TAX COURT OF NEW JERSEY

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OF THE TAX COURT COMMITTEE ON OPINIONS

June 15, 2016

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Eleanor Heck, Deputy Attorney General
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Re: H. Scott Gurvey and Amy Gurvey v. Montclair Township
Docket No. 000339-2011

Dear Mr. and Mrs. Gurvey and Deputy Attorney General Heck:

This letter constitutes the court's opinion with respect to defendant, New Jersey Department of Banking and Insurance's (the "DOBI"), motion to quash plaintiffs' Subpoena Duces Tecum and Ad Testificandum, under R. 1:9-2 ("motion to quash"). For the reasons explained more fully below, the DOBI's motion to quash is granted.

I. Factual Findings and Procedural History

On or about April 7, 2010, the DOBI Consumer Protection Services unit opened an investigative file in response to a consumer complaint filed by plaintiffs, H. Scott Gurvey and Amy Gurvey ("plaintiffs"). Plaintiffs consumer complaint arose from an insurance claim involving damage to plaintiffs' residence located at 315 Highland Avenue, Upper Montclair, New Jersey (the "subject property").

On or about September 20, 2010, the DOBI Consumer Protection Services unit closed its investigative file without pursuing any formal disciplinary action. In accordance with the DOBI's Records Retention and Disposition Schedule, Agency S580800, Schedule 003, the DOBI Consumer Protection Services unit investigative file was maintained for a period of three years after it was closed and then destroyed.

On or about October 27, 2015, the DOBI's Bureau of Fraud Deterrence opened an investigative file, for the purpose of conducting "an insurance-fraud investigation" with respect to plaintiffs' insurance claims and the subject property.

On or about April 5, 2016, plaintiffs sent, by regular mail, a Subpoena Duces Tecum and Ad Testificandum (the "Subpoena") addressed to Matthew Noumoff, OPRA Custodian for the DOBI.[1] The Subpoena was received on April 8, 2016 and was returnable April 22, 2016. The Subpoena seeks the following:

> 1. The entire file or files (including any electronically stored information) maintained by the DOBI relating to the Gurveys and/or the property. This includes but is not limited to, the following:
> a. All reports concerning the property;
> b. All correspondence (including emails) with the Gurveys;
> c. All documents (including emails) exchanged with the Gurveys;
> d. All correspondence (including emails) and/or other documents with any other person or entity relating to the Property or the Gurveys;
> e. All photographs of the Property;
> f. All other documents that depict, describe, evaluate, or otherwise relate to the condition of the Property;
> g. All documents (including emails or notes) reflecting the DOBI's internal communications with the Gurveys or about the

[1] Plaintiffs previously submitted a government records request to the DOBI Records Custodian pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"). The OPRA request was denied on March 21, 2016 for the following reasons: "Exception by State Regulation…Records response to your request are non-public pursuant to N.J.S.A. 17:33A-11 and N.J.A.C. 11:17-2.16(b)(6)." Plaintiffs did not institute a proceeding in the Superior Court challenging the custodian's decision, or file a complaint with the Government Records Council pursuant to N.J.S.A. 47:1A-6. Instead, plaintiffs issued the Subpoena addressed to the DOBI's OPRA Custodian.

Gurveys;
h. All documents (including emails or notes) exchanged with State Farm concerning the Gurveys and/or concerning the Property;
i. All documents (including emails or notes) reflecting the DOBI's internal communications with State Farm about the Gurveys;
j. Any notes written, dictated or otherwise recorded by DOBI employees reflecting its investigation, evaluation or research into the condition of the Property or otherwise pertaining to the Property, and
k. Any notes written, dictated or otherwise recorded by DOBI employees reflecting its investigation, evaluation or research into processing by State Farm of any insurance claim filed by the Gurveys;
l. Any notes written, dictated or otherwise recorded by DOBI employees reflecting its investigation, evaluation or research into any complaint against State Farm filed with DOBI by the Gurveys.

2. To the extent not included in response to the previous requests, any all correspondent, emails, contracts, photographs, notes, reports, etc., relating to the Property of the Gurveys.

In response to plaintiffs' Subpoena, on April 22, 2016, the DOBI filed with the court a motion to quash the Subpoena under R. 1:9-2. In support of its motion to quash, the DOBI argues that the documentation and information sought by the Subpoena from the DOBI's Bureau of Fraud Deterrence are specifically shielded from disclosure under N.J.S.A. 17:33A-11, and under the corresponding administrative regulations codified in N.J.A.C. 11:16-6.11. Moreover, the DOBI asserts that its Consumer Protection Services unit is no longer in possession of its investigative file and therefore, it cannot produce documents it does not possess. Pursuant to the DOBI's Retention and Disposition Schedule, Agency S580800, Schedule 003, the DOBI's Consumer Protection Services unit destroyed its file three years after its investigation was concluded. However, even if the Consumer Protection Services unit investigative account existed, the DOBI maintains that it would be exempt from disclosure under N.J.A.C. 11:17-2.16(b)6.

On May 6, 2016, plaintiffs filed opposition to the motion to quash. In their opposition plaintiffs argue that the investigative records of the DOBI do not enjoy a "blanket privilege"

against disclosure. Plaintiffs assert that the DOBI commissioner "may, in his discretion, make relevant papers, documents, reports, or evidence available to…[an] insurance claimant injured by a violation of this act, consistent with the purposes of this act…" N.J.S.A. 17:33A-11. Moreover, plaintiffs' assert that any "right to confidentiality" enjoyed by its insurer, their agents and representatives under N.J.S.A. 17:33A-11 was expressly waived by plaintiffs' insurer, State Farm, by virtue of having produced "approximately 1,500 pages of its 'business records'" in an action before the Superior Court of New Jersey, Law Division, captioned H. Scott Gurvey and Amy R. Gurvey v. State Farm Fire and Casualty Company and Allan Industries, Inc., et als., docket numbers L-7554-10 and L-10711-10. According to plaintiffs, "[t]hese records contained references to communications between State Farm representatives and 'Clark Masi of the NJ Dept. of Banking & Insurance'". Finally, plaintiffs maintain that the DOBI has "waved [sic] confidentially [sic] at least to the extent…[of] the two separate certifications it filed in support of its motion." Plaintiffs argue that because Gale Simon, Assistant Commissioner of the DOBI Consumer Protection Services unit, and Harry Polihrom, an investigator with the DOBI's Bureau of Fraud Deterrence, submitted certifications in support of the motion to quash, plaintiffs should be permitted to compel their testimony at the time of trial and delve into the factual basis of those statements.

On May 25, 2016, the DOBI filed a reply brief in response to plaintiffs' opposition to the motion to quash.

II. Conclusions of Law

A. Motion to Quash

R. 1:9-2 permits the court "on motion made promptly [to] quash or modify the subpoena…if compliance would be unreasonable or oppressive…" Moreover, the rule allows a

subpoena to be quashed on the grounds of a privilege. In re: Grand Jury Proceedings of Guarino, 104 N.J. 218 (1986); In re Addonizio, 53 N.J. 107 (1968); In re Grand Jury Subpoenas Duces Tecum Served by Sussex County, 241 N.J. Super. 18 (App. Div. 1989).

The DOBI advances three arguments in support of its motion to quash the Subpoena and preclude the testimony of Gale Simon, Harry Polihrom and Clark Masi, a former civil investigator with DOBI's Consumer Protection Services unit.

First, DOBI argues that our Legislature expressly exempted from subpoena the investigative files of the DOBI under N.J.S.A. 17:33A-11. The intent of this exemption, DOBI maintains, is further reflected in the administrative rules promulgated under N.J.A.C. 11:16-6.11. The grant of this exemption arises from the view that the DOBI investigative files are "law enforcement investigative files" and significant public interests are served by preserving their sanctity. The DOBI maintains that these investigative files must be maintained confidential otherwise its ability to conduct insurance-fraud investigations would be unnecessarily hindered, as it would "chill[] cooperation with confidential informants or witnesses; ha[ve] a negative effect on ongoing investigations; and [would] harm[] the privacy interests of unindicted persons." Moreover, the DOBI asserts that it is within the sound discretion of the DOBI commissioner to "make relevant papers, documents, reports, or evidence available" and "under such conditions as he deems appropriate." N.J.S.A. 17:33A-11. Here, the commissioner does not consent to the release of its investigative file to plaintiffs as DOBI maintains a forced release would "unnecessarily hinder" not only its investigation into the plaintiffs matter, but the investigations of other similarly situated insurance fraud claims.

Second, DOBI maintains that the Subpoena is facially defective because it fails to identify Gale Simon, Harry Polihrom and Clark Masi; the body of the Subpoena makes no reference to any

testimony; and the Subpoena does not command any person to attend a hearing, nor does it identify a time or a place to give testimony. As such, the DOBI emphasizes that the Subpoena violates our court rules, requiring a subpoena state the name of "each person to whom it is directed to attend and give testimony at the time and place specified therein." R. 1:9-1.

Finally, the DOBI maintains that it cannot be directed to produce something that it does not possess. Pursuant to its Retention and Disposition Schedule, the DOBI's Consumer Protection Services unit destroyed its April 7, 2010 investigative file three years after its investigation was concluded and therefore, cannot produce the documents sought.

Conversely, plaintiffs maintain that the DOBI commissioner has the authority to release the documents to plaintiffs because he "may, in his discretion, make relevant papers, documents, reports, or evidence available to…[an] insurance claimant injured by a violation of this act, consistent with the purposes of this act…" N.J.S.A. 17:33A-11. Plaintiffs also stress that under the Act, if "after notice to the commissioner and a hearing, a court of competent jurisdiction" determines that "the commissioner would not be unnecessarily hindered by such subpoena [sic]" the papers, documents, reports, or evidence may be disclosed. N.J.S.A. 17:33A-11.

Plaintiffs further contend that subsection (c) of N.J.A.C. 11:16-6.11 is intended to qualify subsections (a) and (b), requiring the Office of the Insurance Fraud Prosecutor ("OIFP") to fulfill its "statutory obligations of working with other law enforcement agencies….and providing information to and among referring entities on pending cases of suspected insurance fraud…", notwithstanding the "[c]onfidentiality of the information and materials in [its] possession". N.J.A.C. 11:16-6.11(c). This, plaintiffs' assert, mandates the disclosure of information with the "referring entities originally contacted by plaintiffs" (the New Jersey Department of

Environmental Protection and the New Jersey Department of Labor, Workforce Asbestos Division) and correspondingly, the disclosure of confidential information to plaintiffs.

B. New Jersey Insurance Fraud Protection Act

Central to the court's discussion in this matter is the New Jersey Insurance Fraud Protection Act, N.J.S.A. 17:33A-1 to -30 (the "Act"). The Act authorizes the DOBI to investigate and pursue civil actions for insurance fraud, and authorizes the OIFP to investigate and criminally prosecute insurance fraud. N.J.S.A. 17:33A-16, -19.[2] The Act provides, in part, that:

> Papers, documents, reports, or evidence relative to the subject of an investigation under this act shall not be subject to public inspection except as specifically provided in this act….subpenaed [sic] records shall be returned to the persons from whom they were obtained. The commissioner may, in his discretion, make relevant papers, documents, reports, or evidence available to the Attorney General, an appropriate licensing authority, law enforcement agencies, an insurance company or insurance claimant injured by a violation of this act, consistent with the purposes of this act and under such conditions as he deems appropriate. Such papers, documents, reports, or evidence shall not be subject to subpena [sic], unless the commissioner consents, or until, after notice to the commissioner and a hearing, a court of competent jurisdiction determines that the commissioner would not be unnecessarily hindered by such subpena [sic]. Division investigators and insurance company fraud investigators shall not be subject to subpena [sic] in civil actions by any court of this State to testify concerning any matter of which they have knowledge pursuant to a pending insurance fraud investigation by the division, or a pending claim for civil penalties initiated by the commissioner.
>
> [N.J.S.A. 17:33A-11.]

Additionally, the administrative regulations promulgated in response to the Act provide that:

> (a) All information and materials in possession of the OIFP [Office of the Insurance Fraud Prosecutor in the Division of Criminal Justice in the Department of Law and Public Safety] concerning

[2] The Office of the Insurance Fraud Prosecutor is a division of the State of New Jersey Department of Law and Public Safety, Office of the Attorney General.

> the possibility of the existence or occurrence of insurance fraud or related criminal activities are confidential and privileged against disclosure, and shall not be deemed public records, so as to protect the public interest in the prosecution of insurance fraud, including protecting witness security, the State's relationship with informants and witnesses, the privacy interests of persons investigated by OIFP where no fraud has been proven and other confidential relationships.
>
> (b) The confidentiality which extends to information and materials possessed by the OIFP with respect to the existence or occurrence of insurance fraud or related criminal activities to all papers, documents, reports, evidence and databases, such as investigative reports, referrals, reports or notifications of suspicious claims or applications or suspected insurance fraud, computer maintained databases of such investigative information, and such other materials and information as the Insurance Fraud Prosecutor, on the basis of his experience and exercise of judgment, believes must be kept confidential in order to ensure the orderly investigation and prosecution of insurance fraud.
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> [N.J.A.C. 11:16-6.11.]

C. Analysis

The court's analysis begins with a principle that is axiomatic, the Tax Court is a court of limited jurisdiction. N.J.S.A. 2B:13-2. As our Supreme Court recently observed, the narrow jurisdiction of the Tax Court is "defined by statute…It is against this comprehensive mosaic of procedural safeguards -- one with which continuing strict and unerring compliance must be observed." McMahon v. City of Newark, 195 N.J. 526, 529 (2008). Here the court is charged with the responsibility, based upon the sufficiency of the evidence to be presented at trial, to make a determination of the true market value of the subject property as of October 1, 2010 valuation date.

As construed by applicable case law, a presumption of validity attaches to original tax assessments, and judgments of the county boards of taxation. MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, 18 N.J. Tax 364, 373 (Tax 1998); Riverview Gardens, Section One,

Inc. v. North Arlington, 9 N.J. 167, 174-175 (1952); Aetna Life Insurance Co. v. Newark City, 10 N.J. 99, 105 (1952); Pantasote Co. v. City of Passaic, 100 N.J. 408, 413 (1985). "Based on this presumption, the appealing taxpayer has the burden of proving that the assessment is erroneous." Pantasote Co., supra, 100 N.J. at 413 (citing Riverview Gardens, supra, 9 N.J. at 174). The presumption is not an evidentiary device functioning "as a mechanism to allocate the burden of proof. It is, rather, a construct that expresses the view that in tax matters it is to be presumed that governmental authority has been exercised correctly and in accordance with law." Pantasote Co., supra, 100 N.J. at 413 (quoting Powder Mill, I Assocs. v. Hamilton Township, 3 N.J. Tax 439 (Tax 1981)).

A litigant can only surmount the presumption of validity by introducing "cogent evidence" of true value. That is, evidence "definite, positive and certain in quality and quantity to overcome the presumption." Aetna Life Insurance Co., supra, 10 N.J. 99, 105 (1952). Thus, the appealing party shoulders the burden of presenting the court with credible evidence "sufficient to determine the value of the property under appeal, thereby establishing the existence of a debatable question as to the correctness of the assessment.'" West Colonial Enters, LLC v. City of East Orange, 20 N.J. Tax 576, 579 (Tax 2003) (quoting Lenal Properties, Inc. v. City of Jersey City, 18 N.J. Tax 405, 408 (Tax 1999), aff'd, 18 N.J. Tax 658 (App. Div. 2000), certif. denied, 165 N.J. 488 (2000)).

1. Discovery and relevancy

To afford litigants the opportunity to fulfill that burden, our court rules favor "broad pretrial discovery." Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 535 (1996) (citing Jenkins v. Rainner 69 N.J. 50, 56 (1976)). The court rules afford litigants the right to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action…" R. 4:10-2(a). However, the relevancy of discovery material is not predicated upon its

admissibility at trial, instead it is founded upon whether the information sought is "reasonably calculated to lead to admissible evidence respecting the cause of action or its defense." Pressler & Verniero, Current New Jersey Rules Governing the Courts, comment 1 on R. 4:10-2(a) (2016). Thus, a party may obtain discovery which "appears reasonably calculated to lead to the discovery of admissible evidence" pertaining to the cause of action. In re: Liquidation of Integrity Ins. Co., 165 N.J. 75, 82 (2000). Documents which bear even a remote relevance to the subject matter of the action are discoverable, but can be withheld by a demonstration of a privilege, whether derived from common law or from statutes. Payton, supra, 148 N.J. at 539.

However, our Supreme Court has recognized that the mere assertion of a privilege does not assure confidentiality of the information over which a privilege has been asserted. A strong presumption of relevancy attaches to discovery material being sought. The person attempting to overcome the presumption of relevancy:

> must establish by a preponderance of the evidence that the interest in secrecy outweighs the presumption. The need for secrecy must be demonstrated with specificity as to each document. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient.
>
> [Hammock by Hammock v. Hoffman-LaRoche, 142 N.J. 356, 381-382 (1995).]

Thus, the party which raises the privilege and seeks to maintain the confidentiality of information must demonstrate, with some precision, the necessity for secrecy with respect to the documents over which the privilege has been asserted. General allegations of harm or injury are insufficient. Our courts disfavor a blanket approach to preserving the secrecy of certain types of information and instead have adopted a "case-by-case balancing" approach. Payton, supra, 148 N.J. at 539. Hence, although relevancy may create "a presumption of discoverability, that presumption can be overcome" by the party asserting the privilege by demonstrating through "a preponderance of the

evidence that the interest in secrecy outweighs the presumption." Payton, supra, 148 N.J. at 539 (quoting Hammock, supra, 142 N.J. at 381).

Moreover, New Jersey has long-standing public policies favoring open government and access to governmental records. See Senator Byron M. Baer Open Public Meetings Act, N.J.S.A. 10:4-6, et seq., and the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. Our Legislature and judicial system have advanced a "tradition of 'openness and hostility to secrecy in government.'" Kuehne Chemical Co., Inc. v. North Jersey Dist. Water Supply Com'n, 300 N.J. Super. 433, 438 (App. Div. 1997), certif. denied, 151 N.J. 466 (1997) (quoting North Jersey Newspapers Co. v. Passaic County Board of Chosen Freeholders, 127 N.J. 9, 16 (1992)). Nonetheless, the public's right to openness, access, disclosure, and inspection is not infinite.

Our courts have recognized that a "government record may be excluded from disclosure by other statutory provisions or executive orders, or exempt from disclosure due to a recognized privilege or grant of confidentiality established in or recognized by the State Constitution, statute, court rule, or judicial decision." O'Boyle v. Borough of Longport, 218 N.J. 168, 185 (2014) (citations omitted).

Thus, despite public policy interests which favor access to governmental records, both our Legislature and courts have recognized that certain records may be shielded from production when a recognized privilege or a risk of danger to public interest has been demonstrated. See Sussex Commons Associates, LLC v. Rutgers, 210 N.J. 531 (2012); Education Law Center v. New Jersey Dept. of Educ., 198 N.J. 274 (2009); Ciesla v. New Jersey Dep't of Health & Sr. Services, 429 N.J. Super. 127 (App. Div. 2012); McGee v. Township of East Amwell, 416 N.J. Super. 602 (App. Div. 2010); MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005).

Therefore, before examining whether the DOBI investigative files are privileged and protected by confidential requisites, the court's threshold inquiry involves the relevancy of the material being sought. See Dixon v. Rutgers, 110 N.J. 432, 441-42 (1988); Integrity Ins., supra, 165 N.J. at 82. Relevant evidence is defined as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. Relevancy is measured by "whether the matter is useful, or if it relates to issues in the case or to the credibility of a party." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, comment 1 on N.J.R.E. 401 (2015). However, "[w]hen the usefulness of the information sought in relation to the main case is speculative and where it is not essential to the perfection of the case of the party seeking the information, a court may decline to force disclosure of the information sought if other protectable interests are or may be unduly infringed upon." Ibid.

Here, plaintiffs' Subpoena seeks the "entire file or files (including any electronically stored information) maintained by the DOBI relating to the Gurveys and/or the property" and "any all correspondent, emails, contracts, photographs, notes, reports, etc., relating to the Property of the Gurveys." The DOBI's Bureau of Fraud Deterrence investigative file was opened for the purpose of conducting "an insurance-fraud investigation." With the exception of materials which may depict or illustrate the condition of the subject property on or about the October 1, 2010 valuation date, the broad scope of information sought under the Subpoena is not likely to substantiate the true market value of the subject property as of that date. Plaintiffs have not demonstrated how correspondence, emails, reports or records related to the DOBI's "insurance-fraud investigation" will have a tendency in reason to prove or disprove the true market value of the subject property as of October 1, 2010, in accordance with N.J.R.E. 401.

As for materials which depict or illustrate the condition of the subject property as of the October 1, 2010 valuation date, they may prove or disprove a fact of consequence with respect to plaintiffs' cause of action and therefore, are relevant to the instant matter.

2. Privilege

However, concluding that all or part of the discovery information sought bears some relevancy and is thus, probative of a "fact of consequence to the determination of the action" does end the court's inquiry. Before instructing or directing a party to provide relevant discovery materials, the court must also gauge whether any of that information is privileged or exempt from disclosure due to a "grant of confidentiality established in or recognized by the State Constitution, statute, court rule, or judicial decision." O'Boyle v. Borough of Longport, 218 N.J. 168, 185 (2014). In conducting this inquiry, the court must balance the public interests in access to "official information with the government's need for confidentiality in the conduct of law-enforcement investigations." Loigman v. Kimmelman, 102 N.J. 98, 101 (1986).

Here, plaintiffs seek access to what is described as the DOBI's Bureau of Fraud Deterrence insurance-fraud investigative account involving plaintiffs' insurer, its agents and representatives. Such accounts are designed to enable the DOBI's Bureau of Fraud Deterrence to conduct undisclosed insurance-fraud investigations, solicit information from witnesses and confidential informants, perform other sensitive law-enforcement functions, and to pursue civil penalties against those charged with violating the Act. Recognizing this essential government function, our Legislature accorded "[p]apers, documents, reports, or evidence relative" that are the subject of an insurance-fraud investigation an exemption from public disclosure and dissemination under the Act. N.J.S.A. 17:33A-11.

As plaintiffs correctly point out, the Legislature afforded the DOBI commissioner the "discretion [to], make relevant papers, documents, reports, or evidence available to…[an] insurance claimant injured by a violation of this act." Ibid. (emphasis added). However, our Legislature narrowly defined the scope of agencies and persons that the commissioner may, in his discretion, make information available related to an insurance fraud investigation. Those agencies and persons include: (1) the Attorney General; (2) a licensing authority; (3) law enforcement agencies; and (4) an insurance company or insurance claimant injured by a violation of the Act. N.J.S.A. 17:33A-11. Plaintiffs assert that they are an "insurance claimant injured by a violation of this act." N.J.S.A. 17:33A-11.

If, based upon a plain reading, statutory language is "clear and unambiguous," the court must "implement the statute as written without resort to judicial interpretation, rules of construction, or extrinsic matters." Bergen Commercial Bank v. Sisler, 157 N.J. 188, 202 (1999) (citing In re Estate of Post, 282 N.J. Super. 59, 72 (App. Div. 1995)). It is undisputed that plaintiffs are insurance claimants. However, here plaintiffs have offered no evidence to the court that the DOBI or OIFP concluded that a violation of the Act was committed, or that plaintiffs suffered an injury as a result of a violation of the Act. In fact, the certification submitted by Assistant Commissioner Gale Simon, in support of the motion to quash, states that "the Department closed its investigative file without taking any formal disciplinary action." Moreover, it appears from the certification of Harry Polihrom, submitted in support of the motion to quash, that the "insurance-fraud investigation" into this matter by the DOBI's Bureau of Fraud Deterrence remains open and is an active investigation. Thus, no evidence has been proffered that the DOBI has reached the conclusion that a violation of the Act occurred. Accordingly, plaintiffs have not demonstrated that they are claimants "injured by a violation" of the Act (emphasis added).

Plaintiffs further assert that the regulations promulgated under N.J.A.C. 11:16-6.11 authorize OIFP to release "information and materials" to law enforcement agencies, local government units and "referring entities", thereby warranting disclosure of the information sought to plaintiffs. N.J.A.C. 11:16-6.11. However, plaintiffs misconstrue the language contained in the regulation. Akin to N.J.S.A. 17:33A-11, the administrative regulations limit disclosure of the confidential information to a narrowly defined segment including "other law enforcement agencies, the Department of Health and Senior Services, the Department of Human Services…the Department of Banking and Insurance…and…referring entities on pending cases of suspected insurance fraud, where such action would serve the public interest…" N.J.A.C. 11:16-6.11 (emphasis added). However, in defining the term "referring entities" our Legislature included only the "Department of Health, the Department of Human Services, the Department of Labor and Workforce Development, any professional board in the Division of Consumer Affairs in the Department of Law and Public Safety, the Department of Banking and Insurance, the Division of State Police, every county prosecutor's office, local government units as may be necessary or practicable, and insurers." N.J.S.A. 17:33A-18. Thus, the term "referring entities" does not include insureds or insurance claimants. N.J.S.A. 17:33A-18. Therefore, plaintiffs do not comprise part of the class consisting of "referring entities" to which the OIFP may make disclosure of confidential investigative material.

3. Waiver of Confidentiality

Plaintiffs argue that any "right to confidentiality" enjoyed by its insurer, their agents and representatives under N.J.S.A. 17:33A-11 was expressly waived by plaintiffs' insurer. However, this argument is without merit. Preserving the confidentiality of papers, documents, reports or evidence in an insurance-fraud investigation under the Act serves substantive public interests,

including, preserving the integrity of the DOBI investigation, the safety and security of witnesses, confidential informants and investigators; enhancing the effectiveness of investigative techniques; and ensuring the privacy interests of unindicted persons. See River Edge Sav. & Loan Assoc. v. Hyland, 165 N.J. Super. 540, 544 (App. Div.), certif. denied, 81 N.J. 58 (1979). Thus, while third-parties may share a concomitant interest in maintaining the confidentiality of the investigative records and documents, the right to confidentiality rests with the DOBI, as the governmental agency charged with the investigation. The confidentiality afforded under N.J.S.A. 17:33A-11 may not be waived by the subjects of any investigation, any witness, confidential informant, investigator or any other law enforcement agency, because the right to confidentiality rests with the DOBI commissioner. Accordingly, no voluntary action by plaintiffs' insurer, its agents or representatives will serve to waive the statutory right to confidentiality afforded the DOBI commissioner under N.J.S.A. 17:33A-11.

4. Unnecessarily hinder investigation

Although our Legislature provided an express proscription against disclosure of papers, documents, reports or evidence that are subject to an investigation, the prohibition was qualified by the phrase, "except as specifically provided in this act." The relevant section of the Act provides, in part, that:

> [s]uch papers, documents, reports, or evidence shall not be subject to subpena [sic], unless the commissioner consents, or until, after notice to the commissioner and a hearing, a court of competent jurisdiction determines that the commissioner would not be unnecessarily hindered by such subpena [sic].
>
> [N.J.S.A. 17:33A-11.]

In directing a court of competent jurisdiction to conduct an inquiry into whether the commissioner's insurance-fraud investigation would be unnecessarily hindered by the disclosure

of information sought under a subpoena, our Legislature required the court to engage in a balancing process. Embarking upon that journey the court must adhere to an approach that is both flexible and adaptable, focusing "upon the relative interests of the parties in relation to the[] specific materials" being sought. McClain v. College Hospital, 99 N.J. 346, 361 (1985). The court must be "sensitive to the fact that the requirements of confidentiality are greater in some situations than in others." Id. at 362. This analysis requires the court to engage in a "'case-by-case consideration of whether access would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.'" Id. at 357 (quoting Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 290 (1979)). Thus, the demanding party's interests in disclosure must be balanced against the public interest served in maintaining confidentiality. Nero v. Hyland, 76 N.J. 213, 224 (1978). Only where "considerations of fundamental fairness" are present which "outweigh the imperative of the interests of the State in protecting and maintaining the confidentiality of the information, an exception is made and disclosure may be had." River Edge Sav. & Loan Assoc., supra, 165 N.J. Super. at 544 (citing Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957)).

Plaintiffs argue that they "have a right to compel documents and testimony needed to establish the condition" of the subject property as of the October 1, 2010 valuation date. Plaintiffs further assert that public interests are not being best served by "a total ban on the production of documents or testimony" by the DOBI. Moreover, plaintiffs claim that their due process rights "entitle them to compel production of documents and testimony" from Assistant Commissioner Gale Simon, investigator Harry Polihrom, and former investigator Clark Masi to ascertain the factual basis for the statements contained in their certifications submitted in support of the motion to quash.

However, given the legislative determination that such confidential investigative accounts are subject to disclosure only under the scrutiny of the DOBI commissioner, "a judge must be convinced of a clear showing of advancement of the public interest to warrant disclosure." Loigman, supra, 102 N.J. at 108.

Here, the DOBI has demonstrated that important governmental functions and public interests are being served by maintaining the confidentiality of their investigative accounts, including, but not limited to, the investigation and prevention of insurance-fraud. The disclosure of these accounts would substantially impede the DOBI's ability to conduct its ongoing insurance-fraud investigation in this matter and would discourage witness and confidential informant cooperation and may place at risk the investigators conducting these investigations. Moreover, plaintiffs have made no showing that disclosure of the subpoenaed information would not unnecessarily hinder the DOBI's insurance-fraud investigation. Plaintiffs have not demonstrated how issues of fundamental fairness outweigh the DOBI's strong interests in preserving and maintaining the confidentiality of its investigative files. The court discerns no compelling need on the part of plaintiffs which would offset the possible harm to the public interests being served were disclosure of its insurance-fraud investigative accounts made. Disclosure of investigatory evidence in a potentially sensitive insurance-fraud investigation would have a tendency to "chill the investigative process" and discourage citizens from confiding in law enforcement officials. Loigman, supra, 102 N.J. at 104.

5. Testimony

Plaintiffs next assert that they can compel the testimony of Assistant Commissioner Gale Simon, Bureau of Fraud Deterrence investigator Harry Polihrom and former Consumer Protective Services unit investigator Clark Masi, at the time of trial pursuant to the Subpoena. However,

these assertions lack merit, as the Subpoena fails to comply with the fundamental requirements of R. 1:9-1.

Pursuant to R. 1:9-1, a subpoena to appear "shall command each person to whom it is directed to attend and give testimony at the time and place specified therein." R. 1:9-1. Here, the Subpoena was addressed to Matthew Noumoff, OPRA Custodian for the DOBI. The Subpoena does not identify Gale Simon, Harry Polihrom or Clark Masi; the Subpoena makes no reference to the provision of testimony; and the Subpoena does not command any person to attend a hearing, nor does it identify a time or a place to give testimony. Accordingly, the Subpoena is facially and procedurally deficient to compel the testimony of Gale Simon, Harry Polihrom or Clark Masi at the time of trial.

6. Documents not in DOBI's possession

The certification of Assistant Commissioner Gale Simon, submitted in support of the DOBI's motion to quash, states that the DOBI is no longer in possession of its April 7, 2010 investigative file. Pursuant to the DOBI's Retention and Disposition Schedule, Agency S580800, Schedule 003, the DOBI's Consumer Protection Services unit destroyed its file three years after its investigation was concluded. The Consumer Protection Services unit closed its file in or about September 20, 2010. Accordingly, the contents of the Consumer Protection Services unit's investigative file were destroyed approximately three years thereafter. Thus, the DOBI's Consumer Protection Services unit is no longer in possession of information responsive to the Subpoena. The court concludes that as a result of the Consumer Protection Services unit's destruction of its investigative files, in accordance with a recognized and published Retention and Disposition Schedule, it is not responsible for producing documents sought under the Subpoena that it does not possess.

III. Conclusion

The court concludes that the information sought under the Subpoena is specifically exempt from disclosure under N.J.S.A. 17:33A-11. Moreover, plaintiffs have failed to demonstrate that issues of fundamental fairness outweigh the DOBI's competing interest in preserving the confidentiality of insurance-fraud investigation accounts. Plaintiffs have made no showing that disclosure of the subpoenaed information would not unnecessarily hinder, obstruct or interfere with the DOBI's ongoing insurance-fraud investigation. Consequently, the court grants the DOBI's motion to quash the Subpoena. An Order quashing the Subpoena will be issued.

Very truly yours,

/s/ Hon. Joshua D. Novin, J.T.C.

Cc: Gary Gordon, Esq.