



**OFFICE OF THE COUNTY PROSECUTOR
JENNIFER WEBB-MCRAE
CUMBERLAND COUNTY PROSECUTOR**

**Harold B. Shapiro
First Assistant Prosecutor**

**Richard E. Necelis
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November 6, 2020

Via email to: opra+request-17732-9ef953a1@requests.opramachine.com

Theo Karan

Re: Records request

Dear Mr. Karan:

Please accept this letter in response to your follow up records request dated October 28, 2020 and October 30, 2020, to your original request in this matter dated October 17, 2020 and received by this Office on October 19, 2020. You indicated in your original email dated October 17, 2020 that this response should be delivered to you electronically via email utilizing the unique email address created for receiving replies to this request via opramachine.com, which is: opra+request-17732-9ef953a1@requests.opramachine.com. Accordingly, this response has been sent to that email address today, November 6, 2020.

You have requested additional documentation in the form of: The attachments to the following emails between members of the Cumberland County Prosecutor's Office and the employees of Testa Heck Testa & White pertaining to the case State of New Jersey v. Jeffrey Profitt, occurring between April 2016 and September 2020" and emails between members of the Cumberland County Prosecutor's Office and members of the Millville Police Department pertaining to MPD officer Jeffrey Profitt's arrest of Kenneth Harden on June 15, 2015 occurring between June 2015 and September 2020:

(1) Holly Moore to Michael Testa, 1/31/2018, Attachment(s): 20180131160937930.pdf; (2) Holly Moore to Robert Malestein and Michael Testa, 4/9/2018, Attachment(s): 20180409160509584.pdf (3) Holly Moore to Robert Malestein and Michael Testa, 4/11/2018, Attachment(s): 20180411160350121.pdf; (4) Amy Huber to Michael Testa and Harold Shapiro, 8/10/2018, Attachment(s): scan0003.pdf; (5) Holly Moore to Robert Malestein and Michael Testa, 8/10/2018 Attachment(s): Appendix – II – color – Profitt.pdf; 8-9-18 Summary Chart – Profitt (1).pdf (6) Holly Moore to Karla Harris and Michael Testa, 10/26/2018, Attachment(s): 10-26-18 - Proposed Consent Order & propd Amnd. Supersdg. Ind – Profitt.pdf;; (7) Holly Moore to Robert Malestein and Michael Testa, 11/2/2018, Attachment(s): partially executed Consent Order – Profitt.pdf; Exhibit A

page w propd Supersdg Ind. - Profitt.pdf; (8) Holly Moore to Robert Malestein, Sherry Danley and Michael Testa, 11/26/2018, Attachment(s): 11-21-18 Order dismissing original indictment – Profitt.pdf; (9) Karla Harris to Holly Moore, 3/1/2019, Attachment(s): Profitt_20190301164001.pdf; (10) Holly Moore to Karla Harris and Michael Testa, 5/29/2019, Attachment(s): 5-29-19 – Consent Order re typo in Count Two of Amnded Ind. - Profitt.docx; (11) Holly Moore to Robert Malestein, Sherry Danley and Michael Testa, 6/5/2019, Attachment(s): Profitt – Consent Order re typo.pdf; (12) Karla Harris to Holly Moore, 6/12/2019, Attachment(s): Profitt_20190612163657.pdf; (13) Holly Moore to Michael Testa, 11/8/2019, Attachment(s): 10-31-18 – Andrew Vinokur Transcript – Profitt.pdf; (14) Holly Moore to Karla Harris and Michael Testa, 1/2/2020, Attachment(s): 1-2-20 – Supp. expert report of Dr. Celeste – Profitt.pdf.; (15) Correspondence between Michael Testa and members of the CCPO in 2016 and 2017; (16) Letter/email dated August 8 2016 from Harold B. Shapiro to Michael Testa (including any and all attachments); (17) Letter/email dated September 25, 2018 from Michael Testa to Harold B. Shapiro (including any and all attachments); (18) Investigation Report attached to March 19, 2018 letter from Harold Shapiro to Michael Testa Letter October 5, 2019 from Harold B Shapiro to Michael Testa regarding plea offer.

With regard to request (1), please find all responsive records attached as Responsive Records 1, with redactions. Please find attached to this request as Responsive Record 1 the first page of the requested attachment, which is a correspondence between Michael L. Testa and Harold B. Shapiro - however, pages two and three of this record have been redacted, as they are an attachment to that letter, dated January 31, 2018, in the form of Internal Affairs Records. This portion of your requested record is an internal affairs record, which would render such records exempt from the provisions of OPRA. OPRA's broad right to access is not absolute, but is instead limited by "established public-policy exceptions," stated in the statute, which declare "[a] government record shall not include... information which is deemed to be confidential." Gilleran v. Bloomfield, 227 N.J. 159, 170 (2016) (quoting N.J.S.A. 47:1A-1.1). Similarly in North Jersey Media Group v. Bergen County Prosecutor's Office, 447 N.J. Super. 182, 201-202 (App. Div. 2016) the Court recognized that the provisions of the Open Public Records Act specifically do not abrogate or erode existing exemptions to public access, including "regulation[s] promulgated under the authority of any statute or Executive Order of the Governor" or "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". N.J.S.A. 47:1A-9.

Internal affairs investigations by law enforcement agencies fall under the supervision of the Attorney General, who is New Jersey's chief law enforcement officer. N.J.S.A. 52:17B-98. The Guidelines of the Attorney General were adopted pursuant to N.J.S.A. 40A:14-181 mandating that every law enforcement agency in New Jersey adopt and implement guidelines consistent with the guidelines governing the "Internal Affairs Policy and Procedures". These guidelines "are binding upon local law enforcement agencies". Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 459 N.J. Super. 458, 500 (App. Div.), certif. granted, 240 N.J. 7 (2019). The Internal Affairs Guidelines specifically mandate that the resulting materials from internal investigations are confidential. IAPP § 9.6.1.

Accordingly, the Attorney General Guidelines within the Internal Affairs Policy and Procedures act with the force of law in rendering materials generated from internal investigations exempt from public access pursuant to the Open Public Records Act, as the Government Records Council has repeatedly held. Carmelo Lio v. Borough of Fairview (Bergen), GRC Complaint No. 2014-431 (November 2015), Wares v. Township of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015), Blaustein v. Lakewood Police Dep't (Ocean), GRC Complaint No. 2011-102 (June 2012), and Rivera v. Borough of Keansburg Police Dep't (Monmouth), GRC Complaint

No. 2007-222 (June 2010). Rivera v. Union County Prosecutor's Office, 2020 WL 3397794. Pages two and three of this requested record are thus exempt from the provisions of OPRA and have been redacted from the attached Responsive Record 1.

With regard to request (2), please find all responsive records attached to this response as Responsive Record 2. With regard to request (3), please find all responsive records attached to this response as Responsive Record 3. With regard to request (4), please find all responsive records attached to this response as Responsive Record 4. With regard to request (5), this request is denied pursuant to the exemptions to the Open Public Records Act for criminal investigatory records as well as advisory and deliberative materials. The requested attachment to the email dated August 10, 2018 is not a correspondence, but is instead appendices to a Memorandum of Law with regard to this matter containing legal analysis with regard to the underlying matter of Jeffrey Proffitt. Advisory and deliberative materials are exempt from disclosure pursuant to the statutory exemption from the Open Public Records Act for records that constitute inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1. See also In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75 (2000) and Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009). The record which you request reflects the analysis and deliberations that occur during the decision-making process with regard to a defendant's matter, and thus contains opinions, recommendations, and advice with regard to agency policies. The record ultimately reflects the State's reasoning with regard to its position regarding the defendant, which is exempt from disclosure pursuant to the statutory exemption.

With regard to request (6), please find all responsive records attached to this response as Responsive Record 6. With regard to request (7), please find all responsive records attached to this response as Responsive Record 7. With regard to request (8), please find all responsive records attached to this response as Responsive Record 8. With regard to request (9), please find all responsive records attached to this response as Responsive Record 9. With regard to request (10), please find all responsive records attached to this response as Responsive Record 10. With regard to request (11), please find all responsive records attached to this response as Responsive Record 11.

With regard to request (12), this request is denied pursuant to the exemptions to the Open Public Records Act for criminal investigatory records as well as advisory and deliberative materials. The requested attachment to the email dated June 12, 2019 is not a correspondence, but is instead a supplemental expert report in the underlying matter regarding Jeffrey Proffitt. Criminal investigatory records are exempt from OPRA. Furthermore, a criminal investigatory record remains exempt from disclosure even after the criminal investigation has been closed. Donna Janeczko v. New Jersey Department of Law and Public Safety, Division of Criminal Justice, Custodian of Record, GRC Complaint Nos. 2002-79 and 2002-80; Andrew Johnson/Press of Atlantic City v. New Jersey Division of State Police, Custodian of Record, GRC Complaint No. 2004-46. With regard specifically to whether expert reports constitute criminal investigatory records exempt from OPRA, the Government Records Council has previously held that expert reports constitute criminal investigatory records and are appropriately exempt from release pursuant to the Open Public Records Act. GRC Complaint No. 2012-193; James Kellinger. v. Bergen County Prosecutor's Office. Accordingly, this request is denied.

With regard to request (13), this request is also denied as a criminal investigatory record. The attachment to the email dated November 8, 2019 is not a correspondence, and is a witness interview transcript prepared in the underlying criminal matter of Jeffrey Profitt. Accordingly, this record is a criminal investigatory record exempt from release pursuant to the Open Public Records Act. Janeczko v. New Jersey Department of Law and Public Safety, Division of Criminal Justice, Custodian of Record, GRC Complaint Nos. 2002-79 and 2002-80; Andrew Johnson/Press of Atlantic City v. New Jersey Division of State Police, Custodian of Record, GRC Complaint No. 2004-46.

With regard to request (14), this request is also denied as a criminal investigatory record as well as an advisory/deliberative record. The attachment to the email dated January 2, 2020 is not a correspondence, and is an expert report provided in the underlying criminal matter of Jeffrey Profitt. Accordingly, this record is also a criminal investigatory record exempt from release pursuant to the Open Public Record Act exemption for criminal investigatory records. Janeczko v. New Jersey Department of Law and Public Safety, Division of Criminal Justice, Custodian of Record, GRC Complaint Nos. 2002-79 and 2002-80; Andrew Johnson/Press of Atlantic City v. New Jersey Division of State Police, Custodian of Record, GRC Complaint No. 2004-46.

With regard to request (15), regarding email correspondence, attached as Responsive Record 15 are the only identifiable emails within this Office's email records from email addresses between the Cumberland County Prosecutor's Office and the law firm of Michael Testa occurring in 2016 or 2017 utilizing the search term "Jeffrey Profitt".

With regard to physical correspondence in this matter not accessible via an electronic search of this Office's email records and refinable via the utilization of search terms provided as the relevant subject, this portion of your request is denied in that it constitutes an open-ended search of this agency's files requiring substantial research and presenting an undue burden upon this Office. The Court held in MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files." Id. at 549 (emphasis added). Bent, 381 N.J. Super. at 37, NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Once more, your request is denied as it is overly burdensome, requiring significant research and on the basis that compliance would substantially disrupt the operations of this Office. If a request for access to a government record would substantially disrupt agency operations, a custodian may deny access to the records. N.J.S.A. 47:1A-5(g). See also Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220; Vessio v. NJ DCA, Division of Fire Safety, GRC Complaint No. 2007-188. As complying with this aspect of your request would require thorough reading of every document within the possession of this office to determine whether it constitutes a correspondence regarding Jeffrey Profitt, compliance with this request would require research into the content of documents and would be substantially disruptive to the operation of this office.

Accordingly, to the extent that this portion of your request can be accomplished via an automated search of email records, utilizing specified search terms to electronically locate records specifically responsive to your request, this request has been granted. To the extent that your request constitutes an improper open-ended search of this agency's files for any written correspondence relating to a subject matter, this is not a specific request for an identifiable record,

calls for substantial research into the content of records, and would otherwise present a substantial and undue burden upon this Office and is accordingly denied.

With regard to request (16), please find the referenced letter attached to this response as Responsive Record 16. However, with regard to your request for any and all attachments to this letter, this request is denied as it is for internal affairs records, criminal investigatory records, medical records and statements of witnesses which constitute criminal investigatory records, all of which are exempt from the provisions of the Open Public Records Act. Janeczko v. New Jersey Department of Law and Public Safety, Division of Criminal Justice, Custodian of Record, GRC Complaint Nos. 2002-79 and 2002-80; Andrew Johnson/Press of Atlantic City v. New Jersey Division of State Police, Custodian of Record, GRC Complaint No. 2004-46. Executive Order #26:4B - Governor James E. McGreevey, August 13, 2002.

With regard to request (17), attached as Responsive Record 17 is the only email in this Office's email records occurring on September 25, 2018 wherein Michael Testa and Harold B. Shapiro were both parties. With regard to physical correspondence in this matter not accessible via an electronic search of this Office's email records and refinable via the utilization of search terms provided as the relevant subject, this portion of your request is denied in that it constitutes an open-ended search of this agency's files requiring substantial research and presenting an undue burden upon this Office. The Court held in MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files." Id. at 549 (emphasis added). Bent, 381 N.J. Super. at 37, NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Once more, your request is denied as it is overly burdensome, requiring significant research and on the basis that compliance would substantially disrupt the operations of this Office. If a request for access to a government record would substantially disrupt agency operations, a custodian may deny access to the records. N.J.S.A. 47:1A-5(g). See also Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220; Vessio v. NJ DCA, Division of Fire Safety, GRC Complaint No. 2007-188. As complying with this aspect of your request would require thorough reading of every document within the possession of this office to determine whether it constitutes a correspondence regarding Jeffrey Profitt, compliance with this request would require research into the content of documents and would be substantially disruptive to the operation of this office.

Accordingly, to the extent that this portion of your request can be accomplished via an automated search of email records, utilizing specified search terms to electronically locate records specifically responsive to your request, this request has been granted. To the extent that your request constitutes an improper open-ended search of this agency's files for any written correspondence, this is not a request for an identifiable record, calls for substantial research into the content of records, and would otherwise present a substantial and undue burden upon this Office and is accordingly denied.

With regard to request (18), this request is denied as a criminal investigatory record. This record is a criminal investigatory record exempt from release pursuant to the Open Public Record Act exemption for criminal investigatory records. Janeczko v. New Jersey Department of Law and Public Safety, Division of Criminal Justice, Custodian of Record, GRC Complaint Nos. 2002-79

and 2002-80; Andrew Johnson/Press of Atlantic City v. New Jersey Division of State Police, Custodian of Record, GRC Complaint No. 2004-46. Accordingly, this request is denied.

The Cumberland County Prosecutor's Office reserves the right to raise any other ground for denial not raised in this response. The failure of the Cumberland County Prosecutor's Office to assert an exception or privilege does not act as a waiver of any ground for denial.

If your request for access to a government record has been denied or unfilled within the seven (7) business days required by law, you have a right to challenge the decision by the Cumberland County Prosecutor's Office to deny access. At your option, you may institute a proceeding in the Superior Court of New Jersey. All questions regarding complaints filed in Superior Court should be directed to the Court Clerk.

Sincerely,

A handwritten signature in black ink, appearing to read 'Stephen C. Sayer', with a stylized flourish at the end.

Stephen C. Sayer [114352015]
Assistant Prosecutor
Alternate Records Custodian