STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY, Plaintiff, vs. 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.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION DOCKET NO.: MER-L- CIVIL ACTION

PLAINTIFF'S BRIEF IN SUPPORT OF ORDER TO SHOW CAUSE SEEKING INJUNCTIVE RELIEF

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PRELIMINARY STATEMENT

This is an action for a declaratory relief and a preliminary injunction brought by the State Troopers Fraternal Association ("STFA") against the State of New Jersey ("State"), Attorney General Gurbir S. Grewal ("Attorney General"), Colonel Patrick J. Callahan, Acting Superintendent of the New Jersey State Police ("Superintendent") and the New Jersey Division of State Police ("NJSP")seeking to temporarily enjoin the enforcement of two Directives issued by the Attorney General.

Attorney General Law Enforcement Directive No. 2020-5 ("Directive 2020-5"), amends the Attorney General Guidelines on Internal Affairs Policy and Procedure ("IAPP") originally issued by the Attorney General in 1991 and recently updated in 2019. Directive 2020-5 requires law enforcement agencies to publish the names of law enforcement officers who received major discipline defined as a suspension of more than five days, a demotion or termination and a synopsis of the discipline and sanctions imposed. Directive 2020-5 applies to all law enforcement agencies under the jurisdiction of the Attorney General.

Attorney General Administrative Executive Directive No. 2020-6 ("Directive 2006-6") applies to the NJSP, Division of Criminal Justice ("DCJ") and the Juvenile Justice Commission ("JJC"). Directive 2020-6 compels the NJSP, DCJ and JJC to

publish the names of law enforcement officers who received major discipline defined as a suspension of more than five days, a demotion or termination in the last 20 years and to issue a synopsis of the discipline and sanctions imposed. This is to be done by July 15, 2020.

The STFA brings the action for temporary restraints because Directive 2020-5 and 2020-6 violate various provisions of the State Constitution, State law, and the Public Policy of the State.

STATEMENT OF FACTS

1. The STFA.

The STFA is a labor organization and the exclusive representative of all Trooper, Trooper I, Trooper II, Detective, Detective I, and Detective II in the Division of State Police. (VC ¶4)[1]. The STFA has approximately 1500 members. Id.

The STFA and the State of New Jersey have been parties to successive collective negotiations agreements. (VC ¶12). The current agreement has a term of July 1, 2019 through June 30, 2023. Id. Article XXVI "Complete Agreement" Section B of the Contract between the STFA and the State sets forth the State's obligation to continue honoring past practices of the parties:

> The State agrees that all mandatorily negotiable benefits, terms and conditions of

[1] References to "VC ¶ __" is to the Verified Complaint filed in this action.

> employment relating to the status of Troopers of the Division of State Police covered by this Agreement shall be maintained at standards existing at the time of the agreement.

Id.

2. Attorney General Law Enforcement Directive No. 2020-5.

On June 15, 2020, the Attorney General issued Directive 2020-5 entitled "Directive Requiring Public Disclosure of the Identities of Officers Who Commit Serious Disciplinary Violations". (VC ¶20, Exh. A). Directive 2020-5 amends the IAPP and requires all law enforcement agencies under the authority of the Attorney General to publish the names of all sworn law enforcement personnel who have been suspended for more than 5 days or who have been demoted or terminated along with a description of the circumstances that led to the discipline. Directive 2020-5 requires the affected agencies to comply with it no later than December 31, 2020 with a 12-month look-back from the date of the initial report with "prospective" application. (VC ¶¶21, 23, Exh. A). Directive 2020-5 amends the IAPP and its effective date is August 31, 2020. (VC ¶23, Exh. A)

Notwithstanding the December 31, 2020 compliance date and the 12-month look-back, according to the Attorney General the NJSP has decided to issue the names of Troopers who are covered by Directive 2020-5 on or before July 15, 2020 with a 20-year look-back. (VC ¶24, Exh. A). In Directive 2020-5, the Attorney

General made it clear that the Superintendent of the NJSP, Colonel Patrick Callahan, is acting voluntarily and that Colonel Callahan "intends to update" previously published annual disciplinary reports issued from 2000 to the present which summarized incidents of major discipline to include the names of the disciplined Troopers. Id.

A June 15, 2020 News Release on the Attorney General website states in relevant part:

> Since 2000, NJSP has imposed major discipline in approximately 430 cases. This includes dozens of State Troopers who received suspensions of more than 180 days, as well as State Troopers whose employment was terminated as a result of their misconduct. The identities of these State Troopers will be published no later than July 15, 2020. Prior to publication, each of the individuals whose names will be revealed will receive notice in writing.

(VC ¶25, Exh. B)

3. **Attorney General Administrative Executive Directive 2020-6.**

On June 19, 2020, the Attorney General issued Directive 2020-6 to compliment Directive 2020-5. (VC ¶26, Exh. C). Directive 2020-6 only applies to law enforcement Troopers in the NJSP and law enforcement officers in the DCJ and JJC. (VC ¶27, Exh. C). Directive 2020-6, which does not amend the IAPP, did make several changes to Directive 2020-5 as it relates to the above-named law enforcement units. Id.

First, it mandated that the NJSP, DCJ and JJC publish on its public website a brief synopsis of all sustained discipline that resulted in a suspension of more than 5 days, a demotion or termination. Id. Second, it mandated that the release go back 20 years. Id. Third, it mandated that the synopsis disclose the identity of the officers. Id. Lastly, Directive 2020-6 indicated that for appeal purposes that it "is a final agency action under Rule 2.2-3(a)(2) of the New Jersey Rules of Court." Id.

Directive 2020-6 also states that at least seven days prior to the publication of the synopsis and their names, active and former officers will be notified. (VC ¶28, Exh. C.) To date, upon information and belief, none of the current or former Troopers who will be identified have received notification from the relevant divisions. Id.

4. **New Jersey State Trooper Discipline**

Troopers[2] are required pursuant to N.J.S.A. 53:1-8 and 1-8.1, to successfully complete re-enlistment evaluation processes at the end of 2 years and 4 years of service. (VC ¶15). A Trooper will not be granted tenure in office until after the completion of 5 years of service in good standing. Id.

[2] The STFA uses the terms "current Trooper," "former Trooper" and "STFA member" interchangeably in this brief.

According to the NJSP's Office of Professional Standard ("OPS") "Annual Report of Discipline", there are three types of disciplinary proceedings in the NJSP: (1) Minor Discipline which may result in a suspension of up to 5 days; (2) Summary Disciplinary Hearing which may result in a suspension of up to 30 days; and (3) General Disciplinary Hearing which may result in a suspension of 30 days and up to termination, and/or a reduction in rank and/or grade. (VC ¶16).

When a Trooper is disciplined, he is served with the Disciplinary Charges and Specifications. (VC ¶17). The Trooper also receives and signs for discovery which is clearly labeled "Confidential". Id. A member of the OPS directs the Trooper that the discovery is for only him or his STFA representative and his attorney and that it is not to be shared with any third party. Id.

During the process, the Trooper is usually advised by OPS that there are avenues available to resolve the Disciplinary matter. (VC ¶18). The Trooper and the NJSP can enter a Voluntary Negotiated Plea Agreement and is advised that agreement will remain strictly confidential and recorded in the Trooper's Discipline/Personnel File and would not be released to the public. Id. It is explained very clearly that if the matter is not adjusted within the NJSP the matter would be transmitted to

the Office of Administrative Law for a Hearing. From that point forward the matter is made public. Id.

The guarantee of confidentiality has caused many Troopers in the STFA unit to enter into settlement agreements with the NJSP. (VC ¶19). That guarantee of confidentiality is also mandated by the current IAPP. Id.

The violations that can lead to Major Discipline in the NJSP is vast. (VC ¶16). The NJSP, as does Directives 2020-5 and 2020-6, defines Major Discipline by the penalty and not the nature of the underlying circumstances that caused the discipline to be issued. (VC, Exhs. A and C).

5. **Irreparable Harm**

It is fair to assume that many of the soon to be named Troopers are retired and may even be deceased. Directive 2020-5 and Directive 2020-6 will cause immediate and irreparable harm to these impacted Troopers, former Troopers, and to the membership of the STFA.

For every individual Trooper and former Trooper identified there is the strong likelihood that when their names are published it will be relatively easy to determine where they live and work. (VC ¶29). It will unnecessarily impact their families who may have not been involved in the underlying disciplinary matter. Id. It could also unveil the identity of a victim or alleged victim of domestic violence. Id.

There exists a very real concern that the safety of these current or former Troopers and their families would be placed at risk by the action of the NJSP's Superintendent. (VC ¶30). Recently the public has learned the name of a Trooper involved in a fatal incident with a motorist on May 23, 2020 on the Garden State Parkway. (VC ¶31). Since the release of his name and videos of the incident by the Attorney General, the Trooper and his family have been targeted for attack and his family's home has been vandalized, specifically the word "Murderer" and the acronym "ACAB" [All Cops Are Bastards] were chalked on his driveway. Id. There is a real concern amongst the STFA membership both current and former that the release of the names of these previously unnamed Troopers and retired Troopers will cause them to be subject to the same criminal conduct or worse. (VC ¶32).

In addition, there are concerns that the identities of witnesses and victims will be easily discovered. (VC ¶33). For example if a Trooper was allegedly involved in a matter at home with a family member or spouse that did not result in a Domestic Violence Temporary Restraining Order and that Trooper was charged with a rules and regulations violation of bringing discredit to the NJSP, it will not be difficult at all to determine identity of that Trooper's spouse or family members

when his name is published along with the disciplinary synopsis. Id.

Similarly if a Trooper in return for confidentiality resolved disciplinary charges for a suspension of more than 5 days for an alcohol related incident, the disclosure of his name will result in the potential for public shaming or interference with that Trooper's performance of his duties for something that might have occurred while off duty more than a decade ago. (VC ¶34).

There is also concern that subsequent to such an event, the Trooper may have sought medical treatment for a condition or dependency and that the release of this information could release the confidential and privileged nature of medical treatment to the public. Id. Releasing this information may also deter Troopers who do have an alcohol dependency from voluntarily coming forward or from seeking treatment. Id.

The Attorney General, until issuing Directive 2020-5 and Directive 2020-6, has made repeated public comments regarding his concern for the safety and well-being of law enforcement officers. (VC ¶35). He has gone to great lengths to assure both law enforcement and the public that his concern was genuine when he issued his Attorney General Law Enforcement Directive No. 2019-1 ("Directive 2019-1") on August 6, 2019, "Directive Promoting Law Enforcement Resiliency" which reads in part:

> The men and women of law enforcement put their lives on the line every day to protect the citizens of New Jersey. They also typically operate in a state of hypervigilance while on duty. The emotional and mental toll of this work can build over time and contribute to a range of health issues, including increased blood pressure, heart disease, diabetes, substance misuse, family and relationship stress, self-harm, and risk of suicide. "Resiliency" is defined as the ability to overcome adversity, and the New Jersey Resiliency Program for Law Enforcement (NJRP-LE) is designed to do just that. This Directive recognizes that protecting an officer's mental health is just as important as guarding their physical safety and strives to create a supportive culture for law enforcement officers, their families, and friends, as well as the broader New Jersey community.

Id.

Notwithstanding his prior proclamations and Directive 2019-1 which was designed to safeguard law enforcement officers, the impact of Directive 2020-5 and 2020-6 will have the immediate effect of harming them, their families and friends, and the community broadly. (VC ¶36).

The NJSP has also publicly expressed a serious concern for the harm to Troopers and the disciplinary process to emphasize why the confidentiality in a Trooper's identity must be maintained. (VC ¶44, Exh. D). In a Certification in a lawsuit against the NJSP, Major John Baldosaro who at that time was the commanding officer of the OPS, strongly set forth the reasons

why the identities of Troopers should not be revealed. Referring to the publication of the Annual Disciplinary Reports he stated:

> Although they do provide a substantial amount of information about complaints and investigations resulting in discipline- they purposely do not disclose names or other information that could identify the persons involved, or similar case-specific information that would compromise the integrity of individual investigations or expose the subjects or witnesses in individual investigations to unwarranted, targeted attention.

(VC ¶44, Exh. D).

Major Baldosaro certified further:

> The identities of the subjects, complainants, and other witnesses in an internal investigation and even basic details such as dates and locations … are all capable of associating specific individuals with acts, events, and circumstances that at best are highly embarrassing, and at worst implicate highly sensitive and personal matters … in other investigations where the allegations are substantiated, they originated from the reporting of private citizens or other NJSP members who, undisputedly, did so with the understanding that their identities would remain protected and disclosed only among those involved in the investigation.
>
> * * *
>
> Even dates, locations, and similar details could, if revealed, suffice to expose a witness or the complainant or subject of the investigation to public identification. These may not be enough to identify those individuals to anyone and everyone who views it, … but when produced publicly … these become available for any persons who would

> have an ability to identify … such persons include those with incentives to embarrass, harass, threaten, or cause harm to the individuals involved in the investigation. Once the information is publicly released, it cannot later be taken back.

Id.

As to the need to keep the Troopers names confidential, Major Baldosaro stated:

> ...I also firmly believe that maintaining the integrity of the NJSP's operations includes protection the identities of any members subject to internal investigations. I submit that the reasons for the non-disclosure implicate not just the privacy interests of individual NJSP members, but also the collective trust that internal investigations will be handled with the necessary levels of sensitivity and confidentiality.
>
> * * *
>
> In some cases – as was the case here with "Trooper Doe" – the subject agrees to accept culpability to some or all of the charges brought against him or her, and thereby waives his or her right to formal administrative proceedings on the charges. Not bringing the matter to a public forum would under current practice and policies protect the subject trooper's identity from public disclosure. While this fact undoubtedly is an incentive for some troopers to agree to cooperate and openly admit culpability to the charges, it also benefits the investigating unit by not having to expend as many resources to conclude an investigation yet still bring about a favorable outcome – the appropriate discipline of a trooper who admittedly committed misconduct.

Id.

Major Baldosaro concluded:

> ...It is my opinion, based on my professional experience and training, that producing the name, date of separation and an additional details into the reasons for his separation, requested by the Plaintiff – or similar internal investigative records – would be contrary to longstanding law enforcement practices and policy and would jeopardize the safety of numerous individuals and the success of current and future internal investigations.

The Active Troopers whose names are released will also be negatively impacted in the performance of their duties by this disclosure which in turn will have a negative impact upon public safety. (VC ¶37). Troopers are trained to act in a community-caretaking role and provide a wide range of social services outside of their traditional law enforcement and criminal investigatory duties. Id. In approximately 90 municipalities statewide the NJSP provides primary patrol responsibility, which effectively makes STFA unit members "small town cops" for those municipalities. Id. In these communities Trooper are recognizable to many residents by face and or name. Identifying them in the discipline synopsis can lead to irreparable harm to the Trooper and the public. Id. In a dire situation which requires the need for emergent action to save or preserve life a resident may choose to delay or prevent the Trooper from entering her home because she learned that the Trooper had a

prior suspension. Id. Perhaps they will choose instead to wait for the next available Trooper, who could be miles away. Id.

6. **Trooper Expectation of Privacy**

Many Troopers resolved their disciplinary matters through a negotiated Voluntary Plea Agreement specifically to prevent disclosure of their names to the public. (VC ¶38). The negotiated Voluntary Plea Agreement/ Negotiated Voluntary Resolution- General Disciplinary Matter that is signed by the Trooper, an STFA representative, and representatives of the NJSP contain the words "CONFIDENTIAL PERSONNEL RECORD" on the forms signed by all of the parties and representatives. (VC ¶¶38, 47, Ex. E). The Trooper is never advised that the confidentiality and binding finality of the voluntary resolution of discipline would ever be disclosed to the public. Id.

It is the expectation of confidentiality that has motivated many Troopers to pursue negotiated pleas of discipline that have always remained confidential. Id.

Those Troopers who have entered into negotiated Voluntary Plea Agreements since 2000 should now be permitted to vacate and re-open those disciplinary matters as the assurance of confidentiality and finality that were a material component of the Plea Agreement no longer exists. (VC ¶39)

ARGUMENT

STANDARD FOR GRANTING PRELIMNARY INJUNCTIVE RELIEF

To obtain temporary injunctive relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982). Further, the public interest must not be injured by the temporary injunctive relief order and the relative hardship to the parties in granting or denying relief must be considered. Id.

A claim for temporary injunctive relief is designed to preserve the status quo and need not meet the heightened standard designed for other forms of injunctive relief. Waste Management of New Jersey, Inc., v. Union County Util.'s Auth, 399 N.J. Super. 508 (App. Div. 2008). Rather "so long as there is some merit to the claim, a court may consider the extent to which the movant would be irreparably injured in the absence of *pendente lite* relief, and compare that potential harm to the relative hardship to be suffered by the opponent if an injunction preserving the status quo were to be entered. If these factors strongly favor injunctive relief, the status quo may be preserved even though the claim on the merits is uncertain or attended with difficulties." Id. at 535.

As set forth below and in the Certification of STFA President Wayne Blanchard, the STFA has met this burden and its request for temporary injunctive relief must be granted.

DECLARATORY JUDGMENT

The Declaratory Judgments Act, N.J.S.A. 2A:16-51 et seq., authorizes courts to declare rights, status, and other legal relations to afford litigants relief from uncertainty and insecurity. Chamber of Commerce v. State, 89 N.J. 131, 140 (1982). To maintain such an action, there must be a "justiciable controversy" between adverse parties, and plaintiff must have an interest in the suit. Id.

These two requirements are satisfied. First, the STFA has a significant interest in this lawsuit. The STFA is the exclusive representative for the Troopers and former Troopers impacted by Directive 2020-5 and 2020-6 and have a statutory obligation to protect their rights. Second, as set forth in the STFA's Verified Complaint and more fully below, by issuing the Directive 2020-5 and Directive 2020-6, the Attorney General and NJSP have created a justiciable controversy between them and the STFA. Therefore, this Court must declare that Directive 2020-5 and Directive 2020-6 are contrary to law and public policy and the rights of the STFA and its members and former members and must be preliminarily enjoined from being enforced.

POINT ONE

THE STFA HAS A SUBSTANTIAL LIKELIHOOD OF PREVAILING IN A FINAL DECISION ON ITS LEGAL AND FACTUAL ALLEGATIONS.

A. The Attorney General's Directive Violates N.J.A.C. 13:1E-3.2(a)(4) and Executive Order 11 Issued by Governor Byrne.

N.J.A.C. 13:1E-3.2(a)(4) provides:

> 4. Records, specific to an individual employee or employees — other than those records enumerated in N.J.S.A. 47:1A-10 as available for public access — and relating to or which form the basis of discipline, discharge, promotion, transfer, employee performance, employee evaluation, or other related activities, whether open, closed, or inactive, except for the final agency determination.

The only exception to this Administrative Code prohibition is records that must be disclosed pursuant to N.J.S.A. 47:1A-10. However, the identities of disciplined Troopers are not a government record required to be disclosed by N.J.S.A. 47:1A-1.1, and 10.

N.J.S.A. 47:1A-10 provides:

> [T]he personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for access.

The statute lists three exemptions, including subsection (a) which states:

> [A]n individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record.

N.J.S.A. 47:1A-10(a).

The personnel exemption has been consistently interpreted as providing a broad protection against disclosure with only minor exceptions. See Kovalcik v. Somerset Cty. Prosecutor's Office, 206 N. J. 581, 592 (2011)(noting that the exemption "begins with a presumption of non-disclosure and proceeds with a few narrow exceptions"); see also Libertarians for Transparent Gov't v. State Police, 2019 W.L. 2172890 at pp. 3-4 (App. Div.), *certif. granted*, 239 N.J. 518 (2019)(Disclosure of a Trooper's name pursuant to the personnel exemption in Section 10 would violate both the letter and spirit of the exemption itself).[3] When interpreting the personnel exemption, "courts have tended to favor the protection of employee confidentiality". " McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 615 (App. Div. 2010).[4]

[3] A copy of the Appellate Division's decision is attached hereto as Exhibit A.

[4] The STFA recognizes that Internal Affairs records are distinct from personnel records. See Rivera v. Union County Prosecutor's Office, et al. Docket No. A-2573-19T3 at 14 (App. Div. June 19, 2020 (Copy attached as Exhibit B). However, under the IAPP, when a law enforcement officer pleads guilty to the charged offenses or waives a hearing, the [c]onclusions of fact and the penalty imposed will be noted in the officer's personnel file after he or she has been given an opportunity to read and sign it." See IAPP, Section 6.3.12 (2019). This is exactly the type of information that is contained in a Trooper's personnel file and that Directive 2020-5 and Directive 2020-6 have ordered released. Moreover, the personnel records exemption is not limited to items contained in an employee's personnel file. McGee, 416 N.J. at Super. At 616.

The information that the Attorney General has directed the NJSP to release is the very type of information that N.J.S.A. 47:1A-10 shields from public release. It does not fall within the personnel exemption set forth in N.J.S.A. 47:1A-10 (a). To allow the release of a Trooper's identity attached to a description of a sustained disciplinary action would violate the letter and spirit of the exemption itself and would render it null and void.

Moreover, N.J.S.A. 47:1A-10 explicitly exempts "records relating to any grievance filed by or against an individual." To disclose the identity of Troopers in disciplinary matters brought against them would immediately connect them to grievances brought against them. Since the NJSP has already publicly disclosed the substantiated allegations against Troopers and the discipline imposed, to publicly expose their identities would reveal information expressly protected by section 10, and therefore must not be disclosed. Id.

Lastly, N.J.S.A. 47:1A-1 "recognizes that records may be exempt from public access based upon authorities "other than the exemptions enumerated within the OPRA". See North Jersey Media Group v. Bergen County Prosecutor's Office, 447 N. J. Super. 182, 201-02 (App. Div. 2016). "N.J.S.A. 47:1A-9 codifies the

Legislatures unambiguous intent that OPRA not abrogate or erode existing exemptions to public access." Id. at 202. This includes Executive Orders of the Governor. N.J.S.A. 47:1A-9 (2020).

Pursuant to N.J.S.A. 52:14B-2, "statements concerning the internal management or discipline of any agency" are not "Agency Rules" or "Rules." Directive 2020-5 was issued by the Attorney General pursuant to his authority to supervise criminal justice in the State. Directive 2020-6 was issued pursuant to the Attorney General's authority to supervise criminal justice in the State and his general responsibility over the Department of Law and Public Safety and the supervision and organization of the Department. Thus, neither Directive is an "Administrative Rule" or "Rule" of a State Agency and therefore to be valid they must be authorized by statute.

While the Attorney General states that he has the authority to issue these directives pursuant to his general supervisory authority over criminal justice and the Department of Law and Public Safety granted by the New Jersey Constitution and the Law and Public Safety Act of 1948, N.J.S.A. 52:17B-1, *et seq.*, he is not authorized to issue Directives that violate the law. O'Shea v. Township of Milford, 410 N.J. Super 371, 385 (App. Div. 2009) (Administrative actions, including those stated in or imported

to duly promulgated rules and regulations, cannot override a legislative enactment such as OPRA).

The Attorney General's Directive 2020-5 and 2020-6 violate N.J.S.A. 47:1A-1, 9 and 10 and N.J.A.C. 13:1E-3.2(a)(4) and the Division must be temporarily enjoined from implementing it[5].

B. **Attorney General Directive 2020-5 and Directive 2020-6 Violate the Doctrine of Promissory Estoppel.**

To establish a prima facie case of promissory estoppel, a party must demonstrate the following: (1) a clear and definite promise by the promisor; (2) the promise must be made with the expectation that the promisee will rely thereon; (3) the promisee must in fact reasonably rely on the promise, and (4) detriment of a definite and substantial nature must be incurred in reliance on the promise. Pop's Cones, Inc. v. Resorts Intern. Hotel, Inc., 307 N.J. Super. 461, 469 (App. Div. 1998); Malaker Corp. Stockholders Protective Committee v. First Jersey Nat. Bank, 163 N.J. Super. 463, 479 (App. Div. 1978). The essential justification for the promissory estoppel doctrine is to avoid the substantial hardship or injustice which would result if such a promise were not enforced. Malaker, 163 NJ Super. at 484.

[5]On November 15, 1972, Governor Byrne issued Executive Order No. 11 which sets forth the same prohibitions as N.J.S.A. 47:1A-10[5] and is still in effect. As such it cannot be abrogated by a Directive of the Attorney General. See e.g., O'Shea, 410 N.J. Super. at 385.

In this case, the NJSP made clear and definite promises to Troopers who reached negotiated plea agreements to resolve disciplinary charges that they would be confidential and not subject to public disclosure. Each of those plea agreements are stamped confidential. These Troopers relied on the confidentiality of the plea agreement when they elected to plead guilty to charges and accept a penalty.

This was confirmed by Major Baldosaro when he certified "that at OPS the trooper is assured that if he enters into a Negotiated Voluntary Plea Agreement that their matter would end and that it would be Final, Binding and most importantly Confidential as the matter was not transmitted to the Office of Administrative Law for a Hearing."

To now allow the NJSP to release the names of current and former Troopers who relied on this confidentiality will unleash a parade of horribles upon these troopers and former Troopers. For every individual Trooper and former Trooper identified there is the strong likelihood that publishing their names will make it relatively easy to determine where they live and work which in turn could expose their families to public scrutiny despite not being involved in the underlying disciplinary matter. It could also unveil the identity of a victim or alleged victim of domestic violence.

There also exists a very real concern that the safety of these current or former Troopers and their families would be placed at risk if their names are released. Such a concern was recently realized when the identity of a Trooper involved in a fatal incident with a motorist on the Garden State Parkway on the morning of May 23, 2020 on the Garden State Parkway. Since the release of his name and videos of the incident by the Attorney General, the Trooper and his family have been targeted for attack and his family's home has been vandalized, specifically the word "Murderer" and the acronym "ACAB" [All Cops Are Bastards] were chalked on his driveway.

Similarly if a Trooper in return for confidentiality resolved disciplinary charges for a suspension of more than 5 days for operating a vehicle while under the influence of alcohol the disclosure of his name will result in the potential for public shaming or interference with that Troopers performance of his duties for something that might have occurred more than a decade ago. There is also concern that the Trooper may have sought medical treatment for dependency and that the public release of his name could expose the confidential and privileged nature of medical treatment. Releasing this information may also deter Troopers who do have an alcohol dependency from voluntarily coming forward or from seeking treatment.

The ability of Active Troopers to perform their duties will also be impacted in the performance of their duties which in turn will have a negative impact upon public safety. Troopers are trained to act in a community-caretaking role and provide a wide range of social services outside of their traditional law enforcement and criminal investigatory duties. In approximately 90 municipalities statewide the NJSP provides primary patrol responsibility, which effectively makes STFA unit members "small town cops" for those municipalities. In these communities Trooper are recognizable to many residents by face and or name. Identifying them in the discipline synopsis can lead to irreparable harm to the Trooper and public. For example, imagine there is a dire situation requiring emergent action to save or preserve life and a resident chooses to delay or prevent the Trooper from entering her home and rendering service because she learned that the Trooper a prior suspension. Perhaps they will choose instead to wait for the next available Trooper who could be miles away.

Attorney General Directive 2020-5 and Directive 2020-6 abrogate the confidentiality of the negotiated plea agreements between Trooper and the NJSP. They should be temporarily enjoined from being implemented pending the outcome of a full hearing on this matter.

C. **Attorney General Directive 2020-5 and Directive 2020-6 Violate Article I, ¶19 of the State Constitution.**

Article I, ¶19 of the New Jersey Constitution states: "[p]ersons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their choosing."

The New Jersey Supreme Court, in Lullo v. Int'l Ass'n of Fire Fighters, Local 1066, 55 N.J. 409 (1970), held that the purpose of the general language of Article I, ¶19 was to "secure to employees collectively in the various employer divisions and agencies of government to the right to get together-to organize-and to select representatives to present their proposals and grievances." Id. at 420. Exclusive representation is the cornerstone of labor relations in New Jersey. Darrigo v. New Jersey State Board of Mediation, 119 N.J. 74 (1990), Lullo, 55 N.J. at 409.

This right is codified in the New Jersey Public Employer-Employee Relations Act, N.J.S.A. 34:13A-5.1, *et seq.*, which sets forth a public employer's duty to negotiate before changing existing working conditions:

> Proposed new rules or modifications of

> existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect grievances, disciplinary disputes, and other terms and conditions of employment.

N.J.S.A. 34:13A-5.3.

Article XXVI "Complete Agreement" Section B of the Contract between the STFA and the State sets forth the State's obligation to continue honoring past practices of the parties:

> The State agrees that all mandatorily negotiable benefits, terms and conditions of employment relating to the status of Troopers of the Division of State Police covered by this Agreement shall be maintained at standards existing at the time of the agreement.

For at least 20 years, the practice within the NJSP has been to preserve as confidential, the identity of Troopers who have entered into confidential plea agreements. The NJSP's and Attorney General's intent to unilaterally publicly release the names of STFA unit members who have received more than five suspension days in the prior twenty years on or before July 15, 2020 as provided for in Directive 2020-5 and Directive 2020-6 is a blatant repudiation of this duly negotiated provision of the parties' contract.

Attorney General Directive 2020-5 and Directive 2020-6

strips the STFA of its right to present and make known to the State its proposals to maintain the confidentiality of the identity of its members whose names will be released in conjunction with their discipline. Maintaining the confidentiality of police personnel records, including records relating to the imposition of discipline upon police officers is a mandatory subject of negotiations. In the Matter of Borough of Hopatcong, PERC No. 91-60, 17 NJPER 62 (1990); see also In the Matter of Borough of Montvale, PERC No. 99-9, 24 NJPER ¶ 29193 (1998) ("confidentiality assurances are mandatorily negotiable because they preclude disclosure of information to members of the public . . . .").

To allow Attorney General Directive 2020-5 and Directive 2020-6 to be implemented unilaterally will fundamentally interfere with the right of the STFA to negotiate as required by Article I, ¶19 of the New Jersey Constitution and N.J.S.A. 34:13A-5.3. Thus, the STFA's request for a preliminary injunction must be granted.

D. Attorney General Directive 2020-5 and Directive 2020-6 Violate Article 4, Section 7 of the State Constitution.

To determine the validity of a contract impairment claim brought under Article 4, Section 7 of the State Constitution the Court must first examine whether (1) a contractual right exists,

(2) whether a change in state law results in the substantial impairment of a contractual relationship and (3) whether the impairment nevertheless is reasonable and necessary to serve an important public purpose. Berg v. Christie, 225 N.J. 245, 259 (2016); N.J.S.A. Const. Art. 4, § 7, par. 3.

There is no dispute in this case that the STFA and the State are parties to a binding collective negotiations agreement or contract. Article XXVI "Complete Agreement" Section B of the Contract between the STFA and the State sets forth the State's obligation to continue honoring past practices of the parties:

> The State agrees that all mandatorily negotiable benefits, terms and conditions of employment relating to the status of Troopers of the Division of State Police covered by this Agreement shall be maintained at standards existing at the time of the agreement.

For at least 20 years, the practice within the NJSP has been to preserve as confidential, the identity of Troopers who have entered confidential plea agreements. Attorney General Directive 2020-5 as complimented by Directive 2020-6 which orders the NJSP to unilaterally release to the public the names of members who have been terminated, demoted or who have received more than five suspension days in the prior twenty years on or before July 15, 2020 is a blatant repudiation of this duly negotiated provision of the parties' contract.

In addition, Directive 2020-5 and Directive 2020-6 impairs the contractual rights of Troopers who entered into confidential plea agreements with the NJSP. Many of the STFA unit members whose names will be released signed binding contractual agreements with the NJSP, accepted discipline, and chose not to pursue appeals based upon the NJSP's binding agreement to keep the Trooper's identity confidential. Attorney General Directive 2020-5 as complimented by Directive 2020-6 ordering the NJSP to release Troopers' names deprives them of the benefit of the bargain that they received in the contractual agreement to resolve their disciplinary action.

The rationale asserted by the Attorney General for ordering the NJSP to release the names of Troopers who have received certain disciplinary penalties does not justify the significant impairment of the contract between the STFA and State. In addition, it does not justify the substantial impairment of the contracts between the many STFA unit members who entered into confidential plea agreements only for them to now be eviscerated. Thus, to avoid this Constitutional violation, the Court must grant the STFA's request for temporary restraints pending the outcome of a full hearing.

E. Directive 2020-5 and Directive 2020-6 Violate the Due Process Rights of the Affected Troopers and Former Troopers.

Article I, paragraph 1 of the New Jersey Constitution does not enumerate the right to due process, but protects against injustice and, to that extent, protects "values like those encompassed by the principle of due process." Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985).

1. Procedural Due Process

In examining a procedural due process claim, the Court will first assess whether a liberty or property interest has been interfered with by the State, and second, whether the procedures attendant upon that deprivation are constitutionally sufficient. Doe v. Poritz, 142 N.J. 1, 99 (1985).

While the State Constitution does not specifically enumerate the right to protect one's reputation, our Courts have found a protectible interests in reputation in Article I, paragraph 1 of the Constitution. Poritz, 142 N.J. at 104. "The right of a person to be secure in his reputation ... is a part of the right of enjoying life and pursuing and obtaining safety and happiness which is guaranteed by our fundamental law." Neafie v. Hoboken Printing & Publishing Co., 75 N.J.L. 564, 567, 68 A. 146 (E. & A.1907). A protectible interest in reputation is established without requiring any other tangible loss. Poritz, 142 N.J. at 104.

Attorney General Directive 2020-05 and Directive 2020-6 both implicate a fundamental right of current and former Troopers whose names will be publicly released to protect their reputations. The release of their names will forever connect them to prior disciplinary actions and the sullying of their reputations. The harm that can result to their reputations is not speculative and indeed has been acknowledged by the NJSP (in the Certification of Major Baldosaro:

> I also firmly believe that maintaining the integrity of the NJSP's operations includes protection the identities of any members subject to internal investigations. I submit that the reasons for the non-disclosure implicate not just the privacy interests of individual NJSP members, but also the collective trust that internal investigations will be handled with the necessary levels of sensitivity and confidentiality.

Once it is determined that due process applies, the question remains what process is due. Nicoletta v. North Jersey Dist. Water Supply Comm., 77 N.J.145, 165(1978). "Fundamentally, [procedural] due process requires an opportunity to be heard at a meaningful time and in a meaningful manner. The minimum requirements of due process, therefore, are notice and the opportunity to be heard." N.J. Parole Bd. v. Byrne, 93 N.J. 192, 208(1983); Avant v. Clifford, 67 N.J. 496, 525(1975).

Attorney General Directive 2020-05 does not require any notice to the impacted current and former Troopers whose names

will be made public in connection with prior disciplinary actions. It does not indicate what if any right to review the synopsis of discipline and penalty to determine if they are accurate before revealing their identities. It also fails to provide any right to be heard prior to the release of their identities.

While Directive 2020-6 requires the NJSP to provide at least seven days' notice to current Troopers "when possible" and to "make reasonable efforts" to notify former Troopers, that does not satisfy the NJSP's and Attorney General's obligation to provide procedural due process. Like Directive 2020-5, Directive 2020-6 does not provide the right to review the synopsis of discipline and penalty to determine if they are accurate before revealing a current or former Trooper's identity. It also fails to provide any right to be heard prior to the release of their identities.

Directive 2020-5 and Directive 2020-6 implicate the right of current and former Troopers to protect their reputations. Neither Directive 2020-5 or 2020-6 provides any procedural due process which mandates that these current and former Troopers receive notice nor is there any right for them to be heard prior to the release of their names. Accordingly, Directive 2020-5 and Directive 2020-6 do not provide the process that is due and therefore the STFA's request for a preliminary injunction must

be granted.

2. **Substantive Due Process – Deprivation of Privacy Rights**

Article I, Section 1 of the New Jersey State Constitution also encompasses the right to privacy. Right to Choose v. Byrne, 91 N.J. 287, 303 (1982). The Supreme Court has found a right to privacy in many contexts, including the disclosure of confidential or personal information. Hennessey v. Coastal Eagle Point Oil Co., 128 N.J. 81, 96 (1992).

When analyzing an allegation that government action has deprived an individual his right to privacy under the State Constitution, the courts balance the government's need for information and the individual's right of confidentiality. In re Martin, 90 N.J. 295, 318 (1982). "Even if the governmental purpose is legitimate and substantial...the invasion of the fundamental right of privacy must be minimized by utilizing the narrowest means which can be designed to achieve the public purpose." Lehrhaupt v. Flynn, 140 N.J. Super. 250, 262 (App. Div. 1976).

Here, Attorney General Directive 2020-5 and 2020-6 infringe on the privacy rights of current and former STFA members. Those members who signed confidentiality agreements concerning discipline had a reasonable expectation of privacy based on those agreements. They also had every right to rely on the

representation that the agreements would remain confidential. The current scheme, whereby the circumstances of the discipline are released, but not the names, struck an acceptable balance between the public purpose and the rights of the employees.

The Attorney General Directive 2020-5 and Directive 2020-6 destroy this balance. They do not even consider the nature of the discipline, which could possibly be relevant to the Attorney General's stated goals, when deciding which names are to be released. Rather in deciding which names will be released, Directive 2020-5 and 2020-6 look only to the penalty, which could be for a very minor offense and not related to the Attorney General's stated goals. For example, a Trooper could have received an insubordination charge 15 years ago for having an argument with his boss over issues that are solely internal to the NJSP and the discipline and the Trooper's name will now be made public.

Troopers that have long since retired will have their names, along with their discipline, publicly released. This serves no public purpose, as these retirees may no longer be working in law enforcement. Even assuming they get a job in law enforcement, the new agency will usually require the Trooper applicant to sign a release for his discipline and internal affairs records as part of his background investigation.

Directive 2020-5 and Directive 2020-6 impermissibly infringe on these retirees right to privacy, especially if they signed confidentiality agreements with the assurance that their names would not be publicly disclosed.

Current STFA members that have had discipline resolved subject to a confidentiality agreement also have a privacy interest in their disciplinary records. As set forth above, these individuals accepted discipline with the assurance that it would remain confidential. Releasing their names despite these confidentiality agreements similarly strikes an inappropriate balance and violates the New Jersey Constitution's right to privacy.

Directive 2020-5 and Directive 2020-6 requiring the disclosure of the names of those Troopers and retired Troopers with long-resolved disciplinary issues is a violation of their right to privacy. Accordingly, a temporary injunction must issue.

F. The Attorney General Directive Violates the Equal Protection Guarantees of the State Constitution.

While the phrase "equal protection" does not appear in the New Jersey Constitution, Article I, ¶1, "like the fourteenth amendment, seeks to protect against injustices and against unequal treatment of those who should be treated alike." Barone v. Dep't of Human Services., 107 N.J. 355, 367 (1987).

When evaluating an equal protection claim under the New Jersey Constitution, the Court must "weigh the nature of the restraint or the denial against the apparent public justification and decide whether the State's action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial." Sojourner A. v. Dep't of Human Servs., 177 N.J. 318, 333 (2003). The review is limited to a determination as to whether all persons within a class reasonably selected are treated alike and whether the classification involved rests upon some ground or difference having a real and substantial relation to the basic object of the particular enactment or on some relevant consideration of public policy. Raybestos-Manhattan v. Glaser, 144 N.J. Super. 152, 174 (Ch. Div. 1976).

The classification covered by Directive 2020-5 is all sworn law enforcement personnel who work for agencies under the authority of the Attorney General. Despite the classification, Directive 2020-6 arbitrarily distinguishes between members of this class. Unlike municipal and county law enforcement officers whose employers are only required to issue the identities of disciplined officers going back 12-months from the date of the report, the NJSP has been required to release the identities of Troopers who meet the disciplinary criteria in

last 20 years. Also, Directive 2020-6 requires the NJSP to release this information by July 15, 2020 while municipal and county law enforcement agencies must do so by December 31, 2020.

Directive 2020-6's application to different classification of law enforcement officers is not reasonably related to the State's purported objective of providing transparency in the disciplinary process to the public. There is no rational basis for attaching names to 20-years of disciplinary actions. Indeed, the Attorney General has admitted that some of the impacted Troopers may be long separated from employment. He tries to justify releasing their names by claiming without offering any proof that many of the separated Troopers continue in law enforcement positions and their disciplinary history must be made known to future employers. Even if this is so, given the rigorous background examinations that are conducted on applicants for law enforcement positions, it would be very unlikely that this information would not be made available to a prospective employer.

By singling out current and former Troopers for disparate treatment without a rational basis, Directive 2020-6 denies them the equal protection guaranteed by the State Constitution and the STFA's request for a preliminary injunction must be granted.

POINT TWO

THE STFA AND ITS CURRENT AND FORMER MEMBERS WILL BE IRREPERABLY HARMED IF THE STFA'S REQUEST FOR PRELIMRAY INJUNCTIVE RELIEF IS DENIED.

Current and former STFA members will suffer immediate and irreparable harm if injunctive relief is not granted. Harm is generally considered irreparable if it cannot be redressed by monetary damages. Crowe, 90 N.J. at 132-33. Here, once the names of those disciplined over the last twenty (20) years are disclosed, the NJSP cannot unring the bell. Current and former STFA members whose names and disciplinary histories are released have a legitimate and reasonable fear for the safety of both themselves and their families. In addition, their will be irreparable harm to the reputations of current and retired STFA members. Further, current and former STFA members will be irreparably harmed as the disclosure of names and disciplinary histories can easily lead to discovery of confidential medical information or information related to domestic violence. Current and former STFA members will undoubtedly suffer irreparable harm if injunctive relief is not granted. Accordingly, the STFA has met this element of the analysis.

Recent events have shown that the safety of current and former Troopers and their families will be jeopardized if names are released. "Reasonable fear of a threat to one's safety, or the safety of one's family, is, by definition, irreparable

harm." TEVA Pharmaceuticals USA, Inc. v. Stop Huntingdon Animal Cruelty USA, 2005 WL 1010454, at 8 (N.J. Super. Ct. Ch. Div. 2005).[6] Once the names of Troopers and former Troopers are disclosed, a quick internet search will reveal where they live and work. Major Baldosaro, the former commanding officer of OPS acknowledged this inherent safety issue in a certification advocating *against* the release of names on behalf of the NJSP:

> ...It is my opinion, based on my professional experience and training, that producing the name, date of separation and an additional details into the reasons for his separation, requested by the Plaintiff – or similar internal investigative records – would be contrary to longstanding law enforcement practices and policy and would ***jeopardize the safety of numerous individuals*** and the success of current and future internal investigations. (Emphasis added).

The fear current and former Troopers have for themselves and their families is very real. Recently, the name of a Trooper involved in a fatal incident on the Garden State Parkway on May 23, 2020 on the Garden State Parkway. Since the release of his name and videos of the incident by the Attorney General, the Trooper and his family have been targeted for attack and his family's home has been vandalized, specifically the word "Murderer" and the acronym "ACAB" [All Cops Are Bastards] were chalked on his driveway.

[6] A copy of this unpublished decision is attached hereto as Exhibit C.

Current and former STFA members whose names will be disclosed have a real fear for the safety of themselves and their families. Anyone with an issue against a Trooper will be able to determine who they are and where they live. The release of names does not solely impact the Trooper or former Trooper that has been disciplined. It impacts their families as well. There is no guarantee that the next aggrieved individual will stop at chalking a driveway. The threat to Troopers, former Troopers and their families is very real, and constitutes irreparable harm.

STFA members and former members whose names are disclosed will also suffer irreparable harm to their reputations. Any harm to one's reputation constitutes irreparable harm. See e.g., Community Hosp. Group v. More, 365 N.J. Super. 84, 100 (App. Div. 2003). In Cherry v. City of Englewood, 2006 WL 133851, at 4 (N.J. Super. Ch. 2006)[7], the court held that harm to a public health official's reputation resulting from a paid suspension constituted irreparable harm. Id. The court reasoned that a suspension could be viewed by the public as a removal from office. Id. The court stated that this type of harm to an individual's reputation cannot be later cured by monetary damages. Id.

[7] A copy of this unpublished decision is attached hereto as Exhibit D.

The Attorney General and NJSP has made the arbitrary distinction to group all individuals with discipline from termination to a suspension of more than five days together. A Trooper or former Trooper who was suspended for six days for a rule and regulation violation in 2005 (which can be as simple as having an argument with a superior officer leading to a charge of insubordination) will have their discipline aired alongside those former Troopers who were terminated from employment for egregious offenses. The public will not distinguish one from the other and reputations will be irrevocably harmed.

The irreparable harm will extend to the public as well. Many Troopers provide primary patrol responsibilities to approximately 90 municipalities throughout the State. The residents of these municipalities know the Troopers that serve and protect them. Identifying these Troopers in the disciplinary synopsis will destroy their reputations to the public they serve. In a dire situation, this could mean the difference between life and death. A resident who knows that a Trooper has been suspended (without knowing the exculpatory facts) may choose to delay or prevent the Trooper from entering their home despite the need for emergent action. The reputations of Troopers serving as "small town cops" will not survive the disclosure of their names on the disciplinary report.

Further, some Troopers have retired or left the employ of the NJSP and have found other careers. Their reputations will be irreversibly damaged if their names are disclosed for a distant suspension. They will be forced to address potentially decades old disciplinary charges even though they may have signed an agreement guaranteeing that the charges and discipline would remain confidential. The harm to reputation here could result in the loss of employment through no fault of the former Trooper.

Disclosing these names also has much darker consequences. It is an unfortunate fact that some Troopers and former Troopers have been disciplined for allegation of domestic violence. Disclosing the names of these Troopers and former Troopers and a synopsis of their discipline will make it extremely easy to determine the victim of domestic violence. This could, in turn, create a disincentive to report domestic violence, as the victim's identity will be easily identifiable when the disciplinary synopsis is released.

Finally, Troopers and former Troopers disciplinary records may reveal medical issues for which they have sought treatment. The Attorney General, in Directive 2019-1, entitled "Directive Promoting Law Enforcement Resiliency" noted the range of health issues that can result from the mental and emotional toll of police work. "The emotional and mental toll of this work can

build over time and contribute to a range of health issues, including increased blood pressure, heart disease, diabetes, substance misuse, family and relationship stress, self-harm and risk of suicide." There are Troopers that have confidentially resolved disciplinary charges resulting in suspensions of more than five days for alcohol offenses. Generally, receiving this discipline is a wake-up call that results in the Trooper receiving treatment for his or her alcohol issues.

Troopers and former Troopers have a privacy interest in ensuring that their employers do not disclose their medical records. Indeed, information about an employee's health benefits or claims history is not a "government record" subject to OPRA. N.J.S.A. 47:1A-1.1 (2020); Michelson v. Wyatt, 379 N.J. Super. 611, 621 (App. Div. 2005). However, once the names are disclosed along with the disciplinary synopsis, the public will know which Troopers or former Troopers may have undergone treatment for alcohol dependency. As a result, Troopers with alcohol issues are less likely to come forward or seek treatment.

Disclosing the names of Troopers and former Troopers along with the disciplinary synopsis will cause irreparable harm. Troopers and former Troopers will justifiably fear for the safety of themselves and their families. They will suffer harm to their reputations. The identity of the victims of domestic

violence may be disclosed. Medical records may be revealed. All of this will occur although many of these Troopers and former Troopers signed agreements ensuring that the discipline and punishment would remain confidential.

Even Major Baldosaro admits that the keeping Troopers names confidential is better for the NJSP: "[w]hile this fact undoubtedly is an incentive for some Troopers to agree to cooperate and openly admit culpability to the charges, it also benefits the investigating unit by not having to expend as many resources to conclude an investigation yet still bring about a favorable outcome-the appropriate discipline for a Trooper who admittedly committed misconduct."

The STFA can prove that its members will suffer irreparable harm if injunctive relief is not granted. Accordingly, it has met this element of the analysis and the Court must grant the relief requested.

POINT THREE

THE HARDSHIP TO THE STFA WILL OUTWEIGH THE HARDSHIP TO THE NJSP AND THE ATTORNEY GENERAL IF THE STFA'S REQUEST FOR TEMPORARY INJUNCTIVE RELIEF IS DENIED.

The NJSP and the Attorney General will not be harmed by preserving the status quo pending the outcome of a full hearing on the matter.

It must be first pointed out that Directive 2020-6 does not amend the IAPP to eliminate the confidentiality requirements.

Those amendments are implemented by Directive 2020-5 which is effective August 31, 2020. As the IAPP has been recognized to have the "force of law" and "cannot be ignored" when a law enforcement agency conducts an internal affairs investigation, the Attorney General should be required to comply with the guidelines that are currently in effect. See O'Shea, 410 N.J. at Super. 384[8]. Likewise, the Attorney General and the NJSP can hardly complain that they are being harmed from the entry of a preliminary injunction that simply upholds the law that will be in effect at least until August 31, 2020.

As for the changes proposed by Directive 2020-5 and Directive 2020-6, the STFA is only asking this Court to uphold a policy of this State that has been in force for decades until it can rule on the merits of the STFA's complaints.

It has long been recognized that the confidentiality interest supporting non-disclosure of information relating to

[8]Section 1.0.13 of the IAPP states:

> This policy, the procedures set forth in the policy and the legal citations contained in the text are intended for implementation by all State, county, and municipal law enforcement agencies. As made clear in AG Directive 2019-5 (issued concurrently with the publication of this December 2019 version of this policy), all law enforcement and prosecuting agencies operating under the authority of the laws of the State of New Jersey are directed to implement and comply with this policy, and to take any additional measures necessary to update their guidelines consistent with this policy, as required by N.J.S.A 40A:14-181.

internal and criminal investigations of State Police members is significant. See, e.g., State v. Marshall, 148 N.J. 89, 273, cert. denied, Marshall v. New Jersey, 522 U.S. 850 (1997); Loigman v. Kimmelman,102 N.J. 98, 105 (1986); Shuttleworth v. City of Camden, 258 N.J. Super. 573, 585 (App. Div.), cert. denied, 133 N.J. 420 (1992); River Edge Say. & Loan Assn v. Hyland, 165 N.J. Super. 540, 543-45 (App. Div.), cert. denied, 81 N.J. 58 (1979). These confidentiality interests are further supported by the federal and state judicial privileges applied to information from law enforcement investigations. See, e.g., Groark v. Timek, 989 F. Supp. 2d 378, 390 (D.N.J. 2013); G-69 v. Degnan, 130 F.R.D. 326, 332 (D.N.J. 1990); N.J.S.A. 2A:84A-27; N.J.R.E. 515. Moreover, since the IAPP was first implemented in 1991, the identity of law enforcement officers who were targets in the internal affairs process has been confidential for almost 30 years.

Producing the information that Directive 2020-5 and Directive 2020-6 require would link current and former Troopers directly to the internal investigation that led to the reported discipline. To date, those current and former Trooper's identities have not ever been released publicly, a fact consistent with all applicable and long recognized legal authority compelling confidentiality.

There are other compelling policy interests to continue to uphold confidentiality of Troopers involved in the Internal Affairs process.

> Disclosure of a complainant's identity could thwart an IA investigation, criminal investigation, or prosecution, or could disclose the name of an informant, and could taint an officer who was wrongfully accused. It could also discourage complainants from coming forward or encourage unwarranted complaints from people seeking notoriety.

See Fraternal Order of Police Lodge 12 v. Newark, 459 N.J. Super.458, 500 (App. Div.), cert. granted, 240 N.J. 7 (2019). In addition, disclosure of the identity of the subject officers could encourage unwarranted complainants to seek notoriety or target an officer for reasons other than wrongdoing. See Rivera, 2020 WL 3397794 at 8.

The need to preserve confidentiality and the policy reasons behind it was best expressed by Major Baldosaro when he certified:

> Even dates, locations, and similar details could, if revealed, suffice to expose a witness or the complainant or subject of the investigation to public identification. These may not be enough to identify those individuals to anyone and everyone who views it, … but when produced publicly … these become available for any persons who would have an ability to identify … such persons include those with incentives to embarrass, harass, threaten, or cause harm to the individuals involved in the investigation. Once the information is publicly released, it cannot later be taken back.

In issuing Directive 2020-5 the Attorney General supplied the following rationale to eliminate the confidentiality of a current or former Trooper's name:

> 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.

The alleged basis for overturning the long-standing policy surrounding confidentiality of internal affairs records, including the identities of Troopers implementing Directive 2020-5 and 2020-6 does not outweigh the harm that will befall current and former Troopers who have their identities released.

The Attorney General's stated purpose is to notify the public of "serious disciplinary violations" and of Troopers who "breaches the public's trust and dishonors the entire profession." The Attorney General's Directives do not relate the disclosure of the identity of current and former Troopers to the severity of the discipline. Rather, the decision to disclose the identity is solely based on the penalty.

The equities in this matter require the Court to grant injunctive relief. The NJSP and the Attorney General will suffer no hardship if injunctive relief is granted until the matter is heard on the merits. Indeed, the NJSP's OPS has consistently argued that maintaining confidentiality in the disciplinary process is beneficial. Major Baldosaro, the commanding officer of OPS, maintains that confidentiality is necessary. Thus, the NJSP and the Attorney General cannot

plausibly argue that they will suffer any hardship by requiring disclosure of these names before a full hearing.

Troopers and former Troopers, however, will suffer extreme hardship. As set forth above, their safety as well as the safety of their families will be jeopardized. Their reputations will be harmed. Their medical issues may be disclosed. Even worse, if the STFA's request for restraints is not granted, the Troopers and former Troopers that have been harmed will have absolutely no recourse. Their names will have been released. This is a bell that cannot be unrung. The equities in this case clearly favor the STFA in this matter. Accordingly, the Court must grant injunctive relief.

CONCLUSION

For the foregoing reasons, the Court must grant the STFA's request for declaratory and preliminary injunctive relief.

Respectfully submitted,

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Dated: June 25, 2020

Exhibit A

2019 WL 2172890
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

LIBERTARIANS FOR TRANSPARENT GOVERNMENT, a NJ Nonprofit Corporation, Plaintiff-Appellant,

v.

NEW JERSEY STATE POLICE and David Robbins, in his official capacity as Records Custodian for the New Jersey State Police, Defendants-Respondents.

DOCKET NO. A-5675-16T2

|

Argued January 30, 2019

|

Decided May 20, 2019

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-0345-17.

Attorneys and Law Firms

Michael J. Zoller argued the cause for appellant (Pashman Stein, PC, attorneys; CJ Griffin, of counsel and on the brief; Michael J. Zoller, on the brief).

Suzanne M. Davies, Deputy Attorney General, argued the cause for respondents (Gurbir S. Grewal, Attorney General, attorney; Raymond R. Chance, III, Assistant Attorney General, of counsel; Suzanne M. Davies, on the brief).

Before Judges Accurso and Vernoia.

Opinion

PER CURIAM

*1 Plaintiff Libertarians for Transparent Government appeals from a July 20, 2017 order dismissing its complaint under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, to compel the Division of State Police to release the name of a trooper listed in the Office of Professional Standard's 2015 annual report to the Legislature as having been terminated for misconduct. We affirm, essentially for the reasons expressed by Judge Jacobson in her cogent and comprehensive opinion from the bench.

The facts are easily summarized. Since 2000, the Office of Professional Standards within the Division of State Police has produced an annual report to the Legislature entitled "Internal Investigation and Disciplinary Process," providing the public with overviews of the discipline imposed on troopers as a result of substantiated allegations of misconduct over the course of a prior year. Included within the 2015 annual report synopsis of major discipline was this entry:

> Member pled guilty to acting in an unofficial capacity to the discredit of the Division while off-duty by having questionable associations, engaging in racially offensive behavior and publicly discussing police patrol procedures. The member was required to forfeit all accrued time and separate from employment with the Division.

After reviewing the report, plaintiff filed an OPRA request seeking the "name, title, date of separation and reasons therefor," for the member. The Division denied the request on the basis it sought personnel records exempt from disclosure under N.J.S.A. 47:1A-10 (section 10). Specifically, the Division asserted its "internal affairs records are confidential from public disclosure both because they consist of long-recognized privileged information, and, to the extent they describe specific individual employees, are individualized personnel records."

Plaintiff filed a complaint and request for an order to show cause in the Law Division seeking to compel the State Police to reveal the identity of the trooper. Plaintiff noted OPRA's personnel records exemption in section 10 contains an exception for the employee's name, title, date of separation and the reason therefor. It argued the exception was drawn from Governor Byrne's 1974 Executive Order No. 11, which the Supreme Court interpreted as requiring a public agency to disclose "the results" of an investigation in providing "the reasons" for a separation. See S. Jersey Publ'g Co. v. N.J. Expressway Auth., 124 N.J. 478, 496 (1991). Plaintiff noted it sought only the limited information explicitly made available by section 10 and nothing about the investigation or the specifics of the discipline.

The Division sought dismissal of the complaint, arguing section 10 did not mandate disclosure of the trooper's name. Instead, it simply declared an employee's name, title, date of separation and the reason therefor a government record, subject to disclosure only if not otherwise exempt under N.J.S.A. 47:1A-1[1] or N.J.S.A. 47:1A-9.[2] The Division argued plaintiff was not "only" seeking the limited information permitted in section 10's exception to the personnel exemption but, armed with the information in the 2015 annual report, was actually trying to pierce the exemption by linking the trooper to his disciplinary records, which it contended was not permitted under OPRA.

***2** The Division presented a certification from the major in charge of the Division's Office of Professional Standards, explaining the purpose of the annual reports was to explain the disciplinary process in the Division of State Police, and provide statistical information about complaints and factual summaries of all completed investigations resulting in discipline to the Governor, the Legislature and all New Jersey citizens on an annual basis. The major also noted the Attorney General's Office of Law Enforcement Professional Standards, created pursuant to the Law Enforcement Professional Standards Act of 2009, N.J.S.A. 52:17B-222 to -236, and responsible for auditing and monitoring the Division's internal investigations to ensure compliance with all established performance standards, also issues periodic reports to the public about trooper misconduct and the Division's handling of complaints and internal investigations.

The major explained those reports are designed to further the public interest in maintaining a level of transparency into the disciplinary process in order to ensure the integrity of the process and the accountability of law enforcement while also safeguarding core confidentiality interests essential to the functioning of the disciplinary system. The major certified that consistent with the Attorney General's Internal Affairs Policies and Procedures, "[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials" — beyond that included in the public reports — is confidential information released only as permitted by the Attorney General's policies and procedures.

The major averred that "[b]esides being contrary to longstanding practice and policy, ... releasing the contents of internal investigative files pursuant to record requests," could expose a witness, a complainant or member of State police to public identification. He contended

> [m]aintaining integrity and public trust in the [State Police] requires not only keeping its employees, as well as private citizens, confident that they can cooperate and come forth with information without fear of public exposure (or worse consequences), but also keeping all [State Police] members on notice that instances of actual misconduct will not go unchecked due to such fears.

The major further expressed the belief that maintaining the integrity of the Division's internal affairs operations "includes protecting the identities of any members subject to internal investigations," providing an incentive to some troopers to cooperate and admit culpability and others to volunteer information about misconduct. The major expressed the view that public disclosure of "the limited information protected under longstanding State policy and law enforcement best practices" of the type sought would quickly erode "the integrity of the [Division's] internal investigations, and the trust of those who would volunteer information or who would be subject to investigations."

Plaintiff countered by arguing the threat of public exposure would likely deter more misconduct and that the public interest is not served by allowing a trooper to resign in secret following misconduct and go on to employment elsewhere with no disclosure of his or her misdeeds. Plaintiff also argued that no policy of the Attorney General prohibiting disclosure of the names of troopers involved in internal affairs investigations can exempt information that section 10 expressly requires to be disclosed.

Judge Jacobson rejected plaintiff's argument and dismissed its complaint. After laying out the facts and the parties' competing arguments, the judge turned to the statute. She began by noting that OPRA was adopted "to provide the public with insight into the operations of government"; that government records are to be readily accessible, with certain exceptions, and that the statute is to be construed in favor of the public's right of access. See N.J.S.A. 47:1A-1; Mason v. City of Hoboken, 196 N.J. 51, 64 (2008). The judge noted OPRA broadly defines "government records" but also

excludes from that definition twenty-one different categories of information. N.J.S.A. 47:1A-1.1.

*3 Judge Jacobson further noted the exemption for personnel records is not included with the list of the other twenty-one exemptions but is set forth in its own separate section of the statute, denoting the Legislature's significant concern in ensuring the protection of the personnel and pension records of public employees. See N.J.S.A. 47:1A-10; Kovalcik v. Somerset Cty. Prosecutor's Office, 206 N.J. 581, 592 (2011). The judge also noted the language of section 10 which states that "records relating to any grievance filed by or against an individual, shall not be considered a government record," N.J.S.A. 47:1A-10, and the Department of Law and Public Safety's subsequent adoption of N.J.A.C. 13:1E-3.2(a)(4), excluding from the definition of government records subject to access under OPRA,

> 4. Records, specific to an individual employee or employees — other than those records enumerated in N.J.S.A. 47:1A-10 as available for public access — and relating to or which form the basis of discipline, discharge, promotion, transfer, employee performance, employee evaluation, or other related activities, whether open, closed, or inactive, except for the final agency determination.

Acknowledging that section 10 provides an exception for an individual's name, Judge Jacobson noted providing the trooper's name here "would run right up against the real thrust of the personnel exemption to reveal misconduct and discipline" and that "to provide the name would provide the discipline." Observing that plaintiff's policy arguments were focused on the importance of holding law enforcement accountable, the judge noted the Legislature in drafting OPRA "did not make any ... distinction" between law enforcement officials and other public employees.

The judge further noted the extent of the information provided regularly by the Office of Professional Standards and the Attorney General's Office of Law Enforcement Professional Standards of complaints and discipline against troopers, albeit without identifying them, consistent with the Attorney General's long-standing policy of the confidentiality of internal affairs records. The judge rejected any argument that internal affairs records were not protected under section 10 because they were not contained in the personnel file of the trooper, noting the exemption had not been interpreted so narrowly. See McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 616 (App. Div. 2010).

The judge declined the State's invitation to apply a "law enforcement" or "official information" privilege, finding them not "clearly defined." She noted, however, that State Police and the Attorney General's Office had been providing reports to the Legislature detailing trooper discipline without identifying the troopers involved since 2000, "[a]nd there's been no call for trooper names, no amendment to OPRA, no distinction between troopers and other public employees."

Judge Jacobson noted our Supreme Court has observed "that the discipline of State Troopers involves the most profound and fundamental exercise of managerial prerogative and policy." See State v. State Troopers Fraternal Ass'n, 134 N.J. 393, 417 (1993). Recognizing the role of the Attorney General as "the State's chief law enforcement officer [with] the authority to adopt guidelines, directives, and policies that bind police departments throughout the State," N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 565 (2017), the judge found the Attorney General's policy that internal affairs records remain confidential has "been acknowledged and followed and not interfered with by the courts" of this State, "underscor[ing] ... the appropriate interpretation of the personnel exemption in the context of this case." Given the primacy of that policy and section 10's exemption of personnel records "including but not limited to records relating to any grievance filed by or against an individual," N.J.S.A. 47:1A-10, the judge concluded revealing the trooper's name here, in light of the information State Police has already publicly disclosed about the substantiated allegations against the trooper and the discipline imposed, would reveal information expressly protected by section 10, and thus mandated the trooper's name not be disclosed.

*4 Plaintiff appeals, reprising the arguments it made to the trial court. We reject those arguments and affirm substantially for the reasons expressed by Judge Jacobson in her opinion from the bench on July 20, 2017. We agree with her analysis that, under the unusual circumstances of this case, disclosure of the trooper's name pursuant to the narrow exception to the personnel records exemption in section 10, would violate both

the letter and the spirit of the exemption itself, and was thus properly denied.

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2019 WL 2172890

Footnotes

1 N.J.S.A. 47:1A-1 provides in pertinent part:

> [A]ll government records shall be subject to public access unless exempt from such access by: [OPRA] as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order.

2 N.J.S.A. 47:1A-9 provides:

> a. The provisions of [OPRA], shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [the Right-to-Know Law, P.L.1963, c. 73 N.J.S.A. 47:1A-1 to -4]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.
>
> b. The provisions of [OPRA], shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.

End of Document

Exhibit B

2020 WL 3397794
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

RICHARD **RIVERA**, Plaintiff-Respondent,
v.
UNION COUNTY PROSECUTOR'S OFFICE, and JOHN ESMERADO in his official capacity as Records Custodian for the **Union County** Prosecutor's Office, Defendants-Appellants,
and
CITY OF ELIZABETH, Intervenor-Appellant.

DOCKET NO. A-2573-19T3
|
Argued telephonically May 18, 2020
|
Decided June 19, 2020

On appeal from the Superior Court of New Jersey, Law Division, **Union County**, Docket No. L-2954-19.

Attorneys and Law Firms

April C. Bauknight, Assistant County Counsel, argued the cause for appellants **Union County** Prosecutor's Office and John Esmerado (Robert E. Barry, **Union County** Counsel, attorney; April C. Bauknight, on the briefs).

CJ Griffin argued the cause for respondent (Pashman, Stein, Walder & Hayden, PC, attorneys; CJ Griffin, on the brief).

Robert F. Varady argued the cause for intervenor-appellant City of Elizabeth (LaCorte, Bundy, Varady & Kinsella, attorneys; Robert F. Varady, of counsel; Christina M. DiPalo, on the brief).

Before Judges Geiger and Natali.

Opinion

PER CURIAM

***1** The **Union County** Prosecutor's Office (UCPO) conducted an internal affairs (IA) investigation of former Elizabeth Police Department (EPD) Director James Cosgrove's alleged workplace misconduct directed at members of the EPD. Plaintiff Richard **Rivera**[1] requested access to the IA investigation report pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common law right of access. The UCPO denied his request.

Plaintiff filed this action against defendants UCPO and John Esmerado, in his official capacity as Records Custodian for the UCPO, demanding access to the IA investigation report. By leave granted, defendants and intervenor City of Elizabeth (Elizabeth) (collectively appellants), appeal from a February 6, 2020 Law Division order requiring the UCPO and Esmerado to produce "the complete set of investigation materials that was conducted into the conduct of former Elizabeth Police Director James Cosgrove" for in camera review.

I.

We summarize the pertinent facts. In February 2019, EPD employees filed an internal complaint alleging Cosgrove used racist and sexist epithets when referring to his staff. After conducting a two-month IA investigation of Cosgrove's conduct, the UCPO sustained the allegations against Cosgrove, finding he violated Elizabeth's anti-discrimination and anti-harassment policies.

In April 2019, the UCPO wrote to the complainants' attorney notifying him that "a thorough investigation" revealed that "Cosgrove used derogatory terms in the workplace when speaking about city employees." The attorney turned the letter over to the media. On April 26, 2019, Attorney General Gurbir S. Grewal issued a press release calling for Cosgrove's immediate resignation. Attorney General Grewal noted that the IA investigation "concluded that, over the course of many years, Director Cosgrove described his staff using derogatory terms, including racist and misogynistic slurs." The media gave substantial coverage to the story. Cosgrove resigned shortly thereafter.

In July 2019, plaintiff submitted an OPRA and common law right of access request to the UCPO, seeking the following material with appropriate redactions: (1) "the report regarding [the EPD's IA] issues and claims of racism and misogyny"; and (2) "all [IA] reports regarding" Cosgrove.

The UCPO issued a July 10, 2019 letter denying plaintiff's request for the documents. As to the requested EPD report, the UCPO advised that "in general, ... no such report exists." As to Cosgrove-related IA reports, the UCPO explained that such material is a "personnel and/or internal affairs record[ ]," which is "exempt from disclosure under OPRA" and remains confidential pursuant to the Internal Affairs Policy & Procedures (IAPP) promulgated by the Attorney General,[2] absent "a court order or consent of the Prosecutor or Law Enforcement Executive."

***2** The UCPO also denied plaintiff's common law request, asserting that its "interest[s] in maintaining confidentiality significantly outweigh [plaintiff's] interests in disclosure." The UCPO explained that releasing the IA reports would have a chilling effect on individuals reporting wrongdoing. It noted that "remedial measures" had been taken, which included Cosgrove's resignation and requiring the EPD "to be retrained on issues of implicit bias and workplace harassment."

On August 21, 2019, plaintiff filed this action against the UCPO and Esmerado alleging violations of OPRA (count one) and the common law right of access (count two). The court issued an order to show cause (OTSC) directing defendants to explain why judgment should not be entered granting plaintiff access to the records and awarding attorney's fees. Elizabeth moved to intervene, which was granted.

During oral argument before the trial court, plaintiff's counsel acknowledged the need to redact information identifying the complainants. Counsel stated that plaintiff "doesn't care about who the complainants are. He doesn't want identifying information. This is just about the facts as it relates to former director Cosgrove, not the people who made the allegations."

The court issued an oral decision and February 6, 2020 order partially granting plaintiff's OPRA application, requiring defendants to produce "the complete set of investigation materials for the investigation that was conducted into the conduct of ... Cosgrove to be reviewed in camera and under seal."

The court acknowledged the competing interests of confidentiality and transparency. It noted that "[t]here is certainly a justification for a level of secrecy to protect people who ... would be putting themselves in jeopardy depending on how they ... were to testify. So, that's a justification for normally keeping these things private." The court recognized that "[IA] investigations of this type are normally not made public under the theory that investigations should be free to explore complaints and issues and witnesses" without the possibility of public disclosure that "could subject them to harm." But the court also expressed "fear that serious matters are covered up by the secrecy with which [IA] investigations have been cloaked."

During oral argument before the trial court, a colloquy ensued regarding whether any public announcements about the IA investigation were "akin" to a waiver of the right to confidentiality. The trial court did not find appellants had waived the right to confidentiality but noted the UCPO and Elizabeth had "publicly affirmed that [the] allegations were based in fact and one of the particular individuals involved in the inappropriate tendencies is no longer with the [EPD] as a result." The court concluded that the acting prosecutor's report about the investigation and findings and Elizabeth's "publicly announced corrective action" rendered "the normal reasons for keeping the [IA] reports secret ... not as valid as they would otherwise be in a routine case."

The court stated it was unaware of any binding precedent prohibiting release of IA materials and noted the IAPP expressly permits the release of such material by court order.

In rejecting appellants' argument that OPRA's personnel record exemption applies, the court reasoned the matter at issue "is not about someone's pension, abuse of sick-leave, vacation accumulation and the like" but rather one of "extraordinary public interest."

***3** The court recognized the risk that complainants and witnesses could face retribution or intimidation if their identities were detected. The Court acknowledged its "obligation to attempt to protect those individuals who could unnecessarily be at risk by public disclosure."

Ultimately, the court required that "all aspects" of the UCPO's investigation be provided for in camera review under seal. To protect confidentiality, the court stated it would redact "not just the names, but the circumstances by which" the complainants and witnesses "could well be identified."

The court did not reach plaintiff's common law right of

access claim and reserved judgment on plaintiff's application for an award of counsel fees. The court subsequently denied defendant's motion to stay the order and plaintiff's motion for reconsideration as to its common law right of access claim.

We granted the UCPO leave to appeal, stayed the trial court's order, and permitted Elizabeth to intervene in the appeal.

On appeal, the UCPO raises the following points:

> I. THE TRIAL COURT ERRED IN CONCLUDING THAT [IA] MATERIAL ARE NOT PERSONNEL RECORDS, AND THEREFORE NOT WITHIN AN EXEMPTION WITHIN N.J.S.A. 47:1A-10.
>
> II. THE ATTORNEY GENERAL'S [IAPP] REINFORCE THE LONG-RECOGNIZED CONFIDENTIALITY OF [IA] RECORDS.
>
> III. THE TRIAL COURT MISCHARACTERIZED THE HOLDING OF O'SHEA[3] BY INFERRING THAT A USE OF FORCE REPORT IS SIMILAR TO AN [IA] REPORT.
>
> IV. THE TRIAL COURT PREMATURELY DISCUSSED ATTORNEY'S FEES THEREBY SIGNALING A DECISION WAS ALREADY MADE.
>
> V. THE DISCLOSURE OF [IA] MATERIAL WILL ERADICATE THE STATE'S PUBLIC POLICY TO MAINTAIN THE CONFIDENTIALITY OF [IA] AND SET PRECEDENT WHICH WILL STRONGLY DEVIATE FROM LEGISLATIVE INTENT.

In turn, Elizabeth raises the following additional points:

> I. THE TRIAL COURT ERRONEOUSLY GRANTED THE PLAINTIFF'S [OTSC] AS THE **UNION COUNTY** PROSECUTOR'S [IA] REPORT RELATING TO THE INVESTIGATION OF JAMES COSGROVE IS CONFIDENTIAL AND CANNOT BE RELEASED UNDER OPRA.
>
> II. THE TRIAL COURT ERRONEOUSLY GRANTED THE PLAINTIFF'S [OTSC] AS THE **UNION COUNTY** PROSECUTOR'S [IA] REPORT RELATING TO THE INVESTIGATION OF JAMES COSGROVE IS EXEMPT FROM OPRA AS IT CONSTITUTES A PERSONNEL RECORD.
>
> III. THE TRIAL COURT'S DECISION IS NOT SUPPORTED BY THE RECORD IN THIS CASE.

II.

We begin our analysis by briefly reviewing OPRA's purpose, requirements, and application. The Legislature enacted OPRA "to promote transparency in the operation of government." Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 541 (2012) (citing Burnett v. Cty. of Bergen, 198 N.J. 408, 414 (2009)). "[T]o ensure an informed citizenry and to minimize the evils inherent in a secluded process," OPRA provides the public with broad access to "government records ... unless an exemption applies." In re N.J. Firemen's Ass'n Obligation, 230 N.J. 258, 276 (2017) (citations omitted). To fulfill that purpose, N.J.S.A. 47:1A-1 provides that "government records shall be readily accessible ... 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." See also N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 555 (2017) (acknowledging this statutory mandate).

***4** "Government record" is broadly defined under OPRA to include any document "made, maintained or kept on file in the course of ... official business by any officer, commission, agency or authority of the State or of any political subdivision [or] subordinate boards thereof." N.J.S.A. 47:1A-1.1. Notwithstanding OPRA's expansive reach, "the right to disclosure is not unlimited." Kovalcik v. Somerset Cty. Prosecutor's Office, 206 N.J. 581, 588 (2011). N.J.S.A. 47:1A-1.1 expressly excludes twenty-one categories of documents and information from its definition of a government record.

Relevant here, OPRA's broad right to access is limited by "established public-policy exceptions," which declare that "government record[s] shall not include ... information which is deemed to be confidential." Gilleran v. Twp. of Bloomfield, 227 N.J. 159, 170 (2016) (second alteration in original) (quoting N.J.S.A. 47:1A-1.1). Such confidential information includes personnel records and grievances. N.J.S.A. 47:1A-1.1, -10.

"OPRA also contains a privacy clause requiring public agencies 'to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy[.]'" L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56, 80 (App. Div. 2017) (alteration in original) (quoting N.J.S.A. 47:1A-1), aff'd by an equally divided Court, 238 N.J. 547 (2019).

Courts consider the following factors when determining whether a government record must be withheld or redacted prior to disclosure under OPRA:

> (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.
>
> [Burnett, 198 N.J. at 427 (quoting Doe v. Poritz, 142 N.J. 1, 88 (1995)).]

Additional provisions exempt government records from public access. Pertinent to this appeal, the statute "exempts from disclosure any information that is protected by any other state or federal statute, regulation, or executive order." Brennan v. Bergen Cty. Prosecutor's Office, 233 N.J. 330, 338 (2018) (citing N.J.S.A. 47:1A-9(a) (stating that OPRA's provisions "shall not abrogate any exemption of a public record or government record from public access" under "any other statute" or "regulation promulgated under the authority of any statute or Executive Order of the Governor")); see also N.J.S.A. 47:1A-1.

Nevertheless, exemptions from disclosure under OPRA should be construed "narrowly." Asbury Park Press v. Cty. of Monmouth, 406 N.J. Super. 1, 8 (App. Div. 2009). The reasons for non-disclosure "must be specific" and courts should not "accept conclusory and generalized allegations of exemptions." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 162 (App. Div. 2011) (quoting Loigman v. Kimmelman, 102 N.J. 98, 110 (1986)). "The public agency [has] the burden of proving that the denial of access is authorized by law." N.J.S.A. 47:1A-6. "To justify nondisclosure, the agency must make a 'clear showing' that one of the law's listed exemptions is applicable." Lyndhurst, 229 N.J. at 555 (quoting Asbury Park Press v. Ocean Cty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)).

***5** We undertake de novo review of "determinations about the applicability of OPRA and its exemptions." N.J. Firemen's Ass'n Obligation, 230 N.J. at 273-74 (citations omitted). We also undertake de novo review of trial court decisions concerning access to government records under the common law right of access. Drinker Biddle & Reath LLP v. Dep't of Law & Pub. Safety, 421 N.J. Super. 489, 497 (App. Div. 2011).

III.

A.

The Legislature has declared that personnel records "shall not be considered a government record and shall not be made available for public access," N.J.S.A. 47:1A-10, "unless it falls within one of the statutory" exceptions, Kovalcik, 206 N.J. at 593.

Defendants contend the IA report is a "personnel record" and thus exempt from disclosure, noting it "originated from a specific complaint against [Cosgrove]." The trial court disagreed, concluding the IA reports were unlike typical personnel records such as an employee's pension or sick leave records. We concur with that aspect of the trial court's analysis.

The Attorney General does not consider IA case files and materials to be personnel records. On the contrary, "[p]ersonnel records are separate and distinct from [IA] investigation records, and [IA] investigative reports shall never be placed in personnel records, nor shall personnel records be co-mingled with [IA] files." IAPP § 9.12.1. This prohibition applies even where the "complaint is sustained, and discipline imposed." Id. at § 9.12.2. Accordingly, the IA materials are not exempt from disclosure as "personnel records."

B.

Plaintiff emphasizes OPRA does not contain a specific reference to the IAPP or enumeration of IA investigation reports as documents that are not government records. However, a literal review of the statute overlooks the depth of the recognized exemptions.

In North Jersey Media Group v. Bergen County Prosecutor's Office, we explained that the available exemptions to disclosure are not limited to "those enumerated as protected categories within the four

corners of OPRA" because "N.J.S.A. 47:1A-1 explicitly recognizes that records may be exempt from public access based upon authorities other than the exemptions enumerated within OPRA." 447 N.J. Super. 182, 201-02 (App. Div. 2016). We further explained that "N.J.S.A. 47:1A-9 codifies the Legislature's unambiguous intent that OPRA not abrogate or erode existing exemptions to public access." Id. at 202. This includes any "regulation promulgated under the authority of any statute or Executive Order of the Governor" and "any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law." Ibid. (emphasis omitted) (quoting N.J.S.A. 47:1A-9). We emphasized that "the plain language of the statute as well as judicial precedent make it clear that an exemption is statutorily recognized by OPRA if it is established by any of the authorities enumerated in N.J.S.A. 47:1A-1 or -9." Ibid.

"The Attorney General is the State's chief law enforcement officer [with] the authority to adopt guidelines, directives, and policies that bind police departments throughout the State." Lyndhurst, 229 N.J. at 565. These "guidelines, directives or policies cannot be ignored," O'Shea, 410 N.J. Super. at 383, and "are binding upon local law enforcement agencies," Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 459 N.J. Super. 458, 500 (App. Div.), certif. granted, 240 N.J. 7 (2019) (emphasis omitted) (citing O'Shea, 410 N.J. Super. at 383; In re Carroll, 339 N.J. Super. 429, 439, 442-43 (App. Div. 2001)).

***6** We recognize that the IAPP along with other Attorney General guidelines, directives, and policies are not adopted in the same way other agencies adopt administrative rules promulgated under the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -15. However, the IAPP does not consist of "'administrative rules' as defined in N.J.S.A. 52:14B-2(e)," and "do not require formal promulgation under the [APA]." O'Shea, 410 N.J. Super. at 383; accord Carroll, 339 N.J. Super. at 442-43 (holding that the IAPP was "not required to be promulgated pursuant to the APA" because it "fall[s] within the [APA's] statutory exception for 'statements concerning the internal management or discipline of any agency'" (quoting N.J.S.A. 52:14B-2(e))).

IA investigations by law enforcement agencies fall under the supervision of the Attorney General. N.J.S.A. 52:17B-98. The IAPP was adopted pursuant to the authority granted to the Attorney General by N.J.S.A. 40A:14-181, which states: "Every law enforcement agency ... shall adopt and implement guidelines which shall be consistent with the guidelines governing the [IAPP] ...."

The IAPP sets forth the policies, procedures, and best practices that all county and municipal law enforcement agencies are required to follow. IAPP § 1.0.4. See McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388, 395 (App. Div. 2008) (stating that N.J.S.A. 40A:14-181 "requires every law enforcement agency to adopt and implement guidelines consistent with the Attorney General's [IAPP])." A crucial aspect of those policies is the confidentiality of IA investigation case files. With limited exceptions, IA records are accessible only to IA personnel, the law enforcement agency executive, and the county prosecutor, keeping the number of individuals with access to a minimum. Section 9.6.1 sets forth the following confidentiality requirements:

> The nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information. The contents of an internal investigation case file, including the original complaint, shall be retained in the internal affairs function and clearly marked as confidential. The information and records of an internal investigation shall only be released or shared under the following limited circumstances:
>
> (a) If administrative charges have been brought against an officer and a hearing will be held, a copy of all discoverable materials shall be provided to the officer and the hearing officer before the hearing;
>
> (b) If the subject officer, agency or governing jurisdiction has been named as a defendant in a lawsuit arising out of the specific incident covered by an internal affairs investigation, a copy of the internal investigation reports, may be released to the subject officer, agency or jurisdiction;
>
> (c) Upon the request or at the direction of the County Prosecutor or Attorney General; or
>
> (d) Upon a court order.

"In addition, the law enforcement [agency's executive officer] may authorize access to a particular file or record for good cause." Id. at § 9.6.2. Such access should be granted "sparingly, given the purpose of the [IA] process and the nature of many of the allegations against officers." Ibid.

Even Civilian Review Boards have limited access to IA investigations and are subject to strict confidentiality requirements. "Internal investigation case files generally

are not releasable to Civilian Review Boards" unless the investigation is "completed or closed," "good cause" is shown, "and the [Board] has in place certain minimum procedural safeguards, as described in Section 9.7.2, to preserve the confidentiality of the requested records and the integrity of the [IA] function, in addition to complying with all other applicable legal requirements." Id. at § 9.7.1.

*7 In turn, Section 9.7.2(b)(1) requires that a Civilian Review Board must meet "in a closed session whenever the content of [IA] records are discussed or testimony or other evidence regarding a specific incident is presented." The Civilian Review Board may not disclose any part of an IA file "to any person who is not a Board member or employee, the law enforcement executive, or a member of the law enforcement agency's [IA] function, except in a final public report appropriately redacted in accordance with instructions from the law enforcement executive." Id. at § 9.7.2(b)(2). Further, "the Civilian Review Board's final public report ... may not disclose the personal identity of subject officers, complainants, or witnesses." Id. at § 9.7.2(b)(3).

These comprehensive restrictions are clearly designed to preserve the integrity and confidentiality of all IA investigations.

In accordance with N.J.S.A. 40A:14-181, the UCPO adopted and implemented policies consistent with the IAPP to govern its IA investigations.

The Use of Force Policy issued by the Attorney General "has 'the force of law for police entities.'" Lyndhurst, 229 N.J. at 565 (quoting O'Shea, 410 N.J. Super. at 382). Similar to the Use of Force guidelines examined in Lyndhurst and O'Shea, we conclude the IAPP was created pursuant to such a statutory mandate and has "the force of law in respect of the duties of law enforcement agencies to conform to the requirements" when conducting internal affairs investigations. O'Shea, 410 N.J. Super. at 384.

The trial court noted that the IAPP states that an IA investigation case file may be released by court order. It found that provision "suggest[ed] that in some circumstances, a court may view that an [IA] investigation should be made public" under OPRA and the common law right of access. Although we agree that the court may order the release of an IA investigation case file when appropriate to do so,[4] IAPP Section 9.6.1(d) does not create an independent substantive basis for release.

Applying these standards, we hold that IA investigation reports and documents are exempt from disclosure under OPRA and reverse the order compelling defendants to produce the complete record of the IA investigation relating to Cosgrove's conduct for in camera review.

The documents plaintiff requested involved internal complaints filed by subordinates against Cosgrove. Accordingly, the resulting IA investigation of Cosgrove's conduct, and potential disciplinary action, "implicate[d] interests beyond those of the parties themselves." Kovalcik, 206 N.J. at 595. Requiring disclosure of such records could well result in far reaching negative impact, impairing the laudable goals of IA investigations.

There are many reasons for maintaining confidentiality of the complainants, witnesses, and officers involved in an IA investigation. As we recently explained:

> Disclosure of a complainant's identity could thwart an IA investigation, criminal investigation, or prosecution, or could disclose the name of an informant, and could taint an officer who was wrongfully accused. It could also discourage complainants from coming forward, or encourage unwarranted complaints from people seeking notoriety.[5]
>
> [Fraternal Order of Police, 459 N.J. Super. at 507.]

*8 In addition, disclosure of the complainants, witnesses, and subject officers could: reveal the name and location of inmates and informants, which may subject them to harm; discourage complainants from coming forward because they will not maintain anonymity; and encourage unwarranted complaints to seek notoriety or target an officer for reasons other than wrongdoing.

While we recognize that the trial court intended to redact the names and identifying circumstances to protect the complainants and witnesses from retribution and intimidation, that task would likely prove very difficult, if not impossible. See L.R., 452 N.J. Super. at 90 (recognizing that "[u]nder certain circumstances, even the redaction of all personally identifiable information would not prevent reasonable persons ... from identifying" an individual); Lyndhurst, 441 N.J. Super. at 111 (noting that "[i]n some cases, in camera review of a Vaughn index[6] may be appropriate, because the release of even a 'detailed Vaughn index' to a requesting party 'may in some cases enable astute parties to divine with great accuracy the names of confidential informers, sources, and the like'" (quoting Loigman, 102 N.J. at 111)). Because the complainants and witnesses are members of the EPD, their statements disclosing the racist and sexist slurs that Cosgrove uttered, and his other discriminatory actions, would likely disclose their identity or narrow the

field to only a few individuals, even if all personally identifiable information is redacted. Other members of the EPD, as well as Cosgrove himself, could probably deduce who reported the behavior.

We question the adequacy of a redaction process that simply deletes "names and circumstances" while leaving other information that would need to be scrubbed from the records to prevent identification of the complainants and witnesses from the redacted document. The identity of those persons can often be readily determined from context or information that a judge conducting an in camera review may deem innocuous. The ability to identify the complainants and witnesses may well impair their safety and otherwise put them at risk of retribution or intimidation.

In addition, as we have noted, disclosure of the IA investigation would discourage complainants and witnesses from coming forward in the future. Particularly in the context of an IA investigation based on employees of a police department complaining of discriminatory treatment by fellow employees or their superior, the fear that anonymity will not be maintained could lead to employees remaining silent about misconduct, thereby thwarting IA investigations and resulting corrective and disciplinary action.

The trial court alluded to appellants waiving the right to contest disclosure of the IA investigation file due to the public statements made following the conclusion of the investigation. We find no such waiver.

***9** "Generally, waiver is defined 'as the voluntary and intentional relinquishment of a known and existing right.'" Quigley v. KPMG Peat Marwick, LLP, 330 N.J. Super. 252, 267 (App. Div. 2000) (emphasis omitted) (quoting Williston on Contracts, § 39:14 (Lord ed. 2000)). "[T]here must be a clear act showing the intent to waive the right." Cty. of Morris v. Fauver, 153 N.J. 80, 104 (1998) (citing W. Jersey Title & Guar. Co. v. Indus. Tr. Co., 27 N.J. 144, 152 (1958)).

The limited information contained in the statements did not constitute an intentional surrender of the right to assert the IA materials were confidential. The statements did not identify the complainants or witnesses or disclose the details of the internal complaints, the statements of witnesses, or other confidential information. At most, the statements provided confirmation that the investigation substantiated the allegations that Cosgrove had uttered sexually harassing and racist slurs towards EPD employees, and that Cosgrove should resign. This limited disclosure did not amount to a voluntary and intentional waiver of the confidentiality of the IA investigation.

Finally, we disagree with the trial court's conclusion that "the normal reasons for keeping the [IA] reports secret ... are not as valid as they would otherwise be" because "[t]he acting prosecutor issued a rather lengthy report about the prosecutor's investigation and findings" and "Elizabeth publicly announced corrective action." The statements made by the UCPO and the Attorney General carefully avoided revealing information that would indirectly identify the complainants and witnesses. The limited information provided did not include the target of the slurs; the specific language used; or the specific date, time, or location of the misconduct. Nor did it describe the circumstances leading up to or following Cosgrove's actions.

Because we hold that the IA investigation file and report are exempt from disclosure under OPRA, we do not reach the issue of attorney's fees.

C.

OPRA contains a separate exemption for grievances. "A government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA]: ... information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual." N.J.S.A. 47:1A-1.1.[7] Appellants argue that disclosure is precluded under this exemption.

***10** The limited record does not contain the internal complaints filed against Cosgrove or any other part of the IA investigation file. Appellants did not move to supplement the record to include those documents by way of confidential supplemental appendix. We are thus unable to review the format of the internal complaints, the relief sought, whether they were filed pursuant to a collective bargaining agreement, how they were presented, or the process the EPD initially undertook when reviewing them. Consequently, we are effectively prevented from determining if the complaints and resulting investigation fall within OPRA's grievance exemption.

Moreover, appellants have not demonstrated, much less made a "clear showing," that the grievance exemption applies in this matter. Appellants acknowledge that the

UCPO's July 2019 denial letter to plaintiff's counsel did not rely upon or even cite OPRA's grievance exemption. See Newark Morning Ledger Co., 423 N.J. Super. at 162 (App. Div. 2011) ("[T]he reasons for withholding documents must be specific. Courts will 'simply no longer accept conclusory and generalized allegations of exemptions.'" (Quoting Loigman, 102 N.J. at 110)). Appellants' briefing to this court likewise fails to adequately address the grievance exemption.[8]

The limited record and appellants' inadequate briefing significantly impedes meaningful appellate review of this issue, which has not been addressed in any published opinion. We therefore decline to address the issue.[9]

IV.

Plaintiff also sought release of the IA reports under the common law right of access. The trial court did not reach this issue.

The common law right of access reaches a broader class of documents than its statutory counterpart. Higg-A-Rella, Inc. v. Cty. of Essex, 141 N.J. 35, 46 (1995) (citing Atl. City Convention Ctr. Auth. v. S. Jersey Publ'g Co., 135 N.J. 53, 60 (1994)). "To gain access to this broader class of materials, the requestor must make a greater showing than OPRA requires ...." Lyndhurst, 229 N.J. at 578. The common law right to access public records hinges on three requirements: "(1) the records must be common-law public documents; (2) the person seeking access must establish an interest in the subject matter of the material; and (3) the citizen's right to access must be balanced against the State's interest in preventing disclosure." Keddie v. Rutgers, 148 N.J. 36, 50 (1997) (citations and internal quotation marks omitted). Furthermore, because the common law right of access to documents is qualified, "one seeking access to such records must 'establish that the balance of its interest in disclosure against the public interest in maintaining confidentiality weighs in favor of disclosure.'" Ibid. (quoting Home News v. Dep't of Health, 144 N.J. 446, 454 (1996)).

***11** Here, there is no dispute that the IA documents are common law public records. The items sought are "written memorial[s] ... made by a public officer, and ... the officer [is] authorized by law to make it." Nero v. Hyland, 76 N.J. 213, 222 (1978) (quoting Josefowicz v. Porter, 32 N.J. Super. 585, 591 (App. Div. 1954)). Plaintiff has the requisite interest in the subject matter of the documents "to further a public good." Loigman, 102 N.J. at 104. Accordingly, the critical factor is whether plaintiff's right to the documents outweighs defendants' interest in preventing disclosure. The balancing of the competing interests in disclosure and confidentiality often involves an "exquisite weighing process." Id. at 108 (citation omitted).

Our Supreme Court provided the following non-exhaustive list of factors to consider in balancing the requester's needs against the public agency's interest in confidentiality:

> (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 decisionmaking will be chilled by disclosure;
>
> (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.
>
> [Loigman, 102 N.J. at 113.]

"To conduct the careful balancing that each case" requires, courts should "look in particular at the level of detail contained in the materials requested." Lyndhurst, 229 N.J. at 580. "More detailed disclosures" present greater concerns. Ibid. To that end, "courts may perform an in camera inspection of the requested records as they balance the relevant factors," L.R., 452 N.J. Super. at 89 (citing Keddie, 148 N.J. at 53-54), and "are authorized to require the redaction of records to maintain confidentiality," Id. at 90 (citing S. Jersey Publ'g Co. v. N.J. Expressway Auth., 124 N.J. 478, 499 (1991)).

When weighing these competing interests, "administrative regulations bestowing confidentiality upon an otherwise public document, although not dispositive of whether there is a common law right to inspect a public record, should, nevertheless, weigh 'very heavily' in the balancing process, as a determination by the Executive Branch of the importance of confidentiality." Bergen Cty. Improvement Auth. v. N. Jersey Media Grp., Inc., 370 N.J. Super. 504, 521 (App. Div. 2004) (quoting Home

News, 144 N.J. at 455). While not an "administrative rule" subject to the APA, the IAPP has the force of law and is binding on local law enforcement agencies, including the UCPO and EPD. It requires local law enforcement agencies to maintain the confidentiality of IA investigation files.[10]

We acknowledge that the common law right of access remains an independent means to obtain government records, id. at 516, and that "[n]othing contained in [OPRA] shall be construed as limiting the common law right of access to a government record, including criminal investigation records of a law enforcement agency," N.J.S.A. 47:1A-8. Nevertheless, a court may consider OPRA's exemptions "as expressions of legislative policy on the subject of confidentiality," provided they do not "heavily influence the outcome of the analysis" under the common law. Bergen Cty. Improvement Auth., 370 N.J. Super. at 520-21. Thus, a court may consider that IA records are exempt under OPRA when considering the common law right of access to such records.

***12** Applying these standards, we hold that the need for nondisclosure substantially outweighs plaintiff's need for disclosure of the IA records. Loigman factors one, two, and three militate strongly against disclosure of IA records. In that regard, the same concerns we have previously discussed apply with equal force to the common law right of access. Likewise, the questionable adequacy of protecting anonymity through simple redaction apply equally to the common law right of access.

In addition, pursuant to N.J.S.A. 40A:14-181, the UCPO adopted and implemented guidelines consistent with the IAPP that compel the UCPO to maintain the confidentiality of the IA investigation and report.

Reversed and remanded for the entry of an order consistent with this opinion.

All Citations

Not Reported in Atl. Rptr., 2020 WL 3397794

Footnotes

1 Plaintiff "is a retired New Jersey municipal police officer, private consultant, civil rights advocate, and expert witness in police practices and policies." Since 2008, he has "volunteer[ed] his time and resources to the Latino Leadership Alliance of New Jersey" and co-chairs its Civil Rights Protection Project.

2 The IAPP is issued by the Attorney General through the Division of Criminal Justice and has been periodically updated, most recently in December 2019. While the 2017 version was in effect when plaintiff filed this action, we cite to the December 2019 version because the revisions do not affect our analysis.

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

4 There may be instances where an IA investigation case file is relevant and probative in the defense of criminal charges or the prosecution of a civil action brought under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to - 42; the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2; or Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -14. No such circumstances are present here.

5 Some of these same concerns mirror the need for confidentiality under the Patient Safety Act, N.J.S.A. 26:2H-12.23 to -12.25. The Legislature found that "[f]ear of sanctions induces health care professionals and organizations to be silent about adverse events, resulting in serious under-reporting." N.J.S.A. 26:2H-12.24(e). It "reasoned that health care professionals and other facility staff are more likely to effectively assess adverse events in a confidential setting, in which an employee need not fear recrimination for disclosing his or her own medical error, or that of a colleague." C.A. ex rel. Applegrad v. Bentolila, 219 N.J. 449, 464 (2014). To achieve that result, the Act provides that "[a]ny documents, materials, or information developed by a health care facility as part a process of self-critical analysis conducted pursuant to [N.J.S.A. 26:2H-12.25(b)] shall not be ... subject to discovery or admissible as evidence or otherwise disclosed in any civil, criminal, or administrative action or proceeding." N.J.S.A. 26:2H-12.25(g)(1).

6 "A Vaughn index is comprised of affidavits containing a 'relatively detailed' justification for the claim of privilege being asserted for each document. The judge analyzes the index to determine, on a document-by-document basis, whether each such claim of privilege should be accepted or rejected." Paff v. Div. of Law, 412 N.J. Super. 140, 161 n.9 (App. Div. 2010) (citing Vaughn v. Rosen, 484 F.2d 820, 826-27 (D.C. Cir. 1973). The affidavits "ordinarily" omit "excessive reference to the actual language of the

document." Vaughn, 484 F.2d at 826-27.

7 We note that the Department of Law and Public Safety adopted a more expansive grievance exception, which precludes OPRA access to any records "specific to an individual employee ... and relating to or which form the basis of discipline, discharge, promotion, transfer, employee performance, employee evaluation, or other related activities, whether open, closed, or inactive, except for the final agency determination." N.J.A.C. 13:1E-3.2(a)(4). This definition includes an IA investigation file relating to or forming the basis for discipline or discharge based on racially or sexually discriminatory misconduct directed at subordinate employees. We recognize, however, that this regulation applies to the Department of Law and Public Safety, not local law enforcement agencies.

8 Appellants each cite the grievance exemption a single time in their appellate briefs: The UPCO asserts "while not explicitly stated in its original denial," it denied "[p]laintiff's records request in accordance with N.J.S.A. 47:1A-1.1[ ] which prohibits the disclosure if records concerning the filing of a grievance against an employee"; Elizabeth merely notes that OPRA's exemptions include "records concerning the filing of a grievance by or against a public employee."

9 Appellate counsel is required to identify and fully brief any issue raised on appeal. See Sackman v. N.J. Mfrs. Ins. Co., 445 N.J. Super. 278, 298 (App. Div. 2016); State v. Hild, 148 N.J. Super. 294, 296 (App. Div. 1977). An argument based on conclusory statements is insufficient to warrant appellate review. Nextel of N.Y., Inc. v. Borough of Englewood Cliffs Bd. of Adjustment, 361 N.J. Super. 22, 45 (App. Div. 2003) (citing Miller v. Reis, 189 N.J. Super. 437, 441 (App. Div. 1983)). "[A]ny privacy concerns about a disclosure sought pursuant to OPRA or the common law should be explained in detail." Paff v.Ocean Cty. Prosecutor's Office, 235 N.J. 1, 28 (2018).

10 By analogy, pursuant to N.J.A.C. 13:1E-3.2(a)(4), Department of Law and Public Safety records relating to the discipline or discharge of a specific employee are excluded from the definition of government records subject to access under OPRA.

End of Document

Exhibit C

2005 WL 1010454
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Chancery Division.

TEVA PHARMACEUTICALS USA, INC.; Plantex USA, Inc.; and George Svokos, Plaintiff(s)
v.
STOP HUNTINGDON ANIMAL CRUELTY USA a/k/a Shac USA, a/k/a Shac, a/k/a Stop Huntingdon Animal Cruelty a/k/a Hugs for Puppies; Animal Defense League of New Jersey; Animal Defense League of Long Island; Nick Cooney, an individual; and John and Jane Does 1 through 100, Defendant(s).

No. BER–C–63–05.
|
Argued April 1, 2005.
|
Decided April 1, 2005.

Attorneys and Law Firms

Brian P. Sullivan, appearing on behalf of the Plaintiffs, **TEVA Pharmaceuticals** USA, Inc., Plantex USA, Inc., and George Svokos (Stevens & Lee).

Bennet D. Zurofsky, appearing on behalf of the Defendant, Stop Huntingdon Animal Cruelty USA, Inc. (Reitman Parsonnet).

Nick Cooney, defendant, pro se.

OPINION

DOYNE, J.

Introduction

*1 Before the court is the return date of an order to show cause why this court should not enter an order against defendants, Stop Huntingdon Animal Cruelty USA, Inc. ("SHAC USA", "SHAC", or "defendant"), Stop Huntingdon Animal Cruelty ("SHAC"),[1] Animal Defense League of New Jersey ("ADLNJ"), Animal Defense League of Long Island ("ADLNY"), and Nick Cooney ("Cooney), preliminarily enjoining defendants, and their members, officers, employees, agents, servants, representatives, supporters, affiliates, and all persons acting in concert or combination with them from (1) coming up or on, or within one-hundred (100) feet of, the real or leased property of Plantex USA, Inc. ("Plantex"); (2) vandalizing or damaging the real, leased, or personal property of Plantex; (3) coming up or on, or within one-hundred (100) feet of, the real property of any employee, or family member of any employee, of Plantex; (4) vandalizing or damaging the real or personal property of any employee, or family member of any employee, of Plantex; and (5) harassing, intimidating, stalking, menacing, or committing or attempting to commit any act of violence, or making any overt or implicit threat of violence, against any employee, or family member of any employee, of Plantex.

On February 22, 2005, this court entered an order to show cause with temporary restraints, wherein defendants were temporarily restrained from engaging in the foregoing activities.

On March 4, 2005, counsel for SHAC USA filed a motion to dissolve the temporary restraints on two days notice. On March 7, 2005, the court denied counsel's request for the reasons then set forth on the record.

Relevant Statement of Facts and Procedural History

TEVA Pharmaceuticals USA, Inc. ("**TEVA**") is a Delaware corporation, with its principal place of business located in North Wales, Pennsylvania. Plantex is a New Jersey corporation, with its principal place of business located at Two University Plaza, Suite 305, Hackensack, New Jersey. Plaintiff, George Svokos ("Svokos") is the president of Plantex.

TEVA is engaged in the business of manufacturing and distributing **pharmaceuticals**. Plantex is an affiliate of **TEVA**, and is the sales and marketing office for **TEVA's**

active **pharmaceutical** ingredient division. Huntingdon Life Sciences ("HLS") conducts research for **pharmaceutical**, biotechnical, agro-chemical, veterinary, food and chemical industries using research that involves the experimental use of live animals.

SHAC is a not-for-profit association, which, according to its own website, is organized as an international campaign to close HLS. SHAC asserts that HLS tests products on animals, purportedly in an inhumane fashion, and has been involved with the killing of hundreds, if not thousands, of animals. SHAC's website indicates that it was formed to target HLS's New Jersey facility, its U.S. affiliates, and "to pose a firm resistance to HLS's eyeing America as a safe haven." In an effort to fulfill this mission, SHAC has identified, and targets, entities that support HLS. These "secondary" targets, such as the plaintiffs, while having no "intrinsic connection to HLS", contract with HLS for the performance of various product testing. **TEVA** contracts with HLS for services and, therefore, **TEVA**, along with its divisions and affiliates, are "secondary" targets.

*2 Defendant Animal Liberation Front ("ALF") is an animal rights group, which allegedly frees animals who are being tortured, exposes animal abuse, and reduces the economic viability of animal abuse industries. Defendants ADLNJ and ADLNY are both unincorporated animal rights groups, which allegedly support the ALF. SHAC USA is a non-profit Delaware corporation, which is affiliated with SHAC and shares the same purpose and strategy as SHAC. Defendant Cooney is a member and/or supporter of SHAC.

Plaintiffs contend that defendants, and those persons associated with defendants, have committed and, unless restrained, will continue to commit unlawful acts resulting in serious injury and/or the threat of serious injury to plaintiffs, its employees, and those having business with plaintiffs. Plaintiffs contend that the Federal Bureau of Investigation ("FBI") has and is actively investigating acts of vandalism and "domestic terrorism" perpetrated by SHAC activists. Plaintiffs' counsel points out that a federal grand jury indicted the defendant and various of its members in a five-count indictment in 2004 for animal enterprise terrorism, conspiracy to engage in interstate stalking and interstate stalking. Counsel have advised the indictment remains pending.

Plaintiffs allege that the defendants have committed various unlawful acts including, but not limited to: (1) verbally and physically harassed the plaintiffs' employees, and the employees' family members; (2) threatened these individuals; (3) threatened violence; (4) uttered violent epitaphs at employees while in their respective homes; and (5) threatened various unlawful acts of violence. In addition to the same, plaintiffs have alleged that the various defendants, their members and/or their followers, have committed various criminal acts including, but not limited to, breaking and entering, stealing, and threatening violence, etc. The same has been substantiated by various certifications, as follows.

By way of certification, Svokos' contends that defendants have been harassing him and his family since 2004. Specifically, Svokos' alleges the following: on January 27, 2005, defendants broke into Svokos' home, at which time they stole an airplane ticket and Svokos' travel itinerary for a trip to London, which included his American Express credit card account number. Defendants thereafter attempted to purchase a "sex doll" using Svokos' account number. The company from which defendants attempted to purchase the sex doll called Svokos' home, and asked his seventeen-year-old daughter whether Svokos would authorize said purchase. Svokos' daughter told the caller no, thereby canceling the order.

On the date that Svokos' home was illegally entered, Svokos' Brooks Brothers Mastercard was stolen. Svokos was notified by his financial institution that over $5,000 in expenses were charged to this stolen credit card.

Commencing in December 2004, defendants repeatedly telephoned Svokos' home at all hours of the night, and threatened Svokos and his family. On December 22, 2004, representatives of defendants called his home, at which time they spoke with his twelve-year-old daughter, and advised her that her father causes animals to be tortured and killed, and described in detail the issues surrounding animal testing.

*3 Defendants have threatened the health and welfare of the Svokos' family on their website and through e-mail. Defendants have distributed fliers on automobile windshields to Plantex employees, Svokos' neighbors, and on Svokos' private property, containing accusations that Plantex abused and killed animals. Thus, it appears defendants trespassed onto Svokos' property without his permission. Moreover, defendants have threatened to return to Svokos' home unless he advises defendants that Plantex will cease doing any further business with HLS.

Plaintiffs contend that defendants took responsibility for a number of the foregoing incidents via the SHAC website. Particularly, the SHAC website memorializes the incidents by way of excerpts submitted by the individuals or on behalf of individuals apparently responsible for the incidents. At oral argument, defendant's counsel indicated

that, to the best of his knowledge, with regard to the postings on its website, an individual or individuals affiliated with SHAC revise the same, determine which submissions should be posted, and may make editorial deletions to the same. The website discloses the personal information of the individuals who were targeted, without their knowledge and/or consent, and encourages SHAC members' and website visitors to contact the "targets", their family members, and their neighbors. Postings encourage activity both within and beyond the parameters of the law.

Plaintiffs indicate that there were various other incidents wherein defendants threatened and/or harassed Plantex employees. Specifically, on January 30, 2005, plaintiffs assert that three of defendants' representatives went to the home of Erez Israeli ("Israeli"), the vice president of marketing and sales for Plantex, at which time the individuals remained outside of the home for fifteen minutes, and spoke to people outside of the home. Additionally, defendants purportedly showed posters of bloody puppies and monkeys for fifteen seconds to a young girl, presumably Israeli's daughter. As a result of the same, Israeli is concerned about the health and welfare of himself and his family.

By way of certification, George Barrett ("Barrett"), the president and CEO of **TEVA**, certifies that defendants have been harassing him, his family, and other **TEVA** employees. Specifically, Barrett certifies to the following: on December 18, 2004, Barrett's neighborhood was leafleted by animal rights groups affiliated with SHAC and Cooney. More troubling, defendants went to the Germantown Friends School, where his children are students, and placed leaflets containing accusations that **TEVA** and Barrett are responsible for abusing and killing animals, on school property. The individuals also apparently conversed with Barrett's son. Thereafter, in late December 2004, Barrett received telephone calls from SHAC members at his home on several occasions, at all hours of the evening. Additionally, SHAC members began making disconnected collect calls. The calls escalated in quantity to the point where Barrett had no choice but to leave his telephone off the hook at a time when his mother was severely ill in the hospital.[1]

*4 In December 2004, representatives from SHAC wrote a letter to the Middle States Tennis Foundation, of which Barrett is a member of the board of directors, informing them that Barrett is a proponent of "extremely brutal felony animal cruelty." SHAC representatives then wrote a second letter to the Middle States Tennis Foundation, in which the representatives profess to be Barrett, who, by copy of such letter, was purportedly resigning from his position on the board. Although the author of the letters is unknown, the incident was thereafter reported on SHAC's website.

Finally, SHAC representatives trespassed on Barrett's private property, and poured paint thinner on four cars parked on his property, thereby causing extensive damage.

By way of certification, Dennis Ferrell ("Ferrell"), the senior director of security operations and loss prevention at **TEVA**, certifies that defendants have been harassing employees of **TEVA** and Plantex, and their families, in a variety of ways, beginning in 2003. Ferrell alleges that defendants have engaged in leafleting, trespass, harassment, and, in particular, targeted Barrett and Svokos.

Based on the foregoing, plaintiffs filed the within order to show cause and verified complaint. The verified complaint, in eight counts, alleges as follows: (1) trespass upon the property of Plantex; (2) trespass upon the property of employees of Plantex, and/or their family members, (3) interference with Plantex's business operations; (4) conspiracy; (5) trespass; (6) intentional infliction of emotional distress; (7) invasion of privacy; and (8) private nuisance.

SHAC USA opposes plaintiffs' application for injunctive relief. By way of certification, Pamelyn Ferdin ("Ferdin"), the president of SHAC, certifies to the following: SHAC is committed to lawful activity, and is not responsible for the purported actions of individuals which may have caused harm to the plaintiffs herein. Specifically, Ferdin directs the court to SHAC's website, which contains a link to the following disclaimer:

> The SHAC USA web site and newsletter, its hosts, designers, contributors, and sponsors, are not responsible for actions on the part of any individual which prove defamatory, injurious or prejudicial to the individuals or entities named herein, their families, or acquaintances. This publication is provided for informational purposes only, and is not intended to incite any criminal action on the part of its readers, visitors, or recipients.
>
> Links are placed for educational purposes only. SHAC USA, Inc. is not responsible for the content posted on outside sites.

SHAC USA provides the seminal case law regarding activists' First Amendment rights on its website for the benefit of its viewers. SHAC asserts it does not take active steps to organize, fund, solicit, participate in, or

incite violence or other unlawful activity. However, "SHAC USA *ideologically* supports some illegal actions when non-violent, legal activity has failed, as long as no human or animal is physically harmed in the course of such actions." This position is endorsed on SHAC's website, which states that "SHAC will vocally support any action that contributes to animal liberation as long as no human or animal is harmed." The website further states, in its "Frequently Asked Questions" section, that:

> ***5** SHAC supports any action that contributes to animal liberation that does not harm any human or non-human. These actions range from protests, phone blockades, and office disruptions to live liberations and economic sabotage that is often painted as "violent" by our opponents. We support these tactics because we feel they are extremely effective and necessary to bring about change in the current social and economic climate.
>
> Prescribed methods of change, such as letter writing campaigns, relying on our elected officials, and even peaceful protest, have proven vastly ineffective in yielding the timely end to animal abuse on their own. Meanwhile billions of animals have suffered and died as time, energy, and resources are spent on tactics that, by themselves, do not bring about its end. If less "drastic," risky, and difficult tactics suddenly began to make the same changes that live liberations and economic sabotage currently do, ALF and other underground actions would be rendered unnecessary.
>
> In the words of Nelson Mandella, "Non-violence is not a moral principle but a strategy. And there is no moral goodness in using an ineffective weapon."
>
> Disclaimer: While SHAC ideologically supports illegal actions, we do not fund, organize, carry out, or have any knowledge of them before they are carried out. As an aboveground, legal campaign we do not involve ourselves in the illegal elements of social struggles, though we do lend our moral support to those carrying them out, will publicize them after the fact, and will lend tangible support to those tried and/or convicted of them.

The SHAC website advises viewers of their right to remain silent when dealing with investigators from the FBI, and further advises SHAC activists to notify SHAC immediately if they have been the subject of an attempted FBI investigation. The website instructs how to avoid being detected when using its website.

Ferdin further certifies that, although courts have in the past entered preliminary injunctions against SHAC USA, there has never been such an adjudication following a hearing in which witnesses were heard. Ferdin contends that, although activists have, in the past, had no prior knowledge of a restraining order, these activists have been arrested and held in jail for violating court orders. Accordingly, Ferdin urges that the foregoing discourages countless activists from attending events in support of the SHAC campaign.

Based on the foregoing, SHAC USA contends as follows: that an injunction cannot properly be entered against it, that there is no evidence that specifically connects SHAC to the events described, and urges that guilt need always be personal. Further, plaintiffs cannot identify the individuals who purportedly committed the acts set forth above, and, therefore, plaintiffs have no basis to allege that they were influenced by SHAC's website or publication.

SHAC USA argues that an injunction against SHAC, which is not an entity but rather a "worldwide campaign", is of no effect, as it is merely a "thought that is shared and endorsed" by SHAC activists. Additionally, although it is a definable legal entity, SHAC USA cannot be held responsible for the conduct of those who share its views and, even if it could, almost all of the conduct alleged in the verified complaint falls within the purview of protections afforded by the United States and New Jersey Constitutions. To enter the requested restraints against SHAC USA based upon its speech and association would be violative of the free speech protections of the United States and New Jersey Constitutions and, further, the proposed injunction violates due process, as it promotes "guilt by association". Furthermore, SHAC USA's position is that all communication in this case is constitutionally protected, including the publication on SHAC's website of the names and addresses of the advocates' targets.

***6** SHAC argues its website is immunized by *Donato v. Muldow*, 374 *N.J.Super.* 475 (App.Div.2005), wherein Judge Lisa found that the defendant, an operator of an electronic community bulletin board website, was covered by the immunity provisions of the Communications Decency Act and therefore not responsible for derogatory statements found thereon.

By way of reply, plaintiffs point out that since the imposition of temporary restraints, defendants' "campaign of harassment and terror" has continued, unabated.

By way of supplemental certification, Svokos certifies as follows: regardless of the restraints, representatives of defendants have continued to contact his home with

"hang-up" calls and, as a result, he has been forced to disconnect his answering machine based on the volume of the calls. Additionally, in February 2005,[4] the priest at St. Nicholas Greek Orthodox Church, which he attends with his wife and children, was contacted via email by representatives of defendants, who claimed they were parishioners and that they, and others, had observed Svokos inappropriately watching and touching children. Defendants' representatives requested that the priest intervene, or they would be forced to contact the police. The incident was thereafter posted on the SHAC website, with the heading "HLS CLIENT EXEC REPORTED AS PEDOPHILE." Based on the foregoing, Svokos' installed security cameras at his home, and employed a private security company to protect his family and home from defendants' unlawful activity. Additionally, Plantex has installed security cameras and other security systems in its Hackensack, New Jersey office as a result of the SHAC USA campaign.

On or about March 11, 2005, Svokos was contacted by a representative of American Express regarding unusual activity on Israeli's corporate account, totaling $1,600.00. Svokos confirmed said charges were not made or approved by Israeli or another Plantex employee, were fraudulent, and, as a result, he cancelled the card.

Richard S. Egosi ("Egosi"), the senior vice president and general counsel for **TEVA**, and a director of Plantex, certifies that on March 12, 2005, SHAC USA activists poured paint stripper on his vehicle that was parked in his driveway at his home, and spray painted his garage doors. The incident was thereafter posted on SHAC USA's website. Egosi further certifies that he has received numerous "hang-up" calls from defendants' representatives at all hours of the night. Egosi contends that the foregoing incidents were carried out in retaliation for the commencement of the within litigation. Based on the foregoing, Egosi maintains that he is concerned that his life, and his family, may be in danger.

By way of supplemental certification, Israeli indicates that he received numerous "hang-up" calls at his home during the week of March 7, 2005. Further, Israeli certifies that there was unusual activity on his company credit card, for on-line purchases that were not authorized by him or other Plantex employees.

*7 Plaintiffs contend that SHAC USA's argument that it is not responsible for the actions of the individuals who purportedly committed the acts alleged in plaintiffs' complaint is without merit. Specifically, plaintiffs assert that SHAC USA "devises, organizes, and directs the unlawful acts directed at the targets of its campaign" and, therefore, act in concert with the activists and/or incite their illegal activity. In support of the same, plaintiffs direct the court's attention to SHAC USA's previous newsletters. The Winter 2003 Newsletter, Volume 3, Issue 3.5 states in pertinent part as follows:

> In 2001 *we* took on the financiers and wiped the floor with the likes of Stephens Inc. and other major banks. In 2002 *we* taught the world's biggest insurance broker, Marsh Inc., a valuable lesson about the consequences of insuring animal cruelty....SHAC has not gone away and continually beats all expectations and delivers devastating blow after devastating blow....
>
> * * *
>
> All of us in the SHAC movement are creative, we are passionate, and we are unstoppable....
>
> * * *
>
> We are well on our way, and together we will close [HLS] and become the most effective voice for those animals this world has ever seen. (emphasis added).

The Fall 2003 Newsletter, Volume 3, Issue 3 included a SHAC action mailer ("mailer"), with an editorial on the first page which described the mailer as "... your resource tool to help dismantle the HLS lifeline." Additionally, the same newsletter included an article entitled "hit 'em HOME", which gives readers a step-by-step guide to home demonstrations, and encourages readers to tell their targets "Hi from SHAC!" Plaintiffs contend that the foregoing newsletters, along with additional newsletters, e-newsletters, and editorials, not only incite harassing and illegal activity, but also instruct its members on how to do so. Plaintiffs contend that SHAC USA participates in the unlawful activity of its members and activists by inciting, aiding and abetting such individuals in the commission of such acts. Further, SHAC USA identifies and targets HLS customers, which SHAC USA identifies as targets on its website.

Oral argument was entertained on April 1, 2005. This court afforded both counsel the opportunity to present witnesses at a plenary hearing specially scheduled for April 4, 2005. Neither counsel wished to call witnesses in support of their respective positions. Defendant's counsel requested the opportunity to subpoena plaintiffs' witnesses and to be able to "cross examine" those witnesses. This request was denied.

Analysis

Preliminary Restraints

As with all matters seeking preliminary relief, the application is guided by *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). That is, for plaintiff to obtain the relief it seeks, he must show (1) irreparable harm; (2) that the application is premised upon settled law; (3) that there is a reasonable probability of success on the merits; and (4) a balancing of the hardships suggests that the relief should be afforded.

A. *Irreparable harm*

***8** The first principle under the *Crowe* standard is that an injunction should not issue except when necessary to prevent irreparable harm. *Id.* at 132. Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. *Id.* at 132–33. Pecuniary damages may be inadequate because of the nature of the injury or of the right affected. *Id.* at 133.

It is clear that the activity as alleged constitutes an immediate threat of irreparable harm. Reasonable fear of a threat to one's safety, or the safety of one's family is, by definition, irreparable harm. Plaintiffs contend that defendants will, if allowed to continue, threaten the safety and privacy of the plaintiffs, its officers and/or employees, cause families to live in fear, repeatedly violate criminal laws, and attempt to ruin the business of **TEVA** and Plantex. Plaintiffs understandably urge that Svokos has suffered disparagement of his reputation, embarrassment and humiliation in the presence of his family, friends, neighbors, and priest. The same can be said, in large measure, for Barrett and Israeli. Based on the foregoing, plaintiffs contend that the harm suffered is irreparable, and cannot be adequately addressed by way of monetary damages.

SHAC USA, although opposing the within application, does not dispute that that the alleged conduct occurred. Rather, SHAC's position is that, even if SHAC activists engaged in such conduct, SHAC is not responsible for the same, and their conduct is protected pursuant to the United States and New Jersey Constitutions.

The court is satisfied that, based on the record before it, the plaintiffs have made a sufficient showing of irreparable harm, as the alleged activity poses significant jeopardy to the health and safety of plaintiffs, their employees, and their families.

B. *Settled Law*

The second prong of *Crowe* is that the legal right underlying the plaintiff's claim is settled. *Crowe, supra*, 90 *N.J.* at 133.

Limits on Freedom of Speech

It has long been recognized that one of the fundamental foundations of this country is the First Amendment and its establishment of freedom of speech. *See, De Jonge v. Oregon*, 299 *U.S.* 353, 364 (1937). Courts must pay due deference not only to the "letter" of the amendment, but also to its spirit, no matter how distasteful. *See, Texas v. Johnson*, 491 *U.S.* 397, 414 (1989); *see also, R.A.V. v. City of St. Paul*, 505 *U.S.* 377, 382 (1992); and *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 *U.S.* 886, 910 (1982), 382

The content of speech, however, may be regulated in limited areas, where the "speech" is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *R.A.V. v. City of St. Paul*, 505 *U.S.* 377, 383 (1992) (*citing Chaplinsky v. State of New Hampshire*, 315 *U.S.* 568, 572 (1942)). *See, e.g., Roth v. United States*, 354 *U.S.* 476, *reh'g denied*, 355 *U.S.* 852 (1957) (obscenity); *Beauharnais v. Illinois*, 343 *U.S.* 250, *reh'g denied*, 343 *U.S.* 988 (1952) (defamation); *Chaplinsky, supra* ("fighting" words); *United States v. O'Brien*, 391 *U.S.* 367, *reh'g denied*, 393 *U.S.* 900 (1968) (burning draft card).

***9** The United States Supreme Court has long recognized the principal that "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 *U.S.* 444, 447 (1969). Moreover, " 'the mere abstract teaching * * * of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' " *Id.* (*citing Noto v. United States*, 367 *U.S.* 290, 297–298 (1961). *Brandenburg* stands for the proposition that inciteful speech alone is not enough to bring the speech

outside of the protection of the First Amendment; rather, there must be a causal nexus between the inciteful speech and imminent unlawful activity. Stated differently, speech that is directed to inciting or producing *imminent* lawless action cannot hide under the veil of the First Amendment if likely to incite or produce such action. *Id. See also, Hess v. Indiana,* 414 *U.S.* 105 (1970), *N.A.A.C.P. v. Claiborne, supra,* 458 *U.S.* at 886, and *Watts v. United States,* 394 *U.S.* 705 (1969).

In the instant matter, the court is satisfied that a prima facie showing has been made that the SHAC website is directed to, and likely to incite, imminent lawless activity. Specifically, the website clearly endorses any activity, legal or illegal, so long as it does not harm any human being or animal. Additionally, each time action is taken against a "target", the same is posted on the website, thereby encouraging further immediate illegal action against the "target". The actions complained of, breaking and entering a personal residence, stealing property of another and thereafter using the same, declaring Svokos' a pedophile, trespassing on private property, making anonymous telephone calls at all hours of the evening, strip painting vehicles and otherwise damaging private property, among others, clearly constitute illegal activity. The court would have to turn a blind eye to find that there is no causal nexus between the SHAC website and the violence thereafter produced. The court need also be concerned about what appears to be an escalation of the level and intensity of criminal behavior. That defendants fail to recognize the gravity of plaintiffs' allegations cannot change that which has occurred.

SHAC USA's Responsibility

The court acknowledges that, during the course of this opinion, it has referred to the defendants collectively, has not segregated the role of SHAC USA, and that a showing of responsibility must be made before an injunction can issue against SHAC USA. Defendant's contention that guilt must be individual, not collective, strikes a vibrant cord. In determining whether SHAC can be deemed responsible for the actions of its activists, the court is instructed by *Donato, supra,* 374 *N.J.Super.* at 475.

***10** In *Donato,* the Appellate Division considered the potential liability of the operator of an electronic community bulletin board website based on allegedly actionable messages posted anonymously by others. *Id.* at 477–78. The website, known as "Eye on Emerson," contained information about local government activities, including minutes of meetings of the borough council, planning board and board of education. *Id.* at 479. The site included a discussion forum, in which any user could post messages, either with attribution or anonymously. *Id.* After the inception of the website, negative messages about elected officials were posted, some concerning the discharge of their official duties, some personal, many vile and derogatory in their language and tone. *Id.* at 479–80. Several elected officials filed suit, alleging that the operator of the website was liable as a publisher of the defamatory statements made by others, and that the operator "actively participated in selective editing, deletion and re-writing of anonymously posted messages on the Eye on Emerson website and, as such, is entirely responsible for the content of the messages." *Id.* at 483–84. Judge Lisa found that the operator of the website was immunized by the provisions of the Communications Decency Act ("CDA"), and therefore not responsible for derogatory statements found thereon. The CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 *U.S.C.A.* § 230(c)(1).

The court is mindful of the court's holding in *Donato;* however, the court is not satisfied that *Donato* is controlling as it addressed distinctly different issues. Specifically, *Donato* is determinative of whether the anonymous posting of potentially politically scurrilous remarks can expose a website operator to liability. In *Donato,* the defamatory postings pertained to political discourse. In this matter, however, the court is not concerned with political discourse and defamation but, rather, criminal activity and threats to an individual and/or an individual's family.

The court is also guided by *N.A.A.C.P. v. Claiborne, supra,* 458 *U.S.* at 886. In that case, the Court dealt with the issue whether an organization can be held legally responsible for the unlawful actions of its activists. *Id.* Particularly, in *N.A.A.C.P. v. Claiborne,* African American citizens of Claiborne County, Mississippi presented white elected officials with a list of particularized demands for racial equality and integration. *Id.* at 889. After failing to receive a satisfactory response, several hundred persons voted at a local National Association for the Advancement of Colored People ("NAACP") meeting to place a boycott on white merchants in the area. *Id.* In carrying out the boycott, "certain of the defendants, acting for all others, engaged in acts of physical force and violence against the persons and property of certain customers and prospective customers. Intimidation, threats, social ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results." *Id.* at

894. As a result of the foregoing, several white business owners filed suit, seeking damages. *Id.* at 890.

*11 Faced with the question whether the NAACP can be held legally responsible for the actions of Charles Evers ("Evers"), the field secretary of the NAACP, the Court noted that "the NAACP—like any other organization—of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority....Moreover, the NAACP may be found liable for other conduct of which it had knowledge and specifically ratified." *Id.* at 930 (internal citations omitted). With the foregoing in mind, the Court held that, in the absence of evidence that the NAACP gave Evers any actual or apparent authority to commit the acts of violence or to threaten violent conduct in connection with the boycott, and in the absence of evidence that the NAACP had knowledge of or ratified any acts of violence, the NAACP could not constitutionally be held liable for any acts of violence in connection with the boycott. *Id.* at 930–31. In so holding, the court noted that the NAACP never authorized, and never considered taking, any official action with respect to the boycott; the NAACP supplied no financial aid to the boycott; and the trial court made no finding that the national organization was involved in any way in the boycott. *Id.*

That said, *N.A.A.C.P. v. Claiborne* allows for the proposition that SHAC USA may be held responsible for the unlawful conduct of its activists of which it had knowledge and specifically ratified, or if such conduct was taken within the scope of actual or apparent authority on behalf of SHAC. There are no facts before the court indicating that activists were acting under the auspice of authority on behalf of SHAC USA.

SHAC's website endorses any activity, legal or illegal, so long as it does not harm any human being or animal. Additionally, each time action is taken against a "target", the same is posted on the website, thereby encouraging further immediate illegal action against the "target". The website goes on to state that, although SHAC does not fund, organize, carry out, or have any knowledge of illegal actions before they are carried out, "we do lend our moral support to those carrying them out, will publicize them after the fact, and will lend tangible support to those tried and/or convicted of them." At oral argument, defendant's counsel indicated that, to the best of his knowledge, with regard to the postings on its website, an individual or individuals affiliated with SHAC revise the same, determine which submissions should be posted, and may make editorial deletions to the same. Accordingly, this court is satisfied, at least at this stage, that a prima facie showing has been made that SHAC ratifies the illegal activity every time it publicizes, and implicitly encourages, the activities on the website after the fact.

SHAC USA contends that the First Amendment provides them with freedom of speech which cannot be restricted by virtue of the proposed restraining order. What SHAC USA fails to note, however, is that the rights of one end where the rights of another begin. *See, West Virginia State Board of Education v. Barnette*, 319 *U.S.* 624, 630 (1943). Here, SHAC's website, whether intentionally or not, treads heavily on plaintiffs' rights to privacy in their home, to live peaceably, without fear. SHAC USA is seeking to avoid responsibility by taking shield behind its website. This court cannot countenance such conduct.

Content Neutral v. Content Based Speech

*12 *Horizon Health v. Felicissimo*, 135 *N.J.* 126 (1994) provides the court with guidance and establishes that the authority to issue injunctive relief falls well within the discretion of a court of equity. *Id.* at 137. "Moreover, courts have noted often that a State may impose content-neutral time, place, and manner restrictions on speech in public forums." *Id.*

In *Horizon*, a family planning clinic sought to enjoin the activities of antiabortion protestors who, directly in front of the clinic, began giving "sidewalk counseling" to potential abortion patients, described as "approaching a woman entering the clinic to gently inform her of alternatives to abortion and the potential bad effects of abortion in an effort to change her mind." *Id.* at 132. The protestors' activities also included handing patients pamphlets containing pictures of bloody, dismembered fetuses, warning patients that "there are murderers in there" who "tear the arms and legs off your babies," and urging staff members to "stop killing those babies." *Id.* The trial court issued an injunction, prohibiting "gathering, parading, patrolling and picketing," thereby regulating "expressive activity traditionally protected by the First Amendment." *Id.* at 139. The injunction enforced the following public-policy interests: "(1) the accessibility of medical services and the maintenance of medical standards; (2) protection of private property; and (3) public safety ." *Id.* at 138.

In a public forum,

> the government may not prohibit

> all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end....The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Murray v. Lawson, 138 *N.J.* 206, 234 (1994), *cert. denied*, 515 *U.S.* 1110 (1995) (*citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 *U.S.* 37, 45 (1983). A threshold inquiry, then, is whether the proposed injunction is content neutral. *Id.*

"The principal inquiry in determining content neutrality in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Horizon, supra*, 135 *N.J.* at 140 (*citing Ward v. Rock Against Racism*, 491 *U.S.* 781, 791, *reh'g denied*, 492 *U.S.* 937 (1989). A restriction is content neutral if it can be justified without reference to the content of the regulated speech. *Id.* If a restriction is imposed because of a disagreement with the message the regulated speech conveys, however, it is impermissibly content-based. *Id.*

***13** Here, the plaintiffs do not seek the entry of the injunction because of what defendants said, but because of how and where they said it. Notably, the proposed injunction does not refer at all to the content of defendants' speech. In the instant matter, defendants have purportedly engaged in illegal conduct, have threatened the lives of Svokos, plaintiffs' employees, and their families, and have harassed the plaintiffs at all hours of the evening. The purpose of the injunction is not to restrain the specific viewpoints of defendants; rather, it is to allow defendants to express their views about animal testing in a manner that does not impermissibly interfere with or unnecessarily disrupt the plaintiffs, their employees, or their families. Accordingly, the proposed injunction is content-neutral.

Time, Place, and Manner Restrictions

Having determined that the injunction is content neutral, the court must next determine whether the proposed time, place, and manner restrictions are reasonable. Specifically, the court must decide whether those restrictions (1) serve a significant government interest; (2) are narrowly tailored to serve such an interest; and (3) leave open ample alternative channels of communication for defendants. *Horizon, supra*, 135 *N.J.* at 143.

1. *Defendant's actions at or near residential property*

"The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Madsen v. Women's Health Center, Inc.*, 512 *U.S.* 753, 775 (1994). Accordingly, the proposed restrictions clearly serve a significant government interest. *See, Frisby v. Schultz*, 487 *U.S.* 474, 484 (1988) (concluding that protection of residential privacy is a significant government interest). Moreover, the proposed restrictions leave defendants with the opportunity to continue leafleting, to continue demonstrating, to continue zealously advocating for animal rights. What the restrictions do, however, is limit defendants' ability to do so within a certain distance of plaintiffs' homes, at all hours of the evening, so as to ensure the health and well-being of plaintiffs, their employees, and their families.

In *Horizon*, the court recognized that the factual history of the protestors' conduct must be considered when crafting an injunctive order. *Id.* at 152. In *Murray*, however, a residential picketing injunction was sustained absent a showing of previous disorderly or unlawful conduct. *Murray, supra*, 138 *N.J.* at 215. In the instant matter, the court is satisfied that plaintiffs have made a prima facie showing that defendants have encouraged, supported, and facilitated illegal and reprehensible conduct by way of its website and newsletter. No matter how noble the defendants' cause, it cannot excuse utilization of terroristic tactics to fulfill its mission. Moreover, plaintiffs have made a prima facie showing that, if an injunction is not issued, defendants will continue to engage in such course of conduct.

***14** The court is satisfied that the proposed time, place, and manner restrictions in connection with plaintiffs' private residences are reasonable based on the circumstances.

2. *Defendant's actions at or near plaintiffs' business premises*

Whether or not the injunction as to plaintiffs' business premises can stand, however, is separate and distinct from the determination as to whether the injunction as to plaintiffs' homes is proper.

A cursory review of plaintiffs' pleadings indicates that, with regard to plaintiffs' business premises, plaintiffs allege that defendants have left fliers accusing Plantex and **TEVA** of abusing and killing animals on the windshields of cars parked in both the Plantex and the **TEVA** parking lots. Additionally, plaintiffs allege that in November 2004, SHAC activists attempted to gain unlawful entry to **TEVA's** Boston facility.[5]

Peaceful leafleting, without more, is clearly constitutionally protected speech. *See, Martin v. City of Struthers,* 319 *U.S.* 141, 143 (1943). "The right to distribute, circulate or otherwise disseminate ideas and written materials has long been recognized to constitute an integral part of the right of free speech and press. Both rights are clearly fundamental ones protected by the First Amendment." *Toms River Pub. Co. v. Borough of Manasquan,* 127 *N.J.Super.* 176, 182 (Ch. Div.1974). *See also, Martin, supra,* 319 *U.S.* at 143.

This court does not wish to be heard for the proposition that leafleting, demonstrations, and ringing doorbells of plaintiffs' neighbors are in any way comparable to illegal activity such as breaking and entering, stealing, and the destruction of property. The court notes that plaintiffs have set forth no evidence establishing that SHAC activists harassed plaintiffs' employees at their place of business, nor did the plaintiffs, its employees, or their families report any acts of violence or threats made at plaintiffs' place of business. There is simply insufficient evidence before the court to support a showing that defendants have taken action which creates the threat of imminent danger to plaintiffs' businesses.

The court is satisfied that plaintiffs have failed to make a prima facie showing that the proposed restrictions in connection with plaintiffs' business premises are reasonable based on the circumstances. Accordingly, plaintiffs' requests to preliminary enjoin defendants from coming up or on, or within one-hundred (100) feet of, the real or leased property of Plantex USA, Inc. ("Plantex") is denied.

Plaintiffs also seek to preliminarily restrain defendants from vandalizing or damaging the real, leased, or personal property of Plantex. The court in like manner cannot enjoin future conduct when there has been no showing of an imminent threat that the same will occur. Accordingly, such request is also denied.

C. *Reasonable Probability of Success*

The third prong of *Crowe* is that a preliminary injunction should not issue where material facts are controverted. *Crowe, supra,* 90 *N.J.* at 133. Thus, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits. *Id.* That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. *Id.* Indeed, the point of temporary relief is to maintain the parties in substantially the same condition when the final decree is entered as they were when the litigation began. *Id.* at 134.

***15** As stated above, SHAC USA does not dispute that the aforementioned conduct occurred. Rather, SHAC's position is that, even if SHAC activists engaged in such conduct, SHAC cannot be held responsible for the same, and their conduct is protected pursuant to the United States and New Jersey Constitutions. Accordingly, the material facts are not disputed but, rather, the parties dispute the extent to which SHAC USA can be held responsible for individual activities, and the applicability of the First Amendment and its progeny.

Accordingly, the court is satisfied, at least at this stage, that plaintiffs have demonstrated a reasonable likelihood of success on the merits.

D. *Balance of Hardship*

The final test from *Crowe* is the relative hardship to the parties in granting or denying relief. *Crowe, supra,* 90 *N.J.* at 134. Therefore, in granting injunctive relief, the court must balance the defendants' constitutional right of free expression against the public-policy considerations. A balance of these competing interests requires the court to devise a remedy that "should be 'no broader than necessary to achieve [the] desired goal[ ].'" *Murray, supra,* 138 *N.J.* at 218 (*citing Madsen v. Women's Health Center, Inc.,* 512 *U.S.* 753 (1994)).

In fashioning injunctive relief, the court is guided by the Supreme Court's holding in *Murray.* In that case, the Supreme Court found that an injunction against picketing

would serve the residential privacy interest while upholding free speech, by prohibiting picketing within 100 feet from the property line of the target's residence, requiring that there be no more than ten picketers outside the "picket free zone", and requiring that notice be given to the local police department at least 24 hours in advance, indicating the number of picketers, the intended commencement time, and the duration of the picketing. *Id.* at 234. Further, picketing was permitted no more than once during any given two-week period. *Id.*

The court is satisfied that, based on the holding in *Murray*, the following injunction will properly serve the plaintiffs' interests while upholding the defendants' rights to free speech: defendants shall be restrained from picketing within 100 feet from the property line of the plaintiffs' residences, there shall be no more than twenty picketers outside the "picket free zone", and defendants shall give twenty-four hours notice to the local police department, indicating the anticipated number of picketers if so known, when picketing shall commence, and the proposed duration of the picketing. Further, picketing shall be permitted no more than twice during any given week period.

This court is sensitive to the difficulties which ensue when the specter of contempt is present and the issue of notice is raised. Therefore, to assuage defendants' concerns as to the power of this court to enforce the within order, particularly in the context of contempt proceedings, the defendant shall post the following language on the websites owned, operated, or controlled by it:

***16** "NOTICE: THE SUPERIOR COURT OF NEW JERSEY HAS ISSUED AN ORDER PROHIBITING CERTAIN ACTIVITY RELATING TO **TEVA PHARMACEUTICALS**, PLANTEX USA, INC., THEIR EMPLOYEES, AND THEIR FAMILIES."

Such notice shall be posted as a continuously visible underlined hyperlink which, when clicked, displays a legible, complete, and unmodified copy of all pages of the order, excluding the names of plaintiffs' attorney. Such notice shall be posted on the home page of any website owned and/or operated by this defendant, in a typeface and color that is consistent with the most prominent reference to plaintiff(s) on each such page, and in a manner whereby the hyperlink is proximately located to the most prominent reference to plaintiff(s) on the page, such that the hyperlink would ordinarily be displayed to a user viewing the page. Such notice shall be posted by this defendant within seventy-two (72) hours of receipt of this court's order memorializing this decision.

The court notes that plaintiff's counsel has not requested, and the court has not directed, that SHAC USA is precluded from posting any publications of its activists on its website.

That which the court grants herein is only that which was requested by plaintiffs' counsel by way of this court's order dated February 22, 2005, (1)(a) through (e), and nothing more.

Plaintiffs' counsel shall prepare and submit the appropriate order pursuant to the five-day rule in conformity with the above.

All Citations

Not Reported in A.2d, 2005 WL 1010454

Footnotes

1 The court notes that SHAC USA is a not-for-profit Delaware corporation, separate and distinct from SHAC, an unincorporated association. Specifically, SHAC is an international campaign to close Huntingdon Life Sciences ("HLS"). SHAC USA reports on efforts around the United States to close HLS. Inasmuch as both SHAC USA and SHAC share the same purpose and strategies, however, the court shall refer to them interchangeably, unless the distinction is significant, at which time they shall be referred to by their specific name.

2 The court notes that SHAC USA is a corporate entity and, as such, whether SHAC activists are deemed "members" is a term loosely utilized. There has been no suggestion by either counsel or their respective clients that the persons who post publications on the SHAC website are officers and/or directors of SHAC USA.

3 *See*, Transcript of Preliminary Injunction Hearing, Montgomery, Pennsylvania, February 28, 2005, p.42, 1.2–7.

4 It is unclear whether this incident occurred before the imposition of the temporary restraints.

5 Plaintiffs do not allege, however, that SHAC activists attempted to gain unlawful entry to **TEVA's** New Jersey facility and, as such, the court shall not address that which purportedly occurred in Boston.

End of Document

Exhibit D

2006 WL 133851
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Chancery Division.

Violet Padayachi **CHERRY**, Plaintiff,
v.
CITY OF **ENGLEWOOD**, Board of Health for the **City** of **Englewood**, and Brenda Greir, Curtis Caviness, Jerald Chambers, James R. Ha and Aaron Wilson, individually and in their capacity as Officers and/or Members of the **City** of **Englewood** Board of Health, Defendants.

No. BER-C-447-05.
|
Argued Jan. 13, 2006.
|
Decided Jan. 17, 2006.

Attorneys and Law Firms

Charles J. Sciarra, for Plaintiff, Violet Padayachi **Cherry**. (Sciarra & Catrambone, LLC.).

William F. Rupp, for Defendant, **City** of **Englewood**. (William F. Rupp,).

Wilfredo Ortiz, for Defendant, Board of Health for the **City** of **Englewood**. (Ortiz & Paster).

MaryAnn Salemi, Assistant Prosecutor, for County of Bergen. (Office of the Bergen County Prosecutor).

OPINION

DOYNE, J.

INTRODUCTION

***1** There are two matters pending before this court: the return of an order to show cause seeking various preliminary relief and a motion, prosecuted on behalf of the **City** of **Englewood** ("the **City**"), seeking to dismiss the plaintiff's complaint for failure to state a cause of action pursuant to *R.*4:6-2(e) or for partial summary judgment pursuant to *R.*4:46.

All applications are denied.

RELEVANT STATEMENT OF FACTS AND PROCEDURAL HISTORY

Violet Padayachi **Cherry** ("**Cherry**" or "plaintiff"), was the duly appointed Director of Health Services and Health Officer for the **City**. Plaintiff has held the dual roles for approximately sixteen (16) years and has served as the Director of Health Services for approximately thirty-one (31) years.

Plaintiff was and is the Chairperson for the **Englewood** Democratic Committee. According to the plaintiff, in the municipal elections in 2004, she supported and campaigned for candidates who were running against candidates supported by the Bergen County Democratic Committee ("BCDC"). Apparently the candidates she supported prevailed in the primary election and, thereafter, in the general election held in November 2004. In or about July 2004 **City** Councilman Henry Citron ("Citron") called for an investigation of plaintiff concerning the purported use of her office to perform political activities during work hours, an allegation denied by the plaintiff. Thereafter, the Bergen County Prosecutor's Office conducted an investigation of these allegations.

Plaintiff has certified the investigation was instituted at the behest of the Manager for the **City**, Cheryl Fuller ("Fuller"). By way of a letter to Fuller, dated December 22, 2004, Assistant Prosecutor Jeffrey S. Ziegelheim ("Ziegelheim") advised that following a complete investigation of the allegations relating to the plaintiff's political campaign activities during working hours, "it has been determined that the allegation of improper conduct on the part of Ms. **Cherry** has been sustained. There is, however, an absence of evidence indicating that it was the intent of the employee to violate the criminal statutes relevant to a charge of theft." Ziegelheim went on to indicate the matter was returned to Fuller for administration of discipline, should Fuller deem the same warranted.

Fuller then authored a letter to Brenda Grier ("Grier"), President of the **Englewood** Board of Health, under cover of February 15, 2005, enclosing Ziegelheim's letter and requested that "appropriate measures" be taken. Plaintiff's counsel, Charles J. Sciarra, Esq. ("Sciarra"), wrote to Ziegelheim requesting a clarification as well as a complete copy of the prosecutor's file. Ziegelheim declined both requests. Thereafter, on or about April 11, 2005, the Board of Health for the **City** of **Englewood** ("the Board"), passed a resolution and appointed John Carbone, Esq. ("Carbone"), as "special investigative attorney for the Board" to investigate "employee misconduct at a specified rate." Carbone authored an interim report to Wilfredo J. Ortiz, II, Esq. ("Ortiz"), counsel to the Board. After Carbone recounted his efforts, he found plaintiff had engaged in political activity on municipal time and had used municipal facilities, equipment and employees for political activities and for unsanctioned and unauthorized private fundraising. He then stated after plaintiff had been alerted to the same, she continued such activities during the election cycle. Carbone found this to be a further violation, as well as actions constituting insubordinate conduct. Carbone concluded plaintiff had repeatedly violated existing policies; nevertheless, he requested the Board appoint a sub-committee to review his findings and to receive recommendations for further disciplinary actions. He recommended interim disciplinary action by the Board "to bring to an immediate halt the continued and insubordinate conduct of the employee [**Cherry**] and particularly the political operations being conducted through and in her office." Specifically, Carbone recommended a suspension with pay. Plaintiff was suspended with pay at a Board meeting apparently conducted on the same date as Carbone's memo, that is, November 14, 2005. It is conceded that no hearing was conducted nor any evidence presented.

***2** On December 7, 2005 a two count verified complaint was filed on plaintiff's behalf against the **City**, the Board, and various individual members of the Board. In the first count, plaintiff asserts the defendants' activities violated *N.J.S.A.* 26:3-27 and, therefore, seeks her immediate reinstatement, reimbursement for any lost compensation, and reimbursement for attorney's fees, costs and expenses. The second count alleges a violation of the Conscientious Employee Protection Act ("CEPA"), *N.J.S.A.* 34:19-1 to -8. Plaintiff claims the actions against her were taken in retaliation for a letter she authored, on December 1, 2004, to Commissioner Clifton Lacy ("Lacy") of the New Jersey Department of Health and Senior Services, wherein plaintiff complained defendants' activities were contrary to the public health. In this count plaintiff seeks various damages as well as reinstatement. The complaint seeks a jury trial on all issues related to the CEPA claim.

A hearing was conducted on December 9, 2005 in conjunction with the plaintiff's request for temporary relief. After having the opportunity of hearing from counsel all temporary relief was denied, but the defendants were restrained, with their consent, from conducting any hearing with respect to any contemplated disciplinary charges until such time as the charges were filed and served and discovery provided.

By way of an order dated December 9, 2005 the court established a briefing schedule as to the plaintiff's request for preliminary relief. The court also directed the Office of the Bergen County Prosecutor ("the Prosecutor") to show cause why the subpoena duces tecum served upon Ziegelheim should not be enforced as issued. Finally, the court ordered the court's jurisdiction as to count one shall also be addressed on the return date.

Thereafter, the **City** prosecuted the motion to dismiss and/or for summary judgment referenced above. The **City** urges that the Board is an independent, autonomous governmental agency and, as such, the **City** had no authority to direct the Board as to how to carry out its duties; therefore, there could be no vicarious responsibility for the actions of the Board. As such, the **City** seeks dismissal of all claims against it.

ANALYSIS

I. *Plaintiff's Request for Preliminary Relief*

The court notes injunctive relief is an extraordinary equitable remedy that should only be entered upon a showing, by clear and convincing evidence, of entitlement to the relief. *Dolan v. DeCapua,* 16 *N.J.* 599, 614 ("Injunctive judgments are not granted in the absence of clear and convincing proof"). The seminal case in determining whether preliminary injunctive relief should be granted is *Crowe v. De Gioia,* 90 *N.J.* 126 (1982). Under Crowe, the movant bears the burden of demonstrating that: 1) irreparable harm is likely if the relief is denied; 2) the applicable underlying law is well settled; 3) the material facts are not substantially disputed and there exists a reasonable probability of ultimate success on the merits; and 4) the balance of the hardship to the parties favors the issuance of the requested relief.

Id. at 132-34.

***3** As to the irreparable harm element, harm is generally considered irreparable if it cannot be redressed adequately by monetary damages. *Id.* at 132-33. Pecuniary damages may be inadequate due to the nature of the injury or the right affected. *Id.* at 133. Moreover, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits. *Id.* That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. *Id.* Indeed, the point of temporary relief is to maintain the parties in substantially the same condition when the final decree is entered as they were when the litigation began. *Id.* at 134.

The thrust of the plaintiff's request for relief is premised upon *N.J.S.A.* 26:3-26 and 27. The first statute provides as follows:

> No health officer, inspector or employee holding a license issued in the name of the State Department of Health after five years' consecutive service in the employ of a local board or regional health commission shall be removed from office or reduced in pay or position except for just cause and after public hearing as provided in section 26:3-27 of this Title.

It is conceded that the plaintiff is a health officer holding the applicable license who has served five consecutive years of service.

*N.J.S.A.*26:3-27 referencing removal of health officers, provides as follows:

> The local board or regional health commission, not operating under the provisions of Title 11A, Civil Service of the New Jersey Statutes employing a health officer or any other such person whom is sought to remove, shall formulate or receive charges in writing, against such person and shall fix a time and place for a hearing thereon.
>
> A written copy of the charges and a written notice of the time and place of the hearing shall be served upon the person sought to be removed at least twenty days prior to the hearing.
>
> At the hearing the local board or regional health commission shall hear all witnesses and receive all evidence produced, and if the charges are found to be true in fact, and just cause be shown, the local board or regional health commission may remove or reduce the pay, or position of the person against whom the charges are made.

It appears to the court the principal, but not only, question presented is whether the plaintiff's suspension with pay constitutes a removal from office or a reduction in pay or position such that the Board's actions must be deemed violative of the Statute. Plaintiff claims she has demonstrated irreparable harm by way of damage to her reputation and damage to the public. Plaintiff asserts her reputation has been, and continues to be, damaged because of the unjustified "removal" from her position. Plaintiff also asserts there will be damage to the public as the public health issues will not be addressed.

***4** For purposes of this hearing, the latter assertion is rejected. The Board has provided a certification of Paula Jenkins ("Jenkins"), now Acting Director of the Department of Health, who claims the department has "flawlessly performed" all of its duties since the plaintiff's suspension. Jenkins further claims as a licensed health officer she is qualified and experienced to carry out the necessary duties of her new appointment. Premised upon the same, the court is not prepared to find that the public has and/or will suffer any irreparable damages. The court is satisfied, however, contrary to the defendants' position, the potential damage to plaintiff's reputation could constitute irreparable harm. *See Community Hosp. Group v. More,* 365 *N.J.Super.* 84, 100 (App.Div.2003), *rev'd on other grounds,* 183 *N.J.* 36 (2005) (where the court concluded any diminution of doctor's reputation is not readily capable of being remedied by monetary damages).

Although the plaintiff successfully surmounted the first prong of *Crowe,* the court is not satisfied plaintiff has made an adequate demonstration of ultimate success on the merits such that interim relief is warranted. Initially, the court is not prepared to find a suspension with pay is tantamount to removal. In *La Polla v. Board of Chosen Freeholders of the County of Union,* the court explained "the power to suspend and the power to remove are not the same. To suspend means to discontinue temporarily. 'Suspension' is an *ad interim* stoppage or arrest of official power and pay, while removal terminates wholly the incumbacy of the office or position." *La Polla,* 71 *N.J.Super.* 264 (Law Div.1961) (citing *Black's Law Dictionary (3d ed.),* page 1528).

The court is also not prepared to find, at least at this stage, there was no just cause for removing the plaintiff. The court is compelled to note that two purportedly independent investigations, one by the Bergen County Prosecutor's Office and one by an attorney appointed by the Board, have found plaintiff engaged in wrongdoing. Accordingly, her entitlement to interim relief at this time is called into question. *See, Borough of Princeton v. County of Mercer,* 169 *N.J.* 135, 158 (2001) (where the court noted under the doctrine of unclean hands a suitor in equity must come into court with clean hands).

Premised upon that which is set forth above, specifically plaintiff's inability to demonstrate ultimate success on the merits, the court is unable to find that the balance of hardship favors the plaintiff's request for relief. Accordingly, plaintiff's request for interim relief is denied. The court does not decide when the Board need bring the required charges other than to note the Board's counsel indicated at oral argument the charges would be filed shortly.

II. *Application to Enforce the Subpoena Duces Tecum*

A subpoena duces tecum was served upon the Prosecutor's Office seeking the investigation file, as referenced in Ziegelheim's letter to Fuller dated December 22, 2004. The subpoena was returnable on December 16, 2005. Under cover of December 8, 2005, Ziegelheim wrote to the court, with a copy to all counsel, advising the Prosecutor's Office would not oppose the release of the confidential file if the court enters an order requiring same. Counsel, however, were unable to resolve the issue of production without court intervention. On January 6, 2006 the court executed an unopposed order directing the Bergen County Prosecutor to produce any and all documents responsive to the Subpoena Duces Tecum by no later than January 13, 2006. At oral argument Assistant Prosecutor MaryAnn Salemi presented all counsel with copies of the investigation file, pursuant to the court order. Accordingly, no further issue remains for decision as to the subpoena served.

III. *The **City's** Application*

The Governing Standard

***5** The **City** brings an application to dismiss the plaintiff's complaint for failure to state a cause of action and/or for partial summary judgment. Whether or not the application is appropriately before the court pursuant to *R.*4:67-4(a) and *R.*4:67-5 need not be addressed in light of the clarity of the issue presented.

The standard governing analysis of a motion to dismiss for failure to state a claim pursuant to *R.* 4:6-2(e) is the complaint must be examined "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." *Printing Mart-Morristown v. Sharp Elecs. Corp.,* 116 *N.J.* 739, 746 (1989). At this preliminary stage of the litigation the court should not be concerned with the ability of plaintiff to prove the allegation contained in the complaint. *See Id.* at 746. The plaintiff is entitled to every reasonable inference of fact and the examination of a complaint's allegation of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach. *See Id.* "Courts should grant these motions with caution and in 'the rarest instances." ' *Ballinger v. Delaware River Port Auth.,* 311 *N.J.Super.* 317, 322 (App.Div.1998), quoting *Printing Mart, supra,* 116 *N.J.* at 772.

A motion for dismissal for failure to state a cognizable claim pursuant to *R.* 4:6-2(e) should be based on the pleadings, with the court accepting as true the facts alleged in the complaint. *See Rieder v. State Dept. of Transportation,* 221 *N.J.Super.* 547, 552, (App.Div.1987). Nevertheless, the motion should be granted if even a generous reading of the allegations does not reveal a legal basis for recovery. *See Edwards v. Prudential Property and Casualty Company,* 357 *N.J.Super.* 196, 202 (App.Div.2003). "The motion may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiff's claim must be apparent from the complaint itself." *Edwards, supra,* 357 *N.J.Super.* at 202.

However, where "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by *R.* 4:46" after reasonable opportunity is provided to present all material pertinent to such a motion. *See R.* 4:6-2.

In the instant matter the **City**, as the moving party, at least in significant part, is not presenting materials outside of the pleadings in prosecuting its motion to dismiss. When a party has not presented evidence outside the four corners

of the complaint, the motion qualifies as a motion to dismiss and is not a motion for summary judgment. *See Velantzas v. Colgate-Palmolive Co.,* 109 *N.J.* 189 (1988). Therefore, the court will not treat the instant application as one for summary judgment but will analyze it under the standards as set forth in *Printing Mart.*

The Instant Application

***6** The Board of Health is apparently an autonomous governmental entity which has exclusive authority to hire, supervise, discipline, suspend or remove its employees, including the plaintiff. *See generally, N.J.S.A.* 26:3-1 to -91. The **City** argues there is no provision of Title 26 which would purport to vest the right to appoint personnel, fix their salaries and terms of office, institute disciplinary actions or remove or suspend employees of the Board of Health in any public body or entity other than the Board of Health. In other words, such authority resides solely with the Board. The plaintiff is an employee of the Board, not the **City**; thus, it appears the **City** does not have the authority to direct the Board to take or withhold disciplinary action against a Board employee. *Ibid., see also* Revised General Ordinance of the **City** of **Englewood**, Chapter 8, Article 3. Accordingly, the court is persuaded to conclude the provisions and mandates of Title 26 address the Board and not the **City**. This, however, is not the end of the **City's** potential liability.

Plaintiff urges, though, the **City** may be liable under the doctrine of respondeat superior. The **City** vigorously urges that it cannot remain as a defendant under this doctrine as the **City** cannot be vicariously liable for the actions of the Board. This matter, interestingly, was specifically addressed by the New Jersey Court of Errors and Appeals, the predecessor to the New Jersey Supreme Court, in the matter of *Valentine v.* ***Englewood,*** 76 *N.J.L.* 509 (E & A 1908). In *Valentine* the Supreme Court was presented with a dispute as to whether the **City** was liable for the quarantine of an individual purportedly afflicted with scarlet fever. The Court addressed the issue whether the **City** of **Englewood** was liable for the acts of the Board of Health given the Board of Health Act, the predecessor to the current Title 26. The Court found the duties of the Board were independent of the provisions of the **City** Charter. The Court specifically rejected the applicability of the rule of respondeat superior as the employees of the Board were neither servants nor agents of the **City** and were not acting in the performance of any duty for the **City**. *Also, see, Abbamont v. Piscataway Twp. Bd. of Ed.,* 138 *N.J.* 405 (1994); Restatement (2nd) of Agency 219, 220 (1958). However, the Court in *Valentine* did note that there was nothing in the facts then before it demonstrating the Board had acted with any authority derived from the **City**. Accordingly, the Court determined "[i]t is not necessary, therefore, to consider whether the liability of the **City** would have been different if express authority had been shown." *Id.* at 513. Also not decided was whether liability could be imposed if it was shown the Board and the **City** had acted collectively and/or cooperatively.

At oral argument counsel for the **City** further maintained that since the **City** could not lawfully direct the Board of Health to take any disciplinary actions against an employee, specifically the plaintiff, the **City** cannot be held vicariously liable for plaintiff's CEPA complaint under the doctrine of respondeat superior. In other words, the **City** could only be held liable when acting under some type of specified authority, but would not be liable if acting unlawfully. The court was not persuaded by this argument and asked counsel to provide the court with a case which held that in the absence of legal authority, a municipality could not be held liable for the purported actions of any of its members, which contributed to and/or asserted the action of the Board, whether actively implicitly or conspiratorially. Although counsel submitted a letter to the court in response to its inquiry, counsel could not provide a case specifically on point.

***7** By way of her certification Plaintiff has alleged: (1) agents of the **City**, most particularly Councilman Citrone, have actively retaliated against her; (2) the **City** Manager requested the Prosecutor's Office investigate the charges against her; (3) her pay stub reflects the same are issued on behalf of the **City**; (4) the **City** Manager has previously asserted authority over the Board as to its hiring practices; (5) health insurance documents are submitted by the plaintiff to the **City**; (6) there is contact with and supervision by the **City** Manager or the Board concerning budget issues, hiring practices and overtime pay; and (7) the plaintiff was compelled to attend a meeting of the **City** Council to address her work schedule, sick days and her purported political activities. In light of the above, plaintiff asserts that to reject a doctrine of respondeat superior and/or vicarious liability, at this stage, is premature. The court agrees. This is particularly so when the **City's** counsel authored a correspondence specifically setting forth the Mayor and Council were responsible for the management and operation of all departments and boards within the **City's** rubric. (See correspondence dated December 29, 1998 from Mr. William F. Rubb to Ms. Lisa M. Fittipaldi attached to Plaintiff's Certification as Exhibit D.)

Given the standard that is applicable at this stage of the

proceeding, and as all allegations pled in the complaint are assumed to be true and the plaintiff is entitled to reasonable factual inferences from those allegations, the application is denied. This conclusion does not mean the **City** will not prevail on its motion at a later date. Once discovery is completed the **City** may be able to successfully argue that it cannot be held liable under the doctrine of respondeat superior. At this point of the litigation, however, the **City's** argument cannot prevail.

IV. *This Court's Jurisdiction*

During oral argument for the plaintiff's request for temporary relief, the court queried counsel as to whether or not this matter properly reposes with the Chancery Division.[1] By way of the order to show cause with temporary restraints, executed on December 9, 2005, the court ordered its jurisdiction as to count one would be addressed on the return date. The intent was for the parties to have an opportunity to more fully explore this issue, and for the court to have the benefit of the parties' respective positions.[2] Thus, a significant issue remains whether or not the entire action more properly reposes with the Law Division. Specifically, whether or not the relief plaintiff seeks in count one is more properly in the nature of a prerogative writ or, more specifically, a mandamus action.

In New Jersey, the actions of municipal agencies are subject to review in the Superior Court, Law Division, in an action in lieu of prerogative writs. *See generally Alexander's v. Borough of Paramus,* 125 *N.J.* 100, 107-108 (1991); *In re LiVolsi,* 85 *N.J.* 576, 592-94 (1981). Similarly, every proceeding to review the action or inaction of a local administrative agency is by complaint in the Law Division. *See Central R.R. v. Neeld,* 26 *N.J.* 172 (1958). *See also Selobyt v. Keough-Dwyer Corr. Facility,* 375 *N.J.Super.* 91 (App.Div.2005). This case law supports the court's initial belief the current dispute properly belongs in the Law Division, as the instant matter involves the actions of the **City's** Board of Health-a local administrative body.

***8** Actions in lieu of prerogative writs are governed by *R.* 4:69, which incorporates the four common civil action prerogative writs available in the pre-1947 Supreme Court: *certiorari, quo warranto, prohibition,* and *mandamus. Alexander's, supra,* 125 *N .J.* at 107. *Mandamus* is a proper remedy (1) to compel specific action when the duty is ministerial and wholly free from doubt, and (2) to compel the exercise of discretion, but not in a specific manner. *Loigman v. Tp. Com. of Middletown,* 297 *N.J.Super.* 287, 299-300 (App.Div.1996). Furthermore, "where there is an omission to do what the law clearly and unmistakably directs as an absolute duty, *mandamus* is an appropriate remedy." *Braun v. Township of Mantua,* 270 *N.J.Super.*404 (App.Div.1993) (citing *Reid Development. Corp. v. Parsippany-Troy Hills Tp.,* 10 *N.J.* 229 (1952)). The plaintiff argues the Board did not proceed in the appropriate manner when trying to remove her from the position of Health Officer. Specifically, the Board did not provide a copy of written charges against her and did not hold a hearing before she was removed. As *N.J.S.A.* 26:3-27 directs the Board to provide these and other procedural rights before a person can be removed from office, *mandamus* would be the proper remedy when there is an omission.

Based on the aforementioned law, the court is convinced the matter belongs in the Law Division as an action in lieu of prerogative writs. This conclusion is further supported by plaintiff's counsel's position the CEPA claim should be transferred to the Law Division. Bifurcating the two counts would neither be prudent or efficacious.

CONCLUSION

For the aforementioned reasons, all request relief is denied. This matter shall be transferred to the Law Division for further proceedings. Plaintiff's counsel shall prepare and submit the appropriate order pursuant to the five-day rule.

All Citations

Not Reported in A.2d, 2006 WL 133851

Footnotes

1 The parties have agreed that the CEPA claim, set forth in count two, should be transferred to the Law Division.

2 Unfortunately the court did not have this benefit as none of the parties addressed the issue in their written submissions.

End of Document

Civil Case Information Statement

Case Details: MERCER | Civil Part Docket# L-001140-20

Case Caption: STATE TROOPERS FRATE RNAL ASSO VS STATE OF NEW J
Case Initiation Date: 06/25/2020
Attorney Name: JAMES M METS
Firm Name: METS SCHIRO & MCGOVERN, LLP
Address: 555 U.S. HIGHWAY ONE SOUTH STE 320 ISELIN NJ 08830
Phone: 7326360040
Name of Party: PLAINTIFF : State Troopers Fraternal Assoc
Name of Defendant's Primary Insurance Company (if known): None

Case Type: OTHER Declaratory Judgment & Constitutional Violations
Document Type: Verified Complaint
Jury Demand: NONE
Is this a professional malpractice case? NO
Related cases pending: NO
If yes, list docket numbers:
Do you anticipate adding any parties (arising out of same transaction or occurrence)? NO

Are sexual abuse claims alleged by: State Troopers Fraternal Assoc? NO

THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

Do parties have a current, past, or recurrent relationship? YES

If yes, is that relationship: Other(explain) Union & Public Entities

Does the statute governing this case provide for payment of fees by the losing party? NO

Use this space to alert the court to any special case characteristics that may warrant individual management or accelerated disposition:

Do you or your client need any disability accommodations? NO
If yes, please identify the requested accommodation:

Will an interpreter be needed? NO
If yes, for what language:

Please check off each applicable category: Putative Class Action? NO **Title 59?** NO **Consumer Fraud?** NO

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with *Rule* 1:38-7(b)

06/25/2020
Dated

/s/ JAMES M METS
Signed