AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION
P.O. Box 32159
Newark, NJ 07102
Phone: (974) 854-1710
Fax: (973) 642-6523
Karen Thompson, Esq. (#313662019)
kthompson@aclu-nj.org
Alexander Shalom, Esq. (#021162004)
Jeanne LoCicero, Esq. (#031422009)

Attorneys for Plaintiff,
American Civil Liberties Union of New Jersey

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, Plaintiff, v. COUNTY PROSECUTORS ASSOCIATION OF NEW JERSEY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY DOCKET NO.: Civil Action

BRIEF IN SUPPORT OF PLAINTIFF'S APPLICATION FOR AN ORDER TO SHOW CAUSE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES, REGULATIONS AND STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

As one of only three states in the nation where prosecutors are appointed rather than elected, New Jersey prosecutors hold vast power within the state's criminal justice system. Whether involving bail, charging decisions, plea bargains, or general accountability, New Jersey's county prosecutors have almost unlimited discretion as they deploy their decision-making powers. In addition to their executive authority within their respective jurisdictions, New Jersey's county prosecutors exercise power over statewide criminal justice policy, in part, through the County Prosecutors Association of New Jersey ("CPANJ" or "Defendant").

To understand the ways in which prosecutors impact the criminal justice system and to educate the public about these issues, the American Civil Liberties Union of New Jersey ("ACLU-NJ" or "Plaintiff") recently submitted requests to CPANJ pursuant to the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 to -13 ("OPRA"), seeking production of various documents related to the public works and funding of CPANJ. CPANJ responded with complete denials of access.

CPANJ is comprised of and operated by appointees of the executive branch. These are appointees who are paid by the New Jersey taxpayer, who regularly meet within government offices and with representatives of the Attorney General, and who are evidently using government resources and time to conduct work on behalf of the State of New Jersey. CPANJ and its members engage in the development of statewide criminal justice policy, through statutory inclusion on criminal justice committees, its work with the Office of the Attorney General, and its advocacy in the courts. New Jerseyans are entitled to know how these government officials are using public resources to develop and implement criminal justice policy.

For the reasons argued and expressed below and in Plaintiff's Verified Complaint, this Court should find that CPANJ is a public agency as defined by OPRA, order them to produce all documents responsive to Plaintiff's requests, and find CPANJ to be in violation of OPRA for failing to timely provide the requested documents and for failing to designate a custodian of records. This Court should direct CPANJ to designate a records custodian, adopt an OPRA request form, and lawfully comply with future OPRA requests. Alternatively, this Court should grant Plaintiff access to the requested documents under the common law right of access.

Lastly, this Court should declare Plaintiff a prevailing party entitled to an award of attorneys' fees.

STATEMENT OF FACTS

CPANJ describes its mission as "maintain[ing] close cooperation between the Attorney General of the State of New Jersey, the Division of Criminal Justice of the State of New Jersey and the twenty-one (21) county prosecutors of the State of New Jersey . . . so as to promote the orderly administration of criminal justice within the State of New Jersey . . ." (emphasis added)(See Exhs. A-C.) Despite being classified as "volunteers" in its 990 tax forms, all officers, trustees, and members of CPANJ are New Jersey county prosecutors, appointed by the Governor and paid by the State of New Jersey. CPANJ's income seems to be entirely derived from membership dues and conference fees.

CPANJ regularly meets with representatives of the Attorney General of New Jersey at the Hughes Justice Complex in Trenton, New Jersey, is treated by the Office of the Attorney General ("OAG") as a partner in implementing statewide criminal justice policy, and is generally treated by the OAG as an instrumentality, as is demonstrated by the well-documented close relationship and coordinated efforts between CPANJ and the OAG.

Indeed, CPANJ regularly sends copies of its meeting agendas to the Office of the Attorney General. Going as far back as February 1985, CPANJ and the Attorney General issued a joint policy statement regarding prosecutorial review of search warrant applications. (Exh. D.) CPANJ has a designated seat on the Department of Law and Public Safety Police Training Commission (N.J.S.A. 52:17B-70) and the New Jersey Parole Advisory Board (N.J.S.A. 30:4-123.47A). On March 5, 2018, the Department of Law and Public Safety and Office of the Attorney General announced the availability of $870,450 in funding to support training in county prosecutors' offices under the Violence Against Women Act ("VAWA") Grant Program. CPANJ is a representative on the VAWA Advisory committee. (See Exh. E.)

In addition, CPANJ has repeatedly litigated and filed appearances as *amicus curiae* in support of the State of New Jersey. For example:

- On October 12, 2017, the CPANJ filed a letter-brief with the New Jersey Supreme Court on Morris County Prosecutor's Office letterhead on behalf of itself as amicus curiae in State of New Jersey v. Hassan Travis (Sup. Ct. Docket No. 080020). The brief was submitted by Richard T. Burke, Warren County Prosecutor and CPANJ president, as well as John McNamara, Jr., ("McNamara") Supervising Assistant Prosecutor in Morris County.
- On November 30, 2018, the CPANJ filed a letter-brief with the New Jersey Supreme Court on Morris County Prosecutor's Office letterhead on behalf of itself as amicus curiae in State of New Jersey v. Terrell Hyman (Sup. Ct. Docket No. 080851). The brief was submitted by Koch, Sussex County Prosecutor, and the CPANJ president, as well as McNamara, now the Chief Assistant Prosecutor in Morris County.
- On September 18, 2019, the CPANJ filed a letter-brief with the New Jersey Supreme Court on Morris County Prosecutor's Office letterhead on behalf of itself as amicus curiae in State of New Jersey v. Antoine McCray and State of New Jersey v. Sahaile Gabourel (Sup. Ct. Docket No. 082744). The brief was, once again, submitted by Koch and McNamara.

Put simply, CPANJ is operated entirely by government appointees who are paid with New Jersey taxpayer funds to perform legal duties on behalf of the State of New Jersey while using government resources to do so.

In light of these facts, the ACLU-NJ's OPRA requests seek five categories of items from CPANJ created during the period spanning from January 1, 2017 to the present: (1) meeting agendas; (2) meeting minutes; (3) records reflecting funding received by CPANJ; (4) briefs filed in state or federal courts by CPANJ; and (5) polices or practices shared with county prosecutors through CPANJ. None of these requests involve criminal investigations, legislative resolutions, executive orders, or a civilian's personal information. None of the requests fall under any of the other categories of exempted records articulated in OPRA.

Regardless, CPANJ has denied Plaintiff's requests, arguing that the denial was justified because: (1) CPANJ is not a public agency as defined by N.J.S.A. 47:1-A-1.1; (2) the requested records were exempt from production pursuant to N.J.S.A. 47:1A-9; (3) CPANJ has no physical office and thus cannot "possess" or "maintain" the requested records which "are scattered and possessed by many members of CPANJ; (4) the requests fail to specifically name identifiable government records; and (5) the requests fail to satisfy the necessary requirements for access to public records under the common law. At no point has CPANJ asserted that the requested documents do not exist; rather, it asserts that the documents bear only a "tangential relationship to the organization" or are subject to one of the exemptions articulated in OPRA.

ARGUMENT

I. DEFENDANTS VIOLATED OPRA BY REFUSING TO PROVIDE DOCUMENTS RESPONSIVE TO PLAINTIFF'S OPRA REQUESTS.

"*[A]ll* government records *shall* be subject to public access unless exempt." MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 544 (App. Div. 2005) (emphasis added). Indeed, "[t]he purpose of OPRA 'is to maximize public knowledge about public affairs . . . and to minimize the evils inherent in a secluded process.'" Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005). OPRA's core

premise is that "society as a whole suffers . . . when governmental bodies are permitted to operate in secrecy." Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (App. Div. 2004). These foundational principles of access are essential in creating and maintaining a transparent, accountable, corruption-free democracy that truly serves New Jersey's citizens. OPRA's language mandates broad construction of its provisions—using a totality of the circumstances analysis—in favor of access. A government records custodian thus "has the burden of proving that [any] denial of access is authorized by law." N.J.S.A. 47:1A-1.1, 6.

Because CPANJ is a public agency playing a central role in the development and implementation of criminal justice policy, the public is entitled to know about its work on the public's behalf. CPANJ has failed to provide any lawful justification for its denial of access.

A. CPANJ is a Public Agency.

OPRA defines a "public agency" or "agency" to include:

> . . . [A]ny political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.
>
> [N.J.S.A. 47:1A-1.1.]

The definition of "public agency" under OPRA is deliberately broad to ensure that the largest number of New Jersey instrumentalities are held accountable to scrutiny and that the central premise of OPRA—public access to government functions—is not impaired or stymied. Fair Share Hous. Ctr., Inc. v. N.J. State League of Municipalities, 207 N.J. 489, 492 (2011) ("[OPRA] is broadly written so that a wide variety of entities fall within the compass of ["public agency."]); see also Paff v. N.J. State Firemen's Ass'n, 431 N.J. Super. 278, 288 (App. Div. 2013) ("[T]he definition of 'public agency' is broad.").

CPANJ argues that its denial of access is justified as it is not a public agency subject to the dictates of OPRA. Citing Fair Share Housing, CPANJ argues that it was "not created by statutory mandate. It does not perform the governmental functions of its creators, nor is the CPANJ assigned or delegated County Prosecutorial duties." (See Exh. F at 3.) CPANJ further argues, this time citing Wronko v. N.J. Soc'y for Prevention to Cruelty to Animals, 453 N.J. Super. 73 (App. Div. 2018), that it does not "fulfill a purpose or perform the duties of the prosecutors' offices, individually or as a whole." Id. These assertions of denial abandon CPANJ's own self-declared purpose which sits squarely within the bounds of OPRA's public agency definition. N.J.S.A. 47:1A-1.1; see also Sussex Commons Assocs., Ltd. Liab. Co. v. Rutgers, 210 N.J. 531, 544 (2012).

As has long been established, "a court must look behind the technical form of an entity to consider its substantive attributes." Paff, 431 N.J. Super. at 287. As a broad guide through that analysis, however, courts have considered the following factors: (1) whether the organization is controlled by the government; (2) whether it serves a traditional government function; and (3) whether it was created by statute. Fair Share Housing, 207 N.J. at 501. These are merely *suggested* factors for consideration, not required elements to be satisfied; to the contrary, any determination of "whether an entity is a public agency involves a fact-sensitive inquiry." Paff, 431 N.J. Super. at 288.

1. CPANJ Is Controlled by Government Actors.

In determining public agency status, courts look to the "formation, structure, and function" of the organization. Id. at 287-88. Whether an entity can be considered a public agency is largely influenced by the level of control exerted by appointed officials. See Fair Share Housing, 207 N.J. at 504 (finding that a nonprofit, unincorporated association, controlled

by elected or appointed officials and created through statutory authorization, is a public agency under OPRA). In this sense, even private non-profit organizations may be considered public agencies. See Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005).

County prosecutors are appointed by the executive branch to serve the counties they represent. See N.J.S.A. 2A: 158-1 ("There shall be appointed, for each county, by the governor with the advice and consent of the senate . . . some fit person . . . who shall be known as the County Prosecutor . . ."). County prosecutors are thus statutory creations entirely subject to the Governor's appointment power and the Attorney General's authority. CPANJ's funding is accrued almost entirely through the dues of the government appointees that it serves. No private citizens are members of CPANJ. It is of no moment that CPANJ is a volunteer run organization or a not-for-profit organization; its membership is restricted to 21 appointees of the executive branch[1] who "have absolute control over the membership" such that CPANJ "could only have been 'created' with their approval." Lafayette Yard, 183 N.J. at 535-36.

2. CPANJ Serves a Government Function.

By its own assertion, CPANJ's mission is to "maintain close cooperation between the Attorney General . . .[and] the Division of Criminal Justice . . . and the twenty-one (21) county prosecutors of the State of New Jersey relative to the developing educational programs so as to promote the orderly administration of criminal justice within the State of New Jersey . . ." including working with assistant prosecutors to file litigation in support of the State.[2] (Exhs. A-

[1] Indeed, CPANJ argues it cannot produce the requested documents because it would be difficult "to compile the CPANJ's records from all 21 County Prosecutors' Offices." (Exh. F at 4).

[2] While CPANJ does tout some sort of educational component to its efforts—and earns some income through conferences—in light of its statutorily ordained spot on several law enforcement oriented boards and commissions as well as its clear legal efforts in the courts, education is an

C.) CPANJ clearly performs a government function "by assisting state and local governments"—often at the State's behest—with the creation and implementation of criminal justice policy, grant making decisions, and litigation in support of state interests. Wronko, 453 N.J. Super. at 81.

CPANJ has no physical office; accordingly, any work done by it is likely done using government infrastructure and means. CPANJ regularly meets with the Attorney General in a government building, during working hours, about State business. CPANJ sends its meeting agendas to the Attorney General's office. CPANJ holds statutorily designated seats on state commissions and boards that are directly connected to state law enforcement interests, including parole and the training of police officers. See N.J.S.A. 52:17B-70; N.J.S.A. 30:4-123.47A. On its factual face, CPANJ is an organization of government appointees carrying out government business.

Even looking beyond these facts, CPANJ also satisfies the OPRA definition for a public agency: an "instrumentality . . . created by a . . . combination of political subdivisions." N.J.S.A. 47:1A-1.1; see also Fair Share Housing, 207 N.J. at 503. As the Supreme Court has held, an "[i]nstrumentality is variously defined as '[a] thing used to achieve an end or purpose' and, alternatively, as '[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body.'" Id. at 504 (*quoting* Black's Law Dictionary 814 (8th ed. 2014)). The CPANJ achieves an end by providing a function on behalf of "the twenty-one (21) County Prosecutors of the State of New Jersey" to "maintain . . . close cooperation between the Attorney General of the State of New Jersey [and] the Division of

---

adjacent and minor purpose compared to the several law enforcement goals for which CPANJ is clearly responsible.

Criminal Justice of the State of New Jersey." (See Exh. A-C). Under the plain language of OPRA, the CPANJ is an instrumentality.

Although the term "political subdivision" is more statutorily nebulous, courts have defined it as "an agency created for the exercise, within the prescribed limits, of the governmental functions and powers of the [S]tate." Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285, 305 (2017) (Albin, J., dissenting), quoting City of Jersey City v. Martin, 126 N.J.L. 353, 361 (1941); see also Black's Law Dictionary 1277 (9th ed. 2009) (political subdivision may be defined as "[a] division of a state that exists primarily to discharge some function of local government."). "When prosecutors perform their law enforcement function, they are discharging a State responsibility . . . *at its essence the County Prosecutors' law enforcement function is clearly a State function* . . ." Wright v. State, 169 N.J. 422, 452 (2001) (emphasis added); see also Lavezzi v. State, 219 N.J. 163, 167 (2014) ("The Criminal Justice Act of 1970 provides that '[t]he criminal business of the State shall be prosecuted by the Attorney General and the county prosecutors.'"). OPRA does not set forth a traditional "government-function test," and it would be irrelevant here as the function of CPANJ must be seen as an essential governmental one, given its interconnectedness throughout State government to the Governor, the Attorney General, and various other cadres of law enforcement.[3] Fair Share Housing, 207 N.J. at 6; see also Paff, 431 N.J. Super. at 288 (mission to promote "the development and advancement of the best methods of fire protection and the cultivation of fraternal fellowship among the various departments and fire persons throughout the State and elsewhere" is a traditional government function).

[3] It should also be noted that OPRA defines "law enforcement agency" as "a public agency, or part thereof, determined by the Attorney General to have law enforcement responsibilities." N.J.S.A. 47:1A-1.1.

Prosecutors yield a tremendous amount of power which is used daily to shape the criminal justice system at large. See Juleyka Lantigua-Williams, "Are Prosecutors the Key to Justice Reform?", available at https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/ (discussing prosecutorial accountability in response to corruption and misconduct) (last checked Oct. 30, 2019). Given the instruction that "any limitation on the right of access . . . shall be construed in favor of the public's right to access," where such power is wielded, checked only by the Attorney General, any benefit of the doubt must remain in favor of the public and their access to public records. N.J.S.A. 47:1A-1; see also Paff, 431 N.J. Super. at 287 (quoting Fair Share Housing, 207 N.J. at 501).[4]

To assert that CPANJ is not a public agency is to "elevate form over substance to reach a result that subverts the broad reading of OPRA as intended by the Legislature." Lafayette Yards, 183 N.J. at 535. CPANJ is an instrumentality of a combination of political subdivisions of the State, and thus is unequivocally a public agency subject to OPRA.

B. The Documents in Question Are Not Exempted From Disclosure.

Any document kept on file or received in the course of the official business of an "agency" is a government document, and thus is subject to disclosure. Fair Share Housing, 207 N.J. at 492. CPANJ asserts, albeit *arguendo*, that, even if it was a public agency, the requested documents are exempt from production as confidential records that, if disclosed, would compromise its ability to effectively conduct investigations. (See Exh. F at 3). To support this

[4] Contrary to CPANJ's assertions, statutory authorization is unnecessary for a public agency finding. (See Exh. F at 3) ("no such statutory construct exists that sanctioned the creation of the CPANJ."). Fair Share Housing described statutory authorization as an *additional* factor that qualified the League as a public agency because, more importantly and essentially, the League was "controlled by . . . *appointed officials from the very municipalities it represents*." Fair Share Housing, 207 N.J. at 504. (Emphasis added.) Such is certainly the case here.

position, CPANJ argues that a decision of the Government Records Council ("GRC"), Akhtar v. DNJ, GRC Complaint No. 2014-344 (September 2016), held that similar documents were exempt from production because they were related to criminal investigations, civil enforcement proceedings, or constitute inter-agency advisory, consultative, or deliberative materials and are exempt from disclosure. Id. at 4. These arguments are all without merit.

As an initial matter, decisions of the GRC are not binding upon this court, and Plaintiff's request for CPANJ's policies or procedures must be considered within the instant context and not as an appendage to an unrelated GRC decision. N.J.S.A. 47:1A-7(e); O'Shea v. Township of West Milford, 410 N.J. Super 371, 382 (App. Div. 2009).

Plaintiff's document requests are simply not materials that could be construed as related to criminal investigations or civil enforcement proceedings. CPANJ argues that any production of documents requested by Plaintiff would invoke an exemption pursuant to N.J.A.C. 13:1E-3.2(a)(2) that is not abrogated by OPRA. (Exh. F at 3-4.) CPANJ's citation in support of this argument, however, leaves out important language so as to insinuate that records and training manuals are exempted from production across the board. As the statute's text makes clear, what is in fact exempted are "[r]ecords, including standard operating procedures, manuals, and training materials that may reveal: . . . *specific legal strategy or advice, attorney work product, attorney-client privileged material, or other privileged material.*" N.J.A.C. 13:1E-3.2(a)(3) (emphasis added). Any privileged material contained in the requested responsive documents could be easily redacted. Further, once redacted, if CPANJ is, in fact, responsible for creating operational techniques and procedures, it seems that knowledge of what those functions are—not the details of what they might be—beg disclosure to a public on the receiving end of actions that would "create a risk to the safety of persons, property, [or] electronic data . . ." N.J.A.C. 13:1E-

3.2(a)(2).

CPANJ also urges this Court to adopt broad readings of the "ongoing investigations" and "criminal investigatory records" exemptions to OPRA's access requirements, which would result in large swaths of records being removed from public view. Based on the intent of the Legislature, prior case law, and practical realities, these arguments must also be rejected.

The ongoing investigatory exemption to OPRA can only be invoked when the requested records "pertain[s] to an investigation" and their "release would be inimical to the public interest." N.J.S.A. 47:1A-3. In addition, the record at issue must not have previously been available to the public. Id. It is unclear on its face what meeting agendas and minutes, accounts of funding, briefing, or even policies and practices created by CPANJ would have to do with an investigation, as CPANJ cannot at once be not involved in law enforcement activities but simultaneously protected by its involvement in law enforcement activities. CPANJ has also failed to establish that any of the requested documents were not previously available to the public, particularly given that some of the records have been sent to the OAG where they are inarguably responsive to public OPRA requests. Lastly, any assessment of whether or not disclosure of a record is "inimical to the public interest" requires a record-by-record analysis, and precludes the categorical restrictions Defendant invokes.

As for the "criminal investigatory record" exception, such exception pertains to a record "not required by law to be made, maintained or kept on file" or relating to "any criminal investigation or related civil enforcement proceeding." N.J.S.A. 47:1A-1.1. Both prongs must be satisfied for a record to be exempt from public access. Id. The requested records do not pertain to an investigation because the records are factual meeting minutes, agendas, and fiscal accountings which are, by nature, non-investigatory and routinely kept in the normal course of

business. While the records at issue may not be required by law to be maintained, IRS guidance directs nonprofit organizations to "take steps to ensure" that they are; indeed, nonprofits filing Form 990s may attest to keeping contemporaneously records documenting meetings or written actions, which CPANJ did in Part VI, line 8a-b of multiple tax forms. (See Exhs. A-C.) The prongs are not satisfied and the exception is thus inapplicable.

CPANJ also invokes the "advisory, consultative, or deliberative material" exception. This exception "has been construed to encompass the deliberative process privilege, which has its roots in the common law." Ciesla v. N.J. Dep't of Health & Sr. Servs., 429 N.J. Super. 127, 137 (App. Div. 2012). The applicability of the deliberative process privilege is governed by a two-prong test: that a document is (1) "pre-decisional," meaning it was "generated before the adoption of an agency's policy or decision;" and (2) deliberative, in that it "contain[s] opinions, recommendations, or advice about agency policies." Educ. Law Ctr. v. Dep't of Educ., 198 N.J. 274, 286 (2009) (quoting In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000)). Only where a document satisfies both prongs is it exempt from disclosure under OPRA.

As to the first prong, CPANJ must prove that the requested documents "were used, or could be used, in the agency's decision-making process." Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83, 90 (App. Div. 2018). If the requested documents remained subject to revision and recommendations, *i.e.* drafts, and were not yet approved for public circulation, they are considered to be pre-decisional. Any documents that were, however, approved for public circulation must be disclosed. Neither fiscal records, briefing, nor meeting agendas, however, include within their ambit decision making materials, and the request is limited to responsive final drafts. To the extent that the meeting minutes and policies include pre- and post-deliberative material, such information could easily be redacted. N.J.S.A. 47:1A-

5(g). As for the second prong, the exempted document must be closely related to "the formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated." Libertarians, 453 N.J. Super. at 89-90. Such a determination is for the court after *in camera* review, but does not encompass the requests that are clearly unrelated to policy. Neither prong of the test is satisfied and the requested documents are thus eligible for disclosure.

C. Defendant is Obligated to Collect and Produce Responsive Documents.

CPANJ argues that it could not comply with Plaintiff's requests because it has no "physical office, location, or even an online presence", the requested records "are scattered and possessed by the many members of the organization", and "the records of the CPANJ [are] unidentifiable," because "the custodian would . . . have to filter between what is repetitive and what is unique, all of which extends beyond the scope of a custodian's duties under OPRA." (Exh. F at 4-5). This reasoning is tortured.

Plaintiff's request would not require CPANJ to analyze, compile or produce new documents. Certainly, Plaintiff is not requesting "an open-ended search . . . of an agency's files." MAG, 375 N.J. Super. at 549. The documents have already been created during the ordinary course of business, have been clearly identified and defined, and are limited in their scope; indeed, some have already been collected and sent to the OAG. Plaintiff has requested specific documents created during a specific timeframe, Plaintiff has not made a blanket request for any and all loosely associated information.

Further:

> OPRA identifies the responsibilities of . . . the agency relevant to the prompt access the law is designed to provide. The custodian . . . *must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, [and] identify requests that require 'extraordinary expenditure of time and effort'* . . .

> [N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 176-77 (App. Div. 2007) (emphasis added)].

OPRA does not require a custodian to not feel challenged when going about their statutory duty.

II. PLAINTIFF IS ENTITLED TO DOCUMENTS RESPONSIVE TO ITS OPRA REQUEST UNDER THE COMMON LAW RIGHT OF ACCESS

At common law, a person has an enforceable right to require custodians of public records to make those records available for inspection. Irval Realty v. Bd. Of Pub. Util. Comm'rs, 61 N.J. 366, 372 (1972). The Supreme Court continued:

> It was, however, necessary that the citizen be able to show an interest in the subject matter of the material he sought to scrutinize. Such interest need not have been purely personal. As one citizen . . . concerned with a public problem or issue, he might demand and be accorded access to public records bearing upon the problem, even though his individual interest may have been slight.
>
> [Id.]

Here, the interest is hardly slight. Given the appointment of county prosecutors by the Governor, there exists no check for prosecutorial accountability by private New Jerseyans through the ballot box. Civic engagement and knowledge is thus the sole means of addressing the public interest in a wide range of issues impacted by prosecutors' decisions in the courtroom and beyond.[5]

Three issues must be addressed in determining whether the common law requires production of the requested records: (1) whether the records are "public records" as defined by the common law; (2) whether the plaintiff has the requisite interest to inspect the public records;

[5] Indeed, in New Jersey, Black people make up only 14% of the population, but comprise 61% of the prison population and are incarcerated at a rate more than 12 times that of whites, a disparity level that is the highest in the nation. This racial disparity can be directly attributed to prosecutorial decision making. See https://www.fundfornj.org/crossroadsnj/reports/criminal-justice-reform?items_per_page=All (last checked Oct. 30, 2019); https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform (last checked Oct. 30, 2019).

and (3) whether an interest in confidentiality outweighs disclosure.[6] See S. Jersey Publ'g Co. v. N.J. Expressway Auth, 124 N.J. 487, 488 (1991); Techniscan Corp. v. Passaic Valley Water Comm'n., 113 N.J. 233, 237 (1988); Shuttleworth v. City of Camden, 258 N.J. Super. 573, 582 (App. Div. 1992); Home News Publ'g Co. v. State, 224 N.J. Super. 7, 16 (App. Div 1988). All three requirements are satisfied here.

A. The Requested Records Are Public Records Under Common Law.

The definition of government record under OPRA is essentially the same as under common law:

> One required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in the public office. The elements essential to constitute a public record are that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it . . . .
>
> [Nero v. Hyland, 76 N.J. 213, 222 (1978)].

Accordingly, the requested documents are public records for essentially the same reasons they constitute a "government record" under OPRA.

B. Plaintiff has the Requisite Interest to Inspect the Public Records.

Under the common law rule of access to public documents, it has long been held that a citizen is entitled to inspect documents of a public nature "provided he shows the requisite interest therein." Ferry v. Williams, 41 N.J.L. 332, 334 (Sup. Ct. 1879). Indeed, nothing contained in OPRA shall be construed as limiting the common law right of access to a

[6] There is no need to perform this analysis if the statutory requirements of OPRA are fulfilled. O'Shea, 410 N.J. Super. at 387 (App. Div. 2009) ("If disclosure is allowed under OPRA, the court should not reach the issue regarding the common law right.")

government record, including criminal investigatory records of a law enforcement agency. N.J.S.A. 47:1A-8; see also N.J.S.A. 47:1A-1; N. Jersey Media Grp., Inc. v. Tp. of Lyndhurst, 229 N.J. 541, 578 (2017).

Plaintiff is the ACLU of New Jersey. The entirety of the organization's existence is dedicated to upholding the civil liberties of New Jerseyans. Plaintiff's interest in seeking disclosure clearly stems from a mission focused on the protection of civil liberties, particularly with regard to the ways in which the New Jersey justice system interplays with prosecutorial decision making across the state, and whether and how CPANJ is using government resources to do its work.

Specifically, as part of a national ACLU Smart Justice campaign, the ACLU-NJ is an active participant in an unprecedented, multiyear effort to reduce U.S. jail and prison populations by 50% and to combat racial disparities throughout the criminal justice system.[7] As a critical part of these efforts in New Jersey, the ACLU-NJ is researching the role of New Jersey prosecutors in shaping the trajectory of the criminal justice system and embarking on efforts to understand how county and assistant prosecutors coordinate efforts on establishing and implementing criminal justice policy in an effort to promote citizen awareness and educate the public around these issues. This effort is consistent with significant work the ACLU-NJ has done historically to ensure that law enforcement, including prosecutors, does not infringe upon citizens' civil liberties and has also become deeply involved in comprehensive research regarding prosecutorial conduct and accountability in New Jersey.[8]

[7] ACLU press release, Sept. 5, 2018, https://www.aclu.org/press-releases/aclu-launches-state-state-blueprints-roadmaps-cutting-incarceration-50-percent (last checked October 28, 2019).

[8] Alexander Shalom, George C. Thomas III, Trial and Error: A Comprehensive Study of Prosecutor Conduct In New Jersey, ACLU of New Jersey, September 19, 2012. Available at

Accordingly, Plaintiff has the requisite interest to gain access to the records under the common law right of access.

C. Plaintiff's Interest in Disclosure Outweighs Any State Interest in Keeping the Records Confidential.

The last question to be addressed is whether the State interest in the meeting minutes, agendas, briefing, fiscal records and policies outweigh any public interest in disclosure. "Ordinarily, only an assertion of citizen or taxpayer status is necessary for production of common-law records, subject to a showing of good faith." Loigman v. Kimmelman, 102 N.J. 98, 104 (1986). The court further stated: "[t]hus, if the government need in confidentiality is slight or non-existent, citizen-taxpayer status will ordinarily warrant that that matters be disclosed. On the other hand, when the public interest in confidentiality is greater, the citizen's right of access qualified." Id. at 105.

The State's arguments against disclosure are unavailing. First, Plaintiff's requests for briefing involves documents clearly within the public sphere; CPANJ's involvement hardly compromises its ability to conduct investigations when it is very publicly arguing its legal points of view. Similarly, neither meeting minutes nor agendas, much less the fiscal map of the organization reveal advisory or deliberative information, as noted *supra*. The requested documents comprise the very basic business documents that are required for any not-for-profit with a board. The public is entitled to know about the programmatic nature of CPANJ and how its' choices create very real, tangible effects in the lives of members of the public.

---

http://www.prosecutorialaccountability.com/wp-content/uploads/trial-and-error.pdf (last checked October 28, 2019).

III. THE COURT SHOULD PERMIT DISCOVERY AS TO WHETHER CPANJ KNOWINGLY AND WILLFULLY VIOLATED OPRA

A. The Court Should Permit Limited Discovery.

In a summary action, the court may permit discovery "for good cause shown." R. 4:67-5. While the Appellate Division has cautioned that "protracted discovery" is generally "not suitable" in OPRA proceedings given their inherent summary and expedited nature, that court has acknowledged that in the event of "legitimate need," discovery may be permissible. MAG, 375 N.J. Super. at 552. Accordingly, courts have permitted discovery in a wide variety of actions where such discovery was necessary to resolve some factual dispute. See, e.g., Paff v. Galloway, 444 N.J. Super. 495, 498 (App. Div. 2016) ("After the court entered the order to show cause, the parties engaged in limited discovery and the court heard testimony over the course of three days."); Newark Morning Ledger Co. v. New Jersey Sports & Exposition Auth., 423 N.J. Super. 140, 152 (App. Div. 2011) (noting the trial court allowed "the deposition [ ] of a[t] least some of the promoters who submitted . . . certifications in order to delve into the basis for the conclusory statements in the certifications that public release of the information would cause a 'competitive disadvantage.'").

In North Jersey Media Group Inc. v. Office of Governor, 415 N.J. Super. 282 (App. Div. 2017), a newspaper brought actions against the Governor's Office for OPRA violations. In each action, the newspaper sought a declaration that the defendant had violated OPRA; the imposition of knowing and willful civil penalties; an order directing the defendant to identify the records custodian who replied to the OPRA request; a sworn statement from any persons involved in handling the OPRA request; and discovery to resolve factual disputes. Id. at 291. The Appellate Division held that N.J.S.A. 47:1A-11 provides "a valuable means to compel compliance with OPRA by public officials, officers, employees and records custodians who might otherwise flout

OPRA's requirements," finding that the civil penalties permitted under that statute help ensure that records at all levels of government are not willfully and knowingly withheld from the public. Id. at 309. The court did not determine whether discovery should be permitted, but left the issue for the trial court to consider in light of its holding that N.J.S.A. 47:1A-11 permits that court to impose civil penalties for willful violations of OPRA. Id. at 309, n. 14. On remand, discovery was permitted to ascertain whether any knowing and willful violation occurred.

Here, CPANJ's assertion of criminal investigations exemptions as both a sword and a shield and the opaque nature of its funding structure, particularly in light of its recent request to the IRS to change its organizational status to a 501(c)(6)—contemporaneous with its receipt of the ACLU-NJ's OPRA requests—necessitates the use of the tools of discovery to ascertain CPANJ's lapses in production. Plaintiff is also entitled to know the sources of CPANJ's resources as they are devoted to its mission, the context and contents of its meetings and events (including dates, times, and locations), and the people performing its operating functions. Good cause has been shown to permit discovery so that the ACLU-NJ can ascertain the clear violations of the statute.

IV. PLAINTIFF IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND LITIGATION COSTS

Plaintiff is statutorily entitled to reasonable attorney's fees and litigation costs. Pursuant to OPRA:

> A person who is denied access to a government records by the custodian of a record, at the option of the requestor . . . may institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . . . The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding *shall* be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6 (emphasis added)].

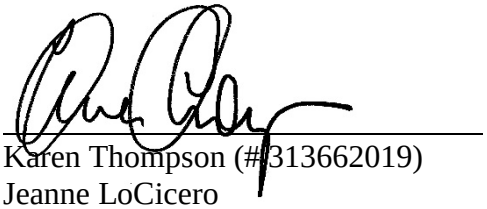
New Jersey law has long recognized the "catalyst theory" with regard to awards of attorney's fees. Mason v. City of Hoboken, 196 N.J. 51, 73 (2008). A plaintiff is entitled to attorney's fees if they can demonstrate "(1) a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; and (2) that the relief ultimately secured by plaintiffs has a basis in law." Id. at 76; see also Smith v. Hudson Cnty. Register, 422 N.J. Super. 387, 394 (App. Div. 2011) ("A plaintiff may qualify as a prevailing party, and thereby be entitled to a fee award, by taking legal action that provides a 'catalyst' to induce a defendant's compliance with the law.").

Plaintiff has made a valid OPRA request for government records and CPANJ has unlawfully denied access to them. This litigation, if successful, will serve as the catalyst for Plaintiff obtaining the unlawfully withheld records. Therefore, Plaintiff is entitled to an award of attorney's fees and costs of this suit.

CONCLUSION

For all the foregoing reasons, Plaintiff asks the Court to grant its Order to Show Cause and (1) find Defendant in violation of OPRA; (2) designate a custodian of records; (3) order Defendant to produce the responsive documents forthwith; (4) declare Plaintiff a prevailing party entitled to an award of attorney's fees. Alternatively, Plaintiff seeks access pursuant to a common law right of access.

Respectfully submitted,



Karen Thompson (#313662019)
Jeanne LoCicero
Alexander Shalom

Counsel for the American Civil Liberties Union of New Jersey