

<p>JOHN PAFF,</p> <p>Plaintiff-Respondent,</p> <p>v.</p> <p>NEW JERSEY MOTOR VEHICLE COMMISSION and JOSEPH F. BRUNO,</p> <p>Defendants-Appellants.</p>	<p><b>SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION</b></p> <p><b>Docket No. A-3335-14T3</b></p> <p><b>CIVIL ACTION</b></p> <p><b>On appeal from a Final Order of the Superior Court of New Jersey, Mercer County, Law Division</b></p> <p><b>Docket No. MER-L-1672-14</b></p> <p><b>Sat Below: Hon. Mary C. Jacobson, A.J.S.C.</b></p>
--	---

**BRIEF OF PLAINTIFF JOHN PAFF**

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

Of Counsel and On the Brief:

Walter M. Luers, Esq.

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities . . . . .	ii
Preliminary Statement. . . . .	1
Procedural History and Statement of Facts . . . . .	1
Questions Presented . . . . .	1
Standard of Review . . . . .	2
Legal Argument. . . . .	3
Point I: The Purpose of OPRA Is To Promote Transparency. . . . .	3
Point II: Unless Exempt, A Written Communication With A Government Agency or Employee Is A Public Record . . . . .	4
A. The Definition of a Public Record Includes All Documents "Received" by a Public Official Or Public Agency in the Court of Its Official Business	5
B. <i>Gannet N.J. Partners L.P. v. County of Middlesex</i> Does Not Bar Requests for Copies of Third Parties' OPRA Requests . . . . .	6
C. <i>Dicta</i> In an Appellate Division Decision On an Issue That Was Waived and Asked By the Court As A Hypothetical Is Not Binding. . . . .	13
Point III: The Disclosure of One Party's OPRA Request To Another Party Cannot Confer An "Undue Competitive Advantage". . . . .	19
Conclusion . . . . .	22

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b> .....	<b><u>Page</u></b>
<i>Asbury Park Press v. Ocean County Prosecutor's Office,</i> 374 N.J. Super. 312 (Law Div. 2004) .....	4, 22
<i>Bent v. Township of Stafford Police Dep't,</i> 381 N.J. Super. 30 (App. Div. 2005) .....	9
<i>Burke v. Brandes,</i> 429 N.J. Super. 169 (App. Div. 2012) .....	<i>passim</i>
<i>Burnett v. County of Bergen,</i> 198 N.J. 408 (2009) .....	3, 4
<i>Commc'ns Workers of Am. v. Rousseau,</i> 417 N.J. Super. 341 (App. Div. 2010) .....	20, 21
<i>Dean v. Barrett Homes, Inc.,</i> 204 N.J. 286 (2010) .....	13
<i>Gannett N.J. Partners L.P. v. County of Middlesex,</i> 379 N.J. Super. 205 (App. Div. 2005) .....	<i>passim</i>
<i>K.L. v. Evesham Township Board of Education,</i> 423 N.J. Super. 337 (App. Div. 2011) .....	2
<i>Kovalcik v. Somerset County Prosecutor's Office,</i> 206 N.J. 581 (2011) .....	4
<i>Libertarian Party of Cent. New Jersey v. Murphy,</i> 384 N.J. Super. 136 (App. Div. 2006) .....	3
<i>Lucent Techs., Inc. v. Township of Berkeley Heights,</i> 201 N.J. 237 (2010) .....	13
<i>MAG Entertainment, LLC v. Division of Alcoholic Beverage</i> <i>Control,</i> 375 N.J. Super. 534 (App. Div. 2005) .....	2, 9, 10
<i>Myers v. Ocean City Zoning Board of Adjustment,</i> 439 N.J. Super. 96 (App. Div. 2015) .....	14, 15
<i>Newark Morning Ledger Co. v. New Jersey Sports &amp; Exposition</i> <i>Auth.,</i> 423 N.J. Super. 140 (App. Div. 2011) .....	4
<i>North Jersey Media Group, Inc. v. Township of Lyndhurst,</i> 441 N.J. Super. 70 (App. Div. 2015) .....	15

<i>O'Shea v. Township of West Milford,</i> 410 N.J. Super. 371 (App. Div. 2009) .....	2, 15
<i>Paff v. Div. of Law,</i> 412 N.J. Super. 140 (App. Div. 2010) .....	2
<i>State v. Breitweiser,</i> 373 N.J. Super. 271 (App. Div. 2004) .....	18
<i>State v. Rose,</i> 206 N.J. 141 (2011) .....	14, 17
<i>Sussex Commons Associates, LLC v. Rutgers,</i> 416 N.J. Super. 537 (App. Div. 2010), .....	2
<i>Times of Trenton Pub. Corp. v. Lafayette Yard Community Development Corp.,</i> 183 N.J. 519 (2005) .....	4
<i>Tractenburg v. Township of West Orange,</i> 416 N.J. Super. 354 (App. Div. 2010) .....	21, 22
<i>United States v. Educ. Dev. Network Corp.,</i> 884 F.2d 737 (3d Cir. 1989) .....	12

**Statutes**

<i>N.J.S.A. 47:1A-1</i> .....	3
<i>N.J.S.A. 47:1A-1.1</i> .....	5, 6, 19

**Rules**

<i>Fed. R. Crim. P. 6(e)</i> .....	12
------------------------------------	----

**Other Authorities**

21 <i>C.J.S. Courts</i> § 230 (2006) .....	17
5 <i>Am. Jur. 2d Appellate Review</i> § 564 (2007) .....	14

### **PRELIMINARY STATEMENT**

The Trial Court's holding and reasoning were sound and should be affirmed. For the most part, Defendants' argument is based on a literal reading of one sentence of *dicta* in a published opinion regarding an argument that the Appellate Division in that case deemed waived. Defendants' arguments regarding competitive disadvantage are untenable because no person or company has any commercial interest in an OPRA request. Even if they did, Defendants have not supported their competitive disadvantage argument with any facts to support an exception that requires factual support to sustain, rather than conjecture or speculation.

### **PROCEDURAL HISTORY AND STATEMENT OF FACTS**

Defendants' Brief, which has combined the procedural and factual sections of its brief, adequately describes the procedural history and facts of the case.

### **QUESTIONS PRESENTED**

1. Whether the Trial Court correctly held that an OPRA request for all of the OPRA requests received by a state agency within a two-week time period was valid and sufficiently specific and that OPRA requests are public records?

2. Whether fulfilling Plaintiff's OPRA request would have conveyed an unfair competitive advantage upon Plaintiff or other parties?

## STANDARD OF REVIEW

On this appeal, this Court's review of the Trial Court's decision is plenary. "The trial court's determinations with respect to the applicability of OPRA are legal conclusions subject to de novo review." *K.L. v. Evesham Township Board of Education*, 423 N.J. Super. 337, 349 (App. Div. 2011) (citing and quoting *O'Shea v. Township of West Milford*, 410 N.J. Super. 371, 379 (App. Div. 2009)). This plenary review extends to determinations of confidentiality and privilege made by the Trial Court. *Id.* (citing *Paff v. Div. of Law*, 412 N.J. Super. 140, 149 (App. Div. 2010)); see also *Sussex Commons Associates, LLC v. Rutgers*, 416 N.J. Super. 537, 548-49 (App. Div. 2010), *rev'd on other grounds*, 210 N.J. 531 (2012) ("We review de novo the issue of whether access to public records under OPRA and the manner of its effectuation are warranted."); *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534, 543 (App. Div. 2005).

**LEGAL ARGUMENT**

**POINT I**

**THE PURPOSE OF OPRA IS TO PROMOTE TRANSPARENCY IN GOVERNMENT**

The Legislature has declared that government records "shall be readily accessible[.]" *N.J.S.A.* 47:1A-1. As stated by Chief Justice Rabner,

Underlying that directive is the bedrock principle that our government works best when its activities are well-known to the public it serves. With broad public access to information about how state and local governments operate, citizens and the media can play a watchful role in curbing wasteful government spending and guarding against corruption and misconduct.

*Burnett v. County of Bergen*, 198 N.J. 408, 414 (2009).

Stated slightly differently, 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 Pub. Corp. v. Lafayette Yard Community Development 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)). Thus, courts that interpret OPRA must err on the side of disclosure.

"[T]he purpose behind the Legislature's enactment of OPRA was to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." *Kovalcik v. Somerset County Prosecutor's Office*, 206 N.J. 581, 588 (2011). Except when balancing a citizen's privacy interest against a requestor's need for disclosure, the reasons behind an OPRA request are irrelevant. *Newark Morning Ledger Co. v. New Jersey Sports & Exposition Auth.*, 423 N.J. Super. 140, 175 (App. Div. 2011) ("[W]e do not consider the purpose behind OPRA requests[.]") (citing and quoting *Burnett*, 198 N.J. at 435).

## POINT II

### **UNLESS EXEMPT, A WRITTEN COMMUNICATION WITH A GOVERNMENT AGENCY OR EMPLOYEE IS A PUBLIC RECORD**

In this Point, we discuss why OPRA requests are themselves public records and rebut the exceptions and *dicta* upon which the Defendants have relied.

**A. The Definition of a Public Record Includes All Documents "Received" by a Public Official Or Public Agency In the Course of Its Official Business**

OPRA defines a government record as "any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document . . . that has been received in the course of [the] official business by any such officer, commission, agency, or authority of the State . . . ." *N.J.S.A. 47:1A-1.1*. In this case, there should be no reasonable dispute that the OPRA requests that are the subject of Plaintiff's OPRA request were "received" within the course of Defendants' "official business." Defendants should concede that the records sought by Plaintiff are "government records" within the meaning of OPRA. Therefore, the issue for this Court to decide is whether the records sought by Plaintiff fall within any of OPRA's exceptions.

A review of OPRA shows that when the Legislature intended for a document sent to or from a public agency to be confidential or exempt from OPRA, the Legislature specifically created an exception. "Inter-agency" or "intra agency advisory, consultative, or deliberative material" is exempt from OPRA's definition of a government record. All "information received by a member of the Legislature from a constituent" is exempt. Any "written request by a crime victim for a record to which the

victim is entitled to access" is not a public record. *N.J.S.A.* 47:1A-1.1.

These exceptions show that the general rule is that requests to public agencies, including OPRA requests, are public records, and that information received by public agencies are public records, unless specifically exempted. The fact that the Legislature has had to create specific exemptions for information received by a public agency suggests that such information is generally considered public, unless the Legislature has crafted a specific exemption, which is the case for requests received from victims for their own records or information received by Legislators from their constituents.

**B. *Gannett N.J. Partners L.P. v. County of Middlesex Does Not Bar Requests for Copies of Third Parties' OPRA Requests***

Defendants are articulating two separate rationales, each one of which is based on a single sentence in *Gannett N.J. Partners L.P. v. County of Middlesex*, 379 N.J. Super. 205 (App. Div. 2005), for denying Plaintiff's OPRA request. The first rationale is that Plaintiff's OPRA request was not sufficiently specific. The second rationale is that Plaintiff is not entitled to documents that might reveal "the nature and scope of a third party's inquiry to a government agency." (Db6). We address each in turn.

### 1. Plaintiff's OPRA Request Was Sufficiently Specific

The first rationale is that Plaintiff's OPRA was not sufficiently specific. As a preliminary matter, this rationale does not apply to Plaintiff's OPRA request, because Plaintiff asked for copies of all OPRA requests received during a two-week period. (Ja7-Ja8). The *dicta* in *Gannett* regarding the specificity of the plaintiff's OPRA request for "all information supplied to the U.S. Attorney or other federal authorities" is not applicable to Plaintiff because Plaintiff did not request "all information supplied to the U.S. Attorney." In this case, Plaintiff asked for copies of OPRA requests received by Defendants for an eight-day time period. (Ja2; Ja7) (page of Verified Complaint alleging scope of documents requested by Plaintiff and copy of Defendant's OPRA response). Defendants' argument would be relevant (if not misguided) if Plaintiff had asked for copies of all of the documents provided by Defendants in response to OPRA requests received by the Defendants. But that was not Plaintiff's request. Therefore, as a matter of logic, the *dicta* in *Gannett* that stated "OPRA does not authorize a party to make a blanket request for every document a public agency has provided another party in response to an OPRA request" does not apply to Plaintiff's OPRA request.

Even if we apply the rationale that Plaintiff's OPRA request was not sufficiently specific, that rationale must fail.

Through several decisions of the Appellate Division, this Court has defined the contours of what constitutes a sufficiently specific OPRA request. In sum, an OPRA request is sufficiently specific if it identifies documents with reasonable clarity and does not require the Records Custodian to perform research.

In *Burke v. Brandes*, 429 N.J. Super. 169 (App. Div. 2012), the Court was asked to determine whether an OPRA request for "government records in [the Office of the Governor's] possession or control regarding 'EZ Pass benefits afforded to retirees of the Port Authority, including . . . all correspondence between the Office of the Governor . . . and the Port Authority . . ." was sufficiently specific. *Id.* at 172. The Trial Court had held that the OPRA request was "lacking in the specificity that's required under OPRA as OPRA has been interpreted by the case law" and that the request was not limited "to any one type of record, but sought all government records, including but not limited to . . . written or electronic correspondence." The Trial Court also held that "[t]here wasn't a request for documents authorized by specific individuals." *Id.* at 173. For these reasons, the Trial Court held that the Plaintiff's request was not sufficiently specific because "there would have to be some discretion . . . applied as

to whether or not a particular document would be responsive or not." *Id.*

On appeal, the Appellate Division reversed. The Court began its analysis of the case by acknowledging precedents that hold that "agencies are only obligated to disclose identifiable government records" and that OPRA "only allows requests for records, not requests for information." *Burke, supra*, 429 N.J. Super. at 174 (citing and quoting *MAG Entertainment v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534, 549 (App. Div. 2005) and *Bent v. Township of Stafford Police Dep't*, 381 N.J. Super. 30, 37 (App. Div. 2005)). "A proper request 'must identify with reasonable clarity those documents that are desired.'" *Id.* (citing and quoting *Bent, supra*, 381 N.J. Super. at 37).

OPRA does not permit "[w]holesale requests for general information to be analyzed, collated and compiled[.]" *Id.* Neither was OPRA "intended as a research tool litigants may use to force government officials to identify and siphon useful information." *Id.* (citing and quoting *MAG Entertainment, supra*, 375 N.J. Super. at 549).

Specifically, in *Bent*, the Appellate Division held that an OPRA request for "the factual basis underlying documented action and advice to third parties to act against my interest" was not a valid OPRA request because a response would

require the records custodian to "analyzed and evaluate information to respond to the request, and an agency has no such duty under OPRA." *Burke, supra*, 429 N.J. Super. at 175.

Likewise, in *MAG*, the requestor demanded

"all documents or records evidencing that the Division of Alcoholic Beverage Control (ABC) sought, obtained or ordered" (1) "revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident"; and (2) "suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity." 375 *N.J. Super.* at 539-40, 868 A.2d 1067.

*Burke, supra*, 429 N.J. Super. at 175.

Because this request required the public agency to manually search through all of its files and to analyze, compile and collate information, and then to determine from that compilation which records were responsive, the request was not sufficiently specific. *Id.*

In light of these principles, the *Burke* Court held that Plaintiff's request for emails and communications regarding EZ Pass benefits for retired Port Authority employees was "confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information, namely, E-ZPass benefits provided to Port Authority retirees." *Burke, supra*, at 176.

Applying these rules and holdings to this case, we find that Plaintiff's request is much more narrow in scope than the request in *Burke*, and is nothing like the requests in *MAG Entertainment* or *Bent*. Plaintiff's OPRA request for all OPRA requests received by the Defendants for an eight-day period "clearly and reasonably described with sufficient identifying information" the documents sought. There is no doubt that the Defendants understood Plaintiff's request and had the capability to fulfill it; if it were otherwise, they have not so stated. For these reasons, this Court should hold that Plaintiff's OPRA request was sufficiently specific and was articulated with reasonable clarity.

**2. OPRA Does Not Prohibit OPRA Requests That Might Reveal "The Nature and Scope of a Third Party's Inquiry to a Government Agency."**

As discussed in some detail above, there is no general rule in OPRA that prohibits disclosure of a "third party's inquiry to a government agency." When communications between public agencies or between a public agency and a third party are deemed confidential, they have been so deemed via a specific exception, such as is the case with intra-agency or inter-agency deliberative materials or communications from constituents to Legislators.

In *Gannett*, the panel was discussing an "inquiry" to a government agency that was specifically exempt from OPRA. The

OPRA request in that case asked for copies of both a Federal grand jury subpoena and copies of all documents provided in response to that grand jury subpoena. However, as the *Gannett* panel correctly observed, a "United States Attorney's investigative inquiry through a grand jury subpoena is protected by federal law[.]" *Gannett*, 379 N.J. Super. at 334 (citing *Fed. R. Crim. P. 6(e)* and *United States v. Educ. Dev. Network Corp.*, 884 F.2d 737, 740-41 (3d Cir. 1989)). The Court further observed that the United States Attorney's office had an interest in participating in litigation concerning whether disclosure of documents in that case would "interfer[e] with a federal criminal investigation." *Id.* at 215.

Defendants' suggestion that OPRA requests to public agencies should be treated the same as Federal grand jury subpoenas is untenable. Unlike Federal grand jury subpoenas, there is no law or statute that prohibits disclosure of OPRA requests. And, unlike a criminal investigation, there is no public interest in keeping OPRA requests confidential. Because Federal grand jury subpoenas are fundamentally different in character from OPRA requests, *Gannett's* characterization of a grand jury subpoenas as an "inquiry from a third party" cannot be applied to OPRA requests.

Although the *Gannett* panel posed the question of whether OPRA requests are confidential, ultimately the inquiry was hypothetical:

Suppose Gannett suspected that another news organization was conducting an investigation into a public agency's financial practices and had sought production of documents under OPRA in connection with that investigation. Could Gannett make a blanket request to the public agency for the production of all records provided to the other news organization?

*Gannett, supra*, 379 N.J. Super. at 212.

Thus, at best, *Gannett's* statement that OPRA prohibits access to the "nature and scope of a third party's inquiry to a government agency" must be limited to Federal subpoenas.

**C. Dicta In an Appellate Division Decision On an Issue That Was Waived and Asked By The Court as a Hypothetical Is Not Binding**

Defendants argue that the Trial Court erroneously declined to follow *dicta* in *Gannett*.

The first issue is whether the sentences upon which Defendants rely were *dicta*. *Dicta* is "something that is unnecessary to the decision in the case and therefore not precedential[.]" *Dean v. Barrett Homes, Inc.*, 204 N.J. 286, 307 (2010) (citing and quoting *Lucent Techs., Inc. v. Township of Berkeley Heights*, 201 N.J. 237, 252 (2010) (Rivera-Soto, J., concurring) (internal quotation marks omitted)).

The Defendants seem to concede that the language upon which they rely in *Gannett* is *dicta*, but argue that nonetheless it was binding on the Trial Court.

To support their argument, Defendants rely *State v. Rose*, 206 N.J. 141 (2011) and *Myers v. Ocean City Zoning Board of Adjustment*, 439 N.J. Super. 96 (App. Div. 2015). These cases do not stand for the proposition that the Trial Court was required to follow *dicta* in *Gannett*.

The *Rose* Court discussed the circumstances under which *dicta* in opinions of the New Jersey Supreme Court must be followed, even when those statements are not essential to the relief accorded to the parties. The Court held that "the legal findings and determinations of a high court's considered analysis must be accorded conclusive weight by lower courts." *Rose, supra*, 206 N.J. at 183. The *Rose* Court was specifically referring to decisions of a "high court." *Id.* Also, the authorities cited by the *Rose* Court discussed the effect of *dicta* in the Supreme Court upon lower courts. *Id.* While we do not want to put too fine a point upon it, *Rose* and the authorities discussed therein were concerned with analyzing how carefully lower courts must abide by considered *dicta* in opinions from the New Jersey Supreme Court.

Defendants also cite 5 *Am. Jur. 2d Appellate Review* § 564 (2007), but this section of the learned treatise is titled

"Effect of precedent in intermediate appellate courts - Precedential effect of dicta." Thus, this authority is limited to discussing when intermediate appellate courts must treat *dicta* from the highest court within a jurisdiction as binding.

Indeed, in the context of OPRA jurisprudence, a three-judge panel of the Appellate Division recently disagreed with a prior published Appellate Division decision regarding whether use of force reports are exempt from disclosure under OPRA as criminal investigatory records. Compare *O'Shea v. West Milford Township*, 410 N.J. Super. 371, 381 (App. Div. 2009) (holding that use of force reports are not criminal investigatory records) with *North Jersey Media Group, Inc. v. Township of Lyndhurst*, 441 N.J. Super. 70, 96 n.16 (App. Div. 2015) (stating that to the extent the Panel's conclusions differ from *O'Shea* regarding the disclosure of use of force reports, they expressed disagreement with *O'Shea*).

A footnote in *Myers v. Ocean City Zoning Board of Adjustment*, 439 N.J. Super. 96, 102 n.2 (App. Div. 2015) states that trial courts are bound by "carefully considered dictum" contained in "pronouncements by our [Appellate] court." This statement leads us to our second argument, which is that the *dicta* upon which the Defendants rely was not given sufficient consideration by the Appellate Panel in *Gannett* to warrant treatment as a binding decision.

In *Gannett*, Middlesex County did not argue that *Gannett's* OPRA request to Middlesex County was invalid because it sought "all information supplied to the U.S. Attorney or other federal authorities in response to the grand jury subpoenas[.]" *Gannett, supra*, 379 N.J. Super. at 211 (internal quotation marks omitted). When Middlesex County received *Gannett's* OPRA request, "Middlesex County could have refused to produce any documents in response to that request, the County did not take that route but instead provided *Gannett* with most of the documents it had furnished to the United States Attorney's Office." *Gannett, supra*, 379 N.J. Super. at 212-13. This fact is important because the issue of whether *Gannett's* OPRA request was valid was not before the Trial Court or, apparently, the Appellate Division. Indeed, when *Gannett* challenged Middlesex County's decision to withhold some responsive documents, "the County did not defend on the ground that *Gannett's* OPRA request was improper but instead claimed that the withheld documents were confidential under OPRA[.]" *Id.* at 213. Thus, the issue of whether *Gannett's* OPRA request was valid was not briefed or argued in the Trial Court and was not preserved for appellate review.

We do not know whether this issue was briefed or argued on *Gannett's* appeal, because the decision is silent on this point. Nonetheless, because the issue of whether *Gannett's*

OPRA request was valid was not argued in the Trial Court, the discussion in *Gannett* cannot constitute a pronouncement on an issue was "involved in a case, argued by counsel and deliberately mentioned by the court . . . as a guide for future conduct." *Rose, supra*, 206 N.J. at 183 (citing and quoting 21 *C.J.S. Courts* § 230 (2006)) (internal quotation marks omitted).

In addition, on the specific issue raised by Defendants, which is whether a third party's "inquiry" to a government agency must be confidential, the *dicta* in *Gannett* does not rise to the level of "considered analysis" or "carefully considered dictum" that was intended "as a guide for future conduct."

The *Gannett* Panel's discussion of the issue in this case, which is whether an OPRA request is a public record, spanned one paragraph of three sentences. The first sentence stated "Moreover, the interest of third parties in protecting the confidentiality of their requests for access to public documents is not limited to law enforcement agencies." *Gannett, supra*, 379 N.J. Super. at 212. The Court then queried whether one news organization that was using an OPRA request to conduct an investigation would have an interest in protecting its OPRA requests from another news organization. *Id.* Specifically, the Court asked: "Could *Gannett* make a blanket request to the

public agency for the production of all records provided to the other news organization?" *Id.* at 212.

Without doubt, this query proves that the *Gannett* panel did not mean its statement "as a guide for future conduct." First, this *dicta* is not relevant to this case because the *Gannett* Court was discussing requests for copies of "all records provided to [an] other news organization." This case is different; this case is about whether third parties' OPRA requests are confidential.

Assuming, *arguendo*, that a request for a third party's OPRA request is the equivalent of requesting all records provided to that third party through OPRA, the *Gannett dictum* still cannot be interpreted "as a guide for future conduct." If the *Gannett* Court had intended to hold or give guidance to future courts regarding how OPRA requests should be treated, the Panel would not have phrased its statement as a hypothetical question. While intermediate appellate courts and lower courts are "bound by carefully considered dictum from the Supreme Court[,]" *State v. Breitweiser*, 373 N.J. Super. 271, 283 (App. Div. 2004), a hypothetical statement regarding an argument that was not preserved by the defendant in the trial court proceedings cannot be fairly characterized as "carefully considered." Rather, at best, while the *Gannett* Court asked the question, it certainly did not answer it.

For these reasons, the Trial Court was correct when it did not follow the *dicta* in *Gannett*.

### **POINT III**

#### **THE DISCLOSURE OF ONE PARTY'S OPRA REQUEST TO ANOTHER PARTY CANNOT CONFER AN "UNDUE COMPETITIVE ADVANTAGE"**

The *Gannett* Court did not "carefully consider" whether obtaining another party's OPRA request constituted an "undue competitive advantage." The fundamental flaw with Defendants' argument is that to invoke the competitive advantage exception, the information must be both proprietary and the party must have taken measures to protect it as secret. Here, OPRA requests in general are not proprietary, and there has been no showing that the specific OPRA requests at issue would be protected as proprietary.

No case has ever held that disclosure of OPRA requests would constitute an unfair competitive advantage, and Defendants cite none.

Defendants' arguments implicate two OPRA exceptions: (1) "trade secrets and proprietary commercial or financial information obtained from any source;" and (2) "information which, if disclosed, would give an advantage to competitors or bidders." *N.J.S.A.* 47:1A-1.1. The Defendants only rely upon the latter exception. Db13 (citing competitive advantage exception).

*Communications Workers of America v. Rousseau*, 417

N.J. Super. 412 (App. Div. 2010) discussed the competitive advantage in detail. In that case, the State's Treasurer withheld several agreements between the State and private-equity funds who managed assets held by New Jersey's employee pension fund. *Id.* at 348. To say that an OPRA request deserves the same protection as the "partnership agreements and side agreements" held to be confidential in *Rousseau* is absurd. In *Rousseau*, the Trial Court found that

Each is a unique blend of variables: the amount of debt each fund may carry, what fees the general partner takes from a fund's profits, the limits on the general partner's powers, how a withdrawing partner redeems their investment, how the fund distributes gains, and various other matters . . . .

Moreover, the agreements detail a fund's limitations on buying and selling investments. **Any competitor knowing when a fund's strategy would induce it to buy or sell would enjoy an advantage over the fund.** Defendants point to a situation where, by reviewing a fund's partnership agreement, a competitor could learn when a fund would be liquidating an investment. As the time for liquidation neared, a competitor could gain an advantage by offering an artificially low price.

*Commc'ns Workers of Am. v. Rousseau*, 417 N.J. Super. 341, 362 (App. Div. 2010).

These findings were supported by certifications from the private funds that detailed how the funds worked in a highly competitive environment; that the responsive information was

kept secret, even within the funds, and that the agreements themselves were sophisticated documents that reflected "years of experience by the general partners and the legal and other professionals employed by the general partners." *Rousseau*, 417 N.J. Super. 341, 362-63.

Here, the Defendants have provided to this Court absolutely no evidence in the form of any documents or certifications that show that the OPRA requests that are responsive to Plaintiff's OPRA request contain any type of trade secrets or that the documents would harm any competitor.

First, we do not even know whether the responsive documents were made to satisfy a commercial interest or some other interest. Second, we do not know if the OPRA requests were made by journalists. Third, we do not know if the persons who made the OPRA requests had any concerns about them becoming public.

Ultimately, the confidentiality or commercial utility of any document cannot be assumed; it must be proven through sworn statements. Here, the Defendants have not provided any sworn statements showing that an OPRA request might constitute information that would confer an undue competitive advantage.

In *Tractenburg v. Township of West Orange*, 416 N.J. Super. 354 (App. Div. 2010), the Court declined to apply the competitive advantage exception to an appraisal "absent a *clear*

showing" that the exception applied. *Tractenburg, supra*, 416 N.J. at 378-79 (citing and quoting *Asbury Park Press v. Prosecutor's Office*, 374 N.J. Super. 312, 329 (Law Div. 2004)) (emphasis in original). In *Tractenburg*, the Court declined to protect an appraisal from disclosure under OPRA because the Defendants had not shown that the Township had initiated negotiations to purchase the appraised property, nor that "such negotiations are probable any time in the near future." *Tractenburg, supra*, 416 N.J. at 379.

For these reasons, the concept that disclosure of an OPRA request might constitute an unfair advantage on any person must be rejected.

**CONCLUSION**

For the foregoing reasons, the holding and reasoning of the Trial Court should be affirmed in every respect.

Dated: October 19, 2015

THE LAW OFFICES OF  
WALTER M. LUERS, LLC

By: Walter M. Luers

Walter M. Luers, Member  
Suite C202  
23 West Main Street  
Clinton, New Jersey 08809  
Telephone: 908.894.5656  
wluers@luerslaw.com