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Attorneys for Plaintiffs,
New Jersey Office of the Public Defender and States Newsroom Inc.

NEW JERSEY OFFICE OF THE PUBLIC DEFENDER and STATES NEWSROOM INC., a foreign nonprofit corporation d/b/a NEW JERSEY MONITOR, Plaintiff, v. NEW JERSEY DEPARTMENT OF HEALTH, DIVISION OF PUBLIC HEALTH AND ENVIRONMENTAL LABORATORIES and ANALIZA GROSS in her official capacity as Records Custodian, Defendants.	**SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MERCER COUNTY** **DOCKET NO.:** Civil Action **VERIFIED COMPLAINT**

Plaintiffs New Jersey Office of the Public Defender and States Newsroom Inc, a foreign nonprofit corporation d/b/a New Jersey Monitor, through its undersigned counsel, Pashman Stein Walder Hayden, A Professional Corporation, complain against Defendant New Jersey Department of Health, Division of Public Health and Environmental Laboratories and its Records Custodian as follows:

INTRODUCTION

1. This is an action seeking public records pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common law right of access to public records.

2. Every baby born in New Jersey is required by law to be tested for sixty disorders within 48 hours of birth as part of the State's Newborn Bloodspot Screening Program. Through a simple needle prick to the heel, hospitals, medical facilities, and health care providers collect blood from newborns. Those blood spot samples are later tested by the Newborn Screening Laboratory, which operated by Defendants New Jersey Department of Health, Public Health and Environmental Laboratories. These blood spot samples are taken without informed consent by the newborn's parents or guardians, and, upon information and belief, the samples are stored by Defendants for more than twenty years.

3. Plaintiff New Jersey Office of the Public Defender (OPD) recently learned that the State Police has successfully subpoenaed a newborn blood spot sample from the Newborn Screening Laboratory that belonged to a child who is now approximately nine years old. The reason the State Police subpoenaed the sample was so that it could perform a DNA analysis on the sample and tie the child's father, who became OPD's client, to a crime that was committed in 1996. By serving a subpoena upon the Newborn Screening Laboratory, the State Police sidestepped its constitutional obligation to develop probable cause and obtain a warrant so that it could obtain a buccal swab from OPD's client to perform an analysis of his DNA. By obtaining the child's blood spot sample from the Newborn Screening Laboratory, it was able to perform a DNA analysis on the child's blood and then use those DNA results to form the basis of an affidavit of probable cause to obtain a warrant for a buccal swab from OPD's client. OPD's client was later criminally charged.

4. Alarmed by this practice it strongly believes constitutes an illegal search, OPD seeks to learn how often State agencies are utilizing the Newborn Screening Laboratory as an

investigatory tool for its prosecutions in order to sidestep the constitutional rights of defendants to be free from warrantless searches and seizures.

5. Accordingly, OPD filed a request pursuant to OPRA and the common law with Defendants to ascertain how often the Newborn Screening Laboratory has received subpoenas from law enforcement agencies over the past five years and which law enforcement agencies are engaging in this troubling practice. OPD clarified that it would accept redacted copies of subpoenas so that no case or investigation-specific information was visible, but so that it could count the number of subpoenas the Laboratory has received and learn which agencies issued them. OPD also indicated that it would be satisfied if Defendants simply produced a Vaughn Index that listed how many subpoenas were being withheld and from which agencies.

6. Defendants refused produce any redacted records, nor would they produce a Vaughn Index. Thus, they have deprived OPD of any information whatsoever regarding how widespread the forensic practice of utilizing newborn blood samples from the Newborn Screening Laboratory is. OPD needs this information to effectively defend their indigent criminal defendant clients from warrantless searches and seizures.

7. Upon learning about this practice through its reporting, Plaintiff States Newsroom Inc., publisher of the New Jersey Monitor, also sought to learn more.

8. The New Jersey Monitor is an independent, nonprofit and nonpartisan news site that strives to be a watchdog for all residents of New Jersey.

9. The New Jersey Monitor believes the public would be shocked by what has occurred in OPD's client's case and that law enforcement agencies are skirting warrant requirements this way and misusing blood samples that were gathered for health purposes to instead conduct criminal investigations. It also believes that parents in particular would be shocked

to learn that their children's blood samples are being stored by the Department of Health for more than twenty years and are being accessed by law enforcement agencies without their knowledge or consent so that their DNA could be analyzed. Many parents are likely not even aware of the screening program or that blood was drawn from their newborn babies, let alone that their children's genetic privacy could be violated in this way.

10. Accordingly, the New Jersey Monitor also filed a public records request very similar to OPD's, seeking to learn how frequently law enforcement agencies are using newborn blood samples as an investigative tool to solve their crimes without a search warrant.

11. Defendants similarly denied the New Jersey Monitor's requests, refusing to even provide a Vaughn Index that indicates how many subpoenas have been received.

12. Plaintiffs collectively file this action to obtain redacted copies of the subpoenas pursuant to OPRA or the common law right of access so that they can learn more about how the State Newborn Screening Laboratory has effectively turned into a warrantless DNA collection facility for State criminal prosecutions.

PARTIES

13. Plaintiff New Jersey Office of the Public Defender is an agency established within the Executive Branch of the State Government pursuant to N.J.S.A. 2A:158A-3.

14. Plaintiff States Newsroom Inc. is an independent national 501(c)(3) organization, which publishes the New Jersey Monitor. The New Jersey Monitor is an independent, nonprofit and nonpartisan news site that strives to be a watchdog for all residents of the Garden State.

15. Defendant New Jersey Department of Health, Division of Public Health and Environmental Laboratories is a state agency located within the Executive Branch of the State Government. Upon information and believe, the Division maintains an office at 1040 River Road,

Ewing Township, NJ 08628.

16. Defendant Analiza Gross is the Records Custodian for the Division of Public Health and Environmental Laboratories and is being sued in her official capacity only. Upon information and belief, she also maintains an office at 1040 River Road, Ewing Township, NJ 08628.

VENUE & JURISDICTION

17. Venue is properly laid in Mercer County because Defendants are located in Mercer County and because the cause of action arose in Mercer County. R. 4:3-2(a).

18. The Court has subject matter jurisdiction pursuant to N.J.S.A. 47:1A-6 and the common law.

FACTUAL ALLEGATIONS

A. Background Information

19. Pursuant to N.J.S.A. 26:2-111 and N.J.A.C. 8:18-1.1 to -1.14, every newborn baby born in New Jersey must have a blood sample taken within 48 hours of birth so that the State may screen the newborn for sixty disorders that can cause serious health problems.

20. This newborn blood screening program has been in place since 1977 and is mandatory unless a parent or guardian objects to the testing on the grounds that it would conflict with their religious tenants or practices. N.J.A.C. 8:18-1.12.

21. However, there appears to be no requirement that parents are informed that blood samples will be taken from their newborn babies. Many parents may not even be aware of this routine practice because there is no informed consent requirement. See Rachel L. Schweers, Ph.D., Newborn Screening Programs: How Do We Best Protect Privacy Rights While Ensuring Optimal Newborn Health?, 61 DePaul L. Rev. 869, 870 (2012).

22. The blood samples are collected by physicians, hospitals, and other health care providers within 48 hours of a child's birth and transmitted to the Newborn Screening Laboratory for testing and analysis.

23. The Newborn Screening Laboratory thereafter tests the blood specimens for disease and then issues reports notifying physicians and others of the results. N.J.A.C. 8:18-1.9.

24. Those reports and the information on newborn infants gathered by the Newborn Screening Laboratory are only to be used by the Department of Health and other agencies for purposes of carrying out the Newborn Bloodspot Screening Program. Such reports and information are expressly "confidential" and shall not be "divulged or made public so as to disclose the identity of any person to which it relates, except as provided by law." N.J.S.A. 26:2-111; See also N.J.A.C. 8:18-1.13.

25. After a newborn has been screened, there is some blood that remains on the testing card that is called a "residual dried blood spot." Upon information and belief, New Jersey stores all residual dried blood spots for 23 years after testing.

26. In early 2022, OPD learned that at least one law enforcement agency has obtained newborn blood spot samples from the Newborn Screening Laboratory to perform a DNA analysis on the sample as part of a criminal investigation.

27. The State Police had re-opened an investigation into a "cold case" of sexual assault that had occurred in 1996 and had genetically narrowed the suspects to one of three brothers and their male offspring.

28. Because there was not probable cause to obtain search warrants for buccal swabs from those suspects, the State Police instead served a subpoena upon the Newborn Screening

Laboratory in or about August 2021 to obtain residual dried blood spot samples that had been collected from a male newborn in or about June 2012.

29. To ascertain which family member was the suspect, the State Police sought the blood spot sample that was taken from an approximately nine-year-old child when he was a newborn to compare it to the DNA it had collected at the crime scene in 1996.

30. The State Police successfully obtained the child's blood spot sample, sequenced the DNA, and then ran further analysis utilizing a technique known as investigative genetic genealogy. The State Police alleges those results showed the newborn blood spot sample belonged to the genetic child of the suspect. From there, the State Police used those results to form the basis of an affidavit of probable cause to acquire a warrant to obtain a buccal swab from OPD's client, who is the child's father. OPD's client was then criminally charged.

31. OPD became alarmed that the State Police, and perhaps other agencies, are utilizing the residual blood spot samples at the Newborn Screening Laboratory to gather forensic evidence for criminal investigations. Because both the Supreme Court of the United States and the New Jersey Supreme Court recognize that people have a right of privacy in their DNA and that the collection and analysis of that DNA is a search, a search warrant is generally required for such invasive actions. The subversion of the warrant requirement, especially because it involved a minor child whose blood was originally and subsequently taken without any parental consent, was highly unusual and concerning.

B. OPD's Public Records Request

32. To learn how frequently law enforcement agencies are flouting warrant requirements and utilizing the Newborn Screening Laboratory to obtain DNA samples, OPD filed

a request pursuant to OPRA and the common law on or about March 3, 2022. See **Exhibit A**, a true and accurate copy of OPD's OPRA and common law request.

33. The request sought all subpoenas served on the Newborn Screening Laboratory by any law enforcement agencies from January 1, 2017 to date. Ibid.

34. On March 17, 2022, Defendants denied Plaintiff's request under OPRA. They stated:

> Please be advised that your request must be denied.
>
> The Department has located documents responsive to your request, which are grand jury subpoenas. Under N.J.S.A. 47:1A-9(b), OPRA "shall not abrogate or erode 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." Records related to grand jury proceedings are made confidential by Court Rule and are therefore not subject to release. R. 1:38-3(c)(4); R. 3:13-3; Grossman v. Office of Pros. Cty., Docket No. OCN-L-533-13 (Law Div. July 26, 2013); Reagan v. Camden Cty. Pros. Office, GRC Complaint No. 2016-28 (July 28, 2017). While such records may be released at the discretion of the Assignment Judge based on a "strong showing of particularized need[,]" Daily Journal v. Police Dep't of Vineland, 351 N.J. Super. 110, 123 (App. Div. 2002), "[p]ublic disclosure . . . has not been sanctioned[,]" State v. Kearney, 109 N.J. Super. 502, 506 (App. Div. 1978).
>
> For these reasons, your request is denied and closed.
>
> [See **Exhibit B**, a true and accurate copy of Defendants' denial and subsequent communications between Plaintiff and Defendants.]

35. Because Defendants' denial letter did not address OPD's common law right of access and because OPD believed that the records could be released with redactions, OPD objected as follows on March 18, 2022:

> We ask that you consider our common law right to access these documents. We are not interested in knowing about any particular grand jury matters or any specific names or information on a

> subpoena to know what criminal inquiries they are tied to. Rather, our interest is in knowing the number of times that law enforcement agencies have served subpoenas upon your lab. We prefer that you give us redacted subpoenas, but would accept a Vaughn Index so that we can count the number of subpoenas you received and see the issuing agency. No confidential information is disclosed this way, but we're able to obtain the data we need.
>
> Our courts have repeatedly recognized that the definition of common law is broader under the common law than under OPRA. The Court has repeatedly looked to the common law to consider the release of law enforcement records that are otherwise exempt under OPRA. See NJMG v. Lyndhurst, 229 N.J. at 578-81; Paff v. Ocean County Pros. Office, 235 N.J. at 1, and Gilleran v. Twp. of Bloomfield, 227 N.J. at 177-78 (2016). Just this past week, the Supreme Court held that police internal affairs records—something that have been strictly confidential for decades—can be released under the common law because the public interest is significant. See Rivera v. Union County Prosecutor's Office, __ N.J. __ (2022).
>
> When the subpoenas are redacted to remove any identifying information, the confidentiality interest is extremely limited and releasing them in no way undermines the policy considerations behind Rule 1:38. On the other hand, our interest in learning more about how often law enforcement is serving subpoenas upon your lab is significant because of the powerful privacy interest people have in their genetic information and in the genetic information of their minor children. The frequency and manner in which this privacy is pierced for the purposes of criminal investigation is of utmost public interest.
>
> [Exhibit B.]

36. After Defendants did not respond, OPD followed up on May 17, 2022 seeking a response to its objection.

37. On May 26, 2022, Defendants finally responded as follows:

> Based upon the authorities cited in the prior response to your OPRA request, and after carefully balancing your generalized interest against the strong interest in preserving the confidentiality of grand jury records, the Department is constrained to conclude that your interest is insufficient to overcome the presumption of confidentiality of grand jury records. Therefore, your request must be denied under the common law.

[Exhibit B.]

38. To date, Defendants have not produced any redacted subpoenas responsive to OPD's request, nor have they produced a Vaughn Index to demonstrate how many responsive subpoenas are being withheld.

C. The New Jersey Monitor's Records Request

39. Through its reporting, the New Jersey Monitor learned that the State Police had served a subpoena upon the Newborn Screening Laboratory to obtain blood samples that had been collected pursuant to the Newborn Bloodspot Screening Program so that the State Police could perform a forensic analysis on the sample to solve a cold case.

40. The New Jersey Monitor was deeply alarmed by this discovery and the serious constitutional and genetic privacy implications it raises. It believes that the public would want to know that a statewide program that is intended to protect the health of newborn babies is being utilized by law enforcement agencies who want to flout warrant requirements and utilize the blood samples as a forensic tool. It further believes that parents in particular would want to know that their children's blood spot samples—and thus their DNA—are being collected and stored by the Department of Health and could be subpoenaed by law enforcement without their knowledge or consent at any time.

41. Accordingly, to support its reporting and ascertain how widespread the problem is, the New Jersey Monitor filed a public records request, which stated:

> The New Jersey Monitor, an independent, non-profit and non-partisan news site that strives to be a watchdog for all residents of New Jersey, is aware that law enforcement agencies have issued subpoenas upon the Newborn Screening Laboratory so that they can perform a DNA analysis of newborn blood samples to assist in their investigations. **Pursuant to OPRA and the common law right of access, please produce all subpoenas served on the Newborn**

> **Screening Laboratory by any law enforcement agency from June 1, 2016 to present date.**
>
> [See **Exhibit C**, a true and accurate copy of an email chain containing the New Jersey Monitor's OPRA request and the response. (emphasis added).]

42. The New Jersey Monitor's request further explained that it would accept heavy redactions to the documents and explained its common law interest in disclosure:

> If you determine that the subpoenas are exempt from access under OPRA, we ask that you provide a Vaughn Index that describes each record that is being withheld. We also ask that you consider our interest under the common law. We are not seeking to learn about any specific criminal matter, nor the individuals named in the subpoena as targets of any investigation (or children of the targets whose DNA or sample is being sought). Thus, we consent to redaction of the subpoenas so that all names, case numbers, and other identifying information is shielded, but so that we are able to ascertain how often the Lab is receiving these subpoenas and from which law enforcement agencies. We believe the public interest in disclosure is significant and we want to report this alarming practice to the public, letting them know that the blood of their newborn children that they are obligated by law to provide for health screening purposes is instead being utilized by law enforcement agencies (and perhaps without even a warrant) to conduct criminal investigations. We do not believe the Legislature intended the newborn screening program to be a tool for law enforcement investigations and that there are serious genetic privacy issues that parents and the public deserve to learn about. We ask that you respond to this request within the allotted seven business days so that we may continue our investigation and reporting.
>
> [Exhibit C.]

43. Just as they had done with OPD's request, Defendants refused to release even redacted versions of the subpoenas or a Vaughn Index so that the New Jersey Monitor could learn how often law enforcement agencies are serving subpoenas upon the Newborn Screening Laboratory. They wrote:

> Please be advised that your request for "all subpoenas served on the Newborn Screening Laboratory by any law enforcement agency

> from June 1, 2016 to present date" must be denied under both OPRA and the common law.
>
> Under N.J.S.A. 47:1A-9(b), OPRA "shall not abrogate or erode 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." Records related to grand jury proceedings are made confidential by Court Rule and are therefore not subject to release. R. 1:38-3(c)(4); R. 3:13-3; Grossman v. Office of Pros. Cty., Docket No. OCN-L-533-13 (Law Div. July 26, 2013); Reagan v. Camden Cty. Pros. Office, GRC Complaint No. 2016-28 (July 28, 2017); State v. Arace Bros., 230 N.J. Super. 22, 36 n.4 (App. Div. 1989). While such records may be released at the discretion of the Assignment Judge based on a "strong showing of particularized need[,]" Daily Journal v. Police Dep't of Vineland, 351 N.J. Super. 110, 123 (App. Div. 2002), public disclosure of these records is neither appropriate nor permitted, State v. Kearney, 109 N.J. Super. 502, 506 (App. Div. 1978).
>
> For these reasons, your request is denied and closed.
>
> [Exhibit C.]

44. This lawsuit seeks access to redated subpoenas so that Plaintiffs may ascertain how many subpoenas the Newborn Screening Laboratory has received from law enforcement agencies during the past few years and which law enforcement agencies are flouting search warrant requirements and utilizing the laboratory as a forensic investigative tool.

FIRST COUNT
(Violation of OPRA)

45. Plaintiffs repeat and incorporate by reference the allegations set forth in the preceding paragraphs as though fully set forth at length herein.

46. Pursuant to N.J.S.A. 47:1A-1, all government records must be "readily accessible" to the public unless specifically exempt by law.

47. Although our court rules require prosecutors, grand jurors, and others to take an oath of secrecy regarding the grand jury proceeding, the secrecy rules do not apply to witnesses and those who receive grand jury subpoenas. R. 3:6-7.

48. Grand jury subpoenas are not exempt from access under OPRA, especially when they have been redacted so that no identifying information about the grand jury proceeding or the target of the grand jury investigation is disclosed.

49. Accordingly, Defendants have violated OPRA by denying access to the redacted grand jury subpoenas so that Plaintiffs may ascertain how many subpoenas the Newborn Screening Laboratory has received and which law enforcement agencies have issued them.

WHEREFORE, Plaintiffs demand judgment against Defendants:

a) Declaring said actions of Defendants to be in violation of OPRA, N.J.S.A. 47:1A-1 *et seq.*, by unlawfully withholding government records and failing to release non-exempt portions of government records;

b) Compelling Defendants to release the non-exempt portions of the requested records, as required by N.J.S.A. 47:1A-5(g);

c) Awarding counsel fees and costs pursuant to N.J.S.A. 47:1A-6; and

d) For such other relief as the Court may deem just and equitable.

SECOND COUNT
(Common Law Right of Access to Public Records)

50. Plaintiffs repeat and incorporate by reference the allegations set forth in the preceding paragraphs as though fully set forth at length herein.

51. There is a compelling public interest in learning more about how law enforcement agencies are utilizing the Newborn Bloodspot Screening Program as a forensic tool to circumvent

the usual warrant requirements that would be required to obtain DNA samples for criminal investigations.

52. Plaintiff OPD has a significant interest in knowing how expansive this law enforcement practice is so that it may better represent its clients who may be subject to such warrantless searches.

53. Plaintiff New Jersey Monitor is the eyes and ears of the public and has an interest in reporting to the public about this practice that violates basic concepts of genetic privacy. Parents may not even be aware that blood is being drawn from their newborn children and stored by the State for many years. They may be particularly alarmed to learn that their children's blood could be accessed by law enforcement agencies without their knowledge or consent.

54. Because both Plaintiffs have agreed that any identifying information about the target of the grand jury investigation could be redacted, there is no justification for complete secrecy.

55. Accordingly, Defendants' failure to disclose the requested records violated Plaintiffs' common law right of access to public records.

WHEREFORE, Plaintiffs demand judgment:

a. Declaring said actions of Defendants to be unlawful and invalid;

b. Directing Defendants to release the redacted records to Plaintiffs forthwith;

c. Ordering Defendants to preserve the requested records pending resolution of these proceedings or as otherwise required by law;

d. Awarding attorney fees and costs of suit pursuant to Mason v. City of Hoboken, 196 N.J. 51, 76 (2008) and Gannett Satellite Information Network v. Twp. of Neptune, 467 N.J. Super. 385 (App. Div. 2021); and

e. For such other relief as the Court may deem just and equitable.

PASHMAN STEIN WALDER HAYDEN
A Professional Corporation,
Attorneys for Plaintiff,
New Jersey Office of the Public Defender and States Newsroom Inc.

Dated: July 10, 2022

By: /s/ CJ Griffin

DESIGNATION OF TRIAL COUNSEL

Pursuant to Rule 4:25-4, CJ Griffin, Esq. is hereby designated as trial counsel for Plaintiff in this matter.

CERTIFICATION PURSUANT TO R. 4:5-1

Plaintiffs, by their attorneys, hereby certify that the matter in controversy is not the subject of any other action pending in any Court and is likewise not the subject of any pending arbitration proceeding. Plaintiffs further certify that they have no knowledge of any contemplated action or arbitration regarding the subject matter of this action and that Plaintiffs are not aware of any other parties who should be joined in this action.

PASHMAN STEIN WALDER HAYDEN
A Professional Corporation,
Attorneys for Plaintiff,
New Jersey Office of the Public Defender and States Newsroom Inc.

Dated: July 10, 2022

By: /s/ CJ Griffin

VERIFICATION/AFFIDAVIT

Tamar Lerer, of full age, deposes and says:

1. I am employed by the Plaintiff New Jersey Office of the Public Defender as an Assistant Deputy Public Defender, and I have been authorized to make this verification.

2. I have read the Verified Complaint. The factual allegations of the Verified Complaint are true. The said Verified Complaint is based on personal knowledge and is made in truth and good faith and without collusion, for the causes set forth herein. As to any facts alleged to be upon information and belief, I believe those facts to be true.

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.

Tamar Lerer

Dated: July 10, 2022

VERIFICATION/AFFIDAVIT

Terrence T. McDonald, of full age, deposes and says:

1. I am employed by the Plaintiff States Newsroom Inc. as the Editor of the New Jersey Monitor, and I have been authorized to make this verification.

2. I have read the Verified Complaint. The factual allegations of the Verified Complaint are true. The said Verified Complaint is based on personal knowledge and is made in truth and good faith and without collusion, for the causes set forth herein. As to any facts alleged to be upon information and belief, I believe those facts to be true.

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.

Terrence T. McDonald

Dated: 7/9/2022

Exhibit A

The following Request for Information will be forwarded to
Health/ Division of Public Health and Environmental Laboratories (PHEL) (Lab requests).

Your confirmation number is **W182800**. Please write this number down or print this page as a reference.

Requestor Information

First Name	MI	Last Name
Tamar	Y	Lerer

Company
New Jersey Office of the Public Defender

Mailing Address
31 Clinton Street, P.O. Box 46003 Newark

City	State	ZIP
Newark	New Jersey	07101 -

Email
Tamar.Lerer@opd.nj.gov

Day Time Telephone:	Area Code	Number	Extension
	973	424 - 8778	

Preferred Delivery: E-Mail

Under penalty of N.J.S.A. 2C:28-3, I certify that I **Have Not** been convicted of any indictable offense under the laws of New Jersey, or any other state, or in United States.

Record Request Information:
This is a request for records pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 et seq.. South Jersey Publishing Co. v. New Jersey Expressway Auth., 124 N.J. 478, 487-89 (1991). The Office of the Public Defender requests the following records: • Subpoenas served on the Newborn Screening Laboratory by any law enforcement agencies from January 1, 2017 to date. If you determine that any portion of the requested materials is exempt from release, we request that you redact the portion that you believe exempt and provide us with copies of the remaining, non-exempt portions. If any or part of this request is denied, please send us a letter describing each partial redaction and listing the exemption(s) on which you rely for each such item or redaction. If there are fees associated with this request, please contact me before proceeding. Further, please provide the requested records in electronic form if it is feasible and economical to do so. Finally, I welcome the opportunity to answer any questions you might have about this request in order to better clarify or facilitate the production of the public records requested.

Payment Information

Maximum Authorized Cost:
$ 20

Payment Method:

Fees: Letter Size @ $0.05/page
Legal Size @ $0.07/page

Electronic Records: shall be provided free of charge, but agency may charge for cost of media, programming, clerical, supervisory assistance and/or substantial use of information technology.

Delivery: Delivery / postage fees additional depending upon delivery type.

Additional Charges: may be charged if extraordinary time/effort required, depending upon request.

Exhibit B

RE: Government Records Request Health/Division of Public Health and Environmental Laboratories (PHEL) (Lab requests) W182800

DOH-dphelcustodian [DOH]

Thu 2022-05-26 08:18

To: Lerer, Tamar [OPD] <Tamar.Lerer@opd.nj.gov>

Dear Ms. Lerer:

Based upon the authorities cited in the prior response to your OPRA request, and after carefully balancing your generalized interest against the strong interest in preserving the confidentiality of grand jury records, the Department is constrained to conclude that your interest is insufficient to overcome the presumption of confidentiality of grand jury records. Therefore, your request must be denied under the common law.

Sincerely,

Analiza Gross
Custodian of Records for the
Division of Public Health and Environmental Laboratories
NJ Department of Health
https://www.state.nj.us/health/opra/requests/index.shtml#6

From: Lerer, Tamar [OPD] <Tamar.Lerer@opd.nj.gov>
Sent: Tuesday, May 17, 2022 1:34 PM
To: DOH-dphelcustodian [DOH] <dphelcustodian@doh.nj.gov>
Cc: DiPippo, Valentina (LPS) <Valentina.DiPippo@law.njoag.gov>
Subject: Re: Government Records Request Health/Division of Public Health and Environmental Laboratories (PHEL) (Lab requests) W182800

Hello,

I am writing to follow up on my email of March 18 requesting redacted subpoenas or a Vaughn index as well as asking you to consider our common law right of access to these documents. I'd appreciate an update on the status of my request.

Thank you,

Tamar

From: Lerer, Tamar [OPD] <Tamar.Lerer@opd.nj.gov>
Sent: Friday, March 18, 2022 10:46
To: DOH-dphelcustodian [DOH] <dphelcustodian@doh.nj.gov>
Cc: DiPippo, Valentina (LPS) <Valentina.DiPippo@law.njoag.gov>
Subject: Re: Government Records Request Health/Division of Public Health and Environmental Laboratories (PHEL) (Lab requests) W182800

Thank you for your response.

We ask that you consider our common law right to access these documents. We are not interested in knowing about any particular grand jury matters or any specific names or information on a subpoena to know what criminal inquiries they are tied to. Rather, our interest is in knowing the number of times that law enforcement agencies have served subpoenas upon your lab. We prefer that you give us redacted subpoenas, but would accept a Vaughn Index so that we can count the number of subpoenas you received and see the issuing agency. No confidential information is disclosed this way, but we're able to obtain the data we need.

Our courts have repeatedly recognized that the definition of common law is broader under the common law than under OPRA. The Court has repeatedly looked to the common law to consider the release of law enforcement records that are otherwise exempt under OPRA. See NJMG v. Lyndhurst, 229 N.J. at 578-81; Paff v. Ocean County Pros. Office, 235 N.J. at 1, and Gilleran v. Twp. of Bloomfield, 227 N.J. at 177-78 (2016). Just this past week, the Supreme Court held that police internal affairs records—something that have been strictly confidential for decades—can be released under the common law because the public interest is significant. See Rivera v. Union County Prosecutor's Office, __ N.J. __ (2022).

When the subpoenas are redacted to remove any identifying information, the confidentiality interest is extremely limited and releasing them in no way undermines the policy considerations behind Rule 1:38. On the other hand, our interest in learning more about how often law enforcement is serving subpoenas upon your lab is significant because of the powerful privacy interest people have in their genetic information and in the genetic information of their minor children. The frequency and manner in which this privacy is pierced for the purposes of criminal investigation is of utmost public interest.

Thank you,

Tamar Lerer

Assistant Deputy Public Defender

New Jersey Office of the Public Defender

From: DOH-dphelcustodian [DOH] <dphelcustodian@doh.nj.gov>
Sent: Thursday, March 17, 2022 08:55
To: Lerer, Tamar [OPD] <Tamar.Lerer@opd.nj.gov>
Subject: FW: Government Records Request Health/Division of Public Health and Environmental Laboratories (PHEL) (Lab requests) W182800

Tamar Lerer, Esq.:

This will respond to your request for government records:

Please be advised that your request must be denied.

The Department has located documents responsive to your request, which are grand jury subpoenas. Under N.J.S.A. 47:1A-9(b), OPRA "shall not abrogate or erode 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." Records related to grand jury proceedings are made confidential by Court Rule and are therefore not subject to release. R. 1:38-3(c)(4); R. 3:13-3; Grossman v. Office of Pros. Cty., Docket No. OCN-L-533-13 (Law Div. July 26, 2013); Reagan v. Camden Cty. Pros. Office, GRC Complaint No. 2016-28 (July 28, 2017). While such records may be released at the discretion of the Assignment Judge based on a "strong showing of particularized need[,]" Daily Journal v. Police Dep't of Vineland, 351 N.J. Super. 110, 123 (App. Div. 2002), "[p]ublic disclosure . . . has not been sanctioned[,]" State v. Kearney, 109 N.J. Super. 502, 506 (App. Div. 1978).

For these reasons, your request is denied and closed.

Sincerely,

Analiza Gross
Custodian of Records for the
Division of Public Health and Environmental Laboratories
NJ Department of Health
https://www.state.nj.us/health/opra/requests/index.shtml#6

-----Original Message-----
From: OPRAreturn@oit.state.nj.us <OPRAreturn@oit.state.nj.us>
Sent: Thursday, March 3, 2022 9:21 AM
To: DOH-dphelcustodian [DOH] <dphelcustodian@doh.nj.gov>
Subject: Government Records Request Health/Division of Public Health and Environmental Laboratories (PHEL) (Lab requests) W182800

****

Below is the information submitted by the OPRA requestor for Govt. Records Request # W182800.
Please use the OPRA Tracking System to process Govt.Records Request # W182800.

****
State Agency: Health/Division of Public Health and Environmental Laboratories (PHEL) (Lab requests)

Requestor Name: Tamar Y Lerer
Company: New Jersey Office of the Public Defender
Address: 31 Clinton Street, P.O. Box 46003 Newark
Newark NJ 07101
Email: Tamar.Lerer@opd.nj.gov
Telephone: 973 424 8778

Convicted of indictable offense: NO

Preferred Delivery: E-Mail
Maximum Authorized Cost: $20
Payment Method: None Selected

Requested Information: This is a request for records pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 et seq.. South Jersey Publishing Co. v. New Jersey Expressway Auth., 124 N.J. 478, 487-89 (1991).
The Office of the Public Defender requests the following records:

- Subpoenas served on the Newborn Screening Laboratory by any law enforcement agencies from January 1, 2017 to date.

If you determine that any portion of the requested materials is exempt from release, we request that you redact the portion that you believe exempt and provide us with copies of the remaining, non-exempt portions. If any or part of this request is denied, please send us a letter describing each partial redaction and listing the exemption(s) on which you rely for each such item or redaction.

If there are fees associated with this request, please contact me before proceeding. Further, please provide the requested records in electronic form if it is feasible and economical to do so. Finally, I welcome the opportunity to answer any questions you might have about this request in order to better clarify or facilitate the production of the public records requested.

Exhibit C

From: **Terrence T. McDonald** <terrence.thornton@gmail.com>
Date: Mon, Jun 20, 2022 at 9:11 AM
Subject: Fwd: FW: Government Records Request Health/Division of Public Health and Environmental Laboratories (PHEL) (Lab requests) W186634
To: <tmcdonald@newjerseymonitor.com>

---------- Forwarded message ---------
From: **DOH-dphelcustodian [DOH]** <dphelcustodian@doh nj.gov>
Date: Mon, Jun 20, 2022 at 9:09 AM
Subject: FW: Government Records Request Health/Division of Public Health and Environmental Laboratories (PHEL) (Lab requests) W186634
To: terrence.thornton@gmail.com <terrence.thornton@gmail.com>

Dear Mr. McDonald:

Please be advised that your request for "all subpoenas served on the Newborn Screening Laboratory by any law enforcement agency from June 1, 2016 to present date" must be denied under both OPRA and the common law.

Under N.J.S.A. 47:1A-9(b), OPRA "shall not abrogate or erode 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." Records related to grand jury proceedings are made confidential by Court Rule and are therefore not subject to release. R. 1:38-3(c)(4); R. 3:13-3; Grossman v. Office of Pros. Cty., Docket No. OCN-L-533-13 (Law Div. July 26, 2013); Reagan v. Camden Cty. Pros. Office, GRC Complaint No. 2016-28 (July 28, 2017); State v. Arace Bros., 230 N.J. Super. 22, 36 n.4 (App. Div. 1989). While such records may be released at the discretion of the Assignment Judge based on a "strong showing of particularized need[,]" Daily Journal v. Police Dep't of Vineland, 351 N.J. Super. 110, 123 (App. Div. 2002), public disclosure of these records is neither appropriate nor permitted, State v. Kearney, 109 N.J. Super. 502, 506 (App. Div. 1978).

For these reasons, your request is denied and closed.

Sincerely,

Analiza Gross
Custodian of Records for the
Division of Public Health and Environmental Laboratories
NJ Department of Health
https://www.state nj.us/health/opra/requests/index.shtml#6

-----Original Message-----
From: OPRAreturn@oit.state nj.us <OPRAreturn@oit.state nj.us>

Sent: Friday, June 3, 2022 1:47 PM
To: DOH-dphelcustodian [DOH] <dphelcustodian@doh.nj.gov>
Subject: Government Records Request Health/Division of Public Health and Environmental Laboratories (PHEL) (Lab requests) W186634

****

Below is the information submitted by the OPRA requestor for Govt. Records Request # W186634.
Please use the OPRA Tracking System to process Govt.Records Request # W186634.

****
State Agency: Health/Division of Public Health and Environmental Laboratories (PHEL) (Lab requests)

Requestor Name: Terrence McDonald
Company:
Address: 38 John St #3C
Bloomfield NJ 07003
Email: terrence.thornton@gmail.com
Telephone: 973 444 0573

Convicted of indictable offense: NO

Preferred Delivery: E-Mail
Maximum Authorized Cost: $25
Payment Method: None Selected

Requested Information: The New Jersey Monitor, an independent, non-profit and non-partisan news site that strives to be a watchdog for all residents of New Jersey, is aware that law enforcement agencies have issued subpoenas upon the Newborn Screening Laboratory so that they can perform a DNA analysis of newborn blood samples to assist in their investigations. Pursuant to OPRA and the common law right of access, please produce all subpoenas served on the Newborn Screening Laboratory by any law enforcement agency from June 1, 2016 to present date. If you determine that the subpoenas are exempt from access under OPRA, we ask that you provide a Vaughn Index that describes each record that is being withheld. We also ask that you consider our interest under the common law. We are not seeking to learn about any specific criminal matter, nor the individuals named in the subpoena as targets of any investigation (or children of the targets whose DNA or sample is being sought). Thus, we consent to redaction of the subpoenas so that all names, case numbers, and other identifying information is shielded, but so that we are able to ascertain how often the Lab is receiving these subpoenas and from which law enforcement agencies. We believe the public interest in disclosure is significant and we want to report this alarming practice to the public, letting them know that the blood of their newborn children that they are obligated by law to provide for health screening purposes is instead being utilized by law enforcement agencies (and perhaps without even a warrant) to conduct criminal investigations. We do not believe the Legislature intended the newborn screening program to be a tool for law enforcement investigations and that there are serious genetic privacy issues that parents and the public deserve to learn about. We ask that you respond to this request within the allotted seven business days so that we may continue our investigation and reporting.