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<b>PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY</b>	:	<b>SUPERIOR COURT OF NEW JERSEY</b>
	:	<b>LAW DIVISION</b>
	:	<b>MERCER COUNTY</b>
	:	
	:	
	:	<b>DOCKET NO.:</b>
	:	
Plaintiff,	:	
	:	Civil Action
v.	:	
	:	
	:	
<b>NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,</b>	:	<b>VERIFIED COMPLAINT</b>
	:	
	:	
Defendant.	:	

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The Plaintiff, Public Employees for Environmental Responsibility, by way of Verified Complaint against the Defendant, alleges as follows:

**FIRST COUNT**

1. Plaintiff Public Employees for Environmental Responsibility (“PEER”) is a non-profit organization with tax-exempt status dedicated to research and public education concerning the activities and operations of federal and state governments. The plaintiff files this action in part pursuant to the Open Public Records Act (“OPRA”), *N.J.S.A. 47:1A-1 et seq.*

2. Defendant, the New Jersey Department of Environmental Protection (“DEP”), is a public agency of the State of New Jersey and is a principal department of the Executive Branch

of State Government as defined by N.J.S.A. § 47:1A-1.1, and is charged with the duty to provide public access to documents in its possession consistent with the requirements of OPRA.

3. On August 8, 2009, Plaintiff submitted an OPRA request (# 84497) to the DEP to conduct a file review of records related to the nomination of board members to the agency's Science Advisory Board ("SAB"). Specifically, Plaintiff sought (1) any and all communication to the Department from external third parties (private and public) regarding recommendations of candidates to serve on the SAB (including all DEP replies to and internal distribution of this information), (2) any and all communication to the Department regarding the SAB (including all DEP replies to and internal distribution of this information), (3) any and all written materials regarding the review and selection of SAB members, including the DEP's policies and procedures governing the SAB candidate selection criteria and review process, (4) all emails, correspondences, meeting notes, etc - internal and external - regarding items #2 and #3 above, and (5) an OPRA privilege log of any documents excluded from above request and basis for exclusion. A copy of this OPRA request is attached as **Exhibit A**.

4. The DEP responded to the OPRA request by electronic form letter dated September 9, 2009, denying Plaintiff's request for nearly all of the documents sought, citing an executive order relating to job applicants. One document responsive to the request, the SAB's Administrative Order, was made available on the DEP website.

5. In response to the first category of requested documents, the DEP stated that responsive records were located but that they were 'analogous to the selection of applications for employment positions with NJDEP,' and therefore denied them pursuant to N.J.S.A. 47:1A-9 and Governor McGreevey's Executive Order 26: 3 (August 13, 2002).

6. With regard to the second category, the DEP failed to produce any documents concerning communications to the Department about the SAB. The DEP further failed to claim that they did not have responsive documents, or that they were exempt for any reason.

7. In response to the third category, the DEP stated that “some responsive records have been identified and are available for direct access on the NJDEP’s web address.” The sole responsive document located on the Department’s website is the SAB’s Administrative Order, which briefly outlines the policies and procedures governing the SAB candidate selection criteria. The DEP failed to produce any other responsive documents, or claim that such documents did not exist or were exempt.

8. Regarding the fourth category, the DEP failed entirely to produce the requested communications, and further failed to justify a basis for refusing to disclose them.

9. Lastly, regarding the fifth category, the DEP failed to provide an OPRA privilege log of excluded documents as requested.

10. Plaintiff asserts that the DEP is required to provide the requested documents and records pursuant to OPRA because none of the documents qualify for exemption under Executive Order 26: 3. Moreover, the DEP failed to respond to the requests contained in categories 2, 3, 4, and 5, either through production of the documents or through assertion of a valid exemption.

11. All of the requested documents and records are subject to the disclosure requirements of OPRA.

12. The DEP’s refusal to make available for inspection and copy the requested documents and records constitutes a violation of OPRA.

**WHEREFORE**, Plaintiff respectfully asks the entry of final judgment as follows:

A. Enter an Order declaring that the DEP has wrongfully withheld the requested agency records and directing the DEP to provide access to true and exact copies of all the requested documents and records to the plaintiffs;

B. Award the Plaintiff reasonable attorney fees and costs incurred in this action, pursuant to *N.J.S.A. § 47:1A-6*;

C. Maintain jurisdiction over this action until the DEP comes into compliance with OPRA and every order of this Court;

D. Order the DEP to determine and implement standard guidelines for OPRA requests consistent with the findings of this Court; and

E. Grant such other and additional and further relief to the plaintiff as the Court deems just and proper.

**DESIGNATION OF TRIAL COUNSEL**

Michael L. Pisauero, Jr. is hereby designated to try this case on behalf of plaintiff.

**CERTIFICATION PURSUANT TO RULE 4:5-1**

Pursuant to the provision of Rule 4:5-1, the undersigned attorney certifies that the matter is not the subject of any other pending action in any court or arbitration proceeding.

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Attorney for Plaintiff

Dated: September 28, 2009

**VERIFICATION**

Jeff Ruch, Executive Director for Public Employees for Environmental Responsibility, of full age, hereby verifies the following:

I am the Plaintiff in this matter. I have reviewed the allegations contained in the foregoing Verified Complaint and the allegations are true and correct to the best of my personal knowledge.

\_\_\_\_\_

DATED

\_\_\_\_\_

Jeff Ruch, Executive Director  
Public Employees for Environmental Responsibility

September 28, 2009

Honorable <JUDGES NAME>  
Mercer County Courthouse  
209 South Broad Street  
Trenton, NJ 08650-0068

**RE: Public Employees for Environmental Responsibility v. New Jersey  
Department of Environmental Protection**

Dear Judge <NAME>:

Please accept this letter brief in support of the Plaintiff's application for an Order to Show Cause.

**PRELIMINARY STATEMENT**

The Plaintiff relies upon the facts set forth in the Verified Complaint.

On August 31, 2009, Plaintiff, Public Employees for Environmental Responsibility ("PEER" or "Plaintiff"), submitted an Open Public Records Act ("OPRA") request (**Exhibit A**) to the Defendant, New Jersey Department of Environmental Protection ("DEP" or "Defendant"), seeking documents and records related to the selection of members of the Department's Science Advisory Board ("SAB"), an impartial committee dedicated to reviewing the science and technical data relied upon by the Department.

On September 9, 2009, Defendant responded to the Plaintiff by electronic form letter. The Defendant denied Item 1 of Plaintiff's request citing, as an analogy, an Executive Order which exempts employment applications, resumes, and related documents from public disclosure. The documents requested under Item 1 are not covered by the Executive Order 26: 3

because the potential members of the SAB are not employees of the Department. Moreover, Plaintiff's request asked for communications regarding recommendations and nominations of candidates, rather than resumes and applications, making the Executive Order invoked by the Defendant further irrelevant to the request. In addition, Defendant gave no justification at all for failing to make available Items 2, 3, 4, and 5 of the request. Rather, Defendant pointed to a single responsive document to Item 3 available on their website, and disregarded the remainder of the request. As such, the Defendant has violated OPRA and the common law right to know doctrine.

### **LEGAL DISCUSSION**

The plaintiff's request for public documents and records was made pursuant to the Open Public Records Act ("OPRA") NJSA 47: 1A-1 et seq. These proceedings are to be conducted in a "summary or expedited manner." *N.J.S.A. 47:1A-6*. If satisfied with the sufficiency of the application, the Court shall order the defendant to show cause why final judgment should not be entered for the relief sought. *R. 4:67-2(a)*. It is the agency's burden to prove that the refusal to allow access to the requested documents was authorized by law. *NJSA 47:1A-6*.

In reviewing whether DEP has wrongfully withheld documents, the analysis must be performed in light of OPRA's command any restriction on the right to documents be construed liberally in favor of public disclosure. *NJSA 47:1A-1*. Defendant has wrongfully withheld documents and information related to the appointment of SAB members first by citing an Executive Order which applies solely to records related to applications for employment and further for failing to respond to items 2, 3, 4, and 5 of the request. DEP's violated OPRA in refusing to produce all of the Requested Documents.



## A. OPRA Request Item 1

Defendant has wrongfully withheld documents asked for under Item 1 of Plaintiff's OPRA request. In its request, Plaintiff had sought: (1) any and all communications to the Department from external third parties (private and public) regarding recommendations of candidates to serve on the SAB (including all DEP replies to and internal distribution of this information). Through this request, Plaintiff sought nominations, recommendations, and other communications from third parties related to the selection and consideration of candidates for the SAB. In its September 9, 2009, letter, Defendant erroneously invoked Governor McGreevey's Executive Order 26:3 in order to withhold from Plaintiff the documents requested in Item 1.

1. Governor McGreevey's Executive Order 26:3 applies only to information contained within applications for employment with public agencies.

New Jersey law "upholds [OPRA] exemptions contained in...Executive Orders." N.J.S.A. 47:1A-9. Any exemption must be narrowly construed to effect the strict mandate of OPRA that documents should be available for public inspection. N.J.S.A. 47:1A-1. On August 13, 2002, Governor McGreevey issued the following Executive Order:

No public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.

*See* Governor McGreevey Executive Order 26: 3 (August 13, 2002). The language of the order is unambiguous in that it solely applies to resumes, applications, and other employment-related information concerning "job applicants." Nowhere in the language of the order does Governor

McGreevey refer to persons considered for non-employment positions with public agencies, such as the candidates to serve on an advisory Board.

2. Members of the Department of Environmental Protection's Science Advisory Board are not employees of the agency, and therefore Executive Order 26: 3 does not apply.

The Administrative Order creating the Science Advisory Board clearly maintains that members elected to the Board are not considered employees of the Department. The Order states that “[w]hereas, the Department’s consideration and deliberation on the scientific and technical underpinnings of its decisions would benefit from review and advice from scientists who are *not employees* of the Department and do not have a conflict of interest in providing this review” (Emphasis added). The Order goes on to explain that “the Board shall be composed of twelve members, *none of whom shall be employed by the Department*” (Emphasis added). The Administrative Order refers to members of the board having ‘membership’ and ‘terms’, as opposed to ‘employment’ and ‘service’. Furthermore, in describing the method through which board members are selected, the Administrative Order makes it clear that the process is one which invites public involvement and comment at all stages:

Eligibility for appointment to the Board and any standing or ad hoc committee shall be determined based upon a public solicitation through the Office of Science. The solicitation process shall be comprehensive and shall include, but not be limited to, an announcement of the solicitation of members on the Department website, letters to the State’s academic institutions and through such other means as the Office of Science deems appropriate.

Admin. Order No. 2009-05 (May 28, 2009).

The Department has claimed that public nominations and recommendations, as well as documents regarding the selection of Board members, are exempt from OPRA disclosure

because they are equivalent to employment applications. However, the Department is erroneous in this analogy and fails to cite any authority supporting the claim that non-employees should be treated like employees for purposes of withholding information under OPRA. Further the Department's reason for excluding this information seems to contradict its own Administrative Order creating the Board. It would also appear that NJSA 47:1A-10 also leads support that these records are discoverable in an OPRA request.

Thus, because members of the Board are not considered employees of the Department, and because Executive Order 26: 3 applies solely to employees of public agencies, the Executive Order exemption cannot be applied to withhold documents responsive to Plaintiff's request.

3. Plaintiff's OPRA request sought communications regarding recommendations of candidates to serve on the SAB, and therefore Executive Order 26: 3 does not apply.

Executive Order 26: 3 relates to resumes, applications for employment, and other information regarding job applicants. The documents sought by Plaintiff in Item 1 of its requested related to nominations and recommendations for appointment to the Board, rather than resumes and employment applications. Thus, because Plaintiff sought records related to recommendations and nominations, and because Executive Order 26: 3 applies solely to resumes and other job application forms, the order cannot be applied to withhold documents response to Plaintiff's request.

**B. OPRA Request Items 2, 3, 4, and 5**

Defendant also failed to make available for production records responsive to Items 2, 3, 4, and 5 of the request. Specifically, Plaintiff had requested: (2) any and all communication to the Department regarding the SAB (including all DEP replies to and internal distribution of this

information), (3) any and all written materials regarding the review and selection of SAB members, including the DEP's policies and procedures governing the SAB candidate selection criteria and review process, (4) all emails, correspondences, meeting notes, etc - internal and external - regarding items #2 and #3 above, and (5) an OPRA privilege log of any documents excluded from above request and basis for exclusion.

In response to Item 3, Defendant pointed to a single document available on the Department's website: an Administrative Order pertaining to candidate selection criteria and review process. Defendant failed to state that this was the only responsive document to Item 3 of the request.

Furthermore, Defendant entirely disregarded Items 2, 4, and 5 of the request. Defendant failed to justify the denial of requested items or make responsive the documents available for review by Plaintiff. Moreover, Defendant did not claim that there were no responsive documents to the items in the request. Lastly, because the rationale for denial of Item 1, Executive Order 26: 3 clearly would not apply to the requests under Items 2, 3, 4, and 5, Defendant cannot claim to have invoked that exemption.

### **CONCLUSION**

Defendant has wrongfully withheld records and documents under OPRA, in violation of OPRA and the common law right to know doctrine. Under these circumstances, the plaintiff is entitled to the entry of an Order to Show Cause, the production of the requested documents, and reasonable attorneys fees and costs.

Respectfully submitted,

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