AMERICAN CIVIL LIBERTIES UNION of NEW JERSEY
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Iris Bromberg
Transparency Law Fellow

VIA LAWYERS SERVICE

January 26, 2017

Middlesex County Courthouse
Superior Court of New Jersey
56 Paterson Street
New Brunswick, NJ, 08903-0964

Re: ACLU-NJ v. Middlesex County Prosecutor's Office
Docket No.: MID-L-06663-16

Dear Clerk:

Enclosed please find for filing an original and two copies of the following Plaintiff's reply letter brief to Defendant's opposition brief. Please file these documents and return a copy stamped "filed" in the enclosed self-addressed, stamped envelope.

Thank you for your attention to this matter. If you have any questions or concerns, please contact me at (973) 854-1713.

Sincerely,

Iris Bromberg

cc: Jeanne- Marie Scollo, Esq.

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Docket No.: MID-L-06663-16

Dear Judge Francis:

Please accept this letter brief in lieu of a more formal reply to the opposition brief by Defendants Middlesex Prosecutor's Office ("MCPO") and James O'Neill ("O'Neill").

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LEGAL ARGUMENT

I. Defendants Failed to Meet Their Burden of Establishing that the N.J.S.A. 47:1A-5(c) Charge is Justified.

As explained in Plaintiff's opening brief, Plaintiff requested easily-identifiable records, namely civil asset forfeiture complaints filed by Defendant Middlesex County Prosecutor's Office (MCPO) and answers to those complaints. The request was one of twenty-one identical requests sent to county prosecutors' offices throughout the state seeking publicly-filed records. In response to the request, every other county produced the publicly-filed records sought free of charge.

Despite this, Defendants continue to condition Plaintiff's access to the public records on payment of a $725.85. Defendants primarily seek fees based on N.J.S.A. 47:1A-5(C). The provision authorizes a special service charge based on the actual direct cost of providing a government record when the records cannot be reproduced using ordinary equipment or reproduction involves an extraordinary expenditure of time and effort. In pertinent part, the section provides:

> Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record

> cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies [.] . . . The requestor shall have the opportunity to review and object to the charge prior to it being incurred.
>
> N.J.S.A. 47:1A-5(c).

As noted in Plaintiff's initial brief, this provision must be read in conjunction with OPRA's mandate that a public agency must make government records "readily accessible" to the public unless exempt, N.J.S.A. 47:1A-1, and that the agency bears the "burden of proving that the denial of access is authorized by law." Id. Additionally, OPRA instructs that ""any limitation on the right of access . . . shall be construed in favor of the public's right of access." Id.

Defendants assert that the special service charge is appropriate because of the time and effort exerted to redact publicly-filed records (that are available without redactions through the judiciary) and to identify and compile records using judiciary technology. Defendants' application of the N.J.S.A. 47:1A-5(c) was not justified and, if Defendants' arguments are adopted, it would impermissibly hinder access to public records contrary to the legislature's intent.

A. Defendants Improperly Imposed a Special Service Charge Based on Self-Imposed Hurdles Created by Both Their Poor Records Management Practices and Their Failure to Cooperate with Plaintiff.

In their brief, Defendants continue to claim a special service charge pursuant to N.J.S.A. 47:1A-5(c) primarily based on the time and effort Defendants exert in compiling the records from judiciary websites due to Defendants' poor internal records management practices. See, e.g., DB.[1] at 4-5 (explaining that "the records sought were only accessible through a two-step process, since the civil forfeitures are not maintained together in one file, nor is a list of civil forfeitures maintained in MCPO's normal course of business); Id. at 5 (explaining that "[s]ince the responsive records were not already stored or maintained by MCPO electronically, in order to provide them electronically, the documents would have needed to be retrieved from individual case files, compiled, and individually scanned."); Id. (describing the production process associated with producing MCPO's records as "overwhelming and time consuming"). Additionally, by Defendants' admission, Plaintiff was excluded from key decisions regarding the use of such technologies. See e.g. DB at 5 (explaining that "rather than undertake th[e] overwhelmingly time consuming process [of

[1] Defendants' brief dated December 21, 2016, will be referred to herein as "Db."

searching for and producing MCPO's records], MCPO opted to utilize the Judiciary Electronic Filing System . . . .").

As discussed above, N.J.S.A. 47:1A-5(c) authorizes a reasonable special service charge based on the actual direct cost of production of printed material where the record cannot be reproduced using ordinary equipment or where reproduction involves extraordinary expenditure of time and effort. See also PB[2]. 11 - 14. It does not - as Defendants continue to assert - apply to the programming or manipulation of technology. Rather, N.J.S.A. 47:1A-5(d), a provision Defendants do not rely on, addresses the use of information technology, and would not justify a special charge or withholding of information here.

However, even if N.J.S.A. 47:1A-5(c) applied to time spent using information technology, Defendants have failed to demonstrate that the retrieval of electronic court records required an extraordinary amount of time and effort. At the risk of stating the obvious, Defendants routinely file complaints and receive responses to those complaints. As such, retrieving these records is more routine and ordinary than exceptional and extraordinary. Indeed, every other county has responded to Plaintiff's request by providing the record in ordinary course of business without imposing a special service charge. Such a

[2] Plaintiff's brief dated November3, 2016, will be referred to herein as "Pb."

result is expected, because Plaintiff requested records that are readily-identifiable and easily obtained; namely, civil asset forfeiture complaints filed by Defendants during a limited period of time and the answers received, if any. Simply put, there was nothing "extraordinary" about Plaintiff's request.

Furthermore, even if the request involved a large expenditure of time and effort, Defendants cannot penalize Plaintiff for their own organizational failures. Indeed, Defendants primarily justify the technology fee based on the agency's own inadequate record management practices. Additionally, Defendants seek to penalize Plaintiff for its unilateral decision to search external records using the judiciary's technology.[3]

Such invocations cannot stand because they reward an agency for failing to meet its obligation to make its "records readily accessible," N.J.S.A. 47:1A-1, and to cooperate with requestors. See Mason v. City of Hoboken, 196 N.J. 51, 66, 78 (2008). An ordinary request (such as Plaintiff's request here) should not be made into an extraordinary one based on an agency's own deficient practices. Otherwise, it would encourage agencies to

[3] Had Defendants communicated any of their alleged concerns regarding the request, Plaintiff would likely have modified the request by accepting non-electronic copies.

refuse to cooperate with requestors and adopt poor record management practices in order to hinder transparency.

The Appellate Division dealt with a similar issue in Burnett v. Gloucester Cty. Bd. of Chosen Freeholders, and rejected such arguments. 409 N.J. Super. 219 (App. Div. 2009). The county there argued that it could not (and was not obligated to) provide the settlement agreements that Burnett sought because the agreements were not held by the county but, rather, were held by a third party namely, the insurance carrier). The court recognized that accepting the county's position would frustrate and undermine OPRA's fundamental purpose of transparency. In determining that the settlements were public records, the court stated that "[w]ere it to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlines OPRA." Id. at 517.

Similarly here, Defendants cannot frustrate access by imposing a special service charge on requestors for efforts and costs stemming from their failure to adopt adequate records management practices and their failure to cooperate with requestors. To conclude otherwise would create a situation where, in response to the same OPRA request, agencies engaging in strong record management practices and communicating with

requestors would produce the records either free of charge or at minimal cost but agencies implementing poor records management or ignoring requestors would frustrate access by conditioning access on unnecessary fees. Neither the spirit nor letter of OPRA, nor precedent, permit that result.

As the Supreme Court has recognized, "New Jersey can boast of a long and proud tradition of openness and hostility to secrecy in government." Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274,283 (2009). The arguments asserted by Defendants would threaten that tradition, undermine the public's statutory rights, and make it more difficult for those seeking to monitor the actions taken on their behalf. Defendants' positions must be rejected.

B. Defendants Improperly Imposed a Special Service Charge Based on Unlawful Redactions to Public Filings.

Defendants continue to seek charges under N.J.S.A. 47:1A-5(c) for the amount of time and effort exerted to redact the publicly-filed court record that were either filed by Defendants themselves or filed without Defendants' objection.

As detailed in Plaintiff's opening brief, Defendants cannot justify special service charges based on unlawful redactions to publicly-filed records. Such records are ordinarily not subject to redactions under OPRA. PB at 13 - 14. Additionally, as previously asserted, to the extent that Defendant MCPO violated

court rules by including personally identifiable information in its civil summonses and complaints or failing to object to such filings, it should bear the burden and cost of correcting its error. Id. Any alternative application of N.J.S.A. 47:1A-5(c) would have the effect of improperly restricting access. Id.

In their brief, Defendants altogether fail to acknowledge the records' unique nature as court records and their direct role in making the very records sought publicly-available elsewhere. Similarly, Defendants fail to provide any specific justification for redacting the records or transferring the costs associated with such actions onto Plaintiff. Indeed, Defendants consideration of the redactions is limited to the conclusory position that the records must be redacted. DB. 6-7 (Arguing that OPRA contemplates redactions but failing to explain why such redactions apply here).

In sum, Defendants have failed to meet their "burden of proving that the denial of access is authorized by law." N.J.S.A. 47:1A-6. As such, the redactions were unlawful and cannot be factored into a special service fee.

II. Defendants Violated OPRA's Procedure for Imposing a Special Service Charge by Failing to Provide Plaintiff with the Opportunity to Review the Charge Before The Documents Were Compiled.

In support of the special service charge, Defendants falsely assert that Plaintiff was provided with an opportunity to review

the charge before the records were compiled. DB at 2 (Defendants characterizing their June 20, 2016 letter to Plaintiff as merely "advis[ing]" that "a special service charge was to be assessed."). This assertion can be quickly disposed of, as the very letter Defendants rely on plainly states that the "Middlesex County Prosecutor's Office has prepared a CD which includes 109 civil summonses and complaints and (4) Answers, Demands for Damages, Separate Defenses and Designation of Trial Counsel from defense counsel . . . for the period of January 1, 2016 to June 1, 2016." See DB at Exhibit A. Thus, by Defendants own admission Plaintiff was informed of the charge only after the records were compiled, redacted and transferred to a CD.

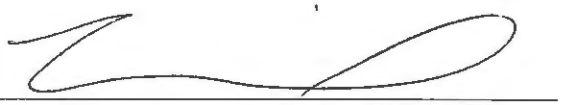
As explained in detail in Plaintiff's main brief, Defendants' actions violate OPRA. Defendants' failure to provide Plaintiff notice of the imposition of a fee runs afoul of OPRA's explicit mandate that a requestor be provided with "the opportunity to review and object to charge prior to it being incurred." N.J.S.A. 47:1A-5(c); Pl. Br. at 14. Additionally, Defendants' failure to cooperate with Plaintiff violates "the responsiveness and cooperation expected from custodians." See Gilleran v. Bloomfield, ___ N.J. ___, 22 (2016) (citing various provisions within N.J.S.A. 47:1A-5); See also PB. at 9 (explaining custodians obligation to work with requestors to reasonably accommodate requests, and outlining various

provisions within OPRA designed to foster cooperation such cooperation).

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Plaintiff's opening brief, the court should direct Defendants to provide the records requested, and award reasonable attorney's fees and costs to Plaintiff.

Respectfully submitted,



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