

February 3, 2016

VIA HAND DELIVERY

Mark Neary, Clerk
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

**Re: *In the Matter of the New Jersey Firemen's Association
Obligation to Provide Relief Applications under the Open
Public Records Act***

Supreme Court Docket No.: 077097

Appellate Division Docket No.: A-2810-13T2

Dear Mr. Neary:

This firm represents Third-Party Plaintiff-Respondent, Jeff Carter, in the above-referenced matter. Enclosed for filing is an original and four (4) copies of the following:

1. Third-Party Plaintiff/Respondent's Brief in Opposition to Petition for Certification;
2. Third-Party Plaintiff/Respondent's Brief and Appendix filed with the Appellate Division on May 19, 2014;
3. Third-Party Plaintiff/Respondent's Reply Brief and Appendix filed with the Appellate Division on July 17, 2014; and
4. Certification of Service.

Please file same and return one (1) "filed" copy back to the undersigned in the enclosed self-addressed stamped envelope provided.

Thank you for your courtesies regarding this matter.

Respectfully submitted,


CJ GRIFFIN
CJG/jj

Enclosures

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IN THE MATTER OF THE NEW
JERSEY FIREMEN'S
ASSOCIATION OBLIGATION TO
PROVIDE RELIEF APPLICATIONS
UNDER THE OPEN PUBLIC
RECORDS ACT.

Jeff Carter,

Third-Party
Plaintiff/Respondent,

vs.

JOHN DOE,

Third-Party Defendant.

ON APPEAL FROM THE FINAL JUDGMENT OF
THE SUPERIOR COURT, APPELLATE
DIVISION

Docket No. A-2810-13T2

Sat Below:

Hon. Carmen Messano, P.J.A.D.
Hon. Mitchell E. Ostrer, J.A.D.
Hon. John R. Tassini, J.A.D.

Civil Action

CERTIFICATION OF SERVICE

I hereby certify that on February 3, 2016, an original and four (4) copies of Plaintiff-Respondent's Brief in Opposition to Petitioner's Petition for Certification and four (4) copies of the Plaintiff-Respondent's Appellate Division briefs and appendixes were Hand Delivered to Mark Neary, Clerk of the

Supreme Court of New Jersey, 25 West Market Street, Trenton, New Jersey 07611. One copy of the Petition was e-mailed and two copies of the Petition were sent via UPS Overnight Mail to:

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

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Date: February 3, 2016

By:



CJ GRIFFIN

SUPREME COURT OF NEW JERSEY
DOCKET NO.: 077097

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Civil Action

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIFICATION

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PRELIMINARY STATEMENT

Petitioner New Jersey State Firemen's Association ("NJSFA") argues that, upon receipt of Respondent Jeff Carter's ("Carter") request for government records pertaining to relief benefits paid to John Doe, it had "no choice" but to file a declaratory judgment action seeking "judicial guidance" regarding how to respond to such a request "to protect the privacy of its membership." While the issue of public access to relief payment records has never been litigated, NJFSA's desire for a definitive ruling, although perhaps understandable from its perspective, is not unique to NJFSA; public agencies routinely receive requests for government records that have not yet been the subject of litigation. Nonetheless, their obligation under the Open Public Records Act ("OPRA") is to either grant access to the requested records or to state a "specific basis" for why they believe that access must be denied.

Initially, NJSFA denied Carter's request by citing OPRA's privacy provision. It then, however, rushed to court to ask a judge to approve its denial. While the trial court erred when it declined to hold that NJFSA's action was procedurally barred by OPRA and gave no reasons for doing so, the Appellate Division correctly held that OPRA precludes such a pre-emptive strike. This holding comports with Section 6, which expressly states that the right to institute "any proceeding" belongs "solely" to a requestor. In filing its action, NJFSA deprived Carter of several statutory rights that OPRA provides exclusively to

requestors, including the right to select the forum (Superior Court or the Government Records Council) in which to have the matter adjudicated.

Importantly, not only was NJFSA's declaratory judgment action barred by OPRA itself, but its action could have never led to the definitive "guidance" it says it wanted "not just in regard to Mr. Carter and his quest, but more importantly in regard to [NJFSA's] membership as a whole." This is because long-standing precedent set forth by this Court in Burnett v. County of Bergen, 198 N.J. 408 (2009), mandates that where privacy is implicated, courts must engage in a "case by case" balancing test to determine whether records are accessible. Thus, the Appellate Division was correct in "individualizing" the "circumstances presented in this case" and considering Carter's unique interest (as a longtime member of the NJFSA) in knowing whether public funds were given to a person who had been discharged from public employment for having allegedly viewed child pornography on a fire district computer, so that Carter could utilize such information to advance policy changes within NJSFA. Simply put, there is no universal, unequivocal answer to NJFSA's inquiry regarding whether relief benefit records are exempt; instead, each and every time it receives a request for such records it must engage in a Burnett balancing test to determine whether to grant access to such records. If a requestor disagrees with NJFSA's decision, OPRA exclusively gives them the "right" to file an action in the forum of their

choice. If agencies are permitted to seek "guidance" from the courts regarding even a tiny fraction of the requests they receive, courts will be flooded with cases that might never have been filed by those who originally sought the records.

Even though OPRA's plain language expressly provides that the right to institute any proceeding belongs "solely" to the requestor, because of Carter's counterclaim the Appellate Division ultimately applied the Burnett factors to Carter's request and thus NJFSA essentially received the very relief it sought in its lawsuit: judicial guidance as to the accessibility of relief payment records. While the NJFSA obviously disagrees with the ultimate outcome in this case, the application of settled principles of law to the specific facts of a case does not constitute a "special reason" warranting this Court's discretionary review. Moreover, because the Burnett balancing test must be applied on a case by case basis in response to future requests for relief payment records, the Appellate Division's decision does not have any universal impact that raises an issue of general importance that must be addressed by this Court. In addition, NJSFA's attempt to characterize the concurrence as a dissent cannot justify certification because the concurrence agreed with both the holdings and reasoning of the majority as applied to the facts of this case. Finally, because the Appellate Division's decision cannot be deemed "palpably wrong, unfair or unjust," the interests of justice do not warrant this Court's review.

LEGAL ARGUMENT

I. CERTIFICATION SHOULD BE DENIED BECAUSE THERE IS NO "SPECIAL REASON" FOR THIS COURT'S DISCRETIONARY REVIEW

In deciding whether to hear an appeal, this Court is guided by the standards in Rule 2:12-4, which instructs that "[c]ertification will not be allowed on final judgments of the Appellate Division except for special reasons." Rule 2:12-4 provides a discretionary grant of certification under three limited circumstances: (1) where the appeal "presents a question of general public importance which has not been but should be settled by the Supreme Court"; (2) where the decision below conflicts with the precedent of a same or a higher court "or calls for an exercise of the Supreme Court's supervision"; and (3) in any other situation "if the interest of justice requires." Ibid.

With regard to the first factor, there can be no unsettled question of public importance where the Appellate Division merely applied established case law to the specific facts of the case. See Bandel v. Friedrich, 122 N.J. 235, 237 (1991). Next, as to the second factor, cases generally do not implicate the Court's "supervisory powers" unless they conflict with another decision of an appellate court or otherwise "transcend[] the immediate interests of the litigants." See Mahony v. Danis, 95 N.J. 50, 51 (1983). Finally, appeals do not warrant "invocation of the Court's certification authority in the interest of justice" unless the decision below is "palpably wrong, unfair or unjust." Bandel, supra, 122 N.J. at 237. "Typically, a case

for certification encompasses several of the relevant factors controlling the exercise of the Court's discretionary appellate jurisdiction." Mahoney, supra, 95 N.J. at 53.

Here, as argued in detail below, none of the factors are present to warrant review by this Court. The Appellate Division applied longstanding precedent of this Court to decide whether records are exempt under OPRA's privacy provision; NJFSA simply disagrees with the outcome and wants to re-litigate the matter. Though there has never been an appellate ruling on whether a public agency may file a declaratory judgment action against a records requestor, this is because public agencies are not filing such actions because on its face OPRA expressly limits the right to institute a proceeding "solely" to a requestor. Accordingly, there is no issue of general importance that must be resolved by this Court and NJFSA has not established that the Appellate Division's decision is in any way "palpably wrong, unfair or unjust." Bandel, supra, 122 N.J. at 237. For the reasons argued below, NJFSA's Petition for Certification should be denied.¹

II. THE APPELLATE DIVISION'S DECISION REGARDING THE RELIEF PAYMENT CHECKS WAS BASED ON WELL-SETTLED LAW

Certification should be denied where a case involves an "intensely factual situation, in no way implicating 'an

¹ Because the Parties have recently settled the amount of attorneys' fees due in this matter, the issue of whether the Appellate Division erred in concluding that Carter was a prevailing party entitled to fees is now moot.

unsettled question of general public importance.'" Bandel, supra, 122 N.J. at 237-38 (quoting In re Route 280 Contract, 89 N.J. 1 (1982)). That is precisely the case here where the NJFSA has conceded from the very beginning of its litigation that Burnett v. County of Bergen, 198 N.J. 408 (2009), is the controlling case where privacy issues are involved.

The alleged error that NJSFA complains of and seems perplexed by is that the Appellate Division "viewed this case as only a dispute between the [NJSFA] and Mr. Carter over John Doe's relief application" and argues that "this narrow, individualized approach by the Appellate Division changed the nature of this litigation and prevented the correct outcome." What NJSFA fails to recognize, however, is that an "individualized" approach is precisely what is required by Burnett. Where OPRA's privacy provision is at issue, Burnett compels courts to engage in "a balancing test that weighs both the public's strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy." 198 N.J. at 427. This is exactly what the Appellate Division did when it considered "the circumstances presented in this case" and Carter's unique interest in John Doe's relief award checks. (Pet. App. 39). The primary error complained of by NJFSA, therefore, is not an error at all. Rather, it is precisely what this Court mandated nearly seven years ago when it adopted a "case by case" approach where privacy is involved.

A. The Appellate Division's Decision Is Not Palpably Wrong, Unfair, Or Unjust

NJFSA's Petition is largely a restatement of the arguments it made below regarding its position that the Burnett balancing factors weigh against disclosure and that the relief payment checks to John Doe² should not be disclosed. Its mere dissatisfaction with the Appellate Division's application of Burnett to a specific set of facts does not warrant review by this Court because the decision cannot be said to be "palpably wrong, unfair, or unjust." Bandel, supra, 122 N.J. at 237-238. The Appellate Division engaged in the Burnett balancing test and cautiously weighed and considered each of the seven factors in deciding whether to grant access to the relief payment checks.³

As it did below, NJFSA argues in its Petition that firefighters are a "proud lot" and that needy firefighters might not avail themselves of relief benefits if they know that there is a chance that their receipt of benefits would be publicly disclosed. The Appellate Division carefully considered this argument and even held that the first four Burnett factors

² While NJFSA claimed that John Doe's identity could not be revealed without violating his privacy, it filed an action in court without redacting John Doe's real name from the records.

³ NJFSA focuses its Petition on relief applications, but the decision below pertains only to the checks paid to John Doe. Further, while Carter abandoned any claim to the applications in his counterclaim, he also agreed that those records could have been redacted to protect any financial or medical information contained within them. OPRA favors redaction over the complete denial of access, N.J.S.A. 47:1A-5(g), and NJFSA has stated all along that the production of relief applications in redacted form would be permissible.

weighed slightly in favor of non-disclosure.⁴ (Pet. App. 36-37). However, that is not the end of the inquiry; courts must also consider the interests of the requestor and the public policies that are advanced by the request itself. The Appellate Division considered the unique factual circumstances of this case, where the requested relief payment check was issued to a man who had been accused of viewing child pornography on a fire district computer and who had been removed from his public employment for "conduct unbecoming of a township employee." (Pet. App. 38-39). It also considered Carter's wholesome interest, as a longtime member of NJFSA, in overseeing NJFSA's decision-making process. Indeed, Carter wishes to advocate for change if it is true that someone unfit for public office was receiving relief funds and wants to work to insure that funds are reserved for deserving firefighters who have a legitimate financial need, not a hardship created by their own inappropriate conduct. Accordingly, the Appellate Division correctly held that factors six and seven "weighed heavily in favor of disclosure" given the lack of any outside review of NJFSA's relief payment awards and the lack of transparency regarding its decision-making process. (Pet. App. 39).

Thus, the Appellate Division correctly applied Burnett and judiciously considered each of the seven factors, finding that

⁴ John Doe was personally served a third-party complaint, but (a) chose not to answer, and (b) chose not to assert any interest in non-disclosure in the proceedings below to advocate for his own privacy.

they weighed in favor of access. NJFSA simply disagrees with the end result, but has not demonstrated that the decision is "palpably wrong, unfair, or unjust." Bandel, supra, 122 N.J. at 237-38. Even in Burnett, where disclosure of millions of social security numbers was at stake and access was denied because the requestor conceded that he had no need for the social security numbers whatsoever, this Court acknowledged that access might have been granted under different factual circumstances. 198 N.J. at 435 ("Were a similar request made by an investigative reporter or public interest group examining land recording practices of local government, this factor would weigh differently in the balancing test."). As an NJFSA member, Carter has a very strong interest in monitoring the expenditure of public funds to a man whose hardship was created by his own public misconduct, so the balancing test certainly weighs differently here than it did in Burnett.

NJFSA attempts to broaden the scope of the Appellate Division's decision, arguing that the interests of justice mandate review by this Court because going forward firefighters will have no privacy rights. The Appellate Division made clear, however, that its decision was limited to the records at issue and the "circumstances presented in this case." (Pet. App. 39). Burnett itself would preclude any ruling that all relief payment records were *per se* accessible to every requestor. Thus, the decision does not have any widespread consequences and only reminds agencies that Burnett requires them to consider not only

the privacy interests at stake, but also the interests of the requestor and how the request advances transparency.

III. THE APPELLATE DIVISION'S RULING REGARDING THE DECLARATORY JUDGMENT ACT DOES NOT WARRANT REVIEW BY THIS COURT

A. This Court's Review Would Not Provide Relief To NJFSA

As a preliminary matter, there is no additional relief NJFSA could obtain by having this Court review the Appellate Division's decision that a public agency is barred from bringing a declaratory judgment action against a records requestor. First, because Carter filed a counterclaim, the Appellate Division ruled upon the substantive issue within NJFSA's declaratory judgment action; thus, NJFSA ultimately got the very relief it sought -- judicial guidance on whether the requested records were accessible. It may be dissatisfied with the end result, but the Appellate Division's ultimate holding that the Burnett factors weighed in Carter's favor was independent of its ruling that the declaratory judgment action was barred. Accordingly, even if this Court grants NJFSA's Petition and modifies the Appellate Division's decision as to the availability of declaratory relief for public agencies, that change itself would not inure to NJFSA's benefit and Carter would still be a prevailing party entitled to the requested records as well as attorneys' fees.

Second, even putting aside the substantive issues addressed below regarding whether public agencies in general are entitled to declaratory relief under OPRA, the reality is that NJFSA's

specific declaratory judgment action could have never provided the unequivocal, universal ruling that motivated it to file its suit. The records at issue are not exempt under any express exemption of OPRA and thus the only plausible reason to deny access is based on OPRA's privacy provision. As outlined above, when privacy is implicated, courts must engage in a "case by case" analysis that considers the seven factors set forth in Burnett. Thus, while NJFSA argues that its lawsuit "was never about Mr. Carter," even if a declaratory judgment action was permissible, it could have *only* been about Carter and his request.

Burnett mandates a case-specific analysis and precludes a court from making any *per se* ruling based on hypothetical requests in the future. 198 N.J. at 437. While it may be understandable that NJFSA felt concerned when it received a request for relief payment records and that it desired resolution sooner rather than later, there simply is no universal answer to whether it must grant access to relief payment records. The only plausible answer a court could give is that Burnett requires it to consider each request on a case by case basis, not in the abstract.⁵ Courts do not "render advisory opinions" or entertain declaratory judgment actions that are "based on facts which are undeveloped or uncertain."

⁵ NJFSA knows this individualized approach is necessary because it focused its brief in support of its order to show cause solely on why the Burnett balancing test weighed against non-disclosure.

In re City of Plainfield's Park-Madison Site, 372 N.J. Super. 544, 550 (App. Div. 2004), certif. denied, 182 N.J. 630 (2005).

B. The Appellate Division Correctly Held That Public Agencies May Not Bring Declaratory Judgment Actions Under OPRA

OPRA expressly provides that the right to institute "any proceeding" belongs "solely" to records requestors. N.J.S.A. 47:1A-6. Those words are clear and unambiguous, yet NJFSA's Petition wholly ignores them. It claims it had "no choice" but to file its action because it needed guidance in how to respond to requests for relief payment records. OPRA, however, provided a simple remedy: if a public agency believes records are exempt, it is required to respond within seven business days and state the "specific basis" for denying access to the records. N.J.S.A. 47:1A-5(g). In response to Carter's request, NJFSA did just that; it responded and stated that the records were exempt based on OPRA's privacy provision, N.J.S.A. 47:1A-1.1. (Pet. App. 4). It then, however, filed its lawsuit asking the court to approve its denial. In filing such an action, it forced Carter to defend a lawsuit over a denial that he might have chosen not to appeal; it deprived him of his statutory right to choose whether to have an appeal of the denial adjudicated in the Government Records Council ("GRC")⁶ or Superior Court; it shifted the burden of proof to Carter; and it put his right to recover attorneys' fees at risk.

⁶ Carter has exclusively appealed OPRA denials to the GRC.

The Appellate Division correctly held that NJFSA's declaratory judgment action was barred because it was, in essence, an attempt to preempt Carter's suit. "[R]elief by way of a declaratory judgment should be withheld when the request is in effect an attempt to have the court adjudicate in advance the validity of a possible defense in some expected future law suit." Donadio v. Cunningham, 58 N.J. 309, 325 (1971); Util. Blade & Razor Co. v. Donovan, 33 N.J. Super. 566, 572-73 (App. Div. 1955) ("In the usual case where an action by one party is imminent, it would serve no sensible purpose to permit his adversary to sue first for a declaration that he has a good defense to the action.").

Moreover, the "purpose of a declaratory judgment proceeding is to provide a means by which rights, obligations and status may be adjudicated in cases involving a controversy *that has not yet reached the stage at which either party may seek a coercive remedy.*" Rego Indus., Inc. v. Am. Modern Metals Corp., 91 N.J. Super. 447, 452-53 (App. Div. 1966) (emphasis added). As soon as an agency fails to produce records within seven business days, which constitutes a deemed denial pursuant to Section 5(i), or affirmatively denies a request, a requestor has the right to file an action and obtain a coercive remedy in the form of an order compelling access to the records. N.J.S.A. 47:1A-6. Here, as soon as NJFSA denied Carter's request, the controversy⁷

⁷ Simply because the agency denies access to records does not mean there is an actual "controversy." OPRA requestors are

reached a stage where Carter could seek a coercive remedy and a declaratory judgment action was no longer proper even if OPRA permitted an agency to file such an action in the first place (which it does not).

NJFSA argues that the plain language of the Declaratory Judgment Act ("DJA") permits it to file an action and that the Legislature cannot, through OPRA, take away its "fundamental right to utilize an available judicial remedy." Importantly, there is no common law right to a declaratory judgment action; the right to file a declaratory judgment action exists solely because the Legislature enacted the DJA. Wood v. New Jersey Mfrs. Ins. Co., 206 N.J. 562, 575 (2011). The DJA is a general statute which provides that persons may seek declaratory judgments "to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." N.J.S.A. 2A:16-51. More than 75 years later, the Legislature enacted OPRA and expressly stated that the right to institute proceedings under OPRA belonged solely to requestors. N.J.S.A. 47:1A-6. "[I]t is well-established that a specific statutory provision dealing with a particular subject prevails

often filed by persons who have an interest in their government, but are not well-versed in the law. OPRA places the onus upon a public agency to explain why it denied access to a record, N.J.S.A. 47:1A-5(g), and it is not uncommon for requestors to accept denials without challenging them because they agree with the public agency's explanation, obtained the records elsewhere, or just do not want to engage in litigation.

over a general statute on the same subject." Trinity Cemetery Ass'n, Inc. v. Twp. of Wall, 170 N.J. 39, 46 (2001).

To the extent that NJFSA argues that this case is not about Carter and is instead about relief applications in general, the DJA bars such a generic action. First, the DJA permits courts to "refuse to render or enter a declaratory judgment, when, if rendered or entered, it would not terminate the uncertainty or controversy giving rise to the proceeding." N.J.S.A. 2A:16-61. Such would certainly be true here where Burnett's case by case analysis is necessary for each and every request for relief records that NJFSA receives and thus the "uncertainty" that motivated its suit cannot be resolved by the filing of a single declaratory judgment action like it did against Carter. Moreover, such an action would result in an impermissible "advisory opinion" that is "based on facts which are undeveloped or uncertain." In re City of Plainfield, supra, 372 N.J. Super. at 550. Finally, the DJA also provides that "[n]o declaratory judgment shall prejudice the rights of persons not parties to the proceeding," N.J.S.A. 2A:16-57, which is exactly what NJFSA's action would do if it were permitted to obtain a declaration that relief payment records were generally not available to anyone. Future requestors would be deprived of their right to present a specific interest that might tip the Burnett test in their favor.

In summary, NJFSA's argument that "nowhere in the statutory scheme of OPRA are public agencies prohibited from filing an

action under the DJA" renders Section 6 of OPRA superfluous and defeats the clear Legislative intent that public agencies must respond by either granting a request or denying it and that only requestors are permitted to institute legal proceedings.

i. DJA Actions Against Requestors Would Chill Access To Government Records

Permitting a public agency to sue a records requestor not only violates the plain language of N.J.S.A. 47:1A-6, but it would cause many citizens to think twice before filing an OPRA request in fear that the agency might subject them to involuntary litigation and all of the financial and emotional consequences that come with defending a lawsuit. It is clear that public agencies have more resources and deeper pockets than the individuals filing OPRA requests. See New Jerseyans for Death Penalty Moratorium v. New Jersey Dep't of Corr., 185 N.J. 137, 153 (2005) ("Without [OPRA's] fee-shifting provision, 'the ordinary citizen would be waging a quixotic battle against a public entity vested with almost inexhaustible resources. By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.'"). In light of the Legislature's intended purpose of ensuring access to public records, it is clear the Legislature did not envision a legal war of attrition between agencies and requestors. That would inevitably lead to fewer requests and less, rather than more, accessibility.

That legal war of attrition is exactly what will happen if public agencies--contrary to the express language of OPRA--are allowed to file declaratory judgment actions rather than simply setting forth their reasons for denial in writing as N.J.S.A. 47:1A-5(g) requires. It would also permit agencies to create unnecessary litigation in order to intimidate requestors from filing future OPRA requests. In response, those who legitimately need government records will be hesitant to file OPRA requests in fear that a public agency will respond by dragging them into court, forcing them to incur significant legal expenses that may or may not be recoverable.⁸ This strategy might be utilized most by public agencies who want to retaliate against a requestor who has exposed misconduct or government waste, something which OPRA is intended to uncover. Burnett, supra, 198 N.J. at 435 (OPRA is intended "to maximize public knowledge about public affairs in order to ensure an

⁸ To be a "prevailing party" entitled to fees, requestors must prove that their lawsuit was the "catalyst" for relief. Mason v. Hoboken, 196 N.J. 51, 76 (2008). Though Carter is a prevailing party because his counterclaim is the catalyst for the release of records, a requestor who merely successfully defends himself against an agency's action might not be entitled to fees. For this reason, a public agency desiring to intimidate (or retaliate against) a requestor might choose to sue after receiving an OPRA request that was clearly invalid, so that the court would (for certain) rule in the agency's favor and there would be no chance that the requestor could prevail and recover fees. The requestor, nonetheless, would incur costs in opposing the suit even though they likely would not have brought the suit themselves in the first place.

informed citizenry and to minimize the evils inherent in a secluded process.").

Permitting a public agency to choose when to sue creates unnecessary litigation and directly contradicts N.J.S.A. 47:1A-6. Although NJFSA's action might have been motivated by a genuine concern that it was uncertain whether it should deny access to the requested records, permitting agencies to file actions against requestors opens the door to abuse. Public agencies who believe a record is exempt have no basis to file a lawsuit, but can protect their interests by issuing a simple denial letter. N.J.S.A. 47:1A-5(g).

C. Judge Messano's Concurring Opinion Does Not Warrant Automatic Review

In an attempt to create jurisdiction where none exists, at page eight and throughout their Petition, NJFSA unfairly characterizes Judge Messano's concurrence as a dissent, and explicitly attempts to invoke Rule 2:2-1(a) (incorrectly cited as Rule 2:2-1(2)), which permits certification to this Court as of right when "there is a dissent in the Appellate Division[.]"

NJFSA cannot shoe-horn its application for certification into one that must be granted by right. Judge Messano's concurrence was not "in the nature of a 'dissenting' opinion," and to so characterize it does an injustice to Judge Messano's thoughtfully crafted concurrence, which not only agreed with all of the majority's holdings, but also explicitly agreed with every aspect of the majority's opinion, while presenting

alternative logic for their conclusion in Part II-A, which was expressed thusly: "[I]f there is no private right of action under a particular statute, a party may not secure a declaration of its statutory rights by seeking relief under the DJA." To characterize this alternative logic with the application of the majority's reasoning to circumstances not presented by this case as an "invitation" fatally contorts both the plain language used by Judge Messano as well as his meaning presented in a "concurring" opinion.

Judge Messano clearly agreed with all of the majority's holdings, especially with regard to whether John Doe had a privacy interest in check(s) written to him. In this regard, Judge Messano described the majority's reasoning as "compelling." (Pet. App. 46). What gave him pause, however, was whether there were any circumstances under which the NJSFA might seek relief through the DJA under OPRA. The sole example cited by Judge Messano was an issue not presented by this case, which was whether the NJSFA was subject to OPRA. Obviously, NJSFA never raised that much more compelling issue with the Court through a DJA action; that issue was only raised to the Court by a private litigant via N.J.S.A. 47:1A-6. See Paff v. N.J. State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013).

Here, the NJSFA simply cannot tenably rely on Judge Messano's concurrence to support their Petition as a "dissent." Even the concurrence agreed that, if there were any

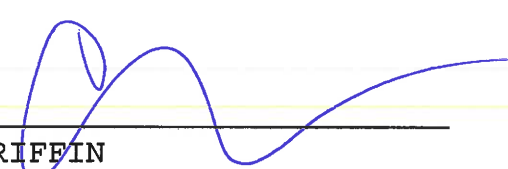
circumstances that could justify a DJA action under OPRA, this case did not present those circumstances. (Pet. App. 46). While this Court may one day be called upon to determine whether it was "unnecessary to paint with such a broad brush," as Judge Messano characterized, this case simply is not the vehicle to do so. Even if we interpreted Judge Messano's concurrence in a light most favorable to NJSFA, Judge Messano still explicitly agreed that NJSFA had no right to force Carter to litigate an individual OPRA request that it had denied. (Pet. App. 46).

CONCLUSION

For all the foregoing reasons, NJSFA's Petition for Certification should be denied.

Respectfully Submitted,

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By: 
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