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MARGARET SUDHAKAR,)
Plaintiff-Appellant,)
)
)
v.)
)
)
NEW JERSEY STATE POLICE &)
NEW JERSEY,)
ATTORNEY GENERAL)
)
)
Defendants-Respondents.)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-001764-22

On Appeal from the decision of New)
Jersey Superior Court, Law Division,)
Docket No. MER-L-1706-22

Honorable Robert Loughy, A.J.S.C.
sitting below

Submitted (revised): June 14, 2023

**BRIEF OF APPELLANT MARGARET SUDHAKAR IN SUPPORT OF
THE MOTION TO APPEAL AS OF RIGHT UNDER RULE 2:2-3(a)**

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PRELIMINARY STATEMENT

There is only one case in New Jersey criminal law history where an Executive Order released to the public the entirety of a criminal case for copying, inspection and examination. This case was the Lindbergh Kidnapping case. Applying the Open Public Records Act (OPRA) to the Executive Order 110 signed by Governor Byrne, the Lindbergh case is open to the public for copying, inspection and examination of all documents. Government transparency, the legislative intent behind OPRA, and the intent behind Governor's Byrne's Executive Order 110, make it very clear that the Lindbergh Kidnapping documents are open to the public for examination and inspection. Today, Courts recognize that the terms examination and inspection of documents would insinuate the collection of DNA from said documents. In short, as the only case in New Jersey's criminal law history that is open to the public for examination and inspection, both the Executive Branch and the Legislative Branch of New Jersey have provided a foundation for the Lindbergh Kidnapping case to be open to the public for a modern-day forensic analysis. Since the State Police and Attorney General's Office are unwilling to cooperate, the Judicial Branch can interpret Governor Byrne's Executive Order 110 with the Legislative intent behind OPRA and reach the conclusion that examination and inspection would apply to DNA testing in this case.

Plaintiff-Appellant, Margaret Sudhakar is a researcher who spent ten years volunteering her time to work on projects at the New Jersey State Police Museum. Her voluntary service to the State of New Jersey was provided in part for her appreciation and support of the State Police and in part because of her fascination with the Lindbergh kidnapping (the “Kidnapping”) case and in hope of gaining more knowledge from the physical documents and collection relating to the Kidnapping.

Ms. Sudhakar contributed to the growth and utility of the New Jersey State Police Museum in many ways. She compiled and digitized a database of every New Jersey State Police report filed on the Kidnapping in the year 1932. Additionally, she helped inventory all the books in the New Jersey State Police Museum pertaining to the Kidnapping.

While volunteering at the New Jersey State Police Museum and acquiring additional knowledge about the Kidnapping, Ms. Sudhakar participated as an expert on the case in an episode of The Travel Channel’s *Mysteries at the Museum*. Additionally, she edited a book for publication on behalf of Michael Melsky, a fellow researcher and author of four volumes on the Kidnapping and was working on these projects while doing everything in her power to assist with the care, preservation and maintenance of these historic documents.

Appellant, Margaret Sudhakar is not opposed to the Governor’s Office being removed as a Respondent from her complaint. Moreover, she is not opposed to the

physical ladder being removed from her complaint. She is however appealing the Judicial decision from the Superior Court on multiple grounds.

PROCEDURAL HISTORY

Margaret Sudhakar filed a Verified Complaint in this matter on September 28, 2022. (Pa1). On October 21, 2022, Pro Bono attorney and author of the Verified Complaint, Kurt W. Perhach, Esq. submitted a Notice of Appearance of an Addendum to the Verified Complaint. (Pa16). Defendants filed an Opposition on December 12, 2022. (Pa25-54). On December 15, 2022, Margaret Sudhakar submitted two OPRA requests, W194790 and W194792. (Pa77). On December 28, 2022, Plaintiff's attorney submitted a Response to the Defendant's Opposition. (Pa55-138).

On January 5, 2023, a hearing in this matter was heard virtually by Superior Court Judge Robert Lougy in under one hour. That same day, Judge Lougy issued an Order and Decision denying the Order to Show Cause and dismissing the Verified Complaint. (Pa139-154).

Plaintiff submitted a notice of appeal on February 26, 2023. (Pa155).

STATEMENT OF FACTS

Ms. Sudhakar submitted her Verified Complaint to the State of New Jersey against the Respondents: New Jersey Governor, New Jersey Attorney General's Office, and New Jersey State Police on September 28, 2022. (Pa1). She received the Respondent's response to her complaint on December 12, 2022. (Pa25). Upon reading the Respondent's brief, Ms. Sudhakar filed two OPRA requests on December 15, 2022: W194790 and W194792. (Pa77). They were respectively submitted against the New Jersey Attorney General's Office and the New Jersey State Police. (Pa77). Ms. Sudhakar filed these requests after the Respondents argued her Verified Complaint should be dismissed for violating the Statute of Limitations since Ms. Sudhakar had never officially filed OPRA requests prior to filing her Verified Complaint. (Pa25). Ms. Sudhakar did not file her own OPRA complaints because she believed interested party Chuck Braverman had filed an OPRA request in July. When the Verified Complaint was written and submitted, Appellant and interested parties genuinely believed Chuck Braverman submitted an OPRA request which was never responded to and genuinely believed the State violated OPRA by not responding within seven business days. (Pa63). Upon reading the Respondent's response and cross-checking Mr. Braverman's e-mails and records, Appellant learned that it was possible Mr. Braverman had not actually submitted an OPRA request in July. (Pa63). When the Respondents argued in their

response that the Statute of Limitations had prohibited Mr. Braverman's OPRA denials from being adjudicated, Ms. Sudhakar timely filed her OPRA requests on December 15, 2022 prior to the court hearing scheduled on January 5, 2023. (Pa77).

Respondent New Jersey Attorney General's Office and Respondent New Jersey State Police denied both of Ms. Sudhakar's OPRA requests on December 27, 2022. (Pa77). This was slightly more than one week prior to her matter being adjudicated before the Honorable Robert Lougy, A.J.S.C. of the Superior Court on January 5, 2023. Given Ms. Sudhakar was leaving the country in early January for an extended period of time and given that the Respondents had already asked for additional time for their response, Ms. Sudhakar and interested parties were eager to conduct this hearing on January 5, 2023, in which they fully expected they would prevail. Consequently, counsel Kurt W. Perhach, did not submit a motion to merge Ms. Sudhakar's OPRA denials into the complaint, which likely would have caused an additional delay. Rather, Appellant presumed that the Court would thoroughly read Appellant's rebuttal to Respondent's response. Either the Court did not diligently read Appellant's rebuttal or made substantial mistakes including stating that Ms. Sudhakar had never submitted an OPRA request. (Pa139). Either case warrants that the Superior Court's decision be overturned and that the OPRA requests be granted.

Ms. Sudhakar, her counsel and interested parties sought to have the hearing on January 5, 2023, without additional delay. At the hearing, The Court held that the interpretation and aim of OPRA remains subject to “reasonable controls to prevent abuse and protect the public officials involved.” MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). (Pa153). The Court also cited the Common Law right of access to documents noting that the Respondent successfully argued that said items requested would be damaged or mutilated. (Pa153).

The Court proceeded to note that Ms. Sudhakar does not have an individualized interest in this matter. Citing Higg-A-Rella, the Court noted that, the “interest” of the party seeking the records can be “a wholesome public interest or a legitimate private interest.” Higg-A-Rella v. County of Essex, 141 N.J. 35, 47 (1995). (Pa150).

The Court further went on to note that testing as described would deprive the public access to these requested items in their original state. (Pa154).

The Court correctly cites the plain language of N.J.S.A. 47:1A-5(a) which provides that records custodians permit a record to be “inspected, examined and copied” and subsequently assessed that granting this request would permanently alter the documents. (Pa153).

The Court was aware of the Statute of Limitations argument made by the Respondent as well as the OPRA denials received by Sudhakar from the State on December 27, 2022. (Pa143-146). In the denials of these two OPRA requests, the Respondents argued that these requests are being denied since they are a part of an ongoing litigation, essentially merging Sudhakar's OPRA denials into the hearing on January 5, 2023. (Pa77).

Moreover, the Court indicated that the Plaintiff-Appellant erred in failing to state a claim. (Pa139-154).

LEGAL ARGUMENT

STANDARD OF REVIEW

"[D]eterminations about the applicability of OPRA and its exemptions constitute legal conclusions, and are therefore subject to de novo review." In re N.J. Firemen's Ass'n Obligation, 230 N.J. 258, 273-74 (2017); Drinker Biddle & Reath, LLP v. N.J. Dep't of Law & Pub. Safety, 421 N.J. Super. 489, 497 (App. Div. 2011).

"Any analysis of OPRA must begin with the recognition that the Legislature created OPRA intending to make governmental records 'readily accessible' to the state's citizens 'with certain exceptions[] for the protection of the public interest.'" Gilleran v. Twp. of Bloomfield, 227 N.J. 159, 170 (2016)(quoting N.J.S.A. 47:1A-1). "OPRA's purpose 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." Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Off., 374 N.J. Super. 312, 329 (Law Div. 2004)).

"OPRA places the burden of proof on the government to show that a requested record may be withheld under an exemption or exclusion from the disclosure requirement." Asbury Park Press v. Cnty. of Monmouth, 406 N.J. Super. 1 (App. Div. 2009) affirmed, 201 N.J. 5 (2010), (citing N.J.S.A. 47:1A-6).

Although "[t]he statute broadly defines the term 'government record,'" it "also calls for a careful balancing of competing interests -- the right of access to government records versus the need to protect personal information." Libertarians for Transparent Gov't v. Cumberland County (Libertarians II), 250 N.J. 46, 54 (2022) (citing Burnett v. Cnty. of Bergen, 198 N.J. 408, 414 (2009)).

In assessing the sufficiency of the agency's proofs submitted in support of its claim for nondisclosure, "a court must be guided by the overarching public policy in favor of a citizen's right of access." Courier News v. Hunterdon Cty. Prosecutor's Office, 358 N.J. Super. 373, 383 (App. Div. 2003) (citing N.J.S.A. 47:1A-1). Absent the necessary proofs, "a citizen's right of access is unfettered." Ibid. If it is determined access has been improperly denied, the access sought shall be granted. See N.J.S.A. 47:1A-6.

POINT I

THE COURT ERRED IN ITS INTERPRETATION OF THE AIM OF OPRA. (Pa139-154).

The Court erred in its interpretation of the legislative intent of OPRA. While Appellant does not dispute that to date, she was unable to cite a New Jersey court case which addresses DNA testing in accordance with OPRA; Appellant specifically argued that the word selection of “examination” chosen by the Legislature as well as the word selection of “inspection” implies that contemporary methods of examination, including DNA testing, should be allowed. The Legislature specifically added the phrase “for inspection, copying or examination by the citizens of this State...” See OPRA Chapter 404, N.J.S. C.47:1A-1, for a reason. DNA technology was unknown at the time the original OPRA was drafted by the Legislature. DNA was not contemplated by Governor Byrne when his Executive Order 110 was enacted in 1981. (Pa32). However, applying a modern-day lens to the specific use of the word “examination” or the use of the word “inspection” as it applies to documents, is clearly intended to include DNA testing specifically in the Kidnapping case in which an Executive Order opened the entire case file up to the public and for the public’s “inspection and examination.” Of note, neither the Respondent, nor the Court cited any OPRA case law which references the word “examination.”

The Court below made the following record regarding the relief sought by the Appellant; “the physical examination...is not a records request. Appellant provides no authority in either statute or case law for the extraordinary remedy she seeks...” (Pa152). Appellant disputes this and counters this argument with a two-pronged analysis. First, “the right to inspect and copy governmental records under OPRA is without limitation as to the reasons for which the access is undertaken.” See MAG, 375 N.J. Super at 546. Appellant has consistently maintained this testing is in the public’s interest and is consistent with the legislative and executive intentions of OPRA and Executive Order 110 for government transparency. Secondly, neither the Respondents nor the Court cited any reference to the use of the word “examination” as it pertains to OPRA requests. As noted by the Superior Court, “In accordance with the wide-ranging mandate of OPRA for ‘further expansion of the public’s right of access,’ the government bears the burden of proof to demonstrate that a request should be denied or withheld under the statute. Burnett v. Cty. of Gloucester, 415 N.J. Super. 506, 512 (App. Div. 2010).” In this case, the government has failed to state a proper denial exemption, and failed to address the meaning of the word “examination” as it applies to records under OPRA.

The error the Court made is the assumption that the legislative intent behind OPRA was not to include the conducting of DNA testing. While this argument is a legal fallacy, given DNA testing did not exist at the time the original OPRA was

written, the legislative purpose underlying OPRA was to provide the public with access to government documents for the purpose of “inspection, copying or examination” of said documents. Applying these words and the rational and logical intent with a modern-day lens in 2023, makes the logic behind the words, “examination” and “inspection” very clear. The Legislature clearly thought more broadly regarding OPRA’s interpretation than simply holding and looking at a document. The plain reading of the statute is obvious regarding what is meant by those two words. The fact that the Appellant cannot cite a case on this point does not mean the case law cannot and should not be updated or brought current.

Additionally, the Court erred when applying *MAG* specifically referencing *MAG* by asserting that the aim of OPRA remains subject “to reasonable controls...to prevent abuse and protect the public officials involved.” See MAG, 375 N.J. Super at 546. As stated by Appellant, all public officials involved in this matter are deceased. There are no public officials to “protect.” Moreover, there is no potential for such abuse. Appellant is making a specific request on a specific case which received enough interest and attention to compel the changing of Federal Laws, and the media. Even decades after the case had closed, a New Jersey Governor signed an Executive Order specific to the maintenance of evidence related to this matter allowing the public to have the right to examine these documents. The Court’s

decision in this matter is completely inconsistent with the intentions and legal meaning behind the words, “inspection” and “examination.”

POINT II

THE COURT ERRED IN NOTING THAT MS. SUDHAKAR DOES NOT HAVE AN INDIVIDUALIZED INTEREST. (Pa139-154).

As the Court notes, the “interest” of a party seeking government records can be a “wholesome public interest or a legitimate private interest.” Higg-A-Rella v. County of Essex, 141 N.J. 35, 47 (1995). Appellant, Margaret Sudhakar represented both, as the Court was made aware. Her private interests are aligned with the public interest. Ms. Sudhakar has been involved with a group of individuals, including the interested parties, for many years. These individuals continue to shed new evidence and new light on arguably New Jersey’s most famous criminal case. This legitimate private interest in part led her to volunteer a decade of her time to help the New Jersey State Police, preserve, protect, archive and inventory approximately 225,000 pieces of Kidnapping evidence. Ms. Sudhakar’s interests are in preserving these artifacts while also seeking the truth for the public.

Ms. Sudhakar has provided expertise to countless persons interested in the case including the media, because in her view, it is clearly within the public’s interest to obtain a full and unfettered explanation of what occurred and to know that justice

was adequately served. Applying Higg-A-Rella, the Court erred in stating that Ms. Sudhakar does not have an individualized interest.

The Court has misconstrued Ms. Sudhakar's deeply personal interest for the public good by assuming that what is at stake is strictly a commercial interest. That could not be further from the truth. The truth is that there remain countless unanswered questions regarding the Lindbergh case and there remains a huge public interest in the case. One of the obtainable facts from this case can be answered in identifying who sent the Kidnapping ransom notes. The pursuit of significant historical truth is and has been Ms. Sudhakar's aim. To claim that such interest is private to Ms. Sudhakar is plainly in error.

POINT III

THE COURT ERRED IN NOTING THAT TESTING AS DESCRIBED WOULD DEPRIVE THE PUBLIC ACCESS TO THESE REQUESTED ITEMS IN THEIR ORIGINAL STATE.
(Pa139-154).

Appellant and interested parties argue, that the documents in question would not be damaged using modern-day forensic technology as described by their subject matter expert. Said expert, Arthur Young, noted in his statement marked as Exhibit G of the Appellant's response (Pa97) that, "It is, therefore, my professional opinion that the ransom envelopes and stamps will not suffer 'damage,' as the State alleges." (Pa103). Mr. Young had an opportunity to review the Respondent's response and update his statement which is why he included the additional language. Mr. Young

was also on standby and prepared to testify at the Superior Court hearing. Moreover, as the Respondents are aware, more than one of the envelopes can be swiped for DNA due to the facts that they are not sealed, but are already open, and the stamp located on envelope number 11 is barely connected to the envelope, which could easily be swabbed for DNA collection without alteration. The Court however noted that “Plaintiff’s expert does not dispute that the testing will result in permanent alteration of the items and acknowledges that they may be damaged as a result” (Pa). This is directly opposite of what Arthur Young stated. (Pa97-104).

In the event this Court is not satisfied with Mr. Young and his methodology, one of the many other experts in the field contacted by Ms. Sudhakar and interested parties is Dr. Angelique Corthals. Dr. Corthals’ CV reflects that Dr. Corthals is a renowned subject matter expert in the field of DNA collection from antique items and has worked on cases including Egyptian royal mummies and the frozen Incan children of Llullaillaco. (Pa161). Dr. Corthals contends that “With respect to the Lindbergh case, I can indeed confirm that it is possible to retrieve DNA from historically important documents both uninvasively and in a non-destructive manner.” (Pa182-183).

It is also noteworthy that the Court did not address the arguments from the Appellant regarding the condition of the items requested. When Appellant advised that she had learned from the previous Archivist who spent over 30 years at the State

Police Museum that to his knowledge, only one person (interested party Wayne McDaniel) in 30 years ever asked to see the back of the envelopes, the Court did not allow for an adequate discussion on this point from Appellant's counsel. The fact remains that DNA testing to the back of the envelopes and the stamps as described by Appellant, interested parties and their expert will not alter the historical envelopes and will not deprive the public access to viewing these envelopes in their original state. Professional, modern-day forensics can extract DNA from these envelopes as described by Appellant expert Arthur Young (Pa97) or through the swabbing method describe by Dr. Corthals (Pa182) with no substantial risk of damage, contrary to Respondent's claims.

Appellant demonstrated photographic evidence and argued to the Court that the New Jersey State Police Museum had a significant water leak in the Spring of 2022. (Pa115). The remedy used to stop the water coming into the museum was to collect the water with garbage bags and a garbage can. The remedy to protect the historic Kidnapping documents was to do nothing. As demonstrated, the State Police failed to move these historic documents located directly underneath the garbage can and garbage bag collecting the leaking water. (Pa115). This water may have caused damage to the original condition of some of the Lindbergh historical records both before the garbage can was placed there to collect water and after the garbage bag and garbage can were placed there. During a pre-arranged visit by Appellant's

counsel at the New Jersey State Police Museum, and with the full cooperation of the New Jersey Attorney General's Office and the New Jersey State Police on Friday March 17, 2023, between 2:00PM and 3:00PM, Mr. Perhach photographed and verbally shared with all State employees present that the damaged ceiling tile from the water had yet to be fixed or repaired. (Pa184).

Appellant clearly demonstrated to the Court that natural causes can easily deprive the public the right to view these historical documents in their original condition. Given this evidence submitted by the Appellant, the Court's conclusion that DNA testing would deprive the public access to see the back of envelopes and the front right corner of the envelopes in their original state is in error. The Court erred in its rationality. The mere fact that Appellant did not provide case law citations does not prevent the Court from ordering a modern-day forensic analysis, at no cost to the State of New Jersey, to be conducted. Depriving this to the public prevents an opportunity to answer a key question in arguably New Jersey's most famous criminal case. The Court's reasoning is faulty, illogical and does not correspond to the intent of the Legislature to allow the public to "examine" and "inspect" government records.

Moreover, to the Court's point on page 16 of the Court's decision (Pa139) that "depriving the public access to these items in their original state does not serve the public interest," there are multiple points in dispute here. First, these items are not

in their original state. While the Museum does its best to keep, maintain and protect the large collection of over 225,000 Kidnapping documents, the envelopes in question are stored in a regular storage box in the room depicted in Exhibit I of the Plaintiff's response below. (Pa115; Pa184). The temperature is controlled, but these documents are not protected in a state-of-the-art facility to maintain paper indefinitely. These items have clearly aged as is evident from Exhibit K to Plaintiff's response below. (Pa134). Second, knowing whose DNA is on these envelopes serves the public interest. It will either confirm that the New Jersey Attorney General and the New Jersey State Police were right in convicting Bruno Richard Hauptmann, or if another person's DNA is identified, it will indicate that someone else was involved in the kidnapping with or without Hauptmann. Either way, knowing the truth is clearly and unequivocally in the public's interest.

POINT IV

THE COURT ERRED IN ITS ANALYSIS OF THE STATUTE OF LIMITATIONS AND ITS APPLICABILITY. (Pa139-154).

The Court recognized and acknowledged that Appellant submitted two OPRA requests on December 15, 2022 (Pa142), which were Denied by Respondent New Jersey Attorney General's Office and by Respondent New Jersey State Police. The Court noted that these were filed after Appellant's Verified Complaint was filed. The Court proceeded to state on Page 14 of its order that "Plaintiff did not file an OPRA request; therefore, Respondents did not deny her access under OPRA."

(Pa152). In the event the Court erred and meant to write that Appellant did not file an OPRA request before filing a Verified Complaint, this may have added some clarity to the Judgment. In the event the Court's intent was to state that it will not recognize the OPRA requests that were denied on December 27, 2022, then the Court should have either: (A). provided the Appellant with an adequate explanation and an opportunity to refile her Complaint, prior to making a judgment with prejudice, or (B). should have ordered the Appellant to re-submit her Verified Complaint and not accept the judicial expediency suggested by both sides. Alternatively, the Court may have simply made a substantial error which is grounds for its decision to be overturned. Either way, the Court erred in stating that Ms. Sudhakar did not file OPRA requests when the Court was aware that, in fact, she had.

This error is a substantial one. As the Court knows, in their denial of OPRA number W194790, The New Jersey Attorney General's Office stated that:

As you are aware, the topic of your request is currently the subject of a pending case you have brought before the New Jersey Superior Court, Law Division, Margaret Sudhakar...Docket No. MER-L-1706-22...The OAG has already submitted its legal brief in the case, explaining in extensive detail the various reasons for which your request should be denied, and the OAG avails itself of all of those stated reasons for denial here.
[Plaintiff's Ex. D (Pa77)].

The New Jersey State Police's denial, OPRA number W194792, mirrors the same language regarding why Ms. Sudhakar's OPRA complaint was denied on

December 27, 2022. (Pa77). The Court and the Respondents were both aware of these denials prior to the hearing on January 5, 2023. Consequently, any argument that Ms. Sudhakar did not comply with the 45-day Statute of Limitations is a moot point and the proper remedy of the Court was either to merge Ms. Sudhakar's OPRA denials into the case heard on January 5, 2023, thereby dismissing Respondents claim that the Statute of Limitations had expired or dismiss Appellant's complaint without prejudice in order for her to re-file her complaint. In either case, the Court's error on this point is a substantial error, since the Court knew that Appellant's complaint was not time-barred under the Statute of Limitations. This is a critical point essential to the Appellant's case, given the Court did not make it clear precisely which OPRA request or non-OPRA request was to be litigated. Moreover, given Appellant's genuine and sincere belief that interested party Chuck Braverman did in fact properly file an OPRA request in July 2022, Ms. Sudhakar believed the State had violated OPRA by not timely responding to him in part prompting her to file her OPRA complaints on December 15, 2022.

POINT V

THE COURT ERRED IN ITS ORDER THAT APPELLANT FAILED TO STATE A CLAIM. (Pa139-154).

The Court erred in its decision that Appellant failed to state a claim. The Appellant stated very clearly and obviously that her belief is that the intent of OPRA as it applies to the Kidnapping case, is to allow the public access to information to

include the examination and inspection of documents. She stated very clearly that she is a citizen who dedicated countless hours to preserving, protecting and caring for the upkeep of the Kidnapping documents and it is her opinion that the requested documents are the only documents within the approximately 225,000 Kidnapping documents that contain any DNA samples valuable to the public. Ms. Sudhakar also stated clearly that she believes coupled with Governor Byrne's Executive Order 110, OPRA is a mechanism which can and should compel the State to allow this testing to occur because it is in the public's interest to know who sealed these envelopes, who licked these stamps, and there is absolutely no plausible reason why the State would not want to also know who sealed these envelopes and who licked these stamps.

In response to Appellant's claim and her argument about the purpose behind the word "examination" used by the Legislature when writing OPRA and the word "examination" used by Governor Byrne when signing Executive Order 110, the Court order was silent. Interestingly, the Respondents were also silent regarding this point raised by Ms. Sudhakar. The Court did not cite case law, argue what its interpretation of the word "examination" means as it applies to OPRA and Executive Order 110, or even reference this critical part of Ms. Sudhakar's argument in its ruling. Neither the Court nor the Respondents cited any case law in reference to this point and their silence on this key and critical point of Ms. Sudhakar's argument

demonstrates the flaw in both the Court's decision and the Respondents' response. Simply put, this causal connection behind the legislative and executive intent of the word "examination" as it applies to OPRA has been made clear for the Judicial branch.

This is a case of first impression. Regardless of whether the court applies a textualist construction or a contemporary interpretation, Appellant should prevail. Clearly a modern-day application would militate toward a finding in Appellant's favor. Ms. Sudhakar stated very clearly that there is no case law or legal precedent on this point that she is aware of. She is requesting that the Court apply a modern-day lens to the use of the word "examination" as to the intent and purpose of OPRA. She further made it clear that this request is only for the Lindbergh Kidnapping case and only for the collection of DNA evidence on a finite number of documents which still exist. The Respondents and Court argued that this could open a floodgate and that a citizen does not have a legal right to demand that the museum begin DNA testing. This argument fails to acknowledge that in all of New Jersey's criminal law history, there is only one case in which a sitting Governor opened the entirety of the case file for the public to examine. Accordingly, the shortcomings of the Courts argument and conclusion are obvious. Ruling in support of Ms. Sudhakar would not compel other people to enter the museum demanding DNA tests, given the very limited scope from an Executive Order on this uniquely historic case. Beyond these

envelopes, there is little evidentiary value remaining of the historic documents. The presumed saliva from the DNA of these envelopes is obtainable and falls within the scope of an “examination” of documents pursuant to OPRA.

Ms. Sudhakar was clear from the beginning about what is different and what is so unique about this case. This is the case in which a New Jersey State Governor ordered the entirety of a case file to be preserved, protected and open to the public. This is the case whose files occupy a substantial part of a building. This is the case which in part justified the State hiring a professional archivist. This is the case that has not left the public interest in over nine decades. This is the case which inspired changes to Federal Law, public media and countless other aspects of modern-day America. This is the case about which books continue to be written about nine decades later.

Appellant Margaret Sudhakar was simply requesting that the Court provide a substantive ruling regarding the word “examination” as it applies to the Kidnapping evidence and applying that ruling to the executive purpose signed by Governor Byrne with Executive Order 110.

The Court ruling that the Appellant failed to state a claim is inaccurate. Testing for DNA under OPRA is applicable to the publicly accessible files of the Kidnapping case, and the applicability and rationality of the legislative and executive intentions as they apply to this specific case are obvious. After spending ten years

managing and archiving the New Jersey State Police files on this matter, Ms. Sudhakar is confident that the envelopes are the only documents out of a collection of approximately 225,000 that contain pertinent DNA for the public's interest in arguably New Jersey most famous criminal case.

Margaret Sudhakar has demonstrated that her complaint is in the public's interest and applying a modern-day lens to the legislative intent behind OPRA and the executive intent behind Governor Byrne's Executive Order 110, the words "inspection" and "examination" clearly authorize DNA testing and therefore the Superior Court's decision should be overturned. She has stated a claim. She has filed OPRA requests which were denied and genuinely believed her associate Chuck Braverman filed an OPRA request which the State improperly never responded to. She has demonstrated the logic of the legislative and executive intentions as applicable to this case and has shown substantial errors committed by the Court.

Perhaps most intriguing are the whys surrounding this case. Why is the State of New Jersey against this? Why have they asked many attorneys from the Attorney General's Office to defend this matter? Why do they care about the envelopes in question when the tangible and historic value of the envelopes were the contents inside of the envelopes? The ransom letters themselves are what need to be preserved indefinitely.

CONCLUSION

Margaret Sudhakar has been seeking truth in this case for over a decade. Based upon the clear and undeniable historical interest in this matter, so have many members of the New Jersey public. Now, thanks to modern DNA technology, the truth is within reach. Connecting the dots with the causal connection behind the legislative intent of OPRA, the executive intent of Governor Byrne's Executive Order 110, makes it obvious that the statutory authority and the executive order in the State of New Jersey should entitle the public access to examine the Kidnapping case in its entirety. For all of these reasons, the Court's decision should be overturned, and Ms. Sudhakar should be permitted by the New Jersey State Police to conduct the DNA tests requested, pursuant to OPRA.

Respectfully submitted,
KURT W. PERHACH, ESQ.
Attorney for Plaintiff

BY: /s/Kurt W. Perhach
KURT W. PERHACH

MARGARET SUDHAKAR,	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
	:	DOCKET NO.: A-1764-22-T2
Appellant,	:	
	:	CIVIL ACTION
v.	:	
	:	ON APPEAL FROM AN ORDER OF THE
NEW JERSEY STATE	:	SUPERIOR COURT OF NEW JERSEY,
POLICE, NEW JERSEY	:	LAW DIVISION - MERCER COUNTY,
ATTORNEY GENERAL	:	MER-L-1706-22
	:	
Respondents.	:	SAT BELOW: Robert T. Lougy, A.J.S.C.

**BRIEF AND APPENDIX ON BEHALF OF RESPONDENTS NEW
JERSEY STATE POLICE AND NEW JERSEY ATTORNEY GENERAL**
Date Submitted: November 2, 2023

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

Appellant Margaret Sudhakar appeals the trial court’s January 5, 2023 decision denying her request to manipulate, test, permanently alter, and likely destroy historical items relating to the March 1, 1932 kidnapping of Charles A. Lindbergh, Junior under both New Jersey’s Open Public Records Act (“OPRA”), N.J.S.A. 47:1A-1.1 to -13, and the common law right of access. (Pa139-54).²

A. The Museum and the Lindbergh Case

The NJSP Museum & Learning Center (“Museum”) is located at the NJSP’s headquarters and is the repository of the NJSP’s historical records. (Pa36-37). The Museum is the custodian of approximately 225,000 documents and historical materials relating to the Lindbergh case. (Pa37). The historical items related to the Lindbergh case include case investigation files, reports, trial evidence, photographs, and correspondence. Ibid.

The Lindbergh case is widely considered the most celebrated and widely-publicized case in NJSP’s history. See New Jersey State Police, The history of

¹ Because they are closely related, these sections are combined for efficiency and the court’s convenience.

² “Ra” refers to Respondents’ appendix. “Pa” refers to Appellant’s appendix and “Pb” refers to Appellant’s brief. “T” refers to the transcript of the January 5, 2023 hearing.

the New Jersey State Police from 1921 to the present.³ The case garnered international and national attention for several years, and it involved every NJSP member as well as almost every police agency in the country and abroad. Ibid.

In 1981, Governor Byrne recognized that the Lindbergh case continued to be “of extraordinary interest” over forty-five years after its conclusion. Executive Order No. 110 (Byrne 1981). In response to its continued significance to New Jersey’s history, Governor Byrne directed the Superintendent of NJSP to make the Lindbergh case’s “investigative files, records and exhibits” available to the public and “subject to inspection and examination and available for copying.” Id. at Section 1. But Governor Byrne also acknowledged that by giving the public access to the historical items of the Lindbergh case, reasonable measures needed to be implemented to ensure their preservation. Id. at Section 2. Accordingly, E.O. 110 empowered the Superintendent to:

establish procedures to insure that there is no risk of damage or mutilation of such files, records, and exhibits and to insure that the public access and right to copy such files, records and exhibits shall be during regular business hours to the extent that such access is compatible with the economic and efficient operation of [the] division and the transaction of its public business and to provide and assure payment of such costs as permitted by law.

[Ibid. (emphasis added).]

³ <https://nj.gov/njsp/about/history/1930s.shtml> (last visited October 26, 2023).

The Museum provides tours to members of the public, including the Lindbergh Archive. (Pa38). The Museum also regularly communicates with researchers who inquire about the Museum's items and their contents. Ibid. Upon appointment, researchers are granted direct access to Museum items, including historical items from the Lindbergh Archive, with appropriate safeguards in place. Ibid.

To protect significant historical items from risk of damage, the Museum's Archivist directly supervises those granted access to Museum items, and other precautions and conditions are implemented depending on the nature of the item being handled. Ibid. Researchers are not allowed to alter the condition of any historical items, or expose them to foreign chemicals or other substances. Ibid. In accordance with archival standards, the Museum contains the Lindbergh case's evidence envelopes in a temperature- and humidity-controlled, locked room. (Pa39). The room is always monitored and secured. Ibid.

Evidence envelopes and their contents are kept in polyester sleeves to allow the observer to inspect and examine the items without directly touching them or transferring any foreign substance that could affect them. Ibid. To further protect these historical items from foreign substances, the sleeves and their contents are kept in "acid-free manuscript folders," which are kept in "standard acid-free board archival boxes that are designed to further reduce or

negate the effects of migrant acidity and atmospheric pollutants.” Ibid.

The ladder and lumber from the Lindbergh case are likewise contained in a locked and sealed glass display for visitors to observe, in accordance with generally accepted archival standards. Ibid. The glass is always monitored and secured, and no foreign substances are allowed inside the glass. Ibid. Through these safeguards, the NJSP balances public access to and information about the Lindbergh case against the need to ensure that these items of historical significance remain available for generations to come.

B. OPRA Requests

Sudhakar and two interested parties, Wayne McDaniel and Chuck Braverman, have allegedly been working together to create a documentary film on the Lindbergh case. (Pa85-86; Pa140-41).

On March 2, 2022, Braverman sent an e-mail to Museum staff requesting to conduct DNA testing on certain historical items from the Lindbergh case. (Ra9-11; Pa141-42). Braverman’s correspondence was not sent to the NJSP’s custodian of records, and it did not use any language to identify his request for government records under OPRA or the common law. (Pa48-49). Without any indication that this was an OPRA request, NJSP processed Braverman’s e-mail as a research request, which the Museum facilitates on a regular basis. (1T35:3-6; Pa38). On March 10, 2022, Braverman submitted a substantially similar

OPRA request to the Governor's Office asking for the same access to conduct DNA testing on the historical items. (Pa6; Pa28-29).

Braverman's requests all sought the same thing: to extract DNA evidence from thirteen sealed ransom envelopes with ten attached stamps, as well as one sealed envelope with its stamp from the man convicted of murdering Charles A. Lindbergh, Jr. (Bruno Richard Hauptmann), the ladder used in the Lindbergh kidnapping, and the lumber found in Hauptmann's attic. (Pa141).

Braverman detailed his proposed testing methods. To access and swab potential saliva that may be found underneath the adhesives on the Lindberg envelopes, Braverman's and Sudhakar's expert, Arthur Young, proposed a new, untested method for neutralizing the gum flaps of the envelopes and stamps by using what he called a "Canned air" technique. (Ra8). This technique would involve tilting a can to dispense a chemical fluid directly onto the historical document to neutralize the adhesive or envelope's gum flap to "unseal" it. Ibid.

Despite Young's claim that this extraction process is "superior" to others, he conceded that he is unable to rule out damage to the historical envelopes and stamps. Ibid.; (Pa53). In fact, Young revealed that this extraction process has only been carried out once on an envelope from 2002. (Ra8). Young could not account for whether this procedure would avoid damage to an almost century old envelope because no samples were available for experimentation and he did

not know what type of adhesive the historical items contained. (Ra7-8).

Nevertheless, without sufficient knowledge and experimentation, Young still requested that the historical items undergo the invasive and potentially destructive procedure starting with a “single envelope first” so as to not “jeopardize the entire collection.” (Ra8). Young later doubled down on this procedure by claiming that the envelopes and stamps will not suffer “damage[,]” even though he had never conducted the procedure on a similarly aged item.⁴ (Pa103). He certified that he could “non-destructively open the sealed back flap of the envelop [and] . . . remove the attached stamp and take a DNA swab from both, with no damage.” Ibid. But Young’s explanation does not alleviate concerns that this experimentation will permanently alter and potentially destroy these historical items, despite his “wish” not to do so. (Pa53; Pa99; Pa103).

As to the Lindbergh case’s ladder and the piece of lumber found in Hauptmann’s attic, Sudhakar and the interested parties expressed their wish to extract six total pieces of wood, each 1/16” in length, to determine the ladder’s

⁴ Respondents do not respond to Sudhakar’s factual assertions related to the opinion of Dr. Angelique Corthals on DNA extraction (Pb14; Pa182-83) because such information was never presented to the trial court. Appellate review is limited to the record developed before the trial court. New Jersey Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 278 (2007) (stating the court’s scope of review “is limited to whether the trial court’s decision is supported by the record as it existed at the time of trial”); Townsend v. Pierre, 221 N.J. 36, 45 n.2 (2015); Davis v. Devereux Found., 209 N.J. 269, 296 n.8 (2012).

origin. (Pa141). There is no dispute that the testing request will result in permanent alteration. (1T25:5-6).

NJSP ultimately denied Braverman's research request to perform DNA tests on the Lindbergh items. (Pa5-6; Pa37; Pa86). The Governor's Office responded to Braverman on March 21, 2022, advising Braverman that it was not the custodian of the requested records. (Pa31).

On July 19, 2022, Braverman continued his pursuit by attempting to submit a request to conduct DNA tests to the Office of the Attorney General (OAG). (Pa142; Ra12-14). Braverman's request was not addressed to OAG's custodian of records or an employee authorized to accept such requests, as required under N.J.A.C. 13:1E-2.4, but was instead addressed to "Frank Caruso/Gov. Records [] 609-292-6830," the Executive Director of the Government Records Council (GRC). (Pa44-45; Ra12-14). As of September 2022, OAG had no record of Sudhakar or any interested party submitting an OPRA request. (Pa44).

C. The Complaint and Subsequent Submissions

On September 28, 2022, Sudhakar filed a verified complaint and order to show cause (OTSC), "pursuant to [OPRA] and the common law right to access public records" seeking a declaratory judgment to allow testing of the historical items. (Pa1-15). Sudhakar later filed an addendum to the complaint to request

a hearing and to include an additional exhibit. (Pa16-17).

NJSP, OAG, and the Governor's Office opposed Sudhakar's OTSC, arguing that Sudhakar's complaint suffered from several procedural and substantive deficiencies, including that Sudhakar could not obtain relief under OPRA or the common law because her OTSC and verified complaint were filed outside the statute of limitations and, having not submitted any of the requests at issue, she lacked standing to sue for denial of requests. In an attempt to cure her procedural deficiencies, Sudhakar submitted her first OPRA requests to the NJSP's and OAG's custodians of records on December 15, 2022, which asked to conduct DNA testing on the Lindbergh evidence. (Pa66; Pa78-83). Both requests were denied. (Pa80; Pa83). While Sudhakar later argued that her December 15, 2022 requests had cured all of the procedural deficiencies, she never moved to amend her complaint to include these OPRA requests and denials. (Pb5; Pa66; Pa142; 1T7:6-20; 1T33:1-21; 1T35:8-22; 1T36:18-23; 1T37:19-21).

D. January 5, 2023 Hearing and Decision

On January 5, 2023, the parties appeared before the Honorable Robert T. Lougy, A.J.S.C. (1T4:20-5:8). The court highlighted the outstanding procedural deficiencies related to Sudhakar's complaint, noting that Sudhakar had not submitted her own OPRA requests until after her complaint was filed.

(1T33:9-21). The court expressed concern because no OPRA request or denial existed at the time of Sudhakar's complaint. (1T33:17-21; 1T34:20-21).

Later the same day, the court issued a written order denying Sudhakar's OTSC, and dismissing her complaint with prejudice. (Pa140). The court initially found that Sudhakar's complaint was procedurally improper because she filed her complaint before submitting an OPRA request and receiving a denial. (Pa142). This procedural deficiency, alone, would justify dismissing the complaint in its entirety. Ibid.

Nevertheless, Judge Lougy addressed the merits of the complaint "because any litigation sounding in OPRA or the common law concerning the post-complaint denial would be meritless[.]" Ibid.⁵ He held that Sudhakar had "no legal right under either OPRA or the common law" to engage in the DNA testing of the envelopes, stamps, ladder, and piece of lumber from the Lindbergh case. (Pa140). Judge Lougy specified that Sudhakar's DNA testing request on the items constituted an "extraordinary remedy" that "would permanently alter the conditions of the items." (Pa153). Furthermore, due to the nature of the chemical DNA tests, Judge Lougy highlighted that Sudhakar's expert did not contest the fact that the testing will result in permanent alteration and possible

⁵ Despite the court's decision on the merits of Sudhakar's requests, on March 2, 2023, Sudhakar sought to challenge the December 15, 2022 denials to the GRC. (Ra19-24).

damage to the requested items. Ibid. Therefore, Sudhakar’s request conflicted with NJSP’s responsibility to protect the historical items from damage or mutilation. Ibid. (citing E.O. 110). As the court recognized, “OPRA is not the vehicle by which a citizen can march up to a museum and demand that the custodians of historical artifacts and documents surrender the State’s treasures for analysis, alteration, and destruction.” (Pa152).

The court also determined that Sudhakar’s request was inconsistent with the “goal of the common law right of access.” Ibid. Sudhakar could not point to any language in the common law right of access contemplating “testing or manipulation such that a government record may be permanently altered or damaged,” and “[a]ltering or destroying government records does not serve the common law’s overarching goal of transparency,” ibid., and “depriving the public access to these items in their original state does not serve the public interest.” (Pa153-54). This appeal followed. (Pa155-59).⁶

⁶ After filing this appeal, on March 2, 2023, Sudhakar filed an action with the GRC challenging the denial of access related to her December 15, 2022 requests submitted to OAG and NJSP. (Ra19-24). In both matters, Sudhakar asserted that she had instituted an action in Superior Court regarding the denials of access. Ibid. On June 5, 2023, the GRC dismissed Sudhakar’s complaints because her actions were already pending in Superior Court. Ibid. These decisions are judicially noticeable under N.J.R.E. 201(a).

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY FOUND THAT SUDHAKAR'S COMPLAINT WAS BARRED BY THE STATUTE OF LIMITATIONS AND THAT SHE DID NOT SUBMIT A PROPER OPRA REQUEST.

The trial court's decision dismissing Sudhakar's complaint should be affirmed because she filed her verified complaint and OTSC well past OPRA's forty-five-day statute of limitations and, even if Sudhakar had met OPRA's statute of limitations requirement, she lacked standing to bring any related suit since she did not submit a request.

A "trial court's determinations with respect to the applicability of OPRA are legal conclusions subject to de novo review." N. Jersey Media Grp., Inc. v. State, Office of Governor, 451 N.J. Super. 282, 301 (App. Div. 2017); O'Shea v. Twp. Of W. Milford, 410 N.J. Super. 371, 379 (App. Div. 2009). A court's determinations regarding the common law right to access are also reviewed de novo. N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 447 N.J. Super. 182, 194 (App. Div. 2016).

The requestor of a government record may challenge the custodian of record's decision by filing an action in Superior Court or with the Government Records Council. N.J.S.A. 47:1A-6. "[R]equestors who choose to file an action

in Superior Court . . . must do so within 45 days.” Mason v. City of Hoboken, 196 N.J. 51, 70 (2008). The 45-day statute of limitations also applies to common law right of access claims. Ibid. The requestor’s right to file such action only vests after a public agency has denied the records request. N.J.S.A. 47:1A-6; In re N.J. Firemen’s Ass’n Obligation to Provide Relief Applications Under Open Pub. Records Act, 230 N.J. 258, 278 (2017) (“Firemen’s Ass’n”) (“OPRA limits access to the courts by conferring the right to initiate a suit only upon the requestor, after a public agency’s denial of access.”) (citing N.J.S.A. 47:1A-6).

Here, the trial court properly determined that Sudhakar’s complaint failed to meet the procedural requirements for bringing a claim. First, Sudhakar did not file an appropriate OPRA request before instituting her action in Superior Court. All requests submitted before Sudhakar filed her complaint were submitted by Braverman, not Sudhakar. (Ra9-14; Pa28-29).⁷ Although McDaniel (the other interested party) was copied on one of Braverman’s requests, Sudhakar did not appear on any of them. Ibid. Thus, Sudhakar filed

⁷ Braverman’s request to NJSP Museum staff was also improper. (Ra9-11). His request did not comply with N.J.A.C. 13:1E-2.4 (a) or (b) and did not provide any language identifying it as an OPRA records request. (Pa48). Because Braverman’s request failed to identify itself as a request under OPRA or the common law and was directed to Museum staff, the NJSP records custodian had no knowledge of any such request until Sudhakar filed her complaint. (Pa48-49).

her OTSC without ever submitting a request or receiving a denial of access from a public agency. While she finally submitted OPRA requests to NJSP and OAG three months later in an attempt to address the procedural deficiencies brought to her attention, (Pa61; Pa66; Pa78-83; Pb4), she never amended her complaint to include these December 2022 OPRA requests. (Pb4-5; Pb7; Pb12; Pa142; Pa152; 1T7:6-20; 1T33:1-21; 1T35:8-22; 1T36:18-23; 1T37:19-21). The trial court rightly noted that these deficiencies alone would have merited dismissal of Sudhakar's complaint. (Pa142).

Second, even if Sudhakar could be considered a party to Braverman's submissions, the trial court correctly determined that her complaint was "far out of time and therefore barred." (Pa153). Sudhakar submitted her complaint on September 28, 2022—205 days after NJSP denied Braverman's request, 191 days after the Governor's Office denied Braverman's request, and 62 days after Braverman allegedly should have received a response from "OAG." (Pa5-6; Pa28-31; Pa44; Pa48; Ra9-14). Without any request to toll the applicable statute of limitations, Sudhakar's complaint was significantly outside the forty-five-day requirement. Again, this alone is sufficient to affirm the trial court's decision to dismiss her complaint.

POINT II

THE TRIAL COURT'S DECISION SHOULD BE AFFIRMED BECAUSE OPRA DOES NOT CONTEMPLATE THE DESTRUCTION OF GOVERNMENT RECORDS AND THE STATE'S INTEREST IN PRESERVING THESE RECORDS OUTWEIGHS ANY INTEREST IN THE PROPOSED TESTING.

Notwithstanding these fatal procedural deficiencies, the trial court considered the merits of her complaint and correctly found that Sudhakar and the interested parties failed to meet the fundamental requirements of an OPRA or common law right of access claim against Respondents. Because OPRA does not allow potentially destructive DNA tests that would permanently alter and possibly destroy government records, and the State's interest in preserving the integrity of the historical items outweighs any interest that might result in their damage or destruction, the trial court's decision should be affirmed.

A. The Trial Court Correctly Found That The Office of the Attorney General Is Not The Custodian of Records.

The trial court's decision dismissing Sudhakar's complaint as to OAG should be affirmed because it is not the custodian of records in this case.⁸

Under N.J.S.A. 47:1A-6, to maintain a cause of action under OPRA, a

⁸ Respondents do not address claims made against the Governor's Office before the trial court because Sudhakar has not raised such claims on appeal. Sudhakar did not include the Governor's Office in her notice of appeal, and has indicated

requestor must be denied access to a government record by the custodian of record. See Firemen's Ass'n, 230 N.J. at 278 (“OPRA clearly and unambiguously confers the right to initiate a suit after a public agency’s denial of access only upon the requestor.”) (emphasis in original). In other words, there can be no denial of access when the requested documents do not exist, or are not in the records custodian’s possession. Bent v. Twp. of Stafford Police Dep’t, Custodian of Records, 381 N.J. Super. 30, 38-39 (App. Div. 2005) (upholding the GRC’s final administrative determination that a custodian has no obligation to search for or provide access to records beyond their respective agency’s files). “OPRA applies solely to documents ‘made, maintained or kept on file in the course of [a public agency’s] official business.’” Id. at 38 (quoting N.J.S.A. 47:1A-1.1).

Here, NJSP—not OAG—is the custodian of the historical items at issue. E.O. 110; (Pa37; Pa47-49; Pa82). Not only did Braverman fail to submit an appropriate OPRA request to OAG in advance of the verified complaint, but after Sudhakar finally sent her OPRA request to OAG on December 15, 2022, OAG timely advised her that, “[t]he OAG is not the custodian of the historical items that you seek, which are kept in the NJSP Museum.” (Pa79). Because

that she is not opposed to the Governor’s Office being removed as a respondent. (Pa146; Pa155; Pb2; 1T19:9-19).

there is no dispute that E.O. 110 establishes the NJSP as the caretaker of the historical records, and therefore OAG's denial was appropriate, the trial court's dismissal of Sudhakar's complaint as to OAG should be affirmed.

B. The Court Also Correctly Found That OPRA Does Not Provide a Vehicle for Testing or Manipulating Government Records.

The trial court decision should also be affirmed because OPRA does not allow for scientific manipulation or testing, and it does not allow for the type of alteration or destruction of government records Sudhakar is seeking.

As a threshold matter, Braverman's request to NJSP was deficient under N.J.A.C. 13:1E-2.4(a) and (b). Under N.J.A.C. 13:1E-2.4(a), requests are required to be submitted by hand delivery during normal business hours, mailed, or submitted electronically through the Department's OPRA website. N.J.A.C. 13:1E-2.4(a). Submissions by facsimile or e-mail are not permitted. Ibid. Moreover, only the agency's custodian of the record requested is authorized to accept receipt of OPRA requests on behalf of the Division, and requests are not considered filed until received by the custodian. N.J.A.C. 13:1E-2.4(b). All other officers or employees are barred from accepting requests on behalf of the Division. Ibid.

Braverman's request to NJSP failed to comply with any of these provisions. Rather than submitting an OPRA request to the appropriate custodian of records via the electronic OPRA request form, Braverman

submitted an e-mail that was not directed to the Custodian, who had no knowledge of his request until Sudhakar filed her complaint and named NJSP as a party. (Pa48-49). Thus, the trial court properly found that the communications with the NJSP did not amount to an OPRA request. (Pa152-53).

Even if Braverman's deficient communication to NJSP was classified as an OPRA request, and it should not be, the extraction and DNA testing it sought are not permitted under OPRA. "OPRA's purpose 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.'" Mason, 196 N.J. at 64 (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)); see also Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 588 (2011). With this in mind, OPRA defines a government record broadly as "any paper, written or printed book,[or] document . . . maintained or kept on file . . . 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," N.J.S.A. 47:1A-1.1, and permits these records to be inspected, examined, and copied unless exempt from public access. N.J.S.A. 47:1A-5.

But any inspection under OPRA is "subject to reasonable controls, and courts have inherent power to prevent abuse and protect the public officials involved." MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J.

Super. 534, 546 (App. Div. 2005); cf. DeLia v. Kiernan, 119 N.J. Super. 581, 585 (App. Div. 1972) (finding that any inspection under the Right to Know Law is permissible only subject to reasonable controls as to time, place, or copying). Here, Sudhakar’s complaint fails under a plain language reading of OPRA. N.J.S.A. 47:1A-5 only allows a custodian to permit a record to be “inspected, examined, or copied.” It does not allow for scientific manipulation or testing, and it certainly does not allow for alteration or destruction of government records. Sudhakar’s expert initially acknowledged that such testing will result in permanent alteration and possible damage to the items. (Ra7-8). Although the expert later retracted his opinion by indicating that the historical “envelopes and stamps will not suffer ‘damage,’ as the State alleges,” the inevitable alteration and risk of possible damage still remains. (Pa40-41; Pa53; Pa103).

Sudhakar argues, without support, that a modern-day interpretation of “inspected” or “examined” includes DNA testing. (Pb9). But this argument ignores both the Court’s caution in MAG that OPRA remains subject to “reasonable controls . . . to prevent abuse and protect the public officials involved,” 375 N.J. Super. at 546, and NJSP’s responsibility, under E.O. 110, to protect the historical items from risk of damage or mutilation to ensure their future accessibility for the public, (Pa153). In short, as the trial court rightly found, “OPRA is not the vehicle by which a citizen can march up to a museum

and demand that the custodians of historical artifacts and documents surrender the State's treasures for analysis, alteration, and destruction." (Pa152).

C. The Trial Court Properly Found That the State's Interest in Preserving the Integrity of the Historical Items Outweighs Any Interest In DNA Testing That Might Result in Damaging or Altering the Records.

The trial court's decision dismissing Sudhakar's complaint under the common law right of access should likewise be affirmed because she fails to provide any support that the common law right of access allows the manipulation, testing, or permanently altering and possible destruction of government records.

The common law right to access public records is not limited by OPRA. Mason, 196 N.J. at 67; see also N.J.S.A. 47:1A-8. "Under the common law rule of access to public documents, a citizen is entitled to inspect documents of a public nature ' . . . provided he shows the requisite interest therein.'" Nero v. Hyland, 76 N.J. 213, 222 (1978) (quoting Ferry v. Williams, 41 N.J.L. 332, 334 (1879)). And while the definition for a public record under the common law "is broader than the statutory definition of 'government record' contained in N.J.S.A. 47:1A-1.1[,]" Bergen Cnty. Imp. Auth. v. N. Jersey Media Grp., Inc., 370 N.J. Super. 504, 509-10 (App. Div. 2004), it is not absolute. "[T]he showing a requestor must make to gain access is greater than that required under OPRA." N. Jersey Media Grp., Inc., 447 N.J. Super. at 210 (citations omitted).

To gain access to public records under the common law right of access, a requestor must show: (1) the records are common-law public documents; (2) the person seeking has an interest in the subject matter of the material; and (3) the citizen's right to access outweighs the State's interest in preventing disclosure. Keddie v. Rutgers, 148 N.J. 36, 50 (1997) (internal quotation marks and citations omitted). When balancing the right to access against the State's interest in preventing the disclosure, courts consider:

(1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for materials.

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

In addition to these factors, "when the requested material appears on its face to encompass legislatively recognized confidentiality concerns, a court should presume that the release of the government record is not in the public interest."

Michelson v. Wyatt, 379 N.J. Super. 611, 621 (App. Div. 2005).

Here, the trial court rightly concluded that Sudhakar's request to manipulate, test, and potentially destroy historical artifacts does not fall within the common law right of access. Historically, the common law right of access developed in circumstances "where a party has sought evidence for the prosecution or defen[s]e of his rights in pending litigation." Ferry, 41 N.J.L. at 334. Under those circumstances, the destruction of evidence would not be permitted. So too here. While OPRA and the common law to access work together to ensure government transparency for the public as a whole, see N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 574 (2017) (recognizing that OPRA was created to foster transparency), the altering or possible destruction of government records does not accomplish its goal of transparency in any way, but instead defeats that purpose and also exposes Respondents to a potential violation of N.J.S.A. 47:3-8.1 to -8.32, which governs the destruction of public records. The goal of transparency cannot be accomplished if the public, and future generations, are no longer able to access these historical records.

Even if the destruction of government records was somehow inexplicably contemplated by the common law right of access, Sudhakar's quest to uncover the "truth" and pursue a commercial interest does not outweigh the State's

interest in protecting and preserving the items. (Pb12). E.O. 110 confirms that while the Lindbergh items must be made available to the public for “inspection and examination and available for copying[,]” NJSP has an obligation to ensure there is no risk of damage or mutilation. E.O. 110, Section 2. Sudhakar’s interest does not tip the scale. Indeed, Governor Byrne specifically required the Superintendent of NJSP to implement procedures to protect the Lindbergh historical items from risk of damage or mutilation to ensure the historical items’ future existence. Ibid. Such requirements to protect the State’s historical items is not out of the ordinary. See Freedom From Religion Found. V. Morris Cnty. Bd. of Chosen Freeholders, 232 N.J. 543, 585 (2018) (Solomon, J., conc.) (“New Jersey’s Constitution recognizes the preservation of historic structures as an important government purpose.”) (citing N.J. Const. art. VIII, § II, ¶ 7).

Here, the historical items must be guarded from the potential damage and mutilation that Sudhakar proposes. By denying Sudhakar’s request, the NJSP is following its directive and ensuring that the public, including future generations, continue to have access to the historical items for one of New Jersey’s most widely-publicized cases. As the trial court correctly found, “the altering or destroying government records does not serve the common law’s overarching goal of transparency.” (Pa153). Although the DNA testing may allow Sudhakar to “pursue her individualized interest[,] . . . depriving the public . . . access to

these items in their original state does not serve the public interest.” (Pa153-54). Because the public’s interest is best served by protecting such items from risk of damage or mutilation, the trial court’s decision to dismiss Sudhakar’s complaint should be affirmed.

CONCLUSION

For these reasons, the trial court’s decision to dismiss Sudhakar’s complaint with prejudice and deny the OTSC should be affirmed.

Respectfully submitted,

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