

## **PRELIMINARY STATEMENT**

This appeal seeks to overturn the Trial Court's ruling that a confidentiality clause in a settlement agreement between a public agency and a public employee trumps the Open Public Records Act, *N.J.S.A. 47:1A-1, et seq.* ("OPRA"). Here, Plaintiff-Appellant John Paff requested a settlement agreement between Defendants-Respondents County of Monmouth and Carol Melnick ("Settlement Agreement"). The Settlement Agreement resolved Ms. Melnick's sexual harassment charges against Monmouth County, which she brought against Monmouth County in Superior Court on April 14, 2005.

A settlement agreement is a contract like any other contract. Under OPRA, public agencies' contracts are public records, regardless of whether they contain confidentiality clauses. This situation is no different. The public policies encouraging prosecution of sexual harassment claims and settlement of actions cited by the Trial Court in its decision cannot thwart disclosure where the subject matter of the sexual harassment claims were filed in Court and there is no evidence that the Settlement Agreement contains any confidential information.

## **PROCEDURAL HISTORY**

On September 10, 2007, Plaintiff-Appellant Paff filed an action against Defendants-Respondents Monmouth County and James Gray in Mr. Gray's capacity as the Monmouth County Custodian of Records. (Paff App. p. 106a).<sup>1</sup> Mr. Paff filed that action to compel Defendants-Respondents Monmouth County and Mr. Gray to produce the settlement agreement in "*Melnick v. Monmouth County Board of Chosen Freeholders, et al.*", which he had previously requested through an OPRA request to Monmouth County on July 19, 2007. (*Id.* pp.

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<sup>1</sup> References to "Paff App. p. \_\_\_" are to the Appendix of Plaintiff-Appellant John Paff.

107a-09a). Mr. Paff also filed a motion to proceed in a summary manner, which was granted on October 5, 2007. (*Id.* pp. 141a-42a). On October 24, 2007, Defendants-Respondents Monmouth County and Mr. Gray filed an answer, which identified *Asbury Park Press v. County of Monmouth*, Docket No. MON-L-4817-07, as a case in which document requests relating to the *Melnick* action were also being litigated. Plaintiff-Appellant Asbury Park Press sought, among other things, the same Settlement Agreement that Mr. Paff was seeking. (*Id.* pp. 38a-41a).

On January 3, 2008, the Trial Court consolidated the *Paff* and *Asbury Park Press* actions under Docket Number MON-L-4358-07. (*Paff App.* pp. 139a-40a). By this time, Defendant-Respondent Melnick had been added to the Asbury Park Press action. (*Id.* p. 138a.) The Trial Court set a briefing schedule and scheduled oral argument for January 24, 2008. (*Id.* pp. 138a-40a). On January 29, 2008, the Court rendered its decision, followed by an order dismissing the case on February 14, 2008. (*Id.* pp. 150a-52).

Although she was named as a defendant in the *Asbury Park Press* action, which was then consolidated with the *Paff* action, Ms. Melnick did not file an answer below, nor did she submit any evidence or appear at oral argument. (Jan. 29 Tr. at 6).<sup>2</sup> Counsel for Ms. Melnick did file a letter brief protesting any disclosure of the Settlement Agreement. (*Id.*).

### **QUESTION PRESENTED**

Whether a settlement agreement containing a confidentiality clause entered into between a public agency and an individual that resolves sexual harassment charges should be

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<sup>2</sup> References to “Jan. 29 Tr. at \_\_\_” are to the Transcript of Decision dated January 29, 2008. References to “Jan. 24 Tr. at \_\_\_” are to the oral argument held by the Trial Court on January 24, 2008.

disclosed upon request pursuant to the New Jersey Open Public Records Act or the Common Law Right of Access?

### **STATEMENT OF FACTS**

On July 19, 2007, Mr. Paff submitted an OPRA request to James Gray, the Clerk of the Monmouth County Board of Freeholders. (Paff App. p. 46a). Mr. Paff used the County of Monmouth's official form. (*Id.*). In relevant part, Mr. Paff requested "[t]he settlement agreement related to the Melnick matter." (*Id.* pp. 46a-47a). Although Mr. Paff requested other documents, his request for those records were not raised in Mr. Paff's Complaint and are not at issue on this appeal. (*Id.* pp. 106a-09a).<sup>3</sup>

On July 30, 2007, Defendants-Respondents denied Mr. Paff access to the Settlement Agreement. (Paff App. pp. 50a-52a). Defendants-Respondents denied access for four reasons:

1. The Settlement Agreement was a record of an investigation in progress and, therefore, exempt from disclosure pursuant to N.J.S.A. 47:1A-3(a).
2. The Settlement Agreement was not a government record pursuant to N.J.S.A. 47:1A-1.1, which exempts from disclosure "information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer . . . ."
3. The Settlement Agreement contains "information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office."

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<sup>3</sup> Plaintiff-Appellant Paff's Statement of Facts does not recount the record below as it relates to Plaintiff-Appellant Asbury Park Press's OPRA requests, although we have included that information in our Appendix.

4. The public interest in confidentiality outweighed Mr. Paff's private interest in disclosure. (*Id.* p. 51a).

As a part of Defendant-Respondents' response to Mr. Paff's OPRA request, they produced a Consent Protective Order in the *Melnick* case. (*Id.* p. 55a-59a).<sup>4</sup> Nothing in the Consent Protective Order appears to cover the Settlement Agreement, and no claim was made below that the Settlement Agreement was covered by the Consent Protective Order. (*Id.*; *id.* at 119a). The Settlement Agreement contains a confidentiality clause restricting its dissemination. (Jan. 29 Tr. p. 13).

Just prior to Mr. Paff's July 19, 2007 OPRA request, an article concerning Ms. Melnick's lawsuit and its settlement appeared in the *Asbury Park Press*. (Paff App. p. 121a). According to that article, Ms. Melnick sued Monmouth County in Superior Court on April 14, 2005, alleging that she had been passed over for promotion and that Monmouth County officials ignored her discrimination and harassment complaints. (*Id.*). According to the article, Ms. Melnick still works for Monmouth County. (*Id.*).

According to certifications filed by Defendant-Respondents, the County of Monmouth has not disbursed any funds to Ms. Melnick or her attorneys. (Paff App. pp. 42a & 43a). Rather, although funds were paid to Ms. Melnick pursuant to the Settlement Agreement, Monmouth County's insurance carrier paid that amount. (Jan. 29 Tr. p. 23).

#### **STANDARD OF REVIEW**

On a review of a summary action, this Court is bound by the Trial Court's findings of fact if they are supported by adequate, substantial, credible evidence in the record. *Rova Farms Resort, Inc. v. Investors Ins. Co. of America*, 65 N.J. 474, 500 (1974). The Trial

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<sup>4</sup> Judge Perri signed the Consent Protective Order.

Court's conclusions of law are reviewed *de novo* by this Court. *Balsamides v. Protameen Chemicals, Inc.*, 160 N.J. 352, 372 (1999). In actions under OPRA, the public agency has the burden of proof. *N.J.S.A. 47:1A-6; North Jersey Media Group, Inc. v. State*, 389 N.J. Super. 527, 533 (Law Div. 2006).

## **LEGAL ARGUMENT**

### **POINT I**

#### **THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY HOLDING THAT THE SETTLEMENT AGREEMENT WAS NOT DISCLOSABLE UNDER OPRA, N.J.S.A. 47:1A-1, OR THE COMMON LAW RIGHT OF ACCESS**

##### **A. The Settlement Agreement Should Be Disclosed Under OPRA**

OPRA mandates that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public’s right of access.” *Libertarian Party of Cent. New Jersey v. Murphy*, 384 N.J. Super. 136, 139 (App. Div. 2006) (citing *N.J.S.A. 47:1A-1*). “The purpose of OPRA ‘is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” *Times of Trenton Pub. Corp. v. Lafayette Yard Community Development Corp.*, 183 N.J. 519, 535 (N.J. 2005) (quoting *Asbury Park Press v. Ocean County Prosecutor’s Office*, 374 N.J. Super. 312, 329 (Law Div. 2004)).

Here, the Trial Court held that the Settlement Agreement was not a public record because it is “information generated by or on behalf of public employers, or public employees, in connection with any sexual harassment complaint filed with a public employer or with any

grievance filed by or against an individual.” (Jan. 24 Tr. p. 17) (citing *N.J.S.A.* 47:1A-1). With respect to its OPRA analysis, this was the basis for the Court’s decision.

The Court’s construction of *N.J.S.A.* 47:1A-1 was incorrect. As the Trial Court correctly observed below, the function of the Court is to determine the Legislature’s intent, Jan. 29 Tr. p. 17, and “generally, the best indicator of that intent is the statutory language.”

*DiProspero v. Penn*, 183 N.J. 477, 492 (2005). “A clear and unambiguous statute is not open to construction or interpretation . . . .” *Watt v. Mayor & Council of Franklin*, 21 N.J. 274, 277 (1956). A court should not “presume that the Legislature intended something other than that expressed by way of the plain language.” *O’Connell v. State*, 171 N.J. 484, 488 (2002).

Here, the Trial Court read OPRA’s exemption for “grievances” and complaints “filed with a public employer” too broadly because the Court did not give effect to OPRA’s distinction between sexual harassment complaints and grievances “filed with a public employer” or “filed by or against an individual,” and those filed with Superior Court. Complaints or grievances filed with a “public employer” are exempt under OPRA, while complaints filed in Superior Court are not included in this exemption and, therefore, should be disclosed.

This construction is plain from OPRA’s statute. The sexual harassment statute does not encompass all “complaints,” rather it only includes “complaints” that are “filed with a public employer or with any grievance filed by or against an individual.” Lawsuits, like the one initiated by Ms. Melnick, are not “filed with” a public employer, rather they are filed with the Court.

This distinction tracks New Jersey’s Law Against Discrimination, *N.J.S.A.* 10:5-1, *et seq.* (“LAD”). Under the LAD, a person “claiming to be aggrieved” by an unlawful employment practice or unlawful discrimination, may *either* “make, sign and file with the

division a verified complaint” or “initiate suit in Superior Court under this act without first filing a complaint with the division or any municipal office.” *N.J.S.A.* 10:5-13. An aggrieved person may do one or the other; they may not do both. *Hermann v. Fairleigh Dickinson Univ.*, 183 N.J. Super. 500, 503 (App. Div. 1982).

This distinction is important, and reasonable. In Superior Court, unlike in administrative proceedings, filings of complaints are public, as are the allegations made within those complaints. Once a person, like Ms. Melnick did here, chooses to initiate a civil action by way of complaint, those allegations are public.

The Trial Court below turned a public policy encouraging the resolution of sexual harassment complaints into an authorization to conduct such proceedings in secret: “In crafting this exception . . . the Legislature acted in a manner consistent with promoting the recording and prosecution of sexual harassment claims *without fear of public disclosure*[.]” (Jan. 29 Tr. p.18) (emphasis added). New Jersey has no such policy regarding civil lawsuits. The sexual harassment claims here were part of a filed complaint. If Ms. Melnick wanted the process to stay secret, she should have filed an administrative action or grievance, as she had the right to do. Indeed, public disclosure is the natural and presumably intended result of a publicly filed lawsuit.

For the same reason, contrary to the Trial Court’s reasoning, Ms. Melnick had no expectation of privacy in making sexual harassment charges or resolving them, as the filing of the complaint and dismissal of the lawsuit were filed with the court.

The Trial Court’s decision is at odds both with the only other Court in this State that addressed this issue, as well as the highest courts of several other States. As every other court has held, confidentiality clauses in public entity settlement agreements conflict with and cannot subvert a public policy of disclosure. *See, e.g., Tribune-Review Publishing Co. v.*

*Westmoreland County Housing Authority*, 833 A.2d 112, 121 (Pa. 2003). Courts across the country have ordered the disclosure of settlement agreements containing confidentiality provisions. *See, e.g., id.*; *State ex rel. Findlay Publ'g Co. v. Hancock Co. Bd. of Comm'rs*, 684 N.E.2d 1222, 1225 (Ohio 1997); *Des Moines Indep. Cmty. Sch. Dist. Pub. Records v. Des Moines Register & Tribune Co.*, 487 N.W.2d 666, 669 (Iowa 1992); *Anchorage Sch. Dist. v. Anchorage Daily News*, 779 P.2d 1191, 1193 (Alaska 1989).

The only New Jersey decision we have found on this issue is *South Plainfield Republican Organization v. Buttiglieri*, No. MID L-6593-05, 2005 WL 5601122 (N.J. Super. Nov. 10, 2005). In that order, the Court held that “settlement documents are public records that should be made available to the Plaintiff.” (Paff App. pp. 143a-45a). In its reasoning, the Court relied on the decisions of the Ohio and Pennsylvania Supreme Courts cited above. (*Id.* p. 144a).<sup>5</sup>

**B. The Settlement Agreement Should Be Disclosed Under the Common Law**

The Settlement Agreement should also have been produced pursuant to New Jersey's common law right of access. Certainly, the Settlement Agreement is a “public record.” *Higg-A-Rella, Inc. v. County of Essex*, 141 N.J. 35, 46 (1995) (defining a common-law record as one that is made by a public official in the exercise of their public function, either because the record was required or directed by law to be made or kept, or because it was filed in a public office). Mr. Paff has standing to request these documents under the common law. “A citizen, and the press on its behalf, does not have to prove any personal interest in order to satisfy the common law standing requirement.” *Daily Journal v. Police Dep't of City of Vineland*, 351 N.J. Super. 110, 122 (App. Div. 2002).

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<sup>5</sup> The *Buttiglieri* Defendants did not appeal the Superior Court's order to disclose the settlement agreement. *South Plainfield Republican Organization v. Buttiglieri*, MID-L-6593-05, 2007 WL 1891301 at \*1-\*2 (App. Div. July 3, 2007) (*per curiam*) (Paff App. pp. 146a-48a).



The only remaining issue is whether the private interest in receiving the information is outweighed by the government's interest in suppressing it.

In weighing whether disclosure outweighs confidentiality, New Jersey courts have weighed several factors, including

(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 their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policy-makers; (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. *Id.* at 123.

Here, these factors weigh in favor of producing the Settlement Agreement. No agency function will be impeded because no information was provide to a public agency. There will not be any effect on individuals who forwarded information because the allegations of sexual harassment are already in the public domain. There is no evidence, and none was submitted below, that agency self-evaluation will be chilled because of disclosure of the Settlement Agreement. No policy-making information is being sought. Finally, any investigative aspect of the *Melnick* action has ended.

There is no record evidence that there would be a chilling effect on either potential plaintiffs who bring complaints or on defendants to settle those lawsuits. And access to settlement agreements cannot impair a person's right under the LAD to bring an administrative grievance. Nor is there any evidence that the Settlement Agreement itself contains information that, on balance, might be confidential or sensitive information pertaining to Ms. Melnick.

Indeed, it would be highly unusual for a Settlement Agreement (as opposed to information exchanged in pre-trial discovery) to contain any sensitive medical or personal information about Ms. Melnick.

**CONCLUSION**

For the foregoing reasons, the Decision of the Court below should be reversed, and the Settlement Agreement should be produced to Plaintiff John Paff.

Dated: June 30, 2008

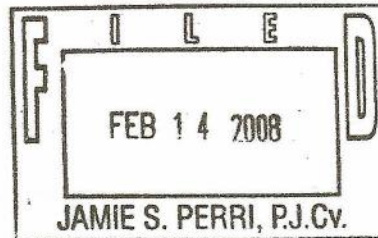
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ASBURY PARK PRESS,  
Plaintiff,

vs.

COUNTY OF MONMOUTH,  
Defendant

and

CAROL MELNICK,  
Defendant.

: SUPERIOR COURT OF NEW JERSEY  
: LAW DIVISION - MONMOUTH COUNTY  
: DOCKET NO.: MON-L-4817-07

Civil Action

JOHN PAFF,  
Plaintiff,

vs.

MONMOUTH COUNTY and JAMES  
GRAY, in his capacity as the Monmouth  
County Custodian of Records,  
Defendants.

ORDER

THIS MATTER having been opened to the Court by Complaint and Order to  
Show Cause filed by Michelle M. Tullio, Esq. of the law firm of Lanfrit and Tullio, LLC,

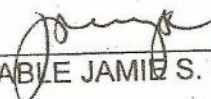
counsel for Plaintiff Asbury Park Press in the above-captioned matter, and by Complaint filed by Walter Luers, Esq., counsel for Plaintiff John Paff in the above-captioned matter, and Linda Grasso Jones, Esq. of the law firm of Cleary, Alfieri & Jones representing Defendants County of Monmouth and James Gray, in his capacity as the Monmouth County Custodian of Records, and Linda Wong, Esq. of the law firm of Wong Fleming representing Defendant Carol Melnick, and papers having been filed on behalf of Plaintiffs Asbury Park Press and John Paff, and on behalf of Defendants Monmouth County and James Gray, as well as on behalf of Defendant Carol Melnick, and all papers having been considered, oral argument having been heard by the Court on January 24, 2008 and good cause shown; and

Plaintiff Asbury Park Press having indicated at oral argument that it was seeking the production not of "all documents possessed by Defendant County of Monmouth relating to Melnick v. Freeholders, docket no. MON-L-1717-05," as requested in the First Amended Verified Complaint, but rather only the settlement agreement entered into in that matter;

IT IS on this 14<sup>th</sup> day of February, 2008,

ORDERED that the relief sought by Plaintiff Asbury Park Press in the Amended Complaint and Order to Show Cause and by Plaintiff John Paff in the Complaint filed in the above captioned matter, specifically the production by the County of Monmouth of the Settlement Agreement entered into in the matter of Melnick v. Monmouth County Board of Chosen Freeholders, et al., Docket No. MON-L-1717-05, is hereby denied; and

IT IS FURTHER ORDERED that the settlement agreement entered into in the matter of Carol Melnick v. Monmouth County Board of Chosen Freeholders, et al., Docket No. MON-L-1717-05, is not subject to production to Plaintiffs under the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 et seq. or under New Jersey common law.

  
HONORABLE JAMIE S. PERRI, P.J. Civ.

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Findings of the Court were set forth on  
Record on 1/24/08.

1 Settlement reached in engineer vs. county  
2 Asbury Park Press (Neptune, NJ) - July 13, 2007  
3 Author: Asbury Park Press, BOB JORDAN  
4 By BOB JORDAN FREEHOLD BUREAU  
5  
6 A 2005 lawsuit in which the Monmouth County traffic engineer alleged  
7 that  
8 county officials ignored her complaints of discrimination and sexual  
9 harassment by her superiors has been settled. But neither side is  
10 providing details, and county officials did not say whether a damage  
11 payment or other compensation must be made.  
12 Carol C. Melnick , 47, of Jackson, filed the civil lawsuit in state  
13 Superior Court on April 14, 2005, alleging that she was passed over  
14 for a promotion because she is a woman. Melnick also said superiors  
15 ignored her complaints about discrimination and sexual harassment.  
16 The freeholders passed a resolution authorizing the settlement  
17 agreement at their business meeting Thursday night.  
18 County Counsel Malcolm V. Carton said after the meeting that the  
19 county's insurance carrier and attorneys for the county and Melnick  
20 had agreed on terms to end the lawsuit. Carton said the parties had  
21 agreed not to divulge details.  
22 Neither Melnick nor Linda Wong, a Princeton attorney representing  
23 Melnick , could be reached for comment Thursday. Staffers at the law  
24 firm of Wong Fleming said they were instructed not to comment.  
25 Melnick still works for the county. She made \$112,800 in 2006.  
26 When the lawsuit was filed in 2005, Wong said the defendants had  
27 ruined her client's career.  
28 "It's humiliating and embarrassing to be subjected to harassment,"  
29 Wong said at the time. "She only brought this suit because of what  
30 they did to her career."  
31 A passage of the lawsuit states: "Ms. Melnick was blatantly subjected  
32 to differential  
33 treatment, as compared to males who were similarly situated, including  
34 (former County Engineer Ted) Giannechini, highway supervisor Richard  
35 Iadanza, assistant highway supervisor Thomas Broderick, motor pool  
36 director Raymond O'Grady and superintendent of bridges Anthony  
37 Palughi, who were frequently absent from work and ostensibly held 'no  
38 show' jobs."  
39 The lawsuit was filed shortly after Iadanza, Broderick and O'Grady  
40 were suspended without pay after they were arrested in February 2005  
41 and charged with public corruption offenses. Palughi, who worked

primarily as a chauffeur for the late Freeholder Director Harry Larrison Jr., later pleaded guilty to taking part in a bribery scheme that implicated Larrison.

29  
30 Court papers show that the county employees denied Melnick 's most serious accusations.

31  
32 According to the lawsuit, Melnick joined the county's Department of Public Works and Engineering as a senior traffic engineer in 1992. She claimed that sexual harassment and discriminatory treatment began in 1994, when she applied for the position of county traffic engineer department head.

33  
34 She said Giannechini told her he was interviewing several men from private firms and gave her a five-minute interview as she stood in his doorway.

35  
36 Melnick said she went to Michael Barrett, who was then director of public works and engineering, to be properly considered for the job, and she was promoted in July 1994.

37  
38 Giannechini could not be reached for comment Thursday.

39  
40 Bob Jordan: (732) 308-7755 or [bjordan@app.com](mailto:bjordan@app.com)

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