



UNION COUNTY PROSECUTOR'S OFFICE
ANDREW K. RUOTOLO JR. JUSTICE CENTER

32 RAHWAY AVENUE
ELIZABETH, NEW JERSEY 07202-2155
(908) 527-4500 FAX: (908) 289-1267
UCPO@ucnj.org

WILLIAM A. DANIEL
Prosecutor of Union County

JAMES O. TANSEY
First Assistant Prosecutor

DOREEN A. YANIK
Deputy First Assistant Prosecutor

September 21, 2021

J.F.

Via email to opra+request-25760-87c4d44e@requests.opramachine.com

Re: Response to OPRA Request 746-2021 (Clark Officer A.M. - Internal Affairs Records)

Dear J.F.:

This letter is in reply to your correspondence seeking certain records pursuant to the Open Public Records Act ("OPRA"), *N.J.S.A.* 47:1A-1 to 47:1A-13, and the common law right of access to public documents. We appreciate your patience and understanding in awaiting our response.

Specifically, your request sought the following:

"A summary of Lieutenant [A.M.] of the Clark Township's Police Department internal affair complaints during his employment at the Clark Police Department, to include date complaint filed, types of complaint, dispositions and discipline given, if any."

You later clarified that you were "only requesting a summary of [A.M.]'s internal affairs complaints while employed at the Clark NJ Police Department, to include dates, types of complaint, adjudications and punishment, and not the contents of all the internal affairs complaints."

Pursuant to *Attorney General Directive 2021-6* (Directive Regarding Public Disclosure of the Identities of Officers Who Commit Serious Disciplinary Violations) and the *Internal Affairs Policy & Procedures* (June 2021 Version),¹ all law enforcement agencies in New Jersey must periodically "submit to the County Prosecutor and the Attorney General, and publish on the agency's public website, a brief synopsis of all complaints where a termination, reduction in rank or grade, and/or suspension of more than five days was assessed to an agency member. This synopsis ... shall include the identity of each officer subject to final discipline, a brief summary of their transgressions, and a statement of the sanction imposed. This synopsis shall not contain the identities of the complainants

¹ Available at https://www.nj.gov/oag/iapp/docs/AG%20Directive%202021-6%20IAPP%20June%202021_All-Documents.pdf.

J.F.

Page 2

September 21, 2021

or any victims. Where discipline relates to domestic violence, the synopsis shall not disclose the relationship between a victim and an officer. In rare circumstances, further redactions may be necessary to protect the identity of a victim. Whenever practicable, notice shall be given to victims of domestic violence in advance of an agency's disclosure."

Except in the circumstances described above, information contained within internal affairs records is exempt from disclosure. *N.J.S.A.* 47:1A-10; *Kovalcik v. Somerset County Prosecutor's Office*, 206 N.J. 581, 592 (2011) (personnel records, including records relating to any grievance filed against an individual, shall not be considered a government record, unless the record fits within one of the three exceptions to the general exemption); *Rivera v. Union County Prosecutor's Office*, 2020 N.J. Super. Unpub. LEXIS 1192, *18-*25 (App. Div., June 19, 2020); *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 459 N.J. Super. 458, 480-81 and 507-08 (App. Div. 2019) (IAPP requires that identities of internal affairs complainants and accused officers must remain confidential); *Paff v. Bergen County*, 2017 N.J. Super. Unpub. LEXIS 627 (App. Div. March 13, 2017); *Vaughn v. City of Trenton (Mercer)*, GRC Complaint No. 2009-177 (June 2010). Moreover, internal affairs investigations and the entire contents of same remain confidential in the absence of a court order or consent of the Prosecutor or Law Enforcement Executive, *See* New Jersey Attorney General's *Internal Affairs Policy & Procedures* at 56 (2021) (the "IAPP"); *see also* *Bayer v. Township of Union*, 414 N.J. Super. 238, 273-74 (App. Div. 2010); *State v. Harris*, 316 N.J. Super. 384, 397-98 (App. Div. 1998); *State v. Jones*, 308 N.J. Super. 15, 43 (App. Div. 1998); *State v. Kaszubinski*, 177 N.J. Super. 136, 141 (Law Div. 1980).

On another note, in *North Jersey Media Group, Inc. v. Bergen County Prosecutor's Office*, 447 N.J. Super. 182, 189 (App. Div. 2016), the Appellate Division held that "an agency may 'neither confirm nor deny' the existence of records in response to an OPRA request when the agency (1) relies upon an exemption authorized by OPRA that would itself preclude the agency from acknowledging the existence of such documents and (2) presents a sufficient basis for the court to determine that the claimed exemption applies." In this regard, it is vital that the agency's responses to similar request remain consistent. "To deny records exist in some cases and to issue no denial in others would implicitly confirm the existence of records in a particular case, entirely defeating any effort to protect the confidentiality interest at stake. *See Daily Journal v. Police Dept. of City of Vineland*, 351 N.J. Super. 110, 128-29 (App. Div.) (citation omitted) (stating disclosure of the names of individuals mentioned in grand jury presentment would be 'tantamount to an accusation' without 'furnish[ing] a forum for a denial,' depriving the individual of 'the right to answer and to appeal'), *certif. denied*, 174 N.J. 364 (2002)." *North Jersey Media Group, Inc., supra*, 447 N.J. Super. at 212.

Here, you have requested Internal Affairs records relating to an officer who has not been the subject of major discipline, as defined in *Attorney General Directive 2021-6* and the IAPP. In essence, this amounts to inquiring whether an officer whose identity is required to be kept confidential is, or has been, the subject of any Internal Affairs investigation. Law enforcement agencies routinely receive allegations that are determined to be unprovable, unfounded or untrue. Identifying the target of such allegations could unfairly subject that individual to irreparable harm. As a result, this Office will

J.F.
Page 3
September 21, 2021

neither confirm nor deny the existence of any records responsive to your request. *N.J.S.A.* 47:1A-9(b); *see also North Jersey Media Group, Inc., supra*, above.

We note that you have also requested these materials pursuant to the common law right of access.

To constitute a public record under the common law, the item must be “a written memorial[] . . . made by a public officer, and . . . the officer [must] be authorized by law to make it.” *Nero v. Hyland*, 76 N.J. 213, 222 (1978) (citations omitted). The common law definition of a public record is broader than the definition contained in OPRA. *Bergen County Improvement Auth. v. N. Jersey Media Group, Inc.*, 370 N.J. Super. 504, 509-10 (App. Div.), *certif. denied*, 182 N.J. 143 (2004); *see also Keddie v. Rutgers*, 148 N.J. 36, 49 (1997) (comparing common law right of access to RTKL); *Nero, supra*, 76 N.J. at 221 (same).

To access this broader class of documents, requestors must make a greater showing than required under OPRA: (1) “the person seeking access must ‘establish an interest in the subject matter of the material’”; and (2) “the citizen’s right to access ‘must be balanced against the State’s interest in preventing disclosure.’” *Keddie, supra*, 148 N.J. at 50 (internal citations omitted).

[*Mason v. City of Hoboken*, 196 N.J. 51, 67-68 (2008)]

See also North Jersey Media Grp., Inc. v. Township of Lyndhurst, 229 N.J. 541, 578-81 (2017).

Factors to be considered in balancing these competing interests include, but are not limited to, “(1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual’s asserted need for the materials.” *Loigman v. Kimmelman*, 102 N.J. 98, 113 (1986).

You have not indicated the nature of your interest in obtaining these records. As a result, we are unable to conduct the necessary analysis to determine whether your interest in obtaining the records outweighs the interest of this Office in maintaining confidentiality. In any event, for the same reasons previously stated, this Office will neither confirm nor deny the existence of any records responsive to your common law request.

J.F.

Page 4

September 21, 2021

Returning to the subject of your OPRA request, the Union County Prosecutor's Office reserves the right to raise any other ground for denial not raised in this response. The failure of the Union County Prosecutor's Office to assert an exemption or privilege herein does not constitute 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 may challenge the decision of this Office to deny access by either instituting a proceeding in the Superior Court of New Jersey or filing a complaint with the Government Records Council ("GRC"). You may contact the GRC by telephone at 866-850-0511, by mail at P.O. Box 819, Trenton, NJ, 08625, by e-mail at grc@dca.state.nj.us, or at their web site at www.state.nj.us/grc.

With this letter, the Union County Prosecutor's Office considers your OPRA request to be completed and closed.

Very truly yours,

WILLIAM A. DANIEL
Prosecutor of Union County

A handwritten signature in black ink, appearing to read "Robert J. Rosenthal". The signature is fluid and cursive, with a large, stylized "R" at the beginning and a long, sweeping tail that extends to the right.

By: Robert J. Rosenthal
Assistant Prosecutor

RJR/

c Marlena M. Russo (via email)
Michael Sheets (via email)
April Bauknight, Esq. (via email)
Barbara Sullivan (via email)
Hannah Butler (via email)