

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MIDDLESEX COUNTY
DOCKET NOS. MID-L-001217-15
MID-L-001938-15
MID-L-001939-15
MID-L-001951-15
MID-L-002022-15
APP. DIV. NO. _____

MIDDLESEX COUNTY :
PROSECUTOR'S OFFICE, :
 :
Plaintiff, :
 :
v. :
 :
NJ ADVANCE MEDIA and :
HOME NEWS TRIBUNE, :
 :
Defendants. :
----- :
HOME NEWS TRIBUNE, :
 :
Plaintiff, :
 :
v. :
 :
MIDDLESEX COUNTY :
PROSECUTOR'S OFFICE, :
 :
Defendant. :
----- :
RICHARD RIVERA, :
 :
Plaintiff, :
 :
v. :
 :
MIDDLESEX COUNTY :
PROSECUTOR'S OFFICE, et al., :
 :
Defendants. :
----- :
COLLENE WRONKO, :
 :
Plaintiff, :
 :
v. :
 :
MIDDLESEX COUNTY :
PROSECUTOR'S OFFICE, et al., :
 :
Defendants. :

TRANSCRIPT
OF
MOTION HEARING

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MIDDLESEX COUNTY
DOCKET NOS. MID-L-001217-15
MID-L-001938-15
MID-L-001939-15
MID-L-001951-15
MID-L-002022-15
APP. DIV. NO. _____

NJ ADVANCE MEDIA, LLC, :
 :
 Plaintiff, : TRANSCRIPT
 :
 v. : OF
 :
 MIDDLESEX COUNTY : MOTION HEARING
 PROSECUTOR'S OFFICE and :
 JAMES E. O'NEILL, :
 :
 Defendants. :

Place: Middlesex County Courthouse
56 Paterson Street
New Brunswick, NJ 08903

Date: June 10, 2015

BEFORE:

HONORABLE TRAVIS L. FRANCIS, A.J.S.C.

TRANSCRIPT ORDERED BY:

BENJAMIN D. LEIBOWITZ, ESQ. (Senior Deputy
Middlesex County Counsel)

APPEARANCES:

BENJAMIN D. LEIBOWITZ, ESQ. (Senior Deputy
Middlesex County Counsel)
Attorney for Plaintiff Middlesex County
Prosecutor's Office

Transcriber: Terry L. DeMarco, AD/T 566

Agency: KLJ Transcription Service, LLC
P.O. Box 8627
Saddle Brook, NJ 07663
(201) 703-1670
(201) 703-5623 (fax)

Digitally Recorded
Operator - Not Indicated

APPEARANCES (Cont.):

CHRISTOPHER K. HARRIOTT, ESQ. (Florio & Kenny, LLP)
Attorney for Defendant Middlesex County
Prosecutor's Office

THOMAS J. CAFFERTY, ESQ. (Gibbons, P.C.)
NOMI I. LOWY, ESQ. (Gibbons, P.C.)
Attorneys for Defendant/Plaintiff Home News Tribune

CANDIDA J. GRIFFIN, ESQ. (Pashman Stein, P.C.)
Attorney for Plaintiff Richard Rivera and
Plaintiff Collene Wronko

KEITH J. MILLER, ESQ. (Robinson Miller, LLC)
Attorney for Plaintiff NJ Advance Media

I N D E X

<u>MOTION FOR PROTECTIVE ORDER AND</u> <u>APPLICATIONS FOR ORDER TO SHOW CAUSE:</u>	<u>PAGE</u>
Synopsis by the Court	7
Argument by Ms. Griffin	18, 56
Argument by Mr. Miller	24, 58
Argument by Mr. Cafferty	32, 61
Argument by Mr. Leibowitz	41, 62
Argument by Mr. Harriott	53
Comments by the Court	63
Decision re Protective Order	64
Argument by Ms. Griffin	66
Colloquy	66

1 (Hearing commenced at 9:09 a.m.)
2 THE COURT: Good morning, counsel. Please
3 be seated.
4 Okay. We're on the record and the Court is
5 hearing argument this morning with respect to the
6 following cases: Richard Rivera versus Middlesex
7 County Prosecutor's Office; Collene Wronko versus The
8 Middlesex County Prosecutor's Office, et al., Docket
9 L-1939-15 and L-1951-15, respectively.
10 The Court is also hearing limited argument
11 with respect to the Vaughn index that was previously
12 provided in the matters of Home News Tribune versus
13 Middlesex County Prosecutor's Office, Docket L-1938-15,
14 New Jersey Advance Media versus Middlesex County
15 Prosecutor's Office, Docket L-2022-15, and Middlesex
16 County Prosecutor's Office versus New Jersey Advance
17 Media, Docket L-1217-15. And that is as it relates to
18 the motion for a protective order.
19 Now, I'd like to start with Rivera versus
20 the Prosecutor's Office and Wronko versus the
21 Prosecutor's Office.
22 Would counsel please put all of your
23 appearances on the record first?
24 MS. GRIFFIN: Good morning, Your Honor.
25 THE COURT: Good morning.

1 MS. GRIFFIN: C.J. Griffin of the law firm
2 Pashman Stein for plaintiff Richard Rivera and
3 plaintiff Collene Wronko.
4 THE COURT: Thank you.
5 MR. MILLER: Good morning, Your Honor.
6 THE COURT: Good morning.
7 MR. MILLER: Keith Miller from the firm of
8 Robinson Miller, Newark, New Jersey, on behalf of New
9 Jersey Advance Media in the L-2022-15 case.
10 THE COURT: Thank you.
11 MS. LOWY: Good morning, Your Honor.
12 THE COURT: Good morning.
13 MS. LOWY: Nomi Lowy on behalf of the Home
14 News Tribune in the Home News Tribune versus Middlesex
15 County case and Middlesex County versus Home News
16 Tribune case.
17 THE COURT: Thank you.
18 MR. CAFFERTY: Good morning, Your Honor.
19 THE COURT: Hi.
20 MR. CAFFERTY: Thomas Cafferty, Gibbons,
21 P.C., in the same case as Ms. Lowy. She's my
22 associate counsel.
23 THE COURT: Thank you, counsel.
24 MR. LEIBOWITZ: Good morning, Your Honor.
25 THE COURT: Hi.

1 MR. LEIBOWITZ: Benjamin D. Leibowitz,
2 Senior Deputy Middlesex County Counsel, appearing on
3 the limited basis of one issue that relates to the
4 prosecutor's order for protective -- for protection on
5 L-1212-15 [sic].

6 THE COURT: Thank you, counsel.

7 MR. HARRIOTT: Good morning, Your Honor.

8 THE COURT: Hi.

9 MR. HARRIOTT: Christopher Harriott from the
10 firm of Florio and Kenny appearing on behalf of the
11 Middlesex County Prosecutor's Office on all five of
12 the matters that are before Your Honor this morning.

13 THE COURT: Okay. Thank you, counsel.

14 Now, with regard to the Rivera and Wronko
15 matters, I am going to summarize what was reviewed in
16 your respective briefs and then I'll give you the
17 opportunity to enhance those arguments. But I ask you
18 please not to repeat what I've already placed on the
19 record.

20 Now, the plaintiffs Collene Wronko and
21 Richard Rivera seek insight into the shooting of a
22 Talbot Schroeder on January 14, 2015 in Old Bridge and
23 submitted various OPRA requests to the township of Old
24 Bridge and the Middlesex County Prosecutor's Office.

25 The township of Old Bridge deferred to the

1 Middlesex County Prosecutor's Office in responding to
2 those requests. And the Prosecutor's Office provided
3 access to some record and denied access to others.

4 Now, Mr. Rivera requested the following, and
5 I will also give you the Prosecutor's Office response
6 to each of those requests:

7 One. "All standard operating procedures and
8 policies currently in effect, except for those with
9 security exemptions, including each date of adoption
10 and authorization to implement."

11 The Prosecutor's Office responded:

12 "Pursuant to N.J.S.A. 47:1A-1, *et seq.*, standard
13 operating procedures and policies detail various
14 police procedures, provide instruction to police
15 officers and are matters of security. If released to
16 the public, it would pose a security threat to law
17 enforcement and the public. As such, the request must
18 be denied."

19 Number two. "Internal Affairs' annual
20 summary reports for 2006 through 2014, including all
21 tables and executive summaries."

22 That request was complied with.

23 Number three. "Police use of force incident
24 reports for January 14, 2015."

25 That request was also complied with.

1 Number four. "All police use of force
2 reports for January 14, 2015."

3 That was complied with.

4 Number five. "Computer-aided dispatching or
5 CAD summary log or similar police report for
6 activities on January 14, 2015 relating to the
7 shooting death of Talbot Schroeder of Cedar Grove
8 Place."

9 The response was: "While a CAD report was
10 created as a result of this incident, N.J.S.A. 47:1A-1,
11 *et seq.* allows for the withholding of a document that
12 is considered part of a criminal investigatory record,
13 serves as an intra-departmental memo within a law
14 enforcement agency and also is exempt as a security
15 measure that, if released to the public, could pose a
16 threat to the safety of law enforcement and the
17 public."

18 Number six. "Computer-aided dispatch and
19 CAD abstract event reports or similar police report or
20 activities on January 14, 2015 relating to the
21 shooting death of Mr. Schroeder."

22 The response by the Prosecutor's Office was
23 essentially the same, again relying on 47:1A-1.

24 Number seven. "Investigation reports,
25 narratives, supplemental reports, special reports,

1 incident reports, and arrest reports relating to the
2 January 14, 2015 shooting of Mr. Schroeder containing
3 information as to the identity of the investigating
4 and arresting personnel and the information of the
5 circumstances immediately surrounding the arrest,
6 including, but not limited to, the time and place of
7 the arrest, resistance, if any, pursuit, possession
8 and nature and use of weapon and ammunition by the
9 suspect and the police."

10 The Prosecutor's Office again responded with
11 a response relying on the language contained within
12 N.J.S.A. 47:1A-1, *et seq.*

13 Item eight. "Police daily log -- daily duty
14 log for January 14, 2015 relating to the shooting
15 death of Mr. Schroeder, including all police officers,
16 supervisors and civilians working during that time and
17 what their assignments were, including directed
18 patrol. There are no security exemptions here, in
19 that the material sought is historical and police
20 officers, except those in an undercover capacity, and
21 known to the public."

22 The Prosecutor's Office responded with a
23 similar response, again relying on the language
24 contained within N.J.S.A. 47:1A-1, *et seq.*

25 Number nine. "All police radio recordings

1 for January 14, 2015 relating to the shooting death of
2 Mr. Schroeder for all police frequencies and
3 channels."

4 Again the response was relying on the
5 aforementioned statute.

6 Number ten. "All police telephone
7 recordings on January 14, 2015 relating to the death --
8 or the shooting death of Mr. Schroeder."

9 Again reliance on the same statute.

10 Number 11. "All 9-1-1 telephone calls on
11 January 14, 2015 relating to the shooting death."

12 The response was: "Although there was a
13 9-1-1 call made to the Old Bridge Police Department on
14 January 14, 2015 concerning this incident, N.J.S.A.
15 47:1A-1 allows for the withholding of a document or
16 recording in which a family or victim has a reasonable
17 expectation of privacy. Additionally, Governor's
18 Executive Order 69, which is incorporated into the
19 aforementioned statute, prohibits the release of the
20 identity of witnesses and victims in instances in
21 which no arrests have been made, as in the case in
22 this incident. Therefore, this portion of the request
23 must be denied."

24 Number 12. "All police telephone call logs
25 on January 14, 2015 relating to the shooting."

1 Again reliance by the Prosecutor's Office on
2 the aforementioned statute.

3 And number 13. "Mobile transmission data,
4 in-car terminals, messages and transmissions to and
5 from all terminals on January 14, 2015 relating to the
6 shooting."

7 Again reliance on the aforementioned
8 statute.

9 Number 14. "Copies of requests for
10 materials and records made by other persons and
11 entities seeking records for the January 14, 2015
12 police incident involving the shooting of Mr.
13 Schroeder."

14 That request was complied with. However, it
15 was complied with after the initiation of the lawsuit.

16 And item 15. "Copies of subpoenas seeking
17 records generated or spawned by the police department
18 on January 14, 2015 relating to the death of Mr.
19 Schroeder."

20 And again the Prosecutor's Office responded
21 relying on the aforementioned N.J.S.A. 47:1A-1.

22 Now, the Wronko request was similar, and
23 there were seven specific requests made by Wronko.

24 One. "Copies of all 9-1-1 calls for 40
25 Cedar Grove Place."

1 The response to the Wronko request was
2 similar in -- basically, in all respects to the
3 response that the Prosecutor's Office gave to the
4 Rivera request, relying on 47:1A-1 and the Governor's
5 Executive Order 69 for denying the request.

6 With respect to item two of the Wronko
7 request -- "copies of all police dispatch reports for
8 40 Cedar Grove Place in Old Bridge -- again, the
9 request was denied, relying on the aforementioned
10 statute.

11 Number three. "Copies of all CAD reports."

12 And the response noted that while a CAD
13 report was created as a result of the incident, again,
14 relying on 47:1A-1, the same was denied.

15 Request number four. "Copies of incident
16 reports for Cedar Grove Place for January 14, 2015."

17 That request was complied with.

18 "Copies of use of force reports for the
19 aforementioned address on the same date."

20 Also complied with.

21 "Copies of Attorney General deadly
22 notification report for 40 Cedar Grove Place for
23 January 14, 2015."

24 The response was: "This two page document
25 will be forwarded to you in a separate e-mail. A

1 police narrative on the second page of the document is
2 considered part of a criminal investigatory record and
3 has been redacted." And again a citation to 47:1A-1.

4 And then, finally: "Copies of Internal
5 Affairs police."

6 And the response was that the request was
7 unclear and, therefore, they were unable to proceed
8 with regard to the same.

9 Now, plaintiffs, specifically Rivera, argues
10 that the Court must determine whether the records
11 requested are government records and whether an
12 exemption applies. And that's the standard clearly
13 that the Court must apply in any case involving a
14 request for public records.

15 And the plaintiff asserts that, because all
16 of the requested records were made by police officers
17 during their official course of business, they are
18 government records within the purview of the statute.
19 And plaintiff contends that the Middlesex County
20 Prosecutor's Office violated the Open Public Records
21 Act by denying access to the 9-1-1 call recordings,
22 the computer-aided dispatch, the CAD reports, police
23 telephone recordings and police telephone call logs,
24 as set forth in items five, six and ten of plaintiff's
25 OPRA request.

1 The defendant stated that they could not
2 release those records, because they are criminal
3 investigatory records and not subject to OPRA.

4 The plaintiff sought access to the 9-1-1
5 tape in item 11 of plaintiff's request. Plaintiff
6 argues that OPRA's privacy provision can only exclude
7 a 9-1-1 tape from access in a very limited
8 circumstance and the plaintiff does not believe that
9 the burden has been met.

10 For request number one, the plaintiff argues
11 that the Prosecutor's Office denied access to the
12 records under the security exemption to OPRA and
13 plaintiff's request specifically stated, quote,
14 "except those with security exemptions," end of quote.
15 Therefore, the plaintiff has requested that the Court
16 compel the defendants to release those that are not
17 exempt and to produce a log of those records withheld
18 in accordance with Paff. And that Paff versus New
19 Jersey Department of Labor at 392 Super. 334, a 2007
20 Appellate Division case.

21 The plaintiff did not address in their brief
22 items seven, eight, nine and 13, and these items were
23 all denied by the defendant as well.

24 The plaintiff is also seeking judgments
25 against the Old Bridge Police Department that, at

1 least in their words, co-opted the Middlesex County
2 Prosecutor's Office responses.

3 The -- in the Wronko matter, plaintiffs
4 essentially assert the same arguments as are asserted
5 in the Rivera matter with respect to those items that
6 were denied by the Prosecutor's Office.

7 The opposition relies in no small part on
8 MAG Entertainment versus The Division of Alcoholic
9 Beverage Control at 375 Super. 534, a 2005 Appellate
10 Division case.

11 The defendant asserts that a records
12 custodian is not required to conduct open-ended
13 searches of the agency's files or to analyze, compile
14 and collate the information contained in the agency's
15 files in an effort to locate information that is the
16 subject of a request. The defendants contend that
17 there is not any particular document sought. The
18 defendant avers that the request fails to reasonably
19 identify any specific governmental records sought, but
20 instead requests information or a category of
21 documents, which the custodian cannot comply without
22 conducting a search of their files. And the
23 defendants assert that the documents sought do not
24 specify from which department said records are
25 requested.

1 Now, the Court would note that the requests
2 were really bifurcated. The requests were made to the
3 Prosecutor's Office, as well as to the Old Bridge
4 Police Department. The Old Bridge Police Department
5 then essentially relied on the Prosecutor's Office to
6 respond to those items that related to them.

7 With regard to requests five, six, seven,
8 nine, ten and 13, defendants submit that the same were
9 properly withheld as criminal investigatory records.
10 The defendants contend that there is a continuing
11 investigation into the circumstances surrounding this
12 police shooting and, therefore, N.J.S.A. 47:1A-1.1
13 excludes criminal investigatory records from release
14 under OPRA.

15 Now, counsel, I will hear your arguments
16 with respect to your specific requests, then I'd like
17 to hear from Mr. Cafferty and counsel with respect to
18 the Vaughn index that was provided, and then I'll hear
19 any additional argument that may have been asserted by
20 counsel for the defense, not only in response to
21 plaintiffs' arguments, but in support of your
22 application for the protective order. Okay? All
23 right.

24 MS. GRIFFIN: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MS. GRIFFIN: I suppose I want to start by
2 saying I feel a little bit like the stepchild here,
3 because I arrived today, I wasn't aware that the other
4 attorneys would be here on the other motion, and
5 actually my clients were never notified that there was
6 a protective order being argued or we did not know its
7 existence.

8 We also did not know that they were -- that
9 the other attorneys were given a Vaughn index. We
10 have not been given that Vaughn index. So I did make
11 an argument in my reply brief that I have no clue what
12 they've even redacted from the 9-1-1 call, because
13 it's not evident to me and there was no index or, you
14 know, no Vaughn index.

15 And then I also am sort of in the dark,
16 because repeatedly throughout both of the briefs in
17 opposition to the orders to show cause, defendants
18 make reference to the certification that was supported
19 in -- that was submitted in support of the motion for
20 a protective order. Which, again, I haven't seen.

21 So I don't see how defendants can meet their
22 burden of proof in my two cases when they have
23 completely kept us in the dark. I am not sure if it's
24 inadvertent, I'm not sure if it's because media
25 entities tend to get a little bit more deference in

1 public records cases and often individual requestors
2 are seen as gadflies or pains.

3 In this particular case, Mr. Rivera made
4 this request on behalf of the Latino Leadership
5 Alliance. He is a scholar on police affairs. He has
6 authored reports for the ACLU. This organization has
7 a civil rights project and they're particular inter --
8 particularly interested in police shootings. So
9 whenever there is a police shooting in the -- of a
10 citizen in this state, Mr. Rivera makes a request for
11 all -- for these same types of records.

12 THE COURT: Okay, but those types of bona
13 fides are not prerequisites for an OPRA request.

14 MS. GRIFFIN: They are. They aren't. I --
15 but they do come into play when you are invoking
16 privacy exemptions and you have to --

17 THE COURT: Correct.

18 MS. GRIFFIN: -- do a Burnett analysis.

19 THE COURT: Mm-hmm. Okay.

20 MS. GRIFFIN: But I suppose I'm making the
21 point that, you know, again, that I feel a little bit
22 like the stepchild in this. That we're completely in
23 the dark. And I don't see how, in our particular
24 cases, the defendants have met their burden of proof
25 as to those.

1 So I don't -- other than the general
2 arguments that you've captured in terms of the 9-1-1
3 call, that it's not -- that -- and the CAD reports,
4 that they're not criminal investigatory records by any
5 means, and there's published case law that says that,
6 and the 9-1-1 statute requires them to be made.

7 THE COURT: Mm-hmm.

8 MS. GRIFFIN: I can't speak as to what was
9 exactly redacted, because I don't know. I don't know
10 what the Vaughn index said with regard to that. I
11 haven't -- I've heard the redacted version. I don't --
12 I understand that Your Honor might have heard the full
13 version. I am completely in the dark as to all of
14 this.

15 In terms of the actual requests, I do want
16 to clarify that for -- Your Honor did read the full
17 request into the record, but Mr. Rivera is only suing
18 on items one, which is the SOPs; five and six, which
19 are the CAD reports; --

20 THE COURT: Mm-hmm.

21 MS. GRIFFIN: -- 11, which is the 9-1-1
22 call; and 14, which were the copies of the requests
23 for records, which they did produce on April 30th.

24 THE COURT: Right.

25 MS. GRIFFIN: And Ms. Wronko is only suing

1 for items one, the 9-1-1 call, the police dispatch and
2 CAD reports, and the narrative section of the Attorney
3 General deadly notification report. It was redacted.
4 She would at least like the Court to conduct an *in*
5 camera review. That's not a criminal investigatory
6 record. It's required by the state use -- Attorney
7 General use of force policy to be made, just like use
8 of force reports are. And O'Shea versus West Milford
9 held that those are not CIRs and they cannot be
10 withheld.

11 THE COURT: Right.

12 MS. GRIFFIN: So we think the redactions are
13 unlawful.

14 In terms of, you know, based on what I've
15 heard from other counsel here today, it appears that
16 the Vaughn index revealed that there might only be one
17 section of the call that relates to the actual victim
18 that might invoke the privacy exemption. The other
19 relates to just calls between police officers.

20 The defendants have made this argument in
21 their brief that any record that might contain the
22 name of a police officer could be withheld, because it
23 could cause harm to the police officer. And I think --
24 you know, I cited all the case law in my reply brief,
25 but if you look at Courier News, that case expressly

1 rejects any argument that would apply to every record
2 and any argument that would apply to any record and
3 keep it exempt for eternity.

4 There is no universal exemption. They have
5 to prove in this particular record that releasing it
6 would be harmful. And I don't see how they can do
7 that here. If you look at their language, for
8 example, for the CAD reports they stated: "The CAD
9 reports are likely to contain graphic and upsetting
10 material." To meet their burden of proof, they have
11 to actually tell us that the CAD report does that.
12 They -- I am not certain it -- when I read this, it
13 felt like counsel made arguments in a brief without
14 having actually viewed the records, so I don't -- you
15 know, they can't meet their burden of proof with this
16 sort of speculation.

17 There is a case that came out last month,
18 Gilleran versus The Township of Bloomfield. That was
19 a case that I had argued and the Appellate Division
20 really talked about this burden of proof. And when
21 you just speculate what a record might contain and you
22 don't even look at the record or watch the record or
23 do anything to meet your burden of proof, the
24 plaintiff wins. You can't meet your burden of proof
25 that way.

1 And the other thing regarding the officer
2 safety is that they did release the use of force
3 report forms with the off -- the name of the officer
4 that fired his weapon in the report. So any mention
5 of that officer in the CAD report or in the 9-1-1
6 call, it has already been disclosed, so I don't see
7 any basis for withholding this record based on the
8 fact that we already know the police officer involved.

9 And finally, with regards to the SOPs, I
10 think there's a clear distinction between MAG
11 Entertainment and Bent and the cases that they cited.
12 In those cases, the person requested the entire file
13 for a certain project, which would contain various
14 types of records within it. Here, he just requested
15 the SOPs. It's clear that he requested them from the
16 Prosecutor's Office and to Old Bridge, he requested
17 them to Old Bridge, and Old Bridge actually gave him
18 the SOPs, so obviously it didn't require research,
19 it's easy to find.

20 It would be the -- the equivalent of me
21 asking Your Honor for all canons of the Judicial Code
22 of Conducts [sic]. You don't have to -- it -- I --
23 they're -- I think what they're ask -- what they're
24 arguing is that he would have to say I want canon 7,
25 and that would be a specific request. But here you

1 can request all of the SOPs. They're generally found
2 in one location. He said expressly that he doesn't
3 need the ones that are, you know, truly exempt under a
4 security exemption, but he made the request for
5 specific records which are SOPs.

6 As to the remainder, I -- you know, I would
7 like some additional time after I hear the arguments
8 about the Vaughn index, because I can't really comment
9 on the 9-1-1 call until I actually am at least a
10 little bit informed as to what has happened with it.
11 But I do find it very troubling that a public agency
12 would make a prot -- a motion for a protective order
13 and argue that without even notifying all the parties
14 that have requested the record and have filed suit on
15 the record. And they have completely left my two
16 clients in the dark as to these records.

17 Thank you.

18 THE COURT: Thank you, counsel.

19 MR. MILLER: Your Honor, Keith Miller on
20 behalf of New Jersey Advance Media.

21 Just addressing the Vaughn index, to follow
22 up on our hearing two weeks ago, we did receive what
23 purports to be a Vaughn index from the Prosecutor's
24 Office. It is certainly our position, as we set forth
25 in our letter to the Court, that it is wholly

1 inadequate. It does not identify a single person by
2 name and nor does it identify a person by title or
3 status. So, as of right now, we still don't have the
4 slightest idea who the caller was, if there's a police
5 officer's voice that's heard on here, if a
6 dispatcher's voice is heard on here.

7 Also, we don't have the slightest idea who
8 the purported victim is here. We still haven't heard
9 and the Prosecutor's Office hasn't identified who the
10 purported victim is here.

11 The only other record we have is the
12 certification that was submitted by the prosecutor,
13 Mr. Carey, back in, I think that was March or April,
14 and that certification, as we argued the last time, is
15 entirely devoid of any information. In fact, it says
16 that he didn't even speak to it. It was that members
17 of his office had contacted some unidentified family
18 members who expressed concerns, but we don't know is
19 the prosecutor Mr. Schroeder -- I mean, is the victim
20 Mr. Schroeder. There's a reference apparently that
21 there was a suicide attempt, but there was also I
22 thought a reference to someone else might have been
23 threatened. So is the victim Mr. Schroeder? Is the
24 victim a family member that Mr. Schroeder might have
25 been threatening? Is the victim Mr. Schroeder when he

1 was apparently shot by a police officer?

2 We don't have the slightest bit of
3 information, and without this type of information, we
4 can't possibly reach an evaluation of whether or not
5 this -- there was information properly withheld under
6 this privacy interest. Which, of course, as we have
7 argued, has to be construed extremely narrowly. And
8 here the Prosecutor's Office is taking a very, very
9 expansive interpretation of this privacy interest.

10 I would also note that we don't really have,
11 you know, adequate information here, because the
12 nature that this was presented, the record will
13 reflect -- and, again, we argued this last time and I
14 won't repeat it -- we had requested a Vaughn index
15 quite a while ago once -- after the prosecutors had
16 initially filed their protective order application.
17 Which, again, I'm not going to reargue. We argued
18 that the last time --

19 THE COURT: Okay.

20 MR. MILLER: -- that it's entirely
21 inappropriate, there's no basis for a protective
22 order. I'm -- I'm not -- that's on the record
23 already, but --

24 THE COURT: Yeah.

25 MR. MILLER: -- we had requested a Vaughn

1 index back then. We did not receive a Vaughn index.
2 Then, apparently, once these lawsuits were started,
3 the Prosecutor's Office presented the unredacted tape
4 to Your Honor. Okay? We did not consent to that.
5 And apparently Your Honor listened to that tape, which
6 we didn't agree to or consent to. For the record, we
7 learned that at the last hearing. We object to that,
8 because that puts us in a very difficult situation
9 where now we don't have an adequate Vaughn index.

10 The prosecutor's position is, well, the
11 judge has the tape, the judge can listen to the tape,
12 the judge can figure out if it's right or wrong. I
13 would submit that's entirely contrary to the law of
14 Vaughn and the Vaughn index. I said it in my brief,
15 but that is not the way that it's supposed to go.

16 The whole point of the Vaughn index is to
17 give specific information. And, again, we don't have
18 it here. The Vaughn index speaks for itself. But in
19 the Fisher case, the Appellate Division made clear
20 that the point of the Vaughn is twofold. One of the
21 purposes is to let the reviewing party, in this case
22 Your Honor, you know, know why they're claiming
23 exemptions. But the other equally important purpose
24 is to let the requestor know what's being claimed as
25 an exemption, so that the requestor can make a

1 reasonable and informed argument to the Court.

2 We are entirely unable to do that now,
3 because we -- like I said, we don't have any of the
4 facts, so we can't possibly make this kind of informed
5 argument. We are now put in a very difficult
6 situation where our best alternative apparently is,
7 well, we can listen to the tape *in camera*. But if we
8 listen to the tape *in camera*, we can't discuss it with
9 our clients. So I am not the requestor. My client is
10 the requestor. So if I listen to the tape, I can't
11 discuss it with my client, I can't talk about a legal
12 strategy, I can't make informed arguments. I still --
13 if I come out and argue before Your Honor, I can't say
14 anything on the record that I might have heard back in
15 there. So it puts me and my client in a very
16 difficult situation, so --

17 You know, and this all started, again, with
18 the improper protective order application, but it's
19 compounded now. We've repeatedly asked for a proper
20 Vaughn index. We have not received a proper Vaughn
21 index.

22 And I would also note that in the Fisher
23 case, the Appellate Division case -- which, again, I
24 cited in my letter brief to Your Honor -- that relied
25 on a case, a Ninth Circuit case called Wiener versus

1 FBI. Which, again, we've cited. And in the Wiener
2 case, you know, the court was clear about the reasons
3 for an *in camera* review. And it says here:

4 "In camera review of the withheld documents
5 by the court is not an acceptable substitute for
6 an adequate Vaughn index. In camera review does
7 not permit effective advocacy. Therefore, resort
8 to *in camera* is appropriate only after the
9 government has submitted as detailed public
10 affidavits and testimony as possible."

11 And then I'm just going to jump in the cite
12 here: "In camera review may supplement an adequate
13 Vaughn index, but may not replace it."

14 And that's from 943 F.2d 972. That's a
15 Ninth Circuit case cited with approval by our
16 Appellate Division.

17 So I would submit that's the position we're
18 putting here. We have not gotten an adequate Vaughn
19 index, despite repeated requests, and we cannot be
20 effective advocates here, because we don't even know,
21 frankly, what we're arguing about.

22 I'd also just like to note very briefly an
23 issue that was raised by the prosecutor when they
24 submitted a reply brief to Your Honor a few days ago.
25 Although, I would note Your Honor didn't call for

1 reply briefs, but they put it in anyway. And they
2 went back to Judge Serpentelli's opinion, which we had
3 discussed last time in the Asbury Park Press case.

4 But, again, going back to Judge
5 Serpentelli's opinion, Judge Serpentelli, even though
6 in that case -- the only reported case where there was
7 a finding of this privacy interest overcoming
8 appellate's right -- in that case, even Judge
9 Serpentelli said that the:

10 "Clearly, the court must always maintain a
11 sharp focus on the purpose of OPRA and resist
12 attempts to limits its scope absent a clear
13 showing that one of the exemptions or exceptions
14 incorporated by the statute by reference is
15 applicable to the requested disclosure. The
16 salutary goal, simply put, is to maximize public
17 knowledge about public affairs in order to ensure
18 an informed citizenry and to minimize the evils
19 inherent in a secluded process."

20 That's at 374 N.J.Super. 312 at 329.

21 And then Judge Serpentelli, in distinguishing
22 that said:

23 "However, having recognized the overarching
24 value and objective of providing broad access to
25 government records, the court must ask how the

1 release of the dying words of Anthony Napoleon in
2 any way contributes to the purpose of OPRA or
3 provides even a scintilla of insight into the
4 functioning of government."

5 So that was the reason Judge Serpentelli
6 gives for saying I won't do that.

7 But here I would just note, Your Honor, that
8 release -- public release of this tape will provide
9 more than a scintilla of insight into the functioning
10 of government. We have to remember here police
11 officers showed up at Mr. Schroeder's house and
12 apparently shot and killed him in the course of
13 responding to a 9-1-1 call. Release of this tape will
14 inform the public as to what happened here. There is
15 a very strong public interest here. So I would just
16 note that's a major difference where Judge Serpentelli
17 said there's absolutely nothing to be gained --

18 THE COURT: There are clearly factual
19 distinctions.

20 MR. MILLER: Right, but --

21 THE COURT: Okay.

22 MR. MILLER: -- but I just wanted -- I just
23 wanted to point that out, Your Honor.

24 THE COURT: Okay.

25 MR. MILLER: Thank you.

1 THE COURT: Okay.

2 MR. CAFFERTY: Good morning, Your Honor.

3 THE COURT: Hi.

4 MR. CAFFERTY: I'll try to be brief.

5 I want to start with the proposition, and I
6 think it's true, procedure matters. And I think that
7 there are several procedural steps that the
8 Prosecutor's Office has taken in this case that has
9 put both the plaintiffs and the Court in a very
10 difficult situation. So let me briefly walk through
11 those and relate them to the Vaughn index.

12 The first is -- counsel have already alluded
13 to -- is the issue of this protective order. And
14 counsel for the Prosecutor's Office this morning -- I
15 suspect it was an oversight -- but he said, Your
16 Honor, he's here to discuss the Vaughn index in the
17 context of the protective order. I know the
18 transmittal of the Vaughn index was in the context of
19 all three, and so I am going to assume that it was.

20 But now addressing the Vaughn index in the
21 context of the protective order. For all of the
22 reasons that we previously argued, that protective
23 order was procedurally improper. And the Cliff note
24 version of that is there's at least six reasons why
25 that protective order is procedurally improper and,

1 therefore, the Vaughn index should not be addressed,
2 respectfully, in the context of that.

3 Number one. Under the Rule 4:10-3,
4 protective orders apply to discovery matters in
5 pending litigation. There was no pending litigation
6 when that discovery order was filed.

7 Number two. There simply was no justiciable
8 controversy when that protective order was filed. The
9 protective order says I don't want to turn over this
10 tape at all to the requestors.

11 THE COURT: In short, the statute gives the
12 requestor the option to come to court, not the
13 governmental entity.

14 MR. CAFFERTY: That's right, Judge. And
15 that's quite apart from the procedural issues with
16 respect to the rule. The statute gives it solely.

17 THE COURT: Mm-hmm.

18 MR. CAFFERTY: And for good reason, because
19 the statute gives the requestor two distinct
20 fundamental rights: whether to litigate at all; --

21 THE COURT: Right.

22 MR. CAFFERTY: -- and, if so, where. The
23 GRC or here.

24 THE COURT: Or here.

25 MR. CAFFERTY: Allowing a protective order

1 preemptively deprives the requestor of those two
2 statutory rights and, candidly, circumvents ther
3 enforcement mechanism of the act, which is the ability
4 of a requestor who prevails to recover attorney fees,
5 because there is no ability in a protective order
6 under 4:42-9, which is the rule that deals with fee
7 allocations or fee awards, that would allow the Court
8 in that circumstances.

9 So, for all those reasons --

10 THE COURT: Yeah, but I take it you're
11 arguing -- you would argue at some point with respect
12 to your application for fees, assuming you're the
13 prevailing party, that any work that was expanded on
14 the protective order was within the context of the
15 OPRA application.

16 MR. CAFFERTY: Well, my first argument --
17 again, because I think procedure matters -- is that we
18 sent a 1:4-8 letter to the prosecutor --

19 THE COURT: Right.

20 MR. CAFFERTY: -- under when we got that
21 protective order. So I think my first argument is,
22 no, it's under the 1:4-8 rule, because there was no
23 basis for it. And because I don't even want to
24 contaminate it and argue it's an OPRA issue.

25 THE COURT: Mm-hmm. Okay.

1 MR. CAFFERTY: So -- so that's -- when we
2 get to that point, that will be our --

3 THE COURT: Okay. And what I was
4 essentially asserting though is that the protective
5 order was spawned based on the OPRA application.

6 MR. CAFFERTY: Yes.

7 THE COURT: Okay.

8 MR. CAFFERTY: Yes. Right.

9 Now, so that deals with the procedural
10 problems in the Vaughn index in the context of the
11 protective order.

12 Now let's turn to the procedural problems of
13 the Vaughn index in the context of our order to show
14 cause.

15 THE COURT: Okay.

16 MR. CAFFERTY: And I think there is -- we
17 start with the proposition -- and there has been a lot
18 of, for lack of a better word, a cornucopia of reasons
19 the prosecutor has advanced. And they have been
20 moving targets throughout this litigation as to why
21 the requestors aren't entitled to this tape. And, you
22 know, we first start reasonable expectation of
23 privacy, the Governor's Executive Order 69, and we go
24 through multiple others. Criminal investigatory --
25 the Court knows and the Court has seen them --

1 criminal investigatory, advisory consultative and
2 deliberative.

3 Now I believe all of that chaff is gone and
4 the sole reason -- and I think this is important --
5 the sole reason now being asserted for the redactions
6 in the Vaughn index are personal privacy. And so all
7 of those other reasons that we had to respond to are
8 no longer in play. So now let's turn to the sole
9 reason in the redactions on the tape.

10 And I think the final procedural problem
11 that the prosecutor has created for both the Court and
12 for counsel -- and Mr. Miller alluded to it -- is
13 transmitting the unredacted version to the Court and
14 doing so without notice to counsel. So we weren't
15 even in a position to be aware until the Court,
16 candidly, told us on the record last time that the
17 Court had the unredacted version.

18 Indeed, what's strange about the prosecutor
19 doing that is his motion for the protective order
20 seeks an order allowing him to send it to the Court.
21 So he has preemptively granted himself the relief that
22 his motion seeks. And that creates problems, because,
23 as Mr. Miller correctly I think described, it -- a
24 Vaughn index arises in the context of an assertion of
25 privilege.

1 And I think the cases have clearly
2 recognized that any viewing by a court of privileged
3 material is a piercing of the privilege. Even an *in*
4 camera viewing. And that's why the Vaughn index
5 serves a role, not only for counsel, to assist counsel
6 to effectively represent their clients' interest
7 without piercing the privilege, but for the Court to
8 determine is -- whether it's necessary to have an *in*
9 camera viewing.

10 And so the Vaughn index we have here --
11 again, I won't repeat all our arguments, except to
12 summarize a few of them to illustrate the problems
13 with it -- just doesn't comply with what a Vaughn
14 index should provide.

15 First counsel talks about Judge
16 Serpentelli's case. And as we talked about last time,
17 I was the attorney in that case. And that was a 2004
18 case, three years after OPRA. The issue in the case,
19 as I said last time, was whether there was even a
20 personal privacy exemption under OPRA. That was the
21 question. And the argument in that case was whether
22 47:1A-1.1, which defines the legislative findings and
23 talks about a personal expectation of reasonable
24 expectation of personal privacy, created a substantive
25 exemption under OPRA or was merely prefatory and not

1 substantive.

2 Judge Serpentelli did listen to the tape.
3 My recollection of it is --

4 THE COURT: You would agree, however, that
5 the remarks of Senator Robertson with respect to the
6 legislation certainly could be reasonably interpreted
7 to include a court's consideration of privacy interest.

8 MR. CAFFERTY: No question of -- yeah,
9 that's what Judge Serpentelli held, --

10 THE COURT: Okay.

11 MR. CAFFERTY: -- but, you know, the
12 prosecutor just seems to argue, because I didn't
13 complain about a person, a Vaughn index in that case,
14 I guess for the next 12 years and for however long I
15 may be lucky to continue to practice law, I'm forever
16 precluded from raising that issue. I don't think
17 that's the law and shame on me perhaps for not doing
18 that, but that doesn't mean that I don't learn by what
19 happened in the past. And it's clear you should have
20 a Vaughn index.

21 Let's turn again to a couple of examples of
22 the redactions to -- which I think illustrate
23 insufficiency of the Vaughn index. We -- the
24 prosecutor has a redaction from 6:15 -- 6 minutes 15
25 seconds to 6 minutes 23 seconds and 6 minutes 26

1 seconds to 6 minutes and 30 seconds. And the basis
2 for that is personal privacy, quote, "fleeing [sic]
3 scream heard in the background."

4 Well, we don't know who -- what that
5 fleeting scream was and, in fact, when you read the
6 prosecutor's letter brief submitted with the Vaughn
7 index to the Court on page 11 of it, I don't think the
8 prosecutor even knows who is the individual screaming,
9 because it says, "apart from the 9-1-1 responder on
10 the call" -- and I'm reading from page 11 of the
11 letter brief, point -- or Arabic number two -- "the
12 other persons heard on the call or cited in the call
13 on the redacted portions of the recording also are
14 private citizens" -- and here's the operative -- "who
15 appear to be household and family members of the
16 caller."

17 So we don't even know who is ex -- who is
18 uttering this fleeting scream, yet we were told -- we
19 are told that there is a reasonable expectation of
20 privacy on the part of that person. And I don't know
21 -- it doesn't appear the tape identifies the person.
22 As I said, the prosecutor doesn't even know who it is,
23 so I don't know how leaving that scream in would
24 invade somebody's reasonable expectation of privacy.

25 On 3 minutes 25 seconds to 3 minutes 27

1 seconds, the basis for that exemption is it
2 constitutes a -- it contains a brief reference to the
3 attempted suicide. Well, we all know that that's what
4 this call involved. We know it, because it's in the
5 news stories that are before the Court. We know it,
6 because the prosecutor himself in his brief publicly
7 filed in this case said it involved an attempted
8 suicide. So I have difficulty with that.

9 And finally, the one that is difficult to
10 respond to, because of deficiencies in the Vaughn
11 index, but that is the from the zero point -- or colon
12 zero zero to 2:53 minutes. Everything is redacted.
13 And the one thing I suspect -- and this illustrates
14 the over-redact, if there's such a word -- over-
15 redaction that occurred here, there's a regulation,
16 N.J.A.C. 17:24-2.3(a)(5), which tells you and dictates
17 how responders to the 9-1-1 calls are to answer the
18 call. And it says: "All calls shall be answered with
19 a response such as '9-1-1, where is the emergency.'" I
20 mean, is that -- you know, that's redacted,
21 apparently, under this. I can't imagine -- or either
22 that or the responder, the person answering the call,
23 disregarded the regulations, which is an important
24 public issue, too. And I don't think that happened,
25 but I think that brief comment is illustrative of the

1 lack of support for redacting what's redacted here.

2 And finally, to the extent there is a
3 personal privacy in some of these comments on the
4 tape, as Mr. Miller and Ms. Griffin referenced, when
5 we get to the Burnett factors, at the end of the day
6 the Court is weighing the personal privacy interest
7 versus the public interest. This was a police
8 involved shooting. It may be completely justified,
9 but it certainly in today's day and age raises
10 significant public interest and concern as to what
11 happened to the 75-year-old disabled man in his home.

12 And that is not an insignificant public
13 interest that I think, from what we can see from this
14 Vaughn index, outweighs any of the assertions that
15 have been advanced for personal privacy.

16 Thank you, Your Honor.

17 THE COURT: Thank you, counsel.

18 MR. LEIBOWITZ: Thank you, Your Honor.

19 It's our position that in an issue of
20 privacy in this case, a Vaughn index itself violates
21 the reasonable expectations of privacy that the
22 private citizen callers on this call, made from the
23 private residence of a citizen, involving a situation
24 they had no control of, that was a personal situation.
25 Not a cat stuck in the tree, come and get the cat out.

1 Not a wire is down on the street, come and remove the
2 wire.

3 But in the particular circumstances of this
4 case, the individual's privacy is compelling and that
5 the very demands of counsel that the Vaughn index was
6 insufficient is not based upon privacy concerns, it's
7 based upon distinguishable cases, documents that you
8 can identify, that the person who wrote a letter, who
9 received the letter, who got copies of a letter, the
10 subject matter of the letter, and the grounds for the
11 privilege. Attorney-client communication. This is
12 completely different from the document cases, Your
13 Honor.

14 And this is a novel case in this regard:
15 it's a case of first instincts that we're presenting
16 here that was not presented apparently in Serrano,
17 that was not presented in the Ocean County Prosecutors
18 case, that's presented here, which is a situation as
19 to whether or not: (A), in the first instance, a
20 Vaughn index has to be produced which compromises --
21 and I think counsel as much said it, that the -- as
22 we've said in our brief -- that this case involves a
23 suicide.

24 I don't believe that even should have been
25 provided, but last time when we were here and the

1 Court directed us to provide the Vaughn index, after
2 counsel spoke among themselves on our option of
3 offering them the opportunity to go into chambers and
4 to listen, subject to a protective order, to what was
5 on the recording. If they want to know what's on the
6 recording of who is speaking, without us compromising
7 the privacy expectations of the private citizens on
8 that call, to me that's a way to avoid it. And
9 counsel said no.

10 Why? Now we hear from Mr. Miller that he
11 can't talk to his client about what's on it. Every
12 day protective orders are entered in courts in this
13 country involving trade secrets, involving a variety
14 of things, where attorneys and courts deal with that
15 situation. The fact that an attorney can't talk to
16 his client at that time about the subject matter is
17 dispositive of nothing in this case or those cases.
18 Because the attorney can argue the position of their
19 client, whether or not in this case, on balance, the
20 interests that they're seeking to protect are greater
21 than the privacy interests of the private citizens
22 making the call in this case from their private
23 residence.

24 It's not just the state that has an
25 obligation to avoid invading the privacy of our

1 citizens. Private corporations, public corporations,
2 individuals. We can't sacrifice our right of privacy
3 based upon speculative and conjectural situations of
4 cit --

5 THE COURT: You're not suggesting that
6 because a private citizen calls for police assistance
7 based on a burglary or a robbery, that that tape would
8 be subject to privacy interest, are you?

9 MR. LEIBOWITZ: Each case, Judge -- I don't
10 know, because each case depends on what's said and
11 what's heard. I can't say yes, I can't say no. I
12 mean, the wire down in the street, the car accident,
13 come, send the ambulance, what have you, in situations
14 not involving personal matters. My neighbor's house
15 has flames coming out of the roof, come and get it. I
16 don't have an issue of privacy that regard, Your
17 Honor. In terms of a burglar, a mere burglar walking
18 around? I probably don't have an issue, because I
19 want to know how promptly the person handling the call
20 gets the address, gets people out. I mean, sure,
21 there's a concern there about whether the public
22 dispatcher, the police officer mishandled the call. I
23 agree entirely.

24 Now that's where the Court comes in, in this
25 case, and that's where we have to make the argument

1 that, in a case of personal privacy of a situation in
2 this case, only the Court can decide whether or not --
3 initially, at least, unless counsel wants to proceed
4 pursuant to a protective order, where we sit together
5 *in camera* to listen to it -- only the Court can
6 decide, like Judge Serpentelli did, whether or not the
7 privacy interests rise to the level of entitling the
8 protection that the Prosecutor's Office has a
9 responsibility to seek.

10 And we're talking about a constitutional
11 obligation as well under the federal constitution,
12 under the state constitution, besides OPRA itself,
13 where Burnett indicates that there is a privacy
14 protection that an agency has a responsibility to
15 protect.

16 So I want to come back to the argument of
17 the interest of whether it's the Latino Coalition,
18 whether it's anybody who follows what goes on in the
19 police shootings. If those generalized concerns are
20 sufficient to eviscerate the privacy interest of
21 private citizens in this particular case, if it is,
22 then any speculation of that nat -- then -- then it
23 means there's no privacy. Then it means that there's
24 no entitlement of a person who has no option but to
25 pick up the telephone and make a call and report that

1 a family member is in the process of attempting to
2 commit suicide. That there's any protection for the
3 distressed call of that individual.

4 And it's a sad day if it comes to that
5 situation. And I respect the media's rights and
6 interest to know whether there was a colorable
7 negligence or misappropriation or mishandling by the
8 public officials in this call, but that's where the
9 Court, we submit, Your Honor, we believe, has to
10 participate and that's a call that the Court has to
11 make.

12 And I want to put on the record that on May
13 19th I got a call from co-defense counsel that the
14 Court is looking for the unredacted recording. Just
15 to indicate how that came about. We did not --

16 THE COURT: Yeah, I thought that I made that
17 clear at the last hearing. The Prosecutor's Office
18 received a request from the Court for that unredacted
19 tape. Okay?

20 Now, I'll let you hear -- I'll let you
21 respond to that, but go ahead.

22 MR. LEIBOWITZ: And with the speed with that
23 unfolded, counsel was notified and the Court was
24 provided with the unredacted recording, --

25 THE COURT: Right.

1 MR. LEIBOWITZ: -- which we indicate at this
2 point, Your Honor, that what is -- I mean, in terms of
3 what we have produced as a Vaughn index and our
4 reluctance to provide it, but we did, because the last
5 time when we appeared before the Court, Your Honor
6 directed us to provide it. It was a delicate
7 balancing, if you will, in terms of still trying to
8 protect the privacy interests, because we believe the
9 people who are on these sections of the call are not
10 police officers, they are not the public dispatcher,
11 they are the private citizens who have a reasonable
12 expectation of privacy and that, under the
13 circumstances, when the Court listens to those, that
14 there's not a colorable instance of misconduct or
15 negligence by the responders.

16 And to that extent, we would submit and I
17 believe that the Court plays a critical role in
18 protecting the privacy interests therefore and
19 balancing the interests of the media and the private
20 citizens who have made this request and the
21 individuals who are entitled to anonymity and who are
22 entitled to solitude. That those very values of
23 privacy are violated and lost if we have to go into
24 the detail in a Vaughn index that counsel have argued
25 from other distinguishable cases have to be provided

1 here. Okay?

2 I offer no apology for saying a family or
3 household member appears in terms of a reference in
4 that Vaughn index to have said something. I think
5 perhaps -- you know, that's as far as privacy would
6 permit us to go without saying Mary Smith or whoever
7 the name of the person may have been said thus and
8 such. Because the next thing you know, her privacy is
9 going to be violated, because the media is going to be
10 at her door asking her about the incident and if she
11 has a privacy interest.

12 Only Your Honor, only the Court can protect
13 her solitude and anonymity for what happened in this
14 case. And the question is whether the segments that
15 we have redacted, that the prosecutors have redacted,
16 colorably fall within the concerns of the plaintiffs
17 in this case. And we would just submit that, Your
18 Honor, we rely upon the Court to address -- to decide
19 that issue and, therefore, we make no apologies for
20 the Vaughn index not having what counsel has sought.
21 We feel it's our responsibility.

22 THE COURT: Okay. All right, counsel.

23 That's --

24 MR. LEIBOWITZ: Now, let me just talk about
25 the procedure briefly, because I think that's a

1 somewhat of a critical issue, but now that the
2 complaints have been filed, it's, in a manner of
3 speaking, somewhat moot in this regard. Obviously,
4 that has been included as a defense to the verified
5 complaints.

6 And as I have read N.J.S.A. 47:1A-6, which I
7 believe is the section that says a requestor may
8 initiate a proceeding under this Act, I thought about
9 what that means and whether -- and I believe what that
10 means, Your Honor, is it's characteristic in a lawsuit
11 that's it's a requirement that a party bringing a suit
12 has to make a demand for relief. Has to make a
13 demand. In a collection case there has to be a bill
14 that's provided, there has to be a demand for payment.
15 If that's not made, a defense to a claim for payment
16 can raise those.

17 It's our position that the language of the
18 statute that's relied upon here simply indicates that
19 a person can't simply initiate a lawsuit against a
20 public agency for a document without making a demand
21 for a document and without then the public agency
22 responding. Which is what occurred here. However,
23 where a constitutional, be it federal or state
24 constitutional right of privacy is involved, the
25 statute cannot operate as a bar to preclude some

1 relief being sought.

2 Now, maybe a motion for a protective order
3 procedurally should have been an order to show cause.
4 Okay? Maybe it should have been an order for a
5 declaratory judgment. But what I'm saying is, once a
6 OPRA --

7 THE COURT: Or maybe it should have simply
8 been a Vaughn index.

9 MR. LEIBOWITZ: Well, here, given the
10 privacy concerns, our position is that it -- we didn't
11 provide a Vaughn index, a Vaughn index in this
12 particular case was not -- I mean, it shouldn't have
13 been requested, but the Court did. So while we have
14 issue with that, if they got the Vaughn index that we
15 provided -- and -- and part of the issue is how
16 specific in a case involving privacy must a Vaughn
17 index be? Judge Serpentelli didn't address that.

18 THE COURT: Okay. Well, I don't want you to
19 go back over that. I got that.

20 MR. LEIBOWITZ: Okay.

21 THE COURT: Okay.

22 MR. LEIBOWITZ: So, I mean, procedurally our
23 position -- and by the way, I do have to say, I mean,
24 we did express in communication before the complaint
25 was filed in response to the request for a Vaughn

1 index that the privacy interests were such that a
2 Vaughn index was not going to be provided. And then
3 we followed with the letter and my certification to
4 counsel saying, look, we'll agree to treat this
5 situation as if under OPRA. You can get attorneys'
6 fees if you prevail, but we offer as an option -- we --
7 going into chambers with the Court and counsel
8 listening to the recording. And we submit that that's
9 a viable option to avoid all of this.

10 THE COURT: Okay.

11 MR. LEIBOWITZ: To avoid the delay that the
12 case has entailed, to avoid the unnecessary expense of
13 filing a complaint. I mean, quite frankly, are we
14 going to argue over who initiates bringing a
15 protective order under the privacy interests of
16 citizens who have constitutional rights over you have
17 to wait until an opera complaint is filed -- an OPRA
18 complaint is filed.

19 It's our position that this was a proactive
20 approach to dealing with a problem that could have
21 been resolved weeks, if not months ago, and we agreed
22 to stipulate that if the plaintiffs prevailed, they
23 would be entitled to attorneys' fees, just as if under
24 OPRA. They would be entitled all rights just as if
25 under OPRA. Our objective was not to deprive them of

1 attorneys' fees. It certainly could have efficiently
2 expedited the matter and they could have gotten their
3 attorneys' fees.

4 THE COURT: Okay.

5 MR. LEIBOWITZ: So, I have to say that we
6 regard that as a significant factor, which I put in my
7 certification to the Court.

8 THE COURT: All right.

9 MR. LEIBOWITZ: I -- if -- in terms of the
10 other arguments of counsel, look, the essence -- and
11 this was argued more the first time that we didn't get
12 a chance to respond, but the prosecutor's
13 certification is such that basically the counsel is
14 seeking the victims, the family members to provide
15 certifications, because we know the prosecutor's
16 certification has hearsay. But in order to protect
17 the privacy interests of the individuals, we would
18 submit that it's contrary to those interests to go to
19 the individuals whose privacy -- private citizens the
20 Prosecutor's Office is seeking to protect -- and say
21 to them, you have to sign this certification so that
22 the plaintiffs who want to hear your moments of
23 distress on the recording don't get to hear it. I
24 mean, we find that totally inappropriate.

25 THE COURT: Or for the Court to review in

1 camera.

2 MR. LEIBOWITZ: Well, I think that, again,
3 it didn't seem that Judge Serpentelli required it and
4 I am not familiar with any case that requires it where
5 privacy is the issue. I think --

6 THE COURT: Mm-hmm. Okay.

7 MR. LEIBOWITZ: -- the privacy issue is one --

8 THE COURT: I got it.

9 MR. LEIBOWITZ: -- listen to the redacted
10 portions. Determine whether, from the redacted
11 portions, a -- the private citizens who are heard have
12 a reasonable expectation of privacy. I think that
13 merely signing a certification that somebody shoves
14 under their nose and says, here, sign this, is really
15 any better than the argument still could be made back
16 and forth what does it matter that that person thinks
17 they have a reasonable expectation of privacy; the
18 media's interest should out balance that.

19 THE COURT: Yeah. Okay.

20 MR. LEIBOWITZ: That's for the Court to
21 decide, Your Honor.

22 THE COURT: All right. Thank you, counsel.

23 MR. HARRIOTT: Yes, Your Honor. I'll be
24 brief.

25 I just want to start by apologizing to Ms.

1 Griffin for any confusion that may have been caused,
2 because it's exactly the type of confusion that I
3 feared would result when we had these multiple
4 applications. I received the Wronko and Rivera
5 matters first. When I was informed by Mr. Leibowitz
6 that there were these three other pending matters, I
7 reached out to everyone who is sitting here at the
8 table today and suggested they all be heard at the
9 same time, exactly because I had concerns about
10 logistically or legally how the Court and the parties
11 would sort this all out.

12 THE COURT: Mm-hmm.

13 MR. HARRIOTT: When the Prosecutor's Office
14 decided to release the redacted copy of the tape to
15 the plaintiffs in the North Jersey Media and New
16 Jersey -- or Home News Tribune and New Jersey Advance
17 Media cases, I also had a copy of the redacted tape
18 made for Ms. Griffin and sent to her. I will admit,
19 Your Honor, in the aftermath of our last hearing on
20 this case I did, in fact, neglect to have the Vaughn
21 index, which was sent to me by Mr. Leibowitz, sent to
22 Ms. Griffin, but I'd just like to represent that at no
23 point was that intentional and I certainly apologize
24 for that.

25 With respect to the applications, Judge --

1 THE COURT: Does she have it now? No?
2 Okay. Go ahead.

3 MR. HARRIOTT: Judge, with respect to the
4 applications, Your Honor accurately summarized our
5 arguments. I will just add that, to the extent the
6 records would not be considered criminal investigatory
7 records, we'd ask the Court to also consider them as
8 records of an ongoing investigation whose release
9 would be inimicable to the public interest. We
10 believe that the certifications that were submitted by
11 Mr. Crocco -- by Sergeant Crocco of the Prosecutor's
12 Office and by Prosecutor Carey support the arguments.
13 Sergeant Crocco's certification certainly supports the
14 -- or establishes the existence of an ongoing
15 investigation, which is currently being handled by the
16 state Attorney General's Office.

17 It also, we would assert, adequately relays
18 the security concerns that are in play in this case
19 with respect to the certification of the prosecutor --
20 of the prosecutor himself, which sets forth the
21 privacy interests, we of course rely on the arguments
22 that Mr. Leibowitz made already, but again would argue
23 that the right of the citizens in this case to remain
24 anonymous and to have their -- to not have their
25 private information disclosed would outweigh the right

1 of the public to know.

2 It would be our position, I think as Mr.
3 Leibowitz ably expressed, that the ability to review
4 the government response on this tape, if that is the
5 concern of the public, is still available even in a
6 redacted form.

7 For -- so for those reasons, Your Honor, we
8 believe that the response of the Middlesex County
9 Prosecutor's Office in all of these matters was
10 appropriate and un (inaudible; voice drops off).

11 THE COURT: All right. Thank you, counsel.
12 All right. Any response?

13 MS. GRIFFIN: Yeah. Well, I just want to
14 respond to that briefly to say I also do not have the
15 prosecutor's certification that supposedly lays out
16 how the ongoing investigation exemption had been met.
17 What I do have is the Croc -- Sergeant Crocco
18 certification, and all it says is that there was an
19 investigation and that's not the standard. You have
20 to prove there was an investigation that's ongoing,
21 but you also have to prove that it would -- a release
22 would be inimicable to the public interest.

23 And what the defendants argued in their
24 brief does not meet the standards. They argued
25 impaneling a jury might be difficult. Courier News

1 expressly said that is not a leg -- that is not a
2 reason for applying the exemption. That there are
3 procedural mechanisms at trial that you can use to
4 counter that problem.

5 They also argued that the -- any document
6 that contains the name of an officer could create
7 security problems in this climate of animosity towards
8 police. That's speculative. They haven't pointed to
9 any particular harm or threats of harm here in
10 Middlesex County. And they also have already released
11 the officer's name in the UFR, the officer that fired
12 the shots, which we've -- which would presumably be
13 the officer that would receive the most animosity from
14 the public.

15 And they also have just made the blanket
16 assertion that these are criminal investigatory
17 records. I think we lay out pretty clearly that they
18 are all required by law to be made. But again,
19 there's just speculation throughout. The CAD reports.
20 Those are reports that are required to be made. They
21 are just recording the dispatch. And they just make
22 this -- these general arguments and then they say
23 they're likely to contain gruesome materials, but, you
24 know, they haven't met their burden of proof, because
25 they haven't demonstrated that they actually do. It

1 reads as if they haven't even looked at the records.

2 THE COURT: Okay.

3 MS. GRIFFIN: As to the 9-1-1 call, again, I
4 believe that my clients are so prejudiced by the lack
5 of information and the lack of Vaughn index and the
6 lack of the certifications that I can only rely upon
7 the arguments of the other counsel here today.

8 THE COURT: All right. Thank you, counsel.

9 MR. MILLER: Yeah. Briefly, Your Honor.

10 THE COURT: Okay.

11 MR. MILLER: I just will go in reverse order
12 of some of the arguments.

13 Just going to the protective order, counsel,
14 Mr. Leibowitz suggested that, well, the OPRA statute
15 kind of says the requestor may file suit, but it's
16 unclear really who can file. Of course that's not the
17 case. N.J.S.A. 47:1A-6 says, quote: "The right to
18 institute any proceeding ... shall solely be [sic]
19 that of the requestor." Close quote. So there is
20 zero discretion there --

21 THE COURT: Next argument.

22 MR. MILLER: -- that -- and so we did, you
23 know, Your Honor, send a letter under Rule 1:4-8 on
24 that before this saying that was frivolous. It was
25 frivolous then, it remains frivolous today.

1 THE COURT: Okay.

2 MR. MILLER: They did not withdraw that.

3 I would also note counsel says, well, after
4 we sent them a letter demanding they withdraw their
5 frivolous application, they sent, in effect, a letter
6 offering to compromise, let's let the Judge listen to
7 it, which we rejected. Now, at best, that's an offer
8 of compromise. That's under Rule of Evidence 408.
9 That's -- that can't be used as evidence of anything,
10 so I would submit that's entirely inappropriate to put
11 that in a certification to Your Honor.

12 As far as the way by which the unredacted
13 tape came into Your Honor's possession, again, that's
14 all certainly news to me and my client. Even if Your
15 Honor had made a request to the custodian to turn over
16 the unredacted tape, the custodian should have and had
17 a duty to at least notify all counsel of record that
18 the tape was being turned over. Okay? To make an ex
19 parte submission without notice is highly improper and
20 irregular, so, again, I object for the record.

21 THE COURT: Okay.

22 MR. MILLER: I would also respectfully
23 submit that, for Your Honor to listen to the tape
24 before we addressed the issue of the Vaughn index, was
25 improper, because it kind of -- it jauntses [sic] Your

1 Honor's view, because you know what's on there. But,
2 again, not to beat the dead horse, but we don't know
3 what's on there and there's no way --

4 THE COURT: Mm-hmm.

5 MR. MILLER: -- we can know what's on there,
6 so I would --

7 THE COURT: Okay.

8 MR. MILLER: -- just object to that
9 procedure.

10 It appears from the arguments that the
11 prosecutor is making that they are trying to flip the
12 burden now that it's up to us, it's up to the
13 requestor to justify why we should have access to this
14 record, but that's not how OPRA works. There is a
15 presumption of public access to everything under OPRA,
16 any exemptions are to be narrowly construed in favor
17 of the public's right of access, and it is entirely
18 the burden of the custodian to justify that one of
19 these exemptions should apply. So it appears that
20 we're now in a position of arguing why -- why this
21 exemption shouldn't apply. It's not really our burden
22 to do.

23 Also just to note, Your Honor, there are
24 many ways that the prosecutor could have put in a
25 legally adequate Vaughn index without getting into the

1 ultimate issue of the, you know, disclosing their
2 client. They could have put in a Doe affidavit from
3 one of the purported --

4 THE COURT: Sure.

5 MR. MILLER: -- people on the tape or one of
6 purported family members. They did not do that.

7 And just to start off, Mr. Leibowitz's
8 argument that this is such an exceptional case that,
9 you know, you've got a 9-1-1 call, you can't possibly
10 let this be turned over. For example, the Courier
11 News case, which was -- that was the Jayson Williams
12 case. That involved a shooting. That tape was held to
13 be turned over by the Appellate Division. So the --
14 so the idea that this is somehow extraordinary? It's
15 not.

16 Almost any 9-1-1 call doesn't involve a cat
17 stuck in a tree, it involves serious crimes, it
18 involves death, it involves injury. And the courts
19 have held that those tapes still should be turned
20 over, because of the public's right to know. And,
21 again, we have made clear the public interest is
22 strong here.

23 Thank you, Your Honor.

24 THE COURT: Okay. Thank you.

25 MR. CAFFERTY: Very briefly, Your Honor.

1 With respect to this preemptive application,
2 the only thing I will say is that issue, the right of
3 a custodian to initiate a proceeding either by virtue
4 of declaratory judgment or in this case with a
5 protective order, was soundly rejected -- and,
6 unfortunately, I didn't know we would be arguing this
7 issue -- by the California Supreme Court in a case
8 Filarsky, F-I-L-A-R-S-K-I -- S-K-Y, and I'd be happy
9 to provide counsel and the Court with that citation.

10 THE COURT: All right. Thank you, counsel.

11 MR. CAFFERTY: And -- and with respect to --
12 to -- Mr. Miller correctly notes -- and the prosecutor
13 knows, because I've -- he knows how to do this,
14 because I had it in another case involving Sayreville
15 -- they could have submitted affidavits from these or
16 certifications from these people, as Mr. Miller
17 indicates, John Doe or initials.

18 THE COURT: Okay.

19 MR. CAFFERTY: Thank you, Your Honor.

20 THE COURT: All right. Thank you, counsel.

21 MR. LEIBOWITZ: Judge, just briefly and --
22 and -- and we disagree with what counsel said, enough
23 is enough. However, if Your Court rules for
24 disclosure, I have to request a stay of the ruling to
25 permit the Prosecutor's Office --

1 THE COURT: Okay. Well, let me rule first
2 and then you can make your stay -- request for the
3 stay. Okay?

4 All right. Counsel, what I'd like for you
5 to do -- I'm going to leave the bench just
6 momentarily. I am going to give you a partial
7 decision today on this protective order issue. I want
8 you to serve counsel with a copy of the Vaughn index
9 and the certification that she did not receive.

10 And, counsel, based on -- granted, it may be
11 a Vaughn index that is not -- what you consider not to
12 be satisfactory, I would like now to listen to the
13 unredacted tape, so I can look at the particular
14 sections of the Vaughn index and determine whether or
15 not any of those should be turned over. Okay?

16 MR. LEIBOWITZ: Time wise, Judge, are you
17 asking for that right now or are you going to --

18 THE COURT: No, I am going to go in
19 chambers. You've got to exchange papers. I'm going
20 to come back out, give you a decision on the
21 protective order, and then, as long as I get that by
22 this afternoon, I'll review it later on tonight and
23 give you a decision tomorrow. Okay?

24 MR. LEIBOWITZ: Okay.

25 MR. MILLER: Thank you, Your Honor.

1 (Recess from 10:20 a.m. to 10:31 a.m.)

2 THE COURT: Be seated, guys.

3 Okay. We're back on the record.

4 With regard to the motion for a protective
5 order, the Court finds that the statute, the OPRA
6 statute, Open Public Records Act, does not in any way
7 provide or even suggest that such a proceeding would
8 be appropriate with respect to protecting information
9 that the governmental entity or the public entity
10 believes should not be provided to the requestor based
11 on a privacy interest. The statute and all of the
12 associated case law creates a procedure for protecting
13 what is otherwise exempted information or information
14 that the entity might consider to be private by a
15 means associated with the providing of a Vaughn index
16 with an explanation as in the terms of why the
17 information should not be provided.

18 The courts in New Jersey, while not binding
19 on this Court, have held that the statute explicitly
20 affords the right to the requestor for review, not the
21 government. I would cite -- and these are unpublished
22 decisions -- New [sic] Jersey Media Group versus Bergen
23 County Prosecutor's Office, and Palisades Avenue Urban
24 Renewal Corporation versus The Borough of Bogota at --
25 and that's a 2014 unpublished decision.

1 The court in Bogota noted that, quote, "If
2 access to a government record is denied, the person
3 denied access and only that person may challenge the
4 decision." End of quote.

5 The Court finds no basis to depart from the
6 clear language of the statute. The option of where to
7 institute the action, the GRC or the Superior Court,
8 and the option of whether to go to court at all are
9 exclusively that of the requestor. The public entity
10 cannot call individuals into court based on their own
11 denial and then require those parties to expend legal
12 fees in order to respond.

13 The motion for a protective order is
14 procedurally defective pursuant to Rule 4:10-3, which
15 is a rule basically of discovery. Motions for
16 protective orders are intended to offer litigants a
17 measure of privacy while balancing this privacy
18 interest against the public's right to obtain
19 information concerning judicial proceedings. Rule
20 4:10 is a rule utilized in the context of pretrial
21 discovery, as the rule alerts us.

22 Accordingly, the Middlesex County
23 Prosecutor's motion for a protective order is hereby
24 denied.

25 Now, counsel, Ms. Griffin, would you

1 acknowledge that you've received the Vaughn index?

2 MS. GRIFFIN: Yes, I have received it.

3 THE COURT: Okay. Have you had the
4 opportunity to review it?

5 MS. GRIFFIN: Yes, I looked at it and it --
6 I would like to reply -- rely upon the arguments of
7 the other counsel.

8 THE COURT: Thank you very much. Okay.

9 MS. GRIFFIN: I also -- if I may, though, I
10 did also receive the certification that was submitted
11 in support of the protective order and I just want to
12 again note that I don't think it meets the
13 requirements -- it doesn't meet their burden of proof,
14 because it's treating the privacy provision as a
15 blanket exemption and -- and also treating the ongoing
16 investigation exemption as a blanket exemption, and
17 it's rely -- especially -- specific -- blah --
18 specifically within the ongoing investigation
19 exemption, I notice that they're relying upon, you
20 know, these general concerns that have been repeatedly
21 struck down by the courts.

22 THE COURT: Okay. Thank you.

23 Now, counsel, I am posing this question to
24 counsel for the government. In listening to this
25 tape, now I am now looking to listen and identify

1 where I am on the -- it's a disk -- by numbers. Do I
 2 need any type of special equipment or can I just put
 3 that in my computer and the numbers will come up?
 4 MR. LEIBOWITZ: Let me just confirm --
 5 THE COURT: I mean, do you need a 15-year-old
 6 to answer that question?
 7 MR. LEIBOWITZ: Well, I might have to call
 8 somebody.
 9 (Discussion among counsel, off the record.)
 10 MR. LEIBOWITZ: Well, if you have the right
 11 player, the numbers should show up on your machine to
 12 follow the time and sequence.
 13 THE COURT: Okay. All right. Very good.
 14 All right. Counsel, I will listen to it,
 15 look at -- compare it to the numbers on the Vaughn
 16 index. I'll give you my decision tomorrow. You're
 17 certainly free to appear -- I know some of you are
 18 coming from long distances -- or I'll give you the
 19 option of appearing by telephone.
 20 MR. HARRIOTT: Thank you.
 21 MR. MILLER: Your Honor, just to be clear,
 22 you'll be reading something into the record tomorrow?
 23 THE COURT: Absolutely.
 24 MR. MILLER: Do you know a time certain, so
 25 I can check my calendar or that --

1 THE COURT: Yeah, at 1:30.
 2 MR. HARRIOTT: One thirty.
 3 MR. LEIBOWITZ: Thank you, Judge.
 4 THE COURT: Thank you. Okay.
 5 MS. GRIFFIN: May I participate in that
 6 call, even though I am not subject to the -- to the --
 7 THE COURT: Oh, sure.
 8 MS. GRIFFIN: -- protective order?
 9 THE COURT: Absolutely.
 10 MR. CAFFERTY: I think we'll participate by
 11 telephone, if I may, Your Honor. I know I have a tax
 12 appeal hearing I have at 9:00, so --
 13 THE COURT: Not a problem. It will probably
 14 take --
 15 MR. CAFFERTY: -- Ms. Lowy --
 16 THE COURT: -- about 30 minutes to get it on
 17 -- to put the entire --
 18 MR. CAFFERTY: Okay.
 19 THE COURT: -- decision on the record.
 20 MR. CAFFERTY: All right.
 21 THE COURT: All right.
 22 MR. MILLER: Thank you, Your Honor. I'll
 23 let you know --
 24 THE COURT: Okay.
 25 MR. MILLER: -- if I'm going to be in person

1 or on the phone. I have something in Trenton I have
2 to see if I can --

3 THE COURT: Notify my law clerk. Okay?

4 MR. MILLER: Thank you, Your Honor.

5 THE COURT: All right. Thank you.

6 MS. GRIFFIN: Thank you.

7 (Hearing adjourned at 10:36 a.m.)
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 CERTIFICATION
2

3 I, TERRY L. DeMARCO, the assigned transcriber, do
4 hereby certify the foregoing transcript of proceedings
5 on CourtSmart, Index Nos. from 9:09:22 to 10:36:48, is
6 prepared to the best of my ability and in full
7 compliance with the current Transcript Format for
8 Judicial Proceedings and is a true and accurate
9 compressed transcript of the proceedings, as recorded.
10
11
12

13 /s/ Terry L. DeMarco

14 Terry L. DeMarco

15 AD/T 566

16 AOC Number

17 KLJ Transcription Service

18 Agency Name

19 06/16/15

20 Date
21
22
23
24
25