#008

GIBBONS

Thomas J. Cafferty
Director

Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102-5310
Direct: (973) 596-4863 Fax: (973) 639-6267
tcafferty@gibbonslaw.com

March 30, 2016

RECEIVED
APR - 4 2016
GLENN A. GRANT, J.A.D.
ACTING ADMINISTRATIVE DIRECTOR

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts Rules Comments
Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey 08625-0037

Re: 2016 Report of the Supreme Court Civil Practice Committee

Dear Judge Grant:

I write to comment on the proposed Amendment to R. 4:18-1 which would add a new Section (e) providing:

> **Notice of Requests for Public Records**. A party who requests public records pursuant to the Freedom of Information Act, 5, U.S.C.A. §552, or the Open Public Records Act, N.J.S.A. 47:1A-1 to -13, that are relevant to a pending litigation from another party in the same litigation shall serve a copy of the request on all parties.

The Committee report states that where an FOIA or OPRA request seeks records relevant to pending litigation "...notice should be given to allow parties to assert that the records are confidential or privileged."

Requests for government records in New Jersey may be based not only upon the statutory right to know, now OPRA, N.J.S.A. 47:1A-1 et. seq., but also upon the common law right to know. See, Irval Realty Inc. v. Board of Public Utility Commissioners of the State of New Jersey, 61 N.J. 366 (1972).

While many OPRA requests are accompanied by a request for access pursuant to the common law, there is nothing that precludes a request for access made solely under the common law. The omission of any reference to common law requests in the proposed Rule Amendment creates an unintended loophole. It would permit a common law request for records relevant to a pending litigation unaccompanied by a FOIA or OPRA request to be made without the notice of such request to all parties in the litigation, which the proposed Rule Amendment contemplates. Accordingly, I suggest adding a reference to the common law in the proposed amendment.

Respectfully submitted,

Thomas J. Cafferty

THOMAS J. CAFFERTY
Director

TJC:cev