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THE AMERICAN CIVIL LIBERTIES UNION  
OF NEW JERSEY, a non-profit  
advocacy organization located in  
Newark, New Jersey,

Plaintiff,

v.

The NEW JERSEY DEPARTMENT OF  
HEALTH, a public agency formed  
under the laws of the State of New  
Jersey;  
GENEVIEVE RAGANELLI, in her  
professional capacity as custodian  
of records for the New Jersey,  
Department of Health,

Defendants.

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: **SUPERIOR COURT OF NEW JERSEY**  
: **LAW DIVISION: Mercer County**  
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: Docket No.:  
:  
: Civil Action  
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:  
: **PLAINTIFF'S BRIEF IN SUPPORT**  
: **OF JUDGMENT ON VERIFIED**  
: **COMPLAINT**

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**STATEMENT OF FACTS**

Plaintiff American Civil Liberties Union of New Jersey [hereinafter "ACLU-NJ"], by way of a records request sent on October 30, 2014, sought records from the New Jersey Department of Health [hereinafter "DOH"] pertaining to government monitoring and management of the Ebola virus disease [hereinafter "EVD"]. The request sought correspondence, including email records, written by or received by specified public employees, during a specific period of time, and containing particular search terms. Alternatively, the request identified correspondence, including email records, written by or received by specified public employees, during a specific period of time, regarding a particular subject matter.

Specifically, Plaintiff's October 30, 2014, request stated:

This request seeks correspondence regarding government management of the Ebola virus disease (EVD). Please provide copies of the following records made, maintained, kept on file, or received by the New Jersey Department of Health (DOH) from September 1, 2014, to the present.

For the purposes requests [sic] 1, 2, and 3 below, we are seeking records, that were made, sent or received on or after September 1, 2014, to or from Commissioner O'Dowd, Dr. Christina Tan, Dr. Arturo Brito, Christopher Rinn, Gary Ludwig, and/or DOH staff members assigned to the Ebola Virus Disease Joint Response Team (EVD-JRT).

1. Correspondence, including email, regarding the development of policies regarding the monitoring and management of EVD.

2. Correspondence, including email, regarding the implementation of policies regarding the monitoring and management of EVD.
3. Email containing one of more of the following keywords: "Ebola," "EVD," "Quarantine," "Isolation," "Screening."

Additionally, for request 4 below, we are seeking records sent from or received by any employee of DOH or the EVD-JRT since September 1, 2014, fitting the following parameters:

4. Correspondence, including email, sent to and/or from any county department of health regarding the implementation of policies regarding the monitoring and management of EVD.

Exhibit A to Verified Complaint.

On November 17, 2014, Defendant Raganelli emailed Plaintiff to confirm receipt of the request (identified by Defendants as Request C92009) on November 5, 2014, and to inform Plaintiff that Defendants required an extension to an anticipated response date of December 2, 2014. Exhibit B to Verified Complaint.

Over two weeks after the initial extension, on December 22, 2014, Defendant Raganelli emailed Plaintiff to inform Plaintiff of an unexplained extension date of January 15, 2015. Exhibit C to Verified Complaint.

On December 22, 2014, an attorney for Plaintiff emailed Defendant Raganelli stating that a failure to meet the new response date, set for over 10 weeks after the initial request was received by DOH, would be deemed a denial. Exhibit D to Verified Complaint.

On January 14, 2015, over two months after Plaintiff's records request was received, Defendant Raganelli denied Plaintiff's request, stating that the requests were "improper and overly broad, as they fail to identify specific government records, [and] would require the custodian to conduct research to respond..." Exhibit E to Verified Complaint. Additionally, the custodian stated that "to the extent they seek 'inter-agency or intra-agency advisory, consultative, or deliberative material' [such material] is excluded from the definition of 'government records.'" *Id.* The Custodian further claimed that the request would substantially disrupt agency operations. *Id.*

Defendants' denial did not explain the necessity of the lengthy extension taken, in order to satisfy a public records request that Defendants claim falls outside of OPRA. Nor did it contain an index of withheld documents.

To date, Defendants have not disclosed to Plaintiff any records responsive to Request C92009. Defendants simply provided Plaintiff with a document entitled "New Jersey Mandatory Quarantine and Screening Protocols" that was dated October 31, 2014 and referred Plaintiff to the Department's website (which contained none of the correspondence Plaintiff requested). Exhibit E to Verified Complaint.

Plaintiff therefore filed this timely challenge to Defendants' denial of access to public records.

## SUMMARY OF ARGUMENT

The ACLU-NJ sought records that fit specific parameters. Its request identified records, including emails, written by or received by one of a few specifically-identified public employees, during a specific period of time, and containing one of five particular search terms. Alternatively, the ACLU-NJ requested records, including emails, written by or received by one of a few specifically-identified public employees, during a specific period of time, regarding a particular subject matter. The ACLU-NJ's requests therefore identified the records sought with reasonable clarity.

Moreover, the request merely required the records custodian to conduct a basic search of the office's email system. It did not require the creation of a new record, nor did it require the records custodian to engage in analytical research or use her discretion in any way.

Accordingly, it was a valid request that should have been fulfilled. Defendants failed to do so, and thereby violated the Open Public Records Act.

Further, the custodian would not be entitled to issue a blanket rejection of all emails as falling within the "inter-agency or intra-agency advisory, consultative, or deliberative material" exemption to OPRA. If the custodian seeks to invoke

that exemption, a document-by-document review must occur, and plaintiff must be provided with a privilege log.

Finally, the custodian failed to either provide the records or deny the request in a timely manner. While custodians are granted leeway in providing documents when extensive searches are occurring, in this case, the custodian took months only to deny plaintiff's request *on the grounds that the request itself was invalid*. Thus, the defendant clearly engaged in delay-after-delay without justification, in violation of OPRA.

#### **ARGUMENT**

The goal 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." *Mason v. City of Hoboken*, 196 N.J. 51, 64-65 (2008), quoting *Asbury Park Press v. Ocean County Prosecutor's Office*, 374 N.J. Super. 312, 329 (Law Div. 2004). To ensure this statutory goal is met, OPRA expressly mandates that "any limitation on the right of access . . . be construed in favor of the public's right of access." *N.J.S.A. 47:1A-1*.

#### **I. DEFENDANTS VIOLATED OPRA BY DENYING ACCESS TO RECORDS THAT WERE "IDENTIFIED WITH REASONABLE CLARITY"**

Plaintiff ACLU-NJ was denied access to records it requested in its October 30, 2014, request. The main basis of the denial



was that the requests were "improper and overly broad, as they fail to identify specific government records, [and] would require the custodian to conduct research to respond. . . ." *Id.* The custodian also stated that "to the extent they seek 'inter-agency or intra-agency advisory, consultative, or deliberative material' [such material] is excluded from the definition of 'government records.'" *Id.* The custodian further claimed that the request would substantially disrupt agency operations. *Id.*

The custodian's contention that the ACLU-NJ's OPRA request for emails was invalid because it was "overbroad" and would require "research" is unfounded. In seeking emails containing either specific terms or a specific subject matter, which were sent to or from identified government officials during a limited two month timeframe, Plaintiff identified records with reasonable clarity and did not make an overly broad request for "information" that would require a custodian to engage in subjective analysis, research, or data correlation.

On several occasions, the Appellate Division has described the difference between valid and invalid OPRA requests. The court has explained that an OPRA request must simply identify the records sought "with reasonable clarity," so that custodians are not required "to conduct research . . . and correlate data from various government records." *See Bent v. Twp. of Stafford*

*Police Dep't* [hereinafter "*Bent*"], 381 N.J. Super. 30, 37 (App. Div. 2005); see also *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control* [hereinafter "*MAG*"], 375 N.J. Super. 534, 546 (App. Div. 2005). While custodians cannot be required to perform "research," requests for emails can properly require a custodian to conduct a search of an agency's email system to "locate[] and produce[]" the records that fit the parameters of the request. *Burke v. Brandes* [hereinafter "*Burke*"], 429 N.J. Super. 169, 177 (App. Div. 2012).

The ACLU-NJ's request identified the records sought with reasonable clarity. In fact, it described the records with several specific parameters. The custodian needed only to conduct a conventional search of the agency's email system to comply.

Properly analyzed, the ACLU-NJ's OPRA request identified records to the extent necessary under controlling law. A review of the requirements for describing records, first discussed at length in *MAG*, and most recently and significantly clarified in *Burke* reveals why this is so.

In *MAG*, the Appellate Division dealt with a broad-based request for, among other items, "all documents or records evidencing that the [Division of Alcoholic Beverage Control] sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated

person in which such person, after leaving the licensed premises, was involved in a fatal auto accident . . . ." 375 N.J. Super. at 539. The requestor asked not only that any such documents be provided, but that the Division affirmatively create documents setting forth "the persons and/or parties involved, the name and citation of each such case, including unreported cases, the dates of filing, hearing and decision, the tribunals or courts involved, the substance of the allegations made . . ." and other details. *Id.* at 540.

The Appellate Division held that "the [OPRA] request failed to identify with any specificity or particularity the governmental records sought" because "MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past" and that, "[u]nder OPRA, agencies are required to disclose only 'identifiable' governmental records not otherwise exempt." *Id.* at 549.

Similarly, in *Bent*, the Appellate Division stated that "a party requesting access to a public record under OPRA must specifically describe the document sought." 381 N.J. Super. at 37. Accordingly, the court held that "a proper request under OPRA must *identify with reasonable clarity* those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents." *Id.* (emphasis

added). Because the request from Bent sought an entire case file, including a request not for records but, instead, for "the factual basis underlying" the agency's action at issue, *id.* at 34, the court held that it was an "open-ended demand [that requires] analysis and evaluation which the agency is under no obligation to provide." *Id.* at 40.

Likewise, in *New Jersey Builders Ass'n v. New Jersey Council on Affordable Housing* [hereinafter "NJBA"], 390 N.J. Super. 166 (App. Div.), *cert. denied* 190 N.J. 394 (2007), the court was faced with an overbroad and vague request that did not identify documents with reasonable clarity. NJBA's request had 38 parts and sought "any and all documents and data" that were "'used' or 'considered' by COAH or 'support[ing],' 'demonstrate[ing,]' 'justify[ing,]' or 'verify[ing]'" various determinations relevant to COAH's determinations about fair-share housing obligations." *Id.* at 172. The Appellate Division found this request to be invalid because the "request required COAH's custodian to survey COAH employees, gather responsive information and produce new documents. . . . OPRA does not require an agency to perform such tasks . . . ." *Id.* at 171.

The ACLU-NJ's request is qualitatively different from those disapproved requests. Not only is the ACLU-NJ's request reasonably clear, but it also does not require the custodian to engage in *any* analysis or evaluation. It merely requires her to

enter the relevant search parameters in the State's email system. In fact, this matter is directly on point with Appellate Division decisions (discussed below) that found that requests should not have been denied, as the requestor identified the documents sought with reasonable clarity.

In finding an OPRA request to have validly identified records "with reasonable clarity," the Appellate Division's decision in *Burnett v. County of Gloucester*, 415 N.J. Super. 506 (App. Div. 2010), is highly instructive. There, the court made clear that a requestor need not identify the record with minute exactitude; he must simply provide enough information for a records custodian to identify what records that requestor is seeking. *Id.* at 513-14.

Specifically, in *Burnett*, the Appellate Division addressed the denial of a request for "[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present" by the County of Gloucester. *Id.* at 508. The county argued that "a request for 'settlement agreements' without specification of the matters to which they pertain" does not sufficiently identify the documents sought. *Id.* The court rejected the county's argument by reiterating that, while not obligated to conduct "research" or correlate data, a records custodian is still required to "search her files" for documents

that have been sufficiently identified by a requestor. See *id.* at 515.

In short, the Appellate Division held: "the fact that [the individual] requested settlement agreements and releases without specifying the matters to which the settlements pertained did not render his request a general request for information obtained through research, rather than a request for a specific record." *Id.* at 513-14. The court explained that the records had been sufficiently identified, "and their retrieval requires a search, not research." *Id.* at 516.

The Appellate Division's decision in *Burke* is most pertinent to this case. First, the decision in *Burke* analyzes and explains the meaning of the terms "reasonable clarity" and "research" as they are used in *MAG* and its progeny. Second, the situation in *Burke* is directly on point with the present case.

In *Burke*, the Appellate Division ruled in favor of a requestor who was denied a request for records by the Office of the Governor. The Appellate Division rejected the State's basis for denying the OPRA request, *i.e.*, that the request lacked specificity and was thus overbroad, and would require "research" rather than a mere search. 429 N.J. Super. at 177-78. The State in the present case denied Plaintiff's request on the same basis.

The requestor in *Burke* sought correspondence (including electronic correspondence) between the Office of the Governor and the Port Authority related to EZ Pass benefits afforded to retirees of the Port Authority. *Id.* at 176-77. The main question in *Burke* (as is the question here) was whether the documents requested were identified with "reasonable clarity," so that there was no need for a clerk "to analyze and evaluate information to respond to the request." *Id.* at 175, citing *Bent*, 381 N.J. Super. at 40.

The court explained that the question under *MAG* and its progeny is whether a request can be satisfied by a clerk simply conducting a search of the email system in order to "locate[] and produce[]" records, or, instead, whether the request demands "analysis []or the exercise of judgment in identifying responsive records." *Id.* at 177. According to the court, a request that identifies specific parameters - there, emails and written correspondence from or to particular individuals, during a particular timeframe, and related to a particular subject - does not necessitate such analysis or exercise of judgment. *Id.* Rather, a clerk only needs to search her files and provide the documents that fit within the requestor's parameters. *Id.*

The court in *Burke* therefore held that the request at issue was valid, as the "responsive records could have been easily identified, located and produced from a routine search of files

pertaining to a very narrowly selected topic . . . .  
[P]laintiff's request in this case demanded neither analysis,  
nor the exercise of judgment in identifying responsive records."  
*Id.*

Here, as in *Burke*, a records requestor identified correspondence by sender and by a particular timeframe. Three of the four specific requests made by Plaintiff also limited the scope of the emails to specific subject matters, just as in *Burke*. Thus, for analysis purposes, three of the four requests here provided the *exact* type of parameters that were at issue in *Burke*. Plaintiff's one additional request here simply provided an alternate way to identify the documents sought, and did so with just as much (if not even more) clarity. The one additional request here also identified correspondence by sender and by a particular timeframe. The lone difference is that it further identified the documents sought by specific keywords rather than by subject matter.

Yet identification by keyword is just as valid an identifier as identifying by subject matter, and thus that is a distinction without a practical or legal difference. Indeed, as the above cases make clear, the question is whether the requested records can be identified with "reasonable clarity" so that the documents can be located and retrieved through a routine search of the email system. Just as in *Burke*, the



parameters of the request here are perfectly clear. Emails to or from specific DOH officials during the given time period and that contain one of the specified keywords are the responsive records Plaintiff seeks. And the exact action required of the custodian to comply with the request in *Burke* is what is required here: *i.e.*, a routine keyword search of an email file.<sup>1</sup>

Thus, like the requests in *Burke* and *Burnett*, and unlike the requests in *MAG*, *Bent*, or *NJBA*, Plaintiff provided information that "identif[ied] with reasonable clarity those documents that are desired." *Bent*, 381 N.J. Super. at 37. That is the case for each of the plaintiff's four requests.<sup>2</sup> And unlike *MAG*, *Bent*, and *NJBA*, the request did not require a custodian to create a new record or engage in subjective analysis or collation of information. As the Appellate Division held in *Burke*: "Involving no research or analysis, but only a search for, and production of, what proved to be readily identifiable records, plaintiff's properly circumscribed and tailored request was wrongly invalidated as overbroad." *Burke*, 429 N.J. Super. at 178.

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<sup>1</sup> Presumably, the custodian complied with the request in *Burke* by using the term "EZ Pass" and other potentially-related terms in keyword email searches.

<sup>2</sup> Even if one or more of the four specific requests within the ACLU-NJ's OPRA submission were invalid (which they are not), the custodian would still be obligated to provide documents for the requests in the OPRA submission that were valid.

Plaintiff made requests with clearly identifiable parameters. Any email (or other correspondence) satisfying those parameters was a responsive document that should have been provided to Plaintiff. Thus, Plaintiff "reasonably identified" the documents it sought. Defendants violated OPRA when they denied Plaintiff access to those requested records.

**II. THE ACLU-NJ'S REQUEST WOULD NOT SUBSTANTIALLY DISRUPT AGENCY OPERATIONS.**

Given that Plaintiff's request would require a normal search for documents and is not a request that would require such overwhelming resources as to disrupt agency operations in any way, much less substantially disrupt such operations, this basis for denial was completely unfounded. This request is limited by numerous ways: sender/recipient (identifiable DOH and county health staff), time frame (two months), and subject matter (EVD). Indeed, the request is not even one that would justify a special service charge (as is permitted for "extraordinary" requests, see *N.J.S.A.* 47:1A-5(c)), much less an outright denial of the request.

Further, even where applicable, such a denial can be invoked only after the custodian "attempts to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." *N.J.S.A.* 47:1A-5(g); see also

*Mason v. City of Hoboken*, 196 N.J. 51, 78 (2008). The

Defendant custodian made no such attempts.

**III. THE EXEMPTION FOR "ADVISORY, CONSULTATIVE, OR DELIBERATIVE MATERIALS" DOES NOT CREATE A BLANKET EXEMPTION BUT, RATHER, REQUIRES A DOCUMENT-BY-DOCUMENT REVIEW AND, IF DOCUMENTS ARE THEN WITHHELD, PLAINTIFF IS ENTITLED TO A LOG OF THOSE WITHHELD DOCUMENTS.**

In the present case, the custodian did not actually deny Plaintiff's request based on the OPRA exemption for "inter-agency or intra-agency advisory, consultative, or deliberative material." However, after denying the request for the reasons discussed in Point I above, the custodian further noted that "to the extent they seek 'inter-agency or intra-agency advisory, consultative, or deliberative material,' [such material] is excluded from the definition of 'government records.'" Exhibit E (emphasis added). The custodian did not identify whether documents were reviewed or if some or all such documents were being claimed to fall under the exemption. Indeed, based on the fact that the records were denied based on what the custodian alleges is the inability to identify the records sought, it seems such a review did not, and could not, occur.

Regardless, the deliberative exemption is not a blanket exemption. A document-by-document review must occur, which did not here. *Paff v. New Jersey Dept. of Labor* [hereinafter "*Paff II*"], 392 N.J. Super. 334, 341 (App. Div. 2007) (requiring review of the deliberative privilege claim "vis a vis each document").

See also *Paff v. Division of Law* [hereinafter "*Paff III*"], 412 N.J. Super. 140, 161, *certif. denied*, 202 N.J. 45 (2010) ("The judge analyzes the index to determine, *on a document-by-document basis*, whether each such claim of privilege should be accepted or rejected") (emphasis added). Indeed, if some documents that fall within the parameters of the request are covered by the exemption and other documents are not, those that do not fall under the exemption must be disclosed. *Id.*

Further, if Defendants at some point hereafter seek to actually invoke the exemption as it pertains to certain documents sought,<sup>3</sup> the ACLU-NJ would have a right to review a privilege log identifying each item that is being withheld. *Paff II*, 392 N.J. Super. at 341 ("An accurate index is necessary for substantive review by the requesting party as well as the reviewing court"); *Paff III*, 412 N.J. Super. at 161.

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<sup>3</sup> While the exemption might apply to certain documents providing advice on determining a final policy on an issue, it is unclear how the exemption would apply to the ACLU-NJ's request for emails after such final policy was reached, e.g., the emails the ACLU-NJ sought informing other government employees how to *implement* the policy. Indeed, for a document to be covered under this exemption, it not only must provide advice, it also "must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional." *In re Liquidation of Integrity Ins. Co.*, 165 N.J. 75, 84 (2000).

**IV. DEFENDANTS VIOLATED OPRA BY FAILING TO EITHER DENY PLAINTIFF'S REQUEST OR PROVIDE THE RECORDS IN A TIMELY MANNER.**

Pursuant to OPRA, after receiving a request for records, a custodian is required to respond within seven business days. *N.J.S.A.* 47:1A-5(i). Recognizing that some requests are extensive or seek documents not immediately in the control of the custodian (such as those in archives or with third parties), courts have permitted clerks to respond by extending the time to search for and provide the requested documents. *See, e.g., N.J.S.A.* 47:1A-5(i) and -5(g); *see also NJBA*, 390 N.J. Super. at 171, 180 (recognizing circumstances in which OPRA permits production at a later date). Yet OPRA does not permit delays that lack any valid or just cause, and that are simply delays for delay's sake. *See, generally, N.J.S.A.* 47:1A-5 (identifying only specific justifications for delays in providing access to records).<sup>4</sup>

In this case, the agency sought multiple delays not because it needed additional time to conduct a search, but rather for no

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<sup>4</sup> The Government Records Council, the body responsible for explaining OPRA to records custodians, explicitly advises that "[c]ustodians should fulfill a request as soon as possible but not later than seven business days after the request is received, provided that the record is currently available and not in storage or archived." *See N.J. GOV'T RECORDS COUNCIL, HANDBOOK FOR RECORDS CUSTODIANS* (5th ed. Jan. 2011), available at [http://www.nj.gov/grc/pdf/Custodians%20Handbook%20\(Updated%20January%202011\).pdf](http://www.nj.gov/grc/pdf/Custodians%20Handbook%20(Updated%20January%202011).pdf)

valid purpose. Indeed, after seeking an extension, missing its own suggested date for response, and not responding for over two months after it received Plaintiff's request - all while Plaintiff waited for records it assumed were being assembled and copied or redacted, the custodian's response was not that documents could not be found. Instead, she claimed Plaintiff *was never entitled to the records in the first place* because the request was invalid.

If that was Defendants' position, then no legitimate reason existed to delay a response to the request. If DOH's position was that the request should be denied, it should have conveyed that response to Plaintiff within seven business days, so that Plaintiff could then effectuate its right to appeal.<sup>5</sup> By engaging in significant delay, making it appear that the search for responsive records was occurring, Defendants misled Plaintiff, and for a period of months unlawfully denied Plaintiff a legitimate response to its OPRA request.

### CONCLUSION

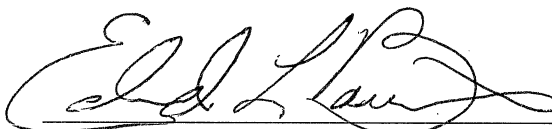
Because Defendants denied a valid records request, and because they delayed providing a final response to Plaintiff's request without having justification for that delay, Defendants

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<sup>5</sup> Not only do such delay tactics violate OPRA, but they incentivize needless litigation and a waste of judicial resources. After repeated delays, requesters are entitled to file suit to demand access.

have violated OPRA. Plaintiff's request for access to the requested records, as well as all other relief sought in its verified complaint, including reasonable attorneys' fees, should be granted.

February 27, 2015



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