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February 6, 2015

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Re: *North Jersey Media Group, Inc. v. Township Of Lyndhurst, et al.*,
Docket No: A-2523-14T1

Honorable Judges of the Appellate Division:

Pursuant to *Rule 2:6-2(b)*, kindly accept this letter-brief on behalf of *Amicus Curiae*
American Civil Liberties Union of New Jersey.

TABLE OF CONTENTS

INTEREST OF AMICUS.....2

STATEMENT OF FACTS AND PROCEDURAL HISTORY3

SUMMARY OF ARGUMENT.....3

ARGUMENT.....4

**I. RECORDS THAT ARE “REQUIRED BY LAW TO BE MADE,
MAINTAINED, OR KEPT ON FILE” ARE CATEGORICALLY
EXCLUDED FROM THE “CRIMINAL INVESTIGATORY
RECORD” EXCEPTION TO OPRA.5**

**II. DEFENDANTS HAVE FAILED TO MEET THEIR BURDEN OF
ESTABLISHING THAT THE DISCLOSURES IN THIS CASE ARE
“INIMICAL TO THE PUBLIC INTEREST;” AS SUCH, THE
“ONGOING INVESTIGATION” EXCEPTION DOES NOT APPLY.8**

CONCLUSION12

INTEREST OF AMICUS

The American Civil Liberties Union of New Jersey (ACLU-NJ) is a private, non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the Constitution. Founded in 1960, the ACLU-NJ has tens of thousands of supporters throughout the state. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is composed of approximately 500,000 members and donors with millions of supporters nationwide.

For decades, the ACLU-NJ has worked on issues affecting the right of New Jersey's residents, enshrined in the common and statutory law of this State, to obtain meaningful and timely access to appropriate information concerning the workings of government. To further our goals, ACLU-NJ formed its Open Governance Project to provide legal assistance, public education and take an active role in adjudication of these issues.

This appeal involves questions of general public importance concerning the right of New Jersey citizens to obtain timely and meaningful access to public documents under the Open Public Records Act, N.J.S.A. 47:1A-1 et seq. ("OPRA"), including access to police records related to civilian fatalities. Specially, it involves the scope of both the "criminal investigatory records" and "ongoing investigations" exemptions to OPRA. The resolution of this issue will significantly influence the ability of the public to monitor police interaction with the public in the State of New Jersey through use of OPRA.

The special interest and the expertise of the ACLU-NJ in this area of law are substantial. The ACLU-NJ has been granted leave to participate as amicus curiae in multiple New Jersey Supreme Court cases involving open governance issues, including: *McGovern v. Rutgers*, 211 N.J. 94 (2012); *Fair Share Housing Ctr., Inc. v. N.J. State League of Municipalities*, 207 N.J.

489 (2011); *Kovalcik v. Somerset Cnty. Prosecutor's Office*, 206 N.J. 581 (2011); *Mason v. City of Hoboken*, 196 N.J. 51 (2008); *Burnett v. Cnty of Bergen*, 198 N.J. 408 (2009); *Tarus v. Borough of Pine Hill*, 189 N.J. 497 (2007); and *New Jerseyans for Death Penalty Moratorium v. N.J. Dept. of Corrections*, 185 N.J. 137 (2005). The ACLU-NJ has served as direct counsel or been granted leave by the Appellate Division to participate as *amicus curiae* in several recent published appeals involving open governance issues, including: *Am. Civil Liberties Union of New Jersey v. New Jersey Div. of Criminal Justice*, 435 N.J. Super 533 (App. Div. 2014); *K.L. v. Evesham Twp. Bd. of Educ.*, 423 N.J. Super. 337, 344 (App. Div. 2011); *Burnett v. Cnty. of Gloucester*, 415 N.J. Super. 506, 507 (App. Div. 2010); and *O'Shea v. Twp. of W. Milford*, 410 N.J. Super. 371, 374 (App. Div. 2009).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For purposes of this brief, *Amicus* American Civil Liberties Union of New Jersey adopts the Statement of Facts and Procedural History set forth by Plaintiff North Jersey Media Group.

SUMMARY OF ARGUMENT

This appeal involves two exemptions to the Open Public Records Act: the “criminal investigatory records” exemption and the “ongoing investigations” exemption. *Amicus* ACLU-NJ submits this brief to provide guidance as to how this Court should analyze those two exemptions.

Pursuant to the definition of “criminal investigatory records,” documents do not qualify for that exception if they are “required by law to be made, maintained or kept on file.” This qualification is categorical; if a record is required by law to be made, the inquiry regarding this

exemption ends. Further, the phrase “required *by law*” does not mean simply “required by statute”; there are additional records requirements (most notably, mandates arising from Attorney General Directives and Guidelines) that also carry the force of law.

In analyzing the “ongoing investigation” exemption, the agency bears the burden of establishing – on a document-by-document basis – that the withheld records are “inimical to the public interest.” To meet that burden, it is not sufficient for a government agency to cite to general concerns or to speculative fears. The concern must be specific and must be supported by evidence. Defendants did not meet that burden here.

ARGUMENT

The New Jersey Supreme Court has declared that the fundamental policy underlying the Open Public Records Act (“OPRA”) is that “knowledge is power in a democracy” and, as such, government cannot be held accountable to its citizens “without access to information maintained by public agencies.” *Fair Share Hous. Ctr., Inc. v. New Jersey State League of Municipalities*, 207 N.J. 489, 502 (2011). *See also 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) (The primary 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”). OPRA therefore expressly states that government records must be “readily accessible” to the public unless exempt, *N.J.S.A.* 47:1A-1, and that the “agency shall have the burden of proving that the denial of access is authorized by law.” *N.J.S.A.* 47-1A-6. Moreover, OPRA specifically instructs that “any limitation on the right of access . . . shall be construed in favor of the public’s right of access.” *N.J.S.A.* 47:1A-1.

This Court explained these general principles in the following manner:

If a document is a government record, it must be disclosed unless it is excluded from disclosure by other statutory provisions or executive orders, *N.J.S.A.* 47:1A-9a, *or* exempt from disclosure due to a recognized privilege or grant of confidentiality established in or recognized by the State Constitution, statute, court rule or judicial decision, *N.J.S.A.* 47:1A-9b.

[*Wilson v. Brown*, 404 N.J. Super. 557, 570-71 (App. Div. 2009) (emphasis added). *See also* *MAG Ent'ment LLC v. Div. of Alcoholic Beverage Control*, 375 N.J. Super. 534, 544 (App. Div. 2005) (“*N.J.S.A.* 47:1A-1 specifically provides that ‘all government records shall be subject to public access unless exempt.’”)]

In the present case, Defendants claim that two exemptions apply to the requested records: the “criminal investigatory records” exemption and the “ongoing investigations” exemption. However, Defendants’ briefs present this Court with improper analyses of those two exceptions. When the proper analysis is applied, it becomes clear that Defendants failed to meet their burden of establishing (for many, if not most, of the records requested) that either of those exemptions to OPRA apply.

I. RECORDS THAT ARE “REQUIRED BY LAW TO BE MADE, MAINTAINED, OR KEPT ON FILE” ARE CATEGORICALLY EXCLUDED FROM THE “CRIMINAL INVESTIGATORY RECORD” EXCEPTION TO OPRA.

Under OPRA, a “criminal investigatory record” is a record that is “not required by law to be made, maintained or kept on file” and that “pertains to any criminal investigation or related civil enforcement proceeding.” *N.J.S.A.* 47:1A-1.1. A record must meet both prongs of that definition to be exempt from public access. *Id.*; *see also* *O’Shea v. Township of West Milford*, 410 N.J. Super. 371, 380-81 (App. Div. 2009); *Serrano v. South Brunswick Tp.*, 358 N.J. Super. 352 (App. Div. 2003).

The first prong of the analysis centers on the *type* of record at issue. In other words, certain types of records are “required by law to be made, maintained or kept on file.” Those records *categorically* do not qualify to be withheld under the criminal investigatory records

exemption. *N.J.S.A. 47:1A-1.1*; *see also O'Shea*, 410 N.J. Super. at 380-81 (holding that Use of Force Reports [hereinafter "UFRs"] are required by law to be made and therefore they would not be exempt as a criminal investigatory record); *Serrano*, 358 N.J. Super. at 352 (holding that because 9-1-1 tapes are required by law to be made, the particular 9-1-1 tape sought could not qualify as a criminal investigatory record). Appellants appear to misapprehend, or at best ignore, that fact. *See Defendants' Supplemental Brief* at 19-25.

As noted by this Court, once a document is determined to be required by law to be made, maintained, or kept on file, the inquiry as to whether or not the exemption applies is "fully resolved." *O'Shea*, 410 N.J. Super. at 385 (holding that the fact that the records at issue were required by law to be made "fully resolved" the question of whether the criminal investigatory exemption applied). Once this is established, the document is excluded from the "criminal investigatory records" exemption to OPRA's reporting requirements and, despite the protestations of Defendants, the specific contents of the particular document, as well as the purported implications of making such contents public, cannot change that result. *Id.*

In the present case, there are numerous documents requested that are required by law to be made, maintained, or kept on file. Because Defendants appear to advocate for a limited view of what documents fit that description (*see Defendants' Supplemental Brief* at 19-25), *amicus* addresses this point simply to emphasize that, as previously held by this Court, what is "required by law" is far broader than merely what is required "by statute." *O'Shea, supra*, 410 N.J. Super. 382.

As noted by Judge Doyne, numerous statutes that require records to be made or maintained are applicable to the present matter. (Da42). For example, 9-1-1 tapes, police dispatch records, CAD entries, and Motor Vehicle Accident Reports are all required to be made

and maintained pursuant to various statutes (specifically, *N.J.S.A.* 52:17C-1, *N.J.S.A.* 17:24-2.4, and *N.J.S.A.* 39:4-131). *Db42*; *see also Serrano*, 358 N.J. Super. at 365 (“because the law requires that [9-1-1] tapes be made and kept, it does not qualify as a “criminal investigatory record”). Judge Doyne also recognized that this Court has firmly held that the term “required by law” is not the equivalent of “required by statute” but, rather, is far more extensive. (*Da41*)

Indeed, there are various other types of authority that create mandatory requirements with the force of law. Most notably, in *O’Shea, supra*, this Court held that, when the Attorney General creates mandatory reporting requirements for law enforcement, the records created pursuant to those mandates are records that are “required by law to be made, maintained or kept on file.” 410 N.J. Super. at 383-385. In short, so long as the Attorney General’s policy is written in a way to connote it is mandatory rather than permissive, such a policy has “the force of law” as it pertains to all law enforcement agencies subject to the Attorney General’s supervision. *Id.* at 384. *O’Shea* dealt directly with a request for Use of Force Reports (which Plaintiff seeks here). This Court held that UFRs were *categorically* excluded from qualifying under the “criminal investigatory records” exception because the Attorney General’s “Use of Force Policy” mandated their creation and maintenance and thus, such records were required *by law* to be made, maintained or kept on file. *Id.* It is therefore clear based on direct on-point precedent that, in the present case, Defendants violated OPRA by denying Plaintiff access to UFRs, as well as access to other records required to be made or maintained by statute, Attorney General reporting or maintenance requirements, or other such authority.¹

¹ Attorney General policies are not the only non-statutory records requirement that carry the force of law. Both Judge Doyne and Plaintiff provide examples of other authority. *See Da42*; Plaintiff’s Brief at 45-52.

II. DEFENDANTS HAVE FAILED TO MEET THEIR BURDEN OF ESTABLISHING THAT THE DISCLOSURES IN THIS CASE ARE “INIMICAL TO THE PUBLIC INTEREST;” AS SUCH, THE “ONGOING INVESTIGATION” EXCEPTION DOES NOT APPLY.

To qualify for the "ongoing investigation" exemption, a record must “pertain to an investigation” and its “release would be inimical to the public interest.” *N.J.S.A.* 47:1A-3. In addition, the record must not have already been available to the public. *Id.* *Amicus* will focus solely on the proper analysis of the second prong of the “ongoing investigation” exception, *i.e.* whether the release of certain records “would be inimical to the public interest.”

Defendants argue that, because the incident that led to the police shooting about which Plaintiff seeks documents also resulted in criminal charges against the individual who the police were chasing along with the shooting victim, disclosure of the requested documents would be inimical to the public interest. Defendants’ argument is based on the idea that, if potential witnesses are able to view the records or view media coverage of the information contained in those records, a witness could be swayed to change his story to conform to what is in the documents. However, far from being specific to the particular matter at hand, Defendants’ argument invokes a general, sweeping concept that would apply to any and all criminal cases. Defendants are essentially seeking a categorical exception for records related to a criminal matter through the entire investigation and trial. If the Legislature intended to create such a sweeping categorical exclusion of records, it clearly knew how to do so, as it did in other areas. *See N.J.S.A.* 47:1A-1.1 (setting forth various exemptions and definitions of terms); *see also N.J.S.A.* 47:1A- 5k (creating categorical exemption for Public Defender records); *N.J.S.A.* 47: 1A-10

(creating categorical exemptions for certain personnel or pension records, with exceptions). The Legislature, however, did not do so here.²

This Court has explained, in numerous analogous cases, that general concerns regarding disclosure of information in pending criminal matters are insufficient to withhold documents from the public, especially when those concerns are based on mere speculation. *Courier News v. Hunterdon County Prosecutor's Office*, 358 N.J. Super. 373, 381-383 (App. Div. 2003); *Serrano*, 358 N.J. Super. at 365; *Asbury Park Press v. Lakewood Tp. Police Department*, 354 N.J. Super. 146, 162-163 (App. Div. 2002).

In *Asbury Park Press*, this Court analyzed in depth whether the government could withhold a 9-1-1 tape based on the concern that disclosure of the tape would bias potential members of a jury. This Court rejected the government's argument. It noted that there was nothing particular to the criminal case at issue and nothing unique about the record sought that would make that particular situation distinct from other high profile cases. 354 N.J. Super. at 162. It further noted that while there might be some chance for prejudice, albeit remote, "there is relief available through many devices such as augmenting the jury pool, use of so-called foreign jurors or even a change of venue." *Id.* Perhaps most importantly, this Court explained: "In any event, mere speculation and unease concerning the release of the tapes at this posture of the proceedings should not undermine the public's right to know." *Id.* at 162-63. As such, this Court found that the disclosure was not "inimical to the public interest" and rejected the government's invocation of the "ongoing investigation" exception to the Right to Know Law (the state's predecessor to OPRA).

² Indeed, as explained above, in addressing records pertaining to criminal matters, the Legislature placed specific limits on the reach of the "criminal investigatory records" exemption. *N.J.S.A.* 47:1A-1.1 (setting forth definition of "criminal investigatory records").

Those themes were reiterated by this Court in *Courier News, supra*. In that case, this Court again addressed the prosecutor's contention that disclosure of a 9-1-1 tape might preclude the likelihood of an impartial jury. This Court made two important pronouncements relevant to the present case. First, this Court explained that the fact that "media coverage may make it more difficult" to prosecute a criminal case (specifically in *Courier News*, to select a fair and impartial jury) "is not a basis to deny access to government records under OPRA." 358 N.J. Super. at 382. Second, this Court highlighted the fact that the burden is on the withholding agency to "produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality," and a concern that is "purely speculative" does not meet that burden. *Id.* at 382-83. As explained by this Court:

In the course of oral argument, we repeatedly asked defendant's counsel for *specific* evidence supporting this assertion [that disclosure of the tape will lead to juror confusion]. None was proffered. Under OPRA, a public agency seeking to restrict the public's right of access to government records must produce *specific reliable evidence* sufficient to meet a statutorily recognized basis for confidentiality. Absent such a showing, a citizen's right of access is unfettered. Moreover, in assessing the sufficiency of the proofs submitted by the public agency in support of its claim for confidentiality, a court must be guided by the overarching public policy in favor of a citizen's right of access. *N.J.S.A.* 47:1A-1. Here, defendant's fears of potential juror confusion *are purely speculative* and fail to meet the statutory burden of proof.

[*Id.* (emphasis added).]

This Court again addressed, in *Serrano, supra*, whether or not disclosure of a particular 9-1-1 tape was "inimical to the public interest" and warranted application of the "ongoing investigation" exemption. Once again, this Court held that general concerns about criminal trials – even including potential inconveniences to or difficulties for the prosecutor – failed to satisfy the "inimical to the public interest" standard. 354 N.J. Super. at 367. The Court noted:

[A] government record does not become cloaked with confidentiality simply because the prosecutor declares it so. Insofar as the public interest is concerned,

and given the caller's consent, the public has a greater interest in the release of this particular [9-1-1] tape than in its suppression. Given the stated public policy in OPRA that records should be readily accessible, a weighty concern indeed should be advanced to counterbalance that interest. The considerations raised in this case, however, such as posited difficulties of impaneling a jury and a possible change of venue, are unpersuasive. Even if they occur, they may be inconveniences to the prosecutor, but without more, that does not make the production "inimical to the public interest[.]"

[*Id.*]

In the present case, as found by Judge Doyne, Defendants merely posited general concerns that would be applicable to almost all criminal cases rather than producing the required "specific reliable evidence" (*see Courier News*, 358 N.J. Super. at 382) to establish that, *in this particular case*, there is heightened reason to believe that witnesses will change their testimony upon viewing media descriptions of the requested records. (Da38-39, *see* specifically footnote 14) As such, just as in the cases above, Defendants' proffers amounted simply to "fears...that are purely speculative." Judge Doyne therefore properly found Defendants' evidence (or, more accurately, lack of specific evidence) to be insufficient to override the "overarching public policy in favor of a citizen's right of access." *Courier News*, 358 N.J. Super. at 382.

Further, just as in the cases above, even in the remote chance that a prosecutor's concerns are realized, there are simple ways to ameliorate the potential harm. As explained by Judge Doyne, among other avenues, the rules of evidence allow for cross-examination of witnesses regarding prior inconsistent statements, affording witnesses opportunities to explain inconsistencies, and reading prior statements into the record when appropriate. (Da35) Thus, especially given the ability to ameliorate the proffered deleterious effects, while "media coverage may make [prosecuting the criminal case] more difficult, . . . [that] is not a basis to deny access to government records under OPRA." *Courier News*, 358 N.J. Super. at 382.

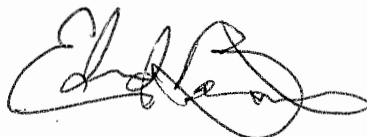
There might be a particular case in the future where the witness testimony may be so tainted by this type of disclosure (and where cross-examination that discloses the taint cannot remedy the problem) such that the disclosure would be “inimical to the public interest.” However, the proof to establish that must be specific and the harm must be both real and substantial in order to override the strong presumption in favor of access. Regardless, this present matter simply is not such a case, and the Defendants’ general and speculative proffer falls far short of meeting that high burden.

CONCLUSION

Because Defendants have failed to meet their burden of establishing that records they withheld fall within a recognized exemption in OPRA, this Court should affirm the decision below.

Date: March 6, 2015

Respectfully submitted,



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