SUPREME COURT OF NEW JERSEY
DOCKET NO. 090375

ALEX ROSETTI, Plaintiff-Respondent, v. RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL BOARD OF EDUCATION, Defendants-Appellants.	On Petition for Certification from a Final Judgment of the Superior Court of New Jersey, Appellate Division Docket No. A-1466-23 A Civil Action Sat Below: Hon. Thomas W. Sumners, P.J.A.D. Hon. Ronald Susswein, J.A.D. Hon. Stanley L. Bergman, Jr., t/a

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Brief of Amici Curiae American Civil Liberties Union of New Jersey and Libertarians for Transparent Government

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CJ Griffin (031422009)
Pashman Stein Walder Hayden, P.C.
21 Main St., Suite 200
Hackensack, NJ 07601
201-488-8200
cgriffin@pashmanstein.com

Ezra D. Rosenberg (012671974)
Jeanne LoCicero (024052000)
American Civil Liberties Union
of New Jersey Foundation
[redacted]
P.O. Box 32159
Newark, New Jersey 07102
(973) 854-1714
erosenberg@aclu-nj.org

Attorneys for Amici Curiae

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PRELIMINARY STATEMENT

In an Open Public Records Act (OPRA) case, a court's first inquiry is whether the records meet the general definition of "government records." If they do, a court determines if the agency has a lawful basis for withholding the records. That most often involves determining whether an exemption applies. In other cases, a court must determine whether there is a procedural basis for denial, such as where the request would "substantially disrupt agency operations." Sometimes, an agency proves that the responsive records do not exist. In every step of this process, the agency bears the burden of proof, which is significant because OPRA must be construed in favor of access.

Although the Appellate Division described its opinion as one addressing an "issue of first impression," the panel's conclusion that email logs are "government records" regardless of whether they are stored on a government server or private server is not groundbreaking; OPRA's plain language requires that outcome. The District's suggestion that email logs are government records only if they are culled from government-owned servers is the type of argument that has been rejected by this Court. If that were true, many records would fall outside of OPRA's reach as agencies move more records to the cloud (in fact, the District stores its official emails on a cloud called Google Workspace).

The Court's focus should be on the next step: whether the District has

proven that there is a valid basis to deny access. There is also nothing new about the Appellate Division's decision in this regard. It held only that the District's certification was inadequate to meet its burden of proof and remanded for more fact-finding. The District had submitted a certification that was not based on personal knowledge but rather speculated about the types of private email services the Board Members "could have used" and opined that "many" of those services make logs impossible or difficult to produce. This Court has held that an agency cannot meet its burden with such speculative statements.

Importantly, OPRA does not permit an agency to outright deny a request simply because it would be difficult to fulfill. An agency must prove that the request would "substantially disrupt agency operations" and then it must try to reach a reasonable solution that accommodates the interests of the requestor and the agency. The District presents this case as an all-or-nothing scenario, arguing (without proof) that none of the Board Members can produce a log because none of the unidentified email services give them tools to do so. On remand, Plaintiff can explore other accommodations to fulfill his request. For example, a Board Member could create a "log" by searching an email account for the requested date range and screenshotting the query results (which will show a list of all emails, including the sender, recipient, date, and subject of each email). Alternatively, they could simply produce all their official emails from their

personal accounts, which would contain the information Plaintiff seeks. Doing so may be burdensome, but it is a burden that they created by flouting state laws to conduct official business on private email accounts.

Contrary to the District's hyperbolic claims, the Appellate Division did not "effectively classif[y] an entire email log . . . from an elected official's private email account as a government record." If the District proves on remand that certain emails do not relate to official business, those entries within the logs can be redacted. One of OPRA's core principles is that records must be produced with redactions rather than withheld in their entirety.

The District's rigid approach contradicts OPRA's express language that ensures that even burdensome requests are accommodated, and that a record is not withheld because portions of it are exempt. The Appellate Division's decision applied longstanding principles to conclude that a remand was warranted so that each Board Member could provide information based on personal knowledge and so the District could try to accommodate the OPRA request, despite its Board Members' decision to discuss public business on private accounts. This Court should affirm.

STATEMENT OF INTEREST OF AMICI CURIAE

For over 60 years, the American Civil Liberties Union of New Jersey (ACLU-NJ) has defended liberty and justice guided by the vision of a fair and

equitable New Jersey for all. Its mission is to preserve, advance, and extend the individual rights and liberties guaranteed to every New Jerseyan by the State and Federal Constitutions in courts, in legislative bodies, and in our communities. Founded in 1960 and based in Newark, the ACLU-NJ is a non-partisan organization that operates on several fronts – legal, political, cultural – to bring about systemic change and build a more equitable society. ACLU-NJ has served as amicus curiae before this Court in dozens of cases, including numerous public records cases. See, e.g., States Newsroom Inc. v. City of Jersey City, 261 N.J. 392 (2025); Fuster v. Twp. of Chatham, 259 N.J. 533 (2025); Gannett Satellite Info. Network LLC v. Twp. of Neptune, 254 N.J. 242 (2023); Rivera v. Union Cnty Pros. Office, 250 N.J. 124 (2022).

Libertarians for Transparent Government (LFTG) is a non-profit organization devoted to transparency and open government in New Jersey, which is run by well-known transparency advocate John Paff. LFTG regularly litigates OPRA cases. See, e.g., In re Adoption of N.J.A.C. 5:105-1.6(a)(1), 479 N.J. Super. 301 (App. Div. 2024); Libertarians for Transp. Gov't v. Cumberland Cnty, 250 N.J. 46 (2022). It has also appeared as amicus curiae in many cases before this Court. See, e.g., Am. Civil Liberties Union of N.J. v. Cnty. Prosecutor's Ass'n of N.J., 257 N.J. 87 (2024); Gannett Satellite Info. Network

LLC v. Twp. of Neptune, 254 N.J. 242 (2023); Bozzi v. City of Jersey City, 248 N.J. 274 (2021).

Both proposed amici have frequently utilized OPRA to advance their missions and will be impacted by the Court's decision in this case. Both proposed amici also participated in Paff v. Galloway Twp., 229 N.J. 340 (2017), with Mr. Paff serving as the plaintiff and ACLU-NJ serving as amicus curiae. Amici thus have a strong interest, as well as an expertise, in the subject matter and their participation will be helpful to the Court. They respectfully ask that their motion for leave to file this brief and to participate in the oral argument be granted.

STATEMENT OF FACTS AND PROCEDURE

The District initially did not respond to Plaintiff's OPRA request at all. (Pa2). After Plaintiff sued to compel a response, the District produced a log of emails from District-owned email addresses. (Pa15). However, it maintained that it had no obligation to produce a log of emails that Board Members had sent from their personal email accounts, even though those accounts were used to conduct official business. (Pa15). The lawsuit thus became about those email logs only.

After first opposing the lawsuit with only a brief, the District later submitted the certification of John Chang, who serves as Director of Technology for the District. (Pa16-Pa18).[1] Chang's short certification demonstrates that he has no personal knowledge about the email logs that have been requested, how such logs are maintained, or whether the specific logs at issue are in fact difficult or impossible to produce. As he explains:

- The District uses a cloud-based email system for its official emails—Google Workspace—and issues accounts to all Board Members. (Pa16).

[1] Pa = Plaintiff's Appellate Division Appendix; DPb = Defendant's Petition for Certification Brief; DPRb = Defendant's Reply Brief Supporting Petition for Certification

- Despite this, Board Members have used private email services to conduct District business and "[e]ach of the proprietary email services have their own administrative settings, many of which make it impossible or extraordinarily time consuming to create logs of any kind." (Pa17) (emphasis added).
- "Although Gmail is the most popular private email service, it is [his] understanding that Board members could have used other proprietary email services, including but not limited to cable and phone providers such as AT&T, Verizon, Spring, Comcast and Optimum; cloud-based services in competition with Gmail such as AOL, Hotmail, and the like; encrypted services that are becoming more popular such as ProtonMail; and the email servers belong to their primary employers." (Pa17) (emphasis added).
- "In most if not all cases, the users themselves do not have administrative rights that would permit them to generate logs[.]" (Pa17) (emphasis added).
- "Even if [he] could figure out how to generate a log for some of these email services, it could potentially take [him] hours to construct each one and [he] would be unable to ensure the integrity of the data (e.g., [he] cannot recover deleted emails in the same way [he] can on the District Workspace service)." (Pa18) (emphasis added).
- "Whereas [he] can generate logs from the District's Workspace service with relative ease, it will be difficult if not impossible to generate logs from most

if not all of the many private email accounts which are used by Board members." (Pa18) (emphasis added).

The trial court ruled in the District's favor. It stated that the Supreme Court's decision in Paff v. Galloway Twp., 229 N.J. 340 (2017), was limited to email logs from a municipality's own server. Therefore, the trial court concluded that "[i]n the absence of any unequivocal declaration from the Paff Court, the Court's ruling should and is interpreted to preclude the disclosure of email logs not stored on a municipality or government agency's server." (Pa31). It noted that "there has been no showing that the email logs from the personal email accounts of government officials are required to be made, maintained, or kept on file during the course of official business. In fact, no provision of OPRA obligates Defendants to produce the requested logs." (Pa32) (emphasis added). Thus, the trial court held that email logs from personal email accounts are not "government records."

The Appellate Division reversed the trial court, finding Chang's certification inadequate because it was not based on personal knowledge. It remanded to the trial court so that each Board Member could search their own email accounts and then submit a certification based on personal knowledge regarding whether the email service used can generate a log. It also ordered the trial court to consider accommodations to Plaintiff's OPRA request, consistent

with N.J.S.A. 47:1A-5(g). Rosetti v. Ramapo-Indian Hills Reg'l High Sch. Bd. of Educ., 481 N.J. Super. 1, 15-16 (App. Div. 2025).

LEGAL ARGUMENT

I. The Appellate Division Correctly Held That the Responsive Email Logs Are "Government Records" and That the District Did Not Meet Its Burden of Proof to Justify the Denial of Access

Public records are "crucial to the organization of our society and essential to the daily operation of government . . . [they] are public property and are held in trust for citizens." N.J. Div. of Revenue & Enterprise Servs., New Jersey Records Manual, 8.[2] Accordingly, pursuant to the Destruction of Public Records Law (DPRL), "public officials must ensure that records are protected from unauthorized alteration, defacement, transfer or destruction." Ibid. See also N.J.S.A. 47:3-17 ("No person shall destroy, sell or otherwise dispose of any public record, archives or printed public documents which are under his control or in his care or custody, whether or not they are in current use, without first having" obtained the consent of the State Division of Revenue and Enterprise Services). This includes "only us[ing] the official, agency-approved electronic mail system . . . to ensure that email records will be properly managed or preserved." N.J. Div. of Revenue & Enterprise Servs., Records Management

[2] https://www.nj.gov/treasury/revenue/rms/manual/RMSManual.pdf.

Guidelines for Remote Work Settings (Nov. 2020).[3] At all times, even when using cloud-based systems or storing records at home, public officials are obligated to "[e]nsure that records are retrievable and reproducible in response to [OPRA] requests, audits, subpoenas and investigations." N.J. Div. of Revenue & Enterprise Servs., Records Management Guidelines for Cloud-based Records Storage (Nov. 2020).[4]

Furthermore, because "secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society," the Open Public Meeting Act (OPMA or "the Sunshine Law") provides the public a right "to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formation, and decision making of public bodies." N.J.S.A. 10:4-7. A "meeting" includes any gathering in which attended an effective majority of a public body to discuss or act upon official business, even if the discussion occurs "by means of communication equipment" (i.e., email, videoconferencing, or telephone). N.J.S.A. 10:4-8.

By using private email accounts to discuss school business, the District's Board Members have violated the DPLR and guidance from the Division of

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[3] https://www.nj.gov/treasury/revenue/rms/pdf/RecordsManagementGuidelinesforRemoteWorkSettings.pdf.

[4] https://www.nj.gov/treasury/revenue/rms/pdf/GuidelinesforRecordsManagementintheCloud.pdf.

Revenue and Enterprise Services (DORES). They may have also run afoul of the Sunshine Law if a quorum of the Board discussed business that must be discussed in a public meeting or a properly noticed closed session. Now, they ask this Court to let them evade OPRA by refusing to produce logs of official emails that the Board Members sent or received on their private accounts.

They argue, without evidence, that the logs are not "government records" at all because the emails are housed on private email services that do not allow the Board Members to generate a log directly from the server. Then, they argue that even if they could produce such logs, doing so would be too burdensome, even though they are the ones who created any alleged burden by flouting state law. Next, they argue that their privacy would be violated because their personal emails would be exposed in the log. And finally, they suggest the Appellate Division's remand requiring Board Members to produce certifications about their individual personal email use is "untenable." Each of these arguments should be rejected for the reasons argued below.

A. OPRA's Plain Language Establishes That Email Logs Are "Government Records" If They Contain Entries Relating to Official Business, Regardless of Whether the Logs Would Be Produced from a Government-Owned or Private Server

"An informed citizenry is essential to a well-functioning democracy." Paff v. Twp. of Galloway, 229 N.J. 340 (2017). By enacting OPRA, "[t]he Legislature

sought 'to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Am. Civil Liberties Union of N.J. v. Cnty. Prosecutors Ass'n of N.J., 257 N.J. 87, 101 (2024) (quoting Sussex Commons Assoc., LLC v. Rutgers, 210 N.J. 531, 541 (2012)). In fact, the "bedrock principle" underlying OPRA is that "our government works best when its activities are well-known to the public it serves." Burnett v. Cty. of Bergen, 198 N.J. 408, 414 (2009).

Consistent with those legislative goals, OPRA provides that all "government records" must be "readily accessible" to the public with limited exceptions that shall be "construed in favor of the public's right of access." N.J.S.A. 47:1A-1. In every OPRA case, a court first determines whether a record meets the general definition of "government record," which OPRA defines as:

> any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof . . .
>
> [N.J.S.A. 47:1A-1.1 (emphasis added).]

This Court has repeatedly called this definition "broad." See Paff v. Galloway, 229 N.J. at 352; O'Boyle v. Borough of Longport, 218 N.J. 168, 184 (2014); Kovalcik v. Somerset Cnty. Pros. Office, 206 N.J. 581, 588 (2011).

When interpreting statutes, a court first looks "to the plain language of the statute . . . ascrib[ing] to the statutory words their ordinary meaning and significance, and read[ing] them in context with related provisions so as to give sense to the legislation as a whole." States Newsroom Inc. v. City of Jersey City, 261 N.J. 392, 407 (2025) (quoting Perez v. Zagami, 218 N.J. 202, 210 (2014), and DiProspero v. Penn, 183 N.J. 477, 492 (2005)). "If the plain language of a statute is clear, [a court's] task is complete." State v. Cromedy, 261 N.J. 421, 430 (2025).

The statutory language here is very clear. Whether a record is a "government record" hinges solely on the content or nature of the record—i.e., whether it has been made, maintained, or kept on file by a public official or public agency and relates to public business—not where the record happens to be located. Thus, regardless of whether a record sits on an agency's server, a cloud-based system, or in a file cabinet in an official's private home office, if it relates to official business then it is a government record and must be retained in accordance to the DPRL and produced pursuant to OPRA (unless an exemption applies). See Records Management Guidelines for Remote Work Settings ("If there is a circumstance that compels you to use your personal email account to create/store a public

record, report the matter to your supervisor and ensure that you forward the record to the official [e]mail system[.] DO NOT delete public records stored in your personal [e]mail system until they have been forwarded to your agency's official system[.]").

Accordingly, the Government Records Council (GRC) and New Jersey courts have held that an email is subject to OPRA if it relates to official public business, even if a personal email account was used to send or receive the email.[5]

[5] Courts across the nation have consistently reached the same commonsense conclusions as to their state public records laws. See, e.g., People for the Ethical Treatment of Animals v. Bd. of Supervisors of Louisiana State Univ., 387 So. 3d 527, 543 (La. 2024) ("Further, and equally well-settled, is the proposition that responsive records remain subject to the Public Records Law even if located on private devices or in private accounts."); Penncrest Sch. Dist. v. Rodgers, 337 A.3d 604, 614-15 (Pa. Commw. Ct. 2025) (holding emails sent by school board members on their personal email accounts were public records because they discussed agency business); Comstock Residents Ass'n v. Lyon Cty. Bd. of Comm'rs, 414 P.3d 318, 322 (Nev. 2018) (holding commissioners' messages about zoning change on private phones and email accounts were "actions performed by governmental entities for the public's benefit" and thus not exempt from public records law); City of San Jose v. Super. Ct., 389 P.3d 848, 852 (Cal. 2017) ("Employees' communications about official agency business may be subject to [state's public records law] regardless of the type of account use in their preparation or transmission."); Toensing v. Attorney General, 178 A.3d 1000, 1008 (Vt. 2017) (holding emails sent on personal accounts subject to public records law if they otherwise meet the definition of public record because they relate to public business); Cheyenne Newspapers, Inc. v. Bd. of Trustees of Laramie Cnty. School Dist. Number One, 384 P.3d 679, 680 (Wyo. 2016) ("Because school board members use their personal email addresses to conduct school board business, the request required a search and retrieval of emails from personal email accounts of the board members as well as from the School District's computer system."); City of Champaign v. Madigan, 992 N.E.2d 629,

Ass'n for Govt. Responsibility, Ethics & Transparency v. Borough of Mantoloking, 478 N.J. Super. 470, 489 (App. Div. 2024); Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 11, 2005). Conversely, if a public official sends a purely personal email that does not relate to official business, such as an email to their doctor or spouse, that email is not transformed into a government record because a government-issued email account was used. See, e.g., Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-318 (Sept. 2016) ("An employee of a public agency may use a government email account to send an innocuous, personal email, which in no way pertains to the agency's 'official business.' It would be an overreach to suggest that such an email is subject to disclosure under OPRA just because it was sent or received on a public entity's computer network."), aff'd, Carter v. Franklin Fire Dist. No. 1 (Somerset), 2018 WL 4761891 (App. Div. Oct. 3, 2018). See also New Jersey Records Manual at 43 ("Any e-mail not received or created in the course of state business, may be deleted immediately, since it is not an official record. Examples include

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640 (Ill. App. 2013) (holding city councilmembers' communications, including text messages on private phones, were "public records" for purposes of Illinois Freedom of Information Act when they "pertain[ed] to public business" and were sent during city council meetings or other convenings of public bodies); Nissen v. Pierce Cty., 357 P.3d 45, 53 (Wash. 2015) (en banc) ("[R]ecords an agency employee prepares, owns, uses, or retains on a private cell phone within the scope of employment can be a public record if they also meet the other [statutory] requirements.").

unsolicited e-mail advertisements, commonly called 'SPAM,' personal messages, or the 'Let's do lunch' (not a State business meeting over lunch), or 'Can I catch a ride?' type of note.").

The District concedes that the emails themselves are subject to OPRA if they relate to official business regardless of whether they were sent from personal email accounts or District-issued email accounts.[6] The responsive email logs are likewise "government records" to the extent that they consist of emails that were sent or received (i.e., made, maintained, or kept on file) by Board Members and relate to public business. This Court's decision in Paff v. Galloway compels that result. 229 N.J. at 357 (holding "fields of information covering 'sender,'

[6] At the same time, the District argues the trial court was correct in holding that "there has been no showing that the email logs from the personal accounts of government officials are required to be made, maintained, or kept on file during the course of official business." (DPb14, quoting Pa32) (emphasis added). Respectfully, the trial court applied the Right to Know Law (RTKL)'s definition of government record, which narrowly applied only to printed copies of records that were required by law to be made, maintained or kept on file. Paff v. Galloway, 229 N.J. at 352. OPRA replaced the RTKL and applies to any record that has been made, maintained, or kept on file. Thus, the entire basis for the trial court's opinion stems from using an outdated definition of government record. Furthermore, the trial court failed to apply OPRA's requirement that ambiguities be construed in favor of access, instead holding that because it viewed the Court's decision in Paff as applying only to logs on a municipal server, the "ruling should and is interpreted to preclude the disclosure of email logs not stored on a municipality or government agency's server." (Pa31).

'recipient,' 'date,' and 'subject' in the emails sent by" two government employees were government records subject to OPRA).

The District clings to language in Paff v. Galloway to argue that email logs are only subject to OPRA if they are maintained on "a database on a municipality's server." (DPb9) (quoting Paff v. Galloway, 229 N.J. at 353). But such a limitation would contradict the plain language of N.J.S.A. 47:1A-1.1, which focuses on whether a public official made or maintained the record as part of official business, not where the record is stored. This Court rejected a similar argument in Simmons v. Mercado, 247 N.J. 24, 40-42 (2021), when it held that CDR-1s were "government records" that must be produced by a police department even if it was the Judiciary who "maintained" the CDR-1s, because the "officers 'make' the information by inputting substantive data about the arrest into eCDR" and the "plain language of the statutory provision at issue here is clear: if a government official makes, maintains, or keeps on file electronic information in the course of his or her official business, it is a 'government record' subject to OPRA." Id. at 41 (citing N.J.S.A. 47:1A-1.1).

If accepted, the District's position would allow public employees to evade OPRA altogether by simply taking copies of all hard copy records home with them

or storing all electronic records on a personal computer or in a cloud.[7] In fact, if the District's argument were accepted, then its own official emails would be outside OPRA's reach because, per Chang, the District's emails are also stored on a server owned by Google called "Google Workspace," a cloud-based productivity platform that many businesses use for email services. (Pa17). This Court avoids interpretations of OPRA that invite evasion of the statute. Simmons, 247 N.J. at 42 ("Were we to engraft upon OPRA an exception for when a government agency has created but no longer maintains a record, it would create a perverse incentive for officials to relinquish electronic records to a third party in order to prevent their public disclosure.").

There is no colorable claim that the email logs fall outside the definition of "government record." That leaves the Court with the District's claim that it should be excused from compliance because Google Workspace provides Chang "tools which permit [him] to easily and expeditiously extract data from the District-controlled Google Workspace . . . accounts," and the Board Members' personal email accounts allegedly do not. (Pa17). That unproven fact does not

[7] The DLPR gives the District custodian the right to compel the Board Members to produce all official emails they have sent because they are public records that belong to the public and must be maintained by law. See N.J.S.A. 47:3-28 ("Any person who is entitled by law to the custody of public records shall demand the same from any person in whose possession they may be, and such records forthwith shall be delivered to the officer charged by law with their custody.").

impact the initial inquiry of whether the email logs fall within the definition of "government records," but instead is addressed in a court's next step—determining whether there is a lawful basis to deny access to a government record or part of a government.

B. The District Failed to Meet Its Burden of Proving That Its Denial of Access is Lawful

Despite having the burden of proof, the District has not cited the legal provisions that could justify a non-denial after the email logs are found to be "government records." Instead, it has vaguely argued that producing the email logs would be impossible or too burdensome or that disclosure of the logs would violate the Board Members' privacy. Each of these arguments should be rejected.

1. The District Has Not Proven That Agency Operations Would Be Substantially Disrupted

The District primarily argues that an email log from a private server is not a "government record," but it fleetingly suggests that the request "would substantially disrupt the District's operations." (DPb11). It never cites the full statutory provision and its requirements, which are as follows:

> If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after informing the requestor of the potential disruption to agency operations and attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.

[N.J.S.A. 47:1A-5(g).]

Thus, for a denial to be lawful under this provision, an agency must prove that 1) fulfilling the request would substantially disrupt agency operations and 2) it has informed the requestor and attempted to reach a reasonable solution that would accommodate both the requestor and the agency's interests. Importantly, this means more than simply proving that the request would "potentially take . . . hours" to fulfill, as Chang claims, because a separate provision of OPRA addresses requests that require "extraordinary expenditure of time and effort," allowing agencies to charge a special service charge in such circumstances. N.J.S.A. 47:1A-5(c). To deny a request requires an agency prove much more—that the request would cause a substantial disruption—and also that unsuccessfully it tried to accommodate the request in some other manner.

In support of its position, the District submitted a brief certification by Chang, which reveals that he does not know the specific private email services the Board Members are using, the scope of their personal email use, or the steps they would need to take to produce an email log from those services. The Appellate Division correctly held that a public agency cannot meet its burden of proof by submitting a certification that is not based upon personal knowledge. See N. Jersey Media Grp. Inc. v. State, Off. of Gov., 451 N.J. Super. 282, 298-

99 (2017) (agency could not prove it made a reasonable search for emails with a certification that was not based on personal knowledge but instead described search of an unidentified third-party vendor); R. 1:6-6 (affidavits must be "made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify").

Courts have also long held that a public agency cannot meet its burden of proof with "speculative" or "generalized, conclusory" certifications. See Rivera v. Union Cnty. Prosecutor's Off., 250 N.J. 124, 149 (2022) (rejecting "two brief certifications . . . that do not disclose particular facts about what took place" and "chiefly contain generalized statements about how disclosure" would cause harm); Paff v. Ocean Cnty. Prosecutor's Off., 235 N.J. 1, 28 (2018) ("We remind parties and their attorneys that a generic objection based on privacy gives a court scant basis to explore the issue, and that any 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) (rejecting denial of names of those who bid on property because the agency's claimed "risk of harm was speculative"); N. Jersey Media Grp. Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 572 (2017) (rejecting State's quest to withhold names of officers who shot suspect because "generic reasons alone cannot satisfy the statutory test"—"a more particularized showing is required"); Courier News v. Hunterdon Cnty.

Prosecutor's Office, 358 N.J. Super. 373, 382-83 (2003) ("[A] public agency seeking to restrict the public's right of access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. . . . [D]efendant's fears of potential juror confusion are purely speculative and fail to meet the statutory burden of proof.").

Chang's certification is generic and hypothesizes only that some Board Members "could have used" proprietary email services and "many" of those services do not allow users to easily produce logs. (Pa17). He claims it would be "difficult if not impossible to generate logs from most if not all of the many private email accounts used by Board members." (Pa18). In other words, while he believes that most of the services the Board Members could have used might make it difficult to produce a log, he has not said for certain that every log cannot be produced, nor can he know for certain the amount of time it would take to produce them—only that it could take "hours." The reason he is vague and speculative is because he lacks personal knowledge. His certification utterly fails to prove that the request would "substantially disrupt agency operations."

The District sharply criticizes the Appellate Division and says it does not understand how "ridiculous or even impossible it would be to ask government officials to obtain [email logs] from third-party corporations such as Google," but they have not proven that such a step is even necessary. It may be that the

services the Board Members used, or at least some of them, allow them to produce logs. There is no contrary competent evidence in the record.

Furthermore, the District takes a rigid view as to what must be produced in response to a request for an email log, suggesting it must be something that the District's IT person culls from a District-owned server. While that is certainly the practice that ensures the best compliance with the DPRL and OPRA, unfortunately the Board Members have made that impossible by using their personal email accounts. That is not a basis to deprive Plaintiff or the public of information from the emails the Board Members sent, however.

There is nothing in the record to suggest the District engaged in any effort to "accommodate" Plaintiff's OPRA request prior to denying access the email logs from personal accounts, as required by N.J.S.A. 47:1A-5(g). In fact, even now, it seems to reject such arguments by Plaintiff, saying that Plaintiff "falsely implies that OPRA is flexible or elastic rather than a statute with clear requirements and limitations." (DPRb9). That contradicts Section 5(g)'s language, which requires flexibility rather than outright denying a request. See also Mason v. City of Hoboken, 196 N.J. 51, 65 (2008) ("Various provisions in the statute are designed to foster cooperation among requestors and agencies and reasonably accommodate their interests.").

On remand, the District will be obligated not only to prove that the request would substantially disrupt agency operations as to each log, but also that there are no reasonable accommodations that could be made to satisfy Plaintiff's request. The parties will be able to explore those accommodations, as a request for an email log can be fulfilled in other ways, such as by having each Board Member search their email account for all emails from November 1, 2022, to January 23, 2023 (the dates in the request). They can then screenshot or print-to-PDF those query results. That screenshot or PDF would be a "log" of all emails and would include the sender, recipient, date, and subject. Although the full list of recipients may be truncated and not show in this format, that does not justify denying Plaintiff access to the rest of the log. If the District proves on remand that certain Board Members use services from which they cannot run a server-generated email log, then producing such a log is a reasonable accommodation that can be made in lieu of denying the request. N.J.S.A. 47:1A-5(g).[8] Plaintiff is owed such an accommodation under the statute.

[8] Although most appropriate to explore on remand, "Google Takeout" allows Gmail users to download a copy of their entire email box, which can then be opened by other email programs so that a log can be produced. Oyinebiladou Omemu, How to Download Your Gmail Emails, Techloy, June 30, 2025, https://www.techloy.com/how-to-download-your-gmail-mails. Each email service likely has some service that would allow the Board Members to produce some version of a log, but District's self-serving certification did not

Alternatively, among other reasonable accommodations Plaintiff could explore on remand, the District could ask the Board Members to search and produce every email they sent or received from November 1, 2022, to January 23, 2023 that relates to official business. From there, the District's custodian (or counsel) could review the emails and produce them to Plaintiff, as they would contain the information he seeks—senders, recipients, dates, subject matters, and bcc's. This may be time-consuming, but the Board Members are the ones who created the extra burdens. Had they complied with the law, they would have a) refrained from discussing District business outside of public meetings, b) utilized District-issued emails where such communications are permissible, or c) in those limited circumstances where using a personal email account was for some reason necessary, they would have forwarded a copy of the email to the District's official server so that it could be maintained pursuant to DPRL and produced under OPRA. The District cannot justify a denial, or pass along extra costs, to the public because their own Board Members created a burden. Respectfully, if the District does not want to bear the burden of the extra work, it should caution its Board Members that personal email accounts cannot be used for school business.

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affirmatively explore these options because its apparent goal is to deny access, not to be "flexible" and accommodate the request.

The Appellate Division stated it took "no position" on whether the District could impose special service charges to fulfill the request. Rosetti, 481 N.J. Super. at 16 (citing N.J.S.A. 47:1A-5(c)). Although OPRA does allow a service charge where fulfilling a request involves an "extraordinary expenditure of time and effort" to fulfill, it would be inequitable to force Plaintiff to pay for the extra time it would take to produce the logs given that the request would take only "minutes" if the Board Members had complied with the law and not used personal email accounts. Paff v. Galloway, 229 N.J. at 354 (noting IT professional said it would take no more than "two to three minutes" to produce a log). Special service charges serve as obstacles to access and should not be allowed where the agency or agency officials created the extra work to fulfill the request.

2. The Appellate Division Correctly Ordered the Board Members to Submit Certifications Based on Personal Knowledge of Their Email Accounts

The Appellate Division concluded that Chang's certification was insufficient to prove that producing the logs would substantially disrupt agency operations and that a remand was necessary:

> Given the insufficiency of Chang's certification—it is "difficult if not impossible to generate logs from . . . personal email accounts"—the trial court should require the Board members to search their personal email accounts to determine if the sought-after logs are

> available. If the logs are unavailable or their production is burdensome, they must be supported by persuasive [Paff v. N.J. Dep't of Labor, 392 N.J. Super. 334, 341 (App. Div. 2007)] certifications. [Plaintiff], of course, should have the opportunity to respond. After the court reviews the parties' submissions, then it must decide if a fact-finding hearing is needed. Moreover, the court should ensure the parties make good faith efforts to reasonably resolve the document request as required by N.J.S.A. 47:1A-5(g). Only after this process can the court judiciously determine if retrieval of the email logs is too burdensome.
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> [Rosetti, 481 N.J. Super. at 4–5.]

The District calls this solution "untenable" because the "District's Board Members, who are mere subscribers to services such as Gmail, lack the ability to generate accurate logs in the manner that was done by the District's IT Director Chang using the District's software." (DPRb4; DPb10). But it misses the point—the District IT Director is not "better suited than the individual board members (or a court) to explain what is and is not possible, and what would substantially disrupt the District's operations" because he has no personal knowledge of what email services the Board Members use. His certification is pure speculation, and, as argued above and recognized by the Appellate Division, he took an all-or-nothing-approach and did not address any reasonable alternatives to fulfill Plaintiff's OPRA request.

The process the Appellate Division applied is common. For nearly twenty years, courts and the GRC have required public agencies to submit sworn certifications by those with personal knowledge to meet their burden of proof for withholding records. Those certifications, called "Paff Certifications," generally must contain explain the search the individual took to locate responsive records; what responsive documents were found; whether any documents, or portions of documents, are claimed to be confidential and the legal basis to justify that confidentiality; and information about whether any responsive documents may have been destroyed. Paff v. Dep't of Labor, 392 N.J. Super. at 341. This ensures that the search was reasonable and that all responsive records are produced or an exemption is justified.[9]

Only the Board Members have personal knowledge of their email accounts to be able to certify about how often they used their personal email accounts, what specific email services they used, and the process for producing a log. If they are not tech savvy, the District can certainly assist them in ascertaining this information and Chang, once he has personal knowledge of the specific email

[9] This process is also followed by other states. See Toensing, 178 A.3d at 1011-13 (adopting process where agency ensures employee who uses personal email is trained to distinguish public from non-public emails and then employee certifies as to details of search terms used and emails withheld). Accord Nissen, 357 P.3d at 56-57; City of San Jose, 389 P.3d at 860-61

service each Board Member used, can also submit a supplemental certification explaining the technological limitations of those services. If the District then satisfies the trial court that there is no way to generate a traditional server-based log, the District still has an obligation to offer reasonable alternatives such as producing a screenshot or PDF of certain query results within the email box or producing copies of all emails in which official business was conducted.[10] The Board Members would necessarily retrieve those emails from their own accounts and need to certify regarding the steps they took to do so and whether they deleted or withheld any emails.

In sum, the Appellate Division's order is not unique—it is exactly how courts have always handled scenarios where government officials must search for records within their personal possession. See N. Jersey Media Grp. Inc. v. State, 451 N.J. Super. at 298-99 (concluding attorney could not certify as to

[10] Although the District hints that it would be difficult to isolate which emails relate to official business, there are ways to do so such as searching for specific search terms (i.e., "school," "District," "BOE," *et cetera*) or for emails with certain individuals (i.e., other Board Members and District staff). Importantly, a search need not be perfect or guaranteed to return every potential email that exists. Rather, a search for public records must simply be "reasonably calculated to uncover all relevant documents." Steinberg v. U.S. Dep't of Justice, 23 F.3d 548, 552 (D.C. Cir. 1994) (emphasis added). On remand, the Paff Certifications should detail the search terms used, and Plaintiff should have the right to challenge the reasonableness of those search terms. This is standard practice in a public records case.

third-party vendor's search of emails); Carter v. Franklin Fire Dist. No. 1, Docket No. A-2726-16T1 (App. Div. Mar. 15, 2019) (concluding records custodian could not certify as to the search conducted by employees of their own personal email accounts or of the IT vendor's search of the agency's server). The decision should be affirmed.

3. To the Extent the Logs List Emails That Are Not "Government Records," OPRA Requires Redactions Rather Than Withholding the Logs in Their Entirety

The District argues that the Appellate Division's "ruling effectively classifies an entire email log—if one could even be generated—from an elected official's private account as a government record." (DPb17). But the ruling does no such thing, as it expressly contemplates the District's ability to produce the logs with redactions to material that falls outside OPRA's reach. Rosetti, 481 N.J. Super. at 16. In fact, the same provision of OPRA that requires an agency to try to accommodate a request even if it would substantially disrupt agency operations also requires the agency to produce a record in redacted form rather than withholding it in its entirety. N.J.S.A. 47:1A-5(g) ("If the custodian of a government record asserts that part of a particular record is exempt from public access . . . the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record."). If the logs contain emails that

are personal in nature, those entries can be redacted because they would fall outside the definition of government record. As expressly contemplated by Paff v. Galloway, 229 N.J. at 359, agencies already do this if an email log from a government server contains emails that fall outside the definition of "government record" either because they are personal in nature or disclose information that OPRA exempts.

C. Nothing in the 2024 OPRA Amendment Establishes Any Legislative Intent to Allow Public Officials to Evade OPRA by Using Private Emails to Conduct Government Business

The District's closing argument is that the 2024 amendments to OPRA, P.L. 2024, c. 16, justify its denial of access because the Legislature intended to "enhance privacy protections for government officials and citizens" (DPb16) and address the fact that "the law was becoming too burdensome on local government." (DPRb1). Respectfully, the amendments the District speaks of were primarily intended to stop commercial entities from using OPRA to gather personal information about residents to send solicitations, not to shield public officials from transparency.[11] Mike Catalini, New Jersey Lawmakers Fast Track Bill That Could Restrict Records Access Under Open Records Law, Associated

[11] The amendments reduced burdens upon local governments in other specific ways, such as allowing agencies more time to respond to commercial requests and prohibiting parties in legal proceedings from using OPRA in lieu of discovery. N.J.S.A. 47:1A-5(g) and (i).

Press, Mar. 11, 2024[12] (quoting bill sponsor as saying, "We want to stop people from profiteering from OPRA on the backs of the taxpayers."). Thus, the amendments exempt personal identifying information disclosed on domestic animal permits, licenses, and registration; in any document "provided to a public agency for the sole purpose of receiving official notifications;" and when "required by a public agency for government applications, services, or programs." N.J.S.A. 47:1A-1.1. The Legislature did not otherwise broadly render all personal identifying information, such as email addresses, exempt and thus there is no broad confidentiality interest within the email logs. To the extent the "privacy" of the Board Members would be violated by disclosing a log that lists their personal email communications—a problem they created by commingling work and personal email—such entries can be redacted as argued above because they are not "government records."[13] To the extent any entry within the log raises a privacy concern or exposes something confidential, those entries can similarly be redacted.[14]

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[12] https://apnews.com/article/open-public-records-act-new-jersey-transparency-34da53dfb7564c46b49409227dba4e95

[13] Their privacy is also protected by allowing the Board Members themselves to comb through their email boxes for official emails.

[14] For example, if a subject line stated, "The Clerk's pending FMLA leave for cancer," that line could be redacted pursuant to OPRA's personnel records exemption and privacy provision. But if the subject merely stated, "The Clerk," no redaction would be necessary or allowed, even if the underlying email

Importantly, although an initial draft proposed to exempt "logs of telephone calls, emails, or texts," that language was promptly removed after public outrage. See Senate Budget & Appropriations Committee Statement to S. 2930, May 9, 2024. Thus, the Legislature was aware that email logs are government records subject to public access and decided to keep it that way.

The public was rightly outraged at the proposed exemption because email logs serve as important accountability measures. For example, email logs allow a requestor to quickly determine the scope of government business that is being discussed privately via email. Requesting actual emails can be difficult because agencies often impose special service charges to review those emails for an exemption, but an email log will give a requestor limited information about what is being discussed, how often, and with whom. In cases like this one, it may allow Plaintiff to quickly see whether the Board Members have violated OPMA, if an entry in the log reveals a quorum was included on a particular email. From there, Plaintiff can request the underlying email to further investigate.

The logs also allow a requestor to identify discrepancies in a records production. For example, a log can reveal that an email was not identified or

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discussed the FMLA leave for cancer, because the subject line itself exposes nothing private or confidential.

disclosed in a response to a prior request for email correspondence. Or it can reveal that dates, times, or other information in an email production were altered.

Therefore, it is imperative that the Court prohibit public officials from evading Paff v. Galloway by using their private emails to conduct government business. The Court should affirm.

CONCLUSION

For all the reasons argued above, the Court should affirm the Appellate Division's holding. The Court should also caution public officials that their obligations under the DPRL and OPRA are best fulfilled by utilizing agency-owned email accounts for all official business.

Respectfully Submitted,

/s/ CJ Griffin
CJ Griffin (031422009)
Pashman Stein Walder Hayden, P.C.
21 Main St., Suite 200
Hackensack, NJ 07601
201-488-8200
cgriffin@pashmanstein.com

Ezra D. Rosenberg (012671974)
Jeanne LoCicero (024052000)
American Civil Liberties Union
of New Jersey Foundation
[redacted]
P.O. Box 32159
Newark, New Jersey 07102
(973) 854-1714
erosenberg@aclu-nj.org