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Attorney for Plaintiff

**FILED**

JAN 07 2011

**BERNADETTE N. DECASTRO, J.S.C.**

<p>FRANK PONCE,  Plaintiff,  v.  TOWN OF WEST NEW YORK and CARMELA RICCIE in her official capacity as Town of West New York's Clerk and Records Custodian,  Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION, HUDSON COUNTY  DOCKET NO.: <u>L-6267-10</u>  Civil Action  <b>ORDER</b></p>
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**THIS MATTER** having been brought before the Court pursuant to *R. 4:67-1(a)* by  
Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC by Verified Complaint and  
Order to Show Cause for an Order requiring Defendants Town of West New York and Carmela  
Riccie in her official capacity as Town of West New York's Clerk and Records Custodian to  
provide Plaintiff with copies of certain public records, and the Court having considered the  
papers submitted by the parties, and heard oral argument on 1/7, 2010; and for good  
cause appearing/the reasons set forth on the record on 1/7/2011, 2010,  
IT IS on this 7<sup>th</sup> day of Jan., 2010

A. **ORDERED** that within 20 days after the date of this Order Defendants  
shall provide Plaintiff with copies of (1) all recorded communications in the possession of the  
police regarding the September 4, 2010 blocked driveway complaint made against Plaintiff,

including the recording of the complainant and any recordings that dispatched the police officer who responded to the complaint; and it is further

B. **ORDERED** that Plaintiff Frank Ponçe is the prevailing party in this matter and shall submit any bill of costs or certification of services for attorney's fees within 20 days after service of this order; and it is further

C. **ORDERED** that Plaintiff serve a copy of this Order upon Defendants within seven days of service of this Order.



**BERNADETTE N. DE CASTRO, J.S.C.**

OPPOSED

UNOPPOSED

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<p>FRANK PONCE,</p> <p>Plaintiff,</p> <p>v.</p> <p>TOWN OF WEST NEW YORK and CARMELA RICCIE in her official capacity as Town of West New York’s Clerk and Records Custodian,</p> <p>Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION, HUDSON COUNTY</p> <p>DOCKET NO.: _____</p> <p>Civil Action</p> <p><b>VERIFIED COMPLAINT</b></p>
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Plaintiff Frank Ponce, by and through his undersigned counsel Law Offices of Walter M. Luers, LLC, by way of verified complaint against the Defendants Town of West New York (“Town”) and Carmela Riccie in her official capacity as Town of West New York’s Clerk and Records Custodian (hereinafter collectively “Defendants”) alleges as follows:

1. This action is being brought because Defendants have violated the Open Public Records Act, *N.J.S.A. 47:1A-1, et seq.* (“OPRA”) and the New Jersey common law right of access by denying Plaintiff to a recorded communication with the West New York Police Department that formed the basis of a criminal complaint against Plaintiff.

2. Plaintiff resides at Monroe, New York and maintains a place of business at 6710 Palisade Avenue, Guttenberg, New Jersey 07093.

3. Defendant Town of West New York is a “public agency” as that term is defined by OPRA, *N.J.S.A. 47:1A-1.1*.

4. Defendant Town maintains its principal offices at 428 60<sup>th</sup> Street, West New York, New Jersey 07093.

5. Defendant Riccie is the Town's Clerk, and is the "Custodian of a government record" for Defendant Town as that term is defined by OPRA, *N.J.S.A. 47:1A-1.1*.

6. Defendant Riccie maintains her principal office at 428 60<sup>th</sup> Street, West New York, New Jersey 07093.

7. This Court has jurisdiction of this matter pursuant to *N.J.S.A. 47:1A-6* and the common law.

8. Venue is proper in this Court because the Defendants are located in Hudson County and the events giving rise to this claim occurred in Hudson County.

9. On or about September 15, 2010, Plaintiff electronically submitted a written OPRA request to Defendants for copies of "all recorded police department communication from 9/3/10 at 10:00 p.m. to 9/4/10 at 2:00 a.m." Subsequently, on September 15, 2010, Plaintiff and Defendants agreed to modify and narrow this request to "a recorded conversation regarding a driveway block complaint as well as the recorded conversation between [the] dispatcher and the officer dispatched to the location." During those conversations, Plaintiff made clear he wanted all recordings relating to the complaint that was made against him.

10. On September 27, 2010, Defendants responded to Plaintiff's OPRA request, as modified. In that response, Defendants made a recording available to Plaintiff on an audio CD, but redacted portions of the recording. The audio CD was redacted to protect the personal privacy of individuals on the recording.

11. Plaintiff has a legitimate interest in receiving access to the redacted audio recording.

12. The audio recording that is being withheld from Plaintiff was a call from a person complaining that Plaintiff's vehicle was blocking the caller's driveway at 6708 Palisade Avenue. Plaintiff seeks the recording because, based on that September 4, 2010 call, a police officer was dispatched to 6708 Palisade Avenue. Once there, the police officer told Plaintiff that the owner of 6708 Palisade Avenue had complained that Plaintiff's car was blocking his driveway, and that the owner was insisting that Plaintiff's car be towed, which it subsequently was.

13. Plaintiff has a legitimate interest in obtaining a copy of the recording because it identifies a witness and formed the basis for a police response that ultimately resulted in Plaintiff's car being towed and receiving a citation, which he is fighting in Municipal Court. Plaintiff also has a legitimate interest in any other recordings that may exist, including any recorded communications between police dispatch and the officer who responded.

14. The owner of 6708 Palisade Avenue has made numerous, unfounded complaints against Plaintiff, and Plaintiff seeks to determine whether that person was the source of this latest complaint.

15. Defendants have no legitimate public interest in denying Plaintiff access to the documents that have been redacted.

16. Plaintiff's interest in access to the withheld and redacted documents outweighs any interest that Defendants may have in continued secrecy.

**COUNT I: OPRA**

17. Plaintiff realleges and incorporates by reference paragraphs 1-16 of the Complaint.

18. Defendants violated OPRA by denying Plaintiff access to a recording of a

call into the police that formed the basis for an officer being dispatched and that resulted in the towing of Plaintiff's vehicle, as well as any other recordings that may exist.

19. Plaintiff demands access to the requested records.

**COUNT II: COMMON LAW RIGHT OF ACCESS**

20. Plaintiff realleges and incorporates by reference paragraphs 1-19 of the Complaint.

21. As a citizen of the State of New Jersey, Plaintiff has standing to request public records pursuant to New Jersey's common law Right of Access.

22. The records requested by Plaintiff are documents that are required to be created, kept and maintained by Defendants.

23. Plaintiff's interest in receiving the records requested by Plaintiff outweighs Defendant's interest in not disclosing the records.

24. Defendants violated Plaintiff's common law right of access by denying Plaintiff access to copies of the aforesaid documents, either in their entirety or through redactions.

25. Plaintiff demands access to the requested records that have not been previously disclosed.

**WHEREFORE**, Plaintiff demands judgment:

A. Ordering Defendants to provide Plaintiff with copies of the audio recording of the person who called the police to complain about Plaintiff's vehicle being in their driveway on or about September 4, 2010, as well as any other recordings requested by Plaintiff;

B. Awarding Plaintiff reasonable attorneys' fees and costs of suit pursuant to

N.J.S.A. 47:1A-6 and the common law right of access; and

C. Such other relief as the Court deems equitable and just.

**DESIGNATION OF TRIAL COUNSEL**

Plaintiff hereby designates Walter M. Luers as trial counsel.

**CERTIFICATION PURSUANT TO R. 1:38-7(B)**

I certify that confidential personal identifiers have been redacted from documents now submitted to the Court, and will be redacted from all documents submitted in the future.

**CERTIFICATION OF NO OTHER ACTIONS**

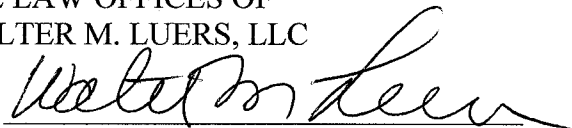
Pursuant to R. 4:5-1, it is hereby stated that the matter in controversy is not the subject of any other action pending in any other court or of a pending arbitration proceeding to the best of my knowledge and belief. To the best of my belief, no other action or arbitration proceeding is pending or contemplated. Further, other than the parties set forth in this pleading, I know of no other parties that should be joined in the above action. In addition, I recognize the continuing obligation of each party to file and serve on all parties and the Court an amended certification if there is a change in the facts stated in this original certification.

Respectfully submitted,

Dated: November 10, 2010

THE LAW OFFICES OF  
WALTER M. LUERS, LLC

By:




Walter M. Luers, Member  
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**VERIFICATION**

Frank Ponce, of full age, certifies as follows:

1. I am the Plaintiff in the action captioned "Frank Ponce v. Town of West New York and Carmela Riccie." All of the facts stated in the verified complaint to which this Verification is attached are true, and as to those facts that are alleged on information and belief, I believe those facts to be true.

2. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

  
\_\_\_\_\_  
Frank Ponce

Dated: November 8, 2010

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November 10, 2010

Walter M. Luers, Esq.\*

\*Also admitted in New York

Honorable Judge  
Superior Court of New Jersey – Law Division  
William J. Brennan, Jr. Courthouse  
583 Newark Avenue  
Jersey City, New Jersey 07306

**Re: *Ponce v. Town of West New York, et al.***

Dear Judge:

We represent Plaintiff Frank Ponce in this action initiated via verified complaint and order to show cause summary proceeding against Defendants Town of West New York and West New York's Custodian of Records. This action was brought because Defendant has denied Plaintiff access to a recording of the telephone call to the West New York police in which a person complained that Plaintiff's car was blocking the complainant's driveway. The call resulted in police being dispatched to the location and, ultimately, in Plaintiff's car being towed.

The facts and documents supporting Plaintiff's application are set forth in the enclosed Verified Complaint and Certification of Walter M. Luers, and we will not repeat them wholesale here. The Court should order disclosure of the requested recording (and any other recordings in the possession of Defendants relating to the blocked driveway complaint) because there is no reasonable expectation of privacy in the recorded conversation.

**This Action Should Proceed in a Summary Manner**

“A person who is denied access to a government record by the custodian of the record, . . . may institute a proceeding to challenge the custodian's decision by filing an action in

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Superior Court.” *N.J.S.A. 47:1A-6*. Once instituted, “[a]ny such proceeding shall proceed in a summary or expedited manner.” *Id.* Here, because OPRA authorizes actions under it to proceed in a summary manner, the order to show cause should be granted so this matter may proceed in a summary manner. *R. 4:67-2(a)*.

This action involves one OPRA claim and an identical claim under the common law right of access. The claim is that Defendant has not provided copies of voice recordings of a complaint made against Plaintiff. Because Plaintiff’s claims are based on documentary evidence that has been submitted to the Court, the facts underlying this action cannot reasonably be disputed. We do not anticipate that any discovery will be required. Any factual issues that may arise can be resolved by evidence submitted through certifications or affidavits by the parties. Therefore, in light of the foregoing and the Legislature’s directive that OPRA actions proceed in a summary manner, we request that the Court sign the Order to Show Cause so that this action may proceed in a summary manner.

#### **Open Public Records Act Claim**

As the Court knows, the Open Public Records Act (“OPRA”) mandates that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public’s right of access.” *Libertarian Party of Cent. New Jersey v. Murphy*, 384 *N.J. Super.* 136, 139 (App. Div. 2006) (citing *N.J.S.A. 47:1A-1*). “The purpose of OPRA ‘is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” *Times of Trenton Publ’g*

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*Corp. v. Lafayette Yard Cmty. Dev. Corp.*, 183 N.J. 519, 535 (2005) (quoting *Asbury Park Press v. Ocean County Prosecutor's Office*, 374 N.J. Super. 312, 329 (Law Div. 2004)).

Here, Plaintiff seeks a recorded communication with the West New York police department that formed the basis of a criminal complaint against Plaintiff. (Verified Complaint ¶ 1). According to the response of the Town, the recording of the individual who made the complaint exists. (November 10, 2010 Certification of Walter M. Luers, ¶ 1 and September 27, 2010 Email from Carmela Riccio to Frank Ponce). Although the recording exists, the portion on which the complainant's call is located was redacted. (*Id.*). This recording is a public record, and Defendants have not claimed that the requested information is not a public record. *N.J.S.A.* 47:1A-1.1 (broadly defining public records as "any paper, written or printed . . . document . . . that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof[.]"). Rather, Defendants claim that the complainant has a reasonable expectation of privacy in making his or her call to the police. (Luers Cert. ¶ 1 and September 27, 2010 Email from Attorney DeArmas to Carmela Riccio).

The New Jersey Supreme Court has set forth seven factors that ought to be used when analyzing requests for disclosure of personal information. *Burnett v. County of Bergen*, 198 N.J. 409 (2009); *Doe v. Poritz*, 142 N.J. 1, 88 (1995). Those factors are: "(1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated

public policy, or other recognized public interest militating toward access.” *Doe*, 142 N.J. at 188.

Here, the Records Custodian gave too much weight to the individual’s privacy interest, and too little weight to Plaintiff’s interest. First and most importantly, the person who called the police is a material witness. That person gave the police information that was sufficient to cause a uniformed officer to report to the scene and, once on the scene, that uniformed officer told Plaintiff that the complainant had complained that Mr. Ponce’s car was blocking the driveway and that the owner was insisting that Plaintiff’s car be towed (which it was). (Verified Complaint ¶ 12). Plaintiff’s interest in identifying and interviewing or subpoenaing that witness that caused the police to investigate more than outweighs any interest that this person may have in confidentiality. This interest is even more important because Mr. Ponce has pled not guilty to the charge of illegally blocking a person’s driveway in municipal court. (*Id.* ¶ 13). These events occurred in front of 6708 Palisade Avenue, which is adjacent to Plaintiff’s office at 6710 Palisade Avenue. The owner of 6708 Palisade Avenue has, in the past, made many unfounded complaints against Plaintiff, and Plaintiff seeks to confirm whether this latest accusation was by the same person. (*Id.* ¶ 14).

Regarding the *Doe* factors, they weigh in favor of disclosure or are neutral. The record requested was an audio recording, and it contains a recording of the complainant’s initial call. There is no potential for harm in disclosure, and Defendants identified no harm in denying access to these records. Plaintiff already suspects it was the owner of 6708 Palisade Avenue who made the call, but must confirm that through the recording. Since Plaintiff and the owner of 6708 Palisade Avenue are already neighbors, they are already in contact. Therefore, there is no risk of additional unsolicited contact. Disclosure of the recording would not injure any

relationship between the complainant and the police. There is no evidence that the complainant is a confidential informant or that any other special relationship exists between the police and the complainant. There appear to be safeguards in place regarding whether this type of recording may be disclosed, since it was redacted from a series of recordings that were given to Plaintiff. Finally, Plaintiff's right to identify and have access to potential witnesses is an express policy that would militate in favor of access.

For the foregoing reasons, there is no right to privacy in the complainant's call to the police.

#### **Common Law Right of Access**

If the Court were to determine that the records requested by Mr. Paff are not public records or are exempt from disclosure under the Open Public Records Act, we request that the requested documents be disclosed pursuant to the common law right of access. "Nothing contained in [OPRA] shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency." *N.J.S.A. 47:1A-8; see also North Jersey Media Group Inc. v. State, Dep't of Personnel*, 389 N.J. Super. 527, 536 (Law. Div. 2006); *Bergen County Improvement Auth. v. N. Jersey Media Group, Inc.*, 370 N.J. Super. 504, 516 (App. Div. 2004). The right of access under the common law is broader than under OPRA. *North Jersey Media Group*, 389 N.J. Super. at 537.

The records sought here are public records because they were created by a public official in the course of their duties. *Higg-A-Rella*, 141 N.J. at 46 (defining a common-law record as one that is made by a public official in the exercise of their public function, either

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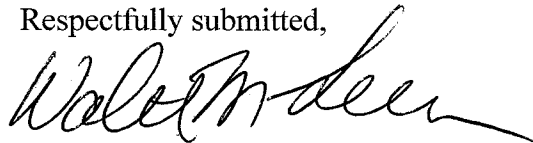
because the record was required or directed by law to be made or kept, or because it was filed in a public office).

The records should be provided under the common law right of access for the same reasons that they should be provided under OPRA.

**Award of Reasonable Attorneys' Fees**

If the Court orders Defendants' to produce the documents at issue, the Court should find that Plaintiff is the prevailing party and, under OPRA's fee-shifting provision and the common law, award Plaintiff a reasonable attorneys' fee and costs. *N.J.S.A. 47:1A-11; Mason v. Hoboken*, 196 N.J. 51, 79 (2008) (concluding that catalyst theory applies to fee awards under both OPRA and the common law right of access).

Respectfully submitted,



Walter M. Luers