

Law Offices of  
Walter M. Luers, LLC

Suite C203  
23 West Main Street  
Clinton, New Jersey 08809  
Telephone: 908.894.5656  
Facsimile: 908.894.5729  
www.luerslaw.com

August 29, 2013

Walter M. Luers, Esq.\*

\*Also admitted in New York

Writer's Direct Email: wluers@luerslaw.com

Honorable Judge of the Superior Court  
Superior Court – Law Division  
Union County Courthouse  
2 Broad Street  
Elizabeth, New Jersey 07207

**Re: *Renna v. County of Union, et al.***

Dear Honorable Judge:

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 Order to Show Cause. This action is being brought because Defendants have denied Plaintiff access to a report of the Union County Prosecutor that was prepared with respect to the unauthorized use of County generators during and after Hurricane Sandy.

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**

We respectfully refer the Court to the Verified Complaint and Certification of Tina Renna for a recitation of the facts upon which we are relying in this application.

## LEGAL ARGUMENT

### POINT I

#### PLAINTIFF'S 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)*.

The Prosecutor’s Office has been named as a defendant because they may have an interest in objecting to disclosure of the report. John Does 1-50 have been named because the individuals identified in the Prosecutor’s report may have an interest in objecting to disclosure of the report. At this time, counsel for Plaintiff does not know who is identified in the Prosecutor’s report.

## POINT II

### THE RECORDS SOUGHT BY PLAINTIFF SHOULD BE DISCLOSED

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.*

Here, the Defendants have denied access to the Prosecutor's report on two grounds, which we address in turn. The Defendants claim that the report is a "criminal investigatory record" under *N.J.S.A. 47:1A-1.1*, and that "significant portions" of the report are "personnel records" within the definition of *N.J.S.A. 47:1A-1.1* and Executive Order 15 (1974).

First, Defendants claim that the Prosecutor's report is a "criminal investigatory record" within the meaning of *N.J.S.A. 47:1A-1.1*, which defines such records as a record "which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding." Here, based on public statements, the Prosecutor's office concluded that no crime occurred. According to the minutes of the June 13, 2013 meeting, the Prosecutor concluded that the taking of generators "is not a criminal matter." (Renna Cert. ¶ 7). This suggests that the Prosecutor office's investigation was not a "criminal investigation." If the Prosecutor investigated and concluded that no crimes had occurred and that the use of generators was not a "criminal matter," then the Prosecutor's report is not a "criminal investigatory record" within the meaning of *N.J.S.A. 47:1A-1.1*.

Defendants, in their rejection of Plaintiff's OPRA request, also claimed that "substantial portions" of the report were exempt as a personnel record under *N.J.S.A. 47:1A-1.1*. This defense should be rejected. Certainly a report prepared by the Prosecutor's office does not have the quality of a personnel record. One would expect personnel records connected to investigations to be handled by the human resources department or administration. The purpose of the Prosecutor's Office investigation was not to make personnel decisions, such as whether to mete out employee discipline or to determine whether there was an infraction of workplace rules. The purpose of the Prosecutor's Office inquiry must have been to determine whether there was any criminal activity. This is not a matter that falls within what might be categorized as a "personnel matter". Here, once the Prosecutor's inquiry ended with the determination that there was no criminal wrongdoing, their inquiry ended. Presumably the Prosecutor did not recommend civil or work-place punishments, such as loss of pay or similar punishments. For these reasons, the Prosecutor's report cannot reasonably be interpreted as a personnel record. Here, it would appear that the Prosecutor investigated, determined that the issue of the unauthorized use of generators was not a criminal matter, and prepared a report containing that conclusion. Therefore, the report is neither a "criminal investigatory record" or "personnel file".

If this Court should deny access to all or portions of the Prosecutor's report 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 Plaintiffs, this Court must balance Plaintiff’s 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).

Most importantly, the Prosecutor's investigation is closed. Because the investigation is closed, the interest in non-disclosure becomes much lower. "While there is a real need to deny access where there is an ongoing law enforcement investigation, or where the protection of witness information or a witness's identity is at stake, the same values do not survive a balancing after the investigation is closed." *Shuttleworth v. City of Camden*, 258 N.J. Super. 573, 587 (App. Div. 1992); *see also Keddie*, 148 N.J. at 54 ("Obviously, the need for confidentiality is greater in pending matters than in closed cases.").

With respect to the first and second factors, we do not know whether the Prosecutor's office relied upon the disclosure of information by citizens or whether the Prosecutor's office promised confidentiality to any person, although this concern can be addressed through the redaction of names of individuals who provided information.

With respect to the third factor, the results of the criminal investigation should not chill agency decision-making because the Prosecutor found that there was no criminal wrongdoing. Based on this finding, there is no decision-making to be made based on it.

With respect to the fourth factor, it is not known how much of the Prosecutor's report is evaluative as opposed to factual.

With respect to the fifth factor, certainly no criminal charges have been brought. Therefore, it may fairly be said findings of misconduct have not been sufficiently corrected by remedial measures.

With respect to the sixth factor, we do not know what disciplinary or investigatory proceedings are underway, although it is our understanding that the County is considering whether to discipline employees.

With respect to Plaintiff's interest in the report under the common law right of access, we respectfully refer the Court to her status as a journalist. We also refer the Court to Plaintiff's certification, which addresses her specific concerns about the matter of the generators that were taken during Hurricane Sandy.

Honorable Judge of the Superior Court  
August 29, 2013  
Page 9 of 9

**POINT III**

**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