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LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, a non-profit advocacy organization located in Washington, D.C.,	**SUPERIOR COURT OF NEW JERSEY LAW DIVISION: Atlantic County**
Plaintiff,	Docket No.:
v.	Civil Action
ATLANTIC CITY BOARD OF EDUCATION, a public agency formed under the laws of the State of New Jersey; **ANGELA BROWN**, in her professional capacity as custodian of records for the Atlantic City Board of Education,	**PLAINTIFF'S BRIEF IN SUPPORT OF JUDGMENT ON VERIFIED COMPLAINT**
Defendants.	

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Plaintiff The Lawyers' Committee for Civil Rights under Law [hereinafter "Lawyers' Committee"], is a national non-profit organization dedicated to securing equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. The Lawyer's Committee focuses on advocacy on behalf of public school children for equal educational opportunities through several of its projects and programs, including the Education Opportunities Project and the former South Jersey Educational Reentry Program (SJERP). Plaintiff maintains an office in Washington, D.C.

Plaintiff, by way of a records request sent on February 10, 2015, sought records from the Defendant Atlantic City Board of Education [hereinafter "BOE"] documenting school-level enrollment and disciplinary statistics by ethnic/racial subgroup, as is required to be collected for the Department of Education Office of Civil Rights Civil Rights Data Collection Survey. The Lawyers' Committee also requested policies and procedures regarding the Board's disciplinary practices and referrals of students to law enforcement. Exhibit A to Verified Complaint; Exhibit B to Verified Complaint. Specifically, Plaintiff requested:

1. Documents that reflect school-level enrollment data by ethnic/racial subgroup for Atlantic City High School, as required to be collected from 2003 - present by the United States Department of Education Office of Civil Rights Civil Rights Data Collection survey (www2.ed.gov/about/offices/list/ocr/docs/crdc-2013-14-allschools-form.doc).

2. Documents that reflect school-level enrollment data by ethnic/racial subgroup for Atlantic City High School East Campus, as required to be collected from 2003 - present by the United States Department of Education Office of Civil Rights Civil Rights Data Collection survey (www2.ed.gov/about/offices/list/ocr/docs/crdc-2013-14-all-schools-form.doc).

3. Documents that reflect school-level disciplinary data by ethnic/racial subgroup for Atlantic City High School, as collected from 2003 - present for the United States Department of Education Office of Civil Rights Civil Rights Data Collection survey.

4. Documents that reflect school-level disciplinary data by ethnic/racial subgroup for Atlantic City High School East, as collected from 2003 - present for the United States Department of Education Office of Civil Rights Civil Rights Data Collection survey.

5. Policies and procedures relating to student disciplinary practices, including but not limited to policies and procedures pertaining suspensions and expulsions, "zero-tolerance" offenses, and disciplinary hearings and appeals.

6. Policies and procedures relating to referrals of students by school officials to law enforcement, if not included by the requests above.

7. A copy of any electronic data sets, such as Access or Excel, maintained by the Atlantic City Board of Education that contains enrollment information separated by campus.

Id.

On February 20, 2015, Defendants' counsel wholly denied Plaintiff's request. Defendants provided three reasons for the denial: (1) the request was submitted by an out of state requestor; (2) the request was overbroad; and (3) the portion of the request seeking information documenting school-level enrollment data by race/ethnicity was "a record that is [not] 'made, maintained or kept' by the Board," and would require "the Board to 'create' a responsive document." Exhibit C to Verified Complaint.[1]

To date, Defendants have not disclosed to Plaintiff any records responsive to February 10, 2015 request.

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

SUMMARY OF ARGUMENT

The Defendants have unlawfully denied access to government records. First, the Lawyers' Committee' sought records that fit specific parameters. For Items 1-4 of its request, Lawyers'

[1] Plaintiff's February 10, 2015 request is the most recent in a series of requests by Lawyers' Committee, primarily focused on obtaining records documenting school-level enrollment and disciplinary data, that were rejected by Defendants. The prior requests are not the subject of this action. The prior requests are described in paragraphs 6 - 26 of Plaintiff's Verified Complaint.

Committee identified documents, for specific years, that set forth enrollment data or disciplinary data that the Board was required by the United States Department of Education to compile and maintain. For Items 5 and 6, it sought documents setting forth the Board's student disciplinary policies and practices, including the policies and practices regarding suspension, expulsions, "zero tolerance" offenses, student disciplinary hearings, and regarding referrals to law enforcement. For Item 7, it sought data sets containing enrollment data, if such records exist. The Lawyers' Committee's request therefore identified the records sought with reasonable clarity.

Moreover, the request merely required the records custodian to conduct a basic search. 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.

Further, Lawyers' Committee's out of state address has no relevance to its statutory right of access under OPRA.

Accordingly, the Lawyers' Committee submitted a valid request that should have been fulfilled. Defendants' failure to disclose the requested government records violated Plaintiff Lawyers' Committee's statutory right of access to government records under the Open Public Records Act.

ARGUMENT

"New Jersey has a strong, expressed public policy in favor of open government . . . ." Times of Trenton Publ'g. Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 529 (2005) (Lafayette Yard). In furtherance of that public policy, and in recognition that "secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society," N.J.S.A. 10:4-7, the New Jersey Legislature passed the Open Public Records Act, N.J.S.A. 47:1A-1 et seq. 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 at 64-65 (2008), quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (App. Div. 2004); see also Lafayette Yard, 183 N.J. at 535 (same).

To ensure that that statutory goal is met, the Act requires a withholding agency to bear the burden of proving that a denial of an OPRA request is justified under one of the statute's limited exceptions,[2] and it expressly mandates that "any

[2] OPRA exempts from public access certain specific records listed in the statute, or that are exempted from disclosure by any other statute, resolutions of either or both houses of the Legislature, regulations promulgated under the authority of

limitation on the right of access . . . be construed in favor of the public's right of access." N.J.S.A. 47:1A-1.

In the present case, Lawyer's Committee was entitled under OPRA to receive the requested records from its February 10, 2015 request. The Atlantic City Board of Education failed to fulfill OPRA's mandate that it be transparent and provide public documents to the public.

I. THE ATLANTIC CITY BOARD OF EDUCATION UNREASONABLY DENIED PLAINTIFF'S ACCESS TO THE GOVENRMENT RECORDS REQUESTED ON FEBRUARY 10, 2015.

A. OPRA Permits "Any Person" Access to Government Records

Defendants contend that "OPRA is limited only to New Jersey citizens." Exhibit C to Verified Complaint. Defendants are simply wrong.

Defendants' assertion is at odds with the unambiguous statutory language in OPRA. In re Kollman, 210 N.J. 557, 568 (2012) ("courts begin with the language of the statute ... If the plain language is clear, the court's task is complete"). While the Legislature did declare in the statute's preamble that it is New Jersey's public policy for government records to be available to "citizens of this State," OPRA's operational

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statute or Executive Order of the Governor, Executive Orders of the Governor, Rules of Court, or any federal law, federal regulation, or federal order. N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-1.1.

provisions do not require that a requestor be a citizen who resides in New Jersey. N.J.S.A. 47:1A-1 et seq. Quite the contrary, the operational provisions consistently, continually, and unambiguously afford access under OPRA to "*any person.*" See e.g. N.J.S.A. 47:1A-5(a)("[the] custodian of a government record shall permit the record to be inspected, examined, and copied *by any person* during regular business hours.")(emphasis added); N.J.S.A. 47:1A-5(b)("a copy or copies of a government record may be purchased by *any person* . . . .")(emphasis added); N.J.S.A. 47:1A-5(f)("[t]he custodian of a public agency shall adopt a form for the use of *any person* who requests access to a government record held or controlled by the public agency.")(emphasis added); N.J.S.A. 47:1A-5(j)(a custodian must post a "statement that sets forth in clear, concise and specific terms the right to appeal a denial of, or failure to provide, access to a government record by *any person* for inspection, examination, or copying or for purchase of copies thereof and the procedure by which an appeal may be filed")(emphasis added). See also N.J.S.A. 47:1A-6(b)(the Government Records Council must "receive, hear, review and adjudicate a complaint filed by *any person* concerning a denial of access to a government record by a records custodian [and] . . . operate an informational website and a toll-free helpline . . . which shall enable *any person*. . . to call for information regarding the law governing access to

public records and allow any person to request mediation or to file a complaint with the council when access has been denied.")(emphasis added); N.J.S.A. 47:1A-6(d)(the Government Records Council must provide parties with an opportunity to resolve the dispute through mediation "[u]pon receipt of a written complaint signed by *any person* alleging that a custodian of a government record has improperly denied that person access to a government record, the council shall offer the parties the opportunity to resolve the dispute through mediation.")(emphasis added).[3]

Moreover, OPRA's explicit allowance of anonymous requests is instructive. See N.J.S.A. 47:1A-5(i). Anonymous requests preclude enforcement of any "citizenship" requirement. The Legislature, when it limited access to certain government records that convicts can receive, specifically denied disclosure of those records to an anonymous requestor to ensure

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[3] The Government Records Council, the body responsible for explaining OPRA to records custodians, explicitly advises that OPRA is available to "Anyone! Although OPRA specifically references 'citizens of this State,' (N.J.S.A. 47:1A-1) the Attorney General's Office advises that OPRA does not prohibit access to residents of other states. Also, requestors may file OPRA requests anonymously without providing any personal contact information, even though space for that information appears on the form; thus anonymous requests are permitted. However, OPRA specifically prohibits anonymous requests for victims' records. N.J.S.A. 47:1A-2.2." 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

enforcement of the provision. N.J.S.A. 47:1A-2.2. If the Legislature intended to limit access to "citizens," it would have provided for similarly adequate enforcement. But tellingly, it did not.

Indeed, if the Legislature had intended to limit coverage under the statute based on state citizenship, domicile or residency, it would have done so in the operational provision, as it has done in other statutes. For example, in Shim v. Rutgers - The State Univ. of N.J., the New Jersey Supreme Court examined the legislative scheme of N.J.S.A. 18A:62-4, which establishes that in-state tuition is based on a presumption of domicile based on duration of residency. 191 N.J. 374, 384 (2007). The Legislature's ability to specifically limit eligibility based on citizenship or residency can also be found in statutory requirements to run for certain elected offices. One such example is N.J.S.A. 40A:9-94, which limits persons who run for the office of county sheriff to citizens of the United States residing in the county for at least 3 years preceding election. But the operational provisions of OPRA contain no citizenship or residency requirement. Instead, the language of the statute is both consistent and clear - it states that "any person" may access records pursuant to OPRA.

Case law also supports OPRA's availability to "any person" regardless of citizenship. Both the Appellate Division and the

Government Records Council have treated out-of-state requestors in the exact same manner as in-state requestors. See e.g. Katon ex rel. Muslim Advocates v. NJ Dept. of Law and Public Safety, Office of Atty. Gen., 2015 WL 567305 (App. Div. 2015)(The Appellate Decision did not mention requester's address, where the legal director of Muslim Advocates, a national legal advocacy and educational organization located in California, challenged the Government Records Council's denial of an OPRA request); Katon ex rel. Muslim Advocates v. NJ Dept. of Law and Public Safety, Office of Atty. Gen., GRC Complaint No. 2012-267 (July 2013)(same). Simply put, in the cases above, the court and Government Records Counsel found no relevance in the residency or citizenship of the requestor.

Defendants' assertion of a "citizenship" requirement hinges on the mistaken contention that Virginia's Freedom of Information Act (hereinafter "FOIA"), which grants a right to access government records only to citizens of the state, informs New Jersey's public records statute. It does not, and the statutory differences are informative. Unlike OPRA, Virginia's FOIA references "citizens" not simply in its preamble, but also in *numerous enactment provisions*. Va. Code Ann. § 2.2-3704(A)("[a]ll public records shall be open to inspection and copying by *any citizens* of the Commonwealth during the regular office hours of the custodian of such records. Access to such

records *shall not be denied to citizens* of the Commonwealth . . … The custodian may require the requester to provide his name and legal address."); Va. Code Ann. § 2.2-3704(F) ("[a]ll charges for the supplying of requested records shall be estimated in advance at the request of *the citizen*.") Va. Code Ann. § 2.2-3704.1 (public bodies must post an explanation of the rights of a requester which includes the statement "all charges for the supplying of requested records shall be estimated in advance at the request of *the citizen* . . .")

Further, Virginia's law does not permit anonymous requests. Va. Code Ann. § 2.2-3700 et seq. The fact that - unlike Virginia's law - New Jersey's public records law does *not* limit access based on citizenship in its operational provisions and *does* permit anonymous requests, clearly distinguishes the New Jersey Legislature's intent to make access to records as broad as possible from the intent of the Virginia Legislature to limit such access.[4]

[4] The inclusion of the term "citizen" in both statutes is not sufficient to support Defendants' contention that McBurney v. Young (hereinafter "McBurney"), 133 S. Ct. 1790 (2013) alters OPRA's accessibility to out-of-state requestors. While McBurney string cites to OPRA's use of the term "citizen," is does so in mere dicta and does not analyze the provision. Furthermore, McBurney did not declare that states must limit public records access to "citizens" of States. Rather, McBurney merely held that Virginia's citizen-only freedom of information provision did not violate the Privileges and Immunities Clause or the Commerce Clause of the Federal Constitution.

In light of the Legislature's ability to limit coverage if it so chose, OPRA's preference for access, and the unambiguous and oft-repeated use of the term "any persons" throughout the statute, the Legislature clearly intended that OPRA be available to all persons regardless of citizenship. And neither Defendants nor a court may "'rewrite a plainly-written enactment of the Legislature [ ] or presume that the Legislature intended something other than that expressed by way of the plain language of the statute.'" James v. N.J. Mfrs. Ins. Co., 216 N.J. 552, 566 (2014)(quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)). Thus, the Defendants' unlawfully withheld government records on the basis of Plaintiff's "citizenship."

B. Access to the Requested Records Should Be Granted Pursuant to OPRA Because Plaintiff "Identif[ied] With Reasonable Clarity" the Government Records it Sought

As an alternative to the denial based on the requestor's out-of-state status, Defendants also denied the request as overbroad. Defendants rejection rests on a flawed understanding of MAG Entertainment, LLC v. Division of Alcoholic Beverage Control (hereinafter "MAG"), 375 N. J. Super. 534 (App. Div. 2005), and its progeny. When those cases are properly analyzed, it is clear that Plaintiff's request more than sufficiently identified public records with "reasonable clarity." See Bent v. Twp. of Stafford Police Dep't [hereinafter "Bent"], 381 N.J.

Super. 30, 37 (App. Div. 2005). Indeed, Plaintiff provided information that made the request as specific or more specific than other requests the Appellate Division has determined to be sufficient. See, e.g., Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012); Burnett v. County of Gloucester, 415 N.J. Super. 506, 513-14 (App. Div. 2010).

On several occasions, the Appellate Division has described the difference between valid and invalid OPRA requests. The court has explained that the 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, 381 N.J. Super. at 37; N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 176-77 (App. Div.2007) , certify. denied, 190 N.J. 394 (2007); MAG, 375 N.J. Super. at 546, 549. These requirements were first discussed at length in MAG.

In MAG, the Appellate dealt with a broad-based request for, among other items, "all documents or records evidencing that the [Division of Alcohol 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 a 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 other otherwise exempt." 375 N.J. Super. 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, citing Gannett N.J. Partners, LP v. Cty. Of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005). 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." Bent, 381 N.J. Super. at 37. (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. 2007), 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 contained 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.

Plaintiff's request is qualitatively different from those disapproved requests. As described infra at pages 20 - 22, Plaintiff's request is not only reasonably clear, but it does not require the custodian to engage in any analysis or evaluation. It merely requires that the records custodian locate

the public records sought. In this way, this matter is more on point with the Appellate Division decisions that found requests which identified documents sought with reasonable clarity to be valid.

In determining when a record identifies items with reasonable clarity, the Appellate Division's decision in Burnett v. County of Gloucester, 415 N.J. Super. 506, 513-14 (App. Div. 2010), is instructive. The decision clarifies that a requestor must simply provide enough information so that a records custodian can identify what records a requestor is seeking; the requestor need not identify record with minute exactitude. Id.

In Burnett, the court addressed a 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. The court reiterated 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. Id. at 515. In short, the court 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. This Court added: "it is the documents, themselves, that have been requested, and their retrieval requires a search, not research." Id. at 516.

The Appellate Division's decision in Burke v. Brandes, supra, is also pertinent to this case. The decision in Burke analyzes and explains the meaning of the terms "reasonable clarity [in identifying government records]" and "research" as they are used in MAG and its progeny.

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. Defendants 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 a particular subject matter: EZ Pass benefits afforded retirees of the Port Authority. Id. at 176-77. The main question in Burke was whether the documents

requested were identified with "reasonable clarity," so that there is 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 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 his files and provide the documents that fit within the requestor's parameters. Id.

The court in Burke therefore held that the request 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, all aspects of Plaintiff's OPRA request identified documents with as much as, or greater, specificity than was done in Burnett or Burke.

For Items 1-4, Plaintiff identified the exact documents it sought. The United States Department of Education, Office of Civil Rights, requires districts to collect enrollment and disciplinary information, on a school-by-school basis, for a Civil Rights Data Collection survey. 20 U.S.C. § 3413; 20 U.S.C. § 3472; 20 U.S.C. § 7913; 20 U.S.C. § 7914; 34 C.F.R. § 100.6(b); 34 C.F.R. § 106.71. See also U.S. Department of Education - Office for Civil Rights 2013-14 School Form, available at www2.ed.gov/about/offices/list/ocr/docs/crdc-2013-14-all-schools-form.doc; U.S. Department of Education - Office for Civil Rights. 2013-14 and 2015-16 CRDC Questions and Answers, available at www2.ed.gov/about/offices/list/ocr/docs/crdc-2013-14-p1-p11-qa.doc. Plaintiff sought the resulting document responding to that survey (presumably the completed survey itself), and limited its request to specific school years. Thus, Plaintiff identified the documents sought in Items 1 through 4 with more than sufficient clarity. The clerk need not engage in subjective analysis or cull through all of the district's records to divine what Plaintiff seeks. Rather, she needs to perform a normal search for the documents. If the documents

were in paper or pdf form, they can be provided as such. If the documents were made by filling out a survey online, a copy of the online surveys (with the district's responses) should be provided.

Further, under OPRA, the definition of "record" includes any "data processed or image processed document [and] *information stored or maintained electronically.*" N.J.S.A. 47:1A-2.1. Thus, if the information that is required to be disclosed pursuant to the Civil Rights Data Collection survey is maintained in a data set, that data set is also subject to disclosure. And such records are clearly included in Plaintiff's request. Indeed, Item 7 of Plaintiff's request clearly states as such; therefore, once again, the records that Plaintiff seeks were defined with "reasonable clarity."

Defendant's claim that Items 5 and 6 are not defined with reasonable clarity is even more frivolous. Plaintiff asked for certain of the district's policies. The request makes clear: If the district has adopted or published student discipline policies or procedures, or has set forth policies and procedures for suspensions and expulsions, "zero tolerance" offenses, or for the referral of students to law enforcement, those documents fit Plaintiff's request and must be provided.[5]

[5] Presumably, the district provides students with a student handbook documenting many of these policies and procedures. It

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. 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.

C. **Plaintiff Contests Defendants' Claim that Records Containing School-Specific Data Does Not Exist.**

Defendants claim that the enrollment information broken down by race/ethnicity, as required to be collected pursuant to the Civil Rights Data Collection survey, was compiled for Atlantic City High School and Atlantic City High School East Campus as if they were one entity, without the information being disaggregated between those two schools. As such, Defendants suggest that there are no records responsive to certain of

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also should have copies of Board resolutions adopting its policies. Yet Defendants failed to provide these or any other records in response.

Plaintiff's requested items.[6] See Exhibit C to Verified Complaint. Plaintiff contests Defendants' claim.

First, Plaintiff has found a document online that is in fact directly responsive to its request and *does* provide enrollment data (including race/ethnicity information) for Atlantic City High School *separately* from Atlantic City High School East. That document is the 2011-12 response to the Civil Rights Data Collection survey, i.e. *one of the exact records Plaintiff identified in its request.* See Exhibit M to Verified Complaint. Defendants failed to disclose that document which provided exactly what Plaintiff sought, and instead claimed that such a document did not exist. That claim was obviously false. That document should have been provided, as should the corresponding documents from the other years identified by Plaintiff.

Second, the federal survey *mandates* that information (including enrollment data identifying race/ethnicity) be collected and be disaggregated by school. 20 U.S.C. § 3413; 20 U.S.C. § 3472; 20 U.S.C. § 7913; 20 U.S.C. § 7914; 34 C.F.R. § 100.6(b); 34 C.F.R. § 106.71. See also U.S. Department of Education - Office for Civil Rights 2013-14 School Form,

[6] Presumably this applies to Items 1 and 2 (and perhaps 7) which seek disaggregated enrollment data. This claim would be inapplicable to the requests for discipline data as well as to Plaintiff's requests for policies and procedures.

available at www2.ed.gov/about/offices/list/ocr/docs/crdc-2013-14-all-schools-form.doc; U.S. Department of Education - Office for Civil Rights. 2013-14 and 2015-16 CRDC Questions and Answers, available at www2.ed.gov/about/offices/list/ocr/docs/crdc-2013-14-p1-p11-qa.doc.

While Defendants may attempt to refer to the two schools (Atlantic City High School and Atlantic City High School East Campus) as simply different "campuses," it is clear that they are in fact two separate schools. Atlantic City High School East (which recently closed) had its own separate administration and its own separate enrollment. See Exhibit L to Verified Complaint. Calling it a different "campus" rather than a different "school" is therefore disingenuous. Indeed, *the district's own description* of the Atlantic City High School East facility clearly identifies it as a separate school. As per the Student Handbook 2010-2011 (see http://achs.acboe.org/www/acboe_achs/site/hosting/studenthandbook2010201112210.pdf):

> **Atlantic City High School East Alternative School**
> The Atlantic City High School East Campus was designed and implemented primarily to benefit students who have problems adjusting to traditional educational settings. The Atlantic City High School East Campus offers an opportunity for placement of such students in a separate setting and provides an atmosphere conducive to changing patterns and helping the students find success in the educational environment.

> The major goal is to assist students in the development of self esteem, self control, improved socialization skills, a positive attitude toward learning, task-oriented behaviors and increased academic achievement. The Atlantic City High School East Campus is a school of rules and guidelines designed to help students develop coping skills and a positive attitude. The Atlantic City High School East Campus is staffed with qualified instructors who have knowledge, compassion and background to teach, counsel and guide students toward these goals. [Id.]

It is also listed as a separate school by the New Jersey Department of Education in its Alternative Placement Listing (see http://www.state.nj.us/education/students/safety/edservices/ae/list.pdf): "Atlantic City High School East Campus serves Atlantic City school district students who are having trouble with academic work, attendance or behavior in other high schools." Id.

Therefore, if Atlantic City Board of Education was not disaggregating the information between the two schools,[7] it was violating the mandates of the federal survey. It should not now be relieved of its responsibility to disclose records it was required to create because it failed to properly create such records.

[7] As noted above, Defendants did in fact disaggregate the information for 2011-12; it just failed to provide that document to Plaintiff. It is unclear however whether Plaintiff failed to do so in other years.

Further, Plaintiff believes that the disaggregated information, if not available in more concrete form as was provided in 2011-12, may nevertheless be available in data sets in the district's computers. As explained in Point II above, such a data set would fit the statutory definition of "record" (*i.e.*, any "data processed or image processed document [and] *information stored or maintained electronically*") and must be disclosed pursuant to an OPRA request. N.J.S.A. 47:1A-2.1. Further, if the disaggregation would simply require the custodian or information technology officer to utilize its Access or Excel tools, the custodian should perform that search and disclose the results. Indeed, normal usage of programs like Access or Excel does not "create new records." As the New Jersey Supreme Court has held, the printing out of certain fields of a data set should be considered a normal search rather than the creation of a new record. In Bd. of Educ. of Newark v. N.J. Dept. of Treasury, 145 N.J. 266 (1996), the Supreme Court (1) ordered the production of electronic data and (2) rejected the defendant's argument that producing the requested data would require it to "create a new record." Id. Instead, the Court explained the data retrieval process was "better characterized as a selective copying from the [defendant's] existing database." Id. at 281. Indeed, in Higg-A-Rella v. County of Essex, 141 N.J. 35, 52 (1995), the New Jersey Supreme Court

noted that "computerized records can be rapidly retrieved, searched, and reassembled in novel and unique ways, not previously imagined,…[and w]e remain committed to providing citizens with convenient and efficient public access to government information." Higg-A-Rella v. County of Essex, 141 N.J. 35, 52 (1995).[8]

Finally, Defendants should, at the very least, be required to provide testimony regarding the actual distinction between the two schools, as well as testimony from the custodian and the district's information technology officer regarding the data sets that are kept and how they can be accessed and used.

II. PLAINTIFF SHOULD HAVE BEEN PROVIDED WITH THE REQUESTED RECORDS PURSUANT TO COMMON LAW BECAUSE PLAINTIFF'S INTEREST IN THE RECORDS OUTWEIGHTS DEFENDANTS' INTEREST IN NONDISCLOSURE

The common law right of access offers an alternate means for obtaining public records in New Jersey. Educ. Law Ctr.v.N.J. Dept. Edu., 198 N.J. 274, 302 (2009) ("Despite the enactment of OPRA, the Legislature explicitly provided that the common law right still exists."). The New Jersey Supreme Court has identified three main requirements for a common law claim: "(1) the records must be common-law public documents; (2) the person seeking access must establish an interest in the subject

[8] As an alternative to running a program on the data sets, the district could disclose the entire data sets to Plaintiff (with identifying information such as names and dates of birth removed).

matter of the material; and (3) the citizen's right to access must be balanced against the State's interest in preventing disclosure." Keddie v. Rutgers, 148 N.J. 36, 50 (1997) (citations and internal quotation marks omitted).

The common law generally provides access to a "wider array" of public records than does OPRA. Educ. Law Ctr., 198 N.J. at 302. Indeed, common law public records typically include any and all records "created by, or at the behest of, public officers in the exercise of a public function." Keddie, 148 N.J. at 50.

A requestor may establish an interest in the records sought that is either personal or public. Loigman v. Kimmelman, 102 N.J. 98, 104 (1986). The main limitation on the common law right of the requestor is that his or her interest in a record must be balanced against the public interest in nondisclosure. Ibid. When balancing these interests, New Jersey courts generally consider the following factors:

> (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 policymakers; (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.
>
> Id. at 113.

This balancing process "is flexible and adaptable to different circumstances and sensitive to the fact that the requirements of confidentiality are greater in some situations than in others." McClain v. College Hosp., 99 N.J. 346, 362 (1985). The balancing of interests further suggests that "[i]f the reasons for maintaining confidentiality do not apply at all in a given situation, or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a compelling need." Ibid. The factors set forth in Loigman "and any other relevant factors should be balanced [against] the importance of the information sought to the plaintiff's vindication of the public interest." Loigman, 102 N.J. at 113.

As an initial matter, Plaintiff sought records containing enrollment and disciplinary data created in response to a federal survey, policies and procedures regarding student disciplinary practices and referrals of students to law enforcement, and data sets containing school-level enrollment information. These records are common law public records because they clearly were "created by, or at the behest of,

public officers in the exercise of a public function." Keddie, 148 N.J. at 50.

Further, Plaintiff can establish a strong interest in these records. Plaintiff and the public alike have a strong interest in obtaining school-level disciplinary and enrollment data by ethnic/racial subgroups, as well as obtaining school disciplinary policies and practices, as this information is essential in assessing whether public school students have equal educational opportunities. Indeed, citizen interest in a matter of such obvious public concern is the archetypal, though not the only, interest that suitably meets this requirement of common law records requests. See Home News v. Dep't of Health, 144 N.J. 446, 454 (1996).

Plaintiff also has a strong individual interest in these records as a non-profit organization that has long fought to secure equal educational opportunities for public school children in New Jersey and across the nation. Obtaining the requested records would shed a light on educational equity and opportunity and provide Plaintiff with information necessary to advocate for its organizational goals.

Finally, disclosure of the records at issue is warranted because Defendants have not established (and likely cannot establish) any public interest in nondisclosure, let alone one that would outweigh Plaintiff's interest. This is particularly

true because when "the reasons for maintaining confidentiality do not apply at all, or apply only to an insignificant degree . . ." the party seeking disclosure is not "required to demonstrate a compelling need." See McClain, 99 N.J. at 362. Indeed, Defendants have failed to articulate an interest in nondisclosure.

In fact, records responsive to nearly all the requested items cannot implicate confidentiality needs. Responsive records to items 1 - 4 contain only numerical data maintained in response to a public federal survey and therefore do not implicate confidentiality concerns. Similarly, the policies and procedures requested in items 5 - 7 do not contain identifying information or other information triggering confidentiality concerns. Theoretically, the data set sought in item 7 could contain sensitive information, such as a student's name or address. In such a situation, the records should be appropriately redacted before disclosure.

In short, Plaintiff's interest in the records outweighs the (non-existent or *de minimis*) public interest in nondisclosure. As such, Plaintiff is entitled to the requested government records under the common law.

III. THIS COURT SHOULD FIND THAT PLAINTIFF IS A PREVAILING PARTY AND SHOULD BE AWARDED A "REASONABLE ATTORNEY'S FEE" BECAUSE IT HAD TO FILE THIS LAWSUIT TO PRESERVE

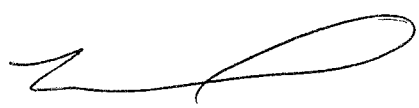
ITS RIGHT TO RECEIVE THE RECORDS REQUESTED ON FEBRUARY 10, 2015

If this court orders Defendants to disclose the records requested by Plaintiff on February 10, 2015, the Court also should find that Plaintiff is the prevailing party and, pursuant to the fee-shifting provisions of OPRA, award Plaintiff reasonable attorney's fees and costs of filing suit. Mason, 196 N.J. at 76; N.J.S.A. 47:1A-6.

CONCLUSION

Because Defendants denied a valid records request, Defendants have violated OPRA and the common law right of access. 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.

April 1, 2015



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