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RECEIVED 3-4-15

March 3, 2015

VIA FEDERAL EXPRESS

Appellate Division Clerk's Office
Superior Court of New Jersey
Hughes Justice Complex
P.O. Box 006
Trenton, NJ 08625-0006

Re: Paff v. Galloway Township, et al.
Docket No. A-000125-14
Our File No. 990000660-1

Dear Sir/Madam:

This firm represents the New Jersey State League of Municipalities ("League") and the New Jersey Institute of Local Government Attorneys ("NJILGA") in connection with the above-captioned matter. Enclosed for filing please find an original and five (5) copies of the following documents:

(1) Notice of Motion to Appear As Amici Curiae;

(2) NJSLOM's and NJILGA's Brief In Support of the Motion;

(3) Proposed Amici Curiae Brief; and

(4) Certificate of Service.

Kindly file this submission and return one copy, stamped as "FILED", in the self-addressed stamped envelope provided for your convenience. Please charge our collateral account No. **#0012343** for any fee associated with this filing.

Thank you for your assistance and attention to this matter. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO

Carl R Woodward, III
CARL R. WOODWARD, III
MB

cc: Michael J. Fitzgerald, Esq. (w/encl.) (via Federal Express)
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New Jersey State League of Municipalities and New Jersey Institute of Local Government Attorneys
Carl R. Woodward, III - 246541968

JOHN PAFF,	: SUPERIOR COURT OF NEW JERSEY
	: APPELLATE DIVISION
Plaintiff-Respondent;	: DOCKET NO: A-000125-14
v.	: Civil Action
TOWNSHIP OF GALLOWAY AND THALIA C. KAY, in her official capacityas Municipal Clerk and Records Custodian of Galloway Township,	: Sat Below: : Hon. Nelson C. Johnson, J.S.C.
Defendant-Appellant.	:

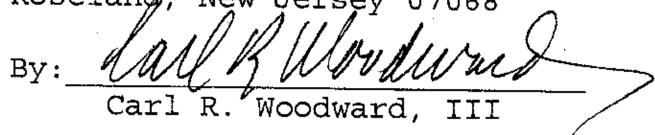
NOTICE OF MOTION ON BEHALF OF THE NEW JERSEY STATE LEAGUE OF MUNICIPALITIES AND THE NEW JERSEY INSTITUTE OF LOCAL GOVERNMENT ATTORNEYS FOR LEAVE TO APPEAR AS *AMICI CURIAE*

Please take notice that pursuant to R. 1:13-9, the New Jersey State League of Municipalities ("League") and the New Jersey Institute of Local Government Attorneys ("NJILGA") move for leave to appear in the captioned matter as *amici curiae*.

In support of this motion, the League and NJILGA shall rely upon the accompanying brief and its proposed *amicus brief*.

Respectfully submitted,

CARELLA, BYRNE, CECCHI, OLSTEIN
BRODY & AGNELLO
5 Becker Farm Road
Roseland, New Jersey 07068



By: ______________________
Carl R. Woodward, III

Dated:March 3, 2015
#572197

Attorneys for the New Jersey State League of Municipalities and the New Jersey Institute of Local Government Attorneys

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New Jersey State League of
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Carl R. Woodward, III - 246541968

JOHN PAFF, Plaintiff-Respondent; v. GALLOWAY TOWNSHIP AND THALIA KAY, in her official capacity as Municipal Clerk and Records Custodian of Galloway Township Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-000125-14 Civil Action Sat Below: Hon. Nelson C. Johnson, J.S.C.

BRIEF ON BEHALF OF NEW JERSEY STATE LEAGUE OF MUNICIPALITIES AND NEW JERSEY INSTITUTE OF LOCAL GOVERNMENT ATTORNEYS IN SUPPORT OF THEIR MOTION FOR LEAVE TO APPEAR AS <u>AMICI CURIAE</u> AND TO SUBMIT A BRIEF

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(973) 994-1700
Attorneys for Amicus Curiae

On the Brief:
Carl R. Woodward, III, Esq.

PRELIMINARY STATEMENT

The New Jersey State League of Municipalities ("League") and the New Jersey Institute of Local Government Attorneys ("NJILGA") seek leave to appear as *amici curiae* and to file a brief on the questions presented in this appeal, including:

> Whether a Court may enter an order that an Open Public Records Act request for a log of email traffic in a municipal clerk's and a municipal police chief's offices be granted where the log does not exist, but must be created by the municipality.

The League and the NJILGA have routinely appeared as amici curiae in a number of cases implicating matters of public interest affecting not only the particular member municipality involved in those matters, but also the other more than 500 municipalities in the State of New Jersey. See, generally, Mount Laurel Tp. v. MiPro Homes, LLC, 188 N.J. 531 (2006), In re Adoption of N.J.A.C. 5:94 and 5:95 By New Jersey Council on Affordable Housing, 390 N.J. Super. 51 (App. Div. 2007), City of Atlantic City v. Tropos, 201 N.J. 447 (2010), DKM Residential Properties Corp. v. Tp. of Montgomery, 182 N.J. 296 (2005), Paff v. Borough of Garwood, Docket No. A-2013-10T3 (App. Div., Nov. 5, 2012). This is but a sampling of cases in which the League and NJILGA have been granted amicus status and have assisted the Court by providing their perspectives on the ramifications the

decision at issue would have beyond its immediate impact upon the member municipality involved in this matter.

ARGUMENT

THE LEAGUE AND THE NJILGA HAVE MADE THE REQUISITE SHOWING TO APPEAR AS AMICI CURIAE IN SUPPORT OF THE POSITION ADVANCED BY GALLOWAY TOWNSHIP

Rule 1:13-9 provides that a party may move for leave to appear as *amicus curiae* by providing the identity of the applicant, the issue to be addressed, the nature of the public interest and the nature of the applicant's interest. Moreover, at least one court has viewed the Rule as "a liberal standard for permitting amicus appearances." *Pfizer v. Director, Div. of Taxation*, 23 N.J. Tax 421, 424 (Tax Ct. 2007). Leave to appear is appropriate here.

The League and the NJILGA are non-interested parties, which seek to offer a different perspective on the issues currently on appeal before this court. The League and the NJILGA submit that this Court will benefit from their participation, as they can offer guidance on the Trial Court's determination to impermissibly expand the reach of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1, et seq., to require the creation of a document that does not exist in and of itself, but can only result from the research, analysis and compiling of a "log" of the "metadata" from emails from the offices of the Municipal Clerk and the Police Chief of Galloway Township, as well as the

Trial Court's justification for its ruling that the "creation" of the document would not be a significant burden on the municipality. Indeed, given the exemptions contained within OPRA and the potential for disclosure of confidential information that may be contained in the "metadata", the Trial Court's concept would impose an unreasonable burden upon governmental agencies which would not only have to "create" a log, but examine every underlying document to determine whether the document and, therefore, the metadata was exempt from disclosure.

CONCLUSION

For all the reasons stated more fully above, the League and the NJILGA respectfully request this Court to grant them leave to appear as _amici curiae_; to file a brief; and to participate in oral argument.

Respectfully submitted,

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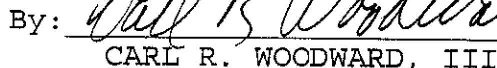
By: 
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March 3, 2015

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JOHN PAFF,	: SUPERIOR COURT OF NEW JERSEY
	:
Plaintiff-Respondent;	: APPELLATE DIVISION
	: DOCKET NO: A-2013-10T3
	:
v.	: ON APPEAL FROM:
	:
TOWNSHIP OF GALLOWAY and THALIA C. KAY in her official capacity as Municipal Clerk and Records Custodian of Galloway Township ,	: Superior Court of New Jersey : Law Division, Atlantic County : : Docket No. ATL-L-005428-13
	:
	: Sat Below:
Defendants-Appellants.	: Hon. Nelson C. Johnson, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF <u>AMICI CURIAE</u> NEW JERSEY STATE LEAGUE OF MUNICIPALITIES AND NEW JERSEY INSTITUTE OF LOCAL GOVERNMENT ATTORNEYS

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On the Brief:
Carl R. Woodward, III, Esq.
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PRELIMINARY STATEMENT

The Open Public Records Act ("OPRA") relates to "government records" that have "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, or that has been received in the course of its official business by any such officer, commission, agency, or authority of the State or of any subdivision thereof, including subordinate agencies thereof." N.J.S.A. 47:1A-1.1. It does not regulate records that are not yet in existence, nor require the creation of records not in existence, nor require the performance of research for or on behalf of any person who requests the creation of such records. In this case, the Trial Court ruled that the Plaintiff's request for a log of emails between July 3 through July 17, 2013 from the offices of the Clerk and Police Chief of the Township of Galloway ("Galloway" or "the Township") must be produced by the Township, notwithstanding such a log did not exist. The Court even acknowledged the non-existence of the log in its opinion wherein it stated that the log would have to be "created" in order to satisfy the request of Plaintiff. Trial Court Opinion dated June 10, 2014, at 4. It thought, however, that the log could be "created without burdening the Township." Id. The Court,

however, failed to follow binding statutory and decisional authority with the result that its decision should be reversed.

QUESTION PRESENTED ON APPEAL

Amici, the New Jersey State League of Municipalities ("NJSLOM") and the New Jersey Institute of Local Government Attorneys ("NJILGA") address the issue presented on appeal by the defendant-appellant Township of Galloway:

> Whether a Court may enter an order that an Open Public Records Act request for a log of email traffic in a municipal clerk's and a municipal police chief's offices be granted, where the log does not exist, but must be created by the municipality.

INTERESTS OF AMICI
NEW JERSEY STATE LEAGUE OF MUNICIPALITIES AND
NEW JERSEY INSTITUTE OF LOCAL GOVERNMENT ATTORNEYS

The NJSLOM and the NJILGA are organizations established for the purpose of facilitating and improving the delivery of municipal government services throughout the State of New Jersey. The NJSLOM is a voluntary association created to help communities do a better job of self-government through pooling information resources and brain power. It is authorized by State Statute and, since 1915, has been serving local officials throughout the Garden State. All 565 municipalities are members of the League. Over 560 mayors and 13,000 elected and appointed officials of member municipalities are entitled to all of the

services and privileges of the League. See, www.njslo.org/njlabout.html.

The NJILGA was "established in 1951 for the purposes of promoting education and professionalism among local government attorneys, and to assist members to the legal profession to better serve local governments in New Jersey." See, www.njilga.org/about. The NJSLOM and the NJILGA have intervened as *amici* in numerous cases which present novel questions affecting the public interest. This is such a case.

PROCEDURAL HISTORY

Amici incorporate by reference the procedural history set forth in the brief of the Township of Galloway.

STATEMENT OF FACTS

In addition to incorporating by reference the Statement of Facts set forth by Galloway, *amici* emphasize the following pertinent facts presented in the case.

There is no question that the request of the Plaintiff requires the "creation" of a document. The document requested does not exist in a natural state, cannot be retrieved as is, but can only come into existence or be created by the operation of a computer to produce a log of the emails sent or received by the Township Clerk and the Police Chief. As a result, the document demanded (i.e. the "log") does not fit within the

definition of a "government record" as set forth at N.J.S.A. 47:1A-1.1:

> Any paper, written or printed book, document, 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 …official business, …or that has been received in the course of …official business…

LEGAL ARGUMENT

THE "LOG" WHICH IS DEMANDED BY PLAINTIFF, DOES NOT EXIST IN AND OF ITSELF, BUT MUST BE "CREATED" BY THE ACTIONS OF THE MUNICIPALITY, AND THEREFORE IS NOT A GOVERNMENT RECORD UNDER THE OPEN PUBLIC RECORDS ACT

Amici have reviewed, agree with and incorporate by reference herein the arguments submitted by the Township in its excellent brief. However, they wish to emphasize that upholding the Trial Court's decision would have significant negative impacts on governmental agencies, in addition to requiring actions that are outside the scope of OPRA.

There is no question that the request of the Plaintiff requires the "creation" of a document. The document requested does not exist in and of itself, cannot be retrieved as is, but can only come into existence or be "created" by the operation of a computer to produce a log from each of the emails sent or received by the Township Clerk and the Police Chief. As a result, the document demanded (i.e. the "log") does not fit

within the definition of a "government record" as set forth at N.J.S.A. 47:1A-1.1:

> Any paper, written or printed book, document, 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 ...official business, ...or that has been received in the course of ...official business...

Indeed, the Trial Court recognized as much in its written opinion of June 10, 2014, wherein it stated at page 4 that "the document(s) sought... can be created without burdening the Township." (Emphasis supplied).

The issue is not whether the "document" can be created without substantially burdening the Township, but whether OPRA can be read to compel the "creation" of a document when it does not exist. The Trial Court acknowledges, but then ignores the full reach of, the leading case on the issue, MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). There the Appellate Division held that OPRA was "not intended as a research tool litigants may use to force government officials to identify and siphon useful information." Id. at 546. It further cites with approval several decisions of the Government Records Council ("GRC"), including Reda v. Tp. Of West Milford, GRC Complaint No. 2002-58 (January 17, 2003), which stated that "OPRA only allows requests

for records, not requests for information, and therefore it is 'incumbent on the requestor to perform any correlations and analysis he may desire.'" The MAG court concluded that:

> Under OPRA, agencies are required to disclose any "identifiable" records not otherwise exempt. Wholesale requests for general information to be analyzed, collated and compiled by the responding government entity are not encompassed therein. In short, OPRA does not countenance open-ended searches of an agency's files.

MAG Entertainment, LLC, supra, at 549. Although the plaintiff herein contends that the data is identifiable, the log itself is not so. It only exists because it must be created by separating and extracting the metadata from the underlying email, and collating and compiling these separate pieces of information attached to each email within the scope of the request to form the "log".[1]

---

[1] 1/ While *Amici* agree that most emails received or sent by a municipal clerk or police chief constitute public records, including the metadata, which only exists in its natural state as part of the email (But, see, 297 Palisades Avenue Urban Renewal Company, LLC v. Borough of Bogota, Docket No. BER-L-979-14 at page 14 (Bergen County, March 26, 2014)(Doyne, A.J.S.C.)(Copy attached hereto as Appendix A) wherein the court ruled that a municipal employee who sends a personal email on a municipal computer may not necessarily be creating a public record under OPRA), this case involves compiling information, extracting it from the email and creating a new "log" or list including the metadata from multiple emails.

The Trial Court's decision also ignores the impact that creating such a log would have on the governmental agency. The court's analogy to a card catalogue in a library fails because it assumes that that information would be readily available to the public without any further analysis by the agency. Unfortunately, it is not so easy. Inasmuch as there are numerous exemptions from the disclosure requirements of OPRA, the agency must review and analyze each of the underlying emails to determine whether any of the information contained in the emails and then in the "metadata" that would form the "log" is exempt and subject to redaction. The reason for this is that the underlying emails may be exempt and therefore not only is the email exempt, but also the metadata may be exempt. In addition, the mere fact of communication with a government official, for example, a member of the police department who may be conducting a confidential investigation, dealing with a confidential informant, or a domestic violence situation, may be subject to that person's reasonable expectations of privacy. Courts have been especially solicitous of this issue and in following the command of OPRA that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's

reasonable expectation of privacy…" N.J.S.A. 47:1A-1. See, e.g., Doe v. Poritz, 142 N.J. 1,82 (1995); Burnett v. County of Bergen, 198 N.J. 408, 422-23(2009); Bolkin v. Borough of Fairlawn, Docket No. BER-L-6547-12 at page 4 (Law Div., December 5, 2012) (Doyne, A.J.S.C.)(2012WL 6057334)(Copy attached hereto as Appendix B), aff'd 2014WL2679673(App. Div., June 16, 2014). Thus, not only does the subject request require the creation of a record, but it also requires the examination of each and every email to determine whether that email is subject to any exemptions under OPRA and whether that email's "metadata" and the email address contained therein prevent disclosure under a citizen's reasonable expectation of privacy. Compliance with the request will require far more than simply pushing a few keys on a computer.

In Bolkin v. Borough of Fairlawn, supra, Judge Doyne ruled that where a political activist wanted all license applications of dog and cat owners in town to solicit voters who were potential supporters of humane treatment of animals laws, very strict rules on the use of the information to be released was imposed. He considered the potential for harm in any subsequent disclosure and considered the factors under Loigman v. Kimmelman, 102 N.J. 98 (1986) and Doe v. Poritz, supra, in rendering his decision. Specifically, he limited the disclosed

documents to names and addresses, and solely to the individual requester and not the League of Humane Voters, of which the requester was a member, absent further order of the court. It approved redaction of any other information including pet breed and reason for owning the pet, and restricted use of the information to the expressed political purpose only, and no other purpose. Bolkin, supra, at 12-16.

Similarly, if disclosure of individual email addresses is required as part of the response to the request, citizens may well be discouraged from using the internet to communicate with their government, because of the fear that disclosure of their email addresses may subject them to unwanted contact or even predatory or malicious use, such as identity theft or internet scams. Unlike Bolkin, in this case there has been on indication that use of the information contained in the "log" will be restricted in any way. Indeed, compliance with the request may well require the agency to contact the owner of each email address to obtain permission to release the address. This approach was employed in the recent decision of Brennan v. Bergen County Prosecutor's Office, Docket No. BER-L-20832-14 at pages 17-18 (Law Div. February 25, 2015)(Doyne, A.J.S.C.)(Copy attached hereto as Appendix C) where communication with the emailers about release of their email addresses was approved out

of the court's concern with their reasonable expectations of privacy. In short, the court's attempt to justify its decision on the card catalogue concept fails to account for the above-described impacts of its decision. Accordingly, it is respectfully submitted that the trial court's decision should be set aside.

CONCLUSION

In sum, the Trial Court's decision to require the "creation" of a "log" of all emails in the municipal clerk's and police chief's offices of Galloway Township violates the definitional command of the Open Public Records Act and, respectfully, should be reversed. OPRA does not require the creation of any document, no matter how few computer keystrokes are needed. Here, however, the consequences of having to "create" a document set in motion far more obligations, including reviewing every email and its metadata to determine whether redactions are required or whether the specific document is exempt from disclosure under OPRA.

CARELLA, BYRNE, CECCHI, OLSTEIN,
BRODY & AGNELLO

BY: ______________________
Carl R. Woodward, III

Dated: March 2, 2015

DOCSLIB-#571716-v1

APPENDIX

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Appendix B: Bolkin v. Borough of Fair Lawn, Docket No. BER-L-6547-12 (Law Div. December 5, 2012)(Doyne, A.J.S.C.)

Appendix C: Brennan v. Bergen County Prosecutor's Office, Docket No. BER-L-20832-14 (Law Div. February 25, 2015)(Doyne, A.J.S.C)

APPENDIX A

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

297 Palisades Avenue Urban Renewal Company LLC, *Plaintiffs*, v. Borough of Bogota, et al., *Defendant*.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L- 979-14 CIVIL ACTION **OPINION**
297 Palisades Avenue Urban Renewal Company LLC, *Plaintiffs*, v. Borough of Bogota, et al., *Defendant*.	

Argued: March 26, 2014
Decided: March 26, 2014

Honorable Peter E. Doyne, A.J.S.C.

Justin D. Santagata, Esq. appearing on behalf of the plaintiff, 297 Palisades Avenue Urban Renewal Company LLC (Kaufman Semeraro & Leibman, LLP) (Justin D. Santagata, Esq. and Deena B. Rosendahl, Esq, (Kaufman Semeraro & Leibman, LLP), On The Briefs).

Bruce Rosenberg, Esq. appearing on behalf of the defendants, Borough of Bogota, Jorge Nunez and Frances Garlicki (Winne Banta Hetherington Basralian & Kahn, P.C.) (Andrew P. Bolson, Esq. (Rubenstein, Meyerson, Fox, Mancinelli, Conte & Bern, P.A.), On The Brief).

Introduction

On January 29, 2014, 297 Palisades Avenue Urban Renewal Company LLC ("297 Palisades" or "plaintiff") had filed on its behalf a verified complaint and an order to show cause against the Borough of Bogota and Councilman Jorge Nunez ("Bogota" or "Nunez" when referenced individually, "defendants" when referenced collectively with Frances Garlicki ("Garlicki")). Plaintiff sought a judgment declaring Bogota and Nunez in violation of the Open Public Records Act, N.J.S.A. § 47:1A-1 et seq. ("OPRA" or the "Act") and the common law right of access. Plaintiff's requested relief seeks an order directing Bogota and Nunez to immediately produce the records sought in plaintiff's OPRA request as well as an award of reasonable attorneys' fees pursuant to N.J.S.A. § 47:1A-6. Additionally, plaintiff seeks the imposition of a $1,000 fine against Nunez.

On February 11, 2014, plaintiff had filed on its behalf another verified complaint and an order to show cause against Bogota and Garlicki, municipal clerk for Bogota. Plaintiff sought a judgment declaring Bogota and Garlicki in violation of the Open Public Records Act, N.J.S.A. § 47:1A-1 to -13 ("OPRA" or the "Act") and the common law right of access, directing Bogota and Garlicki to release the requested records to the plaintiff, imposing counsel fees and costs pursuant to the Act, and providing any other such relief deemed equitable by the court.

The matters were consolidated, sua sponte, pursuant to R. 4:38-1(a) by an order of the court dated March 5, 2014 under docket number BER-L-979-14.

Facts/Procedural History

Plaintiff is a limited liability company in New Jersey which owns property known as 297 Palisades Avenue, Bogota, New Jersey (the "property"). Bogota is a municipality in New Jersey. Nunez is a councilman for Bogota and Garlicki is the municipal clerk for Bogota.

This litigation arises from a redevelopment project (the "project") currently "held in default" by Bogota. The project is a forty-four (44) unit apartment building on Palisades Avenue. Plaintiff was approved to build the apartments by the Planning Board and construction began on the project on December 23, 2013. Dan Howell ("Howell"), the borough zoning official, issued a stop-work order on December 30, 2013 because the building permit could not be located. On December 31, 2013, an article was published in *The Record*, a daily newspaper, quoting Nunez in relation to the stop-work order issued by Bogota for the property. The quote from Nunez was derived from an email he apparently sent to *The Record*.

In addition to the project, there is a political history which underlies this litigation and is relevant in understanding the relationship between and among the parties. According to the certification of Douglas M. Bern, Esq. ("Bern" of "Bern Cert."), the current borough attorney for Bogota, Nunez is and has been a "vocal opponent of the project and has sought to have the circumstances surrounding the negotiation of the redevelopment project investigated by the Attorney General's Office." (Bern Cert. ¶ 4).[1,2] After a Borough Council meeting at which time the council voted to grant a thirty (30) year tax exemption to plaintiff, Nunez sent a letter to United States Attorney Paul J. Fishman, Esq. ("Fishman") expressing concern regarding the project. The vote was 4-2 with Nunez and newly-elected councilman Evaristo Burdiez ("Burdiez") casting the dissenting votes.

Nunez and Burdiez also helped launch a recall election which led to the "ouster" of the previously elected council members. Nunez is now the Council President, having been so sworn

[1] On March 18, 2014, Bern authored a letter to the court recusing himself and his firm from continuing its representation in this matter. This recusal was in response to plaintiff's counsel's assertion in its reply Bern's position as counsel for Bogota presented a conflict as he had previously been a partner and "of counsel" with plaintiff's counsel's firm. While Bern asserts he was unaware his former firm represented plaintiff, he nonetheless recused himself to avoid the appearance of impropriety. Bruce Rosenberg, Esq. ("Rosenberg") from the firm of Winne Banta Hetherington Basralian & Kahn, P.C. was substituted as counsel on March 20, 2014.

[2] Although the Attorney General's Office is referenced in the quoted passage, the U.S. Attorney's Office was the entity requested to investigate.

on January 4, 2014. The recall exemplified political tensions in the community which have been referenced in various news reports and articles. Opponents of Nunez and Burdiez had argued the recall was a waste of taxpayer money.

A. First OPRA Request

On January 2, 2014, plaintiff filed an OPRA request (the "first request") seeking

(1) All emails to or from Councilman Jorge Nunez's government email address from December 1, 2013 to the present;
(2) All emails to or from any private email addresses used by Mr. Nunez for public business from December 1, 2013 to the present;
(3) All emails to or from such private email addresses used by Mr. Nunez from December 1, 2013 to the present with any of the following terms:
   a. 297 Palisade Avenue
   b. 297
   c. Urban
   d. Renewal
   e. Paul
   f. Kaufman
   g. LaBarbiera
   h. Permit
   i. Abatement
   j. Florence
   k. Dewey
   l. Redevelopment
   m. Burdiez
   n. Stop
   o. Work
   p. Construction;
(4) All texts to or from Mr. Nunez on public business from December 1, 2013 to the present;
(5) All texts to or from Mr. Nunez on public business from December 1, 2013 to the present with the [above enumerated] terms;
(6) All emails to or from Councilman Evaristo Burdiez, Jr.'s government email address from December 1, 2013 to the present;
(7) All emails to or from any private email addresses used by Mr. Burdiez for public business from December 1, 2013 to the present;

(8) All emails to or from such private email addresses used by Mr. Burdiez from December 1, 2013 to the present with any of the [above enumerated] terms;
(9) All texts to or from Mr. Burdiez on public business from December 1, 2013 to the present; and
(10) All texts to or from Mr. Burdiez on public business from December 1, 2013 to the present with the [above enumerated] terms.

On January 16, 2014, Marc Leibman, Esq. ("Leibman"), an attorney representing plaintiff, emailed Garlicki advising the defendants' response was overdue. Garlicki responded by email to Leibman that same day that she forwarded the first request to the appropriate parties who informed Garlicki the requested records do not exist.

On January 17, 2014, in response to a request for a certification explaining the nature of the search performed, Garlicki emailed Leibman explaining she asked Nunez and Burdiez for documents responsive to the first request. Garlicki explained Nunez and Burdiez advised no responsive documents existed.

B. Second OPRA Request

On January 17, 2014, plaintiff requested (the "second request") records from Bogota through Garlicki. The second request was made after Bogota "took actions affecting Property owned by Plaintiff." (Compl. ¶ 7). The second request seeks precisely the same material as in the first request. However, the second request seeks that material "from July 1, 2013 to December 2, 2013 to the present."

On January 28, 2014, Garlicki wrote to Leibman explaining she responded to plaintiff's request on January 17, 2014. That same day, Leibman responded to Garlicki explaining defendants' response on January 17, 2014 was in relation to the first request. On February 6, 2014, plaintiff wrote to Garlicki informing her seven business days had elapsed since plaintiff sent the January 28 letter and plaintiff would provide two more business days to respond.

C. Verified Complaints

Plaintiff had verified complaints and orders to show cause filed on January 29, 2014 and February 11, 2014. The matters were thereafter consolidated on March 5, 2014. On March 7, 2014, defendants had answers submitted on their behalf. The court notes, although filed after the order consolidating these matters, the answers correspond to the respective docket numbers of the consolidated complaints. Both answers reflect a demand for a judgment dismissing plaintiff's complaint. Moreover, both assert the same affirmative defenses. Also on March 7, defendants had a letter brief in opposition filed on their behalf. Included in defendants' submission is the certification of Bern. Defendants' counsel also provided a Vaughn Index as well as corresponding documents for in camera review. The court notes the Vaughn Index is not Bates stamped and the documents supplied are a in a stack approximately three to four inches thick. A reply was submitted on plaintiff's behalf on March 17, 2014.

Legal Standards

A. OPRA

The Act, N.J.S.A. § 47:1A-1 to -13, "plainly identifies its purpose at the outset: to ensure that government records, unless exempted, are readily accessible to citizens of New Jersey for the protection of the public interest. To accomplish that aim, OPRA sets forth a comprehensive framework for access to public records." Mason v. City of Hoboken, 196 N.J. 51, 57 (2008) (internal citation omitted).

OPRA provides "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 [under the Act] shall be construed in favor of the public's right of access." N.J.S.A. § 47:1A-1. A government record is defined as:

> 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. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.
>
> [Id. at § 1.1.]

Records are typically available during the public agency's regular business hours with an exception for smaller towns, agencies, and school districts. Id. at § 5. The records may be redacted to protect personal information, and the records custodian may charge a fee for copying and related services. Ibid. Typically, any request for a record must be made using the agency's official request form. Ibid. The custodian must respond to all requests within seven business days, unless the applicant fails to provide necessary contact information. Ibid.

If access to a government record is denied, the person denied access, and only that person, may challenge the decision by filing a complaint in Superior Court or with the Government Records Counsel. Id. at § 6. The application must be brought within forty-five days of the denial. Mason, supra, 196 N.J. at 68 ("[A] 45-day statute of limitations should apply to OPRA actions, consistent with the limitations period in actions in lieu of prerogative writs.").

The proceeding will go forward in a summary or expedited manner. N.J.S.A. § 47:1A-6; see Courier News v. Hunterdon Cnty. Prosecutor's Office, 358 N.J. Super. 373, 378 (App. Div. 2003). As such, "the action is commenced by order to show cause supported by a verified complaint." Ibid. In Courier News, the Appellate Division held the trial court had failed to

follow proper procedure when it denied a newspaper its right to summary adjudication on an OPRA action. The trial judge had erroneously applied the standard for preliminary relief to the summary action and dismissed plaintiff's action without prejudice. Id. at 377. As a result, the Appellate Division, recognizing the Act's policy of expediency, invoked original jurisdiction over the matter. Id. at 379.

In OPRA actions, the public agency has the burden of proving the denial is authorized by law. N.J.S.A. § 47:1A-6. As such, the agency "must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. Absent such a showing, a citizen's right of access is unfettered." Courier News, supra, 358 N.J. Super. at 383.[3] In establishing legal support, "[a] decision of the [Government Records Council] shall not have value as a precedent for any case initiated in Superior Court," N.J.S.A. § 47:1A-7, though such decisions are normally accorded deference unless "arbitrary, capricious or unreasonable" or violative of "legislative policies expressed or implied in the act governing the agency." Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). Lastly, "a court must be guided by the overarching public policy in favor of a citizen's right of access." Courier News, supra, 358 N.J. Super. at 383.

If it is determined access was improperly denied, such access shall be granted, and a successful requestor is entitled to reasonable attorney's fees. N.J.S.A. § 47:1A-6.

B. Vaughn Index

Courts have provided where documents are withheld, the governmental entity must create a detailed summary of the documents and reasoning for their failure to disclosure the same. This is referred to as a "Vaughn Index".

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[3] It should be noted "when a claim of confidentiality or privilege is made by the public custodian of the record" the court must "inspect the challenged document in-camera to determine the viability of the claim." MAG Entm't v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 551 (App. Div. 2005).

> [A] Vaughn index, is a detailed affidavit correlating the withheld documents with the claimed exemptions. To pass muster, a Vaughn index must consist of one comprehensive document, adequately describe each withheld document or redaction, state the exemption claimed, and explain why each exemption applies.
>
> An insufficient description of withheld records may instigate in camera inspection to afford meaningful judicial review. The affidavits themselves may be submitted in camera where, due to the sensitive nature of the documents, the agency is unable to sufficiently detail the records in the public affidavits. Nevertheless, before submitting in camera affidavits, the agency must present as much as it can in a public affidavit.
>
> [Cozen O'Connor v. United States Dep't of Treasury, 570 F. Supp. 2d 749, 765 (E.D. Pa. 2008) (internal citations omitted).]

In Fischer, the court found a twenty-eight page certification provided after denial of the first OPRA request based on deliberative process, provided more than sufficient opportunity for the requestor to advocate his position and remand for a Vaughn Index was unnecessary. Fisher v. Division of Law, 400 N.J. Super. 61, 76 (App. Div. 2008). By way of background, however, the court provided:

> The purpose of a Vaughn index is not only to facilitate the decision-maker's review of governmental records to determine whether they contain privileged material but also to provide the party seeking disclosure with as much information as possible to use in presenting his case. *A decision-maker's in camera review of the withheld documents is not ordinarily an adequate substitute for production of a proper Vaughn index because it does not afford the party seeking disclosure the opportunity to effectively advocate its position.* However, "when the facts in [the requestor's] possession are sufficient to allow an effective presentation of its case, an itemized and indexed justification of the specificity contemplated by Vaughn may be unnecessary."
>
> [Ibid. (emphasis added).]

C. Exemptions

As stated by the Appellate Division in Paff v. Division of Law, 412 N.J. Super. 140, 150, (App. Div. 2010), "OPRA expressly exempts from the definition of a government record "any record within the attorney-client privilege." See N.J.S.A. § 47:1A-1. The attorney-client privilege applies to confidential communications between a lawyer and client in the course of that relationship and in professional confidence. The privilege extends to communications between a public body and the attorney retained to represent it. Paff, supra, 412 N.J. Super. at 140.

Pursuant to N.J.S.A. § 47:1A-3, public records may be denied where they are pertinent to an ongoing investigation by a public agency and "inspection, copying or examination of such record or records shall be inimical to the public interest". N.J.S.A. § 47:1A-3(a). To assert the ongoing investigation exemption applies, the burden is on the defendant to demonstrate (1) there is a pending investigation and (2) disclosure would be inimical to the public interest. Additionally, any records which were public prior to the commencement of an investigation remain accessible, regardless of any subsequent investigation.

However, the mere designation of a document as "investigatory" does not preclude the public's right to access. As the Supreme Court of New Jersey held in McClain v. College Hospital, 99 N.J. 346 (1985), "[r]outine review of government functions is not sheltered, but when 'the inquiry departs from the routine and focuses with special intensity upon a particular party, an investigation is under way.'" Id. at 357.

D. Sanctions

A custodian who knowingly and willfully violates OPRA shall be subject to civil penalties and disciplinary action. N.J.S.A. § 47:1A-11. The penalties are as follows: "$1,000 for an initial violation, $2,500 for a second violation that occurs within 10 years of an initial

violation, and $5,000 for a third violation that occurs within 10 years of an initial violation." Ibid.

E. OPRA Fees

Pursuant to N.J.S.A. § 47:1A-6, "[i]f it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." The Supreme Court of New Jersey in Mason v. City of Hoboken, 196 N.J. 51 (2008), interpreting legislative revisions to the Act, held "OPRA mandate[s], rather than permit[s], an award of fees to a prevailing party." Id. at 75.

In addition, the authority to award fees is prescribed in R. 4:42-9(a)(8) which allows for the award of fees "[i]n all cases where attorney's fees are permitted by statute." R. 4:42-9(a)(8). The New Jersey Supreme Court in New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr., 185 N.J. 137 (2005) ("NJDPM") held a calculation of reasonable fees may be premised upon "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate". Id. at 154.

Analysis

The political tensions briefly described above bear on this litigation as the contentious relationship among the parties has exacerbated the production of documents responsive to plaintiff's requests. While the court makes no findings concerning these underlying issues, it suffices to note neither party has acted with the utmost circumspection.

Defendants' counsel presents several arguments in response to plaintiff's complaints. Initially, defendants' counsel urges plaintiff has "taken to submitting OPRA requests to harass, punish and quiet vocal opponents" of the redevelopment project. (Defs. Br. at 3). In support of

this position, defendants' counsel argues plaintiff has filed six (6) additional OPRA requests with Bogota.[4] In turn, it is argued Bogota is struggling with the resources available to process these voluminous requests. As further consideration, defendants' counsel argues "the position of Borough Attorney had become politically contentious", particularly during January 2014. (Defs. Br. at 3). Accordingly, during the time when plaintiff's requests were made, Bogota did not have "counsel to advise on matters such as responding to OPRA requests." (Defs. Br. at 3). Bern has since been appointed. The forgoing is a preamble to the remainder of the arguments presented by defendants' counsel.

A. Overbroad Requests

[4] On February 25, 2014, five (5) additional OPRA requests were submitted by plaintiff's counsel seeking:

> Invoices/vouchers submitted to the Borough of Bogota by Robert Costa and/or Costa Engineering Corporation since January 1, 2014. Must be provided immediately—N.J.S.A. 47:1A-5(e).
>
> Invoices/vouchers submitted to the Borough of Bogota by Douglas M. Bern and/or Rubenstein, Meyerson, Fox & Conte, PA since January 2, 2014. Must be provided immediately—N.J.S.A. 47:1A-5(e).
>
> Any reports, studies or communications of any kind, including electronic, since January 1, 2014 from Robert Costa and/or Costa Engineering Corporation regarding 297 Palisades Avenue Urban Renewal Company, LLC to anyone in the Borough of Bogota.
>
> Emails from anyone at Borough of Bogota to and from Robert Costa and/or Costa Engineering Corporation regarding 297 Palisades Avenue Urban Renewal Company, LLC since January 1, 2014.
>
> Any reports, studies or communications of any kind, including electronic, since January 1, 2014 from Robert Costa and/or Costa Engineering Corporation regarding 297 Palisades Avenue Urban Renewal Company, LLC to anyone in the Borough of Bogota.

Another request was made by plaintiff's counsel on March 3, 2014 seeking:

> All communications between Douglas M. Bern/Rubenstein Meyer Fox Mancinelli Conte & Bern, PA and Robert Costa/Costa Engineering Corporation since December 1, 2013 to the present on the official business of Bogota.

Defendants' counsel argues upon examination of plaintiff's requests, "[w]hile the Defendants are prepared to disclose some documents, requests that are overly broad, overly disruptive and/or are exempt from disclosure will not be provided". (Defs. Br. at 3).

Defendants declare their intent to disclose correspondence from Nunez's and Burdiez's personal and government emails containing the terms listed in plaintiff's request.[5] This is a modification of the requests made by plaintiff. Specifically, the first and second paragraphs of plaintiff's requests seek "all emails" to or from Nunez's government email address and private email addresses used for public business. Defendants object to plaintiff's requests insofar as they seek text messages however they are willing to provide the cellular phones of Nunez and Burdiez for in camera review.

To the extent plaintiff seeks all emails to or from Nunez and Burdiez from July 1, 2013 to the present, such a request is clearly overbroad and troubling. Limiting production to those emails containing the previously enumerated terms contained in plaintiff's request would satisfy, preliminarily, defendants' obligations under OPRA and is so ordered.

B. Public Records

Defendants' counsel also argues some of the requested documents are neither government records pursuant to OPRA nor are they public records under the common law. Specifically, it is argued Nunez's correspondence with the *The Record* "are not subject to OPRA because they were not authorized by the Borough and were not pursuant to his official duties as a Councilman." (Defs. Br. at 6). Moreover, defendants' counsel argues many of the requested documents were not made during the course of Nunez exercising his function as Councilman.

[5] The terms are: 297 Palisade Avenue, 297, Urban, Renewal, Paul, Kaufman, LaBarbiera, Permit, Abatement, Florence, Dewey, Redevelopment, Burdiez, Stop, Work, and Construction.

Many documents listed in the Vaughn Index are described as not being government or public records. Defendants' counsel argues "[c]orrespondence regarding political campaign strategy or similar correspondence must be distinguished from that correspondence that was sent or received in the Councilmen's official capacity." (Defs. Br. at 6). Without performing an in depth in camera review, the court cannot determine if these documents are appropriately withheld as not being public records.

In reply, plaintiff's counsel argues "*every* email sent or received by Nunez from or to his government email address is a government record by definition." (Reply at 8). Such a broad position appears to overstate the prescriptions of OPRA. A "government record" as defined by the Act must be

> *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 (*emphasis added*)]

Not every email sent from a government email address necessarily is within the purview of OPRA. It is conceivable an employee of a public agency may use a government email address to send an innocuous email which in no way pertains to official business. It would be an overreach to suggest that too is subject to disclosure under OPRA.

C. Exemptions

Defendants' counsel argues if some documents determined to be responsive to plaintiff's request are government or public records, they are exempt from disclosure by the attorney-client

privilege and/or an exemption for ongoing investigations.[6] For instance, some communications requested were between Bern and Nunez. Although fourteen (14) documents are listed on the Vaughn Index as exempt pursuant to the attorney-client privilege, no argument is made in defendants' opposition explaining how the exemption applies to those documents.

For other documents, defendants aver disclosure will "jeopardize the ongoing investigation into the Redevelopment project." (Defs. Br. at 8). It is further argued acquiescing to plaintiff's request will chill critics of the project which, defendants' counsel argues, is plaintiff's intent.

Defendants' counsel specifically argues plaintiff's request for Nunez's email to *The Record* is meant to stifle his efforts to investigate the project and disclosure will negatively affect the community. It is argued determining such records to be public would inhibit Bogota's ability to investigate wrongdoing.

On September 5, 2014, Nunez apparently initiated an "investigation" of the Redevelopment Agreement. Accompanying defendants' opposition is a Vaughn Index and the corresponding documents. Several documents are withheld pursuant to the investigation exemption. Defendants' counsel argues "permitting the Plaintiff to obtain its sought after documents will have the perverse affect [sic] of silencing the project's critics, presumably the exact result the Plaintiff is seeking." (Defs. Br. at 8). Defendants' counsel has marked the documents so withheld but has not provided any further argument explaining how production of these documents will yield the harm it is argued plaintiff intends.

Plaintiff's counsel argues defendants have not satisfied the two prongs necessary in order to invoke the investigation exemption. Initially, it is argued no evidence has been presented a

[6] The court notes, although not referenced in defendants' opposition, some documents have been withheld pursuant to N.J.S.A. § 47:1A-10 which exempts personnel records from disclosure.

"public agency" in Bogota is currently in the process of investigating matters to which the documents contained in defendants' Vaughn Index correspond. Rather, plaintiff's counsel argues, Nunez is pursuing his own investigation independent of some grant of authority to do so. No resolution is before the court suggesting Nunez is investigating the project on behalf of a public agency or entity. The concern raised in plaintiff's reply is recognizing defendants' invocation of the investigation exemption would allow for "literally every inquiry made by any elected or public official on anything" to be exempt from disclosure. Plaintiff's concern is appropriate and shared by the court. Not every action designated an "investigation" is thereby exempt from the operation of OPRA. This exemption is specifically addressed to an investigation by a "public agency", not an individual elected official.

D. Sanctions

The circumstances at the time plaintiff's requests were made suggest Bogota did not have designated counsel to assist in responding to OPRA requests. Accordingly, defendants could not seek advice from counsel concerning their response. Garlicki responded to plaintiff explaining Nunez and Burdiez were asked to provide responsive documents. Garlicki was advised no such documents existed. Absent the advice of counsel, no willful violation can be attributed to Garlicki.

With respect to Nunez's response, defendants' counsel argues Nunez acted in good faith in determining plaintiff's requests were abusive. Given the enmity between the parties, there is some basis for Nunez to so believe. However, Nunez responded to plaintiff's request saying there were no responsive records. Moreover, Nunez admitted the allegation contained in paragraph 10 of plaintiff's first complaint. Paragraph 10 alleges Garlicki responded to plaintiff that Nunez assured her no responsive documents existed.

Any representation by Nunez that no responsive documents existed was fallacious. Plaintiff's counsel referenced the article in *The Record* which is appended as Exhibit A to plaintiff's verified complaint. The article concerns a stop-work order in relation to the project and references an email from Nunez to *The Record.* It is clear Nunez did have documents responsive to plaintiff's OPRA request. Defendants' have demonstrated their intent to disclose certain documents so clearly some production ought to have been made. To assert no responsive documents ever existed was concededly incorrect if not duplicitous. The court notes conspicuously absent from the record is a certification from Nunez. Given his bold assertion no responsive documents existed, it is troubling he provides no certification with regard thereto. In addition to Nunez's email to *The Record,* plaintiff's counsel in its reply argues there are "no less than 26 responsive records" listed in defendants' Vaughn Index. Whatever the precise number of responsive documents which should have been produced, the fact that some substantial quantity has been withheld reflects the contumacious nature of Nunez's response. Accordingly, the court finds Nunez willfully and knowingly withheld documents responsive to plaintiff's OPRA request in violation of N.J.S.A. § 47:1A-11.

Conclusion

The contentious history between the parties is apparent and continues to infect this litigation. While there is insufficient information to find plaintiff's requests were made with the intent to harass defendants, given the requests were directed at the opponents of the project, there may be some credence to defendants' assertion.[7] Clearly, requesting all emails to or from Nunez and Burdiez from July 1, 2013 to present is overbroad and possibly vexatious. The court does

[7] Plaintiff filed another action under docket number BER-L- 2302-14, an order to show cause seeking temporary relief on March 12, 2014. Given the request for emergent relief, the court was compelled to put aside its other business to address that which was purportedly emergent and irreparable. After a review of all submitted pleadings, the court discerned the temporary relief sought was to have a report turned over from the author to the clerk.

not find plaintiff's actions constitute purposeful harassment as an insufficient record exists but nonetheless notes defendants' concerns. Requesting all emails for a one year period is abusive and defendants' response may be understood in that context. With the intervention of counsel a more forthcoming approach has been demonstrated.

However, the court is also concerned with defendants' behavior in responding to plaintiff's requests. Rather than provide documents to plaintiff, defendants have burdened the court with a voluminous stack of documents, apparently suggesting the court conduct an in camera review to sort through the morass presented. The documents appear to correspond to the requested emails but are neither Bates stamped nor is there any indication how many pages there are. The court will not now accommodate counsel by conducting such a review. Defendants' counsel must do more before burdening the court with such a task. Defendants' counsel should turn over the documents unless a specific exemption applies. Moreover, both parties' counsel should confer before requiring this court to divert attention from other matters to address these issues. Thereafter, another action may be pursued if resolution cannot be obtained with a more refined Vaughn Index.

With respect to the request for texts, the court agrees with defendants. The court will not privately inspect and/or review defendants' cellular phones. Further, the defendants' point is well taken that it would require forensic experts to extract the requested information. Such action has not yet been shown to be necessary. Moreover, there is a question whether texts are "government records."[8]

Responsibility for properly addressing these matters, at least in the first instance, falls upon both parties. This court is satisfied, and it has so found, the use of a private computer to

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[8] Neither party has briefed the issue whether texts are government records and the court's initial review of Government Records Council opinions and case law fails to reveal an explicit answer.

send emails does not insulate those emails for the purpose of OPRA provided the documents sought are a government record which is not exempt from disclosure. However, the court finds no willful violation of OPRA by Bogota and finds Garlicki acted appropriately in responding to plaintiff's request. Moreover, no borough attorney was appointed when the requests were made so Garlicki was unable to confer with counsel.

There would appear to be a difference between an individual seeking to promote transparency in government and a private citizen exploring an entrepreneurial interest; this case is the latter. However, although the language of OPRA refers to "the protection of the public interest", the court finds no reported decision indicating the motivation of the requesting party is relevant to a determination whether production should be made. Though a public citizen seeking government records to promote transparency serves a more "noble" purpose than a private entity seeking records for personal gain, both may be entitled to production. The Supreme Court of New Jersey in Burnett v. County of Bergen, 198 N.J. 408 (2009) held, "[a]s a general rule, we do not consider the purpose behind OPRA requests. An entity seeking records for commercial reasons has the same right to them as anyone else." Id. at 435. (internal citation omitted). However, Burnett also held:

> when legitimate privacy concerns exist that require a balancing of interests and consideration of the need for access, it is appropriate to ask whether unredacted disclosure will further the core purposes of OPRA, i.e., to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process. OPRA's goals are not furthered by disclosing SSNs that belong to private citizens to commercial compilers of computer databases. Were a similar request made by an investigative reporter or public interest group examining land recording practices of local government, this factor would weigh differently in the balancing test.
>
> [Id. at 414.]

The court finds defendants' invocation of the investigation exemption to be insufficiently supported. Defendants' counsel must provide a sounder basis to withhold documents under that exemption. Defendants are hereby ordered to provide plaintiff with the requested documents pertaining to the previously enumerated list of key terms.

Counsel are directed, after consideration of this decision, to determine what should be produced, discuss the matter with one another and see if any issues remain. If so, plaintiff shall file a new action which the court will expedite. Thereafter, documents may be submitted for in camera review provided they are Bates stamped, if then deemed appropriate.

Given the court's finding Nunez willfully and knowingly violated OPRA, N.J.S.A. § 47:1A-11 prescribes a sanction of $1,000 for an initial violation. However, as Nunez is a newly-elected councilman who may be unfamiliar with OPRA mandates and could not avail himself of a borough attorney with whom he could consult in response to plaintiff's request, for this violation the court will suspend the fine. The councilman should be aware in the unlikely event a similar matter comes back before the court the court may be less forgiving.

Furthermore, as documents were improperly withheld, plaintiff is entitled to attorneys' fees. However, the issue of what fee would be appropriate is not competently before the court. Counsel are encouraged to agree upon a reasonable fee award. Absent the same plaintiff's counsel shall submit a certification of services and a brief in support of the requested award by April 18, 2014 and defendants may respond thereto by April 25, 2014. After review the court will then determine how best to proceed.

Plaintiff's motion is granted in part.

Plaintiff's counsel shall prepare and submit the appropriate order in conformity with this decision.

APPENDIX B

2012 WL 6057334 (N.J.Super.L.) (Trial Order)
Superior Court of New Jersey, Law Division,
Law Division.
Bergen County

Perry BOLKIN, Plaintiff,
v.
BOROUGH OF FAIR LAWN and Joanne M. Kwasniewski, Custodian of Records for the Borough of Fair Lawn, Defendants.

No. BER-L-6547-12.
December 5, 2012.

West Headnotes (1)

[1] **Records**⚬=Discretion and equitable considerations; balancing interests
Records⚬=In camera inspection; excision or deletion

Possible negative privacy and security consequences of public release of names and addresses of pet owners to requester, so that he could disseminate political literature to inform pet owners of a particular candidate's stance on animal rights issues, were outweighed by benefit of adhering to broad disclosure policies promoted through the Open Public Records Act (OPRA) to maximize public knowledge about public affairs, warranting release of requested information, where requester agreed to redact all information other than names and addresses of pet owners and to seek court approval before allowing his political interest group to use the data. N.J. Stat. Ann. § 47:1A-1 et seq.

Cases that cite this headnote

Opinion

Honorable Peter E. Doyne, A.J.S.C.

CIVIL ACTION

Argued: November 30, 2012

Decided: December 5, 2012

Walter M Luers, Esq. appearing on behalf of the plaintiff, Perry Bolkin (Law Office of Walter M. Luers, LLC).

Ronald P. Mondello, Esq. appearing on behalf of the defendants, Borough of Fair Lawn and Joanne M. Kwasniewski, Custodian of Records for Borough of Fair Lawn (Ronald P. Mondello, P.C.).

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Introduction

On August 24, 2012, Perry Bolkin ("plaintiff" or "Bolkin") had filed on his behalf a verified complaint and an order to show cause. Bolkin sought a judgment declaring defendants, the Borough of Fair Lawn and Joanne Kwasniewski, Custodian of Records for the Borough of Fair Lawn ("Fair Lawn" or "defendant" and "Joanne" when addressed individually, "defendants" when referenced collectively), in violation of the Open Public Records Act, *N.J.S.A.* 47:1A-1 to -13 ("OPRA" or the "Act"), directing defendants to release the requested records to plaintiff, and requested counsel fees and costs pursuant to the Act. Bolkin also sought similar relief by way of the common-law right of access to public records.

Facts/ Procedural History

Bolkin is a resident of Fair Law, New Jersey. He supports the activities of the New Jersey chapter of the League of Humane Voters ("LOHV"). The LOHV is a non-profit political action committee. Its mission is to promote the enactment of animal-friendly legislation and elect candidates for public office who will use their votes and influence for animal protection. Fair Lawn is a municipality organized pursuant to the laws of the State of New Jersey. Joanne is the custodian of records for Fair Lawn.

In order to promote its mission, plaintiff expects to mail literature directly to pet owners in Fair Lawn endorsing candidates for office with the hope that those candidates will support "animal-friendly legislation" and to provide additional information about these candidates. LOHV acquires lists of the names and addresses of pet owners in various municipalities in order to mail its literature to its targeted audience. Fair Lawn and other municipalities maintain copies of applications that residents submit to it in order to receive licenses for their cats and dogs.

On June 28, 2012, plaintiff submitted an OPRA request seeking the names and addresses of pet owners in Fair Lawn. Joanne sent a timely response on July 11, 2012 denying the request. In denying the request, Joanne relied on privacy concerns set forth in *N.J.S.A.* 47: 1A-1,[1] Governor McGreevy's Executive Order Number 21,[2] *Doe v. Poritz,* 142 N.J. 1, 82 (1995),[3] and the Government Record Council's ("GRC's") *Bernstein* decisions.[4]

On August 10, 2012, plaintiff's counsel responded to Joanne's denial by amending plaintiff's original request for documents. Plaintiff's amended request sought documents showing names and addresses of all licensed dog and cat owners in Fair Lawn, including all dog and cat applications or licenses on file, or a list of all licensed dog and cat owners if available. The latter does not exist.

On August 15, 2012, counsel for defendants responded to the August 10th letter by email. The email reiterated Joanne's denial pursuant to the GRC rulings. In response, on August 24, 2012, plaintiff had filed on his behalf a verified complaint seeking access to the documents pursuant to the Act and the common law right of access, as well as reasonable attorney's fees. On that same date, plaintiff filed an order to show cause, which was signed by the Honorable Robert P. Contillo, P.J.Ch. on August 27, 2012, directing defendants to appear and show cause why the requested documents should not be disclosed, and why reasonable attorney's fees should not be awarded to plaintiff.

Plaintiff argues that defendant's stated privacy concerns are insufficient to uphold a denial of the requested documents, outlining the factors regarding disclosure of personal information discussed in *Doe, supra,* 142 N.J. at 88. Plaintiff presents a similar argument regarding the common law right of access, and the balancing factors outlined in *Loigman v. Kimmelman,* 102 N.J. 98, 113 (1986). Plaintiff also cites to an unpublished opinion, *Atlantic County Society for the Prevention of Cruelty to Animals v. City of Absecon,* 2009 *N.J. Super. Unpub.* LEXIS 1370, *1 (App. Div. June 5, 2009) in support of his position.[5]

Defendant filed an answer on October 12, 2012. Defendant's primary argument, as discussed *supra,* is the information requested cannot be disclosed due to privacy concerns. Defendant also argues that the information should not be disclosed due to security concerns, essentially urging that listing dog and cat owners could make pet owners, or non-pet owners, more susceptible to burglaries or "pet theft." Plaintiff filed a response on October 16, 2012. The court entertained oral arguments on November 30, 2012.

Legal Standards

A. OPRA

1. *Generally*

The Act, *N.J.S.A.* 47:1A-1 to -13, "plainly identifies its purpose at the outset: to ensure that government records, unless exempted, are readily accessible to citizens of New Jersey for the protection of the public interest. To accomplish that aim, OPRA sets forth a comprehensive framework for access to public records." *Mason v. City of Hoboken,* 196 N.J. 51, 57 (2008) (internal citation omitted).

OPRA provides "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 [under the Act] shall be construed in favor of the public's right of access." *N.J.S.A.* 47:1A-1. A government record is defined as:
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. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[*Id.* § 1.1.]

Records are typically available during the public agency's regular business hours with an exception for smaller towns, agencies, and school districts. *Id.* § 5. The records may be redacted to protect personal information, and the records custodian may charge a fee for copying and related services. *Ibid.* Typically, any request for a record must be made using the agency's official request form. *Ibid.* The custodian must respond to all requests within seven business days, unless the applicant fails to provide necessary contact information. *Ibid.*

If access to a government record is denied, the person denied access, and only that person, may challenge the decision by filing a complaint in Superior Court or with the Government Records Counsel. *Id.* § 6. The application must be brought within forty-five days of the denial. *Mason, supra,* 196 N.J. at 68 ("[A] 45-day statute of limitations should apply to OPRA actions, consistent with the limitations period in actions in lieu of prerogative writs.").

The proceeding will go forward in a summary or expedited manner. *N.J.S.A.* 47:1A-6; *see Courier News v. Hunterdon Cnty. Prosecutor's Office,* 358 *N.J. Super.* 373, 378 (App. Div. 2003). As such, "the action is commenced by order to show cause supported by a verified complaint." *Ibid.* In *Courier News,* the Appellate Division held the trial court had failed to follow proper procedure when it denied a newspaper its right to summary adjudication on an OPRA action. The trial judge had erroneously applied the standard for preliminary relief to the summary action and dismissed plaintiff's action without prejudice. *Id.* at 377. As a result, the Appellate Division, recognizing the Act's policy of expediency, invoked original jurisdiction over the matter. *Id.* at 379.

In OPRA actions, the public agency has the burden of proving the denial is authorized by law. *N.J.S.A.* 47:1A-6. As such, the agency "must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. Absent such a showing, a citizen's right of access is unfettered." *Courier News, supra,* 358 *N.J. Super.* at 383. In establishing legal support, "[a] decision of the [Government Records Council] shall not have value as a precedent for any case initiated in Superior Court," *N.J.S.A.* 47:1A-7, though such decisions are normally accorded deference unless "arbitrary, capricious or unreasonable" or violative of "legislative policies expressed or implied in the act governing the agency." *Serrano v. S. Brunswick Twp.,* 358 *N.J. Super.* 352, 363 (App. Div. 2003) (*citing Campbell v. Dep't of Civil Serv.,* 39 N.J. 556, 562 (1963)). Lastly, "a court must be guided by the overarching public policy in favor of a citizen's right of access." *Courier News, supra,* 358 *N.J. Super.* at 383. If it is determined access was improperly denied, such access shall be granted, and a

successful requestor shall be entitled to reasonable attorney's fees. *N.J.S.A.* 47:1A-6.

2. *Privacy Exceptions to OPRA*

Exceptions to OPRA can come from a variety of sources:

> [A]ll government records shall be subject to public access unless exempt from such access by: [other provisions of OPRA]; any other statute; resolution of either or both houses of the New Jersey Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order.
>
> [*N.J.S.A.* 47:1A-1]

In addition to the exclusions/exceptions found throughout the Act, the first section of OPRA sets forth the public policy of the statute, stating "a public agency has a responsibility and an obligation to safeguard from public access a citizen's *personal information* with which it has been entrusted when disclosure thereof would violate the citizen's *reasonable expectation of privacy.*" *N.J.S.A.* 47:1A-1 (emphasis added); *see also Burnett v. County of Bergen,* 198 N.J. 408, 422-23 (2009) (stating this portion of OPRA is a substantive part of the statute, not a preface or a preamble).

The *Burnett* Court found "OPRA's language provides for a balancing of interests in privacy and disclosure." *Ibid.* at 420. In that case, a commercial entity requested the bulk release of "eight million pages of land title records of all types, extending over a period of twenty-two years, which contained names, addresses, social security numbers, and signatures of countless citizens of this State." *Ibid.* at 414. The Court stated "OPRA's twin aims--of ready access to government records and protection of citizen's personal information--require a careful balancing of the interests at stake." *Ibid.* The Court found the requested records were unrelated to "OPRA's core concern of transparency in government." *Ibid.* The Court held, "[U]nder the unusual circumstances of this case, the balance tip[ped] in favor of the citizens' reasonable expectation of privacy in one respect: the records [were permitted to be] disclosed after redaction of individual social security numbers." *Ibid.* at 415. Further, the Court held "the cost of redaction [was] borne by the requestor." *Ibid.* In reaching that conclusion, the court adopted the factors set forth in *Doe v. Poritz,* 142 N.J. 1, 88 (1995):

> (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 Court stated OPRA's "privacy provision [was] directly implicated [as] the requested documents contained [social security numbers] along with names, addresses, signatures, and marital status of a substantial number of New Jersey residents." *Burnett.* 198 N.J. at 428. The Court therefore turned to the balancing test outlined in *Doe* "to harmonize OPRA's competing concerns and evaluate whether disclosure without redacting [social security numbers was] proper." *Ibid.*

The Court found the following factors favored disclosure of the records without first redacting the social security numbers: (1) the records were public records, (2) the very purpose of the records was to place the world on notice of their contents, and (3) the realty records in question did not require inclusion of social security number. *Ibid.* at 429. Conversely, the Court considered the following in its determination the social security numbers were to be redacted: (1) that a social security number being available at a clerk's office did not eliminate a person's expectation of privacy, (2) the social security numbers were paired with other personal information, elevating the privacy concern at stake, (3) the bulk disclosure of realty records to a commercial entity to be included in a searchable electronic database would eliminate the practical obscurity that enveloped records held at the Bergen County Clerk's Office, and (4) the documents were composite documents, which "implicate privacy concerns more broadly than documents with one item alone." *Ibid.* at 430-31.

The court concluded, "In short, 'interest in privacy may fade when the information is a matter of public record, but they are

not non-existent.' " *Ibid.* at 431 (*quoting Doe,* 142 N.J. at 87).

B. New Jersey Common Law

In addition to OPRA, disclosure of public records can be sought under the common law. Thus, even if the names and addresses of pet license holders fall within one of the exceptions to access under the statutory construct of OPRA, plaintiff may still prevail by resorting to the common-law right to access government records, a thorough background of which is provided by *Mason, supra,* 196 N.J. at 67-68:
The common law definition of a public record is broader than the definition contained in OPRA.

To access this broader class of documents, requestors must make a greater showing than required under OPRA: (1) the person seeking access must establish an interest in the subject matter of the material; and (2) the citizen's right to access must be balanced against the State's interest in preventing disclosure.

[*Ibid.* (internal citations and quotations omitted).]

Thus, to prevail under the common law, plaintiffs must show the record sought constitutes a "public record" and establish a right in the record sought, which outweighs the State's interest in preventing disclosure.

Once it is shown the record is a "public record" and is therefore subject to disclosure, and the plaintiff's interest in the record is established, the court must weigh the plaintiff's interest against the government's interest in non-disclosure. The Supreme Court has set forth the following factors for use in conducting this balance:
(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 policymakers; (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).]

The Court in *South Jersey Publishing,* in discussing the second requirement for common law disclosure, found:
In its balancing, a court may find it necessary to compel production of the sought-after records and conduct an in camera review thereof. It may, indeed, decide that to release the records in a redacted form, editing out any privileged or confidential subject matter, is appropriate. A mere summary of the record is inadequate, however, where a more complete record reflecting the underlying facts is available and the plaintiff's need therefore outweighs any threat disclosure may pose to the public or private interest.

[*S. Jersey Pub. Co. v. N.J. Expressway Auth.,* 124 N.J. 478, 488-9 (1991).]

Analysis

A. OPRA

1. *The License Applications are Government Records*

In order to be subject to OPRA's disclosure requirements, the records sought must qualify as government records. It is clear that the records sought here -- the license applications for dog and cat owners -- are government records for purposes of OPRA, as the statute defines a government record as, in short, any document or recording made, maintained, or kept by any government entity, or officer or official thereof, in the course of its or his official business. *See N.J.S.A.* 47:1A-1.1; *see also Serrano, supra,* 358 *N.J. Super.* at 365 (holding audiotape of a 911 phone call was a government record). Fair Lawn clearly maintains records of license applications in order to conduct official business, e.g. issuing pet owner licenses. Regardless, there is no argument that the documents are not public records.

2. *Privacy Concerns and Balancing Test*

Privacy concerns surely arise where an individual's home address, name, and social security number are disclosed. However, in order to determine if the need for disclosure under OPRA outweighs the need to protect the disclosed individual's privacy, it is necessary to apply the *Doe* factors. Further, it should also be determined whether any reasonable concerns can be minimized through a redaction of specified information. At oral argument, plaintiff's counsel agreed that plaintiff would consent to prohibiting the use of information other than for the requested purpose: dissemination of political literature to inform pet owners of a particular candidate's stance on animal rights issues. Plaintiff also agreed, through counsel, he would agree to a redaction of all information other than the names and addresses of pet owners.[6] As the documents are to be used solely for political purposes and as potentially private information such as pet breed and reasons for owning the pets can be redacted, disclosure interests outweigh privacy concerns, and thus disclosure is appropriate.

a. Type of record requested and the information it does or might contain.

The documents requested, applications for dog or cat licenses, are government records and do contain some private information that *may* not be appropriate for disclosure. The documents contain the names, addresses, phone numbers, whether the dogs are being used as guide dogs or to assist handicapped individuals, and whether the owner is a senior citizen. Defendants argue that the information beyond the names and addresses is arguably *too* private to warrant disclosure. However, plaintiff has only requested the names and addresses of those who obtained licenses, and has agreed to accept this data with all other information redacted. Names and addresses are not exempt from disclosure under OPRA, and disclosure of this information should be favored barring significant concerns under the remaining factors. Accordingly, the first two factors favor plaintiff.

b. The potential for harm in any subsequent nonconsensual disclosure and injury from the disclosure relationship in which the record was generated.

Regarding the third factor, there does not appear to be significant potential harm in any subsequent disclosure of the information. Plaintiff has stated that he intends to use the information to distribute documents endorsing political candidates. Defendant argues that the information *could* subsequently be used for unsolicited commercial enterprises. While this may be a valid concern, as was the case in the *Bernstein* decision,[7] plaintiff has not made any suggestion and presents no intention to use the names and addresses for commercial purposes. Plaintiff's intention here, unlike the plaintiff in *Bernstein,* is political, not commercial. The greatest harm would be the combination of names and addresses with another personal identifier, such as a social security number. *See e.g., Burnett,* 198 N.J. at 428. This problem is not present here.

Further, at oral argument, plaintiff consented to retaining the information only for his personal use and distribution--to be used for political distribution only--and thus will be barred from allowing others to use the data, including the LOHV. Because the LOHV is a third party not bound by this litigation, defendant fears it might use the pet owners' names and addresses beyond the scope of plaintiff's limited use. Plaintiff, as a member of LOHV, although not acting on its behalf, has expressed his intention to allow the LOHV to use the data. Defendant further fears a key member of the LOHV, Angie Mettler ("Mettler"), will use the data beyond the scope of the agreed limited use.[8] As discussed at oral argument, however, plaintiff has agreed he will not disseminate the data to LOHV and that he would have LOHV submit a request to obtain the information with the permission of the court, limiting LOHV to the same conditions for use as plaintiff.

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Defendant also argues that dog and cat owners will be negatively affected by unsolicited mail every time an election occurs in New Jersey. It is unclear how this position relates to potential "nonconsensual" disclosures, although it is important to note that generally, open political discourse and disclosure in elections should be favored over nondisclosure. Accordingly, the third factor favors plaintiff.

Similarly, regarding the fourth factor, there is little potential for injury to the disclosure relationship from dissemination of the requested information. The applications are required for a dog or cat license. The disclosure, while potentially causing some possible nuisance due to unwanted solicitation, does not include extremely personal or private information that would outweigh or discourage an individual from owning, and properly licensing, a dog or cat. Defendant argues that disclosure of the requested information will be so damaging that it will encourage law-abiding pet owners to stop complying with the law by refusing to file for pet licenses. In support of this contention, defendant offers the certifications of a few concerned citizens regarding disclosure of the information.[9]

Defendant's position, however, cannot be supported. It is unreasonable to suggest that the mere receipt of potentially unwanted information is enough to encourage law-abiding citizens to ignore other deterrents to illegal actions, and thus begin ignoring laws as they deem appropriate. Surely individuals would not start ignoring stop signs and stop lights if they received information as a result of the use of data from their driver's license. Accordingly, the fourth factor favors plaintiff.

c. The adequacy of safeguards to prevent unauthorized disclosure.

As to the fifth factor, unauthorized disclosure of addresses and names is of little concern. Without additional identifiers, the only information available to plaintiff is a name and an address, information that is available to essentially anyone with an available internet connection, phone book, or disposable income.[10] While an individual may seek to hide this information in various instances, this information has historically been available to the public, and thus the fear of unauthorized disclosure, even absent "safeguards" is of little concern. *See Higg-A-Rella, Inc. v. County of Essex,* 141 N.J. 35, 49 (1995). Further, as stated above, plaintiff has agreed to be limited with regard to disclosure of the information and will seek court approval before allowing his organization, LOHV, to use the data. Accordingly, the fifth factor favors plaintiff.

d. The degree of need for access.

As to the sixth factor, as discussed *supra,* plaintiff is seeking to use the information for political purposes. Specifically, plaintiff wishes to endorse specific candidates who share plaintiff's political views with regard to the treatment of animals. Open discussion of a politician's political views is surely in the public interest. Plaintiff requests a targeted list of individuals who might be most amenable to his position in order to reduce costs and to avoid unwanted solicitation of other voters who may not share a similar interest. Overall, plaintiff's need is not overwhelming; however, it is reasonable and beneficial to the public interest as a whole.[11] Accordingly, the sixth factor favors plaintiff.

e. Whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

Regarding the final prong, as there appears to be no strong reason supporting denial of the information, the Legislature's overarching intention to favor OPRA and disclosure of government records must prevail. As already discussed, defendant argues that the information should not be disclosed for fear of encouraging citizens to break the law, fear of annoying voters with unwanted information,[12] and fear of the disclosure of private information. As discussed, these fears are not well supported for various reasons. Defendant's raise a few other concerns, however, which should be addressed.

Defendant argues that the disclosure of home addresses is a public policy concern, as outlined in Executive Order 21, paragraph 3, which exempted home addresses from OPRA. As plaintiff notes, this paragraph was rescinded in Executive Order 26.[13] The current legal posture regarding names and addresses at present is to allow this information so long as there

are no additional personal identifiers. *See Burnett, supra,* 198 N.J. at 428. At oral argument, plaintiff posited that the GRC's *Bernstein* decision (1) is merely advisory due to the authority granted to the GRC by the legislature; (2) has been diminished by the rescission of Executive Order 21, which *Bernstein* heavily relied upon; and (3) has been superseded by *Burnett* and other opinions since the rescission of Executive Order 21. Defendant argued that *Bernstein* is still relevant as it was referenced favorably in *Burnett,* noting that *Burnett* still implicated privacy interests where only names and addresses were disseminated through an OPRA request. As to points (1) and (2), plaintiff is correct. Regarding point (3), defendant correctly notes that privacy interests are implicated solely where names and addresses are released, as is the case in the instant matter. Defendant, however, has not sufficiently demonstrated, as is its burden, that the privacy interests implicated through the disclosure of the redacted information outweigh the overall interests of disclosure pursuant to OPRA. *Burnett* itself found that names and addresses alone, without any other identifiers, did not sufficiently implicate privacy concerns to warrant nondisclosure under OPRA. 198 N.J. at 437.

Finally, regarding *Bernstein,* a key difference between it and the instant case is the intended use of the information. Plaintiff intends to use the names and addresses to create a mailing list to send political literature and inform the public at large, while the plaintiff in *Bernstein* intended to use the information purely for commercial gain. Defendant notes that privacy concerns and the protection of the home are of the utmost importance under this country's Constitution, laws, and traditions. While defendant is surely correct, as voluminous case law and legal literature can attest, the privacy concerns implicated in allowing an organization to inform the public of political issues simply do not outweigh the overall disclosure policies behind OPRA. Even if *Bernstein* were not diminished by subsequent decisions and the rescission of Executive Order 21, the distinguishing characteristic of the intent of the plaintiffs regarding the use of the requested information warrants disclosure.

Defendant argues that people have the right to take their name *off* mailing lists, which shows that information should not be sent unsolicited. There is nothing to indicate that plaintiff would not remove an individual from the mailing list if so requested.

Notably, defendant repeatedly cites security concerns that might arise should the list be disclosed to plaintiff. Defendant suggests that individuals with dogs or cats and those without dogs or cats would be targeted more frequently by criminals. The former would be targeted for "dog or cat theft," possibly depending on the breed of the animal, and the latter as a result of the protection animals provide to a home. These *potential* concerns, however, appear minimal at best, particularly as very limited information is requested, and are outweighed by the overall disclosure goals of OPRA.

Accordingly, because the privacy concerns of the individuals in the disclosed information are outweighed by the overall public interest in disclosure through OPRA, defendant must disclose the requested names and addresses.

B. Attorney's Fees

Plaintiff seeks an award of counsel fees and costs pursuant to *N.J.S.A.* 47:1A-6. OPRA provides that a prevailing party shall be entitled to attorney's fees:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may ... institute a proceeding to challenge the custodian's decision by filing an action in Superior Court ... If it is determined that access has been improperly denied, the court ... shall order that access be allowed. A requestor who prevails ... shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

As plaintiff has prevailed with respect to access to the names and addresses of dog and cat owner license applicants, he is entitled to reasonable attorney's fees and costs for services pertaining to that issue. Defendant's argument the position it adopted was reasonable, and therefore fees should not be awarded, is not supported in existing case law.[14]

C. Common Law

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The analysis for disclosure pursuant to the common law is similar to the statutory analysis. Initially, the records at issue must be determined to be a public record. As noted *supra,* this is undisputed. Next, it is necessary to perform a similar balancing test, but in this case, applying the factors set out in *Loigman.*

The first factor is the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government. As discussed *supra* under factor four of the *Doe* balancing test, defendant argues that citizens will be encouraged to disobey the law by failing to apply for pet licenses if they know that their names and addresses are subject to disclosure. Again, defendant does not provide sufficient support for the proposition that law-abiding citizens will suddenly decide to change their ways as a result of receiving occasional literature on political candidates. Accordingly, the first factor weighs in favor of plaintiff.

The second factor is 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. As already discussed, the greatest effect resulting from plaintiff's requested disclosure on those who applied for dog and cat licenses is that they will likely receive occasional literature regarding political candidates. Plaintiff has not specified any intent to solicit individuals unreasonably or commercially. Further, there is no indication that those applying for licenses from a public entity for a pet license relied on the fact that their names and addresses would be kept secret. The application information is not particularly sensitive in nature. Accordingly, this second factor weighs in favor of plaintiff.

The third factor is the extent to which agency self-evaluation, program improvement, or other decision-making will be chilled by disclosure. As pet license applications are fairly routine and do not require particularly sensitive information, there is little to suggest that any agency activities will be chilled by the disclosure of the names and addresses of those applying for licenses. In fact, the disclosure may encourage Fair Lawn to come up with a short and easily accessible list of the requested information for future use. Accordingly, the third factor weighs in favor of plaintiff.

The fourth factor is the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers. The only information sought is factual in nature, i.e. names and addresses. The data is not particularly sensitive or complex, and thus this factor does not weigh towards nondisclosure.

The fifth factor is whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency. This factor does not appear particularly informative either way and thus does not weigh towards nondisclosure.

The final factor is whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials. As with the previous factor, this factor is not particularly applicable and thus does not way towards nondisclosure.

Looking to all the factors, disclosure of the requested information is not an unreasonable invasion of the applicants' privacy and notably is not a large burden on the defendant. Accordingly, disclosure is warranted under the common law.

Conclusion

The OPRA statute is intended to be construed in favor of the public's right of access. It is then the burden of the public agency to demonstrate the law permits a withholding of such access. "[T]he court must maintain a sharp focus on the purpose of OPRA and resist attempts to limit its scope, absent a clear showing that one of its exemptions or exceptions incorporated in the statute by reference is applicable to the requested disclosure." *Asbury Park Press v. Ocean County Prosecutor's Office,* 374 N.J. Super. 312, 329 (Law Div. 2004).[15] "The salutary goal, simply put, is to maximize public knowledge about public affairs in order to ensure an informed citizenry and minimize the evils inherent in a secluded process." *Ibid.* The court noted, "Exposure of records to the light of public scrutiny may perhaps cause discomfort to some. However, OPRA is founded on the premise that society as a whole suffers far more if governmental bodies are permitted to operate in secrecy." *Ibid.* The court went on to state, "However, having recognized the overarching value and objective of providing broad access to government records, the court must ask how the release of [those records] in any way contributes to the purpose of OPRA or provides a scintilla of insight into the functioning of government." *Ibid.* at 330. The court admitted "the general rule is one

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seeking to obtain government records need not explain why they are requested if there is a clear right to obtain them under the statute ... Yet, that principle becomes less absolute if there is some protection of a privacy right afforded in the Act." *Ibid.*

All considerations in the instant matter weigh in favor of rejecting defendant's reasonable expectation of privacy argument. *N.J.S.A.* 47:1A-1. The intrusion in this matter, names and addresses, is minimal. Any further intrusion shall be offset by a redaction of additional identifiers, including pet breed or reasons for owning the pets. It is notable that plaintiff's intent in acquiring the requested information is for political disclosure and not for a commercial enterprise. An overarching goal of OPRA is to "maximize public knowledge about public affairs," which at times may "cause discomfort to some." *Asbury Park Press, supra,* 374 *N.J. Super.* at 329. The discomfort of having one's name and address provided to a political interest group does not outweigh the interests of open disclosure in the political process. Many of those who receive LOHV's literature may welcome the information, and overall an educated electorate is to be promoted, not hindered. The security issues similarly may raise some concerns; however these are at best quite minimal, and at worst, non-existent.

Overall, the possible negative consequences in releasing the requested information to plaintiff do not outweigh the benefit of adhering to the broad disclosure policies that are promoted through OPRA. Accordingly, plaintiff must be provided with the names and addresses of people who submitted cat and dog applications in Fair Lawn, and acquired licenses. Any additional identifiers, including but not limited to breeds of pet, age of parties, or reasons for the application, shall be redacted.

Similarly, plaintiff is also entitled to relief under the common law, and defendant is directed to provide the information as stated regarding OPRA.

By consent, plaintiff is prohibited from disseminating the names and addresses of cat and dog license applicants to LOHV barring further approval from this court regarding LOHV's agreement to abide by the limited use consented to by plaintiff.

Plaintiff is entitled to reasonable attorney's fees and costs with respect to services performed in connection with release of the names and addresses of pet license applicants in Fair Lawn. *N.J.S.A.* 47:1A-6.

Plaintiff's attorney is directed to submit the appropriate order in conformity with this decision.

Footnotes

1 The relevant part of *N.J.S.A.* 47:1A-1 states:
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; and nothing contained in [the Act], as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

2 The order states:
WHEREAS, the Legislature further found and declared in [the Act] 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.
34 *N.J.R.* 2487(a) (Aug. 5, 2002)

3 In *Doe,* the Court held:
Our analysis is altered, however, by the disclosure of plaintiff's home address, and more importantly, by the totality of the information disclosed to the public. We believe that public disclosure of plaintiff's home address does implicate privacy interests. We are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions.
(internal marks and citations omitted)
Doe, 142 N.J. at 82.

4 In brief, these decisions by the GRC denied the complainant's access to lists of names and addresses of dog license owners pursuant to *N.J.S.A.* 47:1A-1, Executive Order 21, and, among other cases, *Doe v. Poritz.*

5 *But see R.* 1:36-3.

6 Redacted information would include pet breeds, SSN (if present), nature of the ownership (i.e. whether the dog is used for protection, disability, etc.), the age or other descriptive data of the owner or pet, or any other data that was not merely the name and address of the owner.

7 The *Bernstein* decision, as an opinion by the GRC, is not precedential in this case. However, plaintiff cites to an unpublished opinion, *Atlantic County, supra,* which, pursuant to *R.* 1:36-3, also does not constitute precedent. Accordingly, while this court is not bound by either decision, both will be considered in fairness to the parties.

8 Defendant also points to Mettler's zealous promotion of animal rights as a concern regarding the dissemination of the requested information to the LOHV. As part of its submission, plaintiff included a certification of Mettler, which indicated that she intended to use the data to further the LOHV's mission of promoting "animal-friendly legislation." Defendant notes that Mettler has broken the law to promote the LOHV's mission, citing to a youtube.com video where Mettler states "we know [removing bears from snare traps] is illegal" but "come arrest me and I'll do it again." www.youtube.com/watch?v=EQxRPruEomU at 2:40/8:56. Regardless of Mettler's past actions, however, the court will not presume that an organization will break the law in the future particularly where there are sufficient deterrents in place should the order be violated.

9 Notably, none of these citizens states their intent to engage in a form of civil disobedience or any other illegal activity should the information be disclosed. Further, based on defendant's papers, it is unclear whether some of the individuals do in fact own dogs or cats, thus including their information as part of the disclosure. Defendant, however, presented at oral argument that all five individuals who submitted certifications are in fact pet owners in Fair Lawn.

10 Defendant's counsel notes that he was unable to locate his and Mr. Luer's home address using the internet, although he admits that he is not as "computer savvy" as his children. Various address and informational databases are available online, which will provide information for free or at times for a small fee. *See e.g., www.whitepages.com.*

11 Plaintiff also notes that it requires a shortened list of pet owners that filed for licenses in Fair Lawn in order to avoid excessive bulk mailing costs. At oral argument, plaintiff's counsel stated that he believed costs of bulk mail to be approximately 17 to 19 cents per item mailed. According to the United States Postal Service, mailing a standard postcard in bulk appears to be approximately 18.5 cents, with additional costs of about 6 cents per piece. United States Postal Service Price List, Notice 123, June 24, 2012, page 13, http:// pe.usps.com/cpim/ftp/manuals/dmm300/Notice123.pdf. Plaintiff further estimated that there are approximately 7,600 voters in Fair Lawn--the likely recipients, if untargeted, plaintiff would mail political literature to--which, according to defendant, has a population of around 40,000. Plaintiff's papers indicate there are approximately 2,250 dog and cat license applicants in Fair Lawn. Accordingly, assuming costs of about 25 cents per mailing, plaintiff's costs would diminish by approximately $1335 per mailing with a targeted list of solely pet license applicants as opposed to a list of voters. While this cost issue is not particularly crucial to the court's decision, the need for a targeted list to avoid costs is notable.

12 Candidly, as this was an election year, an "overabundance" of solicitations regarding political issues and candidates may well be argued persuasively. However, there is nothing to suggest that any additional information, notably targeted and minimal information regarding a group's endorsement of a candidate, would have the devastating impact defendant suggests. To the contrary, endorsement and disclosure of information regarding political candidates should be encouraged and disseminated as frequently as possible, particularly to those who might have the greatest interest in this information. OPRA itself is designed to encourage an engaged and informed electorate, thus promoting accountability. It is not the court's place to evaluate the nature of the disseminating organization, but instead to determine whether an OPRA request is valid.

13 Defense counsel conceded this at oral argument as well.

14 At oral argument, plaintiff concedes, and the court agrees, that Joanne's denial of access to the requested records was made in good faith and that her position was reasonable, even if not supported herein. With regard to attorney's fees, however, there is simply no legislative or legal support for a denial of reasonable attorney's fees where a defendant denied access in good faith. It is up to the legislature, not the court, to create such a provision.

15 The court acknowledges *Asbury Park Press* was written by a trial court and is not binding authority. However, the opinion is scholarly and has been commented upon favorably by multiple appellate courts which continue to recognize its vitality and strength. *See Burnett, supra,* 198 N.J. at 417.

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APPENDIX C

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

WILLIAM J. BRENNAN, *Plaintiff,* v. BERGEN COUNTY PROSECUTOR'S OFFICE; FRANK PUCCIO, CUSTODIAN OF RECORDS FOR THE BERGEN COUNTY PROSECUTOR'S OFFICE; and JOHN DOES 1-10, BEING AGENTS, SERVANTS, AND EMPLOYEES OF EACH AS A CONTINUING INVESTIGATION MAY REVEAL (WHO ARE FICTITIOUSLY NAMED BECAUSE THEIR IDENTITIES ARE UNKNOWN), *Defendants.*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET No. BER-L-20832-14 CIVIL ACTION OPINION

Argued: February 20, 2015
Decided: February 25, 2015

Honorable Peter E. Doyne, A.J.S.C.

Donald F. Burke, Esq. appearing on behalf of the plaintiff, William J. Brennan (The Law Office of Donald F. Burke).

John M. Carbone, Esq. appearing on behalf of the defendants, Bergen County Prosecutor's Office, Frank Puccio and John Does 1-10 (Carbone & Faasse).

Introduction

Presented is an application filed by counsel for plaintiff, William J. Brennan ("plaintiff" or "Brennan") against defendants, the Bergen County Prosecutor's Office, Frank Puccio and John

Does 1-10 (the "BCPO," "Puccio" or "John Does" when referenced individually, "defendants" when referenced collectively). Plaintiff sought a judgment finding defendants in violation of the Open Public Records Act, N.J.S.A. 47:1A-1 to -13 ("OPRA" or the "Act"), directing them to release the requested documents, awarding attorney's fees and costs, and granting any other relief the court may deem just and equitable. Plaintiff also sought similar relief by way of the common law right of access to government records, the New Jersey Constitution (the "Constitution") and the New Jersey Civil Rights Act (the "Civil Rights Act").

Facts/ Procedural History

This matter arises from the partial denial of plaintiff's OPRA request. On December 9, 2014, plaintiff, a resident and citizen of New Jersey, submitted the following request for records to the BCPO upon information and belief that office had seized baseball memorabilia from one William Stracher ("Stracher") after prosecutors asserted he illegally sold prescription drugs:

> Dear Mr. Molinelli:
>
> In accordance with the Open Public Records Act and my common law right to access public records, I hereby request the following public records:
>
> 1. Records of payment received from all winning bidders on sports memorabilia items auctioned by your office on 05/03/2014 at the Bergen County Law & Public Safety Institute, Hall of Heroes Auditorium, 281 Campgaw Road in Mahwah, NJ 07430.
>
> 2. Contact information for each winning bidder of items auctioned by your office or agents on that date.
>
> 3. Contract between your office and the auctioneer conducting the aforementioned auction.
>
> 4. Records of bid submissions, price quotes and documents relevant to the award of a contract to auction material on behalf of your office.

I prefer to receive these public records electronically however if you are unable to produce these records in an electronic format I will accept them in a format that complies with OPRA. I authorize a charge of up to $100.00 for the processing of my request, if the cost of processing my request exceeds $100 please contact me via e-mail before processing this request.

Thank you in advance for your prompt attention to this matter.

Sincerely,

William Brennan
14 Iowa Road
Wayne, NJ 07470

On December 10, 2014, Puccio, in his capacity as the Custodian of Records for the BCPO, responded on behalf of that office to plaintiff's OPRA request, stating:

December 17, 2014

William Brennan
14 Iowa Road
Wayne, NJ 07470
Via E-mail: firemanbrennanayahoo.com [sic]

Re: Request for Public Records

Dear Mr. Brennan:

This is in response to your request for public records dated 12-09-14, which this office received on 12-09-14, and in which you requested four sets of records. I address each set of records separately.

Item 1: Records of payment received from all winning bidders on sports memorabilia items auctioned by your office on 05/03/2014 at the Bergen County Law & Public Safety Institute, Hall of Heroes Auditorium, 281 Campgaw Road in Mahwah, NJ 07430

The May 3, 2014, auction was conducted both live and online. Live bidders completed a numbered registration form that requested their name, address, telephone number and e-mail address. Each live bidder was then given a paddle bearing the number that was on their registration form. Online bidders were

also assigned a paddle number. Bidding was then conducted anonymously, by paddle number. A winning live bidder (buyer) was given a receipt that only listed their paddle number, listed as the buyer number. The receipt does not contain the buyer's name, address or any other identifying information. A winning online bidder (buyer) was sent an online receipt that listed the paddle number on the right and the buyer's name and address on the left.

I have placed the receipts for all live buyers (those receipts do not list names, etc.) and the online receipts for all online buyers with the names and addresses redacted on a compact disc. Since the bidding process was conducted anonymously, we are concerned that the buyers had no reasonable expectation of their identifying information ever being made public. You may be aware that Prosecutor Molinelli has already alerted the buyers to the recent reports regarding the auctions and the availability of refunds. (An unaddressed copy of his December 12, 2014 letter to the buyers is on the compact disc). Additionally, today we have sent a letter (unaddressed copy on the compact disc) to each buyer advising them of our receipt of Open Public Records Act requests for records that disclose their identity. We have requested that each buyer inform us by December 30, 2014 whether they consent to our releasing their identifying information. For all buyers who consent, we will then provide you with the registration form or unredacted online receipt. As to buyers who do not consent to the release of their personal information, we will be compelled to continue to keep that information confidential consistently with *N.J.S.A.* 47:1A-1. I anticipate advising you how the buyers have responded on either Friday, January 2, 2015, or Monday, January 5, 2015. There may be one exception to this time line [sic]. The auction was conducted for the Prosecutor's Office by an auctioneer. To comply with Item 1 above, we have had to obtain the relevant records from the auctioneer. As of the time of this writing, the auctioneer has been unable to locate the registration forms for Buyers 1, 8 and 30. The auctioneer has provided the receipts for those buyers and the receipts are included in the material provided to you. As soon as the auctioneer locates the registration forms for those buyers and provides them to this office, I shall send those buyers the same letter regarding the release of their personal information and proceed accordingly. I shall keep you informed of the process toward obtaining these registration forms. Because all the buyers may consent to the release of their personal information and render the issue moot, I have not fully elaborated on their expectation of privacy pursuant to OPRA. Nor have I addressed your access to that information under the common law. Should a buyer or buyers object to the

release of their information and the issue become ripe for argument, I shall provide you with a more detailed basis of the denial.

Item 2: Contact information for each winning bidder of items auctioned by your office or agents on that date

The Open Public Records Act (OPRA) provides for access to specifically identifiable government records, not to information. *MAG Entertainment, LLC v. Division of Alcoholic Beverages Control,* 375 *N.J. Super.* 534 (2005). Accordingly, this request is denied.

Item 3: Contract between your office and the auctioneer conducting the aforementioned auction

There was no contract specifically to conduct the auction that occurred on May 3, 2013. Rather, there was an overall contract to conduct auctioneering services for this office at that time as described in Item 4. Because the bid specifications are so detailed, the contract itself is often a one or two page document that largely references the bid specifications. As an example, I have provided the contract for the period August 3, 2005 through August 2, 2006. At the time of this writing, personnel in the county counsel and county purchasing divisions (where the contracts are kept) are attempting to locate the contract for the period covering May 3, 2013. As soon as they provide it to me, I shall forward it to you.

Item 4: Records of bid submissions, price quotes and documents relevant to the award of a contract to auction material on behalf of your office

The contract to conduct auctions on behalf of this office during 2013 was awarded pursuant to Bid No. 11-89 and Resolution No. 1071-11 on September 7, 2011.

The award was for the period September 7, 2011 through September 6, 2012 with an option for two, one year renewals. Caspert Management Co., Inc. was the only bidder. A copy of the bid, labeled "Bid 11-89" (31 pages) and Caspert's submission, labeled "Caspert Bid" (32 pages) are included on the compact disc in **PDF** format.

The cost for the compact disc is $1.25. If you would like to obtain it by mail, please send a check in that amount made payable to the

County of Bergen to Assistant Prosecutor Thomas McGuire at the following address:

Assistant Prosecutor Thomas McGuire
Bergen County Prosecutor's Office
Justice Center
10 Main Street
Hackensack, NJ 07601

If you would like to pick up the compact disc, please contact Legal Secretary Maria Fagliarone, 201-226-5148, and schedule a time to do so. Ms. Fagaliarone is authorized to provide the disc to you in exchange for the check. This office is not authorized to accept cash.

The Bergen County Prosecutor's Office also reserves the right to raise any other ground for denial not raised in this response. The failure of the Bergen County Prosecutor's Office to assert an exception or privilege does not act as a waiver of any ground for denial.

You have a right to appeal the decision that the document or documents are not public records or are otherwise exempt from disclosure. At your option, you may either institute a proceeding in the Superior court of New Jersey or file a complaint with the **Government Records Council ("GRC") by completing the Denial of Access Complaint Form. You may contact the GRC by toll-free telephone at 866-850-0511, by mail at PO Box 819, Trenton, NJ 08625, by e-mail at** ***grc@dca.state.nj.us,*** **or at their web site at** ***www.state.nj.us/grc*****. The Council can also answer other questions about the law. All questions regarding complaints filed in Superior Court should be directed to the Court Clerk in your County.**

Very truly yours,
John L. Molinelli
Bergen County Prosecutor
By:

Frank Puccio
Executive Assistant Prosecutor

Notwithstanding his OPRA request, plaintiff never retrieved the CD-ROM from the BCPO.[1] Based on the substance of defendants' response, though, plaintiff asserts defendants have: (1) "unilaterally and unlawfully withheld the identities of persons who have contracted with the [BCPO] for the purchase of goods"; and (2) not yet provided the auctioneer's contract for the May 5, 2013 auction (the "auction"). In addition, plaintiff asserts defendants' response to his records request was inadequate given the statutory burden imposed upon public agencies to demonstrate the denial of access is authorized by law.

On December 26, 2014, plaintiff had filed a three-count verified complaint with an order to show cause and a memorandum of law in support of the relief requested. Respectively, the first through third counts allege violations of: (1) OPRA, (2) the common law right of access and (3) the Constitution and the Civil Rights Act.[2] Plaintiff sought a judgment directing defendants to release requested documents, awarding attorney's fees and costs, and granting any other relief the court may deem just and equitable.

On February 4, 2015, defendants had filed an answer in opposition to the verified complaint and a motion to partially dismiss the same, with the certification of Puccio ("Puccio Certification") and a letter brief in support of the relief requested.

On February 6, 2015, plaintiff had filed a reply in further support of the verified complaint.

Oral argument was entertained on February 20, 2015.

[1] At oral argument, and for the first time, plaintiff's counsel, Donald F. Burke, Esq. ("Burke") conceded, as of the time the complaint was filed, his client had not retrieved the CD-ROM from the BCPO. The court has not been presented with any proofs suggesting plaintiff has since attempted to pick up the CD-ROM, or arranged for an alternate method of delivery.

[2] Although the complaint alleged violations of the Constitution and the Civil Rights Act, these claims were withdrawn by plaintiff's counsel at oral argument. Therefore, they shall not be considered.

Legal Standards

A. OPRA

1. Generally

The purpose of OPRA, N.J.S.A. 47:1A-1 to -13, is plainly set forth in the statute: "to insure that government records, unless exempted, are readily accessible to citizens of New Jersey for the protection of the public interest." Mason v. City of Hoboken, 196 N.J. 51, 57 (2008) (citing N.J.S.A. 47:1A-1). The Act replaced the former Right to Know Law, N.J.S.A. 47:1A-1 to -4 (repealed 2002), and perpetuates "the State's long-standing public policy favoring ready access to most public records." Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 36 (App. Div. 2005) (quoting Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003)). To accomplish that objective, OPRA establishes a comprehensive framework for access to public records. Mason, supra, 196 N.J. at 57. Specifically, the statute requires, among other things, prompt disclosure of records and provides different procedures to challenge a custodian's decision denying access. Ibid.

OPRA mandates "all government records shall be subject to public access unless exempt." N.J.S.A. 47:1A-1. Therefore, records must be covered by a specific exclusion to prevent disclosure. Ibid. The Act defines "government record" as follows:

> [A]ny 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. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.
>
> [N.J.S.A. 47:1A-1.1.]

The OPRA framework contemplates a swift timeline for disclosure of government records. Mason, supra, 196 N.J. at 57. Unless a shorter time period is prescribed by statute, regulation or executive order, a records custodian must grant or deny access to a government record "as soon as possible, but not later than seven business days after receiving the request." N.J.S.A. 47:1A-5(i). Failure to respond within seven business days "shall be deemed a denial of the request." Ibid. If the record is in storage or archived, the custodian must report that information within seven business days and advise when the record will be made available. Ibid.

If access to a government record is denied by the custodian, the requestor may challenge that decision by filing an action in Superior Court or a complaint with the Government Records Council ("GRC"). N.J.S.A. 47:1A-6. The right to institute any proceeding under this section, however, belongs solely to the requestor. Ibid. If the requestor elects to file an action in Superior Court, the application must be brought within forty-five days of the denial. See Mason, supra, 196 N.J. at 70 (holding, explicitly, a 45-day statute of limitations applies to OPRA actions). The Act, however, specifically provides "a decision of the [GRC] shall not have value as precedent for any case initiated in Superior Court," N.J.S.A. 47:1A-7, though such decisions are normally considered unless "arbitrary, capricious or unreasonable, or [violative of] legislative policies expressed or implied in the act governing the agency." Serrano, supra, 358 N.J. Super. at 362 (citing Campbell v. Dep't of Civil Service, 39 N.J. 556, 562 (1963)).

In OPRA actions, the public agency bears the burden of proving the denial of access is authorized by law. N.J.S.A. 47:1A-6. As such, an agency "seeking to restrict the public's right of

access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality." Courier News v. Hunterdon Cnty. Prosecutor's Office, 358 N.J. Super. 373, 382–83 (App. Div. 2003). Absent the necessary proofs, "a citizen's right of access is unfettered." Ibid. In assessing the sufficiency of the proofs submitted by the agency in support of its claim for nondisclosure, "a court must be guided by the overarching public policy in favor of a citizen's right of access." Ibid. If it is determined access has been improperly denied, such access shall be granted, and a prevailing party shall be entitled to a reasonable attorney's fee. N.J.S.A. 47:1A-6.

2. OPRA Exemptions

Although OPRA defines "government record" broadly, the public's right of access is not absolute. Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 284 (2009) (citing Mason, supra, 196 N.J. at 65). The statute excludes twenty-one categories of information, which are exempt from disclosure. Mason, supra, 196 N.J. at 65. Specifically, N.J.S.A. 47:1A-I provides:

> [A]ll government records shall be subject to public access unless exempt from such access by: [other provisions of OPRA]; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order.

The Supreme Court noted these protected categories include "criminal investigatory records, victims' records, trade secrets, various materials received or prepared by the Legislature, certain records relating to higher education, and other items." Mason, supra, 196 N.J. at 65. The Court also noted "records within the attorney-client privilege or any executive or legislative privilege, as well as items exempted from disclosure by any statute, legislative resolution, executive order, or court rule" are excluded. Ibid.

3. Personal Information

While OPRA favors the disclosure of government records, it also acknowledges "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." N.J.S.A. 47:1A-1. The statute, however, does not define "personal information" or "reasonable expectation of privacy." Nor does it contain a general privacy exemption. It does, though, specifically exempt certain types of personal information from disclosure, such as: social security numbers, credit card numbers, unlisted telephone numbers and driver's license numbers. N.J.S.A. 47:1A-1.1. This personal information is to be redacted from a government record before the custodian permits access to the remainder of the document. N.J.S.A. 47:1A-5(a).

OPRA also provides exemptions for personal identifying information received in connection with the issuance of any license authorizing hunting with a firearm as well as any application to purchase a firearm. N.J.S.A. 47:1A-1.1. This information includes, but is not limited to: identity, name, address, social security number, telephone number and driver's license number. Ibid.

In addition, OPRA provides an exemption for personal information that is protected from disclosure by any other state or federal statute, regulation or executive order. N.J.S.A. 47:1A-9. For example, OPRA may not be used to obtain the residential home address of a victim of domestic violence who is protected by the Address Confidentiality Program Act, N.J.S.A. 47:4-1 to -6. N.J.S.A. 47:4-2.

To resolve the competing interests of privacy and access, the Supreme Court has adopted the multifactorial test of Doe v. Poritz, 142 N.J. 1 (1995). Burnett v. Cnty. of Bergen, 198 N.J. 408, 427 (2009). "Although Doe considered constitutional privacy interests implicated by

Megan's Law, it relied on case law concerning statutory privacy provisions under the Freedom of Information Act (FOIA)." Ibid. The test articulated in Doe identified the following factors:

> 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.
>
> [Ibid. (quoting Doe, supra, 142 N.J. at 88).]

4. OPRA Fees

Generally, in New Jersey, a prevailing party is not entitled to attorney's fees from the losing party. Id. at 70 (citation omitted). Fees may be awarded, however, when a statute, court rule or contractual agreement so provides. Ibid. Under OPRA, "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. The Supreme Court, interpreting legislative revisions to the Act, has held OPRA "mandate[s] rather than permit[s], an award of attorney's fees to a prevailing party." Mason, supra, 196 N.J. at 75.

As the mandatory fee-shifting provision of OPRA is triggered only when a requesting party prevails, there must be a determination what constitutes a "prevailing party." The Supreme Court has adopted a two-part test (the "catalyst theory") to ascertain whether a requesting party has prevailed under OPRA. Id. at 76. Under this test, requestors are entitled to fees, absent a judgment

or an enforceable consent decree, when they can show: "(1) a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; and (2) the relief ultimately secured by plaintiffs had a basis in law." Ibid. (quoting Singer v. State, 95 N.J. 487, 495 (1984)) (internal quotation marks omitted). The Court has held requestors seeking fees are required to make this showing. Ibid.

B. New Jersey Common Law

In addition to OPRA, disclosure can be sought under the common law. The Act provides "[n]othing contained in [OPRA] shall be construed as limiting the common law right of access to a government record." N.J.S.A. 47:1A-8. Thus, even if the information requested falls within one of the exceptions to access under the statutory construct of OPRA, requestors may still prevail by resorting to the common law right to access public records. To constitute a government record under the common law, the item must be:

> [O]ne required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are * * * that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it.
>
> [S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 487–88 (1991) (quoting Nero v. Hyland, 716 N.J. 213, 222 (1978)).]

To reach this broader class of documents, requestors must satisfy a higher burden than required under OPRA: "(1) the person seeking access must establish an interest in the subject matter of the material; and (2) the citizen's right to access must be balanced against the State's interest in preventing disclosure." Mason, supra, 196 N.J. at 67–68 (quoting Keddie v. Rutgers,

148 N.J. 36, 50 (1997)) (internal quotations and citations omitted). The Supreme Court has articulated several factors for a court to consider in performing its balancing:

> (1) [T]he 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 policymakers; (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.
>
> [S. Jersey Pub., supra, 124 N.J. at 488 (quoting Loigman v. Kimmelman, 102 N.J. 98, 113 (1986)).]

Analysis

Presented is an intriguing question, among others, whether the winning bidders in a public auction have a reasonable expectation of privacy in their personal information transmitted to a public agency in connection with their participation in the auction. For the reasons set forth herein, the court finds they do not, but in light of defendants' good faith attempt to comply with the request and the state's obligation to safeguard personal information, defendants shall be afforded an additional ten days to cure the alleged infirmities.

A. OPRA

1. Government Records

In order to trigger OPRA's disclosure requirements, the information sought must qualify as a "government record." N.J.S.A. 47:1A-1. The statute defines a government record broadly, in the following comprehensive fashion:

> [A]ny 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.]

Defendants assert the requested documents are not government records because they "were neither made nor received by the [BCPO] but were and are the records of Caspert Management Company."[3] This argument, however, is unavailing as it is fundamentally inconsistent with OPRA's policy favoring public access to government records. To be considered a government record, an item must be maintained or received in the course of official business by an "officer, commission, agency, or authority of the State or of any political subdivision." N.J.S.A. 47:1A-1.1. Clearly, the Legislature intended this definition to encompass items made by or on behalf of the state. See Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 516–17 (App. Div. 2010) (holding, generally, for the proposition when a government agency delegates its functions to an agent, the records made or maintained by the agent are government records). The Burnett court continued, "[w]ere we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA." Ibid. (citation omitted).

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[3] Hereinafter, Caspert Management Company shall be referred to as "Caspert." Caspert is a private auctioneering and appraisal company that apparently contracted with the County of Bergen (the "County") to provide auctioneering services on behalf of the BCPO.

In this case, the records sought were made and/or maintained by Caspert, on its own behalf and on behalf of the BCPO and/or the County. That they were not in the possession of the BCPO is of no moment, as Caspert was a contracting party with the BCPO and/or the County. The court is not prepared to find the requested documents are not government records simply because the BCPO delegated its recordkeeping function to a third party. Therefore, the court finds the requested documents are government records within the definition of N.J.S.A. 47:1A-1.1.

2. Personal Information

Once it has been determined the requested documents are government records, the public agency must point to a specific statutory exclusion to foreclose public access. N.J.S.A. 47:1A-1. OPRA excludes twenty-one categories of information from the definition of a government record. N.J.S.A. 47:1A-1.1. These protected categories include, inter alia, criminal investigatory records, victims' records, various materials prepared or received by the Legislature and certain records relating to higher education. Ibid. There is, however, no specific statutory exemption for personal identifying information. OPRA does, though, provide public agencies have a "responsibility and an obligation to safeguard from public access a citizen's personal information."

OPRA also clearly provides the burden is on the public agency to prove the denial of access is authorized by law. N.J.S.A. 47:1A-6. If an agency is unable to comply with a request for access, "the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5(g). Absent the necessary proofs, "a citizen's right of access is unfettered." Courier, supra, 358 N.J. Super. at 383. Moreover, in evaluating the sufficiency of the proofs in support of the agency's claim for nondisclosure, "a court must be guided by the overarching public policy in favor of a citizen's right of access." Ibid.

In this case, the BCPO denied plaintiff's request for "[r]ecords of payment received from all winning bidders" as it was concerned "the buyers had no reasonable expectation of their identifying information ever being made public." In support of its denial, the BCPO cited OPRA's privacy clause, N.J.S.A. 47:1A-1, but it did not reference a specific statutory exemption in favor of its assertion of nondisclosure. Rather, it promised to disclose the registration forms and/or receipts for all winning bidders who consented to the release of their personal information, to wit, their names, addresses and telephone numbers.[4] On January 5, 2015, nearly one month after plaintiff's request, the BCPO advised plaintiff only two buyers had consented to the release of their personal information.

The OPRA framework contemplates a swift timeline for disclosure of government records. Mason, supra, 196 N.J. at 57. A fortiori, then, it does not permit public agencies to adopt a "wait-and-see" approach to grant or deny public access. The statute provides, in relevant part: "[A] custodian of a government record shall grant access to a government record or deny a request for access to a government record within seven business days after receiving a request." N.J.S.A. 47:1A-5(i). If, however, a custodian fails to respond within seven business days, "the failure to respond shall be deemed a denial of the request." Ibid.

Although the BCPO failed to set forth a specific statutory exemption to justify its denial of access, the court is not prepared to find it violated OPRA. Rather, the court is mindful OPRA's privacy clause may be a valid basis for exemption. Burnett, supra, 198 N.J. at 427. Therefore, given plaintiff's failure to retrieve the documents which were made available, the

[4] This is not, however, what OPRA requires. The Act creates a strong preference in favor of public access. N.J.S.A. 47:1A-1. Here, the BCPO promised to release the registration forms and/or receipts if and when the winning bidders consented to their dissemination. This mode of operation, though, posed the question improperly. The burden is on the public agency to provide access. Therefore, the BCPO should have contacted the winning bidders to advise them the documents would be disclosed absent an affirmative request not to disclose, with reasons and/or sought to intervene in this action.

state's obligation to safeguard personal information and the BCPO's good faith attempt to comply with OPRA, defendants are hereby afforded an additional ten days to contact the winning bidders and advise them they must either: (1) affirmatively object to the release of their personal information and state the reasons therefor or (2) move to intervene in this case.

3. Government Contracts

OPRA also provides, ordinarily, immediate access shall be granted to the following types of government records: "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e) (emphasis added). If, however, the government record is temporarily unavailable due to its use or storage, the public agency must so advise the requestor and make arrangements to promptly furnish a copy of the record. N.J.S.A. 47:1A-5(g). The agency has seven business days from its receipt of the request to transmit this information. N.J.S.A. 47:1A-5(i). The agency must also advise the requestor when the record can be made available. Ibid. "If the record is not made available by that time, access shall be deemed denied." Ibid.

In this case, it appears the County contracted with Caspert to provide auctioneering services for the BCPO. The contract was awarded pursuant to Bid No. 11-89 and Resolution No. 1071-11 on September 7, 2011. The award was for a twelve-month period from September 7, 2011 to September 6, 2012 with an option for two one-year renewals. On June 6, 2012, the County exercised the first option in the contract, which extended the award for another year, from September 7, 2012 to September 6, 2013. The auction occurred during this renewal period.

On December 9, 2014, plaintiff requested a copy of the contract "between [the BCPO] and the auctioneer conducting the [May 3, 2013] auction." On the following day, the BCPO advised it was not in possession of the contract, but County personnel were attempting to locate it. In the

interim, though, as an exemplar, the BCPO provided plaintiff with a copy of the contract for the period August 3, 2005 to August 2, 2006.[5] Thereafter, on December 18, 2014, the BCPO advised it was unable to locate a signed copy of the contract. Instead, it provided plaintiff with a copy of Resolution No. 754-12, which the County adopted on June 6, 2012.[6]

It appears the BCPO may have violated OPRA as it may have failed to make reasonable arrangements to promptly make a copy of the 2012-2013 contract available. See N.J.S.A. 47:1A-5(g). OPRA's directive is clear: the custodian must advise the requestor the item is temporarily unavailable and make arrangements to promptly make a copy of it available. Ibid. Here, the BCPO advised plaintiff it could not find the contract, but premised upon the current record, the court cannot conclude it has taken reasonable steps to recover it and make it available. Obviously, though, a public agency cannot produce that which it cannot locate. Therefore, defendants are hereby afforded an additional ten days to provide plaintiff and the court with a certified update regarding the status of the location of the contract as well as a specific explanation regarding its nonproduction.

B. Verification of Pleadings

R. 1:4-7 governs the verification of pleadings. The rule provides:

> Pleadings need not be verified unless ex parte relief is sought thereon or a rule or statute otherwise provides. The verification shall not repeat the allegations of the pleadings but may incorporate them by reference if made on personal knowledge and so stated, and the allegations are of facts admissible in evidence to which the affiant is competent to testify.

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[5] The court was not presented with any proofs to allow for a determination as to whether the substance of the 2005-2006 contract was the same as or at least similar to the 2012-2013 contract.

[6] Hereinafter, Resolution No. 754-12 shall be referred to as the "June 6 Resolution." Notably, however, the June 6 Resolution merely provided the authority for the BCPO to conduct auctions for the September 7, 2012 to September 6, 2013 period. It did not attach or include a copy of the contract between the County and Caspert. The resolution provides the contract was to be executed by the County Executive and approved by County Counsel.

[R. 1:4-7.][7]

Put somewhat more succinctly, "[the] rule requires that an affiant who incorporates the allegations of a pleading by reference state expressly in his [or her] verification that the allegations have been made on his [or her] personal knowledge." Pressler, Current N.J. Court Rules, comment on R. 1:4-7 (2014). See Monmouth Cnty. Soc. Servs. v. P.A.Q., 317 N.J. Super. 187, 193–94 (App. Div.), certif. denied, 160 N.J. 90 (1998) (holding a verification made without personal knowledge of the facts alleged is a "nullity" and is therefore insufficient to invoke the jurisdiction of the court in an action requiring a verified complaint).

Defendants argue "[t]he court must strike the complaint for the failed and non-compliant verification and specifically paragraphs 2 through 5 [therein]." The basis for this contention is that plaintiff's allegations, namely, those in the heretofore referenced paragraphs, were made without offering a source or statement of his personal knowledge. This argument, though technically correct, is unavailing as these "facts" are not material to the present dispute and the court has not relied on them in rendering its decision. This matter, ostensibly, is an OPRA dispute. Therefore, the court has focused its attention on the nature and substance of plaintiff's request and defendants' response thereto; not unimportant background facts the latter has urged are pivotal.

C. Motion to Dismiss

R. 4:5-2 governs the criteria for adequacy of pleading. The rule provides, in relevant part:

> [A] pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain a statement of the facts on which the claim is based, showing that the pleader is entitled to relief, and a demand for judgment for the relief to which the pleader claims entitlement.
>
> [R. 4:5-2.]

[7] R. 4:67-2(a), which is applicable to OPRA matters, provides such actions must be initiated by an order to show cause supported by a verified complaint. See Courier, supra, 358 N.J. Super. at 378 (holding the language in N.J.S.A. 47:1A-6 requires a trial court to proceed under the rules prescribed in R. 4:67).

To be adequate, "it is fundamental that the pleading must fairly apprise the adverse party of the claims and issues raised and that on a challenge to adequacy, all facts, reasonable inferences and implications are to be considered most strongly in favor of the pleader." Pressler, Current N.J. Court Rules, comment 1 on R. 4:5-2 (2014). Therefore, a complaint is entitled to a liberal reading in determining its adequacy. Ibid. (citing Van Damm Egg Co. v. Allendale Farms, 199 N.J. Super. 452 (App. Div. 1985)).

Defendants argue dismissal is warranted as "the complaint is bereft of any facts that are clear and evident from the four corners of the complaint, such that the motion to dismiss must be granted." This argument, however, is rejected. R. 4:5-7 provides: "Each allegation of a pleading shall be simple, concise and direct, and no technical forms of pleadings are required. All pleadings shall be liberally construed in the interest of justice." The purpose of this rule is to "fairly apprise[] the adversary of the issues in dispute." Pressler, Current N.J. Court Rules, comment on R. 4:5-7 (2014). In this case, plaintiff set forth the essential facts regarding the parties, his request for records and defendants' response thereto. These facts were sufficient to place defendants on notice plaintiff was challenging the BCPO's denial of his request by filing an action in Superior Court.[8] Therefore, the court is satisfied plaintiff has met the minimum pleading requirements.

D. Common Law Right of Access

In addition to OPRA, plaintiff has also sought relief under the common law right of access to government records. The definition of a government record under the common law is broader than under OPRA. Mason, supra, 196 N.J. at 67 (citations omitted). To reach this broader class of documents, the requestor must show: (1) the records are common law public documents; (2) an

[8] See N.J.S.A. 47:1A-6, which provides a person who is denied access to a government record may, at his or her option, file an action in Superior Court or institute a proceeding with the GRC.

interest in the subject matter of the material; and (3) the balance of hardship favors disclosure. Keddie, supra, 148 N.J. at 50 (citations omitted).

At this point, however, given the court's holding, it would be premature to conduct a common law analysis. The court has afforded to defendants the benefit of the full ten-day period to contact the winning bidders and provide an update regarding the status of the contract. Without that information, the court could not, for example, evaluate "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." See S. Jersey Pub., supra, 124 N.J. at 488 (quoting Loigman, supra, 102 N.J. at 113). Therefore, the court reserves the right to conduct a common law analysis at a later point, upon further application, if necessary.

E. Attorney's Fees

Plaintiff has also sought an award of reasonable attorney's fees. OPRA provides "[a] requestor who prevails in any proceeding is entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. To be eligible for fees, there must be a determination as to whether a requesting party has "prevailed." See p. 12 supra. At this point, however, there can be no such determination as the court has not granted any relief – i.e., the documents sought by plaintiff are not now being ordered to be produced. Rather, as indicated previously, defendants have been afforded an additional ten days to contact the winning bidders and provide a certified update regarding the status of the whereabouts of the contract. Therefore, the court reserves the right to conduct a fee analysis at a later point, upon further application, if necessary.

Conclusion

OPRA is intended to be construed in favor of the public's right of access. The purpose of the statute 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." Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super 312, 329 (Law Div. 2004). To that end, "the court must always maintain a sharp focus on the purpose of OPRA and resist attempts to limit its scope, absent a clear showing that one of its exemptions or exceptions incorporated in the statute by reference is applicable to the requested disclosure." Ibid.

In light of the foregoing, the court holds: (1) defendants shall be afforded an additional ten days to contact the winning bidders and advise them they must: (a) affirmatively object to the release of their personal information and state the reasons therefor or (b) move to intervene in this case; and (2) defendants shall be afforded an additional ten days to provide plaintiff with a certified update regarding the status of the contract as well as a specific explanation regarding its nonproduction.

Plaintiff's counsel is hereby directed to prepare and submit the appropriate order under the five-day rule. The ten-day period shall begin on the same day the order is executed.

CERTIFICATION OF SERVICE

I certify that on March 3, 2015, two copies of the Notice of Motion to Appear as Amici Curiae, with Certificate of Service, on behalf of the New Jersey State League of Municipalities and the New Jersey Institute of Local Government Attorneys, together with their Brief in support of the Motion, and Proposed Amici Curiae were served via Federal Express on:

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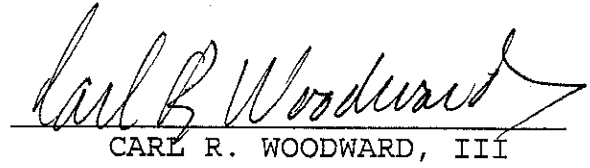
I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made

by me are willfully false, I am subject to punishment.

Dated: March 3, 2015



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