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Counterclaim Plaintiff Jeff Carter

**FILED**  
**JAN 15 2014**  
HON. LISAF. CHRYSTAL, J.S.C.

<p>IN THE MATTER OF THE NEW JERSEY STATE FIREMEN'S ASSOCIATION OBLIGATION TO PROVIDE RELIEF APPLICATIONS UNDER THE OPEN PUBLIC RECORDS ACT.</p> <hr/> <p>JEFF CARTER,  Third-Party Plaintiff,</p> <p>v.</p> <p>JOHN DOE,  Third-Party Defendant.</p>	<p><b>SUPERIOR COURT OF NEW JERSEY LAW DIVISION – UNION COUNTY</b></p> <p><b>DOCKET NO. UNN-L-2932-13</b></p> <p><b>CIVIL ACTION</b></p> <p><b>ORDER</b></p>
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**THIS MATTER** having been brought before the Court pursuant to R. 4:67-1(a) by George M. Morris, Esq. of Parker McCay P.A. by Verified Complaint and Order to Show Cause for an Order requesting declaratory relief regarding whether individual relief applications filed with the Plaintiff may be disclosed and other relief, and by Walter M. Luers, Esq. of Law Offices of Walter M. Luers, LLC by Verified Answer and Counterclaims, and the Court having considered the papers submitted by the parties, and having heard oral argument on September 27, 2013; and for the reasons set forth on the ~~record on September 27, 2013~~ *letter opinion attached*, and for good cause shown,

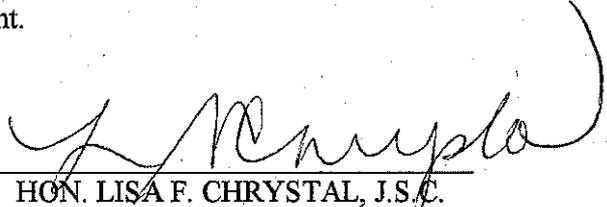
IT IS on this 15<sup>th</sup> day of Jan, 2014

A. **ORDERED** Plaintiff's Verified Complaint is dismissed with prejudice;  
and it is further

B. **ORDERED** that within 20 days after the date of service of this Order on Plaintiff, Plaintiff shall provide Defendant with copies of all checks representing relief funds paid to the individual identified by Plaintiff as "John Doe," and it is further

C. **ORDERED** that Defendant is the prevailing party in this matter and shall serve and file a motion and fee certification for reasonable attorney's fees and costs within 20 days after service of this order upon counsel; and it is further

D. **ORDERED** that Defendant shall serve a copy of this Order upon Plaintiff within seven days of service of this Order on Defendant.

  
HON. LISA F. CHRYSTAL, J.S.C.

This order was:

OPPOSED \_\_\_\_\_  
UNOPPOSED \_\_\_\_\_

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF  
KATHERINE R. DUPUIS  
PRESIDING JUDGE - FAMILY



COURTHOUSE  
ELIZABETH, NEW JERSEY  
07207-8001

**FILED**  
**JAN 15 2014**  
HON. LISA F. CHRYSTAL, J.S.C.

LETTER OPINION

NOT FOR PUBLICATION  
APPROVAL OF THE COMM

*Aley -  
Ready to  
go out  
today. Is  
there another  
ORDER?*

Walter M. Luers, Esq.  
Law Offices of Walter M. Luers, LLC  
23 West Main Street, Suite C203  
Clinton, New Jersey 08809

George Morris, Esq.  
Parker McCay, P.A.  
9000 Midlantic Drive, Suite 300  
P.O. Box 5054  
Mount Laurel, New Jersey

Re: **N.J. Firemen's Assoc. Obligation to Provide Relief Applications  
Under OPRA**  
Docket No: **UNN-L-1345-12**

Dear Counsel:

The Court has before it the Order to Show Cause as to whether the New Jersey Firemen's Association is required to produce certain relief applications under either the Open Public Records Act or the common law right to access. The Order to Show Cause was accompanied by the Verified Complaint of the New Jersey Firemen's Association ("Association"). The Association's brief in support of the Order to Show Cause and Verified Complaint seeking Declaratory Judgment accompanied the Verified Complaint. Defendant, Jeff Carter ("Defendant") filed a letter brief in lieu of more formal opposition. The Certification of Jeff Carter accompanied the opposition. The Association submitted a letter brief in reply to the opposition to Order to Show Cause and Verified Complaint. The Certification of Frank B. Gunson, 3<sup>rd</sup> accompanied the reply.

## I. Background

The New Jersey State Firemen's Association ("Association") is a statutorily created relief organization which provides financial relief to indigent firemen and financial assistance to surviving family members. See Pl.'s Verified Complaint ¶ 1. On June 14, 2013, the New Jersey Superior Court, Appellate Division ruled in Paff v. N.J. Firemen's Assoc., 2013 N.J. Super. LEXIS 90 (App. Div.) that the Association is a public entity subject to the New Jersey Public Records Act, N.J.S.A. 47:1A-1 et seq. Id. at ¶ 3. The Requestor of information under the Open Public Records Act ("OPRA") in the instant action is Jeffrey Carter, an individual New Jersey citizen. Id. at ¶ 2. Defendant is a life member of a volunteer fire company located in Fire District No.1. See Carter Cert. ¶ 4. Defendant served as an elected fire commissioner in the Fire District between 1987-1997. Id. at 6. On July 15, 2013, Requestor electronically filed an OPRA request seeking a relief application for an individual referred to as "John Doe", Jr.<sup>1</sup> who was elected fire commissioner in 2007 and served as Chairman of the Fire District Board of Fire Commissioners. See Pl.'s Verified Complaint ¶ 4; see also Carter Cert ¶ 7. The Requestor further sought a copy of all financial records identifying disbursement of funds to that individual. See Pl.'s Statement of Facts ("SOF") at ¶ 1. Defendant alleges that in 2007, John Doe was caught viewing and printing pornographic images, including what was reported as child pornography on the Fire District's computers. See Carter Cert. ¶ 10. After an investigation, John Doe was arrested and the Grand Jury returned a no bill on the charge of endangering the welfare of a child. Id. Defendant stated in his Certification that he made his OPRA request to the Association for the payments made to John Doe because he sought to publicize that John Doe was receiving hardship benefits for hardship caused by his own actions. Id. at ¶ 18. On July 22, 2013, the association denied the request for release of the application citing the privacy provision found in N.J.S.A. 47:1A-1. The Association states in its Verified Complaint that it is obligated to protect the identity of its members who seek relief because the individuals seeking relief are either indigent or have major medical conditions. See Pl.'s Verified Complaint at ¶ 6. The Association has a standard policy that individual relief applications are assigned a unique identifying number when reviewed by the local relief association to protect the dignity of the applicant. Id. at ¶ 8. On August 5, 2013, the Defendant renewed his request for the records. See Pl.'s SOF ¶ 1.

## II. Order to Show Cause

### a. Association's Brief in Support of Order to Show Cause

In New Jersey, citizens may obtain access to public records through the Open Public Records Act, civil litigation procedures and the common law right of access. However, The Association argues that it should not be required to release individual relief applications a public agency has a responsibility to protect individual privacy interests. Mag Entm't, LLC v. Div. of Alcoholic Beverage Control, 373 N.J. Super. 534, 543 (App. Div. 2005). The Association argues that while OPRA's function is to "make identifiable government records readily accessible for inspection, copying or examination," the law also requires that:

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<sup>1</sup> Defendant John Doe is the individual who received relief and is subject of this application. Although his actual identification has been revealed to the Court through *in camera* submissions, he will be referred to as John Doe to protect his privacy interests.

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..."

[See N.J.S.A. 47:1A-1]

The Association argues that when the requested material appears on its face to encompass legislatively recognized confidentiality concerns, a court should presume that the release of the government records is not in the public interest. Gannett New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. 205, 215 (App. Div. 2005). Courts have tended to favor the protection of confidential materials. The Association argues that "the dangers inherent in disclosure of confidential information for public dissemination are so obvious that we are compelled to conclude that the privacy interest of the material requested prevail over the public interest in disclosing the information. North Jersey media Group, Inc. v. Bergen County Prosecutor's office, 405 N.J. Super. 386, 391 (App. Div. 2009).

The Association cites Michaelson v. Watt, 379 N.J. Super. 611 (App. Div. 2005) to show that the Court considered a request to disclose health insurance coverage provided to public employees. In Michaelson, the records custodian refused to provide any individualized information concerning current employees, retired employees or officials and their dependents who participate in the medical plans offered by the municipality concluding that the information could not be released under OPRA because the same would invade personal privacy interests. *Id.* at 616-17. The Court agreed with the records custodian finding that generic information could be released as to the health care programs offered, but information about individuals, including what plan the employee had chosen or the amount of the benefits received was confidential in nature and could not be released under either OPRA or the common law right of access. *Id.* at 625.

Additionally, in Rivera v. Office of the County Prosecutor, 2012 N.J. Super. Unpub. LEXIS 1921 (Law Div. 2012), cited by the Association, the requestor sought to obtain all Use of Force Reports completed by police officers during a specific time period. The Court recognized that OPRA creates specific responsibility to safeguard personal information. *Id.* at 12-13. To reconcile the interests, the Court utilized a seven factor balancing test explained in Doe v. Portiz, 142 N.J. 1, 88 (1995), which requires a court to consider:

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.

The Rivera Court concluded that even if police intervention is required during a psychological incident and a Use of Force Report is required to be created, the obligation to file the report does not denude the subject of his or her privacy interest. The Court held, "This is a highly personal event and the subject likely would not want to be disclosed." Id. at 19. The Association argues the same logic applies to relief applications.

Applying the Doe factors to the present case, the association argues that with regard to the first factor, the application is a public record as a document kept, made or maintained in the course of official business of the Association. The Association argues that although a public record, the documents may not be released because of the privacy interest of the applicant. The Association argues that these records are no different than an application for welfare or an individual health report. The Association argues that the second factor weighs in favor of non-disclosure because the information is an individual's complete and personal financial history, including but not limited to tax returns, credit card bills, mortgage payments and, hospital bills. The Association argues that there is no public interest to revealing this information and that the harm created by the release of said information would likely lead to identity theft and public embarrassment.

The Association argues that the fourth factor supports non-disclosure because a significant harm exists if individual relief applications are released. The Association argues that the release of the information may cause an applicant to hesitate before that person in need seeks assistance and may withhold critical information regarding his or her needs for assistance, fearing that the knowledge will be subject to public scrutiny. The fifth factor, according to the Association, speaks to the adequacy of safeguards to prevent disclosure. The Association has established a system to convert the individual's name into a unique identification number for each applicant to ensure the confidentiality of the information and to protect the interests of the applicant. Lastly, the Association argues that the seventh factor weighs in favor of non-disclosure because there is no policy or statute which mandates access.

Furthermore, the Association argues that the release of a relief application under the common law right of access should be prevented because an individual's right to privacy outweighs public disclosure. The Association argues that in order to be eligible to receive materials under the common law, the requestor must demonstrate his interest in the subject matter of the materials sought. S. Jersey Publishing Co. v. New Jersey Expressway Authority, 124 N.J. 478, 487 (1991). The Association argues that a six part test was established in Loigman v. Kimmelman, 102 N.J. 98, 113 (1986) to consider whether release of public records is appropriate under the common law. The test is:

1. The extent to which disclosure will impede agency function by discouraging citizens from providing information to the government;
2. The effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed;
3. The extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure;
4. The degree to which the information sought includes factual data as opposed to evaluative reports of policymakers;

5. Whether any finding of public misconduct have been insufficiently corrected by remedial measure instituted by the investigative agency; and
6. Whether any agency disciplinary or investigatory proceedings have arisen that may circulate the individual's asserted need for the materials.

The Association argues that the requestor has not propounded any need for the individual application requested and that the only conceivable purpose for seeking this information is to evaluate whether the Association has acted appropriately in granting relief. The Association argues that an evaluation of its program can be considered without the agency having to acknowledge the names of an individual who have sought relief. Accordingly, the Association argues that without justifying the need for the requested information, each of the aforementioned factors would weigh in the Association's favor preventing disclosure or acknowledgment.

**b. Defendant's Opposition/Support of Counterclaims and Third Party Complaint under OPRA**

Defendant argues that the Association's Verified Complaint should be dismissed with prejudice because the Association and Records Custodian has no cause of action under OPRA of the common law right of access. Defendant argues that, "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 Superior Court." N.J.S.A. 47:1A-6.

Defendant argues that public agencies have no cause of action under OPRA and thus the Association's Verified Complaint should be dismissed. Defendant argues that the Association is asking this Court to exceed its jurisdiction and regulate the manner in which Defendant and all future OPRA requestors may submit OPRA requests in the future and what they might receive. Defendant argues that the Legislature created several remedies for public agencies who receive OPRA requests. These remedies are exclusive and do not include the initiation of actions in Superior Court to regulate future conduct. Defendant states that the Legislature explicitly found and declared that it is:

The public policy of this State 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 by OPRA shall be construed in favor of the public's right of access.

[See N.J.S.A. 47:1A-1]

Furthermore, Defendant argues that if access to a public records request is denied, that person may "at the option of the requestor," "institute a proceeding to challenge the custodian's decision by filing an action in Super Court...or file a complaint with the Government Records Council." N.J.S.A. 47:1A-6. Defendnt argues that it is clear from the statutory regulatory framework that the Association's remedies are limited to following OPRA's procedures. Under those procedures, Defendant argues that if an OPRA request implicates a person's reasonable

expectation of privacy, the request may be denied. Furthermore, Defendant postulates that while OPRA does provide for a private right of action, that cause of action is reserved exclusively for those who have requested records. N.J.S.A.47:1A-6. Defendant argues that to determine whether a statute confers an implied private right of action, courts consider whether: (1) plaintiff is a member of the class for whose special benefit the statute was enacted; (2) there is any evidence that the Legislature intended to create a private right of action under the statute; and (3) it is consistent with the underlying purposes of the legislative scheme to under the existence of such a remedy. R.J. Gaydos Ins. Agency, inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 272 (2001). Defendant argues that the private right of action applies solely to records requestors and that the Association and other public entities are not members of the class protected by OPRA. Thus, the Association, according to the Defendant, has no cognizable remedy under OPRA and their claims must be dismissed with prejudice.

Defendant next argues that the Association has not stated a claim for declaratory judgment. Defendant argues that it is clear that relief by way of a declaratory judgment should be withheld when the request is in effect an attempt to have the court adjudicate in advance the validity of a possible claim or defense in some expected future law suit. Donadio v Cunningham, 58 N.J. 309, 325 (1971). Furthermore, Defendant argues that the declaratory judgment procedure may not be used to prejudge issues that are committed for initial resolution to an administrative forum, any more than it may be used as a substitute to establish in advance the merits of an appeal from that forum. Pennsylvania Dep't of Gen. Serv. V. Frank Briscoe Co., 466 A.2d 1336, 1341 (Pa. 1983). Applying these principles to the instant case, Defendant argues that Plaintiff may not seek or receive declaratory relief that would limit Defendant's rights and the rights of future OPRA requestors. Defendant argues that because Defendant Carter is not seeking hardship applications, the Plaintiff is asking this Court for an advisory opinion under the guise of declaratory judgment.

Next, Defendant argues that the name of John Doe and the checks made payable to him should be disclosed. Defendant/Counterclaim Plaintiff seeks records pursuant to OPRA and the common law right of access. The Defendant argues that 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 if 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). The Defendant argues that the burden of proof in showing that a denial of access was justified rests solely with the Records Custodian. Asbury Park Press. Monmouth County, 406 N.J. Super. 1,7 (App. Div. 2009). Defendant argues that The Association's brief concedes that the records at issue are public records when they stated "It is clear that the application is a public record as a document kept, made or maintained in the course of the official business of the Association." See Association brief at ¶ 6. Defendant argues that the Supreme Court held that a public employee had no reasonable expectation of privacy in a lawsuit filed in Court and its results, even though the settlement agreement that resolved that litigation contained a confidentiality provision that prohibited disclosure of that agreement to the public. Furthermore, Defendant cites Livecchia v. Borough of Mount Arlington, 421 N.J. Super. 24, 29 (App. Div. 2011) for the proposition that the Court held that a municipal employee did not have a reasonable expectation of privacy in the locations and destinations of phone calls made by

her on a municipal cell phone. Defendant further argues that even in the landmark case of Burnett v. County of Bergen, 198 N.J. 408, 429 (2009) the Court was most concerned with the bulk of disclosure of social security numbers contained within public records filed with the County Clerk. There was no dispute that "individual realty records are available and will remain available, for copying and inspection at clerks' offices.

Defendant states that the Court must determine whether the identity of the particular hardship applicant here and the amount paid to him in hardship relief funds should be withheld from the public under the balancing test that the Burnett Court applied to OPRA. Defendant acknowledges that the Association has already conceded that the records at issue are public records. With respect to the second factor, Defendant argues that the information sought is already well known in the community as someone who was connected to a criminal and grand jury investigation and as someone who was fired from his full-time job for viewing pornography when he should have been working. Defendant argues that through the newspapers coverage of the underlying incident, John Doe's identity is well known in the community and within the relevant Fire District.

With respect to the third factor, Defendant argues that there is no harm in disclosing John Doe's identity and the amount he received in hardship support because his connection to child pornography and loss of his employment have already played out in the public. Defendant argues that John Doe's reputation in the community cannot be worse with the disclosure of his receipt in hardship assistance. With respect to the fourth factor, Defendant argues that there will be no injury to the relationship between John Doe and the association because the hardship funds have already been distributed and there is no evidence that John Doe was promised confidentiality. Regarding the fifth factor, Defendant argues that the safeguards articulated by the association are inadequate because if the safeguards were sufficient, the Defendant would not have heard about John Doe's application and payment. Defendant argues that with regard to the sixth factor, the need for access is strong because Defendant wants to be able to convey truthful information to the public about the Association's payment of hardship assistance to a person who should not have received assistance ahead of other persons. With respect to the seventh factor, Defendant argues that the Association has identified no express statutory mandate favoring non-disclosure.

Defendant argues that if the Court denies him access to the documents under OPRA, he should be permitted access under the common law right of access. Defendant argues that the common law right of access has three elements: 1) The records must be common law public documents; 2) the person who seeks access must establish an interest in the subject matter of the material; and 3) the citizen's right to access must be balanced against the State's interest in preventing disclosure. Keddie v. Rutgers, The State University, 148 N.J. 36, 50 (1997). To determine whether the records should be disclosed to Defendant, Defendant argues that the Court must balance Defendant's interest in disclosure against the association's interest in confidentiality. Defendant argues that a six part test was established in Loigman v. Kimmelman, 102 N.J. 98, 113 (1986) to consider whether release of public records is appropriate under the common law. The test is:

1. The extent to which disclosure will impede agency function by discouraging citizens from providing information to the government;

2. The effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed;
3. The extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure;
4. The degree to which the information sought includes factual data as opposed to evaluative reports of policymakers;
5. Whether any finding of public misconduct have been insufficiently corrected by remedial measure instituted by the investigative agency; and
6. Whether any agency disciplinary or investigatory proceedings have arisen that may circulate the individual's asserted need for the materials.

With respect to the first and second factors, Defendant argues that the association has not provided any certifications or affidavits suggesting that benefits will drop if John Doe's identity is disclosed. Defendant argues that with respect to the third factor, disclosure of amounts paid in relief funds should not affect the Association's ability to process applications because the Defendant is not seeking information that might be contained within those applications. With respect to the fourth, Defendant argues that the information sought is solely factual. Defendant argues with respect to the fifth factor, findings of public misconduct have not been sufficiently corrected by remedial measures and that no disciplinary proceedings have arisen that might circumvent Defendant's need for access under the sixth factor.

Additionally, Defendant argues that the Court should award counsel fees if Plaintiff is required to produce documents.

### **c. Association's Reply to Defendant's Opposition**

The Association argues that this action does not concern John Doe's legal issues but rather is solely raised for the Court to determine whether the Association must strip itself of its obligation to protect privacy of all members as these qualified individuals and their spouses seek earned financial support from the Association in their time of need.

The Association argues that it is permitted to bring this application before the Court to seek a declaration as to its rights and responsibilities under OPRA. The Association argues that the Courts have permitted public agencies to seek such declarations as to their obligations. Bergen County Imp. Auth. V. North Jersey Media Group, Inc. 370 N.J. Super. 504 (App. Div. 2004). Here, the Association argues that it is seeking a declaration from the Court as to whether the OPRA's Legislative findings and intent regarding personal privacy as any merit. The Association cites N.J.S.A. 47:1A-1 for the proposition 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. The Association submitted a Certification of Frank B. Gunson, 3<sup>rd</sup> who outlined the specific procedures for a relief application. Mr. Gunson served as an Executive Committeeman from 1992 through 2004 and has served as Vice President of the New Jersey State Fireman's Association since 2007. In paragraph 9, he sets out the purpose of The Association and in paragraphs 11-16, he explains examples of how The Association assists colleagues, members and

members' families through an anonymous system that protects the members "privacy and dignity in their time of need."

Additionally, The Association argues that the Defendant's counterclaim is time barred and must be dismissed. The Association argues that OPRA permits a requestor to file an action in lieu of prerogative writs when it believes it has been improperly denied access to public records. The Association argues that it properly denied the requestor access to records on July 22, 2013. The Association argues that OPRA never addressed whether a requestor can reset the clock by simply filing a new request. The Association argues that the Court issue declaratory relief and reject Defendant's counterclaim to dismiss the action.

### III. Analysis

In New Jersey, citizens may obtain access to public records through 1) the Open Public Records Act ("OPRA"), 2) civil litigation procedures and 3) the common law right of access. Mag Entm't, LLC v. Div. of Alcoholic Beverage Control, 373 N.J. Super. 534, 543 (App. Div. 2005). While OPRA's function is to "make identifiable government records readily accessible for inspection, copying or examination," the law also requires 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..."

[See N.J.S.A. 47:1A-1]

Recently, in Sussex Commons Associates LLC v. Rutgers, 210 N.J. 531 (2012), the New Jersey Supreme Court noted that The Legislature passed OPRA in 2001 to replace the Right to Know Law. See Fair Share Hous. Ctr., supra, 207 N.J. at 497 n.4, 25 A.3d 1063. **HN3** OPRA requires that "government records shall be readily accessible" to the public "with certain exceptions, for the protection of the public interest." N.J.S.A. 47:1A-1. The law is designed to promote transparency in the operation of government. Burnett, supra, 198 N.J. at 414, 968 A.2d 1151. OPRA's promise of accessible public records enables "citizens and the media [to] play a watchful role in curbing wasteful government spending and guarding against corruption and misconduct." *Ibid.*

To that end, OPRA defines "government records" broadly:

[any record] 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 . . . or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof.

[N.J.S.A. 47:1A-1.1]

OPRA defines "public agency" or "agency" to include "any of the principal departments in the Executive Branch of State Government . . . and any independent State authority, commission, instrumentality or agency." *Ibid*.

However, Chief Justice Rabner explained:

OPRA exempts various documents from disclosure including records protected by the attorney-client privilege, inter- or intra-agency advisory, consultative, or deliberative material, pedagogical records at a public institution of higher education, and information that must be kept confidential pursuant to court order. Sussex, 201 NJ. 531 at 542.

The Appellate Court has determined that the Association was subject to OPRA, the question of whether an individual application for relief should be released has not been considered by the Court or the Government Records Council.

“The custodian and the court must delve into state and federal statutes and regulations to determine if the information is considered confidential and whether access to the information is inimical to the public interest or the individual interests of the person about whom information is sought, particularly when those entities or individuals have not received notice of the request and are unable to express their privacy concerns.”

[Gannett New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. 205, 213-14 (App. Div. 2005)]

When the requested material appears on its face to encompass legislatively recognized confidentiality concerns, a court should presume that the release of the government records is not in the public interest. *Id.* at 215.

In this case, the Court must determine whether Defendant is entitled to the requested disclosure under OPRA and/or under the common law. In Rivera v. Office of the County Prosecutor, 2012 N.J. Super. Unpub. LEXIS 1921 (Law Div. 2012), the Court recognized that OPRA creates specific responsibility to safeguard personal information. *Id.* at 12-13. To reconcile the interests, the Court utilized a seven factor balancing test explained in Doe v. Portiz, 142 N.J. 1, 88 (1995), which requires a court to consider:

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.

[142 N.J. 1, 88]

Courts have tended to favor the protection of confidential materials. “The dangers inherent in disclosure of confidential information for public dissemination are so obvious that we are compelled to conclude that the privacy interest [of the materials requested] prevail over the public interest in disclosing the information.” North Jersey Media Group, Inc. v. Bergen County Prosecutor’s Office, 405 N.J. Super. 386, 391 (App. Div. 2009).

The Courts have considered the public agency’s significant responsibility to protect privacy interests. In Michelson v. Watt, the Court considered a request to disclose health insurance coverage provided to public employees. 379 N.J. Super. 611 (App. Div. 2005). The records custodian refused to provide any individualized information concerning current employees, retired employees or officials and their dependents who participate in the medical plans offered by the municipality concluding that the information could not be released under OPRA because the same would invade personal privacy interests. *Id.* at 616-17. The Court agreed with the records custodian finding that generic information could be released as to the health care programs offered, but information about individuals, including what plan the employee had chosen or the amount of benefits received was confidential in nature and could not be released under either OPRA or the common law right of access. *Id.* at 625.

In Rivera v. Office of the County Prosecutor, the requestor sought to obtain all Use of Force Reports completed by police officers during a specific time period. 2012 N.J. Super. Unpub. LEXIS 1921 Law Div. 2012. The records custodian questioned whether release was appropriate where the “force used by the officer was done to restrain a person in psychological need rather than during a criminal arrest. The Law Division recognized that OPRA creates specific responsibility to safeguard personal information. *Id.* at 12-13. The Court concluded that in this, “highly personal event, the subject would likely not want to be disclosed.” *Id.* at 19.

Applying the Doe factors to the present case, the application is a public record as a document kept, made or maintained in the course of official business of the Association. The second factor weighs in favor of non-disclosure because the information is an individual’s complete and personal financial history, including but not limited to tax returns, credit card bills, mortgage payments and, hospital bills. Applying the third factor, revealing this information has the potential to lead to great harm created by the release of said information because it has the potential to lead to identity theft and public embarrassment. Defendant’s argument that John Doe has already sustained great public embarrassment is not without merit being that the incident for which he was fired was disclosed in the newspaper. A significant harm exists if individual relief applications are released. Applying the fourth factor, the release of the information may cause an applicant to hesitate before seeks assistance and may chill the disclosure of critical information regarding the need for assistance for fear that the knowledge will be subject to public scrutiny. The fifth factor, speaks to the adequacy of safeguards to prevent disclosure. The Association has established a system to convert the individual’s name into a unique identification number for each applicant to ensure the confidentiality of the information and to protect the interests of the applicant. While the Association has not directed this Court towards a statute mandating non-disclosure the seventh factor weighs in favor of non-disclosure because there is no policy or statute which mandates access.

In Sussex Commons, Chief Justice Rabner acknowledged that Rutgers University is subject to OPRA. Likewise, here the Appellate Division has acknowledged that the Association is subject to OPRA. However, the narrower issue is whether the Association must disclose the name and amount of relief given to a qualified member in a time of need. The Association has developed specific procedures to ensure that member applications are treated anonymously to eliminate the possibility of discrimination in determining relief requests. See Gunson Cert. at ¶ 9-16. As in Sussex Commons, this Court cannot see how it would further the purposes of OPRA to allow public access to documents not even revealed to the Association. Applicants seeking relief are identified only by number and applications are evaluated on the merits. See Gunson Cert. at ¶ 13-16. Thus the possibility of disclosure of applicants' names would create a chilling effect on applicants in their time of need. Moreover, disclosure under OPRA of an applicant's name would eradicate the procedures followed by the Association to provide relief anonymously to address members' needs.

Disclosure of members' names would likely harm the operation of the Association that serves qualified firefighters and their families throughout the State. See Gunson Cert. at ¶ 9. Thus the Court concludes that the names of applicants and amount paid in aid by the Association are not subject to OPRA.

Defendant has also sought disclosure under the common law right of access. The test articulated in Loigman v. Kimmelman, 102 N.J. 98, 113 (1986) is:

1. The extent to which disclosure will impede agency function by discouraging citizens from providing information to the government;
2. The effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed;
3. The extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure;
4. The degree to which the information sought includes factual data as opposed to evaluative reports of policymakers;
5. Whether any finding of public misconduct have been insufficiently corrected by remedial measure instituted by the investigative agency; and
6. Whether any agency disciplinary or investigatory proceedings have arisen that may circulate the individual's asserted need for the materials.

Applying these factors to the instant case, it is likely that disclosure would impede agency function because it would discourage indigent firemen and their families from applying for much needed aid. Additionally, allowing disclosure in the instant case would cause indigent firemen and those requiring medical treatment to be reluctant to provide the Association with personal and private information regarding their identity. There might be hesitancy on the part of applicants to provide the Association with personal information.

Moreover, if the defendant seeks to evaluate the Association relief program, it can do so without the names of individuals who have sought relief. No justified need has been articulated by the defendant. As set forth in Sussex Commons:

"The common law right extends to "written records 'made by public officers in the exercise of public functions.'" N. Jersey Newspapers Co. v. Passaic Cnty. Bd. of Chosen Freeholders, 127 N.J. 9, 13, 601 A.2d 693 (1992) (quoting Nero v. Hyland, 76 N.J. 213, 221-23, 386 A.2d 846 (1978)). Access to those materials involves a balancing of interests. A requestor must demonstrate an interest in the public record, which must "outweigh the State's interest in non-disclosure." See Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 302, 303, 966 A.2d 1054 (2009) (citations omitted).

[Sussex Commons Associates, LLC v. Rutgers, 210 N.J. 531, 549 (2012)]

Because the Association does not need to reveal the names of applicants to be evaluated, there is no common law right of access in this case. That right does not extend to the names of firefighters or their families who seek the Association's financial assistance in their time of need. Thus, the names and amount paid, need not be disclosed under the common law right of access. Therefore, the Association's Order to Show Cause is **GRANTED**.



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HON. LISA F. CHRYSTAL, J.S.C.