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**SUPERIOR COURT OF NJ
MERCER VICINAGE
CIVIL DIVISION**

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Attorney for Plaintiff

<p>JOHN PAFF, Plaintiff, v. CITY OF TRENTON, RICHARD M. KACHMAR in his official capacity as Clerk and Records Custodian of the CITY OF TRENTON, and JOHN and JANE DOES 1-10, Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION; MERCER COUNTY DOCKET NO. <u>L 2152-15</u> CIVIL ACTION ORDER TO SHOW CAUSE AND SCHEDULING OF CASE MANAGEMENT CONFERENCE</p>
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THIS MATTER being brought before the Court by Law Offices of Walter M. Luers, LLC, attorney for Plaintiff John Paff, seeking relief by way of summary action pursuant to R. 4:67-1 and R. 4:67-2(a), based upon the facts set forth in the verified complaint and supporting papers filed herewith; and the Court having determined that this matter may be commenced by order to show cause as a summary proceeding pursuant to *N.J.S.A.* 47:1A-6 and for good cause shown,

IT IS on this 1st day of October, 2015 ORDERED that the Defendants the City of Trenton and Richard M. Kachmar appear and show cause on the 15th day of December, 2015 before the Honorable Mary C. Jacobson, A.J.S.C., Superior Court, County of Mercer, 4th Floor, New Criminal Courthouse, 400 S. Warren Street, Trenton, New Jersey, at 10^{AM} o'clock in the forenoon or as soon thereafter as counsel can be heard, why judgment should not be entered:

A. Ordering Defendants to make inquiry of all of the unsuccessful candidates considered for the position of Trenton's chief municipal prosecutor to determine whether they consent to release of their resume and for Defendants to disclose to Plaintiff the resumes of all such candidates who consent to disclosure; or, in the alternative, ordering Defendants to disclose to Plaintiff copies of (1) the resume of each person who sought or who was considered for the position of Trenton's chief municipal prosecutor that was recently filled by Kimberley Wilson, (2) any documents that discloses the name of each person who sought or who was considered for the position of Trenton's chief municipal prosecutor that was recently filled by Kimberley Wilson and (3) any document that discloses the name and address of each person who sought or who was considered for the position of Trenton's chief municipal prosecutor that was recently filled by Kimberley Wilson;

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

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

And it is further *ORDERED* that:

1. A copy of this order to show cause, verified complaint and all supporting affidavits or certifications submitted in support of this application be served upon the Defendants personally or by certified mail, return receipt requested, ^{on or before October 9, 2015,} within days of the date hereof, in accordance with R. 4:4-3 and R. 4:4-4, this being original process.

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

The Court shall conduct a case management conference by telephone on

November 4, 2015 at 2 a.m. (p.m.) Plaintiff's counsel shall arrange the call.

Defendant shall provide contact information for the call to Plaintiff's counsel within two business days prior to the call.

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 November 20, 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 Mary C. Jacobson, A.J.S.C.

4. The Plaintiff must file and serve any written reply to the Defendants' order to show cause opposition by December 4, 2015. The reply papers must be filed with the Clerk of the Superior Court in the county listed above and a copy of the reply papers must be sent directly to the chambers of the Honorable Mary C. Jacobson, A.J.S.C.

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

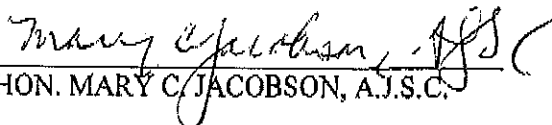
6. If the Plaintiff has not already done so, a proposed form of order addressing the relief sought on the return date (along with a self-addressed return envelope with return address and postage) must be submitted to the Court no later than three (3) days before the return date.

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

8. These documents must be filed with the Clerk of the Superior Court in the county listed above. A directory of these offices is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf. Include a \$175 filing fee payable to the "Treasurer State of New Jersey." You must also send a copy of your answer, answering affidavit or motion 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, answering affidavit or motion with the fee or judgment may be entered against you by default.

9. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-LAW (1-888-576-5529). If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.us/prose/10153_deptyclerklawref.pdf.

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


HON. MARY C. JACOBSON, A.J.S.C.

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<p>JOHN PAFF, Plaintiff, v. CITY OF TRENTON, RICHARD M. KACHMAR in his official capacity as Clerk and Records Custodian of the CITY OF TRENTON, and JOHN and JANE DOES 1-10, Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MERCER COUNTY</p> <p>DOCKET NO. _____</p> <p>CIVIL ACTION</p> <p>VERIFIED COMPLAINT</p>
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Plaintiff John Paff, through his undersigned counsel Law Offices of Walter M. Luers, LLC, by way of verified complaint against Defendants City of Trenton and Richard M. Kachmar, alleges as follows:

PRELIMINARY STATEMENT

1. This is an action alleging violations of the Open Public Records Act, *N.J.S.A. 47:1A-1, et seq.* ("OPRA") and the common law right of access and seeks an ordering requiring Defendants to make inquiry of all of the unsuccessful candidates considered for the position of Trenton's chief municipal prosecutor to determine whether they consent to release of their resume and for Defendants to disclose to Plaintiff the resumes of all such candidates who consent to disclosure; or, in the alternative, ordering Defendants to disclose to Plaintiff copies of (1) the resume of each person who sought or who was considered for the position of Trenton's chief municipal prosecutor that was recently filled by Kimberley Wilson, (2) any documents that

discloses the name of each person who sought or who was considered for the position of Trenton's chief municipal prosecutor that was recently filled by Kimberley Wilson and (3) any document that discloses the name and address of each person who sought or who was considered for the position of Trenton's chief municipal prosecutor that was recently filled by Kimberley Wilson.

THE PARTIES

2. In this Verified Complaint, the following abbreviations are used: (1) For Plaintiff John Paff, "Plaintiff;" (2) for Defendant City of Trenton, "Trenton"; and (3) Richard M. Kachmar, "Records Custodian".

3. Plaintiff John Paff is a resident of Bridgeton, New Jersey and resides at 172 Silver Lake Road, Bridgeton, New Jersey.

4. Defendant Trenton is a public municipal body corporate and politic and is a public agency within the meaning of *N.J.S.A. 47:1A-1.1*. Trenton's principal place of business is 319 East State Street, Trenton, New Jersey.

5. Defendant Records Custodian is a "custodian of a government record" as that term is defined by OPRA, *N.J.S.A. 47:1A-1.1*. Defendant Records Custodian's principal place of business is 319 East State Street, Trenton, New Jersey.

6. Defendants John and Jane Does 1-10 are being named because Plaintiff does not know and has no means of knowing the names of unsuccessful candidates.

JURISDICTION AND VENUE

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

8. Venue is proper in this court pursuant to *R. 4:3-2(a)(2)* because all of the relevant events known to Plaintiff occurred in Mercer County and the Defendants are located in Mercer County.

FACTUAL ALLEGATIONS

A. BACKGROUND ABOUT THE PLAINTIFF

9. Plaintiff's *bona fides* as an advocate for transparency are beyond reproach. Plaintiff has served as the Chairman of the New Jersey Libertarian Party's Open Government Advocacy Project since 2005. Plaintiff has also served on the Board of Directors of the New Jersey Foundation for Open Government, Inc. ("NJFOG") since 2008 and currently serves as its treasurer.

10. Plaintiff is considered an authority on the Open Public Records Act ("OPRA") and the Open Public Meetings Act ("OPMA"). On October 24, 2014, Plaintiff was awarded the "Heroes of the Fifty States" award at the National Freedom of Information Coalition's ("NFOIC") Freedom of Information Summit in St. Petersburg, Florida.

11. Plaintiff's avocation is holding New Jersey government officials accountable. Plaintiff began this pursuit in 1992 when Plaintiff investigated deceased Somerset County Prosecutor Nicholas L. Bissell's use of asset forfeiture laws to seize property and money from sometimes innocent parties. *See, e.g.*, "Bissell bows to group on forfeiture's audit," *Star-Ledger*, Joe Tyrrell, June 3, 1992 and "Forfeiture flap triggers harsh words," *Times of Trenton*, Adam Miller, November 8, 1993.

12. After the enactment of OPRA in 2002, Plaintiff became active in pushing the new law's boundaries and testing its contours. Plaintiff has been the plaintiff in eight published court opinions: *Paff and Asbury Park Press v. County of Monmouth*, 406 N.J. Super. 1

(App. Div. 2009, *aff'd* 201 N.J. 5 (2010); *Paff v. New Jersey Dept. of Labor, Bd. of Review*, 379 N.J. Super. 34 (App. Div. 2005); *Paff v. Byrnes*, 385 N.J. Super. 574 (App. Div. 2006); *Libertarian Party of Cent. New Jersey and Paff v. Murphy*, 384 N.J. Super. 136 App. Div. 2006); *Paff v. New Jersey Dept. of Labor*, 392 N.J. Super. 334 (App. Div. 2007); *Paff v. City of East Orange*, 407 N.J. Super. 221 (App. Div. 2009); *Paff v. Division of Law*, 412 N.J. Super. 140 (App. Div. 2010); *Paff v. New Jersey State Firemen's Ass'n*, 431 N.J. Super. 278 (App. Div. 2013) and *Paff v. Director, Office of Attorney Ethics*, 399 N.J. Super. 632, (Law Div. 2007). Plaintiff has also been a plaintiff in several other unpublished trial and appellate court decisions.

13. Since 2009, Plaintiff has maintained a blog entitled "NJ Open Government Notes" (njopengovt.blogspot.com) where Plaintiff reports on OPRA and OPMA court cases and other matters involving New Jersey government transparency. As of January 2015, Plaintiff has posted more than 450 articles on this blog.

14. Since 2008, Plaintiff maintained a blog entitled "NJ Civil Settlements" (njcivilsettlements.blogspot.com) where Plaintiff reports on civil settlements entered into between citizen plaintiffs and New Jersey government agencies and officials. As of January 2015, Plaintiff has posted more than 295 articles on this blog.

15. In addition to "NJ Open Government Notes" and "NJ Civil Settlements," Plaintiff also publishes "Random note on NJ government" (njrandomgovt.blogspot.com), "NJ Police Internal Affairs Complaints" (njpoliceia.blogspot.com), "What's happening in Englewood Cliffs Borough" (englewoodcliffs.blogspot.com), and the "Fairfield Township Informant" (fairfieldinformant.blogspot.com).

16. During Plaintiff's twenty-plus years of advocating for greater transparency in government and accountability for government officials, Plaintiff has developed relationships

with dozens of journalists throughout New Jersey. Plaintiff is recognized as a worthy news source by these journalists and the stories Plaintiff posts on his various blogs are often picked up by the mainstream media.

17. In 2014 alone, Plaintiff's blog posts and other avenues of public advocacy caused approximately fifty news articles to be published. Among them are "Camden ordered to turn over police overtime records," South Jersey Times, Jason Laday, January 3, 2014; "Medford settles suit for \$83,000," Burlington County Times, Peg Quann, February 26, 2014; "Cliffside Park Chief's Payout Larger Than Acknowledged," The Record, Linh Tat, March 6, 2014; "Hamilton school district ordered to pay court fees for man in OPRA case," The Times of Trenton, Mike Davis, June 7, 2014; "Medford tight-lipped on investigation," Burlington County Times, Alexis Sachdev, August 13, 2014; "N.J. Facing more suits for release of documents," Herald News, Stephanie Akin, August 13, 2014; "Activist: Don't let Perth Amboy BOE pay hush money," Home News Tribune, Sergio Bichao, September 8, 2014; "Judge: Police Dashboard Videos Are Public Records," Star Ledger, Christopher Baxter, October 14, 2014 and "Names of Cops who are subject To Internal Affairs Complaints are Public Record, Judge Rules," Star Ledger, Christopher Baxter, October 17, 2014.

B. PLAINTIFF'S OPRA REQUEST AND DEFENDANTS' DENIAL OF ACCESS

18. In his Verified Complaint, Plaintiff's interactions with the agents of the Defendant will be attributed to the Defendant itself in his official capacity.

19. On July 23, 2015, Plaintiff submitted an OPRA request via email to dallen@trentonnj.org seeking copies of (1) the resume of each person who sought or who was considered for the position of Trenton's chief municipal prosecutor that was recently filled by Kimberley Wilson, (2) any documents that disclose the name of each person who sought or who

was considered for the position of Trenton's chief municipal prosecutor that was recently filled by Kimberley Wilson and (3) any document that discloses the name and address of each person who sought or who was considered for the position of Trenton's chief municipal prosecutor that was recently filled by Kimberley Wilson.

20. In his OPRA request, the Plaintiff candidly stated that, although he understands the law to allow disclosure of the resumes of unsuccessful candidates if they consent, Plaintiff has no way of knowing the identities of the unsuccessful candidates. Because Plaintiff has no way of ascertaining their identities, he has no way to secure their consent. In addition, he has no information regarding (and no way of learning) whether the Defendants have made any effort to secure or otherwise determine whether the candidates consented to disclosure of their resumes. And Defendants have declined to identify the names of the unsuccessful candidates.

21. On August 4, 2015, Defendants denied Plaintiff's OPRA Request on the grounds that:

"... personnel records are exempt under N.J.S.A. 47:1A-10. Additionally, no public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure."

22. The documents requested by Plaintiff are public records and subject to disclosure. Plaintiff submitted a valid written OPRA request.

23. Plaintiff has a strong public interest and legitimate private interest in obtaining the requested documents.

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

COUNT I: OPEN PUBLIC RECORDS ACT, N.J.S.A. 47:1A-1, ET SEQ.

25. Plaintiff repeats and incorporates by reference each and every allegation contained in paragraphs 1-24 of the Plaintiff's complaint as though fully set forth at length herein.

26. Defendant has violated OPRA by not providing to Plaintiff copies of the following documents and information: (1) the resume of each person who sought or who was considered for the position of Trenton's chief municipal prosecutor that was recently filled by Kimberley Wilson, (2) any documents that disclose the name of each person who sought or who was considered for the position of Trenton's chief municipal prosecutor that was recently filled by Kimberley Wilson and (3) any document that discloses the name and address of each person who sought or who was considered for the position of Trenton's chief municipal prosecutor that was recently filled by Kimberley Wilson.

COUNT II: COMMON LAW RIGHT OF ACCESS

27. Plaintiff repeats and incorporates by reference each and every allegation contained in paragraphs 1-26 of the Plaintiff's complaint as though fully set forth at length herein.

28. Plaintiff has a common law right of access to copies of the documents and information requested by him.

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

30. Defendants have no legitimate interest in maintaining the secrecy of the requested documents and information. Therefore, the Defendants have violated Plaintiff's common law right of access.

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

A. Ordering Defendants to make inquiry of all of the unsuccessful candidates considered for the position of Trenton's chief municipal prosecutor to determine whether they consent to release of their resume and for Defendants to disclose to Plaintiff the resumes of all such candidates who consent to disclosure; or, in the alternative, ordering Defendants to disclose to Plaintiff copies of (1) the resume of each person who sought or who was considered for the position of Trenton's chief municipal prosecutor that was recently filled by Kimberley Wilson, (2) any documents that disclose the name of each person who sought or who was considered for the position of Trenton's chief municipal prosecutor that was recently filled by Kimberley Wilson and (3) any document that discloses the name and address of each person who sought or who was considered for the position of Trenton's chief municipal prosecutor that was recently filled by Kimberley Wilson.

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

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

CERTIFICATION PURSUANT TO R. 4:5-1

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

I know of no other parties that should be made a part of this lawsuit. In addition, I recognize my continuing obligation to file and serve on all parties and the Court an amended certification if there is a change in the facts stated in this original certification.

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

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

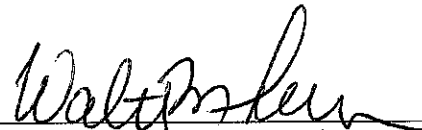
DESIGNATION OF TRIAL COUNSEL

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

Respectfully Submitted,

LAW OFFICES OF WALTER M. LUERS, LLC

By: _____



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

DATED: September 17, 2015

VERIFICATION

John Paff, of full age, certifies as follows:

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

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



John Paff

Dated: September 17, 2015

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September 17, 2015

Walter M. Luers, Esq.*

*Also admitted in New York

Writer's Direct Email: wluers@luerslaw.com

Hon. Mary C. Jacobson, A.J.S.C.
Superior Court of New Jersey
New Criminal Courthouse
400 S. Warren Street
Trenton, New Jersey 08650

Re: *Paff v. City of Trenton, et al.*

Dear Judge Jacobson:

We are submitting this Letter Brief in lieu of a more formal brief in support of this action under the Open Public Records Act ("OPRA"), *N.J.S.A. 47:1A-1, et seq.*, and the common law right of access, which has been opened to the Court via Verified Complaint and Order to Show Cause. The issue in this case is whether the Defendants are obligated to make inquiry of unsuccessful job candidates to determine whether they consent to disclosure of their resumes. Because Plaintiff has no possible means for determining either the identities of unsuccessful candidates or whether they have given their consent to disclosure of their resumes, we request that the Court order Defendants to make such inquiry and produce the resumes of unsuccessful candidates to the extent that they consent to disclosure. To do otherwise would make the third paragraph of Executive Order 26 (McGreevey 2002), which permits disclosure of resumes of unsuccessful candidates if they consent, a dead letter.

First, we discuss the facts of this case. Second, we discuss why this action should proceed in a summary manner. Third, we discuss legal arguments that support disclosure.

STATEMENT OF FACTS

For a full recitation of the facts, the Court is respectfully referred to Plaintiff's Verified Complaint. Plaintiff's OPRA requests and the Defendants' responses are attached to the Luers Certification. All of the information below is taken from Plaintiff's Verified Complaint and the two exhibits.

Essentially, Plaintiff seeks information about individuals who were considered for the recently open position of Trenton's Chief Municipal Prosecutor. There have been several media reports regarding the qualifications of the person who was ultimately selected for that position. Plaintiff, who is aware that Executive Order permits the disclosure of unsuccessful candidates for public employment once the position has been filled and with the consent of the unsuccessful candidate, submitted an OPRA request in which he asked for copies of the resume of each person who sought or was considered for the position of Chief Municipal Prosecutor of Trenton, as well as copies of records that show the names and addresses of each such person. Plaintiff also asked for the basis of Defendants' knowledge that unsuccessful candidates do not consent to disclosure.

Defendants denied access to Plaintiff's OPRA request. The Defendants' response was not responsive to the substance and meaning of Plaintiff's OPRA request, which was really a request for insight into whether Trenton knew whether unsuccessful candidates had consented to the disclosure of their resumes. What Defendants did say is that "According to the Department of Law; [*sic*] The request is denied because personnel records are exempt under N.J.S.A. 47:1A-10." The Defendants also quoted the language in Executive Order 26 regarding resumes,

including the rule that the “resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.” Unfortunately, Defendants did not disclose what efforts they had made to secure or determine any person’s consent to the disclosure of their resumes.

LEGAL ARGUMENT

POINT I

PLAINTIFF’S ACTION SHOULD PROCEED IN A SUMMARY MANNER

“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 DEFENDANTS MUST BE ORDERED TO DETERMINE WHETHER UNSUCCESSFUL CANDIDATES CONSENT TO DISCLOSURE OF THEIR RESUMES

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

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

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

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

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

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

The underlying 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.” *Kovalcik v. Somerset County Prosecutor’s Office*, 206 N.J. 581, 588 (2011)(quoting *Mason v. City of Hoboken*, 196 N.J. 51, 64-67 (2008)), a goal accomplished by “broadly defining ‘government records.’” *Id.* That broad definition of “government record” is buttressed by the principle that courts “must always maintain a sharp focus on the purpose of OPRA and resist attempts to limit its scope, absent a clear showing that one of its exemptions applies to bar the requested disclosure.” *Tractenberg v. Township of West Orange*, 416 N.J. Super. 354, 378-79 (App. Div. 2010). The disclosure of these records serves OPRA’s purpose in preventing the danger of government secrecy; disclosure should be required where there is no specific and cognizable basis for denial of access.

The general proposition cited in Defendants’ OPRA response is correct, but does not respond to the specific interest and issue raised by the Plaintiff. Under Executive Order 26, resumes of unsuccessful candidates are not *per se* non-public records. If the Governor intended

resumes of unsuccessful candidates to be exempt from OPRA, then the Executive Order would have been written so as to prohibit disclosure. But the Executive Order was not written that way.

Rather, the Executive Order really created a new class of public record, which is a public record whose disclosure is conditional upon the consent of another person.

Certainly, courts have addressed the circumstances under which a party may intervene in an OPRA case to assert their privacy or other interests. The best example of this in the published caselaw is *Gill v. N.J. Department of Banking and Insurance*, 404 N.J. Super. 1 (App. Div. 2008), in which the Government Employees Insurance Company (“GEICO”) was given leave to intervene in a Government Records Council case where the issue revolved around disclosure of GEICO’s allegedly proprietary and confidential information submitted to the Department of Banking and Insurance. But disclosure in the *Gill* case did not revolve around GEICO’s consent. Certainly, GEICO could have consented to disclosure or have declined to intervene in the case, however the Department of Banking and Insurance would still have defended its position that the requested records are not public records.

Here, the Court is presented with the unique question of whether the Defendants must make inquiry regarding the consent of unsuccessful candidates. We urge the Court to hold that the Defendants have a duty to make such inquiry because disclosure of the resumes in this case depends on whether the unsuccessful candidates consent to disclosure.

Defendants ought to have such a duty because Plaintiff has no means of discovering the identities of unsuccessful candidates. Even the most motivated requestor cannot reasonably discover the identities of unsuccessful candidates, for several reasons.

First, the information regarding unsuccessful candidates is solely within the possession and control of the Defendants, and they have refused to produce that information to

the Plaintiff. Second, there is no known mechanism by which unsuccessful candidates would be made aware of Plaintiff's pending OPRA request. Third, Plaintiff has no means of contacting unsuccessful candidates to request their consent.

To hold otherwise would make paragraph 3 of Executive Order 26 a dead letter. Unless there is some mechanism for determining whether all candidates consent to the disclosure of their resumes, then no person will ever be able to successfully acquire a copy of the resume of an unsuccessful candidate because the requestor will not know their identity. If some mechanism to seek an unsuccessful candidate's consent is not implemented, then the third paragraph of Executive Order 26 has no meaning. Certainly OPRA should not be construed in such a manner that a provision within an Executive Order is eviscerated. Finally, the Legislature has been silent on this issue since the Executive Order became law. The absence of Legislative action that would have overruled or modified Executive Order 26 strongly suggests that the Legislature has accepted Executive Order 26 as correct.

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).

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 Defendant 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

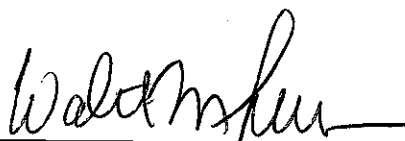
WALTER M. LUERS, ESQ. – 034041999
LAW OFFICES OF WALTER M. LUERS, LLC
Suite C202
23 West Main Street
Clinton, New Jersey 08809
Telephone: 908.894.5656
Attorney for Plaintiff

<p>JOHN PAFF, Plaintiff, v. CITY OF TRENTON, RICHARD M. KACHMAR in his official capacity as Clerk and Records Custodian of the CITY OF TRENTON, and JOHN and JANE DOES 1-10, Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MERCER COUNTY</p> <p>DOCKET NO. _____</p> <p>CIVIL ACTION</p> <p>CERTIFICATION OF WALTER M. LUERS</p>
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I, WALTER M. LUERS, of full age, hereby certify:

1. I am an attorney of the State of New Jersey and a member of the law firm of Law Offices of Walter M. Luers, LLC, and counsel for Plaintiff John Paff.
2. Attached as Exhibit A is a true and correct copy of Plaintiff's July 23, 2015 OPRA Request.
3. Attached as Exhibit B is a true and correct copy of Defendants' August 4, 2015 denial.
4. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: September 17, 2015



WALTER M. LUERS

Exhibit A

Fwd: Request for Representation: Paff v. Trenton

Subject: Fwd: Request for Representation: Paff v. Trenton
From: Walter Luers <wluers@luerslaw.com>
Date: 9/17/2015 11:28 AM
To: wluers@luerslaw.com

----- Forwarded message -----

From: Diadina Allen <dallen@trentonnj.org>
Date: Tue, Aug 4, 2015 at 9:58 AM
Subject: RE: OPRA REQ 2015-277 resp
To: paff@pobox.com
Cc: Sonya McRae-Richards <smrichards@trentonnj.org>, "Marc A. McKithen" <mmckithen@trentonnj.org>, OPRA <OPRA@trentonnj.org>

OPRA REQ 2015-277 RESPONSE;

According to the Department of Law, The request is denied because personnel records are exempt under N.J.S.A. 47:1A-10. Additionally, no public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.

The above response is the result to your request for information via the Open Public Records Act (OPRA).

This file is now closed.

Please acknowledge receipt with a reply. Thank you

From: opengovtissues@gmail.com [mailto:opengovtissues@gmail.com] **On Behalf Of** John Paff
Sent: Thursday, July 23, 2015 6:08 PM
To: Diadina Allen
Subject: Records Request to the City of Trenton

Dear Ms. Allen:

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

KIMBERLEY M. WILSON
111 Kensington Avenue
Trenton, New Jersey 08618
kimberlev.m.wilson@gmail.com

Member of the New Jersey bar.

EDUCATION:

Washington & Lee University
Lexington, Virginia J.D.

1992-1995

Honors/Activities: Burks Scholar, Phi Alpha Delta Legal Fraternity, Legal Practice Clinic, President – Black Law Students Association, Research Assistant.

University of North Carolina at Chapel Hill

1987-1991

Chapel Hill, North Carolina B.A. Journalism and Political Science

Honors: Honors Program, Gannett Foundation Scholarship, Roy J. Wilkins Memorial Scholarship.

LEGAL EXPERIENCE:

Office of Corporation Counsel, City of Hoboken

2012-2014

Hoboken, New Jersey

Assistant Corporation Counsel/Affirmative Action Officer

- Handled employee grievances from inception to resolution, which included negotiating the resolution of grievances and arbitrating them, appearing before the N.J. Public Employee Relations Commission and handling any other advocacy necessary.
- Handled disciplinary matters brought against City employees.
- Provide legal advice on issues raised by department directors and other senior staff and prepared memoranda and/or legislation, when necessary.
- Provided legal counsel during meetings for certain City boards and commissions, including the City Council.
- Drafted and negotiated various legal documents, including, but not limited to, settlement agreements, leases, memoranda of understanding and side bar agreements to collective bargaining agreements.
- Reviewed and revised City policies, including drug and alcohol policies.
- Handled appeals before the N.J. Civil Service Commission, such as desk audits, test eligibility determinations and psychological disqualifications.
- Handled potential affirmative action/anti-harassment complaints from inception to resolution, including investigating complaints, preparing reports that contain factual findings and, determinations of probable cause for employment discrimination and suggesting remedial action where necessary.
- Ensured affirmative action/anti-harassment policies were distributed to all City employees and prepared memoranda to City employees and directors regarding the enforcement of Administrative Directive 2012-006.

Department of Law, City of Trenton

Trenton, New Jersey

2006-2011

Assistant City Attorney

- Handled all aspects of New Jersey Tort Claim Act and civil rights litigation in the Superior Court of New Jersey and U.S. District Court, District of New Jersey from inception through resolution, including the following: filing answers, serving and answering discovery requests, serving subpoenas and authorizations to obtain medical information, investigating discovery responses, conducting and defending depositions, appearing in court for settlement and status conferences, filing discovery-related and dispositive motions and appearing in court for oral argument on motions when required.

- Supervised and managed outside counsel on pending civil rights litigation, including coordinating litigation strategy.
- Resolved issues related to requests for information, including subpoenas, issued to Trenton Police Department's Internal Affairs Bureau and other City of Trenton departments.
- Handled matters appealed to the Superior Court of New Jersey, Appellate Division and U.S. Circuit Court of Appeals, Third Circuit, including the filing of briefs and appearing at oral argument, when required.
- Provided leadership to improve Department of Law operations and administrative needs.

GluckWalrath LLP
Trenton, New Jersey
Associate

2004-2006

- Defended employment discrimination matters in the Superior Court of New Jersey and U.S. District Court, District of New Jersey, from inception through trial.
- Managed governmental-based litigation, including affordable housing enforcement matters and builder's remedy lawsuits, in the Superior Court of New Jersey from inception through trial.
- Handled general business litigation matters in the Superior Court of New Jersey from inception to resolution.
- Provided legal advice and research on various legal issues raised by municipal agencies and employees, including employment-law related issues.
- Handled appeals of matters before the N.J. Superior Court, Appellate Division, including the filing of briefs, for contractual and health care issues.

Office of the Mercer County Counsel
Trenton, New Jersey
Assistant County Counsel

2003 - 2004

- Handled all aspects of personal injury, civil rights and government litigation in the Superior Court of New Jersey and U.S. District Court, District of New Jersey, from inception through resolution, including the following: filing answers, serving and answering discovery requests, serving subpoenas and authorizations to obtain medical information, investigating discovery responses, conducting and defending depositions, appearing in court for settlement and status conferences, filing discovery-related and dispositive motions and appearing in court for oral argument on motions when required.
- Reviewed and negotiated leases for properties owned by the County of Mercer.
- Provided legal advice and researched various legal issues raised by directors and employees.

Pellettieri, Rabstein & Altman
Princeton, New Jersey
Associate

1999-2002

- Managed aspects of business and employment-related litigation, from inception through resolution, including various types of motions, oral argument and discovery, for a variety of clients, including individuals, businesses and college athletic conferences.
- Negotiated severance agreements for employees.
- Advised clients and prepared opinion letters on employment law matters.
- Prepared employment policies and handbooks for businesses and college athletic conferences, and prepared employment agreements for businesses.
- Prepared bylaws, various policies and opinion letters for college athletic conferences.
- Handled unemployment compensation appeals before the Department of Labor's Appeals Tribunal.
- Handled real estate and general business matters for certain clients.

Fox, Rothschild, O'Brien & Frankel, LLP
Lawrenceville, New Jersey
Associate

1997 - 1999

- Closed residential and commercial real estate transactions.
- Negotiated residential and commercial leases.

- Appeared before various municipal Planning Boards to obtain approvals for site plan applications.
- Formed numerous business entities and drafted various corporate documents.
- Assisted in closing a \$10 million sale of physician practice to a physician practice management company.

Superior Court of New Jersey, Appellate Division
 The Honorable Dennis J. Braithwaite
 Atlantic City, New Jersey
 Law Clerk

1996-1997

- Researched and wrote legal memoranda for pending appeals.
- Edited legal opinions and handled emergent appeals.
- Mediated pending matters in the Superior Court, Special Civil Part.

Law Offices of John A. Maher, Esq.
 Summit, New Jersey

1995-1996

- Assisted during real estate transactions.
- Reviewed litigation documents.
- Prepared deposition summaries from transcripts.
- Drafted legal documents.

PUBLICATION:

A Disparity That Is Worlds Apart: The Federal Sentencing Guidelines Treatment of Crack Cocaine and Powder Cocaine, 1 Race & Ethnic Ancestry Law Digest 21 (1995).

PROFESSIONAL ASSOCIATIONS:

New Jersey Bar Association (Mercer County Representative, Executive Committee, Young Lawyers Division, 2000-2004; Member, Business and Commercial Litigation Committee, 2002-2005), Mercer County Bar Association, Association of Black Women Lawyers, District VII Ethics Committee (2009-2013), Historical Society of the United States District Court for the District of New Jersey (2009-2011).

SEMINARS PRESENTED:

Handling the Police Liability Claim, National Business Institute (presented with two other faculty members) at the following dates and locations: (i) June 14, 2011 in Princeton, New Jersey; (ii) December 8, 2011 in Newark, New Jersey; and (iii) December 9, 2011 in Cherry Hill, New Jersey.

COMMUNITY INVOLVEMENT:

YWCA of Trenton, Inc. (Member of Board of Trustees, Board Attorney, 2000-2002), Junior League of Greater Princeton (2002-present), First Baptist Church of Lincoln Gardens (Member 2006-present, Sunday School Ministry, 2011-present), I Am Trenton Community Foundation Grants Committee (2011-present).

INTERESTS:

Cooking, reading, book collecting, golf.

Exhibit B

Fwd: Request for Representation: Paff v. Trenton

Subject: Fwd: Request for Representation: Paff v. Trenton
From: Walter Luers <wluers@luerslaw.com>
Date: 9/17/2015 11:28 AM
To: wluers@luerslaw.com

----- Forwarded message -----

From: Diadina Allen <dallen@trentonnj.org>
Date: Tue, Aug 4, 2015 at 9:58 AM
Subject: RE: OPRA REQ 2015-277 resp
To: paff@pobox.com
Cc: Sonya McRae-Richards <smrichards@trentonnj.org>, "Marc A. McKithen" <mmckithen@trentonnj.org>, OPRA <OPRA@trentonnj.org>

OPRA REQ 2015-277 RESPONSE;

According to the Department of Law, The request is denied because personnel records are exempt under N.J.S.A. 47:1A-10. Additionally, no public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.

The above response is the result to your request for information via the Open Public Records Act (OPRA).

This file is now closed.

Please acknowledge receipt with a reply. Thank you

From: opengovtissues@gmail.com [mailto:opengovtissues@gmail.com] **On Behalf Of** John Paff
Sent: Thursday, July 23, 2015 6:08 PM
To: Diadina Allen
Subject: Records Request to the City of Trenton

Dear Ms. Allen:

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

Background:

I am interested in learning the names and/or addresses of all the people who sought or who were considered for the recently-filled position of Trenton's chief municipal prosecutor. As you know, Kimberley Wilson was selected for that position. I believe that it would be of public interest to know the identities of all the others who wanted, but were passed over, the position. As you are also aware, Wilson's appointment has been the subject of several news stories written by Trentonian writer Isaac Avilucea.

The law that directly applies to my request is Executive Order 26, which states in relevant part:

No public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.

The way I read this, nothing in the Executive Order prevents the City from disclosing the names and addresses of the unsuccessful candidates because the search is now over and the position is filled. The only records that this Executive Order prevents the City from disclosing after the search is over are the resumes submitted by the unsuccessful candidate but only when those candidates fail or refuse to consent to their disclosure.

Presently, I have no idea who the unsuccessful candidates are and whether they oppose or welcome disclosure of their resumes. Unless the City, at the time the resumes were received, asked each candidate whether he or she consented or opposed disclosure of his or her resume if they didn't get the position, I would think that the City also doesn't know whether each unsuccessful candidate opposes or consents to disclosure of his or her resume.

So, in responding to ¶ 1 of my request below, for each resume to which access is denied, please set forth the basis of the City's knowledge that the candidate who submitted the resume does not consent to its disclosure.

Records requested:

1. The resume for each person who sought or who was considered for the position of Trenton's chief municipal prosecutor that was recently filed by Kimberley Wilson.
3. Any document that discloses the name of each person who sought or who was considered for the position of Trenton's chief municipal prosecutor that was recently filed by Kimberley Wilson. Please disregard this paragraph of my request if you grant access to the records sought under ¶ 3 below.

3. Any document that discloses the name and address of each person who sought or who was considered for the position of Trenton's chief municipal prosecutor that was recently filed by Kimberley Wilson.

John Paff

*P.O. Box 5424
Somerset, NJ 08875
Voice: 732-873-1251
Fax: 732-862-4449
e-mail: paff@pobox.com*

—Attachments: —

Kim Wilson Resume.pdf

134 KB