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Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director
Richard J. Hughes Complex
25 West Market Street
P.O. Box 037
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Re: Comments Regarding R. 4-18-1 (FOIA and OPRA Requests for Information)

Dear Judge Grant:

On behalf of the American Civil Liberties Union of New Jersey (ACLU-NJ), I write to respectfully urge the Supreme Court to reject the proposed amendment to R. 4-18-1 (FOIA and OPRA Requests for Information) that inserts third parties into requests for government records. The proposed amendment would require a party to litigation who requests public records pursuant to the federal Freedom of Information Act, 5 U.S.C. § 522 (FOIA), or the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1, et seq., to provide a copy of the request to all counsel, if the records requested are relevant to pending litigation.[1] The discovery subcommittee concluded that "notice should be given to allow parties to assert that the records are confidential or privileged." See http://www.judiciary.state.nj.us/reports2016/CPC_report.pdf, pg. 35.[2] The fact that a records requestor is party to a lawsuit should not diminish nor delay her right to public records, nor should it preclude the right to request records anonymously. Yet the proposed amendment does just that.

The ACLU-NJ is concerned that requiring notification of outside parties will impermissibly entangle the right of access to government records with collateral private litigation and will delay access to public records. Courts have recognized that the right to obtain records through public records laws is wholly separate from the right to obtain documents through litigation. Kovalcik v. Somerset County Prosecutor's Office, 206 N.J. 581, 591 (2011) (holding that denial of a motion to compel discovery did not affect disclosure of records under OPRA and that status of

[1] For example, a requestor involved in a dog bite case would be required to inform opposing counsel of a records request to a municipality seeking animal control records about the dog. Similarly, a plaintiff in consumer fraud litigation would be required to inform all parties of requests for consumer complaints filed against the entity.

[2] The proposed amendment was suggested by an attorney contending "that release of certain public records could affect a pending matter because a party in pending litigation may have a confidentiality interest in the public records and the lack of notice could prejudice that party." See http://www.judiciary.state.nj.us/reports2016/CPC_report.pdf, pg. 35

requestor and reasons for request of documents were not relevant to right of access to records under OPRA); Atlantic City Convention Center Authority v. South Jersey Publishing Company, Inc., 135 N.J. 53, 59 (1994) (holding that federal discovery rules governing plaintiff's civil lawsuit against municipal defendants did not preclude plaintiff from requesting documents under OPRA even though plaintiff might obtain documents from defendants more quickly through OPRA and the documents might be otherwise unobtainable under the federal rules). See also MAG Entertainment, LLC. v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 545-46 (App. Div. 2005) ("The private needs of the requesting party for information in connection with collateral proceedings play no part in whether the request is proper or whether the disclosure is warranted."); National Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004) ("[A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information."); NLRB v. Sears, Roebuck & Co.,421 U.S. 132, 143 n.10 (1975) (recognizing that a requestor's "rights under the Act are neither increased nor decreased by reason of the fact that [the requestor] claims an interest in the [requested records] greater than that shared by the average member of the public"). Thus, parties to litigation should enjoy neither enhanced nor diminished rights regarding the submission of a public records request. Indeed, other than extremely limited circumstances, the identity of a requestor should simply play not part in the government's determination of whether records are public or not. See e.g. N.J.S.A. § 47:1A-1, et seq. (generally granting access to records to "any person"); id. § 47:1A-1.1 (limiting access to a victim's records to the victim of a crime and limiting access to certain veteran's records to veteran or veteran's spouse or surviving spouse); id. § 47:1A-1.1 (limiting a convict's access to government records containing personal information pertaining to the person's victim or the victim's family); 5 U.S.C. § 552(a)(3)(A)(requiring federal agencies to provide records to "any person"); id. § 552(a)(4)(A), (a)(6)(E)(requestor's propose and need may be factors in fee waiver and expedited processing determinations).

Further, OPRA contains a right to request records anonymously. See N.J.S.A. § 47:1A-5(i) (explicitly authorizing anonymous requests). Especially in contentious matters, anonymity can be essential. That statutory right would be extinguished by the proposed rule.

While we recognize the need to both promote public access to government records and protect rights of third parties, the state and federal legislatures have already achieved the proper balance. Both FOIA and OPRA mandate that government records be available unless particular material is exempt from disclosure due to a recognized privilege, grant of confidentiality, or expectation of privacy. See e.g., N.J.S.A. § 47:1A-1 (requiring government records be accessible unless exempt and construing limitations to the right of access in favor or access); id. § 47:1A-1.1 (explicitly declaring several categories of information as confidential under OPRA, including trade secrets, proprietary information, victims' records, records within the attorney-client privilege, and personally identifying information.); id. § 47:1A-1 (requiring agencies to "safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy."); 5 U.S.C. § 552(b)(4) (protecting "trade secrets and commercial or financial information obtained from a person and privileged or confidential."); id. § 552(b)(6) (exempting "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."). Critically, the statutes entrust the government entities to assess

whether the documents in their control are public documents. Neither open records law exempts records based on claimed interests of third parties related to litigation; rather both statutes mandate that exemptions be determined based on whether material within the requested record qualifies for a specific recognized exemption. See e.g., Chrsyler Corp. v. Brown, 441 U.S. 281, 294 (1979)(concluding that Congress granted agency's discretion to disclose information when it enacted FOIA, thus FOIA does not afford a person who submits information to an agency any private right of action to enjoin agency disclosure of that information.). In short, if a document is a public record, it does not lose that status because a subject of the document is involved in a lawsuit, and an opposing party to the lawsuit should not be able to preclude the disclosure of public documents that the government is prepared to release.

In addition to the significant policy concerns, we also note that there are operational issues. For example, OPRA provides that an agency should respond within seven business days, N.J.S.A. 47:1A-5(i), but some records are to be provided immediately. See N.J.S.A. 47:1A-5(e) (requiring that immediate access ordinarily be granted to budgets, bills, vouchers, contracts, and public employee salary and overtime information). The proposed amendment does not specify when a party is required to serve the request, but even if a party is diligent and does so within a day of making the request, the other litigants may receive it well after records have been provided. Moreover, an attorney representing a party may not be aware that her or his client has independently made such requests until well after the records have been provided. The proposed amendment also burdens litigants who use two particular methods for obtaining public records, when there are other mechanisms, including the common law, through which the public has access to information.

Thank you for your attention to this matter. If you have any questions, please feel free to contact us.

Respectfully submitted,

Iris Bromberg
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