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KENNETH A. VERCAMMEN & Associates, PC
Plaintiff
Vs

_____

Defendant

THE NJ OPEN PUBLIC RECORDS ACT/ RIGHT TO KNOW LAW- CRIMINAL COMPLAINT AND ARREST INFORMATION ARE POLICE RECORDS ARE AVAILABLE TO ALL CITIZENS UNDER OPRA-NJSA 47:1A-1

POINT I

Under the Open Public Records Act Chapter 404, P.L. 2001 and Right to Know Law, NJSA 47:1A-1, public records include criminal complaints and warrants prepared in a municipality or forwarded to criminal case management.

The Law Office of Kenneth Vercammen and Associates, PC made a formal written request to view and inspect "Police" arrest information.

The Law Office of Kenneth Vercammen made a formal, written request to view the arrest information at your police department. Under the Open Public Records Act Chapter 404, P.L. 2001 NJSA 47:1A-1, public records include arrest information prepared in a municipality.

This request was made under NJSA 47:1A-3(b) Access to records of investigation in progress.
b. ..... the following information concerning a criminal investigation shall be available to the public within 24 hours, or as soon as practicable, of a request for such information: ...
if an arrest has been made, information as to the defendant's name, age, residence, ...

This formal, written request was served on:

1. Police department, Records section.

2. Police Chief

They have refused our request and OPRA. This request has nothing to do with the Municipal Court. We have not been granted access to inspection by the Police Department.

Under the Open Public Records Act Chapter 404, P.L. 2001 and Right to Know Law, NJSA 47:1A-1, public records include criminal complaints and warrants prepared in a municipality or forwarded to criminal case management. The Open Public Records Act expanded the types of records required to be public.

The police department provides access to the Star Ledger and certain newspapers, but refused other access.

The following portions of the OPRA law can be found on the NJ Legislature's website:
NJSA 47:1A-1 Legislative findings, declarations.

1. The Legislature finds and declares it to be the public policy of this State that:
government records shall be readily accessible for inspection, copying, or examination by the citizens of this State....
all government records shall be subject to public access unless exempt from such access by: P.L. 1963...

NJSA 47:1A-5 Times during which records may be inspected, examined, copied; access;
6. a. The custodian of a government record shall permit the record to be inspected, examined, and copied by any person during regular business hours.

I spoke with the NJ Attorney General's Office and confirmed this new law is in effect for police records. I have been advised the contact person in the Attorney General's office is Bruce Solomon, DAG 609-984-6112.

In my review of the law, if the police department does not provide access to the arrest reports, copies of complaints, summons or warrant, they will be in violation of OPRA.

NJSA 47:1A-11 Violations, penalties, disciplinary proceeding.
NJSA 47:1A-6 Proceeding to challenge denial of access to record.

7. A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

... in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to section 8 of P.L. 2001, c.404 (NJSA 47:1A-7)...

The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. **A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.**

12. a. A public official, officer, employee or custodian who knowingly and willfully violates P.L. 1963, c.73 (NJSA 47:1A-1 et seq.), as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty of $1,000.

Recently, the Appellate Division even held a 911 emergency call to police was a public records and open to free access. The Court in Serrano v South Brunswick 358 NJ Super. 352 (App. Div 2003):

> "We thus review the final determination of the GRC and conclude that the determination that this tape should be available for review by the public is correct. Our review is subject of course to the principle that we review final agency decisions with deference and that we will not ordinarily overturn such determinations unless they were arbitrary, capricious or unreasonable, or violated legislative policies expressed or implied in the act governing the agency. Campbell v. Dep't of Civil Service, 39 N.J. 556, 562 (1963).
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> Appellants contend the GRC erroneously interpreted OPRA, alleging the GRC employed "hyper-technical" statutory construction and disregarded an alleged legislative intent to exclude from OPRA 911 calls which set a criminal investigation in motion and 911 calls which are "closely contemporaneous" to a crime and which "bear[] vital evidentiary significance to that investigation."
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> OPRA, codified at N.J.S.A. 47:1A-1 to -13, replaced the Right to Know Act of 1963, N.J.S.A. 47:1A-1 to -4, and became effective July 7, 2002, little more than a week before the subject 911 call. OPRA built on the State's long-standing public policy favoring ready access to most public records. The interpretive context of the statutory provisions we must construe in the course of this opinion is in no way murky, for in the statute itself the Legislature has provided, with respect to the public's right of access:
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> 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, and any limitations on the right of access accorded by P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented, shall be

construed in favor of the public's right of access[.]
[N.J.S.A. 47:1A-1.]

This declaration is fully consistent with the approach under prior law, as to which our Supreme Court stated in South Jersey Pub. Co. v. New Jersey Expressway Auth., 124 N.J. 478, 496 (1991), that "a court should construe narrowly any possible exceptions to the Right to Know Law." The historical setting was described by the Court as follows:

New Jersey has a history of commitment to public participation in government and to the corresponding need for an informed citizenry. The New Jersey courts have long recognized a limited common-law right to inspect governmental records. See, e.g., Ferry v. Williams, 41 N.J. L. 332 (Sup. Ct. 1879) (court recognized common-law right of discovery of public documents); Casey v. MacPhail, 2 N.J. Super. 619 (Law Div. 1949) (citizen taxpayer granted

access to voter registration lists). The Open Public Meetings Act, N.J.S.A. 10:4-6 to -21, and the Right to Know Law, N.J.S.A. 47:1A-1 to -4, also reflect that tradition favoring the public's right to be informed about governmental actions.

[124 N.J. at 486-87.]

In its analysis in South Jersey Pub. Co., the Court quoted the following passage written by James Madison:

A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

[124 N.J. at 491-92 quoting a letter to W.T. Barry, Aug. 4, 1822, in 9 Writings of James Madison 103 (G. Hunt ed. 1910).]

See also Polillo v. Deane, 74 N.J. 562, 570-71 (1977) (giving the background of the Open Public Meetings or Sunshine Act of 1975, N.J.S.A. 10:4-6 et seq. and the former Right to Know Law of 1960, N.J.S.A. 10: 4-1 et seq.).

Litigation over access to law enforcement information as alleged public records has been the subject of extensive judicial consideration both under prior statutes and under the common law. See, for example, Shuttleworth v. City of Camden, 258 N.J. Super. 573 (App. Div.), certif. denied, 133 N.J. 429 (1992). We are called upon in these appeals, however, to interpret a statute that at the time of the decision appealed from had been in effect for little more than half a year.

We first consider whether the 911 tape is a "government record" for purposes of OPRA. That term is defined broadly to mean:

any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, 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. The term[] shall not include inter-agency or intra-agency advisory, consultative, or deliberative material. [N.J.S.A. 47:1A-1.1.]

We note that 911 calls are required by law to be recorded by a government agency and that these tapes must be retained for "no less than 31 days." See N.J.S.A. 52:17C-1 and N.J.A.C. 17:24-2.4. From this, we conclude that the subject 911 tape comes within the definition of a government record for purposes of N.J.S.A. 47:1A-1. See also Asbury Park Press v. Lakewood Township Police Department, 354 N.J. Super. 146 (Law Div. 2002) (construing the former Right to Know Law to determine that the tape of a 911 call constituted a public record and thus was available to the public because it did not fall into one of the exceptions articulated in the Right to Know Law.)"

Serrano v South Brunswick , supra

In Williamson v Treasurer of New Jersey ___ NJ Super. ___ (App. Div. 2003 A-2355-01T5) the Appellate Division held the Right to Know Law overrules other state statutes dealing with confidentiality.

The court wrote" "Plaintiff Williamson is a lawyer who operates a business that for a fee researches and locates the missing owners of unclaimed assets held by the State. The Office of the Administrator (see N.J.S.A. 46:30B-6a) of Unclaimed Property (OAUP) in the Department of the Treasury is charged with the responsibility of maintaining records of abandoned property. N.J.S.A. 46:30B-1, et seq. These parties were previously involved in litigation arising out of the OAUP's refusal to confirm the existence or nonexistence of property held for the benefit of missing owners." ....

One of the 2002 amendments to the Right to Know Law (L. 2001, c. 404 § 17) states "Section 2 of P.L. 1963, c. 73 (C. 47:1A-2), section 8 of P.L. 1994, c. 140 (C: 47:1A-2.1) and section 4 of P.L. 1963, c. 73 (C. 47:1A-4) are repealed." The sponsors' statement to Assembly Bill, No. 1309 of 2000 also vaguely indicates that the provisions of the three repealed sections "are dealt with in the new sections in this bill." See also Assembly

State Government Committee Statement to Assembly Bill No. 1309 (dated March 6, 2000). Although not indicating which sections those would be, it appears that the new section addressing the substance of the repealed N.J.S.A. 47:1A-2 provision is entitled "Custodian of government records to permit inspection, examination and copying; certain information to be redacted; purchase of records; immediate access in certain circumstances," N.J.S.A. 47:1A-5a, See footnote 1010 that now provides that:

The custodian of a government record shall permit the record to be inspected, examined, and copied by any person during regular business hours ... unless a government record is exempt from public access by: P.L. 1963, c. 73 (C. 47:1A-1 et. seq.) as amended and supplemented; any other statute; resolution or either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

However, under our rules of construction and the stated policy purposes of the Right to Know Law we do not construe the legislation to refer to this portion of the statute by citing "section 2 of P.L. 1963, c. 73 (C. 47:1A-2)" in the Unclaimed Property Act (N.J.S.A. 46:30B-76.1). Indeed, we are enjoined by N.J.S.A. 47:1A-1 to construe "any limitations on the right of access" in the amended and supplemented Right to Know Law "in favor of the public's right of access." Thus, we are left with the Unclaimed Property Act referring to an unspecified portion of the Right to Know Law which no longer exists, which calls into question the validity of this section of the Unclaimed Property Act.

Furthermore, the provisions of the Right to Know Law trump those of New Jersey's Unclaimed Property Act not only because the Right to Know Law became effective on July 7, 2002, later than the Unclaimed Property Act on July 1, 2002, but because of the clear and strong public policy behind the Right to Know Law. In general, a new law altering fundamental assumptions relied upon by the old law supersedes earlier inconsistent statutes. New Jersey State Benevolent Assoc. of New Jersey, Inc. v. Town of Morristown, 65 N.J. 160 (1974) (citing Board of Education v. Tait, 81 N.J. Eq. 161 (E. & A. 1913)); Two Guys from Harrison, Inc. v. Furman, 32 N.J. 199, 223-225 (1960); and Mahr v. State, 12 N.J. Super. 253, 261-262 (Ch. Div. 1951)). "If the later act prescribes a new scheme or approach it will supersede a prior treatment of the matter, especially if the policies of the statutes cannot coexist." Two Guys from Harrison, supra (32 N.J. at 278) (citing De Ginther v. New Jersey Home, 58 N.J.L. 354, 358 (E. & A. 1895)). The policies of the Right to Know Law and the confidentiality provision of New Jersey's Unclaimed Property Act appear inconsistent, as the Right to Know Law seeks to provide the public with access to public

records, while the 2002 amendments to N.J.S.A. 46:3B-76 and references to N.J.S.A. 46:3B- 76.1 and its confidentiality provisions in the Unclaimed Property Act would attempt for the first time to limit access to amounts held under life insurance and annuity proceeds. Because the policies underlying these statutes are in conflict, the Right to Know Law, is entitled to precedence over the Unclaimed Property Act's ambiguous provisions regarding insurance and annuities. The public had a right to view records of the amounts and still has a right to the records at issue pursuant to the Right to Know Law. Because any limitations on the right of access "shall be construed in favor of public access," N.J.S.A. 47:1A-1, the now inconsistent provision in New Jersey's Unclaimed Property Act cannot prevail. " Williamson v Treasurer of New Jersey , supra.

In North Jersey Newspapers Company v Passaic County Board of Chosen Freeholders 127 NJ 7 (1992) the Supreme Court in examining the Right to Know Law and common law right to know recognized the traditions of openness and hostility to secrecy in government. The Court held:

> We are a society committed to openness in government. Our courts stand ready to enforce the social policy established by our Legislature on behalf of the public in this area. We do not believe, however, that the Legislature has yet transposed into the public prism every detail of information that public bodies assemble. We believe that what the Legislature has in mind when enacting the Right- to- Know Law was full and unrestricted citizen access to all records that would allow public involvement in most aspects of government. "Simply stated, that public interest is in access to sufficient information to enable the public to
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> understand and evaluate the reasonableness of the public body's action." South Jersey Publishing Co. v New Jersey Expressway Authority 125 NJ 478, 494-95 (1991).
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> North Jersey Newspapers 127 NJ at 17.

The Supreme Court's decision in Irval Realty v Board of Public Utility Com'rs 61 NJ 355 , 294 A. 2d 425 (1972) sets forth the duty of government to supply requested documents. In Irval Realty, an action was brought for an order to inspect and copy accident reports by the Board of Public Utility Commissioners and those filed by a gas company. The Supreme Court opinion, written by Justice Mountain, held that the citizens were entitled to examine such reports, either under the Right to Know Law or pursuant to the common-law right of citizens to inspect public records.

The Supreme Court held:

> A person seeking access to public records may today consider at least three avenues of approach. He may assert his common law right as a citizen to inspect records; he may resort to the Right to Know Law, NJSA 47:1A-1 et seq., or, if he is a litigant, he may avail himself of the broad discovery procedures for which our rules of civil practice make ample proof.
> 292 A. 2d at 428.

The Supreme Court in Irval Realty, supra, further wrote:

> "At common law a citizen had an enforceable right to require custodians of public records to make them available for reasonable inspection and examination. It was, however, necessary that the citizen be able to show an interest in the subject matter of the material he sought to scrutinize. Such interest need not have been purely personal. As one citizen or taxpayer out of many, concerned with a public problem or issue, he might demand and be accorded access to public records bearing upon the problem, even though his individual interest may be slight....
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> The Right to Know Law, NJSA 47:1A-1 et seq. seems to require no such showing. Its intention, as we read the statute, is to afford broad access to public records to all citizens, whether or not they are able
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> to demonstrate any personal or particular interest in the material which they seek to examine. In support of this conclusion we note in the first place that the statute itself contains no requirement of personal or other interest. On its face it applies to every citizen alike. Secondly, it seems clear that such was the interpretation placed upon it at the time of its enactment."
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> 294 A.2d at 428.

Any citizen is entitled to copy or look at traffic tickets under each of the three avenues of access under Irval Realty.

Justice O'Hern concluded in North Jersey :

> "To repeat what we said in South Jersey Publishing, a popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance. and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." [124 NJ at 491-92 (quoting Letter to W.T. Barry, Aug. 4, 1822, in 9 James Madison, Writings of James Madison 103 (G. Hunt ed. 1910)).]

North Jersey, 127 NJ at 19.

Other New Jersey statutes make it clear that there must be clear and

free public access to information.

All public records requested should be compelled. In New Jersey, courts have long recognized a common law right to public information. Polillo v Deane 74 NJ 562 , 379 A.2d 211 (1977)

Right to know law is paramount

The Supreme Court in ***Laufgas v. NJ Turnpike Authority*** 156 NJ 436 (1998) decided that the Right to Know Law supersedes other conflicting laws.

POINT II

THE COMMON LAW RIGHT TO KNOW ALLOWS ALL INTERESTED CITIZENS ACCESS TO PUBLIC DOCUMENTS.

Our Courts have increasingly expanded the scope of police-related documents the public may review and copy. The Appellate Division (Judges Stern, JH Coleman and Keefe) compelled the release of police records in Shuttleworth v City of Camden, 258 NJ Super. 573 (App. Div. 1992). On November 27, 1986, Mark Watson was shot to death while in the custody of Camden police officers. A subsequent internal investigation was conducted by the police and by the county prosecutor. Between February, 1987 and November, 1988, Courier Post reporter Ken Shuttleworth unsuccessfully sought access to the investigative files and reports. Finally, Shuttleworth and the newspaper's publisher, Southern Jersey Newspapers, Inc., applied to the Law Division for access and review of the police files and the autopsy report. Their complaint enumerated, among other items, all reports related to Watson's arrest and the related firearm discharges that resulted in his death and the wounding of two police officers.

The Appellate Division in Shuttleworth v City of Camden observed that the Right to Know Law embodies a policy which promotes unrestricted public access to public records. If a document is a "public record" then access is absolute unless a specific

exception applies. Under the statute, a "public record" is a document required by law to be made, maintained or kept on file by a public body.

The court in Shuttleworth v City of Camden found that under the common law almost every document recorded, generated or produced by public officials, whether or not required by law, is a "public document." The Appellate Division stated that there was little doubt that the materials sought by Shuttleworth met the common law definition of "public record." Therefore, the issue before the court was whether the public's interest in disclosure outweighed the government's need for confidentiality.

The court in Shuttleworth v City of Camden acknowledged that there is a real need to deny access during an ongoing investigation or where the protection of witness information or identity is at stake, but once an investigation closes, the same values do not survive a balancing of interests.

The appeals court in Shuttleworth also rejected the argument that, under the medical examiner's own regulations, Shuttleworth and the publisher were not "persons with a proper interest" who were entitled to a copy of the autopsy report. The court noted that the power of an administrative agency to restrict Right to Know Law access is limited to reasonable time and place restrictions and that they can deny access only when it is necessary for the protection of the public interest. But the regulation by itself cannot control the common law disposition of the disclosure issue. Since no statute clearly bars or provides authority to bar all public access to an autopsy report, and since New Jersey favors access to public documents while limiting regulatory restrictions to access, the appeals court declined to read any regulatory scheme as preventing common law disclosure where the balance of relevant factors sustains such access. Shuttleworth, Id.

Police records and investigative reports have never been privileged. The public records requested should be provided.

The Appellate Division recently held that under the common law right to know an interested person could even require a governmental entity to provide

requested information on a computer disc. In Higg-a-Rella, Inc. v. County of Essex 276 NJ Super. 183 App. Div. 1994) the Appellate Division held that although the computerized master tape of municipal property tax assessments generated and maintained by the Essex County Board of Taxation from the individual municipal lists is not a public record under the Right-to-Know Law because it is not required to be maintained, it is a public record under common law because it is prepared and maintained by the county board. Plaintiffs were entitled to a computer readable electronic copy of the tape, subject only to payment of a reasonable fee, since the availability of this public information should not be limited by its technological form.

Relying on the public-records doctrine, plaintiffs Higg-a Rella, trading as State Information Services, sought a computer-readable copy of the Essex County property tax assessment lists from the Essex County Board of Taxation. The board agreed to provide a copy of the official lists on paper but refused the demand for an electronic copy.

Under the common law, however, the electronic tax assessment records maintained by the county board are public records. The common-law definition of a public record is very broad, including "almost every document recorded, generated, or produced by public officials, whether or not "required by law to be made, maintained or kept on file,' as required under the [Right-to-Know Law]." Shuttleworth v. City of Camden, 258 N.J. Super. 573, 582 (App. Div. 1992). Accordingly, by preparing and maintaining a consolidation of the various municipal assessment lists, the county board created a public record.

The Higg-a-Rella court held that the county board's electronic record of all the municipal assessment lists is a public record under the common law because it is used by the board as an expeditious way to print any particular official municipal assessment list. The electronic records kept by the county board of taxation are not simply preliminary work product used to prepare the required lists. They are another form of the already-public assessment lists. As it has been concluded that this

particular set of assessment records is a common-law public record, availability of such a record should not be limited by its technological form.

It has long been judicial policy to respect and recognize advances in technology. Moore v. Bd. of Freeholders Mercer Cty., 76 N.J. Super. 396, 408 (App. Div.), aff'd 39 N.J. 26 (1962), provided that:

> To ignore the efficacy and practical worth of[photocopying] equipment, and to compel plaintiff to resort to laborious and time-consuming hand-copying, would substantially impair their right to inspect and copy.
> To prohibit photocopying with proper equipment is to ignore the significant progress which our generation has witnessed.

In affirming, the Supreme Court in Moore modified the ruling only to the extent that it required the public official to furnish the photocopy at a reasonable cost, thus preventing possible damage to the official records through the use of a private photocopier.

The Higg-a-Rella court held that at common law, access is to be permitted unless outweighed by a countervailing privacy interest. But here, as in Moore, no privacy interest exists because the exact records are freely available on paper instead of magnetic tape. Since plaintiffs are willing to pay the county board's reasonable cost of furnishing the electronic copy, they have the right to obtain it.

The Higg-a-Rella court reversed and remanded. The Defendant Municipality was required to provide the records on a nominal cost basis.

Common law standards must guide the court in balancing our traditions of openness and hostility to secrecy in government against the government's asserted need for confidentiality. Ibid. That the Legislature has considered but failed to enact legislation which explicitly recognizes the public's right to copy the government's computer records does not indicate a reluctance on the part of the legislature to accord citizens the right to copy computer records. Moore, supra, at 404.

There is no dispute that traffic tickets and criminal complaints are public documents.

Our courts have looked to decisions under the Federal Freedom of Information Act and similar state statutes to decide common law values. McClain, supra, at 356. See Yeager v. Drug Enforcement Admin., 678 F. 2d. 315 (DC Cir. 1982), Petroleum Information Corporation v. U.S. Interior Dept., F. 2d 1029 (D.C. Cir 1992),

As the considerations justifying confidentiality become less relevant, a party asserting a need for public records has a lesser burden of showing need. If the reasons for maintaining confidentiality do not apply at all, or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a compelling need. McClain, supra, at 362. Ordinarily, only an assertion of citizen or taxpayer status and a showing of good faith is necessary for the production of common law public records. Loigman v. Kimmelman, 102 N.J. 98,104 (1986).

In NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 N.10, 95 S.Ct. 1504, 44 L.Ed. 2d 29 (1975), the Supreme Court made clear that an individual's rights under the FOIA are neither increased or decreased by reason of the nature of his particular interest in the materials sought. Our common law provides that unless the government has an interest in confidentiality, public records should be released to any citizen who intends to use them for a legitimate purpose.

Respectfully submitted,

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KAV/