SARAH MCLAUGHLIN; JOSEPH COHN; and the FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, INC., Plaintiffs, v. ESSEX COUNTY COLLEGE; and KAREN BRIDGETT, Associate Director of Essex County College in her official capacity as records custodian, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART ESSEX COUNTY Docket Number: Civil Action (OPRA)

BRIEF IN SUPPORT OF ORDER TO SHOW CAUSE PURSUANT TO R. 4:67-1 (A)

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PRELIMINARY STATEMENT

The Foundation for Individual Rights in Education ("FIRE") is a nonprofit and nonpartisan organization that works to defend civil liberties on the campuses of universities and colleges across the United States. Through the use of investigative reporting, commentary in media, and correspondence to collegiate institutions that have violated individual rights, FIRE seeks to defend freedom of speech and academic freedom in institutions of higher education, where "the vigilant protection of constitutional freedoms is nowhere more vital." Healy v. James, 408 U.S. 169, 180 (1972) (internal citation omitted).

Essex County College ("Essex") in Newark, New Jersey is one such institution. After adjunct professor Lisa Durden debated a "Black Lives Matter" event on a prime-time appearance on Fox News — which did not reference her relationship with Essex — Essex president Anthony E. Munroe claimed to have been "inundated" with criticism that compelled him to terminate Durden's employment.

This action is brought under the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 to –13, and the common law right of access, because Essex, a public institution of higher education, has denied FIRE access to records that would allow it to explore the circumstances surrounding Durden's termination and the criticism Munroe claims caused him to violate a faculty member's rights to free speech and academic freedom.

STATEMENT OF FACTS

Plaintiffs rely upon the facts set forth in the verified complaint and the certifications of Sarah McLaughlin, Marieke Tuthill Beck-Coon, and Joseph Cohn, and upon the exhibits attached thereto.

On June 6, 2017, Lisa Durden, at the time an adjunct professor at Defendant Essex County College, appeared in a segment on Tucker Carlson's Fox News program, debating whether it was appropriate for a Black Lives Matter ("BLM") group to hold an event that excluded white people from attending. Complaint ¶¶ 9, 10. Durden was not a member of the BLM group, but she appeared on Carlson's show in order to provide a perspective contrasting Carlson's views. Complaint ¶ 9.

At the time of her appearance, Fox News did not mention Durden's relationship with Essex, or mention Essex at all. Complaint ¶ 10. Two days after her appearance, Essex suspended Durden and subsequently terminated her employment. Complaint ¶ 11. In a June 23 statement, Essex's president, Anthony E. Munroe, issued a statement citing a "responsibility to investigate" any "outpouring of concern regarding [the] student body," and he claimed that Essex had been "immediately inundated with feedback from students, faculty and prospective students and their families expressing frustration, concern and even fear that the views expressed by [Durden] would negatively impact their experience on campus." Complaint ¶ 13, Exhibit 1.

FIRE is a nonprofit and nonpartisan organization that works to defend civil liberties on campus, including the freedom of speech of adjunct faculty members like Durden. Although no amount of "outpouring of concern" or "feedback" could justify an abridgment of a faculty member's rights to free speech and academic freedom, FIRE sought to ascertain the veracity of Munroe's claims and the circumstances surrounding Durden's termination by issuing a narrow request under OPRA.

FIRE's first OPRA request was submitted by a senior program officer, Plaintiff Sarah McLaughlin, on July 13, 2017, on behalf of FIRE. Complaint ¶ 15, Exhibit 2. When Essex failed to respond, FIRE sent a second request on July 31, seeking the same records. Complaint ¶ 16, Exhibit 3. On August 4, FIRE's director of litigation, Marieke Tuthill Beck-Coon, Esq., sent a letter to Essex's records custodian on behalf of FIRE and McLaughlin. Complaint ¶ 17, Exhibit 4. Beck-Coon wrote: "Essex County College has failed to respond to our requests. Per law, failure to respond serves as a constructive denial of our request." Id.

On August 14, Defendant Bridgett emailed Beck-Coon and McLaughlin and acknowledged her receipt of the first request and August 4 letter. Complaint ¶ 18, Exhibit 5. This was the first time Plaintiffs received a response to its OPRA requests. Id. Bridgett sought an extension of twenty business days to respond to Plaintiffs' requests, which Beck-Coon granted. Id. On September 13, Bridgett sought another extension of twenty business days, which Beck-Coon again granted. Complaint ¶ 19, Exhibit 6. The pattern continued and on September 29, Bridgett asked for yet another extension until October 20. Complaint ¶ 20, Exhibit 7. Beck-Coon granted the request on October 3, but warned Bridgett that this would be the last extension. Id. Bridgett acknowledged consent to this extension by email later that day. Id.

FIRE also issued a third request for records on October 11, seeking records immediately accessible to the records custodian related to Essex's efforts to respond to Plaintiffs' prior request. Complaint ¶ 21, Exhibit 8.

On October 20, Bridgett requested by email a fourth extension to respond to Plaintiffs' requests to October 27. Complaint ¶ 22, Exhibit 9. FIRE did not reply to this request, and on November 3, Essex's general counsel, Joy Tolliver, called Beck-Coon. Complaint ¶ 23, Exhibit 10. Tolliver explained that Essex was having difficulty responding to OPRA requests and sent an

email to Beck-Coon memorializing their conversation. Id. Tolliver told Beck-Coon that she anticipated providing a response by November 20, 2017. Id. Beck-Coon responded the same day agreeing to this extension of time to respond to FIRE's requests. Complaint ¶ 24, Exhibit 10.

On December 19, with no communication from Defendants since November 3, and having received no responsive records as a result of Plaintiffs' requests, Beck-Coon again emailed Tolliver seeking Essex's compliance with OPRA. Complaint ¶ 26, Exhibit 11. Beck-Coon's December 19 email requested that Defendants produce records by the end of the week, added Plaintiff Cohn as a requestor, and explained that the requests should also be construed as requests under the common law right of access. Id.; see also Cohn Cert. Beck-Coon warned that Plaintiffs were prepared to seek judicial intervention. Exhibit 11.

In the 174 days since Plaintiffs' first request, Essex has failed to produce a single responsive record. Beck-Coon Cert. Instead, Essex has asked for five extensions to respond, and it has been granted four. Its most recent promise to respond by November 20 passed without production of records or a request for a sixth extension. Complaint ¶ 27. Plaintiffs' repeated attempts to procure compliance have been met with silence. Complaint ¶¶ 25, 27.

LEGAL ARGUMENT

I. DEFENDANTS ARE IN VIOLATION OF OPRA

A. OPRA Requests Are Adjudicated in a Summary Proceeding

Disputes over a public agency's compliance with an OPRA request are summarily adjudicated. "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 Cty. Prosecutor's Office, 358

N.J. Super. 373, 378 (App. Div. 2003). The instant action involves the failure of a public agency to comply with its obligations under OPRA and the common law right of access. The request for an order to show cause is supported by a verified complaint, the relevant documents have been provided by way of certification, and the relevant facts cannot reasonably be disputed. Accordingly, the Order to Show Cause should be granted so that this matter may proceed in a summary manner. R. 4:67-2(a).

B. The Requested Documents Are Government Records That Must Be Produced Under OPRA

OPRA is intended 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 Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean Cty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). OPRA mandates that the records of government agencies "shall" be made available for inspection or copying in order to facilitate public oversight of government affairs. N.J.S.A. 47:1A-1. Any statutory limitations on the right of access "shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1. Accordingly, records are presumptively open and "[t]he public agency shall have the burden of proving that the denial of access is authorized by law." N.J.S.A. 47:1A-6.

In keeping with the vital public interests at stake, OPRA's definition of the "government records" to which the public must be granted access is sweepingly broad. As defined by N.J.S.A. 47:1A-1.1, records within the meaning of OPRA include:

> 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 . . . or that has been received in the course of his or its official business . . . .
>
> [N.J.S.A. 47:1A-1.1.]

The records sought by Plaintiffs fall squarely within this definition. Defendants cannot dispute that they are "officer[s], . . . agenc[ies] or authorit[ies] of the State," and all of the documents Plaintiffs have requested are "maintained or kept on file . . . or . . . [have] been received . . . in the course of [their] official business." Plaintiffs' requests seek "records comprising, reflecting, or referencing" particular "communications, expressions, or 'feedback'" that had been identified in a statement by the institution's president — a statement so important that Essex released it in both text and video format. Complaint ¶¶ 12, 13, 15, Exhibits 1, 2. Plaintiffs also seek records relating to Essex's response to Plaintiffs' OPRA requests, which would shed light on what action, if any, Essex undertook to respond to Plaintiffs' earlier request and its motivations in doing so. Exhibit 8.

Since OPRA clearly applies to these requests, the statute mandates that access "*shall*" be granted. N.J.S.A. 47:1A-1 (emphasis added). Even if Defendants could now summon some substantive objection to producing the records, they cannot meet their burden of proving that the denial of access is authorized by law. N.J.S.A. 47:1A-6. Because Defendants cannot meet this burden, OPRA mandates that the records be immediately produced. Id.

C. Essex County College's Refusal to Promptly Provide Access Is a Constructive Denial of Access in Violation of OPRA

"OPRA's framework calls for quick action" on the part of government agencies, which "must respond promptly to requests for records," and "citizens are entitled to swift access to public records . . . ." Mason v. City of Hoboken, 196 N.J. 51, 69 (2008). The statute requires the agency to grant "[i]mmediate access" to certain records, but the agency must otherwise provide access "as soon as possible, but not later than seven business days after receiving the request . . . ." N.J.S.A.

47:1A-5(e), -5(i). Recognizing that some requests, or the nature of government record-keeping, may not permit an expeditious response, New Jersey courts permit and encourage parties to either agree to extend the seven-day requirement or negotiate a resolution that avoids substantial disruption of regular operations. Mason, 196 N.J. at 78; N.J.S.A. 47:1A-5(g). Under OPRA, a requestor is constructively denied access once this seven-day period passes. N.J.S.A. 47:1A-5(i) ("The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.").

Here, Plaintiffs repeatedly granted Defendants good faith extensions to respond to the requests. Essex utilized these good faith extensions to place Plaintiffs in a holding pattern, asking for brief (but nearly identical) extensions that appear modest at first glance, but are anything but modest in the aggregate. Even then, once Essex was informed that Plaintiffs would not grant additional extensions, Essex still sought and was granted an additional extension, and advised Plaintiffs when the responsive records could be made available. Essex failed to produce the records at that time and did not provide any explanation to Plaintiffs. Accordingly, by operation of N.J.S.A. 47:1A-5(i), Defendants' failure to make the records available by the estimated time is deemed a denial of access.

Even if access were not constructively denied, Defendants' failure to *promptly* produce a single responsive record independently breaches OPRA. N.J.S.A. 47:1A-5(i) requires a records custodian to make the records available "as soon as possible," and N.J.S.A. 47:1A-5(g) requires records custodians to "promptly comply with a request" to copy a record. These requirements are in keeping with the statute's purpose of facilitating effective oversight of government affairs, as excessive delay may thwart the public's ability to engage in the oversight for which OPRA exists. If public agencies can continue to delay production of records, the public interest in the subject

matter may wane, or the timeframe in which action might be taken to correct an agency's action might lapse.

Defendants' intransigence in failing — for over six months — to produce records that may subject its president to criticism, and in subsequently adopting a strategy of radio silence when Plaintiffs persisted in their requests, does not come close to fulfilling the mandate for "prompt" compliance with OPRA. Defendants have failed to produce a single record, even in response to the October 11 request for records pertaining to Defendants' efforts to locate records responsive to Plaintiffs' earlier request, which must certainly be immediately available to the record custodian. A six-month delay when OPRA requires compliance within seven days is neither "prompt" nor "as soon as possible."

D. Essex's Failure to Provide Specific Reasons for Denying Access Is a Violation of OPRA to the Prejudice of Plaintiff and This Court

Defendants further independently breached OPRA by failing to enumerate any specific reasons for failing to timely respond. OPRA explicitly requires records custodians to, using the request form mandated by OPRA, "indicate the specific basis" of any inability to "comply with a request for access" and inform the requestor. N.J.S.A. 47:1A-5(g). "N.J.S.A. 47:1A-5(g) imposes upon the custodian the responsibility to 'indicate the specific basis' for the denial of access." Lagerkvist v. Office of Governor of State, 443 N.J. Super. 230, 235 (App. Div. 2015). The purpose of this requirement is abundantly clear here. Without an explicit objection, Plaintiffs can only guess which objections Defendants might have or might now interpose, prejudicing Plaintiffs' ability to efficiently apprise the Court of the parties' positions.[1]

[1] Members of the public should not be required to seek counsel and judicial intervention in order to compel a public agency to provide specific objections to a request, which is the bare minimum a public agency must do when responding to requests under OPRA.

Even were Essex to attempt to interpose specific objections at this late date, there are no substantive grounds on which Defendants would be justified in withholding responsive records. The records sought do not fall into any of the enumerated exemptions to OPRA. All records are public unless they fall within a specific exemption. N.J.S.A. 47:1A-1. The records sought herein relate to public criticism of a professor who appeared on a prime-time cable news show, which Essex publicly cited as motivating the institution's termination of that professor.

Because Essex has constructively denied access to the records by operation of N.J.S.A. 47:1A-5(i), failed to respond promptly to Plaintiffs' requests, and failed to interpose specific written objections in response to the requests, Defendants are in breach of OPRA's mandates on each of these points, and Plaintiffs are entitled to judgment on each.

II. THE COMMON LAW RIGHT OF ACCESS ALSO REQUIRES DEFENDANTS TO DISCLOSE THE RECORDS

In addition to OPRA, Essex is required to disclose public records in accordance with the common law right of access. "OPRA does not limit the common law right of access to government records," which provides a "definition of a public record [that] is broader than the definition contained in OPRA." Mason, 196 N.J. at 67. To the contrary, OPRA explicitly leaves the common law right of access intact. N.J.S.A. 47:1A-8 ("Nothing contained in [OPRA] shall be construed as limiting the common law right of access to a government record . . . .").

In order to claim a right of access under the common law, a plaintiff must establish three elements: "(1) the records must be common-law public documents; (2) the person seeking access must 'establish an interest in the subject matter of the material,' . . . ; and (3) the citizen's right to access 'must be balanced against the State's interest in preventing disclosure.'" Keddie v. Rutgers, 148 N.J. 36, 50 (1997) (internal citations omitted). Plaintiffs meet each of these elements.

First, the records are public documents subject to the common law right of access. When the legislature enacted OPRA, it specifically ensured that "[n]othing contained in [OPRA] shall be construed as limiting the common law right of access to a government record." N.J.S.A. 47:1A-8. To the contrary, the common law right goes beyond even OPRA's already broad range, generally providing access to a "wider array" of documents than the statute. Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 302 (2009) (citing Higg-A-Rella, Inc. v. Cty. of Essex, 141 N.J. 35, 46 (1995)). As the Supreme Court of New Jersey has explained, the common law right of access is potentially applicable to "almost every document recorded, generated, or produced by public officials whether or not required by law to be made, maintained or kept on file . . . ." Higg-A-Rella, 141 N.J. at 46 (internal quotation marks and citation omitted). Because Plaintiffs' requests seek records well within OPRA's broad definition, it follows that the records are also of the class subject to the common law right of access.

As to the second requirement, establishing an interest in the subject matter of the material sought is not arduous. "The interest does not have to be purely personal, but rather '[a]s 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.'" S. Jersey Pub'g Co. v. N.J. Expressway Auth., 124 N.J. 478, 487 (1991) (quoting Irval Reality, Inc. v. Bd. of Pub. Util. Comm'rs, 61 N.J. 366, 372 (1972)). "For example, a newspaper's interest in 'keep[ing] a watchful eye on the workings of public agencies' is sufficient to accord standing under the common law." S. Jersey Pub'g Co., 124 N.J. at 487 (quoting Red Bank Register v. Bd. of Educ., 206 N.J. Super. 1, 9 (App. Div. 1985) (internal citation omitted)). The purpose for which the records are sought — evaluating a public college's rationale for infringing on a professor's right to free speech and academic freedom — is squarely within the

mission of FIRE, a nationally-recognized nonprofit watchdog organization dedicated to preserving the civil liberties of students and faculty in higher education.

Finally, the right of access weighs firmly in favor of disclosure. Essex's chief official cited public pressure as requiring him to violate the rights of a faculty member who spoke on national television concerning an issue of public interest. As the Supreme Court of the United States has stated, "[T]he precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Healy v. James, 408 U.S. 169, 180 (1972) (internal quotation and citation omitted). The public deserves to know what pressure Essex County College's president faced and whether his actions were truly urged by the public at all, or whether they were instead animated by his own dislike of the professor's views, a desire to avoid public controversy, or some other motivating factor. Because of the importance of First Amendment rights such as free speech and academic freedom to campus and national discourse, administrators' decisions infringing upon these rights must be scrutinized.

III. PLAINTIFFS ARE ENTITLED TO ATTORNEY'S FEES

If the Court orders Defendants to produce either responsive documents or written reasons for the denial of access, the Court should find that Plaintiffs are the prevailing party and, under OPRA's fee-shifting arrangement, award Plaintiffs their reasonable attorney's fees and costs.

OPRA mandates an award of attorney's fees to a successful plaintiff. "A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. A plaintiff is a "prevailing" party where there is a judgment in their favor or where the plaintiff can establish that their lawsuit was a "catalyst" for the agency's eventual compliance with the law. Mason, 196 N.J. at 76.

Additionally, where an agency fails to provide a timely response to an OPRA request, "the burden shifts" to the agency "to prove that plaintiff's lawsuit . . . was not the catalyst behind the . . . voluntary disclosure." Mason, 196 N.J. at 79. In Mason, the Supreme Court of New Jersey recognized the "logical approach that custodians may obtain consent from requestors to extend the seven-business-day deadline in N.J.S.A. 47:1A-5(i)." Id. at 78 (citing Paff v. Bergen Cty. Prosecutor, GRC No. 2005-115 (N.J. March 15, 2006)). Where the agency does not respond within the seven-business-day time frame, "but voluntarily discloses records after a requestor files suit, the agency should be required to prove that the lawsuit was not the catalyst for the agency's belated disclosure." Mason, 196 N.J. at 76–77.

Here, the parties agreed to repeated requests to extend the deadline to respond. Essex provided a date by which it expected not only to respond but also to produce responsive records. That date has come and gone without any further response and nary a record. Because Essex did not respond within the period permitted, Defendants bear the burden of demonstrating that this lawsuit was *not* the catalyst for any response it now provides, whether voluntarily or by order of this Court.

CONCLUSION

OPRA provides an important check on government affairs, subjecting the activities and claims of the authorities to scrutiny of the public eye. When agencies skirt their obligations under public records laws by failing to timely respond, or by failing to allocate sufficient resources to respond to those requests, they frustrate the ability of the public to provide that oversight. If a public official can avoid scrutiny just long enough, he can hope that the public interest will fade by the time the truth of his conduct is revealed.

This oversight is particularly critical when scrutinizing public officials' claims that they face specific calls to violate the civil liberties of campus constituents.

Respectfully submitted,

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