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IN RE THE REQUEST FOR THE DISCLOSURE OF 911 CALL OF JANUARY 14, 2015 TO OLD BRIDGE POLICE	SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY: LAW DIVISION Docket No.: MID-L-000000-15 Civil Action

BRIEF OF HOME NEWS TRIBUNE AND SERGIO BICHAO IN OPPOSITION TO THE MOTION FOR A PROTECTIVE ORDER FILED BY THE MIDDLESEX COUNTY PROSECUTOR'S OFFICE

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PRELIMINARY STATEMENT

On January 16, 2015, the Home News Tribune and its reporter, Sergio Bichao, (collectively "HNT" or "Newspaper") made a government records request, under the Open Public Records Act ("OPRA") and the common law, to the Middlesex County Prosecutor's Office ("County") for a copy of the audio recordings of 911 calls to police concerning the police-involved shooting of Talbot Schroeder. That request was denied by the County on February 17, 2015, although the County acknowledged that such a recording exists.

After denying the request for records, the County filed a Motion for Protective Order seeking, in essence, to have this Court approve the County's decision to deny access. No lawsuit was pending when the Motion for Protective Order was filed. In short, the County raced to Court in order to obtain a judicial determination that its defenses, in response to an ***anticipated*** lawsuit, were valid. Indeed, in its supporting brief, the County expressly characterized its motion as a "presumably pre-complaint" motion. The County's actions in filing a Motion for Protective Order were wholly inappropriate.

The County's Motion for Protective Order must be denied as: (1) Protective Orders apply to discovery matters in pending litigation and no litigation was pending or discovery outstanding at the time the County filed its Motion; (2) the County's Motion is, in any event, moot, as the County denied access to the government records requested and, therefore, there is no justiciable controversy currently pending before this Court; (3) there is no basis or authority under which the County can initiate such an action in connection with a government records request; and (4) the County's Motion is improperly forcing the Newspaper to litigate as a defendant the denial of its OPRA request.

For these reasons, which are more fully set forth below, this Court should deny the Motion for Protective Order.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

On January 16, 2015, the Newspaper made a government records request to the Middlesex County Prosecutor's Office. Specifically, the HNT requested, pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 et seq., and the common law:

> Audio recordings of 911 calls and calls to police concerning the police-involved shooting January 14 at 40 Cedar Grove Place, Old Bridge, and Talbot Schroeder.

Certification of Sergio Bichao ("Bichao Cert."), ¶ 2.

On February 17, 2015, the County denied the request. The written denial stated that such a recording exists but that it would not be produced because "N.J.S.A. 47:1A-1, et seq. allows for the withholding of a document or recording in which a family or victim has a reasonable expectation of privacy." The denial further provided that "Governor's Executive Order 69, which is incorporated into N.J.S.A. 47:1A-1 et seq., prohibits the release of the identity of witnesses and victims in instances in which no arrests have been made, as is the case in this incident." Bichao Cert., ¶ 3.

On March 9, 2015, counsel for the Newspaper wrote to James E. O'Neill, Records Custodian for the County, asking that the County reconsider the denial, as the purported basis for the denial was unfounded. Certification of Nomi I. Lowy, Esq. (Lowy Cert.") ¶ 2. Instead of responding to the letter asking that the County reconsider its position, the County instead filed with this Court a Motion for a Protective Order bearing a caption "In Re The Request for the Disclosure of 911 Call Of January 14, 2015 to Old Bridge Police." No action was pending and no Complaint had been filed by any party in connection with the government records request at issue. Id. Indeed, in the letter brief accompanying the Motion for Protective Order the County refers to the motion as a "presumably pre-complaint motion." County's Br. at 1.

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[1] As the statement of facts and procedural history are intertwined, they have been combined herein for ease of reference.

LEGAL ARGUMENT

I. PROTECTIVE ORDERS APPLY TO DISCOVERY MATTERS IN PENDING LITIGATION AND NO LITIGATION WAS PENDING AT THE TIME THE MOTION WAS FILED.

Rule 4:10-3 provides:

4:10-3. Protective Orders

On motion by a party or by the person from whom discovery is sought, the court, for good cause shown or by stipulation of the parties, may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

> **(a)** That the discovery not be had;
>
> **(b)** That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> **(c)** That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
>
> **(d)** That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
>
> **(e)** That discovery be conducted with no one present except persons designated by the court;
>
> **(f)** That a deposition after being sealed be opened only by order of the court;
>
> **(g)** That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
>
> **(h)** That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of R. 4:23-1(c) apply to the award of expenses incurred in relation to the motion.

When a protective order has been entered pursuant to this rule, either by stipulation of the parties or after a finding of good cause, a non-party may, on a

> proper showing pursuant to R. 4:33-1 or R. 4:33-2, intervene for the purpose of challenging the protective order on the ground that there is no good cause for the continuation of the order or portions thereof. Neither vacation nor modification of the protective order, however, establishes a public right of access to unfiled discovery materials.

This Rule clearly and expressly relates to pretrial discovery in pending litigation. Indeed, it is found within that section of the Rules titled "Pretrial Discovery." The Rule does not provide for, authorize and/or contemplate the filing of a motion for a protective order absent a pending lawsuit and absent an outstanding discovery demand in that lawsuit. Here, no lawsuit was pending at the time the County's Motion was filed and no discovery demand was outstanding.[2]

Moreover, protective orders are issued to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." None of these circumstances are, or could ever be, present here, as the County has denied the Newspaper's record request and, thus, has made a decision that it will not turn over the requested material. As such, the filing of a Motion for Protective Order was improper and without legal authority. Despite the fact that the County was without authority to file such a motion, the Newspaper is now forced to expend significant time and money opposing the improper motion. The County's actions in filing the motion should not be condoned and the County should be required to reimburse the Newspaper for the expenses, including attorneys' fees, incurred in opposing the motion, as is set forth more fully in Point V, infra.

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[2] And, of course, even if a motion for protective order were appropriate, which it clearly is not, the County would in any event bear the burden of establishing good cause, which it cannot do. "Implicit in R. 4:10-3 is the notion that the movant bears the burden of persuading the court that good cause exists for issuing the protective order." Kerr v. Able Sanitary and Environmental Services, Inc., 295 N.J. Super. 147, 155 (App. Div. 1996) (citing D'Agostino v. Johnson & Johnson, 242 N.J. Super. 267, 281 (App. Div. 1990) ("Under R. 4:10-3, the burden is clearly on the person to be deposed to show that a protective order is necessary . . .")).

II. THE MOTION FOR PROTECTIVE ORDER IS MOOT.

The County denied the Newspaper's government records request on or about February 17, 2015. Because the County denied the request, the requested records have not and will not be accessible to the Newspaper unless this Court rules otherwise in any action filed by the Newspaper and, consequently, there was no justiciable controversy between the Newspaper and the County when the motion was filed.

> A justiciable controversy exists when "one party definitively asserts legal rights and such rights are positively denied by the other party." Registrar & Transfer Co. v. Director, Division of Taxation, 157 N.J. Super. 532, 539[] (Ch. Div.1978), rev'd on other grounds, 166 N.J. Super. 75, 76[] (App. Div.1979). It is a controversy "in which a claim of right is asserted against one who has an interest in contesting it." *Black's Law Dictionary* 777 (5th ed. 1979). It is a real controversy, as opposed to one that is hypothetical or abstract. Ibid.

O'Shea v. New Jersey Schools Const. Corp., 388 N.J. Super. 312, 317 (App. Div. 2006). Here, there was no real controversy when the Motion was filed, as the County had already denied access. A justiciable controversy could only thereafter arise if the Newspaper chose to institute a proceeding, in accordance with N.J.S.A. 47:1A-6, in connection with the denial. That had not occurred at the time the Motion was filed, and the County was not legally authorized (as is set forth below) to initiate any action. As such, any determination to be made by this Court with regard to the County's Motion for a Protective Order would constitute a prohibited advisory opinion. N.J. Assoc. for Retarded Citizens v. N.J. Dept. of Human Services, 89 N.J. 234. 241 (1982) ("We will not render advisory opinions or function in the abstract[.]").

III. OPRA DOES NOT PERMIT A CUSTODIAN OF RECORDS TO INITIATE A LAWSUIT, N.J.S.A. 47:1A-6 UNEQUIVOCALLY VESTS THAT RIGHT SOLELY IN THE REQUESTOR.

OPRA provides in relevant part:

§ 47:1A-6. Proceeding to challenge denial of access to record

> 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 which shall be heard in the vicinage where it is filed by a Superior Court Judge who has been designated to hear such cases because of that judge's knowledge and expertise in matters relating to access to government records; or
>
> in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to section 8 of P.L. 2001, c. 404 (C. 47:1A-7).
>
> ***The right to institute any proceeding under this section shall be solely that of the requestor***. Any such proceeding shall proceed in a summary or expedited manner. 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.

(Emphasis added).

The statute confers standing on the requestor, it does not authorize a government entity to initiate an action and, therefore, the County does not have statutory standing to initiate this proceeding. "Statutory standing" is a doctrine of law that asks whether a statute creating a private right of action authorizes a particular plaintiff to avail him/herself of that right of action. See Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014); see also Lawson v. Office of the Attorney General, 415 S.W.3d 59 (Ky. 2013). "New Jersey courts have been reluctant to infer a statutory private right of action where the Legislature has not expressly provided for such action." R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 271 (2001). To determine statutory standing, courts consider whether: "(1) plaintiff is a member of the class for whose special benefit the statute was enacted; (2) there is any evidence that the Legislature intended to create a private right of action under the statute; and (3) it is consistent with the underlying purposes of the legislative scheme to infer the existence of such a

remedy." Id. at 272. Courts give varying weight to each one of these factors, but the primary goal is a search for the underlying legislative intent. Id. at 272-73.

N.J.S.A. 47:1A-6 expressly provides, in relevant part, "[t]he right to institute ***any*** proceeding ... shall be solely that of the ***requestor***." (Emphasis added). "The statute explicitly affords the right to the requester for review, not to the government." N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, No. BER-L-6741-13, 2013 N.J. Super. Unpub. Lexis 2766, *23 (Law Div. Nov. 15, 2013) (citing N.J.S.A. 47:1A-6); Lowy Cert, Exhibit A; see also 297 Palisades Ave. Urban Renewal Co. v. Borough of Bogota, No. BER-L- 979-14, 2014 N.J. Super. Unpub. Lexis 666, *10 (Law Div. Mar. 26, 2014) ("If access to a government record is denied, the person denied access, and only that person, may challenge the decision ...."); Lowy Cert., Exhibit B.[3] The words chosen by the Legislature are clear and unambiguous and must be interpreted according to their plain meaning:

> It is well settled that statutes should be interpreted in accordance with their plain meaning. Where a statute is clear and unambiguous, a court may not impose an interpretation other than the statute's ordinary meaning.

Munoz v. N.J. Auto. Full Ins. Underwriting Ass'n, 145 N.J. 377, 384-85 (1996) (internal citations omitted). Thus, the Legislature intended to confer statutory standing to bring any

[3] Other jurisdictions have examined the question in the similar context of whether a government entity has standing to file a declaratory judgment action regarding access to public records. In Filarsky v. Superior Court, 28 Cal. 4th 419 (Cal. 2002), the California Supreme Court concluded that California's Public Records Act provides "the exclusive procedure for litigating the issue of a public agency's obligation to disclose records to a member of the public in these circumstances, and these provisions do not authorize a public agency in possession of the records to seek a judicial determination regarding its duty of disclosure." Id. at 423; see also City of Burlington v. Boney Publrs., Inc., 166 N.C. App. 186 (N.C. Ct. App. 2004 (concluding that the City could not institute a declaratory judgment action in response to a request for public records); but see, Arpaio v. Citizen Publ'g Co., 221 Ariz. 130 (Ariz. Ct. App. 2009); Indianapolis Convention & Visitors Ass'n v. Indianapolis Newspapers, Inc., 577 N.E.2d 208 (Ind. 1991); and Topeka v. Stauffer Communications, Inc., 7 Kan. App. 2d 353 (Kan. Ct. App. 1982), which appear to allow a government entity to file a declaratory judgment action regarding access to records, while not specifically addressing the issue.

proceeding under OPRA only upon the requestor. The government is clearly not within the class of persons authorized by the statute to initiate a lawsuit. This is consistent with the underlying purpose of OPRA, which is to encourage citizens to request access to government records and to facilitate prompt access to those records.

The County, as the public agency, and not the requestor, was not authorized under OPRA to file a Motion for a Protective Order or any other proceeding arising under OPRA. Rather, the custodian for the County had the responsibility of granting or denying access to the applicable government record(s). Specifically, the custodian was required to either "promptly comply" with the request or "indicate the specific basis" why the custodian was unable to comply with the request and promptly notify the requestor. N.J.S.A. 47:1A-5(g). The custodian did, in fact, make a decision regarding access, i.e., it denied the Newspaper's request. At that point, the County had discharged its responsibility under OPRA. Therefore, it was not only unlawful under OPRA, but also unnecessary, for the County to move for a protective order asking the court to, in reality, affirm its decision.

Had the Legislature intended to allow public agencies to file actions, or any other proceedings, under OPRA, it would not have expressly limited the right to initiate *any* proceeding to the *requestor*. The fact that the Legislature did so limit that right evidences the inappropriateness of the Motion for Protective Order filed by the County in this case.

IV. THE COUNTY'S MOTION FOR PROTECTIVE ORDER IS IMPROPERLY FORCING THE NEWSPAPER TO LITIGATE AS A DEFENDANT THE DENIAL OF ITS OPRA REQUEST.

As set forth more fully in Point III, supra, it is solely the requestor's prerogative, under OPRA, to challenge the denial of a record request and to do so in the forum of the requestor's choosing, either the Superior Court or before the Government Records Council. N.J.S.A. 47:1A-6. Allowing a public agency to file a Motion for Protective Order action under OPRA

improperly forces the requestor to litigate a government records request that he or she may not have otherwise chosen to litigate. Requestors may choose not to litigate a denial of access by a custodian for a myriad of reasons including: (i) lack of resources (whether time or finances) to pursue a denial; (ii) agreement with the reason for denial given by the custodian; or (iii) acquisition of the requested records elsewhere, thereby obviating the need to acquire the records from the public agency.[4]

Here, the County's Motion for Protective Order action stripped the Newspaper of its choice to decide *whether* it wanted to challenge the County's denial and, if so, *where* that challenge would take place, i.e., Superior Court or the Government Records Council. This, despite the fact that, pursuant to the express language in OPRA, these choices were exclusively the Newspaper's to make.

Not only does the government's institution of an action under OPRA force a requestor to litigate the issue of access and to do so in a forum that might not be of the requestor's choosing, but it also improperly shifts the burden of proof in that litigation, requiring the requestor to prove the unlawfulness of the denial of access, as opposed to requiring the government to prove "that the denial of access is authorized by law." N.J.S.A. 47:1A-6.

> If a public agency denies a requestor access, OPRA places the burden on the agency to prove the denial was authorized by law. N.J.S.A. 47:1A-6. As such, an agency "seeking to restrict the public's right of access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality." Courier News v. Hunterdon Cnty. Prosecutor's Office, 358 N.J. Super. 373, 382-83[] (App. Div. 2003). Absent the necessary proofs, "a citizen's right of access is unfettered." Id. at 383. In assessing the sufficiency of the agency's proofs submitted in support of its claim for nondisclosure, "a court

[4] In this case, the Newspaper has chosen to initiate a proceeding for the wrongful denial of access and intends to file an appropriate action ***in accordance with the statute***. As such, suit will be filed in the forum of the Newspaper's choosing, as is the requestor's prerogative, the burden will, as required, remain on the government to justify its denial, and the fee shifting provision will apply if the Newspaper is successful in its lawsuit.

> must be guided by the overarching public policy in favor of a citizen's right of access." Ibid.

N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, No. BER-L-19048-14, 2015 N.J. Super. Unpub. LEXIS 76, *27 (Law Div. Jan. 12, 2015); Lowy Cert., Exhibit C; see also K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 350 (App. Div. 2011) ("The government bears the burden of proof to show that a requested record may be withheld under an exemption or exclusion from OPRA's disclosure requirement."), certif. denied, 210 N.J. 108 (2012).

Allowing a public agency to initiate a proceeding has an even more profound effect - an effect that may well be intended by public agencies. Placing the requestor in the position of defendant not only improperly shifts the burden of proof, but it also prevents the requestor from recovering attorneys' fees, despite a judicial determination that the records are accessible under OPRA. OPRA provides that "a requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. This attorney fee provision would not be available to the Newspaper in the instant action.

> In general, New Jersey disfavors the shifting of attorneys' fees. N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 569[] (1999). However, "a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract." Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 440[] (2001).

Litton Industries, Inc. v. IMO Industries, Inc., 200 N.J. 372, 385 (2009).

The New Jersey Legislature incorporated a fee-shifting provision into OPRA because, without such a provision:

> "the ordinary citizen would be waging a quixotic battle against a public entity vested with almost inexhaustible resources. By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight."

New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr., 185 N.J. 137, 153 (2005) (quoting Courier News v. Hunterdon Cnty. Prosecutor's Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In order to qualify as a "prevailing requestor," a requestor must file, not defend, a lawsuit, which is the catalyst for the disclosure of the requested records.

> [R]equestors are entitled to attorney's fees under OPRA ... when 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."

Mason v. Hoboken, 196 N.J. 51, 76 (2008) (quoting Singer v. State, 95 N.J. 487, 494 (1984)); see also Teeters v. Div. of Youth and Family Servs., 387 N.J. Super. 423, 431-32 (App. Div. 2006), certif. denied, 189 N.J. 426 (2007).[5]

Permitting a public agency to initiate a Protective Order action eliminates the balance the Legislature carefully incorporated into OPRA. The requestor, who has been involuntarily haled into court, contrary to the express terms of OPRA, only to have the records requested judicially determined to be accessible, may be precluded from the status of a "prevailing requestor," because he or she did not initiate the lawsuit that was the catalyst for the disclosure of the records. Therefore, even if the court determines that the requestor was unlawfully denied access, and orders the disclosure of the requested records, the requestor will be unable to recover the expense of litigation - a litigation in which he or she was forced to participate and in which he or she was successful in obtaining access.

The potential for abuse by public agencies through this procedural maneuver is obvious and not limited to the patent chilling effect engendered by the prospect of a requestor being sued

[5] The fact that courts, in describing a "prevailing requestor," discuss the "plaintiff's litigation" as being the catalyst for disclosure of the requested records, only serves to highlight the fact that the requestor is the only party with standing to file a lawsuit under OPRA, as discussed in Point III, supra.

by a public agency. Under OPRA, "a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request[.]" N.J.S.A. 47:1A-5(i). Filing a Protective Order action in lieu of responding to a request provides a public agency, desiring to delay release of records, a method of circumventing OPRA's strict timeframes for responding to an OPRA request. In effect, this artifice would extend the seven business day deadline, as the decision on access would now be that of the court in a litigated proceeding.

V. BECAUSE THERE IS NO BASIS FOR THE COUNTY'S MOTION FOR PROTECTIVE ORDER, THE NEWSPAPER IS ENTITLED, UPON DENIAL OF THE MOTION, TO REASONABLE EXPENSES, INCLUDING ATTORNEYS' FEES, INCURRED IN OPPOSING THIS MOTION

As noted, Rule 4:10-3 provides in pertinent part:

> The provisions of R. 4:23-1(c) apply to the award of expenses incurred in relation to the motion.

Rule 4:23-1(c) provides:

> **(c) Award of Expenses of Motion.** ...If the motion is denied, the court shall, after opportunity for hearing, require the moving party to pay to the party opposing the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust...

Therefore, in the event the County's Motion for Protective Order is denied, the County is required, after opportunity for hearing, to pay the Newspaper its reasonable expenses, including attorneys' fees, incurred in opposing the motion, as there was no justification -- much less "***substantial***" justification -- for making the motion[6] and there are no other circumstances making an award of expenses unjust.

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[6] In fact, on March 9, 2015, the Newspaper issued a Rule 1:4-8 letter to the County, asking that the Motion be withdrawn, as it was not authorized by law and was frivolous.

CONCLUSION

For these reasons, Defendants, Home News Tribune and Sergio Bichao respectfully request that Plaintiff's Motion for a Protective Order be denied.

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Dated: March 30, 2015