The Law Office of
Donald M. Doherty, Jr.
125 North Route 73
West Berlin, NJ 08091
Licensed in NJ, FL & PA

(609) 336-1297 T
(609) 784-7815 F

July 21, 2011

Via Hand Delivery
The Honorable Nelson C. Johnson, JSC
Atlantic County Civil Courthouse
1201 Bacharach Blvd.
Atlantic City, NJ 08401

Re: Rosewood v. Egg Harbor Township
Docket No. (Filed as OSC/to be supplied)

Dear Judge Johnson:

Plaintiff Rosewood initiated this action via verified complaint and files this Order To Show Cause to proceed on a summary basis against Defendant Egg Harbor Township, its Clerk and the person denominated as its "records room supervisor". The case arises under the Open Public Records Act (OPRA).

This action was brought because Defendants have denied Plaintiff access to records by their refusal to allow access to material or even outline what materials that they possess that are being withheld.

STATEMENT OF FACTS

As has been widely reported in the press, there was a burglary at the Longport mayor's home on July 14. *(Counsel Certification, Exhibit C*, dated July 20, reports the burglary as "Thursday", and other sources reported about the arrest, without the date of the burglary beginning on July 16, *Counsel Certification, Exhibit A*. Obviously the arrest occurred at some point after the burglary and "Thursday" is the only reference point available.)

On July 18, 2011, 4 days *after* the burglary and arrest, 2 days *after* the incident began to be widely reported in the local news and *the same day* the incident was reported in the national news, Plaintiff requested police reports and government records relating to the events. *Verified Complaint, Exhibit A*

On July 19, Defendants denied the records request on the basis that ***"This is an indictable case and must go to the Atlantic County Prosecutor's Office. We cannot release any information at this time."*** *Verified Complaint, Ex. B.*

This suit for access to the records and a *Vaughn* index (if appropriate) follows.

LEGAL ARGUMENT

I. THIS ACTION SHOULD PROCEED IN A SUMMARY MANNER

The Open Public records Act authorizes "[a] person who is denied access to a government record by the custodian of the record,.....may institute a proceeding to challenge the custodian's decision by filing an action in Superior Court. *N.J.S.A. 47:1A-6* Once instituted, "[a]ny such proceeding shall proceed in a summary or expedited manner." Id. Here, because OPRA authorizes actions under it to proceed in a summary manner, the order to show cause should be granted so this matter may proceed in such fashion. *R. 4:67-2(a)*

This action involves an OPRA claim that is neither complicated nor procedurally complex. All that is "complex" is the fact that Plaintiff does not even know what records it is fighting to access because the Defendants refused to explain even what was being withheld.

All claims arise under an OPRA request that was submitted and responded to in writing. Because Plaintiff's claims are based on documentary evidence that has been submitted to the Court, the facts underlying this action cannot reasonably be disputed. The OPRA request is attached as Exhibit A Verified Complaint. The response is Exhibit B to the same document. The material in the certification of counsel is all available in the public domain. Discovery is not anticipated any factual issues that may arise can be resolved by evidence submitted through certifications or affidavits by the parties.

Therefore, in light of the foregoing and the Legislature's directive that OPRA actions proceed in a summary manner, it is requested the Court sign the Order to Show Cause so that this action may proceed in a summary manner and expedited resolution.

II. THE OPEN PUBLIC RECORDS ACT AND POLICY CONSIDERATIONS

A. Defendants Articulate No Basis For Denial Under OPRA and Even Under Theoretically Applicable Bases, The Records Must Still Be Made Available

As the Court knows, 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) (*quoting Asbury Park Press v. Ocean County Prosecutor's Office*, 374 N.J. Super. 312, 329 (Law Div. 2004)).

Here, the documents sought by Plaintiff are government records within the meaning of OPRA. Under OPRA, a government record :

> *.....means 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, including subordinate boards thereof. N.J.S.A.47:1A-1.1.*

Here, there is no doubt that at least some of the records requested by Plaintiff are government records. Other may not be, as discussed (conceptually) below. ***However, Defendants never asserted that the records sought were not government records.*** 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 County*, 406 N.J. Super. 1, 7 (App. Div. 2009).

In denying the request, Defendants asserted that the matter involved an "indictable offense" and no information would therefore be made available.

OPRA allows for no such justification. *N.J.S.A. 47:1A-1.1* define government records and the exceptions. Whether or not the crime and arrest discussed in the documents is "indictable" or "non-indictable" has no bearing on that determination.

On that basis alone, Defendants have made an improper denial of access and cannot prevail. *N.J.S.A. 47:1A-5(g)* mandates that a records custodian ***specifically*** delineate the basis for access denial. The specific basis articulated here is not an accepted basis for access denial.

However, in the interest of avoiding needless future disputes in this case over what is available to my client, the Defendant should be aware of the following analysis: If the Defendants are going to attempt a wholesale restriction on access based upon the records being "criminal investigatory records" that will not carry the day.

First, Executive Order #69 *(Counsel Certification, Exhibit D)* was issued while the prior Right-To-Know law was in effect. Executive Order #69 provided for a fairly broad array of information to be available to the public within 24 hours. Given that OPRA was enacted to expand the public's access to records over what was available under the prior Right-To-Know law, it is impossible that access was intended to be curtailed from what was available under Executive Order #69.

Second, we know the above to be an absolute truth because *N.J.S.A. 47:1-3(b)* largely mimics Executive Order #69. Further, *N.J.S.A.47:1A-1*'s expression of public policy mandates the narrow construction of exemptions and expansive interpretation of the public's right of access.

Third, "criminal investigatory records" are only exempt from disclosure to the extent that they are not "required to be made, maintained or kept on file". *N.J.S.A. 47:1A-1.1* While no court has specifically passed on just "what" records are exempt - and we cannot analyze this here at this point because we do not even know what records exist without a *Vaughn* index (discussed below) - dicta in *O'Shea v. Township of West Milford*, 410 N.J. Super. 371, 378 (App. Div. 2009) indicates that it is material constituting "work product" of the investigators. That would be notes and similar items, not reports and documents that must be created in order to have a file to send to the prosecutor. Surely there are incident reports, arrest reports, inventories of recovered items, mug shots and bail-related materials that are government records if the alleged criminals have already been proceed to the point of being charged, held in jail and subject to bail hearings.

Finally, in the event the dispute gets pushed to the extreme, the Court will have to analyze whether even records that would otherwise be exempt from disclosure would be subject to access

because of the wide reporting of the event in the press and that certain facts, whether contained in an official report or not were relied upon for establishing bail limits or in other public proceedings.

B. A *Vaughn* Index is Required

All that can be ascertained by the Defendant's response is that there are records exist that were not supplied. We do not know the magnitude of what was withheld. We do not know nature of the material withheld.

While no proper basis for access denial has been articulated, even if there had been, specious claims of 'privilege' would nullify the entire thrust of the ***OPEN Public Records*** Act and would render "public records" "open" in name only. Our courts are not so easily fooled and in *Hartz Mountain Indus., Inc. v. N.J. Sports & Exposition Auth.*, 369 N.J. Super. 175, 185 (App. Div.), *certif. denied*, 182 N.J. 147 (2004), the appellate division created a procedure to address claims that public records are privileged. The withholding party is required to create what has come to be known as a *Vaughn* index[1] and provide the index to the trial court and the record requestor's counsel.

The basis for each redaction is to be delineated and the public entity is to provide a sworn statement with an accurate description of each claim of confidentiality. *Paff v. New Jersey Dept. of Labor*, 392 N.J. Super. 334, 341 (App. Div. 2007). What the Defendants have done - a blanket assertion that nothing is available for copying - is not sufficient. The circumstances here such that claim cannot be accepted on its face. It is just not conceivable that some accessible records do not exist (speculation on what may exist is outline above). To be sure, the are undoubtedly some documents that are completely privileged or exempt, but Plaintiff is unable to enter a debate about the records because there is no information about what exists. And to be sure, it is not anticipated the Court is going to direct the turnover of the entire file without knowing what is contained within it. It is equally a certainty that some records may contain some information that just needs to be redacted out. The index forces the government to be candid about what it has and why a requester cannot have it.

A proper *Vaughn* index is an absolutely necessity. The index/privilege log is as fundamental to access as the documents themselves. It provides a context and scope for the

---

[1] Derived from *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), which centered around claims of "privilege" regarding records sought in the context of the federal Freedom of Information Act.

records that are disclosed. It demonstrates that the actions undertaken were done as a considered process. The paper trail it documents shows "action" taking place on behalf of taxpayers. Plus, it enforces honesty, fair dealing and the government "turning square corners" when dealing with responses to records requests. "Blanket assertions" foster distrust and are easily abused. If an agency appreciates that it will have to go through and delineate each document and how a privilege applies to it, it will be more circumspect in its analysis of what is withheld knowing that it may ultimately face scrutiny for its assertions. As records are specifically analyzed for the application of a privilege, some may readily become apparent to not be so protected.

C. AN AWARD OF REASONABLE ATTORNEYS' FEES IS MANDATED BY OPRA

If the Court orders Defendants to produce any documents relevant to the request - or even a *Vaughn* index of what was withheld - the Court must also find that Plaintiff is the prevailing party. Under OPRA's fees-shifting provisions, Plaintiff must be awarded a reasonable attorneys' fee and costs. *N.J.S.A. 47:1A-6* mandates an award of attorney's fees in "any proceeding" where the requester is successful. This is true even the compliance comes about without a formal Court Order, as may well happen here. *See, Teeters v. Division of Youth & Family Services*, 387 N.J. Super. 423 (App. Div. 2006), certif. denied, 189 N.J. 426 (2007) holding that a party can be a prevailing party by bringing about compliance without a court order; *See also, 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).

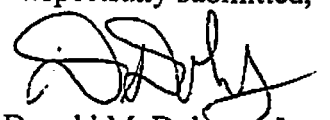
Counsel fee awards are mandatory so as to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections*, 185 N.J. 137, 153 (2005) certification of Counsel Fees and Costs accompanies this filing.

CONCLUSION

The Defendants have government records responsive to Plaintiff's request. Whether or not an indictable offense occurred is not a basis for denial. Undoubtedly some records are available to the Plaintiff because even under the broadest construction the Court could ever afford the Defendants, we all know there is information about the type of crime, location, and use of any weapons available. We also know that information relating to the arrest is available because the alleged criminals have been arrested and their arrests have been published in national press reports. All that material and more is available under Executive Order # 69 and OPRA.

And because we do not know what other records exist, a *Vaughn* index is required so we can similarly analyze those materials.

Respectfully submitted,



Donald M. Doherty, Jr.