DOUGLAS F. CIOLEK, ESQ.	**: SUPERIOR COURT OF NEW JERSEY**
	: APPELLATE DIVISION
	: DOCKET NO. A-001068-23T4
Plaintiff-Respondent,	**:**
	: Civil Action
v.	**:**
	: ON APPEAL FROM:
TOWNSHIP OF ROXBURY	**: THE SUPERIOR COURT OF NEW JERSEY**
	: LAW DIVISION, MORRIS COUNTY
Defendant-Appellant.	**: DOCKET NO. MRS-L-668-22**
	:
	SAT BELOW
	HON. STUART A MINKOWITZ, A.J.S.C.

BRIEF OF DEFENDANT-APPELLANT, TOWNSHIP OF ROXBURY

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PRELIMINARY STATEMENT

The issue presented in this appeal is whether a custodian of records must autonomously provide information pursuant to N.J.S.A. 47:1A-3(b) when denying access to an exempt criminal investigatory record under the Open Public Records Act (hereinafter "OPRA") in response to a records request and whether not doing so is an OPRA violation.

The matter comes before this Panel after a prior appellate remand to the trial court. The remand resulted from an appeal made by the Plaintiff of the trial court's dismissal of his denial of access OPRA complaint. The Appellate Division remanded the matter so that the trial court could conduct an *in camera* examination of an unreleased criminal record to determine whether it was properly withheld as an exempt criminal investigatory record. On remand, after "review of the criminal investigatory reports that were withheld by the Township as not eligible for disclosure under OPRA," the trial court ordered the production of "information as to the type of crime [investigated], time, location and type of weapon, if any." After cross-motions for reconsideration, the trial court clarified its decision and awarded Plaintiff attorney's fees as a prevailing party, which *ipso facto*, is a determination that access was improperly denied under N.J.S.A. 47:1A-6 and the custodian committed an OPRA violation.

In this case the Plaintiff **never** made a specific request for information as explicitly required by N.J.S.A. 47:1A-3(b), nor was the custodian given an opportunity to provide such information before the Plaintiff filed a complaint challenging the denial of access to criminal investigatory records. The trial court's holding establishes a rule that would trigger an obligation under Section 3 of OPRA for a custodian, when properly denying access to a criminal investigatory record, to examine the exempt record and extract information. Such a position engrafts a secondary obligation upon a custodian not embraced or required by the Open Public Records Act.

To the contrary, criminal investigatory records are exempt from OPRA disclosure and the exemption is not qualified by N.J.S.A. 47:1A-3. Indeed, Section 3 governs access to government records and information of investigations in progress—not access to exempt criminal investigatory records. Moreover, the information required by N.J.S.A. 47:1A-3(b) is to be made available within twenty-four hours, "or as soon as practicable, **of a request for such information**." In this case, the Plaintiff never made such a request for information, and the custodian's failure to provide the information cannot be ruled an improper denial of access as the custodian was never afforded twenty-four hours to respond to a request. For the following reasons, the trial court's judgment must be reversed.

PROCEDURAL HISTORY

On April 19, 2022, Plaintiff filed a verified complaint alleging that the Defendant, Township of Roxbury (hereinafter "Township"), violated OPRA by not releasing a criminal investigatory record. (Da3). Under Docket No. MRS-L-668-22, the trial court entered an order setting a hearing date on April 20, 2022. (Da21). The Township answered the verified complaint and submitted opposition on May 20, 2022. (Da25). The trial court conducted a hearing on July 11, 2022 (Da34), and the Plaintiff filed an amended verified complaint on July 12, 2022. (Da29). Thereafter, the trial court entered judgment in favor of the Township on August 1, 2022, with a written opinion. (Da58-67).

The Plaintiff filed an appeal of the trial court's judgment on August 5, 2022, and a Notice of Docketing issued on August 8, 2022, bearing Docket No. A-3729-21. (Da68). After briefing and oral argument, the Appellate Division issued a decision on July 26, 2023, and remanded the matter to the trial court for an *in camera* review of the unreleased criminal investigatory record. (Da70-80).

On July 28, 2023, the trial court entered an order on remand requiring the submission of the withheld record for an *in camera* examination (Da81) and the record was submitted under cover of correspondence dated August 8, 2023. (Da83). On August 15, 2023, the trial court entered an order *identifying the unreleased*

document as a criminal investigatory record, but then requiring the production of certain N.J.S.A. 47:1A-3(b) information by the Township. (Da85).

The Plaintiff filed a motion to reconsider the trial court's order for an award of attorney's fees on August 21, 2023 (Da87) and the Township cross-moved for reconsideration and opposed an award of attorney's fees on August 31, 2023. (Da96). The trial court entered an order on October 27, 2023, awarding attorney's fees to Plaintiff and denying the Township's cross-motion. (Da108-119). On October 31, 2023, the Plaintiff filed a second motion for reconsideration, which was opposed by the Township. (Da120-123).

The Township filed the instant appeal (Da1) and the Plaintiff sought to dismiss the appeal on December 12, 2023. On December 18, 2023, the trial court denied the Plaintiff's motion for reconsideration without prejudice (Da124) and the Plaintiff withdrew its motion to dismiss the appeal on December 21, 2023.

STATEMENT OF FACTS

On April 1, 2022, the Plaintiff submitted an OPRA request to the Township of Roxbury seeking:

All police reports + notes relating to:

1.) Natalia Brewington, DOB 2/10/92, from 1-1-15 to present

2.) Thomas Grego, DOB 4/9/57, from 2-3-19 to 2-28-19

3.) 130 Landing RD., Landing, NJ for 4-11-19 to 4-12-19; and 2-3-19 to 2-4-19

(Da10).

On April 11, 2022, the Township responded to the request. (Da15-20). Only two records were responsive to the request parameters—a Township Police "Operations Report" and a February 3, 2019, criminal investigatory report that was not eligible for release under OPRA. (Da19). The Plaintiff was given the non-exempt Operations Report and the response noted the existence of the exempt criminal investigatory record as "not eligible for OPRA." Id. The Plaintiff's record request was only made under OPRA and **did not** include a request under the common law right of access.

On April 19, 2022, the Plaintiff filed the verified complaint alleging an improper denial of access under OPRA relating to the unreleased criminal investigatory record. (Da3). Prior to filing the verified complaint, the Plaintiff **never requested information** pertaining to a criminal investigation, nor was the Township's custodian given an opportunity to supply such information. (Da53 at T20:2-5). In fact, the Plaintiff drafted its verified complaint on April 8, 2022, which was four days before the Township's response period elapsed and the Plaintiff received the Township's timely response. (Da93).

LEGAL ARGUMENT

The OPRA issue before the Court is subject to a *de novo* standard of review. It is well accepted that a "trial court's determinations with respect to the applicability of OPRA are legal conclusions subject to de novo review." O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 379 (App.Div. 2009). In this case, the undisputed facts matter, as they are of legal significance to the applicability of OPRA requirements here. For the following reasons, the trial court's order on remand must be reversed and the trial court's original order dismissing the Plaintiff's complaint must be reinstated.

POINT ONE

THERE WAS NOT AN IMPROPER DENIAL OF ACCESS UNDER N.J.S.A. 47:1A-3(b) BECAUSE A REQUEST FOR INFORMATION WAS NOT MADE TO THE CUSTODIAN.

(Da85; Da108)

The operative trigger for a custodian's obligation arising under N.J.S.A. 47:1A-3(b) is a request for "information." The plain language of the statute requires that specified information "shall be available to the public within 24 hours or as soon as practicable, of a request for such information." The statute does not say within twenty-four hours of a crime being reported, or a government record being produced. In this instance, the Plaintiff never requested information, and the custodian was not given twenty-four hours to make the information available. Accordingly, there was no improper denial of access under OPRA when the custodian failed to provide

Section 3 information to the Plaintiff, as no request was made for that information and the custodian was not afforded twenty-four hours to supply such information. Despite this syllogistic logic, the trial court ordered information be provided and found the Plaintiff as a "prevailing party," which axiomatically equates to a determination that access was improperly denied by the Township. N.J.S.A. 47:1A-6.

This result is confounding as the trial court's original decision dismissing the Plaintiff's complaint identified the disjunction in the Plaintiff's argument that the Township was required to release N.J.S.A. 47:1A-3(b) information in the context of the Plaintiff's OPRA request:

> Indeed, plaintiff's request solely sought investigatory reports and notes, not any specific information. While investigatory reports and notes may include some disclosable information, plaintiff did not seek that information, only records . . . because plaintiff's records request would require the records custodian to speculate as to what information plainsought [sic], defendant's denial was appropriate.

(Da66-67).

The intervening appellate court rejoinder to Plaintiff's appeal was a remand for "the trial court to undertake the necessary in camera inspection to enable the trial court to exercise its role in assuring that the documents and information are not improperly withheld under OPRA." (Da80). The Appellate Division left "the scope and breadth of the in camera inspection to the discretion of the trial court" and did not retain jurisdiction. Id.

On remand, the trial court identified the unreleased document as a criminal investigatory record but nonetheless ordered the release of Section 3 information in the absence of a triggering request for this "unique" case. Trying to minimize the damage of its holding, the trial court said its ruling "is limited to the unique facts of this case, in conjunction with the Appellate Division's decision on remand" by which it was bound. (Da114). This anomalous result may have been caused by ambiguous language within the opinion accompanying the remand. In this regard, the Appellate Division's prior opinion at Page 9 (found at Da78) states that "[i]n contrast to criminal investigatory records, OPRA *allows* access to '[r]ecords of investigations in progress'" under N.J.S.A. 47:1A-3. (Emphasis added.) This was a clear misstatement and reversal of import, as N.J.S.A. 47:1A-3 actually permits the *denial* of access to government records that pertain to an investigation in progress. The opinion also ambiguously identified the trial court's obligation to determine whether the undisclosed record was an exempt criminal investigatory record that included information exempted under OPRA and whether such "documents and information are not properly withheld under OPRA." (Da80).

Regardless of the source of the confusion, the trial court took its remand instruction a step too far when it equated the Township custodian's failure to provide information from an exempt report as a denial of access when no request for such

information was made. In this matter, the Township custodian properly denied access to an exempt criminal investigatory record.

Given that no request for information under N.J.S.A. 47:1A-3(b) was tendered, the only remaining manner by which the trial court could have conceivably deemed the Township's custodian to have committed an OPRA violation is through a false conflation of a custodian's obligations arising under Section 3 when denying access to a criminal investigatory record in response to a records request. For the following reasons, interpreting OPRA to suggest a result that a custodian's proper denial of access to a criminal investigatory record itself creates a reporting requirement under Section 3 is error.

POINT TWO

A CUSTODIAN OF RECORDS IS NOT REQUIRED TO AUTONOMOUSLY PROVIDE INFORMATION PURSUANT TO N.J.S.A. 47:1A-3(B) WHEN DENYING ACCESS TO AN EXEMPT CRIMINAL INVESTIGATORY RECORD UNDER THE OPEN PUBLIC RECORDS ACT IN RESPONDING TO A RECORDS REQUEST.

(Da85; Da108)

Putting the finest point on the issue, the question presented is whether, under OPRA, a request seeking police reports is equivalent to, and is to be treated as, a request for information under N.J.S.A. 47:1A-3(b)? Given the statutory framework of OPRA, the answer to this question must be no.

In answering this question, preliminary distinctions must be drawn between what requirements apply to requests for government records, criminal investigatory records, and requests for "information" under N.J.S.A. 47:1A-3(b).

As defined at N.J.S.A. 47:1A-1.1, a "government record" encompasses a broad spectrum of items that have been made, maintained, or kept on file in the course of official business, including papers, books, documents, information stored or maintained electronically, etc. N.J.S.A. 47:1A-5(a) requires that a "custodian of a government record shall permit the record to be inspected, examined, and copied by any person during regular business hours . . . unless a government record is exempt from public access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; any of statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order." (Emphasis added.) In turn, OPRA enumerates twenty-seven exemptions, described as "information which is deemed to be confidential for the purposes of [OPRA]" and one of these exemptions is for "criminal investigatory records." Importantly, if a government record does not fall within a categorized exemption, the custodian must, with limited exception, grant or deny a request for access to the record not later than seven business days after receiving the request.

One of the enumerated exemptions is for "criminal investigatory records." A criminal investigatory record is specifically defined as "a record which is not 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," N.J.S.A. 47:1A-1.1. Our Supreme Court has identified various law enforcement records that either do or do not qualify for the exemption based upon the two prongs of: (1) pertaining to a criminal investigation; and (2) not being required by law to be made or maintained. See generally, Paff v. Ocean Co. Pros. Office, 235 N.J. 1 (2018)(Mobile Video Recorders, or "MVRs" qualify as exempt criminal investigatory record under OPRA as they are not required by law to be made or maintained); North Jersey Media Group, Inc. v. Tp. Of Lyndhurst, 229 N.J. 541 (2017)(Use of Force Reports are not exempt criminal investigatory records as they are required by law to be made and maintained).

On remand, the criminal record at issue in this case was identified by the trial court as a criminal investigatory record, as indeed, it was an investigation report related to an alleged criminal matter and was not required by law to be made or maintained. See Bent v. Tp. of Stafford, 381 N.J.Super. 30, 39 (2005), where the Appellate Division acknowledged finding "no requirement in the law concerning 'the making, maintaining or keeping on file the results of an investigation by a law enforcement official or agency into the alleged commission of a criminal offence.'"

As such, it is a record that is exempt from access. In accordance with the statute, and as buttressed by privacy interests expounded upon in North Jersey Media Group, Inc. v. Bergen Cnty. Pros. Office, 447 N.J.Super. 182 (App.Div. 2016) and Fuster v. Tp. of Chatham, _____ N.J.Super. ____ (App.Div. 2023)(reproduced at Da127), the Township custodian properly denied access to this criminal investigatory record.

The issue in this case appears to spring from the interface of the treatment of exempt criminal investigatory records and obligations arising under N.J.S.A. 47:1A-3. Under the rubric of "Access to records of investigation in progress," the Legislature prescribed regulations allowing for the limited *denial* of access to non-exempt investigatory records that are normally subject to disclosure and for the release of information concerning a criminal investigation. In full, N.J.S.A. 47:1A-3 provides:

> a. Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented, where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced. Whenever a public agency, during the course of an investigation, obtains from another public agency a government record that was open for public inspection, examination or copying before the investigation commenced, the investigating agency shall provide the other agency with sufficient access to the record to allow

the other agency to comply with requests made pursuant to P.L. 1963, c. 73 (C. 47:1A-1 et seq.).

b. Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.), as amended and supplemented, the following information concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such information:

where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;

if an arrest has been made, information as to the name, address and age of any victims unless there has not been sufficient opportunity for notification of next of kin of any victims of injury and/or death to any such victim or where the release of the names of any victim would be contrary to existing law or Court Rule. In deciding on the release of information as to the identity of a victim, the safety of the victim and the victim's family, and the integrity of any ongoing investigation, shall be considered;

if an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;
information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;

information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;

information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police; and

information as to circumstances surrounding bail, whether it was posted and the amount thereof.

> Notwithstanding any other provision of this subsection, where it shall appear that the information requested or 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.

The clear import of subsection a is to allow for the limited denial of access of otherwise accessible government records created in the course of a criminal investigation if their release would be inimical to the public interest. Subsection b differs in that it directs certain information that must be made available in the context of a criminal investigation in progress, regardless of the availability of non-exempt government records amenable to release.

When these various definitions and sections are read in *pari materia*, Section 3(a) of OPRA only makes sense if considered in the context of ongoing investigations where access to otherwise non-exempt government records that are otherwise subject to release under OPRA, such as body worn police camera footage, use of force reports, accident reports, 911 tapes, etc., may be denied if inimical to the public interest for the integrity of an investigation. Section 3(b) finds meaning in the context of an ongoing investigation, in that allows for release of information pertaining to the investigation, whether access to exempt or non-exempt records is permitted or denied.

Chief Justice Rabner writing for the Court in Libertarians for Transparent Government v. Cumberland Co., 250 N.J. 46, 58 (2022) interpreted Section 3(b) of OPRA as being limited to ongoing criminal investigations:

> The Legislature acknowledged the distinction between providing information and actual records in different settings. The statute, for example, directs that certain 'information' about ongoing criminal investigations shall be made available to the public. Id. § 3(b) (emphasis added). Elsewhere, the Legislature directs that 'government records,' as opposed to information, be disclosed. Id. § 1.

The significance ascribed to Section 3(b) by the Chief Justice becomes relevant when applied to this matter, because it demonstrates that there is a distinction between a request for *records* and a request for *information* that must be recognized. A custodian's obligations in respect to these two species of requests are different and these obligations are not interconnected by statute. This is underscored by the fact that a custodian generally has seven business days to respond to a records request and twenty-four hours to respond to a request for "information" under Section 3(b).

To be clear, if the Court were to subscribe to the opinion that N.J.S.A. 47:1-3(b) imposes a separate obligation upon a custodian to provide such information in response to a records request, such a rule would simultaneously undercut the clear legislative exemption applicable to criminal investigatory records and "expand the custodian's role beyond what the Legislature specifically described in N.J.S.A.

47:1A-5(g)," which was disapproved by the Appellate Division in American Civil Liberties Union v. New Jersey Div. of Crim. Justice, 435 N.J.Super. 533, 541 (App.Div. 2014). In fact, such a holding is not supported by OPRA's statutory regime and had such requirement been envisioned, the Legislature could have qualified the criminal investigatory records exemption with the simultaneous obligation to provide Section 3(b) information. The Legislature did not do this.

As correctly recognized by this Court, it is not the province of a records custodian to read anything into a records request. MAG Entertainment, LLC v. Div. of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App.Div. 2005). A custodian is not constrained to solicitously offer information not requested. Impressing such a secondary obligation would require a records custodian to scrutinize every exempt criminal investigatory record responsive to a records request and extract information to be released, regardless of whether the exempt record pertains to an ongoing criminal investigation or one long closed. Rhetorically, would this obligation further require a custodian to consult other sources to ferret out responsive Section 3 information if such information is not fully contained within an exempt criminal investigatory record otherwise responsive to a records request? Such an obligation would run afoul of the holdings in MAG Entertainment, supra, at 546-549 and Bent v. Tp. of Stafford, 381 N.J.Super. 30, 37 (2005), which maintain

that a records custodian is not required to conduct research or correlate data from various government records.

This type of secondary obligation would further place municipal custodians in a position to assess whether "the information requested or to be examined will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release" N.J.S.A. 47:1A-3(b). This type of determination should be made by a law enforcement official as directed by the statute—not a municipal clerk responding to a records request.

In light of the above referenced principles, there is no basis to support the conclusion that a custodian is required to independently provide information pursuant to N.J.S.A. 47:1A-3(b) when denying access to an exempt criminal investigatory record. Accordingly, the trial court's finding to the contrary must be reversed.

POINT THREE

IT WAS ERROR FOR THE TRIAL COURT TO FIND PLAINTIFF A PREVAILING PARTY AND AWARD ATTORNEY'S FEES BECAUSE THERE THE TOWNSHIP CUSTODIAN COMPLIED WITH OPRA AND THERE WAS NO IMPROPER DENIAL OF ACCESS.

(Da85; Da108)

If it is not readily apparent given the modest attorney's fees awarded in this case, the primary motivation of this appeal finds its source in the merits of the issue and the defense of the Township custodian's actions. The Township's record

custodian takes compliance obligations of OPRA quite seriously and fairly expects a reviewing court to rigorously apply proper analysis in reviewing access determinations.

In this case, the trial court ordered the release of information to the Plaintiff, however, under the explicit authority of N.J.S.A. 47:1A-6, the court is only authorized to order such access if "it is determined that access has been improperly denied." Continuing, the statute provides for a reasonable attorney's fee to a requestor who prevails in a proceeding. By deductive operation, the trial court's order and award of attorney's fees in this matter equates to a determination that the Township custodian violated OPRA.

While the reasons why the custodian did not violate OPRA advanced above need not be repeated, the trial court's opinion supporting its determination that Plaintiff was a prevailing party rests largely upon the fact that the document withheld by the Township custodian did contain information disclosable under N.J.S.A. 47:1A-3(b) and the court then ordered its disclosure. (Da115). The trial court's logic does not support a determination that an improper denial of access occurred. It is more than mere supposition to believe that many exempt criminal investigatory records contain information that may be available upon request under N.J.S.A. 47:1A-3(b). To ascribe a custodian's failure to communicate this information, absent a request as is mandated by the statute, as a denial of access is patently wrong.

Respectfully, there must be some action or inaction taken by the custodian that runs afoul of OPRA's requirements to find an improper denial of access occurred and which would justify the award of attorney's fees. In this case, there is no action, inaction or fact of legal significance that suggests the Township custodian did anything, or failed to do anything, in contravention of OPRA's mandates. Quite simply, either the Township custodian complied with OPRA or the custodian committed an improper denial of access to a government record. Based upon the elemental facts of this case, there was no violation or improper denial of access. If the custodian did not improperly deny access, then it was improper for the trial court to award the Plaintiff attorney's fees and the court's determination must be reversed.

CONCLUSION

Based upon the foregoing, Defendant-Appellant, Township of Roxbury, respectfully requests that this Court reverse the trial court's determination on remand and reinstate the trial court's original dismissal of the Plaintiff's action.

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Dated: February 20, 2024
Amend: March 12, 2024

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Douglas F. Ciolek, Esq.,	SUPERIOR COURT – APPELLATE DIVISION
Plaintiff-Respondent	DOCKET No.: A-001068-23T4
vs.	SUPERIOR COURT OF NEW JERSEY
Township of Roxbury	LAW DIVISION: MORRIS COUNTY
Defendant-Appellant	Docket No.: MRS-L-668-22
	CIVIL ACTION

BRIEF OF RESPONDENT

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Douglas F. Ciolek, Esq. On the Brief

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COURT RULES

PRELIMINARY STATEMENT

Appellant appeals from a 10/27/23 order denying its cross-motion for reconsideration. This order should easily be affirmed as the issue raised on appeal was never initially raised by Appellant below.

PROCEDURAL HISTORY

Respondent adopts Appellant's procedural history in its brief.

STATEMENT OF FACTS

The pertinent facts are also found within the PROCEDURAL HISTORY section in Appellant's brief, along with the documents cited in same.

Respondent simply adds that Appellant never raised below the issue that is now on appeal. Its original brief filed with the trial court never raised the alleged deficiency of the request itself. Pa1-10.[1] It simply argued that Respondent's OPRA request sought a criminal investigatory record which was wholly exempt from disclosure. *Ibid*.

[1] Appellant's underlying brief is attached to my Appendix per R. 2:6-1(a)(2) to show that no such argument was asserted below.

LEGAL ARGUMENT

POINT I

THE ISSUE RAISED IN APPELLANT'S APPEAL WAS NEVER INITIALLY RAISED BELOW AND THE TRIAL JUDGE'S ORDER DENYING RECONSIDERATION MUST THEREFORE BE AFFIRMED

A. STANDARD OF REVIEW

Appellant appeals from a 10/27/23 Order denying its cross-motion for reconsideration. The Appellate Division reviews a trial judge's decision on whether to grant or deny a motion for reconsideration under R. 4:49-2 (motion to alter or amend a judgment order) for an abuse of discretion. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

As such, Respondent disagrees with Appellant's request for a *de novo* review (Db6) of an issue never raised below by it, as argued by the undersigned *infra*.

B. APPELLANT NEVER INITIALLY ARGUED BEFORE THE TRIAL JUDGE THAT RESPONDENT'S OPRA REQUEST WAS SOMEHOW IMPROPER, AND AS SUCH, APPELLANT'S RECONSIDERATION MOTION WAS PROPERLY DENIED

The procedural history's important dates/events are summarized below.

The initial appearance before the trial judge was on July 11 of 2022, Da34 which led to an 8/1/22 Order of dismissal. Da58-67. Briefs were filed by the parties. The Township's brief did ***not*** assert that the request itself was in any way improper or

ambiguous. Pa1-10. It ***only*** argued that the document withheld was not a public document (i.e. a "government record") and therefore wholly exempt from disclosure. Ibid. Indeed, even Appellant's brief filed in this pending appeal does not state under its Point Headings that this issue was "Argued Below".

The trial judge's 8/1/22 order was appealed by the undersigned, and the Appellate Division vacated the judge's order. Da68. That means that the judge's order was void and set aside, and the parties were returned to their pre-decision status.

The trial judge then reviewed the disputed document in accord with the Appellate Division's decision and ruled in Respondent's favor, finding that certain information within the disputed document must be disclosed. Da81,85.

Then Respondent filed a motion to alter the 8/15/23 Order to reflect an award of counsel fees. Da87. Appellant cross-moved for reconsideration, arguing for the first time that Respondent's request itself was improper. Da96. In response to Appellant's cross-motion, Respondent specifically argued that the Township did not make this argument at the outset in its initial brief. Appellant's cross-motion was denied per the court's 10/27/23 Order. Da108-119.

When considering these facts in light of the applicable legal standards, the trial judge did not abuse his discretion as a

matter of law because he presumably followed well settled binding precedent.[2] The focus of a reconsideration motion is on what was before the court in the first instance and is not intended to become a vehicle for a new argument. Lahue v. Pio Costa, 263 N.J. Super. 575, 598 (App.Div.1993); Morey v. Borough of Wildwood Crest, 18 N.J. Tax 335, 341 (App.Div.1999). Stated otherwise, there is nothing to reconsider when the argument was not initially raised. In light of this history, the cross-motion was **required** to be denied. As such, there can be no abuse of discretion by the trial court in denying the order under review.

And because the issue of an improper request was never initially raised below, Appellant can rest easy without worrying about the court improperly expanding the custodian's role in an OPRA request as noted in POINT II of its brief. While Respondent completely disagrees with Appellant's substantive argument in POINT II and its "concerns", this appeal fails because this issue was not initially raised by Appellant at the outset.

Appellant may try to contend in its reply that the trial judge's initial opinion in Da58-67 contained language critical

[2] I say "presumably" because the trial judge did not discuss the standard for reconsideration in his opinion. He simply denied Appellant's reconsideration cross-motion. But in any event, the Appellate Division can affirm an order on appeal even if the reasons are different than that of the trial judge or if the trial judge provided the wrong reason. Wilson v. Grant, 297 N.J. Super. 128, 139 (App.Div.1996).

about Respondent's request. However, it was the court that improperly raised it (*sua sponte*) in its opinion, not Appellant at the outset. Pa1-10. Nevertheless, vacating the trial judge's prior order returned the parties to their pre-decision status and does not allow Appellant to resurrect an argument never made by it at the outset.

CONCLUSION

The 10/27/23 order under appeal should be affirmed because Appellant's argument before this court was never initially raised below by it. As such, its reconsideration cross-motion was properly denied.

Douglas F. Ciolek

_____
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Pro Se and attorney for underlying Defendants in related cases MRS-L-1818-20 & MRS-L-117-21

4/2/24

DOUGLAS F. CIOLEK, ESQ.	**: SUPERIOR COURT OF NEW JERSEY**
	: APPELLATE DIVISION
	: DOCKET NO. A-001068-23T4
Plaintiff-Respondent,	**:**
	: Civil Action
v.	**:**
	: ON APPEAL FROM:
TOWNSHIP OF ROXBURY	**: THE SUPERIOR COURT OF NEW JERSEY**
	: LAW DIVISION, MORRIS COUNTY
Defendant-Appellant.	**: DOCKET NO. MRS-L-668-22**
	:
	SAT BELOW
	HON. STUART A MINKOWITZ, A.J.S.C.

REPLY BRIEF OF DEFENDANT-APPELLANT, TOWNSHIP OF ROXBURY

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PROCEDURAL HISTORY

The Appellant, Township of Roxbury, adopts and incorporates by reference the procedural history previously set forth in Appellant's primary brief.

STATEMENT OF FACTS

The Appellant, Township of Roxbury, adopts and incorporates by reference the statement of facts previously set forth in Plaintiff-Appellant's primary brief.

LEGAL ARGUMENT

The Plaintiff-Respondent does not substantively address the merits of the Township's appeal, but rather grounds his opposition on the standard of review applicable to the appeal and the appellate principle that an issue not raised below is not subject to review. For the reasons more fully detailed below, the standard of review in this matter is a *de novo* standard and the issue on appeal was repeatedly addressed in the prior proceedings of this matter.

POINT ONE

THE PROPER STANDARD OF REVIEW ON APPEAL IS THE DE NOVO STANDARD AND NOT THE ABUSE OF DISCRETION STANDARD BECAUSE OF THE NATURE AND PROCEDURAL POSTURE OF THE LITIGATION.

The Respondent initially argues that the current issue on appeal is subject to an abuse of discretion standard of review because it is asserted the appeal was made after denial of a motion for reconsideration, citing Branch v. Cream-O-Land Dairy, 244 N.J. 567 (2021). This argument is without merit.

The instant appeal springs from an appellate remand to the trial court for an *in camera* review of an unreleased criminal investigatory record. After inspection of the document, the trial court ordered the release of certain information, with scarce explanation or legal analysis. After both the Township and Respondent filed motions for reconsideration—the Respondent seeking prevailing party status and attorney's fees and the Township for clarification and opposing the award of attorney's fees—the trial court only then offered a determination that there was an improper denial of access under OPRA and granted Respondent's motion.

Against this procedural backdrop, the only order from which the Township could legitimately appeal was from the trial court's judgment as clarified by the trial court because of the parties' cross-motions for reconsideration. It was that ruling that resulted in an appealable determination and legal conclusion related to this OPRA matter after remand.

It is beyond dispute that a "trial court's determinations with respect to the applicability of OPRA are legal conclusions subject to de novo review." O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 379 (App.Div. 2009). It is the trial court's determination and legal conclusions related to OPRA that are subject to this appeal and not a discretionary decision as to some miscellaneous. Nor is this an appeal of the denial of the Township's motion for reconsideration itself. This is simply the appeal of the trial court's OPRA determination. Accepting the Respondent's

argument would result in a situation where a litigant that appeals from a trial court's summary judgment decision, after having filed and been denied a motion for reconsideration, would then be subject to an abuse of discretion standard of review rather than the *de novo* standard that is applicable to summary judgment review. Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 511 (2019) As such, this appeal is subject to the *de novo* standard of review as to the trial court's legal determination as to this OPRA issue.

POINT TWO

CONTRARY TO THE RESPONDENT'S ASSERTION, THE ISSUE ON APPEAL WAS REPEATEDLY RAISED IN THE PRIOR PROCEEDINGS AND IS RIPE FOR ADJUDICATION.

The Respondent's assertion that the issue on appeal, namely, the applicability of N.J.S.A. 47:1A-3(b) in the context of Respondent's OPRA request, is wrong and is belied by the record. Simply reviewing the Township's initial brief on the order to show cause as provided in Respondent's appendix proves the inaccuracy of this assertion. As found at Pa7, in response to the Plaintiff-Respondent's multifaceted and evolving theories of relief, the Township plainly argued that N.J.S.A. 47:1A-3(b) was not applicable. In fact, it was the Plaintiff-Respondent that actually raised the issue requiring this response.

If the foregoing does not undermine the Respondent's assertion, the Township responded to, and argued the inapplicability of N.J.S.A. 47:1A-3(b) in the following

documents as found in the Defendant's appendix: Da47-48; 52 (Oral argument before trial court); Da102-105 (Argument on remand reconsideration). Respectfully, in its initial briefing to the Appellate Division under A-3729-21, the second point of the Township's brief was addressed to the applicability of N.J.S.A. 47:1A-3(b). In short, the issue under review has in many respects been an issue of this litigation addressed by the Township.

The Respondent, as the Plaintiff below, brought affirmative claims against the Township and the Township responded to those claims and issues raised by the Plaintiff. It was only after the prior appellate remand, and the trial court's subsequent treatment and attendant legal conclusions reached on remand, that the issue *sub judice* matured. Indeed, the Respondent's own argument concludes that the prior remand returned the parties to the pre-decision status. Pb. 3. If this concept is accepted as true, then the Township could not be simultaneously prejudiced by having not raised the issue in the original litigation, at least from a logical standpoint as the Respondent suggests.

In short, there is no factual basis to assert that the issue of the applicability of N.J.S.A. 47:1A-3(b) was not raised or addressed by the Defendant Township throughout the entirety of the proceedings in this matter. Moreover, even if such a perception exists, the matter on appeal is related to the Open Public Records Act and a custodian's treatment of criminal investigatory records, which implicates the

public importance of the issue. It is well accepted that an issue that is jurisdictional in nature or substantially implicates a matter of public interest, it is reviewable even if not raised below. See Finderne Heights Condominium Ass'n v. Rabinowitz, 390 N.J.Super. 154, 166 (App.Div. 2007). For this reason, even if the Respondent was correct, the matter on appeal must be reviewed.

CONCLUSION

Based upon the foregoing, Defendant-Appellant, Township of Roxbury, respectfully requests that this Court reject the Plaintiff-Respondent's argument in opposition and reverse the trial court's determination on remand and reinstate the trial court's original dismissal of the Plaintiff's action.

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Dated: April 29, 2024

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Re: *Douglas F. Ciolek, Esq. v. Township of Roxbury*
Docket No. A-001068-23T4

To the Honorable Judges of the Appellate Division:

This law firm is counsel to proposed amicus curiae the Municipal Clerks' Association of New Jersey, Inc. ("Clerks' Association" or "MCANJ"). The MCANJ is a private, non-profit organization that serves the professional and personal educational needs of the over 600 members who are active and retired clerks and deputy municipal clerks around the State of New Jersey. Please accept this letter brief in lieu of a more formal submission as MCANJ's amicus brief in the above-referenced action.

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I. INTRODUCTION

Requests for government records are ubiquitous and reach almost every government entity, spanning all levels of government— local, county, and state. Among just municipalities, hundreds of government records requests are submitted every day. Virtually all those requests are handled dutifully by municipal clerks who also serve as custodians of records. Almost none of those public servants hold law licenses. Yet, they all are required by law to respond promptly, adequately, and correctly to each request in full compliance with a large, dynamic body of statutory or common law. In effect, they are called on to make legal interpretations akin to quasi-judicial decision-making. One misstep in this complicated process can be serious, including the imposition of

civil penalties, discipline, and legal fees.

Depending on how it is decided, the legal rule emanating from this case could place municipal custodians in an even more precarious position. At issue is whether a records custodian or other government official must examine an exempt criminal investigatory record and disclose information available under N.J.S.A. 47:1A-3(b) even when the requestor never requested such information. The MCANJ respectfully urges the Court to reverse the decision below and not impose such a requirement.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

MCANJ relies on and incorporates by reference the Procedural History and Statement of Facts set forth in Appellant Township of Roxbury's opening brief.

III. LEGAL ARGUMENT

The thrust of the Open Public ***Records*** Act (OPRA) concerns public access to government records. Indeed, the express legislative purpose is to ensure that the public has ready access to "government ***records***." N.J.S.A. 47:1A-1 (emphasis added). To that end, it is the State's public policy that "all

governments records" be accessible to the public unless they are exempt. Ibid.

Under OPRA, "records" are distinct from "information." Although all records contain information, not all information is embodied in a record. See N.J.S.A. 47:1A-1.1 (defining "government record" or "record" beyond mere information); see also N.J.S.A. 47:1A-3 (distinguishing between records in subsection (a) and information in subsection (b)). Amidst OPRA's predominant focus on records is a single subsection found in N.J.S.A. 47:1A-3(b) that requires the release of ongoing investigations information under limited circumstances. Whether such information had to be disclosed absent a request is the subject of this appeal and one that poses substantial concern for MCANJ's members.

In this case, Plaintiff submitted a request for government records, not for information. The full extent of Plaintiff's OPRA request was "[a]ll police reports + notes relating to" two individuals and one location. Da10. Thus, at the time of Plaintiff's OPRA request dated April 1, 2022, he did not otherwise request information, including about ongoing investigations available under N.J.S.A. 47:1A-3(b). If he desired to access "such information," he was required

to request it. He did not. Indeed, the specific subsection plainly ties the time period for response (within 24 hours or as soon as practicable) to the receipt "***of a request for such information***[.]" N.J.S.A. 47:1A-3(b) (emphasis added).

This makes sense. As a practical and legal matter, OPRA does not and cannot work unless a citizen first makes a request to a public agency. See N.J.S.A. 47:1A-5(i)(1) (stating generally that access to government records shall be granted or denied no later than seven business days after custodian receives request). Said another way, it is the citizen's request that triggers any obligations under OPRA. To expect or require custodians or public agencies to discharge those obligations without proper notice, i.e., the request itself, would breach fundamental notions of fairness and due process, not to mention deviating from the language of the statute itself.

Not only must requests be made, but they must also be legally valid. In Bent v. Township of Stafford Police Department, this Court declared that "a party requesting access to a public record under OPRA must specifically describe the document sought." 381 N.J. Super. 30, 37 (App. Div. 2005) (quoting Gannett N.J. Partners, LP v. County of Middlesex, 379 N.J. Super. 205,

213 (App. Div. 2005)); MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (noting that OPRA applies to "identifiable" government records). Likewise, the New Jersey Supreme Court has instructed that "[a]lthough OPRA favors broad public access to government records, it is not intended to be a research tool that litigants may use to force government officials to identify and siphon useful information." Simmons v. Mercado, 247 N.J. 24, 38 (2021) (internal quotations and citations omitted). "Thus, to prompt disclosure under OPRA, requests for information must be properly circumscribed." Ibid. (quoting Paff v. Galloway Township, 229 N.J. 340, 352 (2017)). Being that these decisions insist on the validity of requests, the law must at least demand that requests be made.

The decision below represents a major departure from this case law and OPRA's plain language. The trial court on remand ordered the disclosure of "information as to the type of crime, time, location and type of weapon, if any" even though Plaintiff did not request such information when he submitted the

OPRA request or before he filed suit. Da86.[1] Worse still, prevailing party status and a fee award was later conferred to Plaintiff. Da108, Da115.

In making those determinations, the lower court appeared to misconstrue this Court's decision in the first appeal. There, this Court was asked to review whether the trial court had ruled correctly that the two withheld criminal investigatory records were in fact exempt under OPRA. The Court, however, was unable to do so because it could not "review the contents of the two criminal investigatory reports." Da79. The Court also corrected a procedural misstep that it observed below, namely, the documents needed to be reviewed in camera so that the parties and the records custodian could have an opportunity to be heard. Da79-80.

In its October 27, 2023, Statement of Reasons, the trial court on remand emphasized one word in the remand instructions—"information"—as if that

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[1] It appears that Plaintiff did not invoke N.J.S.A. 47:1A-3(b) until litigation commenced when he averred in his pleading that the exempt criminal investigatory records should have been turned over pursuant to that subsection as well as N.J.S.A. 47:1A-3(a). See Da29-31. Rather than submit a corrected OPRA request or speak to the custodian, we understand that he instead chose to litigate.

tasked the court on remand to search in camera for any "disclosable" content within the otherwise exempt material and order the release of any such information. See Da115. We submit, however, that, when read in context, no such parsing was intended. Instead, the remand instructions were designed for a simpler purpose—for the court on remand to see the two documents for itself so it could better evaluate whether they were in fact exempt under OPRA. Doing so would address the two concerns identified by this Court as noted in the preceding paragraph.

The decision below is problematic for other reasons. On remand, the trial court properly determined that the two documents in question were criminal investigatory records under N.J.S.A. 47:1A-1.1 and, yet, quixotically, that they contained "disclosable" information under N.J.S.A. 47:1A-3(b). But the former relates to completed investigations while the latter concerns active investigations in progress. Johnson & Connell, Open Public Records & Meetings § 8.1 (2024); see Libertarians for Transparent Government v. Cumberland Co., 250 N.J. 46, 58 (2022) (noting that N.J.S.A. 47:1A-3(b) concerns information about ongoing criminal investigations). It does not appear

that the decision below reconciles these two inconsistencies. See Da86, Da115.

Finally, OPRA permits the filing of a complaint in the Superior Court or with the Government Records Council only when the "[a] person [] is denied access to a government ***record***." N.J.SA. 47:1A-6 (emphasis added). Thus, the statute, by its terms, does not confer this type of private right of action, one where attorney's fees may be recovered by a prevailing requestor, to a person who is denied ***information*** under N.J.S.A. 47:1A-3(b). That is not to say that a requestor would lack the ability bring a challenge in a court of law. The point is that OPRA's fee-shifting and other incentives are only available to remedy the improper denial of access to records. Once the court on remand determined that the two criminal investigatory records were indeed exempt, at minimum, those remedies should no longer have been available or awarded on the basis of prevailing party status.

IV. CONCLUSION

For the foregoing reasons, the Municipal Clerks Association of New Jersey, Inc. respectfully requests that the Court reverse the decision below and hold that a record custodian or other official need not examine an exempt

criminal investigatory record and release information available under N.J.S.A. 47:1A-3(b) absent a specific request for such information. We thank the Court for granting us the opportunity to share its viewpoint and for its attention and consideration of these important issues that will affect our municipal clerk members.

Respectfully submitted,

/s/ Michael S. Carucci

Michael S. Carucci

cc: All Counsel (via eCourts)

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DOUGLAS F. CIOLEK, ESQ.,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-001068-23 T4
Plaintiff/Respondent;	
	Civil Action
v.	
	On Appeal From Superior
TOWNSHIP OF ROXBURY,	Court Law Division, Morris County
Defendant/Appellant.	Docket No.: MRS-L-668-22
	Sat Below: Hon. Stuart A. Minkowitz, A.J.S.C.

BRIEF AND APPENDIX ON BEHALF OF AMICI CURIAE NEW JERSEY STATE LEAGUE OF MUNICIPALITIES AND NEW JERSEY INSTITUTE OF LOCAL GOVERNMENT ATTORNEYS

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PRELIMINARY STATEMENT

This case presents the issue of whether a records custodian under the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1, must, in responding to a request for records, search out and provide "information" not asked for in the request. Here the request, dated April 1, 2022, was for "All police reports + notes relating to:" two individuals and one address for a specific set of date ranges. (Da10) (Da15)[1] Defendant promptly responded on April 7, 2022, by producing one operations report and stating that the second document was a (criminal) investigation report that was exempt from OPRA. (Da19) Plaintiff, instead of discussing the response with the custodian or requesting the "information" specifically identified in the pertinent section of OPRA, N.J.S.A. 47:1A-3b, immediately filed (April 19, 2022) a complaint in the Superior Court Law Division. (Da3) After a hearing in the Law Division, the trial court dismissed

[1] References are to Defendant's Appendix filed herein.

the case on the grounds that the OPRA request only sought records, not the "information" described in N.J.S.A. 47:1A-3b. (Da66-67)

On Appeal, the Appellate Division remanded to the trial court to conduct in *in camera* review to ascertain whether "documents and information are not improperly withheld under OPRA". (Da80) The trial court conducted an *in camera* review and concluded that the withheld document was indeed a criminal investigatory record, but, under N.J.S.A. 47:1A-3b, then ordered the release of the "information" not requested by the Plaintiff. (Da96) On motion for reconsideration, he ruled that, while not creating "a new standard for records custodians under OPRA", he was complying with the Appellate Division's clearly binding remand decision. (Da114)

Unfortunately, his ruling does exactly that inasmuch as he awarded counsel fees against the Township, notwithstanding the custodian's compliance with OPRA. In essence, the trial court's ruling requires a custodian to search out "information" not requested on pain of

violating OPRA and becoming subject to counsel fees and potential penalties under OPRA. As a result, the lower court's ruling should be reversed and the custodian's obligations clarified to accord with the holdings of *Simmons v. Mercado*, 247 N.J. 24, 38 (2021); *Bent v. Twp. of Stafford Police Dep't.*, 381 N.J. Super. 30, 37 (App. Div. 2005); and *Burnett v. Cnty. Of Gloucester*, 415 N.J. Super. 506, 516 (App. Div. 2010). Further, the award of counsel fees should be reversed because the plaintiff's lawsuit was not the catalyst for the relief obtained. *Mason v. Hoboken*, 196 N.J. 51 (2008), *Spectraserve, Inc. v. Middlesex County Utilities Auth.*, 416 N.J. Super. 565 (App. Div. 2010).

QUESTIONS PRESENTED ON APPEAL

The New Jersey State League of Municipalities ("League"), and the New Jersey Institute of Local Government Attorneys ("NJILGA") address the issue pressed on appeal by defendant-appellant Roxbury:

1. Whether, where "information" under N.J.S.A. 47:1A-3b is not requested as part of an OPRA request for records, a records custodian is

obligated to expand his/her search beyond that which is specifically requested.

2. Whether, where an OPRA request foes not seek "information" pursuant to N.J.S.A. 47:1A-3b and a later court order directs the release of the "information", the requestor is not entitled to counsel fees under *Mason v. Hoboken*, 196 N.J. 51 (2003) as he was not the "catalyst" nor prevailed in the litigation.

INTERESTS OF AMICI THE LEAGUE AND THE NJILGA

The League, authorized by State statute, is a voluntary association created to assist municipalities do a better job of self-government. Established in 1915, with over 560 municipal members, the League appears as amicus curiae in cases that involve novel legal questions affecting municipalities generally, primarily at the appellate level. See, www.njslom.org.

The NJILGA was "established in 1951 for the purposes of promoting education and professionalism among local government attorneys, and to assist members of the legal profession to better serve local governments in New Jersey." See, www.njilga.org/about.

"The Institute intervenes as amicus curiae in cases which present novel questions affecting the public

interest, often in conjunction with the New Jersey League of Municipalities. The Institute is an affiliate of the League of Municipalities." Id.

This is such a case.

STATEMENT OF FACTS

In the interests of brevity, the League and the NJILGA subscribe to the Procedural History and Statement of Facts set forth in the Defendant/Appellant Township of Roxbury's Brief filed herein.

LEGAL ARGUMENT

POINT I

OPRA DOES NOT REQUIRE A RECORDS CUSTODIAN TO SEARCH FOR "INFORMATION" THAT IS NOT REQUESTED IN THE OPRA REQUEST.

Amici have reviewed, agree with, and incorporate by reference herein, the arguments submitted by the Township in its excellent brief, and add the following comments in support thereof.

The Plaintiff, in his OPRA request dated April 1, 2022, specifically requested "All police reports + notes relating to" two individuals, Natalia Brewington and

Thomas Grego, and a property location in Landing, NJ, Rumor's Gentlemen's Club, for specific date ranges as to each individual and the property. (Da10) The Roxbury Police Department records custodian, Jennifer Dillard, promptly responded to the request on April 7, 2022:

> "1. 1 Report included
>
> 2. Only an Investigation Report, so not eligible for OPRA.
>
> 3. 1 Report for 2/3/19, but Investigation Report, not eligible for OPRA." (Da19)

The OPRA request does not seek "information", but rather only "police reports + notes". N.J.S.A. 47:1A-3b is clear that only "information concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such information: where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any". (Emphasis supplied). Section 3b does not refer to records. Indeed, this court has stated, in *North Jersey Media Group v.*

Lyndhurst, 441 N.J. Super. 70, 112 (App. Div. 2015), aff'd in part, rev'd in part, 229 N.J. 541, 570-572 (2017) that:

> Had the Legislature intended section 3(b) to oblige a public agency to release records, as opposed to information, it would have said so…
>
> We conclude the word "information," as used in the statute, is not synonymous with tangible records, such as written documents, notes, or recordings that contain the specified information. The required "information" may be conveyed in a newly drafted press release. Conceivably, the information could be provided in a public oral announcement.

Comparison of the OPRA requests in *Lyndhurst* to this case reveals that the North Jersey Media Group reporter specifically included "information" in the requests to the various municipal and county agencies.

> 5. All information required to [be] released by law enforcement under Section 3(b) of the New Jersey Open Public Records Act, *N.J.S.A.* 47:1A-3(b) where (i) an arrest has not yet been made; and (ii) where an arrest has been made.

North Jersey Media Group v. Lyndhurst, *supra* at 81. There is, therefore, a significant distinction between

"records" and "information". Thus, if a requestor seeks "information", it must be requested. It cannot be assumed. To hold otherwise would now impose an increased and distinct burden and liability on the records custodian or other municipal official.

While the *Lyndhurst* fact pattern is the reverse of this case, the principle is the same, and the holdings of the Appellate Division and the Supreme Court apply with equal force. "Records" are not "information" and vis-a-versa. The custodian here was asked to produce police reports and notes (records) and not information. Indeed, the requestor, upon receiving the reply, could easily have contacted the custodian by telephone and obtained the "information", which, as noted by this court and the Supreme Court, could have been done orally or by press release. Having failed to do so and chosen to litigate, this extensive court proceeding has needlessly consumed precious time and resources.[2]

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[2] This court's July 26, 2023 opinion footnotes the underlying tort cases that prompted the request. Of note, both cases were fully settled and dismissed before

Here, the custodian fully responded to the specifics of the request. One document was provided, while the criminal investigatory record was appropriately withheld. If the trial court's order on the remand is upheld, record custodians would now be required to intuit whether the requestor desired the "information" set forth in Section 3b. Inasmuch as there is a clear distinction between "records" and "information", this becomes an undue burden on a custodian. Indeed, it is not certain who would have to release the "information" because it can be withheld by a "law enforcement official".

> Notwithstanding any other provision of this subsection, where it shall appear that the information requested or to be examined will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release,

---

the filing of that opinion. In *Grego,* the stipulation was filed on October 4, 2022, while in *Brewington*, the stipulations of dismissal were filed on June 7, 2023 and July 17, 2023. Copies of the stipulations are included in the Appendix hereto as A01, A03 and A04, respectively. Indeed, the criminal investigatory report at issue here related solely to the Grego matter. Yet, it appears the plaintiff did not notify the court that the underlying cases had been dismissed.

> 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.

N.J.S.A. 47:1A-3b. See, *North Jersey Media Group v. Lyndhurst, supra,* at 570-571, which suggests that it is the responsibility of the law enforcement official to respond. The bottom line is that the failure of the plaintiff to specifically request the "information" under Section 3b is fatal to his lawsuit.

Further, the trial court's order on Roxbury's motion for reconsideration fails to properly analyze the basis for directing the disclosure of the "information". In its Statement of Reasons supporting its order to disclose the information, it contends that its "holding in this matter is limited to the unique facts of this case, in conjunction with the Appellate Division's decision on remand, and it does not create a new standard for records custodians under OPRA." (Da 114) That reasoning is

faulty, because the Appellate Division appropriately wanted a review of the Criminal investigatory report *in camera* to ascertain what was actually in the report. (Da78-80). The Appellate Division, however, did not compare the deficiencies in the OPRA request with the obligation of the municipality to release "information". Its order on remand, thus, could be construed as overly broad. However, the court did say:

> We therefore remand for the trial court to undertake the necessary in camera inspection to enable the trial court to exercise its role in assuring that documents and information are not improperly withheld under OPRA. We leave the scope and breadth of the in camera inspection to the discretion of the trial court. (Da80)

The Appellate Division gave significant leeway for the trial court to make an appropriate ruling. The trial court, however, interpreted that remand order overly restrictively and failed to discern whether any "information" was improperly withheld. Inasmuch as "information" was not requested, there was no improper withholding. Accordingly, the trial court's order to

disclose the "information" should, respectfully, be reversed.

POINT II

BECAUSE THE REQUESTOR FAILED TO REQUEST "INFORMATION" UNDER SECTION 3b, THE REQUESTOR DID NOT PREVAIL IN THE LITIGATION AND IS THEREFORE NOT ENTITLED TO COUNSEL FEES.

Requestor's failure to request the "information" set forth at N.J.S.A. 47:1A-3b prevents him from prevailing in this litigation. OPRA's counsel fee provision (N.J.S.A. 47:1A-6) allows a "reasonable counsel fee" to a prevailing party. Here, however, requestor did not prevail because of his failure to request the "information" under Section 3b. As discussed in Point I, infra, requestor only sought "records" and, thus, the municipal response fully conformed with OPRA.

The leading case of *Mason v. Hoboken,* 196 N.J. 51, 73 (2008) provides that in order to prevail, a litigant must establish that there is a causal nexus between an OPRA suit and the agency's response. Here, there is no causal nexus, nor has there been a finding that Roxbury or its records custodian violated OPRA. *Mason, supra* at

78-79, held that a "fact-sensitive inquiry on a case-by-case basis, evaluating the reasonableness of, and motivations for, an agency's decisions" was required in determining whether to award counsel fees. Review of the trial court's decision does not reveal any such analysis. It ignored the distinction between the "records" requested and the "information" not sought.[3]

It believed it was obligated to do so under the remand order of the Appellate Division. (Da113-115). However, the remand order gave the trial court wide discretion. It did not hamstring the trial court in evaluating whether there was a violation of OPRA that established the causal nexus of *Mason*. Indeed, without finding a violation, the order on reconsideration merely concluded that plaintiff had prevailed and was thus entitled to counsel fees. (Da115).

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[3] The trial court's original ruling acknowledged that distinction when it stated, "plaintiff did not seek information, only records. The records custodian need not read anything into the request. *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534, 546 (App. Div. 2005)." (Da66)

In *Spectraserv, Inc. v. Middlesex County Utilities Authority,* 416 N.J. Super. 565, 577-579 (App. Div. 2010), the court acknowledged that the rule awarding counsel fees applied, but only if a proper OPRA request had been made. However, it held that Spectraserve's OPRA requests were overly broad and generalized and therefore improper under OPRA, and that that was sufficient to deny the request for counsel fees, notwithstanding the ultimate production of approximately 150,000 documents. See, also, *N.J. Builders Ass'n. v. N.J. Council on Affordable Housing,* 390 N.J. Super. 166, 179 (App. Div.); *certif. denied,* 190 N.J. 394 (2007).

Here, the OPRA request was improper in that it did not seek "information". The order to disclose the "information" did not come from the request, but rather on the remand order from the trial court. Inasmuch as Roxbury complied with the OPRA request, any other relief did not originate from a valid OPRA request (i.e., to disclose the "information"). Therefore, plaintiff failed to establish that its suit was the catalyst for the

disclosure of the unrequested "information". Accordingly, the trial court's award of counsel fees must, respectfully be reversed and the case dismissed.

CONCLUSION

For the aforementioned reasons, the amicus parties, the League and the NJILGA, request that the trial court's Order directing the disclosure of the "information" under N.J.S.A. 47:1A-3b and Order Granting Counsel Fees, be vacated.

Respectfully submitted,

Dated: April 26, 2024

By: Carl R. Woodward

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#837804

APPENDIX

TABLE OF CONTENTS

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Attorneys for Plaintiff

THOMAS GREGO, **Plaintiff,** **v.** **MEGAMAC, LLC, CARMELLA MACPHERSON, MARIE VARTOLO, ESTATE OF CHARLES MACPHERSON, RUMOR'S GENTLEMEN'S CLUB, STEVEN FRENCH, ABC CORPS, 1-10, and JOHN/JANE DOES 1-10 (last two names being fictitious and presently unknown),** **Defendants.**	**SUPERIOR COURT OF NEW JERSEY** **MORRIS COUNTY: LAW DIVISION** **DOCKET NO: MRS-L-117-21** **Civil Action** **STIPULATION OF DISMISSAL WITH PREJUDICE AS TO ALL DEFENDANTS**

THIS MATTER, having been amicably resolved between the Plaintiff, Thomas Grego and the Defendants, Megamac, LLC, Carmella MacPherson, Marie Vartolo, Estate of Charles MacPherson, Rumor's Gentlemen's Club, and Steven French, it is hereby stipulated that the Complaint and any and all Counterclaims are hereby dismissed with prejudice without costs to either party.

SNYDER SARNO D'ANIELLO MACERI & DA COSTA
Attorneys for Plaintiff

By: *Phillip C. Wiskow*
Phillip C. Wiskow, Esq.

Date: 05/02/2022

JOSEPH J. FRITZEN, ESQ.
Attorneys for Defendant, Steven French

By: _____
Joseph J. Fritzen, Esq.

Date: 5/9/2022

ROSENBERG JACOBS HELLER
& FLEMING
Attorneys for Defendants, Megamac,
LLC, Carmela MacPherson, and
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Douglas F. Ciolek, Esq.

Date: 6/2/22

A02

THE VESPI LAW FIRM, LLC
Jared E. Drill - 004702000
361Union Boulevard
Totowa, New Jersey 07512
TEL: 973-633-1000
Attorneys for Plaintiff

NATALIA BREWINGTON,

Plaintiff(s),

vs.

RUMOR'S GENTLEMAN'S CLUB, ANTHONY MARIANO, STEVE FRENCH, MEGAMAC, LLC, CARMELLA MACPHERSON, MARIE VARTOLO, ESTATE OF CHARLES MACPHERSON, ABC CORPS. 2-20, CHARLIE OWNER 4-10, BOUNCER 1-10, and JOHN/JANE DOES 1-20 (last four names being fictitious and presently unknown),

Defendant(s).

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY
DOCKET NO.: MRS-L-1818-20

Civil Action

STIPULATION OF DISMISSAL WITH PREJUDICE

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice and without costs to either party.

THE VESPI LAW FIRM, LLC
Attorneys for Plaintiff

By: _____
JARED E. DRILL

Dated: 5.24.23

ROSENBERG JACOBS HELLER & FLEMING, PC
Attorneys for Defendants *

By: _____
DOUGLAS F. CIOLEK

Dated: 6/7/23

* FOR DEFENDANTS: CARMELA MACPHERSON, CARMELA MACPHERSON AS EXECUTRIX OF THE ESTATE OF CHARLES MACPHERSON, MEGAMAC LLC, & MELMAR LLC

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Attorney for Defendant, Steven French

NATALIA BREWINGTON,

Plaintiff,

vs.

RUMOR'S GENTLEMAN'S CLUB, ANTHONY MARIANO, STEVE FRENCH, ABC CORPS. 1-20, CHARLIE OWNER 1-10, BOUNCER 1-10, and JOHN/JANE DOES 1-20 (last four names being fictitious and presently unknown),

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MORRIS COUNTY

DOCKET NO.: MRS-L-1818-20

Civil Action

STIPULATION OF DISMISSAL AS TO DEFENDANT STEVE FRENCH

To: Clerk of the Superior Court
Law Division
Morris County Court House
Washington & Court Streets
Morristown, NJ 07963

Dear Sir or Madam:

WHEREAS, the matters in dispute in the above-entitled action having been amicably resolved between Plaintiff and Defendants, it is hereby stipulated by Joseph J. Fritzen, Esq., as counsel for the Defendant, Steve French, and Jared Drill, Esq., of The

Vespi Law Firm LLC, counsel for the Plaintiff, Natalia Brewington, that the Complaint and Answer shall be dismissed as to Defendant, Steve French, with prejudice and without costs as to either party; and

WHEREAS, it is further stipulated and agreed that the filing of the within pleading closes the case.

THE VESPI LAW FIRM, LLC

By: _____
Jared Drill, Esq.
Attorney for Plaintiff

Dated: June 17, 2023

JOSEPH J. FRITZEN
ATTORNEY AT LAW

By: _____
Joseph J. Fritzen, Esq.
Attorney for Defendant, French

Dated: July 17, 2023