

MARC

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

MCCUSKER • ANSELM

ROSEN • CARVELLI

210 Park Avenue, Suite 301

Florham Park, New Jersey 07932

Tel: 973.635.6300 • Fax: 973.635.6363

www.marc-law.com

BRUCE S. ROSEN

Director

Direct: 973.457.0123

Fax: 973.457.0276

brosen@marc-law.com

January 23, 2013

Via Facsimile and Hand-Delivery

Hon. Karen M. Cassidy, A.J.S.C.

Union County Courthouse

2 Broad Street

Elizabeth, NJ 07207

**Re: In re January 11, 2013 Subpoena by Grand Jury of Union County, NJ
Prosecutor's Docket 13-0001**

Dear Judge Cassidy:

Please accept this letter-brief in lieu of a more formal reply to The Union County Prosecutor's (the "State's") Opposition to Tina Renna's Motion to Quash the above-referenced subpoena.

The State completely misunderstands the Newsperson's Shield and misstates the criteria for defining a journalist under the Shield Law. Instead, what is offered up is a personal attack on Ms. Renna, a well-known critic of the Prosecutor, which belies the real reason for this subpoena: to undermine the ability of one of the few reporters engaged in regular investigative reporting in Union County to do her job by showing her sources that unlike other journalists, the State can subject her to questioning under oath.

Ms. Renna has been a thorn in the side of not only the Prosecutor, but one-party Union County government for seven years. That much is clear from the outrageously shrill whining in the Opposition about the tone of her attacks on Union County politicians. It is as if the State never read New York Times v. Sullivan, 376 U.S. 254 (1964), and has no idea that it is the media's purpose to report, investigate and even castigate government officials; the media's job is to be a check on unbridled power, which is exactly what exists in a one-party government. See, e.g., Maressa v. New Jersey Monthly, 89 N.J. 176, 200-201 (N.J. 1982) ("Sometimes published statements will hurt. Sometimes they will turn out to be untrue. Nevertheless, those regrettable consequences must yield to the need for an informed citizenry"). This role – reporting and commentary on government -- is at the heart of the First Amendment. In fact, the very reason Ms. Renna has been successful is that she

gathers information that is often inaccessible to the public – much of it unpleasant for those in power – and disseminates that information in a regular fashion to her readers over an electronic media, the very definition of a journalist under the Shield Law.

The Shield Law requires that claimants show three things: first, a connection to news media; second, a purpose to gather, procure, transmit, compile, edit, or disseminate news; and third, that the materials sought were obtained in the course of pursuing professional newsgathering activities. N.J.S.A. 2A:84A-21.3. *Too Much Media, LLC v. Hale*, 206 N.J. 209, 238 (N.J. 2011).

Interestingly, the State concedes the last two prongs of the test, that Ms. Renna “occasionally circulates news” (Opp. Br. at 4) and that Ms. Renna obtained the information sought “in the ordinary course of her activities” (Opp. Br. at 12), but they then attack her connection to news media, claiming that countywatchers.com (“County Watchers”) is not “alike in substance or essentials” to more traditional media, and thus eligible for the Shield because:

- County Watchers fails to follow voluntary journalism codes of ethics because in 2006 it plagiarized “significant portions” of another blog, fails to get comment from the other side of the issue, fails to identify sources where feasible, fails to correct mistakes, is riddled with “profanities, slurs and personal attacks (such as calling Union County Democrats “psychopaths” or levying “insulting and vulgar” attacks, and mixes “commentary with opinion.”). (Opp. Br. at 5-8)
- County Watchers “consistently casts the UCWA [Union County Watchdog Association], in a positive light while castigating and demeaning the members of Union County government.” (Opp. Br. at 8-9)
- She is a “political activist masquerading as a government watchdog” because her husband worked for the County until 2004 and unsuccessfully ran for freeholder in 2005 and the UCWA was created the following year and she ran as a candidate for Republican County Committee in 2010. (Opp. Br. At 9-10)
- She “screams” at freeholders during board meetings (Opp. Br. At 10)
- She promotes UCWA in her writing and is therefore “more akin to a public relations firm,” ineligible for Shield protection. Id.
- She appears as part of the news and has been described as an “activist” “watchdog” “gadfly” or “critic.” (Opp. Br. at 11).
- Her writing is not sufficiently edited. (Opp. Br. at 12).

The Appellate Division in Too Much Media made a conscientious effort to identify certain criteria that would help determine whether a person qualifies for protection under the Shield Law. Among other things, the panel considered whether defendant identified herself as a reporter and had an “understanding or agreement of confidentiality” with her sources, whether she adhered to certain journalistic “standard[s] of professional responsibility,” and whether she produced

investigatory notes. 413 N.J. Super. 135, 158-59 (App. Div. 2010) The Supreme Court made clear that “those criteria are not required under the statute,” Too Much Media, *supra*, 206 N.J. at 239-240.

Maintaining particular credentials or adhering to professional standards of journalism -- like disclosing conflicts of interest or note taking -- is also not required by the Shield Law. Amicus NJMG suggests that industry practices vary widely and that some characteristics highlighted by the Appellate Division are not followed. Regardless, the statute mandates a connection to “news media” and a purpose to gather or disseminate news; it does not limit the privilege to professional journalists who follow certain norms. The Legislature could have chosen that approach but did not. Compare N.J.S.A. 2A:84A-21 with N.Y. Civ. Rights Law § 79-h (applying New York's Shield Law only to “professional journalists and newscasters”).

206 N.J. at 240.; *see also* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 549 (1976) (proscribing the use of voluntary guidelines in regulating the publication of journalists). Thus, the thrust of the State's Opposition, that County Watchers does not follow journalism guidelines, is a red herring. The State's citation to an alleged incident of plagiarism seven years ago is mind-boggling and its emphasis on deportment rather than the timely gathering and distribution of news by an electronic means of communication is telling. The Shield law does not require that a publication be objective, or that it be nice to politicians, or that it not self-promote (frankly every publication and news entity has been guilty of that (starting with “*The Star Ledger* has learned,” the “*Star Ledger* reported,” in almost every edition, but it inundates virtually every broadcast news or entertainment show). In fact, self-promotion is now virtually required in this era of unlimited online competition for readers/viewers as well as Facebook, Twitter and Tmblr. *See, e.g.,* http://www.cjr.org/realtalk/journo_promote_thyself.php.; <http://brandmeajournalist.com/>; <http://daily-download.com/andrew-sullivan-journalists-art-self-promotion/>.

On the matter of Ms. Renna's supposed partisanship as a bar to her being considered media, the State is woefully misguided. Our press has a long history of partisanship, beginning with Federalist newspapers at the nation's founding, to pro and anti-slavery newspapers and ultimately the media's role in pushing for the Spanish-American War, for civil rights, investigating Watergate, or opposing the Vietnam or Gulf wars. Today, one can easily find news outlets clearly eligible for New Jersey's Shield Law that are completely partisan, for example, *New York Post*, Fox News or MSNBC; to some, *The New York Times* is a partisan news outlet. Even when news outlets purport to report news independently, they often advocate for pet projects. Over the years, *The Star Ledger's* advocacy was partially responsible for no-fault insurance and construction of the meadowlands sports complex. There is no rule in the First Amendment or the Shield Law that a particular news media must be objective; and there is plenty of case law setting forth that courts cannot decide what constitutes news as opposed to information that appears to entertain. *See* below.

The State's depiction of Ms. Renna as a “political activist masquerading as a government watchdog” because her husband worked for the County until 2004 and because he unsuccessfully ran for freeholder in 2005 or she ran for county committee in 2010 is similarly meaningless. Political figures go in and out of journalism, whether it is William F. Buckley, Gore Vidal, Norman Mailer, Senator Al Franken, CBS Commentator Dave Ross or Vice President Al Gore,

Patrick Buchanan or Arianna Huffington. This does not make them any less qualified as journalists when they function as journalists. The fact that Ms. Renna shows up at a freeholder meeting and makes her points or asks questions is likewise meaningless. News people appear regularly at colleges, on television, in debates and take strong positions. The fact that she files OPRA lawsuits actually dovetails with her status as a member of the news media; OPRA lawsuits are filed regularly by established news media.

What matters is that when the Court looks at her writing, whether the sample recent columns set forth at Exhibit B of Ms. Renna's Certification or the ("generatorgate") articles at issue here (only a handful of the hundreds she has written) they will see real investigative reporting. Most of the stories/blog posts use standard news story form and include attribution to written sources, although they may also include confidential sources. For example:

- In "Directors have a duty to be informed about the Union County alliance" (Nov. 24, 2012), she uses a well-known journalistic vehicle, a letter to a politician, to ask demanding questions regarding the lack of oversight by the Union County Alliance's Board of Directors.
- In "Union County Prosecutor's Office – I'm not an Idiot" (Mar. 18, 2012), Ms. Renna told the story that the *Star Ledger* did not tell regarding the Prosecutor's new crime lab director.
- In "OPRA request reveals freeholder's son is involved in county criminal investigation, the county won't release the records" (April 13, 2012), she explained the reasons for the OPRA filing (and virtually every media outlet files OPRA requests, Government Records Council appeals, and yes, lawsuits).
- In "UC Dem Chair has had permission to work her county job from home since 2004" (Apr. 25, 2011), Ms. Renna reported that the executive director of the Union County Improvement Authority not only works from home, but the UCIA pays for insurance on her home. The article also details alleged cronyism regarding board activities.
- "Another Pension Gets Padded" (March 10, 2011) reports on how a part-time investigator for the county was promoted, and three years later he retired and began receiving a monthly pension higher than his part-time salary.
- "Hush Bennies" (Feb. 20, 2011), describes an ordinance that would enable non-unionized county employees to receive lifetime health benefits upon retirement, including numerous friends and relations of powerful Democratic politicians.
- "New Navigation systems will help employees find their way to work from Europe" (July 12, 2009) describes how the county purchased new luxury vehicles with GPS devices that include European roads.

- “Generatorgate: Blatant Lies and the Lying Public Officials Who Tell Them” (Dec. 16, 2012) was a summary of her investigations and those of the *Local Source*, and the *Star Ledger*

The above articles/blog post (although sometimes folksy or refreshingly blunt, with a point of view and sometimes requiring copyediting) contain all of the attributes of investigative reporting: a story about potential corruption, sources exposing abuse of power, and a clear explanation as to the significance of what is happening. It is safe to say there has been more original reporting on this “generatorgate” story, like most other such stories in County Watchers than in the *Star Ledger* or any other publication (see: http://www.nj.com/union/index.ssf/2012/11/prosecutors_investigating_whet.html).

Moreover, County Watchers’ articles are almost indistinguishable in appearance from nj.com or northjersey.com. As the Supreme Court approvingly noted in Too Much Media:

Certain online sites could satisfy the law's standards. In *O'Grady v. Superior Court*, for example, a California appellate court held under federal and state law that the reporter's privilege applied to an individual who claimed to operate an "'online news magazine' devoted to news and information about Apple Macintosh computers and compatible software and hardware." n3 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72, 77 (2006). **The court observed that "the open and deliberate publication on a news-oriented Web site of news gathered for that purpose by the site's operators" was "conceptually indistinguishable from publishing a newspaper, and we see no theoretical basis for treating it differently."** Id. at 100. The appellate panel pointedly contrasted the site with "the deposit of information, opinion, or fabrication by a casual visitor to an open forum such as a newsgroup, chat room, bulletin board system, or discussion group." Ibid.

Too Much Media, *supra*, 206 N.J. at 236 (emphasis added)

The State’s position that County Watchers is not news because it does not fit within some outdated notion of what constitutes the news media is also erroneous. In upholding the Shield Law for a *New York Times* subsidiary that filmed realty shows in emergency rooms, the Appellate Division discussed how the definition of news has changed even in 2003 and how the Courts should exercise caution in parsing distinctions of content:

We also reject plaintiff's alternative argument that NYT's videotape of him is not protected by the Shield Law because NYT is not part of the "news media" and the show "Trauma: Life in the E.R." is not "news" but rather a form of "entertainment" which plaintiff characterizes as "shock TV." Our courts have broadly construed the terms "news media" and "news." See, e.g., *Woodhaven*, [Lumber & Mill Work] *supra*, 123 N.J. [481,] 497-98, (Shield Law applies to unpublished photographs taken by a news photographer at a fire); [*154] *Gastman v. N. Jersey Newspapers Co.*, 254 N.J. Super. 140, 145-46, (App.Div.1992) (Shield Law applies to letter published anonymously in letters to the editor column); *In re Avila*, 206 N.J. Super. 61, 66, (App.Div.1985)

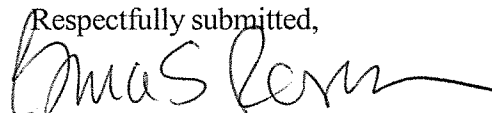
(Shield Law applies to a free twenty-page Spanish language tabloid); In re Burnett, 269 N.J. Super. 493, 500-02, (Law Div.1993) (Shield Law applies to information used in preparation of annual insurance rating report issued by industry trade publication). Moreover, the Supreme Court has held that in the absence of a countervailing constitutional right, the privilege from disclosure provided by the Shield Law is "absolute." *Maressa v. N.J. Monthly*, 89 N.J. 176, 187-89, 445 A.2d 376, cert. denied, 459 U.S. 907, 103 S. Ct. 211, 74 L. Ed. 2d 169 (1982).

We recognize that the mere fact a videotape is taken for use in a television show does not automatically mean that the videotape producer is part of the "news media." We also recognize that most television shows do not consist of "news." It is clear, however, that "news" is not limited to reports of significant public events. Local television news programs are sometimes dominated by pictures of fires, accident scenes and interviews of crime victims or their families. Even network national news programs frequently broadcast "human interest" stories that may be considered more entertaining than informative. News magazine programs such as "60 Minutes" and "20/20," which present feature stories on topics that range from in-depth examinations of important public issues to interviews of entertainment celebrities, have become a common form of television show. In view of the variety of topics covered by news shows and the shadowy boundary between "news" and "entertainment," the Supreme Court has observed that "courts should be chary of deciding what is and what is not news." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561, 105 S. Ct. 2218, 2231, 85 L. Ed. 2d 588, 607-08 (2d Cir.1985) (quoting dissent below by Meskill, J., 723 F.2d 195, 215 (1983)).

Kinsella v. Welch, 362 N.J. Super. 143, 153-154 (App.Div. 2003).

Therefore, this Court can easily conclude without further proceedings that County Watchers provides news that is gathered for the purpose of dissemination and that it is neither a bulletin board, nor an open forum as in *Too Much Media*; it contains original reporting, illustrations, commentary and a reader's forum just as every major newspaper's web site does.

For these reasons and those in Ms. Renna's moving papers, Ms. Renna asks that the Subpoena be quashed and fees assessed against the State.

Respectfully submitted,

Bruce S. Rosen

BSR/ckc
Cc: Clerk, Criminal Division (via hand-delivery)
Estrella Lopez, A.P. (via hand delivery)
Ms. Tina Renna (via email)