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Clinton, New Jersey 08809
Telephone: 908.894.5656
Attorney for Plaintiff

<p>JOHN PAFF, Plaintiff, v. COUNTY OF OCEAN – OFFICE OF THE PROSECUTOR and RECORDS CUSTODIAN OF THE COUNTY OF OCEAN – OFFICE OF THE PROSECUTOR, Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: OCEAN COUNTY</p> <p>DOCKET NO. <input type="text" value="OCN-L-252-15"/></p> <p>CIVIL ACTION</p> <p>VERIFIED COMPLAINT</p>
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Plaintiff John Paff through his undersigned counsel Law Offices of Walter M. Luers, LLC, by way of verified complaint against the Defendants County of Ocean – Office of the Prosecutor and Records Custodian of the County of Ocean – Office of the Prosecutor, alleges as follows:

PRELIMINARY STATEMENT

1. This is an action alleging violations of the Open Public Records Act, *N.J.S.A. 47:1A-1, et seq.* (“OPRA”) and the common law right of access seeking a copy of the June 6, 2014 Investigation Report that reflects information required to be disclosed to the public pursuant to *N.J.S.A. 47:1A-3(b)*.

THE PARTIES

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

3. Defendant County of Ocean – Office of the Prosecutor is a public municipal body corporate and politic. This Defendant is a “public agency” as the term is defined by OPRA, *N.J.S.A.* 47:1A-1.1.

4. Defendant Records Custodian of Defendant County of Ocean – Office of the Prosecutor is a “custodian of a government record” as that term is defined by OPRA, *N.J.S.A.* 47:1A-1.1. The specific identify of Defendant’s Record’s Custodian is not known to Plaintiff at this time.

JURISDICTION AND VENUE

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

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

FACTUAL ALLEGATIONS

7. On November 28, 2014, Plaintiff submitted a written OPRA request to Defendants via email addressed to MKelly@co.ocean.nj.us. In that OPRA request, he asked for copies of several documents. In relevant part, Plaintiff requested “All police incident report[s] and/or investigatory complaints regarding this incident.” The “incident” is an allegation that a former Galloway elementary and preschool principal, John Gibson, is under investigation for an incident that occurred in Little Egg Harbor.

8. According to an online media report that were cited in Plaintiff’s OPRA request, on January 30, 2014, Gibson “unexpectedly [took] a paid leave of absence from his

position” and that the “leave is of a confidential nature” and that no other information could be provided. On May 3, 2014,

9. According to a second online media report on May 3, 2014, Ocean County Assistant Prosecutor O. Nicholas Monaco “confirmed that John Gibson” was under investigation for “an incident that occurred in Little Egg Harbor.” The incident, according to the Defendants, relates to “child victims of sexual assault or abuse.”

10. In his OPRA request, Plaintiff stated that the “logical inference from what has been disclosed so far makes it hard to exclude the possibility that Gibson, a person to whom the care of children was entrusted, may have been involved in an incident prior to January 30, 2014 that involved the sexual assault or abuse of a child.

11. Also in his OPRA request, Plaintiff expressed his interest in knowing “When did this incident take place?” and “Why is the investigation taking so long?” and “Will the public ever get the full story as to what happened?” and “How many children were involved?”. Plaintiff wrote that “I have been involved in open government activism for over 20 years and have never seen a case that screams out for public knowledge and scrutiny as well as media publicity than this one.”

12. In response to Plaintiff’s OPRA request, in relevant part, the Defendants identified one responsive document: “An Ocean County Prosecutor’s Office Detective prepared an Investigation Report, dated June 6, 2014, regarding his investigation into the allegation made against John Gibson.”

13. Information in this Report should be disclosed to the extent that the information reflects information that must be disclosed pursuant to *N.J.S.A. 47:1A-3(b)*.

14. The documents requested by Plaintiff are public records and subject to disclosure. Plaintiff submitted a valid written OPRA request. No claim is made as to credit card numbers or social security numbers or employee numbers.

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

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

COUNT I: VIOLATION OF OPRA (N.J.S.A. 47:1A-1, ET SEQ.)

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

19. The Defendants have violated OPRA by not providing to Plaintiff the information required to be produced to Plaintiff pursuant to *N.J.S.A. 47:1A-3(b)*.

COUNT II: COMMON LAW RIGHT OF ACCESS

20. Plaintiff repeats and incorporates by reference each and every allegation contained in paragraphs 1-19 of the Plaintiff's complaint as though fully set forth at length herein.

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

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

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

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

- A. Ordering Defendants to provide to Plaintiff a copy of the June 6, 2014 Investigation Report that shows the information required to be disclosed by *N.J.S.A. 47:1A-3(b)*;
- B. Awarding Plaintiff costs and reasonable attorneys' fees; and
- C. For such other or further relief as this Court deems just and equitable.

CERTIFICATION PURSUANT TO *R. 4:5-1*

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

continuing obligation to file and serve on all parties and the Court an amended certification if there is a change in the facts stated in this original certification.

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

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

DESIGNATION OF TRIAL COUNSEL

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

Respectfully Submitted,

LAW OFFICES OF WALTER M. LUERS, LLC



By: _____

DATED: January 21, 2015

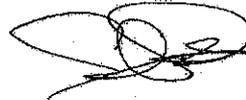
Walter M. Luers, Member
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23 West Main Street
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Telephone: 908.894.5656

VERIFICATION

John Paff, of full age, certifies as follows:

1. I am the Plaintiff in the action captioned "John Paff v. County of Ocean – Office of the Prosecutor, *et al.*" All of the facts stated in the verified complaint to which this Verification is attached are true, and as to those facts that are alleged on information and belief, I believe those facts to be true.

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



John Paff

Dated: January 20, 2015

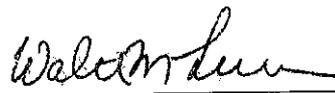
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<p>JOHN PAFF, Plaintiff, v. COUNTY OF OCEAN – OFFICE OF THE PROSECUTOR and RECORDS CUSTODIAN OF THE COUNTY OF OCEAN – OFFICE OF THE PROSECUTOR, Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: OCEAN COUNTY</p> <p>DOCKET NO. _____</p> <p>CIVIL ACTION</p> <p>CERTIFICATION OF WALTER M. LUERS</p>
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I, WALTER M. LUERS, of full age, hereby certify:

1. I am an attorney of the State of New Jersey and a member of the law firm of Law Offices of Walter M. Luers, LLC, and counsel for Plaintiff John Paff.
2. I am attaching to this Certification true and correct copies of Plaintiff's November 28, 2014 OPRA request and Defendants' December 8, 2014 denial of access.
3. 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: January 20, 2015



WALTER M. LUERS



John Paff <opengovtissues@gmail.com>

Records request to Ocean County Prosecutor's Office

1 message

John Paff <paff@pobox.com>
To: MKelly@co.ocean.nj.us

Fri, Nov 28, 2014 at 3:01 PM

Please accept this e-mail as my request under the Open Public Records Act (OPRA) and the common law right of access. Please send all responses and responsive records to me via e-mail to paff@pobox.com. Thank you.

Background:

We Libertarians sometimes joke about how strictly those in the private sector are held accountable to the letter of the law compared to the leniency enforcement officials extend to their colleagues in the public sector. A very good friend of mine once quipped, "If you're in a public job and have the right connections, you'd have to rape a child in order to get in trouble." The present case, which I've been exploring since the Spring of this year, causes me to wonder if even this is true.

At the heart of this inquiry is a May 3, 2014 Galloway Township News article (click here) entitled "UPDATED: Prosecutors Confirm Former Galloway elementary and preschool school principal John Gibson Involved in Criminal Investigation" which reports on an April 29, 2014 e-mail in which Ocean County Assistant Prosecutor O. Nicholas Monaco confirmed that John Gibson, a school principal formally employed by the Galloway Township (Atlantic County) school district, was under investigation for "an incident that occurred in Little Egg Harbor." Other than the Galloway Township News, which is an on-line only publication, with limited readers, no other media have covered this matter.

A previous article in the Galloway Township News (on-line here) noted that there was "great concern within the parental community of Galloway Township" due to Gibson unexpectedly taking a paid leave of absence from his position on January 30, 2014. The article states that a letter was sent home to parents advising of Gibson's leave of absence and explaining that "because this leave is of a confidential nature, I am not able to provide you with any information at this time."

In a May 2, 2014 letter, on-line here, which was sent in response to my subsequent records request, Monaco adds to the mystery by claiming that he cannot release any information because of N.J.S.A. 2A:82-46(c), on-line here, which grants specific protection to "child victims of sexual assault or abuse."

I have been involved in open government activism for over 20 years and have never seen a case that screams out for public knowledge and scrutiny as well as media publicity than this one. The logical inference from what has been disclosed so far makes it hard to exclude the possibility that Gibson, a person to whom the care of children was entrusted, may have been involved in an incident prior to January 30, 2014 that involved the sexual assault or abuse of a child.

Questions abound. When did this incident take place? Why is the investigation taking so long? Will the public ever get the full story as to what happened? How many children were involved?

I understand first and foremost, the identity of the children involved, as well as information that might be able to lead to the children's identify, must be kept completely confidential. I am also aware that there are some legitimate reasons why information regarding the investigation must be held close to the vest to avoid jeopardizing the investigation. Still, I believe that at least some information concerning the incident at the heart of this investigation can be disclosed without imperiling the investigation or jeopardizing any children's right to privacy.

Part of my problem so far has been the prosecutor's refusal to provide me with any information as to the type of records it maintains. Illustrative is Assistant Prosecutor Monaco's October 16, 2014 letter, on-line here, in response to my request for "audio or video recordings of any custodial interrogations of John Gibson." (I felt that this was a good record to request because it is not a "criminal investigatory record" because it is required by "law" (i.e. the Attorney General's guidelines) to be maintained.) Monaco, however, didn't clearly tell me whether such a record exists. Rather, he states that his "office cannot release any audio and/or video recordings that *may* exist. (emphasis supplied) If I were to sue for disclosure of the recordings, I might later find out that they don't exist which would result in a waste of time and resources.

So, in response to this request, I ask that you send me a response similar to the January 4, 2013 letter, on-line here, that the Warren County Prosecutor sent me. You'll note that even though the Warren County Prosecutor disagreed with my claim regarding disclosure of the records, he at least gave me a detailed description of each record he was withholding. This information didn't reveal anything sensitive, but it at least gave me the ability to determine whether it makes sense to file a lawsuit (I did file suit, won in trial court and the case is now on appeal). I realize that your position will be that N.J.S.A. 2A:82-46 prohibits you from disclosing the records, but please at least describe the responsive records in your possession.

Records Requested:

1. Audio and/or video recordings of custodian interrogations of John Gibson.
2. Any CDR or other forms of complaint that have issued as a result of this investigation.
3. All police incident report and/or investigatory complaints regarding this incident.
4. All records in the OCPO's investigatory files regarding the Gibson incident. For each record that is claimed to be exempt, please describe in the same matter as the Warren County Prosecutor did his January 4, 2013 response at the link above.

*John Paff
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JOSEPH D. CORONATO
Ocean County Prosecutor



GLENN MILLER
Chief of Detectives

OFFICE OF THE PROSECUTOR
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(732) 929-2027 Fax (732) 288-7227

December 8, 2014

Via Email and Regular Mail

Mr. John Paff
P.O. Box 5424
Somerset, New Jersey 08875

RE: OPRA REQUEST
November 28, 2014

Dear Mr. Paff:

I am in receipt of your emailed correspondence dated November 28, 2014. You have requested that I provide you with a description of the documents that are in possession of the Ocean County Prosecutor's Office pertaining to Mr. Gibson.

Your "Records Requested" are listed verbatim below with my responses:

1. Audio and/or video recordings of custodian interrogations of John Gibson.

RESPONSE: An Ocean County Prosecutor's Office Detective interviewed John Gibson at the Little Egg Harbor Police Department on January 27, 2014, regarding Mr. Gibson's involvement with a minor. This interview was video-recorded in a DVD format.

This material is exempt for the following reasons.

Under N.J.S.A. 47:1A-1 et seq., it is a criminal investigatory record and therefore, exempt from public disclosure.

OPRA REQUEST

December 8, 2014

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Additionally, the Open Public Records Act (OPRA), under N.J.S.A. 47:1A-9 provides, in relevant part, the following sections, which authorize a custodian of records to deny release of certain records:

a. The provisions of this act, P.L.2001, c. 404 (C.47:1A-5 et al.), shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L.1963, c. 73 (C.47:1A-1 et seq.); 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.

b. The provisions of this act, P.L.2001, c. 404 (C.47:1A-5 et al.), shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.

One such statute encompassed under the provisions of N.J.S.A. 47:1A-9(a) and (b) is N.J.S.A. 2A:82-46. This statute mandates the confidentiality of all records related to child victims of sexual assault or abuse. In fact, under subpart (c), a requesting party is required to make formal application with the court for disclosure of such records:

The information described in this act shall remain confidential and unavailable to the public unless the court, after a hearing, determines that good cause exists for disclosure. The hearing shall be held after notice has been made to the victim, parents of victim, spouse, or other person legally responsible for the maintenance and care of the victim, and to the person charged with the commission of the offense, counsel or guardian of that person.

OPRA REQUEST

December 8, 2014

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In addition to the exclusions and 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, 422-423 stating this portion of OPRA is a substantive part of the statute, not a preface or preamble.)

The legislature determined any "report, statement, photograph, court document, indictment, complaint, or any other public record" relating to child victims of "aggravated sexual assault, sexual assault, criminal sexual contact, criminal sexual contact, endangering the welfare of children under N.J.S.A. 2C:24-4, or in any action alleging an abused or neglected child under P.L. 1974, c 119" shall be "confidential and unavailable to the public." N.J.S.A. 2A:82-46. As such, records of "Audio and/or video recordings" and any other records "pertaining" to those victims are treated as exempt from OPRA.

2. Any CDR or other forms of complaint that have issued as a result of this investigation.

RESPONSE: No such documents exist as no criminal charges and no criminal complaints of any kind have been issued against John Gibson.

3. All police incident report and/or investigatory complaints regarding this incident.

RESPONSE: An Ocean County Prosecutor's Office Detective prepared an Investigation Report, dated June 6, 2014, regarding his investigation into the allegation made against John Gibson.

This document is also exempt from public disclosure for all of the same reasons set forth in Paragraph One hereinabove. In addition, the New Jersey Government Records Council (GRC) held in Janeczko v. Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80, that the exemption for criminal investigatory records applies to all investigations, "resolved and unresolved."

OPRA REQUEST

December 8, 2014

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The GRC further noted that the exemption for criminal records applies "without reference to the status of the investigation."

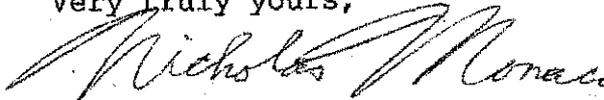
4. All records in the OCPO's investigatory files regarding the Gibson incident.

RESPONSE: This request fails to identify with reasonable clarity the specific government records sought, as is required by Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005). At this time, we request clarification of your OPRA request. Please respond in writing and identify the specific government records sought so that we may process your request. Failure to provide written clarification of your request will result in the closure of this OPRA request.

In the event that you disagree with this office's determination in this matter, you may appeal these responses to the New Jersey Government Records Council or the New Jersey Superior Court as provided by N.J.S.A. 47:1A-6 and 7.

If you should be interested in discussing your requests with me in greater detail, please do not hesitate to contact me.

Very truly yours,



O. NICHOLAS MONACO, ESQ.
Assistant Prosecutor

ONM/

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January 21, 2015

Walter M. Luers, Esq.*

*Also admitted in New York

Writer's Direct Email: wluers@luerslaw.com

Honorable Vincent J. Grasso, A.J.S.C.
Superior Court of New Jersey
Ocean County Courthouse
118 Washington Street, 2nd Floor
Toms River, New Jersey 08754

Re: *Paff v. County of Ocean – Office of the Prosecutor, et al.*

Dear Judge Grasso:

We are submitting this Letter Brief in lieu of a more formal brief in support of this action under the Open Public Records Act ("OPRA"), *N.J.S.A. 47:1A-1, et seq.*, and the common law right of access, which has been opened to the Court via Verified Complaint and Order to Show Cause.

Based on two reports in the media and Defendants' responses to Plaintiff's OPRA request, the Ocean County Prosecutor's Office is investigating an elementary and pre-school principal for an "incident" involving a child victim of sexual assault or abuse. Starting on January 30, 2014, the person being investigated began a paid leave of absence from his position. This lawsuit was brought to gain access to more information regarding the Prosecutor's investigation.

STATEMENT OF FACTS

For a recitation of the facts known to the Plaintiff, we respectfully refer the Court to the Verified Complaint and the Luers Certification that has Plaintiff's OPRA request and Defendants' response attached to it.

LEGAL ARGUMENT

POINT I

PLAINTIFF'S ACTION SHOULD PROCEED IN A SUMMARY MANNER

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

POINT II

THE INVESTIGATION REPORT SOUGHT BY PLAINTIFF SHOULD BE DISCLOSED TO THE EXTENT REQUIRED BY N.J.S.A. 47:1A-3(B)

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

As the Court knows, the Open Public Records Act (“OPRA”) mandates that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public’s right of access.” *Libertarian Party of Cent. New Jersey v. Murphy*, 384 N.J. Super. 136, 139 (App. Div. 2006) (citing *N.J.S.A. 47:1A-1*). “The purpose of OPRA ‘is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” *Times of Trenton Publ’g Corp. v. Lafayette Yard Cmty. Dev. Corp.*, 183 N.J. 519, 535 (2005) (quoting *Asbury Park Press v. Ocean County Prosecutor’s Office*, 374 N.J. Super. 312, 329 (Law Div. 2004)).

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

The burden of proof in showing that a denial of access was justified rests solely with the Records Custodian. *N.J.S.A. 47:1A-6; Asbury Park Press v. Monmouth County*, 406

N.J. Super. 1, 7 (App. Div. 2009). Here, the documents sought by Plaintiff are “government records” within the meaning of OPRA. Under OPRA, a “government record”:

means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof.
N.J.S.A. 47:1A-1.1.

Here, some of the information contained within the June 6, 2014 investigative report should be disclosed to the Plaintiff. Under OPRA, the following information “shall be available to the public within 24 hours or as soon as practicable” after a criminal investigation has commenced:

(1) “where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;” (2) “if an arrest has been made, information as to the name, address and age of any victims . . .”; (3) “if an arrest has been made, information as to the defendant’s name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule”; (4) “information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule”; (5) “information as to the identity of the investigating and arresting personnel and agency and the length of the investigation”; (6) “information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and

ammunition by the suspect and by the police”; and (7) “information as to circumstances surrounding bail, whether it was posted and the amount thereof.” *N.J.S.A. 47:1A-3*; *see also O’Shea v. Township of West Milford*, 410 N.J. Super. 371, 377 (App. Div. 2009) (discussing these exceptions).

Here, because no arrest has been made and no charges have been filed, but a crime has been reported, item one of the exception is in play. Here, the Defendants should be required to disclose the June 6, 2014 report to the extent it reveals “information as to the type of crime, time, location and type of weapon, if any[.]”

Defendants will likely counter that the disclosure of any information would jeopardize their investigation. This claim should be rejected. Under the circumstances of this case, it is clear that some type of crime has been reported and has or is being investigated. The person who appears to be the subject of the investigation has left his job and has been interviewed by the authorities. Thus, the subject knows he is the subject. In addition, through both online media reports and in response to Mr. Paff’s OPRA requests, the public now knows that the subject was interviewed in connection with an “incident.” Thus, disclosure of the details of “the type of crime, time, location and type of weapon, if any” would not jeopardize the investigation.

Defendants’ reliance on *N.J.S.A. 2A:82-46* is misplaced. That statute only applies to public records “which state[] the name, address and identity of a victim[.]” If the June 6, 2014 investigative report does not contain that information, then it must be disclosed. If the June 6, 2014 investigative report does in fact contain that information, then the document should be redacted so that only information regarding the “the type of crime, time, location and type of weapon, if any” is revealed.

POINT III

COMMON LAW RIGHT OF ACCESS

If this Court should deny access to the records requested under OPRA, the Court should grant access under the common law right of access. The public's right of access to records is broader under the common law right of access than under OPRA. "Nothing contained in [OPRA] shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency." *N.J.S.A.* 47:1A-8; *see also North Jersey Media Group Inc. v. State, Dep't of Personnel*, 389 N.J. Super. 527, 536 (Law. Div. 2006); *Bergen County Improvement Auth. v. N. Jersey Media Group, Inc.*, 370 N.J. Super. 504, 516 (App. Div. 2004). Thus, the right of access to records under the common law is broader than under OPRA. *North Jersey Media Group*, 389 N.J. Super. at 537.

The common law right of access has three elements: (1) the records must be common law public documents; (2) the person who seeks access must "establish an interest in the subject matter of the material," *South Jersey Publishing Co. v. New Jersey Expressway Auth.*, 124 N.J. 478, 487 (1991), and (3) the citizen's right to access "must be balanced against the State's interest in preventing disclosure." *Higg-A-Rella, Inc.*, 141 N.J. at 46; *see also Keddie v. Rutgers, The State University*, 148 N.J. 36, 50 (1997) (discussing these three elements).

Common law public records "include almost every document recorded, generated, or produced by public officials whether or not 'required by law to be made, maintained or kept on file.'" *Shuttleworth v. City of Camden*, 258 N.J. Super. 573, 582 (App. Div. 1992). Here, the records sought are public records because they are kept by the public agency. *Higg-A-Rella, Inc.*, 141 N.J. at 46 (defining a common-law record as one that is made by a public official in the exercise of their public function, either because the record was required or directed by law to be

made or kept, or because it was filed in a public office). Plaintiff has standing to request these documents under the common law, a requirement that is easily met. "A citizen, and the press on its behalf, does not have to prove any personal interest in order to satisfy the common law standing requirement." *Daily Journal v. Police Dep't of City of Vineland*, 351 N.J. Super. 110, 122 (App. Div. 2002).

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

(1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policy-makers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials. *Loigman v. Kimmelman*, 102 N.J. 98, 113 (1986).

With regard to the first factor, there is no evidence that disclosure of the "information as to the type of crime, time, location and type of weapon, if any" would discourage citizens from providing information to the police. If anything, disclosure would encourage citizens to provide information about possible crimes relating to children because the public will know that it is more likely that such allegations and reports will be investigated by the authorities.

Regarding the second factor, this does not weigh against disclosure because we are not seeking the identities of any person who has given information to the authorities.

Regarding the third factor, this does not weigh against disclosure because no agency decision-making is affected by disclosure.

Regarding the fourth factor, this factor weighs in favor of disclosure because the information sought is purely factual and does not reflect policy-making.

Regarding the fifth factor, this weighs in favor of disclosure because there is no evidence that the reported misconduct has been remediated. Quite to the contrary, no person has been charged and the subject has taken a paid leave of absence. To our knowledge, the reported misconduct has not been remediated at all.

Regarding the sixth factor, because our request is limited to "information as to the type of crime, time, location and type of weapon, if any," disclosure should not affect the current investigation.

[continued on next page]

POINT IV

AWARD OF REASONABLE ATTORNEYS' FEES

If the Court orders Defendants to produce the documents at issue, the Court should find that Plaintiff is the prevailing party and, under OPRA's fee-shifting provision and the common-law right of access, award Plaintiff a reasonable attorneys' fee and costs. *N.J.S.A. 47:1A-6; Mason v. Hoboken*, 196 N.J. 51, 79 (2008) (concluding that catalyst theory applies to fee awards under both OPRA and the common law right of access).

Respectfully submitted,



Walter M. Luers

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Attorney for Plaintiff

<p>JOHN PAFF, Plaintiff, v. COUNTY OF OCEAN – OFFICE OF THE PROSECUTOR and RECORDS CUSTODIAN OF THE COUNTY OF OCEAN – OFFICE OF THE PROSECUTOR, Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: OCEAN COUNTY</p> <p>DOCKET NO. _____</p> <p>CIVIL ACTION</p> <p>ORDER TO SHOW CAUSE</p>
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THIS MATTER being brought before the Court by Law Offices of Walter M. Luers, LLC, attorney for Plaintiff John Paff, seeking relief by way of summary action pursuant to *R. 4:67-2(a)*, based upon the facts set forth in the verified complaint and supporting papers filed herewith; and the Court having determined that this matter may be commenced by order to show cause as a summary proceeding pursuant to *N.J.S.A. 47:1A-6* and for good cause shown,

IT IS on this _____ day of _____, 2015 *ORDERED* that the Defendants County of Ocean – Office of the Prosecutor and Records Custodian of the County of Ocean – Office of the Prosecutor appear and show cause on the _____ day of _____, 2015 before the Honorable Vincent J. Grasso, A.J.S.C., Superior Court of New Jersey, Ocean County Courthouse, 118 Washington Street, Toms

River, New Jersey 08754, at ___ o'clock in the _____ noon or as soon thereafter as counsel can be heard, why judgment should not be entered:

A. Ordering Defendants provide to Plaintiff a copy of the June 6, 2014 Investigative Report to the extent that it shows "the type of crime, time, location and type of weapon, if any;"

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

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

And it is further *ORDERED* that:

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

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

3. Defendants shall file and serve a written answer and opposition papers to this order to show cause and the relief requested in the verified complaint and proof of service of the same by _____, 2015. The answer and opposition papers must be filed with the Clerk of the Superior Court in the county listed above and a copy of the papers must be sent directly to the chambers of the Honorable Vincent J. Grasso, A.J.S.C.

4. The Plaintiff must file and serve any written reply to the Defendants' order to show cause opposition by _____, 2015. The reply papers must

be filed with the Clerk of the Superior Court in the county listed above and a copy of the reply papers must be sent directly to the chambers of the Honorable Vincent J. Grasso, A.J.S.C.

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

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

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

These documents must be filed with the Clerk of the Superior Court in the county listed above. A directory of these offices is available in the Civil Division Management Office in the county listed above and online at:

http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf. Unless exempt from paying the filing fee, include a \$175 filing fee payable to the “Treasurer, State of New Jersey.” You must also send a copy of your answer and opposition papers to the Plaintiff’s attorney whose name and address appear above, or to the Plaintiff, if no

attorney is named above. A telephone call will not protect your rights; you must file and serve your answer and opposition papers (with the fee) or judgment may be entered against you by default.

8. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-LAW (1-888-576-5529). If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available in the Civil Division Management Office in the county listed above and online at:

http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf

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

HON. VINCENT J. GRASSO, A.J.S.C.

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<p>JOHN PAFF, Plaintiff, v. COUNTY OF OCEAN – OFFICE OF THE PROSECUTOR and RECORDS CUSTODIAN OF THE COUNTY OF OCEAN – OFFICE OF THE PROSECUTOR, Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: OCEAN COUNTY</p> <p>DOCKET NO. _____</p> <p>CIVIL ACTION</p> <p>ORDER</p>
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THIS MATTER having been brought before the Court pursuant to *R. 4:67-2(a)* by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC, counsel for Plaintiff John Paff, by Verified Complaint and Order to Show Cause for an Order requiring Defendants to provide a copy of the June 6, 2014 Investigative Report showing “the type of crime, time, location and type of weapon, if any”, and having heard oral argument on _____, 2015; and for the reasons set forth on the record on _____, 2015, and for good cause shown,

IT IS on this ____ day of _____, 2015

A. ORDERED that Defendants provide to Plaintiff a copy of the June 6, 2014 Investigative Report to the extent that it shows “the type of crime, time, location and type of weapon, if any;” and it is further

B. ORDERED that Plaintiff is the prevailing party in this matter and is entitled to an award of reasonable attorneys' fees and costs and if the parties are not able to resolve the quantum of the amount amicably Plaintiff shall submit an application for such an award via motion; and it is further

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

HON. VINCENT J. GRASSO, A.J.S.C.

This order was:

OPPOSED _____

UNOPPOSED _____