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Attorneys for Plaintiff,
Peter M. Heimlich

<p>PETER M. HEIMLICH, Plaintiffs, v. EDUCATIONAL INFORMATION & RESOURCE CENTER and STEPHEN H. HOFFMAN in his capacity as Custodian of Records for the Educational Information & Resource Center, Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: GLOUCESTER COUNTY DOCKET NO.: L-779-16 <u>Civil Action</u> VERIFIED COMPLAINT</p>
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Plaintiff, Peter M. Heimlich, through his undersigned counsel, Pashman Stein Walder Hayden, A Professional Corporation, complains against the Defendants as follows:

1. This is an action alleging violation of the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1, *et seq.*, (“OPRA”) and the common law right of access to public records, seeking records from the Educational Information & Resource Center.

PARTIES

2. Plaintiff Peter M. Heimlich is an investigative blogger. He resides in Peachtree Corners, Georgia and publishes articles online that can be read worldwide.

3. Defendant Educational Information & Resource Center (“EIRC”) is a public agency with its main place of business located at South Jersey Technology Park, 107 Gilbreth Parkway, Suite 200, Mullica Hill, New Jersey.

4. Defendant Stephen H. Hoffman is the designated Custodian of Records for the EIRC. Upon information and believe, Defendant Hoffman maintains an office at South Jersey Technology Park, 107 Gilbreth Parkway, Suite 200, Mullica Hill, New Jersey.

VENUE

5. Venue is properly laid in Gloucester County because Defendant EIRC is located in Gloucester County and because the cause of action arose in Gloucester County. R. 4:3-2(a).

FACTUAL ALLEGATIONS

Background of Peter M. Heimlich

6. Plaintiff received his college degree from Syracuse University's Newhouse School of Journalism in 1977. While in school he was an editor, reporter, and columnist for the Daily Orange student newspaper, was a freelance writer for the Cincinnati Enquirer Sunday Magazine and other publications, and won a 1976 Hearst Foundation national award for Excellence in News Writing.

7. In 2002, Plaintiff began researching the career of his father, Henry J. Heimlich MD, and uncovered a history of unseen fraud which he has published on his website, <http://medfraud.info>. Since spring 2003, Plaintiff's work has been the basis for numerous print and broadcast media reports concerning his father and a host of other news topics including fraud surrounding the "Save a Life Foundation." Plaintiff's research has contributed to articles that have been published by the Washington Post, NJ.com, Slate, the Cincinnati Enquirer, The Hollywood Reporter, and ABC News among many other news outlets. Additionally, Plaintiff's research has contributed to broadcast reports on WSB-TV (ABC Atlanta), WPIX-TV (New York), Fox9 News (Idaho), Fox-TV (New Jersey) and ABC 20/20.

8. Since 2010, Plaintiff has done original document-based reporting, mostly about fraud and/or ethical misconduct, on his blog. He publishes articles online at his blog. <http://the-sidebar.com>.

9. Plaintiff's reporting covers topics of national and international importance and can be read worldwide on the Internet.

Plaintiff's May 27, 2016 OPRA Request

10. On May 27, 2016, Plaintiff submitted a request for government records pursuant to OPRA and the common law right of access to the EIRC. Plaintiff's request specifically stated:

According to this page on your agency's website, recording artist Carl Brister appeared at the April 14, 2016 International Conference for Child Assault Prevention in Atlantic City:
<http://www.eirc.org/news-announcements/icap-international-conference-april-14-2016/>

Please provide me with copies of all records associated with Mr. Brister's appearance including but not limited to correspondence, promotional materials, contracts, and financial records including copies of checks.

If possible, please provide the records in digital format via e-mail. If your office wishes to correspond with me, please feel free to do so via e-mail.

I'm requesting these records for an article I'm reporting on my blog and I have no financial interest in the requested information, therefore this is to request that I be categorized as a member of the news media.

[Attached hereto as **Exhibit A** is a true and accurate copy of Plaintiff's May 27th OPRA request (the "Request).]

11. Later on May 27, 2016, Defendant Hoffman denied Plaintiff's Request. Specifically, Mr. Hoffman stated:

Your request has been denied in light of the fact that you are not considered a "citizen" of the State of New Jersey. More specifically, you indicated an address on your OPRA Request that

is outside the State of New Jersey, and have provided no evidence that you are a citizen of New Jersey. As such, in accordance with applicable law, including the decision in Sheeler v. City of Cape May et al, Docket No. CPM-L-444-15 (February 19, 2016) which held that OPRA was only applicable to citizens of this State (namely New Jersey), your request is denied since you are not a citizen of New Jersey and do not have standing to submit an OPRA Request.

[Attached hereto as **Exhibit B** is a true and accurate copy of Defendants' May 27th denial of Plaintiff's Request.]

12. To date, the EIRC has released no records in response to Plaintiff's OPRA Request. This lawsuit challenges Defendants' contention that Plaintiff does not have standing to submit an OPRA Request.

FIRST COUNT
(Violation of OPRA)

13. Plaintiff repeats and incorporates by reference the allegations set forth in the preceding paragraphs as though fully set forth at length herein.

14. The records sought by Plaintiff are government records and are subject to access under OPRA, N.J.S.A. 47:1A-1 et seq.

15. OPRA provides that "any person" may inspect, examine, copy, or purchase records. N.J.S.A. 47:1A-5(a).

16. OPRA provides that "any person" may file an action in Superior Court to challenge the denial of access to a record. N.J.S.A. 47:1A-6.

17. A government agency must grant access to the requested records, or otherwise state a lawful basis for withholding, within seven (7) business days after receiving the request. N.J.S.A. 47:1A-5(i).

18. A public agency has the burden of proving that any denial of access is authorized by law. N.J.S.A. 47:1A-6.

19. The requested records are government records because they were “made, maintained or kept on file,” or “received in the course of . . . [the EIRC’s] official business.” N.J.S.A. 47:1A-1.1.

20. The records Plaintiff seeks are not wholly exempt pursuant to any exemption of OPRA or any other law. To the extent any portion of the requested records are exempt, Defendants have an obligation to redact any exempt portion and produce the records with the appropriate redactions. N.J.S.A. 47:1A-5(g).

21. Defendants failed to provide access to the requested correspondence within seven (7) business days.

22. Accordingly, Defendants violated OPRA by:

- a. Denying Plaintiff’s OPRA Request;
- b. Failing to provide access “as soon as possible, but not later than seven business days” to the requested correspondence in violation of N.J.S.A. 47:1A-5(i);
- c. Failing to provide a lawful basis for denying access to government records, in violation of N.J.S.A. 47:1A-5(g); and
- d. Failing to identify the specific public records responsive to the request and the specific basis for withholding each of those records, in violation of N.J.S.A. 47:1A-5(g).

WHEREFORE, Plaintiff demands judgment against Defendants:

- a. Declaring that Plaintiff has standing to submit OPRA requests;

- b. Declaring said actions of Defendants to be in violation of OPRA, N.J.S.A. 47:1A-1 et seq. by failing to grant access to the requested government records as required by OPRA;
- c. Directing Defendants to release the requested records to Plaintiff forthwith; Alternatively, if the Court believes that any information is exempt from public access, Plaintiff respectfully asks the Court to review the document(s) in camera and then require Defendants to delete or excise from the records the portion(s) which are exempt from public access and promptly permit access to the remainder of the public record;
- d. Ordering Defendants to preserve the requested records pending the resolution of these proceedings or as otherwise required by law;
- e. Awarding counsel fees and costs pursuant to N.J.S.A. 47:1A-6; and
- f. For such other relief as the Court may deem just and equitable.

CERTIFICATION PURSUANT TO R. 4:5-1

Plaintiff, by his attorney, hereby certifies that the matter in controversy is not the subject of any other action pending in any Court and is likewise not the subject of any pending arbitration proceeding, other than that the issue of whether a non-citizen has standing to file OPRA requests is presently on appeal before the Appellate Division. Plaintiff further certifies that he has no knowledge of any contemplated action or arbitration regarding the subject matter of this action and that Plaintiff is not aware of any other parties who should be joined in this action.

PASHMAN STEIN WALDER HAYDEN
A Professional Corporation,
Attorneys for Plaintiff,
Peter M. Heimlich

Dated: June 23, 2016

By:  _____
CJ GRIFFIN, ESQ.

VERIFICATION

Peter M. Heimlich, of full age, deposes and says:

1. I am Plaintiff in the foregoing Verified Complaint.
2. The allegations of the Verified Complaint contained in Paragraphs 1-4 and 6-12 are true. The said Verified Complaint is made in truth and good faith and without collusion, for the causes set forth herein. The allegations in the Verified Complaint are based on personal knowledge.
3. All documents attached to the Verified Complaint are true copies and have not been redacted, changed, modified, adjusted, or otherwise altered in any manner by me or my agents.

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.



PETER M. HEIMLICH

Dated: June 23, 2016

CERTIFICATION OF FAX/ELECTRONIC SIGNATURE

CJ Griffin, Esq., of full age, certifies and says as follows:

1. I am an attorney with the law firm of Pashman Stein Walder Hayden, P.C. I make this certification of the genuineness of the electronic signature of Peter M. Heimlich.

2. I hereby certify that Mr. Heimlich has acknowledged to me the genuineness of his signature on the foregoing verification.

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.

PASHMAN STEIN WALDER HAYDEN
A Professional Corporation
Attorneys for Plaintiff,
Peter M. Heimlich

By: _____

CJ GRIFFIN, ESQ.

Dated: June 23, 2016

June 23, 2016

VIA OVERNIGHT MAIL

Hon. Georgia M. Curio, A.J.S.C.
Cumberland County Courthouse
60 West Broad Street, Courtroom 346
Bridgeton, New Jersey 08302

Re: Heimlich v. Educational Information & Resource Center, et al.
Our File No. 1749-001

Dear Judge Curio:

Please accept this letter brief, in lieu of a more formal brief, in support of Plaintiff's application for an Order to Show Cause seeking relief from Defendants' unlawful response to the Open Public Records Act ("OPRA") Request identified in the Verified Complaint and discussed in detail below.

PRELIMINARY STATEMENT

Plaintiff Peter M. Heimlich is an investigative blogger. Plaintiff's research and reporting has uncovered fraud and ethical misconduct. While he resides in Georgia, his work has been the basis for numerous print and broadcast media reports from major news outlets across the nation, including outlets here in New Jersey. In addition to leaking stories and data to major publications, Plaintiff also self-publishes investigative articles online on his website and blog.

As part of his research and a potential news story, Plaintiff submitted a valid OPRA request to Defendant Educational Information & Resource Center ("EIRC") seeking copies of records related to the appearance of a recording artist at a conference the EIRC was hosting. The EIRC responded to Plaintiff's request by denying it on the basis that he was not considered a

“citizen” of the State of New Jersey. Defendants’ denial of the request cited Judge Johnson’s decision earlier this year in Sheeler v. City of Cape May. Plaintiff challenges this denial.

As explained in more detail below, Defendants’ denial of Plaintiff’s request was unlawful. Defendants’ reliance on the Cape May decision ignored two other New Jersey decisions, including one decided after Cape May, where the both Judge Bookbinder and Judge Troncone held that out-of-state residents could indeed submit an OPRA request. Moreover, the Cape May decision itself is erroneous for several reasons including that OPRA itself repeatedly states that “any person” may gain access to government records and the legislative history demonstrates an intention to permit “anyone” to access records. For these reasons and the others explained below, Plaintiff submits that this Court should not be persuaded by the nonbinding opinion of Cape May.

Accordingly, for the reasons argued herein, this Court should enter an order finding Defendants to be in violation of OPRA, compelling Defendants to search for and produce responsive records, and awarding Plaintiff his reasonable attorney’s fees and costs of suit.

STATEMENT OF FACTS

Plaintiff received his college degree from Syracuse University’s Newhouse School of Journalism in 1977. While in school he was an editor, reporter, and columnist for the Daily Orange student newspaper, was a freelance writer for the Cincinnati Enquirer Sunday Magazine and other publications, and won a 1976 Hearst Foundation national award for Excellence in News Writing.

In 2002, Plaintiff began researching the career of his father, Henry J. Heimlich MD, and uncovered a history of unseen fraud which he has published on his website, <http://medfraud.info>.

Since spring 2003, Plaintiff's work has been the basis for numerous print and broadcast media reports concerning his father and a host of other news topics including fraud surrounding the "Save a Life Foundation." Plaintiff's research has contributed to articles that have been published by the Washington Post, NJ.com, Slate, the Cincinnati Enquirer, The Hollywood Reporter, and ABC News among many other news outlets. Additionally, Plaintiff's research has contributed to broadcast reports on WSB-TV (ABC Atlanta), WPIX-TV (New York), Fox9 News (Idaho), Fox-TV (New Jersey) and ABC 20/20.

Since 2010, Plaintiff has done original document-based reporting, mostly about fraud and/or ethical misconduct, on his blog. He publishes articles online at his blog. <http://the-sidebar.com>. Plaintiff's reporting covers topics of national and international importance and can be read worldwide on the Internet.

A. Plaintiff's May 27, 2016 OPRA Request

On May 27, 2016, Plaintiff submitted a request (the "Request") for government records pursuant to OPRA and the common law right of access to the EIRC. Plaintiff's request specifically stated:

According to this page on your agency's website, recording artist Carl Brister appeared at the April 14, 2016 International Conference for Child Assault Prevention in Atlantic City:
<http://www.eirc.org/news-announcements/icap-international-conference-april-14-2016/>

Please provide me with copies of all records associated with Mr. Brister's appearance including but not limited to correspondence, promotional materials, contracts, and financial records including copies of checks.

If possible, please provide the records in digital format via e-mail. If your office wishes to correspond with me, please feel free to do so via e-mail.

I'm requesting these records for an article I'm reporting on my blog and I have no financial interest in the requested information, therefore this is to request that I be categorized as a member of the news media.

[See Verified Complaint, Exhibit A.]

Later on May 27, 2016, Defendant Stephen Hoffman denied Plaintiff's Request.

Specifically, Mr. Hoffman stated:

Your request has been denied in light of the fact that you are not considered a "citizen" of the State of New Jersey. More specifically, you indicated an address on your OPRA Request that is outside the State of New Jersey, and have provided no evidence that you are a citizen of New Jersey. As such, in accordance with applicable law, including the decision in Sheeler v. City of Cape May et al, Docket No. CPM-L-444-15 (February 19, 2016) which held that OPRA was only applicable to citizens of this State (namely New Jersey), your request is denied since you are not a citizen of New Jersey and do not have standing to submit an OPRA Request.

[See Verified Complaint, Exhibit B.]

As of the date of this filing, the EIRC has released no records in response to Plaintiff's Request.

LEGAL ARGUMENT

I. DEFENDENTS HAVE VIOLATED OPRA BY REFUSING TO RESPOND TO HIS OPRA REQUEST BASED ON AN ERRONEOUS CLAIM THAT NON-CITIZENS ARE BARRED FROM FILING OPRA REQUESTS

OPRA reflects New Jersey's "history of commitment to public participation in government" and its "tradition favoring the public's right to be informed about governmental actions." South Jersey Pub. Co. Inc. v. N.J. Expressway Auth., 124 N.J. 478, 486-87 (1991). The statute's "purpose is 'to maximize public knowledge about public affairs and to minimize the evils inherent in a secluded process.'" Mason v. City of Hoboken, 196 N.J. 51, 64 (2008)

(quoting Lakewood Residents Assoc., Inc. v. Twp. of Lakewood, 294 N.J. Super. 207, 225 (Law Div. 1994)). A citizen's right to access public records has been deemed "unfettered" absent a statutory exemption. Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003)(emphasis added). Accordingly, pursuant to OPRA,

government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by [OPRA] shall be construed in favor of the public's right of access. . . .

[N.J.S.A. 47:1A-1 (emphasis added).]

It is the public agency's burden to prove that denial of access is authorized by law. N.J.S.A. 47:1A-6. Based on the reasons below, Defendants cannot meet this burden.

A. Defendants Have Violated OPRA by Denying Plaintiff's OPRA Request Based on his Residency Outside of New Jersey

1. OPRA Permits "Any Person" to Gain Access to Government Records and OPRA's Legislative History Demonstrates an Intent to Permit Non-Citizens to Access Records

When interpreting OPRA, this court must construe *any limitation* on the right of access *in favor of granting access*. N.J.S.A. 47:1A-1. Thus, all of OPRA's provisions must be construed in favor of granting access to Plaintiff. Defendants' assertion that OPRA is limited to only New Jersey citizens (residents) is at odds with the unambiguous statutory language used throughout numerous OPRA operating provisions. See In re Kollman, 210 N.J. 557, 568 (2012) (noting "courts begin with the language of the statute . . . If the plain language is clear, the court's task is complete."). The review of the legislative history of OPRA is critical in demonstrating that citizenship is *not* a requirement for accessing government records.

While Section 1 of OPRA declares that public records are to be readily available to “citizens of this State,” OPRA’s operational provisions do *not* require that a requestor be a resident of New Jersey. Instead, the operational provisions uniformly and unambiguously grant access to public records under OPRA to “*any person*,” not just “citizens.” Indeed, critically, the word “citizen” is never used in any of OPRA’s operational provisions. Instead, section after section provides substantive rights under OPRA to “any person,” as demonstrated by the following provisions:

- N.J.S.A. 47:1A-5(a) provides that “[t]he custodian of a government record shall permit the record to be inspected, examined, and copied *by any person* during regular business hours.” (emphasis added);
- N.J.S.A. 47:1A-5(b) provides that “[a] copy or copies of a government record may be purchased *by any person* upon payment of the fee prescribed by law or regulation” (emphasis added);
- N.J.S.A. 47:1A-5(f) provides that “[t]he custodian of a public agency shall adopt a form for the use of *any person* who requests access to a government record held or controlled by the public agency.” (emphasis added);
- N.J.S.A. 47:1A-5(j) provides that a custodian must post a “statement that sets forth in clear, concise and specific terms the right to appeal a denial of, or failure to provide, access to a government record *by any person* for inspection, examination or copying . . .” (emphasis added);
- N.J.S.A. 47:1A-5(j) provides that case files maintained by the Office of the Public Defender “shall not be open to inspection *by any person* unless authorized by law” (emphasis added);
- N.J.S.A. 47:1A-6 provides that, “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 . . .” (emphasis added);
- N.J.S.A. 47:1A-7(b) provides that the GRC must “receive, hear, review, and adjudicate any complaint filed *by any person* concerning a denial of

access to a government record by a records custodian . . .” (emphasis added);

- N.J.S.A. 47:1A-7(b) provides that the GRC must “allow *any person* to request mediation or to file a complaint with the council when access has been denied.” (emphasis added);
- N.J.S.A. 47:1A-6(d) provides that the GRC must provide mediation opportunities “[u]pon the receipt of a written complaint signed *by any person* alleging that a custodian of a government record has improperly denied that person access to a government record” (emphasis added);
- N.J.S.A. 47:1A-1.1 provides that personal firearms records are exempt “except for use *by any person* authorized by law to have access to these records” (emphasis added);
- N.J.S.A. 47:1A-1.1 provides that a government record does not include “that portion of any document which discloses the social security number, credit card number, unlisted telephone number or driver license number of *any person*” (emphasis added);
- N.J.S.A. 47:1A-5(a) provides that “[p]rior to allowing access to any government record, the custodian thereof shall redact from that record any information which discloses the social security number, credit card number, unlisted telephone number, or driver license number of *any person*” (emphasis added);

Thus, the Legislature used the phrase “any person” in the operating provisions of OPRA *twelve* times: six times in Section 5; two times in Section 6; two times in Section 7; and two times in Section 1.1.

The use of the “*any person*” language is critical when considering OPRA’s predecessor law, the Right to Know Law (“RTKL”). OPRA was enacted to expand access to government records over what was provided in the RTKL. Mason v. City of Hoboken, 196 N.J. 51, 64 (2008). It did so by significantly broadening the definition of “government record,” N.J.S.A. 47:1A-1.1, and by making fee awards mandatory rather than permissible, N.J.S.A. 47:1A-6. But

OPRA also broadened the RTKL's operational provisions to provide access to non-citizens. The RTKL's operational provisions were starkly different from OPRA's and did limit access only to citizens. Section 2, the operational provision, provided:

Every citizen of this State, during the regular business hours maintained by the custodian of any such records, shall have the right to inspect such records. *Every citizen* of this State shall also have the right, during such regular business hours and under the supervision of a representative of the custodian, to copy such records by hand, and shall also have the right to purchase copies of such records. . . . If the custodian of any such records shall find that there is no risk of damage or mutilation of such records and that it would not be incompatible with the economic and efficient operation of the office and the transaction of public business therein, he may permit *any citizen* who is seeking to copy more than 100 pages of records to use his own photographic process, approved by the custodian, upon the payment of a reasonable fee, considering the equipment and the time involved, to be fixed by the custodian of not less than \$10.00 or more than \$50.00 per day.

[N.J.S.A. 47:1A-2 (Repealed by L.2001, c. 404 (OPRA))(emphasis added).]

The change from "any citizen" to "any person" in the operational provisions is significant and demonstrates an intention to make government records accessible to any person, not just citizens. DiProspero v. Penn, 183 N.J. 477, 494 (2005) ("A change of language in a statute ordinarily implies a *purposeful alteration* in [the] substance of the law.") (emphasis added).

In In re Zhan, 424 N.J. Super. 231, 237 (App. Div. 2012), the Appellate Division held that a statute which read that "any person may institute an action in Superior Court for authority to assume another name" did not apply only to citizens because "**the term 'any person' is clearly broader than the term 'citizen.'**" (emphasis added). The Zahn court also looked to Dep't of Labor v. Cruz, 45 N.J. 372 (1965), a case in which the Supreme Court construed an amendment of a civil rights statute as broadening its protections to cover noncitizens because:

The elimination of “citizens of the State of New Jersey” and the substitution of “any person” reveals the intention to prohibit discrimination of the nature described against aliens, as well as citizens in the hiring of employees on [public works] projects.

[Cruz, supra, 45 N.J. at 380 (emphasis added).]

The same is here: the Legislature amended the RTKL so that the “any citizen” provisions were repealed and replaced with “any person” provisions. It did this to increase access to government records so that records would be accessible both to citizens of this State as well as any other person, including non-citizens. See also Application of Pirlamarla, 208 N.J. Super. 112, 115 (Ch. Div. 1985) (holding that “any person” is facially broad enough to confer upon a noncitizen the statutory authorization to seek a name change). It is well-established that “the Legislature is presumed to be aware of judicial construction of its enactments.” DiProspero, supra, 183 N.J. at 494. The Legislature is thus well aware that our courts have repeatedly held that where the Legislature changes statutory language from “any citizen” to “any person” that it intended to broaden the scope of the law’s provisions to include non-citizens.

Accordingly, New Jersey courts have treated out-of-state requestors in the exact same manner as in-state requestors. See e.g., Scheeler v. Atlantic County Mun. Joint Ins. Fund, docket no. BUR-L-990-15, 2015 WL 9910117 (Law Div. October 2, 2015)¹ (holding non-citizen may file OPRA requests); Scheeler v. Ocean County Prosecutor's Office, docket no. OCN-L-3295-15, 2016 WL 1587341 (Law Div. April 14, 2016)² (holding non-citizen may file OPRA requests); Philadelphia Newspapers, Inc. v. State, 232 N.J. Super. 458, 460 (App. Div. 1989) (granting access to government records under the Right to Know Law, which also included “citizens of

¹ Attached as Exhibit 1 to the Certification of CJ Griffin (“Griffin Cert.”).

² Attached as Exhibit 2 to the Griffin Cert.

this State” language); Katon ex rel. Muslim Advocates v. N.J. Dep’t of Law & Pub. Safety, 2015 WL 567305 (App. Div. 2015)(no mention of requestor’s address where the requestor was the legal director for a national organization located in California)³; WNBC-TV v. Allendale Bd. of Educ., docket no. BER-L-1765-15, 2015 WL 3548252 (Law Div. June 4, 2015) (no mention of citizenship issue where requestor is television company located in New York City).⁴

2. Our Courts Disfavor Unenforceable Interpretations of Statutes

When legislative intent is unclear, our courts disfavor interpretations that would be unenforceable or evadable. See, e.g., Hasbrouck Heights Hospital Ass’n v. Borough of Hasbrouck Heights, 15 N.J. 447, 453 (1954)(“A statute should not be construed to permit its purpose to be defeated by evasion[.]”). For example, in Kovalcik v. Somerset County, 206 N.J. 581 (2011), the Supreme Court rejected the defendants’ argument that criminal defendants were prohibited from using OPRA to obtain records that they were denied in discovery. The Supreme Court held that OPRA did not contain such an exemption, but importantly held: “More to the point, were we to agree with the Attorney General's suggestion, **we would be crafting a remedy that would be unenforceable as a practical matter. That is, were we to impose a limitation on the use of OPRA that applied to criminal defendants generally, they could easily evade it by employing others to make requests on their behalf.**” Id. at 591 (emphasis added).

The same is true here—any attempt to limit the statute to New Jersey residents only would not only contradict the many provisions of OPRA that plainly state that “*any person*” can request government records, but it would also be completely unenforceable and evadable as a matter of law. OPRA expressly authorizes a person to file a request anonymously, N.J.S.A.

³ Attached as Exhibit 3 to the Griffin Cert.

⁴ Attached as Exhibit 4 to the Griffin Cert.

47:1A-5 (f) & (i), and Plaintiff therefore could simply proceed going forward by simply submitting his anonymous requests to the EIRC via an anonymous email address. Defendants would then be obligated to respond and produce the records because OPRA permits anonymous requests.

3. Limiting OPRA to “Citizens” Could Bar Media Entities from Filing Requests

Plaintiff submitted his request as part of his journalistic pursuits. A decision by this Court that limits OPRA only to “citizens” rather than “any person” not only conflicts with the plain language of at least twelve separate provisions of OPRA, it prohibits out-of-state media entities and bloggers, such as Plaintiff, from gaining access to New Jersey’s records. Even worse, such a decision might also put *any* media corporation’s right to obtain public records at risk.

Our Legislature dictates that, when used in any statute, the word “person” “includes corporations, companies, associations, societies, firms, partnerships and joint stock companies as well as individuals, unless restricted by the context to an individual as distinguished from a corporate entity or specifically restricted to 1 or some of the above enumerated synonym[.]” N.J.S.A. 1:1-2. Thus, OPRA’s “any person” language obviously includes media corporations, nonprofit organizations, and other types of business entities. In sharp contrast, a holding that OPRA may only be utilized by “citizens” may bar these other entities from gaining access to records even if they are entities formed within the State of New Jersey. In Int’l & Life Assur. Co. v. Haight, 35 N.J.L. 279 (Sup. Ct. 1871), the Supreme Court held that a tax exemption, which exempts “stocks and other personal estates owned by citizens of this state, situated and being out of this state...” was *not* applicable to corporations, only natural persons, because

the “ordinary reference to the word is to a natural person, and when construed otherwise, the general purpose and spirit of the law must require it.” Id. at 284.

While it is true that corporations are considered “citizens” or “residents” of states for certain limited purposes such as venue/jurisdiction (Id. at 283), courts have repeatedly refused to treat corporations and business entities as “citizens” when a law gives substantive rights to “citizens” instead of “persons.” See, e.g., Braswell v. United States, 487 U.S. 99, 104-10 (1988)(holding that corporations are not “persons” entitled to the Fifth Amendment’s self-incrimination privilege). For example, the U.S. Supreme Court has refused to give corporations protections under the Fourteenth Amendment’s Privileges & Immunities Clause, which commands that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of *citizens*.” Western & S.L.I. Co. v. Board of Equalization, 451 U.S. 648, 656 (1981). In contrast, the Court has held that corporations have equal protection rights under the Fourteenth Amendment because those rights apply to “any person.” See Pembina Consolidated Silver Mining Co. v. Pennsylvania, 125 U.S. 181, 189 (1888)(“Under the designation of ‘person’ there is no doubt that a private corporation is included.”). Thus, a holding that only “citizens” can utilize OPRA could ban media corporations from gaining access to government records.

4. The GRC Directs that OPRA is for “Anyone”

In enacting OPRA, the Legislature also formed the Government Records Council (“GRC”) and gave it substantial administrative powers. Though the GRC’s decisions are not precedential, our courts do give deference to the GRC’s administrative actions just as they do for any other administrative agency. See e.g. Paff v. City of E. Orange, 407 N.J. Super. 221, 226

(App. Div. 2009)(deferring to GRC because when “the Legislature delegates authority to a state agency to administer and interpret a statute, our courts will defer to that agency’s interpretation of the statute “provided it is not plainly unreasonable”). Our Legislature has dictated that the GRC shall “prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records.” N.J.S.A. 47:1A-7(b). In compliance with this dictate, the GRC has authored the Handbook for Records Custodians⁵ to instruct records custodians as to how to lawfully respond to OPRA requests. The GRC provides the following guidance to custodians:

Who may file an OPRA request?

Anyone! Although OPRA specifically references “citizens of this State,” (N.J.S.A. 47:1A-1) **the Attorney General’s Office advises that OPRA does not prohibit access to residents of other states.**

Also, requestors may file OPRA requests anonymously without providing any personal contact information, even though space for that information appears on the form; thus anonymous requests are permitted. However, OPRA specifically prohibits anonymous requests for victims’ records. N.J.S.A. 47:1A-2.2.

[N.J. Gov’t Records Council, Handbook for Records Custodians (5th ed. Jan. 2011), 6, (emphasis added).]

Accordingly, it is clear that from the language of OPRA’s operational provisions and the guidance of the administrative agency tasked with handling OPRA disputes that New Jersey’s public records are accessible to any person, not just New Jersey “citizens” or its “residents.”

Therefore, Plaintiff has standing to submit OPRA requests.

5. Two New Jersey Courts Have Found That Non-Residents Have Standing to Submit OPRA Requests

⁵ The relevant excerpt from the Handbook is attached Exhibit 5 to the Griffin Cert. The full handbook is available online at: [http://www.nj.gov/grc/pdf/Custodians%20Handbook%20\(Updated%20January%202011\).pdf](http://www.nj.gov/grc/pdf/Custodians%20Handbook%20(Updated%20January%202011).pdf).

Three New Jersey trial courts have previously addressed the issue before the Court in this matter, namely does an out-of-state resident have standing to submit OPRA requests to New Jersey government agencies? Not surprisingly, here, Defendants base their entire denial of Plaintiff's Request on the trial court's decision in Sheeler v. City of Cape May et al, Docket No. CPM-L-444-15 (February 19, 2016),⁶ written by the lone judge who held that an out-of-state resident did not have standing to submit an OPRA request. Plaintiff submits that the decisions in both Scheeler v. Atlantic County Mun. Joint Ins. Fund, docket no. BUR-L-990-15, 2015 WL 9910117 (Law Div. October 2, 2015) and Scheeler v. Ocean County Prosecutor's Office, docket no. OCN-L-3295-15, 2016 WL 1587341 (Law Div. April 14, 2016), which found that out-of-state residents do have standing to submit an OPRA request, are persuasive decisions that this Court follow.

All three of the Cape May, Atlantic County and Ocean County cases were brought by the same plaintiff who at the time of his requests resided in North Carolina. In the Atlantic County case, the Honorable Ronald E. Bookbinder, A.J.S.C., analyzed the arguments set forth above and reached the conclusion that:

Limiting OPRA standing to New Jersey residents would greatly limit the public's right of access to records under OPRA, as out-of-state news agencies and media companies could not request, review, and share government records from the State of New Jersey. Given the presumption in favor of the right of access and New Jersey's liberal approach to questions of standing, [this] Court finds Defendants' interpretation of OPRA incorrect, and holds that Plaintiff has standing to make OPRA requests despite no longer living in New Jersey.

[Atlantic County Mun. Joint Ins. Fund, 2015 WL 9910117 at *9.]

⁶ Attached as Exhibit 6 to the Griffin Cert.

Likewise, in the Ocean County case, a decision reached after Cape May, the Honorable Mark A. Troncone, J.S.C. analyzed the various provisions of OPRA and held that:

In the court's view, the language of OPRA is clear and unambiguous. Access to public records under OPRA is not limited to New Jersey "citizens." If the Legislature intended to do so it could have, . . . , incorporating that term in the statute's operational provisions.

Furthermore, public policy as evidenced in the statute's legislative Findings and Declarations, the very paragraph relied on by OCPO, provides "[a]ny limitation on the right of access accorded by [OPRA], **shall be construed in favor of the public's right of access.**" N.J.S.A. 47:1A-1 (emphasis supplied). Thus to the extent there is any ambiguity in the law as to the scope of those entitled to access, such ambiguity must be resolved in favor of a more liberal reading. Such a reading of the statute would also comport with the generally liberal view of standing taken by New Jersey courts. In re Camden County, 170 N.J. 439, 449 (2002)

It is clear that taken to its logical conclusion, the position advanced by OCPO would leave many parties who have a legitimate need to access to public records without recourse. For example, a non-resident property owner and taxpayer could not obtain public records affecting his property; the out-of-state motorist involved in an accident would be unable to access documents from law enforcement officials relating to the incident; and a newspaper, published in a neighboring state but circulated in New Jersey, investigating a claim of alleged official misconduct or corruption would be barred from obtaining public records.

[Ocean County Prosecutor's Office, 2016 WL 1587341 at *5.]

In reaching their decisions, Judge Bookbinder and Judge Troncone focused solely on the language of the OPRA statutes and its underlying public policy. On the other hand, in the Cape May decision, the Honorable Nelson C. Johnson, J.S.C., peppered his decision with clear and biting animosity towards the actual plaintiff. Four different times Judge Johnson derisively referred to Mr. Scheeler as a "gadfly." Moreover, he referred to Mr. Scheeler's correspondence

with the defendants as “bullying.” It is clear that Judge Johnson’s distaste for Mr. Scheeler led to his erroneous conclusion that “Mr. Scheeler is not someone the Legislature had in mind when it adopted OPRA.” Cape May op. at 7. His opinion of Mr. Scheeler then led Judge Johnson to interpret OPRA in such a way as to deny Mr. Scheeler the ability to submit requests.⁷ That holding was erroneous and should not be accepted by this Court, which would preclude well-intentioned bloggers like Plaintiff from filing OPRA requests and writing stories that advance the public interests of New Jerseyans.

Beyond his personal opinion of Mr. Scheeler, Judge Johnson’s decision also fails to properly appreciate the law. In both of their decisions, Judges Bookbinder and Troncone took into account that “[a]ny limitation on the right of access accorded by [OPRA], shall be construed in favor of the public's right of access.” N.J.S.A. 47:1A-1. Judge Johnson’s opinion did not provide any analysis of this imperative mandate. Additionally, in attempting to explain that the “any person” language that is repeated twelve times in the OPRA statute does not actually mean any person, Judge Johnson referenced New Jersey statutes that refer to registering to vote and obtaining a driver’s license in New Jersey, neither of those statutes is informative in the present context. The voter registration statute has a specific residency requirement that is not present in OPRA. See N.J.S.A. 19:31-5 (“Each person, who is at least 17 years of age at the time he or she applies for registration, **who resides in the district in which he or she expects to vote...**”)(emphasis added). On the other hand, the driver’s license statute actually does allow for licenses to be issued to out-of-state residents. See N.J.S.A. 39:3-10n (“Notwithstanding the

⁷ It should also be noted that Plaintiff in this case does not share any of the “character concerns” that seemed to offend Judge Johnson with respect to Mr. Scheeler. Plaintiff here is essentially an investigator who submitted a simple OPRA request to Defendants seeking basic information. There was no acrimonious correspondence, nor any badgering or belittling. Denying Plaintiff access to OPRA would be tantamount to preventing any out-of-state news agency from ever submitting OPRA requests in New Jersey.

provisions of any law to the contrary, the chief administrator may...issue a temporary driver's license that is valid...to New Jersey licensees who...temporarily are residents of another state or foreign country.”). The foregoing makes it clear that Judge Johnson’s analysis simply does not holdup. He wholly ignored the fact that the Legislature changed the RTKL’s operating provisions from stating “any citizen” to “any person,” despite the fact that courts are required to presume that the Legislature acted purposefully and intentionally in making such a change. DiProspero, 183 N.J. at 494. (“A change of language in a statute ordinarily implies a purposeful alteration in [the] substance of the law.”).

Accordingly, this Court should not be persuaded by Judge Johnson. Instead, this Court should follow in the well-reasoned footsteps of Judge Bookbinder and Judge Troncone and find that Plaintiff has the standing to submit OPRA requests.

II. PLAINTIFF IS A PREVAILING PARTY AND ENTITLED TO AN AWARD OF ATTORNEY’S FEES

Plaintiff is statutorily entitled to reasonable attorney’s fees and costs. Pursuant to OPRA,

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 The public agency shall have the burden of proving that the denial of access is authorized by law. **If 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.**

[N.J.S.A. 47:1A-6 (emphasis added).]

New Jersey law has long recognized the “catalyst theory” in regards to an award of attorney’s fees. Mason v. City of Hoboken, 196 N.J. 51, 73 (2008). A plaintiff is entitled to attorney’s fees if they can demonstrate “1) a factual causal nexus between plaintiff’s litigation and the relief


ultimately achieved; and 2) that the relief ultimately secured by plaintiffs had a basis in law.” Id. at 76; See also Smith v. Hudson Cnty. Register, 422 N.J. Super. 387, 394 (App. Div. 2011)(“A plaintiff may qualify as a prevailing party, and thereby be entitled to a fee award, by taking legal action that provides a ‘catalyst’ to induce a defendant’s compliance with the law.”).

Here, Plaintiff made a valid OPRA request for government records; Defendants unlawfully denied access to those records. This litigation, if successful, will serve as the catalyst for Plaintiff obtaining the unlawfully withheld records. Therefore, Plaintiff is entitled to an award of attorney’s fees and costs of suit.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully asks this Court to enforce his statutory rights under OPRA by 1) declaring that Plaintiff has standing to submit OPRA requests; 2) declaring that Defendants are in violation of OPRA by failing to provide timely access to the requested records; 3) directing Defendants to immediately release copies of all responsive records to Plaintiff; 4) naming Plaintiff a prevailing party entitled to an award of legal fees and costs of litigation; and 5) for such other relief the Court may deem just and equitable.

Respectfully Submitted,


CJ GRIEFIN