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March 8, 2019

The Honorable Francis B. Schultz
Superior Court of New Jersey
583 Newark Avenue
Jersey City, NJ 07306

Re: Ernest Bozzi v. City of Jersey City and Irene McNulty.
Docket No. HUD-L-354-19

Dear Judge Schultz:

Please accept this letter brief in lieu of a more formal brief in opposition to the Order to Show Cause filed by Ernest Bozzi.

FACTS AND PROCEDURAL HISTORY

On November 27, 2018, pursuant to the Open Public Records Act, ("OPRA"), N.J.S.A. 47:1A-1 et seq., Plaintiff Ernest Bozzi ("Plaintiff") sent a records request to the Defendants, the City of Jersey City and Irene McNulty (collectively the "City"), that stated:

> I would like your most recent compiling of dog license records (annual/yearly). You can redact the breed , name of dog, any information about why they have the dog and any phone numbers whether they are unlisted or not. I am only looking for the names and addresses of dog owners for my invisible fence installations (I am a licensed home improvement contractor). Please remove any information beyond the names and addresses for there are no privacy concerns as outlined by the Government Record Council in Bernstein v Allendale. [Exhibit A, Page Da002].

On December 10, 2018, the City denied the Plaintiff's request pursuant to N.J.S.A. 47:1A-1, Executive Order No. 21 (McGreevey, 2002), Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005) and Knehr v. Township of Franklin, GRC Complaint No.

2012-38 (December, 2012). See Plaintiff's Verified Complaint, Exhibit 2. In particular, the City stated in its denial that:

> N.J.S.A. 47:1A-1 specifically states that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." In this particular instance, the people identified on the dog licensing records would likely be subjected to unsolicited commercial contact. Additionally, "public disclosure of registered dog owners would jeopardize the security of the dog owner, the security of the non-dog owner, the property that the dog may be protecting and the dog itself from burglary, theft and other criminal activity. Many homeowners use their dogs as a means of security and that others have valuable dogs that could be subject to theft." Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005). As a result, the responsive documents in the possession of the City are exempt from disclosure pursuant to OPRA. [Id.]

On January 24, 2019, Plaintiff commenced this action by filing a Verified Complaint and Order to Show Cause.

LEGAL ARGUMENT
POINT I

PROCEEDING IN THE ABSENCE OF THE LICENSED DOG OWNERS IN JERSEY CITY VIOLATES DUE PROCESS, WHICH REQUIRES THAT THE OWNERS BE AFFORDED NOTICE AND AN OPPORTUNITY TO BE HEARD, AND A DETERMINATION ON THE MERITS SHOULD BE ADJOURNED TO PERMIT SUCH NOTICE.

The Court should afford Jersey City Dog license applicants and holders notice and an opportunity to be heard before ordering the release of their personal information. The applicants, whose personal information is sought in the request, have never consented that the City release their personal information for commercial purposes. Due process requires that the Court adjourn these proceedings until all interested parties are noticed.

New Jersey Courts have recognized a citizen's due process right in intervening in an

OPRA action when dissemination of their personal information is at issue. For example, in Brennan v. Bergen County Prosecutor's Office, the trial court granted defendants ten more days to contact the citizens and "advise them either to object to the release of their personal information or to move to intervene." Brennan v. Bergen County Prosecutor's Office , 233 N.J. 330, 335 (2018). In Burnett v. County of Bergen, the Supreme Court acknowledged the importance of notice when it denied a "bulk request for millions of realty records" where there was no "possibility of advance notice to those individuals." Burnett v. County of Bergen, 198 N.J. 408, 437 (2009).

The City has a statutorily recognized public health and safety need for this information. Dog owners are required to register for a dog license pursuant to the Municipal Code of the City of Jersey City ("City Code") §90-13(A) and N.J.S.A. 4:19-15.5. Mandatory dog license registration arises from public safety and welfare concerns. Municipalities must ensure that local animals are vaccinated and do not pose a health risk to others. In cases of emergency, first responders must know whether they are responding to a household where pets are present.

Dog license applicants in Jersey City have a legitimate basis to object to the release of their personal information, especially when it is being used for commercial purposes. The United States Supreme Court has held that a vendor does not have a right "under the Constitution or otherwise to send unwanted material into the home of another." Rowan v. United States Post Office Dep't, 397 U.S. at 738. The Court made clear that "[a] mailer's right to communicate must stop at the mailbox of an unreceptive addressee" as "nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit." Id at 737. "No one has a right to press even 'good' ideas on an unwilling recipient." Id at 738. Such power permits citizens to "erect a wall that no advertiser may penetrate without his [or her] acquiescence." Id at

738.

In reaching the Court's holding, former Chief Justice Burger noted:

> Without doubt the public post system is an indispensable adjunct of every civilized society and communication is imperative to a healthy social order. **But the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate.** In today's complex society we are inescapably captive audiences for many purposes, **but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail.** . . . Today's merchandising methods, the plethora of mass mailings subsidized by low postal rates, and the growth of the sale of large mailing lists as an industry itself have changed the mailman from a carrier of primarily private communications. . . and have made him an adjunct of the mass mailer who sends unsolicited and often unwanted mail into every home. [Id at 736 (emphasis added).]

See also Martin v. Struthers, 319 U.S. 141, 148 (1943) (while supporting the "freedom to distribute information to every citizen," acknowledged a limitation in terms of leaving "with the homeowner himself" the power to decide "whether distributors of literature may lawfully call at a home").

It follows that Plaintiff should not have the right to access the names and addresses of citizens for this unlawful commercial purpose. Plaintiff's request has turned dog ownership into a personal identifier for purposes of targeting citizens for unsolicited and unwanted advertisements. While some may argue that Plaintiff's advertising material is not offensive, and may be both relevant and beneficial to dog owners, the law is clear that "not even 'good' ideas may be mailed to an unwilling recipient." Id. The focus is not on the content of the material but the unwillingness to receive it.

The Supreme Court's ruling in Rowan was motivated by the need to protect the "privacy of homes." Id. The City's denial of Plaintiff's OPRA request is no different. The dog owners of the City have the right "to be left alone." Id at 736. Granting Plaintiff the ability to access the

names and addresses of dog owners for the sole purpose of mailing unsolicited advertisements infringes on these rights and the right "to exercise control over unwanted mail." Id. As such, the City requests that the Court permit the City an opportunity to notify interested citizens and to adjourn a determination on the merits until interested citizens are heard.

POINT II

PLAINTIFF'S REQUEST IS EXEMPT FROM OPRA PURSUANT TO THE PRIVACY PROTECTIONS ENACTED IN N.J.S.A. 47:1A-1.

Exempt from disclosure under OPRA is "personal information that, if disclosed, 'would violate [a] citizen's reasonable expectation of privacy.'" Brennan, 223 N.J. at 339-40 (quoting N.J.S.A. 47:1A-1). As a threshold showing for OPRA's privacy exception, "a custodian must present a colorable claim that public access to records requested would invade a person's objectively reasonable expectation of privacy." Brennan, 233 N.J. at 342. Once a showing of a reasonable expectation of privacy is made, courts must conduct the seven-prong test provided in Doe v. Poritz. Burnett, 198 N.J. at 427 (citing Doe v. Poritz, 142 N.J. 1, 88 (1995)). The seven-prong test includes consideration of the following:

> (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access. [Id. at 427 (quoting Doe, 142 N.J. at 88).]

We will address this two-part analysis in turn.

A. Access to Dog License Applicant's Home Address Would Invade a Citizen's Reasonable Expectation of Privacy.

Dog license applicants possess a reasonable expectation of privacy in their home address

when they, in accordance with state law, are mandated to submit an application notifying the municipality they own a dog. Additionally, citizens that do not possess a dog also possess the same expectation of privacy. It is very important to keep in mind that a list of dog license owners provides a requester with a road map of every dwelling in the City of Jersey City that houses a dog and, in the opposite, every dwelling in the City of Jersey City that **does not** house a dog.

The New Jersey Supreme Court has denied OPRA requests by finding a reasonable expectation of privacy where the information included a person's home address. For example, in Burnett a requestor sought "land title records of all types, extending over a period of twenty-two years, which contain[ed] names, addresses, social security numbers, and signatures of countless citizens." 198 N.J. at 414. The Court recognized the potential roadmap to fraud based on the information sought, particularly the social security numbers. Id at 414. The Court concluded that the information implicated OPRA's privacy protections. Id at 428.

Similarly, in Carter v. Doe, the Court found OPRA's privacy exclusion implicated where the plaintiff sought copies of hardship payments and financial assistance applications made to firefighters through the Firemen's Association. Carter v. Doe (In re J.J. Firemen's Ass'n Obligation), 230 N.J. 258, 267-68 (2017). In obtaining the personal financial information, the Association "led applicants to believe that the entrusted information would remain confidential." Id at 269. The Court found a reasonable expectation privacy interest implicated where the request sought the personal financial history of individuals. Id at 280. Thus, the Court declined disclosure. Id.

Importantly, in both Burnett and Carter, the information was not being voluntarily offered into the public domain. The legal requirement of recording title to one's home requires

the disclosure of one's address to obtain title to that property. In Carter, to file for financial assistance and hardship payments, the applicant was required to disclose his identity.

By contrast in Asbury Park Press v. County of Monmouth, the Court declined to find that a privacy interest was implicated when one voluntarily availed her identity to the public domain. Asbury Park Press v. County of Monmouth, 201 N.J. 5, 6 (2010). In that case, an employee had voluntarily filed a lawsuit claiming sex discrimination, harassment, retaliation and a hostile work environment. Id. The Court found "'no reason to analyze the Doe factors' where 'a former county employee chose to file a public action – a complaint against the County which was available to the public' – and the matter would have unfolded in open court had the case not settled." Brennan, 233 N.J. at 341 (quoting Asbury Park Press v. County of Monmouth, 201 N.J. at 7)). It held that disclosure of the settlement agreement "would not violate any reasonable expectation of privacy." Asbury Park Press v. County of Monmouth, 301 N.J. at 7 (emphasis omitted).

Furthermore, in Brennan, the Supreme Court declined to find a reasonable expectation of privacy for the names and addresses of successful bidders who voluntarily participated at a public auction of government property. 233 N.J. at 342. The Court reasoned, "[c]onsider the context of this appeal[, t]he bidders knew that they were participating in a public auction." Id. It noted "[f]orfeiture proceedings and public auctions of forfeited property are not conducted in private" and that "[b]efore the State can subject property to forfeiture, it [is statutorily required to] file a complaint and give notice to any person known to have a property interest in the article." Id at 342 (citation and internal quotation marks omitted). These circumstances undermined "the notion that a bidder could reasonably expect the auction . . . be cloaked in privacy" and that "[v]iewed objectively, it was unreasonable for a buyer to expect that the

information requested would remain private." Id at 343.

In the City, dog owners are required to register for a dog license pursuant to local ordinance and state law. Section 90-13(A) of the City Code, entitled "License and registration tag required; removal of registration tags," states that "every owner of a dog of licensing age shall obtain a license and official registration tag for such dog and shall place upon such dog a collar or harness with the registration tag securely fastened thereto." City Code §90-13(A). This mandatory pet licensing ordinance is enacted pursuant to State statute, which provides:

> The application shall state the breed, sex, age, color and markings of the dog for which license and registration are sought, whether it is of a long- or short-haired variety, and whether it has been surgically debarked or silenced; also the name, street and post-office address of the owner and the person who shall keep or harbor such dog. The information on the application and the registration number issued for the dog shall be preserved for a period of three years by the clerk or other local official designated to license dogs in the municipality. [N.J.S.A. 4:19-15.5].

Neither the State statute nor the City Code places a citizen on notice that the information, which they are legally required to provide if they own a pet, will be made available to the general public. Simply stated, an objectively reasonable City resident would not expect that, by complying with law and registering their dog, their personal contact information will be publicly released. Additionally, for the residents of Jersey City that do not own a dog and have not filed any paperwork stating such, they also have no reason to know or believe that the City may release information that proclaims to the public that their homes are dog free.

Unlike the citizen who voluntarily filed a public complaint in Asbury Park Press v. County of Monmouth or those who voluntarily participated in the public auction in Brennan, the dog owners of the City, and those without a dog in the City, have not availed themselves to the release of this information. Furthermore, unlike Brennan, where the information sought related to

government owned property, a citizen's dog is his or her private property, which should be of no concern to others except for those keeping record for legitimate public health and safety purposes.

B. Plaintiff's Claim Fails under the Burnett/Doe Analysis

The Burnett/Doe analysis "must be applied case by case." Burnett, 198 N.J. at 437. As recognized in the unpublished opinion cited by the Plaintiff, different factual circumstances have the potential to compel different results. See Plaintiff's Certification, Exhibit 2, Bolkin v. Borough of Fair Lawn, A-02205-12T4, 2014 N.J. Super. LEXIS 1409, at *8 (App. Div. June 16, 2014). First and foremost, the City stresses that the unreported cases and trial court orders cited by Plaintiff are not binding on this court. R. 1:36-3. In particular, the factual circumstances of those cases are unique, unknown and incomplete. In addition, Plaintiff has failed to certify that he is not aware of any unreported cases holding for propositions contrary to the cases he cited as required by R. 1:36-3. With that in mind, as previously noted, the Burnett/Doe analysis looks to:

> (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access. [Burnett at 427 (quoting Doe, 142 N.J. at 88.]

Here, there are unique factual circumstances that warrant a finding that the records at issue are exempt from disclosure. With respect to factors one and two, Plaintiff's request is for dog license applications. Plaintiff sells invisible dog fences. The application includes the names, addresses, and dog ownership status of City residents. Plaintiff has conceded that he is not looking for any additional information other than (1) names and addresses of individuals and (2)

the fact that they possess a dog license.

In analyzing the third factor, there is great "potential for harm of subsequent nonconsensual disclosure." Contrary to the plaintiff in Bolkin, a case repeatedly cited to by Plaintiff for support, Plaintiff has not consented to limiting his use of the requested information in any way. See Plaintiff's Certification, Exhibit 2, Bolkin, 2014 N.J. Super. LEXIS 1409, at *4 (noting requestor "consented to retaining the information only for his personal use and distribution"). Thus, the records here can be sold or otherwise distributed to new parties who could use it for any purpose. Additionally, since the records to be produced by the City would be digital copies, if the digital copies were uploaded anywhere to the Internet that is accessible to the public, either intentionally or by accident, search engines such as Google will quickly archive the names and addresses of all dog owners throughout the City.

The fourth factor looks to the "the injury from disclosure to the relationship in which the record was generated." Here, disclosure can, and will, also discourage individuals from owning dogs or applying for dog licenses. Permitting the dog license applicants to intervene will shed further light on this fact. More critically, disclosure undermines the City's public safety purpose in requiring licensing. It will be a detriment to the health and safety of the City's residents if the Town is no longer able to accurately verify if dogs are properly vaccinated. Disclosure can also increase the potential for physical injury to first responders when those individuals are responding to an emergency and no longer aware a dog is present.

Plaintiff's counsel engages in great hyperbole throughout his brief to minimize the notion that the release of the addresses of dog owners would cause any threat to safety. However, it is woefully ignorant of the realities of modern life. For example, people that have suffered at the hands of an abusive partner that purchased or adopted dogs for protection upon relocating to a

new residence, and who have gone to great pains to ensure that their new address remains unknown to their former abusive partner, may find themselves locatable by such malicious actors. Once the requested list of names and addresses of dog owners in Jersey City is archived by a search engine such as Google, a malicious actor need only enter their target's name into Google and, if that person's name was on a publicly disclosed list, they will discover both their target's home address and the fact that they own a dog. Additionally, if the information is not made available on Google, the use of OPRA to obtain such information by a stalker is a simple and free step that can be done anonymously. As the Plaintiff's Counsel makes clear in his brief with the cases cited, Anonymous OPRA requests are allowable under New Jersey law. Therefore, the potential for the abuse of the requested information is of utmost concern to the City. [Exhibit B, Page Da004]

Furthermore, criminals that wish to commit burglaries will no longer need to surveil a home in advance to discover if a dog is present. Rather, such criminals will be able to submit an OPRA request to the City and obtain a map of literally every home that has a dog, thus empowering such criminals to know which homes in Jersey City are not protected by a dog. The Plaintiff's counsel again engages in hyperbole by inferring that such criminals consist only of "the meth-addled and crack-addicted." See Plaintiff's Brief, page 14. However, such stereotypes greatly underestimate the potential for criminality. Areas of wealth are identifiable throughout the City of Jersey City. Professional criminals will be able to discover which homes are not guarded by a dog through nothing but a Google search or a simple anonymous OPRA request. While the Plaintiff makes the assumption that the filing of an OPRA request would make such criminals easily identifiable, due to the fact that the City's OPRA submission portal is on the Internet, the argument is recklessly ignorant of the fact that free tools exist that make it

exceedingly difficult, if not impossible, for local law enforcement to track the originating destination of such requests. [See the Tor Browser and Tor Project, https://www.torproject.org/about/overview].

To allow the requested information to be obtained through OPRA creates a slippery slope and begs the court to question where to draw the line of what is permissible usage and what is not. What was intended as a target audience for advertising can eventually become targets to crime. Homes not protected by dogs are a potential target of robbery or theft. In N.J.S.A. 47:1A-1.1 the legislature prohibited the release of personal firearms records including a person's name and address because knowledge of specific contents of one's home could pose a safety concern. The recognized privacy interest in one means of personal protection cannot be preferred over another. All of the above mentioned factors create a situation where the public will be less inclined to register their dogs with the City, while also demonstrating the very real potentials for harm that this Court has the power to prevent.

The fifth factor examines "the adequacy of safeguards to prevent unauthorized disclosure." As admitted, there are no safeguards in this instance. Plaintiff seeks unfettered access to the information and would possess the opportunity to resale or further disseminate it.

The sixth factor looks to "the degree of need for access." Here, there is no public interest and arguably not even a legitimate private interest. The records are not sought to further transparency in government. "An entity seeking records for commercial reasons has the same right to them as anyone else. However, when legitimate privacy concerns exist that require a balancing of the interests and consideration of the need for access, it is appropriate to ask whether unredacted disclosure will further the core purposes of OPRA." Burnett, 198 N.J. at 435. Plaintiff's motive is for commercial marketing purposes in a City where the majority of the

residents do not possess the type of property where an "invisible fence" can be installed. The vast majority of housing throughout the City consists of apartments where such a fence is utterly pointless. Furthermore, the majority of the front facing portions of lots are immediately connected to the sidewalk and are covered by concrete. Additionally, the very real risk of a lawsuit resulting from an individual or child entering a property surrounded by an invisible fence receiving a dog bite creates an extreme disincentive for any property owner within the City to purchase an invisible fence. Finally, the fact that dogs are stolen from yards in Jersey City is yet another example of why an invisible fence will be completely undesirable in the City. [Exhibit C, Page Da006]. The owner has less costly, less intrusive and more effective means to reach an audience that may be interested in invisible dog fences. Mass mail through the postal service is a much more costly endeavor than, for example, the purchasing of targeted advertising on Google or Facebook, which **most importantly** will be directed at individuals that have opted into receiving such information.

As noted, infra at 8, the Burnett Court denied a request for land title records, containing names, addresses, social security numbers, and signatures of citizens. The court noted:

> Neither of OPRA's goals is furthered by disclosing SSNs that belong to private citizens to commercial compilers of computer databases. Were a similar request made by an investigative reporter or a public interest group examining land recording practices of local government this factor would weight differently in the balancing test. [Burnett, 198 N.J. at 435.]

Perhaps the most compelling Burnett/Doe factor is the last, which requires a court to evaluate "whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access." Here, in addition to the constitutional principles previously set forth, infra at Point I, Plaintiff's intended use of the requested

information is contrary to the articulated public policy underlying OPRA. OPRA was enacted "to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Asbury Park Press v. Ocean Cty. Prosecutor's Office, 374 N.J. Super. 312, 219 (Law Div. 2004). Despite favoring transparency, OPRA expressly recognizes that "**a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.**" N.J.S.A. 47:1A-1 (emphasis supplied). The Supreme Court has held that N.J.S.A. 47:1A-1 "is neither a preface nor a preamble", but rather "part of the body of the law," and that the privacy provision in N.J.S.A. 47:1A-1.1 specifically "**imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests.**" Burnett, 198 N.J. at 422-423 (emphasis supplied).

The Supreme Court denial in Burnett was based, in part, on the grounds that "the request does not further OPRA's core aim of transparency in government." Id at 437. The same ground for denial is applicable here.

In Asbury Park Press v. Ocean Cty. Prosecutor's Office, the court stated:

> However, having recognized the overarching value and objective of providing broad access to government records, the court must ask how the release of the dying words of Anthony Napolean in any way contributes to the purpose of OPRA or provides even a scintilla of insight into the functioning of government. Admittedly, the general rule is that one seeking to obtain government records need not explain why they are requested if there is a clear right to obtain them under the statute. Yet, that principle becomes less absolute if there is some protection of a privacy right afforded in the Act. Arguably, the plaintiff may find information of public worth in the manner in which the victim's call was handled. Beyond that, how can the release of the victim's description of his distress and perhaps his last words contribute to the goals of a more informed citizenry or elimination of the evil of secrecy.

. . .

> The extensive discussion of privacy concerns in the legislative hearing, the recognition of privacy issues in the Senate statement to an earlier bill, the adoption of OPRA with full recognition of both the constitutional amendment and statutory protection of victims' rights, the legislators' knowledge that those concerns had always been addressed either by express exemptions or a common law balancing test under the law existing prior to the adoption of OPRA, and the very words chosen in Section 1 of OPRA, **convince the court that the Legislature intended to provide protection against disclosure in those instances in which a person had a reasonable expectation of privacy.** The fact that the legislation was inarticulately crafted cannot be used as a basis to circumvent the obvious legislative intent -- so obvious that our courts in Serrano [v. South Brunswick Twp., 358 N.J. Super. 352 (App. Div. 2003)] and Courier News [v. Hunterdon Cty. Prosecutor's Office, 358 N.J. Super. 373 (App. Div. 2003)] readily assumed the truth of that proposition. [Asbury Park Press v. Ocean Cty. Prosecutor's Office, 374 N.J. Super. at 330-31 (emphasis supplied).]

Without minimizing the emotional content of the information denied in Asbury Park Press v. Ocean Cty. Prosecutor's Office, the same rational is applicable here and greatly undermines the Plaintiff's arguments that the finding of a privacy interest in the names and addresses of owners derives only from a mistaken interpretation of the since modified Executive Order 21 (McGreevey, 2002) [Exhibit D, Page Da009], rather than the statutory language of N.J.S.A. 47:1A-1. The findings by the Government Records Council in Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005) [Exhibit E, Page Da013] and Knehr v. Township of Franklin, GRC Complaint No. 2012-38 (December, 2012) [Exhibit F, Page Da018] did not merely rely on Executive Order 21 (McGreevey, 2002). Both Bernstein and Knehr cite multiple decisions from courts involving the New Jersey Superior Court and the New Jersey Supreme Court. Furthermore, both Bernstein and Knehr rely upon the statutory language in N.J.S.A. 47:1A-1 that states that agencies have a duty to safeguard from public access a citizen's

personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. In particular both Bernstein and Knehr recognize that:

> The New Jersey Supreme Court has indicated that, as a general matter, the public disclosure of an individual's home address "does implicate privacy interests." Doe v. Poritz, 142 N.J. 1, 82 (1995). The Court specifically noted that such privacy interests are affected where disclosure of a person's address results in unsolicited contact. The Court quoted with approval a federal court decision that indicated that significant privacy concerns are raised where disclosure of the address "can invite unsolicited contact or intrusion based on the additional revealed information." *Id.* (citing Aronson v. Internal Revenue Service, 767 F.Supp. 378, 389 n. 14 (D. Mass. 1991)). [Exhibit E, Page Da014 and Exhibit F, Page Da026].

Additionally, the Plaintiff's attorney engages in hyperbole when he states that Executive Order 26 (McGreevey 2002), which repealed various provisions of Executive Order 21, entirely nullified the finding that there are privacy interests in personal addresses. [See Plaintiff's Brief, Page 6]. In particular, paragraph 5 of Executive Order 26 states "the Privacy Study Commission created by Chapter 404, P.L. 2001, is hereby directed to promptly study the issue of whether and to what extent the home address and home telephone number of citizens should be made publicly available by public agencies and to report back to the Governor and the Legislature within six months." [Exhibit G, Page Da32]. On the topic of home addresses, pages 18-23 of the December 31, 2004 Final Report by the Privacy Study Commission contained multiple recommendations that demonstrated that privacy interests continued to exist regarding the publication of home addresses. [Exhibit H, Pages Da060-Da066] Furthermore, on pages 45-46 of the Final Report by the Privacy Study Commission, the "Conclusion" specifically states that:

> The Commission believes that in some cases disclosure under OPRA of personally identifiable information such as home addresses may violate a citizen's reasonable expectation of privacy.[58] People who do

> not want their home addresses released have limited means for preventing disclosure, and little recourse once the disclosure has been made. The Legislature has specifically articulated in OPRA its intention of not forcing individuals to sacrifice their privacy as a condition of doing business with the government when it stated that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy."[59] Likewise, Governor McGreevey articulated the same intention in Executive Orders 21 and 26.
> …
> The recommendations outlined in this report are based upon statutory and judicial interpretations of an individual's reasonable expectation of privacy regarding the disclosure by government of his or her home address and telephone number, as well as policy considerations of the same. [Exhibit H, Pages Da088-Da099]

Therefore, Plaintiff's claim that Executive Order 26 (McGreevey, 2002) "nullified" the expectation of privacy in regards to the disclosure of home addresses is demonstrably false.

Plaintiff requests the names and addresses of dog license owners, but concedes that the City can redact the breed of dog, the name of the dog, and any reason why someone would want the dog. [Exhibit A, Page Da002**]**. He admits that all he seeks is the name and address of the dog owners. Id. In essence, Plaintiff is not seeking to be an informed citizen. Rather, he is seeking for the City to formulate a mailing list despite the fact that the Plaintiff has less intrusive means to reach their target market that will consist of an audience that has opted in to receiving solicitations, rather than consisting of a potential market that is identifiable only because City law compelled them to provide their home addresses in a licensing system.

OPRA was intended to create transparency in governmental processes and decision making, to prevent instances of abuse of power and discretion, and to foster public trust. It was not intended to create transparency in the private lives and homes of citizens. The names, addresses, and pet ownership status of citizens has no bearing on the integrity of the City's local government. Plaintiff's request does not stem from the perspective of a concerned citizen, but

rather that of a business man seeking information for the sole purpose of directly mailing dog owners unsolicited advertising material for his invisible dog fence product, while recklessly asserting that no privacy implications exist because one paragraph of Executive Order 21 (McGreevey, 2002) was repealed. Local governments were not intended to serve as marketing agencies – creating the mailing lists of target audiences and clientele for private entities. The focus should not be, as Plaintiff contends, the availability of the information being sought, but rather the intended purpose underlying the request, whether it is safe to release such information and whether same coincides with the legislature's intent, particularly in regards to the statutory concerns regarding the disclosure of private information. Such should be weighed greatly with considerations for the potential of abuse coupled with the fact that the physical condition of properties throughout the City make the desire for an invisible fence practically non-existent or impractical.

The City has a public safety interest in requiring dog owners to register their pets. Public policy dictates that the City should not be forced to choose between protecting public safety, on the one hand, and acting as a data aggregation conduit for the dissemination of private personal information for commercial purposes, on the other. In particular, such information should not be released when there is a genuine and demonstrable concern that the release of such information will constitute a threat to public safety. [Exhibit B, Page Da004]. For the reasons stated above, Plaintiff's claim fails under the Burnett/Doe analysis and the City's denial of his OPRA request should be upheld.

POINT III

JERSEY CITY'S DOG LICENSE APPLICATIONS ARE EXEMPT FROM OPRA PURSUANT TO THE PRIVACY PROTECTIONS EMBODIED IN THE NEW JERSEY AND UNITED STATES CONSTITUTIONS.

OPRA cannot force the disclosure of material when it would be unconstitutional to do so. Exempt from disclosure under OPRA are "any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record." N.J.S.A. 47:1A-9. Also exempt are records exempted "by any federal law, federal regulation, or federal order." N.J.S.A. 47:1A-1.

N.J. Const., Art. 1, § 1 provides:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

N.J. Const., Art. 1, § 7 provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

The Declaration of Independence and United States Constitution contains similar language embodying these substantive legal protections. See the Declaration of Independence, paragraph 2. (U.S. 1776) and the United States Constitution, Amendment IV. Through these fundamental constitutional principles, the New Jersey Supreme Court has found its State Constitution to possess a fundamental right to privacy in several contexts. See Hennessey v. Coastal Eagle Point

Oil Co., 129 N.J. 81, 96 (1992) (outlining constitution based privacy rights). This includes a right to privacy in the disclosure of confidential or personal information. See Doe v. Poritz, 142 N.J. 1, 89-90 (1995) (stating "[w]ith its declaration of the right to life, liberty, and the pursuit of happiness, Article I, § 1 of the New Jersey Constitution encompasses the right of privacy").

Recently, in analyzing its analogous constitutional provisions, the Pennsylvania Supreme Court held that public school teachers' home addresses are exempt from disclosure under its public records law based on the individuals' constitutionally protected privacy interest. Pa. State Educ. Ass'n v. Commonwealth, 637 Pa. 337, 362-64 (2016). Quoting the United States Supreme Court, Pennsylvania Supreme Court Justice Wecht stated, "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." Id at 369 (Wecht, J., concurring) (quoting Dep't of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 500 (1994)).

> Although individuals voluntarily may reveal their home addresses in a variety of contexts, i.e., obtaining various licenses, going to court, or owning property, **this voluntary disclosure is legally distinct from and irrelevant to the question of whether a public employer must produce its employees' home addresses upon demand.** Nor is it relevant as a matter of constitutional law that home addresses are available in the public domain and accessible through internet searches or particular websites. **That such information may be uncovered by private citizens through industry or skullduggery does not mean that government must employ public resources to assist in that activity.** [Pa. State Educ. Ass'n, 637 Pa. at 369-70 (emphasis supplied).]

Plaintiff is requesting that a local government assist his private business by formulating a mailing list so he can, without prior authorization, distribute marketing materials and solicit business from Jersey City residents. Plaintiff does not have a right "under the Constitution or otherwise to send unwanted material into the home of another." Rowan, 397 U.S. at 738.

"[I]ndividual autonomy must survive to permit every householder to exercise control over unwanted mail[.]" Id at 736. While Plaintiff asserts that one may voluntarily release their home addresses in other contexts, it is "legally distinct and irrelevant" to the question of whether a municipality must categorize and produce its citizens' addresses on demand. Both Federal and State Constitutions protect the dissemination of information that City citizens were legally required (for health and safety purposes) to submit to the City.

POINT IV

PLAINTIFF'S CLAIM FOR DISCLOSURE UNDER THE COMMON LAW RIGHT OF ACCESS FAILS AS A MATTER OF LAW.

Unlike the right to view documents under OPRA, the common law right of access is a qualified one:

> The common-law right to access public records depends on three requirements: (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," South Jersey Publishing Co. v. New Jersey Expressway Auth., 124 N.J. 478, 487 (1991); and (3) the citizen's right to access "must be balanced against the State's interest in preventing disclosure." Higg-A-Rella[, Inc. v. County of Essex], 141 N.J. [35, 46 (1995)].
>
> [Keddie v. Rutgers, State University, 148 N.J. 36, 50.]

In balancing the competing interests, trial courts should consider:

> (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial

> measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.
>
> [Loigman v. Kimmelman, 102 N.J. 98, 113 (1986).]

A. Plaintiff Does Not Have a Wholesome Public Interest or a Legitimate Private Interest in the Subject Matter.

Plaintiff only asserts a "legitimate" private interest, not a public interest in the records sought. Plaintiff's Brief at 17. Notably, the unpublished case law cited by Plaintiff for support of his argument that he is entitled to the records all involved a public interest.

In Atl. Cty. SPCA v. City of Absecon, A-3047-07T3, 2009 N.J. Super. LEXIS 1370 (App. Div. June 5, 2009)[1] [Plaintiff's Exhibit 1], the Atlantic County Society for the Prevention of Cruelty to Animals ("AC-SPCA"), a statutorily authorized entity, sought a complete list of all licensed dog owners in the County under OPRA. Id at *2. The primary purpose of the request was to "assist in its animal cruelty enforcement efforts." Id. Specifically, the agency would use the information to track if owners had multiple pets when an instance of suspected animal cruelty was supported. Id. The AC-SPCA contended, "we would want to be alerted to the need to inquire about other animals." Id. The secondary purpose was to solicit charitable contributions from the public so that the AC-SPCA could continue to perform its animal cruelty enforcement efforts. Id. The trial court found and the Appellate Court agreed that the AC-SPCA had a wholesome public interest.

Similarly, in McGuire v. Twp. of Waterford, A-3196-05T5, 2007 N.J. Super. LEXIS 2436 (App. Div. Feb. 28, 2007), certif. denied., 192 N.J. 70 (2007) [Plaintiff's Exhibit 4],

[1] The unreported cases and trial court orders cited by Plaintiff are not binding on this court. R. 1:36-3. The factual circumstances of those cases are unique, unknown and incomplete. In addition, Plaintiff has failed to certify that he is not aware of any unreported cases holding for propositions contrary to the cases he cited. See Id.

another unreported decision cited by Plaintiff, the requestor made an anonymous OPRA request seeking the number of dog licenses issued to a particular citizen, who had been the subject of investigations and law enforcement proceedings for animal cruelty. Id at *2. In McGuire, the court noted that the plaintiff was "active in a small community of individuals concerned about the safety of animals." Id. This interest was a public one – to prevent animal cruelty and support the general safety of animals.

In Bolkin, the Appellate Division affirmed the trial court's application of the Burnett/Doe analysis and granted Plaintiff's request for the names and addresses of pet owners in Fair Lawn for the purpose of sending "pet owners political literature informing them of the policy positions espoused by various candidates for office." Bolkin, 2014 N.J. Super. LEXIS 1409 at *2 [Plaintiff's Exhibit 2]. The trial court reasoned and the Appellate Court agreed that "the discussion of views held by political candidates was surely in the public interest." Id at *4.

Here, Plaintiff's sole purpose for obtaining the names and addresses of dog owners is not to further a public interest, but rather to further his private business interest. The question becomes, is this interest legitimate? The City submits it is not. As the United States Supreme Court has stated, "[a] mailer's right to communicate must stop at the mailbox of an unreceptive addressee" and "a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail[.]" Rowan, 397 U.S. 736-37.

Plaintiff intends to use the information to directly mail unsolicited advertisements and brochures for his invisible fence product. Plaintiff's purpose does not compare to animal cruelty interests in Atl. Cty. SPCA or McGuire or to the political speech interests in Bolkin. Plaintiff's interest to send commercial spam into the mailbox of an unreceptive addressee is not legitimate.

Additionally, access to the requested records is not the only means by which the Plaintiff can contact the market he wishes to address. As mentioned earlier, far less intrusive means through the use of services such as Google or Facebook will allow the Plaintiff to reach residents of Jersey City that voluntarily opted in to receiving solicitations. Furthermore, such methods produce greater returns for business at a cheaper cost than the option of invasive mass junk mailing.

B. Even If Plaintiff Was Found to Have a Legitimate Interest, His Claim Fails Upon Balance of the Parties' Interests.

In Higg-A-Rella, the Supreme Court permitted the disclosure of a computer tape copy of the tax assessment records of every municipality in Essex County to the plaintiff corporation under the Common Law Right to Access. Higg-A-Rella, Inc. v. County of Essex, 141 N.J. at 55. The Plaintiff's corporation was involved in the business of selling such data to real-estate brokers, attorneys, and appraisers. According to statute, the lists at issue were to "remain in the office of the board as a public record." Id at 42 (quoting N.J.S.A. 54:4-55). The Court found that the plaintiff had a "legitimate for-profit enterprise." Id at 47. The Court further found that the balance test of the parties' competing interests weighed in favor of the plaintiff, because the defendants did not differentiate the need to keep the computer copy confidential and the hard copy public. Id at 48-49. The Court reasoned that the lists "contained simple, non-evaluative data that have historically been available to the public," and therefore did not give rise to expectations of privacy. Id at 49.

There are numerous specialized industries and businesses that partake in tax and real estate transactions. Such transactions are public in nature and the resulting documents are often required to be recorded to place the public on notice. Unlike tax assessment and real estate records, dog license records have not been "historically available to the public." Although dog

license records do not contain evaluative data, their disclosure presents a series of issues that tip the Loigman balancing test in the City's favor.

As noted herein, disclosure will "discourage citizens from providing information to the government." This will, in turn, "impede agency functions." When submitting dog license applications, no reasonable person would expect that, by registering for a dog, you avail yourselves to unwanted commercial mailings. In addition, the City will be "chilled" by the disclosure. As noted, disclosure will undermine the City's health and safety purposes in enacting City Code §90-13. Public officers will face an increased risk of harm. The fact that Plaintiff only seeks addresses and that dog license applicants voluntarily may reveal their home address in a variety of contexts "is legally distinct from and irrelevant to" the question of whether the City should produce a categorized list of citizens on demand. See Pa. State Educ. Ass'n, 637 Pa. at 369-70. "[A]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." Dep't of Defense, 510 U.S. at 500. A government must not employ public resources to assist Plaintiff in his unwanted commercial marketing efforts.

Accordingly, it is respectfully submitted that Plaintiff does not possess a valid claim for access under the common law.

CONCLUSION

For the reasons set forth above, the City respectfully requests that the Court permit notice and an opportunity for the public to intervene and be heard regarding the public disclosure of their home addresses in relation to the public disclosure of dog license information. After those interested parties are provided with an opportunity to be heard, it is respectfully submitted that Plaintiff's Order to Show Cause is denied and Verified Complaint is dismissed. This court

should consider the concerns of City residents before opening a Pandora's Box that will allow for the dissemination of personal and private information into a sphere over which the City has no control. The City maintains serious concerns about the potential for the abuse of this information once it becomes public. [See Exhibit B, Pages Da004-Da005]. Furthermore, the City emphasizes that existing Federal and State Law and precedent, coupled with the duty of government entities to safeguard the disclosure of information that would violate a citizen's reasonable expectation of privacy as enacted in N.J.S.A. 47:1A-1.1, justify a ruling from this court that states the City properly denied the Plaintiff's OPRA request.

Very truly yours,

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CORPORATION COUNSEL

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John McKinney
Assistant Corporation Counsel

Enclosures per above
Cc: Donald M. Doherty, Jr., Esq.