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DEBORAH JACOBS

DEBORAH JACOBS,

Plaintiff,

v.

PETER C. HARVEY, in his official capacity as  
Attorney General of the State of New Jersey, and  
BRUCE SOLOMON, in his official capacity as  
Custodian of Records of the Office of the  
Attorney General,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
MERCER COUNTY  
Docket Number: MER-L-3119-04

Civil Action

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**BRIEF IN SUPPORT OF PLAINTIFF DEBORAH JACOBS'S MOTION TO WITHDRAW THE  
STIPULATION OF DISMISSAL PURSUANT TO R. 4:50-1(c), REINSTATE THE COMPLAINT  
IN LIEU OF PREROGATIVE WRIT, AMEND THE COMPLAINT IN LIEU OF  
PREROGATIVE WRIT PURSUANT TO R. 4:9-1 AND R. 4:27-1, EXTEND DISCOVERY  
PURSUANT TO R. 4:24-1(c) AND GRANT AN ASSESSMENT OF PENALTIES AND AN  
AWARD OF ATTORNEYS FEES AND COSTS TO THE PLAINTIFF**

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Of Counsel and on the Brief:

Gary D. Nissenbaum, Esq.  
Edward Barocas, Esq.  
Payal A. Patel, Esq.

## PRELIMINARY STATEMENT

This motion should be granted because the Plaintiff relied upon the word of the chief law enforcement officer of the State of New Jersey, that now appears to have been an untruth. As a result, her rights were materially compromised, and it is therefore incumbent upon this Court to afford her the relief requested in the motion.

The New Jersey Open Public Records Act (“OPRA”) fosters reasonably unfettered access to public records in an effort enable the public to understand and evaluate the reasonableness of [a] public body’s action. Kuehne Chemical Co., Inc. v. New Jersey Dist. Water Supply Comm’n. 300 N.J. Super. 433 (App. Div. 1997). The Plaintiff, Deborah Jacobs, sought to exercise this right by requesting the production of documents relating to the identification and classification of “potential threat elements” by law enforcement authorities (“PTE Records”) from various local law enforcement agencies in the State of New Jersey (“Agencies”). Generally, the Agencies issued denials of her request, some of which were expressly based on the advice of the Office of the Attorney General. Plaintiff therefore requested records from Defendants, including, among other items, “any other memorandum, letter, email or other correspondence related to the identification or disclosure of PTEs” and “[a] copy of all directives issued by the NJ State Government regarding requests for information regarding PTEs, including the directive referred to in the attached letter dated April 16, 2004 from Mr. John J. McKniff, Assistant Township Attorney in Wayne.” Defendants denied Plaintiff’s request. In an effort to gain access to these records, the Plaintiff bought a complaint in lieu of prerogative writ against the putative source of the denials, the Defendants, Peter C. Harvey and Bruce Solomon, the then-Attorney General of New Jersey and Custodian of Records for the Office of the Attorney General in October 2004.

Thereafter, the Defendants submitted correspondence to this Court in which they denied the existence of any “records responsive to the [Plaintiff’s] OPRA request” and represented that no written directive existed with regard to the Office of the Attorney General’s direction of the Agencies’ responses. The Defendants further misrepresented to the Plaintiff that they had “no records responsive to the OPRA request upon which the above complaint is based” and “did not direct or control the responses made by local law enforcement agencies to OPRA requests for [PTE records], which requests had been made at an earlier date by [P]laintiff [Jacobs].” The Plaintiff relied on these material misrepresentations to her detriment by entering into a stipulation of dismissal, which bound her to forego all her claims against the Defendants. She did so because the Defendants’ statement provided assurances, which were later discovered to be incorrect, that (1) the Defendants truly had no responsive documents; (2) no written directives had been issued with regard to the direction and control of the Agencies’ denials by the Defendants; and (3) subsequent requests made with the Agencies for the same PTE Records, as were requested in the Plaintiff’s original request, would be meaningfully evaluated upon the independent judgment of the particular Agency.

Fortunately, when the Plaintiff again attempted to exercise her right to access to public records from various municipalities, one of them disclosed a memorandum (“Miller Memo”) which proved that the Defendants supplied Plaintiff with misinformation. Specifically, West New York provided the Plaintiff with documentation which established the Defendants had, in fact, been directing and controlling the Agencies’ responses to her requests and had a memorandum responsive to Plaintiff’s request for “any memorandum, letter, email or other correspondence related to the identification or *disclosure of* PTEs.” (Emphasis added). The Miller Memo was sent to “[a]ll County Prosecutors’ OPRA Coordinators” with the subject line “ACLU

OPRA Request.” The Miller Memo stated: “[t]he following are specific reasons for denial of access under both OPRA and the common law” and proceeded to set forth three reasons for denial.

The Defendants’ counsel, Assistant Attorney General Lewis Scheindlin, Esq., also admitted to Plaintiff’s attorney that he had, in fact, known of the existence of the Miller Memo when the misrepresentation was made. The documentation unequivocally demonstrates that the Defendants, through their various departments and county prosecutors, counseled other entities as to reasons to reject Plaintiff’s OPRA requests. Accordingly, the documentation in essence demonstrates that the Defendants made what appears to have been a material misrepresentation in connection with this settlement.

New Jersey Court Rule 4:50-1(c) allows parties, such as the Plaintiff, who have been subject to a fraudulently-obtained final order or judgment, to seek its withdrawal. To succeed in withdrawing the fraudulent judgment or order, the Plaintiff must prove the Defendants committed, at the very least, equitable fraud in inducing the Plaintiff to enter into the stipulation of dismissal. Here, the Defendants actions clearly constituted equitable fraud and have subjected the Plaintiff to an unfair final judgment. As such, the Plaintiff must be allowed to proceed with her original complaint against the Defendants.

The Plaintiff also seeks to amend her original complaint in lieu of prerogative writ to include causes of action which directly relate to the material misrepresentation of the Defendants’ and the harm she has suffered as a result. Although these additional causes of action do not challenge the Defendants’ denial of access to information under OPRA, they do arise out of the same events and are against the same parties. As such, the Plaintiff’s request to amend her original complaint in lieu of prerogative writ should be granted in the interest of justice and to promote judicial economy, administrative efficiency, fairness to litigants and the just resolution of disputes, pursuant to R. 4:9-1 and R. 4:27-1. Likewise, the Plaintiff seeks to

extend the discovery period, pursuant to R. 4:24-1(c) in order to fully investigate the additional causes of action.

As the Defendants' fraudulent actions have caused the Plaintiff to expend a substantial amount of legal fees, her motion for attorney's fees pursuant to violation of the Frivolous Lawsuit statute and OPRA should be granted. Additionally, the Defendants used their misrepresentations to evade their duty to produce documents as required under OPRA. Furthermore, the Defendants failure to fulfill their duties under OPRA constitutes a knowing and willful violation of OPRA and an unreasonable denial of records under the totality of circumstances. These actions warrant sanctioning the Defendants with a \$1,000.00 civil penalty pursuant to OPRA.

## **STATEMENT OF FACTS**

Plaintiff hereby incorporates the accompanying certification of Deborah Jacobs dated May 3, 2006 (“Jacobs Certification”) and certification of Edward Barocas dated May 3, 2006 (“Barocas Certification”) as her Statement of Facts in this matter.

## POINT ONE

### **THE DEFENDANTS' FRAUD WARRANTS WITHDRAWAL OF THE STIPULATION OF DISMISSAL AND REINSTATING THE ORIGINAL COMPLAINT IN LIEU OF PREROGATIVE WRIT**

New Jersey Court Rule 4:50-1(c) permits the Court to relieve a party from a final judgment or order if it was based on fraud perpetuated by the opposing party. R. 4:50-1(c). As the relief sought under R. 4:50-1(c) involves equitable relief, only equitable fraud, and not legal fraud, must be established by the moving party. Nolan v. Lee Ho, 120 N.J. 465, 472 (1990). In order to prove equitable fraud, the Plaintiff must demonstrate that the Defendants made a material misrepresentation with the intent that it be relied upon, regardless of whether the Defendants knew at the time that their statement was a misrepresentation. Furthermore, the Plaintiff must show that she actually relied on the material misrepresentation to her detriment. Nolan v. Lee Ho, 120 N.J. 465, 472 (1990).

In this matter, all of these elements have been satisfied. As will be demonstrated below, the Defendants made a material misrepresentation to the Plaintiff, which directly related to the basis of her complaint, with the intent that she rely on it and enter into the stipulation of dismissal. The Plaintiff did in fact rely on the Defendants' material misrepresentation, in good faith, to her detriment, and entered into the stipulation of dismissal, foregoing her cause of action against the Defendants.

#### **A. The Stipulation Of Dismissal Constitutes A Final Judgment From Which The Plaintiff May Seek Relief Based On Fraud Perpetuated By The Defendants Under R. 4:50-1(c)**

A voluntary dismissal entered upon stipulations constitutes a final judgment if it terminates the case on all issues as to all parties. Lawler v. Isaac, 249 N.J. Super. 11, 17 (App.

Div. 1991). Plaintiff's cause of action against the Defendants terminated upon entry of the stipulation of dismissal. According to the stipulation of dismissal, all parties to the action agreed to dismiss all claims against each other. See Jacobs Certification, at p. 4 ¶ 12 and Exhibit I. As such, the stipulation of dismissal constitutes a final judgment from which the Plaintiff may seek relief.

“A settlement agreement between parties to a lawsuit is a contract” and “when a settlement is obtained by fraud, the injured party may seek rescission.” Nolan v. Lee Ho, 120 N.J. 465, 472 (1990). The stipulation of dismissal constitutes an agreement between the parties to terminate the action and therefore the same principals applied to settlement agreements should be applied here. As such, the elements of equitable fraud should be applied to the stipulation of dismissal in order to determine whether the Plaintiff is entitled to relief from a final judgment and reinstatement of her original complaint in lieu of prerogative writ.

**B. The Instant Matter Should be Reinstated Because The Defendants Made A Material Misrepresentation Intending To Induce The Plaintiff Into Entering Into The Stipulation Of Dismissal**

The Defendants made the material misrepresentation to this Court and the Plaintiff that they had “no records responsive to the [Plaintiff's] OPRA request.” See Barocas Certification at p. 2-3 ¶ 6 and Exhibit B (“Feinberg Letter”). The Defendants also denied, in correspondence to this Court, the existence of any written directive controlling the Agencies' denials of the Plaintiff's request. See Id. Subsequently, the Defendants further represented to the Plaintiff that they “did not direct or control the responses made by [Agencies] to OPRA requests for PTE records, which had been made at an earlier date by [P]laintiff. . . .” See Jacobs Certificate at p. 4 ¶ 10 and Exhibit H (“Harvey Letter”). These statements constituted misrepresentations,

regardless of whether they were intentionally made, because the Miller Memo plainly shows that the Office of the Attorney General did, in fact, have a responsive memorandum and did, in fact, direct and advise the Agencies as to the reason why they should deny the Plaintiff's OPRA Requests, contrary to their assertion to the Plaintiff and this Court. Furthermore, the Miller Memo, dated approximately two weeks after Plaintiff submitted her request for PTE Records with the Agencies, was addressed to each OPRA Coordinator for the respective counties and set forth three reasons to deny the Plaintiff's request. See Id. at p. 4-5 ¶¶ 14, 15 and Exhibit L.

The content of the Miller Memo and the circumstances surrounding its issuance proves the Defendants and their employees colluded to direct and control the towns' responses to the Plaintiff's request for PTE Records. The Wayne Letter (to which Plaintiff specifically referred in her OPRA Request to Defendants) stated that the "Attorney General will be issuing a directive regarding [PTE] dealing with the Office of Counter-Terrorism." See Id. at p. 2 ¶ 5 and Exhibit C. Furthermore, the fact that the Edison Letter and West New York Letter acknowledge receiving advice and direction from the Office of the Attorney General further indicate that the Defendants had in fact issued a directive with regard to the Plaintiff's request and that the Defendants' conclusions set forth in the Miller Memo were successful in that they effectively barred Plaintiff's request from being meaningfully evaluated against the standards of OPRA. See Id. at p. 2-3 ¶¶ 4, 6 and Exhibits B and D. This demonstrates that the Defendants' statements in the Feinberg Letter and the Harvey Letter to the effect that no such directive existed and that no such communications had taken place, constitute clear and unequivocal misrepresentations, regardless of whether they were intentionally made.

The denials of access issued from the Agencies in response to the Plaintiff's initial request for PTE Records alluded to the possibility that the Defendants were directing and

controlling the Agencies' decisions. The entire essence of the instant litigation was to ascertain whether the Defendants were in fact making these communications to the municipalities in question, and thereby frustrating the Plaintiff's efforts to obtain a meaningful response to her OPRA requests. That was the very reason that the Plaintiff brought her complaint against the Defendants and not the individual Agencies. As such, statements that there were no such communications or written directives were material. The Defendants' statement in the Harvey Letter that they neither directed nor controlled the Agencies' denials of Plaintiff's request for PTE records and their statement to the Court in the Feinberg Letter that no written directive existed constituted material misrepresentations because, had the Plaintiff known that the Defendants had in fact directed or controlled the Agencies decisions and had also issued a directive, she would have proceeded with her complaint against the Defendants.

Defendants also provided false information to Plaintiff when, in the Harvey Letter and Feinberg Letter, they stated that they have "no records responsive to the [Plaintiff's] OPRA request." Plaintiff had requested, among other documents, both (1) any "memorandum, letter, email or other correspondence related to the identification or disclosure of PTEs" and (2) "[a] copy of all directives issued by the NJ State Government regarding requests for information regarding PTEs, including the directive referred to in the attached letter dated April 16, 2004 from Mr. John J. McKniff, Assistant Township Attorney in Wayne." See Id. at p. 3 ¶ 7 and Exhibit E. The Miller Memo was responsive to both requests, as they were clearly a "memorandum...related to the...disclosure of PTEs" and, as previously explained, provided direction to the towns as to reasons for denial of Plaintiff's requests. See Id. at p. 4 ¶ 14 and Exhibit L.

The Defendants clearly intended that the Plaintiff rely on their misrepresentations in an effort to persuade her to dismiss her action against them. Plaintiff bases this assertion upon two important items.

First, the sentence immediately following the Defendants' material misrepresentations in the Harvey Letter which states that "[i]n view of the foregoing, the parties agree that the above action [Jacobs v. Harvey (now, Farber), Docket No. MER-L-3119-04] will be dismissed." See Id. at p. 4 ¶¶ 10, 11 and Exhibit H.

Second, as stated in the Barocas Certification, counsel for the Attorney General has essentially admitted that the material was intentionally withheld. As stated in paragraphs eight through thirteen of that Certification:

8. On or about March 21, 2006, Plaintiff submitted new OPRA requests regarding PTEs to nine New Jersey municipalities.
9. In response, the Town of West New York denied the request. In the letter of denial dated March 22, 2006 George B. Campen ("Campen Letter"), the town attorney based his denial upon correspondence from "the State Attorney General's Office dated April 20, 2004 indicating that your request should not be complied with." A true copy of the Campen Letter is attached hereto as Exhibit D.
10. That letter also enclosed a Memorandum from E. Robbie Miller, D.A.G. dated April 20, 2004 ("Miller Memo") to all county prosecutors' OPRA coordinators. A true copy of the Miller Memo is attached hereto as Exhibit E.
11. The Miller Memo was written to "All County Prosecutors' OPRA Coordinators." The subject of the Miller Memo is "ACLU OPRA Request." The Memo states: "As you may know, many municipal police departments have received an Open Public Records Act (OPRA) request from the American Civil Liberties Union of New Jersey (ACLU-NJ)

seeking access to certain government records. This memo delineates the reasons upon which a denial of access to these documents can be based.” After describing the ACLU-NJ’s request, the Memo then states: “The following are specific reasons for denial of access under both OPRA and the common law.” The Memo proceeds to provide three separate reasons for denial. Id.

12. On or about April 27, 2006, I telephonically contacted Assistant Attorney General Lewis Scheindlin Esq. – who was Defendants’ attorney in the above captioned case - to inform him of our receipt of the Miller Memo. He informed me that he was aware of the Miller Memo.
13. When I asked him how, in light of that fact, he could have sent the Harvey Letter to Plaintiff’s lead counsel Ronald Chen, Esq., Mr. Scheindlin stated that the Attorney General did not consider the Miller Memo a “Directive.” On this basis, he asserted to me that he did not consider the statements in the Harvey Letter a misrepresentation.

See Barocas Certification at p. 3-4 ¶¶ 8-13 and Exhibits D and E.

The foregoing clearly demonstrates that the Defendants, in fact, admitted and acknowledged that the statement regarding their direction and control over the Agencies’ denials was made with the intent that the Plaintiff rely on it and enter into the stipulation of dismissal.

**C. The Instant Matter Should be Reinstated Because Plaintiff Relied On the Defendants’ Material Misrepresentation To Her Detriment By Entering Into The Stipulation Of Dismissal**

The Plaintiff relied on the Defendants’ material misrepresentations in the Feinberg Letter and Harvey Letter because she entered into the stipulation of dismissal. See Jacobs Certification at p. 4, ¶ 12 and Exhibit I. The Plaintiff did so to her detriment because she gave up her claims against the Office of Attorney General as set forth in the compliant in lieu of prerogative writ. As

such, the stipulation of dismissal should be withdrawn and the original complaint in lieu of prerogative writ should be reinstated.

In determining whether to withdraw the stipulation of dismissal and reinstate the original complaint in lieu of prerogative writ, this Court need only find that the Defendant's actions constituted equitable fraud. The Defendants made material representations intended to persuade the Plaintiff to dismiss her action against them. Whether the misrepresentations were intentionally made or whether the Defendants knew or should have known their statement was false at the time made is not at issue under R. 4:50-1(c), rather whether the statements were made with the intent that it be relied upon.

Importantly, whether or not the Court determines that the Defendants' actions were intentional – and the statements of Defendant's attorney set forth in the Barocas Certification provide evidence they were – nevertheless, the statements were at the very least, clearly made with the intent of inducing reliance. The statements induced the settlement by dismissal of this matter. The Plaintiff did in fact rely on the misrepresentations to her detriment. As such, the Court must allow the withdrawal of the stipulation of dismissal and the reinstatement of the original complaint in lieu of prerogative writ.

## POINT TWO

### **PLAINTIFF SHOULD BE PERMITTED TO AMEND HER ORIGINAL COMPLAINT FREELY IN THE INTEREST OF JUSTICE AND TO PROMOTE JUDICIAL ECONOMY, ADMINISTRATIVE EFFICIENCY, FAIRNESS TO LITIGANTS, AND THE JUST RESOLUTION OF DISPUTES**

New Jersey Court Rule 4:9-1 permits parties to amend their pleadings by leave of the Court and further states that Courts shall allow such amendments freely in the interest of justice. R. 4:9-1. The Plaintiff reasonably relied on the Defendants' material misrepresentations by entering into a stipulation of dismissal terminating her pending action. See Jacobs Certification at p. 4, ¶ 12 and Exhibit I. As the stipulation of dismissal was based upon the Defendants' material misrepresentations in regard to their direction and control over the Agencies' denials and whether they had memoranda pertaining to the disclosure of PTEs, the Plaintiff has been unfairly and unjustly subject to a fraudulent agreement, for which she deserves an opportunity for relief. Furthermore, the Defendants caused a fraudulent agreement to be submitted and entered by the Court. See Id. Amending her original complaint with causes of action aimed at redressing the fraud perpetuated by the Defendants would further the interest of justice and provide the Plaintiff with an opportunity to seek relief from the harm she has suffered due to the Defendants' wrongful actions.

The Plaintiff seeks to include additional causes of action for attorney's fees and costs for violation of the Frivolous Lawsuit statute and OPRA, breach of contract, breach of the implied covenant of good faith and fair dealing, legal fraud and equitable fraud. See Id., at p. 5, ¶ 19 and Exhibit N. Although these causes of action do not directly challenge the decision of the Defendants' denying the Plaintiff access to PTE Records, as the counts in the original complaint in prerogative writ do, they do, however, arise from the Defendants' wrongful conduct in

connection with their decision. In her motion to amend the original complaint in lieu of prerogative writ with these additional causes of action, Plaintiff relies on New Jersey Court Rule 4:27-1, which permits a plaintiff “to join, either, as independent or as alternate claims, as many claims, either legal or equitable or both, as he or she may have against an opposing party.” R. 4:27-1. Furthermore, the ultimate goal of New Jersey Court Rule 4:27-1 is to promote judicial economy, administrative efficiency, fairness to litigants, and the just resolution of disputes. Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 351-52 (1984). As such, the Court should allow the Plaintiff to include the additional causes of action to consolidate matters which arise from the same events and involve the same parties.

### POINT THREE

#### **THE DISCOVERY PERIOD MUST BE EXTENDED TO PROVIDE THE PLAINTIFF A FAIR OPPORTUNITY TO CONDUCT DISCOVERY TO DETERMINE MORE FULLY THE UNDERLYING FACTS CONCERNING THE ADDITIONAL CAUSES OF ACTION AND UNDERLYING MISREPRESENTATION**

The Plaintiff moves to extend the discovery period in order to fully determine the underlying facts relating to the Defendants' wrongful action. New Jersey Court Rule 4:24-1(c) allows the court to extend discovery upon a showing of good cause and a description of the additional discovery to be conducted, provided an arbitration or trial date has not been fixed. The Plaintiff seeks to amend the original complaint in lieu of prerogative writ with causes of action for which there has been no discovery. As such, a full discovery period is needed to fully investigate the underlying facts of these causes of action.

In the instant motion, the extension of discovery is based upon additional causes of action and events which arose and or occurred during the settlement proceedings, nearly one year after the Plaintiff filed her initial complaint in lieu of prerogative writ. See Jacobs Certification, at p. 4 ¶¶ 10-12 and Exhibit H and I.<sup>1</sup> Denying the Plaintiff's motion to extend the discovery period, based upon the limitation contained in New Jersey Court Rule 4:24-1(c), would unfairly reward the Defendants for committing their wrongful act at a later stage of the initial action and would effectively permit them to evade any consequences for their wrongful actions. Therefore, good cause exists for the Court to extend the discovery period so that Plaintiff may fully investigate and avail herself of the opportunity to effectively prove her additional causes of action against the Defendants for their wrongful conduct.

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<sup>1</sup> Moreover, some of the events which form the basis for these additional causes of action occurred within the past week. See Barocas Certification at p. 4 ¶¶ 12-13.

## POINT FOUR

### **ATTORNYES FEES AND COSTS SHOULD BE AWARDED TO THE PLAINTIFF FOR THE DEFENDANTS' VIOLATION OF THE FRIVOLOUS LAWSUIT STATUTE AND OPRA**

To date the Plaintiff has undertaken a substantial amount in attorney time and disbursements due to the Defendants' wrongful actions. Their actions have subjected the Plaintiff to the stipulation of dismissal which was induced by fraud and has, in turn, caused her to dismiss her already-filed and pending complaint in lieu of prerogative writ, renew her requests for PTE Records with various Agencies and institute this motion. See Jacobs Certification at p. 4 ¶¶ 12, 13 and Exhibits I and J. The Defendants' actions have further violated the Frivolous Lawsuit statute and OPRA, which both provide for attorney's fees to be paid to the party upon whom the wrongful act was committed.

Under the Frivolous Lawsuit statute, a Court may award all reasonable litigation costs and reasonable attorney fees to a prevailing party, "if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the non-prevailing person was frivolous." N.J.S.A. 2A:15-59.1(a). In order to determine whether a complaint, counterclaim, cross-claim or defense was frivolous, the Frivolous Lawsuit statute provides for the Court to assess whether it was "commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury." N.J.S.A. 2A:15-59.1(b)(1).

The Defendants' defense that they did not direct or control the Agencies' denials of the Plaintiffs PTE Requests was fraudulent and as such ample evidence exists that it was raised in bad faith. Likewise, the representation that Defendants had "no records responsive to the OPRA request upon which the above complaint is based" was also made in bad faith, as to which the Miller Memo attests. Indeed, as stated earlier, the Barocas Certification clearly reflects that the

Office of the Attorney General was aware of the Miller Memo when he informed Plaintiff's counsel that the Attorney General's Office did not direct or control the Agencies responses and had no documents responsive to Plaintiff's request. See Barocas Certification at p. 3-4 ¶ 10-13.

Furthermore, an improper denial of government records under OPRA provides for an award of attorney's fees to the prevailing party. N.J.S.A. 47:1A-6. The Defendants denied the Plaintiff access to the PTE Records and as such must be directed to pay the attorney's fees the Plaintiff incurred in bringing her complaint challenging such denial.

## POINT FIVE

### **THE DEFENDANTS MUST BE SUBJECT TO A CIVIL PENALTY FOR KNOWINGLY AND WILLINGLY VIOLATING OPRA AND UNREASONABLY DENYING THE PLAINTIFF ACCESS TO THE REQUESTED PTE RECORDS**

OPRA allows a court to impose a civil penalty in the amount of \$1,000.000 against a “public official, officer, employee or custodian who knowingly and willfully violates [OPRA]. . . and is found to have unreasonably denied access under the totality of the circumstances.”

N.J.S.A. 47:1A-11. Both Defendants fall within the ambit of this provision of OPRA because the Defendant Bruce Solomon serves as Custodian of Records for the Office of the Attorney General of New Jersey, qualifying as a public custodian, and the Defendant Peter C. Harvey qualifies as a public official by virtue of his position as the Attorney General for the State of New Jersey. The Defendants were entrusted to permit “record[s] to be inspected, examined, and copied by any person under OPRA.” N.J.S.A. 47:1A-5.

The Defendants violated this duty when they denied the Plaintiff’s request for PTE Records. See Jacobs Certification at p. 3 ¶ 8 and Exhibit F. Their denial was also unreasonable, given the totality of the circumstances. The request pertained to specific documents and was not overly burdensome. See Id., at p. 3 ¶ 7 and Exhibit E. Consequently, the Court must assess the penalty of \$1,000.00 against each of the Defendants for knowingly and willfully violating OPRA and unreasonably denying access to the requested PTE Records, under the totality of the circumstances.

**CONCLUSION**

For the foregoing reasons, the motion to withdraw the stipulation of dismissal, reinstate the original complaint in lieu of prerogative writ, amend the original complaint in lieu of prerogative writ, extend discovery and grant an award of attorney's fees and costs to the Plaintiff should be granted in favor of the Plaintiff.

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Dated: May 3, 2006