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Honorable Judge Caulfield, J.S.C.
Superior Court of New Jersey – Law Division
Union County Courthouse
2 Broad Street
Elizabeth, New Jersey 07207

Re: Renna v. County of Union
Docket No.

Defendant's Opposition to Plaintiff Order to Show Cause

Dear Honorable Judge Caulfield:

This office represents the Defendant, the County of Union, in the above captioned matter. We are submitting this Letter Brief in lieu of a more formal brief in opposition to Plaintiff's action under the Open Public Records Act ("OPRA"), *N.J.S.A. 47:1A-1, et seq.*, and the common law right of access opened to the court via Certified Complaint and Order to Show Cause. Plaintiff brought this action seeking access to the Union County Police's investigatory file on Patrick Scanlon, Jr. At both the time of the request and currently, the records on file are exempt under OPRA from release under *N.J.S.A. 47:1A-1.1* Criminal Investigatory records.

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STATEMENT OF FACTS

The Plaintiff submitted an OPRA request to the County of Union on March 10, 2012 for "copies of all investigations, including County Police, Sheriff and Prosecutor, into the matter involving former County employee Patrick Scanlon, Jr." (See Exhibit A, Plaintiff's OPRA request). Defendant inquired with each of the County's law enforcement agencies and determined that the Union County Police were the only agency involved in an investigation in which Patrick Scanlon Jr. had been questioned.

An investigation began on or about January 30, 2012 when the Union County Police were contacted to investigate parks maintenance equipment missing from a County of Union service yard. (See Exhibit B, Certification of Lt. James C. Debbie). Patrick J. Scanlon Jr., a former County of Union parks maintenance employee, was one of several of the employees questioned regarding the matter. (See Exhibit B) This investigation is currently categorized as active and on-going by the Union County Police and foreseeably will remain so for a period in the future while new information is gathered, potential leads are explored and witnesses or potential suspects are identified and questioned. (See Exhibit B)

On April 10, 2012, Defendant responded via email to Plaintiff indicating that the requested documents, "are on file with the County Police; however, they are criminal investigatory records that are not subject to disclosure under the OPRA." (See Exhibit C, Defendant's response to OPRA request) Defendant, in conjunction with Lt. Debbie, reviewed the records at issue here. Defendant made the determination that the file notes of the investigators and notes from witnesses interviewed were not immediately disclosable to Plaintiff as the investigation is still on-going. (See Exhibit B)

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To date, the investigation of the missing parks maintenance equipment has neither resulted in the arrest of, nor formal charges filed by any law enforcement agency, including the Union County Police, against any Union County parks maintenance employee, including the subject of the OPRA request. As no arrest has been made, there is not a bail amount, set nor has an indictment been issued in this matter by any law enforcement agency. The investigation is still currently underway. (See Exhibit B) Therefore, release of the requested documents is expressly exempted by N.J.S.A. 47:1A-1.1 and does not fall under the enumerated list of criminal investigatory information which must be disclosed under N.J.S.A. 47:1A-3.b.

**LEGAL ARGUMENT
POINT I**

**THE RECORDS SOUGHT BY PLAINTIFF ARE CRIMINAL INVESTIGATORY
RECORDS SUBJECT TO AN ON-GOING INVESTIGATION AND
SHOULD NOT BE DISCLOSED**

Plaintiff submitted a request under the Open Public Records Acts for "copies of all investigations, including County Police, Sheriff and Prosecutor, into the matter involving former County employee Patrick Scanlon, Jr." Defendant made diligent inquiry for any government records pertaining to the request. While no such record exists within the Union County Sheriff's Department nor the Union County Prosecutor's Office, an investigation was undertaken in January of 2012 and is to date, on-going with the Union County Police concerning missing parks maintenance equipment. (See Exhibit B)

The records that exist within the Union County Police Department are not disclosable at this time as the investigation is still being actively undertaken. N.J.S.A 47:1A-1.1 declares that a government record shall not include various categories of information which are deemed to be confidential. One such category is criminal investigatory records, defined as "a record which is

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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.”

The Defendant has the burden of proof to show that the denial of access was justified. Defendant must meet both prongs of the definition of "criminal investigatory reports for the documents to be inaccessible to plaintiff under *N.J.S.A. 47:1A-1.1*. (1) The records must "not be required by law to be made," and (2) they must "pertain to any criminal investigation or related civil enforcement proceeding." *O'Shea v. Township of West Milford*, 410 N.J. Super 371, 381 (App. Div. 2009).

Here, Defendant satisfies both of the prongs set down in *O'Shea*. The investigation which has ensued and the records maintained in the furtherance thereof are not required by law to be maintained. This investigation, pertaining to missing equipment, is still underway by the Union County Police. Those conducting the investigation categorize the proceeding as "active" and "on-going." New information is still forthcoming, all potential leads have not yet been exhausted and a suspect or suspects have not been charged. Furthermore, an arrest has not been made, there is not a bail amount set nor has an indictment been issued in this matter by any law enforcement agency. (See Exhibit B)

Such records must be released unless the information will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release. *Id.* The judge's interpretation in *O'Shea* of a criminal investigatory record is a record created while a criminal investigation is going on[,] or "the work product of . . . the people investigating." Beyond a doubt, the records in which Plaintiff seeks here are exactly the types of

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records that were created during a criminal investigation. The on-going investigation exempts disclosure under OPRA under *N.J.S.A. 47:1A-1.1*.

LEGAL ARGUMENT
POINT II
THE RECORDS SOUGHT BY PLAINTIFF DO NOT FALL WITHIN THOSE
INVESTIGATORY INFORMATION WHICH MUST BE DISCLOSED

Various types of law enforcement records and more specifically a "criminal investigatory record" under N.J.S.A. 47:1A-1.1 are exempt from access under OPRA. N.J.S.A. 47:1A-3b makes very clear what types of records and documents are considered criminal investigatory information which must be disclosed to the public within 24 hours. The categories of immediately releasable criminal investigatory information are: (1) "where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;" (2) if an arrest has been made, information as to the name, address and age of any victims ... In deciding on the release of information as to the identity of a victim, the safety of the victim and the victim's family, and the integrity of any ongoing investigation, shall be considered;" (3) "if an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;" (4) "information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;" (5) "information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;" (6) "information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest,

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resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police;" and, (7) "information as to circumstances surrounding bail, whether it was posted and the amount thereof."

The criminal investigatory records at issue here – file notes of the investigators and notes from witnesses interviewed - do not fall under any of the specified categories above. Specifically, the records at issue here do not relate to an arrest that has been made, bail set, an indictment or accusation or complaint against a specific or specified individuals.

N.J.S.A. 47:1A-3b goes on further to state that, "Notwithstanding any other provision of this subsection, where it shall appear that the information requested or to be examined will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release, such information may be withheld. This exception shall be narrowly construed to prevent disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety. Whenever a law enforcement official determines that it is necessary to withhold information, the official shall issue a brief statement explaining the decision. The attached certification of Lt. James C. Debbie states that this matter is currently subject to an "active" and "on-going" investigation. New information is still forth coming, leads have not been exhausted and a potential suspect or suspects have not been charged. (See Exhibit B) Release of the information at issue here does not fall within the exceptions listed and therefore do not have to be disclosed.

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LEGAL ARGUMENT
POINT III

~~THE COMMON LAW RIGHT OF ACCESS DOES NOT FAVOR~~
DISCLOSURE OF THESE SPECIFIC RECORDS

While the common law right of access is indeed much broader than OPRA, the Court should still not grant Plaintiff's request for these criminal investigatory records as Defendant's interest in preventing disclosure of these on-going criminal investigation records outweighs Plaintiff's common law right of access. As Plaintiff's set forth in their Letter Brief to the Court, the elements of the common law right of access include: (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, and (3) the citizen's right to access must be balanced against the State's interest in preventing disclosure. *Higg-A-Rella, Inc. v. County of Essex*, 141 N.J. 35, 46.

The first element is arguably satisfied as the file notes and notes from witnesses interviewed were made by Defendant's employees while in their official capacity. The second and third elements are not clearly satisfied and Defendant did not disclose the subject records operating under the believe that Plaintiff is not entitled under common law for failure to satisfy these elements. "A citizen's right to access to public documents rests upon a showing of a personal or particular interest in the subject matter sought. Yet, even the existence of this does not give an absolute right to obtain the documents. The Court must engage in a balancing test to determine whether the individual's rights to the information outweighs the public's interest in confidentiality of the matter." *Asubry Park Press v. Borough of Seaside Heights*, 246 N.J. Super. 62, 68 (1990).

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Six factors have been used to balance confidentiality over individuals right's: (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 decision making 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).

In the case here, specifically related to the first two enumerated factors above, the certification of Lt. Debbie outlines that the release of the investigatory information will hinder the investigation into the missing parks maintenance equipment and there is less likelihood that the remaining equipment will be recovered. There is also less likelihood that witnesses or potential suspects will come forward. There have not been any arrests made, formal charges have not been filed and the matter has not been deemed closed. The likelihood for new information, leads to follow and suspect(s) to charge are possibilities which are not exhausted at this time. (See Exhibit B)

Finally, in an unpublished decision, *Higgins v. Twp. of Hopewell*, 2006 N.J. Super. Unpub. LEXIS 69, 2007 N.J. Super Unpub. LEXIS 2001 (See Exhibit D), the judge there found that the interest in preventing disclosure outweighed any common law right to access. Mr.

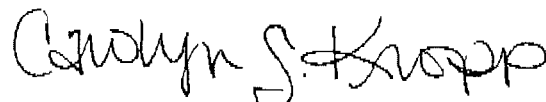
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Higgins placed an OPRA request for a security camera videotape that recorded the Township of Hopewell's Committee meeting of May 1, 2003. The tape was not released subject to a criminal investigation. The tape was determined by the Township police and the Prosecutors' office to be a criminal investigatory record. The judge noted that plaintiff's allegation that he was engaged in the gathering, editing and reporting of information regarding the conduct of an elected official amounted to a vague and non-compelling interest favoring disclosure which was clearly insufficient when weighed against defendant's interest in protecting information that was the subject of an on-going criminal investigation." *Higgins*, 2007 N.J. Super Unpub. LEXIS 2001 at 9. In the present case, releasing information could adversely affect an ongoing investigation, especially since the investigation is still relatively recent. Releasing information while an ongoing investigation is underway could influence witnesses and make it that much harder for the Union County Police to attain evidence.

CONCLUSION

Therefore, for the reasons set forth in the initial above the Defendants respectfully request that the Court dismiss Plaintiff's complaint with prejudice.

Respectfully submitted,



CAROLYN SULLIVAN KROPP
Assistant County Counsel

CSK/deb
Enclosure
Cc: Walter M. Luers, Esq.