

LAW OFFICES OF WALTER M. LUERS, LLC
Suite C203
23 West Main Street
Clinton, New Jersey 08809
Attorney for Plaintiff John Paff

<p>JOHN PAFF, Plaintiff, v. EGG HARBOR TOWNSHIP, EILEEN M. TEDESCO in her official capacity and Records Custodian, MICHAEL J. MORRIS, JEFFREY LANCASTER, EGG HARBOR TOWNSHIP POLICE DEPARTMENT, and NORTHFIELD POLICE DEPARTMENT Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ATLANTIC COUNTY</p> <p>DOCKET NO. ATL-L-008976-11</p> <p>CIVIL ACTION</p> <p>NOTICE OF MOTION FOR SUMMARY JUDGMENT</p>
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TO: Marc Friedman, Esq.
616 Ocean Heights
Linwood, New Jersey 08221

COUNSEL:

PLEASE TAKE NOTICE that on June 29, 2012 at 9 a.m. or as soon thereafter as counsel may be heard, the undersigned, counsel for Plaintiff John Paff, will move pursuant to R. 4:46-2(a) before the Hon. Valerie H. Armstrong, J.S.C., Atlantic County Courthouse, Superior Court, Law Division, 1201 Bacharach Boulevard, Atlantic City, New Jersey 08401 for summary judgment granting Plaintiff access to the documents requested by him in his Complaint and for Declaratory Judgment declaring that the records sought by Plaintiff are subject to disclosure under the common law right of access.

PLEASE TAKE FURTHER NOTICE that in support of this Motion, the undersigned shall rely upon the enclosed Certification of John Paff and Memorandum of Law. A proposed form of order is included.

PLEASE TAKE FURTHER NOTICE that Plaintiff requests oral argument if opposition to this motion is received.

Dated: May 30, 2012

Respectfully submitted,

THE LAW OFFICES OF
WALTER M. LUERS, LLC

By: _____

Walter M. Luers, Member
Suite C203
23 West Main Street
Clinton, New Jersey 08809
Telephone: 908.894.5656

Law Offices of Walter M. Luers, LLC
Suite C203
23 West Main Street
Clinton, New Jersey 08809
Phone: 908-894-5656
Counsel for Plaintiff

<p>JOHN PAFF, Plaintiff, v. EGG HARBOR TOWNSHIP, EILEEN M. TEDESCO in her official capacity and Records Custodian, MICHAEL J. MORRIS, JEFFREY LANCASTER, EGG HARBOR TOWNSHIP POLICE DEPARTMENT, and NORTHFIELD POLICE DEPARTMENT Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ATLANTIC COUNTY DOCKET NO. ATL-L-008976-11 CIVIL ACTION CERTIFICATION OF JOHN PAFF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT</p>
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I, John Paff, being of full age, hereby certify as follows:

1. I am the Plaintiff in this action.
2. Defendant Eileen M. Tedesco is Egg Harbor's Records Custodian.
3. Defendant Michael J. Morris is the Chief of Police of Egg Harbor Township.
4. The records at issue in this case are within the *de jure* control of Defendant Egg Harbor Township and Defendant Tedesco, but are in the *de facto* control of Defendants Egg Harbor Township Police Department and Chief Morris.
5. According to documents and audio recordings that I have reviewed, on February 17, 2011, at about 2:04 a.m. Northfield Police observed a black Mercedes sitting at a traffic light while the light went through multiple rotations. The vehicle, which was privately owned, was being operated by Defendant Egg Harbor Township Police Officer Jeffrey Lancaster, who was off-duty at the time.

6. Radio transmissions that I requested via OPRA and have listened to indicate that the Northfield officers had initial difficulty waking Defendant Lancaster and getting him to “open up” the car’s door. The transmissions indicate that the Northfield officers later realized that Lancaster was a fellow police officer and that they confirmed through the dispatcher that Defendant Lancaster was “still working” as a police officer for Egg Harbor Township.

7. According to audio recordings to which I have listened, Egg Harbor Township Police Sergeant Michael T. Hughes telephoned the Egg Harbor Township Police dispatch center. The dispatcher told Hughes that Defendant Lancaster was found asleep behind the wheel in Northfield. Hughes asked if Defendant Lancaster was “4-50” (presumably, whether he was in violation of *N.J.S.A. 39:4-50*—New Jersey’s drunk driving statute), the dispatcher said that he didn’t know and that the Northfield Police wanted to know if Defendant Lancaster still worked as an Egg Harbor Township officer and had inquired “who was the sergeant” that was on duty that morning. According to the audio, Hughes offered to have the Northfield Police call him on his cell phone, and the dispatcher, who was simultaneously speaking with both Hughes and the Northfield Police, said that the Northfield Police had reported Defendant Lancaster as being “A.O.B.” (which, in police parlance, means “alcohol on breath.”). Hughes, after asking “who was working” in Northfield, learned that “Peary” (presumably Martin L. Peary) was working and that Hughes went to the scene to “give [Lancaster] a ride home.”

8. In a later radio communication to which I have listened, an unidentified Northfield officer attempted to sanitize the event by saying that Defendant Lancaster was “definitely sound asleep” but “no A.O.B.” and attributed Defendant Lancaster falling sound asleep behind the wheel at two o’clock in the morning to “moonlighting.” Even though Defendant Lancaster was purportedly not drunk, Northfield Police inexplicably asked for “Mike” (presumably Sergeant Hughes) to report to the scene to “give [Lancaster] a ride home.”

9. On August 8, 2011, I submitted a request for government records to Defendant Tedesco, the Egg Harbor Township Custodian of Government Records pursuant to the Open Public Records Act, *N.J.S.A. 47:1A-1* and the common law right of access. (**Exhibit 1**). On the same date, I sent a letter that contained the records request to Sergeant Michael Hughes. (*Id.*). Among the items requested was “any report or other writing written by or on behalf of Sgt. Hughes arising out of the Northfield PD’s February 17, 2011, 02:04 a.m. encounter with Egg Harbor Township Police Officer Jeffrey Lancaster.” Also among the records requested was “any preliminary notice of discipline, final notice of discipline or other writing relating to any action taken against Lancaster arising out of [the February 17, 2011, 02:04 a.m. incident].” (*Id.*).

10. By letter dated August 15, 2011, Defendant Egg Harbor Township Police Chief Michael J. Morris responded to my records request to Egg Harbor. (**Exhibit 2**). Regarding my request for “any report or other writing” written by Sergeant Hughes relating to his February 17 2011 contact with Officer Lancaster, Defendant Morris conceded that a such a report exists and “is recorded in Egg Harbor Township Police Department Affairs Investigative Case File #11002.” In response to my request for disciplinary records, Defendant Morris informed me that Defendant Lancaster was disciplined as a result of the investigation that found that he had violated “several departmental rules and regulations.” Yet, he denied me access to any of those records claiming that they “are part and parcel to the internal affairs case file [and] are considered exempt from disclosure under *N.J.S.A. 47:1A-10*.” (**Exhibit 2**).

11. Based on the available evidence, I have deduced that Defendant Lancaster wasn’t simply sleeping behind the wheel while his car was stopped at two o’clock in the morning at a Northfield intersection while the traffic light went through multiple rotations. Had he been merely sleeping there would have been no need for Sergeant Hughes to drive him home and

there would have been no apparent basis for imposing discipline upon him. Rather, it appears that Defendant Lancaster was driving while intoxicated and that the Northfield Police, in strict obedience to the unwritten, discriminatory rules demanding preferential treatment of fellow police officers, elected to subvert justice rather than treating Defendant Lancaster as they undoubtedly would have treated a private citizen.

12. The public has a great interest in learning whether Defendant Lancaster was intoxicated on February 17, 2011 at 2:04 a.m. and whether the discipline imposed upon him was related to him being intoxicated. If the records sought in this complaint are revealed, it will be evident that certain members of the Defendant Northfield Police Department, and possibly members of the Defendant Egg Harbor Township Police Department, subverted justice and violated the public's trust. The public's interest in identifying, publicly exposing and demanding discipline against any police officers who subverted justice or violated the public's trust is far greater than any confidentiality or privacy interests that any of the Defendants could assert.

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

Dated: May 30, 2012

John Paff



New Jersey Libertarian Party

Police Accountability Project

John Paff, Chairman

P.O. Box 5424

Somerset, NJ 08875-5424

Phone: 732-873-1251 - Fax: 908-325-0129

Email: lpsmc@pobox.com

August 8, 2011

Michael T. Hughes, Sergeant
Egg Harbor Township Police Department
3515 Bargaintown Road
Egg Harbor Township, NJ 08234-8321

(Personal and Confidential¹)

Dear Sir or Madam:

I chair the New Jersey Libertarian Party's Police Accountability Project and wanted to inform you that I submitted the following records request to Egg Harbor Township today:

Records Request: Egg Harbor Township

to etedesco@ehtgov.org

Please accept this e-mail as my request for government records in accordance with the Open Public Records Act (OPRA) and the common law right of access. Please respond and send all responsive documents to me via e-mail at paff@pobox.com. If e-mail is not possible, please fax responses and responsive records to me at 908-325-0129. Also, I would appreciate it if you would acknowledge your receipt of this e-mail.

Background:

From reading the Northfield's Police Department's "Detail Call for Service Report" regarding a February 17, 2011, 02:04 a.m. encounter with Egg Harbor Township Police Officer Jeffrey Lancaster and listening to Sergeant Hughes' (presumably Michael T. Hughes') call to Egg Harbor Township Communication, it certainly appears possible that a) Lancaster was "AOB" (i.e. had alcohol on his breath) and was "four-fifty" (in violation of N.J.S.A.

¹ The exterior of the transmittal envelope was clearly marked "personal and confidential."

39:4-50, New Jersey's drunk driving statute) when he was found asleep behind the wheel and b) the Northfield Police wanted to know if Lancaster still worked for Egg Harbor Township's police department and wanted to know which sergeant was on duty that night and c) that Sergeant Hughes suggested that the Egg Harbor dispatcher give Northfield his cell phone number and said that he'd go over to the scene and give Lancaster a ride home.

This stinks to high heaven and suggests that Lancaster ought to have been investigated and perhaps arrested for drunk driving, but because of his status of a police officer, was given a pass. If this is true, it's of great public interest because it would reveal wrongdoing by both Egg Harbor Township's and Northfield's departments. I intend to get to the bottom of this and have absolutely no qualms about filing litigation if necessary.

If Egg Harbor's Sergeant Hughes went to the scene to give Lancaster a ride home, I would think that he would have at least written up some sort of report on it. So, the first records I am seeking (see #1 and #2 below) are any writing that Sgt. Hughes created regarding his visit to Lancaster at the scene of the incident in Northfield and any data showing whether or not his car went to Northfield that morning. If you deny me access to the record requested in #1, it is very important for you to at least confirm whether or not the record exists.

As to the request in #3 below, I realize that police discipline is normally confidential, but I believe that knowing whether or not Internal Affairs charges were processed against Lancaster is of public importance because, if he was charged, it would conclusively show that the Northfield PD acted improperly by not investigating him for DUI, as they undoubtedly would have had he not been one of the "favored class."

Remember that this isn't just an OPRA request that's subject to standard OPRA exemptions. I am also requesting these records under the common law right of access because I believe that it's clearly in the public's interest to know whether or not a) Hughes just gave Lancaster a ride home without writing a report, b) whether Lancaster was ultimately disciplined for his behavior in this incident, c) whether the Northfield PD improperly showed favoritism toward Lancaster. I believe that the public's right to this information greatly exceeds any confidentiality interest that Egg Harbor's police department, Lancaster or any other person could possibly assert.

Records Requested:

1. Any report or other writing written by or on behalf of Sgt. Hughes arising out of the Northfield PD's February 17, 2011, 02:04 a.m. encounter with Egg Harbor Township Police Officer Jeffrey Lancaster.

2. Any CAD report, daily activity report or other type of report that show Hughes' activity on the February 17, 2011.

3. Any preliminary notice of discipline, final notice of discipline or other writing relating to any action taken against Lancaster arising out of the incident that is the subject of this request.

Since you are specifically named within the request, I felt that you should be put on actual notice of it.

Sincerely,

A handwritten signature in black ink, appearing to read "John Paff", with a large, stylized flourish above the name.

John Paff



BLAZE CATANIA
Chief of Police

DEPARTMENT OF POLICE EGG HARBOR TOWNSHIP

3515 BARGAINTOWN ROAD
EGG HARBOR TOWNSHIP, NJ 08234-8321



(609)926-4036
FAX: 926-4004

FAX TRANSMITTAL COVER PAGE

TO: John Paff

FROM: Egg Harbor Township Police Department

Sharon

DATE: 8/15/11

PAGES: _____ (including Cover)

COMMENTS:

OPRA request response.



New Jersey Libertarian Party

Police Accountability Project

John Paff, Chairman

P.O. Box 5424

Somerset, NJ 08875-5424

Phone: 732-873-1251 - Fax: 908-325-0129

Email: lpsmc@pobox.com

August 8, 2011

Michael T. Hughes, Sergeant
Egg Harbor Township Police Department
3515 Bargaintown Road
Egg Harbor Township, NJ 08234-8321

(Personal and Confidential!)

Dear Sir or Madam:

I chair the New Jersey Libertarian Party's Police Accountability Project and wanted to inform you that I submitted the following records request to Egg Harbor Township today:

Records Request: Egg Harbor Township

to etedesco@ehtgov.org

COPIES

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Background:

From reading the Northfield's Police Department's "Detail Call for Service Report" regarding a February 17, 2011, 02:04 a.m. encounter with Egg Harbor Township Police Officer Jeffrey Lancaster and listening to Sergeant Hughes' (presumably Michael T. Hughes') call to Egg Harbor Township Communication, it certainly appears possible that a) Lancaster was "AOB" (i.e. had alcohol on his breath) and was "four-fifty" (in violation of N.J.S.A.

¹ The exterior of the transmittal envelope was clearly marked "personal and confidential."



Michael J. Morris
Chief of Police

**DEPARTMENT OF POLICE
EGG HARBOR TOWNSHIP**

3515 BARGAIN TOWN ROAD
EGG HARBOR TOWNSHIP, NJ 08234-8321



(609) 926-4036
FAX: 926-4004

August 15, 2011

John Paff, Chairman
PO Box 5424
Somerset, NJ 08875-5424

Dear Mr. Paff:

In regards to your letter dated August 8, 2011:

1. Sergeant Michael Hughes's did author a report after his contact with Officer Lancaster on February 17, 2011. This report is recorded in Egg Harbor Township Police Department Internal Affairs Investigative Case File # 11-02. Because this document is an internal affairs report it is considered exempt from disclosure under N.J.S.A.47:1A-10.
2. Attached is Sergeant Hughes's activity log for February 17, 2011.
3. As a result of our investigation, Officer Lancaster plead guilty to violating several departmental rules and regulations. As such, he was disciplined accordingly. Because the documents pertaining to this action are part and parcel to the internal affairs case file, they are considered exempt from disclosure under N.J.S.A.47:1A-10.

Sincerely,

Michael J. Morris
Chief of Police

bmb

INCIDENT SEARCH

Print Date/Time: 8/12/2011 11:57:59 AM

Incident Number	Call Date/Time	Location	Incident Type	Persons
2011-00810179	02/17/2011 23:03:49	563 ZION RD, Egg Harbor Township	Accident	
2011-00010177	02/17/2011 22:51:47	310 CHELTON AVE, Egg Harbor Township	Noise Complaint	
2011-80010174	02/17/2011 22:42:09	2408 TILTON RD, Egg Harbor Township	Motor Vehicle Stop	
2811-80010153	02/17/2011 21:48:01	6698 BLACK HORSE PIKE A, Egg Harbor Township	Administrative Call	
2811-80818164	02/17/2011 21:25:28	2549 RIDGE AVE, Egg Harbor Township	Property Check	
2811-08809968	02/17/2011 02:83:59	6120 MILL RD dpw, Egg Harbor Township	Property Check	
2811-00809958	02/17/2011 01:56:16	24 HIGH SCHOOL DR, Egg Harbor Township	Property Check	
2011-00089956	02/17/2011 01:52:21	298 SYCAMORE AVE, Egg Harbor Township	Property Check	
2811-80089935	02/17/2011 00:39:08	6823 TILTON RD, Egg Harbor Township	Property Check	

Total Rows: 9

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Attorney for Plaintiff John Paff

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**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

This Memorandum of Law is being submitted in support of Plaintiff's motion for summary judgment. Because we believe all of the material facts supporting Plaintiff's application should not reasonably be disputed, these issues may be determined as a matter of law.

PRELIMINARY STATEMENT

This action concerns an important episode in which the evidence obtained by Plaintiff strongly suggests that a New Jersey police officer, Officer Jeffrey Lancaster, fell asleep while operating his private motor vehicle on February 17, 2011 at 2:04 a.m. because he had consumed an excessive amount of alcohol. The evidence also suggests that police officers from two jurisdictions, which were the jurisdiction in which the officer was found asleep and the jurisdiction in which he worked, conspired to cover-up the fact that the sleeping officer had been drinking. Finally, the evidence shows that the sleeping officer was not charged with a violation of this State's laws against driving under the influence of alcohol, even though audio recordings of the responding officers' communications recorded those officers as saying the sleeping officer was "AOB" – meaning alcohol on breath.

This action was commenced to obtain copies of a report prepared by the Northfield Police Department regarding its encounter with Officer Lancaster, as well as copies of preliminary and final notices of discipline and documents that reflect any discipline taken against Officer Lancaster in connection with the February 17, 2011 incident.

STATEMENT OF FACTS

On February 17, 2011, at about 2:04 a.m., Northfield Police observed a black Mercedes sitting at a traffic light while the light went through multiple rotations. The vehicle, which was privately owned, was being operated by Defendant Egg Harbor Township Police Officer Jeffrey Lancaster, who was off-duty at the time. (Certification of John Paff ¶ 5 (hereinafter “Paff Cert.”)).

According to radio transmissions received and reviewed by Plaintiff, the Northfield officers had initial difficulty waking Defendant Lancaster and getting him to “open up” the car’s door. The transmissions indicate that the Northfield officers later realized that Lancaster was a fellow police officer and that they confirmed through the dispatcher that Defendant Lancaster was “still working” as a police officer for Egg Harbor Township. (Paff Cert. ¶ 6).

According to these same audio recordings, Egg Harbor Township Police Sergeant Michael T. Hughes telephoned the Egg Harbor Township Police dispatch center. The dispatcher told Hughes that Defendant Lancaster was found asleep behind the wheel in Northfield. Hughes asked if Defendant Lancaster was “4-50” (a reference to *N.J.S.A. 39:4-50*—New Jersey’s drunk driving statute). The dispatcher said that he did not know and that the Northfield Police wanted to know if Defendant Lancaster still worked as an Egg Harbor Township officer and had inquired “who was the sergeant” that was on duty that morning. According to the audio recording, Hughes offered to have the Northfield Police call him on his cell phone, and the dispatcher, who was simultaneously speaking with both Hughes and the Northfield Police, said that the Northfield Police had reported Defendant Lancaster as being “A.O.B.” (which means “alcohol on breath.”). Hughes, after asking “who was working” in Northfield, learned that

“Peary” (presumably Martin L. Peary) was working and that Hughes went to the scene to “give [Lancaster] a ride home.” (Paff Cert. ¶ 7).

In a later radio communication, an unidentified Northfield officer attempted to sanitize the event by saying that Defendant Lancaster was “definitely sound asleep” but “no A.O.B.” and attributed Defendant Lancaster falling sound asleep behind the wheel at two o’clock in the morning to “moonlighting.” Even though Defendant Lancaster was purportedly not drunk, Northfield Police inexplicably asked for “Mike” (presumably Sergeant Hughes) to report to the scene to “give [Lancaster] a ride home.” (Paff Cert. ¶ 8).

On August 8, 2011, Plaintiff submitted a request for government records to Defendant Tedesco, the Egg Harbor Township Custodian of Government Records pursuant to the Open Public Records Act, *N.J.S.A. 47:1A-1* and the common law right of access. (Paff Cert. ¶ 9 and Exhibit 1). Among the items requested was “any report or other writing written by or on behalf of Sgt. Hughes arising out of the Northfield PD’s February 17, 2011, 02:04 a.m. encounter with Egg Harbor Township Police Officer Jeffrey Lancaster.” (*Id.*). Also among the records requested was “any preliminary notice of discipline, final notice of discipline or other writing relating to any action taken against Lancaster arising out of [the February 17, 2011, 02:04 a.m. incident].” (*Id.*).

By letter dated August 15, 2011, Defendant Egg Harbor Township Police Chief Michael J. Morris responded to Plaintiff’s records request to Egg Harbor. (Paff Cert. Exhibit 2). Regarding Plaintiff’s request for “any report or other writing” written by Sergeant Hughes relating to his February 17 2011 contact with Officer Lancaster, Defendant Morris stated that a such a report exists and “is recorded in Egg Harbor Township Police Department Affairs Investigative Case File #11002.” In response to Plaintiff’s request for disciplinary records,

Defendant Morris advised Plaintiff that Defendant Lancaster was disciplined as a result of the investigation that found that he had violated “several departmental rules and regulations.” Nonetheless, Defendant Morris denied Plaintiff access to all of the documents that Defendant characterized as being part of an internal investigation. (Paff Cert. ¶ 10 and Exhibit 2).

LEGAL ARGUMENT

First, we discuss the Court’s standard of review. Second, we discuss why Plaintiff is entitled to the documents requested by him under the common law right of access.

STANDARD OF REVIEW

On a motion for summary judgment, the Court must “accept as true all the evidence which supports the position of the party defending against the motion” and must view the facts in the light most favorable to the non-movant. *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 535 (1995); *J.H. v. Mercer County Youth Detention Center*, 396 N.J. Super. 1, 6 (App. Div. 2007); *R. 4:46-2(b)*. “[Summary judgment] is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at trial.” *Ledley v. William Penn Life Ins. Co.*, 138 N.J. 627, 641-42 (1995) (internal quotation marks and citation omitted).

To successfully oppose a motion for summary judgment, the non-moving party must raise factual issues that are not “immaterial or of an insubstantial nature, a mere scintilla, ‘fanciful, frivolous, gauzy or merely suspicious[.]’” *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 N.J. 67, 75 (citations omitted).

I. THE COURT SHOULD GRANT ACCESS TO THE REQUESTED DOCUMENTS

Under the common law right of access, Plaintiff is entitled to access to the documents he requested because the public's interest in learning of the consequences to Officer Lancaster of his behavior greatly outweigh any interest in secrecy that the Defendants may have.

A. Access Should Be Granted Pursuant to the Common Law Right of Access

“New Jersey has a history of commitment to public participation in government and to the corresponding need for an informed citizenry.” *South Jersey Pub. Co. v. New Jersey Expressway Authority*, 124 N.J. 478, 486-87 (1991). “A citizen’s right to obtain and review public information is historically rooted in the proposition that the government holds public information in trust for the people. As eloquently stated by Judge Dixon 125 years ago in *Ferry v. Williams*, 41 N.J.L. 332, 334 (Sup.Ct.1879): ‘[E]very officer appointed by law to keep records ought to deem himself for that purpose a trustee.’ Our republican form of governance is only possible when citizens have access to the information necessary to make a rational and informed judgment.” *Bergen County Imp. Auth. v. N. Jersey Media Group, Inc.*, 370 N.J. Super. 504, 523 (App. Div. 2004). New Jersey’s courts have recognized this “historically rooted” right by creating and developing the common law right of access.

Under the common law right of access, “almost every document recorded, generated, or produced by public officials” are subject to disclosure to a citizen, provided that their interest in the records is greater than the State’s interest in continued secrecy. *Higg-A-Rella, Inc. v. County of Essex*, 141 N.J. 35, 46 (1995).

The Court’s balancing test must be performed without regard to any limitations or restrictions on access that may be contained within the Open Public Records Act. “Nothing contained in [OPRA] shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency.”

N.J.S.A. 47:1A-8; see also North Jersey Media Group Inc. v. State, Dep't of Personnel, 389 N.J. Super. 527, 536 (Law. Div. 2006); *Bergen County Improvement Auth. v. N. Jersey Media Group, Inc.*, 370 N.J. Super. 504, 516 (App. Div. 2004). The right of access under the common law is broader than under OPRA. *North Jersey Media Group*, 389 N.J. Super. at 537.

The existence of a statutory or regulatory exemption is not relevant under a common law analysis; rather, “the focus must always be on the character of the materials sought to be disclosed” and the Court must be “concretely focused upon the relative interests of the parties in relation to [the] specific materials[.]” *Home News v. State Department of Health*, 144 N.J. 446, 455 (1996) (internal quotation marks and citations omitted). “[A] blanket prohibition is not consistent with the balancing approach mandated by the common law.” *Home News*, 144 N.J. at 456.

The common law right of access has three elements: (1) the records must be common law public documents; (2) the person who seeks access must “establish an interest in the subject matter of the material,” *South Jersey Publishing Co. v. New Jersey Expressway Auth.*, 124 N.J. 478, 487 (1991), and (3) the citizen’s right to access “must be balanced against the State’s interest in preventing disclosure.” *Higg-A-Rella, Inc. v. County of Essex*, 141 N.J. at 46; *see also Keddie v. Rutgers, The State University*, 148 N.J. 36, 50 (1997) (discussing these three elements). “[T]he common law process, unlike the [repealed] Right-to-Know process, should be flexible and adaptable to difference circumstances.” *Higg-A-Rella, Inc.*, 141 N.J. at 45.

Here, the records sought here are public records because they are required to be kept by the public agency or at least because they were filed in a public office. *Higg-A-Rella, Inc. v. County of Essex*, 141 N.J. 35, 46 (1995) (defining a common-law record as one that is made by a public official in the exercise of their public function, either because the record was

required or directed by law to be made or kept, or because it was filed in a public office). Plaintiff, as a member of the public, has standing to request these documents under the common law. “A citizen, and the press on its behalf, does not have to prove any personal interest in order to satisfy the common law standing requirement.” *Daily Journal v. Police Dep’t of City of Vineland*, 351 N.J. Super. 110, 122 (App. Div. 2002). A plaintiff need show only a “wholesome public interest or a legitimate private interest.” *Loigman v. Kimmelman*, 102 N.J. 98, 112 (1986). If Defendants make a claim of confidentiality, Courts examine whether Plaintiff’s purpose advances or furthers that public or private interest. *Keddie v. Rutgers, State University*, 148 N.J. 36, 51 (1997).

The documents requested by Plaintiff are certainly public records under the common law, since they are certainly a “written memorial [] . . . made by a public officer, and . . . the officer [was] authorized by law to make it.” *Nero v. Hyland*, 76 N.J. 213, 222 (1978) (citations omitted). Here, Defendants conducted an internal affairs investigation, were authorized to conduct that investigation and created and filed records memorializing that investigation.

To determine whether the records should be disclosed to Plaintiff, this Court must balance Plaintiff’s interest in disclosure against Defendants’ interest in confidentiality. In weighing whether disclosure outweighs confidentiality, New Jersey courts have weighed several factors, including

- (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 policy-makers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials. *Loigman v. Kimmelman*, 102 N.J. 98, 113 (1986).

The first factor of the *Loigman* test is the “extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government.” Here, disclosure will not “impede agency functions by discouraging citizens from providing information to the government” because no information was provided by citizens. According to Egg Harbor Chief of Police Morris, Northfield Police Department Sergeant Hughes prepared a report regarding his department’s encounter with Officer Lancaster. (Paff Cert. ¶ 2). That report is a part of Egg Harbor Township’s disciplinary file on Officer Lancaster. (Paff Cert. Exh. 2). There is no evidence that any of the information regarding Officer Lancaster was transmitted by citizens.

Defendants might argue that disclosure of internal affairs disciplinary reports or files might chill citizen disclosure in other cases. But this concern, which is not present in this specific case, can be alleviated by redacting the names of citizens who provide valuable information, after an *in camera* review of relevant documents by the Court. *Shuttleworth v. City of Camden*, 258 N.J. Super. 573, 585 (App. Div. 1992) (observing that an *in camera* review of materials to protect a witness’s identity can be part of the “balancing approach”).

A related and important fact is the fact that the investigation into Officer Lancaster’s behavior is closed, and discipline has already been issued. (Paff Cert. Exh. 2). “While there is a real need to deny access where there is an ongoing law enforcement investigation, or where the protection of witness information or a witness’s identity is at stake,

the same values do not survive a balancing after the investigation is closed.” *Shuttleworth*, 258 N.J. Super. at 585. Since the investigation against Officer Lancaster has ended, Defendants’ interest in non-disclosure is slight. Thus, the first factor weighs in Plaintiff’s favor.

The second factor is “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[.]” Here, according to Chief Morris, the only person who gave information regarding the incident is Sergeant Hughes. Chief Morris told Mr. Paff that Sergeant Hughes had authored a report regarding his contact with Officer Lancaster. (Paff Cert. Exh. 2). There is no evidence that Sergeant Hughes prepared that report “in reliance” on a promise of confidentiality, and Chief Morris disclosed the existence of the report and who authored it. Therefore, this second factor weighs in Plaintiff’s favor.

Regarding the third factor, which is “the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure,” this factor weighs in favor of disclosure. There is no evidence that Defendants have undertaken any type of self-evaluation, program improvement or other “decisionmaking.” Here, the evidence shows that Officer Lancaster “plead [*sic*] guilty to violating several departmental rules and regulations” and was “disciplined accordingly.” (Paff Cert. ¶ 2). While some type of decision was made with respect to the discipline to which Officer Lancaster was subjected, there is no reason to believe that the prior discipline or any future discipline given to other officers in similar situations will be “chilled.”

Regarding the fourth factor, which is “the degree to which the information sought includes factual data as opposed to evaluative reports of policy-makers,” this factor weighs strongly in favor of disclosure. Plaintiff seeks information which is purely factual in nature,

which is Sergeant Hughes' report, preliminary and final notices of discipline or other document that shows the disciplinary action taken against Officer Lancaster. (Paff Cert. Exh. 1).

Regarding the fifth factor, which is "whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency," this factor is neutral at this time because Plaintiff is not in a position to know whether "any findings of public misconduct" have been remedied.

Regarding the sixth factor, "whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials," this factor weighs in favor of disclosure. While disciplinary proceedings have arisen, those disciplinary proceedings have been completed. Therefore, there is no possibility that any disclosure could interfere with those proceedings.

II. PLAINTIFF IS ENTITLED TO AN AWARD OF REASONABLE ATTORNEYS' FEES

If the Court orders Defendants to produce at least portions of some of the documents at issue, the Court should find that Plaintiff is the prevailing party and, under the common law, award Plaintiff a reasonable attorneys' fee and costs. *Mason v. Hoboken*, 196 N.J. 51, 79 (2008) (concluding that catalyst theory applies to fee awards under both OPRA and the common law right of access).

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's motion for summary judgment.

Respectfully submitted,

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LAW OFFICES OF

WALTER M. LUERS, LLC

By: _____

Walter M. Luers, Member
Suite C203
23 West Main Street
Clinton, New Jersey 08809
Telephone: 908.894.5656