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DARNELL HARDWICK, Plaintiff, v. COUNTY OF CAMDEN and MARIA EFSTRATIADES in her official capacity as County Clerk and Records Custodian of the COUNTY OF CAMDEN, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: CAMDEN COUNTY DOCKET NO. <u>L-3039-15</u> CIVIL ACTION ORDER TO SHOW CAUSE
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THIS MATTER being brought before the Court by Law Offices of Walter M. Luers, LLC, attorney for Plaintiff, seeking relief by way of summary action pursuant to R. 4:67-1(a), based upon the facts set forth in the verified complaint and supporting papers filed herewith; and the Court having determined that this matter may be commenced by order to show cause as a summary proceeding pursuant to *N.J.S.A.* 47:1A-6 and for good cause shown,

IT IS on this 12 day of August, 2015 **ORDERED** that the Defendants County of Camden and Maria Efstratiades appear and show cause on the 24 day of Sept., 2015 before the Honorable M.J. Kassel, J.S.C., Superior Court, County of Camden, Hall of Justice, 101 South 5th Street, Camden, New Jersey at 9 o'clock in the AM ~~noon~~ or as soon thereafter as counsel can be heard, why judgment should not be entered:

A. Ordering Defendants to provide to Plaintiff copies of the applications of the following successful Camden County police officer candidates hired in 2013: Anthony Adair, Stephen Knatz, Lucas Murray, Anthony Rossner, Michael Swangler, Nicole Berry, Lance Carrington, and Diana Deren to the extent necessary to show conformance with specific experiential, educational or medical qualifications as a Camden County police officer;

B. Awarding Plaintiff costs and reasonable attorneys' fees; and

C. For such other or further relief as this Court deems just and equitable.

And it is further *ORDERED* that:

1. A copy of this order to show cause, verified complaint and all supporting affidavits or certifications submitted in support of this application be served upon the Defendants personally or by certified mail, return receipt requested, within 7 days of the date hereof, in accordance with R. 4:4-3 and R. 4:4-4, this being original process.

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

3. Defendants shall file and serve a written answer and opposition papers to this order to show cause and the relief requested in the verified complaint and proof of service of the same by Sept. 14, 2015. The answer and opposition papers must be filed with the Clerk of the Superior Court in the county listed above and a copy of the papers must be sent directly to the chambers of the Honorable M.J. Kasse, J.S.C.

4. The Plaintiff must file and serve any written reply to the Defendants' order to show cause opposition by Sept 21, 2015. The reply papers must be

filed with the Clerk of the Superior Court in the county listed above and a copy of the reply papers must be sent directly to the chambers of Honorable

M. Kasser, J.S.C.

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

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

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

These documents must be filed with the Clerk of the Superior Court in the county listed above. A list of these offices is provided. Include a \$175 filing fee payable to the "Treasurer, State of New Jersey." You must also send a copy of your answer and opposition papers to the Plaintiff's attorney whose name and address appear above, or to the Plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve your answer and opposition papers (with the fee) or judgment may be entered against you by default.

8. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live. A list of these offices is provided. If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A list of these numbers is also provided.

9. The Court will entertain argument, but not testimony, on the return date of the order to show cause, unless the Court and parties are advised to the contrary no later than 3 days before the return date.

TRUE COPY

MICHAEL J. KASSEL, J.S.C.

HON.

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August 6, 2015

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Honorable Judge of the Superior Court
Superior Court of New Jersey
Hall of Justice
101 South 5th Street
Camden, New Jersey 08103

Re: *Hardwick v. County of Camden, et al.*
Docket No. [not yet assigned]

Dear Honorable Judge of the Superior Court:

We filed this OPRA action because Defendants have not disclosed to the Plaintiff the applications of eight Camden County police officers who were hired by the County.

Pursuant to the laws and executive orders of this State that go back to 1979, the applications must be disclosed to the extent that the applications show "conformity with specific experiential, educational or medical qualifications required for government employment."

We discuss the facts of the case first. Then we discuss why this OPRA action should proceed in a summary manner. Then we discuss our legal arguments with respect to each category of records to which access was denied.

STATEMENT OF FACTS

We refer the Court to the Verified Complaint for a recitation of the facts.

LEGAL ARGUMENT

POINT I

PLAINTIFFS' ACTION SHOULD PROCEED IN A SUMMARY MANNER

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

POINT II

THE APPLICATIONS MUST BE DISCLOSED

In this case, the applications of the eight police officers must be disclosed to the extent necessary to show they have met the specific hiring requirements of the job. Portions of the applications that do not show this information or are otherwise exempt may be redacted.

Plaintiff seeks records pursuant to OPRA. As the Court knows, the Open Public Records Act (“OPRA”) mandates that “government records shall be readily accessible for

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

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

The burden of proof in showing that a denial of access was justified rests solely with the Records Custodian. *N.J.S.A. 47:1A-6; Asbury Park Press v. Monmouth County*, 406 N.J. Super. 1, 7 (App. Div. 2009). Here, the documents sought by Plaintiff are "government records" within the meaning of OPRA. Under OPRA, a "government record":

means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision

thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. *N.J.S.A. 47:1A-1.1.*

The issue for the Court is whether portions of the applications that show compliance with the requirements of the job are public records. Based on executive orders that go back to 1979, they are.

In 1979, Governor Byrne issued Executive Order 11 (“EO 11”). That order recited many of the principles regarding public records that hold true today, which are that it is “the public policy of this State that public records shall be readily accessible for examination by the citizens of this State for the protection of the public interest” and that all “public records” are “subject to inspection and examination and available for copying.” In a prior executive order, Executive Order 9 issued by Governor Hughes in 1963 (“EO 9”), Governor Hughes exempted from access “all personnel and pension records.” EO 11 narrowed that exemption and created an “exception to the exception.” EO 11 rescinded the blanket exemption in EO 9. In its place, EO 11 iterated the exemption for personnel and pension records, but granted to the public access to a band of documents and information. (EO 11, paragraphs 1 & 2).

EO 11 expanded access to personnel records by requiring access to the following documents and information: “An individual’s name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, date of separation from government service and reason therefor; and the amount and type of pension he is receiving[.]” This affirmative grant of access to certain personnel records was adopted and codified almost verbatim when OPRA became law, and is reflected in *N.J.S.A. 47:1A-10*. (*N.J.S.A. 47:1A-10* & EO 11, paragraph 2(a)).

In addition to the foregoing information, EO 11 further expanded access to personnel records by creating a second “exception to the exception.” In this second “exception to the exception,” Governor Byrne ordered that the following information were also public records: “Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment” except that “in no event shall detailed medical or psychological information be released.” Like the payroll information exception discussed in the paragraph immediately foregoing, this exception was also adopted and codified nearly verbatim into OPRA at *N.J.S.A. 47:1A-10*.

Therefore, based on the unambiguous and plain language of both EO 11 and *N.J.S.A. 47:1A-10*, Defendants must produce the requested applications to the extent they show conformity with “specific experiential, educational or medical qualifications required for government employment.” No case has ever weakened or otherwise invalidated this “exception to the exception,” which allows access to documents that would otherwise be personnel records.

Having established that the requested applications are subject to disclosure, we must now determine what are the “specific experiential, educational or medical qualifications” for being a Camden County police officer.

According to Camden County’s Pilot Program for the Expeditious Staffing of a New County Police Department, which is attached as Exhibit A to the Luers Certification, the new County department had to quickly hire many dozens of officers. New officers were to be drawn from five sources: (1) existing police officers from municipalities within Camden County; (2) “Special Reemployment Lists” from municipalities within Camden County; (3) “Police Training Commission” certified eligible officers; (4) the “Statewide Eligible List” or

“Rice Bill” list, which were established pursuant *N.J.S.A.* 40A:14-180 and *N.J.A.C.* 4A:4-3.9 and 3.10; and (5) advertising directed to law enforcement officers. (Exhibit A at page 2).

On page three of the Pilot Program document, it states that “All candidates selected through this process will be Police Training Commission (‘PTC’) certified, thus speeding up the deployment process.” (Exhibit A to the Luers Certification).

The Final Administrative Action of the Civil Service Commission that established Camden County’s Pilot Program stated that Camden County “is directing its recruitment efforts to individuals who already successfully passed the Basic Police Course for Police Officers and are PTC certified.” (Exhibit B at 13 to the Luers Certification). The Pilot Program was approved for one year, commencing November 1, 2012 to continuing October 31, 2013.

Thus, based on the approval of the Pilot Program, the police officers hired by Camden County had to at least have been “Police Training Commissioner” certified and have already passed the “Basic Police Course for Police Officers.”

A blank copy of the application of the Camden County Police Department is attached as Exhibit C to the Luers Certification. The application contains data that must be disclosed.

The data in the application must be disclosed to the extent it shows whether the applicants were “Police Training Commissioner” certified or had already passed the “Basic Police Course for Police Officers” because these were job requirements according to the Civil Service Commission’s final agency determination. (Exhibit B to the Luers Certification at 13).

On the third page of the application, the name of the applicant must be disclosed because they were subsequently hired. A public employee’s name is a public record. *N.J.S.A.* 47:1A-10. The rest of the third page requests the work history of the applicant. All information

regarding public employment must be disclosed because a person's history of public employment is a public record. This should include information or data about public employment in states outside of New Jersey or with the Federal government.

Similarly, still on this third page, all answers regarding whether the applicant has complete police training or police courses should be provided because having been a trained police officer is required for hiring.

The sixth page of the application lists various requirements. Applicants must (1) be at least 18 years old; (2) have graduated from high school or vocational school or have an equivalent certificate; (3) have completed of the Basic Police Officer Program; (4) have proficiency in the use of firearms; (5) have valid driver's license; and (6) New Jersey residency. (Exhibit C at the sixth page). All of this data contained in the applications must be disclosed because they are requirements for the job.

Applicant questions start at the eighth page of the application. Several of these questions and their answers must be disclosed. The following numbers correspond to various questions on the application where we believe we are entitled to the answers.

1 and 2: Personal pedigree information. Name and date of birth should be disclosed, because there is an age requirement. Phone numbers are exempt.

4-6: Citizenship. Questions regarding citizenship should be answered if a non-citizen cannot become a police officer.

8: Residency. Residency should be disclosed to the extent required to show conformance with the residency requirement.

48-50, 54: High school graduation. These questions regarding high school and GED certificates implicate a minimum educational requirement and therefore the answers must be produced.

55, 59, 60: Military Background. Military background is public employment, therefore the answers to questions about time in the service must be produced.

62, 63: Criminal pedigree. Criminal pedigree showing arrests or charges are public records (*N.J.S.A. 47:1A-3(b)*).

64: Civil lawsuits. Records of civil proceedings are public records.

68-69: Drivers license. Because a drivers license is a job requirement, this question and answer regarding whether the applicant has a drivers license must be produced.

73-75: Motor Vehicle Offenses: Traffic court summons and records of moving violations, including DWI stops and charges, are public records because they are not criminal investigatory records.

79-80: Work History. Employment records should be disclosed, to the extent they reflect public employment.

87: Work history. Any separation of employment from a public agency should be produced.

94: Criminal pedigree. Information regarding criminal arrests and charges are public records and must be produced.

103, 105: Experience as a police officer. Experience as a police officer is a record of public employment and must be produced.

107: Academy training. Training in police academy is a job requirement and must be produced.

118 and 119: Employment as a police officer. Again, prior or current public employment as a police officer is a public record.

123: Special skills, assignments and training. Any certificates or training or assignments are public records.

For the foregoing reasons, these questions and answers on the responsive applications must be produced to Plaintiff.

POINT III

ACCESS SHOULD BE GRANTED UNDER THE COMMON LAW RIGHT OF ACCESS

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

The common law right of access has three elements: (1) the records must be common law public documents; (2) the person who seeks access must "establish an interest in the subject matter of the material," *South Jersey Publishing Co. v. New Jersey Expressway Auth.*, 124 N.J. 478, 487 (1991), and (3) the citizen's right to access "must be balanced against the

State's interest in preventing disclosure.” *Higg-A-Rella, Inc.*, 141 N.J. at 46; *see also Keddie v. Rutgers, The State University*, 148 N.J. 36, 50 (1997) (discussing these three elements).

Common law public records “include almost every document recorded, generated, or produced by public officials whether or not 'required by law to be made, maintained or kept on file.’” *Shuttleworth v. City of Camden*, 258 N.J. Super. 573, 582 (App. Div. 1992). Here, the records sought are public records because they are kept by the public agency. *Higg-A-Rella, Inc.*, 141 N.J. at 46 (defining a common-law record as one that is made by a public official in the exercise of their public function, either because the record was required or directed by law to be made or kept, or because it was filed in a public office). Plaintiff has standing to request these documents under the common law, a requirement that is easily met. “A citizen, and the press on its behalf, does not have to prove any personal interest in order to satisfy the common law standing requirement.” *Daily Journal v. Police Dep’t of City of Vineland*, 351 N.J. Super. 110, 122 (App. Div. 2002).

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

- (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government;
- (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed;
- (3) the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure;
- (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policy-makers;
- (5) whether any findings of public misconduct have been insufficiently corrected by remedial

measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials. *Loigman v. Kimmelman*, 102 N.J. 98, 113 (1986).

Absent a more detailed denial of access from the Defendants, we respectfully submit that the reasons for disclosure under OPRA are the same as under the common law

POINT IV

AWARD OF REASONABLE ATTORNEYS' FEES

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

Respectfully submitted,



Walter M. Luers