SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4604-14T1

JOHN PAFF,

Plaintiff-Respondent,

v.

CAPE MAY COUNTY
PROSECUTOR'S OFFICE,

Defendant-Appellant.

Argued September 22, 2016 – Remanded November 17, 2016
Resubmitted June 8, 2017 – Decided March 9, 2018

Before Judges Hoffman and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Cape May County, Docket No. L-0265-14.

James B. Arsenault, Jr., Cape May County Counsel, argued the cause for appellant.

Richard M. Gutman argued the cause for respondent.

The opinion of the court was delivered by

O'CONNOR, J.A.D.

This matter returns to us from the trial court following our remand directing it to clarify certain factual findings and to make additional findings pertaining to its May 8, 2015 order, from which defendant Cape May County Prosecutor's Office appeals. See Paff v. Cape May Cty. Prosecutor's Office, No. A-4604-14 (App. Div. Nov. 17, 2016) (slip op. at 9). Defendant also appeals from the July 10, 2015 order awarding plaintiff John Paff counsel fees and costs.

Because the trial court failed to follow our instructions on remand, we are constrained to remand this matter a second time. We vacate the May 8, 2015 and July 10, 2015 orders, and direct that another judge hear this matter.

I

We incorporate our first opinion by reference and thus decline to recite the entire factual and legal background set forth in that opinion, but do recite those facts and legal principles relevant to the new remand.

Plaintiff requested defendant provide him copies of "all letters . . . made by the [defendant] of such exculpatory or favorable information . . . concerning Wildwood Crest Officers . . . Captain Mayer [and] Lt Hawthorne." Paff, slip op. at 1. Plaintiff made his request under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common law right of

access to public records (CLRA), see Keddie v. Rutgers, 148 N.J. 36, 49-50 (1997).

Defendant declined to turn over copies of the letters, claiming they were exempt from release under N.J.S.A. 47:1A-1. Defendant maintained the letters were inter-agency or intra-agency advisory, consulting or deliberating materials; criminal investigating records; and records concerning a grievance by or against an employee. In response, plaintiff filed a verified complaint alleging defendant wrongfully denied him access to the letters under OPRA and the common law.

During the course of the litigation, defendant provided a Vaughn Index[1] to the court and to plaintiff, and submitted the letters to the court under seal for in camera review. The letters were from defendant to the mayor of the Borough of Wildwood Crest, in which reference was made to David Mayer and Michael Hawthorne, two former officers of the Wildwood Crest Police Department.[2] Defendant also submitted other documents to

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[1] A "Vaughn Index" typically consists of "a detailed affidavit, the purpose of which is to permit the court system effectively and efficiently to evaluate the factual nature of disputed information." John Doe Agency v. John Doe Corp., 493 U.S. 146, 149 n.2 (1989) (internal quotation marks omitted) (citing Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973. See also Paff v. Div. of Law, 412 N.J. Super. 140, 161 n.9 (App. Div. 2010).

[2] As we did in our first opinion, when referencing the subject documents, we do not divulge any details that may be protected from disclosure under either OPRA or the common law right of

the trial court, also under seal, for its review in camera. Defendant believed the additional documents would put its position in perspective.

Thereafter, the trial court found the contents of the four letters exempt from disclosure under OPRA, because the letters contained inter-agency advisory communications between a county prosecutor and a mayor. However, because it believed defendant did not oppose the release of the records under the common law, the court ordered copies of the four letters be turned over to plaintiff pursuant to CLRA. Defendant filed a motion for reconsideration, arguing the court erred when it concluded defendant did not oppose the release of the letters under the common law.

The court considered defendant's arguments, as well as the positions of Wildwood Crest and the two police officers on the question of releasing the letters. However, on May 8, 2015, the court ordered the release of these documents to plaintiff. In its written decision, the court again found the records exempt from release under OPRA but, after "considering the standards and applying the tests set forth by our Supreme Court in Loigman [v. Kimmelman, 102 N.J. 98 (1986)]," it determined plaintiff was entitled to these documents under CLRA.

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access to public records, with the exception of that information already known to plaintiff.

Defendant appealed from the May 8, 2015 order, as well as from the July 10, 2015 order awarding plaintiff $45,176 in counsel fees and $514.76 in costs.

II

Following our review of the record and hearing oral argument, we remanded this matter to the trial court and directed it to clarify certain factual findings and to make additional ones.

In our first opinion, among other legal principles, we noted:

> "The common-law right to access public records depends on three requirements: (1) the records must be common-law public documents; (2) the person seeking access must establish an interest in the subject matter of the material; and (3) the citizen's right to access must be balanced against the State's interest in preventing disclosure." Keddie v. Rutgers State Univ., 148 N.J. 36, 50 (1997) (citations and internal quotation marks omitted). Furthermore, because the common law right of access to public documents is qualified, "one seeking access to such records must establish that the balance of its interest in disclosure against the public interest in maintaining confidentiality weighs in favor of disclosure." Ibid. (citation and internal quotation marks omitted).
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> [Paff, slip op. at 5.]

Here, defendant does not dispute the letters are common law public documents and that plaintiff has the requisite interest

in the subject matter of the materials. The issue in controversy is whether plaintiff's right to the documents outweighs defendant's interest in preventing disclosure.

We also observed in our first opinion that, in Loigman, 102 N.J. at 113, our Supreme Court provided a list of factors the trial court must consider when balancing a requester's right to public documents against the public agency's interest in confidentiality. These factors are:

> (1) [T]he 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 decisionmaking 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.
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> [Ibid.]

We set forth the trial court's findings on the first five Loigman factors; it did not make any findings on the sixth factor. Its findings were:

> (1) [P]olice officers play a unique and fundamental role in preserving order in civilization; they are our society's social sanitation workers, handling problems no one else wants to tackle. In doing so, they have the authority to use deadly force and to arrest people, yet with such power comes a critical need for public oversight; (2) Hawthorne and Mayer were in leadership positions which heightens the need for oversight and release of these letters is something they should reasonably expect; (3) the letters do not discuss any other individuals and will not have a "chilling effect" on future internal affairs investigations; (4) because the facts of this situation are so idiosyncratic to Messrs. Mayer and Hawthorne, the disclosure of these letters will not impede the [Prosecutor's Office's] ability to perform its duties, including issuance of similar letters in the future; and (5) the public's interest in access to these letters outweighs both [Wildwood Crest's] and the [Prosecutor's Office's] interest in confidentiality.
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> [Paff, slip op. at 7-8.]

Although the trial court did make a statement seemingly in reference to the first five factors, it did not in fact address them. Thus, we remanded this matter so the trial court could supplement its findings on the first five factors and make findings on the sixth one. We retained jurisdiction.

On remand, the trial court declined to make the findings we requested, stating, "[t]here is nothing in Loigman that commands trial courts to appraise each of the six factors in balancing the competing interests of citizens and government when public

documents are sought." Notwithstanding, the court did state as to the sixth Loigman factor that because the proceedings concluded long ago, no disciplinary or investigatory proceedings have arisen that may circumscribe plaintiff's entitlement to the letters.

We permitted the parties to provide briefs on the trial court's supplemental opinion. In his brief, plaintiff contends one can discern the trial court's views on Loigman factors one, two, and four because of comments the court made in colloquy between the court and counsel, or in statements the court made in the opinion which led defendant to file its motion for reconsideration. We disagree.

First, colloquy between the court and counsel is not a substitute for a judge's obligation to articulate findings of fact and conclusions of law. Pardo v. Dominquez, 382 N.J. Super. 489, 492 (App. Div. 2006) (rejecting "the suggestion that a judge's comment or question in a colloquy can provide the reasoning for an opinion which requires findings of fact and conclusions of law").

Second, any findings the trial court made in the opinion to which plaintiff refers hardly carries any weight. The court reconsidered the rulings that emanated from such opinion and issued a new opinion. The court's ultimate rulings remained the

same, but the new opinion essentially replaced the earlier one. Third, plaintiff does not identify any comment the court made that conclusively reveals its findings on the third and fifth factors.

As for the trial court's view that Loigman did not compel it to review and make findings on the six factors, the trial court was not at liberty to spurn our instruction that it do so. It is the responsibility of trial courts to follow pronouncements of appellate courts. State v. Smith, 169 N.J. Super. 98, 100 (App. Div. 1979), rev'd on other grounds, 85 N.J. 193 (1981). "Trial judges are privileged to disagree with the pronouncements of appellate courts; [but] the privilege does not extend to non-compliance." Reinauer Realty Corp. v. Paramus, 34 N.J. 406, 415 (1961).

In addition, the trial court erred when it found it need not consider the Loigman factors. Our Supreme Court has made it clear that when balancing a requester's interest in certain documents against the public's interest in confidentiality under CLRA, a court must consider the Loigman factors. See Educ. Law Ctr. v. N.J. Dept. of Educ., 198 N.J. 274, 302-03 (2009); see also N. Jersey Media Grp., Inc. v. Bergen Cty. Prosecutor's Office, 447 N.J. Super. 182, 209-11 (App. Div. 2016) (same).

We are unable to exercise original jurisdiction and decide that which the trial court was entrusted with determining. Rule 2:10-5 does permit an appellate court to "exercise such original jurisdiction as is necessary to the complete determination of any matter on review." However, we may not do so if fact finding is required. See State v. Francis, 191 N.J. 571, 594 (2007) (stating in lieu of exercising original jurisdiction, the better practice is to remand to the trial court to determine the relevant facts). See also Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 2:10-5 (2018) (stating "it is clear that resort [to original jurisdiction] by the appellate court is ordinarily inappropriate when fact-finding or further fact-finding is necessary in order to resolve the matter"). In addition, the trial court noted it reviewed materials supplied by defendant that clarified the facts; those materials were not made a part of the appellate record.

Accordingly, we remand this matter a second time so that the appropriate factual findings can be made. Although we realize it will require a new judge to consider the matter anew, in view of the circumstances, we direct any further proceedings be heard by a judge different from the one previously involved in this matter.

The May 8, 2015 and July 10, 2015 orders are vacated and this matter remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.