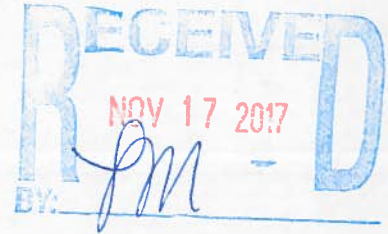


Law Offices of
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November 12, 2017

Walter M. Luers, Esq.*

*Also admitted in New York

Writer's Direct Email: wluers@luerslaw.com

Honorable Marlene Lynch Ford
Superior Court of New Jersey
Courtroom #1, Second Floor
118 Washington Street
Toms River, New Jersey 08753

Re: *Libenschek v. Township of Stafford, et al.*

Dear Judge Ford:

We submit this Letter Brief in lieu of a more formal brief in support of this action under the Open Public Records Act ("OPRA"), *N.J.S.A. 47:1A-1, et seq.*, which has been opened to the Court via Verified Complaint and Order to Show Cause. This case was brought because the Defendants have denied access to a log of emails requested by the Plaintiff.

STATEMENT OF FACTS

The facts are set forth in our Verified Complaint and the OPRA request and denial of access are attached to the Luers Certification being filed herewith.

Honorable Marlene Lynch Ford, A.J.S.C
November 12, 2017
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LEGAL ARGUMENT

POINT I

PLAINTIFF'S ACTION SHOULD PROCEED IN A SUMMARY MANNER

The standards governing the initiation of OPRA actions are familiar ones. "A person who is denied access to a government record by the custodian of the record, . . . may institute a proceeding to challenge the custodian's decision by filing an action in Superior Court." *N.J.S.A.* 47:1A-6. Once instituted, "[a]ny such proceeding shall proceed in a summary or expedited manner." *Id.* "This statutory language requires a trial court to proceed under the procedures prescribed in Rule 4:67." *Courier News v. Hunterdon County Prosecutor's Office*, 358 N.J. Super. 373, 378 (App. Div. 2003). Any such action must be initiated by Order to Show Cause, supported by a verified Complaint. *Id.* (citing *R. 4:67-2(a)*). Here, because OPRA authorizes actions under it to proceed in a summary manner, and because Plaintiff's request for an order to show cause is supported by a verified complaint, the relevant documents have been provided via certification, and the relevant facts should not reasonably be disputed, the Order to Show Cause should be granted so this matter may proceed in a summary manner. *R. 4:67-2(a)*.

POINT II

THE REQUESTED DATA ARE PUBLIC RECORDS

Plaintiff seeks records pursuant to the Open Public Records Act ("OPRA"). OPRA mandates that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest." *Libertarian Party of Cent. New Jersey v. Murphy*, 384 N.J. Super. 136, 139 (App. Div. 2006) (citing *N.J.S.A.* 47:1A-1). The New Jersey Supreme Court has stated that "Those who enacted OPRA understood that knowledge is power in a democracy, and that without access to

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information contained in records maintained by public agencies citizens cannot monitor the operation of our government or hold public officials accountable for their actions.” *Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities*, 207 N.J. 489, 502 (2011). Recognizing the paramount importance of public access to government records, the controlling statute and interpreting courts provide that “any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public’s right of access.” *Libertarian Party of Cent. New Jersey*, 384 N.J. Super. at 139.

There is no question that the Defendant is a “public agency” as that term is defined by *N.J.S.A. 47:1A-1.1*. The Township “makes, maintains, or keeps on file” or “receives in the course of . . . its business” government records, and is therefore subject to OPRA.

Furthermore, the records sought by Plaintiff are clearly “government records” within the meaning of OPRA. Under OPRA, the definition of a “government record” includes “...*information stored or maintained electronically* or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or *that has been received* in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof.” *N.J.S.A. 47:1A-1.1* (emphasis added). Moreover, the Supreme Court of the State of New Jersey has recently removed any doubt that the definition of “government record” includes “information stored or maintained electronically in a database on a municipality’s server,” even if such data requires extraction. *Paff v. Galloway Twp.*, 229 N.J. 340, 353-54 (2017); *N.J.S.A. 47:1A-1.1*. Reasoning that the Legislature “decided against defining government record as documents or files stored or

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November 12, 2017
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maintained electronically,” the Court found that, with regards to determining whether an item is a government record, “information is the key word.” *Id.* By this reasoning, the Court found that “information in electronic form, even if part of a larger document, is itself a government record.” *Id.* Thus, the New Jersey Supreme Court found that “electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record.” *Id.* Like the records at issue in *Paff*, the information requested here falls well within the broad definition of government record, and, as in *Paff*, extraction of the data does not constitute the creation of a new record. Instead, the data sought constitutes “electronically stored information” and falls well within the definition of a “government record” under *N.J.S.A. 47:1A-1.1* as interpreted by the Courts of this state. Indeed, in *Galloway*, the Court held that the very type of log being requested here was a public record. *Paff*, 229 N.J. at 353-54.

POINT III

IN THE ALTERNATIVE, ACCESS SHOULD BE GRANTED UNDER THE COMMON LAW

If this Court should deny access to the records requested under OPRA, the Court should grant access under the common law right of access. The public’s right of access to records is broader under the common law right of access than under OPRA. “Nothing contained in [OPRA] shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency.” *N.J.S.A. 47:1A-8*; see also *North Jersey Media Group Inc. v. State, Dep’t of Personnel*, 389 N.J. Super. 527, 536 (Law. Div. 2006); *Bergen County Improvement Auth. v. N. Jersey Media Group, Inc.*, 370 N.J. Super. 504, 516 (App. Div. 2004). Thus, the right of access to records under the common law is broader than under OPRA. *North Jersey Media Group*, 389 N.J. Super. at 537.

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The common law right of access has three elements: (1) the records must be common law public documents; (2) the person who seeks access must “establish an interest in the subject matter of the material,” *South Jersey Publishing Co. v. New Jersey Expressway Auth.*, 124 N.J. 478, 487 (1991), and (3) the citizen’s right to access “must be balanced against the State’s interest in preventing disclosure.” *Higg-A-Rella, Inc.*, 141 N.J. at 46; *see also Keddie v. Rutgers, The State University*, 148 N.J. 36, 50 (1997) (discussing these three elements).

Common law public records “include almost every document recorded, generated, or produced by public officials whether or not ‘required by law to be made, maintained or kept on file.’” *Shuttleworth v. City of Camden*, 258 N.J. Super. 573, 582 (App. Div. 1992). Here, the records sought are common law public records because they are kept by the public agency. *Higg-A-Rella, Inc.*, 141 N.J. at 46 (defining a common-law record as one that is made by a public official in the exercise of their public function, either because the record was required or directed by law to be made or kept, or because it was filed in a public office). Furthermore, as a resident of the Township, Plaintiff has standing to request these documents under the common law, a requirement that is easily met. “A citizen, and the press on its behalf, does not have to prove any personal interest in order to satisfy the common law standing requirement.” *Daily Journal v. Police Dep’t of City of Vineland*, 351 N.J. Super. 110, 122 (App. Div.2002).

To determine whether the records should be disclosed to Plaintiff, this Court must balance Plaintiffs’ interest in disclosure against Defendants’ interest in confidentiality. In weighing whether disclosure outweighs confidentiality, New Jersey courts have weighed several factors, including:

- (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

Honorable Marlene Lynch Ford, A.J.S.C
November 12, 2017
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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 policy-makers; (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 the materials. *Loigman v. Kimmelman*, 102 N.J. 98, 113 (1986).

Defendants have not articulated any interest in non-disclosure, thus we are left to speculate regarding the arguments they might make under the common law right of access.

POINT IV

REASONABLE ATTORNEYS' FEES

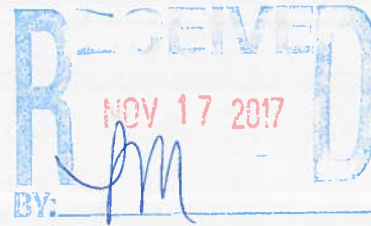
If the Court orders Defendants to produce the documents at issue or the Defendants produce the records in response to this lawsuit, the Court should find that Plaintiff is the prevailing party and, under OPRA's fee-shifting provisions, award Plaintiff its reasonable attorneys' fees and costs. *N.J.S.A. 47:1A-6*; *Mason v. Hoboken*, 196 N.J. 51, 79 (2008) (concluding that catalyst theory applies to fee awards under both OPRA and the common law right of access).

Respectfully submitted,

/s/ Walter M. Luers

Walter M. Luers

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LAW OFFICES OF WALTER M. LUERS, LLC
Suite 2
122 West Main Street
Clinton, New Jersey 08809
Telephone: 908.894.5656
Attorneys for Plaintiff



ERIC LIBENSCHKEK, Plaintiff, v. TOWNSHIP OF STAFFORD and LINDA MARTIN in her official capacity as Municipal Clerk and Records Custodian of Township of Stafford, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: OCEAN COUNTY DOCKET NO. _____ CIVIL ACTION CERTIFICATION OF WALTER M. LUERS
---	--

Walter M. Luers, of full age, hereby certifies and says:

1. Attached as Exhibit A is a true and correct copy of Plaintiffs' OPRA request dated September 28, 2017.
2. Attached as Exhibit B is a true and correct copy of Defendants denial of Plaintiffs' OPRA request dated September 29, 2017.

Dated: November 10, 2017

/s/ Walter M. Luers
Walter M. Luers

Exhibit A

Tracking Information		Final Cost
Tracking #	_____	Total _____
Rec'd Date	_____	Deposit _____
Ready Date	_____	Balance Due _____
Total Pages	_____	Balance Paid _____

Records Provided

Exhibit B

Telephone
(609) 597-1000 Ext. 8510

•TOWNSHIP OF STAFFORD•

OCEAN COUNTY

260 EAST BAY AVE • MANAHAWKIN, NEW JERSEY • 08050-3329

Refer To:
Municipal
Clerk's
Office

September 29, 2017

Eric Libenschek
159 Topsail Lane
Manahawkin, NJ 08050

Re: 09/28/2017 OPRA request-Email logs for Mayor John Spodofora

Dear Mr. Libenschek,

I am in receipt of your OPRA request dated 09/28/2017. Please be advised that after concurring with the Township Administrator I was advised that Stafford Township does not maintain an e-mail log or is required to do so. Therefore, I am unable to fulfill your request.

Sincerely,

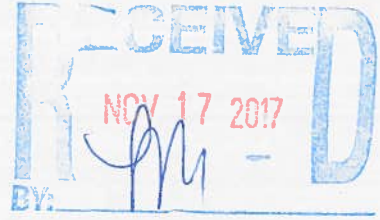


Linda Martin
Acting Municipal Clerk

/lam

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November 16, 2017

Walter M. Luers, Esq.*

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VIA CERTIFIED MAIL

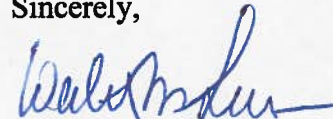
Township Of Stafford
Linda Martin, Records Custodian
260 East Bay Avenue
Manahawkin, New Jersey 08050

Re: ***Eric Libenschek v. Township of Stafford et,al.***
Docket No. OCN-L-003156-17

Dear Ms. Martin,

We hereby serve you with copies of the filed Order to Show Cause and related papers that were filed in the above-referenced matter. Thank you.

Sincerely,



Walter M. Luers

WL:dw
Enc.