SUPREME COURT OF NEW JERSEY
DOCKET NO. 089508 (A-71-24)

ASSOCIATION FOR GOVERNMENTAL RESPONSIBILITY, ETHICS AND TRANSPARENCY, Plaintiff-Petitioner, **v.** **BOROUGH OF MANTOLOKING, MUNICIPAL CLERK OF THE BOROUGH OF MANTOLOKING, AND CUSTODIAN OF RECORDS,** Defendants-Respondents.	Civil Action On Petition for Certification of a Final Judgment of the Superior Court of New Jersey, Appellate Division Docket No. A-002395-22 Sat Below: Hon. Lisa Rose, J.A.D. Hon. Morris Smith, J.A.D. Hon. Lisa Perez Friscia, J.A.D.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY AND LIBERTARIANS FOR TRANSPARENT GOVERNMENT

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PRELIMINARY STATEMENT

This case presents an idiosyncratic, but important, issue under New Jersey's Open Public Records Act ("OPRA") and the common law right of access to government records. The idiosyncrasy arises from the fact that every word of substance of the lone document at the center of this case – an email setting forth a script for a person acting as municipal prosecutor to follow at a hearing in that case – was intentionally disclosed by that municipal prosecutor to her adversary. The public's right of access to the substance of the document is therefore not in issue. The sole issue is whether Plaintiff should be given access to the redacted part of the email which concealed its author's identity.

It is important to emphasize what this case is *not* about: it is *not* about a "chilling effect on the collegiate relationship among attorneys," a running theme in the opinion by the majority of the panel below. Recognizing the statutory or common law right of public access to the identity of the email's author under the peculiar circumstances of this case does not in any way implicate the collegial give-and-take between attorneys in the private sector, let alone have a "chilling effect" on that conduct. Indeed, it scarcely implicates the collegial give-and-take of legal advice in the *public* sector, most of which undoubtedly occurs, if at all, orally, and is thus not subject to OPRA or the common law rights of public access. Even if legal advice is given in writing in

the public sector, it is likely to occur under circumstances that, unlike those here, give clear rise to the application of the intra-agency consultative exemption – an exemption which the majority below conceded was not clearly applicable here, but applied it anyway – or to the application of the "common interest" privilege, neither asserted nor present here. Perhaps most important, rarely if ever, will the substance of such advice be intentionally disclosed to the government's adversary – as occurred here – waiving any possible privilege that might apply to the government record in the first place.

Once the majority's prophecy of doom for attorney collegiality is placed in context, it becomes clear that any claim of privacy as to the identity of the email's author is outweighed by the public's interest in access to that information. Attorneys know that their identities are rarely protected from disclosure, even if their work product is. For example, they know that if they submit billing records to a government agency, identifying information will be disclosed, even if substantive work product is redacted. They know that when they assert a communication is subject to either attorney-client or work product privilege in discovery, invariably the identities of attorneys are disclosed, even if the substance of the communications is not. And they know that their conduct is subject to strict conflict of interest rules, necessitating that adverse parties are aware of their participation – an issue of particular

importance here where the person acting as municipal prosecutor was in that position because of the appointed municipal prosecutor's conflict of interest.

The record here is barren as to whom the acting municipal prosecutor contacted for help, whether her "colleague" was a municipal employee, had any connection to the defendant in the municipal proceedings, or had any personal interest in the outcome of the highly contentious proceedings. What is known is that the "colleague" provided a script for the municipal prosecutor to use at a hearing, filled with under-linings, bolded words, and exclamation points that reads more like instructions than collegial advice. The prosecutor followed the script virtually verbatim. Clearly, the public possesses an interest in knowing who is providing services to the government, essentially directing the course of a prosecution of a private individual, whether for pay or not.

Because there is no record evidence that would clearly exempt the email from its presumptive disclosure as mandated by OPRA, because the municipal prosecutor's voluntary disclosure of the document to her adversary waived any work product privilege that might otherwise have attached to the document, and because the public's interest in access to this limited information easily outweighs any privacy interests or other governmental interests in nondisclosure, the redacted information must be disclosed under both OPRA and the common law.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici rely on the statement of facts and procedural history of this case as set forth in the Appellate Division's opinion.

ARGUMENT

I. OPRA provides a right of access to the portion of the email that identifies the attorney who drafted the email.

OPRA was enacted "to maximize public knowledge about public affairs" and "to minimize the evils inherent in a secluded process." *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 229 N.J. 541, 555 (2017), *quoted with approval in Simmons v. Mercado*, 247 N.J. 24, 36-38 (2021). Thus, under OPRA, government records must be "readily accessible" to New Jerseyans, and any limitations on the right of access must be construed "in favor of the public's right of access." N.J.S.A. 47:1A-1.

Access to public records is not without any limitations and "requests for information must be properly circumscribed." *Simmons*, 247 N.J. at 38. It is difficult to conceive of a more circumscribed request than that at bar: simply the disclosure of the redacted identifying information of the person who sent the email that Ms. Leahey, acting as municipal prosecutor, read from in open court and showed to opposing counsel.

Also, while all government records are "presumptively accessible to the public," there are exemptions. *In re N.J. Firemen's Ass'n Obligation to Provide*

Relief Applications Under Open Pub. Recs. Act, 230 N.J. 258, 276 (2017). The public entity bears the burden of proving that an exemption applies. *Id.* at 276-77. And, as Judge Smith emphasized in his dissent, refusing to divulge the very information that the municipality seeks to conceal renders it impossible for the municipality to meet its burden. *Ass'n for Governmental Resp., Ethics & Transparency v. Borough of Mantoloking*, 478 N.J. Super. 470, 500-01 (App. Div. 2024) (Smith, J., dissenting).

A. No exemption under OPRA applies to shield the email from disclosure.

There is no genuine dispute here whether the email from the unidentified attorney was "received in the course of [the municipal prosecutor's] official business . . . ." N.J.S.A. 47:1A-1.1. As the entire panel below agreed, *Ass'n for Governmental Resp., Ethics & Transparency*, 478 N.J. Super. at 489-90, it undoubtedly was. Moreover, even the majority of the panel expressly acknowledged that the email "does not fall squarely within any exception to the government record definition under OPRA." *Id.* at 491. Given the presumption favoring disclosure and the burden on the Borough to prove an exemption applies, these two conclusions should have ended the discussion. Nevertheless, the majority of the panel proceeded to rule that the email was not a government record for two reasons.

First, the majority analogized the email to the board secretary's handwritten notes that were ruled not subject to OPRA disclosure in *O'Shea v. West Milford Board of Education*, 391 N.J. Super. 534 (App. Div. 2007). *Ass'n for Governmental Resp., Ethics & Transparency*, 478 N.J. Super. at 489-90. Any comparison between the "cryptically written notes" and "work-in-progress" that could not "be relied on as a factual account of board proceedings" at issue in *O'Shea*, 391 N.J. Super. at 537, and the email that was used as a virtually verbatim script by Ms. Leahey in the prosecution of Mr. Burke is strained at best.

Second, the majority ruled that because the email included "inter-agency or intra-agency advisory, consultative, or deliberative material," it fell out of OPRA's definition of "Government record." *Ass'n for Governmental Resp., Ethics & Transparency*, 478 N.J. Super. at 497 (quoting N.J.S.A. 47:1A-1.1). As Judge Smith thoroughly explained, there is nothing in the record to support the notion that the email was an inter- or intra-agency memorandum. The description in Ms. Leahey's declaration of the email's author as being a "colleague" and a "friend" is of no help on the issue. The courts below had no idea whether this "colleague" and "friend" worked for the municipal prosecutor, for the municipality or any other agency, for Ms. Leahey's law firm, or for none of these. Indeed, that Ms. Leahey was acting as municipal

prosecutor in this case because of a conflict in the office of the municipal prosecutor would suggest that, at a minimum, the email could not have been an intra-agency email. Moreover, the majority below expressly disclaimed the existence of "any sort of agency relationship between Leahey and the sending attorney," *Id.* at 491, placing the email author's status even further away from any de facto inter- or intra-agency relationship.

Tacitly acknowledging this, the majority below characterized its application of the inter/intra-agency exemption as by way of "analogy," *Id.* at 491-92, concluding that the email was exempt as intra-agency consultative material because it was the equivalent of "legal advice between colleagues." *Id.* at 491. Certainly, the email's author was sending a colleague "legal advice," but that does not in itself make it "intra-agency." Were that so, it would not have been necessary for this Court to ratify the "common interest" privilege as available to protect similar communications between outside lawyers and government agencies from disclosure under OPRA in *O'Boyle v. Borough of Longport*, 218 N.J. 168, 198-99 (2014).

B. Any work product privilege was waived and would not have shielded disclosure of the email author's identity in any event.

Against this backdrop, amici suggest that the Court view the document for what it is: a government record that does not squarely fit any exemption

under OPRA, but may constitute an attorney's work product, which, if so, may serve to restrict public access under N.J.S.A. 47:1A-9(b). The problems with relying on work product privilege to protect the email against public access are multi-fold.

First, that there is no record evidence that the email's author was an "agent" of Ms. Leahey makes it difficult to fit the email written not by Ms. Leahey (and presumably not by an attorney in her firm) precisely within the rule applicable to municipal court proceedings, *R.* 7:7-7 (prohibiting discovery in municipal court of "work product," consisting of memorandums by "that party or by that party's attorney or agents . . . .").

Second, because the email's author was not Ms. Leahey's agent, the unknown attorney would have to meet the standards of having a "common interest" with the municipality in the prosecution of Mr. Burke in order to maintain the confidentiality of the work product. Such an exception applies only "to communications between attorneys for different parties if the disclosure is made due to actual or anticipated litigation for the purpose of furthering a common interest, and the disclosure is made in a manner to preserve the confidentiality of the disclosed material and to prevent disclosure to adverse parties." *O'Boyle*, 218 N.J. at 199. There is no evidence in the

record to support the existence of such "common interest" between the municipal prosecutor and the email's author.

Third, even assuming that the word "agent" as used in *R.* 7:7-7 is more broadly construed than the phrase "intra-agency" in OPRA because of OPRA's presumption of access, and assuming further that this Court would extend work product privilege in the face of OPRA requests beyond the "common interest" scenario, any work product privilege was waived by the Borough's express disclaimer of any privilege as the basis for initially withholding production of the entire email. *Ass'n for Governmental Resp., Ethics & Transparency*, 478 N.J. Super. at 481-82).

Fourth, even if somehow that did not constitute waiver, the Borough had already waived privilege by Ms. Leahey's giving the entire substance of the email to her adversary. "In most instances, disclosure by an attorney of his or her work product to a third party functions as a waiver of the protection accorded to an attorney's work product." *O'Boyle*, 218 N.J. at 189 (citing N.J.S.A. 2A:84A-29; N.J.R.E. 530). Although there is a body of law to the effect that there is "a wider set of circumstances in which disclosure of work product to a third party . . . will preserve the protection afforded to work product than when the disclosure to a third party involves confidential communications protected by the attorney-client privilege," "the prevailing

view seems to extend only to adversaries, 'so only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection.'" *O'Boyle*, 218 N.J. at 192 (quoting *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 687 (1st Cir. 1997)). To say the least, Ms. Leahey's handing over the email to her opposing counsel in the municipal court matter (and perhaps to his client, who is his father and the attorney for Plaintiff in this case) "made it substantially likely that the protected material would reach an adversary." *Id.* As Judge Smith explained in his dissent, the intentional disclosure of the substance of the work product in the email necessarily means that the confidentiality of the whole of the email, including the identifying information, is, "in fairness," also waived as related to the same subject matter. *Ass'n for Governmental Resp., Ethics & Transparency*, 478 N.J. Super. at 498; N.J.R.E. 530(c)(1)(A)-(C).

The majority of the Appellate Division panel's treatment of this issue was cursory. It reasoned that it "perceive[d] nothing 'inherently unfair'" about protecting the identity of the email's drafter, even in the face of the disclosure of the substance of the email, because "such protection is in line with the strong policy behind shielding attorney communications." *Ass'n for Governmental Resp., Ethics & Transparency*, 478 N.J. Super. at 495-96. Leaving aside that a standard of "nothing inherently unfair" is not the same as

a standard of "in fairness," the "strong policy" protecting attorney communications is limited to the substance of the communication, and the communication has already been disclosed. The only thing left undisclosed is the identity of the attorney, and there is no established "strong policy" shielding the identity of attorneys.

Indeed, even were the identifying information considered not related to the waived subject matter, then it would be subject to disclosure nevertheless, as it would not be covered by any privilege. For example, "a document by a third party, such as a bill for services prepared by an attorney retained by a public entity and submitted to it for payment, is subject to public access pursuant to OPRA." *O'Boyle v. Borough of Longport*, 218 N.J. at 184-85. Such bills necessarily identify the attorneys who have provided the legal advice, even if the tasks performed are redacted as privileged work product. *See, e.g.*, *Hunterdon Cnty. Policemen's Benevolent Ass'n Loc. 188 v. Twp. of Franklin*, 286 N.J. Super. 389, 393 (App. Div. 1996).

The Borough's belated assertion of the work product privilege, even if not waived, does not prohibit access to the email author's identity.

C. Any claims of privacy do not outweigh the public's right to access of the information.

OPRA requires public agencies "to safeguard from public access a citizen's personal information" when "disclosure thereof would violate the

citizen's reasonable expectation of privacy." N.J.S.A. 47:1A-1; *In re N.J. Firemen's Ass'n Obligation*, 230 N.J. at 277; *Burnett v. Cnty. of Bergen*, 198 N.J. 408, 414, 427-28 (2009). To that end, our courts weigh such claims of privacy in accordance with the following factors:

> (1) The type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.
>
> [*Doe v. Poritz*, 142 N.J. 1, 88 (1995) (quoting *Faison v. Parker*, 823 F. Supp. 1198, 1201 (E.D. Pa. 1993)).]

Because it had found that the email was not a government record, it was unnecessary for the majority below to analyze the *Doe* factors. It did so nevertheless, "for the sake of completeness." *Ass'n for Governmental Resp., Ethics & Transparency*, 478 N.J. Super. at 492. Its application of the *Doe* factors was insufficiently robust.

It found that *Doe* factor one, "the type of record," favored non-disclosure because it was "a single email from an unknown colleague of a municipal prosecutor, sent in response to the prosecutor's general request for advice in an 'unusually complex and particularly contentious' assignment in a quasi-criminal municipal matter." *Ass'n for Governmental Resp., Ethics &*

Transparency, 478 N.J. Super. at 492. How these facts favor non-disclosure was left unexplained. Indeed, that this was just a "single email" would seem to favor disclosure. Further, the majority's description overstates significantly what was being sought – not the whole email, which had already been disclosed, but only that which made the author "unknown," the redacted information.

In fact, the tenor of that which *was* disclosed points more to the need for disclosure than not, as it is written in a peremptory, directive tone, that could raise legitimate questions as to the interest of the email's author in the municipal proceedings. The email's author wrote (with the emphasis in the original):

> Second, if your adversary knowingly reveals [the expungement] in open court he himself is guilty of a d/p offense as well as an ethics violation RPC 8.4(b).
>
> Remind him of this statute in open court on Thursday!!!

The email quoted in bold N.J.S.A. 2C:52-30, which provides that the intentional disclosure of expunged information is a disorderly person offense. Da2.[1]

[1] "Da" refers to the Appellate Division appendix of Defendant-Respondent Borough of Mantoloking. It is doubtful whether the "colleague's" advice was accurate. *See G.D. v. Kenny*, 205 N.J. 275, 297, 300 (2011) (limiting the breadth of the expungement statute to those government agencies statutorily required to be served with the expungement order and construing N.J.S.A.

Directing a municipal prosecutor to threaten opposing counsel with criminal sanctions and ethics proceedings is far from the typical "collegial" advice that one attorney might give to another, as is underlining that advice, and emphasizing it with three exclamation points. The "type of record" factor appears to favor access.

The majority below found that *Doe* factor two (the information the government record contains) favored non-disclosure because the "substance of the email provides statutory citation and the sender's advice, all of which has been disclosed . . . , save for the sending attorney's identity and email address." *Ass'n for Governmental Resp., Ethics & Transparency*, 478 N.J. Super. at 492. In sum, this says nothing more than that access to the email author's identity should be denied because Plaintiff is seeking access only to the email author's identity. How this tautology favors non-disclosure is left unexplained. Again, the limited nature of the requested disclosure of the redacted information in the context of the intentional disclosure of all of the substance of the email would appear to favor disclosure of the remainder, not prohibit it.

2C:52-30 as not applying to persons "who have spoken truthfully about lawfully acquired information long contained in public records, even if they know of the existence of an expungement order.").

Turning to *Doe* factor three, the majority found "the potential for harm regarding further nonconsensual disclosures . . . substantial." *Id.* Its support for this conclusion, however, rested on a basis not related to the purposes of OPRA, that "compelling disclosure of the name and email address of attorneys who render advice to one another has the potential for a chilling effect on the collegiate relationship among attorneys and their private communications concerning their shared legal advice." *Id.* The issue in this case has nothing to do with the "collegiate relationship among attorneys and their private communications concerning their shared legal advice" generally. It has to do with the very specific situation of an attorney giving legal advice to a governmental entity. Had this occurred in the private context, there would be no issue of disclosure under OPRA. Had the unknown attorney given the "collegial" advice orally even to a public agency, there would be no issue of disclosure under OPRA.

The majority's fear of a "chilling effect" on attorney collegiality is pure speculation. Nothing in Ms. Leahey's Certification supports this conclusion, not even a statement that her "friend" asked that their identity not be revealed. The Borough has clearly not met its burden of proof on this issue. *See Paff v. Ocean Cnty. Prosecutor's Off.*, 235 N.J. 1, 28 (2018) ("[A]ny privacy concerns about a disclosure sought pursuant to OPRA or the common law should be

explained in detail."); *Brennan v. Bergen Cnty. Prosecutor's Off.*, 233 N.J. 330, 343 (2018) ("[R]isk of harm was speculative" thus providing insufficient support to protect against disclosure of bidders' identities); *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 229 N.J. at 572 ("[G]eneric reasons alone cannot satisfy the statutory test").

Disclosure of the attorney's identity does not come close to the sort of personal information our courts have deemed worthy of protection, such as medical information or thoughts revealed in the course of psychiatric treatment. *Doe*, 142 N.J. at 88. Here, the access is sought only to the identity of a lawyer who gave legal advice to another lawyer, significantly relating to the latter's role as a governmental official. Factor three does not favor non-disclosure.

Turning to *Doe* factor four (incorrectly designated factor five by the majority below), the injury from disclosure to the relationship in which the record was generated, the majority acknowledged that defendants "did not articulate specific injury" that would result to the relationship between Leahey and her "friend" from disclosure. *Ass'n for Governmental Resp., Ethics & Transparency*, 478 N.J. Super. at 493. This is an understatement. The portion of Ms. Leahey's certification on the issue of potential harm is rank speculation: "Mr. Burke has a copy of this document in its entirety, he only wants the name

or email address of my friend, presumably to subject my friend to harassment or to involve my friend in litigation in some way." *Id.* at 483.

Addressing *Doe* factor five (incorrectly designated factor six by the majority below), which concerns the adequacy of safeguards to prevent unauthorized disclosures, the majority again tautologically surmised that, "because Leahey redacted the sender's name and address, there exists no other means to provide the requested record without disclosing personal information," *Id.* at 493. In essence, the majority stated that the information that Plaintiff seeks cannot be disclosed because it has not been disclosed.

The majority below assumed, without disputing, that *Doe* factors six (degree of need for access) and seven (whether there is an express statutory mandate, public policy, or recognized public interest militating toward access) favored disclosure. *Id.* These two factors in themselves outweigh the weak arguments for non-disclosure posited by the majority as to factors one through five.

The need for access in this case cannot be stated better than as was done by Judge Smith: "the public has a substantial interest in learning who directed and influenced this municipal court prosecution" and in "knowing who directs and influences criminal court proceedings in our state by offering a prosecutor scripts and arguments to use in court." *Id.* at 502 (Smith, J., dissenting). And

there is public policy supporting disclosure even beyond that. As discussed above, even in the context of privileged documents, there is no ironclad bar to disclosure of the identity of the attorney whose communications are privileged. Further, New Jersey attorneys are strictly prohibited from providing legal advice in situations that would place them in a conflict of interest. RPC 1.7; RPC 1.8. While there is no affirmative duty for attorneys to announce their participation in every matter, the somewhat strange circumstances here, including the contentiousness of the proceedings, the disqualification of the municipal prosecutor because of a conflict, the voluntary disclosure of every substantive word of the email, and the strange peremptory tone and tenor of the email militate in favor of disclosure.

II. The common law provides a right of access to the portion of the email that identifies the attorney who drafted the email.

The common law right of access to public records gives the public a right to a more expansive array of public documents than does OPRA. *Paff*, 235 N.J. at 28. These include documents both "created by, or at the behest of, public officers in the exercise of a public function." *Keddie v. Rutgers, The State Univ.*, 148 N.J. 36, 50 (1997). Thus, that the email was not drafted by Ms. Leahey – a point highlighted by the majority below in its rejection of any common law right of access, *Ass'n for Governmental Resp., Ethics & Transparency*, 478 N.J. Super. at 493 – is irrelevant.

Oddly, the majority went on to say that "there is no evidence in the record the email was made at her 'behest.'" *Id.* "At someone's behest" is an idiomatic phrase, defined consistently in many dictionaries, as "because of being asked or ordered by someone."[2] Given Ms. Leahey's statement in her certification that she reached out to a colleague and asked for the advice and given the tone and substance of the email, a fair reading of the circumstances is that Ms. Leahey and her colleague communicated orally or in writing about the issue Ms. Leahey was considering, and Ms. Leahey asked that her colleague send her an email with the colleague's advice. Contrary to the Appellate Division's conclusory statement, there is certainly evidence that the email was sent at Ms. Leahey's behest.

The showing of a common law right of access to public records requires that the person requesting to see the records "establish an interest in the subject matter of the material," and that interest "must be balanced against the

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[2] *See, e.g.*, *At the behest of someone*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/at%20the%20behest%20of%20someone (last visited Aug. 20, 2025); *see also At someone's behest/at the behest of someone*, Dictionary.Cambridge.org, https://dictionary.cambridge.org/dictionary/english/behest?q=at+someone%27s+behest%2Fat+the+behest+of+someone (last visited Aug. 20, 2025) ("because someone has asked or ordered you to do something").

State's interest in preventing disclosure." *Paff*, 235 N.J. at 29 (quoting *N. Jersey Media Grp., Inc.*, 229 N.J. at 578-79).

The entirety of the majority's weighing of these factors consisted of questioning the "wholesome[ness]" and "legitima[cy]" of Plaintiff's public interest in the document – without describing what these interests were or even concluding that they were not wholesome or legitimate, *Ass'n for Governmental Resp., Ethics & Transparency*, 478 N.J. Super. at 493, and then concluding – again without discussion – that whatever interest Plaintiff had was outweighed by the municipality's interest in preventing disclosure. *Id.*

The majority did not undertake the analysis of the factors required by this Court in *Loigman v. Kimmelman*, 102 N.J. 98, 113 (1986), as to that balancing, because, it said, the request for disclosure was too "discrete." *Ass'n for Governmental Resp., Ethics & Transparency*, 478 N.J. Super. at 493. That the request in this case is so limited that the *Loigman* factors were not implicated argues forcefully for recognition of Plaintiff's common law right of access to the redactions.[3]

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[3] The *Loigman* factors are:

> (1) The extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that

CONCLUSION

For the reasons set forth above and in the dissenting opinion of Judge Smith, this Court should reverse the judgment of the Appellate Division and order that Plaintiff be given access to the redacted portion of the email at issue in this case, including the name and business email address of the author of the email.

Respectfully submitted,

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> their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decision[-]making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.
>
> [*Loigman*, 102 N.J. at 113.]

Of these, only factor 2 – not discussed by the majority of the panel – is possibly relevant, and there is no indication in the record that Ms. Leahey told her colleague that she would not disclose the colleague's identity.

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