

STATEMENT OF PROCEDURAL HISTORY AND FACTS

Beginning in December 2000 and ending in February 2001, John Gural made consensual recordings at the direction of the Division of Criminal Justice (DCJ) under the authorization of the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 et al. These consensual recordings were made in the course of DCJ's criminal investigation into the appointment of the Borough of Palmyra Solicitor for the year 2001. (Hess Certification, Ma5 at ¶¶14-15). Approximately 330 hours of consensual recordings were made by Gural. (Hess Certification, Ma5-6 at ¶16).

In June of 2004, the Federal Bureau of Investigation (FBI) requested of DCJ "an opportunity to review these conversations and transcripts in their entirety" to determine whether they revealed criminal violations of federal law. (Rossner Certification, Ma10-11 at ¶2; Ma13). DCJ's criminal investigation was in progress, however, and the tapes could not be released to the FBI at that time. (Rossner Certification, Ma10-11 at ¶¶2-4; Ma13; Ma14).

On or about August 10, 2004, Gural and Ted M. Rosenberg, plaintiffs in the related federal matter of Rosenberg v. JCA Associates, Civil Action No. 03-274(JBS)<sup>1</sup>, served upon DCJ a subpoena duces tecum to produce the Gural tapes. (Lester

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<sup>1</sup> The defendants in Rosenberg v. JCA Associates are George E. Norcross, III; Mark Neisser; Henry Chudzinski; R. Louis Gallagher, II; and JCA Associates, Inc.

Certification, Ma17 at ¶8; Ma26-27). On September 17, 2004, the Division of Law (DOL) on behalf of the State, a non-party, filed a notice of motion to intervene and supporting documents in the federal matter for the limited purpose of seeking a stay as to all discovery directed towards it. The request for the limited stay was based upon the ongoing nature of DCJ's criminal investigation. The State requested that in the event the federal court deny its request for a limited stay, the State be granted an additional 90 days from the entry of the federal court's decision to respond to Gural's subpoena to permit a review of the investigative materials for applicable privileges. (Lester Certification, Ma17-18 at ¶9; Ma26-27).

By order dated October 15, 2004, the Honorable Anne Marie Donio, U.S.M.J., granted the State's motion for a limited stay of discovery directed towards it. The stay was to expire on January 5, 2005. Judge Donio noted in her order that none of the parties to the matter, including Rosenberg, objected to the State's requested relief. (Ma49-50).

On December 22, 2004, the Records Custodian for DCJ received a written request under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq., from Rosenberg for the following:

Any and all recordings and transcripts of such recordings made by the Division of Criminal Justice of the Office of the Attorney General of New Jersey ("DCJ") of conversations between John J. Gural, Jr. and various individuals during the period commencing December 2000 and ending Feb. 2001. During the aforesaid period, Mr. Gural surreptitiously recorded various individuals at the direction and/or request of the DCJ.

The investigation involved allegations of wrongdoing in the appointment process of the position of Solicitor for the year 2001 in the Borough of Palmyra.

The individuals recorded by Mr. Gural include but are not limited to the following: Henry Chudzinski, Mark Neisser, Mark Hanson, John Harrington, R. Louis Gallagher, George Norcross, III, Alice Furia, as well as other employees and officers of JCA Associates, Inc.

(Ma56-57). On January 4, 2005, Rosenberg's OPRA request was timely denied as a criminal investigatory record under N.J.S.A. 47:1A-1.1. (Ma56-57).

By letter dated January 11, 2005, to the DCJ Records Custodian, Rosenberg modified his OPRA request to seek access to the tape recordings and transcripts under the common law "right to know" doctrine. (Ma58). Rosenberg also requested "[a]ny and all investigative records, documents, or other information made or kept by DCJ relating to any criminal investigations involving the appointment of the Solicitor in Palmyra in the year 2001." (Ma59). By letter dated January 18, 2005, DCJ's OPRA Counsel denied Rosenberg's request under the common law "right to know" doctrine on two grounds: first, "no analysis has been made as you have failed to assert your interest in the records requested," and, second, "there is litigation pending in both state and federal courts regarding the records you are seeking. Any determination pursuant to your common law request is inappropriate while the litigation is pending." (Ma60).

On January 12, 2005, Rosenberg filed a Verified Complaint in Lieu of Prerogative Writ, Order to Show Cause and supporting

Brief with the Superior Court of New Jersey, Law Division, Burlington County, for production of the tape recordings and documents listed in his January 11, 2005, letter to DCJ. (Ma61-116). That same day, the Honorable John A. Sweeney, Jr., A.J.S.C., signed an order directing the State "to show cause why an order should not be entered compelling defendants to immediately produce '[a]ny and all recordings and transcripts of such recordings made by the [DCJ] of conversations between John J. Gural, Jr. and various individuals during the period commencing December 2000 and ending February 2001[.]'" (Ma117-118).

On January 27, 2005, the parties in the federal matter of Rosenberg v. JCA Associates appeared before Judge Donio for a status conference. The criminal investigation was still open, and the State requested an extension of the limited stay of discovery until February 11, 2005. None of the parties in the federal matter, including Rosenberg, objected to the State's request. By order dated January 28, 2005, Judge Donio granted DCJ's request for an extension. (Lester Certification, Ma18 at ¶11).

During the conference held on January 27, 2005, Judge Donio directed counsel for the State to advise the parties in the federal action of the status of DCJ's criminal investigation by February 11, 2005. On February 10, 2005, Assistant Attorney General Louise Lester of DCJ informed DOL Deputy Attorneys General handling the federal litigation that DCJ's criminal

investigation into the appointment of the Palmyra Solicitor was closed. Because Friday, February 11, 2005, was a State holiday, the DOL DASG advised the parties in the federal matter and Judge Donio by letter dated February 14, 2005, that the state criminal investigation was no longer ongoing. (Lester Certification, Ma19 at ¶¶12-14).

On February 14, 2005, a hearing on Rosenberg's motion for an order to show cause in state court was held before Judge Sweeney. (1T).<sup>2</sup> Because the related civil litigation handled by DOL was simultaneously pending in federal court, DOL acted as counsel for DCJ in Rosenberg's public records request before Judge Sweeney. The DOL DAG at this hearing, however, was not directly involved in the federal matter and had not yet been made aware of the very recent change in the status of DCJ's criminal investigation. The DAG thus justly believed that the tapes and transcripts were still the subject of an ongoing criminal investigation. (1T8-11 to 13). Judge Sweeney placed a telephone call to AAG Lester to determine the status of the criminal investigation. (1T32-23 to 33-13). AAG Lester explained to Judge Sweeney that the criminal investigation was officially closed the previous business day.

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<sup>2</sup> "1T" refers to the transcript of the February 14, 2005, hearing on Rosenberg's motion for an order to show cause before the Honorable John A. Sweeney, A.J.S.C.;

"2T" refers to the transcript of the February 25, 2005, hearing on Rosenberg's motion for an order to show cause before Judge Sweeney;

"3T" refers to the transcript of the March 29, 2005, hearing on the State's motion for reconsideration before Judge Sweeney.

(1T33-15 to 34-19). Judge Sweeney adjourned the argument for approximately ten days. (1T35-5 to 21; Ma61-67).

On February 23, 2005, the parties in the federal matter appeared before Judge Donio for a status conference in Rosenberg v. JCA Associates. During the conference, the non-party State requested a reasonable amount of time (90 to 120 days) to respond to the federal plaintiffs' subpoena to permit a review of the investigative materials for applicable exemptions or privileges as the criminal investigation was no longer ongoing. The State's request was consistent with the alternative ground for relief requested in its notice of motion for a limited stay filed in federal court on September 17, 2004. (Lester Certification, Ma19-20 at ¶15).

By order dated February 24, 2005, with the consent of the parties, Judge Donio granted the State's request for a reasonable period of time to respond to plaintiffs' subpoena in the federal action. The order provided that "[t]he State shall produce its response to the subpoena on or before April 25, 2005, unless further extended by the Court upon motion for good cause made prior to the expiration of such date." The order did not require production of any investigative materials on or before April 25, 2005. (Lester Certification, Ma20 at ¶16).

On February 25, 2005, the hearing in state court resumed before Judge Sweeney. Counsel for DOL argued that the Gural tapes and transcripts might contain conversations of innocent third parties who have privacy concerns in some of the

conversations that were immaterial to the criminal investigation. (2T13-23 to 13-5). Counsel also argued that the tapes might contain privileged conversations between Gural and State Investigators as the recording device Gural wore was connected and disconnected each day. (2T18-15 to 19-8).

By order filed March 4, 2005, Judge Sweeney granted Rosenberg's request for production of the tapes in DCJ's possession and ordered the Office of the Attorney General to transmit to plaintiff by 4:00 p.m. on the fifteenth day after February 25, 2005, "[c]opies of any and all recordings" requested by Rosenberg. (Ma119-120). Judge Sweeney filed a written opinion dated March 7, 2005. (Ma121-127). An amended order was filed on March 10, 2005, extending the deadline for the production of the tapes to March 21, 2005. (Ma128-129).

Upon learning through published newspaper reports that DCJ had closed its criminal investigation, the FBI renewed its request to obtain access to or copies of the Gural tapes. (Rossner Certification, Ma11-2, at ¶¶5-6). On March 16, 2005, AAG Andrew L. Rossner was advised by DCJ Director Vaughn L. McKoy that he had spoken with United States Attorney Christopher Christie and had agreed that DCJ would provide the FBI and the United States Attorney's Office with access to DCJ's criminal investigatory file. (Rossner Certification, Ma12 at ¶7).

In anticipation of filing a motion for reconsideration of Judge Sweeney's order before the March 21, 2005, deadline for release of the Gural tapes, the State accelerated its

confidentiality and privilege review of all 330 hours of the Gural tapes. DCJ assigned additional resources to expedite this review, which was completed by March 16, 2005. The tapes contain conversations revealing the identities of innocent third parties, as well as criminal investigative methods and techniques. (Lester Certification, Ma22-23 at ¶23; Hess Certification, Ma6-7 at ¶¶17-20).

On March 16, 2005, the defendants in Rosenberg v. JCA Associates (Norcross, Neisser, Chudzinski, Gallagher and JCA Associates, Inc.) filed a joint motion for intervention in the matter before Judge Sweeney "for the sole purpose of also receiving any and all tape recordings and transcripts ordered produced to Mr. Rosenberg." (Ma131-163).

On March 18, 2005, the State moved for reconsideration of Judge Sweeney's order pursuant to Rule 1:7-4(b). In its supporting brief, the State argued that both the common law "right to know" doctrine and the New Jersey Wiretapping and Electronic Surveillance Control Act protected the audio tapes from public disclosure. In support of this motion, descriptive Vaughn Indices of the Gural tapes and available transcripts were voluntarily prepared by the State and submitted to Judge Sweeney for his in camera review on March 28, 2005. These expedited logs itemized the tape recordings or existing transcripts; identified the parties to the conversations by name, initials or relationship to Gural; identified persons named in conversations by name, initials or relationship to Gural; provided an



abbreviated description of the conversations; and noted the claimed privilege or confidentiality interest, where applicable. (Hess Certification, Ma7 at ¶21).

At a hearing held March 29, 2005, Judge Sweeney granted the JCA defendants' joint motion for intervention<sup>3</sup>; denied the State's Motion for Reconsideration; and ordered the State to "produce all of the recordings and transcripts to the Plaintiff, Ted M. Rosenberg, and to all interveners by 4:00 p.m. on March 31, 2005." (3T6-11 to 8-11; Ma166-167). Because the issue of Rosenberg's entitlement to access to the documents and other information in DCJ's investigatory file had not yet been decided, Judge Sweeney's order was interlocutory. (3T63-20 to 65-6).

On March 31, 2005, the State filed its Notices of Motions for leave to appeal and for an emergent stay. (Ma168-169; Ma170-171). The State's emergent application to the Appellate Division to stay Judge Sweeney's interlocutory order pending disposition of the State's motion for leave to appeal was granted by the Honorable Joseph F. Lisa, J.A.D., that same date. (Ma178). The State has turned over to Rosenberg and all interveners copies of all tape recording in which Rosenberg or intervener Norcross is a participant in the recorded conversation that have been identified to date. (Hagerty Certification, Ma179-180 at ¶¶1-4).

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<sup>3</sup> Several newspaper organizations were also granted intervener status: Philadelphia Newspapers, Inc., publisher of the Philadelphia Inquirer; the Newark Morning Ledger Company, publisher of the Star-Ledger; the New York Times Company; the Record of Bergen County; the Burlington County Times; and the Courier-Post of Cherry Hill. (Ma130; Ma164-165; Ma166-167).

## LEGAL ARGUMENT

### POINT I

#### **LEAVE TO APPEAL FROM THE TRIAL COURT'S INTERLOCUTORY ORDER DIRECTING THE STATE TO DISCLOSE UNREDACTED CONSENSUAL AUDIO TAPE RECORDINGS MADE IN THE COURSE OF A CRIMINAL INVESTIGATION SHOULD BE GRANTED TO PREVENT IRREMEDIAL INJURY TO THE STATE.**

The basis for leave to appeal is the State's strong interest in maintaining the confidentiality and integrity of the unreleased recordings at issue here, many of which are wholly immaterial to the interests of plaintiff or the interveners. The irreparable injury the State will unquestionably suffer through public disclosure of unredacted consensual audio tape recordings which the trial court has directed the State to release in its interlocutory order presents a situation in which leave to appeal should be granted by this Court "in the interests of justice" pursuant to R. 2:2-4. Leave to appeal is "highly discretionary" extraordinary relief and should be granted where, as here, a fundamental claim "would otherwise be irremediable in the ordinary course" of litigation. State v. Alfano, 305 N.J. Super. 178, 190 (App. Div. 1997). This Court's intervention is needed to prevent gratuitous public exposure of innocent third party conversations and lawful criminal investigatory techniques.

On March 29, 2005, Judge Sweeney entered an interlocutory order directing the State to turn over to Rosenberg and interveners all 330 hours of unredacted consensual audio tape recordings made by Gural at DCJ's direction in connection with of a criminal investigation into the appointment of the Borough of

Palmyra Solicitor for the year 2001. By Rosenberg's own estimation, however, the 330 hours of tapes include only "10 or 15 hours" of "significant conversations." (1T22-9 to 11). Rosenberg himself has noted that Gural wore the wire continuously for several months from 7:00 a.m. until 6:00 p.m. "so that 99 percent of everything that was taped is just [Gural's] ordinary day[.]" (1T21-21 to 22-6).

Gural was a confidential informant at the time he made the tapes under the authorization of the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-4c. Whenever a confidential informant wears a secreted recording device for the duration of a day or more, numerous utterances invariably will be captured on audio tape which are completely unrelated to and immaterial to the criminal investigation. The Vaughn Indices prepared by DCJ for Judge Sweeney's edification bear this out: identified on the indices, for example, are Gural's personal conversations with his immediate family members; Gural's office small talk in a bathroom and at a holiday party; and Gural's request for a blueberry bagel with cream cheese.<sup>4</sup>

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<sup>4</sup> Copies of the two Vaughn Indices and accompanying certification of State Investigator Edgar Hess which were submitted to Judge Sweeney for his in camera review have been submitted to this Court simultaneously with the filing of this brief in a sealed envelope as confidential exhibits. The State is continuing its comprehensive review of the Gural tapes in preparing its response to the subpoena in federal court, which is due on or before April 25, 2005, and will submit upon this Court's request revised indices identifying any conversations that were not previously identified.

Judge Sweeney's blanket order for release of the tapes does not, however, make this critical distinction between the Gural conversations directly relating to the criminal investigation that Rosenberg is actively seeking and the Gural conversations that may be wholly immaterial to Rosenberg's interests. The unfortunate result will be the public dissemination of 300-plus hours of audio recordings involving innocent third party participants, even though Judge Sweeney did not make the required finding of interest.

Many of these third parties -- including Gural's wife, mother, daughters and co-workers -- were neither involved in nor were targets of the criminal investigation. (Hess Certification, Ma6 at ¶19). Many of these individuals have utterly no idea that their conversations with Gural were intercepted and recorded. Release of conversations obtained as part of a criminal investigation, whether open or closed, pursuant to a common law public record request could unfairly taint the names of innocent third persons and sully their reputations. Had Judge Sweeney properly weighed the interests of these innocent third parties, the State's compelling need for maintaining the confidentiality of those third party conversations which are immaterial and irrelevant to the criminal investigation would far outweigh Rosenberg's admitted lack of interest in these conversations.

See Loigman v. Kimmelman, 102 N.J. 98, 102 (1986); see also Point II, infra.<sup>5</sup>

Additionally, many portions of the tape recordings will expose to would-be criminals bona fide criminal investigatory techniques relating to consensual intercepts. State investigators in fact have identified on the Gural tapes numerous conversations in which lawful investigative methods and techniques were employed during the investigation, including the type of recording devices used to make the consensual recordings, where the recording devices were placed during the intercepts, DCJ's instructions to Gural in making the consensual tape recordings, and discussions regarding the substance of the recordings. (Hess Certification, Ma6-7 at ¶20). The Vaughn Indices prepared by DCJ explicitly identified these conversations as well. None of the parties seeking disclosure

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<sup>5</sup> The State has released to the parties pursuant to Judge Sweeney's order those portions of tape recordings and transcripts in which either Rosenberg or Norcross was a direct participant in the intercepted conversations. (Hagerty Certification, Ma179-180 at ¶¶1-4). In releasing these particular tapes, the State has acceded to Rosenberg's and Norcross' public appeals for disclosure. Rosenberg, of course, filed an application in state court for access to his taped conversations with Gural. Although Norcross' attorney William M. Tambussi, Esq., represented at the March 29, 2005, hearing that his client merely wanted to receive copies of the tapes at the same time as they are released to Rosenberg and the intervening newspapers (3T7-24 to 8-7), the previous day Tambussi issued a lengthy statement to the press publicly calling for the release of the Gural tapes "to prove that, despite the rantings of failed political wannabes, no wrongdoing [on behalf of his client Norcross] has occurred." (Ma181-184). Both Rosenberg and Norcross thus have expressly acquiesced to public dissemination of their conversations with Gural.

have ever articulated a need for access to these particular tape recordings, yet they have been swept up in Judge Sweeney's exceedingly broad order for release. When proper weight is given to the Vaughn Indices in the balancing process, the State's need for confidentiality far outweighs Rosenberg's and the interveners' need for disclosure in these conversations.

Release of these tapes for public consumption prior to appellate review will also render moot the State's argument supporting non-disclosure. See Statewide Hi-Way Safety, Inc. v. New Jersey Department of Transportation, 283 N.J. Super. 223, 225 (App. Div. 1995).

The impending harm cannot be overemphasized. Judge Sweeney's interlocutory order directs the State to turn over all 330 hours of unredacted audio tape recordings to Rosenberg and interveners. Once released, the damage to innocent third parties and to confidential investigatory techniques cannot be undone.

By granting the State's emergent application for a stay (Ma178), this Appellate Court plainly understood the magnitude of the harm to the State associated with unrestricted disclosure of the Gural tapes. This Court should now grant the State's motion for leave to appeal from Judge Sweeney's order for release of all 330 hours of consensual recordings and continue the stay pending a remand to the trial court to prevent the predictable harm to the State.

## POINT II

**THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE NEWLY DEVELOPED FACTS AND LEGAL ARGUMENTS PRESENTED IN THE STATE'S MOTION FOR RECONSIDERATION; CONSEQUENTLY, THIS MATTER MUST BE REMANDED TO THE TRIAL COURT TO DEVELOP AN ADEQUATE FOUNDATION FOR APPELLATE REVIEW.**

Without listening to a single audio tape at issue, Judge Sweeney broadly determined that Rosenberg's and interveners' interests in disclosure of all 330 hours of unredacted conversations outweighed the State's need to maintain the confidentiality of the consensual interceptions produced at DCJ's direction during a criminal investigation that has since been closed. Judge Sweeney's ruling is unsupported by fact or law, despite the State's efforts to present him with all of the available factual data and legal analyses to reach an informed decision. There is simply no adequate foundation for appellate review of the trial court's order for production of the tapes, see S.N. Golden Estates, Inc., v. Continental Casualty Insurance Co., 317 N.J. Super. 82, 91 (App. Div. 1998), and this matter should be remanded to the trial court.

The State's initial position presented at the hearing before Judge Sweeney on February 14, 2005, against public release of the tapes was that the DCJ criminal investigation was ongoing. (1T8-11 to 13). Skeptical of the State's claim, Judge Sweeney contacted an AAG in DCJ who informed him that the investigation was closed the prior business day. (1T32-23 to 34-29). The

judge adjourned the hearing until February 25, 2005. (1T35-5 to 21; Ma61-67).

On February 25, 2005, the DOL DAG representing the State correctly informed Judge Sweeney that, with the criminal investigation over and a request for access pursuant to civil law made by plaintiff, the tapes could be reviewed by DCJ for the specific purpose of identifying confidentiality and privileges.<sup>6</sup> (2T20-20 to 21-7, 26-14 to 28-21, 29-13 to 30-8). The DAG suggested two potential interests: first, the confidentiality concerns of innocent third parties in intercepted conversations that were immaterial to the criminal investigation (2T13-23 to 13-5); second, discussions between Gural and state investigators while the recording device Gural wore was connected and disconnected each day. (2T18-15 to 19-8). Unconvinced by the State's argument, Judge Sweeney ordered the release of all 330 hours of tapes. (2T34-9 to 35-9).

By letter opinion dated March 7, 2005, Judge Sweeney supplemented his oral findings from the February 25, 2005, hearing. (Ma121-127). In balancing Rosenberg's right to access against the State's right to non-disclosure, Judge Sweeney did not at all refer to the State's argument at the hearing that some of the Gural tapes involved conversations with innocent third

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<sup>6</sup> As a general rule, during the course of an ongoing criminal investigation, DCJ has no practical justification to expend scarce resources to scrutinize consensual intercepts for the purpose of identifying privileges or confidential conversations absent a request for access under the Open Public Records Act or the common law "right to know," which are civil actions.



parties or with state investigators. (See 2T13-23 to 13-5; 18-15 to 19-8). The Judge's decision instead relied exclusively on the State's "primary objection" to release of the tapes that the criminal investigation was ongoing. (Ma125). Judge Sweeney found it "clear that no such investigation is ongoing" (Ma125) and ordered full disclosure of the tapes. (Ma127).

The State moved for reconsideration of Judge Sweeney's order pursuant to R. 1:7-4(b). Its supporting brief thoroughly examined the applicable legal standards under the common law "right to know" doctrine and the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 et al. Factual developments arising subsequent to the entry of the Judge's order and critical to the State's position were also presented and supported by certifications by AASG and a State Investigator fully familiar with the case.

In prompt response to Judge Sweeney's March 7, 2005, order for release of the tapes, DCJ accelerated its confidentiality and privilege review of all 330 hours of the tapes and identified numerous conversations that either (1) involve or identify innocent persons who were neither involved in nor were targets of the criminal investigation, or (2) reveal DCJ's investigatory methods and techniques. (Lester Certification, Ma19 at ¶13; Hess Certification, Ma6-7 at ¶¶17-20).

Using the information synthesized during this expedited review, the State prepared descriptive Vaughn Indices that were voluntarily submitted to Judge Sweeney in support of the State's

motion for reconsideration. These indices itemized the tape recordings or existing transcripts; identified the parties to the conversation by name, initials or relationship to Gural; identified persons named in conversations by name, initials or relationship to Gural; provided brief summaries of the conversations; and noted the claimed privilege or confidentiality interest, where applicable. Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564 (1974). Because these indices identified innocent third parties by name, initials or relationship to Gural, the indices were submitted to Judge Sweeney for his in camera review, but were not distributed to any of the parties, so as not to compromise the confidential nature of the information. See Loigman v. Kimmelman, 102 N.J. 98, 110 (1986).

During the same period of time in which the Vaughn Indices were being prepared, the FBI and United States Attorney's Office's renewed their requests to review the Gural tapes to determine whether federal crimes have been committed. Such inquiry may persuade federal or state law enforcement agencies to renew the investigation. (Rossner Certification, Mall-12 at ¶¶5-7).

DCJ's expedited confidentiality and privilege review of the tapes and the federal government's renewed interest in DCJ's criminal investigatory file produced facts and information Judge Sweeney needed to assess Rosenberg's state court application for access to the tapes under the common law "right to know." These

facts were logistically unavailable, however, until the criminal investigation was closed and all 330 hours of recordings could be examined with the specific goal of identifying confidential or privileged information.

A trial court should hear new or additional information provided on reconsideration if the new or additional information could not have been provided on the first application. Morey v. Wildwood Crest Borough, 18 N.J. Super. 335, 341 (App. Div. 1999), certif. denied, 163 N.J. 80 (2000). Had the information catalogued in the Vaughn Indices or the federal government's renewed request for the tapes simply been "overlooked" by the State during the February 2005 hearings, it would have been within Judge Sweeney's discretion to deny the motion for reconsideration. Ibid. But the facts presented by the State on its State's motion for reconsideration were unavailable prior to Judge Sweeney's order granting access.

At the March 29, 2005, hearing, all parties had a full opportunity to address the State's motion for reconsideration. The judge, however, gave no credence to the State's new factual developments and chastised the Attorney General's Office for sending an unprepared attorney to the first hearing. (3T53-6 to 54-2, 59-9 to 13). He dismissed as belated hearsay AAG Rossner's certification attesting to the federal government's renewed interest in the Gural tapes. (3T9-9 to 10-11, 58-20 to 59-4). Judge Sweeney flatly refused to consider whether the Wiretapping Act protects the contents of consensual interceptions. (3T59-14

to 17). He characterized the information voluntarily catalogued by the State in the confidentiality and privilege indices submitted for his in camera review as legal conclusions, not new facts. (3T58-5 to 9). In the judge's opinion, the indices were too generic to identify which tapes he should listen to "save two." (3T16-18 to 17-9, 57-20 to 58-4). Importantly, however, Judge Sweeney did not listen to a single tape in camera, including the two tapes of interest he identified from the Vaughn Indices. Nor did he seek from the State additional information to facilitate his review. He made absolutely no attempt to determine whether redaction was necessary to protect innocent third persons or to shield from public scrutiny DCJ's investigatory methods and strategies. Instead, Judge Sweeney denied the State's motion for reconsideration on the ground that the State's arguments came too late in the game.<sup>7</sup>

A dispassionate balancing of the parties' interests under the common law "right to know" doctrine, however, would produce a very different result. The State amply demonstrated to Judge Sweeney the high degree of need for confidentiality in the tapes of innocent third party conversations and investigatory techniques. See Loigman v. Kimmelman, 102 N.J. at 108. On the

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<sup>7</sup> The judge's outright refusal to listen to any of the Gural tapes for the purpose of deciding the State's motion for reconsideration was foreshadowed by his remarks at the February 25, 2005, hearing: when the DAG tried to explain what would be contained in the privilege log DCJ was preparing in response to Judge Donio's February 24, 2005, order, Judge Sweeney abruptly replied, "[F]rankly, I don't care what's on them ... I have no interest in it." (2T22-1 to 14).

other side of the scale, Rosenberg's himself has indicated that these particular tapes are immaterial to his quest to expose crimes committed by South Jersey political insiders. (1T21-21 to 22-6). Intervener Norcross' reason for wanting disclosure is to clear his name against what he terms unsubstantiated mud-slinging by Rosenberg. The intervener newspapers reason for wanting disclosure is to inform the public of contents of the tapes relating to the Palmyra Solicitor investigation by DCJ. Under the Loigman balancing test, the State's need to protect the confidentiality of the 300-plus hours of Gural tapes which have not yet been turned over to the parties and which are immaterial to the DCJ criminal investigation far outweighs the opposing parties' non-existent need for disclosure of these tapes.

Rosenberg and the intervening parties also fail to show "good cause" for the court-ordered release of consensual intercepts pursuant to section 17c of the Wiretapping Act, N.J.S.A. 2A:156A-17c. Indeed, Judge Sweeney's refusal to apply the Wiretapping Act at all calls into question the legitimacy of his order for disclosure of consensual intercepts.

Justice demands that the merits of the dispute be resolved, notwithstanding the procedural deficiencies. In re Spano's Estate, 49 N.J. 263, 267 (1967). There is no legitimate support for wholesale disclosure of confidential and privileged information which is completely immaterial to Rosenberg's and the interveners' claims.

Unfortunately, the trial court's abdication of its judicial responsibility to apply the law and facts leaves the trial record barren for appellate review. The emergent stay granted by this Court should be continued and the matter remanded to the trial court with directions to address the substance of the State's arguments presented in the motion for reconsideration in order to present an adequate factual basis for direct appeal. Cf. Loigman v. Kimmelman, 102 N.J. at 102 (in view of the fact that plaintiff in an application for access to public records alleged a common-law right of inspection that was not clearly asserted in the trial court, Appellate Division concluded that the claim should be first decided by the trial judge and remanded the matter to the lower court).

### POINT III

**SHOULD THIS COURT DENY THE STATE'S MOTION FOR LEAVE TO APPEAL, THIS COURT SHOULD CONTINUE THE EMERGENT STAY ENTERED ON MARCH 31, 2005, TO PERMIT THE PARTIES TO RETURN TO THE TRIAL COURT TO LITIGATE THE REMAINING ISSUE IN THIS MATTER.**

Judge Sweeney's order granting plaintiff and interveners unrestricted access to the consensual intercepts is interlocutory because there remains an undecided issue at the trial level, namely, plaintiff's application for access under the common law "right to know" to documents in DCJ's criminal investigatory file concerning the appointment of the Solicitor of Palmyra in 2001. (3T63-20 to 65-6). If this Court denies the relief the State seeks of a remand to the trial court to reopen the motion for reconsideration, see Point II, supra, this Court should nonetheless extend its temporary stay of the production of the Gural tapes to allow the parties to return to the trial court for disposition of the remaining issue. Once a final order is entered, the entire matter can be presented in a unified action on direct appeal.

There will be considerable harm to the State in premature release of the tapes and transcripts prior to direct appeal. The standard for granting a stay requires this Court to consider (1) whether irreparable harm will result from enforcement of a judgment pending further judicial review; (2) whether a meritorious issue is presented; and (3) the likelihood of success on further judicial review. Crowe v. DeGioia, 90 N.J. 126, 133 (1982); Avila v. Retailers & Manufacturers Distribution, 355 N.J.

Super. 350, 354 (App. Div. 2002), certif. denied, 176 N.J. 74 (2003). The State easily meets all three prongs of this test.

First, as detailed in Point I, supra, release to the public of the confidential information contained in the tapes prior to further judicial review will cause irreparable harm that cannot be undone, even if the State is ultimately successful on appeal. Second, the State has presented a meritorious issue, namely, that its compelling interest in preserving the confidentiality of innocent third party conversations and criminal investigatory techniques far outweighs plaintiff's and interveners' insubstantial interest in disclosure. Third, the trial court's refusal in denying the State's motion for reconsideration to consider new factual developments in this matter and the applicable legal standards for production supports the likelihood of the State's success on appeal. A stay in this matter will simply maintain the status quo of the parties, and will not cause undue hardship to plaintiff or interveners.



**CONCLUSION**

For the forgoing reasons, the State respectfully urges this Court to grant its motion for leave to appeal, to continue the emergent stay, and to remand the matter to the trial court with directions to address the substance of the State's claims raised in the Motion for Reconsideration; alternatively, this Court should continue its temporary stay of the interlocutory order directing release of all 330 hours of unredacted tape recordings to allow the parties to return to the trial court for final disposition of all issues related to this matter.

Respectfully submitted,

WILLIAM C. BROWN  
ACTING ATTORNEY GENERAL OF NEW JERSEY  
ATTORNEY FOR DEFENDANTS-MOVANTS

BY: \_\_\_\_\_  
Lisa Sarnoff Gochman  
Deputy Attorney General

VAUGHN L. MCKOY  
ASSISTANT ATTORNEY GENERAL  
DIRECTOR, DIVISION OF CRIMINAL JUSTICE

LISA SARNOFF GOCHMAN  
DEPUTY ATTORNEY GENERAL  
DIVISION OF CRIMINAL JUSTICE  
POLICY AND LEGISLATION BUREAU

OF COUNSEL AND ON THE BRIEF

DATED: APRIL 14, 2005

DOCKET No. A-M-507-04T3

TED M. ROSENBERG, :

Plaintiff-Respondent, :

v. : CIVIL ACTION

STATE OF NEW JERSEY DEPARTMENT: On Appeal from an Interlocutory  
OF LAW AND PUBLIC SAFETY, Order of the Superior Court of  
DIVISION OF CRIMINAL JUSTICE, : New Jersey, Law Division,  
Burlington County.

Defendants-Movants. : Sat Below:  
Hon. John A. Sweeney, Jr., A.J.A.D.

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BRIEF AND APPENDIX ON BEHALF OF THE STATE OF  
NEW JERSEY DEPARTMENT OF LAW & PUBLIC SAFETY,  
DIVISION OF CRIMINAL JUSTICE, IN SUPPORT OF  
MOTION FOR LEAVE TO APPEAL.

---

WILLIAM C. BROWN  
ACTING ATTORNEY GENERAL OF NEW JERSEY  
ATTORNEY FOR DEFENDANTS-MOVANTS,  
STATE OF NEW JERSEY DEPARTMENT OF  
LAW & PUBLIC SAFETY,  
DIVISION OF CRIMINAL JUSTICE  
RICHARD J. HUGHES JUSTICE COMPLEX  
TRENTON, NEW JERSEY 08625

VAUGHN L. MCKOY  
ASSISTANT ATTORNEY GENERAL  
DIRECTOR, DIVISION OF CRIMINAL JUSTICE  
P.O. BOX CN085  
TRENTON, NEW JERSEY 08625  
(609) 984-6500

LISA SARNOFF GOCHMAN  
DEPUTY ATTORNEY GENERAL  
DIVISION OF CRIMINAL JUSTICE  
POLICY AND LEGISLATION BUREAU  
P.O. BOX CN085  
TRENTON, NEW JERSEY 08625  
(609) 984-6500

OF COUNSEL AND ON THE BRIEF

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