

PREPARED BY THE COURT

JOHN PAFF

Plaintiff,

v.

EGG HARBOR TOWNSHIP,  
EILEEN M. TEDESCO,  
MICHAEL J. MORRIS,  
JEFFREY LANCASTER, and EGG  
HARBOR TOWNSHIP POLICE  
DEPARTMENT

Defendant.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION-ATLANTIC COUNTY

Docket No. ATL-L-8976-11

Civil Action

**FILED**

JUN 25 2013

**ATLANTIC COUNTY  
LAW DIVISION**

ORDER

THIS MATTER having been brought before the Court by Walter M. Luers, Esq., attorney for Plaintiff John Paff, and upon due notice to Marc Friedman, Esq., representing Defendants, Egg Harbor Township, Eileen M. Tedesco, Michael J. Morris, Jeffrey Lancaster, and Egg Harbor Township Police Department, and the Court, having considered the submissions of the parties and for the reasons placed on the record at the conclusion of oral argument, and for good cause shown:

**IT IS on this 25<sup>th</sup> day of February, 2013, ORDERED:**

- 1) Plaintiff's motion for Summary Judgment is **GRANTED IN PART.**
- 2) The Court orders that Sergeant Hughes' report regarding his contact with Defendant Lancaster on February 17, 2011 be made available to Plaintiff, as redacted by the Court to shield any legitimately confidential information in accordance with OPRA and Plaintiff's common law right of access to that report. The parties shall contact the Court to make arrangements for the redaction of the required portion before future disclosure.
- 3) This Court further declares that the notices of preliminary and final disciplinary records related to Defendant Lancaster's conduct on February 17, 2011 are not available to Plaintiff in accordance with OPRA and Plaintiff's common law right of access.



**JULIO L. MENDEZ, A.J.S.C**

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION, ATLANTIC COUNTY  
DOCKET NO. ATL-L-8976-11

JOHN PAFF

Plaintiff,

v.

EGG HARBOR TOWNSHIP, EILEEN M.  
TEDESCO, MICHAEL J. MORRIS,  
JEFFREY LANCASTER, and EGG  
HARBOR TOWNSHIP POLICE  
DEPARTMENT

Defendants.

OPINION

**FILED**

JUN 25 2013

**ATLANTIC COUNTY  
LAW DIVISION**

JUNE 25, 2013

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**JULIO L. MENDEZ, A.J.S.C.**

**COUNSEL:** *Walter M. Luers, Esq.*, for Plaintiff, John Paff.

*Marc Friedman, Esq.*, for Defendants, Egg Harbor Township, Eileen M. Tedesco,  
Michael J. Morris, Jeffrey Lancaster, and Egg Harbor Township Police Department.

The opinion of the court was delivered by

MENDEZ, A.J.S.C.

This matter comes before the Court by way of a Complaint in Lieu of Prerogative Writ filed on September 29, 2011 by the plaintiff, John Paff (hereinafter "Plaintiff"). Plaintiff seeks a declaratory judgment pursuant to the Declaratory Judgment Act, N.J.S.A. 2A:16-51, for Defendants' failure to provide Plaintiff with certain Egg Harbor Township Police Department records, which Plaintiff believes are public records.

Accordingly, Plaintiff alleges that Defendants acted in contravention of the Open Public Records Act (hereinafter "OPRA"), N.J.S.A. 47:1A-1 *et seq.*, and/or the common law right of access by failing to provide such records.

Plaintiff is a resident of Somerset County, New Jersey. He chairs the New Jersey Libertarian Party's Police Accountability Project which seeks to hold police officers accountable to the public they serve. Defendant Eileen M. Tedesco (hereinafter "Defendant Tedesco"), is the Custodian of Government Records for the Township of Egg Harbor in Atlantic County, New Jersey. Defendant Michael J. Morris (hereinafter "Defendant Morris") is the Chief of Police in the Township of Egg Harbor in Atlantic County, New Jersey. Defendant Jeffrey Lancaster (hereinafter "Defendant Lancaster") is a sworn police officer employed by Egg Harbor Township.

The genesis of this action can be traced to an incident which occurred on February 17, 2011 wherein Defendant Lancaster was found in Northfield, at or about two (2) o'clock in the morning, sitting at a traffic light sleeping while the light went through several rotations. At the time of the incident Defendant Lancaster was in his own, privately owned vehicle and was off-duty. The responding police officers that observed the incident were employed by the Northfield Police Department. Upon arriving at the scene, the Northfield police officers attempted to wake Defendant Lancaster and had some difficulty getting Defendant Lancaster to open his car door. Through a series of radio transmissions sent to a dispatcher, the Northfield officers began to inquire as to the identity of the man in the vehicle, at which point the officers learned that the man was a fellow police officer employed with the Egg Harbor Township Police Department. The

audio recording of the radio transmissions were properly provided to Plaintiff by Defendants.

Plaintiff certifies that the audio recording confirms that Sergeant Michael T. Hughes of the Egg Harbor Township Police Department called the Egg Harbor Township Police dispatch center and was informed by the dispatcher that Defendant Lancaster was found asleep behind the wheel in Northfield. The audio recording reveals that the Northfield Officers inquired as to whom the sergeant on duty was that morning, and the recording also reveals that Sergeant Hughes asked the dispatcher if Defendant Lancaster was "4-50," which presumably was a reference to N.J.S.A. 39:4-50, New Jersey's drunk-driving statute, to which the dispatcher answered that he did not know.

Plaintiff further certifies that according to the audio recording, Sergeant Hughes offered to have the Northfield officers call him on his cell phone, and the dispatcher, who was simultaneously speaking with both the Northfield officers and Sergeant Hughes, stated that the Northfield officers had reported Defendant Lancaster as being "A.O.B.," an acronym used in police parlance, which means alcohol on breath. Defendants, however, contest that fact. The audio recording also reveals that Sergeant Hughes learned that Northfield officer "Peary," presumably Martin L. Peary, was working at that time and soon after Sergeant Hughes arrived on to the scene and gave Defendant Lancaster a ride home. Plaintiff also certifies that the Northfield officers asked for "Mike," presumably Sergeant Michael Hughes, to report to the scene to give Lancaster a ride home. During a subsequent radio communication, an unidentified Northfield officer indicated that Defendant Lancaster was sleeping and there was no alcohol on his breath.

The officer attributed Defendant Lancaster's falling asleep behind the wheel to "moonlighting."<sup>1</sup>

On August 8, 2011, Plaintiff submitted a request for government records to Defendant Tedesco, the Custodian of Government Records pursuant to OPRA and the common law right of access. The records request, which was also sent to Sergeant Hughes by way of a letter sent on the same day, included "any report or other writing written by or on behalf of Sgt. Hughes arising out of the Northfield [ . . . ] [Police Department's] February 17, 2011, 2:04 a.m. encounter with Egg Harbor Township Police Officer Jeffrey Lancaster." Plaintiff also requested "any preliminary notice of discipline, final notice of discipline or other writing relating to any action taken against Lancaster arising out of [ . . . ][the incident]."

On August 15, 2011, the Egg Harbor Township Chief of Police, Defendant Morris, responded to Plaintiff's records request by way of a letter wherein Defendant Morris indicated that a report written by Sergeant Hughes relating to his interactions with Defendant Lancaster on February 17, 2011 does exist. Defendant Morris also stated in his letter that the report written by Sergeant Hughes is recorded in the Egg Harbor Township Police Department Affairs Investigative Case File #11002. The letter also confirmed that Defendant Lancaster was disciplined as a result of the investigation and that he violated several of the rules and regulations of the department. In his letter, Defendant Morris also directed that Plaintiff is denied access to the requested documents as they are a part of an internal investigation.

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<sup>1</sup> Moonlighting is defined as "the fact or practice of working at a second job after the hours of a regular job." Black's Law Dictionary, 1029 (8th ed. 2004).

On September 29, 2011, Plaintiff filed a Complaint in Lieu of Prerogative Writ seeking a declaratory judgment pursuant to the Declaratory Judgment Act, N.J.S.A. 2A:16-51, for the Defendants' alleged violations of the Open Public Records Act (hereinafter "OPRA"), N.J.S.A. 47:1A-1 et seq., and/or the common law right of access. Subsequently, on November 21, 2011, Defendants filed their Answer to Plaintiffs Complaint in Lieu of Prerogative Writ. On May 31, 2012, Plaintiff filed a Motion for Summary Judgment wherein Plaintiff hypothesizes that Defendant was intoxicated at the time of the incident on February 17, 2011 and was afforded preferential treatment by his fellow officers at the detriment of the public's interest in exposing and demanding discipline.

On July 20, 2012, Defendants filed its opposition to Plaintiffs motion for summary judgment and filed a cross motion for summary judgment. Defendants essentially argue that because the requested documents are a part of the internal affairs investigation, they should be precluded from the request. Defendants argue that revealing the nature of the facts evaluated and the conditions imposed by the Police Department will "pose a threat to both public and private interests" of the Township and the Police Department. Specifically, Defendants argue that these records disclose more than just the facts of the incident, but rather, include confidential personnel records, including medical and psychological evaluations and prior disciplinary history, as well as reports and documents from witnesses, fellow officers, and professionals. Defendants also cite to N.J.S.A. 47:1A-10, which subject to certain enumerated exceptions, directs in part that personnel records are not considered government records and thus should not be made accessible to the public.

On August 13, 2012, Plaintiff filed a letter reply brief in which he argued that the report requested was not a part of the internal affairs investigation, but rather was created either contemporaneously with or immediately after Sergeant Hughes' contact with Lancaster. Plaintiff characterized Sergeant Hughes' report as a police incident report and Plaintiff clarified that he is solely requesting the factual information surrounding the incident. Plaintiff also argued that even if Sergeant Hughes' report was subsequently made a part of the internal affairs file on Defendant Lancaster, it was originally a public record, pursuant to Serrana v. Southern Brunswick Township, 358 N.J. Super. 352 (App. Div. 2003). Lastly, Plaintiff suggested that the Court hold *in camera* review and look at the records to determine whether disclosure is appropriate.

During the first round of oral argument conducted on August 24, 2012, Defendants argued that Sergeant Hughes' intent and purpose in writing the report on February 17, 2011 were for purposes of conducting the internal investigation; it was not to investigate criminal activity and therefore should not be disclosed to the public. At that time, this Court directed Defendant Egg Harbor Township to file with the Court in a sealed envelope for *in camera* review copies of Sergeant Hughes' report of his encounter with Defendant Lancaster on February 17, 2011, as well as the preliminary notice of discipline and the final notice of discipline with respect to Defendant Lancaster's conduct on that date. Also, during oral argument on August 24, 2012, a stipulation was entered on the record that the Northfield Police Department was excused with prejudice from further participation as a co-defendant in this action.<sup>2</sup> The reason this was done was

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<sup>2</sup> The Northfield Police Department's dismissal from this action with prejudice is memorialized in this Court's Order filed September 17, 2012.

because the Northfield Police Department did not write a report about the incident with Defendant Lancaster on February 17, 2011, and there was no record for them to release.

As requested, on September 13, 2012, Defendants filed with the Court the pertinent documents under seal, including a privilege log itemizing the documents contained under seal, and the certification of Defendant Morris, Chief of Police. Thereafter, the Court conducted a hearing in this case on October 18, 2012. Subsequently, on November 13, 2012, Defendants filed a supplemental certification of Defendant Morris, privilege log and exhibits, whereby the exhibits were submitted under seal for *in camera* review by the Court. In Defendant Morris' supplemental certification he certifies that Sergeant Hughes prepared his statement at the direction of his superior, Captain John Woods, and that it formed the foundation for the Police Department to initiate an internal investigation on whether formal charges should be brought against Defendant Lancaster.

Soon after, on November 20, 2012, Plaintiff filed a supplemental letter brief in which he reiterated that Sergeant Hughes' report was not a part of an internal investigation; rather, his report was the catalyst for the investigation as indicated by Defendant Morris' supplemental certification. Plaintiff further argued that the case law and OPRA clarify that documents and reports that are created prior to the initiation of an investigation do not become confidential because they are later placed within an investigation file or are later determined to be relevant to such an investigation. Serrano, *supra*, 358 N.J. Super. at 352.

A party is entitled to summary judgment when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-529 (1995) (quoting R. 4:46-2). In this Court's view, this case is ripe for a summary judgment motion because there are no disputed issues of material fact and thus the Court can enter a judgment as a matter of law.

The issues before this Court are whether Sergeant Hughes' report of February 17, 2011 is subject to disclosure under OPRA or the common law right to access. Also, before this Court is whether the notices of disciplinary action are subject to disclosure under OPRA or the common law right to access. After reviewing the submissions of the parties in this matter the Court's decision follows.

## DISCUSSION

### **I. The Report of Sergeant Hughes and Officer Lancaster's Preliminary and Final Notice Of Discipline under OPRA**

The Open Public Records Act (hereinafter "OPRA"), codified as N.J.S.A. 47:1A-1 et seq., directs that the legislature finds and declares it to be the public policy of this State that:

government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access;

all government records shall be subject to public access unless exempt from such access by: P.L. 1963, c. 73 (C. 47:1A-1 et seq.) 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;

a public agency has a responsibility and an obligation 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; and nothing contained in P.L. 1963, c. 73 (C. 47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

[N.J.S.A. 47:1A-1].

OPRA replaced the Right to Know Act of 1963, N.J.S.A. 47:1A-1 to -4, and became effective July 7, 2002. Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003). OPRA reflects this State's "public policy favoring ready access to most public records." Ibid.

The public policy favoring disclosure of public records is not without its limits. OPRA carves out exceptions, pursuant to N.J.S.A. 47:1A-10, whereby certain documents are shielded from public disclosure as follows:

Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.) or any other law to the contrary, the 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 public access, except that:

an 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;

personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official

duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

[N.J.S.A. 47:1A-10].

In this case, the Defendant is relying on this particular subsection, N.J.S.A. 47:1A-10, to argue that Sergeant Hughes' February 17, 2011 report was a part of the personnel records of Officer Lancaster and thus is not subject to release under OPRA. On the other hand, Plaintiff is arguing that the report is a police incident report and is subject to release under OPRA.

In the context of evaluating the nature of the document or information being requested, a government record is,

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

[N.J.S.A. 47:1A-1.1.]

As a preliminary matter, it is undisputed that the report written by Sergeant Hughes qualifies as a government record. The New Jersey legislature defines a government record as “any paper, written or printed book, document, [ . . . ] that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State [ . . . ].” N.J.S.A. 47:1A-1.1. Next, the Court will address the reports accessibility under OPRA.

A. The Report of February 17, 2011 Written by Sergeant Hughes is accessible to Plaintiff under OPRA because the Report was not a Part of an Internal Affairs Investigation

This Court disagrees with Defendants characterization of Sergeant Hughes’ report of February 17, 2011 as being a part of an internal affairs investigation. The facts disclose that Sergeant Hughes created his report either contemporaneously or within a few hours of his encounter with Defendant Lancaster. Given the close proximity between the time Sergeant Hughes arrived in Northfield to pick up Defendant Lancaster and created his report, this Court is satisfied that the report served to memorialize his encounter with Defendant Lancaster through a factual recitation of the events that occurred at that time.

The Court also finds compelling that there was no internal affairs investigation pending at the time of the incident. Thus, Sergeant Hughes’ report memorialized his encounter with Defendant Lancaster “in the course of his [ ] official business.” Sergeant Hughes is not an internal affairs investigator; rather, Sergeant Hughes prepared his statement at the direction of his superior, Captain John Woods. The fact that it later formed the foundation for the Police Department to initiate an internal investigation on

whether formal charges should be brought against Defendant Lancaster does not necessarily mean that the report as initially created is not subject to disclosure.

Most concerning to this Court is that the only report written regarding the encounter with Defendant Lancaster was made by Sergeant Hughes. Indeed, the Northfield officers that were first on scene did not create a report. Thus, the report created by Sergeant Hughes is the only record memorializing the incident. After reviewing the report it becomes evident that it is a recitation of the observations made and the factual details of the incident with Defendant Lancaster during those early morning hours of February 17, 2011. There were no details in the report which disclose any communications made by Defendant Lancaster in the course of an interview or any other interviews conducted of other officers that were on the scene at the time. Any sensitive or confidential information would be subject to appropriate redaction before disclosure of the report.

Pursuant to OPRA the right to access certain records that "pertain to an investigation in progress by any public agency, [ . . . ] may be denied if [ . . . ] the inspection [ . . . ] shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced. [ . . . ]" N.J.S.A. 47:1A-3(a). This principle is reiterated in Serrano v. South Brunswick Tp., wherein the Appellate Division directs that "[i]f it was a public record when created, then it would remain accessible to the public under N.J.S.A. 47:1A-3(a) even if its release would be inimical to the public interest." Serrano v. South Brunswick Tp., 358 N.J. Super. 352, 366 (App. Div. 2003).

The Court finds that Sergeant Hughes' report was a public record at the time it was created, because there was no internal affairs investigation going on at the time that it was created and it merely contains a recitation of the events of that morning. While the Court acknowledges the report was created at the request of Captain John Woods, who was at the time the internal affairs officer, that in and of itself, in this Court's view is not sufficient to render the report a personnel record.

In reviewing the report, it reveals that all that Sergeant Hughes did was recite the events of that evening and he did he not get involved in interviewing other officers or interviewing Defendant Lancaster himself. Also, in the report Sergeant Hughes did not make any conclusions or statements about discipline or prior disciplinary records, or psychological records, or any other fact that would generally be included in an internal affairs investigation.

This Court recognizes, as outlined by the New Jersey Supreme Court, that ". . . a police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. . . . He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." In re Carter, 191 N.J. 474, 486 (2007) (citing Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966)). This Court finds that disclosure of the report is not inimical to important public interests in that a police officer serves in a position of trust and disclosure will only fortify the trust and credibility afforded to the Egg Harbor Township police department by its citizenry. In this Court's view, the report written by Sergeant Hughes on February 17, 2011 is accessible to plaintiff under OPRA because it is not a personnel record as a part of an internal affairs

investigation but rather is a police incident report. Therefore, this Court finds that Plaintiff is entitled to access Sergeant Hughes' report under OPRA subject to redaction of legitimately confidential information.

B. The Egg Harbor Township Police Department's Preliminary and Final Notice of Disciplinary Action is not accessible under OPRA

This Court notes that "[. . .] the personnel [. . .] records of any individual in the possession of a public agency, [. . .] shall not be considered a government record and shall not be made available for public access." N.J.S.A. 47:1A-10. Discipline imposed against an officer is a part of an officer's employment record and is generally included in their personnel file. Therefore, although the public policy favoring the public's right of access to disclosure of government records is clearly stated in N.J.S.A. 47:1A-1, the records which Plaintiff requests access are also subject to the personnel records exception as provided in N.J.S.A. 47:1A-10.

The discipline imposed against Defendant Lancaster implicates important privacy concerns and was a part of the Egg Harbor Township Police Department's internal affairs investigation. Therefore, this Court finds that the personnel record exception to the general policy in favor of disclosing public records, as well as Defendant Lancaster's right to privacy with respect to his disciplinary matters supports this Court's finding that the notices of preliminary and final disciplinary action created by the Egg Harbor Township Police Department are not subject to disclosure, pursuant to N.J.S.A. 47:1A-10. Accordingly, Plaintiff is not entitled to access such disciplinary records under OPRA.

## II. The Common Law Right of Access

In addition to the arguments under OPRA, the Plaintiff also seeks access to the report and disciplinary notices under the common law right of access. The common law right of access has three elements: (1) the person who seeks access must "establish an interest in the subject matter of the material [ . . . ]"; (2) the records must be common law public documents; and (3) the citizen's right to access "must be balanced against the State's interest in preventing disclosure." South Jersey Publishing Co. v. New Jersey Expressway Auth., 124 N.J. 478, 487 (1991); See also Higg-A-Rella, Inc. v County of Essex, 141 N.J. 35, 46 (1995); See also Keddie v. Rutgers, 148 N.J. 36, 50 (1997).

The right of access under the common law is broader than under OPRA. North Jersey Media Group, Inc. v. State, Dep't of Personnel, 389 N.J. Super. 527, 537 (Law. Div. 2006). Indeed, under N.J.S.A. 47:1A-8, nothing in OPRA "shall be construed as limiting the common law right of access to a government record. . . ." N.J.S.A. 47:1A-8. However, the common law right of access is not absolute; it is subject to a balancing of the public interest in maintaining confidentiality and the private interest in disclosure. Keddie, supra, 148 N.J. at 50; See also Home News v. Dep't of Health, 144 N.J. 446, 454 (1996).

### A. Plaintiff Has a Cognizable Interest in the Subject Matter of the Material Requested

As a threshold matter under the common law right to access, this Court must first determine whether Plaintiff has standing to assert his request for documents. See S. N.J. Newspapers v. Twp. of Mt. Laurel, 141 N.J. 56, 71 (1995). "The interest does not have to be purely personal, but rather may be 'one citizen or taxpayer out of many, concerned

with a public problem or issue.” Id. (quoting Irval Realty Inc. v. Board of Pub. Util. Comm'rs, 61 N.J. 366,372 (1972)).

Here, the Plaintiff is a concerned citizen seeking to hold police officers accountable to the public they serve. Plaintiff has standing in this action because “a citizen’s concern about a public problem is a sufficient interest for purposes of standing.” Home News v. State Dep’t of Health, 144 N.J. 446, 454. “Ordinarily, only an assertion of citizen or taxpayer status is necessary [ . . . ], subject to a showing of good faith.” Loigman v. Kimmelman, 102 N.J. 98, 104 (1986). Therefore, the Court is satisfied that prong one is established and that the Plaintiff has a cognizable interest in the subject matter of the material requested.

B. The Documents Requested fall Within the Parameters of Common Law Public Documents

A common law public record is

“one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are [ . . . ] that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it [ . . . ].”

S. N.J. Newspapers v. Twp. of Mt. Laurel, 141 N.J. 56, 71 (1995) (citing Nero v. Hyland, 76 N.J. 213, 222 (1978) (quoting Josefowicz v. Porter, 32 N.J. Super. 585, 591 (App. Div.1954) (internal quotations omitted))).

Here, the report created by Sergeant Hughes qualifies as a common law public record because Sergeant Hughes works for the Township of Egg Harbor as a law enforcement officer and therefore qualifies as a public officer. As a public officer, Sergeant Hughes created his report as a written memorial of his encounter with

Defendant Lancaster on the morning of February 17, 2011. This Court's characterization of the report, as being either an incident report or a part of the internal affairs investigation, is of no moment in determining if Sergeant Hughes was authorized by law to create the report; Sergeant Hughes is authorized by law to create either report. Accordingly, this Court finds that the report written by Sergeant Hughes on February 17, 2011 is a common law public record. This Court also applies the same analysis in determining that both notices of preliminary and final disciplinary action are common law public records. Therefore, this Court finds that prong two is satisfied and that the documents requested fall within the parameters of common law public documents.

C. The Exquisite Weighing Process as set forth in *Loigman v. Kimmelman*

A court must balance the plaintiff's interest in the information against the public interest in confidentiality of the documents, including a consideration of whether the "demand for inspection is 'premised upon a purpose which tends to advance or further a wholesome public interest or a legitimate private interest.'" *Loigman v. Kimmelman*, 102 N.J. 98, 112 (1986) (quoting *City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811, 815 (Ky. 1974)). When "common-law documents have been filed with courts, agencies, and arbitral forums without being sealed, confidentiality is nonexistent; standing alone is sufficient to require disclosure [ . . .]." *Keddie v. Rutgers*, 148 N.J. 36, 52 (1997) (citing *Loigman*, *supra*, 102 N.J. at 105; *Shuttleworth v. City of Camden*, 258 N.J. Super. 573, 579 (App. Div.), *certif. denied*, 133 N.J. 429 (1992)).

Here, Defendants have filed both Sergeant Hughes' report and the notices of preliminary and final disciplinary action with the Court under seal for *in camera* review, and thus, Defendants have asserted and maintained the confidentiality of the documents.

"Where a claim of confidentiality is asserted, the applicant's interest in disclosure is more closely scrutinized. In that context, courts consider whether the claim of confidentiality is 'premised upon a purpose which tends to advance or further a wholesome public interest or a legitimate private interest.'" Keddie, supra, 148 N.J. at 51 (quoting Loigman v. Kimmelman, 102 N.J. 98, 112 (internal quotations omitted)). Accordingly, the Court must engage in an "exquisite weighing process," involving a balancing of the following six (6) factors:

- (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government;
- (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed;
- (3) the extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure;
- (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers;
- (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and
- (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.

Against these and any other relevant factors should be balanced the importance of the information sought to the plaintiff's vindication of the public interest.

Loigman v. Kimmelman, 102 N.J. 98, 113 (1986).

- i. The Report Written by Sergeant Hughes on February 17, 2011 is accessible to Plaintiff under the common law right of access

This Court commences the "exquisite weighing process" by first considering the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government. In this Court's view Sergeant Hughes' report is precisely the type of information that is appropriate for disclosure as it will have only a minimal impact, if any, in discouraging citizens from providing information to the

government. Disclosure of the report serves to foster a relationship of trust between the police department and its citizenry. Trust can only be established through transparency, which will ultimately aid in the credibility of the department.

Public confidence is associated with disclosure; however, non-disclosure can create an aura of secrecy and does nothing more than promulgate a code of silence which begins to erode public confidence in the institution of law enforcement. Accordingly, this Court is satisfied that disclosure of Sergeant Hughes' report will encourage citizens to provide information to the government because it will foster a relationship of trust and will not impede agency functions. The Court gives substantial weight to this factor.

Next, this Court will consider the effect that disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed. Creating police reports are a part of the day-to-day activities of a law enforcement officer. People that find themselves involved in criminal or other matters, such as victims of crime, witnesses, experts, and others, routinely provide statements or opinions to police officers with the expectation that their statements have the potential of being used in future litigation, investigation, and the like. This Court finds that Sergeant Hughes created his report either contemporaneously or within hours of his encounter with Defendant Lancaster on February 17, 2011. This Court does not find that Sergeant Hughes' report was created for the purpose of the internal affairs investigation, but rather the report was similar to an incident report. This Court also finds that Sergeant Hughes' report contained a factual recitation of his encounter with Defendant Lancaster, which was created very close in time to that encounter.

Conversely, even if this Court were to find that Sergeant Hughes' report was created for the purpose of the internal affairs investigation, the report is not completely shielded from disclosure. Indeed, factual events, statements, and opinions have the potential of being disclosed through discovery or otherwise in future court proceedings. Accordingly, this Court is not persuaded that disclosure of the report will necessarily result in doctors, therapists, and witnesses becoming dissuaded from providing evaluations and cooperating in future police investigations. Therefore, this Court finds that the effect that disclosure may have upon persons who have given such information is minimal and redaction of names where appropriate can be used to cure any confidentiality concerns. This Court also weighs this factor in favor of disclosure.

Next, this Court will consider the extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure of Sergeant Hughes' report. Defendants argue that a chilling effect will result, because disclosure will affect the ability of police departments to conduct internal investigations. This Court disagrees. While the Court recognizes "that the public interest is furthered by the promotion of internal efforts to analyze problems and correct deficiencies" this Court must use its discretion in determining whether that interest outweighs Plaintiffs need for disclosure on a case by case basis. Loigman, supra, 102 N.J. at 107. In this Court's view a lack of transparency will hinder program improvement and self-evaluation within law enforcement and therefore this Court finds that disclosure will not result in a chilling effect on agency self-evaluation, program improvement and other decision making. Again, this factor weighs in favor of disclosure.

The fourth factor this Court will consider is the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers. This Court characterizes Sergeant Hughes' report as an incident report for the reasons previously outlined. After conducting an *in camera* review of the report, it is clear that mainly the report provides a factual recitation of the events involving Defendant Lancaster on February 17, 2011. Plaintiff indicated that his request for the report is qualified to the facts surrounding the incident alone, and therefore this Court is satisfied that there is a high degree of factual data to be gleaned from Sergeant Hughes' report. Also, there are no evaluative reports of policymakers or opinions included in the report, and if any those will be subject to appropriate redaction. Again, this weighs in favor of disclosure.

Next, this Court will consider whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency. As with most disciplinary or remedial measures there does not exist a precise formula to deduce an appropriate course of action, rather there is usually a range of actions that could apply. After conducting an *in camera* review of the documents filed with the Court under seal, this Court is satisfied that the disciplinary measures imposed by the Egg Harbor Township Police Department were within the appropriate range. Therefore, given the sufficiency of the disciplinary remedial measure instituted by the Egg Harbor Township Police Department, this factor weighs in favor of non-disclosure.

The last factor this Court will consider is whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials. The Court has been informed that all disciplinary or investigatory proceedings have been concluded which is why there was a delay involved in bringing

this action to trial, given that Plaintiff filed his complaint over a year ago on September 29, 2011. This factor weighs in favor of disclosure because there are no other remedies available to the Plaintiff to obtain these records.

Upon carefully balancing the aforementioned factors and engaging in an exquisite weighing process the Court concludes that the factors weigh in favor of disclosure. Specifically, the balancing of the six (6) Loigman factors and the importance of the report to Plaintiff's vindication of the public interest, weigh in favor of disclosure. Indeed, the appellate division has directed disclosure of incident reports is appropriate as they do not "disclose disciplinary charges brought against any of the law enforcement officers involved or charges pending against anyone else who may have participated in the altercation." Asbury Park Press, Inc. v. Borough of Seaside Heights, 246 N.J. Super. 62, 69 (Law Div. 1990). Thus, under the common law analysis this Court is satisfied that the disclosure of Sergeant Hughes' report is appropriate and redaction of confidential information such as names, addresses, opinions and the like should occur prior to disclosure.

- ii. The Egg Harbor Township Police Department's Preliminary and Final Notice of Disciplinary Action is not accessible to Plaintiff under the common law right of access

Under Loigman, this Court must balance various factors in order to determine whether disclosure of the preliminary and final notice of disciplinary action is appropriate in this case. The Court finds that the disciplinary measures taken by the Egg Harbor Township police department against Defendant Lancaster should remain confidential and are not subject to disclosure. New Jersey has a long-standing policy preventing access to such personnel actions under common law. See Executive Order No. 11 (Byrne) (Nov.

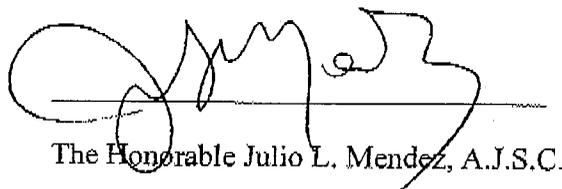
14, 1975); Executive Order No. 9 (Hughes) (October 1, 1963); See also S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 495 (1991) (discussing the Executive Order); Williams v. Bd. of Educ. of Atlantic City Pub. Schools, 329 N.J. Super. 308, 317 (App. Div. 2000) (same).

Therefore, this Court finds that in balancing the Loigman factors, the need for confidentiality and non-disclosure outweighs Plaintiffs interest in obtaining the specific disciplinary actions taken against Defendant Lancaster. Accordingly, the Egg Harbor Township Police Department's preliminary and final notice of disciplinary action is not accessible to Plaintiff under the common law right of access.

#### CONCLUSION

Hence, for all the reasons contained herein and placed on the record, and pursuant to the Declaratory Judgment Act, N.J.S.A. 2A:16-51, the Court declares that Sergeant Hughes' report regarding his contact with Defendant Lancaster on February 17, 2011 be made available to Plaintiff, as redacted by the Court to shield any legitimately confidential information in accordance with OPRA and Plaintiff's common law right of access to that report. This Court further declares, pursuant to the Declaratory Judgment Act, N.J.S.A. 2A:16-51, that the notices of preliminary and final disciplinary records related to Defendant Lancaster's conduct on February 17, 2011 are not available to Plaintiff in accordance with OPRA and Plaintiff's common law right of access. An Order is attached.

June 25, 2013

  
The Honorable Julio L. Mendez, A.J.S.C.