.J. at 47-48. In making that determination, courts are to consider the following factors:

> (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.
> Loigman v. Kimmelman, 102 N.J. 98 (1986).

The Appellate Division found that these factors overwhelmingly weighed against disclosure, the record is a single email sent by an unknown colleague in response to a request for advice in a very unusually complex municipal court matter. Moreover, the entire contents of the email had already been turned over to the appellant. The only information that the appellant does not have is the name and email address of the sender.

It is without question that the only reason the name and email address of the sender is being sought is to subject the sender to unwanted contact. The Appellate Division found that "the potential for harm regarding further nonconsensual disclosure is substantial."

Therefore, the email is not subject to disclosure and is exempt both under the privacy provision of OPRA, N.J.S.A. 47:1A-1.1 as well as under the Common Law.

The release of a private attorney's name and email address resulting from his offering of advice to a friend and colleague does not implicate the interests

of justice, in fact the ramifications of a decision requiring release are harmful to the public interest and to free and protected collegial discourse.

There is no interest of justice served by Appellant's campaign to unmask the Prosecutor's friend and colleague whose advice sought to protect both parties from the disclosure of protected information. The email itself has been provided to the Appellant. The interest of justice lies in continued protection of the "strong policy behind shielding attorney communications."

For the above reasons, and for the reasons set forth in the decision of the Appellate Division and the briefs submitted by the Borough of Mantoloking to the Appellate Division, it is respectfully requested that the petition for certification be denied as there is no important public question implicated in this matter that requires review by the Supreme Court.

This is not a question of an important public purpose but the subject of a personal vendetta against the Borough and the individuals involved in the underlying municipal court matter.

Very truly yours,

ROBIN LA BUE
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