Jonathan F. Cohen, Esq. (043492006)
PLOSIA COHEN LLC
51 Gibraltar Drive, Ste. 3B
Morris Plains, NJ 07950
908-888-2547
jcohen@pclawnj.com
Attorneys for Defendants/Petitioners
Ramapo-Indian Hills Regional Board of
Education and Thomas Lambe

| | |
|---|---|
| ALEX ROSETTI,<br><br>Plaintiff/Appellant/Respondent,<br><br>v.<br><br>RAMAPO-INDIAN HILLS REGIONAL BOARD OF EDUCATION and THOMAS LAMBE, IN HIS OFFICIAL CAPACITY AS RECORDS CUSTODIAN,<br><br>Defendants/Respondents/Petitioners<br>. | SUPREME COURT OF NEW JERSEY<br>Docket No. 090375<br><br>Civil Action<br><br>On Petition for Certification from:<br>Superior Court of New Jersey<br>Appellate Division<br>Docket No. A-1466-23 |

# REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR CERTIFICATION AND IN RESPONSE TO RESPONDENT'S OPPOSITION BRIEF

Of Counsel and On the Brief:

Jonathan F. Cohen, Esq. (043492006)

On the Brief:

Veronica A. Acevedo, Esq. (424592023)

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases



## Rules

## KEY FOR REFERENCES TO APPENDICES CITED HEREIN

"Pa" refers to the appendix submitted by Plaintiff/Appellant/Respondent Alex Rosetti on April 18, 2024.

"SCPa" refers to the appendix submitted by Defendants/Respondents/Petitioners Ramapo-Indian Hills Regional School District's February 24, 2025 Supreme Court Appendix.

## INTRODUCTORY STATEMENT

This is not a case about resisting transparency, but about recognizing OPRA's statutory limits and the real-world technological barriers that prevent the creation of records from systems the government neither owns nor controls. The Petitioners Ramapo-Indian Hills Regional Board of Education ("District") and Thomas Lambe bring this important matter to the attention of the Supreme Court to avoid the overexpansion of the New Jersey Open Public Records Act ("OPRA") as set forth by the Appellate Division's January 27, 2025 decision in favor of Respondent Alex Rosetti ("Respondent"). The Legislature revamped OPRA, effective September of 2024, because the law was becoming too burdensome on local government. The Appellate Division's decision that email logs must be generated on private servers under the proprietary ownership of tech giants like Google and Apple, when government officials use their services, only exacerbates the headaches to custodians that the Legislature sought to ameliorate last year and create new privacy concerns.

This Court has established the only recognized definition of an OPRA-able email log, which is generated on a government server and manipulates email data into a comprehensive spreadsheet. The appellate court misunderstood what constitutes an email log. Its decision is out of step with technology and the realities facing government records custodians. The Supreme Court should grant Certification to bring clarity to the Appellate Division's potentially disastrous ruling.

## POINT I

### THE APPELLATE DIVISION ERRED IN DETERMINING THAT EMAIL LOGS TO BE GENERATED FROM PRIVATE SERVERS ARE GOVERNMENT RECORDS

#### A. Certification should be granted because the Appellate Division decision conflicts with the precedent established in Galloway.

Respondent's March 6, 2025 opposition brief ("Rb") incorrectly argues that the Appellate Division's decision did not conflict with Paff v. Galloway Tp., 229 N.J. 340 (2017) and there consequentially is no basis for Certification. See R. 2:12-4. Respondent's interpretation of Galloway ignores key aspects of this Court's finding as it relates to the definition of "government records." This Court held in Galloway that "OPRA makes clear that **government records** consist of not only hard-copy books and paper documents housed in file cabinets or on shelves, but also 'information stored or maintained electronically' **in a database on a municipality's server**." 229 N.J. at 353 (emphasis added).

There are two critical points on which the Appellate Division's decision conflicts with this Court's ruling in Galloway: (1) whether email **logs**, rather than readily identifiable emails themselves, are government records when the computer information necessary to generate them are maintained exclusively by a private entity; and (2) should a court be able to compel such a private entity as Google, Apple, or the like, to create or generate such a log in response to an OPRA request?

In Galloway, this Court found that OPRA requires a government entity to extract information it maintains in its database for an email log that includes certain fields: the sender, recipient, date, and subject, because this is "a function the Legislature clearly envisioned the municipality performing, **provided that it has the means of doing so.**" 229 N.J. at 354. (emphasis added). In this case, the Appellate Division did not address this Court's admonition in Galloway regarding whether the public records custodian must have "the means" of generating the requested record. With respect to email logs maintained by the Googles and Apples of the world, no public entity, subject to OPRA, will have the means to produce logs from a private server due to the proprietary ownership of the private company.

Respondent's claims that the Appellate Division applied settled case law are incorrect. The Appellate Division's decision, so lauded by Respondent, states on its face that this is a case of first impression. (SCPa2). Not even the Appellate Division agrees with Respondent's assertion. In Galloway, this Court did not contemplate the whether email logs to be generated from private servers or services fall into the OPRA definition of "government records," nor did this Court have the opportunity to address technological and privacy issues implicated by that nuanced issue. Unless this Court intervenes, public entities will strain to square Galloway with the reported decision below. The Supreme Court should take this opportunity to clarify the proper application of the Galloway case as it relates to email logs on private servers.

### B. The Appellate Division's proposed "Paff Certification" solution does not work under the circumstances of privately maintained email logs.

Although Respondent argues that this Court has never recognized as valid "artificial barriers" to access, such as conversion of formats and excessive costs, valid, the barriers to production here are neither artificial nor uncomplicated. See Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35 (1995); see also Moore v. Bd. of Freeholders of Mercer County, 39 N.J. 26 (1962). The District has no control or authority over the administrative procedures and technological features of private servers. The Appellate Division's remand Order that requires the District, by way of Board members, to produce email logs from private servers cannot be performed technologically or reliably because the information is not stored on the government server. (SCPa19). The District's Board Members, who are mere subscribers to services such as Gmail, lack the ability to generate accurate logs in the manner that was done by the District's IT Director Chang using the District's software. (SCPa5).

As stated above and in Mr. Chang's certification (Pa17), the District has no means of generating Galloway logs from these proprietary accounts. Respondents' unfounded accusation that the District seeks to use private emails to keep government records from the public misstates the District's argument. The District asserts merely that the definition of government records does not include email logs belonging to an individual account to be generated from a private server.

### C. The Appellate Division erred by conflating emails with email logs.

In its Petition Brief, the District asserted that Respondent had stated in oral argument through his attorney that he used the email log produced from the government server (SCPa4) to subsequently request and obtain individual emails, including ones that were stored on private servers. The Respondent did not deny that this happened in his opposition brief, from which this Court can deduce the truth of the District's statement. As is clear from Respondent's previous use of a Galloway log, such logs, when generated on government servers, provide OPRA requestors with a list of emails from which the requestor may identify and request the ones that they desire from the report (e.g., the Galloway log). Here, the Appellate Division misconstrued the case law regarding emails accessible under OPRA, by failing to afford proper weight to the infeasibility of generating and producing logs from private servers. Respondent's reliance on the case law relating only to *emails* that were made, maintained, or received on private accounts does not justify the Appellate Division's expansion of the Galloway decision.

### D. The Supreme Court should grant Certification because the Appellate Division misapplied OPRA case law regarding third-party storage of government records.

In Respondent's opposition brief, he once again repeats the legal truism that a government entity is responsible for documents that it creates and stores at a private

third party's location and/or which the third party makes at the direction of the government entity. The District agrees with the principle that a government record does not cease being a government record because it is stored elsewhere. This simplistic take, however, does not apply to email logs that have never been made and can only be generated for the first time using proprietary software from a private server.

In Burnett v. Gloucester County. 415 N.J. Super. 506 (App. Div. 2010), the Appellate Division correctly held that the settlement agreements requested under OPRA "were 'made' by or on behalf of the [County] in the course of its official business" even if they were stored off-site by the County's insurance broker. Id. at 517. The Burnett decision effectively deterred government actors from attempting to avoid OPRA disclosure by storing records created for governmental purposes in the hands of their private agents or vendors.

The Appellate Division incorrectly applied the foregoing principle to email logs that have never been generated by their proprietary software owner, much less held by that company on the government's behalf. The Appellate Division also did not consider that individual Board members likely signed up to use these servers as private individuals or in certain cases operated email accounts to which they were given access by their private employers. Under these circumstances, the executives who run private email companies such as Gmail or Apple are likely unaware of the

existence of Ramapo-Indian Hills Regional Board of Education and would not know or have reason to know that one of their millions of individual account holders utilized their personal account to send out or receive an email regarding Board business.

Respondent also incorrectly attempts to utilize Simmons v. Mercado, 247 N.J. 24 (2021), to buttress his reliance on Burnett. In Simmons, this Court considered whether complaint-summons forms created by municipal police officers but stored on judiciary servers were accessible under OPRA when requested from the municipality. Id. The Supreme Court found that those records were *made* by the municipal police department and therefore were the municipality's government records as defined by OPRA. Id. at 41. Here, the District's argument is narrowly confined to email logs, which would have to be *made* by private email providers, are not government records as defined by the New Jersey Supreme Court. The term "made" must, however, be carefully used when discussing email logs. This Court observed in Galloway that such logs do not constitute the making of a new document so much as the rearranging of existing metadata stored on a server into a report, which, in the Galloway case, the IT Director stated he was able to do in a few keystrokes. 229 N.J. at 354.

Respondent's claims of obstructive or ill motives by Board Members constitute nothing but unsupported ad hominem attacks. The District contends that

the Court should focus less on the intent of Board Members but rather whether to permit the Appellate Division's expansion of OPRA into the private sphere. The trial court correctly held that the District was under no obligation to produce these email logs and recognized that "[w]hile it is undeniable that Plaintiff has a right to the email correspondences from the private email accounts of the Board members, that right cannot be extended to include email logs from personal, non-Board-issued email accounts." (Pa32). The Appellate Division exceeded its authority by compelling performance by private companies that have no relationship to the local government and a tenuous relationship at best with the end user (e.g., the Board Member who signed up for an email account on the private server).

### E. The Appellate Division disregarded the implicit privacy concerns embodied in the amended OPRA statute, P.L. 2024, c. 16.

Respondent's opposition sanctimoniously trumpeted the need for transparency and openness. See Polillo v. Deane, 74 N.J. 562 (1977); see also Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531 (2012) and Mason v. City of Hoboken, 196 N.J. 51 (2008). The District does not oppose the principle of transparency that this Court has repeatedly found constitutes the basis for OPRA. The Appellate Division's decision in this case, however, takes transparency beyond reasonable bounds, and expands OPRA to such an extent that it may deter public participation from government activities. Unless the Supreme Court grants

Certification, lower courts may read the Appellate Division's decision to mean that all public employees' and officials' private email logs are now public records under OPRA. There is a high likelihood that the 21 or so Assignment Judges who decide most OPRA disputes would construe and apply the Appellate Division's ruling inconsistently because of the alleged leeway that it has afforded Board members in terms of how to search for and produce records on their private accounts subject to a Paff Certification. Paff v. New Jersey Dep't of Labor, 392 N.J. Super. 334, 341 (App. Div. 2007).

Respondent's contention that individual Board Members can simply search their emails for specific senders or recipients misinterprets the strict legal framework of OPRA. (Rb14). This argument falsely implies that OPRA is flexible or elastic rather than a statute with clear requirements and limitations. This Court's decision in Galloway clearly defines the specific fields an email logs is required to produce. However, Respondent seeks to convince this Court to leave in place the disastrous Appellate Division decision by assuaging the Court that if Board Members cannot use the proprietary software to generate true Galloway logs, then half-measures will suffice. Such an interpretation undermines OPRA's strict statutory intent and could lead to inconsistent or incomplete disclosures.

The Legislature, in amending OPRA effective September 3, 2024, sought to address legitimate privacy concerns caused by the disclosure of OPRA records with

the public policy goal of transparency. The Legislature struck the appropriate balance by setting tighter restrictions on the sharing of personal information, by reducing the range of records available for public access, and broadening exemptions concerning personal data, while otherwise leaving OPRA intact.

The appellate decision below threatens the privacy of individual Board Members' accounts and potentially force governmental entities to expend taxpayer funds in legal battles with tech giants. The Appellate Division's order requiring the Board members to search through personal emails and to certify that the email logs are unavailable or burdensome not only ignores the significant hurdle of searching through their private accounts without technological support but also fails to consider the privacy implications that would expose not only the District's Board members but other public employees should these email logs be accessible to the public under OPRA. It is this slippery slope that may open the floodgates to access to more personal information, such as accessing an entire private phone log if the official admits making one call about government business on their private phones.

## CONCLUSION

Based upon the foregoing reasons and those set forth in the Board's initial and Appellate Division briefs, the Board respectfully requests that its Petition be granted.

PLOSIA COHEN LLC
Attorneys for Petitioners

Dated: March 17, 2025

By: /s/ *Jonathan F. Cohen*