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## Statement of Facts

Plaintiff American Civil Liberties Union of New Jersey [hereinafter "ACLU-NJ"], by way of a records request made on May 27, 2016, sought from Defendant Middlesex County Prosecutor's Office [hereinafter "MCPO"] publically filed records pertaining to civil asset forfeiture. See Exhibit A to Verified Complaint. Specifically, Plaintiff requested the following records for the period of January 1, 2016 to May 27, 2016:

- Copies of all summonses and complaints filed by the State of New Jersey, The Middlesex County Prosecutor's Office, or any employee or agent thereof pursuant to N.J.S.A. 2C:64-1 et seq., whether or not those complaints proceeded beyond the complaint phase; and
- Copies of answers to all civil summonses and complaints filed by the State of New Jersey, The Middlesex County Prosecutor's Office, or any employee or agent thereof pursuant to N.J.S.A. 2C:64-1 et seq., including answers filed by pro se litigants, whether or not those complaints proceeded beyond the complaint phase.

Id.

Further, Plaintiff specified that, to the extent possible, it sought the "responsive records as PDF files by email, which are ordinarily free of charge pursuant to OPRA. N.J.S.A. 47:1A-5(b)." Id.

Plaintiff's May 27, 2016 request was one of twenty-one identical requests sent on that day to county prosecutor's offices throughout the state seeking public-filed records. See Verified Complaint, paragraph 1. In response to the records

requests, twenty other counties produced responsive records without charge. Id., paragraph 9.

On June 20, 2016, Defendant O'Neill sent Plaintiff a letter confirming receipt of the request. See Exhibit A to Verified Complaint. Additionally, Defendant O'Neill informed Plaintiff that Defendants "prepared a CD which includes 109 civil summonses and complaints and (4) four Answers, Demand for Damages, Separate Defenses and Designation of Trial Counsel from defense counsel which where (sic) filed with the Superior Court of New Jersey County of Middlesex for the period of January 1, 2016, to June 1, 2016; the response totaled 728 pages." See Exhibit B to Verified Complaint. Defendant O'Neill also informed Plaintiff of the imposition of a \$721.85 fee. Id. Defendant had not previously made mention to Plaintiff of any charge that would be required for production of the records requested. See Verified Complaint, paragraph 10.

Defendants calculated the fee based on the cost of reproduction and a special service charge. See Exhibit B to Verified Complaint. The reproduction cost of \$36.67 consisted of the cost of reproducing 728 pages at \$0.05 per page and the cost of the disc containing the records, \$0.27. Id. The special service charge of \$685.18 was assessed based on the hourly rate for two employees as follows:

One employee holding the title of Keyboard & Clerk 1, at an hourly rate of \$26.37, totaled 11 work hours on this request to retrieve the responsive records. This included first creating an inquiry into the Judiciary Account Charge System (JACS) in order to create a report of the requested documents. Then, each of the 109 civil summonses and complaints as well as the 4 answers included in the report had to be individually retrieved from the Judiciary Electronic Filing System (JEFIS). The 3L Dockets had to also be retrieved from the Forfeiture Units Files.

The second employee, holding the title of agent at an hourly rate of \$39.51, totaled 10 work hours on this request. Each civil complaint and answer had to be examined for confidential personal identifiers and if found the information was redacted pursuant to R.1:38-7. Please note the only redactions were in the complaints which included a motor vehicle; the VIN number as well as the vehicle plate number was redacted. Then, each document had to be individually scanned and downloaded into a file which was later copied to a CD.

Id.

On August 23, 2016, an attorney for Plaintiff emailed Defendants seeking clarification regarding the special service charge. See Exhibit C to Verified Complaint. In particular, Plaintiff explained that nineteen other counties, in response to identical records requests from Plaintiff, produced similar records without charge, including populous counties such as Essex, Camden, Hudson, and Passaic. Id. As such, Plaintiff asked the department to clarify why a special service charge was appropriate. Id. Additionally, Plaintiff asked Defendants to explain why the lowest paid employee capable of fulfilling the request did not compile and redact the records. Id.

On September 2, 2016, Defendant O'Neill sent Plaintiff a letter further explaining the special service charge. See Exhibit D to Verified Complaint. Defendants wrote that the "Middlesex County Prosecutor's Office assessed a special service charge based on the guidelines provided under N.J.S.A. 47:1A-5C." Id. Additionally, Defendant restated the process taken to comply with the request and the calculation used to determine the reproduction cost and special service cost under N.J.S.A. 47:1A-5(c). Id. In addition, Defendant O'Neill explained that responsive records were located and redacted by the lowest paid employees capable of undertaking the process. Id.

On September 18, 2016, an attorney for Plaintiff, in an attempt to resolve the matter or have Defendants reconsider the matter, contacted Defendants and sought clarification as to why court documents that were publicly-filed by Defendant MCPO would require redactions. See Verified Complaint, paragraph 13.

On September 20, 2016, an attorney for Defendant called Plaintiff to explain that the Defendants' position was reflected in its previous letter correspondence, thereby making clear to Plaintiff that Defendant's position was final and would not be reconsidered. Verified Complaint, paragraph 14.

To date, Defendants have not disclosed to Plaintiff any records responsive to its May 27, 2016 request.



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

#### **SUMMARY OF ARGUMENT**

Defendants denied Plaintiff access to public records by imposing an unlawful special service fee and an unlawful reproduction fee. As a preliminary matter, a special service fee under N.J.S.A. 47:1A-5(c) may not include the cost of manipulating or programming information technology. Additionally, it can only be imposed for an "extraordinary" request, and the present request was not extraordinary. Indeed, nineteen other prosecutor's offices in New Jersey responded to Plaintiff's request by providing the responsive records without seeking to impose a special service charge. Plaintiffs sought civil asset forfeiture complaints publicly-filed by Defendant during a specific time, and any publicly-filed answers by *pro se* defendants. Since the records sought were all publicly-filed (and most filed by Defendants themselves), Defendants' claim that the request was extraordinary because an extensive amount of time was required to redact the documents is simply not justifiable. Even assuming that Defendants initially violated court rules and included improper private information in their publicly-filed complaints, any cost of correcting its errors should be borne by Defendants.

To the extent that any publicly-filed answers by *pro se* defendants required redactions, such redactions would only require an ordinary amount of time and effort, and would not justify a special charge.

Defendants' assessment of reproduction costs for the printed materials was also improper. It is ordinarily inappropriate to charge requestors page costs for electronically maintained records requested in an electronic format. If Defendant had to print such records in order to redact them, such cost should bore by Defendants, as the responsive records to Plaintiff's request were mostly records Defendants publicly-filed themselves with the judiciary. Likewise, to the extent that answers contained any sensitive material, they were filed without Defendants' objection.

Even if a special service charge was appropriate (which it was not), Defendants failed to comply with the statutory procedure for imposing special service charges because it did not provide Plaintiff with the opportunity to review the charge before documents were compiled. Additionally, Defendants failed to cooperate with Plaintiff to reach a reasonable accommodation.

Plaintiff's request should have been fulfilled either free of charge or at a significantly lower rate. Defendants' failure to do so violated Plaintiff's statutory right of access to records under the Open Public Records Act.

## LEGAL ARGUMENT

"New Jersey can boast of a long and proud tradition[] of openness and [of] hostility to secrecy in government." New Jersey Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 283 (2009), (quoting N. Jersey Newspapers v. Passaic Cty. Bd. of Chosen Freeholders, 127 N.J. 9, 16 (1992)(internal quotation marks omitted); see also Ferry v. Williams, 41 N.J.L. 332, 334 (Sup. Ct. 1879) ("every person is entitled to the inspection of [public documents], provided he shows the requisite interest therein"); Taxpayers Ass'n v. City of Cape May, 2 N.J. Super. 27, 31 (App. Div. 1949) ("the right of interested citizens and taxpayers to inspect public records should be broadly recognized"). As the New Jersey Supreme Court has declared, it is "axiomatic in any democratically constituted society that the public business is indeed the public's business. The people have a right to know." Tarus v. Borough of Pine Hill, 189 N.J. 497, 507 (2007).

New Jersey has furthered the ideals of openness and transparency in government by fostering both a statutory and a common law right of access to public records. See Educ. Law Ctr., supra, 198 N.J. at 302. Indeed, "our well-established common law protection of a citizen's right to access . . . [was] complemented by the Legislature's enactment of OPRA, which was

intended to enhance the citizenry's statutory rights to government maintained records." Id. at 283.

The goal of the 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, 196 N.J. at 64, (quoting Asbury Park Press, 374 N.J. Super. at 329). "Those who enacted OPRA understood that knowledge is power in a democracy, and that without access to information contained in records maintained by public agencies citizens cannot monitor the operation of our government or hold public officials accountable for their actions." Fair Share Housing Ctr., 207 N.J. 489, 501 (2011). An underlying premise of OPRA is that society as a whole suffers when "governmental bodies are permitted to operate in secrecy." Id. (quotations omitted).

To that end, OPRA is written in extremely broad terms, and seeks to ensure that the widest possible breadth of documents and government-related entities are subject to the Act's disclosure provisions. OPRA mandates that a public agency must make government records "readily accessible" to the public unless exempt, N.J.S.A. 47:1A-1, and that the "agency shall have the burden of proving that the denial of access is authorized by law." Id. Additionally, 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; See also Paff v. New Jersey. State Firemen's Ass'n, 431 N.J. Super. 278, 287 (2013) (quoting Fair Share, supra, 207 N.J. at 501) (when evaluating whether an entity is an instrumentality of government, and thus a public agency, OPRA mandates that OPRA be construed in favor of public access.).

Additionally, as our Supreme Court has recognized, various provisions within OPRA are designed to foster cooperation among requestors and agencies and reasonably accommodate their interests. See Mason v. City of Hoboken, 196 N.J. 51, 66, 78 (2008); see e.g. N.J.S.A. 47:1A-5(c)(allowing the imposition of special service charges if a requestor has an opportunity to review and object to the charge in advance); N.J.S.A. 47:1A-5(g)(authorizing a custodian to deny requests that would substantially disrupt agency operations after attempting to reach a reasonable solution with the requestor); N.J.S.A. 47:1A-5(a)(allowing smaller municipalities to limit the number of days and hours of access during a week); N.J.S.A. 47:1A-7(b)(established an "informal mediation program" to resolve disputes before the Government Records Council).

In short, OPRA directs custodians to construe the law broadly, in favor of public access to information, and to work with requestors to reasonably accommodate requests.

**I. Defendants Violated OPRA By Imposing Improper Fees on Plaintiff.**

OPRA contemplates that a records request might be costly and that complying with a request might require fees. A public agency may charge a reasonable special service charge where production of printed material "involves an extraordinary expenditure of time and effort to accommodate the request." N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 199 (Ch. Div. 2002)(discussing factors which may be relevant to whether a special service charge is appropriate). In such a case, the requestor is entitled to review and object to the charge in advance. N.J.S.A. 47:1A-5(c). Similarly, a custodian may charge a reasonable special charge, in some instances, where a request is for a record not routinely used by the agency, not routinely developed by the or maintained by the agency, or requiring a "substantial amount of manipulation or programming of information technology." N.J.S.A. 47:1A-5(d); Burnett v. County of Bergen, 198 N.J. at 437-38 (2009)(applying N.J.S.A. 47:1A-5(c) and N.J.S.A. 47:1A-5(d), and holding that the costs of redaction and duplication of eight million pages of records should be borne by the plaintiff). In addition, a custodian may charge for actual duplication fees, however such charges may only consist of the "cost of materials and supplies used to make a copy of the

record" and not "the cost of labor or other overhead expenses associated with making the copy." N.J.S.A. 47:1A-5(b).

**A. Defendants Violated OPRA by Inappropriately Imposing a Special Service Charge.**

Defendants seek a special service charge for the time and effort it took two employees to comply with the request pursuant to N.J.S.A. 47:1A-5(c). In part, Defendants' assessed the charge based on the amount of time and effort it took one employee to retrieve an undisclosed amount of physical files, and to retrieve and print electronic files using the Judiciary Charge System (JACS) and the Judiciary Electronic Filing System (JEFIS). Additionally, Defendants' assessed the charge based on the amount of time and effort it took another employee to redact, scan and electronically save the responsive records.

At the outset, N.J.S.A. 47:1A-5(c) authorizes a reasonable special service charge based on the actual direct cost of providing a government record when the record cannot be reproduced using ordinary equipment or reproduction involves extraordinary expenditure of time and effort. It does not address the use of information technology to comply with a records request. In pertinent part, the section provides:

Whenever the nature, format, manner of collation, or volume of a government record embodied in the

form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies [.] . . . The requester shall have the opportunity to review and object to the charge prior to it being incurred.

[Id.]

Here, Defendants claim a special services charge only under N.J.S.A. 47:1A-5(c), a provision that does not apply to the programming or manipulation of information technology. As such, Defendants' cannot rely on this provision to seek costs based on the use of information technology.

Defendants' reliance on N.J.S.A. 47:1A-5(c) is only potentially relevant, if at all relevant, to the extent that Defendants exerted extraordinary time and effort to compile physical records or to review responsive records for redactions. Defendants have failed to demonstrate that either circumstance applies here.

Additionally, Defendants' retrieval of physical documents cannot justify a special service charge. First, the time and effort required to retrieve physical court records is more routine and ordinary than exceptional and extraordinary. Indeed,



every other county prosecutor's office has responded to Plaintiff's request by providing the record in ordinary course without imposing a special service charge. That is not surprising, because Plaintiff requested records that are easily-identifiably and easily obtained; namely, civil asset forfeiture complaints filed by Defendants during a limited period of time and the answers received, if any. Nothing about the request is "extraordinary."

Defendants might argue that the need to review the document for redactions makes the case "extraordinary." However, Plaintiff requested *publicly-filed documents*. Ordinarily, publicly-filed court documents are not subject to redactions under OPRA. See e.g. Hammock v. Hoffmann-LaRoche, Inc., 142 N.J. 356 (1995) ("There is a presumption of public access to documents . . . filed with a court in connection with civil litigation."); In re Commitment of Edward S., 118 N.J. 118, 140 (1990) ("Since the adoption of our current Constitution in 1947, the rules governing New Jersey courts have endorsed a strong and consistent policy in favor of open judicial proceedings."). To the extent that Defendant MCPO violated court rules by including personally identifiable information in its civil summonses and complaints, it should bear the burden and cost of correcting its error. Defraying costs onto requestors for agency errors has the inevitable effect of restricting public access, and encouraging

agencies to ignore or violate court rules to later curtail public access. Indeed, it is unclear why publicly-filed records filed by MCPO (or filed by another party without objection from MCPO) have information therein that should be shielded from public view. Regardless, the burden of correcting any such problem must fall on the agency, not on a person who requests the publicly-filed documents.

Finally, even if the special service charge were appropriate (which it was not), Defendants failed to follow the clear procedure set forth in OPRA. Defendants first informed Plaintiff of a prohibitive special service charge only after compiling and redacting the records. In doing so, Defendants violated OPRA's mandate that requestors be provided with the opportunity to review and object to a charge prior to it being incurred, N.J.S.A. 47:1A-5(c), and OPRA's spirit of fostering cooperation between requestors and agencies. See Mason v. City of Hoboken, 196 N.J. 51, 66, 78 (2008).

**B. Defendants Violated OPRA by Imposing a Paper  
Reproduction Cost for Production of Electronic  
Records.**

As previously noted, OPRA authorizes an agency to charge a requestor for the actual cost of materials and supplies used to duplicate government records. N.J.S.A. 47:1A-5(b). Here, Defendants unlawfully seek to impose \$36.67 for electronic

records provided on CD. Defendants calculated the cost by charging \$0.05 per page for 728 pages and \$0.27 for the disc containing the records. However, Plaintiff requested the records in electronic format and at least some of the records were maintained in such a format. Additionally, as discussed *infra* at 1.A, to the extent that electronic records had to be printed due to Defendants failure to properly draft court records, Plaintiff should not bear the cost of such error. Thus, any cost associated with printing electronic records to redact inappropriate material filed by Defendants should be bore by Defendants.

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

The common law right of access offers an alternative for obtaining public records in New Jersey. Educ. Law Ctr. V. N.J. Dept. Edu., 198 N.J. at 302. 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 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)(internal citations 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 civil summonses and complaints filed by the State regarding civil asset forfeiture, and answers filed by pro se litigants. 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 litigation documents regarding civil asset

forfeiture, as this information is essential in assessing whether the police are unlawfully seizing civilians' property and whether prosecutors are depriving civilians of due process after their property has been seized.

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 defend liberty throughout New Jersey. Obtaining the requested records would shed a light onto prosecutorial and police conduct, and provide Plaintiff with information necessary to advocate for its organizational goals. Indeed, Plaintiff requested this information throughout New Jersey, and nineteen other counties have thus far provided such information (without imposing a special service charge under OPRA).

Finally, disclosure of the records at issue is warranted because Defendants have not established (and likely cannot establish) any public interest in nondisclosure of the publicly-filed documents at issue, 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 a reason for withholding documents that were publicly-filed.

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 JUNE 9, 2016.**

If this court orders Defendants to disclose the records requested by Plaintiff on June 9, 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.

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IRIS BROMBERG (067272013)  
EDWARD L. BAROCAS (026361992)  
JEANNE LOCICERO (024052000)  
AMERICAN CIVIL LIBERTIES UNION  
OF NEW JERSEY FOUNDATION  
89 Market Street, 7th Floor  
Newark, New Jersey 07102  
(973) 642-2086

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