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February 20, 2018

Via eFiling

Honorable Jeffrey Beacham, J.S.C.
New Jersey Superior Court, Essex County
Historic Courthouse
470 Martin Luther King, Jr. Blvd., 3rd Floor
Newark, New Jersey 07102

Re: Steven Wronko v. City of Newark, et al.
Our File No. 9840-030

Dear Judge Beacham:

This firm represents Plaintiff, Steven Wronko, in the above-captioned matter. Please accept this letter brief, in lieu of a more formal brief, in support of Plaintiff's application for an Order to Show Cause seeking relief from Defendants' unlawful response to the Open Public Records Act ("OPRA") request identified in the Verified Complaint and discussed in detail below.

PRELIMINARY STATEMENT

Amazon, Inc. is one of the largest companies in the world and the identity of the city where Amazon will build its new headquarters is a topic of international news. Amazon set off a bidding war in 2017 when it issued a Request for Proposals ("RFP") for locations to build its second headquarters. Municipalities throughout North America tried hard to garner Amazon's attention and interest. Social media campaigns were launched and hundreds of proposals were submitted. New Jersey was not exempt from the craze as many municipalities submitted proposals, including Defendant City of Newark ("Newark"), which has been selected as a finalist.

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The potential addition of Amazon's new headquarters to Newark portends a major impact on not only Newark's economy, but New Jersey's economy as a whole. This is especially true because Amazon's RFP specifically mentions that it is looking for incentives to pick its new location in the form of tax breaks and other financial kickbacks. With such far reaching stakes at play, Plaintiff, and New Jersey citizens in general, are very interested to know what Newark is offering Amazon in its proposal, how the city is selling itself, and other information that will impact citizens and taxpayers.

After seeing many other municipalities, including some of the finalists, publically release their Amazon proposals, Plaintiff submitted a request pursuant to OPRA and the common law right of access to Newark seeking a copy of its proposal and other related records. Newark wholesale denied Plaintiff's request on the basis that releasing the records **could possibly** provide an advantage to its competitors. As discussed in more detail below, Newark has not met its burden to show that OPRA's exemption for records that provide an advantage to competitors applies to the records sought by Plaintiff. Additionally, Newark has not demonstrated why the requested records cannot be produced with redactions to remove any information that actually would provide a competitor with an advantage, as OPRA mandates. Finally, there is absolutely no reason why the requested contracts for third-party vendors (such as proposal writers, public relations firms, etc) that Newark hired to help draft its proposal should not be released. The public has a right to see how much Newark spent in trying to land Amazon's headquarters.

Accordingly, Plaintiff respectfully asks this Court to vindicate his statutory rights by: 1) declaring Defendants in violation of OPRA and 2) directing Defendants to release the requested records to Plaintiff forthwith or, alternatively, submit them to the Court for an *in camera* review so they can be produced with any necessary redactions and a Vaughn Index. Alternatively,

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Plaintiff seeks access to the requested records pursuant to the common law. As the foregoing relief will make Plaintiff a prevailing party, he also seeks attorney's fees and costs of suit pursuant to the statute.

STATEMENT OF FACTS

Plaintiff, Steven Wronko, is a concerned taxpayer and open government activist who routinely monitors government spending. In late 2017, Amazon issued an RFP calling on municipalities throughout North America to submit proposals for being the location for Amazon's new proposed second headquarters. [Exhibit A to the Verified Complaint]. The RFP cites as a preference in the consideration process the financial incentives the municipality can offer to Amazon including tax credits and exemptions. Id. Accordingly, Newark's effort to woo Amazon is one of the biggest acts of government spending, in the form of tax breaks and other financial incentives, currently in the news.

The deadline for submitting proposals to Amazon was October 19, 2017. Id. Newark was one of the hundreds of municipalities to submit a proposal to Amazon and in fact, Newark's proposal made it onto the shortlist of 20 finalists. Based on the huge impact any agreement with Amazon would have on Newark and, more generally New Jersey's taxes and economy, Plaintiff, and New Jersey citizens in general, have an interest in reviewing the proposal.

Therefore, On January 31, 2018, Plaintiff filed a request with Newark pursuant to OPRA and the common law right of access seeking the following:

I would like the following docs per OPRA and common law:

The bid/RFP and all accompanying documents submitted by Newark to Amazon for their RFP regarding its new headquarters.

Any contracts with vendors or service providers that you used to place the bid, like RFP writers, PR firms, architectural firms, etc.

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Any resolution of the City Council approving the submission of the bid.

[Exhibit B to Verified Complaint.]

On February 2, 2018, Plaintiff received a letter from the Acting Corporation Counsel for Newark responding to his request. That response stated:

Your request is **denied**. Under OPRA, all government records are subject to public access unless the records fall within at least one of its exemptions. N.J.S.A. 47:1A-1. Included among the government records to which the exemption applies is “information which, if disclosed, would give an advantage to competitors or bidders” Id.; Communications Workers of Am. v. Rousseau, 417 N.J. Super. 341 (App. Div. 2010). Although Amazon has stopped accepting public bids, Amazon has not selected the location of its new headquarters, nor has it released any documentation stating that competing cities cannot amend their bids. If the text of the City's bid or the details of contracts with third party vendors become public, there is a substantial risk that representatives from any of the competing cities will amend their own bids in response. Furthermore, Amazon's representatives have asked that competing cities keep the details of the selection process confidential.

For the aforementioned reasons, the City **denies** your request.

[Exhibit C to Verified Complaint.]

As of the date of this filing, Defendants have not produced *any* records responsive to Plaintiff's request.

LEGAL ARGUMENT

I. DEFENDANTS VIOLATED THE OPEN PUBLIC RECORDS ACT BY DENYING ACCESS TO THE REQUESTED PROPOSAL

“An informed citizenry is essential to a well-functioning democracy.” Paff v. Twp. of Galloway, 229 N.J. 340 (2017). OPRA reflects New Jersey's “history of commitment to public participation in government” and its “tradition favoring the public's right to be

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informed about governmental actions.” S. Jersey Pub. Co. Inc. v. N.J. Expressway Auth., 124 N.J. 478, 486-87 (1991). The statute’s “purpose is ‘to maximize public knowledge about public affairs and to minimize the evils inherent in a secluded process.’” Mason v. City of Hoboken, 196 N.J. 51, 64 (2008)(quoting Lakewood Residents Assoc., Inc. v. Twp. of Lakewood, 294 N.J. Super. 207, 225 (Law Div. 1994)). A citizen’s right to access public records has been deemed “*unfettered*” absent a statutory exemption, which must be narrowly construed. Courier News v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003) (emphasis added).

“Where [OPRA] is unclear, the Court has resolved any ambiguities in a manner consistent with its broad purpose.” Paff v. Ocean Cty. Prosecutor's Office, 446 N.J. Super. 163, 181 (App. Div. 2016)(citing Fair Share Hous. Ctr., Inc. v. N.J. State League of Municip., 207 N.J. 489, 502 (2011); Sussex Commons Assocs. v. Rutgers, 210 N.J. 531, 540–41 (2012)). This is because the Legislature has instructed that “OPRA ‘*shall be construed in favor of the public's right of access.*’” Paff v. Ocean Cty., *supra*, 446 N.J. Super. 181 (quoting N.J.S.A. 47:1A-1); Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 366 (App. Div. 2003)(noting that ambiguities in OPRA “must be resolved ‘in favor of the public's right of access[.]’”).

Under OPRA, the first question to be addressed is whether the requested records are, in fact, “government records” that are therefore subject to OPRA’s disclosure requirements.

Section 1.1 of OPRA broadly defines the term “government records” to include:

[A]ny 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

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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 terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[N.J.S.A. 47:1A-1.1.]

Here, the records that Plaintiff seeks are all government records because they are records made and maintained by Newark in the course of its official business. Thus, unless one of OPRA's exemptions applies, the records are “government records” that should have been produced within seven business days of Plaintiff’s OPRA request or in the case of contracts, immediately released. N.J.S.A. 47:1A-5(e). As argued below, no exemption applies.

The burden of “proving that the denial of access is authorized by law” rests with the agency from which the records have been sought. N.J.S.A. 47:1A-6. For the reasons argued herein, Newark cannot meet its burden of proving that its response to Plaintiff’s OPRA request was lawful and that the records he seeks are exempt.

A. The Requested Proposal Is Not *Wholly Exempt*

Defendants’ complete denial of access to the records is without merit. Defendants claim that every requested record is exempt because they fall within the exemption for “information which, if disclosed, would give an advantage to competitors or bidders.” N.J.S.A. 47:1A-1.1. As explained below, Newark has not met its burden to prove the exemption applies.

In analyzing an OPRA exemption, “the court must always maintain a sharp focus on the purpose of OPRA and resist attempts to limit its scope, absent a *clear showing* that one of its exemptions or exceptions incorporated in the statute by reference is applicable to the

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requested disclosure.” Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 378–79 (App. Div. 2010)(citation omitted). “The reasons for withholding documents must be specific. Courts will “simply no longer accept conclusory and generalized allegations of exemptions ... but will require a relatively detailed analysis in manageable segments.’” Newark Morning Ledger Co. v. New Jersey Sports & Exposition Auth., 423 N.J. Super. 140, 162 (App. Div. 2011)(citations omitted). The justification offered by Newark to deny Plaintiff’s request does not rise to this standard.

As Defendants admit in their response, Amazon has stopped accepting bids for the new headquarters. See Exhibit C. Accordingly, their fear of providing an advantage to competitors stems wholly from the hypothetical that other finalist cities may amend their own bid based on information that could be learned if Newark’s bid is released to the public. Id. This fear is wholly speculative because, as explained below, there is very little that can be learned from the bid that another finalist would be able to implement because most of the information is fact sensitive to the specific municipality. “To justify non-disclosure under [the advantage to competitors] provision, there must be ‘a clear showing’ that the exemption applies. The ‘mere potential’ that disclosure of information in a government record might confer a competitive advantage upon some person or entity is not sufficient.” Scheeler v. Office of the Governor, 448 N.J. Super. 333, 347 (App. Div. 2017)(citation omitted).

Defendants’ position is further belied by the fact that numerous municipalities in New Jersey, in response to OPRA requests, have already produced copies of the proposals they submitted to Amazon. See Certification of CJ Griffin, Esq.¹ Exhibits A, B, C, D, and E. All of these bid proposals were provided to the public before Amazon even announced the 20 finalist

¹ References to the Certification of CJ Griffin, Esq., submitted herewith are made as “Griffin Cert.”

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cities. A quick review of the proposals that have been released shows that the information contained therein would not provide an advantage to competitors because the information is specific to the particular city. The proposals all mostly focus on assets of the particular city and the region that surrounds it including demographics, geography, including the proposed location for Amazon's headquarters, and other attributes. See Id. It is all essentially factual information that anyone could gather from other sources. A competitor would not be able to change its bid to gain an advantage over factual information about the City of Newark. The public has the right to see how Newark is representing itself to Amazon.

Additionally, to the extent a proposal contains information about specific incentives being offered, Amazon is likely going to use this information to play the finalist cities off of each other to obtain the best deal it can; consequently, the finalist cities will have the opportunity to best each other's offers regardless of if the information is made public. Since the information is likely going to be revealed to the competitors anyway, the public deserves to know it too. Cf. Newark Morning Ledger Co. supra, 423 N.J. Super. at 169-170 (fact the terms in the requested contract were known to competitors in the industry was a factor in finding that the record was not exempt from production as providing an advantage to a competitor).

B. To the Extent Necessary, the Requested Records Should be Produced in Redacted Form Instead of Withheld in their Entirety

OPRA mandates that “[i]f the custodian of a government record asserts that part of a particular record is exempt from public access...**the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.**” N.J.S.A. 47:1A-5(g)(emphasis added). The foregoing means that if any portion of the requested records does actually contain

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information that would provide an advantage to a competitor, Defendants are *required* to redact the exempt portion and produce the remaining portion of the records. The GRC followed this directive in the case of Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006)² when it determined that requested reports regarding the status of negotiations for the purchase of land could be produced with redactions to the information that could provide an advantage to bidders. The GRC reviewed the records *in camera* to determine what portions should be redacted and what should be produced. If Defendants insist the requested records include information that would provide an advantage to a competitor, the Court should review the records *in camera* to determine what, if any, provisions cannot be produced and order Defendants to redact those portions and produce the remainder of the records.

Providing access to a redacted version of Newark's proposal is further supported by the conduct of fellow finalist municipalities. Boston, Miami, Philadelphia, and Montgomery County, Maryland are four of the other nineteen finalists for the second headquarters. Griffin Cert. Exhibit G. In response to public records requests, all four municipalities released copies of their proposals to Amazon. See Griffin Cert. Exhibits H, I, J, and K. Philadelphia and Montgomery County released their proposals with redactions, whereas Boston and Miami actually released their proposals without redactions. See Id. From all four proposals it can be seen that the demographics of the region and supposed advantages that the specific municipality offers to Amazon have been made available for the public to review. There is no reason the same information about Newark should not be made available to the citizens of New Jersey. This is simply not information that would give a competitor any creative advantage if it is disclosed.

² A true and accurate copy of the GRC's decision in Boggia is attached to the Griffin Cert. as Exhibit F.

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Accordingly, Defendants have violated OPRA by denying Plaintiff's request in its entirety. Even if some of the information in the records is exempt, that does not justify Defendants' blanket denial of the request. Instead, Defendants should have redacted the specific exempt information and promptly permitted access to the remaining records, as OPRA expressly requires them to do.

Therefore, the Court should compel Defendants to release all portions of the records which do not contain information that could give an advantage to a competitor. The Court should also compel Defendants to produce a Vaughn Index which explains all redactions that are made.

II. DEFENDANTS VIOLATED OPRA BY DENYING ACCESS TO THE REQUESTED CONTRACTS WITH THIRD PARTY VENDORS WHO HELPED PREPARE THE PROPOSAL AND THE RESOLUTION APPROVING THE PROPOSAL

Plaintiff's OPRA request did not just seek the proposal itself, but it also sought:

Any contracts with vendors or service providers that you used to place the bid, like RFP writers, PR firms, architectural firms, etc.

Any resolution of the City Council approving the submission of the bid.

[Exhibit A to Verified Complaint.]

There is absolutely *no* reason that this information cannot be disclosed.

Contracts are to be *immediately* accessible to the public. N.J.S.A. 47:1A-5(e). The public has a right to know how much money Newark spent in drafting its proposal, which includes knowing how much money it spent on third party vendors such as proposal writers, public relations firms, architectural firms, and others who may have provided guidance. Disclosure of this information does not in any way disclose anything about Newark's proposal itself, but does

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let the public judge the reasonableness of Newark's actions in attempting to secure Amazon's business.

Moreover, any resolution approving the submission is a quintessential public record that must be available to the public. There is no competitive advantage that will be given to other cities by disclosure of a resolution, but it will let the public know that the proposal was formally approved by the City Council.

Accordingly, Newark violated OPRA by failing to disclose its contracts and its resolution approving the bid.

III. PLAINTIFF IS A PREVAILING PARTY ENTITLED TO AN AWARD OF ATTORNEY'S FEES

Plaintiff is statutorily entitled to reasonable attorney's fees and costs. Pursuant to OPRA,

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may . . . institute a proceeding to challenge the custodian's decision by filing an action in Superior Court 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.**

[N.J.S.A. 47:1A-6 (emphasis added).]

New Jersey law has long recognized the "catalyst theory" in regards to an award of attorney's fees. Mason v. City of Hoboken, 196 N.J. 51, 73 (2008). A plaintiff is entitled to attorney's fees if they can demonstrate "1) a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; and 2) that the relief ultimately secured by plaintiffs had a basis in law." Id. at 76; See also Smith v. Hudson Cnty. Register, 422 N.J. Super. 387, 394 (App. Div. 2011)("A

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plaintiff may qualify as a prevailing party, and thereby be entitled to a fee award, by taking legal action that provides a ‘catalyst’ to induce a defendant’s compliance with the law.”).

Here, Plaintiff made a valid OPRA request for government records; Defendants unlawfully denied access to those records. This litigation, if successful, will serve as the catalyst for Plaintiff obtaining the unlawfully withheld records either in redacted or un-redacted form. Therefore, Plaintiff is entitled to an award of attorney’s fees and costs of suit.

IV. PLAINTIFF IS ENTITLED TO THE RECORDS UNDER THE COMMON LAW RIGHT OF ACCESS

At common law, a person has an enforceable right to require custodians of public records to make records available for reasonable inspection and examination. Irval Realty v. Bd. of Pub. Util. Comm’rs, 61 N.J. 366, 372 (1972). In Irval, the Supreme Court stated:

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 have been slight.

[Id.]

Thus, three issues must be addressed in determining whether the common law requires production of the records at issue here: (1) whether the records are “public records” as defined by the common law; (2) whether the plaintiff has the requisite interest to inspect the public records; and, (3) whether an interest in confidentiality outweighs disclosure. See S. Jersey Publ’g Co., supra, 124 N.J. at 487-88; Techniscan Corp. v. Passaic Valley Water Comm’n., 113 N.J. 233,

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237 (1988); Shuttleworth v. City of Camden, 258 N.J. Super. 573, 582 (App. Div. 1992); Home News Publ'g Co. v. State, 224 N.J. Super. 7, 16 (App. Div. 1988).

A. The Requested Records are Public Records Under the Common Law

The definition of government record under OPRA is essentially the same as under the common law; that is, pursuant to the common law, a government record is:

one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in the public office. The elements essential to constitute a public record are that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it...

[Nero v. Hyland, 76 N.J. 213, 222 (1978).]

Accordingly, the requested records are public records under the common law for essentially the same reasons that they constitute government records under OPRA. The records were made by Newark in the course of its official business.

B. Plaintiff has the Requisite Interest to Inspect the Public Records

Under the common law rule of access to public documents, it has long been held that a citizen is entitled to inspect documents of a public nature "provided he shows the requisite interest therein." Ferry v. Williams, 41 N.J.L. 332, 334 (Sup. Ct. 1879). Plaintiff, and New Jersey citizens in general have an interest in Newark's proposal to Amazon because any agreement with Amazon stands to have a major impact on the taxes and economy of Newark individually and New Jersey as a whole. Plaintiff, and the public, also have an interest in knowing how much the City spent in creating its proposal, which would be evidence by how much it spent on third party vendors who helped draft the proposal, who engaged in publicity

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campaigns, etc. Accordingly, Plaintiff has the requisite interest to gain access to the records under the common law right of access.

C. Plaintiff's Interest in Disclosure Outweighs Any Interest in Keeping The Records Confidential

The last question to be addressed is whether the public interest in confidentiality of the application, if any, outweighs any interest in disclosure. "Ordinarily, only an assertion of citizen or taxpayer status is necessary for production of common-law records, subject to a showing of good faith." Loigman v. Kimmelman, 102 N.J. 98, 104 (1986). The court in Loigman further stated: "[t]hus, if the government need in confidentiality is slight or non-existent, citizen-taxpayer status will ordinarily warrant that the matters be disclosed. On the other hand, when the public interest in confidentiality is greater, the citizen's right of access is qualified." Id. at 105.

As discussed above, the addition of Amazon to Newark has the potential for far reaching implications, financial and otherwise, that would affect all citizens of New Jersey. Consequently, Plaintiff, and the public in general, has a significant interest in learning about the proposal Newark submitted and the resources that Newark expended in creating the proposal. Defendants, on the other hand, have very little need to keep the records confidential. The records likely do not contain any information that would provide an advantage to competitors and to the extent they do, that information can be redacted prior to production. Accordingly, the Court should grant access to the records pursuant to the common law right of access.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully asks this Court to enforce his statutory rights under OPRA by 1) declaring that Defendants are in violation of OPRA by failing to grant access to the requested records; 2) directing Defendants to release the requested records to

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Plaintiff forthwith or, alternatively, submit them to the Court for an *in camera* review so they can be produced with any necessary redactions and a Vaughn Index; 3) naming Plaintiff a prevailing party entitled to an award of reasonable attorney's fees and costs of litigation; or 4) in the alternative ordering Defendants to produce the records pursuant to the common law right of access.

Respectfully Submitted,

A handwritten signature in black ink, consisting of a stylized 'G' followed by a long horizontal stroke that tapers to the right.

CJ GRIFFIN