

PRELIMINARY STATEMENT

Amicus The Coalition for Sensible Public Records Access ("CSPRA" or "*Amicus*") is a nonprofit organization dedicated to promoting records access for consumers and businesses. *Amicus* submits this Brief to assist the Court in deciding between two competing views reflected in the Trial Court decisions below: whether OPRA will empower requestors across the country to access information that is a part of the modern information economy, or whether provincial concerns will hinder that access.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Regarding the particular facts of the matters below and the procedural histories of those cases, *Amicus* relies on the briefs submitted by the Plaintiffs.

Public records laws of the 50 states are the essence of *Amicus's* business and inform transactions in numerous fields of endeavor. Requests for and receipt of public record information under state freedom of information laws represent both a daily occurrence, and the lifeblood of *Amicus's* commercial activity. *Amicus* organizes, indexes and compiles information obtained from public records laws into paper and electronic services and publications with regional or nationwide scope. Real estate financing, credit reporting, background checks, tenant screening, and even political campaigns all rely

to some degree on access to state public records of the 50 states. Public entities, including housing authorities, law enforcement and intelligence agencies, rely on access to state public-record information to perform their public duties.

The member companies that comprise CSPRA all share two things in common: (1) nondiscriminatory access to public records nationwide is the *sine qua non* of their businesses; and (2) customers value and depend upon their publications because of their thoroughness and accuracy.

CSPRA's publication of public record information satisfies an essential need of modern commercial and political life. The information they provide lays the foundation for transactions in a wide variety of markets, and ensures transparency and efficiency in those markets. *Amicus's* efforts to sort, collect and analyze public records enables sellers to determine whether a potential home buyer is qualified, an employer to determine whether a suspect has convictions in multiple jurisdictions, or an insurer to determine what rate of insurance a particular property should be.

Public records are used by the companies that comprise CSPRA for a myriad of purposes, and there is no monolithic "public records industry." Some of the companies represented by CSPRA acquire public records information for the purpose of evaluating consumer credit.

Reed Elsevier, a subsidiary company of CSPRA member company RELX, offers its Accurint service that provides fraud prevention tools to financial and retail institutions. Thus, when authenticating an oral request to transfer funds from a bank account, a financial institution will ask questions that a thief of a wallet would probably not be able to answer, such as "Which of the following five addresses is a past home address of yours?" or "Which of the following cars did you once own?" The answers to these questions would be found in state real property records or Uniform Commercial Code filings.

The nationwide availability of this information also helps make markets in products and services more competitive. For example, CSPRA member R.L. Polk & Co., the parent company of Carfax (www.carfax.com) provides a variety of automotive information to manufacturers and consumers that it obtains from state governments subject to the Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721 *et seq.*, as well as public records laws. Carfax uses that information to provide consumers and dealers with a vehicle accident history, informing customers whether they are buying a potential "lemon." Polk also combines title information with other state records to help manufacturers notify individual consumers in the event of a safety recall.

The private sector is not alone in its reliance on public record information. The federal government relies on

Amicus's state-held public records for various purposes, including law enforcement. For example, LexisNexis' databases have been used for years by the FBI. On the local level, governments use real estate records like those in this case to detect tax avoidance. Delaware County, Indiana recovered over \$1.5 million in new revenue due to homestead exemption fraud.¹ An audit assisted by LexisNexis' electronic databases of public records revealed that owners claiming Indiana as a principal residence in fact were claiming multiple homestead exemptions across multiple states.²

The above activities represent just a fraction of the daily uses that are made from state public records. If New Jersey decides to bar access to non-citizen requestors under its open records laws, important data will be missing from information services that aid criminal investigators, detect

¹Indiana law permits taxpayers certain deductions for their primary residence. See Ind. Code §§ 6-1.1-12-37(a)(1)-37(a)(2)-37(c) (describing deduction).

² Press Release, LexisNexis, LexisNexis and Tax Management Associates Identity Fraud and Discover Nearly \$1,500,000 in new revenue for Delaware County, Indiana (Feb. 27, 2012), available at <http://www.lexisnexis.com/risk/newsevents/press-release.aspx?id=1330361634905478>. On the federal level, LexisNexis products are used by the United States Department of Health and Human Services, and their state government analogs to detect Medicare and Medicaid fraud by matching requests for payment against licensure records and other information acquired from public records.

fraud and government waste, screen the criminal background of employees, and give certainty to commercial transactions.

LEGAL ARGUMENT

POINT I

A CITIZENSHIP REQUIREMENT FOR ACCESS TO PUBLIC RECORDS IS INCONSISTENT WITH THE MODERN INFORMATION ECONOMY

These cases raise the question of whether the rights granted by the New Jersey Open Public Records Act, *N.J.S.A.* 47:1A-1, *et seq.* ("OPRA") extend to non-citizens of New Jersey. The question comes before the Court uniquely postured, having been briefed in three separate matters: *Lawyers Committee for Civil Rights v. Atlantic City Board of Education*, A-002704-15 (hereafter "*Lawyers Committee*"), *Scheeler v. City of Cape May, et al.*, A-002716-15 (hereafter "*Cape May*"), and *Scheeler v. Atlantic County Municipal Joint Insurance Fund, et al.*, A-002092-15 (hereafter "*ACJMF*"). The Plaintiffs argue that the extensive use of the term "any person" throughout OPRA's "operational" provisions (in contrast to the former Right-to-Know-Law, which used "citizen"), the fact that OPRA provides for anonymous records requests, as well as numerous other principles of statutory construction, require reading OPRA to extend to non-citizens. *Amicus* agrees with the Plaintiffs and urge this Court to hold that any "person" may utilize OPRA to access public records.

Rather than re-tread these points of law that have been thoroughly briefed by the parties, *Amicus* direct their efforts towards matters of policy from their unique perspective as commercial purveyors of public information. As advocates of the sensible use of public records laws who are devoted to dispelling the prejudice and misunderstanding that often infiltrates debates on these matters, *Amicus* will discuss the potential consequences of failing to extend access to all persons, whether citizens of New Jersey or not, under OPRA.

New Jersey can "boast of a long and proud tradition of openness and hostility to secrecy in government." *Education Law Center v. NJDOE*, 198 N.J. 274, 283 (2009). Indeed, New Jersey courts "have long recognized a common law right to public information." *Polillo v. Deane*, 74 N.J. 562, 570 (1977) (citing *Ferry v. Williams*, 41 N.J.L. 332 (Sup. Ct. 1879)); *see also Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978) (citing *Ferry v. Williams*, with law of three other States in recognizing common law right "to inspect and copy public records and documents"). In New Jersey the right to know is "elevated to a position of the highest sanction. . . . Freedom of information is the very foundation of all those freedoms that the First Amendment of our Constitution was intended to guarantee." *Moore v. Board of Chosen Freeholders of Mercer County*, 76 N.J. Super. 396, 404-05 (App. Div. 1962). New Jersey's long and proud

tradition would be undermined by any decision to limit the right of access under OPRA to New Jersey "citizens-only."

Notably, this question arises somewhat late in OPRA's history, because limiting access under OPRA to New Jersey citizens was disallowed by the Third Circuit in *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006), until that case was abrogated by *McBurney v. Young*, 133 S. Ct. 1709 (2013). *McBurney* upheld the Virginia Freedom of Information Act's ("VFOIA") "citizens-only" restriction under a Constitutional challenge under the privileges and immunities clause. However, despite that abrogation, the advice of the Virginia agency responsible for providing guidance under VFOIA remained identical its advice prior to *McBurney*: "agencies should still comply with non-resident requests," because, the Council reasoned, seeking to bar non-citizen requests "just creates additional work for governments."³ This fact is instructive, and would be prescient if the Court rejected Plaintiffs' and *Amicus's* proffered interpretation. While a citizens-only requirement may be permissible under the United States Constitution, that is not necessarily best for New Jersey.

³ See Aaron Mackey, *Questions linger over impact of McBurney v. Young decision*, Reporters Committee for Freedom of the Press, available at: <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2013/questions-linger-over-impac>

Americans now live in, and have tied their future to the further development of, an information economy. The foundation of that economy begins with widespread and straightforward access to governmental information. Alexander Hamilton arguably anticipated the need for that access in his Federalist No. 84:

Citizens who inhabit the country at and near the seat of government will, in all questions that affect the general liberty and prosperity, have the same interest with those who are at a distance, and that they will stand ready to sound the alarm when necessary, and to point out the actors in any pernicious project, the public papers will be expeditious messengers of intelligence to the most remote inhabitants of the Union.⁴

While Hamilton's comments were directed towards the federal government, they foreshadow the information economy that we inhabit. The notion that information that is of vital interest in one locality can be confined within the artificial boundary of a single state is not only quaint, but dangerous. Time and again, issues before state governments surface identically in each and every state, fueled by the existence of a national media and the interconnection of households across the country via the Internet. Local issues, such as the crisis

⁴ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, Charles R. Kesler and Clinton Rossiter, Eds., Penguin, New York, NY (1999).

in water quality that has come to public consciousness following the news from Flint, Michigan, play out on a national scale. Governance, too, cannot be confined within state boundaries, as states design cooperative policies that cross borders, such as the Regional Greenhouse Gas Initiative started by nine northeastern states to formulate policies to address climate change.⁵ Or, as another example, federal funds support resources under purely "local" control, such as municipal housing authorities. Further, at every level state and federal actions are now coordinated, particularly in the area of law enforcement, following the profound changes wrought by 9/11.

There could hardly be an issue more ill-suited to compartmentalization along state lines than access to information. Indeed, there is hardly a State more ill-suited to attempt this than in New Jersey, which is situated between two of the Country's largest and most vital metropolitan regions and information hubs, New York and Philadelphia.

Amicus represents companies that play a vital role in the information economy. CSPRA's members facilitate efficiencies and public benefits that are so taken for granted that they are barely noticed. Nonetheless the importance of the

⁵ See *Regional Greenhouse Gas Initiative, an initiative of the Northeast and Mid-Atlantic States of the U.S.*, available at: <https://www.rggi.org/>.

market for commercial information is not foreign to our jurisprudence, and has been accorded First Amendment protections:

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate...information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., et al.*, 425 U.S. 748, 763-764 (1976).

Indeed, the seminal New Jersey case recognizing the common law right of access, *Ferry v. Williams*, involved an individual requesting information to determine whether the alcohol licensing laws of the City of Orange were being observed. In other words, the earliest judicial recognizance in New Jersey of the right of access derives from a plaintiff whose interests were similar to the *Amicus's* interests.

POINT II

PRESENTED WITH TWO COMPETING VIEWS, THE COURT MUST DECIDE THAT OPRA IS A BENEFIT, NOT A BURDEN

The decisions below offer a stark contrast in two competing perspectives on OPRA. This Court is presented with two paths for New Jersey, and the choice will affect all New Jersey Citizens. Under the first approach, the *ACJMF* Court emphasized that all OPRA requests, whether they come from New

Jersey citizens or not, benefit citizens of New Jersey. The Trial Court in *Cape May* and *Lawyers Committee*, by contrast, emphasized a supposed burden to New Jersey taxpayers. The premise of the *Cape May* and *Lawyers Committee* Courts' approach is that OPRA is a service whose use should be limited to those who directly subsidize or pay for it through taxes collected within New Jersey. The opinions of these Courts are diametrically opposed. If the *Cape May and Lawyers Committee* approach is affirmed by this Court, it will send a dangerous message that a part of New Jersey is closed to interstate commerce and the modern information economy. Such a holding is contrary to OPRA's founding principles and New Jersey's long and venerated tradition of openness.

The decisions of the *Cape May* and *Lawyer's Committee* Trial Court have proposed that OPRA is a burden, and that OPRA's availability should only be cautiously extended to a greater number of individuals, if at all. As the *Cape May* Court framed the question in its opening line in discussing Plaintiff Harry Scheeler: "Plaintiff [] 'files approximately 100 OPRA requests or more' each year . . . did the members of the New Jersey Legislature contemplate that they were authorizing an out-of-state gadfly to repeatedly bombard local governments with

demands to produce public records?" CM2a.⁶ From these opening lines, the *Cape May* court never withdrew its attention from its thinly veiled disapproval for what it felt was the inappropriate conduct of Plaintiff Scheeler - an issue that is irrelevant to the fact of New Jersey citizenship: "Plaintiff is an inquiring person," CM2a, "sitting in the comfort of his home, hundreds of miles away in North Carolina Plaintiff types a note at his keyboard, and with the click of his mouse submits an email making demands upon the City Clerk." CM3a. Also, "Mr. Scheeler is not someone the Legislature had in mind when it adopted OPRA." CM7a. And, "The [evidence] reveal[s] a time-consuming exchange between City officials and a practiced, disruptive gadfly, bent on intimidating public officials." CM8a. The *gravitas* of the Court's complaint directed towards the Plaintiff in *Cape May* could have applied to a citizen of New Jersey of similar demeanor. And, while none of CSPRA's members may fairly be described as "practiced, disruptive" gadflies, they can and do request records "hundreds of miles away" "with the click of [their] mouse[.]"

⁶ References to CM are to Plaintiff's Appendix in *Scheeler v. City of Cape May, et al.*, Docket No. A-002716-15. References to ACJMF are to Plaintiff's Appendix in *Scheeler v. Atlantic County Municipal Joint Insurance Fund, et al*, A-002092-15. References to LC are to Plaintiff's Appendix *Lawyers Committee for Civil Rights v. Atlantic City Board of Education*, A-002704-15.

Further, the Courts in *Cape May* and *Lawyer's Committee* discussed OPRA as a service that should be made available only to those who pay for it. For example, the *Lawyers Committee* Court compared OPRA to such privileges as voting and driving: "voting in New Jersey's elections and domicile requirements for obtaining a New Jersey license . . . require that the recipient [] of the benefit . . . also bear the burden of said benefit's cost via tax dollars." LC10a-11a. Further, the *Cape May* Court noted, "the benefits of [] OPRA are properly given to those who not only 'foot the bill' for such benefits but who also are directly affected by the very political processes the aforementioned legislation was enacted to protect and serve." CM6a.

By contrast, the Court in *ACJMF* had a simple answer for the problem raised by the decisions above. The Court reasoned "New Jersey citizens would benefit the same from an out-of-state OPRA request that increases transparency and efficiency of a New Jersey public entity as they would from the same request made by an in-state resident." ACJMF192. The Court also proceeded to observe that a citizens-only requirement would be "meaningless" (because easily evaded, as noted by Virginia even in the aftermath of *McBurney*) and, further, a direct contradiction of OPRA's provision permitting anonymous requests. *N.J.S.A.* 47:1A-5(f).

Thus, *Amicus* asks this Court to hold that the use of OPRA, by anyone, benefits all New Jersey citizens.

POINT II

IMPOSING A "CITIZENS-ONLY" REQUIREMENT WILL UNDERMINE OPRA FOR ALL NEW JERSEY CITIZENS

With the passage of OPRA, New Jersey has witnessed a steady expansion of the public right of access, and a corresponding benefit that is unqualified. Relatively early in its interpretation of OPRA, our Supreme Court wrote: "The purpose of OPRA '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.'" *Times of Trenton Pub. Corp. v. Lafayette Yard Community Development Corp.*, 183 N.J. 519, 535 (2005). Defendants' interpretation would break that promise.

While it has been observed in these proceedings that it is unclear if a "citizens-only" provision can achieve its aims, what is clear is that it would be a direct assault on hard-won progress through the passage of OPRA. One of those important achievements was shifting the burden of proof to deny access on the agency. *N.J.S.A.* 47:1A-6. Another outstanding achievement has been OPRA's granting of prompt access. *N.J.S.A.* 47:1A-5(i) (requiring a response to OPRA requests within seven

business days); *Mason v. City of Hoboken*, 196 N.J. 51, 57 (2008) (“[OPRA] outlines a swift timeline for disclosure of records”).

However, perhaps the most important achievement of OPRA has been granting access without reference to the identity or purpose of the requestor. See *Burnett v. County of Bergen*, 198 N.J. 408, 435 (“As a general rule, we do not consider the purpose behind OPRA requests. An entity seeking records for commercial reasons has the same right to them as anyone else”); *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534, 543 (App. Div. 2005) (“the purpose or motive for which information is sought is generally immaterial to the disclosure determination under OPRA”). All of these principles are put in jeopardy by the proposed “citizens-only” interpretation.

A case that illustrates the issue under OPRA is *ACLU-NJ v. NJ Div. of Criminal Justice*, 435 N.J. Super. 533 (App. Div. 2014). In that case, this Court addressed the question of whether under OPRA “a government agency has the authority to redact an admittedly responsive document to withhold information the agency deemed to be outside the scope of the request.” *Id.* at 534. In responding to a request for documents related to “Automatic License Plate Recognition (ALPR) technology,” 79 pages of documents were redacted throughout with the following

justification offered by the custodian: 'redacted information not relevant to request.'" *Id.* at 537-38.

In rejecting the actions of the custodian, this Court turned to the provision under OPRA that delineate the responsibilities of the Records' Custodian, Section 5(g). The Court held: "we discern no legal basis to expand the custodian's role beyond what the Legislature specifically described in *N.J.S.A. 47:1A-5(g)*." *Id.* at 541. This Court also rejected a proposal of the trial court to force requestors "to explain or justify . . . the need to copy and examine a public record" for the simple reason that this would "impose[] a bureaucratic hurdle that runs counter to our State's strong public policy favoring 'the prompt disclosure of government records.'" *Id.* at 541. The Court also noted that it inappropriately shifted the burden onto the requestor. *Ibid.*

In these cases, just as occurred in *ACLU-NJ v. NJDCJ*, Section 5(g) does not include any procedure to determine if OPRA requestors are New Jersey citizens, and adding such a requirement would add a bureaucratic hurdle, place Records Custodians in the role of inquiring into the identity and purpose of OPRA requestors, and would inappropriately place a burden on requestors to justify their entitlement to access. For all of these reasons, the "citizens-only" requirement will

dilute OPRA's achievement of granting prompt and unqualified access, and must be rejected.

Further, if the *Cape May* and *Lawyers Committee* decisions are affirmed, the view in some quarters that OPRA is a costly burden on taxpayers whose use should be limited will be amplified, to the detriment of the public. Particularly in New Jersey, the argument that taxpayers are shouldering a "burden" and should solely enjoy the "benefit" makes little sense. New Jersey is situated between two of the largest metropolitan conglomerates in the nation. Every day countless workers pore in both directions across both the Pennsylvania and New York borders. There are consequently countless of "non-citizens" who pay state employment taxes. On the other hand, there are almost 1 million New Jersey citizens who live below the poverty line and likely pay almost no net taxes.⁷ At the outset, the "taxpayer" argument is both under and over inclusive, by a wide margin, in New Jersey.

More importantly, however, OPRA is not a "burden." Since its passage OPRA has been at the epicenter of ferreting out the corruption and political cronyism with which New Jersey

⁷ Carla Astudillo, *Nearly 1M people live in poverty in N.J., new census data shows*, NJ.com, Sep. 21, 2015, available at: http://www.nj.com/news/index.ssf/2015/09/nearly_1m_people_live_below_the_poverty_line_in_nj_new_census_data_shows.html

has become regrettably identified in the public mind. OPRA was directly involved in uncovering the notorious "Bridgegate" scandal by causing the disclosure of the infamous text message "time for some traffic problems in Fort Lee."⁸ OPRA helped demonstrate in an investigation by the nationally renowned blog Techdirt that only 1% of New Jersey internal affairs investigations are sustained, compared to a national average of 8%.⁹ OPRA led to the release of hundreds of pages of emails surrounding a \$100 million donation from Facebook to the Newark public schools that has been the subject of a number of books and newspaper articles.¹⁰ OPRA allowed the Star Ledger to learn that three students who had been wrongfully accused of academic

⁸ See Victor Li, *Newspaper counsel takes on New Jersey governor over 'Bridgegate'*, ABA Journal, July 1, 2014, available at: http://www.abajournal.com/mobile/article/newspaper_counsel_takes_on_new_jersey_governor_over_bridgegate.

⁹ Tim Cushing, *Internal Affairs Division Dismissing 99% of Misconduct cases against New Jersey Police Officers*, Techdirt, January 8, 2014, available at: <https://www.techdirt.com/articles/20140106/10162825772/internal-affairs-divisions-dismissing-99-misconduct-cases-against-new-jersey-police-officers.shtml>.

¹⁰ Peggy McGlone, *ACLU-NJ reaches settlement with Newark public schools over release of public records*, NJ.com, April 14, 2014, available at: http://www.nj.com/education/2014/04/aclu-nj_reaches_settlement_with_newark_public_schools_over_release_of_public_records.html.

misconduct received a \$525,000 settlement from Rutgers University.¹¹ The list is far from exhaustive.

The benefits of such public disclosure may be difficult to quantify, but they are profound. That such disclosures can be, and are, initiated by non-New Jersey residents is not the most important point. Adding a procedural hurdle and putting the burden on a requester to demonstrate citizenship will undermine OPRA's framework that has worked so well for everyone. A citizens-only requirement will begin to erode what is perhaps OPRA's greatest achievement: the requirement of disclosure regardless of the identity or purpose of the requestor. Further, as the discussion of the *Cape May* court that was directed at requestor Harry Scheeler demonstrated, the attempt to impose a "citizens-only" requirement this late in OPRA's history may well serve as a proxy for discrimination against disfavored individuals and groups. For the statute to lead New Jersey into the future of our burgeoning information economy, that instinct to discriminate is one that should never be validated under OPRA.

Finally, we are aware that the New Jersey League of Municipalities, whose motion to appear as *amicus curiae* is

¹¹ Claire Heining, *Rutgers settles suit, but not without cost*, NJ.com, March 2, 2008, available at: http://www.nj.com/news/index.ssf/2008/03/rutgers_settles_suit_bu_t_not_w.html.

pending before this Court, would have requestors certify as to their citizenship, which is analogous to many OPRA forms in this State that require a statement regarding whether a person has been convicted of an indictable offense and their request is for records of their victims. Certifications regarding criminal history protect an important public interest, which is to protect victims' rights. Similar certifications for citizenship will only increase the burdens of municipal clerks and other records custodians in processing such requests. Clerks will have to determine whether requests received from out-of-state are from companies or individuals who may be citizens of New Jersey, but who are temporarily housed or located out of the State. Tasking records custodians as citizenship gatekeepers simply carries a burden with no corresponding benefit.

CONCLUSION

For the reasons set forth above, as well as those set forth in Plaintiffs' appellate papers, this Court should maintain New Jersey's place in the information economy and hold that any "person" may request copies of public records under OPRA.

Respectfully submitted,

LAW OFFICES OF WALTER M. LUERS, LLC

By: _____
Walter M. Luers, Esq.
Raymond M. Baldino, Esq.