

WALTER M. LUERS, ESQ. - 034041999
LAW OFFICE OF WALTER M. LUERS, LLC
Suite C202
23 West Main Street
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Attorney for Plaintiff

FILED

FEB 04 2014

LAWRENCE M. MARON, J.S.C.

BATCH #	265
RECEIVED DATE	1-27-14
CA / CK / MO / CG	CA / CK / MO / CG
CK/CG ACCT. #	5394
AMOUNT	30-
PAYOR	Luers

JOHN PAFF, Plaintiff, v. HUDSON COUNTY SHERIFF DEPARTMENT and ROBERT TAINO in his official capacity as Executive Administrative Assistant and Records Custodian, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO. <u>L-38814</u> CIVIL ACTION ORDER TO SHOW CAUSE
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THIS MATTER being brought before the Court by Law Offices of Walter M. Luers, LLC, attorney for Plaintiff John Paff, seeking relief by way of summary action pursuant to R. 4:67-1(a), based upon the facts set forth in the verified complaint and supporting papers filed herewith; and the Court having determined that this matter may be commenced by order to show cause as a summary proceeding pursuant to *N.J.S.A.* 47:1A-6 and for good cause shown,

IT IS on this 4 day of FEBRUARY, 2014 ORDERED that the Defendants Hudson County Sheriff Department and Robert Taino appear and show cause on the 14 day of MARCH, 2014 before the Honorable Lawrence M. Maron, J.S.C., Superior Court, County of Hudson, County Administration Building, 595 Newark Avenue, 8th Floor, Jersey City, New Jersey, at 9 o'clock in the fore noon or as soon thereafter as counsel can be heard, why judgment should not be entered:

A. Disclosure of (1) all incident reports prepared in connection to an incident that occurred on December 2, 2013 that resulted in Ashely R. Hulse being charged with a violation of N.J.S. 2C:29-4A (child neglect) and other crimes at the location of 257 Cornelison Avenue, Jersey City, New Jersey; (2) all audio and visual recordings created in connection with that incident; and (3) all audio and video recordings of conversations between Gisele Camillo and any Hudson County Official at 2:30 p.m. on December 2, 2013 at the Sheriff Department's public window; and

B. An award of costs of this action and reasonable attorneys' fees; and

C. Such other, further and different relief as the Court may deem equitable and just.

And it is further *ORDERED* that:

1. A copy of this order to show cause, verified complaint and all supporting affidavits or certifications submitted in support of this application be served upon the Defendants personally or by certified mail, return receipt requested, within 7 days of the date hereof, in accordance with *R. 4:4-3* and *R. 4:4-4*, this being original process.

2. The Plaintiff must file with the Court their proof of service of the pleadings on the Defendants no later than three (3) days before the return date.

3. Defendant shall file and serve a written answer and opposition papers to this order to show cause and the relief requested in the verified complaint and proof of service of the same by FEBRUARY 21, 2014. The answer and opposition papers must be filed with the Clerk of the Superior Court in the county listed above and a

copy of the papers must be sent directly to the chambers of the Honorable Lawrence M. Maron, J.S.C.

4. The Plaintiff must file and serve any written reply to the Defendants' order to show cause opposition by MARCH 3, 2014. The reply papers must be filed with the Clerk of the Superior Court in the county listed above and a copy of the reply papers must be sent directly to the chambers of the Honorable Lawrence M. Maron, J.S.C.

5. If the Defendants do not file and serve opposition to this order to show cause, the application will be decided on the papers on the return date and relief may be granted by default, provided that the Plaintiff files a proof of service and a proposed form of order at least three days prior to the return date.

6. If the Plaintiff has not already done so, a proposed form of order addressing the relief sought on the return date (along with a self-addressed return envelope with return address and postage) must be submitted to the Court no later than three (3) days before the return date.


7. Defendants take notice that the Plaintiff has filed a lawsuit against you in the Superior Court of New Jersey. The verified complaint attached to this order to show cause states the basis of the lawsuit. If you dispute this complaint, you, or your attorney, must file a written answer and opposition papers and proof of service before the return date of the order to show cause.

These documents must be filed with the Clerk of the Superior Court in the county listed above. A list of these offices is provided. Include a \$135 filing fee payable to the "Treasurer, State of New Jersey." You must also send a copy of your answer and

opposition papers to the Plaintiff's attorney whose name and address appear above, or to the Plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve your answer and opposition papers (with the fee) or judgment may be entered against you by default.

8. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live. A list of these offices is provided. If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A list of these numbers is also provided.

9. The Court will entertain argument, but not testimony, on the return date of the order to show cause, unless the Court and parties are advised to the contrary no later than 3 days before the return date.



HON. LAWRENCE M. MARON, J.S.C.

WALTER M. LUERS, ESQ. - 034041999
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Telephone: 908.894.5656
Attorney for Plaintiff

<p>JOHN PAFF, Plaintiff, v. HUDSON COUNTY SHERIFF DEPARTMENT and ROBERT TAINO in his official capacity as Executive Administrative Assistant and Records Custodian, Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO. _____ CIVIL ACTION VERIFIED COMPLAINT</p>
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Plaintiff John Paff through his undersigned counsel Law Offices of Walter M. Luers, LLC, by way of complaint against the Defendants Hudson County Sheriff Department and Robert Taino, alleges as follows:

PRELIMINARY STATEMENT

1. This is an action alleging violations of the Open Public Records Act, *N.J.S.A. 47:1A-1, et seq.* ("OPRA") and the common law right of access seeking to require disclosure of documents and that were withheld.

THE PARTIES

2. Plaintiff John Paff is a resident of Franklin Township, New Jersey. His address is P.O. Box 5424 Somerset, NJ 08875.

3. Defendant Hudson County Sheriff Department's principal place of business is located at Hudson County Administration Building, 595 Newark Avenue, Jersey

City, New Jersey 07306. The Office of the Governor is a “public agency” as the term is defined by OPRA, *N.J.S.A.* 47:1A-1.1.

4. Defendant Robert Taino is employed as an Executive Administrative Assistant at the Sheriff’s Department and is the person who denied access to the requested records. Taino is a “custodian of a government record” within the meaning of *N.J.S.A.* 47:1A-1.1. Taino’s principal place of business is Hudson County Administration Building, 595 Newark Avenue, Jersey City, New Jersey 07306.

JURISDICTION AND VENUE

5. The Court has subject matter jurisdiction of this action pursuant to *N.J.S.A.* 47:1A-6 and the common law.

6. Venue is proper in this court pursuant to *R.* 4:3-2(a)(2) because all of the relevant events occurred in this County, and the public agency, the Defendant, is located in Hudson County.

FACTUAL ALLEGATIONS

7. On December 2, 2013, Plaintiff submitted a written OPRA request to the Defendants requesting, in relevant part, copies of the police incident reports involving the arrest of Ashley Hulse on December 2, 2013 at 2 p.m. in front of 257 Cornelison Avenue, Jersey City, and all audio and video recordings of that incident, and all audio and video recordings of conversations between any Hudson County official and Gisele Camillo that occurred on December 2, 2013 at about 2:30 p.m. at the window where the Sheriff’s office interacts with citizens.

8. On December 12, 2013, Defendants denied access to the incident reports as criminal investigatory records. Also, the Defendants requested additional time to locate and review the audio and visual recordings.

9. On December 12, 2013, Plaintiff wrote an email to Defendant Taino granting him an extension of time until December 20, 2013 to provide Plaintiff with a response regarding the requested audio and video recordings.

10. On December 17, 2013, Plaintiff wrote an email to Neil Carroll at Defendant and told him that parts of his OPRA request were still outstanding.

11. As of the date of this Verified Complaint, Plaintiff has received no further response and has not received the requested audio and video recordings.

12. The documents requested by Plaintiff are public records and subject to disclosure. Plaintiff submitted a valid written OPRA request.

13. Plaintiff has a strong public interest and legitimate private interest in obtaining the requested documents. Plaintiff submits hundreds of OPRA requests to public agencies at all levels of government. Sometimes he does so to ensure compliance with OPRA or the Open Public Meetings Act or financial disclosure laws. Other times he reads about matters in the press, especially those involving official misconduct or police misconduct, and he files OPRA requests for information. Often Mr. Paff will frequently follow-up such OPRA requests by filing internal affairs complaints, ethics grievances or complaints with the Division of Local Government Services if warranted.

14. The documents requested are public records within the meaning of the common law right of access. Defendant's interest in non-disclosure does not outweigh Plaintiff's interest in disclosure.

COUNT I: VIOLATION OF OPRA

15. The Plaintiff repeats and incorporates by reference each and every allegation contained in paragraphs 1-14 of the Plaintiff's complaint as though fully set forth at length herein.

16. The Defendant has violated OPRA by not providing copies of the documents requested by Plaintiff.

COUNT II: VIOLATION OF COMMON LAW RIGHT OF ACCESS

17. Plaintiff repeats and incorporates by reference each and every allegation contained in paragraphs 1-16 of the Plaintiff's complaint as though fully set forth at length herein.

18. Plaintiff has a common law right of access to receive copies of the documents requested by him.

19. Plaintiff has a legitimate private interest and wholesome public interest in the requested records.

20. Defendant has no legitimate interest in maintaining the secrecy of these documents. Therefore, the Defendant has violated Plaintiff's common law right of access.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment against the Defendant:

- A. Ordering Defendant to provide copies of the documents requested by him in his December 2, 2013 OPRA request;
- B. Awarding Plaintiff costs and reasonable attorneys' fees; and
- C. For such other or further relief as this Court deems just and equitable.

CERTIFICATION PURSUANT TO R. 4:5-1

I certify that the dispute about which I am suing is not the subject of any other action pending in any other court or a pending arbitration proceeding to the best of my knowledge and belief. Also, to the best of my knowledge and belief no other action or arbitration proceeding is contemplated. Further, other than the parties set forth in this complaint, I know of no other parties that should be made a part of this lawsuit. In addition, I recognize my continuing obligation 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.

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

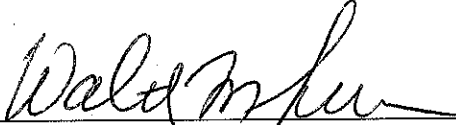
I certify that confidential personal identifiers have been redacted from documents now submitted to the Court, and will be redacted from all documents submitted in the future.

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4, Walter M. Luers, Esq. is designated as trial counsel on behalf of Plaintiff.

Respectfully Submitted,

LAW OFFICES OF WALTER M. LUERS, LLC

By: 
Walter M. Luers, Member
Suite C202
23 West Main Street
Clinton, New Jersey 08809
Telephone: 908.894.5656

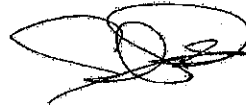
DATED: January 25, 2014

VERIFICATION

John Paff, of full age, certifies as follows:

1. I am the Plaintiff in the action captioned "John Paff v. Hudson County Sheriff Department, *et al.*" 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.



John Paff

Dated: January 24, 2014

WALTER M. LUERS, ESQ. - 034041999
LAW OFFICE OF WALTER M. LUERS, LLC
Suite C202
23 West Main Street
Clinton, New Jersey 08809
Telephone: 908.894.5656
Attorney for Plaintiff


<p>JOHN PAFF, Plaintiff, v. HUDSON COUNTY SHERIFF DEPARTMENT and ROBERT TAINO in his official capacity as Executive Administrative Assistant and Records Custodian, Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY</p> <p>DOCKET NO. _____</p> <p>CIVIL ACTION</p> <p>CERTIFICATION OF WALTER M. LUERS</p>
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WALTER M. LUERS, of full age, who is the attorney for the Plaintiff in this action,
hereby certifies and says:

1. Attached are true and correct copies of Plaintiff's December 2, 2013
OPRA request; Defendants' December 12, 2013 response; Plaintiff's December 12, 2013
extension to December 20, 2013; and Plaintiff's December 17, 2013 follow-up email.

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.

DATED: January 25, 2014


Walter M. Luers



John Paff <opengovtissues@gmail.com>

OPRA Request County of Hudson

1 message

John Paff <paff@pobox.com>

Mon, Dec 2, 2013 at 4:17 PM

To: ncarroll@hcnj.us, paff@pobox.com

County of Hudson

Please accept this e-mail/fax as my request for government records in accordance with the Open Public Records Act (OPRA) and the common law right of access. Please respond and send all responsive documents to me via e-mail at paff@pobox.com. If e-mail is not possible, please fax responses and responsive records to me at [908-325-0129](tel:908-325-0129). Also, I would appreciate it if you would acknowledge your receipt of this e-mail.

Records requested:

For the following incident/arrest:

Accused: Ashley Hulse

Approximate Location: In front of 257 Cornelison Avenue, Jersey City.

Date and approximate hour of incident: December 2, 2013, at approx. 2 p.m.

Arresting Officer: Unknown Hudson County Sheriff's Department Officer


I would like the following records:

1. Police Incident Reports, including all supplemental reports.
2. Call For Service (CFS) record from the PD's CAD system.
3. Uniform Arrest Report(s).
4. Use of Force Report(s).
5. All video and audio recordings (including but not limited to those from patrol car dash cameras) of or related to this incident and subsequent processing and incarceration of the accused. Specifically, if there are any cameras that captured any video of the sidewalk and street in front of 257 Cornelison Avenue, Jersey City between 1:00 p.m. and 3:00 p.m. on 12/02/13, I want copies of those recordings. (Note, if you claim that the recordings are exempt from access, DO NOT delete or overwrite them until after the conclusion of any litigation I may file challengin denial of access).
6. All CDR and other forms of complaints filed against the accused.
7. All video and audio recordings of conversations between any Hudson County official and Gisele Camillo that occurred on 12/02/13 at about 2:30 p.m. at the window where the Sheriff's office interacts with citizens.

Thank you.

John Paff
(voice - 732-873-1251)

Attachment: This request as a text file.

 **20131202T161750R.txt**
2K



John Paff <opengovtissues@gmail.com>

Re: FW: OPRA Requests - Dated December 2, 2013:

1 message

John Paff <paff@pobox.com>

Thu, Dec 12, 2013 at 1:08 PM

To: Robert Taino <rtaino@hcnj.us>

Mr. Taino:

Thank you. On items 5 through 7, I agree to an extension through Friday, December 20, 2013 within which you will either fulfill or deny my request. Is that agreeable to you?

*John Paff
P.O. Box 5424
Somerset, NJ 08875
Voice: 732-873-1251
Fax: 908-325-0129
e-mail: paff@pobox.com*

On Thu, Dec 12, 2013 at 12:49 PM, Robert Taino <rtaino@hcnj.us> wrote:

Sorry about that - problem with Email - they are attached now.

Mr. Paff:

In response to your 7 OPRA Requests of December 2, 2013 the reply to the same is as follows:

1 - Your requests for all Incidents reports is denied, this is based upon Executive Order # 9, the exclusions in NJSA47:1A-1.1 as this request deals with criminal investigative reports. See Nance v. Scotch Plains Police Department GRC 2003-125 & Rivera v. Passaic County Sheriffs Office GRC Complaint # 2010-152.

2 - The Uniform Arrest is attached.

3 - Use of Force Report is attached.

4 - All Forms of Complaints are attached, including Motor Vehicle Summons.

Please Note: The attachments for #s 2-4 contain necessary redactions

5 - Your request for Call for Service C.F.S. can not be supplied as that document does not exist.

6 - Your request for audio & visual recordings is being undertaken. Additional time is required to locate the same and thereafter a determination may be made as to your request.

7 - Your request for audio & video recordings of conversations between Gisele Camillo and any Hudson County Official at 2:30 P.M. on December 2, 2013 will require additional time to locate and thereafter a determination will be made regarding your request.



John Paff <opengovtissues@gmail.com>

Re: FW: OPRA Requests - Dated December 2, 2013:

1 message

John Paff <paff@pobox.com>

Tue, Dec 17, 2013 at 12:51 PM

To: Neil Carroll <ncarroll@hcnj.us>

Mr. Carroll:

Attached is my response to Mr. Taino. In sum, I received the attachments but there are still some parts of my request that are pending.

*John Paff
P.O. Box 5424
Somerset, NJ 08875
Voice: 732-873-1251
Fax: 908-325-0129
e-mail: paff@pobox.com*

On Tue, Dec 17, 2013 at 10:43 AM, Neil Carroll <ncarroll@hcnj.us> wrote:

Mr. Paff:

I have been out of my office since last Wednesday. Upon returning today I noticed your e-mail below. Please let me know if you ultimately received the missing attachments. If not I will make sure that the matter gets taken care of immediately.

Thanks

Neil

From: opengovtissues@gmail.com [mailto:opengovtissues@gmail.com] **On Behalf Of** John Paff**Sent:** Thursday, December 12, 2013 12:43 PM**To:** Robert Taino**Cc:** Neil Carroll; Robert Pompliano; Donato Battista; Frank Schillari**Subject:** Re: FW: OPRA Requests - Dated December 2, 2013:

I show no attachments. Please advise.

John Paff
P.O. Box 5424
Somerset, NJ 08875
Voice: 732-873-1251
Fax: 908-325-0129
e-mail: paff@pobox.com

On Thu, Dec 12, 2013 at 11:09 AM, Robert Taino <rtaino@hcnj.us> wrote:

Mr. Paff:

In response to your 7 OPRA Requests of December 2, 2013 the reply to the same is as follows:

1 - Your requests for all Incidents reports is denied, this is based upon Executive Order # 9, the exclusions in NJSA47:1A-1.1 as this request deals with criminal investigative reports. See Nance v. Scotch Plains Police Department GRC 2003-125 & Rivera v. Passaic County Sheriffs Office GRC Complaint # 2010-152.

2 - The Uniform Arrest is attached.

3 - Use of Force Report is attached.

4 - All Forms of Complaints are attached, including Motor Vehicle Summons.

Please Note: The attachments for #s 2-4 contain necessary redactions

5 - Your request for Call for Service C.F.S. can not be supplied as that document does not exist.

6 - Your request for audio & visual recordings is being undertaken. Additional time is required to locate the same and thereafter a determination may be made as to your request.

7 - Your request for audio & video recordings of conversations between Gisele Camillo and any Hudson County Official at 2:30 P.M. on December 2, 2013 will require additional time to locate and thereafter a determination will be made regarding your request.

We will advise you of the nominal fees for this information upon conclusion of the recording investigation.



Extension to 12-20.pdf
53K

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www.luerslaw.com

January 25, 2014

Walter M. Luers, Esq.*

*Also admitted in New York

Writer's Direct Email: wluers@luerslaw.com

Hon. Lawrence M. Maron, J.S.C.
Superior Court of New Jersey – Law Division
Administration Building
595 Newark Avenue, 8th Floor
Jersey City, New Jersey 07306

Re: *Paff v. Hudson County Sheriff Department, et al.*

Dear Judge Maron:

We are submitting this Letter Brief in lieu of a more formal brief in support of this action under the Open Public Records Act (“OPRA”), *N.J.S.A. 47:1A-1, et seq.*, and the common law right of access, which has been opened to the Court via Verified Complaint and Order to Show Cause. This action is being brought because Defendants have denied Plaintiff access to the following records: (1) all incident reports prepared in connection to an incident that occurred on December 2, 2013 that resulted in Ashely R. Hulse being charged with a violation of N.J.S. 2C:29-4A (child neglect) and other crimes at the location of 257 Cornelison Avenue, Jersey City, New Jersey; (2) all audio and visual recordings created in connection with that incident; and (3) all audio and video recordings of conversations between Gisele Camillo and any Hudson County Official at about 2:30 p.m. on December 2, 2013 at the Sheriff Department’s public window.

First, we discuss the facts of this case. Second, we discuss why this action should proceed in a summary manner. Third, we discuss legal arguments that support disclosure.

STATEMENT OF FACTS

For the facts, the Court is respectfully referred to Plaintiff's Verified Complaint. Plaintiff's OPRA request and related correspondence is attached to the Certification of Walter M. Luers ("Luers Cert.").

LEGAL ARGUMENT

POINT I

PLAINTIFF'S 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 Superior Court." *N.J.S.A.* 47:1A-6. Once instituted, "[a]ny such proceeding shall proceed in a summary or expedited manner." *Id.* "This statutory language requires a trial court to proceed under the procedures prescribed in Rule 4:67." *Courier News v. Hunterdon County Prosecutor's Office*, 358 N.J. Super. 373, 378 (App. Div. 2003). Any such action must be initiated by Order to Show Cause, supported by a verified Complaint. *Id.* (citing *R. 4:67-2(a)*). Here, because OPRA authorizes actions under it to proceed in a summary manner, and Plaintiff's request for an order to show cause is supported by a verified complaint, the relevant documents have been provided via certification, and the relevant facts should not reasonably be disputed, the order to show cause should be granted so this matter may proceed in a summary manner. *R. 4:67-2(a)*.

POINT II

THE RECORDS SOUGHT BY PLAINTIFF SHOULD BE DISCLOSED

Plaintiff seeks records pursuant to OPRA and the common law right of access. 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 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)).

These lofty descriptions of the purposes of OPRA are not mere bromides or empty statements of legislative intent. Our Supreme Court has stated that "Those who enacted OPRA understood that knowledge is power in a democracy, and that without access to information contained in records maintained by public agencies citizens cannot monitor the operation of our government or hold public officials accountable for their actions." *Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities*, 207 N.J. 489, 502 (2011).

The burden of proof in showing that a denial of access was justified rests solely with the Records Custodian. *N.J.S.A. 47:1A-6*; *Asbury Park Press v. Monmouth County*, 406 N.J. Super. 1, 7 (App. Div. 2009). Here, the documents sought by Plaintiff are "government records" within the meaning of OPRA. Under OPRA, a "government record":

means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, 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, including subordinate boards 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, including subordinate boards thereof. *N.J.S.A. 47:1A-1.1.*

For the forgoing reasons, we submit that the records requested by Plaintiff are all government records that must be disclosed under OPRA. With respect to the requested audio and video recordings, Defendants have not given any reason for non-disclosure; they simply have not provided the requested records within both seven business days after the request and within Mr. Paff's extension of time to respond.

A. Plaintiff's Request for Incident Reports

Defendants claim the "criminal investigatory record" exemption in response to Plaintiff's request for incident reports. However, reliance on that exemption is improper here. The "criminal investigatory records" exception only applies to records that are *not* required by law to be made, maintained or kept on file by the Defendants. *N.J.S.A. 47:1A-1.1.* That definition does not apply to the incident reports created here because they are required by law to be made, maintained or kept on file.

First, Plaintiff has requested the criminal investigatory records in a case where a person was charged with an indictable offense for which the legislature requires law enforcement officials, in cooperation with county and State bureaus of identification, to make and maintain records. Pursuant to *N.J.S.A. 53:1-20.2*, it is the "duty" of law enforcement officers in complaints of indictable offenses, to forward to specific State and county records bureaus of identification "*all such information which can at that time be obtained*, on forms to be provided

for that purpose.” (emphasis added). There is a continuing duty to report the information. *Ibid*. The term “all such information” must include some of the information obtained in a criminal investigation of this offense, therefore, for at least some of the information requested by Plaintiff, a statutory duty already exists for records to be “made, maintained or kept,” and therefore those records are not subject to the “criminal investigatory” exemption.

Second, according to New Jersey Division of Archives and Records Management (“DARM”) records retention schedule C210000-002, which is the records retention schedule for the County prosecutors’ offices (available at <http://www.nj.gov/treasury/revenue/rms/pdf/C210000-002.pdf>), the Defendants are required to retain the criminal investigatory records requested by the Plaintiff. (Record Series 0100-0001). Because of the DARM requirement, the records are not subject to the “criminal investigatory” exemption, because they meet the “required by law to be made, maintained or kept” test. The Appellate Division has held that under OPRA, this test can be satisfied by authority other than “statutes” or “administrative rules”; here, the DARM retention schedules constitute such authority. In *O’Shea v. Township of West Milford*, 410 N.J. Super. 371 (App. Div. 2009), the Appellate Division held that the Attorney General’s “Use of Force” Policy issued in 1985 had the force of law within the meaning of the “required by law to be made, maintained or kept” test. *Id.* at 382. The Appellate Division observed that “[m]anifestly, there are no specific ‘statutes’ or ‘administrative rules’ that require [Use of Force reports] to be completed or maintained by the Township’s police department.” However, the Appellate Division then held that the Attorney General’s “Use of Force” Policy issued in 1985 had the force of law and was sufficient to meet the “required by law to be made, maintained or kept” test. *Ibid.* As a result of this holding, the Appellate Division

rejected the Defendants' arguments that Use of Force reports were criminal investigatory records that were not subject to OPRA.

DARM retention schedules should be held to have the same legal effect as the Attorney General's "Use of Force" Policy; these schedules carry at least the same force of law as Attorney General's internal guidelines. None other than the Office of the Attorney General has acknowledged that the DARM retention schedules have the force of law, in the Attorney General's Internal Affairs Guidelines, located at http://www.nj.gov/lps/dcj/agguide/internalaffairs2000v1_2.pdf.

For that reason this Court should hold that records subject to the DARM retention schedules are not included in the definition of "criminal investigatory records." Recognizing that DARM retention schedules meet the "required by law to be made, maintained or kept" standard under OPRA is consistent with the statute's broad mandate of access. Under the statute, the "criminal investigatory" exemption should not be limitless. That is not what OPRA states. Where records, even those in a criminal investigation, are systematically kept and maintained by the State pursuant to agency guidelines that carry the force of law, they can no longer be considered "criminal investigatory" records under OPRA. Recognizing this principle will not render the "criminal investigatory" exemption meaningless.

Further evidence that OPRA contemplates the disclosure of at least some closed criminal investigatory cases can be found in the structure of OPRA itself. *N.J.S.A.* 47:1A-3(b) already permits the disclosure of records in *ongoing* criminal investigations. It states, in relevant part, that in ongoing criminal investigations, "the right of access...*may* be denied...[if it is] inimical to the public interest" (emphasis added). *Ibid.* The "may" in this provision is permissive of disclosure of some criminal investigatory records at the discretion of officials;

these same records must certainly also be available in closed criminal investigations. After all, the most compelling need to protect records in a criminal investigation exists when that investigation is ongoing, and the need for confidentiality drops drastically once the investigation is over. *Shuttleworth v. City of Camden*, 258 N.J. Super. 573, 586 (App. Div. 1992). If OPRA does not require the disclosure of records in this closed investigation, then the criminal investigatory exception would seal such records from public disclosure forever, which directly contradicts the language in *N.J.S.A. 47:1A-3(b)* that already contemplates some criminal investigatory records being disclosed. Certainly the Legislature did not intend that access to records would be greater *during* an investigation than after it has been closed.

As discussed earlier, the requirement that records must be “required by law to be made, maintained or kept” to be subject to public access under the Right to Know Law was “strictly construed.” It is entirely reasonable to interpret the repeal of RTKL with OPRA, which included a much broader definition of public records, as eliminating the requirement that the criminal investigatory record exception retain its “strict construction.” Quite to the contrary, OPRA specifically states that all 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*). Defendants and this Court are under an “express policy directive of the Legislature to construe limitations narrowly.” *Asbury Park Press v. County of Monmouth*, 406 N.J. Super. 1, 8 (App. Div. 2009). Allowing Defendants to claim these records exempt as criminal investigatory records does exactly the opposite: it construes access narrowly and in favor of public agencies.

For these reasons, the Court should follow the published opinion of *O'Shea v. Township of West Milford* and hold that DARM records retention requirements have the force of law, and that records covered therein satisfy the "required by law to be made, maintained or kept" test. That principle requires the disclosure of the incident reports.

POINT III

ACCESS SHOULD BE GRANTED UNDER THE COMMON LAW RIGHT OF ACCESS

If this Court should deny access to the records requested under OPRA, the Court should grant access under the common law right of access. The public's right of access to records is broader under the common law right of access than under OPRA. "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). Thus, the right of access to records under the common law is broader than under OPRA. *North Jersey Media Group*, 389 N.J. Super. at 537.

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," *South Jersey Publishing Co. v. New Jersey Expressway Auth.*, 124 N.J. 478, 487 (1991), and (3) the citizen's right to access "must be balanced against the State's interest in preventing disclosure." *Higg-A-Rella, Inc.*, 141 N.J. at 46; see also *Keddie v. Rutgers, The State University*, 148 N.J. 36, 50 (1997) (discussing these three elements).

Common law public records “include almost every document recorded, generated, or produced by public officials whether or not 'required by law to be made, maintained or kept on file.’” *Shuttleworth v. City of Camden*, 258 N.J. Super. 573, 582 (App. Div. 1992). Here, the records sought are public records because they are kept by the public agency. *Higg-A-Rella, Inc.*, 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 because the record was required or directed by law to be made or kept, or because it was filed in a public office). Plaintiff has a strong interest in these records because he is a civil rights activist working towards the public accountability of the police within his community. Thus, Plaintiff has standing to request these documents under the common law, a requirement that is easily met. “A citizen, and the press on its behalf, does not have to prove any personal interest in order to satisfy the common law standing requirement.” *Daily Journal v. Police Dep’t of City of Vineland*, 351 N.J. Super. 110, 122 (App. Div. 2002).

To determine whether the records should be disclosed to Plaintiff, this Court must balance Plaintiffs’ interest in disclosure against Defendants’ interest in confidentiality. In weighing whether disclosure outweighs confidentiality, New Jersey courts have weighed several factors, including

- (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government;
- (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed;
- (3) the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure;
- (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policy-makers;
- (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and
- (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual’s asserted need for the

materials. *Loigman v. Kimmelman*, 102 N.J. 98, 113 (1986).

Defendants have submitted no reasons for why these factors weigh against disclosure of these documents here. Briefly, however, we submit that they weigh in favor of disclosure. As discussed in Plaintiff's Verified Complaint, Plaintiff frequently makes OPRA requests regarding the use of force by law enforcement officers; he blogs about use of force; he files internal affairs complaints; and he brings attention to the use of force (and the unlawful use of force) by law enforcement. In this case, in which force was used, the incident reports may very well show that the law enforcement officer acted reasonably under the circumstances and they would show the law enforcement officer's side of the story. Thus, disclosure is reasonable, especially when Defendants have not articulated any reason for non-disclosure.

Finally, the interest weighing against disclosure here is significantly less than in an ongoing investigation because "[w]hile there is a real need to deny access where there is an ongoing law enforcement investigation...the same values do not survive a balancing after the investigation is closed." *Shuttleworth v. City of Camden*, 258 N.J. Super. 573, 586 (App. Div. 1992). There is really no reason to withhold any of these records, now that the investigation is complete. The Sheriff's Department has arrested a person and charged them. Thus, the investigation is over. Plaintiff possesses a wholesome, indeed compelling public interest in the disclosure of these documents, and they should be disclosed under the common law right of access.

Respectfully submitted,



Walter M. Luers

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March 21, 2014

VIA HAND DELIVERY

Civil Filing Clerk
Hudson County Superior Court
595 Newark Avenue
Jersey City, NJ 070306

**Re: John Paff v. Hudson County Sheriff Department, et al.
Docket No.: HUD-L-399-14
Our File No.: 12290-0098**

Dear Sir/Madam:

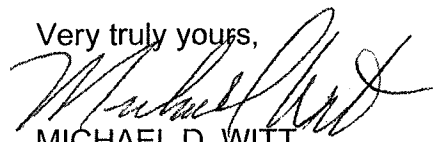
Enclosed please find an original and one copy of the following on behalf of Defendants, Hudson County Sheriff Department and Robert Taino, in his official capacity as Executive Administrative Assistant and Records Custodian:

- 1) Answer to Verified Complaint;
- 2) Brief;
- 3) Certification of Counsel;
- 4) Certification of Andrew Conti;
- 5) Certification of Service; and
- 6) Proposed Form of Order.

Also enclosed please find our firm check in the sum of \$135.00 representing your filing fee. Kindly file same and return a stamped filed copy in the enclosed self-addressed envelope provided for your convenience.

Thank you for your attention to this matter.

Very truly yours,


MICHAEL D. WITT
For the Firm

MDW:a/
Enclosures

c: Honorable Lawrence M. Maron, J.S.C. (*via hand delivery*)
Walters M. Leurs, Esq. (*via email & lawyers service*)

**MICHAEL D. WITT, ESQ. (031021999)
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300 Harmon Meadow Boulevard
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Attorneys for Defendants
File No. 12290-0098**

JOHN PAFF,

Plaintiff,

v.

**HUDSON COUNTY SHERIFF
DEPARTMENT and ROBERT TAINO in
his official capacity as Executive
Administrative Assistant and Records
Custodian,**

Defendants.

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - HUDSON COUNTY
DOCKET NUMBER: HUD-L-399-14**

Civil Action

**ANSWER TO VERIFIED COMPLAINT
AND DESIGNATION OF TRIAL
COUNSEL**

Defendant Hudson County Sherriff's Office and defendant Robert Taino, in his official capacity as Executive Administrative Assistant and custodian of records (collectively, "Defendants"), answer as follows to Plaintiff's Verified Complaint:

1. Admitted.
2. Defendants are without sufficient knowledge to form a belief as to the accuracy of the allegations contained in Paragraph 2 of Plaintiff's Verified Complaint and, therefore, deny the same.
3. Admitted.
4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted to the extent that Plaintiff made a request for records to Defendants on the date indicated. As to content, the request speaks for itself.

8. Admitted.

9. Admitted.

10. Admitted.

11. Denied.

12. Denied.

13. Denied to the extent that the first sentence of Paragraph 13 of Plaintiff's Verified Complaint contains no factual allegations but is, rather, a conclusion of law. With regard to the remaining allegations contained in Paragraph 13, Defendants are without sufficient knowledge to form a belief as to the accuracy of those allegations and, therefore, deny the same.

14. Denied.

COUNT I: VIOLATION OF OPRA

15. Defendants re-allege and incorporate their answers to Paragraphs 1 through 14 of Plaintiff's Verified Complaint as if each were set forth fully herein.

16. Denied.

COUNT II: VIOLATION OF COMMON LAW RIGHT OF ACCESS

17. Defendants re-allege and incorporate their answers to Paragraphs 1 through 16 of Plaintiff's Verified Complaint as if each were set forth fully herein.

18. Denied.

19. Denied.

20. Denied.

WHEREFORE, Defendants respectfully request that judgment be entered in favor of Defendants and against Plaintiff on all counts of Plaintiff's Verified Complaint, that Plaintiff's Verified Complaint be dismissed in its entirety, with prejudice, and that each party bear its own costs, fees, and expenses.

CERTIFICATION PURSUANT TO R 4:5-1

I certify that the dispute about which I am suing is not the subject of any other action pending in any other court or a pending arbitration proceeding to the best of my knowledge and belief. Also, to the best of my knowledge and belief no other action or arbitration proceeding is contemplated. Further, other than the parties set forth in this complaint, I know of no other parties that should be made a part of this lawsuit. In addition, I recognize my continuing obligation 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.

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.

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4, Michael D. Witt, Esq., is designated as trial counsel on behalf of Plaintiff.

CHASAN LEYNER & LAMPARELLO, PC
Counsel for Defendants
Hudson County Sherriff's Department and
Robert Taino

Date: March 21, 2014

By: _____



Michael D. Witt, Esq.

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* CERTIFIED CIVIL TRIAL ATTORNEY
+ CERTIFIED CRIMINAL TRIAL ATTORNEY
^o R. 1:40 QUALIFIED MEDIATOR

March 21, 2014

Honorable Lawrence Maron, J.S.C.
Superior Court of New Jersey ~ Hudson Vicinage
595 Newark Avenue, Chambers 803A
Jersey City, New Jersey 07306

Re: **Paff v. Hudson County Sheriff's Office, et al.**
Docket No. : HUD-L-399-14
Our File No: 12290-0098
Defendants' Response to Order to Show Cause

Judge Maron:

This firm represents defendants Hudson County Sheriff's Office and Robert Taino, custodian of records (collectively, "Defendants"), in the referenced matter. Please accept this letter brief in lieu of a more formal pleading in opposition to Plaintiff's Order to Show Cause and Verified Complaint in the above referenced matter. For the reasons set forth herein, Defendants respectfully request that Plaintiff's Order to Show Cause and Verified Complaint be dismissed in their entirety with prejudice.

RELEVANT FACTS

On December 2, 2013, Plaintiff submitted a written OPRA request to the Defendants requesting, in relevant part, copies of police incident reports involving the arrest of Ashley Hulse on December 2, 2013 at 2 p.m. in front of 257 Cornelison Avenue, Jersey City, and all audio and video recordings of that incident, and all audio and video recordings of conversations between any Hudson County official and Gisele Camillo that occurred on December 2, 2013 at about 2:30 p.m. at the window where the Sheriff's office interacts with citizens. (Verified Complaint, ¶7)

On December 12, 2013, Defendants denied access to the incident reports as criminal investigatory records. (Verified Complaint, Exhibit B) Also, the Defendants requested additional time to locate and review the audio and visual recordings. (Id.) Plaintiff was advised of the reason for the denial, which were that the documents requested were criminal investigatory records and that they pertained to an investigation in progress. (Id.)

Video footage potentially responsive to Plaintiff's was recorded by a security camera operated by the Hudson County Sheriff's Office at the County of Hudson Offices complex (the "Complex") located at Hudson County Plaza, 257 Cornelison Avenue, Jersey City, New Jersey. The Sheriff's Office declined to provide the video footage in response to Plaintiff's request. (Verified Complaint, ¶11)

The Complex is a seven (7) story high building and has approximately 340,000 square feet of space. The Complex houses a number of County offices, including the County Clerk, Department of Family Services, the Sheriff's Office, Superintendent of

Elections, Division of Community Development, the Registrar's Office, and the Board of Taxation. (Certification of Andrew Conti ("Conti Cert."), ¶3)

Due to the number of County offices present and the services provided to the public by those offices, the Complex receives a large number of outside visitors on a daily basis. This number can reach in the hundreds on a given day. (Conti Cert., ¶4) Given the high level of public visitation, security measures are in place at the Complex in order to protect the health, safety, and welfare of both the County personnel who work there as well as the public who visit. (Conti Cert., ¶5) In general, security measures include armed Sheriff's Officers, security checkpoints, check-in requirements, civilian security guards at all employee and public entrances, and remote surveillance methods. (Conti Cert., ¶6) Although some security measures are open and apparent, the Sheriff's Office does not disclose the exact nature of all security measures in order to maintain an effectively safe environment. Simply put, if all security measures were disclosed to the public, those measure lose their effectiveness as plans can be made to defeat the same. (Conti Cert., ¶7)

Part of the security measures in place includes remote surveillance via video camera. The cameras are located around the Complex and provide coverage of various locations both inside and outside the Complex. Sheriff's Office personnel monitor the video feeds to look for suspicious or unusual activity. (Conti Cert., ¶8) Family Services in particular receives a high amount of outside visitors. Accordingly, Sheriff's Officers are regularly posted at that office to maintain security and safety. (Conti Cert., ¶9)

The camera located near the Family Services Office's entrance is purposefully not readily identifiable as a video camera. Rather, its appearance and placement are intended to make the camera blend in with other features of the building. (Conti Cert., ¶10) Providing video from this particular camera would enable a viewer to determine with a high degree of specificity the location and coverage of the camera. Thus, a person who wished to approach the Family Services Office could do so undetected from the outside once learning the location and coverage of the camera in question. (Conti Cert., ¶11) For these reasons, the disclosure of video feed from the camera in question to the public in general upon request will have a negative impact on the effectiveness of security measures in the area, which in turn will have a negative impact on the Sheriff's Office's ability to provide for the safety and security of County personnel and visitors to the Complex. (Conti Cert., ¶12)

LEGAL ARGUMENT

POINT I

BURDENS OF PROOF

With regard to requests for records under OPRA N.J.S.A. 47:1A-6 provides in relevant part: "The public agency shall have the burden of proving that the denial of access is authorized by law."

As a fallback position, Plaintiff argues that he has a right to inspect records request under the common law right of New Jersey citizens to access "public records." "Under the common law rule of access to public documents, a citizen is entitled to

inspect documents of a public nature ‘ . . . provided he shows the requisite interest therein.’” Nero v. Hyland, 76 N.J. 213, 222 (1978) (quoting Ferry v. Williams, 41 N.J.L. 332, 334 (Sup.Ct.1879)). Thus, and unlike the right to view documents under OPRA, the common law right of access is a qualified one:

The common-law right to access public records depends on three requirements: (1) the records must be common-law public documents; (2) the person seeking access must “establish an interest in the subject matter of the material,” South Jersey Publishing Co. v. New Jersey Expressway Auth., 124 N.J. 478, 487 (1991); and (3) the citizen's right to access “must be balanced against the State's interest in preventing disclosure.” Higg-A-Rella [, Inc. v. County of Essex], 141 N.J. [35, 46 (1995)].

Keddie v. Rutgers, State University, 148 N.J. 36, 50 (1997).

Also dissimilar to OPRA, the burden of showing entitlement to access public documents under the common law rests with the requestor, not the responding agency. See Keddie, *supra*; Home News v. State, Dept. of Health, 144 N.J. 446, 454-55 (1996).

POINT II

PLAINTIFF IS NOT ENTITLED TO THE REQUESTED RECORDS UNDER OPRA

While OPRA is to be construed broadly and in favor of disclosure of “government records” as defined under N.J.S.A. 47:1A-1, there are 24 exceptions to that definition contained throughout the OPRA statute. OPRA places no obligation on a public agency to turn over any documents that fall under any of those exceptions. See O’Shea v. West Milford Bd. of Educ., 391 N.J.Super. 534, 537-38 (App. Div. 2007); Michelson v. Wyatt,

379 N.J.Super. 611, 619 (App. Div. 2005)(specifically holding that “[i]nformation that is deemed confidential is not considered a government record.” Id.)

Further, although a trial court making a determination on whether particular material is a “government record” for purposes of OPRA may conduct an in camera review of the material, such a review is not always necessary, as previously determined by the Appellate Division in a case involving the same plaintiff who is before this Court: “We do not imply that in camera review is required in a case in which the document is per se exempt from access under OPRA. See, e.g., N.J.S.A. 47:1A–1.1 (defining government records to exclude, among other things, criminal investigatory records and emergency procedures for buildings).” Paff v. New Jersey Dept. of Labor, Bd. of Review, 379 N.J.Super. 346, 355, 878 A.2d 31, 36 (App. Div. 2005).

A. “Incident Reports”

Such is the case before this Court, where Plaintiff has specifically requested law enforcement “Incident Reports” and video from surveillance cameras. (Verified Complaint, Exhibit A.) The Government Records Council – the administrative government agency charged with enforcing OPRA in the State of New Jersey – recently re-affirmed that law enforcement “incident reports” are not subject to production under OPRA:

Criminal investigatory records are exempt from disclosure. N.J.S.A. 47:1A-1.1. A criminal investigatory record is defined as “...a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding...” Id.

The status of records purported to fall under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1 was examined by the GRC in Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). In Janeczko, the Council found that under OPRA, "criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed."

More specifically, in Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005), the Council determined that police incident reports, continuation reports, and property and evidence reports are criminal investigatory records as defined by N.J.S.A. 47:1-1.1, and are therefore exempt from disclosure.

DeFrancisci v. Town of Secaucus, GRC Complaint No. 2013-181 (December 2013) at p. 7. See also Executive Order No. 69 (Whitman 1997).

Plaintiff first attempts to side-step this inconvenient line of rulings by citing N.J.S.A. 53:1-20.2 and stating that "it is the 'duty' of law enforcement officers in complaints of indictable offenses, to forward to specific State and county records bureaus of identification 'all such information which can at that time be obtained, on forms to be provided for that purpose.' (Plaintiff's Brief in Support of Order to Show Cause, p. 5) Plaintiff then contends that "the term 'all such information' must include some of the information obtained in a criminal investigation of this offense, therefore, for at least some of the information requested by Plaintiff, a statutory duty already exists for records to be "made, maintained or kept," and therefore those records are not subject to the "criminal investigatory" exemption." Id.

Plaintiff fails, however, to draw the Court's attention to the immediately preceding statute, N.J.S.A. 53:1-20.1, which specifically identifies the "all such information" referred to in the following statute. Even a cursory review of N.J.S.A. 53:1-20.1 reveals that the information required to be provided is only the most basic of information, all of which has been provided to Plaintiff in this matter through the disclosure of arrest reports and the complaint and warrant issued in this matter. Thus, while N.J.S.A. 53:1-20.1 may require that certain information be provided by local law enforcement agencies to county or state law enforcement agencies, there is no evidence that the incident reports in this case or any other are documents required to be kept under that law. Indeed, the Government Records Council has repeatedly held that they are not.

Plaintiff's reliance on the New Jersey Destruction of Public Records Act, N.J.S.A. 47:3-16 et seq., is equally misplaced. Guidance documents issued by the State of New Jersey Division of Records and Archives Management ("DARM") do refer to a retention schedule for "incident reports." DARM guidance does not, however, define what an "incident report" is, and what it entails. If, as Plaintiff suggests, "incident report" includes any and all information generated during the investigation of an incident, then no record generated under such an interpretation would ever fall under the "criminal investigatory records" exception of N.J.S.A. 47:1A-1.1 and, thus, the exception would prove to be meaningless. "Courts are to avoid constructions that make statutory provisions ... meaningless." Paper Mill Playhouse v. Millburn Twp., 95 N.J. 503, 521, 472 A.2d 517 (1984); see also G.S. v. Dep't of Human Servs., 157 N.J. 161, 172, 723 A.2d 612 (1999); Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 68, 389 A.2d 465 (1978).

In short, it is not what the record is called which determines whether it is subject to OPRA; rather, it is the purpose for which it is prepared. In the case before this Court, the incident reports in question are investigatory records. As such, they are entitled to exemption under N.J.S.A. 47:1A-1.1.

Even should the Court find that the incident reports are not exempt from disclosure under N.J.S.A. 47:1A-1.1, the records may still be exempted from disclosure under N.J.S.A. 47:1A-3. The matter involved in this case pertains to an open criminal investigation and prosecution as well as to a juvenile proceeding with the County Department of Family Services. The County Sheriff's Offices sees no need to impede either investigation through the premature release of information pertaining to either proceeding.

B. Videotape

N.J.S.A. 47:1A-1.1 specifically exempts from disclosure:

emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein; and

security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software.

As demonstrated through the Certification of Hudson County Undersheriff Andrew Conti, the video in question clearly falls under the exemptions above; thus, no production under OPRA should be mandated.

POINT III

**PLAINTIFF IS NOT ENTITLED TO THE
REQUESTED RECORDS UNDER COMMON LAW**

In order to obtain the requested records under the common law, Plaintiff must show that his private interest as a citizen outweighs the public's interest in the continued prosecution of a criminal matter, and, thus, in keeping such information confidential. The New Jersey Supreme Court has stated:

Because the common-law right of access to public records is not absolute, one seeking access to such records must "establish that the balance of its interest in disclosure against the public interest in maintaining confidentiality weighs in favor of disclosure." Home News, supra, 144 N.J. at 454. Thus, it has been said that the balancing process is "concretely focused upon the relative interests of the parties in relation to [the] specific materials." McClain v. College Hosp., 99 N.J. 346, 361 (1985); Atlantic City [Convention Center Authority v. South Jersey Publishing Co.], 135 N.J. 53, 60 (quoting McClain, supra, 99 N.J. at 361).

Generally, the public's interest in nondisclosure is based on the need to keep the information confidential. Where a claim of confidentiality is asserted, the applicant's interest in disclosure is more closely scrutinized. In that context, courts consider whether the claim of confidentiality is "premiered upon a purpose which tends to advance or further a wholesome public interest or a legitimate private interest." Loigman v. Kimmelman, 102 N.J. 98, 112 (1986) (quoting City of St. Matthews v. Voice of St. Matthews, Inc., 519 S.W.2d 811, 815 (Ky.1974)). However, where the interest in confidentiality is "slight or non-existent," standing alone will be sufficient to require disclosure to advance a legitimate private interest. Id. at 105.; see also McClain, supra, 99 N.J. at 362.

Keddie, supra, 148 N.J. at 50-51.

Plaintiff acknowledges the "real need to deny access where there is an ongoing law enforcement investigation," citing to Shuttleworth v. City of Camden 258 N.J.Super. 573, 585, 610 A.2d 903, 909-10 (App.Div. 1992). Plaintiff fails to acknowledge, however, that the records he seeks pertain to an ongoing criminal matter that has not yet been prosecuted. Rather, he claims that the "investigation is closed" because the subject of the investigation has been charged. Plaintiff offers no evidence, however, to support his conclusion, asking this Court in essence to rule that no further investigation of a matter continues once a charge has been made.

The decision to file charges in a matter does not mean that investigation is over; it simply means that enough information has been collected, in the view of a prosecutor, to file charges on at least one or more criminal statutes. Thus, and until the time when the matter has been concluded, further investigation remains a possibility.

The Sheriff's Office has already advised Plaintiff at the time of his request that the matter remained under investigation. (Verified Complaint, Exhibit B). Plaintiff has provided no evidence to the contrary. Accordingly, Plaintiff cannot satisfy the third prong of the Keddie test and, thus, is not entitled to the records sought.

Hon. Lawrence Maron, J.S.C.

March 21, 2014

Page 12

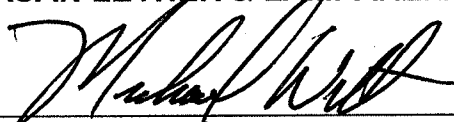
CONCLUSION

For the forgoing reasons, Defendants Hudson County Sheriff's Office and Robert Taino, custodian of records, respectfully request that Plaintiff's Order to Show Cause and Verified Complaint in this matter be dismissed with prejudice.

Respectfully Submitted,

CHASAN LEYNER & LAMPARELLO, PC

By: _____



Michael D. Witt, Esq.

MICHAEL D. WITT, ESQ. (031021999)
CHASAN LEYNER & LAMPARELLO, PC
300 Harmon Meadow Boulevard
Secaucus, New Jersey 07094-3621
(201) 348-6000
Attorneys for Defendants
File No. 12290-0098

JOHN PAFF,

Plaintiff,

v.

**HUDSON COUNTY SHERIFF
DEPARTMENT and ROBERT TAINO in
his official capacity as Executive
Administrative Assistant and Records
Custodian,**

Defendants.

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - HUDSON COUNTY
DOCKET NUMBER: HUD-L-399-14**

Civil Action

**CERTIFICATION OF
MICHAEL D. WITT, ESQ.**

MICHAEL D. WITT, of full age, hereby certifies as follows:

1. I am an attorney admitted to practice law in the State of New Jersey and a partner of the law firm of Chasan Leyner & Lamparello, PC, attorneys for defendants Hudson County Sheriff Department and Robert Taino, in his official capacity as Executive Administrative Assistant and Records Custodian.
2. Andrew Conti was not available to sign his original Certification.
3. Andrew Conti acknowledged the genuineness of the facsimile signature appearing on his Certification.

4. The document or a copy with an original signature affixed will be filed with the Court if requested in accordance with R. 1:4-4(c).

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


MICHAEL D. WITT

Dated: March 21, 2013

**MICHAEL D. WITT, ESQ. (031021999)
CHASAN LEYNER & LAMPARELLO, PC
300 Harmon Meadow Boulevard
Secaucus, New Jersey 07094-3621
(201) 348-6000
Attorneys for Defendants
File No. 12290-0098**

JOHN PAFF,

Plaintiff,

v.

**HUDSON COUNTY SHERIFF
DEPARTMENT and ROBERT TAINO in
his official capacity as Executive
Administrative Assistant and Records
Custodian,**

Defendants.

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - HUDSON COUNTY
DOCKET NUMBER: HUD-L-399-14**

Civil Action

CERTIFICATION OF ANDREW CONTI

ANDREW CONTI, of full age, certifies as follows:

1. I am an sworn member of the Hudson County (New Jersey) Sheriff's Office, where I have been employed for three years and three months. My current rank is Undersheriff, which I have held for approximately two and one-half years. I have been employed in law enforcement since 1982, for approximately 30 years. I make this certification based upon my own personal knowledge and experience.

2. Part of my job responsibilities include commanding the operations division of the Sheriff's Office, which is located the County of Hudson Offices complex (the

“Complex”) located at Hudson County Plaza, 257 Cornelison Avenue, Jersey City, New Jersey, and which is responsible for security and safety at the Complex.

3. The Complex is a seven (7) story high building and has approximately 340,000 square feet of space. The Complex houses a number of County offices, including, but not limited to, the County Clerk, Department of Family Services, the Sheriff’s Office, Superintendent of Elections, Division of Community Development, the Registrar’s Office, and the Board of Taxation.

4. Due to the number of County offices present and the services provided to the public by those offices, the Complex receives a large number of outside visitors on a daily basis. This number can reach as high as hundreds of people on any given day.

5. Given the high level of public visitation, security measures are in place at the Complex in order to protect the health, safety, and welfare of both the County personnel who work there as well as the public who visit.

6. In general, security measures include armed Sheriff’s Officers, security checkpoints, check-in requirements, civilian security guards at all employee and public entrances, and remote surveillance methods.

7. Although some security measures are open and apparent, the Sheriff’s Office does not disclose the exact nature of all security measures in order to maintain an effectively safe environment. Simply put, if all security measures were disclosed to the public, those measures lose their effectiveness as plans can be made to defeat the same.

8. Part of the security measures in place includes remote surveillance via video camera. The cameras are located around the Complex and provide coverage of

various locations both inside and outside the Complex. Sheriff's Office personnel monitor the video feeds to look for suspicious or unusual activity.

9. There is a video camera located in the vicinity of the County's Department of Family Services offices at the Complex. Family Services in particular receives a high volume of outside visitors, who often have to form lines inside and outside of the building while waiting to see caseworkers. Accordingly, Sheriff's Officers are regularly posted at that office to maintain security and safety.

10. The camera located near Family Services Offices is purposefully not readily identifiable as a video camera. Rather, its appearance and placement are intended to make the camera blend in with other features of the building.

11. Providing video from this particular camera would enable a viewer to determine with a high degree of specificity the location and coverage of the camera. Thus, a person who wished to approach the Family Services Office could do so undetected from the outside once learning the location and coverage of the camera in question.

12. It is my opinion that the disclosure of video feed from the camera in question to the public in general upon request will have a negative impact on the effectiveness of security measures in the area for the reasons previously stated, which in turn will have a negative impact on the Sheriff's Office's ability to provide for the safety and security of County personnel and visitors to the Complex, as well as for the facility itself.

I certify that the foregoing statements are true to the best of my knowledge. I am aware that if any of the foregoing are knowingly and willfully false, I am subject to punishment.

Date: March 21, 2014



ANDREW CONTI

**MICHAEL D. WITT, ESQ. (031021999)
CHASAN LEYNER & LAMPARELLO, PC
300 Harmon Meadow Boulevard
Secaucus, New Jersey 07094-3621
(201) 348-6000
Attorneys for Defendants
File No. 12290-0098**

JOHN PAFF,

Plaintiff,

v.

**HUDSON COUNTY SHERIFF
DEPARTMENT and ROBERT TAINO in
his official capacity as Executive
Administrative Assistant and Records
Custodian,**

Defendants.

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - HUDSON COUNTY
DOCKET NUMBER: HUD-L-399-14**

Civil Action

CERTIFICATION OF SERVICE

ANGELA LEON, by way of Certification, says that:

1. I am a legal assistant with the firm of Chasan Leyner & Lamparello, PC, attorneys for defendants Hudson County Sheriff Department and Robert Taino, in his official capacity as Executive Administrative Assistant and Records Custodian, with regard to the above captioned matter.

2. I hereby certify in accordance with R. 1:5-3, that on March 21, 2014, I served, via email and Lawyers Service, defendant's Answer to Plaintiff's Verified Complaint, Brief, Certification of Counsel, Certification of Andrew Conti, and Proposed Form of Order to:

Walter M. Luers, Esq.
Law Office of Walter M. Luers, LLC
23 West Main Street, Suite C202

Clinton, New Jersey 08809
Attorney for plaintiff, John Paff

3. Also on March 21, 2014, I caused copies of the above-identified pleading to be delivered via hand delivery to the following:

Hon. Lawrence Maron, J.S.C.
Hudson County Superior Court
595 Newark Avenue, Chambers 803A
Jersey City, NJ 07306

4. I hereby 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 misleading or untrue, I am subject to punishment.



ANGELA LEON

DATED: March 21, 2014

**MICHAEL D. WITT, ESQ. (031021999)
CHASAN LEYNER & LAMPARELLO, PC
300 Harmon Meadow Boulevard
Secaucus, New Jersey 07094-3621
(201) 348-6000
Attorneys for Defendants
File No. 12290-0098**

JOHN PAFF,

Plaintiff,

v.

**HUDSON COUNTY SHERIFF
DEPARTMENT and ROBERT TAINO in
his official capacity as Executive
Administrative Assistant and Records
Custodian,**

Defendants.

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - HUDSON COUNTY
DOCKET NUMBER: HUD-L-399-14**

Civil Action

**ORDER DISMISSING PLAINTIFF'S
VERIFIED COMPLAINT WITH
PREJUDICE**

THIS MATTER having been brought before the Court by Plaintiff, John Paff and Chasan Leyner & Lamparello, PC, attorneys for defendants Hudson County Sheriff Department and Robert Taino, in his official capacity as Executive Administrative Assistant and Records Custodian, appearing, and the Court having considered the papers submitted in support thereof and oral arguments, and for good cause having been shown,

IT IS, THEREFORE, on this _____ day of April, 2014,

ORDERED THAT:

1. Judgment is entered in favor of defendants, Hudson County Sheriff Department and Robert Taino, in his official capacity as Executive Administrative Assistant and Records Custodian;

2. Plaintiff's Verified Complaint is dismissed as to all defendants in its entirety with prejudice with each party to bear its own costs, and;

3. A copy of this Order shall be served upon all parties by counsel for plaintiff within seven (7) days of the date hereof.

, J.S.C.

_____ Opposed

_____ Unopposed

Law Offices of
Walter M. Luers, LLC

Suite C202
23 West Main Street
Clinton, New Jersey 08809
Telephone: 908.894.5656
Facsimile: 908.894.5729
www.luerslaw.com

March 29, 2014

Walter M. Luers, Esq.*

*Also admitted in New York

Writer's Direct Email: wluers@luerslaw.com

VIA OVERNIGHT DELIVERY

Deputy Clerk of the Superior Court
Superior Court of New Jersey – Law Division
Central Fee Office: Civil/Special Civil/General Equity
595 Newark Avenue – Room G-9
Jersey City, New Jersey 07306

Re: *Paff v. Hudson County Sheriff Department*
Docket No. HUD-L-000399-14

Dear Sir or Madam:

On behalf of the Plaintiff, we enclose the original of our Reply Letter Brief, which is being submitted in connection with Plaintiff's OPRA Order to Show Cause, currently returnable before the Honorable Lawrence M. Maron, J.S.C., on April 11, 2014. Should you have any questions regarding the foregoing, kindly contact us.

Respectfully submitted,



Walter M. Luers

cc: Hon. Lawrence M. Maron, J.S.C. (via Priority Mail)
Michael D. Witt, Esq. (via email and First-Class Mail)

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March 29, 2014

Walter M. Luers, Esq.*

*Also admitted in New York

Writer's Direct Email: wluers@luerslaw.com

Hon. Lawrence M. Maron, J.S.C.
Superior Court of New Jersey – Law Division
Administration Building
595 Newark Avenue, 8th Floor
Jersey City, New Jersey 07306

Re: *Paff v. Hudson County Sheriff Department, et al.*
Docket No. HUD-L-000399-14

Dear Judge Maron:

We submit this letter brief in lieu of a more formal brief in reply to the opposition papers filed by the Defendants.

1. **Plaintiff's Construction of the Criminal Investigatory Exception Does Not Make the Exception Meaningless**

At page 8 of their Brief, Defendants argue that if this Court accepted our argument regarding the retention of incident reports, then the criminal investigatory record exception would be rendered “meaningless.” We do not agree with this argument. Incident reports are clearly identifiable records. An incident report is readily distinguishable from other criminal investigatory records that might be excludable under the exception, such as interview notes, investigator’s notes, internal affairs reports, medical examiner’s reports, draft documents and other documents that cannot be fairly categorized as incident reports.

Here, we note Defendants’ reliance on decisions of the Government Records Council (“GRC”). Decisions of the GRC are, at best, advisory opinions and “shall not have

value as a precedent for any case initiated in Superior Court pursuant to [OPRA].” *N.J.S.A.*
47:1A-7.

2. **Defendants’ Invocation of the Ongoing Investigation
Exception Is Not Supported by an Affidavit or Certification**

At page 9 of their brief, Defendants invoke, without factual support, the ongoing investigation exception. But there simply is no factual predicate regarding these statements. The only certified statement from a potential fact witness is from Undersheriff Conti, and his statements are limited to the issue of whether the video recordings should be disclosed. Undersheriff Conti is silent regarding any ongoing criminal investigation. Defendants do not even tell us who is performing that investigation.

In the past, law enforcement agencies have taken (and continue to take) the position that an investigation is open and ongoing, presumably until the date of trial. The Appellate Division has already held that records cannot be withheld on the basis that they “pertain to” an ongoing investigation that will culminate in a criminal trial. In *Courier News v. Hunterdon County Prosecutor’s Office*, 358 N.J. Super. 373, 380 (App. Div. 2003), the Prosecutor’s Office “assert[ed] that the 911 tape [requested by the Plaintiff] is a record ‘pertaining to’ its ongoing investigation in the case of *State v. Jayson Williams*.” The Court rejected the Prosecutor’s argument because “[a]cceptance of defendant’s argument would seal every government record associated with a criminal investigation until the trial has been completed and all potential appeals have been exhausted.” *Id.* at 381. Here, the connection between the records being requested and the Records Custodian is tenuous at best. The Sheriff’s Department is not performing the investigation (at least there is no sworn evidence that they are

performing the investigation). We also note that Defendants' original denial did not state that the denial was based on an ongoing investigation. Because charges have been filed in the underlying matter, presumably the matter is now in the hands of the Prosecutor's Office. And Defendants' statement at page 9 of their brief that release of any records relates to a "juvenile proceeding with the County Department of Family Services" lacks any factual support in the record. If disclosure of records would have harmed any ongoing investigation or a "related" proceeding, then the Defendants would have had grounds not to disclose the use of force reports, arrest reports and other records that were in fact disclosed.

3. Undersheriff Conti's Certification is a Net Opinion

The Defendants are relying on Undersheriff Conti's "opinion" that "disclosure of [the] video feed will have a negative impact on the effectiveness of security measures in the area[.]" This opinion is a net opinion and should be disregarded. Undersheriff Conti's opinion is not based on any facts, studies or evidence. The opinion appears to be based solely on the Undersheriff's experience, the details of which are not revealed in Undersheriff Conti's certification, except that "part" of his job responsibilities include "commanding the operations division of the Sheriff's office[.]"

"The net opinion rule has been succinctly defined as a prohibition against speculative testimony." *Koruba v. Am. Honda Motor Co.*, 396 N.J. Super. 517, 525 (App. Div. 2007) (quoting *Grzanka v. Pfeifer*, 301 N.J. Super. 563, 580 (App. Div. 2008)) (internal quotation marks omitted). An expert's opinion must be founded on facts or data; thus, the net opinion rule "requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion." *Rosenberg v. Tavorath*, 352 N.J. Super. 385, 401 (App. Div. 2002).

It may be easy to say that a sheriff's opinion should be given weight. But this particular witness's opinion should be given no weight because the basis for the opinion is simply the opinion itself and the Undersheriff's "personal knowledge and experience." The mere fact that a person has a law enforcement background does not make them an expert in building security, and we do not know Undersheriff Conti's background or even his education. A family law lawyer would not be consulted to be an expert in a criminal matter, just like a criminal defense lawyer would not be engaged to render expert advice in an OPRA case.

The Undersheriff also does not quantify the "negative impact" that release would have "on the effectiveness of security measures in the area." The standard in OPRA is whether the location of the security camera that is not "readily identifiable" is a "security measure[or a] surveillance technique[] which, if disclosed, would create a risk to the safety of persons, property, electronic data or software." *N.J.S.A. 47:1A-1.1*. The only factual reason given for this conclusion is that "a person who wished to approach the Family Services Office could do so undetected from the outside once learning the location and coverage of the camera in question." Undersheriff Conti makes this statement, but he does not state whether he has reviewed the video in question *personally*. He does not state whether the video camera is monitored as a *live* feed or whether the video recordings are stored and only retrieved if necessary. We request that the Court conduct an *in camera* review of the video to assist in the Court's determination regarding whether the video should be disclosed.

4. **Plaintiff Requests An In Camera Review**

We request that the Court conduct an in camera review of all of the documents being withheld by the Defendants, and that Defendants be directed to serve and file a *Vaughn* index that itemizes the documents being submitted and the grounds on which they were withheld.

An in camera review is necessary because the documents being withheld are not *per se* exempt from OPRA. Rather, whether the exemptions apply depend on the findings of fact that this Court will make. In addition, there is no *per se* exemption of any document under the common law right of access; the Court must always weigh the relative interests of disclosure against non-disclosure. Thus, *in camera* review in this case is appropriate.

Respectfully submitted,



Walter M. Luers

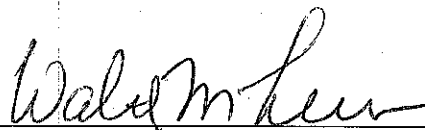
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Attorney for Plaintiff

<p>JOHN PAFF, Plaintiff, v. HUDSON COUNTY SHERIFF DEPARTMENT and ROBERT TAINO in his official capacity as Executive Administrative Assistant and Records Custodian, Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO. HUD-L-000399-14 CIVIL ACTION CERTIFICATION OF SERVICE</p>
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I, WALTER M. LUERS, of full age, hereby certify:

1. I am an attorney of the State of New Jersey and a member of the law firm of Law Offices of Walter M. Luers, LLC, and counsel for Plaintiff John Paff.
2. On March 29, 2014, I served one copy of Plaintiff's Reply Letter Brief on the Defendants by transmitting one copy to counsel for Defendants, Michael D. Witt, Esq., Chasan Leyner & Lamparello, P.C., 300 Harmon Meadow Boulevard, Secaucus, New Jersey 07094-3621 via First-Class Mail and email.
3. I certify that the foregoing statements made by me are true. I understand that if any of the statements made by me are willfully false, I am subject to punishment.

Dated: March 29, 2014


WALTER M. LUERS