

BELOW IS A SUMMARY OF THE CASE YOU ARE FILING WITH THE **APPELLATE DIVISION**.
 REVIEW ALL INFORMATION AND DOCUMENTS FOR ACCURACY PRIOR TO HITTING THE **SUBMIT** BUTTON
 ON THE NEXT PAGE.

FILING ID # 1378016 **TRIAL COURT DOCKET #** MER-L-1140-20
APPELLATE # A-003950-19 **TRIAL COURT COUNTY** MERCER
CASE TITLE STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY, V. STATE OF
 NEW JERSEY; GURBIR S. GREWAL, IN HIS CAPACITY
CASE TYPE CIVIL **DISPOSITION DATE** 06/29/2020
CATEGORY LAW-CIVIL PART
TRIAL COURT JUDGE MARY C. JACOBSON, JSC

PARTY/ATTORNEY

PARTY NAME	PARTY ROLE	PARTY DESIGNATION	FIRM NAME - ATTORNEY NAME / ATTORNEY ROLE	ADDRESS
ACLU-NJ, NAACP STATE CONFERENCE AND 22 OTHER ORGANIZATIONS	OTHER	MOVANT	AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION - JEANNE M LOCICERO (ATTORNEY OF RECORD)	89 MARKET STREET, 7TH FL, PO BOX 32159 NEWARK, NJ 07102-0000 973-854-1720 JLOCICERO@ACLU-NJ.ORG,COURTFILING@ACLU-NJ.ORG
			AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION - ALEXANDER R SHALOM (CO- COUNSEL)	89 MARKET STREET, 7TH FL, PO BOX 32159 NEWARK, NJ 07102-0000 973-854-1720 ASHALOM@ACLU-NJ.ORG,COURTFILING@ACLU-NJ.ORG
			AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION - KAREN D THOMPSON (CO- COUNSEL)	89 MARKET STREET, 7TH FL, PO BOX 32159 NEWARK, NJ 07102-0000 973-854-1720 KTHOMPSON@ACLU-NJ.ORG,ASHALOM@ACLU-NJ.ORG,COURTFILING@ACLU-NJ.ORG
			AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION - MOLLY K C LINHORST (CO- COUNSEL)	89 MARKET STREET, 7TH FL, PO BOX 32159 NEWARK, NJ 07102-0000 973-854-1720 MLINHORST@ACLU-NJ.ORG
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY, NEW JERSEY STATE OFFICE OF THE PUBLIC DEFENDER	OTHER	MOVANT	GIBBONS PC - LAWRENCE S LUSTBERG (ATTORNEY OF RECORD)	ONE GATEWAY CTR NEWARK, NJ 07102-5310 973-596-4500 LLUSTBERG@GIBBONSLAW.COM,KTOLSON@GIBBONSLAW.COM,NMITCHELL@GIBBONSLAW.COM
			GIBBONS PC - MICHAEL ROSS NOVECK (CO- COUNSEL)	ONE GATEWAY CTR NEWARK, NJ 07102-5310 973-596-4500 MNOVECK@GIBBONSLAW.COM
ASSOCIATION OF FORMER NEW	OTHER	MOVANT	BRACH EICHLER LLC - ANTHONY M	101 EISENHOWER PKWY ROSELAND, NJ 07068 973-228-5700

JERSEY STATE TROOPERS, THE N.J. FORMER TROOPERS HERITAGE FOUNDATION, INC., AND FORMER TROOPER MEMBERS & FTA MEMBERS NO. 1 & 2	DEFENDANT	RESPONDENT	RAINONE (ATTORNEY OF RECORD) BRACH EICHLER LLC - CARL J SORANNO (CO-COUNSEL) BRACH EICHLER LLC - JAY I SABIN (CO-COUNSEL)	ARAINONE@BRACHEICHLER.COM,PALONSO@BRACHEICHLER.COM,CBUDRIS@BRACHEICHLER.COM 101 EISENHOWER PKWY ROSELAND, NJ 07068 973-228-5700 CSORANNO@BRACHEICHLER.COM,JPMARTIN@BRACHEICHLER.COM,DFAMULA@BRACHEICHLER.COM 101 EISENHOWER PKWY ROSELAND, NJ 07068 973-228-5700 (jsabin@bracheichler.com)
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GURBIR S GREWAL	DEFENDANT	RESPONDENT	ATTORNEY GENERAL LAW - EMILY MARIE BISNAUTH (ATTORNEY OF RECORD) ATTORNEY GENERAL LAW - CHRISTOPHER W WEBER (CO-COUNSEL) ATTORNEY GENERAL LAW - MELISSA H RAKSA (CO-COUNSEL)	25 MARKET ST, PO BOX 112 TRENTON, NJ 08625 609-984-3900 EMILY.BISNAUTH@LAW.NJOAG.GOV 25 MARKET ST, PO BOX 112 TRENTON, NJ 08625 609-984-3900 CHRISTOPHER.WEBER@LAW.NJOAG.GOV 25 MARKET ST, PO BOX 112 TRENTON, NJ 08625 609-984-3900 DOL.APPEALS@LAW.NJOAG.GOV
NATIONAL COALITION OF LATINO OFFICERS; LAW ENFORCEMENT ACTION PARTNERSHIP	OTHER	MOVANT	PASHMAN STEIN WALDER HAYDEN, PC - CJ GRIFFIN (ATTORNEY OF RECORD)	COURT PLAZA SOUTH, 21 MAIN ST STE 200 HACKENSACK, NJ 07601-7054 201-488-8200 CGRIFFIN@PASHMANSTEIN.COM,AMOVE@PASHMANSTEIN.COM,MBANTA@PASHMANSTEIN.COM
PATRICK J CALLAHAN	DEFENDANT	RESPONDENT	ATTORNEY GENERAL LAW - EMILY MARIE BISNAUTH (ATTORNEY OF RECORD) ATTORNEY GENERAL LAW - CHRISTOPHER W WEBER (CO-COUNSEL)	25 MARKET ST, PO BOX 112 TRENTON, NJ 08625 609-984-3900 EMILY.BISNAUTH@LAW.NJOAG.GOV 25 MARKET ST, PO BOX 112 TRENTON, NJ 08625 609-984-3900 CHRISTOPHER.WEBER@LAW.NJOAG.GOV
STATE OF NEW JERSEY	DEFENDANT	RESPONDENT	ATTORNEY GENERAL LAW - EMILY MARIE BISNAUTH (ATTORNEY OF RECORD) ATTORNEY GENERAL LAW - CHRISTOPHER W WEBER (CO-COUNSEL)	25 MARKET ST, PO BOX 112 TRENTON, NJ 08625 609-984-3900 EMILY.BISNAUTH@LAW.NJOAG.GOV 25 MARKET ST, PO BOX 112 TRENTON, NJ 08625 609-984-3900 CHRISTOPHER.WEBER@LAW.NJOAG.GOV
STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY	PLAINTIFF	APPELLANT	METS SCHIRO & MCGOVERN, LLP - JAMES M METS (ATTORNEY OF RECORD) MARKMAN & CANNAN, LLC - ROBERT RUDDEN CANNAN (CO-COUNSEL)	555 U.S. HIGHWAY ONE SOUTH, STE 320 ISELIN, NJ 08830 732-636-0040 JMETS@MSMLABORLAW.COM 391 FRANKLIN ST BLOOMFIELD, NJ 07003 973-748-2100 RCANNAN@MARKMANCANNANLAW.COM

DOCUMENTS

DOCUMENT / FILE NAME	FILING PARTY	FIRM NAME / ATTORNEY ATTENTION	CATEGORY / DOCUMENT TYPE	SOURCE	DATE POSTED
ORDER OF TRANSFER	STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY	METS SCHIRO & MCGOVERN, LLP - JAMES M METS	ORDER - ORDER OF TRANSFER	UPLOAD	06/29/20
CASE INFORMATION STATEMENT	STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY	METS SCHIRO & MCGOVERN, LLP - JAMES M METS	APPELLATE DOCUMENTS - CASE INFO STATEMENT	SYSTEM GENERATED	06/29/20
PROOF OF SERVICE	STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY	METS SCHIRO & MCGOVERN, LLP - JAMES M METS	APPELLATE DOCUMENTS - PROOF OF SERVICE	SYSTEM GENERATED	06/29/20
NOTICE OF DOCKETING	Court		APPELLATE DOCUMENTS - COURT INITIATED NOTICES	INTERFACE	06/29/20
EMERGENT APPLICATION DISPOSITION GRANTED	Court		APPELLATE DOCUMENTS - EMERGENT DISPOSITION FORMS	INTERFACE	07/01/20
EMG-APPLICATION FOR EMERGENT RELIEF	Court		APPELLATE DOCUMENTS - APPLICATION FOR EMERGENT RELIEF - RULE 2:9-8	INTERFACE	07/01/20
MOTION	STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY	METS SCHIRO & MCGOVERN, LLP - JAMES M METS	MOTION - MOTION for emergent relief	SYSTEM GENERATED	07/02/20
MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY	METS SCHIRO & MCGOVERN, LLP - JAMES M METS	MOTION SUPPORTING DOCUMENTS/ANSWERS/OPPOSITIONS/ATTACHMENTS - MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	UPLOAD	07/02/20
MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY	METS SCHIRO & MCGOVERN, LLP - JAMES M METS	MOTION SUPPORTING DOCUMENTS/ANSWERS/OPPOSITIONS/ATTACHMENTS - MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	UPLOAD	07/02/20
PROOF OF SERVICE	STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY	METS SCHIRO & MCGOVERN, LLP - JAMES M METS	APPELLATE DOCUMENTS - PROOF OF SERVICE	SYSTEM GENERATED	07/02/20
ORAL ARGUMENT REQUEST	STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY	METS SCHIRO & MCGOVERN, LLP - JAMES M METS	APPELLATE DOCUMENTS - ORAL ARGUMENT REQUEST	SYSTEM GENERATED	07/02/20
PROOF OF SERVICE	STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY	METS SCHIRO & MCGOVERN, LLP - JAMES M METS	APPELLATE DOCUMENTS - PROOF OF SERVICE	SYSTEM GENERATED	07/02/20
MOTION TO APPEAR AS AMICUS CURIAE	ACLU-NJ, NAACP STATE CONFERENCE AND 22 OTHER ORGANIZATIONS	AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION - JEANNE M LOCICERO	MOTION - TO APPEAR AS AMICUS CURIAE & , IF SCHEDULED, TO PARTICIPATE IN ORAL ARGUMENT.	SYSTEM GENERATED	07/07/20
MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	ACLU-NJ, NAACP STATE CONFERENCE AND 22 OTHER ORGANIZATIONS	AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION - JEANNE M LOCICERO	MOTION SUPPORTING DOCUMENTS/ANSWERS/OPPOSITIONS/ATTACHMENTS - MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	UPLOAD	07/07/20
MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	ACLU-NJ, NAACP STATE CONFERENCE AND	AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY	MOTION SUPPORTING DOCUMENTS/ANSWERS/OPPOSITIONS/ATTACHMENTS - MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	UPLOAD	07/07/20

PROOF OF SERVICE	22 OTHER ORGANIZATIONS ACLU-NJ, NAACP STATE CONFERENCE AND 22 OTHER ORGANIZATIONS	FOUNDATION - JEANNE M LOCICERO AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION - JEANNE M LOCICERO	APPELLATE DOCUMENTS - PROOF OF SERVICE	SYSTEM GENERATED	07/07/2
MOTION TO APPEAR AS AMICUS CURIAE	NATIONAL COALITION OF LATINO OFFICERS; LAW ENFORCEMENT ACTION PARTNERSHIP	PASHMAN STEIN WALDER HAYDEN, PC - CJ GRIFFIN	MOTION - TO APPEAR AS AMICUS CURIAE	SYSTEM GENERATED	07/07/2
MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	NATIONAL COALITION OF LATINO OFFICERS; LAW ENFORCEMENT ACTION PARTNERSHIP	PASHMAN STEIN WALDER HAYDEN, PC - CJ GRIFFIN	MOTION SUPPORTING DOCUMENTS/ANSWERS/OPPOSITIONS/ATTACHMENTS - MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	UPLOAD	07/07/2
MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	NATIONAL COALITION OF LATINO OFFICERS; LAW ENFORCEMENT ACTION PARTNERSHIP	PASHMAN STEIN WALDER HAYDEN, PC - CJ GRIFFIN	MOTION SUPPORTING DOCUMENTS/ANSWERS/OPPOSITIONS/ATTACHMENTS - MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	UPLOAD	07/07/2
PROOF OF SERVICE	NATIONAL COALITION OF LATINO OFFICERS; LAW ENFORCEMENT ACTION PARTNERSHIP	PASHMAN STEIN WALDER HAYDEN, PC - CJ GRIFFIN	APPELLATE DOCUMENTS - PROOF OF SERVICE	SYSTEM GENERATED	07/07/2
MOTION TO APPEAR AS AMICUS CURIAE	ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY, NEW JERSEY STATE OFFICE OF THE PUBLIC DEFENDER	GIBBONS PC - LAWRENCE S LUSTBERG	MOTION - TO APPEAR AS AMICUS CURIAE	SYSTEM GENERATED	07/07/2
MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY, NEW JERSEY STATE OFFICE OF THE PUBLIC DEFENDER	GIBBONS PC - LAWRENCE S LUSTBERG	MOTION SUPPORTING DOCUMENTS/ANSWERS/OPPOSITIONS/ATTACHMENTS - MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	UPLOAD	07/07/2
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MOTION ANSWER/OPPOSITION	GURBIR S GREWAL	ATTORNEY GENERAL LAW - EMILY MARIE BISNAUTH	MOTION SUPPORTING DOCUMENTS/ANSWERS/OPPOSITIONS/ATTACHMENTS - MOTION ANSWER	UPLOAD	07/07/2

MOTION APPENDIX (Vol. 1)	GURBIR S GREWAL	ATTORNEY GENERAL LAW - EMILY MARIE BISNAUTH	MOTION SUPPORTING DOCUMENTS/ANSWERS/OPPOSITIONS/ATTACHMENTS - MOTION APPENDIX	UPLOAD	07/07/2
MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	GURBIR S GREWAL	ATTORNEY GENERAL LAW - EMILY MARIE BISNAUTH	MOTION SUPPORTING DOCUMENTS/ANSWERS/OPPOSITIONS/ATTACHMENTS - MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	UPLOAD	07/07/2
MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	GURBIR S GREWAL	ATTORNEY GENERAL LAW - EMILY MARIE BISNAUTH	MOTION SUPPORTING DOCUMENTS/ANSWERS/OPPOSITIONS/ATTACHMENTS - MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	UPLOAD	07/07/2
MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	GURBIR S GREWAL	ATTORNEY GENERAL LAW - EMILY MARIE BISNAUTH	MOTION SUPPORTING DOCUMENTS/ANSWERS/OPPOSITIONS/ATTACHMENTS - MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	UPLOAD	07/07/2
PROOF OF SERVICE	GURBIR S GREWAL	ATTORNEY GENERAL LAW - EMILY MARIE BISNAUTH	APPELLATE DOCUMENTS - PROOF OF SERVICE	SYSTEM GENERATED	07/07/2
ORDER (GRANTED AND OTHER)	Court		APPELLATE DOCUMENTS - ORDER	INTERFACE	07/08/2
ORDER (GRANTED AND OTHER)	Court		APPELLATE DOCUMENTS - ORDER	INTERFACE	07/10/2
MOTION TO CONSOLIDATE APPEAL	STATE OF NEW JERSEY	ATTORNEY GENERAL LAW - EMILY MARIE BISNAUTH	MOTION - TO CONSOLIDATE APPEAL Motion to consolidate appeals	SYSTEM GENERATED	07/14/2
MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	STATE OF NEW JERSEY	ATTORNEY GENERAL LAW - EMILY MARIE BISNAUTH	MOTION SUPPORTING DOCUMENTS/ANSWERS/OPPOSITIONS/ATTACHMENTS - MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	UPLOAD	07/14/2
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PROOF OF SERVICE	STATE OF NEW JERSEY	ATTORNEY GENERAL LAW - EMILY MARIE BISNAUTH	APPELLATE DOCUMENTS - PROOF OF SERVICE	SYSTEM GENERATED	07/14/2
MOTION ANSWER/OPPOSITION (linked documents:1)	STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY	MARKMAN & CANNAN, LLC - ROBERT RUDDEN CANNAN	MOTION SUPPORTING DOCUMENTS/ANSWERS/OPPOSITIONS/ATTACHMENTS - MOTION ANSWER	UPLOAD	07/15/2
PROOF OF SERVICE	STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY	MARKMAN & CANNAN, LLC - ROBERT RUDDEN CANNAN	APPELLATE DOCUMENTS - PROOF OF SERVICE	SYSTEM GENERATED	07/15/2
STATEMENT OF ITEMS COMPRISING THE RECORD	GURBIR S GREWAL	ATTORNEY GENERAL LAW - CHRISTOPHER W WEBER	APPELLATE DOCUMENTS - STATEMENT OF ITEMS	UPLOAD	07/15/2
PROOF OF SERVICE	GURBIR S GREWAL	ATTORNEY GENERAL LAW - CHRISTOPHER W WEBER	APPELLATE DOCUMENTS - PROOF OF SERVICE	SYSTEM GENERATED	07/15/2
ORDER (OTHER)	Court		APPELLATE DOCUMENTS - ORDER	INTERFACE	07/21/2
ORDER (OTHER)	Court		APPELLATE DOCUMENTS - ORDER	INTERFACE	07/21/2
ORDER (GRANTED AND OTHER)	Court		APPELLATE DOCUMENTS - ORDER	INTERFACE	07/21/2
ORDER (GRANTED AND OTHER)	Court		APPELLATE DOCUMENTS - ORDER	INTERFACE	07/21/2
MOTION TO INTERVENE	ASSOCIATION OF FORMER NEW JERSEY STATE TROOPERS, THE N.J. FORMER TROOPERS HERITAGE FOUNDATION, INC., AND FORMER TROOPER MEMBERS & FTA MEMBERS NO. 1 & 2	BRACH EICHLER LLC - ANTHONY M RAINONE	MOTION - TO INTERVENE	SYSTEM GENERATED	07/27/2
MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	ASSOCIATION OF FORMER NEW JERSEY STATE TROOPERS, THE N.J.	BRACH EICHLER LLC - ANTHONY M RAINONE	MOTION SUPPORTING DOCUMENTS/ANSWERS/OPPOSITIONS/ATTACHMENTS - MOTION BRIEF/CERTIFICATION/SUPPORTING DOCUMENT	UPLOAD	07/27/2

MOTION-PROOF OF SERVICE	FORMER TROOPERS HERITAGE FOUNDATION, INC., AND FORMER TROOPER MEMBERS & FTA MEMBERS NO. 1 & 2	BRACH EICHLER LLC - ANTHONY M RAINONE	MOTION SUPPORTING DOCUMENTS/ANSWERS/OPPOSITIONS/ATTACHMENTS - MOTION PROOF OF SERVICE	UPLOAD	07/27/2
PROOF OF SERVICE	ASSOCIATION OF FORMER NEW JERSEY STATE TROOPERS, THE N.J. FORMER TROOPERS HERITAGE FOUNDATION, INC., AND FORMER TROOPER MEMBERS & FTA MEMBERS NO. 1 & 2	BRACH EICHLER LLC - ANTHONY M RAINONE	APPELLATE DOCUMENTS - PROOF OF SERVICE	SYSTEM GENERATED	07/27/2
ORDER (GRANTED)	Court		APPELLATE DOCUMENTS - ORDER	INTERFACE	07/29/2
INTERVENORS BRIEF	ASSOCIATION OF FORMER NEW JERSEY STATE TROOPERS, THE N.J. FORMER TROOPERS HERITAGE FOUNDATION, INC., AND FORMER TROOPER MEMBERS & FTA MEMBERS NO. 1 & 2	BRACH EICHLER LLC - ANTHONY M RAINONE	BRIEF AND APPENDIX - INTERVENORS BRIEF	UPLOAD	08/05/2
SUPPLEMENTAL APPENDIX (Vol. 1)	ASSOCIATION OF FORMER NEW JERSEY STATE TROOPERS, THE N.J. FORMER TROOPERS HERITAGE FOUNDATION, INC., AND FORMER TROOPER MEMBERS & FTA MEMBERS NO. 1 & 2	BRACH EICHLER LLC - ANTHONY M RAINONE	BRIEF AND APPENDIX - SUPPLEMENTAL APPENDIX	UPLOAD	08/05/2
PROOF OF SERVICE	ASSOCIATION OF FORMER NEW JERSEY STATE TROOPERS, THE N.J. FORMER TROOPERS HERITAGE FOUNDATION, INC., AND FORMER TROOPER MEMBERS & FTA	BRACH EICHLER LLC - ANTHONY M RAINONE	APPELLATE DOCUMENTS - PROOF OF SERVICE	SYSTEM GENERATED	08/05/2

MEMBERS NO. 1 &
2

FEES AND PAYMENTS

Fee Type	Fee Amount	Fee Status	Fee Paid	Payment Date	Payment Type	Amount Due
No record found.						

RELATED APPEALS

CASE TYPE	APPELLATE #	TRIAL COURT/ AGENCY DOCKET #	Case Title	Disposition Date	Status
No record found.					

STATE TROOPERS FRATERNAL
ASSOCIATION OF NEW JERSEY;

Appellants-Petitioners,

v.

STATE OF NEW JERSEY; GURBIR S.
GREWAL, in his capacity as
ATTORNEY GENERAL; COLONEL PATRICK
J. CALLAHAN, in his capacity as
SUPERINTENDENT of the DIVISION OF
STATE POLICE; and the DIVISION OF
STATE POLICE;

Defendants/Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-003950-19

Civil Action

LEAVE TO APPEAL SOUGHT FROM:
ADMINISTRATIVE ACTIONS OF THE
ATTORNEY GENERAL

*On Appeal from the June 15,
2020, and June 19, 2020 Final
Administrative Actions of the
Attorney General*

**INTERVORS' APPENDIX IN SUPPORT OF APPEAL
VOL I of I**

(Ia1 - Ia37)

BRACH EICHLER LLC

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Foundation, Inc., and Former Trooper
Members & FTA Members No. 1 & 2*

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On the Brief:

Jay Sabin, Esq. (jsabin@bracheichler.com)

TABLE OF TRANSCRIPTS OF PROCEEDINGS BEFORE THE TRIAL COURT

Not Applicable.

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<u>Item</u>	<u>VOLUME I OF I</u>
Ia1	Attorney General Law Enforcement Directive No. 2020-5, dated June 15, 2020;
Ia6	Attorney General Administrative Executive Directive No. 2020-6, June 19, 2020;
Ia9	<u>State Troopers Non-Commissioned Officers Association of New Jersey, et al. v. State of New Jersey, et al.</u> , Appellate Docket A-003975-19T4, Motion Docket M-007633-19 Order entered granting Proposed Intervenor's Motion to Intervene entered by Allison E. Accurso, J.A.D., dated July 21, 2020;
Ia11	<u>State Troopers Non-Commissioned Officers Association of New Jersey, et al. v. State of New Jersey, et al.</u> , Appellate Docket A-003975-19T4, Motion Docket M-007738-19 Order entered granting Respondent's Motion to Consolidate Appeals entered by Allison E. Accurso, J.A.D., dated July 21, 2020;
Ia14	Certification of Former Trooper & FTA Member No. 1, in support of Intervenor's Motion, dated July 6, 2020;
Ia17	Certification of Former Trooper & FTA Member No. 2, in support of Intervenor's Motion, dated July 5, 2020;
Ia20	<u>New York Public Radio v. Office of the Governor</u> , 2016 WL3693949 (App. Div. July 13, 2016)(unpublished);
Ia26	<u>Ruff v. Rutgers, the State Univ. of New Jersey</u> , 2018 WL6518105 (App. Div. June 20, 2019)(unpublished);
Ia28	<u>New York Public Radio v. Office of the Governor</u> , 2016 WL3693949 (App. Div. July 13, 2016)(unpublished);



PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
PO Box 080
TRENTON, NJ 08625-0080

GURBIR S. GREWAL
Attorney General

ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2020-5

TO: All Law Enforcement Chief Executives

FROM: Gurbir S. Grewal, Attorney General

DATE: June 15, 2020

SUBJECT: Directive Requiring Public Disclosure of the Identities of Officers Who Commit Serious Disciplinary Violations

For decades, New Jersey has treated a police department's internal disciplinary files—generally known as “internal affairs” records—as highly confidential, in line with the way that personnel records for all public employees are usually treated. This Directive establishes an important and necessary exception to that practice for serious cases of law enforcement officer discipline.

There are good reasons why internal affairs records are not generally disclosed to the public, including the need to protect those who report and witness police misconduct. Complainants might be unwilling to report misconduct if they knew that their names would ultimately be disclosed publicly. Similarly, witnesses—including officers asked to testify against a colleague—might be unwilling to cooperate in an inquiry if they knew that their statements would be available for public inspection. These are among the reasons why, even within police departments, internal affairs records are closely guarded and generally not shared outside the agency's internal affairs unit.

Moreover, a number of misconduct complaints against law enforcement officers are ultimately determined to be unsubstantiated or unfounded. In cases where these complaints were thoroughly and objectively investigated by the appropriate authorities, it would be unfair to publicly disclose unproven allegations against officers—particularly given that such complaints against other public employees are not typically disclosed absent extenuating circumstances.

At the same time, however, law enforcement officers are entrusted with extraordinary responsibility and it is imperative that all officers maintain the highest standards of good



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discipline and conduct. Therefore, when a law enforcement agency concludes that one of its members has violated agency rules in a way that warrants professional sanction, there is a stronger rationale for public disclosure. And the more significant the violation, the more important it is that the public knows about the misconduct.

In New Jersey, the internal disciplinary process for law enforcement agencies is governed by *Internal Affairs Policy & Procedures (IAPP)*, a binding policy first issued by the Attorney General in August 1991 and updated multiple times. By law, every law enforcement agency in the state is required to adopt policies consistent with *IAPP*. N.J.S.A. 40A:14-181.

In December 2019, I issued Attorney General Law Enforcement Directive No. 2019-5, known as the "Internal Affairs Directive." The Directive marked one of the most substantial revisions to *IAPP* since its initial publication, and represented a significant step forward in promoting accountability and strengthening public confidence in law enforcement. Among many other changes, the Internal Affairs Directive strengthened oversight of internal affairs, and allowed for internal affairs files to be shared with civilian review boards that establish certain procedural safeguards. Importantly, the Directive also clarified *IAPP* to require that each law enforcement agency publish on its website an annual "synopsis" summarizing all disciplinary complaints against the agency's officers resulting in a fine or suspension of ten days or more, but did not require the disclosure of the identity of those officers. *IAPP* § 9.11.2.

After further review, I believe that even this significant set of changes does not go far enough. More is required to promote trust, transparency and accountability, and I have concluded that it is in the public's interest to reveal the identities of New Jersey law enforcement officers sanctioned for serious disciplinary violations. Our state's law enforcement agencies cannot carry out their important public safety responsibilities without the confidence of the people they serve. The public's trust depends on maintaining confidence that police officers serve their communities with dignity and respect. In the uncommon instance when officers fall well short of those expectations, the public has a right to know that an infraction occurred, and that the underlying issue was corrected before that officer potentially returned to duty.

It is time to end the practice of protecting the few to the detriment of the many. The vast majority of law enforcement officers in New Jersey serve with honor and astonishing courage under extremely difficult circumstances. Most go through their entire careers without engaging in conduct that warrants a major disciplinary action against them. But their good work is easily undermined—and quickly forgotten—whenever an officer breaches the public's trust and dishonors the entire profession. The likelihood of such misbehavior increases when officers believe they can act with impunity; it decreases when officers know that their misconduct will be subject to public scrutiny and not protected. The deterrent effect of this scrutiny will, in the end, improve the culture of accountability among New Jersey law enforcement.

For the purposes this Directive, I am treating disciplinary violations as sufficiently serious to warrant public disclosure of an officer's identity when the sanction involves

termination of employment, reduction in rank or grade, and/or a suspension greater than five days. Correspondingly, I am revising *IAPP* to indicate that every law enforcement agency's annual synopsis report must include all final disciplinary actions that meet this threshold.

This classification mirrors the distinction that the New Jersey State Police draws between "minor discipline," which may result in a written reprimand or a suspension of up to five days, and "major discipline," which may result in termination, reduction in rank, or lengthier suspensions. Major disciplinary violations can include conduct involving, among other things, excessive force against civilians, racially derogatory comments, driving while intoxicated, domestic violence, theft, the filing of false reports, and/or conduct that results in criminal charges against the officer.

To be clear, today's Directive applies prospectively. Law enforcement agencies subject to its requirements must publish their first report disclosing names of officers recently suspended for serious misconduct no later than December 31, 2020. At the same time, nothing in this Directive prevents agencies from releasing similar information regarding historical incidents of officer misconduct. For example, the law enforcement agencies housed with the Department of Law & Public Safety—the New Jersey State Police, the Division of Criminal Justice, and the Juvenile Justice Commission—will publish the names of any officers who have been subject to serious discipline by July 15, 2020. The New Jersey State Police, which since 2000 has published an annual report summarizing incidents of major discipline that does not disclose the identities of the State Troopers, intends to update these annual reports with the Troopers' names no later than July 15, 2020.

Pursuant to the authority granted to me under the New Jersey Constitution and the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 to -117, which provides for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the state in order to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the state, I hereby direct all law enforcement and prosecuting agencies operating under the authority of the laws of the state of New Jersey to implement and comply with *IAPP* as revised by this Directive, and to take any additional measures necessary to update their guidelines consistent with *IAPP*, as required by N.J.S.A 40A:14-181.

I. **Revision to *Internal Affairs Policy & Procedures***

A. ***Publication of public reports.*** *IAPP* Section 9.11 (Public Reports) is amended in part to read:

9.11.1 On an annual basis, every law enforcement agency shall publish on its public website a report summarizing the types of complaints received and the dispositions of those complaints. This report ~~can~~ should be statistical in nature.

~~and the names of complainants and subject officers shall not be published.~~

9.11.2 On a periodic basis, and at least once a year, every agency shall submit to the County Prosecutor and publish on the agency's public website a brief synopsis of all complaints where a ~~fine or~~ termination, reduction in rank or grade, and/or suspension of ten days or 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 ~~officers or complainants, but should briefly outline the nature of the transgression and the fine or suspension imposed.~~ An example of a synopsis is found in Appendix U.

- B. *Initial report.* Each law enforcement agency shall publish its first report in compliance with the revised Section 9.11.2 no later than December 31, 2020. The first report shall cover disciplinary actions finalized during, at a minimum, the preceding twelve months.

II. Other Provisions

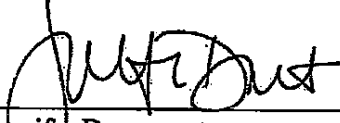
- A. *Non-enforceability by third parties.* This Directive is issued pursuant to the Attorney General's authority to ensure the uniform and efficient enforcement of the laws and administration of criminal justice throughout the State. This Directive imposes limitations on law enforcement agencies and officials that may be more restrictive than the limitations imposed under the United States and New Jersey Constitutions, and federal and state statutes and regulations. Nothing in this Directive shall be construed in any way to create any substantive right that may be enforced by any third party.
- B. *Severability.* The provisions of both this Directive and *LAPP* shall be severable. If any phrase, clause, sentence or provision of either this Directive or *LAPP* is declared by a court of competent jurisdiction to be invalid, the validity of the remainder either document shall not be affected.
- C. *Questions.* Any questions concerning the interpretation or implementation of this Directive or *LAPP* shall be addressed to the Executive Director of Office of Public Integrity & Accountability (OPIA), or their designee.
- D. *Effective date.* This Directive shall take effect on August 31, 2020. Prior to the effective date, OPIA shall publish an updated *LAPP* that incorporates the revisions mandated by both this Directive and the Internal Affairs Directive issued on December 4, 2019. The

provisions of this Directive shall remain in force and effect unless and until it is repealed, amended, or superseded by Order of the Attorney General.



Gurbir S. Grewal
Attorney General

ATTEST:



Jennifer Davenport
First Assistant Attorney General
Dated: June 15, 2020



State of New Jersey

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
PO BOX 080
TRENTON, NJ 08625-0080

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

GURBIR S. GREWAL
Attorney General

ATTORNEY GENERAL ADMINISTRATIVE EXECUTIVE DIRECTIVE NO. 2020-6

TO: Superintendent, New Jersey State Police
Director, Division of Criminal Justice
Executive Director, Juvenile Justice Commission

FROM: Gurbir S. Grewal, Attorney General

DATE: June 19, 2020

SUBJECT: Directive Requiring Public Disclosure of the Identities of Department's
Officers Who Committed Serious Disciplinary Violations Since 2000

On June 15, 2020, I issued Law Enforcement Directive No. 2020-5, known as the "Major Discipline Directive," to promote a culture of transparency and accountability in policing. Today's Administrative Executive Directive complements that action by ordering additional transparency measures for the agencies that employ law enforcement officers within the Department of Law & Public Safety (the Department).

The Major Discipline Directive amended the statewide rules for internal affairs investigations, known as Internal Affairs Policy & Procedures (IAPP), to require that all law enforcement agencies annually publish the names of officers who have been terminated, demoted, or suspended for more than five days due to a disciplinary violation. Although the IAPP amendments apply prospectively—with the first annual lists due no later than December 31, 2020—the Directive also made clear that law enforcement agencies may elect to publish historical lists of disciplined officers.

The Major Discipline Directive also noted that, by July 15, 2020, the New Jersey State Police, the Division of Criminal Justice, and the Juvenile Justice Commission will publish the names of any officers who have been subject to serious discipline in the past twenty years. There are compelling reasons for that requirement, many of which are laid out in the Major Discipline Directive, which is incorporated by reference herein. Sharing the identities of individuals who received major discipline will allow for public scrutiny and improve the culture of accountability among the Department's law enforcement agencies. That is true even where an individual no



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longer works for the relevant agency, as many of our officers go on to serve with other law enforcement agencies, and the State at present lacks a licensing system to track such repeat disciplinary sanctions across agencies. Moreover, the sharing of identities will enable the public and policymakers to identify repeat offenders, and to hold the Department's law enforcement agencies accountable for their response to patterns of discipline. And, most importantly, the sharing of identities will help to build public confidence in the vast majority of officers in the New Jersey State Police, the Division of Criminal Justice, and the Juvenile Justice Commission, who—like the officers of other law enforcement agencies—serve with honor and astonishing courage under extremely difficult circumstances. Releasing the identities of those who committed major disciplinary infractions will show that all the remaining officers did not commit such an infraction—which will help to build significant trust between these law enforcement officers and the communities they serve.

Pursuant to the authority granted to me under the New Jersey Constitution; the Law and Public Safety Act of 1948, N.J.S.A. 52:17B-1, *et seq.*, which provides for general responsibility of the Department's operations and the supervision of the organization of the Department; and the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97, *et seq.*, which provides for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State in order to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State, I hereby direct all Department personnel operating under the authorities of the laws of the State of New Jersey to implement and comply with the following directives.

- I. **Disclosure requirement for divisions employing law enforcement officers**
 - A. **Disclosure of officers' identities.** No later than July 15, 2020, the Division of State Police, the Division of Criminal Justice, and the Juvenile Justice Commission shall each publish on its 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 a law enforcement officer since January 1, 2000. These synopses shall include the identity of each officer subject to a final disciplinary action, a summary of their transgressions, and a statement of the sanction imposed.
 - B. **Notice to officers.** At least seven days prior to the publication of the synopses described in Paragraph I.A, the relevant division shall provide notice to each officer it intends to identify, whenever possible. In cases where the officer is no longer employed by the division, the division shall make reasonable efforts to contact the officer at their last known residential address, email address, or phone number.
- II. **Other Provisions**
 - A. **Non-enforceability by third parties.** This Directive is issued pursuant to the Attorney General's authority to supervise the operations of the Department and ensure the uniform

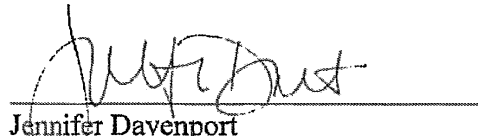
and efficient enforcement of the laws and administration of criminal justice throughout the State. This Directive imposes limitations on law enforcement agencies and officials that may be more restrictive than the limitations imposed under the United States and New Jersey Constitutions, and federal and state statutes and regulations. Nothing in this Directive shall be construed in any way to create any substantive right that may be enforced by any third party.

- B. **Severability.** The provisions of this Directive shall be severable. If any phrase, clause, sentence, or provision of this Directive is declared by a court of competent jurisdiction to be invalid, the validity of the remainder of the document shall not be affected.
- C. **Questions.** Any questions concerning the interpretation or implementation of this Directive or the Major Discipline Directive shall be addressed to the Executive Director of the Office of Public Integrity & Accountability (OPIA), or their designee.
- D. **Effective date.** This Directive shall take effect immediately and remain in force and effect unless and until it is repealed, amended, or superseded by Order of the Attorney General.
- E. **Appeal.** This Directive is a final agency action under Rule 2:2-3(a)(2) of the New Jersey Rules of Court.



Gurbir S. Grewal
Attorney General

ATTEST:



Jennifer Davenport
First Assistant Attorney General

Dated: June 19, 2020

- CC: Executive Director, Office of Public Integrity & Accountability
Insurance Fraud Prosecutor
Director, Division of Alcoholic Beverage Control
Director, Division of Gaming Enforcement

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003975-19T4
MOTION NO. M-007633-19
BEFORE PART K
JUDGE(S): ALLISON E. ACCURSO

STATE TROOPERS NON-COMMISSIONED OFFICERS ASSOCIATION OF NEW JERSEY, ON BEHALF OF ITS MEMBERS, AND ALL OTHER PERSONS SIMILARLY SITUATED BUT UN-NAMED, AND PETE J.

STILIANESSIS, PRESIDENT OF THE STATE TROOPERS NON-COMMISSIONED OFFICERS ASSOCIATION, AND STATE TROOPERS SUPERIOR OFFICERS ASSOCIATION OF NEW JERSEY, ON BEHALF OF ITS INDIVIDUAL MEMBERS, AND ALL OTHER PERSONS SIMILARLY

SITUATED, AND RICHARD ROBERTS, PRESIDENT OF THE SUPERIOR OFFICERS ASSOCIATION, AND JOHN DOES 1 THROUGH 10, WHO ARE STATE TROOPERS WHO, FOR PURPOSES OF PRIVACY, ARE UNNAMED,

APPELLANTS-PETITIONERS,
V.

STATE OF NEW JERSEY, OFFICE OF THE ATTORNEY GENERAL, GURBIR S. GREWAL, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY DIVISION OF LAW AND PUBLIC SAFETY DIVISION OF STATE POLICE; ACTING SUPERINTENDENT OF STATE POLICE, PATRICK CALLAHAN, DIVISION OF STATE POLICE THE DEPARTMENT OF LAW AND PUBLIC SAFETY, AND THE OFFICE OF LAW ENFORCEMENT PROFESSIONAL STANDARDS, RESPONDENTS.

MOTION FILED: 07/08/2020

BY: THE ASSOCIATION OF FORMER NEW JERSEY STATE TROOPERS, THE N.J. FORMER TROOPERS HERITAGE FOUNDATION, INC., FORMER TROOPER

ANSWER(S) 07/13/2020
FILED:

BY: STATE OF NJ OFFICE OF ATTORNEY
GENERAL; GURBIR S. GREWAL,
ATTORNEY GENERAL; SUPERINTENDENT
STATE POLICE LT COL PATRICK
CALLANHAN; OFFICE OF PROFESSIONAL
STANDARDS

SUBMITTED TO COURT: July 16, 2020

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS
21st day of July, 2020, HEREBY ORDERED AS FOLLOWS:

MOTION BY MOVANT

MOTION TO INTERVENE

GRANTED and OTHER

SUPPLEMENTAL:

The motion to intervene in these consolidated appeals is granted.
Movant may file a brief on the existing schedule and participate as
plaintiffs in accordance with the order consolidating these appeals. Any
future filings shall be under A-003950-19, the lead case.

FOR THE COURT:

Allison E. Accurso

ALLISON E. ACCURSO, J.A.D.

N/A
ORDER - REGULAR MOTION
CLD

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003975-19T4
MOTION NO. M-007738-19
BEFORE PART K
JUDGE(S): ALLISON E. ACCURSO

STATE TROOPERS NON-COMMISSIONED OFFICERS ASSOCIATION OF NEW JERSEY, ON BEHALF OF ITS MEMBERS, AND ALL OTHER PERSONS SIMILARLY SITUATED BUT UN-NAMED, AND PETE J.

STILIANESSIS, PRESIDENT OF THE STATE TROOPERS NON-COMMISSIONED OFFICERS ASSOCIATION, AND STATE TROOPERS SUPERIOR OFFICERS ASSOCIATION OF NEW JERSEY, ON BEHALF OF ITS INDIVIDUAL MEMBERS, AND ALL OTHER PERSONS SIMILARLY

SITUATED, AND RICHARD ROBERTS, PRESIDENT OF THE SUPERIOR OFFICERS ASSOCIATION, AND JOHN DOES 1 THROUGH 10, WHO ARE STATE TROOPERS WHO, FOR PURPOSES OF PRIVACY, ARE UNNAMED,

APPELLANTS-PETITIONERS,

V.

STATE OF NEW JERSEY, OFFICE OF THE ATTORNEY GENERAL, GURBIR S. GREWAL, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY DIVISION OF LAW AND PUBLIC SAFETY DIVISION OF STATE POLICE; ACTING SUPERINTENDENT OF STATE POLICE, PATRICK CALLAHAN, DIVISION OF STATE POLICE THE DEPARTMENT OF LAW AND PUBLIC SAFETY, AND THE OFFICE OF LAW ENFORCEMENT PROFESSIONAL STANDARDS, RESPONDENTS.

MOTION FILED: 07/14/2020

BY: STATE OF NJ OFFICE OF ATTORNEY GENERAL; GURBIR S. GREWAL, ATTORNEY GENERAL; SUPERINTENDENT

STATE POLICE LT COL PATRICK
CALLANHAN; OFFICE OF PROFESSIONAL
STANDARDS

ANSWER FILED: 07/15/2020

BY: NJ STATE TROOPERS NON-
COMMISSIONED OFFICERS
ASSOCIATION; PETE J.
STILIANESSIS, PRESIDENT; NJ STATE
TROOPERS SUPERIOR OFFICERS
ASSOCIATION; RICHARD ROBERTS,
PRESIDENT; AND JOHN DOES 1
THROUGH 10

SUBMITTED TO COURT: July 16, 2020

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS
21st day of July, 2020, HEREBY ORDERED AS FOLLOWS:

MOTION BY RESPONDENT

MOTION TO CONSOLIDATE APPEALS

GRANTED AND OTHER

SUPPLEMENTAL:

The Attorney General's motion for consolidation is granted. For administrative purposes, the cases are to be listed on any caption sequentially by docket number beginning with A-003950-19, which is now considered the lead case having the lowest docket number. Plaintiffs are permitted to file separate briefs, as are intervening parties, on the existing schedule. The court kindly asks, however, that plaintiffs collaborate to the extent possible to reduce redundant arguments. The Attorney General is permitted to respond to the arguments of all plaintiffs in one brief.

The parties are invited to address the effect, if any, of the following Executive Orders on the Attorney General Directives at issue in this appeal: Hughes EO 9; Byrne EO 11; McGreevey EO 21. The parties are likewise invited to address the effect of any other Executive Order, statute or regulation addressing the maintenance and release of personnel records of State, county or municipal employees. The court also invites the Attorney General to provide the court and counsel with all earlier iterations of the Internal Affairs Policy and Procedures.

Each party will be permitted oral argument before the court. The court would appreciate plaintiffs conferring and advising the panel ten days before argument of the order in which counsel will present argument and the time requested for each party. The court does not anticipate it will be necessary to permit each lawyer fifteen minutes, so please be guided accordingly. If plaintiffs agree that certain parties will be addressing arguments common to all plaintiffs, kindly advise the court of that as well. The court anticipates issuing an order after briefing is complete, and plaintiffs have submitted the letter requested, addressing the order of argument. As the case will be argued telephonically, addressing these logistical issues in advance should allow the parties to more effectively present their arguments to the court.

FOR THE COURT:

Allison E. Accurso

ALLISON E. ACCURSO, J.A.D.

N/A
ORDER - REGULAR MOTION
CLD

CERTIFICATION OF FORMER TROOPER & FTA MEMBER NO. 1

1. I am a former New Jersey State Trooper ("Trooper"). I served as a Trooper employed by the New Jersey Division of State Police ("NJDSP") for over 25 years and was honorably discharged by the NJDSP within the past 15 years.
2. I am a member in good standing of the Association of Former New Jersey State Troopers ("FTA").
3. I submit this certification in my capacity as a former Trooper and as a member of the FTA in support of the motion to intervene by myself and by the FTA in the Appeal denominated State Troopers Non-Commissioned Officers Association of New Jersey v. State of New Jersey, Docket No. A-003975-19 T4 (the "Appeal").
4. I am familiar with facts and circumstances giving rise to the Appeal and have personally reviewed Attorney General Law Enforcement Directive 2020-5 ("Directive 2020-5") and Attorney General Law Enforcement Directive 2020-6 ("Directive 2020-6") (together the "Directives").
5. I am also a small business owner who, after his honorable discharge as a Trooper, started his own business and grew that business based in large measure on my service as a Trooper and my honorable discharge by the NJDSP.
6. I submit this certification anonymously because of the irreparable damage I, my family and my business will suffer if the statements which follow become publicly associated with my identity or the identity of my business.

Discipline Imposed By The NJDSP

7. Approximately fifteen (15) years ago while on duty I was directed to evaluate a motorist suspected of being drug impaired. I interviewed the motorist, who was Caucasian, and requested that the person submit a urine sample in accordance with standard protocol.
8. The motorist agreed to submit the urine sample, and returned soon thereafter with a sample.
9. I examined the sample and quickly concluded that the liquid in the container was not urine based upon my visual observation of the liquid and the temperature of the container.
10. Based upon my assessment of the motorist's demeanor and the subterfuge over providing a urine sample, I concluded that the motorist was not drug impaired and instead probably had a medical/mental health issue. In connection with finalizing the assignment, I destroyed the contents of the specimen container.
11. It is my understanding that NJDSP subsequently received an anonymous letter of complaint about how I handled this matter. After conducting an investigation, NJDSP notified me that it intended to issue me a Summary Discipline for Culpable Inefficiency for Failing to Adhere to Evidence Submission Procedures because, according to the

NJDSP, I should have had a regional laboratory destroy the motorist's urine sample rather than destroying it at station level.

12. I retained legal counsel who was able to negotiate a settlement with the *State of New Jersey Attorney General's Office*. The settlement agreement provided for, among other things, that I would serve an unpaid administrative suspension of over a week and that the terms of the settlement and all information about the alleged infraction and the NJDSP's investigation of it would remain confidential. I would not have entered into the settlement agreement but for the promise of confidentiality. I signed the confidential agreement and it was signed by the Deputy Attorney General on behalf of the State.
13. If a mutually satisfactory settlement agreement had not been negotiated, I would have directed my attorney to contest the charges in an effort to avoid any discipline and clear my good name.
14. A few years after entering into the settlement agreement I retired from the NJDSP.

My Own Business

15. After retiring I began my own business utilizing the skills I had developed as a Trooper and leveraging my many years of service as a Trooper and my honorable discharge by the NJDSP to promote and market the business. The business is a service business and the services are performed almost exclusively by me.
16. The business is in a competitive industry, and customers and potential customers have multiple service providers from which to choose. I have convinced third parties to choose me by relying upon my good reputation as a former Trooper honorably discharged from service. If that good reputation is impaired, I will not be able to garner as many new and repeat customers.

The Directives Will Cause Irreparable Harm

17. It is my understanding that the Directives are scheduled to go into effect on July 15, and that if they go into effect it is likely that my name will be published along with a synopsis of the reason for my suspension. It is also my understanding that the Directives will not provide me with an opportunity or avenue to contest the disclosure or the wording of the synopsis.
18. My last name is rather unique and I believe a person using reasonable diligence would be able to locate my home address and information about my business using the information disclosed by the Directives.
19. When disclosed and connected to me, the information will irreparably harm my reputation and that of my business. I expect that the public will associate my name with police misconduct in general and with police misconduct related to racial bias, and I will not have a reasonably effective means to counteract such perceptions.

20. To seek relief for breach of the settlement agreement, I will have to retain my own attorney at my own expense. It is my understanding that I may not have a legal basis to seek such relief and that I may not be able to recoup my attorney's fees even if I am successful in the litigation. Certainly I know that monetary damages will not make me or my business whole for the harm to my reputation.
21. In addition, given the current climate placing law enforcement officers in danger I am clearly concerned that my family and I may not be safe if my name is published pursuant to the Directives.

Miscellaneous

22. I am signing this document as "Former Trooper & FTA Member No. 1."
23. I certify that I have signed this document and have sent it by Portable Document Format (PDF). If requested by the court or a party to the Appeal, I shall ensure that the attorney filing the document can provide the original document.
24. I further certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: July 6, 2020

Former Trooper and FTA Member No. 1
Former Trooper & FTA Member No. 1

CERTIFICATION OF FORMER TROOPER & FTA MEMBER NO. 2

1. I am a former New Jersey State Trooper ("Trooper"). I served as a Trooper employed by the New Jersey Division of State Police ("NJDSP") for over 25 years and was honorably discharged by the NJDSP within the past 15 years.
2. I am a member in good standing of the Association of Former New Jersey State Troopers ("FTA").
3. I submit this certification in my capacity as a former Trooper and as a member of the FTA in support of the motion to intervene by myself and by the FTA in the Appeal denominated State Troopers Non-Commissioned Officers Association of New Jersey v. State of New Jersey, Docket No. A-003975-19 T4 (the "Appeal").
4. I am familiar with facts and circumstances giving rise to the Appeal and have personally reviewed Attorney General Law Enforcement Directive 2020-5 ("Directive 2020-5") and Attorney General Law Enforcement Directive 2020-6 ("Directive 2020-6") (together the "Directives").
5. I am currently employed in a position that I obtained based in large measure on my service as a Trooper and my honorable discharge by the NJDSP.
6. I submit this certification anonymously because of the irreparable damage I, my family and my employment will suffer if the statements which follow become publicly associated with my identity or the identity of my employment.

Discipline Imposed By The NJDSP

7. Approximately sixteen (16) years ago while on duty, I became aware that my relative, who is Caucasian, had been arrested by a Trooper in connection with a motor vehicle stop.
8. I proceeded to the station where my relative was detained and offered to provide assistance to resolve the matter.
9. After my departure, it is my understanding that the Station Commander filed a complaint against me for attempting to interfere in the investigation. After conducting a lengthy investigation, NJDSP notified me that the stated charges lodged against me by the Duty Sergeant could not be substantiated and that it intended to issue me a Summary Discipline for Conduct Unbecoming, an all-encompassing charge that is commonly used when specific charges cannot be substantiated.
10. Throughout the entire Internal Investigation process, I was reassured by members of the Internal Affairs Unit that the entire process would remain confidential.
11. My union negotiated a plea deal to resolve the complaint and recommended that I accept the deal especially since information about the investigation, the discipline imposed, and the plea would remain confidential.

12. I agreed to an unpaid administrative suspension of over a week. The agreement provided that the terms of the settlement and all information about the alleged infraction and the NJDSP's investigation of it would remain confidential. I would not have entered into the settlement agreement but for the promise of confidentiality. I signed the confidentiality agreement and it was signed by the Deputy Attorney General on behalf of the State.
13. If a mutually satisfactory settlement agreement had not been negotiated, I would not have agreed to the negotiated deal made by the union on my behalf. This was a family matter, and at the time I was only interested in putting it behind me and maintaining the confidentiality of the agreement.
14. A few years after entering into the settlement agreement I retired from the NJDSP.

My Employment

15. After retiring I was offered a position utilizing the skills I had developed as a Trooper and leveraging my many years of service as a Trooper and my honorable discharge by the NJDSP. My employment is in the security field and the services performed are almost exclusive to those possessing the background, experience, and type of security clearance that I possess.
16. The position I hold relies upon my good reputation as a former Trooper honorably discharged from service. If that good reputation is impaired, it is reasonably likely that I will not be able to maintain that position.

The Directives Will Cause Irreparable Harm

17. It is my understanding that the Directives are scheduled to go into effect on July 15, and that if they go into effect it is likely that my name will be published along with a synopsis of the reason for my suspension. It is also my understanding that the Directives will not provide me with an opportunity or avenue to contest the disclosure or the wording of the synopsis.
18. My last name is not that unusual, and I believe a person using reasonable diligence would be able to locate my home address and information about my employment using the information disclosed by the Directives.
19. When disclosed and connected to me, the information will irreparably harm my reputation and likely endanger my current employment and future employment prospects. I expect that the public will associate my name with police misconduct in general and with police misconduct related to racial bias, and I will not have a reasonably effective means to counteract such perceptions.
20. To seek relief for breach of the plea deal, I will have to retain my own attorney at my own expense. It is my understanding that I may not have a legal basis to seek such relief and that I may not be able to recoup my attorney's fees even if I am successful in the litigation. Certainly, I know that monetary damages will not make me whole for the harm to my reputation and the good will associated with my name.

21. In addition, given the current climate placing law enforcement officers in danger, I am clearly concerned that my family and I may not be safe if my name is published pursuant to the Directives.
22. My matter has no direct association or implications with what is transpiring today alleging ongoing police brutality and racism. Divulging my identity and the identity of others who have received similar administrative suspensions, dating back some twenty-years, is not a rational response to the concerns raised today about policing, won't provide transparency and/or any sense of clarity, but will only establish a sense of confusion and distrust.
23. I am aware of a number of other former Troopers who during their NJDSP employment received disciplinary action that will seem excessive for the reported violations committed. I believe this will foster a level of distrust where the public will claim a "cover up," implying the State Police and/or the Attorney General are hiding the real "truth."

Miscellaneous

24. I am signing this document as "Former Trooper & FTA Member No. 2."
25. I certify that I have signed this document and have sent it by Portable Document Format (PDF). If requested by the court or a party to the Appeal, I shall ensure that the attorney filing the document can provide the original document.
26. I further certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: July 5, 2020

Former Trooper & FTA Member 2
Former Trooper & FTA Member No. 2

2016 WL 3693949

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

NEW YORK PUBLIC RADIO d/b/a New Jersey
Public Radio, Plaintiff–Respondent,

v.

OFFICE OF THE GOVERNOR,
Defendant–Appellant,

and

Andrew J. McNally, custodian; N.J. Department of
Community Affairs; Custodian of Records for the
N.J. Department of Community Affairs; N.J.
Department of Law and Public Safety, Division of
State Police; Custodian of Records for the N.J.
Department of Law and Public Safety, Division of
State Police; N.J. Transit; Custodian of Records
for N.J. Transit, Defendants.

A

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Argued May 24, 2016.

Decided July 13, 2016.

Synopsis

Background: Public radio station initiated action seeking order compelling Office of the Governor to produce its town priority list and outside activity questionnaires completed by Office of the Governor employees. The Superior Court Jersey, Law Division, Mercer County, entered order compelling production of town priority list under Open Public Records Act (OPRA) and subsequently entered second order compelling production of questionnaires under common law right of access. Office of the Governor appealed.

Holdings: The Superior Court, Appellate Division, held that:

[1] radio station’s interest in receiving questionnaires did

not outweigh Office of the Governor’s interest in preventing disclosure, and

[2] town priority list was exempt from production under OPRA as deliberative material.

Reversed in part, vacated in part, and remanded with directions.

Procedural Posture(s): On Appeal.

West Headnotes (2)

[1] **Records** Access to records or files in general

Public radio station’s interest in receiving outside activity questionnaires completed by Office of the Governor employees did not outweigh Office of the Governor’s interest in preventing disclosure, and thus disclosure of questionnaires to radio station was not required under common law right of access; significant privacy interests were implicated by disclosure of questionnaires, which were personnel forms, radio station’s interest in viewing such forms for tangential possibility of finding traces of wrongdoing was comparatively limited, and permitting public dissemination of questionnaires would chill process of encouraging state employees to make ethics inquiries before participating in outside activities.

[2] **Records** Internal memoranda or letters; executive privilege

Office of the Governor’s town priority list was exempt from production under Open Public Records Act (OPRA) as deliberative material; town priority list itself represented key component of Office of the Governor’s deliberative process when making policy decisions, town priority list was used on daily basis to determine where and how to allocate agency resources, and town priority list directly

related to manner in which Office of the Governor conducted its community outreach.

 [N.J.S.A. 47:1A-1.](#)

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1345-14.

Attorneys and Law Firms


[Raymond R. Chance, III](#), Assistant Attorney General, argued the cause for appellant ([Robert Lougy](#), Acting Attorney General, attorney; Mr. Chance and [Matthew T. Kelly](#), Deputy Attorney General, on the briefs).

[James Rosenfeld](#) (Davis Wright Tremaine LLP) of the New York bar, admitted pro hac vice, argued the cause for respondent (McCusker, Anselmi, Rosen & Carvelli, attorneys; [Bruce S. Rosen](#), Mr. Rosenfeld and Yonatan Berkovits (Davis Wright Tremaine LLP) of the New York bar, admitted pro hac vice, on the brief).

Before Judges [REISNER](#), [HOFFMAN](#) and [LEONE](#).


Opinion

PER CURIAM.

*1 Defendant Office of the Governor appeals from two Law Division orders granting requests for public records submitted by plaintiff New York Public Radio doing business as New Jersey Public Radio. The first order, entered on December 9, 2014, compelled production of defendant's Town Priority List (TPL), pursuant to the Open Public Records Act (OPRA),  [N.J.S.A. 47:1A-1](#) to—13. The second order, entered on January 5, 2015, compelled production of Outside Activity Questionnaires (OAQs) completed by defendant's employees, pursuant to the common law right of access. For the reasons that follow, we reverse the January 5, 2015 order compelling production of the OAQs; we also vacate the December 9, 2014 order compelling production of the TPL, and remand for the Law Division to consider whether disclosure of the TPL is warranted under the common law right of access.

I.

We briefly summarize the salient facts. As part of its ordinary investigatory process, plaintiff frequently files requests for public records with various state and local agencies. This case concerns two particular OPRA requests submitted by plaintiff to defendant in April 2014.

The first request sought what is known as the "T-100" list, or TPL, which itemizes "key towns whose support for the Governor could grow." The TPL was used by the Office of Inter-Governmental Affairs (IGA) on a daily basis, and directed the IGA's "efforts to have the Governor visit a school or organize a town hall in certain towns in order to strengthen the Administration's relationship with those towns." On April 25, 2014, defendant issued a letter to plaintiff denying its OPRA request on the basis that the TPL was protected by the "advisory, consultative, and deliberative privilege." Additionally, defendant claimed the list was exempt from the definition of "government record" because it was "inter-agency or intra-agency advisory, consultative, or deliberative material" pursuant to  [N.J.S.A. 47:1A-1.1.](#)

The second request sought certain OAQs, which were defined in plaintiff's OPRA request as:

All notifications to Ethics Liaison Officer [(ELO)] Hillary Hewit from executive branch employees about participation in partisan political activities during the 2013 election cycle. As per the executive branch's guide to ethics standards: "You should notify your ELO prior to engaging in partisan political activities so that your situation can be reviewed to determine what, if any, restrictions apply."

Defendant denied the request for the OAQs on April 30, 2014. In addition to citing the same privilege and statutory exemption for advisory, consultative, and deliberative material, defendant further claimed the requested records were "confidential ethics communications."

On June 16, 2014, plaintiff initiated this action in the Law Division, seeking an order compelling production of the TPL and OAQs.¹ On December 9, 2014, the trial court ordered production of the TPL under OPRA. In holding that the deliberative-process privilege and statutory exemption did not apply, the court stated that disclosure of the TPL would not "give ... any insight into how it was used" or the nature of any deliberations. The court also held that the TPL did not contain official information and that disclosure would not harm the public interest.

*2 The trial court issued another order on January 5,

2015, compelling production of the OAQs under the common law right of access. The trial court determined that, following an in camera review, the OAQs were “personnel records” exempt from disclosure under OPRA, but nevertheless subject to disclosure under the common law. In weighing the applicable factors in the common-law analysis, the court noted that “clearly the public would be interested in which publicly-paid employees are also doing political activity during a gubernatorial campaign” and, when weighing that interest against employee privacy concerns, “the balance ... tips ever so slightly in favor of the plaintiff.” The order required complete redaction of all information on the OAQs, except for the filing employee’s name and response to Question 7 on the document: “Do you currently hold, or plan to hold, any outside voluntary position(s)? If yes, explain.”

In subsequent orders dated January 9 and February 6, 2015, the trial court stayed production of the documents pending appeal. On August 18, 2015, the parties entered into a stipulation, wherein they agreed to the amount of counsel fees owed to plaintiff as a prevailing party under OPRA, with defendant reserving the right to appeal the orders compelling production of the TPL and the OAQs. Defendant filed its notice of appeal on October 5, 2015, raising the following arguments:

POINT I

THE COMMON LAW RIGHT OF ACCESS DOES NOT REQUIRE THE PRODUCTION OF OUTSIDE ACTIVITY QUESTIONNAIRES.

POINT II

THE T-100/117² LIST IS EXEMPT FROM DISCLOSURE UNDER OPRA PURSUANT TO THE DELIBERATIVE PROCESS PRIVILEGE AND THE OFFICIAL INFORMATION PRIVILEGE.

A. The T-100/117 List is Exempt from Disclosure Under OPRA Pursuant to the Deliberative Process Privilege.

B. The T-100/117 List is Exempt from Disclosure Under OPRA Pursuant to the Official Information Privilege.

II.

We review a trial judge’s legal conclusions concerning access to public records de novo. [Drinkier Biddle & Reath LLP v. N.J. Dep’t of Law and Pub. Safety](#), 421 N.J.Super. 489, 497, 24 A.3d 829 (App.Div.2011). We will not disturb factual findings as long as they are supported by adequate, substantial and credible evidence. [Meshinsky v. Nichols Yacht Sales, Inc.](#), 110 N.J. 464, 475, 541 A.2d 1063 (1988).

^[1] We first address the trial court’s decision to order production of the OAQs pursuant to the common law right of access. The common law provides broader access to government records than OPRA. [Mason v. City of Hoboken](#), 196 N.J. 51, 67, 951 A.2d 1017 (2008). Thus, even if a record is shielded from access under OPRA, it may be obtained under the common law if the requestor’s interest in obtaining the record outweighs the government agency’s interest in preventing disclosure. [Id.](#) at 67–68, 951 A.2d 1017. In determining whether a public record must be disclosed under the common law, courts undergo a balancing test, assessing the following six factors:

(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.

*3 [[Loigman v. Kimmelman](#), 102 N.J. 98, 113, 505 A.2d 958 (1986).]

In this case, the trial court concluded that plaintiff’s interest in receiving the OAQs outweighed defendant’s interest in preventing disclosure:

[T]he records, I think, are common law public documents, and [plaintiff] has a general interest, and then it’s really whether the

particularized interest is of [plaintiff], you know, how you view that. I mean, clearly the public would be interested in which publicly-paid employees are also doing political activity during a gubernatorial campaign. That would be an issue of significance and something that the public would be very interested in. And then ... you compare it to the privacy interests of the individuals and ... I haven't heard from any individual who is concerned about their privacy interest. The government has just said these are personnel records, they ought to be protected. And generally that's absolutely true of the privacy interests. But where somebody is involved in political activity—where a public employee who is paid also wants to do outside political activity, there—you know, that certainly is something that they're choosing on their own to do ... But given the ... overarching concern of the public to ... look at this line ... the Court finds that the balance in this case tips ever so slightly in favor of the plaintiff ... [.]

Based on our own review and balancing of the *Loigman* factors, we cannot agree with the trial court's reasoning. Simply put, plaintiff's interest in viewing OAQs does not outweigh the significant privacy interests that are implicated by their disclosure.




Defendant's confidentiality concerns are significant. As redacted, OAQs reveal which State employees have requested permission to volunteer in political activities on their own time, as well as a description of their political activities. On the other hand, plaintiff's interest is comparatively limited. It is undisputed that it can be legal for a State employee to engage in independent political activity, and it is certainly not illegal for an employee to make a request to engage in such activity. The information provided by employees on OAQs is not so critical to plaintiff's interest so as to outweigh the confidentiality concerns for State employees.


This case particularly implicates the first, second, and

third *Loigman* factors, all of which weigh in defendant's favor. OAQs are personnel forms. Permitting the public disclosure of State personnel forms would raise significant and far-reaching confidentiality concerns. When juxtaposed with plaintiff's interest in viewing such forms for the tangential possibility of finding traces of wrongdoing, the result of the balancing test is clear.

State employees presumably submit OAQs with the understanding that they will remain private. They do not shed their right to privacy by merely asking for permission to engage in outside activities on their own time. Furthermore, there is a strong governmental interest in encouraging State employees to make ethics inquiries before they participate in outside activities. Employees should always be encouraged to ask for permission before, rather than forgiveness after, when it comes to extra-vocational political activity. Permitting public dissemination of OAQs would chill that process, and deter State employees from asking for permission to engage in independent political activity. Clearly, in this case defendant's interests in the privacy of its employees is greater than plaintiff's interests in viewing the OAQs. We therefore reverse the trial court's order compelling production of the OAQs under the common law right of access.

*4 ^[2] Next, we address the trial court's decision to order production of the TPL pursuant to OPRA. The statute was enacted "to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process."

 *Mason, supra*, 196 N.J. at 64, 951 A.2d 1017 (quoting *Asbury Park Press v. Ocean Cty. Prosecutor's Office*, 374 N.J.Super. 312, 329, 864 A.2d 446 (Law Div.2004)). "With broad public access to information about how state and local governments operate, citizens and the media can play a watchful role in ... guarding against corruption and misconduct."  *Burnett v. Cty. of Bergen*, 198 N.J. 408, 414, 968 A.2d 1151 (2009). OPRA provides that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access ... shall be construed in favor of the public's right of access."  N.J.S.A. 47:1A-1.

The threshold question in an OPRA claim is whether the plaintiff has requested "government records" pursuant to the statute.  *O'Shea v. Twp. of West Milford*, 410 N.J.Super. 371, 380, 982 A.2d 459 (App.Div.2009) (citation omitted). The statute broadly defines a "government record" as:

any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof. *The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*

[[N.J.S.A. 47:1A-1.1](#) (emphasis added).]

On appeal, defendant argues that the TPL falls under the specific exemption for “inter-agency or intra-agency advisory, consultative, or deliberative material.” *Ibid.* This exemption has been understood to encompass the deliberative process privilege found in our common law. [Educ. Law Ctr. v. Dep’t of Educ.](#), 198 N.J. 274, 284, 966 A.2d 1054 (2009). It was implemented by the legislature to “ensure free and uninhibited communication within governmental agencies so that the best possible decisions can be reached” and to “prevent disclosure of proposed policies before they have been fully vetted and adopted by a government agency, as well as the desire to prevent the confusion that could result from release of information concerning matters that do not bear on an agency’s chosen outcome.” [Id.](#) at 286, 966 A.2d 1054 (internal citation omitted).

In order to invoke the deliberative-material exemption under OPRA, a records custodian must demonstrate that the sought record is pre-decisional and deliberative in nature. A pre-decisional document is created prior to adoption of an agency’s policy or decision, and utilized during that agency’s decision-making process. *Ibid.* (citing *In re Liquidation of Integrity Ins. Co.*, 165 N.J. 75, 84, 754 A.2d 1177 (2000)). Generally, a deliberative document “contain[s] opinions, recommendations, or advice about agency policies.” *Ibid.* To determine whether a largely factual pre-decisional document is also deliberative, “[a] court must assess such fact-based documents against the backdrop of an agency’s deliberative efforts in order to determine a document’s nexus to that process, and its capacity to expose the agency’s deliberative thought-process.” [Id.](#) at 299–300, 966 A.2d 1054. Stated differently, “[w]hen materials [can] not reasonably be said to reveal an agency’s or official’s mode of formulating or exercising policy-implicating judgment the deliberative process privilege is inapplicable.” [Corr. Med. Servs. v. State](#), 426 N.J.Super. 106, 123, 43 A.3d 1174 (App.Div.2012)

(emphasis removed) (quoting [Petroleum Info. Corp. v. Dep’t of Interior](#), 976 F.2d 1429, 1435 (D.C.Cir.1992)).

*5 Applying these principles, we conclude that the TPL is exempt from production under OPRA as deliberative material. The TPL itself represents a key component of defendant’s deliberative process when making policy decisions. Members of the IGA testified that they used the TPL on a daily basis to determine where and how to allocate agency resources. In this respect, the role played by the TPL is clearly pre-decisional. The agency’s decisions about where, what, and how many resources are allocated may have been decided using the TPL, but those decisions were not made in the TPL itself.

Plaintiff argues that the TPL is merely a compilation of facts, as opposed to deliberative material. However, “it is not the existence of a ‘fact’ that should strip a document used in governmental deliberation from the protection of the privilege.” [Educ. Law Ctr.](#), *supra*, 198 N.J. at 294, 966 A.2d 1054. Rather, facts, or in this case compilations of facts, are only problematic if they are not “part of the formulation, or exercise, of policy-oriented judgment.” [Id.](#) at 295, 966 A.2d 1054. Here, the TPL was part of both the formulation and exercise of policy-oriented judgment, as the selection of these towns as the most effective locations for community outreach itself involved deliberation, and the TPL was then used by the agency to reach decisions on what agency resources should be allocated where.

The trial court’s reasoning is particularly problematic to the extent it attempts to distinguish the TPL from agency decisions that rely on the TPL:

If there was a particular decision where the list was used, that very well could be deliberative. But just the list itself, it just doesn’t seem to fall neatly within the—you know, the definitions of deliberative process.... It’s just give us the list, not any decision where it was used....

As set forth plainly in our precedent, decisions themselves are not covered by the deliberative-material exemption. Only deliberative materials or processes that are pre-decisional qualify. Thus, the trial court’s insinuation that a decision would be exempt if it was made in reliance

on the TPL is flawed.

The relevant inquiry instead is “how closely the material (including the selection of ‘factual’ or ‘informational’ material) relates to the ‘formulation or exercise of ... policy-oriented judgment or [to] the process by which policy is formulated.’ “ [Id.](#) at 295, 966 A.2d 1054 (quoting [Mapother v. Dep’t of Justice](#), 3 F.3d 1533, 1539 (D.C.Cir.1993)). In this case, the TPL directly relates to the manner in which defendant conducts its community outreach on a daily basis. Thus, it falls within the deliberative-material exemption, and need not be produced pursuant to OPRA.

Our analysis is supported by the Supreme Court’s application of the exemption in *Education Law Center*. In that case, the Court held that a “Simulation Memo,” which contained statistical projections regarding the allocation of resources by the Department of Education (DOE), was protected by the exemption. [Id.](#) at 300, 966 A.2d 1054. Notably, the Simulation Memo was largely comprised of numbers and equations; standing alone, it did not represent any particular agenda or suggest any particular decision by the Governor or the DOE. *Ibid.* The Court held that bare compilations of facts, when used in a decision-making process, are protected as part of the agency’s broader deliberative process.

*6 The application to this case is clear. Even more so than the Simulation Memo in *Education Law Center*, the TPL in this case represents the deliberative process of a

government agency. The TPL does not represent basic numerical figures and statistics; it represents quite a bit more. It is a list of strategically-chosen locations that could be utilized in community-outreach efforts to maximize efficiency. We are satisfied it represents the type of fact-based material that qualifies for the exemption, as contemplated by the Court in *Education Law Center*.

In sum, we find that the TPL is exempt from disclosure under OPRA pursuant to the deliberative-material exemption found in [N.J.S.A. 47:1A-1.1](#). Further analysis is necessary, however, as the trial court did not determine whether disclosure of the TPL is warranted pursuant to the common law right of access. Therefore, we vacate the December 9, 2014 order and remand to the trial court, with instructions to analyze whether disclosure of the TPL is warranted pursuant to the common law right of access.³


Reversed, in part, and vacated and remanded, in part. We do not retain jurisdiction.

All Citations

Not Reported in A.3d, 2016 WL 3693949

Footnotes

- ¹ Several additional documents were requested in plaintiff’s complaint, but those requests have since been resolved. Only the requests for the TPL and OAQs are at issue on appeal.
- ² Following Superstorm Sandy, the IGA added seventeen towns to the TPL, and thereafter referred to it as the “T-117.”
- ³ We note that the trial court correctly declined to apply the official-information privilege found in [N.J.S.A. 2A:84A-27](#). Defendant has not shown that the TPL’s disclosure is forbidden by law and would harm the public interests.

 KeyCite Yellow Flag - Negative Treatment
Certification Granted, Cause Remanded by [Ruff v. Rutgers](#), N.J., March 21, 2019

2018 WL 6518105

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Edward RUFF, Plaintiff-Appellant,

v.

RUTGERS, the State University of New Jersey, Rutgers University Police Department, Executive Director of Police Services/Chief of Police Kenneth Cop, Individually and in His Official Capacity, and Captain Michael Rein, Individually and in His Official Capacity, Defendants-Respondents.

DOCKET NO.

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2549

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16T3

Argued September 26, 2018

Decided December 12, 2018

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4740-16.

Attorneys and Law Firms

[Catherine M. Elston](#) argued the cause for appellant (C. Elston & Associates, LLC, attorneys; [Catherine M. Elston](#), of counsel and on the briefs; [Cathlene Y. Banker](#), on the brief).

[James P. Lidon](#) argued the cause for respondents (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; [James P. Lidon](#), of counsel and on the brief).

Before Judges [Alvarez](#) and [Nugent](#).

Opinion

PER CURIAM

*1 Edward Ruff, a Rutgers University campus police

officer, appeals from the dismissal of his complaint against his employer, defendant Rutgers, The State University (Rutgers) alleging a breach of the collective bargaining agreement (CBA) entered into between the Fraternal Order of Police-Primary Unit, Lodge 62 (FOP) and Rutgers. We affirm.

On July 31, 2013, a final notice of disciplinary action (FNDA) suspended Ruff for ten days for breach of departmental rules. He served the suspension the following month. The Law Division judge dismissed Ruff's case because he found no legal basis existed for his challenge to Rutgers' action or the related Public Employment Relation Commission's (PERC) August 14, 2014 final decision. Ruff asserted in the complaint that before major disciplinary action, such as the suspension, could be taken against an employee, the employer was required to engage in the binding arbitration described in the fourth and final step in the grievance procedure outlined in the CBA. Ruff further claimed Rutgers' failure to adhere to the fourth step was a breach of contract, violation of due process, and otherwise constituted a violation of the CBA.

Earlier, Rutgers had filed a scope of negotiations petition and successfully restrained binding arbitration. In its August 14, 2014 decision, PERC "determined the relevant statute[, [N.J.S.A. 34:13A-5.3](#),] authorizing binding arbitration of disputes involving major discipline—discipline which includes a suspension of more than five days—'only applies to unionized employees of the State of New Jersey.'" In the Matter of Rutgers, the State University, and FOP Lodge 62, No. A-0455-14 (App. Div. Sept. 8, 2016) (slip op. at 3) (citation omitted). In our decision with regard to the FOP's direct challenge to Rutgers' position, we addressed the FOP's argument that pursuant to [N.J.S.A. 34:13A-5.3](#), Ruff had a contractual right to arbitrate major discipline. We affirmed PERC's decision, holding that the statute did not include campus police in its purview and that therefore the FOP could not compel binding arbitration of major disciplinary action. In the Matter of Rutgers, slip op. at 10-11.

Dissatisfied with our decision, Ruff filed the within complaint. In our view, however, the Law Division judge's dismissal of the complaint was mandated, given our prior interpretation of the statutory scheme. This appeal is moot because the issues Ruff raised by way of complaint were resolved by our decision regarding the statute.

"A case is technically moot when the original issue

presented has been resolved, at least concerning the parties who initiated the litigation.” [Betancourt v. Trinitas Hosp.](#), 415 N.J. Super. 301, 311 (App. Div. 2010) (citing [DeVesa v. Dorsey](#), 134 N.J. 420, 428 (1993) (Pollock, J., concurring)). An appellate court “declin[e] to review legal questions” that are no longer an ongoing concern “out of reluctance to render a decision in the abstract on such moot issues and a related desire to conserve judicial resources.” [Finkel v. Twp. Comm. of Hopewell](#), 434 N.J. Super. 303, 315 (App. Div. 2013).

*2 All of the relief Ruff seeks stems from Rutgers’ refusal to participate in step four of the CBA grievance procedure—a decision we already affirmed. In the Matter of Rutgers, slip op. at 11. In granting Rutgers relief, PERC relied on [Ridgefield Park Educ. Ass’n v. Ridgefield Park Bd. of Educ.](#), 78 N.J. 144 (1978). In that case, our Supreme Court found that issues, such as major discipline, should not be subject to binding arbitration as they are a necessary exercise of an employer’s inherent managerial responsibilities. [Id.](#) at 156. PERC also interpreted the 2003 amendment of [N.J.S.A. 34:13A-5.3](#) as leaving intact the prohibition against the submission of major disciplinary disputes involving police officers to binding arbitration. See [State v. State Troopers Fraternal Ass’n](#), 134 N.J. 393 (1993) (holding that a statute that stated that discipline was a subject of

negotiation did not apply to state police).

We concluded that PERC’s decision was not clearly arbitrary and capricious, and therefore affirmed. In the Matter of Rutgers, slip op. at 11. These issues have been previously disposed of with finality. The appeal is made moot by our prior decision, as all of the allegations in the complaint involve an attempt to enforce the fourth step of the grievance procedure, or obtain redress for Rutgers’ failure to participate. Casting the challenge in different language does not change its inherent nature. No public interest is involved here which is so great as to require us to revisit the issue. See [Reilly v. AAA Mid-Atl. Ins. Co. of N.J.](#), 194 N.J. 474, 484 (2008). The unenforceability of step four of the grievance procedure outlined in the CBA has already been decided. Our judicial power should not be exercised here; Ruff is simply not entitled to relief. See [Betancourt](#), 415 N.J. Super. at 311.

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2018 WL 6518105, 2018 L.R.R.M. (BNA) 459,081

2015 WL 3495916

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

Roger VOGEL, Petitioner–Appellant,

v.

BOARD OF TRUSTEES, POLICE AND
FIREMEN'S RETIREMENT SYSTEM,
Respondent–Respondent.

A

5547

12T2

Argued April 27, 2015.

Decided June 4, 2015.

Synopsis

Background: Former juvenile justice correction officer appealed decision of the Board of Trustees of Police and Firemen's Retirement System (PFRS), adopting ALJ's decision, [2013 WL 2480735](#), to revoke his membership in PFRS for failure to complete mandatory basic training, rendering him ineligible for accidental disability retirement (ADR) benefits.

Holdings: The Superior Court, Appellate Division, held that:

[1] statutory amendments to training requirements for PFRS membership, not in effect at time of officer's appointment, applied prospectively only;

[2] Board was not equitably estopped from challenging officer's eligibility for ADR benefits on basis of officer's failure to complete training course required after amendment to regulations governing PFRS membership; and

[3] remand was required to address officer's assertions that he was unable to complete training as result of injury

suffered in course of different training academy and as result of becoming totally and permanently disabled from separate assault.

Remanded.

West Headnotes (3)

[1] **Infants** → Juvenile justice in general

Statutory amendments to training requirements for membership in Police and Firemen's Retirement System (PFRS) applied prospectively only and, thus, did not prevent juvenile justice correction officer, whose alleged disability occurred prior to amendments, from retaining membership in PFRS, and submitting claim for accidental disability retirement (ADR) benefits, on basis of failure to meet amended requirements; neither language of amendments nor PFRS's commentary to proposal reflected intention to apply new regulations retroactively, and grandfather provision and proposal indicated that enrollments would remain in effect so long as officer completed training without eighteen months. [N.J.A.C. 17:4–2.4](#); [N.J.S.A. 43:16A–1\(2\)\(a\)](#), [43:16A–1\(2\)\(a\)\(iii\)](#); [N.J.S.A. 52:17B–66](#).

[2] **Infants** → Compensation and benefits **Public Employment** → Disability pensions and disability retirement in general

Board of Trustees of Police and Firemen's Retirement System (PFRS) was not equitably estopped from challenging eligibility of juvenile justice correction officer for accidental disability retirement (ADR) benefits, on basis of his failure to complete training course required after amendment to regulations governing PFRS membership, even though it was not clear at time officer was appointed, prior to such amendments, that he could not be enrolled in

PFRS until after he completed training course; officer did not reference any misrepresentation in regulations promising he could collect benefits without completing required training, or that he relied on misinformation in PFRS's member handbook, and Board raised challenge promptly upon learning that officer did not complete required training. [N.J.S.A. 52:17B-68.1\(a\)](#), [§ 43:16A-1\(2\)\(a\)](#); [N.J.S.A. 52:17B-67](#); 33 *N.J.R.* 684(a).

[3] [Infants](#) [Compensation and benefits](#)
[Public Employment](#) [Proceedings on remand](#)

Remand of challenge by former juvenile justice correction officer to decision of Board of Trustees of Police and Firemen's Retirement System (PFRS) revoking his membership in PFRS based on his failure to complete required training pursuant to amendments to statutory PFRS membership requirements was needed to address officer's assertions that he was unable to complete training as result of injury suffered in course of different training academy and as result of becoming totally and permanently disabled from separate assault, and to determine whether facts warranted application of equitable principles. [§ N.J.S.A. 43:16A-7\(1\)](#); [N.J.S.A. 17:4-2.4\(a\)\(7\)](#); [N.J.A.C. 17:4-2.4\(a\)\(7\)](#); [N.J.S.A. 52:17B-66](#).

On appeal from the Board of Trustees of the Police and Firemen's Retirement System, Department of Treasury, PFRS # 3-103829.

Attorneys and Law Firms

[Stephen B. Hunter](#) argued the cause for appellant (Detzky, Hunter & DeFillippo, LLC, attorneys; Mr. Hunter, of counsel and on the briefs).

[Jeff S. Ignatowitz](#), Deputy Attorney General, argued the cause for respondent (John J. Hoffman, Acting Attorney General, attorney; [Melissa H. Raksa](#), Assistant Attorney

General, of counsel; Mr. Ignatowitz, on the brief).

Before Judges [SABATINO](#), [LEONE](#) and [GILSON](#).

Opinion

PER CURIAM.

*1 Petitioner Roger Vogel appeals the revocation of his membership in the Police and Firemen's Retirement System (PFRS), [§ N.J.S.A. 43:16A-1](#) to -68. The Board of Trustees (Board) of the PFRS revoked his membership because he failed to complete his mandatory basic training as a juvenile corrections officer under the Police Training Act, [N.J.S.A. 52:17B-66](#) to -77, and the Juvenile Justice Act, [N.J.S.A. 52:17B-169](#) to -178. We vacate and remand.

I.

Before the Administrative Law Judge (ALJ), the parties stipulated to the following underlying facts.¹

On September 2, 2006, Vogel was enrolled in the PFRS upon his employment in a PFRS-covered position, namely Juvenile Justice Corrections Officer. During his employment regular pension deductions were taken from his paycheck as contributions into the PFRS. However, Vogel did not complete the Police Training Commission (PTC) training.

On August 23, 2007, while Vogel was working as a corrections officer at a juvenile medium security facility, he was assaulted by an inmate who jumped at him and threatened to kill Vogel and his family. The inmate spit in Vogel's face and eyes, causing Vogel to fall backward over a stool and strike a file cabinet. He injured his low back and groin.

Vogel did not complete the PTC training prior to ceasing employment. On July 8, 2008, Vogel filed an application for accidental disability retirement (ADR) benefits under the PFRS. Neither Vogel nor his employer informed the PFRS Board or the Division of Pension and Benefits (Division) that Vogel failed to complete PTC training.

In his application, Vogel alleged ADR benefits were warranted because he was suffering from a [post-traumatic](#)

stress disorder as a result of three separate assaults on him on July 15, August 15, and August 23, 2007. On February 11, 2009, the Board denied Vogel's application. The Board determined the third physical assault on August 23 met the criteria to qualify as a traumatic event justifying ADR benefits. However, the Board's independent medical examination (IME) found Vogel's disability directly resulted from all three incidents. Because the Board found the first two incidents did not qualify as traumatic events, it denied ADR benefits.

Vogel appealed that denial, arguing he suffered permanent physical injuries during the August 23 assault that prevented him from performing the essential duties of a corrections officer. To support that revised argument, Vogel's counsel filed medical certifications from two physicians. Vogel also saw a doctor who prepared an IME report.

Meanwhile, Vogel's revised application was listed on the Board's August 2010 agenda. Immediately prior to the August 2010 meeting, the PFRS first became aware that Vogel had not completed the PTC training. On August 10, 2010, the Board issued a decision again finding Vogel ineligible for ADR benefits. The Board maintained Vogel was improperly enrolled in the PFRS. Prior to that time, Vogel had not been advised there were any "eligibility concerns" relating to his application for ADR benefits.

*2 Thereafter, by agreement of the parties, Vogel's appeal was submitted to the ALJ for summary disposition on stipulated facts. After receiving briefs and hearing oral argument, the ALJ summarily denied Vogel's appeal on April 26, 2013. On June 11, 2013, the Board adopted the ALJ's decision.² Vogel appeals to this court.

II.

The ALJ rejected Vogel's claim in a summary decision under *N.J.A.C. 1:1-12.5*. "The standard governing agency determinations under *N.J.A.C. 1:1-12.5* is 'substantially the same as that governing a motion under *Rule 4:46-2* for summary judgment in civil litigation.'" *L.A. v. Bd. of Educ.*, 221 N.J. 192, 203 (2015) (citation omitted). Summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C. 1:1-12.5(b)*.

[A] court must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party."

L.A., *supra*, 221 N.J. at 204 (quoting *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 523, 666 A.2d 146 (1995)).

"Because an agency's determination on summary decision is a legal determination, our review is *de novo*." *Ibid*. We must hew to that standard of review.

III.

To be a member of the PFRS, a person must meet the PFRS's definition of a "policeman" or "fireman." *N.J.S.A. 43:16A-1(3)*, -3. The PFRS provides in pertinent part:

"Policeman" shall mean a permanent, full-time employee of a law enforcement unit as defined in section 2 of P.L.1961, c. 56 (C.52:17B-67)³ ... whose primary duties include the investigation, apprehension or detention of persons suspected or convicted of violating the criminal laws of the State and who:

...

(iii) is required to complete successfully the training requirements prescribed by P.L.1961, c. 56 (C.52:17B-66 et seq.) or comparable training requirements as determined by the board of trustees[.]

[*N.J.S.A. 43:16A-1(2)(a)* (emphasis added).]

N.J.S.A. 43:16A-1(2)(a) does not expressly state that an officer cannot be enrolled as a member of the PFRS until he or she completes that training. There was no mention of the training requirement in the PFRS regulations at the time Vogel was working. *N.J.A.C. 17:4-2.1(b)(11)* and *N.J.A.C. 17:4-2.2* simply referenced the definition in *N.J.S.A. 43:16A-1(2)(a)*. 33 *N.J.R.* 684(a) (Feb. 20, 2001). *N.J.A.C. 17:4-2.1(a)*

directed, then as now, that “[a]ll public employees actively employed in positions meeting the statutory definition ‘police officer’ or ‘firefighter’ found at [N.J.S.A. 43:16A-1\(2\)\(a\) and \(b\)](#) shall be members of the [PFRS].” 38 *N.J.R.* 1578(a) (Apr. 3, 2006) (emphasis added). At that time, *N.J.A.C.* 17:4-2.6(a) provided that “[a]n employee who is appointed to a permanent position from a civil service list shall be considered as having begun eligibility for enrollment on the date of regular appointment.” 33 *N.J.R.* 684(a) (emphasis added).

*3 On December 15, 2008, the Board extensively amended the PFRS regulations.⁴ The 2008 amendments required “successful completion of the basic training course approved by the [PTC] pursuant to [N.J.S.A. 52:17B-66 et seq.](#)” 40 *N.J.R.* 6991(b) (Dec. 15, 2008) (adding *N.J.A.C.* 17:4-2.1(b)(11)-(12)) (defining “[p]ermanent police officer”).⁵

The 2008 amendments added a new rule at [N.J.A.C. 17:4-2.4](#) entitled “Training Requirements.” 40 *N.J.R.* 6991(b). The new *N.J.A.C.* 17:4-2.4(a) provided: “As required under [N.J.S.A. 43:16A-1\(2\)\(a\)\(iii\)](#), permanent, full-time police officers are required to successfully complete the [PTC] training requirement prescribed under [N.J.S.A. 52:17B-66 et seq.](#), ... or proof of comparable training requirements as determined by the Board of Trustees.” *Ibid.* The new *N.J.A.C.* 17:4-2.4(a)(6) mandated that “[t]he applicant or the employer must submit evidence to the Division of Pensions and Benefits that such basic training course was satisfactorily completed.” *Ibid.* The new *N.J.A.C.* 17:4-2.4(a)(7) provided that “[a]ny current PFRS police members that have not successfully completed the PTC or comparable training by (18 months after the effective date of this new rule), will be removed from participation in the PFRS.” *Ibid.*

The 2008 amendments added a preface to [N.J.A.C. 17:4-2.2](#) providing that membership in the PFRS was “[p]ursuant to [N.J.A.C. 17:4-2.3, 2.4 and 2.5](#),” 40 *N.J.R.* 6991(b), “to specifically address medical, training and age requirements,” 40 *N.J.R.* 4678(a) (Aug. 18, 2008). Similarly, the amendments changed *N.J.A.C.* 17:4-2.6(a) to include “[p]ursuant to [N.J.A.C. 17:4-2.3, 2.4 and 2.5](#), an employee who is appointed to a regular classified appointment from a Civil Service list to a PFRS position shall be considered for PFRS enrollment upon successful completion of the police or firefighting training.” 40 *N.J.R.* 6991(b). The amendments rewrote *N.J.A.C.* 17:4-2.6(d) to provide that employees “who are hired into approved PFRS titles and are otherwise eligible, will not be permitted enrollment in PFRS, until the employer certifies that the employees have successfully completed

the police or firefighting training.” *Ibid.*

In the Board’s proposal to enact the 2008 amendments, it explained the Division “found during a functional analysis ... that employees are enrolled in PFRS, prior to the successful completion of the training requirements pursuant to [N.J.S.A. 43:16A-1](#).” 40 *N.J.R.* 4678(a). “This finding initiated a review of the enrollment practices for police and fire positions among both Civil Service and non-Civil Service employers.” *Ibid.* “The Division found that there is not a uniform enrollment practice among the PFRS participating employers and situations have been identified wherein nonqualified employees are permitted entry into the PFRS.” *Ibid.*

The Board’s proposal acknowledged that under the Police Training Act, “no person shall accept a permanent appointment as a police officer until that person successfully completes PTC or comparable training.” 40 *N.J.R.* 4678(a). Nonetheless, the Board found “it is necessary to amend certain rules in *N.J.A.C.* 17:4 to ensure that the enrollment practices are in compliance with the statute and provide the Division with the authority to prohibit the existing practice of nonqualified employees getting enrolled in the PFRS.” *Ibid.* “The proposed amendments to [N.J.A.C. 17:4-2.6](#) will standardize the enrollment date for all locations.” *Ibid.*

*4 The Board’s proposal explained that through the new *N.J.A.C.* 17:4-2.4(a)(7), “[t]he Board will grandfather those members that are already enrolled in the PFRS by allowing 18 months from the effective date of the rule to attend the appropriate police or firefighter training classes.” 40 *N.J.R.* 4678(a). “The Board does not want to harm any member currently hired in a police or fire position that has not attended the necessary training for the position[.]” *Ibid.*

IV.

^[1] In its August 10, 2010 decision rejecting Vogel’s claim, the Board relied on the new [N.J.A.C. 17:4-2.4](#), which was added after he allegedly became disabled. Vogel asserts the 2008 amendments were not meant to have retroactive effect.

“Generally, a regulation only applies prospectively.” *Rahway Hosp. v. Horizon Blue Cross Blue Shield of N.J.*, 374 *N.J.Super.* 101, 112, 863 A.2d 1050 (App.Div.), certif. denied, 183 *N.J.* 217, 871 A.2d 95 (2005).

“Prospectivity is favored because ‘retroactive application of new laws involves a high risk of being unfair.’ “ *Seashore Ambulatory Surgery Ctr., Inc. v. N.J. Dep’t of Health*, 288 N.J.Super. 87, 97, 671 A.2d 1088 (App.Div.1996) (quoting *Gibbons v. Gibbons*, 86 N.J. 515, 522, 432 A.2d 80 (1981)). “A regulation may apply retroactively if the Legislature or agency has expressed that intent, either explicitly or impliedly, and retroactive application would not cause a manifest injustice or an interference with a vested right.” *Rahway Hosp., supra*, 374 N.J.Super. at 112, 863 A.2d 1050 (citing *State Troopers Fraternal Ass’n v. State*, 149 N.J. 38, 54, 692 A.2d 519 (1997)).

Here, neither the language of the 2008 amendments nor the PFRS’s commentary to the proposal “reflects an intention to apply the new regulation[s] retroactively.” *See ibid.* The 2008 amendments were expressly effective on December 15, 2008, and gave no indication the PFRS intended to revoke the enrollment in the PFRS of officers who had not completed the training requirement. Rather, the grandfather provision and the Board’s proposal indicate those enrollments would remain in effect so long as the officers completed the training within eighteen months.

Moreover, as set forth above, the Board found no “uniform enrollment practice.” 40 N.J.R. 4678(a). This was not a situation where “ ‘[t]he provisions of [the amended] rule reflect long-standing current practice’ “ and are simply “codifying existing statewide practice.” *State Troopers, supra*, 149 N.J. at 54, 692 A.2d 519 (citation omitted). Indeed, prior to the amendments, the *Police & Firemen’s Ret. Sys. Member Handbook* (last updated October 10, 2008) advised that “[t]he date of enrollment for the PFRS is the date of permanent appointment to the position, even if the enrollee has yet to complete law enforcement of fire fighter training.”

“[P]rospective application is ‘particularly appropriate when [an agency] renders a first-instance or clarifying decision in a murky or uncertain area of the law.’ “ *Selective Ins. Co. of Am. v. Rothman*, 208 N.J. 580, 587 (2012) (quoting *Montells v. Haynes*, 133 N.J. 282, 298, 627 A.2d 654 (1993)). Here, it was not just one person who found the law murky or uncertain. *Cf. id.* at 588. The Deputy Attorney General at oral argument informed us that, at the time of the 2008 amendment, over one hundred officers were enrolled in the PFRS without having completed the training requirement.

*5 We find no intent to apply the new restrictions in the 2008 amendments retroactively, and decline to do so. *See*

Chiarello v. Bd. of Trs., Pub. Emps. Ret. Sys., 429 N.J.Super. 194, 199 & n. 5 (App.Div.2012). Thus, we need not consider whether retroactive application would work “a manifest injustice.” *State Troopers, supra*, 149 N.J. at 54, 692 A.2d 519.

V.

The ALJ ruled, and the Board now argues, regardless of the 2008 amendments to the regulations, the statutes were clear that Vogel could not be enrolled in the PFRS without completing the training requirement. We agree that the Juvenile Justice Act and the Police Training Act state clearly that a person should not be appointed as a juvenile corrections officer until he successfully completes the training course. The Juvenile Justice Act provides that “no person shall be appointed as a juvenile corrections officer unless that person: ... (7)[h]as successfully completed the training course approved by the [PTC] and required by [N.J.S.A. 52:17B–68.1] or is exempt pursuant to the provisions of that section.” *N.J.S.A. 52:17B–174(b)*.

The Police Training Act requires “[a] person appointed as an adult or juvenile corrections officer or as a juvenile detention officer by the State or county shall satisfactorily complete prior to permanent appointment a basic training course approved by the [PTC],” unless he has successfully completed specified alternate training. *N.J.S.A. 52:17B–68.1(a)*; *see also N.J.S.A. 52:17B–67, –68*. It has long been understood the Police Training Act “requires the successful completion of an approved police training course as a prerequisite to appointment as a permanent police officer.” *Azzara v. Twp. of Waterford*, 392 N.J.Super. 322, 324, 920 A.2d 725 (App.Div.2007); *see, e.g., Marcinczyk v. State Police Training Comm’n*, 203 N.J. 586, 590 (2010); *State v. Bealor*, 187 N.J. 574, 592, 902 A.2d 226 (2006); *Greenwood v. State Police Training Ctr.*, 127 N.J. 500, 505, 606 A.2d 336 (1992); *Belmar Policemen’s Benevolent Ass’n v. Belmar*, 89 N.J. 255, 265, 445 A.2d 1133 (1982).

Thus, Vogel’s employer violated those acts when it appointed him to a regular position.⁶ We reject Vogel’s claim that he fulfilled his training requirement simply by working as a juvenile corrections officer. That claim is antithetical to the purpose of the Police Training Act. *N.J.S.A. 52:17B–66*. That claim is also contrary to the provisions providing the only alternative to PTC training

is if an officer “has successfully completed training conducted by a federal, State or county agency the requirements of which are substantially equivalent to the requirements of a basic training course approved by the [PTC].” *N.J.S.A. 52:17B-68.1*; accord *N.J.S.A. 52:17B-68(a)*; see also *N.J.S.A. 52:17B-174(b)(7)*.

However, the issue before us is not a civil service challenge to Vogel’s appointment. Rather, we must decide whether it was clear Vogel could not be enrolled in the PFRS when he was appointed. At that time, the statute and regulations governing the PFRS did not clearly state a person could not be enrolled in the PFRS until after he completed the training course. See *N.J.S.A. 43:16A-1(2)(a)*. Indeed, the regulations then in effect made no mention of the training requirement, and *N.J.A.C. 17:4-2.6(a)* provided that a person appointed to a permanent position achieved “eligibility for enrollment on the date of regular appointment.” 33 *N.J.R.* 684(a). Moreover, at that time the PFRS’s Member Handbook mistakenly stated that a person could be enrolled in the PFRS even if the enrollee has yet to complete law enforcement training.

*6 Any doubt the PFRS regulations and statute were not sufficiently clear is removed by the Board’s proposal explaining the need for the 2008 amendments. The Board found the PFRS participating employers read the PFRS statutes and regulations differently, resulting in “inconsistency” and a lack of any standard enrollment practice. 40 *N.J.R.* 4678(a). The widespread confusion made it “necessary” for the Board to extensively amend the regulations “to ensure that the enrollment practices are in compliance with the statute.” *Ibid.* Further, the Board found the amendments were necessary to “provide the Division with the authority to prohibit the existing practice of nonqualified employees getting enrolled in the PFRS.” *Ibid.*

“We give substantial deference to an agency’s interpretation of the statute it is charged with carrying out, as well as to the interpretation the agency itself gives to its own regulations.” *Fedor v. Nissan of N. Am., Inc.*, 432 *N.J.Super.* 303, 320 (App.Div.2013), *certif. denied*, 217 *N.J.* 52 (2014). “Such deference has been specifically extended to state agencies that administer pension statutes.” *Bueno v. Bd. of Trs., Teachers’ Pension & Annuity Fund*, 404 *N.J.Super.* 119, 125, 960 A.2d 787 (App.Div.2008), *certif. denied*, 199 *N.J.* 540, 973 A.2d 944 (2009); see, e.g., *Matturri v. Bd. of Trs. of the Judicial Ret. Sys.*, 173 *N.J.* 368, 381–82, 802 A.2d 496 (2002). Accordingly, we defer to the Board’s own assessment in its proposal that the PFRS statutes and

regulations were unclear before the extensive 2008 amendments.⁷

^[2] We reject, however, Vogel’s argument the Board is equitably estopped from challenging his eligibility for ADR benefits because of his reliance on the PFRS regulations in force before the 2008 amendments. “[E]quitable estoppel is rarely invoked against the government.” *Bridgewater-Raritan Educ. Ass’n v. Bd. of Educ.*, — *N.J.* —, — (2015) *Bridgewater-Raritan Educ. Ass’n v. Bd. of Educ.*, — *N.J.* —, — (2015) (slip op. at 19) (citation omitted). “The essential elements of equitable estoppel are a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation would probably induce reliance, and reliance by the party seeking estoppel to his or her detriment.” *O’Malley v. Dep’t of Energy*, 109 *N.J.* 309, 317, 537 A.2d 647 (1987).

Vogel has not cited any such misrepresentation in the pre-2008 PFRS regulations promising he could collect ADR benefits without completing the required PTC training. Cf. *Middletown Twp. Policemen’s Benevolent Ass’n Local No. 124 v. Twp. of Middletown*, 162 *N.J.* 361, 372, 744 A.2d 649 (2000) (employee was “repeatedly assured” that he would receive benefits). Vogel does not claim he relied on the misinformation in the PFRS’s Member Handbook. “Absent reasonable reliance on affirmative assurances, estoppel is unavailable.” *Petersen v. Twp. of Raritan*, 418 *N.J.Super.* 125, 137 (App.Div.2011). Nor can the Board be estopped because it did not initially challenge Vogel’s eligibility when he sought ADR benefits. The Board properly raised that challenge promptly upon learning he did not complete the required training. See *N.J.S.A. 43:16A-18*; see also *Tubridy v. Consol. Police & Firemen’s Pension Fund Com.*, 84 *N.J.Super.* 257, 263, 201 A.2d 736 (App.Div.1964).

VI.

*7 ^[3] The 2008 amendments granted a grace period to people like Vogel. Upon his improper appointment, Vogel was enrolled as a member in the PFRS under the unclear regulations then in force, even though he did not complete the PTC training. He was a “member in service” when he was allegedly disabled. See *N.J.S.A. 43:16A-7(1)*, –15.2(a); cf. *Smith v. State, Dep’t of Treasury, Div. of*

Pensions & Benefits, 390 *N.J.Super.* 209, 211, 915 A.2d 48 (App.Div.2007) (disabling injury occurred before the employee became a member of the pension system). Although Vogel's ADR benefits claim sought a retirement date of November 1, 2008, he had not been granted retirement when the new *N.J.S.A.* 17:4-2.4(a)(7) was enacted on December 15, 2008. It "grandfather [ed] those members that are already enrolled in the PFRS" because "[t]he Board d[id] not want to harm any member currently hired in a police or fire position that has not attended the necessary training for the position[.]" 40 *N.J.R.* 4678(a). As the Board explained in a December 15, 2008 memorandum, all "PFRS members without the required training [] have eighteen months (December 31, 2008 through June 30, 2010) to ... have the required PTC ... training."⁸

It is undisputed that Vogel did not complete the required PTC training before he was allegedly disabled, and that he did not complete the training within the grace period provided by the new *N.J.A.C.* 17:4-2.4(a)(7). Nevertheless, the parties stipulated before the ALJ that Vogel made two factual allegations to excuse his failure to complete the PTC training.

First, Vogel asserted he was unable to complete the Basic Class for Juvenile Corrections Officer (BCJCO) in September 2006 as a result of an injury suffered in the course of his Training Academy. Second, Vogel argued that he became totally and permanently disabled as a result of the August 23, 2007 assault, and thus could no longer be assigned to, or complete, the BCJCO training program that he was scheduled to begin in September 2007.


The ALJ did not resolve Vogel's first factual assertion. The ALJ cited a September 29, 2006 memorandum to Vogel from Michael Cleary, School Director of the Juvenile Justice Commission's Training Academy (Cleary Memo). According to the ALJ and the Board, the Cleary Memo indicated that "Vogel was unable to complete the mandatory [BCJCO] training requirement as provided by *N.J.S.A.* 52:17B-66 et seq." The ALJ found the Cleary Memo informed Vogel he was being withdrawn from the September training cycle due to his "inability to participate in the physical conditioning program" of the BCJCO. Vogel had "already missed more than 10% of the instructional time assigned to the physical training component," and thus would "not be able to meet the 90% participation standard established by the PTC." The ALJ also noted the Cleary Memo told Vogel that he should report to his assigned facility, that he would be reassigned to the Training Academy in early March 2007, and that his "attendance at the March 2007 BCJCO will be [his]

final opportunity to complete this course successfully."

*8 The ALJ also cited an October 5, 2006 letter from Cleary to the PTC (Cleary Letter). According to the ALJ, the Cleary Letter stated Vogel missed six police training (PT) sessions, and as a result he would be unable to participate in the minimum PT sessions for the September 2006 cycle. Thus, "the agency has decided to recycle him in the March 2007 BCJCO," and he would work at his assigned facility in the interim. According to the ALJ, the Cleary Letter added that, in his first PT session, Vogel complained of knee pain, which he indicated "was related to a prior injury." However, "he was asked at least twice if he was claiming an injury and he said he was not."

Finally, the ALJ cited Vogel's "exceptional" performance review through August 2007, which stated that he was "due to attend the Academy in September [2007]."

Although the Cleary Memo, Cleary Letter, and performance review were exhibits to the parties' Second Supplemental Stipulation of Facts, the parties failed to supply them to this court. The portions quoted or paraphrased in the decisions of the Board and the ALJ do not resolve the veracity of Vogel's assertion that he was unable to complete the BCJCO training in September 2006 as a result of an injury suffered in his training. The record on appeal also does not explain whether he was reassigned from his assigned facility to attend the March 2007 training, or if so, why he did not complete it.

Under  *N.J.S.A.* 52:17B-71(n), the PTC has the authority

[t]o extend the time limit for satisfactory completion of police training programs or programs for the training of corrections officers, juvenile corrections officers and juvenile detention officers upon a finding that health, extraordinary workload or other factors have, singly or in combination, effected a delay in the satisfactory completion of such training program.

Thus, if Vogel's health justified a delay in training, he may not have violated the Police Training Act prior to allegedly becoming disabled. Vogel's enrollment for the September 2007 training class also may not have violated the Police Training Act. The PTC may allow the training

period to “exceed one year for those persons enrolled within the one-year period in a basic training course scheduled to end after the expiration of the one-year period.” *N . J.S.A.* 52:17B–68.1(b); see *N.J.S.A.* 52:17B–69.

The Board’s proposal justifying the 2008 amendments stated that “employees injured during [PTC] training should not be eligible for accidental disability retirement benefits.” However, the Board noted that under the prior unclear situation, “some employees may file for accidental disability retirement benefits if previously enrolled in the PFRS, while others are not permitted to file since they do not qualify for PFRS enrollment.” 40 *N.J.R.* 4678(a). If Vogel’s first factual allegation is true, he may fall within the first group the Board cited.

The ALJ also did not resolve Vogel’s second factual allegation. Vogel asserted as a result of the August 23, 2007 assault, he became totally and permanently disabled and was incapable of completing the PTC training in September 2007 or thereafter. He argues this prevented him from completing the PTC training before the July 1, 2010 expiration of the 2008 amendments’ grace period. There may be some truth in this claim. The Board’s February 11, 2009 decision found Vogel was totally and permanently disabled from the performance of his regular and assigned duties.

*9 These unresolved factual disputes are relevant under cases cited in support of Vogel’s equitable claims. In *Kyer v. City of E. Orange*, 315 *N.J.Super.* 524, 526–27, 719 A.2d 184 (App.Div.1998), the plaintiff was hired as a provisional employee, a status that should be limited to twelve months. However, due to the mishandling by the municipality of her initial paperwork, she never took the competitive civil service examination that was necessary to become a permanent employee. *Id.* at 527–28, 719 A.2d 184. Nonetheless, she continued to work until her termination seven years later. *Id.* at 528, 530–31, 719 A.2d 184. We held:

[W]here, as here, a long-term provisional employee has performed satisfactorily and has failed to achieve permanent status because of the appointing authority’s neglect, the [agency] has the authority to retroactively, as it were, determine the employee’s qualifications by such methods as it shall in its discretion deem appropriate and to further determine whether, had the inquiry into qualifications been timely made, the employee would have achieved permanency in the normal course of municipal management of its affairs.

[*Id.* at 534, 719 A.2d 184.]

We stressed that “government is required to ‘turn square corners’ in dealing with its citizens, and persons employed by civil service municipalities ought not to have to retain counsel for advice as to their job rights.” *Ibid.* (quoting *F.M.C. Stores Co. v. Borough of Morris Plains*, 100 *N.J.* 418, 426, 495 A.2d 1313 (1985)). Accord *Melani v. Cnty. of Passaic*, 345 *N.J.Super.* 579, 581–82, 589, 786 A.2d 133 (App.Div.2001).

We have extended *Kyer* to pension issues. *Sellers v. Bd. of Trs. of the Police & Firemen’s Ret. Sys.*, 399 *N.J.Super.* 51, 59, 942 A.2d 870 (App.Div.2008); see *Francois v. Bd. of Trs.*, 415 *N.J.Super.* 335, 353–54 (App.Div.2010). In *Sellers*, a thirty-eight-year old was hired as a firefighter under the mistaken belief that credit for prior service would exempt him from the prohibitions in *N.J.S.A.* 43:16A–3, *N.J.A.C.* 17:4–2.5, and elsewhere against hiring and enrolling in the PFRS any officer over thirty-five-years old. *Sellers, supra*, 399 *N.J.Super.* at 52–55, 942 A.2d 870. We noted the difficulties arising from the “overlapping responsibility between municipalities and the Board,” and that municipalities “make hiring decisions based upon their understanding of the pension law, which may be the result of reasonable mistake based on past confusion.” *Id.* at 60–61, 942 A.2d 870. We held “that the Board does have equitable powers to allow [the employee] enrollment in PFRS” and remanded for the Board “to determine whether the facts warrant application of equitable principles.” *Id.* at 53, 63, 942 A.2d 870.

These equitable principles may be applicable in this case. As in *Kyer*, Vogel was employed in a regular position even though a necessary step to become a permanent employee had not been satisfied. While *Kyer* served for a substantially longer period, Vogel’s employer actually appointed him to a regular position. Moreover, as in *Sellers*, Vogel’s employer enrolled him in the PFRS as the result of its reasonable misunderstanding of the pension law.

*10 Thus, the resolution of Vogel’s two factual allegations and other unanswered factual questions is crucial to the application of such equitable principles. Vogel alleges he was injured in the course of his PTC training in September 2006 and unable to complete it, but the Cleary Memo suggests his failure to complete the training was attributable to preexisting injury, inability, or unwillingness. Although the Cleary Letter states that Vogel was to attend the training in March 2007, our record is silent as to why he did not attend. Vogel alleges he was prevented from completing the required training in

September 2007 or thereafter due to his allegedly disabling injury in August 2007. If all of these factual issues are resolved in Vogel's favor, he may have a claim under equitable principles that he failed to complete the training not through his own fault but that of his employer, and he may deserve "a remedy or, at least, a remedial opportunity." [Kyer, supra, 315 N.J.Super. at 527, 719 A.2d 184.](#)

Accordingly, "[w]e remand in order for the Board to make these findings and to determine whether the facts warrant application of equitable principles here." [Sellers, supra, 399 N.J.Super. at 63, 942 A.2d 870.](#) Because those factual findings could require credibility assessments, the Board may refer the matter again for hearing before the Office of Administrative Law. The parties are free to enter into additional stipulations to narrow the factual issues, provided that they are actual stipulations of fact and not merely stipulations identifying the parties' competing allegations.

"[T]he Board does have the authority to apply equitable principles to provide a remedy when justice so demands, provided the power is used rarely and sparingly, and does no harm to the overall pension scheme." [Id. at 62, 942 A.2d 870.](#)

[T]he Board must carefully balance the relevant public and private interests. It should look at the equities from [the employee's] point of view, considering whether

the government failed to "turn square corners" with him, whether he acted in good faith and reasonably, the degree of harm he will sustain if the [training] requirement is strictly enforced, and other factors that go to the fairness of applying the [training] restriction to him.... The Board must then consider the purposes of the [training] restrictions from the perspective of the [juvenile corrections officer] position and the pension system and determine whether or to what extent those purposes will be thwarted if relief is provided to [the employee.]

[[Id. at 62–63, 942 A.2d 870.](#)]

In assessing this balance, the Board shall consider the " "potential adverse impact on the financial integrity" of the pension fund." " [Francois, supra, 415 N.J.Super. at 349–50, 357](#) (citations omitted); [Smith, supra, 390 N.J.Super. at 212–13, 215, 915 A.2d 48.](#)

Accordingly, we remand to the Board for further proceedings.⁹ We do not retain jurisdiction.

All Citations

Not Reported in A.3d, 2015 WL 3495916

Footnotes

- ¹ The parties also stipulated to "facts" that are nothing more than the contentions of the parties (e.g., "Vogel has alleged"). Such stipulations fail to establish any underlying facts, and so we treat them as contentions and address them separately.
- ² The Board noted the exceptions filed by Vogel. It was not required to discuss them further. *Compare N.J.A.C. 17:4-18.4 with 17:4-18.6.*
- ³ *N.J.S.A. 52:17B-67* defines "Law enforcement unit" as an organization which has "the responsibility of detecting crime and enforcing the general criminal laws of this State." That section, unlike the PFRS legislation, does not expressly include those "whose primary duties include the ... detention of persons." [N.J.S.A. 43:16A-1\(2\)\(a\)](#). However, the Juvenile Justice Act provides that person appointed as juvenile corrections officers are considered " 'policemen' within the meaning of [[N.J.S.A. 43:16A-1](#)] and members of the [PFRS] established pursuant to [[N.J.S.A. 43:16A-2](#)]." [N.J.S.A. 52:17B-174\(a\)](#).
- ⁴ The additions to and deletions from the prior regulations are detailed in *40 N.J.R. 4678(a)* (Aug. 18, 2008).
- ⁵ These definitions now appear in [N.J.A.C. 17:4-1A.1](#).

- ⁶ According to the Board, "Vogel was appointed to the position of Correction Officer Recruit on September 2, 2006," which appears to be a regular appointment. See *N.J.A.C. 4A:3-3.7B*; 42 *N.J.R.* 9(a) (Jan. 4, 2010).
- ⁷ We find the Board's proposal a more thorough and compelling interpretation of the PFRS statutes and regulations than the Board's current position in its brief that the PFRS statutes were clear. In any event, we are " 'in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue.' " *Richardson v. Bd. of Trs.*, 192 *N.J.* 189, 196, 927 *A.2d* 543 (2007) (citation omitted).
- ⁸ *N.J.S.A. 17:4-2.4(a)(7)* was deleted in 2011 "as the timeframe for police officers to have completed the PTC was from January 1, 2009 until July 1, 2010." 43 *N.J.R.* 1177(a) (May 2, 2011). We consider it here because it was in force during the pertinent period.
- ⁹ Vogel asserts that if he is found to be ineligible for the PFRS, his case should be referred to the Public Employee's Retirement System. Nothing in our opinion forecloses Vogel from making that argument to the Board on remand.

STATE TROOPERS FRATERNAL
ASSOCIATION OF NEW JERSEY;

Appellants-Petitioners,

v.

STATE OF NEW JERSEY; GURBIR S.
GREWAL, in his capacity as ATTORNEY
GENERAL; COLONEL PATRICK J.
CALLAHAN, in his capacity as
SUPERINTENDENT of the DIVISION OF
STATE POLIC; and the DIVISIONO F
STATE POLICE;

Defendants/Respondents.

SUPERIOR COURT OF NEW
JERSEY
APPELLATE DIVISION
DOCKET NO.: A-003950-19

Civil Action

LEAVE TO APPEAL SOUGHT
FROM:
ADMINISTRATIVE ACTIONS OF
THE ATTORNEY GENERAL

*On Appeal from the June 15,
2020, and June 19, 2020 Final
Administrative Actions of
the Attorney General*

**INTERVENORS' BRIEF IN SUPPORT OF A PERMANENT INJUNCTION
ENJOINING ENFORCEMENT OF ATTORNEY GENERAL ADMINISTRATIVE
EXECUTIVE DIRECTIVE NO. 2020-6**

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PRELIMINARY STATEMENT

Two non-profit New Jersey State Trooper ("Trooper") advocacy groups, the Association of Former New Jersey State Troopers Association ("FTA") and the N.J. Former Troopers Heritage Foundation, Inc. (the "Heritage Foundation"), and two members of the FTA (all collectively referred to as the "FTA Intervenors") have intervened in this Appeal to underscore the irrationality and illegality of government compelled disclosure of confidential, personal, identifiable information spanning the past 20 years under the moniker of "misconduct" and to highlight the irreparable damage this will likely cause to private citizens who have retired from state law enforcement, their families, and their financial security.

This Appeal has a limited focus, and the Court should reject the attempts of Respondents and certain *amici curiae* to turn this proceeding into a debate forum on police reform, black lives matter, and public transparency. While those are all worthy causes meriting deliberation and the weighing of competing societal interests, discussion about them needs to be generated from and by our legislative branch of government. The legislature could decide, for example, to amend the statutory Trooper misconduct disclosure obligations set forth at N.J.S.A. 53:1-10.1 or expand the exemptions from non-disclosure of

government employee personnel records set forth at N.J.S.A. 47:1A-10.

This Appeal addresses solely whether the New Jersey Attorney General ("NJAG") - not the legislature - has the authority to mandate the retroactive disclosure of twenty years of various forms of Trooper discipline and require that the names of the disciplined Troopers be appended to the synopses of the transgressions without providing any process for input by or on behalf of the named individuals, and whether such disclosure under those conditions would be manifestly unjust. Some of the individuals to be named are private citizens, having retired from Trooper service, and may or may not be alive. The FTA Intervenors represent their specific interests in this Appeal.

Heightened court scrutiny is merited because the NJAG issued its administrative edict with no formal rulemaking process, outside the purview of the Administrative Procedure Act, N.J.S.A. 52:14B-1, et seq. (the "NJAPA") and devoid of any input from those to be impacted. The retroactive dictate also runs contrary to the public policy of the State by creating two worlds of purported police transparency: one for State law enforcement officers and the other for local law enforcement officers.

An examination of the limits of the NJAG's authority, and his decision to apply these new Trooper misconduct disclosure

rules retroactively, demonstrates that he has exceeded that authority and that manifest injustice would result. Accordingly the Court should permanently enjoin the enforcement of Directive 2020-6.

PROCEDURAL HISTORY

The FTA Intervenors adopt the recitation of the procedural history presented by the Appellants-Petitioners, other than to note that the Court granted the FTA Intervenors motion to intervene in a related appeal on July 21, 2020 (Ia9) and, after the five related appeals had been consolidated, in this Appeal on July 29, 2020. (Ia11). Jurisdiction is proper pursuant to R. 2:2-3(a)(2).

STATEMENT OF FACTS

The FTA Intervenors adopt the recitation of facts presented by the Appellants-Petitioners. Attorney General Law Enforcement Directive No. 2020-5, dated June 15, 2020, is referred to as "Directive 2020-5" (Ia1) and Attorney General Administrative Executive Directive No. 2020-6, dated June 19, 2020, is referred to as "Directive 2020-6." (Ia6). (Directive 2020-5 and Directive 2020-6 are collectively referred to as the "Directives").

LEGAL ARGUMENT

I. RETROACTIVE APPLICATION OF THE NJAG'S NEW DISCLOSURE RULES IS NOT AUTHORIZED AND WOULD BE MANIFESTLY UNJUST

A. The Attorney General and the Limits of His Rulemaking Authority

The NJAG is an unelected State official, "nominated and appointed by the Governor with the advice and consent of the Senate." NJ Constitution, Art. V, Section IV, paragraph 3. The NJAG is "head of the Department of Law and Public Safety" (N.J.S.A. 52:17B-2). Within that department is the "Division of State Police" (N.J.S.A. 52:17B-3), which is the division that employs Troopers. The NJAG is statutorily authorized "to formulate and adopt rules and regulations for the efficient conduct of the work and general administration of the department, its officers and employees." N.J.S.A. 52:17B-4d. In connection with addressing "organized crime" it is "the public policy of this State to encourage cooperation among law enforcement officers and to provide for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State." N.J.S.A. 52:17B-98.

When the NJAG issues directives under this authority, that rulemaking is not subject to the protections provided for in the NJAPA. See O'Shea v. Twp. of W. Milford, 410 NJSuper. 371, 383,

982 A.2d 459, 466 (App. Div. 2009).¹ In contrast, rulemaking by the head of the Division of the State Police is. See In re Carberry, 114 NJ 574, 578, 556 A.2d 314 (1989) (the "Division satisfies the definition of 'state agency' under the Administrative Procedure Act, N.J.S.A. 52:14B-2(a)"). Protection against wayward NJAG rulemaking therefore is solely provided by the courts. See R. 2:2-3(a)(2). NJAG rulemaking cannot run roughshod over any constitutional, statutory, or common law provisions or principles and is subject to review using ordinary judicial principles with no Chevron² like deference afforded the rulemaker. See Doe v. Poritz, 142 NJ 1, 662 A.2d 367 (1995); see also Christensen v. Harris Cty., 529 US 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 1087 (2000) (executive branch "policy statements, agency manuals, and enforcement guidelines" are not entitled to Chevron deference because they

¹ The court so held in Doe v. Poritz, 142 NJ 1, 96-99, 662 A.2d 367 (1995) under a six factor test "applied when determining whether an agency action constitutes rulemaking which must conform to the requirements of the Administrative Procedure Act." Id. at 96. Because the NJAG's guidelines at issue in Doe differ from the Directives, and because the present context also differs, the FTA Intervenors join in any argument that the Directives should be subject to the NJAPA (particularly because they constitute a material and significant change from a clear, past agency position on the identical subject matter) based upon the Doe six factor test. If it is found that the issuance of Directives is subject to the NJAPA, then for that independent reason the Court should grant the requested relief.

² Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

are not the product of "formal adjudication or notice-and-comment rulemaking.").³

B. Directive 2020-05 Is A Marked Departure From The Status Quo

By requiring the naming of names Directive 2020-05 represents a marked departure from the status quo. The red-lined text of changes to the NJAG's *Internal Affairs Policy & Procedures* (the "IAPP") in Directive 2020-5 amply displays the substantive nature of the changes:

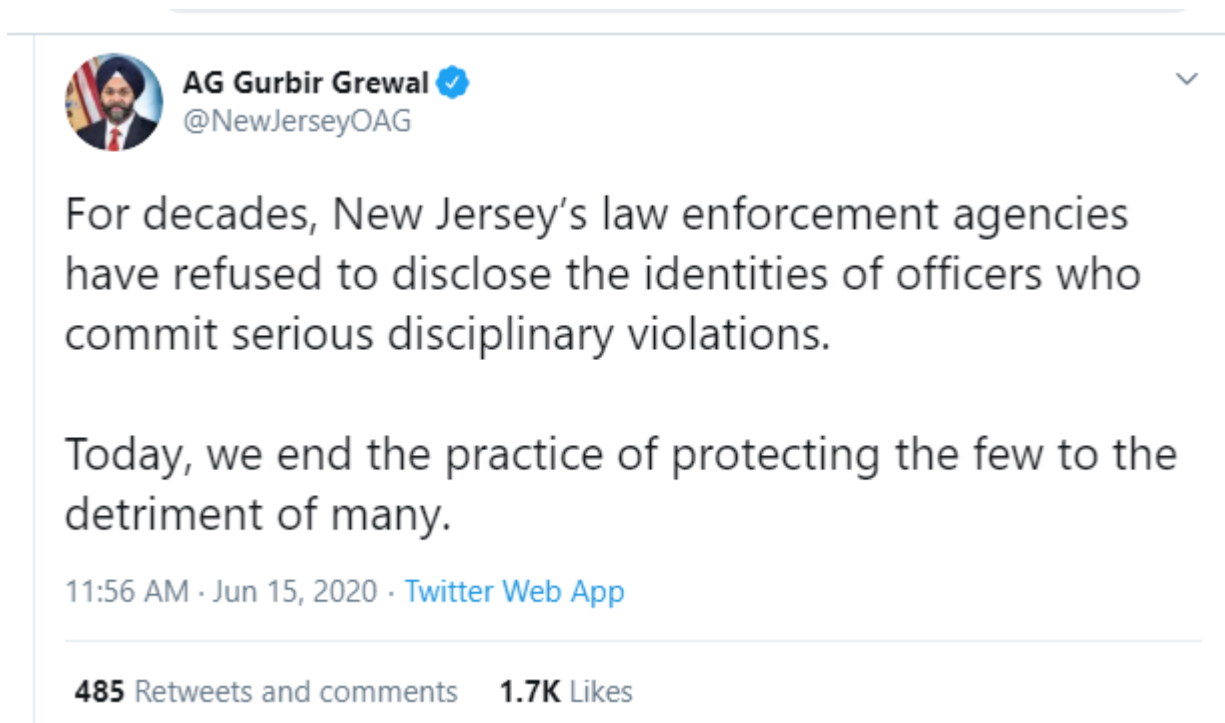
9.11.1 On an annual basis, every law enforcement agency shall publish on its public website a report summarizing the types of complaints received and the dispositions of those complaints. This report ~~can~~ should be statistical in nature, ~~and the names of complainants and subject officers shall not be published.~~

9.11.2 On a periodic basis, and at least once a year, every agency shall submit to the County Prosecutor and publish on the agency's public website a brief synopsis of all complaints where a ~~fine or~~ termination, reduction in rank or grade, and/or suspension of ~~ten days or~~ more than five days was assessed to an agency member. This synopsis shall include the

³ In other contexts our courts have found that NJAG administrative adjudicative determinations are to be reviewed more deferentially. See Prado v. State, 186 NJ 413, 895 A.2d 1154 (2006). In Prado, the affected party had an opportunity to have input into the administrative process and, as the court carefully noted, had "an additional opportunity in another forum" to prosecute his interest, a crucial "counterweight to the administrative deference accorded to the Attorney General's duty-to-defend decision." Id. at n.8. The Directives present none of those factors.

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 officers~~ or complainants, ~~but should briefly outline the nature of the transgression and the fine or suspension imposed.~~ An example of a synopsis is found in Appendix U.

(Ia4). No doubt was cast on how significant a departure it was from the status quo when the NJAG trumpeted the policy change on Twitter:



C. Directive 2020-6's Retroactivity Makes Its Enforceability Suspect As A Matter of Law.

The Attorney General in Directive 2020-06 elected to apply the Directive 2020-05 disclosure rules retroactively to some members of the State policing community, including retired

Troopers. (Ia6). ("the Division of State Police, the Division of Criminal Justice, and the Juvenile Justice Commission shall each publish . . . a brief synopsis of all complaints where a termination, reduction in rank or grade, and/or suspension of more than five days was assessed . . . since January 1, 2000"). The Attorney General issued this directive only days after noting in Directive 2020-5 "[t]o be clear, today's Directive applies prospectively." (Ia7). The upshot of this demarcation is that the names of local law enforcement officers will not be compelled to be disclosed for misconduct occurring prior to 2020 (N.J.S.A. 40A:14-181) whereas the names of state law enforcement officers - including retired officers - will be disclosed for misconduct dating back to 2000.

The judiciary has long guarded against the unjust retroactive application of law in a variety of contexts. With respect to judicial rulings that depart from established law, "the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective" to avoid "prejudice [to] those who might have relied on [the state of the law prior to the ruling]." Linkletter v. Walker, 381 U.S. 618, 627-28, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) (citation omitted). Our courts have implemented this "accepted rule" via a three part construct for assessing the interest of justice: "(1) the purpose of the rule and whether it would be furthered

by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice." State v. Nash, 64 NJ 464, 471, 317 A.2d 689 (1974).

Retroactive application of statutes, while also long disfavored by the judiciary⁴, necessitates a different assessment because a deliberative body has made a conscious choice, and each member of the body is subject to electoral recall. Even so, retroactive legislation remains subject to a stricter form of constitutional scrutiny than ordinary legislation. See Bowen v. Georgetown University Hospital, 488 U.S. 204, 223-24, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) (dissent, J. Scalia). "The preference for prospective application of new legislation" and the corollary presumption against retroactive application, "is based on our long-held notions of fairness and due process.'" James v. NJ Mfrs. Ins. Co., 216 NJ 552, 563, 83 A.3d 70, 77 (2014) (citation omitted). New Jersey courts apply a two-part test to determine whether to apply legislation retroactively: did the legislature clearly intend retroactive application, and,

⁴ See Society for the Propagation of the Gospel v. Wheeler, 22 Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156) (Story, J.) ("Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective").

if so, "whether retroactive application of that statute will result in either an unconstitutional interference with 'vested rights' or a 'manifest injustice.'" Phillips v. Curiale, 128 NJ 608, 617, 608 A.2d 895 (1992) (citations omitted); see also NJ Div. of Youth & Family Servs. v. MR, 314 NJSuper. 390, 415, 715 A.2d 308 (App. Div. 1998) (even if no "manifest injustice" arises, retroactive application of a statute is warranted only if: "the legislative intent expressly or impliedly states that the change is retroactive; the amendment is ameliorative or curative in nature, and was added in order to better carry out the intent of the original statute; or it is necessary to fulfill the parties' reasonable expectations.").

Administrative rulemaking that departs from prior rules bears more of a resemblance to judicial decision-making because of the lack of a direct democratic check on the administrator. "To be sure, retroactive application of an administrative rule is not favored." Citizens for Equity v. New Jersey Dept. of Environmental Protection, 252 NJSuper. 62, 76, 599 A.2d 516 (App.Div.1990), aff'd, 126 NJ 391, 599 A.2d 507 (1991). That is so because "[p]ersons subject to regulation are entitled to something more than a general declaration of statutory purpose to guide their conduct before they are restricted or penalized by an agency for what it then decides was wrong from its hindsight conception of what the public interest requires in the

particular situation." Boller Beverages, Inc. v. Davis, 38 NJ 138, 152, 183 A.2d 64 (1962); see also Delaware Re. Est. Com'n v. Patterson-Schwartz & As. Inc., Del.Supr., 344 A.2d 242, 245 (1975) (adopting the principles of Boller and finding that "retroactive rule-making . . . 'suffers from serious due process deficiencies' and is constitutionally impermissible.").

When reviewing the attempts of non-elected public officials to regulate retroactively, the first line of inquiry is whether the legislature has clearly authorized the administrator to create retroactive rules. Bowen v. Georgetown University Hospital, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988); In re Failure by the Dep't of Banking & Ins., 336 NJ Super. 253, 268, 764 A.2d 494, 502 (App. Div. 2001) ("the prime test for determining whether a regulation should be applied retroactively is the intent of the Legislature"); accord Kingsley v. Hawthorne Fabrics, Inc., 41 NJ 521, 528, 197 A.2d 673 (1964) ("An administrative agency may not under the guise of interpretation . . . give the statute any greater effect than its language allows"). If such statutory authority exists, the next line of inquiry is whether such rulemaking has not violated the interests of justice as expressed in State v. Nash. See, e.g., Vogel v. Board of Trustees, Police and Firemen's Retirement System, 2015 WL3495916 (App. Div. June 4, 2015)(unpublished) (declining to

undertake second line of inquiry where the statute did not authorize retroactive rulemaking).

D. Directive 2020-6 Is Ultra Vires and Manifestly Unjust

In Bowen, supra, the U.S. Supreme Court invalidated a retroactive regulation because the "statutory provisions establishing the Secretary's general rulemaking power contain no express authorization of retroactive rulemaking." 488 U.S. at 213. The court drew that conclusion even though the statute at issue deputized the administrator to adopt regulations to "provide for the making of suitable retroactive corrective adjustments." Id. at 209.

An examination of the NJAG's statutory authority yields the same conclusion. N.J.S.A. 52:17B-4d is a statement of general authorization, imbuing the NJAG with the power "to formulate and adopt rules and regulations for the efficient conduct of the work and general administration of the department, its officers and employees." No reference is made to applying those rules and regulations other than prospectively, and the conclusion that Directive 2020-6 is ultra vires is far easier to make than the one made by the court in Bowen.⁵

⁵ The other statutory provision, N.J.S.A. 52:17B-98, cited by the NJAG to support his authority to issue Directive 2020-6 (Ia6) is limited to addressing "organized crime" and states only that it is "the public policy of this State to encourage cooperation among law enforcement officers and to provide for the general supervision of criminal justice by the Attorney General as chief

Even if the Court finds that the NJAG has the authority to regulate retroactively in general, for the multiple reasons set forth in the briefs of the Appellants-Petitioners, as adopted by the FTA Intervenors⁶, the retroactive application of Directive 2020-6 would be manifestly unjust. Intervenors in particular emphasize the irreparable harm that would be thrust upon retired Troopers as private citizens with no countervailing rational basis for the State to do so. (Ia14; Ia17). In highly apropos words, the court in State v. Knight, 145 NJ 233, 678 A.2d 642 (1996), explained that, because the first Nash factor is often of "pivotal consideration,"

if the newly announced rule is . . . intended solely to discourage police misconduct, then the rule's purpose would not be served by applying the rule to conduct occurring before the rule was announced.

Id. at 251. Yet this is exactly the justification proffered by the NJAG: "Releasing the identities of those who committed major

law enforcement officer of the State." Such legislative milquetoast can hardly be the fodder for overriding a strong presumption against having the authority to regulate retroactively.

⁶ The FTA Intervenors depart from the Appellants-Petitioners on only one ground: that the Court should take into consideration that the Directives may violate the New Jersey Public Employer-Employee Relations Act, N.J.S.A. 34:13A-5.1 et seq. Because no unfair practice charge has been filed with NJ Public Employment Relations Commission, the issue is not appropriately before the Court. See N.J.S.A. 34:13A-5.4(c); see also City of Hackensack v. Winner, 82 NJ 1, 26 (1980); Galloway Twp. Bd. of Educ. v. Galloway Twp. Ass'n of Educ. Secretaries, 78 NJ 1, 8 n.2 (1978).

disciplinary infractions will show that all the remaining officers did not commit such an infraction." (Ia7). There is no rational basis for the NJAG to attempt to deter retired Troopers from committing major disciplinary infractions at a time when they are no longer providing law enforcement services to the State. Indeed some targeted individuals are no longer alive.

E. Even When Advancing The Proper Administration Of Law Enforcement And Public Accountability The Attorney General Has Previously Applied Its Directives Only Prospectively

In conscious regard for the injustice that can be caused by retroactive rulemaking, the NJAG has previously exercised its directive making authority prospectively. See, e.g., Attorney General Law Enforcement Directive No. 2018-1 (Feb. 26, 2018) (release of deadly force recordings); Attorney General's Law Enforcement Drug Testing Policy, Revised April 2018 at p.3 (available at www.nj.gov/oag/dcj/njpdresources/pdfs/Drug-Test-Policy_2018-05.pdf) ("Random drug testing cannot be implemented until the rule, regulation or procedure has been in effect for a minimum of 60 days."); Attorney General, Law Enforcement Drug Screening Guidelines, Memorandum, Oct. 22, 1986 (cited in In re Carberry, 114 NJ 574, 582, 556 A.2d 314 (1989) ("The Attorney General did not direct that the Law Enforcement Drug Screening Guidelines (Guidelines) apply retroactively"))).

It bears worth noting that these policies of the NJAG all pertained to the proper administration of law enforcement and public accountability - yet in no instance did the NJAG retroactively apply its new rules.

The New Jersey legislature has acted in accord with this concern as evidenced by the fact that its prior legislation expanding the scope and applicability of the NJAG's IAPP applied only prospectively. See, e.g., L.2015, c.52, §1, eff. Sep. 1, 2015; see also Ruff v. Rutgers, the State Univ. of New Jersey, 2018 WL6518105 (App. Div. June 20, 2019) (unpublished) (noting that the litigations had offered "no precedent making the [expansion of the IAPP] requirement [in L.2015] retroactive"). The same may be said of the judiciary. See State v. Brimage, 153 NJ 1, 26, 706 A.2d 1096 (1998) (applying new NJAG Guidelines only prospectively).

F. The NJAG Tries To Turn On Its Head The Accepted Balance Between the Reasonable Privacy Interests of Troopers And The Interests of Public Transparency

The NJAG presented his decision to issue Directive 2020-6 as premised on two grounds: to "allow for public scrutiny" and to "improve the culture of accountability." (Ia6). As noted supra, a policy prescription deterring conduct in order to improve accountability makes no sense when the conduct has already occurred. See State v. Knight, supra. Public scrutiny,

the remaining ground, also cannot withstand scrutiny when assessed by the traditional tools used to balance public transparency with the reasonable privacy interests of individuals.

Courts in other jurisdictions have repeatedly found that legislatures have acted rationally and constitutionally when retroactively imposing new safeguards against the disclosure of certain confidential governmental information. See Deal v. Coleman, 294 Ga. 170, 751 SE2d 337, 348-49 (2013)(collecting cases). These decisions rest on the unexceptional principle that the privacy expectation interests of the individuals involved outweigh the public's right to know, thereby justifying the retroactive application of safeguards. Our courts adhere to this principle. See, e.g., Burnett v. County of Bergen, 198 NJ 408, 968 A.2d 1151 (2009) (finding privacy interests outweighed public transparency interests under the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 et seq.); New York Public Radio v. Office of the Governor, 2016 WL3693949 (App. Div. July 13, 2016) (unpublished) (shielding from disclosure information provided to the State by State employees when the information had been provided "with the understanding that [it] will remain private").

The NJAG, however, seeks to turn this principal on its head, disregarding privacy interests and trumpeting only the amorphous goal of public transparency.

II. DIRECTIVE 2020-6 CONTRADICTS NEW JERSEY STATUTORY POLICY

In addition to the multitude of reasons set forth in Appellants-Petitioners' briefs that Directive 2020-6 must be enjoined because its enforcement would result in manifest injustice, Directive 2020-6 should be enjoined for the independent reason that it contradicts New Jersey policy. The legislature declared in N.J.S.A. 52:17B-98 that it is "the public policy of this State" to authorize the NJAG to take certain actions "in order to secure the benefits of a **uniform** and efficient enforcement of the criminal law and the **administration of criminal justice throughout the State.**" (Emphasis supplied.)

The Directives establish one set of rules for active local enforcement officers and another set for active and retired State law enforcement officers. Such a dichotomy cannot be reconciled with the policy of the State expressed in N.J.S.A. 52:17B-98, and the NJAG made no effort in Directive 2020-6 to support the dichotomy. If, as the NJAG has represented, both directives were authorized by the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 et seq., and if, as the NJAG has represented, both directives were driven by the public's "right to know," then there can be no rationale for treating different sets of law

enforcement officers differently. Because "an agency may not, through adoption of regulations, . . . frustrate the policy embodied in the statute," Reilly v. AAA Mid-Atl. Ins. Co., 194 NJ 474, 485 (2008) (citation omitted), the Court should grant the requested relief for this independent reason.

CONCLUSION

For the foregoing reasons, the FTA Intervenors respectfully request that the Court permanently enjoin enforcement of Directive 2020-6.

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Before Appellate Division,
Superior Court of New Jersey
DOCKET NO. **A-003950-19**

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STATE TROOPERS FRATERNAL
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V.
STATE OF NEW JERSEY; GURBIR
S. GREWAL, IN HIS CAPACITY

PROOF OF SERVICE

I hereby certify that an original of the following documents, **SUPPLEMENTAL APPENDIX (Vol. 1), INTERVENORS BRIEF, PROOF OF SERVICE** were submitted and transmitted to the parties listed below in the following format:

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I certify that the forgoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

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Dated: **08/05/2020**

By: **S/ ANTHONY M RAINONE, Esq.**