

JOHN T. PAFF,	:	
Plaintiff-Appellant,	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
v.	:	DOCKET NO. A-1641-04T1
	:	Civil Action
	:	
	:	On Appeal From a Final
	:	Judgment of the Superior Court
	:	of New Jersey, Law Division
KEVIN J. BYRNES, as Custodian	:	Passaic County
of Government Records for the	:	
Township of West Milford,	:	Sat Below:
	:	Hon. Robert J. Passero, A.J.S.C.
Defendant-Respondent.	:	
	:	

BRIEF OF PLAINTIFF-APPELLANT JOHN T. PAFF

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PRELIMINARY STATEMENT

This appeal concerns John T. Paff's request under the Open Public Records Act ("OPRA") for a government record in the possession of Defendant Byrnes, Records Custodian and Clerk for the Township of West Milford.

West Milford has an ordinance, the Attorney Accountability Act, ("Ordinance") which requires all Township attorneys to request the Office of Attorney Ethics ("OAE") to send to the Township the attorney's Certificate of Ethical Conduct, containing the attorney's disciplinary history, and for the Township to make the Certificate available to the public.

Pursuant to the West Milford Ordinance and Supreme Court Attorney Discipline Rule 1:20-9(a)(1), West Milford Township Attorney William DeMarco had requested from the OAE his Certificate of Ethical Conduct. After Mr. DeMarco's Certificate of Ethical Conduct with attached Ethics History Report was issued by the OAE and transmitted to the Township, Plaintiff Paff requested a copy of the Certificate from Byrnes as Records Custodian for the Township.

Byrnes, however, refused to disclose the parts of the Ethics History Report describing Township Attorney DeMarco's disciplinary history, on the grounds that the information was an exempt personnel record under OPRA. But OPRA states that personnel records shall be public "when required to be disclosed by another law." The West Milford Ordinance was such a law since it required

public disclosure of DeMarco's Certificate of Ethical Conduct. Paff therefore filed suit.

Judge Robert J. Passero held that the OPRA "another law" exception did not apply, and dismissed Paff's lawsuit, for three reasons. First, he ruled that the Ordinance required disclosure only of the Certificate of Ethical Conduct, not the attached Ethics History Report. The court erred, since the Ethics History Report is an integral part of the Certificate of Ethical Conduct and is so considered by the Office of Attorney Ethics, which creates them.

Second, Judge Passero ruled that the "another law" exception did not apply because the OPRA term "law" does not include municipal ordinances. The court erred, since OPRA uses the terms "state law," "federal law" and "statute" where it wishes to exclude ordinances. Moreover, OPRA expressly requires that it be construed "in favor of the public's right of access."

Third, the court ruled that the West Milford Ordinance violates OPRA and the Supreme Court Rule on the confidentiality of attorney disciplinary records, R. 1:20-9, and is therefore invalid. But the Ordinance does not violate OPRA since OPRA expressly states that personnel records are public if a law so provides.

Nor does the Ordinance violate R. 1:20-9 confidentiality. Two of the four categories of information to be disclosed under the Ordinance, "Public Discipline" and "Other Public Cases," by

definition were never confidential. As for that type of information, there never was any confidentiality to be violated.

As to the two categories of information, "Private Discipline" and "Other Pending Cases" that had once been confidential, R. 1:20-9(a)(1) expressly grants the OAE Director the discretion to disclose previously confidential disciplinary matters if the attorney respondent waives confidentiality. What a third party, in this case the Township of West Milford, then does with the attorney's disciplinary history released by the OAE cannot violate R. 1:20-9 because, according to R. 1:20-9(h), attorney disciplinary confidentiality does not apply to third parties. Thus, the Ordinance does not violate R. 1:20-9 as regards either the ethics history that had always been public or the ethics history that had been confidential prior to the OAE Director's disclosure.

PROCEDURAL HISTORY

This is an action under the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 to -11, and the common law right of access to public records, challenging the Defendant West Milford Records Custodian Kevin J. Byrnes' denial of access to the disciplinary history portions of an attorney Certificate of Ethical Conduct. (Paff did not seek access to the attorney's redacted social security number.)

A complaint in lieu of prerogative writs and an order to show cause were filed on April 29, 2004. (Pa1.) (OPRA provides that "[a]ny such proceeding shall proceed in a summary or expedited manner." N.J.S.A. 47:1A-6.) Plaintiff sought (1) a ruling that Byrnes' first two responses had violated OPRA by failing to give a specific reason for his denial of access, (2) a ruling that Byrnes has unlawfully failed to grant access to portions of the requested record and (3) a sanction for willful and knowing violation of OPRA. (Pa1.)

Judge Christine L. Miniman on May 6, 2004, denied Plaintiff Paff's order to show cause on the grounds that R. 4:69 does not permit commencement of the action by order to show cause. After receiving a call from the Clerk's Office, Plaintiff Paff requested that his complaint in lieu of prerogative writ be viewed as a simple complaint, rather than one in lieu of prerogative writ. (Pa7.)

After the Defendant filed his Answer on July 14, 2004,

Plaintiff Paff filed a motion for summary judgment. Defendant never made a motion for summary judgment or to dismiss Plaintiff's complaint. (T59-5.)

On October 15, 2004, Judge Robert J. Passero heard oral argument on Paff's motion for summary judgment, denied Plaintiff Paff's motion for summary judgment and dismissed his complaint with prejudice. (P11.) The court held that the records at issue were exempt from disclosure under OPRA as personnel records and that the OPRA exception for personnel records required to be disclosed "by another law," N.J.S.A. 47:1A-10, did not apply here because (1) while the West Milford Attorney Accountability Ordinance provides for the disclosure of Certificates of Ethical Conduct, it does not provide for the disclosure of the attached and referenced Ethics History Report, (T48-9 to T49-7, T53-13 to -19), (2) an ordinance is not a "law," (T50-12 to T51-4), and (3) the West Milford Ordinance is void to the extent that it requires disclosure of ethics history reports by the Clerk because such disclosure would violate OPRA and the Supreme Court rules on attorney discipline confidentiality. (T51-5 to T53-13.) Arguments (1) and (2) had not been made by the Defendant. The Court also held that there was no common law right of access to the records at issue, (T54-17 to T58-1) and denied the request for sanctions. (T58-2 to T59-4.)

On December 6, 2004, Plaintiff Paff appealed the court's decision that Mr. Byrnes was not required by OPRA to disclose the

withheld information. (Appellants' CIS.) He is not appealing the court's decision regarding the common law right of access. Nor is he appealing the court's decision regarding the alleged failure to initially give a specific reason for withholding nor the denial of sanctions. (Appellants' CIS.)

STATEMENT OF FACTS

Pursuant to the West Milford Township Ordinance Concerning Attorney Accountability, #2003-50, (Pa16), West Milford Township Attorney William J. DeMarco completed an Authorization And Release Form for the Office of Attorney Ethics to furnish the Township of West Milford his Certificate Of Ethical Conduct. (Pa20, Pa2 ¶5, Pa8 ¶5.)

In response, and as authorized by R. 1:20-9(a)(1), (Pa18), the Office of Attorney Ethics issued a Certificate of Ethical Conduct, (Pa23), with attached Ethics History Report regarding Mr. Demarco. (Pa34.) The Township of West Milford obtained and maintained a copy of Mr. DeMarco's Certificate of Ethical Conduct with attached Ethics History Report. (Pa2 ¶6, Pa8 ¶6, Pa32.)

On January 31, 2004, Plaintiff Paff submitted to Defendant Byrnes an OPRA request for "all correspondence and documents sent to and received from the Office of Attorney Ethics or other agency of the judiciary arising out of the Attorney Accountability Ordinance." (Pa21.)

Defendant Byrnes responded to Paff's records request on February 11, 2004, by sending Paff a copy of Mr. DeMarco's

Certificate of Ethical Conduct. (Pa22.) The Certificate of Ethical Conduct stated "SEE ATTACHED ETHICS HISTORY REPORT." (Pa23.) Defendant Byrnes did not send Plaintiff Paff the attached Ethics History Report. (Pa23, Pa2 ¶8, Pa9 ¶8.)

Plaintiff Paff submitted to Defendant Byrnes a second OPRA request on February 17, 2004, in which he "specifically request[s] the 'Ethics History Report' that was apparently attached to Mr. DeMarco's Certificate of Ethical Conduct." (Pa24.)

In response to Paff's February 17, 2004, OPRA request, Defendant Byrnes asserted that there were no additional documents received from the Office of Attorney Ethics and that the Office of Attorney Ethics had advised him that the Certificate of Ethical Conduct contained non-public information that the Office of Attorney Ethics would not release publicly. Defendant Byrnes did not send Plaintiff Paff Mr. DeMarco's Ethics History Report and did not state that he possessed a copy. (Pa25.)

Under OPRA and the common law, Plaintiff Paff on March 24, 2004, again requested all Ethics History Reports. (Pa28.) In response, Defendant Byrnes sent Plaintiff Paff DeMarco's Ethics History Report from which Byrnes had redacted Mr. DeMarco's "Public Discipline" and his "Private Discipline" on the grounds that it was a personnel file. (Pa32-34.)

LEGAL ARGUMENT

Standard of Review

The Appellate Division reviews a grant of summary judgment de novo, applying the same standard employed by the lower court. Prudential Property Ins. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998). The Court decides first whether there was a genuine issue of fact. If there wasn't, it then decides whether the lower court's ruling on the law was correct.

In appeals of summary judgment, the Appellate Division views the record in the light most favorable to the party opposing summary judgment. It accepts that party's allegations as true and gives it the benefit of the doubt whenever its assertions conflict with those of the moving party. R. 4:46-2(c); Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995).

The New Jersey Constitution requires that "any law concerning municipal corporations ... shall be liberally construed in [its] favor." N.J. Const. art. IV, § 7, ¶ 11. Thus, as a matter of state constitutional compulsion, a municipal ordinance is presumed to be valid, thereby placing a heavy burden on a party seeking to overturn an ordinance. Quick Chek Food Stores v. Springfield Tp., 83 N.J. 438, 447 (1980). If any facts may reasonably be conceived to justify the ordinance, it will not be set aside. Hutton Park Gardens v. Town Council of Town of West Orange, 68 N.J. 543, 564-65 (1975).

OPRA Requires Disclosure of DeMarco's Ethics History Report Because the West Milford Ordinance Requires Disclosure

Under the Open Public Records Act ("OPRA"), all government records are subject to public access unless exempted by statute, resolution, regulation, executive order or court rule. N.J.S.A. 47:1A-1. Any limitation in OPRA on the right of access "shall be construed in favor of the public's right of access." Id.

In refusing to disclose the substantive portions of Mr. DeMarco's Ethics History Report, Defendant Township Records Custodian Byrnes relied upon the OPRA exemption for personnel records. (Pa33.) But the personnel records section of OPRA expressly provides that "personnel . . . records . . . shall be accessible when required to be disclosed by another law." N.J.S.A. 47:1A-10. (Pa17.) Here, access to Mr. DeMarco's Ethics History Report was required by the West Milford Attorney Accountability Ordinance. (Pa16.) Thus, OPRA's personnel records exemption does not apply, and Defendant Byrnes violated OPRA by refusing to release DeMarco's Ethics History Report in unredacted form.

The lower court decision held that the "another law" exception to OPRA's personnel exemption did not apply here because (A) while the West Milford Ordinance required disclosure of the Certificate of Ethical Conduct, it did not require disclosure of the attached and referenced Ethics History Report, (T48-9 to T49-7, T53-13 to -19), (B) an ordinance is not a "law"

(T50-12 to T51-4), and (C) the West Milford Ordinance conflicts with OPRA and the Supreme Court's attorney disciplinary rules and therefore is invalid to the extent it authorizes public release of the record. (T51-5 to T53-13.) On the contrary, as Paff will explain in the following sections, (A) the Ethics History Report is an integral part of the Certificate of Ethical Conduct, (B) OPRA uses the term "law" to include municipal ordinances and (C) the West Milford Ordinance neither contradicts nor intrudes upon the Supreme Court's attorney disciplinary rules nor OPRA.

A. An Ethics History Report is an Integral Part of a Certificate of Ethical Conduct

The lower court's first reason for deciding that OPRA does not require disclosure of DeMarco's Ethics History Report is that the West Milford Ordinance supposedly requires disclosure only of the Certificate of Ethical Conduct, not the Ethics History Report. (T48-9 to T49-7, T53-13 to -19.)

But the Ethics History Report is an essential part of the Certificate of Ethical Conduct. A Certificate of Ethical Conduct cannot achieve its purpose of disclosing what disciplinary charges have been sustained or are pending against a particular attorney without the attached Ethics History Report.

The form for the Certificate of Ethical Conduct states that the attorney has never been disciplined nor is any grievance pending "except as set forth below:" (Pa23.) To prepare a Certificate of Ethical Conduct, the OAE must type in the

attorney's name and address and then indicate whether the attorney has received any discipline and, if so, the nature of the discipline, by either typing in the word "NONE" or by typing in the phrase "SEE ATTACHED ETHICS HISTORY REPORT" and attaching an Ethics History Report (as in the case of Mr. DeMarco). (Pa23, Pa34.) Functionally, an Ethics History Report belongs in the middle of the Certificate of Ethical Conduct. The information in the Ethics History Report exists on a separate page only because it is too extensive to be placed in the Certificate of Ethical Conduct.

That the Ethics History Report is part of the Certificate of Ethical Conduct is vividly demonstrated by the fact that the Office of Attorney Ethics, the agency that created the Certificate of Ethical Conduct, responded to DeMarco's request for his Certificate of Ethical Conduct by sending both the page entitled "Certificate of Ethical Conduct" and the page entitled "Ethics History Report." (Pa32.)

B. OPRA Uses the Word "Law" to Include Ordinances

Judge Passero's second reason for concluding that the "other law" exception to OPRA's personnel record exemption did not apply here is that, although OPRA requires disclosure of personnel records when required by a "law," ordinances are supposedly not included in OPRA's meaning of "law." (T50-12 to T51-4.) That reading of OPRA conflicts with both OPRA's plain meaning and its express purpose.

In interpreting a word in a statute, the full statute must be examined. Denbo v. Township of Moorestown, 23 N.J. 476, 481 (1957). While OPRA uses the broad word "law" in the section at issue, (Pa17), other sections of OPRA refer to specific types of laws other than ordinances. N.J.S.A. 47:1A-1.1, -5a ("State or federal law" and "State statute," but not "ordinance"); N.J.S.A. 47:1A-1, -5a, -9(a) ("statute" and "federal law," but not "ordinance"); N.J.S.A. 47:1A-9(b) ("statute," but not "ordinance"). Thus, the drafters of OPRA used the terms "state law," "federal law" and "statute" when they wished to exclude ordinances. Where the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded. GE Solid State, Inc. v. Director, Div. of Taxation, 132 N.J. 298, 308 (1993). If OPRA's drafters had wanted to exclude ordinances in the phrase at issue, they would have written "statute" or "state or federal law," instead of the broad term "law."

Moreover, the parts of a statute are to be read to carry out the purpose of the statute as a whole. Hackensack Water Co. v. Ruta, 3 N.J. 139, 147 (1949). The purpose of OPRA is that "government records shall be readily accessible for inspection, copying, or examination." N.J.S.A. 47:1A-1. In fulfilling that goal of public access to government records, OPRA does not permit ordinances to exempt records from public access, N.J.S.A. 47:1A-1, -1.1, -5a, -9a, -9b, but does permit ordinances to require

public records access, N.J.S.A. 47:1A-10.

Finally, as previously noted, OPRA expressly requires that "any limitations on the right of access accorded by [OPRA] shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1. Following that mandate, the phrase at issue must be construed as including not only federal and state statutes but also local ordinances, since that interpretation is in favor of the public's right to access, while the lower court's interpretation is against the public's right to access.

C. The Ordinance Does Not Violate OPRA or Supreme Court's Disciplinary Rules

The lower court also held that the Township of West Milford Attorney Accountability Ordinance was invalid because it supposedly attempted to "trump" both OPRA and Supreme Court R. 1:20-9 by making Ethics History Reports available to the public. (T51-5 to T53-13.) The Ordinance does not attempt to trump OPRA or the Supreme Court Rule.

As previously explained, the Ordinance does not conflict with OPRA since OPRA expressly provides that "personnel . . . records of any individual shall be accessible when required to be disclosed by another law." N.J.S.A. 47:1A-10. (Pa17.) Contrary to the lower courts' decision, the personnel records of public employees are not immune from public access under OPRA. N.J.S.A. 47:1A-10 lists several specific types of personnel information that are public records. (Pa17.)

As regards the Supreme Court rules, the New Jersey Constitution provides that “[t]he Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.” N.J. Const. art. VI, § 2, ¶ 3. This does not mean that other branches of government lack authority to deal with those subjects. Knight v. City of Margate, 86 N.J. 374, 386-391 (1981). In Knight, the Supreme Court concluded that it had the authority under the principles of the separation and interdependence of government powers to permit the exercise of power by other branches of government even if they might impinge upon the Court’s paramount constitutional powers. The Court explained

The constitutional validity of such action by another branch of government, and the Supreme Court’s ultimate power to accept or reject such action, turn upon the legitimacy of the governmental purpose of that action and the nature and extent of its encroachment upon judicial prerogatives and interests.
Id. at 391.

Action by other branches of government was to be tolerated where such action “does not interfere with judicial prerogatives or only indirectly or incidentally touches upon the judicial domain.” Id. at 390. In Knight, the Supreme Court upheld statutory ethical restrictions on municipal court judges because the statute did not conflict with the Supreme Court’s powers, had a legitimate purpose and did not interfere with the Court’s regulation of the judiciary and legal profession. Id. at 394-95. In contrast, in McKeown-Brand v. Trump Castle Hotel & Casino, 132

N.J. 546, 557-58 (1993), the Court limited the reach of a statute so that it would not overlap the Court's disciplinary rules.

In the case at bar, the West Milford Ordinance has a legitimate governmental purpose. The Ordinance's preamble states that the Township Council found that the Ordinance's purpose was "in the best interests of the public." (Pa16.) That purpose was to ensure that West Milford Township officials and residents know the disciplinary history, and thus the character, of the attorneys representing the Township and thereby "preserve public confidence in government." Knight, 86 N.J. at 391. In contrast, an ordinance that required each attorney practicing law before Township boards, including attorneys that did not represent the Township, to waive confidentiality as to his or her disciplinary record might not have a legitimate legislative purpose.

Nor does the Ordinance conflict with, interfere with or overlap the Supreme Court Rules. Rather, the Ordinance merely requires the disclosure of records that are public under the Supreme Court Rules. Two of the four types of disciplinary actions on the Ethics History Report, (Pa34), "Public Discipline" and "Other Public Cases (Hearings/MFD/MRD)" (emphasis added), by definition, were never confidential. R. 1:20-9(c).

The remaining records on the Ethics History Report, (Pa34), "Private Discipline" and "Other Pending Cases," are not confidential under the Supreme Court Rules when in the possession of the Township of West Milford. The Office of Attorney Ethics, with Mr.

DeMarco's consent, disclosed DeMarco's records to the Township of West Milford pursuant to R. 1:20-9(a)(1). Third parties such as the Township have no confidentiality obligations under R. 1:20-9 when they come into possession of attorney disciplinary records because attorney discipline confidentiality applies only to the participants in the disciplinary proceedings --- in this case, Mr. DeMarco and his former client grievant --- and the employees of the disciplinary system. R. 1:20-9(h). This is also the understanding of the Office of Attorney Ethics. (See March 16, 2004, letter in which the OAE Director, without any mention of R. 1:20-9, states that "[i]t is up to the Township of West Milford as to what information involving a potential personnel matter they wish to disclose and to whom.") (Pa27.)

Thus, the West Milford Ordinance does not conflict with the Supreme Court Rule since the Ordinance does not make public what is confidential under the Rule. The "Public Discipline" and "Other Public Cases," information in the Ethics History Report, (Pa34), was never confidential under the Supreme Court Rules, and the "Private Discipline" and "Other Pending Cases" information, (Pa34), loses its confidentiality under the Rules when the OAE Director discloses it to the Township. Nor does the Ordinance overlap with the Rule since, unlike the Rule, it does not create confidentiality. The Ordinance merely requires Township attorneys to use a procedure that is, not only authorized by R. 1:20-9(a)(1), but also could not be carried out without the voluntary

participation of the OAE Director. Defendant Byrnes has not overcome the presumption in favor of the validity of the Ordinance.

CONCLUSION

Plaintiff Paff respectfully prays that this Court reverse the lower court's October 15, 2004, decision and grant summary judgment to Plaintiff Paff as regards his right under OPRA to access the unredacted Certificate of Ethical Conduct with attached Ethics History Report.

Respectfully submitted,

Richard Gutman
Attorney for Plaintiff-Appellant Paff

January 12, 2005

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	:	Appellate Division
JOHN T. PAFF	:	Docket No. A-1641-04T1
	:	
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	:	
vs.	:	
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KEVIN J. BYRNES, as Custodian	:	On Appeal from a Final
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	:	Division, Passaic County
Defendants-Respondents	:	Sat Below:
	:	Hon. Robert J. Passero, A.J.S.C.

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(Editors Note: Tables of Contents and Authorities are not included)

PRELIMINARY STATEMENT

The Township of West Milford has an ordinance requiring [i] its attorneys have a "Certificate of Ethical Conduct" delivered to the Township Clerk (Defendant/Respondent) and [ii] further requiring that the Township Clerk maintain such certificates as public records. Mr.

DeMarco is an attorney to whom the Ordinance applies, and he accordingly had his Certificate of Ethical Conduct delivered to the Township Clerk. Accompanying Mr. DeMarco's Certificate of Ethical Conduct, however, was also his "Ethics History Report." Plaintiff-Appellant requested and received a copy of Mr. DeMarco's Certificate of Ethical Conduct. Plaintiff-Appellant subsequently requested a copy of Mr. DeMarco's Ethics History Report. A redacted version of same was provided to the Plaintiff-Appellant by the Defendant-Respondent Township Clerk, but Plaintiff-Appellant demands an un-redacted copy, claiming he is entitled to same under New Jersey's Open Public Records Act ("OPRA")

It is the position of the Defendant-Respondent Township Clerk that the Ethics History Report cannot be released to the public because the Ordinance that purports to require it is unlawful and unenforceable. Furthermore, such a release is not only not required by OPRA, such a [*page 2] release would actually be a violation of OPRA. Lastly, putting aside the legality/enforceability of the Ordinance, the Ethics History Report should not be released because the Ordinance specifically addresses only Certificates of Ethical Conduct (not Ethical History Reports) and also because Mr. DeMarco did not consent to having his Ethical History Report released to the public.

PROCEDURAL HISTORY

On April 29, 2004, Plaintiff-Appellant filed a Complaint in Lieu of Prerogative Writ and a request for an Order to Show Cause. Pala-Pa6a and Pb4. The Complaint demanded judgment against Defendant-Respondent: [i] declaring that Defendant-Respondent had violated OPRA, the common law

right to public records and the Township Ordinance; [ii] enjoining Defendant-Respondent from responding to OPRA requests without either granting access or stating the basis for not granting access; [iii] enjoining Defendant-Respondent from continuing to withhold the redacted portion of Mr. DeMarco's Ethics History Report; [iv] fining Defendant-Respondent in the amount of one thousand dollars (\$1,000); [v] awarding Plaintiff-Appellant costs of suit and attorney's fees; and [vi] other relief as the Court may have deemed equitable and just. [*page 3]

On May 6, 2004, Judge Christine L. Miniman denied Plaintiff-Appellant's request for an Order to Show Cause. Pb4.

By correspondence dated May 11, 2004, Plaintiff-Appellant's counsel requested that the Complaint in Lieu of Prerogative Writ instead be considered to be a simple Complaint. Pa7a.

On July 14, 2004, Defendant-Respondent filed his Answer. Pa8a-Pa10a.

On August 12, 2004, Plaintiff-Appellant filed a Motion for Summary Judgment on all counts of the Complaint (Pa41a), and arguments were heard before Judge Robert J. Passero, A.J.S.C., on October 15, 2004. Judge Passero made the following findings:

~~The~~ The Ordinance cannot trump either State statute or Supreme Court Rules; an ordinance that conflicts with the clear mandate of a State statute or the clear mandate of the Supreme Court Rules cannot be enforced. T53-1 through 13.

~~The~~ The Ordinance purportedly applies to, inter alia, the Township's Municipal Court Judge; but all judges in this State are within the exclusive jurisdiction and control of the New Jersey Supreme Court and the Chief Justice, not the Township of West Milford. Transcript of Proceedings, page 47, line 19 through page 48, line 4.

- ~~///~~ The Ethics History Report comes within the exception for personnel records under OPRA. T50-7 through 11.
- ~~///~~ Within the provision of OPRA that provides that personnel records are not public documents unless they [*page 4] are required to be disclosed by "another law," "another law" refers to another statute or executive order, not a municipal ordinance. T50-19 through 24.
- ~~///~~ OPRA provides that all government records shall be subject to access unless exempt by Rules of Court, and New Jersey Court Rule 1:20-9 provides for confidentiality. T51-5 through 11.
- ~~///~~ The fact that the Office of Attorney Ethics sent Defendant-Respondent a "Certificate of Ethical History" [sici premised upon Mr. DeMarco's authorization does not transform it into a public record. T52-3 through 7. At best, it is transformed into a personnel record which is privileged. T52-16 through 17.
- ~~///~~ There is nothing to indicate that there is a need for Mr. DeMarco's Ethics History Report in order to protect the public, the administration of justice, and the legal profession. T54-3 through 6.
- ~~///~~ The Ethics History Report was not transformed into a common law document of public record. T55-1 through 4.
- ~~///~~ Plaintiff-Appellant has not shown any personal or particular interest in the material sought, and therefore has no right to examine it under the common law. T55-20 through T56-1.
- ~~///~~ Even assuming that such an interest exists, it would not translate into an absolute right to obtain the documents; rather, the Court must engage in a balancing test to determine whether the individual's right to the information outweighs the public's interest in the confidentiality of the material. T56-2 through 7. Here, even a superficial balancing test shows that the confidentiality addressed by the Supreme Court Rules and by the OPRA exceptions is not outweighed by the interests of Plaintiff-Appellant. T56-8 through 12.
- ~~///~~ As a matter of law under the undisputed facts presented, Plaintiff-Appellant's Complaint must be dismissed with prejudice. T59-6 through 9. The [*page 5] Complaint does not set forth a cause of action. T59- 13 through 14.
- ~~///~~ The Ordinance expressly provides that Certificates of Ethical Conduct be available as public records; the Ordinance does not provide for disclosure of any accompanying documentation of

ethical conduct. T48-9 through 13.

~~///~~ If the Ordinance purports to alter the confidentiality of certain records, the Ordinance should have been very explicit in that regard. T48-17 through 22.

~~///~~ The Ethics History Report does not constitute a Certificate of Ethical Conduct. T49-3 through 5.

Ultimately, and for all the foregoing reasons, the Court below ordered as follows: [i] Plaintiff-Appellant's Motion for Summary Judgment was denied; and [ii] based upon the undisputed facts presented, the Complaint was dismissed with prejudice for failure to state a cause of action [R. 4:6-2(e)]

On December 6, 2004, Plaintiff-Appellant filed a Notice of Appeal. Plaintiff-Appellant is only appealing the lower court's decision that Defendant-Respondent was not required by OPRA to disclose the withheld information. Pb5-Pb6. Plaintiff-Appellant is not appealing the lower court's decisions regarding: [i] the common law right of access; [ii] the alleged failure to initially give a specific reason for withholding; or [iii] the denial of sanctions. Pb6.[*page 6]

STATEMENT OF FACTS

Plaintiff-Appellant John T. Paff ("Plaintiff-Appellant") is an individual residing at 1605 Amwell Road, Somerset, New Jersey. Defendant-Respondent Kevin J. Byrnes ("Defendant-Respondent") is the Township Clerk for the Township of West Milford ("Township"), Passaic County, New Jersey.

The Township has in place an ordinance "Concerning Attorney Accountability," number 2003-50 ("Ordinance") Pal6a. The Ordinance, in sum, requires as follows:

~~§~~ All attorneys who are either appointed to Township office, or who are retained by the Township to provide legal advice or services to the Township, must execute a "Disciplinary Authorization and Release" form.

~~§~~ The Township clerk shall submit the signed form to the New Jersey Supreme Court Office of Attorney Ethics, "with a request that a 'Certificate of Ethical Conduct' or other superseding certificate be furnished."

~~§~~ "Upon receipt of the 'Certificate of Ethical Conduct' or other superseding certificate, the Clerk shall file it in his or her office where it will remain as a public record."

William J. DeMarco, Esq. ("Mr. DeMarco"), is the Township Attorney, and hence falls within the scope of the Township Ordinance. Accordingly, Mr. DeMarco completed an "Authorization and Release Form to Obtain Certificate of Ethical Conduct." Pa20a. As a result, the Township [*page 7] received a Certificate of Ethical Conduct for Mr. DeMarco issued by the Office of Attorney Ethics. Pa23a. The Certificate referenced an Ethics History Report, which was also provided to the Township.

On January 31, 2004, Plaintiff-Appellant submitted a "Request for Access to Government Records" to the Township for the following:

All correspondence and documents sent to and received from the Office of Attorney Ethics or other agency of the judiciary arising out of the Attorney Accountability Ordinance enacted by the Township on December 11, 2003, except for those documents previously provided in response to OPRA Request 2004-03. Specifically included in this request are the completed written request/waiver forms signed by each attorney who is subject to the ordinance (social security number redacted as necessary), including any copy of the form that was reportedly submitted directly to the Office of Attorney Ethics directly by Mr. DeMarco.
Pa21a.

By correspondence dated February 11, 2004, Defendant-Respondent provided Plaintiff-Appellant with Mr. DeMarco's Certificate of Ethical Conduct.

Pa22a. Defendant-Respondent did not include the Ethics History Report because he had, prior to responding, contacted the Office of Attorney Ethics, and had been advised by it that the Certificate of Ethical Conduct contained information that was not available to the public and would not be released to the public by the Office of Attorney Ethics.

Pa39a. [*page 8

On February 17, 2004, Plaintiff-Appellant requested from the Township the Ethics History Report associated with Mr. DeMarco's Certificate of Ethical Conduct (Pa24a), and was denied same pursuant to a February 18, 2004, memorandum from Defendant-Respondent (Pa25a). On March 24, 2004, Plaintiff-Appellant made a similar request (Pa28a), and in response, on April 2, 2004, Defendant-Respondent sent Plaintiff-Appellant certain documents, including a redacted copy of Mr. DeMarco's Ethics History Report (Pa32a-Pa34a).

In that same April 2, 2004, communication, Defendant-Respondent suggested to Plaintiff-Appellant that they jointly request a determination from the Government Records Council as to whether an Ethics History Report of an attorney engaged by a governmental entity should be considered a "personnel record" and therefore exempt from the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"). Pa33a and Pa39a-Pa40a. Plaintiff-Appellant rejected that offer, but Defendant-Respondent noted during the litigation that it was still willing to proceed in such a manner. Pa40a.

STANDARD OF REVIEW

Because the matter at hand was decided by way of summary judgment,

the standard of review on appeal is the same as that of the motion judge's. Fireman's Fund Ins. [*page 9] Co. v. Imbesi, 361 N.J. Super. 539, 563 (App. Div.), certif. denied, 178 N.J. 33 (2003). As does the motion judge, the Appellate Division first decides if there is a genuine issue of material fact, and if none, whether the moving party is entitled to judgment as a matter of law. Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 427. See also, Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Prudential Property Casualty Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998); R.4:46-2(c).

LEGAL ARGUMENTS

I. NEITHER THE "ETHICS HISTORY REPORT" NOR THE "CERTIFICATE OF ETHICAL CONDUCT" SHOULD BE DEEMED TO BE PUBLIC RECORDS BECAUSE THE ORDINANCE IS UNLAWFUL AND UNENFORCEABLE DUE TO ITS CONTRAVENTION OF THE POWERS OF THE NEW JERSEY SUPREME COURT:

The Ordinance is unenforceable as a matter of law because it is an unlawful attempt to contravene the powers of the New Jersey Supreme Court. More specifically, the New Jersey Constitution provides in Art. VI, § 2, ¶ 3, as follows:

The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.
[*page 10]

The Supreme Court has held that both grants of authority are exclusive. See e.g., Winberry v. Salisbury, 5 N.J. 240, 255, cert. denied, 340 U.S. 877 (1950); In re LiVolsi, 85 N.J. 576, 585 (1981) ["For 33 years this court exercised plenary, exclusive and almost

unchallenged power over the practice of law in all its aspects under N.J.Const. (1947), Art. VI, § II, par. 3"] See also, R. 1:20-2 (formation and description of duties of the Office of Attorney Ethics, including but not limited to maintaining records of all ethics matters)

According to certain rules promulgated by the State Supreme Court under the authority of the constitutional provision cited above, certain attorney disciplinary records are required to remain confidential. For example, R. 1:20-9(c)(3) provides that, "Private reprimands issued prior to the effective date of this rule shall remain confidential."¹ The Township's Ordinance (or at least Plaintiff-Appellant's interpretation of the Ordinance), however, is attempting to transform all disciplinary records into public documents. The Township simply does not have that authority; the maintenance of records [*page 11] relative to the discipline of attorneys practicing in New Jersey is the sole and exclusive domain of the New Jersey Supreme Court. See, Lawrence R. McCoy Co., Inc. v. S.S. Theomiter III, 133 N.J. Super. 308, 320 (Law Div. 1975) (the power to promulgate rules of court is vested in the Supreme Court, and such rules are not subject to overriding legislation)

Plaintiff-Appellant contends that the New Jersey Constitutional provision providing that "[t]he Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted," "does not mean that other branches of government lack authority to deal with those subjects. Knight v. City of Margate, 86

¹ See also, R. 1:20-9(a), which provides that, "Prior to the filing and service of a complaint in a disciplinary matter, the disciplinary matter and all written records received and made pursuant to these rules shall be confidential" (with certain exceptions)

N.J. 374, 386-391 (1981)." Pb14-1 through Pb14-7. Plaintiff-Appellant continues: "In Knight, the Supreme Court concluded that it had the authority under the principles of the separation and interdependence of government powers to permit the exercise of power by other branches of government even if they might impinge upon the Court's paramount constitutional powers." Pb14-7 through Pb14-11. Plaintiff-Appellant's reliance upon Knight is misplaced. A thorough analysis of Knight (see immediately below) reveals that it actually supports the position of Defendant-Respondent. [*page 12]

This is made clear by the New Jersey Supreme Court in McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546 (1993):

Unlike our authority over practice and procedure, which we sometimes share in the spirit of comity, **our authority over the discipline of attorneys is not subject to legislative action.** This Court's power to regulate attorneys is exclusive. In re LiVolsi, 85 N.J. 576, 583 (1981); State v. Rush, 46 N.J. 399, 411-12 (1966) . As we stated in In re Hearing on Immunity for Ethics Complainants, 96 N.J. 669, 678 ... (1984)

[Attorney discipline] is one area, however, in which our constitutional responsibility is so clear as to leave no doubt of our duty to adopt a rule that we think is needed, despite its clear conflict with existing legislation. **This Court simply cannot in the least abdicate its responsibility to exercise exclusive power over the disciplining of attorneys.**

Notwithstanding the exclusiveness of judicial authority, we have upheld **narrowly-circumscribed legislation** that touches on attorney discipline. Knight v. Margate, 86 N.J. 374 ... (1981). In Knight, the Legislature amended the conflicts-of-interest law ... to deal with special problems arising from casinos. The law prohibited certain public officials, including judges, from certain dealings with casinos. **We upheld the law, finding that "the Court could, consistent with its own exclusive constitutional authority, tolerate actions of other branches of government affecting the judicial system, at least in the absence of its own actions."** Knight,

supra, 86 N.J. at 390... In upholding the statute, we explicitly noted that **our determination of its validity lay solely within our "ultimate power to accept or reject such [*page 13] action..."** Id. at 391... Such a determination turns on the legitimacy of the Legislature's purpose and on the extent of the encroachment of the statute on judicial prerogative and interests. Ibid. In the present case, our concern is not with the purpose of the statute, but with its encroachment on **this Court's exclusive power over attorney discipline.**

McKeown-Brand, supra, at 556-57
[emphasis added].

For all these reasons, the Township's Ordinance is an unlawful attempt to contravene the powers of the New Jersey Supreme Court. The Ordinance directly conflicts with the New Jersey Supreme Court's Rules on confidentiality. The Ordinance is therefore unenforceable as a matter of law to the extent that the Ordinance may require that Certificates of Ethical Conduct and Ethics History Reports be made public records.

II. THE RELEASE OF THE "ETHICS HISTORY REPORT" IS NOT REQUIRED BY OPRA; IN FACT, MAKING EITHER THE "CERTIFICATE OF ETHICAL CONDUCT" OR THE "ETHICS HISTORY REPORT" PUBLIC RECORDS WOULD BE IN CONTRAVENTION OF OPRA:

In adopting OPRA, the New Jersey Legislature found and declared it to be the public policy of the State that government records shall be readily accessible for inspection, copying or examination by the citizens of this State, with certain exceptions. N.J.S.A. 47:1A-1. OPRA defines "government record," in relevant part, as "any document ... that has been made, maintained, or kept on file [*page 14] in the course of his or its official business by any officer, ... agency or authority of the State or of any political subdivision thereof..." N.J.S.A. 47:1A-1.1. The following three provisions within OPRA support the court's

decision below.

A. Deference to Rules of Court:

OPRA specifically acknowledges, accepts and ratifies any exemptions from the general rule of public access that may be provided by "any other statute; resolution of ... the Legislature; regulation promulgated under ... any statute or Executive Order...; Executive Order...; Rules of Court any federal law, or federal order." N.J.S.A. 47:1A-1 (emphasis added) As discussed at length in Section I supra, New Jersey's Rules of Court, as promulgated by the New Jersey Supreme Court, require that certain attorney disciplinary records remain confidential. Accordingly, because Mr. DeMarco's Ethics History Report is protected by the New Jersey Supreme Court's Rules of Court, OPRA does not require its disclosure.

Furthermore, because OPRA specifically ratified the exemptions provided by the Rules of Court, it is a violation of OPRA to make either the Certificate of Ethical Conduct or the Ethics History Report public [*page 15] records. See discussion of State preemption, *infra* at pages 18-19.

B. Privacy of Personnel Records:

OPRA specifically provides that (with certain exceptions) "the personnel ... records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed against an individual, shall not be considered a government record and shall not be made available for public

access..." N.J.S.A. 47:1A-10. While OPRA does not define "personnel record," its example of "any grievance filed ... against an individual" certainly supports the position that an attorney's Certificate of Ethical Conduct and Ethics History Report are "personnel records" within the meaning of OPRA. This is especially the case given the context of how Mr. DeMarco's Certificate and Report came into play, i.e., an ordinance which applies to attorneys who are engaged by the Township to provide legal counsel.

Plaintiff-Appellant does not dispute the fact that the Ethics History Report is a "personnel record" within the meaning of OPRA, but asserts that the Ordinance is a "law" as that word is used in the exception to the general provision of N.J.S.A. 47:1A-[*page 16]10 (i.e., a personnel record "shall be accessible when required to be disclosed by another law") . Such a proposition, however, is untenable. If a municipal ordinance was, in fact, a "law" in the context that Plaintiff-Appellant suggests, municipalities would effectively have the ability to contravene OPRA, which would be an unlawful outcome under the principle of State preemption (see discussion infra at pages 18-19). Consequently, it is a violation of OPRA to make either the Certificate of Ethical Conduct or the Ethics History Report public records.

Furthermore, the exception to the personnel record provision of OPRA upon which Plaintiff- Appellant relies, only applies "when disclosure is essential to the performance of official duties of a person duly authorized by this State..." There has been no showing

by Plaintiff-Appellant, and the facts do not support the conclusion, that the disclosure of Mr. DeMarco's Ethics History Report is essential to the performance of a public official's duties. Consequently, even if one were to accept the premise that a municipal ordinance was a "law" as that term is used in the exception to the OPRA personnel record [*page 17] provision, the exception is still not applicable to the matter at bar.

C. Deference to a Citizen's Reasonable Expectation of Privacy:

OPRA also acknowledges that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." N.J.S.A. 47:1A-1. In other words, in enacting OPRA "the Legislature intended to provide protection against disclosures in those instances in which a person had a reasonable expectation of privacy." Asbury Park Press v. Ocean County, 374 N.J. Super. 312, 331 (Law Div. 2004)²

In the matter at hand, Mr. DeMarco clearly had a very reasonable expectation of privacy. First, as previously discussed, it was reasonable for Mr. DeMarco to believe that, because of the confidentiality imposed under the Rules of Court, the Ethics History Report would not become a public record. Second, neither

² See Asbury Park Press also for the proposition that certain enforceable provisions of OPRA are found in that law's "Legislative findings and declarations" section (i.e., N.J.S.A. 47:1A-1).

the "Authorization and [*page 18] Release Form" executed by Mr. DeMarco, nor the Ordinance itself, would give a reasonable person so much as a hint that Ethics History Reports would be made public (i.e., both the Authorization Form and the Ordinance refer only to "Certificates of Ethical Conduct")

Accordingly, it is a violation of OPRA to make either the Certificate of Ethical Conduct or the Ethics History Report public records. See discussion of State preemption, infra at pages 18-19.

For the reasons set forth above, then, OPRA not only does not require the release of the Ethics History Report, but the Ordinance violates OPRA to the extent the Ordinance allegedly makes Certificates of Ethical Conduct or Ethics History Reports a matter of public record. The principle of preemption dictates that "a municipality, which is an agent of the State, cannot act contrary to the State." Mack Paramus Co. v. Mayor and Council of Borough of Paramus, 103 N.J. 564, 573 (1986), quoting, Overlook Terrace Management Corp. v. Rent Control Board of W. New York, 71 N.J. 451, 461 (1976)

The following five factors are to be considered in a preemption analysis (Mack Paramus Co., supra, and Overlook Terrace Management Corp., supra)[*page 18]

- (1) Does the ordinance conflict with the state law, either because of conflicting policies or operational effect, that it, does the ordinance forbid what the Legislature has permitted?
- (2) Was the state law intended expressly or impliedly to be exclusive in the field?
- (3) Does the subject matter reflect a need for uniformity?
- (4) Is the state scheme so pervasive or comprehensive that it

precludes coexistence of municipal regulation?

- (5) Does the ordinance stand as an obstacle to the accomplishment and execution of the full purpose and objectives of the Legislature?

Applying these factors to the Ordinance and OPRA, one must conclude that the provisions of the Ordinance that allegedly make Certificates of Ethical Conduct and Ethics History Reports a matter of public record are preempted by OPRA, and therefore void and unenforceable. More specifically:

- (1) The Ordinance attempts to forbid the confidentiality of certain attorney disciplinary records. Such confidentiality, however, is required by both the New Jersey Supreme Court Rules of Court and OPRA (both discussed supra).

- (2) The very first line of OPRA indicates that it (OPRA) is setting forth "the public policy of this State" (emphasis added) as it relates to [*page 20] public records and public access thereto. N.J.S.A. 47:1A-1. Therefore, because the Ordinance contravenes OPRA (as discussed supra), the Ordinance is preempted by OPRA.

- (3) Access to public records is a subject matter needing uniformity. This is demonstrated by OPRA's creation of a "Government Records Council," which is tasked (in part) with the preparation of guidelines "for use by records custodians in complying with the law governing access to public records..." N.J.S.A. 47:1A-7.b. The application of Plaintiff-Appellant's argument would effectively result in every municipality being able to make its own determinations as to what are, and what are not,

public records, which would violate the intent of OPRA.

(4) Regarding public records, OPRA, inter alia: sets forth the State public policy (N.J.S.A. 47:1A-1); sets forth certain exemptions from the general rules of access (id. and N.J.S.A. 47:1A-10); defines certain terms (N.J.S.A. 47:1A-1.1); addresses biotechnology trade secrets (N.J.S.A. 47:1A-1.2); addresses access to certain information by criminals (N.J.S.A. 47:1A-2.2); [*page 21] addresses records related to investigations (N.J.S.A. 47:1A-3); dictates times and procedures for accessing government records, and the costs for copying same (N.J.S.A. 47:1A-5); sets forth the procedure to challenge a denial of access (N.J.S.A. 47:1A-6); establishes a Government Records Council, which in turn is tasked with numerous, detailed responsibilities (N.J.S.A. 47:1A-7); and sets forth penalties for violations (N.J.S.A. 47:1A-11). The foregoing clearly constitutes a pervasive and comprehensive State scheme, thereby precluding the coexistence of municipal regulation.

(5) Lastly, and as already discussed, the Ordinance stands as an obstacle to at least one of OPRA's purposes, i.e., providing protection against disclosure in those instances in which a person has a reasonable expectation of privacy (N.J.S.A. 47:1A-1)

As a result of all the foregoing, the Ordinance is preempted by

OPRA. [*page 22]

III. ASSUMING, ARGUENDO, THAT THE ORDINANCE IS ENFORCEABLE, THE ORDINANCE DOES NOT REQUIRE THAT "ETHICS HISTORY REPORTS" BE MADE A PUBLIC RECORD:

The Ordinance requires that: [i] a Certificate of Ethical Conduct

be provided to the Township for every attorney who is either appointed to Township office or who is retained to provide legal services for the Township; and [ii] such Certificates be filed in the Defendant-Respondent's office where they will remain as public records. Pa16a. The Township received a Certificate of Ethical Conduct for Mr. DeMarco (Pa23a), and, upon request, said Certificate was provided to Plaintiff-Appellant. Pa22a. Plaintiff-Appellant, however, argues that, in addition to the Certificate of Ethical Conduct, the Township should also provide him with a copy of Mr. DeMarco's Ethics History Report, which accompanied the Certificate.

Especially in the context of the Ordinance, one cannot simply assume that the Ethics History Report is part of the Certificate of Ethical Conduct. The fact of the matter is that the Ordinance specifically refers only to a Certificate of Ethical Conduct. The Ordinance does not in any way refer to an Ethics History Report or, for that matter, any other reports or certificates. As the Court below found: [*page 23]

The Certificate of Ethical Conduct is a document that was signed for and received. The attachments do not constitute a Certificate of Ethical Conduct – so that the Ordinance does not address anything more than the linear certificate which was received.

T49-3 through 7.

The canons of statutory construction require that the Ordinance's plain language be considered first. Kimmelman v. Henkels & McCoy, 108 N.J. 123, 128 (1987). In the matter at hand, the language could not be any clearer, i.e., the Ordinance speaks to, and only to, Certificates of Ethical Conduct. If the Township had wanted the

Ordinance to apply to documents beyond the actual Certificate, they could have easily included some type of "catch-all" language such as, "and any and all documents related thereto." The Township did not do so. The Ordinance cannot be applied in a fashion that is broader than its plain language.

IV. ASSUMING, ARGUENDO, THAT THE ORDINANCE IS ENFORCEABLE, THE "ETHICS HISTORY REPORT" SHOULD NOT BE RELEASED TO THE PUBLIC BECAUSE MR. DEMARCO DID NOT CONSENT TO SUCH A RELEASE:

Neither the Authorization and Release Form ("Authorization Form") executed by Mr. DeMarco, nor the Ordinance itself, authorized the release of the Ethics History Report. Both the Authorization Form and the Ordinance appropriately utilized very specific language to [*page 24] identify the document at issue, and that document was the Certificate of Ethical Conduct – nothing more, nothing less. Neither the Authorization Form nor the Ordinance in any way reference the Ethics History Report.

Furthermore, even putting aside the distinction between the Certificate of Ethical Conduct and the Ethics History Report, it is critical to note that the Authorization Form did not authorize the release of any document to the public. Nowhere in the Authorization Form executed by Mr. DeMarco does it indicate that by releasing his Certificate of Ethical Conduct to the Township, he is also releasing it to the public. Pa20a. As previously discussed in Section II.C, Mr. DeMarco had a very reasonable expectation of privacy even after he executed the Authorization Form.

Accordingly, Plaintiff-Appellant's argument that Mr. DeMarco consented to the release of his Ethics History Report to the public must fail.

CONCLUSION

There are no genuine issues of any material facts. Based upon the undisputed facts, and as a matter of law, Plaintiff-Appellant's Motion below was appropriately denied, and his Complaint was appropriately dismissed with prejudice. For all the foregoing reasons, the October 26, [*page 25] 2004, Order of the court below should be upheld and affirmed.

Respectfully submitted,
/s/ Salvatore T. Alfano
Attorney for Defendant/Respondent
By /s/ Michael S. Bubb

Apr11 15, 2005

Appellant Paff's Reply

April 24, 2005

Honorable Judges
Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, NJ 08625-0006

Re:

JOHN T. PAFF,	:	SUPERIOR COURT OF NEW JERSEY
Plaintiff-Appellant,	:	APPELLATE DIVISION
	:	DOCKET NO. A-1641-04T1
vs.	:	Civil Action
	:	On Appeal From a Final
KEVIN J. BYRNES, as Custodian	:	Judgment of the Superior Court
of Government Records for the	:	of New Jersey, Law Division
Township of West Milford	:	Passaic County
Defendant-Respondent	:	Sat Below:
	:	Hon. Robert Passero, A.J.S.C.

Honorable Judges:

Plaintiff-Appellant John T. Paff respectfully submits this letter in lieu of a formal brief, in reply to the April 15, 2005, Brief of Defendant-Respondent Kevin J. Byrnes, using the same outline as used by Defendant Byrnes.

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ARGUMENT

I. Ordinance Does Not Conflict With Court Rule 1:20-9

On page 13 of his brief, Defendant Byrnes asserts that "[t]he Ordinance directly conflicts with the New Jersey Supreme Court's Rule on confidentiality." There is no conflict. The Ordinance makes public four types of attorney discipline, "Public Discipline," "Other Public Cases (Hearings/MFD/MRD)," "Private Discipline" and "Other Pending Cases." (Pa34.) As indicated by their names, the first two types of discipline -- "Public Discipline" and "Other Public Cases" -- were never confidential. R. 1:20-9(b); (c) (1). Therefore, their public disclosure cannot conflict with any confidentiality provision of R. 1:20-9.

As for the other two types of discipline, "Private Discipline" and "Other Pending Cases," the Ordinance ends their confidentiality pursuant to the procedure of R. 1:20-9(a) (1). A request is made to the Director of the Office of Attorney Ethics, who in turn determines whether or not disclosure to the Township Clerk is consistent with the Rule. Nor is the Clerk's disclosure to the public in conflict with the Rule, since the Rule does not apply to disclosures by individuals unconnected to the disciplinary process. R. 1:20-9(h). Thus, there is no conflict between the Ordinance and the Rule.

Furthermore, if the Ordinance were in conflict with the Court Rule as to one type of discipline but not in conflict as to another type of discipline, the Ordinance would survive, since it states in its last sentence, "[I]f any part of this Act is declared invalid, the remainder of the Act is valid and effectual." (Pa16.)

II. Ordinance Does Not Conflict With OPRA

A. Rules of Court

See Section I above.

B. Personnel Records

Defendant Byrnes argues at page 16 that ordinances cannot authorize the disclosure of personnel records because municipalities cannot "contravene" a state statute such as OPRA. But if the word "law" in N.J.S.A. 47:1A-10 includes "ordinances," there is no "contravention" of OPRA, since OPRA expressly authorizes the disclosure of personnel records pursuant to "another law."

Defendant Byrnes seriously misreads N.J.S.A. 47:1A-10 when he states on page 16 that it provides that personnel records shall be accessible when required to be disclosed by another law "only . . . 'when disclosure is essential to the performance of official duties of a person dully authorized by this State . . . '" (emphasis added). Those phrases in the statute are connected by the word "or," not by the word "and."

C. Reasonable Expectation of Privacy

Defendant Byrnes at page 17 argues that the disclosure of

Mr. DeMarco's public and private discipline pursuant to the Ordinance would violate the OPRA provision protecting reasonable expectations of privacy. The OPRA personal privacy language is merely an expression of general legislative policy. The preamble of a legislative act "cannot be given the effect of enlarging the scope or effect of a statute." 1A Sutherland, Statutory Construction § 20:3 (6th ed. 2002). The specific application of that general purpose to personnel records is found in N.J.S.A. 47:1A-10 where OPRA states that public personnel records shall "not includ[e] any detailed medical or psychological information." There is no medical or psychological information in the record at issue.

Moreover, even if OPRA contained a separate exemption for personal privacy, it would not apply here. First of all, a record of how the government has disciplined Mr. DeMarco is not a matter of personal privacy. It is neither an intimate, personal matter such as procreation nor a matter in which government has no business, such as family relationships. Doe v. Poritz, 142 N.J. 1, 77-78 (1995).

Nor did Mr. DeMarco have any reasonable expectation of secrecy as to the information at issue. Obviously, there is no reasonable expectation of privacy as to information that is now, and has always been, public, such as Mr. DeMarco's public discipline. (Pa34.) Id. at 79 ("Information that is readily available to the public" is not protected by the right to personal priv-

acy.)

As to the Mr. DeMarco's private discipline, (Pa34), he could not have had any reasonable expectation of privacy after he submitted an "Authorization and Release Form," (Pa20), pursuant to an ordinance, (Pa2, ¶5; Pa8, ¶5), which states that Township attorneys are "to waive confidentiality of his or her disciplinary history." (Pa16.)

As regards Defendant Byrnes' extensive discussion of State preemption on pages 18-21, OPRA expressly provides for the disclosure of personnel records pursuant to other laws. N.J.S.A. 47:1A-10. Nor is OPRA exclusive or comprehensive. It expressly states that "nothing contained in [OPRA] shall be construed as affecting in any way the common law right of access to any record," N.J.S.A. 47:1A-1, and provides that OPRA shall not abrogate any other law, regulation or privilege. N.J.S.A. 47:1A-9. Nor does the fact that a record is not a public record under OPRA generally preclude a government agency from voluntarily releasing the record.

III. The Ethics History Report is an Integral Part of the Certificate of Ethical Conduct

Defendant Byrnes at page 22 states that "[t]he fact of the matter is that the Ordinance specifically refers only to a Certificate of Ethical Conduct." The Ordinance also specifically refers to the requirement that a Township attorney be required "to waive confidentiality of his or her disciplinary history."

(Pa16.) There would be no reason to waive confidentiality as to the disciplinary history if the Ordinance was not intended to disclose the attorney's disciplinary history, which is listed on the Ethics History Report.

The Ethics History Report is not merely "related" to the Certificate, as Byrnes asserts on page 23. It is part of the Certificate, and functionally belongs in the middle of the Certificate where it states "SEE ATTACHED ETHICS HISTORY REPORT." (Pa23.)

IV. DeMarco Did Consent, and No Consent is Necessary

Mr. Byrnes argues on page 23-24 that DeMarco never consented to the disclosure of his Ethics History Report and never consented to any disclosure to the public. Since Mr. Byrnes has admitted that Mr. DeMarco signed the "Authorization and Release Form" pursuant to the West Milford Attorney Accountability Ordinance, (Pa2, ¶5; Pa8, ¶5), and the Ordinance authorizes an attorney's "disciplinary history" to become "a public record," (Pa16), DeMarco has consented.

However, no consent is necessary. All that is required to make the Ethics History Report a public record under OPRA is that (1) an ordinance or other law exists requiring public disclosure, (2) the Ordinance's precondition for disclosure (the subject of the personnel record has executed an Authorization and Release form) has been satisfied and (3) the record at issue is in the possession of a government official, in this instance Township

Clerk Byrnes. Neither OPRA nor the Ordinance requires that the Authorization and Release expressly refer to the Ethics History Report or to public disclosure.

Respectfully submitted,

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cc: Salvatore T. Alfano, P.A.