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Deputy Attorney General Philip H. Hopkins, Jr.
Administrative Practice Officer
Department of Law and Public Safety
Office of the Attorney General
P.O. Box 081
Trenton, NJ 08625-0081

Re: PRN 2010-269, N.J.A.C.13:1E-3

Dear Deputy Attorney General Hopkins:

I am an attorney concentrating in Open Public Records Act (OPRA) litigation. Thank you for this opportunity to comment on the proposed rule N.J.A.C. 13:1E-3, PRN 2010-269, that exempts certain records from access under the Open Public Record Act, N.J.S.A. 47:1A-1 to -11.

Certain of the proposed provisions deviate from the standards of the federal Freedom of Information Act and even violate OPRA, thereby inappropriately increasing government secrecy. The following are my comments on specific proposed rules, using the Department's numbering:

1. A flat exemption for all standard operating procedures and training materials, irrespective of any harm caused by disclosure, would seriously undermine the public interest without legitimate cause.

The federal Freedom of Information Act, not only does not exempt many of those records from public disclosure, it affirmatively requires their availability in the agency's public reading room. 5 U.S.C. § 552(a)(2) (B), (C). ("those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register," and "administrative staff manuals

and instructions to staff that affect a member of the public.”)

To deny the public access to agency standard operating procedures and training material regarding agency policies that affect the public is to create a body of secret law. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1073, 1075 (D.C. Cir. 1981) (en banc). The public has a right to know how a government agency operates when it directly affects the public. Therefore, while the federal FOIA has an express exemption for information “related solely to the internal personnel rules and practices of an agency,” 5 U.S.C. § 552(b)(2), the federal courts have limited that exemption to such records whose disclosure “significantly risks circumvention of agency regulations or statutes.” Id. at 1074. Thus, the Department should limit an exemption for standard operating procedures and training materials to those that “significantly risk circumvention of Department regulations or statutes,” as does the federal act.

2. No comment.

3. Like the proposed exemption #1, a flat exemption for all “agency’s surveillance, security or investigative techniques or procedures” goes well beyond what is justifiable. OPRA already exempts “security measures and surveillance techniques, which, if disclosed, would create a risk to the safety of persons, property, electronic data or software.” N.J.S.A. 47:A-1.1. Similarly, the federal FOIA has an exemption for law enforcement records that “would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions” but only “if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). This provision does not exempt routine techniques and procedures already well known to the public, such as ballistics tests, fingerprinting and other scientific tests or commonly known techniques. H.R. Rep. No. 93-1380, at 12 (1974) (Conf. Rep.) Albuquerque Publ’g Co. v. Dep’t of Justice, 726 F.Supp. 851, 858 (D.D.C. 1989).

4. Proposed Rule #4 violates OPRA. It purports to exempt all “records . . . which form the basis of . . . discharge . . . except for the final agency determination.” OPRA, however, expressly requires the disclosure of an employee’s “date of separation and the reason therefor.” N.J.S.A. 47:A-10. South Jersey Publishing Company, Inc. v New Jersey Expressway Authority, 124 N.J. 478, 495-96 (1991) (related executive order). While the fact of separation presumably would be a “final agency determination,” a record containing the actual “basis” for the discharge might not necessarily be the “final agency

determination.”

Nor should records that “form the basis of” disciplinary or personnel decisions be exempt if those records were public records prior to their use for disciplinary or personnel decisions. For example, a bill, voucher or contract should not become exempt from public access merely because it was the basis for a disciplinary decision. That is the reason OPRA’s disciplinary/ grievance exemption is limited to information “generated by or on half of” the complaint. N.J.S.A. 47:A-1.1. It does not include pre-existing records.

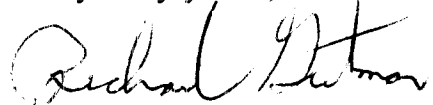
5. No comment.

6. No comment.

7. First, the undersigned is unaware of a justification for creating an exemption for all overtime data pertaining to an individual law enforcement officer. This proposed exemption is particularly questionable in light of recent exposures of massive overtime payments to law enforcement officers. In that context OPRA expressly requires disclosure of “payroll record” and “salary” information. N.J.S.A. 47:A-10, and, thus, this proposed exemption appears to violate OPRA.

Second, while there may be a justification for exempting duty assignments in certain sensitive situations, such as undercover officers, a flat exemption for all duty assignments appears unjustified. Moreover, OPRA expressly requires disclosure of an employee’s name, title and “position.” N.J.S.A. 47:A-10.

Very truly yours,

A handwritten signature in cursive script that reads "Richard Gutman".

Richard Gutman