Law Offices of
Walter M. Luers, LLC
Suite C202
23 West Main Street
Clinton, New Jersey 08809
Telephone: 908.894.5656
Facsimile: 908.894.5729
www.luerslaw.com

November 3, 2014

Walter M. Luers, Esq.*

*Also admitted in New York

Writer's Direct Email: wluers@luerslaw.com

Honorable Camille M. Kenny, J.S.C.
Superior Court – Law Division
Union County Courthouse
2 Broad Street
Elizabeth, New Jersey 07207

Re: ***Renna v. Union County, et al.***
Docket No. UNN-L-003253-14

Dear Judge Kenny:

We write to reply to Defendants' October 16, 2014 opposition papers.

The most important issue to be addressed in reply is the insufficiency of Defendants' proofs regarding whether the responsive Emergency Plans ("Plans") should be disclosed. In *Philadelphia Newspapers, Inc. v. State, Dep't of Law and Public Safety, Div. of Police*, 232 N.J. Super. 458 (App. Div. 1989), the Appellate Division refused to accept conclusory statements by the New Jersey Superintendent of State Police who claimed that disclosure of the patterns of helicopter travel by the Governor and Attorney General would be a security risk. Like the Appellate Panel in *Philadelphia Newspapers*, this Court should decline to accept mere conclusory allegations of security risks set forth in a certification, and hold that Defendants have not satisfied their burden of proof.

Our arguments are set forth below in point numbers that correspond to the point numbers in Defendants' October 16, 2014 letter brief.

I. Marlena Russo Is a Proper Party Defendant

Notwithstanding their certification in their Answer that there are no other parties who should be joined to this action, Defendants claim in their brief that Ms. Russo is not a proper defendant and that Mr. Pellettiere should be named as a defendant. Ms. Russo is a proper defendant to this action because she is the individual who in fact denied Plaintiff's OPRA request. However, because there is no claim that the Defendants should be penalized for their conduct, it is not particularly important whether the Defendants believe that the wrong individual was named personally. With the consent of Defendants, we would be pleased to serve and file an amended complaint naming James E. Pellettiere as a defendant. In this regard, we note again that in their Answer, Defendants have certified that they are "not aware of any other parties who should be joined in this action pursuant to Rule 4:28 or who is subject to joinder pursuant to Rule 4:29-1(b) at this time." Thus, Defendants have, at best, made conflicting statements to this Court regarding who they think are the proper parties defendant.

II. Defendants Have Failed to Prove Any Security Risk

Defendants argue that release of the emergency plans would "substantially interfere with the State's ability to protect and defense the State and its citizens against acts of sabotage or terrorism" or "would materially increase the risk or consequences of potential acts of sabotage or terrorism," or that disclosure would "create a risk to the safety of persons, property, electronic data or software." (Executive Order 21 and the security measures exemption contained in *N.J.S.A.* 47:1A-1.1). Defendants have the burden of proof to meet this exception, and they have utterly failed to meet that burden.

Defendants' argument is purely conclusory. Defendants present no evidence that disclosure of the emergency plans would "substantially" interfere with the State's ability to protect citizens or "materially" increase the risk or consequences of potential sabotage or terrorism.

As the Court knows, in OPRA matters, the Plaintiff does not have the burden of proof. In contrast to most types of cases, in OPRA matters, the Defendants have the burden of proof. *N.J.S.A.* 47:1A-6. In this case, the Defendants have only offered purely conclusory allegations and a conclusory certification in support of their case. Conclusory statements that are not specific and that are not based on specific, reliable evidence cannot suffice.

"[T]he reasons for withholding documents must be specific." *Newark Morning Ledger Co. v. New Jersey Sports & Exposition Authority*, 423 N.J. Super. 140, 162 (App. Div. 2011). Courts will "simply no longer accept conclusory and generalized allegations of exemptions . . . but will require a relatively detailed analysis in manageable segments." *Loigman v. Kimmelman*, 102 N.J. 98, 110 (1986) (internal quotation marks and citation omitted); *see also Communications Workers v. America v. McCormac*, 417 N.J. Super. 412, 442 (App. Div. 2008) (citing and quoting the same language in *Loigman* as well).

When attempting to utilize any exception, "a public agency seeking to restrict the public's right of access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality." *Courier News v. Hunterdon County Prosecutor's Office*, 358 N.J. Super. 373, 382-83 (App. Div. 2003). "Absent such a showing, a citizen's right of access us unfettered." *Id.* at 383. With those general requirements in mind, we turn to a specific case in which the Court reversed a decision of the Superintendent of the State

Police and overruled allegations of security concerns because they were not sufficiently supported by evidence.

We are aware of only one case (published or unpublished) in New Jersey that has discussed security concerns. In *Philadelphia Newspapers, Inc. v. State, Dep't of Law and Public Safety, Div. of Police*, 232 N.J. Super. 458 (App. Div. 1989), which was decided under the predecessor to OPRA, which was the Right-to-Know Law, and the common law right of access, the plaintiff sought copies of the flight logs and related documents for a State-owned helicopters that were used for both official and unofficial travel by New Jersey's governor and attorney general. *Id.* at 460-61. The Superintendent of the State Police ("Superintendent") decided that the records regarding helicopter use were not public records. The documents, if disclosed, would have revealed the specific helicopter used by the State, "the date and time of each use, the distance traveled, the place of departure and arrival;" and information regarding the costs of those trips. *Id.* at 461. The State argued that disclosure of patterns of past helicopter travel would assist a person in developing plans to assassinate the Governor or Attorney General. *Id.* at 465. The State "infer[ed] from this fact that disclosure to the public of specific details of the Governor's and Attorney General's past use of state-owned helicopters could provide terrorists with information from which they may project a pattern of these officials' future activities." *Id.* at 465.

The Appellate Division reversed the decision of the Superintendent and rejected the State's argument because the State did not muster sufficient evidence to support it. "[T]here is no evidence in this record, including any statement in the Superintendent's affidavit, that there has been a pattern of past helicopter use that could be used to predict future use." *Id.* at 465. The Appellate Division stated that the Court had a "duty to focus upon the evidence offered by

the Superintendent as the basis for denying [plaintiffs] information by which the public may know how the government is being run." *Id.* at 466. Further, the Court recognized "the Superintendent's expertise in matters of security, but his unsupported conclusion that common-law public records may not be disclosed for security reasons is not the last word where a conflicting public interest must be weighed in the balance." *Id.* at 466. Thus, even when conclusory allegations of a security risk were presented by an expert, the Court still rejected those claims regarding security risks when those claims were not supported by evidence. Ultimately, the Appellate Division remanded the matter for a determination regarding whether the documents at issue could be produced to the plaintiffs with appropriate redactions, and no further proceedings are noted.

This Court should follow the holding of *Philadelphia Newspapers* and reject the Defendants purely conclusory arguments regarding purported safety risks.

Here, the Scaturo certification is purely conclusory. At paragraph 5, regarding the location of law enforcement headquarters during emergencies, it states "Disclosure of such information would jeopardize the security of the building or facility. Should the location of the building or facility or the type of equipment stored in that building or facility be disclosed, it would certainly cause a safety and security risk for not only the personnel operating from this building or facility, but would adversely affect the County's ability to properly handle and/or react to an emergency situation."

This statement is utterly conclusory and, more importantly, unsupported by reality. In reality, the public already knows the locations of law enforcement headquarters. According to the County's website, the Union County police department's headquarters is 300 North Avenue East, Westfield, New Jersey. Information about other locations of County

operations are located on Defendants' website or the Internet. If the site where emergency services personnel would be headquartered during an emergency is a secret site, then there might be some interest in non-disclosure. But if someone truly wanted to cause the County harm, the location of the police headquarters is already public knowledge.

Likewise, at paragraph 9, Scaturo states that the Defendants have not "disclosed the contents of the Plans because disclosure to the public creates safety and security issues." Again, we are left with the statement that the information cannot be disclosed because the information cannot be disclosed. This is exactly the type of circular, conclusory reasoning that the Appellate Division rejected in *Philadelphia Newspapers*. This case is actually a worse fact pattern for the Defendants, because at least in *Philadelphia Newspapers* the Appellate Division credited the Superintendent of the State Police with expertise in the role of that job. Notwithstanding that expertise, the Appellate Division nevertheless held that mere conclusory statements could never support a security exception. Here, Scaturo does not even claim to be an expert in the area of security concerns.

For these reasons, Defendants allegations of security risk must be rejected.

III. Plaintiff Has A Strong Interest Under the Common Law Right of Access

Plaintiff's interest in Union County operations and her role as a watchdog have been well-established in this Court. In *In re January 11, 2013 Subpoena by Grand Jury of Union County*, 432 N.J. Super. 570 (Law Div. 2013), the Court held that Plaintiff's blogging and reporting about Union County's finances and activities qualified her as a member of the media and she was thus entitled to the "newspaperman's privilege" contained in *N.J.S.A.* 2A:84A-21. *Id.* at 592 (quashing Grand Jury subpoena directed to Plaintiff regarding the unauthorized use of

Union County property during Hurricane Sandy). In *Renna v. County of Union*, 407 N.J. Super. 230 (App. Div. 2009), the Appellate Division rejected the County's position and held that public agencies could not require requestors to use OPRA request forms when submitting OPRA requests). Thus, her *bona fides* as a government watchdog are well-established. Her interest in the specific Plans is to try to assure that Union County does not experience a disaster similar to New Jersey Transit in which during Hurricane Sandy, 70 locomotives and 273 rail cars were damaged by floodwaters in a low-lying rail yard in Kearny, New Jersey, causing $120 million of damage to the cars. (Reported by The Record on August 19, 2013).

With respect to the Defendants' interest in non-disclosure, we refer the Court to the insufficiency of Defendants' arguments regarding security concerns discussed above.

IV. The State of New Jersey Is Not an Indispensable Party

Confusingly, in their Answer, Defendants state that there are no parties who must be joined to this case, but in Point IV of their Brief, they argue that the State of New Jersey is an indispensable party. If Defendants truly believed that, they could have simply named the State as a party. But the notion that the State is an indispensable party in this case is a frivolous argument. The State has no interest in this case. The documents being sought are within the possession of Union County, not the State of New Jersey. The State of New Jersey is not the Records Custodian here, and the State of New Jersey has absolutely no interest in these documents. When the Defendants denied Plaintiff's OPRA request, they did not consult with the State of New Jersey, copy New Jersey on the request or response, and there is no evidence that the Defendants have made any effort to make the State of New Jersey aware of this case or the OPRA request here. Thus, this argument should be disregarded.

We are aware of only two cases where the Appellate Division has discussed whether a third party should have been joined to an OPRA case. In *Gill v. N.J. Dep't of Banking and Insurance*, 404 N.J. Super. 1 (App. Div. 2008), the Government Records Council ("GRC") rejected GEICO's motion to intervene in Senator Gill's OPRA case before the GRC. On appeal, the Appellate Division reversed and held that the GRC abused its discretion when it did not permit GEICO to intervene. One of the grounds for the ruling was that the documents at issue had been submitted to the New Jersey Department of Banking and Insurance by GEICO – the documents at issue were in fact GEICO's documents, and GEICO was in the best position to articulate grounds for non-disclosure. *Id.* at 11-12.

In *Gannett New Jersey Partners, LP v. County of Middlesex*, 379 N.J. Super. 205 (App. Div. 2005), the Court held that the Justice Department should have been joined in the lawsuit because one of the documents at issue was a copy of a federal grand jury subpoena. The Court held that the Department of Justice should have been joined so that it could assert the confidentiality of the grand jury subpoenas as federal criminal investigatory records. *Id.* at 214-15.

In both of these cases, the party that was joined or that should have been joined was the party that had the actual interest in non-disclosure of the records. In *Gill*, GEICO wanted to intervene to protect the confidentiality of its own documents that were submitted to the State. In *Gannett*, the Court held that the entity that the Justice Department should have been joined to a case regarding a subpoena that was issued from the federal grand jury. Here, New Jersey has no such interest. The documents here were created by Union County and are maintained by Union County. New Jersey has absolutely no interest in the confidentiality of the records at issue. For these reasons, Plaintiff was correct in not naming the State of New Jersey.

V. Attorneys Fees Under the Common Law Right of Access

Defendants are wrong regarding their discussion of the availability of attorneys' fees under the common law right of access. Defendants appear unaware of *Kahler v. New Jersey State Police, Custodian of Records*, 2011 WL 208285 (App. Div. Jan. 25, 2011), in which the Appellate Division interpreted the holding in *Mason* by stating that the "Court's language was intended to make clear that application of the 'catalyst theory' applies to actions brought under either or both OPRA and the common law right of access to public records, as long as a plaintiff can 'demonstrate: (1) a factual nexus between [the] plaintiff's litigation and the relief ultimately achieved; and (2) that the relief ultimately secured by [the] plaintiffs had a basis in law." *Id.* at *2 (internal quotation marks and citations omitted). "Upon satisfying those prongs, a plaintiff is entitled to an award of counsel fees under the catalyst theory as a prevailing party." *Id.* Thus, if Plaintiff meets this criteria in this case, Plaintiff would be entitled to attorneys fees under the common law right of access. (*Kahler* is attached to the Certification of Walter M. Luers attaching unpublished authority).

VI. *In Camera* Review; Redactions

In the event that the Court accepts the conclusory statements by the Defendants, we request that the Court perform an *in camera* review of the records at issue.

In addition, we request that, in the event the Court finds that some of the information in the responsive records is confidential, that only the truly sensitive information be redacted and that the remaining information be produced.

For the foregoing reasons as well as those set forth in our opening papers, we request that the Court order the Plans released to Plaintiff.

Respectfully submitted,

Walter M. Luers