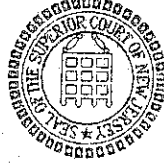


SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
LISA F. CHRYSTAL
JUDGE



COURTHOUSE
ELIZABETH, NEW JERSEY
07207

FILED
JAN 06 2014
HON. LISA F. CHRYSTAL, J.S.C.

LETTER OPINION

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE OF OPINIONS

January 6, 2013

Walter M. Luers, Esq.
Walter M. Luers, LLC
23 West Main Street, Suite C203
Clinton, New Jersey 08809

Robert E. Barry, Esq.
Union County Counsel
Department of Law
Administration Building
Elizabeth, New Jersey 07207

Re: **Renna v. County of Union, et als.**
Docket No.: **UNN-L-3161-13**

Dear Counsel:

The Court has before it Plaintiff, Tina Renna's, Order to Show Cause for the release of documents and information relating to the use of generators by Union County personnel for personal use. Plaintiff's Verified Complaint accompanied the Order to Show Cause. Plaintiff submitted a letter brief in lieu of a more formal brief in support of the Order to Show Cause. The Certification of Tina Renna accompanied the letter brief. Opposition was filed by defendants, County of Union, James Pelletiere and the Office of the Prosecutor of the County of Union. The Certifications of Alfred J. Faella, James C. Russo, and Rachel M. Caruso, Esq. accompanied the opposition. Plaintiff submitted a brief in reply to Defendant's opposition. Oral argument was heard on October 11, 2013.

I. Background

This is an action under the Open Public Records Act, N.J.S.A. 47:1a-1 and the common law right of access seeking to require disclosure of the report prepared by the Office of the Prosecutor of Union County regarding the unauthorized use of County-owned generators during and after Hurricane Sandy.

Plaintiff is the President of the Union County Watchdog Association, Inc., which is a non-profit organization dedicated to educating the public about the operations of county government in Union County. See Pl.'s Verified Complaint ¶ 2. Plaintiff resides at 202 Walnut Avenue in Cranford, New Jersey 07016. Id.

In the immediate aftermath of Hurricane Sandy, approximately 15-20 Union County employees were alleged to have taken county-owned generators for their personal usage at their homes. See Renna Cert. ¶ 2. Public records indicate that Union County then paid \$ 42,892.30 to rent and purchase twenty-seven (27) new generators. Id.; See Generator Invoices attached to Renna Cert. as Ex. 1. The removal and use of the County-owned generators for personal use was first brought to Plaintiff's attention through her blog on the website of the Union County Watchdog Association, www.countrywatchers.com. Id. at ¶ 3. Plaintiff published this information on her blog and was subpoenaed by a Grand Jury sitting in Union County. Id. at ¶ 4. On April 12, 2013, the Honorable Judge Karen Cassidy, A.J.S.C. quashed the subpoena pursuant to New Jersey's "newsperson's privilege."

On June 21, 2013, Plaintiff submitted an OPRA request to Union County for copies of all reports between the officer of the UC Prosecutor to the State Attorney General's Office and all reports between the Office of the Union County prosecutor and the Union County Manager regarding employee use of generators during Hurricane Sandy and power outages that followed. Id. at ¶ 8. On July 17, 2013, Defendants denied access to the "Union County prosecutor Report on the Unauthorized Use of County Property" ("Report").

II. Order to Show Cause

a. Plaintiff's Argument

Plaintiff argues that the Open Public Records Act ("OPRA") mandates that government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded under OPRA as amended and supplemented, shall be construed in favor of the public's right of access. Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006) (citing N.J.S.A. 47:1A-1). Plaintiff argues that the purpose of OPRA is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize

the evils inherent in a secluded process. Times of Trenton Publ'g Corp v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005).

Plaintiff asserts that the burden of proof in showing that a denial of access was justified rests solely with the Records Custodian. N.J.S.A. 47:1A-6; Asbury Park Press v. Monmouth Cnty, 406 N.J. Super. 1, 7 (App. Div. 2009). Plaintiff argues that the documents sought in the instant case are government records within the meaning of OPRA. Plaintiff argues that a "government record" is:

Any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof.

[See N.J.S.A. 47:1A-1.1]

Plaintiff maintains that Defendants have denied access to the Prosecutor's Report on two grounds. First Defendants claim that the Prosecutor's Report is a "criminal investigatory record" within the meaning of N.J.S.A. 47:1A-1.1, which defined such records as a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding. Plaintiff argues that, based on public statements, the Prosecutor's Office concluded that no crime occurred and that according to the minutes of the June 13, 2013 meeting, the Prosecutor concluded that the taking of generators "is not a crime." See Renna Cert. ¶ 7. Plaintiff maintains that the Prosecutor's statements suggests that the investigation was not a criminal investigation and thus the Prosecutor's Report is not a "criminal investigatory record" within the meaning of N.J.S.A. 47:1A-1.1.

Plaintiff argues that Defendants' defense that "substantial portions" of the Report were exempt as a personnel record under N.J.S.A. 47:1A-1.1 should be rejected. Plaintiff argues that the purpose of the Prosecutor's Office investigation was not to make a personnel decision but rather to determine whether there was any criminal activity. Plaintiff maintains that this is not a matter that falls within what might be categorized as a "personnel matter." Here, Plaintiff argues, once the Prosecutor's inquiry ended with the determination that there was no criminal wrongdoing, their inquiry ended. Therefore, Plaintiff argues that the report is neither a "criminal investigatory record" nor a "personnel file."

Plaintiff argues that if she should be denied access to the Prosecutor's Report under OPRA, she should be permitted access under the common law right of access. Plaintiff argues that the common law right of access has three elements: 1) the records must be common law public documents; 2) the person who seeks 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. Higgs-A-Rella v. County of Essex, 141, N.J. 35, 46 (1995). Common law public records include almost every document recorded, generated, or produced by public officials whether or not required by law to be made, maintained or kept on file. Shuttleworth v. City of Camden, 258 N.J. 573, 582 (App. Div. 1992). Plaintiff argues that here, the records sought are public records because they are kept by the public agency. Higgs-A-Rella v. County of Essex, 141, N.J. 35, 46 (1995) (defining a common law record as one that is made by a public official in the exercise of their public function, either because the record was required or directed by law to be made or kept, or because it was filed in a public office).

Plaintiff argues that a six part test was established in Loigman v. Kimmelman, 102 N.J. 98, 113 (1986) to consider whether release of public records is appropriate under the common law. The test is:

1. The extent to which disclosure will impede agency function 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 finding of public misconduct have been insufficiently corrected by remedial measure instituted by the investigative agency; and
6. Whether any agency disciplinary or investigatory proceedings have arisen that may circulate the individual's asserted need for the materials.

Plaintiff argues that the Prosecutor's investigation is closed and therefore the interest of non-disclosure becomes much lower. Plaintiff cites Shuttleworth v. City of Camden, 258 N.J. Super. 573, 587 (App. Div. 1992) for the proposition that there is a real need to deny access where there is an ongoing law enforcement investigation, where the protection of witness information or a witness's identity is at stake, the same values do not survive a balancing after the investigation is closed. Plaintiff argues that with respect to the first and second factors, it is unknown whether the Prosecutor's office relied upon the disclosure of information by citizens or whether the Prosecutor's office promised confidentiality to any person. With respect to the third factor, Plaintiff argues that the

results of the criminal investigation should not chill agency decision-making because the Prosecutor found that there was no criminal wrong-doing. With respect to the fourth factor, Plaintiff argues that it is not known how much of the Prosecutor's report is evaluative as opposed to factual. With respect to the fifth factor, no criminal charges have been brought and therefore, findings of misconduct have not been sufficiently corrected by remedial measures. Furthermore, with respect to the sixth factor, Plaintiff argues that it is unknown what disciplinary or investigatory proceedings are underway.

Furthermore, Plaintiff argues under OPRA's fee-shifting provision and the common law right of access, Plaintiff is entitled to reasonable attorney's fees and costs. N.J.S.A. 47:1A-6; Mason v. Hoboken, 196 N.J. 51, 79 (2008) (concluding that catalyst theory applies to fee awards under both OPRA and the common law right of access).

b. Defendant's Opposition to Order to Show Cause

Defendant argues that the records sought by Plaintiff are criminal investigatory records that are not subject to disclosure under OPRA. Defendant argues that it must meet both prongs of the definition of "criminal investigatory record" for the documents to be inaccessible to plaintiff under N.J.S.A. 47:1A-1.1. The records must not be required by law to be made, and they must pertain to any criminal investigation or related civil enforcement proceeding. O'Shea v. Township of West Milford, 410 N.J. Super. 371, 381 (App. Div. 2009). Defendant argues that it satisfies both prongs in O'Shea because the investigation, pertaining to the employee use of generators and the records maintained in furtherance thereof are not required by law to be maintained.

Defendant next argues that the records sought by Plaintiff do not fall within the type of criminal investigatory information which must be disclosed under OPRA. Defendant argues that various types of law enforcement records and more specifically a "criminal investigatory record" under N.J.S.A. 47:1A-1.1 are exempt from access under OPRA. The categories of immediately releasable criminal investigatory information are:

1. Where a crime has been reported but no arrest yet made;
2. If an arrest has been made, information as to the name, address and age of any victims;
3. If an arrest has been made, information as to the defendant's name, age, resident, occupation, marital status and similar background;
4. Information as to the test of any charges such as the complaint, accusation, and indictment...;
5. Information as to the identity of the investigating and arresting personnel;
6. Information of the circumstances immediately surrounding the arrest; and
7. Information as to circumstances surrounding bail.

[See N.J.S.A. 47:1A-3b]

Defendant argues that the investigatory records at issue are interview summaries and a methodology on how the investigation was conducted and is thus exempt because it

does not fall under any of the aforementioned categories. Defendant argues that based on Captain Russo's training and experience in criminal investigations, disclosing investigative information would be detrimental to the State's interest in bringing individual responsibility for criminal activity to justice and would also impede law enforcement in protecting the public and the community.

Furthermore, Defendant argues that the records sought by Plaintiff fall within the personnel exemption and must not be disclosed under OPRA. In the matter at issue, Defendant is using the Prosecutor's report relative to the generator issue as the basis for administrative proceedings currently being conducted by Personnel Counsel for the County of Union. Defendant argues that pursuant to Civil Service Regulations, Preliminary Notices of Disciplinary Act ("PNDA") seeking suspensions, were issued to various County employees after review of the Prosecutor's report. In this case, PNDA served upon County employees the page or pages of the Prosecutor's report which concerned the employee. Defendant argues that these were used at the basis for the disciplinary proceedings and are thus confidential. Defendant argues that the County employees who have received a PNDA have a privacy interest in their personnel records. See Cert. of Alfred J. Faella, County Manager for Union County at ¶ 5, 6, 9, 10, 11, 12; See also Cert. of Rachel Carruso, Special Personnel Counsel for Disciplinary Matters, Office of the County Counsel at ¶ 3, 4, 5, 6, 7, 8.

Moreover, Defendant argues that Plaintiff is not entitled to the Prosecutor's report under the common law right of access because Plaintiff's interest in access is outweighed by the Defendant's interest in maintaining the confidentiality of the information. Defendant argues that the common law right of access has three elements: 1) the records must be common law public documents; 2) the person who seeks 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. Higgs-A-Rella v. County of Essex, 141, N.J. 35, 46 (1995). Defendant argues that the first element is satisfied as the investigation report was made and maintained by Defendant's employees while in their official capacity. Defendant argues that the second element is not in dispute because Plaintiff has set out her interest in the records requested. Defendant argues, however, that the Plaintiff's interest does not give her an absolute right to obtain the records sought. Defendant argues that the Supreme Court has articulated the factors to consider when balancing individual rights and public interest in confidentiality:

1. The extent to which disclosure will impede agency function 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 finding of public misconduct have been insufficiently corrected by remedial measure instituted by the investigative agency; and
6. Whether any agency disciplinary or investigatory proceedings have arisen that may circulate the individual's asserted need for the materials.

Defendants maintain that they have a significant interest in maintaining the confidentiality of the Prosecutor Report. Defendant further argues that it has a strong interest in not releasing the methodology and the strategy the Prosecutor's Office used to illicit information. Defendant argues that based on Captain Russo's training and experience in criminal investigations, disclosing investigative information would be detrimental to the State's interest in bringing individuals responsible for criminal activity to justice while at the same time impede law enforcement's mission to protect the public and community. The OPRA/Common Law request was made eleven days after the Prosecutor's criminal investigation was complete and there is an ongoing administrative case in which hearings will be conducted. Thus, Defendant argues that this case is far from over.

Furthermore, the ongoing disciplinary hearings circumscribe Plaintiff's asserted need for the Prosecutor's Report. Defendant argues that the sixth Loigman factor must be considered because the County is currently conducting disciplinary hearings on County employees mentioned within the report. Defendant argues that the release of the report before the proceedings are done will have negative effects upon the proceedings because witness testimony can be altered with release of the Prosecutor's report. Additionally, Defendant argues that individuals involved will be less likely to cooperate with the County. Defendant argues that it has a duty to maintain the employees' due process rights and an interest in non-disclosure.

Moreover, Defendant argues that Public employees have a right to privacy to their personnel records. Defendant argues that courts have tended to favor the protection of employee confidentiality with respect to personnel records. McGee v. Township of East Amwell, 416 N.J. Super at 615. Defendant argues that in the instant case, the Prosecutor's report was placed in employees personnel files and was used in lieu of the County's own report. The Prosecutor report was kept confidential and only the County Manager and Counsel have reviewed the report. Defendant argues that the employees involved have an interest in non-disclosure of the report to fully maintain their Due Process rights.

In conclusion, Defendant argues that Plaintiff's interest is based on the fact that she wants to write an article in regards to the contents of the report and thus her status as a journalist increases her interest. Defendant contends that its interest in preserving

criminal investigation, integrity, due process rights of employees, and protection of employees' right to privacy in personnel records indicates that plaintiff's common law request should be denied.

With regard to attorney's fees, Defendant argues that the common law right to access does not allow for the award of reasonable attorney's fees. Defendant argues that there is no statutory law or court rule which provides for attorney's fees for a prevailing party in a common law right to access case. Defendant cites N.J.S.A. 47:1A-6 to illustrate that pursuant to OPRA, 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 proceedings shall be entitled to a reasonable attorney's fee. *Id.* Furthermore, Defendant cites Paff v. Borough of Garwood, 2012 N.J. Super. Unpub. LEXIS 2499 which states that "while N.J.S.A. 47:1A-6 expressly permits an award of counsel fees under OPRA, there is no statutory authority for such an award to a prevailing party in a common law right of access to public records lawsuit.

c. Plaintiff's Reply to Opposition

Plaintiff argues that the Report is not a criminal investigatory record and alternatively, the information should be produced pursuant to N.J.S.A. 47:1A-3(b). Plaintiff argues that the Report was shared with the County Freeholders and County Administration. Criminal investigatory records are those that are held by a law enforcement agency. N.J.S.A. 47:1a-1.1. That Report has now become the basis for administrative proceedings against Union County employees and this the Report is no longer held by a law enforcement agency. The Report has not been distributed outside of the Prosecutor's office. Plaintiff next argues that the Report concluded that there was no criminal conduct and therefore does not constitute a criminal investigatory record. Plaintiff argues that even if the Court finds that this is a criminal investigatory record, all of the information set forth in N.J.S.A. 47:1A-3(a) should be disclosed, including information as to the type of crime, time, location and type of weapon, if any and information as to the identity of the investigating and arresting personnel and agency and the length of the investigation. N.J.S.A. 47:1A-3(b).

Plaintiff argues that the Russo Certification is merely conclusory and worthless because it contains one paragraph stating that "Based on my training and experience in criminal investigations, disclosing investigative information would be detrimental to the State's interest in bringing individuals responsible for criminal activity to justice while at the same time impede law enforcement's mission to protect the public and the community." Plaintiff argues that this Certification does not discuss why disclosure of this particular investigation would harm this investigation but rather states that disclosure of the results will compromise all future investigations. Plaintiff argues that should Russo's certification be read as an expert opinion, it is a net opinion that should be disregarded by the Court. Plaintiff argues that the net opinion rule has been succinctly defined as a prohibition against speculative testimony. Koruba v. Am. Honda Motor Co. 396 N.J. Super. 517, 525 (App. Div. 2007). An expert's opinion must be founded on facts

or data; thus the net opinion rule requires an expert to give the way and wherefore of his or her opinion, rather than a mere conclusion. Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (app. Div. 2002). Plaintiff argues that here, the Russo Certification is merely conclusory, and does not contain any of the facts or data upon which a conclusion might be based. Therefore, the Russo Certification must be disregarded.

Plaintiff next argues that the Report is not a personnel record because the it was not a personnel record when it was created by the Prosecutor's Office. Plaintiff argues that the Report is not a document that triggers Union County's internal procedures regarding employee discipline. Plaintiff maintains that the fact that the report may have been annexed to the notices of discipline is irrelevant, because documents cannot become retroactively confidential even if they are a part of an investigation. Serano v. South Brunswick Township, 358 N.J. Super. 352, 367 (App. Div. 2003) (assuming the record was a public record when created, it did not become retroactively confidential simply because the prosecutor obtained the record.) Plaintiff contends that this exception includes civil investigation because N.J.S.A. 47:1A-3(a) applies to any public agency. Plaintiff maintains that the Report's use after it was created cannot retroactively cloak the Report in confidentiality. Plaintiff argues that she does not seek the employee statements made during disciplinary proceedings or notices of discipline but rather seeks the Report, which contains neither of these things.

Plaintiff argues that the Report is not a personnel record. Plaintiff argues that Courts have held that County investigators' requests for outside employment, emails about an employee's performance and records showing educational courses taken voluntarily by police officers are not personnel records. North Jersey Media Group, Inc. v. Bergen Cnty Prosecutor's Office, 405 N.J. 386 (App. Div. 2009) (requests for outside employment). Plaintiff argues that the Report at issue is nothing like other circumstances in which courts have held that documents constitute personnel records. Plaintiff contends that the Report was created by the Prosecutor's Office and not internally by the County of Union. Even if the Report is to be construed to be a personnel record. The County in its OPRA response has already conceded that the entire Report is not a personnel record but only "significant portions" See Ex. B to County Opposition.

Plaintiff argues that alternatively, the Report should be disclosed under the Common Law Right to Access. Plaintiff maintains that the Prosecutor's investigation is closed, with not finding of criminal wrongdoing thus the County's interest in non-disclosure does not survive. Plaintiff argues that the grounds that disclosure of the Report would reveal the "means, techniques and methodologies by which the criminal investigation" was conducted is, an overstatement.

In Camera Review

The Plaintiff requests that the Court conduct an *in camera* review of the Report so that any truly sensitive law enforcement investigative techniques can be redacted and any names and identifying information of witnesses who were promised confidentiality may also be redacted. Plaintiff argues that there should be a mechanism for confirming which witnesses were promised confidentiality. Plaintiff contends that the identities of subjects

should not be redacted especially of those who waived their Fifth Amendment rights and spoke with investigators.

With respect to the ongoing disciplinary hearings, Plaintiff argues that half of these proceedings have been concluded and thus the sections of the Report that address employees whose disciplinary proceedings have concluded (or against whom no disciplinary proceedings were initiated) should be disclosed. Plaintiff maintains that with respect to ongoing disciplinary proceedings, these matters are not going to be tried by a jury and that they are essentially held in secret. Plaintiff argues that the disclosure of the Report cannot reasonably be thought to affect proceedings that are otherwise held in secret.

III. Analysis

In the instant action, the Court must determine whether Defendant is required to disclose the Prosecutor's Report pursuant to OPRA, or in the alternative, the common law right to access.

a. OPRA

The Open Public Records Act ("OPRA") mandates that government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded under OPRA as amended and supplemented, shall be construed in favor of the public's right of access. Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006) (citing N.J.S.A. 47:1A-1). The purpose of OPRA is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process. Times of Trenton Publ'g Corp v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005). Pursuant to N.J.S.A. 47:1A-1.1 a "government record" is defined as:

Any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof.

While the purpose of OPRA is to maximize public knowledge, documents may be inaccessible to a plaintiff if the records are: 1) not required by law to be made; and 2) they pertain to any criminal investigation or related civil enforcement proceeding. O'Shea v. Township of West Milford, 410 N.J. Super. 371, 381 (App. Div. 2009).

The term "criminal investigatory record" is defined by N.J.S.A. 47:1A-1 as:

“A record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.”

Here, the investigation, pertaining to the employee use of generators during the Super Storm Sandy emergency and the records maintained in furtherance thereof are not required by law to be maintained. The records sought are primarily Captain Russo's notes which include interview summaries, the means, techniques and methodologies by which the original investigation was conducted; the identities of confidential witnesses and summaries of their statements; the sources of information (including civilian cooperation) facilitating the investigation; and the analysis, evaluation, and procedure by decision makers within the Union County Prosecutor's Office. The records Plaintiff seeks are records that were created during a criminal investigation. Although the conclusion of the Prosecutor's report is that no crimes were found to be committed, the reason for the conducting the investigation was in furtherance of finding whether criminality occurred.

While various types of law enforcement records and more specifically a “criminal investigatory record” under N.J.S.A. 47:1A-1.1 are exempt from access under OPRA, N.J.S.A. 47:1A-3b indicates the records and documents considered criminal investigatory records which must be disclosed to the public within 24 hours. The categories of immediately releasable criminal investigatory information are:

1. Where a crime has been reported but no arrest yet made;
2. If an arrest has been made, information as to the name, address and age of any victims;
3. If an arrest has been made, information as to the defendant's name, age; resident, occupation, marital status and similar background;
4. Information as to the test of any charges such as the complaint, accusation, and indictment;
5. Information as to the identity of the investigating and arresting personnel;
6. Information of the circumstances immediately surrounding the arrest; and
7. Information as to circumstances surrounding bail.

The criminal investigatory records at issue consisting of interview summaries, methodology on how the investigation was conducted and identities of confidential witnesses, do not fall within the specified categories requiring disclosure under N.J.S.A. 47:1A-3b. The records at issue do not relate to an arrest that has been made, bail set, an indictment or accusation or complaint against a specific or specified individuals. N.J.S.A. 47:1A-3b further states that, “Notwithstanding any other provision of this subsection, where it shall appear that the information requested to be examined will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release, such information may be withheld. This exception shall be narrowly construed to prevent disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety. Whenever a law enforcement official determines that it is necessary to withhold information, the official shall issue a brief statement explaining the decision.” Based on Captain Russo's training and experience in criminal investigations, disclosing investigative information would be detrimental to the

State's interest in bringing individuals responsible for criminal activity to justice while at the same time impede the law enforcement mission to protect the public and the community.

N.J.S.A. 47:1A-10 exempts from access under OPRA "personnel and pension records, except specific information identified as: an individual's name, title, position, salary, patrol record, length of service, date of separation and the reason for such separation and payment and type of pension received."

Here, the County of Union is using the Prosecutor's report relative to the generator issue as the basis for administrative proceedings currently being conducted by Personnel Counsel for the County of Union. Captain Russo certified that on November 15, 2012, he was assigned to conduct a criminal investigation into the County of Unions' employees' use of generators during Hurricane Sandy and that during the course of said investigation, he conducted interviews of a number of County of Union employees, civilian witnesses and reviewed documents. See Russo Cert. ¶¶ 3-4. Moreover, Captain Russo certified that the investigation started on November 15, 2012 and concluded on June 10, 2013, however, the Special Prosecutions Unit referred the matter to the Union County Manager Alfred J. Faella for administrative action by the County of Union. Id. at ¶ 5; See also Cert. of Alfred J. Faella at ¶ 5, 6, 9, 10, 11, 12.

Personnel Counsel assigned by the County was provided the Prosecutor's report relative to the generator issue and reviewed same for the purpose of evaluating potential personnel disciplinary action to be taken against the involved County employees pursuant to N.J.A.C. 4A:2-2:3. Preliminary Notices of Disciplinary Action ("PNDA") seeking suspensions were issued to various County employees after review of the Prosecutor's report. See Caruso Cert. at ¶¶ 3-9. PNDA and any documents annexed thereto, are confidential and are part of each employee's confidential personnel file, as maintained by the County of Union. Id.

N.J.S.A. 47:1A-10 provides that "the personnel or pension records of any individual in the possession of a public agency shall not be considered a government record and shall not be made available for public access." The Supreme Court has noted that, "personnel records are, by definition, not classified as government records at all; any documents that qualifies as a personnel record is therefore not subject to being disclosed notwithstanding the other provisions of the statute." Kovalcik v. Somerset County, 206 N.J. 581, 592 (2011). OPRA's personnel records provision, "begins with a presumption of non-disclosure." Id. at 594. Based on this legislative purpose, in interpreting the scope of the public record law personnel exemption, "courts have tended to favor the protection of employee confidentiality." McGee v. Township of East Amwell, 416 N.J. Super. 602, 615 (App. Div. 2010). The County employees who received a PNDA have a privacy interest in their personnel records because each employee made statements during the investigation which they believed would be kept confidential. Therefore, Plaintiff's request to disclose the Prosecutor's Report pursuant to OPRA is **DENIED**.

b. Common Law Right to Access

The common law right of access has three elements: 1) the records must be common law public documents; 2) the person who seeks 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. Higgs-A-Rella v. County of Essex, 141, N.J. 35, 46 (1995). The Supreme Court has articulated the factors to consider when balancing individual rights and the public's interest in confidentiality. The test is whether:

1. The extent to which disclosure will impede agency function 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 finding of public misconduct have been insufficiently corrected by remedial measure instituted by the investigative agency; and
6. Whether any agency disciplinary or investigatory proceedings have arisen that may circulate the individual's asserted need for the materials.

[See Loigman v. Kimmelman, 102 N.J. 98, 113 (1986)]

Furthermore, in North Jersey Medial Group, Inc. v. Bergen County Prosecutor's Office, 405 N.J. Super. 386, 391 (App. Div. 2009), the Court stated that prosecutor's office employees have a "special privacy interest" because they "might be subjected to threats or harm by criminals or suspects." The Court in McGee v. Township of East Amwell, 416 N.J. Super. 602, 616 (App. Div. 2010) reasoned that while a public employee's conduct is inherently open to a degree of public observation, it is reasonable for a public employee to expect conversations about his or her performance on the job to remain confidential. The McGee Court held that "despite the Act's [OPRA] broad objective of promoting disclosure, the balance tips in favor of protecting private personnel information regarding a particular employee." Id.

In the instant case, the records sought are public records because they are maintained by a public agency. Higgs-A-Rella v. County of Essex, 141, N.J. 35, 46 (1995) (defining common law record as one that is made by a public official in the exercise of their public function, either because the record was required or directed by law to be made or kept, or because it was filed in a public office). Plaintiff contends that she has an interest in the material because she is a citizen acting on behalf of the Union County Watchdog Association, which seeks to shed light on alleged Union County misconduct. Plaintiff is a reporter seeking information for publication. While the Plaintiff

made her request eleven days after the criminal investigation was complete, there is currently an ongoing administrative case in which hearings will be conducted and thus the Defendant's investigation is not yet complete. The release of the Report before the completion of the hearings may have a negative effect upon the proceedings because witnesses will be required to testify and may be less likely to cooperate with the County. See Russo Cert. at ¶ 5-8; See also Carruso Cert. at ¶ 3-9. For the foregoing reasons, Plaintiff is not entitled to the Prosecutor's Report under the Common Law Right to Access.

Therefore, Plaintiff's request to require the County of Union to disclose the Prosecutor's Report and the award of reasonable attorney's fees is hereby **DENIED**.



HON. LISA F. CRYSTAL, J.S.C.