

**AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY FOUNDATION**

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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

VERIFIED COMPLAINT

Plaintiff American Civil Liberties Union of New Jersey through its undersigned counsel,
American Civil Liberties Union of New Jersey Foundation, complains against Defendant as
follows:

1. This is an action alleging violation of the New Jersey Open Public Records Act,
N.J.S.A. 47:1A-1 to -13 (“OPRA”) and the common law right to access to public records in light
of the denial of a request seeking governmental records from the County Prosecutors Association
of New Jersey (“CPANJ” or “Defendant”).

2. CPANJ—a political subdivision of the State comprised exclusively of government officials and performing duties commonly associated with government functions, including, but not limited to, law enforcement—seeks exemption from its general obligations under OPRA, which allows New Jersey residents access to government records for inspection, copying or examination.

3. Because CPANJ is a public agency and no legitimate exemptions or exceptions supported by law or in fact have been articulated for withholding the requested documents, Plaintiff seeks relief from this Court in the form of access to the requested documents through this Complaint.

PLAINTIFF

4. Plaintiff AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY (“ACLU-NJ” or “Plaintiff”) is a New Jersey not-for-profit corporation dedicated to preserving constitutional liberties, including advocating for governmental transparency and protecting the public’s right to access governmental records in New Jersey. The ACLU-NJ has its offices in Newark, New Jersey. It sues on behalf of its approximately 40,000 members, most of whom are residents of and taxpayers in New Jersey. It and its members advocate for and are deeply invested in questions of civic engagement in public discourse and the accountability of public officials to their constituencies. Both of these aims are accomplished through the right to access of public governmental records.

DEFENDANT

5. DEFENDANT CPANJ is a 501(c)(3) registered in the State of New Jersey and comprised of 21 County Prosecutors.

6. According to its 2015-2017 990 Forms, CPANJ's mission and significant activities are "[t]o maintain 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 relative to the developing educational programs so as to promote the orderly administration of criminal justice within the State of New Jersey, consistent with the Constitution and the laws of the State of New Jersey." (Attached hereto as Exhibits ("Exhs." or "Exh.") A, B and C are true and accurate copies of CPANJ's 2015, 2016 and 2017 990 Forms).

7. No designated custodian has been identified by CPANJ to Plaintiff.

VENUE & JURISDICTION

8. Venue is properly laid in Essex County because Defendant's registered office address is in Essex County. R. 4:3-2(a).

9. This Court has subject matter jurisdiction pursuant to N.J.S.A. 47:1A-6.

FACTUAL ALLEGATIONS

A. The ACLU-NJ's Interest in the Records at Issue

10. The ACLU-NJ has long championed the fundamental rights guaranteed to the accused, Defendants, offenders, and prisoners; indeed, it is a foundational part of the ACLU-NJ's work to safeguard the essential political rights that protect all Americans from governmental abuses of power and overreach.

11. As part of these efforts, the ACLU-NJ has litigated or served as *amicus curiae* in several cases involving prosecutors in New Jersey. See, e.g., State v. T.J.M., 220 N.J. 220 (2015); State v. Jackson, 460 N.J. Super. 258 (App. Div. 2019). The ACLU-NJ has also engaged in legislative efforts to ensure that prosecutors do not engage in actions raising, *inter alia*, 8th

Amendment and due process concerns: from solitary confinement to bail system reform.

12. The ACLU-NJ has engaged in research regarding prosecutorial accountability and transparency, including the publication of a 2012 report detailing prosecutorial conduct in New Jersey.¹

13. The ACLU-NJ is also part of a national ACLU Smart Justice campaign, an unprecedented, multiyear effort to reduce the U.S. jail and prison populations by 50% and to combat racial disparities throughout the criminal justice system.² As a critical part of the Smart Justice campaign, the ACLU-NJ is researching the role of county prosecutors in the criminal justice system and embarking on efforts to understand the trajectory of prosecutorial input on criminal justice policy statewide.

B. About CPANJ

12. The ACLU-NJ has identified the CPANJ to be an instrumentality created by a combination of political subdivisions to facilitate cooperation between government agencies and other political subdivisions.

13. CPANJ has identified itself as a nonprofit, tax-exempt organization with seven voting members of its governing body in its 2015-17 Form 990s filed with the Internal Revenue Service (“IRS”). According to its 990 forms, CPANJ does not compensate any staff.

14. In those filings, pursuant to IRS guidance, CPANJ acknowledged that it contemporaneously documents “the meetings held or written actions undertaken during the year

¹ Alexander Shalom, George C. Thomas III, Trial and Error: A Comprehensive Study of Prosecutor Conduct In New Jersey, ACLU of New Jersey, Sept. 19, 2012. Available at <http://www.prosecutorialaccountability.com/wp-content/uploads/trial-and-error.pdf> (last checked Oct. 28, 2019).

² See American Civil Liberties Union, “ACLU Launches State-By-State Blueprints With Roadmaps for Cutting Incarceration by 50 Percent”, Sept. 5, 2018. Available at <https://www.aclu.org/press-releases/aclu-launches-state-state-blueprints-roadmaps-cutting-incarceration-50-percent> (last checked Nov. 4, 2019).

by [t]he governing body [and] [e]ach committee with authority to act on behalf of the governing body.” (Exhs. A-C.)

15. CPANJ’s tax forms also identify organizational purposes that are inextricably linked to government functions.

16. 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* relative to the developing educational programs so as to promote the orderly administration of criminal justice within the State of New Jersey . . .” (emphasis added) (See Exhs. A-C.)

17. Despite being classified as “volunteers” in their 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.

18. Upon information and belief, CPANJ regularly meets with representatives of the Attorney General of New Jersey at the Hughes Justice Complex in Trenton, New Jersey and is treated by the Office of the Attorney General (“OAG”) as a partner in implementing statewide criminal justice policy.

19. Upon information and belief, CPANJ regularly sends copies of its meeting minutes and agendas to the Office of the Attorney General.

20. In February 1985, CPANJ and the Attorney General issued a joint policy statement regarding prosecutorial review of search warrant applications. (Attached hereto as Exh. D is a true and accurate copy of the February 1985 Joint Policy Statement Issued by the Attorney General of New Jersey and CPANJ Regarding Prosecutorial Review of Search Warrant Applications.).

21. CPANJ has a designated seat on the Department of Law and Public Safety Police Training Commission (N.J.S.A. 52:17B-70) as well as on the New Jersey Parole Advisory Board. N.J.S.A. 30:4-123.47A.

22. 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. (Attached hereto as Exh. E is a true and accurate copy of a March 2018 Public Notice of Availability of VAWA Grant Funds in the New Jersey Register.)

23. Upon information and belief, County Prosecutors use the resources of their offices to conduct CPANJ business, including the development of agendas, the coordination of meetings and dinners, and the administration of its scholarship program.

24. Upon information and belief, CPANJ has appeared as *amicus curiae* and filed appearances using the government resources of various county prosecutors to do so. In the examples listed below, it is clear that the Morris County Prosecutor's Office is acting as an instrumentality of CPANJ:

- a. On October 12, 2017, 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.
- b. On November 30, 2018, 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. Terry Hyman (Sup. Ct. Docket No. 080851). The brief was submitted by Francis A. Koch ("Koch"), Sussex County Prosecutor, and CPANJ president, as well as McNamara, now the Chief Assistant Prosecutor in Morris County.

- c. On September 18, 2019, 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.

25. CPANJ's income seems to be entirely derived from membership dues and conference fees, all collected from or by county prosecutors and or by their staff members.

26. Put simply, and upon information and belief, 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.

C. Plaintiff's OPRA Requests

27. On July 19, 2019, the ACLU-NJ submitted OPRA records requests to CPANJ pursuant to OPRA and the common law right of access. The requests sought production of meeting agendas and minutes, funding records, and briefs filed in state or federal courts by CPANJ, as well as any policies or practices shared with county prosecutors by CPANJ. (Attached hereto as Exh. F is a true and accurate copy of the ACLU-NJ's July 19, 2019 OPRA request to CPANJ.)

28. CPANJ was asked—by email communication—to identify their dedicated records custodian so as to properly determine where all communications regarding Plaintiff's OPRA requests should be sent. CPANJ did not respond and failed to provide the identity of their designated records custodian.

29. On August 2, 2019, Koch, of the Sussex County Prosecutor's Office, sent an email to Plaintiff requesting an extension until September 20, 2019 to respond to Plaintiff's OPRA requests.

30. On September 18, 2019, CPANJ sent a letter to Plaintiff denying access to all of its document requests under both OPRA and the common law. (Attached hereto as Exh. G is a true and accurate copy of CPANJ’s September 18, 2019 Letter Denying Access to the Requested Records.)

31. In its denial, CPANJ stated that “[t]he CPANJ is a private non-profit organization and not a public agency subject to the dictates of OPRA or to requests made under the common law right of access.” (Id. at 2.)

32. CPANJ identified itself as:

. . . a non-profit society, organized pursuant to Section 501(c)(6) of the Internal Revenue Code, which covers business leagues, chambers of commerce, boards of trade, and similar organizations. It is a private association comprised of the 21 County Prosecutors and has as its goal the promotion of the orderly administration of criminal justice within the State and the fair and effective enforcement of the constitution and laws of this State through the cooperation of all law enforcement agencies³

(Id.)(footnote omitted.)

33. CPANJ also noted other bases for its dismissal, specifically that “it cannot be considered a public agency under OPRA” and that the records requested are “exempt from production.” (Id. at 3.)

34. CPANJ further argued that the denial was proper under the common law and Plaintiff’s requests for documents failed to satisfy the three requirements necessary under the common law for release. (Id. at 5.)

35. To date, CPANJ has not provided the requested documents that are responsive to Plaintiff’s OPRA request.

³At the time CPANJ received the OPRA request, CPANJ was still established as a 501(c)(3) although CPANJ applied to change that status to a 501(c)(6) at some point in July 2019. It is unknown if the change was requested prior to or after the ACLU-NJ’s OPRA request.

36. Plaintiff files this lawsuit to obtain those documents so as (1) to continue its investigation into how county prosecutors and their staff members coordinate their efforts on criminal justice policy; (2) to determine if those efforts are in anyway financed by or supported with State funds or resources; and (3) to adequately monitor prosecutorial transparency and accountability within the New Jersey criminal justice system.

FIRST COUNT
(Violation of OPRA)

37. Plaintiff re-alleges each allegation set forth in Paragraphs 1 through 35, inclusive, and incorporates them by reference herein.

38. The Defendant is subject to the Open Public Records Act, N.J.S.A. 47:1A-1 because it meets OPRA's definition of a public agency.

39. Public agencies are obligated to produce government records within seven business days of an OPRA request. N.J.S.A. 47:1A-5(i).

40. OPRA defines a "public agency" broadly to include, among other entities, an "instrumentality" of the state, a political subdivision of the state, or any combination of political subdivisions of the State. N.J.S.A. 47:1A-1.1.

41. Numerous non-profit organizations have been found to be "public agencies" that are subject to OPRA. See, e.g., Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519 (2005); Fair Share Hsn'g. Ctr., Inc. v. N.J. State League of Municipalities, 207 N.J. 489 (2011); Paff v. N. J. State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013); and Wronko v. N. J. Soc. For Prevention of Cruelty to Animals, 453 N.J. Super. 73 (App. Div. 2018).

42. The government records requested by Plaintiff—meeting agendas and minutes, accounting of funding, briefs filed in state or federal courts, policies or practices shared with

county prosecutors—are all “government records” as that term is defined by OPRA because they were all “made, maintained or kept on file in the course of [the CPANJ’s] official business.”

N.J.S.A. 47:1A-1.1.

43. Plaintiff’s requests for documents are not exempt from production under any of OPRA’s exceptions. The documents are required to be kept in the regular order of business, were filed with the courts of this State, and disseminated by CPANJ to the Attorney General.

44. Plaintiff does not seek information that would compromise the CPANJ’s investigatory capacities; rather, to the extent that the requested documents contain privileged or confidential information, redaction, not non-disclosure, is the proper response. N.J.S.A. 47:1A-5(i).

45. As a public agency, CPANJ must make available government documents as required by OPRA. Plaintiff is entitled to the production of these documents whether or not they have previously been collected, cached and collated and whether or not CPANJ has officially designated a custodian of records to do so.

46. In fact, because CPANJ is a “public agency” that must comply with OPRA, it is statutorily obligated to designate a records custodian and make an OPRA request form available to the public. N.J.S.A. 47:1A-5(f).

47. Accordingly, Defendant has violated OPRA by:

- a. Failing to make the records requested “readily accessible for inspection, copying, or examination” in violation of N.J.S.A. 47:1A-1.
- b. Failing to grant access to government records within seven business days, in violation of N.J.S.A. 47:1A-5(g);
- c. Failing to prove that the denial of access is authorized by law, in violation

of N.J.S.A. 47:1A-6;

- d. Failing to designate a records custodian, in violation of N.J.S.A. 47:1A-1.1;
- e. Failing to maintain an OPRA request form, in violation of N.J.S.A. 47:1A-5(f); and
- f. Unlawfully denying access to non-exempt portions of government records, in violation of N.J.S.A. 47:1-5(i).

WHEREFORE, Plaintiff ACLU-NJ prays for relief as follows:

- a. That the Court declare the Defendant to be a public agency pursuant to OPRA, N.J.S.A. 47:1A-1;
- b. That the Court declare Defendant to be in violation of OPRA, N.J.S.A. 47:1A-1 et seq., by failing to provide lawful access to the requested documents;
- c. That the Court direct Defendant to release the responsive documents forthwith. Alternatively, if the Defendant asserts or the Court believes that any information within any responsive documents is exempt from public access, Plaintiff respectfully asks the Court to review the documents *in camera* and then order Defendant to release the documents in redacted format and to submit a certification setting forth a lawful basis for the redactions;
- d. That the Court direct Defendant to designate a records custodian, adopt an OPRA request form, and lawfully comply with future OPRA requests;
- e. That the Court direct Defendant to preserve any responsive documents

pending resolution of these proceedings or as otherwise required by law;

- f. That the Court award Plaintiff fees and costs pursuant to N.J.S.A. 47:1A-6; and
- g. For any other relief as this court deems just and equitable.

SECOND COUNT
(Violation of the Common Law Right of Access)

48. Plaintiff re-alleges each allegation set forth in Paragraphs 1 through 46, inclusive, and incorporates them by reference herein.

49. The public enjoys a vested common law right of access to public records generated or maintained by public entities. See e.g., Keddie v. Rutgers, 148 N.J. 36 (1997); S. Jersey Publ'ing Co. v. N.J. Exp'way Auth., 124 N.J. 478 (1991).

50. The requested documents are public records subject to public access under the common law.

51. Plaintiff, and by extension, its members and the public, has a significant interest in reviewing these documents to learn more about the CPANJ's relationship with prosecutors across the state and the role the CPANJ plays in setting policy and/or procedures for prosecutors around the state.

52. Plaintiff, and by extension, its members and the public which it serves as an organization invested in upholding civil liberties of New Jerseyans, has a strong interest in knowing and developing prosecutor accountability and transparency.

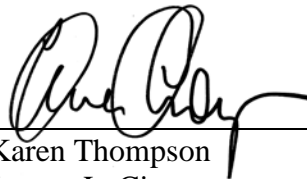
53. Plaintiff, and by extension, its members and the public, has a right to know the information contained in the requested documents to provide complete information to the public regarding prosecutorial decision making, accountability, and funding for actions taken by the CPANJ on behalf of the State.

54. Accordingly, Defendant' failure to disclose the requested documents violates Plaintiff's common law right of access to public records.

WHEREFORE, Plaintiff ACLU of New Jersey pray for relief as follows:

- a. That the Court declare the Defendant subject to the common law right of access;
- b. That the Court declare the actions of Defendant to be unlawful and invalid;
- c. That the Court direct Defendant to release the requested records to Plaintiff forthwith. Alternatively, if the Court believes that any information is exempt from public access, we respectfully ask the Court to review the records *in camera* and then require Defendant to delete or excise from the records the portion(s) which are exempt from public access and promptly permit access to the remainder of the records;
- d. That the Court direct Defendant to preserve any responsive documents pending resolution of these proceedings or as otherwise required by law;
- e. That the Court award Plaintiff fees and costs of this suit; and
- f. For any other relief as this court deems just and equitable.

Respectfully submitted,



Karen Thompson
Jeanne LoCicero
Alexander Shalom

*Counsel for the American Civil Liberties Union
of New Jersey*

VERIFICATION

Karen Thompson, of full age, deposes and says:

1. I am a senior staff attorney for the American Civil Liberties Union of New Jersey, the Plaintiff in this matter.

2. I have read the Verified Complaint. The allegations in the Verified Complaint 8-22 are true. The said Verified Complaint is based on personal knowledge and is made in truth and good faith and without collusion, for the causes set forth herein. As to any facts alleged to be upon information and belief, I believe those facts to be true.

3. All documents attached to the Verified Complaint and Brief are true copies and have not been redacted, changed, modified, adjusted or otherwise altered in any manner by me or my agents unless so stated.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.


KAREN THOMPSON

Dated: November 4, 2019