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M E M O R A N D U M

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CC: Chief Keith M. Bendul, Fort Lee Police Department
Chief Raymond J. Hayducka, South Brunswick Township Police Department

FROM: Vito A. Gagliardi, Jr.

FILE: New Jersey State Association of Chiefs of Police

FILE NO.: 06030.32558

SUBJECT: Open Public Records Act Request from the Asbury Park Press

DATE: November 10, 2016

Over the past two weeks, police departments throughout the State have been served with identical Open Public Records Act ("OPRA") requests from the Gwenda R. Davis, Coordinator at Seton Hall Law School's Center for Policy and Research, on behalf of Richard Rivera. Pursuant to your directive, we have analyzed the specific requests. Our thoughts are set forth below.

1. *Police Department use of force incident reports for all incidents in 2014, 2015 and January 1, 2016 to June 30, 2016.*

According to a Complaint filed in 2012, Richard Rivera is a retired police officer who now researches and investigates police conduct and civil rights violations.¹ In this role, Mr. Rivera has filed at least 7 OPRA Orders to Show Cause in the New Jersey Superior Court² and 58 Complaints with the

¹ *Rivera v. Office of the County Prosecutor of the County of Bergen*, 2012 WL 3233511, BER-L-1310-12 (N.J. Sup. Ct. Law Div. July 26, 2012).

² *Rivera v. New Jersey State Police*, WL 3626542, MER-L-2026-15 (N.J. Sup. Ct. Law Div. Jun. 30, 2016); *Rivera v. New Jersey State Police*, 2016 WL 3626542, MER-L-2400-15 (N.J. Sup. Ct. Law Div. Jun. 30, 2016); *Rivera v. New Jersey State Police*, 2016 WL 3626542, MERL-1517-15 (N.J. Sup. Ct. Law Div. Jul. 2, 2015); *Rivera v. Bergen County Prosecutor's Office*, *Rivera v. Toms River*, OCN-L-225-15 (N.J. Sup. Ct. Law Div. 2015); *Rivera v. Seaside Park*, OCN-L-452-15 (N.J. Sup. Ct. Law Div. 2015); 2012 WL 6191282, BER-L-4310-12 (N.J. Sup. Ct. Law Div. Dec. 11, 2012); *Rivera*, 2012 WL 3233511.

Governments Records Council ("GRC").³ In short, this is not the first OPRA request that Mr. Rivera has brought seeking Use of Force Reports ("UFRs").⁴ Unfortunately, the courts have reached different results regarding whether these documents are disclosable under OPRA. The main contention between the courts is whether the criminal investigatory exception applies. Under this exception, a record need not be disclosed under OPRA when it is a record which "is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding." *N.J.S.A.* 47:1A-1.1. The main dispute between the courts is whether UFRs are required by law to be made or maintained.

In *Rivera v. Bergen County Prosecutor's Office*,⁵ Mr. Rivera requested "reports received from law enforcement agencies within Bergen County documenting use of force." In response, the Records Custodian provided the documents, but redacted the names of all individuals subjected to force. The court first held that the records were government records under OPRA. It then held that, based on the Appellate Division's holding in *O'Shea*, the criminal investigatory record exception does not apply. Specifically, in *O'Shea*,⁶ the court found that UFRs were required by police departments to be maintained by law, since the Attorney General Guidelines and Directives mandated these records be kept. Therefore, since this exception did not apply, UFRs were subject to OPRA. The *Rivera* court also examined whether the records could be redacted based on an individual's privacy rights. The court found that where force was used based on an individual being described in the UFR as "suicidal," "emotionally distrusted person" or any other description of a purported psychological condition, that individual's name should be redacted to protect their privacy rights. However, in all other situations where an arrest was made, the name of the individual should not be redacted.

Comparatively, in *Rivera v. New Jersey State Police*,⁷ the Records Custodian provided the UFRs, but redacted officer names and their related information. Notably, the court did not determine whether the redactions were appropriate,⁸ instead finding that "UFRs meet the criminal investigatory records exemption." This determination was based on a more recent Appellate Division decision, which disagreed with the court's finding in *O'Shea*. Instead, in *Lyndhurst*⁹ the court concluded that the Attorney General Guidelines on the creation of UFRs could not be considered "law", but rather were simply agency directives. The court therefore held that UFRs are "not required by law to be made, maintained or kept on file" under OPRA's definition of criminal records. Therefore, based on this holding, UFRs need not be disclosed based on the criminal investigatory records exception.¹⁰

³ The GRC decisions can be found at <http://www.nj.gov/cgi-bin/dca/grc/decisionsearch.pl>.

⁴ *Rivera*, 2012 WL 3233511; *Rivera*, 2016 WL 3626542.

⁵ *Rivera*, 2012 WL 3233511.

⁶ *O'Shea v. Twp. of W. Milford*, 410 N.J. Super. 371, 385 (App. Div. 2009).

⁷ *Rivera v. New Jersey State Police*, 2016 WL 3626542.

⁸ However, the Court did find that the names of the officers was required to be released pursuant to *N.J.S.A.* 47:1A-3(b), which provides that following a criminal investigation the "identity of the investigating and arresting personnel" must be made available to the public within 24 hours or as soon as practicable. The only exception is where release of this information will jeopardize the safety of any person or jeopardize any investigation in progress.

⁹ *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 441 N.J. Super. 70, (App. Div. 2015), cert. granted, 223 N.J. 553 (2015).

¹⁰ Recently, another Appellate Division panel disagreed with the *Lyndhurst* court; instead concurring with the rationale set forth in *O'Shea*. *Paff v. Ocean Cty. Prosecutor's Office*, 446 N.J. Super. 163, 188, (App. Div. 2016). However, since one of the judges on that three judge panel dissented, the prosecutor's office has chosen to

Unfortunately, where Appellate Division decisions conflict, the trial court has the discretion to choose the reasoning they would like to follow.¹¹ However, the New Jersey Supreme Court has agreed to hear an appeal on *Lyndhurst*. Therefore, there likely will be clarity in the near future regarding whether the criminal investigatory records exception applies to UFRs.

Until the Supreme Court decides *Lyndhurst*, it is our opinion that the requested records should be disclosed to avoid costly litigation and the possibility of paying prevailing attorney's fees. However, where force was used based on an individual being described in the UFR as suicidal, emotionally distrusted person or any other description of a purported psychological condition, the records custodians should redact that individual's name from the documents to protect his/her privacy rights.

For the reasons set forth above, it is our recommendation that the requested UFRs be provided, but redacted.

2. *Police Department Internal Affairs Annual Summary Reports with all tables and summaries where fines or suspensions were imposed for the years 2011 to 2015.*

Similarly, Mr. Rivera previously has brought OPRA requests seeking "Annual Summary Reports."¹² Based on these previous challenges, it is our opinion that this request should be granted. For example, in *Rivera v. Passaic*,¹³ Mr. Rivera sought "Police Department Internal Affairs Annual Summary Reports for 2008 and 2010." The city denied this request arguing the documents were exempt from disclosure under the Attorney General's Internal Affairs Policy & Procedures ("IAPP"). Its decision was based on the IAPP requirement that "[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information."¹⁴ However, the IAPP also mandates that each department summarize its internal affairs matters and provide this information to the public. Specifically, the IAPP states:

Each agency must annually release reports to the public summarizing the allegations received and the investigations concluded for that period. These reports shall not contain the identities of officers or complainants.

exercise its right to file an appeal to the New Jersey Supreme Court. Due to this case's impact on police departments throughout the State, the NJSCOP has decided to file a motion to appear amicus in this case.

¹¹ *Sabella v. Lacey Twp.*, 204 N.J. Super. 55, 61 (App. Div. 1985); *but see Petition of Gardiner*, 67 N.J. Super. 435, 446 (App. Div. 1961) (noting that in the face of two conflicting Supreme Court opinions, the Court should "follow the more recent, and clearly the more soundly conceived" decision).

¹² *Rivera v. City of Passaic*, GRC Complaint No. 2011-214 (Sept. 2012); *Rivera v. Plainfield*, GRC Complaint No. 2010-112 (Sept. 2012); *Richard Rivera v. Rutherford Police Dept.*, GRC Complaint No. 2011-277 (Sept. 2012); *Rivera v. Cliffside Park Police Dept.*, GRC Complaint No. 2010-275 (Jun. 2012); *Rivera v. Keansburg Police Dept.* GRC Complaint No. 2007-222 (Jul. 2010); *Richard Rivera v. Cliffside Park Police Dept.*, GRC Complaint No. 2008-233 (Nov. 2009).

¹³ *Rivera v. Passaic*, GRC Complaint No. 2011-214 (Sept. 2012).

¹⁴ *See Wares v. West Milford*, GRC Complaint No. 2014-274 (May 2015) (the IAPP exempts internal affairs records from disclosure); *Rivera v. Keansburg Police Dept.*, GRC Complaint No. 2007-222 (June 2010) (internal affairs reports are confidential records not subject to OPRA based upon the IAPP guidelines).

Therefore, in reviewing Mr. Rivera's request, the Government Records Council determined that the summaries were not exempt under OPRA since these same documents were to be made available to the public. Accordingly, the GRC found that the records custodian wrongfully withheld the documents under OPRA.

For the reasons set forth above, it is our recommendation that the requested Internal Affairs Annual Summary Report be provided.

3. *Police Department policy and procedures for early warning and intervention upon employee conduct.*

It is our opinion that this request should be granted if disclosure would not create a risk to the public or employees. OPRA defines a government record to include "any ... document ... that has been made, maintained or kept on file in the course of his or its official business."¹⁵ A police department's policies fall within this definition.

However, certain records of police departments are confidential and exempt from disclosure under OPRA.¹⁶ These include "security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software"¹⁷ and "[r]ecords, including standard operating procedures, manuals, and training materials, that may reveal ... an agency's operational techniques, measures, or procedures, which, if disclosed, would create a risk to the safety of person ... or compromise an agency's ability to effectively conduct investigations."¹⁸ Therefore, disclosure of the early warning and intervention policies and procedures should only be withheld if releasing them would create a risk to individual employees. In that situation, the portions of the policy that create such a risk should be redacted accordingly.

For the reasons set forth above, it is our recommendation that the requested policy and procedures should be provided.

4. *Police Department consent to search forms and reports filed by officers where the party's consent was requested and either consented to or declined for: searches of vehicles, mobile homes and structures including, but not limited to, apartments and houses.*

This request should be denied in our opinion because the records are exempt under the criminal investigatory record exception and because the request is overly broad. A government record does not include a "criminal investigatory record," defined as "a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding." *N.J.S.A. 47:1A-1.1*. Thus, to prove that a record is a criminal investigatory record, the public agency must show that the record: (1) is not required by law to be made and (2) pertains to a criminal investigation or related civil

¹⁵ *N.J.S.A. 47:1A-1.1*.

¹⁶ *Id.*;

¹⁷ *Id.*;

¹⁸ *N.J.A.C. 13:1E-3.2*. While this regulation applies to the New Jersey State Police, the GRC has extended its applicability to local police departments. See *Rivera v. Passaic*, GRC Complaint No. 2011-214 (September 2012); *Rivera v. Plainfield Police Dept*, GRC Complaint No. 2009-317 (Sept. 2012)).

enforcement proceeding.¹⁹

Our office is unaware of any law that requires a "Consent to Search" form be made or maintained. Rather, in 1975, the New Jersey Supreme Court held in *Johnson*²⁰ that the New Jersey Constitution requires that any consent given to a police officer to conduct a warrantless search be given knowingly and voluntarily. In response to the Supreme Court's decision, the New Jersey State Police developed a "Consent to Search" form, which authorizes officers to conduct a search.²¹ Therefore, it appears that the form was created in response to the Supreme Court's ruling; and not a law or administrative directive.

To determine whether a document "pertains to a criminal investigation," courts typically consider two factors: 1) whether the particular document is relevant to a criminal investigation; and 2) the timing of the document's creation.²²

In *Lyndhurst*²³ the court examined the first factor by noting there is a distinction between documents relating to criminal investigations, compared to those relating to a police officer's "community caretaking function." As an example, the court indicated that UFRs prepared "after a police officer shoots a dangerous dog" would be classified as a non-exempt community caretaking function, while "documenting the use of force in the course of arresting a criminal suspect," would be exempt as a criminal investigation. In *Rivera*²⁴ the court held that UFRs generated due to actions taken by police officers engaging in criminal law enforcement activities (such as conducting an arrest, responding to violent outbursts occurring during the initial processing of arrestees, responding to threats to police officers, or responding to insubordinate resistance to police officer commands), pertain to criminal investigations because "they all involved actions that implicate violations or potential violations of criminal law." In obtaining a "Consent to Search" form, it is without question that an officer will not be engaging in a "community caretaking function." Rather, the purpose of the form is to conduct a search to discovery criminal conduct that may lead to a criminal charge and prosecution. Therefore, it is our opinion that a "Consent to Search" form meets the first factor.

Regarding the second factor, when a document has been created prior to the start of an investigation, that document cannot be considered as "pertaining to" that investigation.²⁵ However, determining when an investigation begins is not always straightforward.²⁶ Here, it is our opinion that the investigation likely would have already begun prior to the officer requesting the "Consent to Search" form because one expects that the officer already had reasonable suspicion before

¹⁹ *Paff v. Ocean Cty. Prosecutor's Office*, 446 N.J. Super. 163, 180 (App. Div. 2016).

²⁰ *State v. Johnson*, 68 N.J. 349, 354 (1975).

²¹ *State v. Carty*, 170 N.J. 632 (2002).

²² *Rivera*, 2016 WL 3626542.

²³ *Lyndhurst*, 441 N.J. Super. at 105.

²⁴ *Rivera*, 2016 WL 3626542.

²⁵ *Id.*; see *Serrano v. S. Brunswick Twp.*, 358 N.J. Super. 352, 366 (App. Div. 2003) (concluding that 911 tapes recorded only hours before initiation of a police investigation did not pertain to an investigation on the theory that "[a]ssuming [the document] was a public record when created, it did not become retroactively confidential simply because the prosecutor obtained the tape").

²⁶ See *Lyndhurst*, 441 N.J. Super. 104-05 (noting that "when an officer turns on a mobile video recorder to document a traffic stop or pursuit of a suspected criminal violation of law, that recording *may* pertain to a 'criminal investigation,' albeit in its earliest stages") (emphasis added).

requesting consent for the search.²⁷

Therefore, since the "Consent to Search" forms are not required by law to be made and they pertain to a criminal investigation, it is our opinion that they need not be disclosed based upon the criminal investigatory record exception.

Furthermore, this request should be denied as it is overly broad. OPRA makes identifiable government records readily accessible for inspection, copying, or examination.²⁸ Therefore, an OPRA request "must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."²⁹ OPRA does not authorize unbridled searches of an agency's property and "is not intended as a research tool litigants may use to force government officials to identify and siphon useful information."³⁰ For example, in *MAG* the complainant requested all documents or records evidencing that the Division of Alcoholic Beverage Control sought, obtained or ordered revocation of a liquor license.³¹ In upholding the custodian's denial, the court held that the request lacked "any specificity or particularity" and "provided neither names nor any identifiers other than a broad generic description" of the documents sought. Therefore, the request would require the custodian "to manually search through all of the agency's files, analyze, compile and collate the information contained therein."³² As such, valid OPRA requests must contain specifically identifiable information to ensure that the custodian is not required to search through the agency's files.³³

Here, the request seeks "Consent to Search" forms "where the party's consent was requested and either consented to or declined for: searches of vehicles, mobile homes and structures including, but not limited to apartments and houses." To start, this request contains no date parameters and therefore would require the records custodian to search through all of the police departments records. The request would further require the custodian to search and analyze the files manually to determine whether a party consented or declined a search of a vehicle, mobile home, or structures. In our opinion, such a request fails to identify with reasonable clarity the documents sought.

For the reasons set forth above, it is our recommendation that the "Consent to Search" form not be provided.

* * *

Naturally, we invite individual police departments to confer with the appropriate attorney retained for each respective municipality. However, to the extent chiefs are interested in our analysis, we are pleased for this opportunity to convey our thoughts.

²⁷ *Paff*, 446 N.J. Super. at 189.

²⁸ *MAG Entm't, LLC v. Div. of Alcoholic Beverage Control*, 375 N.J. Super. 534, 543 (App. Div. 2005).

²⁹ *Bent v. Twp. of Stafford Police Dep't, Custodian of Records*, 381 N.J. Super. 30, 37 (App. Div. 2005).

³⁰ *Bent*, 381 N.J. at 37; *MAG*, 375 N.J. Super. at 543.

³¹ *MAG*, 375 N.J. Super. at 539.

³² *Id.* at 549; see also *Bart v. Passaic County Public Hous. Agency*, 406 N.J. Super. 445, 451 (App. Div. 2009) ("The requestor must identify the records sought with specificity. The request may not be a broad, generic description of documents that requires the custodian to search the agency's files and 'analyze, compile and collate' the requested information").

³³ *MAG*, 375 N.J. Super. at 549.