NOT FOR PUBLICATION WITHOUT APPROVAL OF COMMITTEE ON OPINIONS

RICHARD RIVERA, Plaintiff, v. NEW JERSEY STATE POLICE, THOMAS PRESTON, in his capacity as Records Custodian for the New Jersey State Police, DAVID ROBBINS, in his capacity as Records Custodian for the New Jersey State Police, Defendants, and RICHARD RIVERA, Plaintiff, v. NEW JERSEY STATE POLICE, THOMAS PRESTON, in his capacity as Records Custodian for the New Jersey State Police, DAVID ROBBINS, in his capacity as Records Custodian for the New Jersey State Police, Defendants, and	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MERCER COUNTY CIVIL ACTIONS CONSOLIDATED FOR DECISION DOCKET NO. MER-L-1517-15 DOCKET NO. MER-L-2026-15

JOHN PAFF, Plaintiff, v. OFFICE OF THE ATTORNEY GENERAL, NEW JERSEY STATE POLICE, BRUCE SOLOMON, in his capacity as Records Custodian for the Office of the Attorney General and New Jersey State Police, MERCER COUNTY SHERIFF'S DEPARTMENT, and JOHN DOE, in his capacity as Records Custodian for Mercer County Sheriff's Department Defendants.	DOCKET NO. MER-L-2400-15

Decided: June 30, 2016.

Samuel Samaro and CJ Griffin (PASHMAN STEIN) for plaintiffs Richard Rivera and John Paff.

Christopher S. Porrino, Acting Attorney General, Jeffrey Jacobson, Chief Counsel to the Attorney General, Raymond R. Chance, III, Assistant Attorney General, and Nicole E. Adams, Deputy Attorney General, for defendants New Jersey State Police and the Office of the Attorney General.

Arthur R. Sypek, County Counsel, John Maloney, Assistant County Counsel, and Paul Adezio, Deputy County Counsel, for defendant Mercer County Sheriff's Department.

Jacobson, A.J.S.C.

INTRODUCTION

Before the court are three complaints brought by Plaintiffs John Paff and Richard Rivera seeking primarily to compel the Office of the Attorney General and State of New Jersey to disclose the names of law enforcement officers involved in uses of force pursuant to the Open Public Records Act ("OPRA") and the common law right to access: Richard Rivera v. NJ State Police, et al., MER-L-1517-15 ("Rivera I"), Richard Rivera v. NJ State Police, et al., MER-L-2026-15 ("Rivera II"), Paff v. Office of the Attorney General, et al., MER-L-2400-15 ("Paff"). Each cause of action was prompted by a high-profile incident involving the use of physical, and sometimes deadly, force by police officers against civilians—-the fatal shooting of Daniel Wolfe on April 21, 2015, the use of crowd control techniques at the Hot 97 Summer Jam on June 7, 2015, and the shooting of a juvenile in Trenton on August 7, 2015, respectively.

Despite what may at first blush appear to be straightforward requests, the court has spent significant time grappling with the complexities presented by these three cases, which have been consolidated only for the purpose of decision given the similarity of the legal issues raised in each case. The requests implicate somewhat intricate statutory provisions of OPRA, including one that can accurately be characterized as an exception to an exception to an exemption. Some of these provisions and the

interplay among them have received little appellate treatment, presenting some issues of first impression.

Further adding to the difficulty is the nature of the parties' applications. Plaintiffs' demands were themselves quite varied, requesting both event-specific records as well as broad swaths of reports generated over the course of years. The Office of the Attorney General has added to the complexity of the required analysis by raising numerous arguments, some of which stretch the statutory language in incongruous ways, in order to block the release of the information. Notably, many of the State's arguments were not raised in its initial denials of Plaintiffs' requests.

Finally, these requests for the release of public records touch upon topics of great national importance and public debate: the extent of appropriate transparency of police operations when force is used, and the role of public oversight over that conduct. Plaintiffs seek the officers' names to increase transparency and public oversight. On the other hand, the State raises the critically important issue of officer safety and urges confidentiality in order to shield officers from potential dangers.

OPRA itself drives the analysis here. But the proper balance between transparency and disclosure is difficult to decipher from the statutory language and the competing concerns addressed by the Legislature and argued by the parties. In the end, the court can

only be guided by the language itself, principles of statutory construction, and various case law precedents in New Jersey and elsewhere that address the delicate balance that must be struck in order to adjudicate the claims before the court.

STATEMENT OF FACTS

RIVERA I:

On April 21, 2015, at least one State trooper shot and killed Daniel Wolfe after pursuing a carjacked vehicle in Union, New Jersey. Compl. ¶ 9. Thereafter, on May 6, 2015, Plaintiff Richard Rivera filed the first of two OPRA requests regarding uses of force with the State Police's Records Custodian. Id. at ¶ 11. He requested Use of Force Reports ("UFRs") as well as all information "relating to the police shooting of Daniel Wolfe on or about April 21, 2015 in Union" required to be released by N.J.S.A. 47:1A-3(b) ("Section 3(b)"). Ibid. On May 6, 2015, Plaintiff made a second OPRA request, which asked for all UFRs completed by State troopers in 2015. Id. at ¶ 18.

On May 15, 2015, Thomas Preston (Records Custodian for New Jersey State Police) responded to Plaintiff's first OPRA request. Id. at ¶ 12. He provided UFRs to Mr. Rivera, but redacted all names, badge numbers, and signatures of the responding officers and the reviewing officers, claiming that the redactions complied with N.J.A.C. 13:1E-3.2(a)(7), a regulation that prevents the release of trooper duty assignments. Id. at ¶ 13(1). As for the

requested Section 3(b) information, Mr. Preston provided the information that had been disclosed previously in a press release. Id. at ¶ 13(9). On May 21, 2015, David Robbins (Records Custodian for New Jersey State Police) responded to Plaintiff's second OPRA request by providing similarly redacted UFRs, totaling 107 documents. Id. at ¶ 19. While those documents were allegedly not provided within seven business days as required by N.J.S.A. 47:1A-5(i), id. at ¶ 20, Mr. Robbins later explained that technical difficulties related to the size of the production had prevented a timely electronic response. Robbins Certif. ¶ 7. Hard copies of the redacted documents were sent by mail, but no explanation for the redactions was provided. Compl. ¶ 21.

Plaintiff Rivera filed a verified complaint and order to show cause on July 2, 2015. Rivera claimed that Defendants violated OPRA by failing to make the requested records "readily accessible for inspection, copying or examination" pursuant to N.J.S.A. 47:1A-1. Compl. ¶ 31(a). In particular, Plaintiff Rivera asserted a right to the identifying information of officers involved in the Wolfe incident and listed on all UFRs pursuant to N.J.S.A. 47:1A-3(b). Pl.'s Br. 4-5. Plaintiff also argued he was entitled to specific information regarding the type of gun and ammunition used by the police under the same provision. Ibid. Additionally, Plaintiff alleged a violation of N.J.S.A. 47:1A-5(i) for taking longer than seven business days to provide the documents, and a

violation of N.J.S.A. 47:1A-5(f) for failure to state a specific lawful basis for the denial and for failure to identify the information that had been redacted. Compl. ¶¶ 31(b)-(c), (e). Rivera also asserted that he had a right to the redacted information under the common law. Id. at ¶¶ 36, 38. As the case progressed, the parties focused on the substance of the request and the redactions and not on the alleged procedural and technical irregularities.

On September 11, 2015, Defendants released more information regarding the incident. Def.'s Opp'n Ex. A. Notably, the release included a more specific identification of the gun and ammunition used. Ibid. (stating that the police officer "discharged two rounds from a nine millimeter Sig Sauer P229 semi-automatic service weapon striking Wolfe in the shoulder and chest").

In his Reply Brief, Plaintiff effectively conceded that his request for Section 3(b) information regarding the weapon and ammunition used in the shooting has been satisfied. See Pl.'s Repl. Br. 30-31. It appears that Plaintiff now only seeks the release of officer names and counsel fees.

RIVERA II:

On June 7, 2015, the radio station Hot 97 held its annual Summer Jam concert at Metlife Stadium in East Rutherford, New Jersey. Compl. ¶ 24. At around 7 P.M., a fight broke out near one of the entrances to the stadium. Id. at ¶ 24(1). In addition, there

were several people who were trying to get into the concert without having purchased tickets. Ibid. As a result of these disturbances, the State Police closed down the entrance to the stadium. Ibid. Unfortunately, this action meant that many people who *had* bought tickets, but had not yet gained entry, could no longer enter the concert. Id. at ¶ 25. In their frustration, several people began rushing the entrance and throwing bottles and other objects at police officers. Ibid. In response, the police allegedly used pepper spray, tear gas, and loud noise emitters from an armored police vehicle to disperse the crowd. Id. at ¶ 26. In the end, over sixty people were arrested and at least one State trooper was injured. Id. at ¶ 26(2).

On June 9, 2015, counsel for Plaintiff submitted an OPRA request seeking records related to the Summer Jam incident. Id. at ¶ 28. Mr. Rivera asked for all UFRs and arrest forms/reports without any redactions of Section 3(b) information. Ibid. On June 17, 2015, Defendants denied access to both requests due to the criminal investigatory records ("CIR") exemption under OPRA. Id. at ¶ 29.

Refining its request in response to the State's denial, on June 29, 2015, Plaintiff's counsel asked for Section 3(b) information from "all records relating to" the Hot 97 Summer Jam Concert incident. Id. at ¶ 30. The second request also sought all

complaints and summonses that had been issued as a result of the event. Ibid.

Documents and information were provided by the State over the following month. On July 16, 2015, Defendants provided a list of sixty individuals who had been arrested at the Summer Jam event, along with related Section 3(b) information. Id. at ¶¶ 31-32. This list did not include information about weapons or ammunition used by the suspects and by the police and did not address whether there had been any resistance to arrest by any suspect. Ibid. The State also provided no explanation as to why such information was not included. Ibid. On July 27, 2015, Defendants provided all complaints and summonses produced in connection with the event, with certain redactions made "to protect personal identifiable information." Id. at Ex. D.

On June 17, 2015, Defendants informed Plaintiff that they were now willing to release the UFRs themselves, albeit in redacted form, responsive to Plaintiff's original June 9 OPRA request. Id. at ¶ 33. Defendants clarified that the UFRs would be redacted "for safety/security reasons." Id. at Ex. E. On July 21, 2015, Defendants emailed to Plaintiff's counsel seven UFRs with the names and badge numbers of State troopers redacted. Id. at ¶ 35.

On June 30, 2015, Plaintiff's counsel submitted another OPRA request asking for all UFRs completed by State troopers from March 31, 2013 to December 31, 2014, as well as the State Police's Use

of Force policy/Standard Operating Procedure and any instructions on completing a UFR. Id. at ¶ 37. After an extension was granted, Defendants responded on July 22, 2015, attaching the State Police Operating procedure and noting that the UFRs would be provided separately. Id. at ¶ 38; Ex. H. The UFRs were provided on CD-ROM on July 27, 2015, with redactions of names and badge numbers in reliance on N.J.A.C. 13:1E-3.2(a)(7). Id. at Ex. H.

Plaintiff filed a verified complaint and order to show cause on September 8, 2015. Plaintiff sought "full access" to all requested records. Id. at ¶ 48(a). Additionally, Plaintiff sought a "complete list of N.J.S.A. 47:1A-3(b) information pertaining to the Summer Jam Incident." Plaintiff also sought relief under the common law.

PAFF:

On August 7, 2015, two State troopers and a Mercer County Sheriff's officer responded to a report of gunshots fired near 500 Prospect Village, Trenton, New Jersey. Compl. ¶ 9. The three officers were assigned to the Targeted Integrated Deployment Effort ("TIDE"), which is a "multi-agency initiative to address violence in Trenton." Ibid. While en route to the scene, the officers stopped three teenage males who were walking within a half mile radius of the location noted in the reports. Ibid. As the officers approached the teenagers, one fled. Ibid. One of the State troopers and the Sheriff's officer ran after the youth,

firing between 15-18 shots and striking him in his legs and buttocks seven times. Id. at ¶ 10. Subsequent to these events, the Division of Criminal Justice of the Attorney General's Office filed three charges against the juvenile: unlawful possession of a handgun, aggravated assault, and possession of a defaced firearm. Id. at ¶ 18; Ex. E. The Office of the Attorney General ("OAG") also announced that it was "conducting an ongoing investigation into whether the shooting was legally justified." Id. at ¶ 19.

Shortly after the incident, the OAG on August 10, 2015, issued a press release, stating that "witnesses reported that as the . . . state trooper and the sheriff's officer ran after the 14-year-old, the youth was reaching into his waistband." Id. at ¶ 9. A .22-caliber automatic handgun containing three rounds of ammunition was later recovered underneath a vehicle at the scene on Calhoun Street." Id. at ¶ 14; Ex. A. The Complaint filed against the juvenile apparently alleges that he was in possession of the handgun at the time of the shooting. Id. at ¶ 17; Ex. E. It further alleges that he had pointed the gun at the officers. Ibid.

Plaintiff's complaint raises concerns regarding the substance of the OAG's reports. Some news articles published shortly after the incident reported that the gun was found after a twelve-hour search about 151 feet from the place where the youth collapsed. Id. at ¶¶ 14-15; Ex. C, D, and E. There were also reports of searches on a nearby rooftop, "which caused experts to speculate

that there was some evidence that the police initially believed the juvenile tossed his weapon onto the roof and thus knew that he did not have it in his hand when he was shot." Id. at ¶ 13; Ex. C. The youth's attorney stated that the suspect ran away purely because "he sensed trouble" and that eyewitnesses have noted they "never saw [him] with a gun." Id. at ¶ 16; Ex. F. Plaintiff has also alleged that the "defendants and other law enforcement agencies" have attempted to cast the youth in a negative light by leaking mug shots of the juvenile and information regarding his criminal history to media outlets. Id. at ¶¶ 23-24.

On August 29, 2015, Plaintiff submitted a request for public records pursuant to OPRA and the common law right of access. Id. at ¶ 29. Plaintiff made four requests, seeking: (1) identifying information of the law enforcement officers who shot the youth pursuant to N.J.S.A. 47:1A-3(b) ("Section 3(b)"), (2) Use of Force reports filed by the two officers, (3) police incident or other reports containing the names of the two officers, and (4) "the name, title position, salary, payroll record, length of service, date of separation and the reason therefor" pursuant to N.J.S.A. 47:1A-10 of the two officers. Ibid. All four requests for information clarified that the Plaintiff's primary interest was learning the identities of the officers involved in the shooting. See Ibid.

In response to the first request, Assistant Attorney General Raymond Chance sent a letter to Plaintiff on August 31, 2015. Id. at ¶¶ 30-31; Ex. M. The letter refused to provide identifying information, noting in response to Plaintiff's first request that Section 3(b) does not apply because "no arrest has been made." Id. at Ex. M. Further, the letter asserted that even if Section 3(b) did apply, that the release of information would be exempted based on safety concerns for the officers. Ibid.

On September 1, 2015, the Mercer County Counsel responded, relying largely on the OAG Letter. Id. at ¶ 32; Ex. N. The Office of County Counsel contacted Plaintiff on September 10, 2015, noting that OAG was the "primary agency on the investigation," and that the Office might need extra time to respond. Id. at ¶¶ 33-35; Ex. O. Plaintiff consented, and received denials of the remainder of his requests from Mercer County Counsel in a September 18, 2015 letter. Id. at ¶ 34; Ex. P.

On September 11, 2015, OAG Records Custodian Bruce Solomon requested by voicemail additional time to respond to the remaining requests, to which Mr. Paff also consented. Ibid. ¶ 35. On September 11 and September 16, OAG provided its response. Id. at ¶¶ 36-37(a)-(d); Ex. Q, R. Specifically, as to the second request, OAG indicated that no Use of Force reports had been generated. Ibid. In response to the third request, OAG stated that the "matter is subject to an ongoing criminal investigation and the release of

these records would jeopardize the safety of the officers involved," citing N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-3. Ibid. Regarding request four, the response noted that there was an ongoing investigation by the Attorney General's Shooting Response Team as to whether the shooting was legal. Ibid. Accordingly, the names and actions of the officers would be presented to a grand jury to determine whether probable cause existed to issue an indictment against the officers. Ibid. The response further noted that disclosure of the information was exempted under N.J.S.A. 47:1A-1.1, 47:1A-3, and 47:1A-9. Ibid.

On October 15, 2015, NJ Advanced Media reported that "unnamed law enforcement sources had leaked the names of the two officers who shot" the youth. Id. at ¶ 38. In that article, an OAG spokesperson refused to confirm that report. Ibid. Plaintiff sent a letter to Mr. Solomon seeking confirmation from OAG regarding the identities and reissuing his first four requests on October 16, 2015. Id. at ¶ 39. Deputy Attorney General Ryan Atkinson responded on the State's behalf on the same day, reaffirming OAG's refusal to provide the identities of the two law enforcement officials under N.J.S.A. 47:1A-3(b). Id. at ¶ 40; Ex. U. No further information or records have been released to Mr. Paff to date.

Mr. Paff filed a verified complaint and order to show cause on October 20, 2015. Plaintiff sought full access to all requested

records. Id. at ¶ 53. Additionally, Plaintiff sought relief under the common law.

Due to the similarity of the issues presented in these cases, the court has considered them together. All three matters will be addressed in this decision.

LEGAL ANALYSIS

I. Overview of OPRA

Plaintiffs in these actions seek, pursuant to OPRA, the names of the police officers who have used varying degrees of force in the course of carrying out their duties. The wide swath of requested records can be organized into two types of requests: first, there were requests for records pertaining to specific events. In Rivera I, Plaintiff requested UFRs and other information relating to the shooting of Daniel Wolfe. In Rivera II, Plaintiff requested UFRs, and arrest forms and reports, pertaining to the Hot 97 summer event at the Meadowlands where a disturbance led to numerous arrests. Lastly, in the Paff matter, Plaintiff requested UFRs and other reports pertaining to the shooting incident involving a juvenile in Trenton in August of 2015. Second, there were general requests for UFRs generated within specific timeframes but not tied to any specific event. In Rivera I, Plaintiff requested all UFRs that had been submitted by State troopers in 2015 through the date of the request. In Rivera II,

Plaintiff also requested UFRs completed by State troopers between March 31, 2013 and December 31, 2014.

These requests implicate two interrelated exemptions to OPRA's general statutory requirement that public records be disclosed: the "criminal investigatory record" exemption under N.J.S.A. 47:1A-1.1 and the "investigation in progress" exemption under N.J.S.A. 47:1A-3. The court will begin its analysis with an examination of the statute.

OPRA provides that for all "public agencies," "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions . . . ." N.J.S.A. 47:1A-1. The purpose of OPRA is "to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." O'Boyle v. Borough of Longport, 218 N.J. 168, 184 (2014) (quoting Mason v. City of Hoboken, 196 N.J. 51, 64 (2008)). OPRA itself requires courts to narrowly construe OPRA's limitations on the right to access government records. N.J.S.A. 47:1A-1 ("[A]ny limitations on the right of access . . . shall be construed in favor of the public's right of access.").

When a plaintiff challenges an agency's denial of access to records, the public entity defendant has the burden to show that the denial was "authorized by law." N.J.S.A. 47:1A-6. This shifting of the burden to defendants is at odds with most civil

claims and underscores the strong preference for disclosure of public records that prompted the adoption of OPRA.

Moreover, the burden placed on the public agency is a heavy one. It is not met by providing mere "conclusory and generalized allegations," Gilleran v. Twp. of Bloomfield, 440 N.J. Super. 490, 497 (App. Div.), certif. granted, 223 N.J. 402 (2015) (quoting Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 162 (App. Div. 2011)), but instead necessitates a "clear[ ] demonstrat[ion of] a claim of privacy in all redacted information." Livecchia v. Borough of Mount Arlington, 421 N.J. Super. 24, 29 (App. Div. 2011). The State must "produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality." Gilleran, supra, 440 N.J. Super. at 497 (quoting Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003)). This explanation is required for redactions as well as for refusals to produce documents. See, e.g., Newark Morning Ledger Co., supra, 423 N.J. Super. at 148.

Consistent with the policy of maximizing public knowledge about public affairs and promoting an informed citizenry, OPRA defines a "government record" very broadly. Accordingly, a government record includes:

> 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 . . . or that has been received in the course of . . . official business.
>
> [N.J.S.A. 47:1A-1.1.]

However, OPRA constricts this general definition by naming twenty-one classes of records that are deemed "confidential" and exempt from the definition of "government records." Ibid.; Mason, supra, 196 N.J. at 65. In addition, OPRA authorizes non-disclosure when mandated by "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." N.J.S.A 47:1A-9(a).

Criminal investigatory records are explicitly exempt from the definition of "government record" under OPRA and are thus not subject to disclosure. OPRA defines criminal investigatory records as follows:

> "Criminal investigatory record" means a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.
>
> [N.J.S.A. 47:1A-1.1.]

The language used in this statutory definition was derived in part from the Right to Know Law, L. 1963, c. 73 (repealed 2002), which

OPRA replaced. See generally North Jersey Media Group, Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70, 93-97 (App. Div. 2015). Under the Right to Know Law, access was required to documents required by law to be made. L. 1963, c. 73, § 1. Thus, there are two salient components to determining whether a document constitutes a criminal investigatory record: the document must (1) not be required by law to be produced and retained, and (2) it must pertain to a criminal investigation. As the Appellate Division noted, the phrase "required by law" refers primarily to statutes and formally adopted regulations. Id. at 97-103. Thus, the scope of documents to which the exemption applies (i.e., those *not* required by law to be made) is quite broad.

The "investigation in progress" exemption codified at N.J.S.A. 47:1A-3 applies paradoxically to, at once, a narrower and a broader scope of documents than the "criminal investigatory record" exemption. The exemption applies to any "record or records . . . [that] pertain to an investigation in progress by any public agency." N.J.S.A. 47:1A-3(a). This definition is broader in scope than the "criminal investigatory record" exemption because it applies to *any* agency investigation, not only criminal ones. Conversely, it is narrower than the criminal investigatory records exemption because it applies solely to investigations that are *ongoing*. Accordingly, N.J.S.A 47:1A-3 applies to criminal investigatory records while the investigation is still in

progress. It provides no further guidance regarding the possible release of criminal investigatory records after the investigation has ended.

The "investigation in progress" exemption consists of two seemingly straightforward but ultimately difficult to apply subsections, N.J.S.A. 47:1A-3(a) and N.J.S.A. 47:1A-3(b). N.J.S.A. 47:1A-3(a) states that any record that pertains to an ongoing investigation "may be denied [disclosure] if the inspection, copying or examination of such record or records shall be inimical to the public interest." N.J.S.A. 47:1A-3(a). This protection is quite extensive, and courts have repeatedly emphasized the public interest in maintaining the confidentiality of all ongoing agency investigations. See, e.g., Gannett N.J. Partners, LP v. County of Middlesex, 379 N.J. Super. 205, 214 (App. Div. 2005) (observing that the ongoing investigation exemption reflects a longstanding, "general legislative recognition of the public interest in law enforcement and other investigatory agencies maintaining the confidentiality of documents relevant to ongoing investigations"). The Supreme Court has noted that this interest is "especially important in the context of a pending criminal proceeding." State v. Marshall, 148 N.J. 89, 273 (1997).

But this protection of the public interest has never been considered absolute. See Lyndhurst, supra, 441 N.J. Super. at 109 (noting that the confidentiality interest diminishes after the

investigation ends); River Edge Sav. & Loan Ass'n v. Hyland, 165 N.J. Super. 540, 544 (App. Div.), certif. denied, 81 N.J. 58 (1979) (noting that the investigatory process privilege "is not absolute . . . . where there are present considerations of fundamental fairness or other considerations of a compelling nature such as outweigh the imperative of the interests of the State in protecting and maintaining the confidentiality of the information" (citing Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957))). Since all criminal investigative records have already been exempted from disclosure under N.J.S.A. 47:1A-1.1, this protection for "ongoing investigations" appears to be redundant as applied to those records. This redundancy does not render the text superfluous, however, since N.J.S.A. 47:1A-3(a) also protects ongoing agency investigations that are not criminal in nature.

N.J.S.A. 47:1A-3(a) also provides that the 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). In other words, if the document or information was publicly available initially, it may not be shielded from disclosure if it later becomes part of an agency's investigation, no matter how high the confidentiality interest of the document subsequently becomes. The exception applies even when the

investigation begins within hours of the document's initial production. Lyndhurst, supra, 441 N.J. Super. at 104 (citing Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 366-67 (App. Div. 2003)).

The second subsection of the investigation in progress exemption applies only to ongoing *criminal* investigations. N.J.S.A. 47:1A-3(b). Section 3(b) requires agencies to disclose an enumerated list of details relating to the criminal investigation. Ibid. Notably, while OPRA generally provides for access to public records and not to information, see N.J.S.A. 47:1A-1, this subprovision addresses a right to information, not to documents themselves. The information that must be disclosed depends on whether an arrest has been made. N.J.S.A. 47:1A-3(b). If no arrest has been made, only "information as to the type of crime, time, location and type of weapon" is required. Ibid. If an arrest has been made, however, a far greater amount of information must be made available upon request. Specifically, the statute requires the following disclosures:

> information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;
>
> information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the

> release of such information is contrary to existing law or court rule;
>
> information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;
>
> information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police; and
>
> information as to circumstances surrounding bail, whether it was posted and the amount thereof.
>
> [N.J.S.A. 47:1A-3(b).]

Particularly relevant for the present cases is the required disclosure of "information as to the identity of the investigating and arresting personnel and agency," even where the incident involves "use of weapons and ammunition by the . . . police." Ibid. Notably, no other identities of law enforcement personnel must be released under this Section. The subprovision also provides a time limit on the agency's disclosure of this information. Specifically, it requires the disclosure "within 24 hours or as soon as practicable" following a request for the information. Ibid.

Further complicating the matter, the provision contains an exception to this directive to disclose information. N.J.S.A 47:1A-3(b) notably permits an agency to deny the disclosure of these enumerated details if the disclosure "will jeopardize the safety of any person or jeopardize any investigation in progress

or may be otherwise inappropriate to release." Ibid. While this language appears far-reaching on its face, the Legislature has explicitly limited the breadth of this exception by providing that it should be "narrowly construed to prevent disclosure of information that would be harmful to a bona fide law enforcement purpose or public safety." Ibid. When this narrow exception is invoked, the agency must "issue a brief statement explaining the decision." Ibid. This limitation is consistent with the general principles underlying OPRA that foster disclosure of public records and require narrow construction of the exceptions to disclosure. N.J.S.A. 47:1A-1 ("[A]ny limitations on the right of access . . . shall be construed in favor of the public's right of access.").

Taking these provisions together, the Legislature intended to create a broad protection for criminal investigatory records. This protection tempers the expansion of the right of access that was the motivating force for the enactment of OPRA. But the Legislature also saw fit not to make that protection absolute. Instead, it directed disclosure of specific information about ongoing criminal investigations that it deemed of significant public interest. Among the informational rights that the Legislature decided to protect is the one at the heart of these cases: the right to know the identity of any officer who has made an arrest pursuant to a criminal investigation.

Having opened a narrow corridor of access, the Legislature also created and placed a protective filter over it, preventing the disclosure of such names if their release would "jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release." N.J.S.A. 47:1A-3(b). But the Legislature also explicitly noted that this filter should remain porous, requiring it to be "narrowly construed," lest the exception swallow the access otherwise provided. The extra burden this requirement places on the public agency is significant since, as noted above, an agency must always demonstrate "a 'clear showing' that one of OPRA's exclusions applies," Gilleran, supra, 440 N.J. Super. at 497 (quoting Tractenberg v. Twp. Of W. Orange, 416 N.J. Super. 354, 378-79 (App. Div. 2010)), using "specific reliable evidence." Gilleran, supra, 440 N.J. Super. at 497.

II. All of Plaintiffs' requests for names shall be granted.

Plaintiffs have attempted to gain access to the names of the officers through two means. First, they have claimed that the State has inadequately demonstrated that the Use of Force Reports, on which most of the names are found, fall under the criminal records exemption as defined by N.J.S.A. 47:1A-1.1. Second, they have claimed that the State has inadequately demonstrated that the names of arresting officers should be withheld under N.J.S.A. 47:1A-3(b). The court will consider each in turn.

A. UFRs are "criminal investigatory records" under N.J.S.A. 47:1A-1.1.

Plaintiffs argue that the State has failed to meet its burden under N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-1.1 to demonstrate that the UFRs qualify as "criminal investigatory records" and therefore should be exempt from disclosure. Plaintiffs argue that UFRs meet neither condition of OPRA's two-part definition. They argue that the State has failed to show that UFRs are "not required by law" to be made and that they "pertain to an investigation."

i. Under Lyndhurst, UFRs are not required by law to be made.

UFRs constitute the great majority of documents requested by Plaintiffs. The reports require the officer who used force to state his or her name, the reason for the use of force, the degree of force used, and the impact of the use of force on the victim. See Rivera I, Compl. Ex. E. They are required to be made by Attorney General ("AG") Guidelines and Directives, which mandate such reports to be filled out whenever "physical, mechanical or deadly force is used." Office of the Att'y Gen., Attorney General's Use of Force Policy 7 (2000). They must be completed by "each officer who has employed such force." Ibid.

Plaintiffs argue that the AG Guidelines have the force and effect of law. Accordingly, since the Guidelines require police officers to create UFRs, UFRs are "required by law" to be made and thus fall outside the statutory exemption for criminal

investigatory records under OPRA. The court is constrained by the Appellate Division's recent decision in Lyndhurst, supra, 441 N.J. Super. at 97-103 ("Lyndhurst"), to disagree with Plaintiffs' position. Nevertheless, the court wishes to raise certain concerns that appear not to have been fully considered by the Lyndhurst court in the event that appellate review of any of these cases is pursued.

Plaintiffs' argument has been raised and addressed previously in two published Appellate Division decisions, producing disparate results. In O'Shea v. Township of West Milford, 410 N.J. Super. 371, 385 (App. Div. 2009), the Appellate Division concluded that the "Attorney General's requirements regarding UFRs . . . satisfy OPRA's 'required by law' standard." Id. at 385. But a separate panel of the Appellate Division more recently came to the opposite conclusion in Lyndhurst, supra, 441 N.J. Super. at 97-103, stating that AG Guidelines were "internal agency directives" that did not rise to the level of "law" under the OPRA exemption.

Plaintiffs argue that this divergence of opinion has created a split between Appellate Division panels and that neither is consequently binding on this court. See Pressler & Verniero, Current N.J. Court Rules, comment 3.3 on R. 1:36—3 (2014) ("If . . . separate panels of the Appellate Division reach different results on a given issue, a trial court or agency is free to choose which panel to follow until the matter is resolved by the Supreme

Court."); Sabella v. Lacey Twp., 204 N.J. Super. 55, 61 (App. Div. 1985) (noting that when two Appellate Division panels diverge, "the proper course is for [the trial judge] to choose the alternative which to him or her seems better reasoned").

The court agrees that the Appellate Division opinions do offer a stark contrast, not only in the conclusions reached but also in their approach. While the O'Shea court offered a highly pragmatic interpretation of the "required by law" phrase, the Lyndhurst opinion demonstrated a more formalistic approach. After reviewing both decisions, the court concludes that it is constrained to follow Lyndhurst. The Lyndhurst opinion is the more recently decided case and provides a more thorough analysis of the issue. See Petition of Gardiner, 67 N.J. Super. 435, 446 (App. Div. 1961) (noting, in the face of two conflicting Supreme Court opinions, that it was "perforce required to follow the more recent, and clearly the more soundly conceived" of the two).

Lyndhurst's approach focused on the legislative history behind the phrase, "required by law." The court noted that the phrase was directly borrowed from OPRA's prior iteration, the Right to Know Law ("RTKL"). Under the RTKL, a person seeking disclosure of public records only had a right to those documents that were "required by law to be made, maintained or kept on file." L. 1963, c. 73, § 1. As noted by the Appellate Division in Lyndhurst, New Jersey courts had narrowly circumscribed their interpretation of

the phrase under the RTKL, resulting in the non-disclosure of many documents. First of all, the "law" was interpreted to apply only to "statute[s], regulation[s], executive order[s] or judicial decision[s]." Nero v. Hyland, 76 N.J. 213, 220 (1978); see also State v. Marshall, 148 N.J. 89, 272 (1997). Moreover, within this narrow definition, courts interpreted "regulation" as applying only to formal promulgations, as opposed to "mere[ ] . . . administrative directives." See In re Request for Solid Waste Util. Customer Lists, 106 N.J. 508, 525 (1987) (denying disclosure under RTKL of certain customer and pricing lists required to be made by utility companies pursuant to an order—not regulation--from the Board of Public Utilities); Nero, supra, 76 N.J. at 220-21 (denying disclosures of certain records produced pursuant to a character investigation required by the Governor under the RTKL). Accordingly, courts historically permitted only a small amount of documents in the possession of a public body to be disclosed under the RTKL.

The passage of OPRA marked a sea change in the law by greatly expanding the public's right of access. This expansion was accomplished in great part by the removal of the phrase "required by law" from the definition of "public records." See N.J.S.A. 47:1A-1. But the Lyndhurst court found the re-insertion of the phrase in the definition of the "criminal investigatory records" exemption to be significant. Just as the removal of "required by

law" communicated the Legislature's desire to increase access to public records as a general matter, so the inclusion of the phrase revealed the Legislature's desire to create a broad protection for criminal investigatory records. Thus, while OPRA led to the great expansion of the right of access to public records when not attached to a criminal investigation, the law maintained the prior, restrictive standard for criminal records.

On the basis of this interpretation of OPRA, the Lyndhurst court concluded that the AG Guidelines on the creation of UFRs could not be considered "law" under the criminal records exemption of OPRA, but instead were simply agency directives. UFRs, accordingly, are "not required by law to be made, maintained or kept on file" in accordance with OPRA's definition of criminal records.

As noted above, this court has determined that it is constrained to abide by this application of the exemption to the AG Guidelines. The court therefore finds, based on Lyndhurst, that the AG Guidelines are not "law" under OPRA and that UFRs are "not required by law to be made, maintained or kept on file."

The court understands the Appellate Division's decision in Lyndhurst to follow the long-established distinction between informal publications and "rules and regulations of a state administrative agency, duly promulgated under properly delegated powers." State v. Atlantic City Electric Co., 23 N.J. 259, 270

(1957). Nevertheless, this court is concerned that the Appellate Division's decision in Lyndhurst did not fully address some important factors that possibly could have altered the analysis. Since the issue may soon be viewed by other Appellate Division panels and the Supreme Court, this court wishes to offer some additional factors for consideration.

The court agrees with Lyndhurst's conclusion that AG Directives and Guidelines concerning officer conduct are not promulgated in conformance with formal rulemaking requirements. The definition of a formal "rule" is found in the New Jersey Administrative Procedure Act ("APA"), N.J.S.A. 52:14B-1, et seq., which states that:

> "Administrative rule" . . . means each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term . . . does not include: (1) statements concerning the internal management or discipline of any agency; (2) intraagency and interagency statements; and (3) agency decisions and findings in contested cases.
>
> [N.J.S.A. 52:14B-2(e).]

One thrust of this definition is to require formal rulemaking proceedings except for internal policies that apply to agency personnel and not the public. The definition does not erode agency authority over internal procedures or personnel who are bound by those policies, however.

The court in O'Shea, supra, 410 N.J. Super. at 383, concurred with Lyndhurst's conclusion that the AG Guidelines and Directives do not meet the APA's definition of "rule." Instead, since they regulate the policing procedures of law enforcement agencies, the Directives and Guidelines constitute "statements concerning the internal management or discipline of an[ ] agency." Ibid. (citing In re Carroll 339 N.J. Super. 429, 442-43 (App. Div.) certif. denied 170 N.J. 85 (2001)). As such, they are binding on the agency, and therefore on law enforcement, without formal rulemaking. But the fact that AG Guidelines and Directives lack the imprimatur of a formal regulation passed according to notice and comment procedures should not necessarily disqualify them from having legal effect under OPRA. The court is particularly concerned that Lyndhurst's reasoning failed to recognize the authoritative stature of the AG Guidelines and Directives under New Jersey law.

In New Jersey, the Attorney General enjoys a unique position within the executive branch as the chief law enforcement officer in the State. As the Supreme Court has explained, that special status and authority derived from the role of Attorney General as it existed in England:

> Under the common law of England, the Attorney-General was the chief law officer and adviser of the Crown upon whom devolved the management of its legal affairs and the prosecution of all suits, civil and criminal, in which the crown had an interest; and these functions and responsibilities, in the absence of

> constitutional limitations, appertain to the office of Attorney-General in New Jersey, as a part of our common-law inheritance, subject to enlargement or abridgement by the legislative authority.
>
> [Alexander v. N.J. Power & Light Co., 21 N.J. 373, 380 (1956) (citing Wilentz v. Hendrickson, 133 N.J. Eq. 447, 454 (Ch. 1943) (Jayne, V.C.), aff'd, 135 N.J. Eq. 244 (E. & A. 1944)).]

Among the responsibilities of the Attorney General is the authority to regulate the conduct of all law enforcement personnel throughout the State. Accordingly, the Attorney General's pronouncements operate with a level of binding force that is perhaps second only to the Governor, whose Executive Orders were considered "law" under the RTKL. Nero, supra, 76 N.J. at 220.

Notably, the broad authority of the Attorney General over the conduct of all law enforcement officials in the State has been statutorily affirmed by the Legislature at N.J.S.A. 52:17B-98 and N.J.S.A. 40A:14-181. N.J.S.A. 52:17B-98 provides a broad statement that promotes this power:

> The Legislature recognizes that the existence of organized crime presents a serious threat to our political, social and economic institutions and helps bring about a loss of popular confidence in the agencies of government. Accordingly, it is hereby declared to be the public policy of this State to encourage cooperation among law enforcement officers and to provide for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State, in order to secure the benefits of a uniform and efficient

> enforcement of the criminal law and the administration of criminal justice throughout the State. All the provisions of this act shall be liberally construed to achieve these ends and administered and enforced with a view to carrying out the above declaration of policy.
>
> [Ibid.]

Additionally, N.J.S.A. 40A:14-181 provides a particular application of that authority through the publication of common standards:

> Every law enforcement agency shall adopt and implement guidelines which shall be consistent with the guidelines governing the "Internal Affairs Policy and Procedures" of the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the Department of Law and Public Safety, and shall be consistent with any tenure or civil service laws, and shall not supersede any existing contractual agreements.
>
> [Ibid.]

As the Appellate Division has noted, "the statute requires every law enforcement agency to adopt and implement guidelines consistent with the Attorney General's internal affairs policies and procedures." McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388, 395 (App. Div. 2008).

The Guidelines and Directives at issue in this case are plainly encompassed by these statutory authorizations. They establish common standards for local law enforcement agencies to review the conduct of their officers when they engage in the use

of force in the course of their duties. Notably, the OAG's Internal Affairs Policy and Procedures, to which N.J.S.A. 40A:14-181 explicitly refers, explains that Attorney General promulgations regarding the use of force must be followed by local law enforcement agencies. Office of the Att'y Gen., Internal Affairs Policy & Procedures 7 (2014).

The judiciary has also confirmed the Attorney General's unique position of power, having long enforced the legally binding authority of these promulgations by the Attorney General. See, e.g., State v. Henderson, 397 N.J. Super. 398, 411-12 (App. Div. 2008), aff'd in part and modified in part, 208 N.J. 208 (2011) (stating that, because AG Guidelines regarding photographic identification protocol had been breached "in a material way," "the disposition of [the] appeal turns on the remedy warranted by that improper conduct"); see also McElwee, supra, 400 N.J. Super. at 395-96 (evaluating a former police officer's challenge to his termination by reference to the decision's compliance with AG Guidelines). The authority attributed to AG promulgations remains the same, whether they are issued as Guidelines or Directives. See State v. Brimage, 153 N.J. 1, 4 (1998) (discussing Directives and Guidelines interchangeably).

The AG Guidelines and Directives have this authoritative impact on law enforcement officers throughout the State despite the fact that they are created solely at the Attorney General's

discretion and not through notice and comment procedures. The absence of such procedures does not automatically disqualify an executive declaration from having legally binding status under OPRA. Notably, OPRA already recognizes the legally binding force of Executive Orders of the Governor without requiring pre-adoption publication and public comment. See, e.g., Kenny v. Byrne, 144 N.J. Super. 243 (App. Div. 1976), aff'd, 75 N.J. 458 (1978).

Finally, the court has been struck by the irony and inconsistency of the OAG's repeated disavowal of the legal effect of its Guidelines and Directives under OPRA. The State's result-oriented arguments in this case appear at odds with the Attorney General's own statements in those very publications. For example, the initial Attorney General Directive on Use of Force Reports states:

> [The Directive] shall be binding upon all affected law enforcement agencies, and shall automatically supersede and take precedence over any rules and regulations, standing operating procedures, guidelines or protocols issued or employed by the affected law enforcement agencies.
>
> [Office of the Att'y Gen., Attorney General Law Enforcement Directive No. 2006-05 at ¶ 8 (2006).]

The Directives themselves thus assert an authoritative force not only over the behavior of law enforcement officials, but over rules and regulations.

Consequently, it appears to this court that the Legislature, the courts, and the Attorney General himself clearly intended for the Guidelines to be the law of the land, binding on all law enforcement officers across the State. Moreover, the Guidelines at issue here establish a strict code of conduct and a required procedure that touches an essential component of law enforcement action--the use of force to subdue ordinary citizens. The Guidelines are not, in other words, the sort of pronouncements that are ordinarily categorized as an "informal action" without the force of law. Compare In re Request for Solid Waste Util. Customer Lists, supra, 106 N.J. at 518-20 (concerning an agency directive requiring solid waste utilities to publish customer lists and related financial information).

Notably, a recognition of the legal status of AG Guidelines and Directives would not risk unduly expanding the application of the phrase "required by law" to other administrative orders issued by other agencies or government officials. As the foregoing analysis demonstrates, the Attorney General's scope of authority appears to be unique among cabinet officials.

The Appellate Division in Lyndhurst was ultimately persuaded by the Attorney General's arguments regarding the status of AG Guidelines and Directives under OPRA. This court, however, finds itself with persistent doubts about the diminution in authority of the Attorney General that underlies the Lyndhurst analysis. While

constrained to follow Lyndhurst, this court has offered the above analysis to raise concerns that it thinks should be considered by any other appellate court that confronts the issue in the future.

ii. The UFRs Pertain to Criminal Investigations.

As noted above, the definition of criminal investigatory records is conjunctive. Accordingly, the court must also consider whether the UFRs "pertain to a criminal investigation." For the foregoing reasons, the court is satisfied that the UFRs in question meet this definition as well.

When considering whether a document "pertains to a criminal investigation," New Jersey courts must resolve two questions. First, the court must determine whether the particular document is relevant to a criminal investigation. This task is complicated by the fact that many documents, including UFRs, are used for multiple purposes--some relating to criminal investigations, some to "community caretaking functions." Lyndhurst, supra, 441 N.J. Super. at 105. As the court in Lyndhurst noted, there is an important difference between UFRs prepared "after a police officer shoots a dangerous dog" and those "documenting the use of force in the course of arresting a criminal suspect." Ibid.; see also O'Shea, supra, 410 N.J. Super. at 385-86 (denying that UFRs automatically pertain to criminal investigations because "it cannot be assumed that a UFR might become part of a criminal investigation"). Thus, courts must engage in a case-by-case

analysis to determine whether a document should be considered exempt from disclosure under the OPRA definition.

Second, the court must determine the timing of the document's creation. When a document has been created prior to the start of an investigation, that document cannot be considered as "pertaining to" that investigation. See Lyndhurst, supra, 441 N.J. Super. at 104-05; Serrano, supra, 358 N.J. Super. at 366-67 (concluding that 911 tapes recorded only hours before initiation of a police investigation did not pertain to an investigation on the theory that "[a]ssuming [the document] was a public record when created, it did not become retroactively confidential simply because the prosecutor obtained the tape"). However, it is not always entirely clear when an investigation begins. See Lyndhurst, 441 N.J. Super. 104-05 (noting that "when an officer turns on a mobile video recorder to document a traffic stop or pursuit of a suspected criminal violation of law, that recording may pertain to a 'criminal investigation,' albeit in its earliest stages").

Here, there is ample evidence to conclude that the UFR requests tailored to specific incidents were made pursuant to criminal investigations already in progress. The UFRs detail incidents that occurred during the course of police responses to suspected criminal activity. Mr. Wolfe was shot after a car chase and suspected carjacking, and the Hot 97 Summer Festival involved a crowd's violent interaction with police that led to over 60

arrests. Curiously, the State has confirmed that no UFRs were filed for the incident involving the shooting of a juvenile. That omission appears to be a deviation from official policy, but may be explained (albeit not clarified in the record here) by the suspension of the officers following the shooting to review their conduct.

The analysis is more complicated with respect to the additional, broad requests for UFRs in Rivera I and Rivera II. In Rivera I, Plaintiff Rivera requested all UFRs created by the New Jersey State Police from January 1, 2015, until the time of Plaintiff's OPRA request. In Rivera II, Plaintiff Rivera requested all UFRs completed by State Troopers from March 31, 2013 to December 31, 2014. The State has not provided an individualized justification for each UFR. Instead, the State relies on a broad summary of the records in order to demonstrate that they fall within the criminal investigatory records exemption. Plaintiff, in response, has argued that the State failed to meet its burden under N.J.S.A. 47:1A-6 to provide "specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality." Gilleran, supra, 440 N.J. Super. at 497.

But the court finds that the State has met its burden, despite its summary explanations. The UFRs were all generated pursuant to actions taken by police officers engaging in criminal law enforcement activities: either conducting an arrest, responding to

violent outbursts occurring during the initial processing of arrestees, responding to threats to police officers, or responding to insubordinate resistance to police officer commands. In other words, they all involved actions that implicate violations or potential violations of criminal law. The State's summary explanations are buttressed by the redacted UFRs themselves, supplied by Plaintiff Rivera, which provide accounts of the contexts in which each UFR was created.

Thus, despite the State's summary explanation to justify redactions to well over 100 documents, which may not suffice when a record for a particular incident is requested and reviewed, the court concludes that the State has satisfied its burden here under N.J.S.A. 47:1A-6. In none of the aforementioned cases were police officers merely engaging in a "community caretaking function," as described in Lyndhurst. Instead, the UFRs documented events that transpired at the very start of criminal law enforcement activity or at some point thereafter. The UFRs themselves are part of a systematic compilation of information that reflects such activity. In other words, the reports all appear to be related to separate criminal investigations that begin with criminal conduct or potentially criminal conduct and may lead to a criminal charge and prosecution.

Consequently, the court concludes that the State has demonstrated that the UFRs requested under OPRA "pertain to a

criminal investigation." Furthermore, since the court already has concluded, albeit somewhat reluctantly, that none of the documents are "required by law" to be made under Lyndhurst, this court finds that the UFRs meet the "criminal investigatory records" exemption as defined at N.J.S.A. 47:1A-1.1.

B. Although the UFRs are "criminal investigatory records," the requested names of officers must be released pursuant to N.J.S.A. 47:1A-3(b).

Although the documents themselves are not subject to disclosure, a separate section of OPRA requires the publication of certain information relating to ongoing criminal investigations that may be found within those documents. N.J.S.A. 47:1A-3(b); see Lyndhurst, supra, 441 N.J. Super. at 91. Most critical for this case, the list of mandatory disclosures includes release of "information as to the identity of the investigating and arresting personnel." N.J.S.A. 47:1A-3(b). This information is only available, however, if an arrest has been made, and its disclosure may be barred by law enforcement officials upon a showing that such disclosure "will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release." Ibid. Notably, the statute provides guidance on the interpretation of this exception, requiring that it "be narrowly construed to prevent disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety." Ibid.

Accordingly, in order for the court to review the requests for release of the names of police officers, the court must determine (1) whether an arrest was made, (2) whether the release of officer identities requires the disclosure of officer names, and (3) whether there are any countervailing interests strong enough to prevent disclosure.

i. The police interactions constitute "arrests."

The State has argued that the names of the officers involved in the two shootings should not be released because they did not effectuate an "arrest" under Section 3(b). Instead, the State has alleged that, as a matter of statutory interpretation, "arrest" under the text of Section 3(b) applies only to official arrests that are made pursuant to formal charges. The State contrasts this narrowed interpretation of "arrest" with the common law definition, which is more expansive and can include such minor engagements as traffic stops. Since the police shootings of the juvenile and Mr. Wolfe did not include formal arrests at the time of the incidents, the State contends that no "arrests" under Section 3(b) were made and that Section 3(b) does not require OAG to release the names of the officers involved.

In making this argument, the State does not mention the plethora of other "arrests" potentially at issue--i.e., the events surrounding the Hot 97 summer event and various circumstances that led to the creation of UFRs requested from 2013-2015. The court

will, however, assume the State raises a similar challenge with respect to these UFRs.

The State argues that the statutory text supports a technical interpretation of "arrest." It notes that Section 3(b) also requires the publication of "information as to the text of any charges such as the complaint, accusation and indictment" as well as "information as to circumstances surrounding bail." N.J.S.A. 47:1A-3(b) On this basis, the State concludes that "arrest" in Section 3(b) must mean an act that occurs only in conjunction with formal charges and could lead to the imposition of bail.

First, it is important to note that, as a general matter of interpretation:

> It is a well settled principle, that if a statute makes use of a word the meaning of which is well known, and which has a definite sense at common law, it shall be received in that sense, unless from some reason it clearly appears that it was intended to use the word in a different signification.
>
> [State v. Engle, 21 N.J.L. 347, 360 (1848).]

The State has argued that because Section 3(b) mentions information that ordinarily attends a formal arrest, only such arrests were contemplated. But the court is unpersuaded by this interpretation and will not depart from the broader definition of arrest under the common law.

Contrary to the State's assertions, the Legislature intended to require law enforcement agencies to provide information to the

public whenever police actions involve resistance by suspects and use of weapons by either suspects or police. Section 3(b) requires law enforcement agencies to publish specific details about these interactions, including the "possession and nature and use of weapons and ammunition . . . by the police." N.J.S.A. 47:1A-3(b). By contrast, when a crime has merely been reported and no arrest made, only "information as to the type of crime, time, location and type of weapon" is required. Ibid.

Under the State's interpretation of "arrest," the public would be entitled to information about violent interactions between officers and civilians, including shootings, only when they immediately resulted in the issuances of formal charges and not, for example, when they resulted in death. But the court cannot agree with an interpretation that would lead to such an untenable result. A broader understanding of the term "arrest" provides the more plausible interpretation of Section 3(b). When the law enforcement agency has only received a report of a crime, or where suspects elude the police, its disclosure to the public is necessarily limited by those circumstances. Once the police have apprehended a suspect, however, the public is entitled to the information specified in Section 3(b). This interpretation is also more consistent with OPRA's fundamental purpose: to protect the public's interest in transparency.

Using the common law definition is not without challenges, however, due to the significant overlap of the term "arrest" with the term of "seizure." Both parties agree that a police shooting of suspects constitutes a "seizure." Both have cited Tennessee v. Garner, 471 U.S. 1, 7, 105 S. Ct. 1694, 1699, 85 L. Ed. 2d 1, 7 (1985), for the proposition that "the use of deadly force amounts to a seizure." Pl. Br. 15; Opp. 6.

But whether a particular "seizure" constitutes an "arrest" appears to be a gray area in the law. For example, Black's Law Dictionary includes "arrest" in its definition of "seizure" and "seizure" in its definition of "arrest." Black's Law Dictionary 124, 1480-81 (9th ed. 2009) Moreover, as an oft-cited scholar in criminal law has noted, determining a precise definition of an "arrest" has historically been a challenge for the courts:

> The question of what constitutes an arrest is a difficult one. On one end of the spectrum it seems apparent that detention accompanied by handcuffing, drawn guns, or words to the effect that one is under arrest qualifies as an "arrest" and thus requires probable cause. At the other end, a simple question on the street will often not rise to the level of an arrest. Somewhere in between lie investigative detentions at the stationhouse."
>
> [Charles H. Whitebread, Criminal Procedure: An Analysis of Constitutional Cases and Concepts § 3.02, at 61 (1980).]

Accordingly, courts have long wrestled with identifying the features of arrests that distinguish them from seizures. See Terry

v. Ohio, 392 U.S. 1, 16-17, 88 S. Ct. 1868, 1877-79, 20 L. Ed. 2d 889, 903-05 (1968) (discussing whether "stop and frisk" police procedures were "arrests" or mere "seizures").

Perhaps the clearest definition of an arrest is found in California v. Hodari D., 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991). In Hodari D., a group of youths started fleeing two police officers who were simply on patrol. The police officers became suspicious and chased the youths. During the police officers' pursuit, an officer saw one of the youths throw away an item--later identified as crack cocaine—-immediately before he was tackled. The Court was then asked to determine whether this item was the fruit of a seizure. In order to answer this question, the Court was required to determine precisely when the youth had been seized.

In determining that a seizure did not occur prior to the tackle, the Court promoted a rather broad definition of an "arrest." As the Court noted, an "arrest" included "the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee." Id. at 624. Applying case law defining "seizures" as a "single act," the Court also clarified that the arrest would occur only *during* that contact. Id. at 625 (citing Thompson v. Whitman, 18 Wall. 457, 471 (1874)). The Court concluded that "an arrest requires *either* physical force *or*, where that is absent, submission to the

assertion of authority." Hodari D., supra, 499 U.S. at 626. The Court reasoned that, since no physical touching or submission occurred prior to the police officer's tackle, there was no arrest prior to that point.

The application of this test to Section 3(b) appears to be a matter of first impression. That application, however, leads to the conclusion that all of the UFRs implicated by Plaintiffs' requests reflect arrests. The AG Guidelines require UFRs to be filled out whenever an officer uses at least some "physical force" on a civilian. Office of Att'y Gen., Attorney General's Use of Force Policy 8 (2000). "Physical force" is defined as follows:

> Physical force involves contact with a subject beyond that which is generally utilized to effect an arrest or other law enforcement objective. Physical force is employed when necessary to overcome a subject's physical resistance to the exertion of the law enforcement officer's authority, or to protect persons or property.
>
> Examples include wrestling a resisting subject to the ground, using wrist locks or arm locks, striking with hands or feet, or other similar methods of hand-to-hand confrontation.
>
> [Id. at 3.]

In other words, each UFR details a particularly forceful interaction between a police officer and a citizen. That use of force was used by the police officer in order to subdue a citizen's allegedly unlawful or unruly behavior. Applying the Supreme Court's guidance in Hodari D., such encounters entail more than an

ordinary application of physical force against a person. Despite the gray line that exists between arrests and seizures, the encounters detailed by the UFRs qualify as the former.

Additionally, the specific instances surrounding the juvenile and Mr. Wolfe are undoubtedly "arrests" under the common law definition. Both shootings applied physical force that caused both the youth and Mr. Wolfe to submit to the officers' authority. They clearly constitute common law arrests and do not require the court to determine fine analytical distinctions between arrests and seizures. Moreover, as the State has conceded, in both instances the officers in pursuit were intending to arrest the person prior to opening fire. In the juvenile's case formal charges were in fact issued after the incident. In the case of Mr. Wolfe, charges would have been brought had he not been fatally wounded. Thus, the shootings occurred at a time when criminal charges were imminent. Moreover, in releasing some 3(b) information shortly after the shooting of the youth, the State acted as if an arrest had been made, listing the charges filed against him. The incidents thus are clearly of the type envisioned by the Legislature to fall under Section 3(b).

In short, the court concludes that all of the officers whose names are sought by Plaintiffs in these actions conducted "arrests" pursuant to Section 3(b).

ii. Section 3(b) does not create a distinction between an "identity" and a "name."

Somewhat surprisingly to the court, the State has argued that, even if the police officers did engage in arrests, the State need not divulge the *names* of the arresting officers, but only more general information about their status. The State points out that OPRA only requires "information as to the *identity* of the investigating and arresting personnel" to be disclosed, but does not mention names. N.J.S.A. 47:1A-3(b) (emphasis added). The State further notes that this requirement contrasts with other provisions in Section 3(b), which explicitly require the "name" of the person to be divulged. See Ibid. (requiring "information as to the name, address and age of any victims"). Accordingly, the State argues that it is not statutorily required to provide the names of any police officers to Plaintiffs.

The court will quickly dismiss this misguided argument. First, it is obvious from the text of Section 3(b) that "name" and "identity" are used interchangeably. For example, when discussing information regarding the defendant and the complaining party, the statute requires the following disclosures:

> [I]f an arrest has been made, information as to the defendant's *name*, age, residence, occupation, marital status and similar background information and, the *identity* of the complaining party unless the release of such information is contrary to existing law or Court Rule.
>
> [N.J.S.A. 47:1A-3(b) (emphasis added).]

Under the State's interpretation, the sentence establishes an unpersuasive distinction in the information required about a defendant and about the complaining party. The State would require the court to read as separate and distinct the requirements that defendant's "name" and the complainant's "identity" be provided. Instead, the court will eschew this illogical reading for the common sense (and obvious) one: "identity" and "name" are synonymous. The disclosure requirement is the same for both parties.

Even without this explicit textual support, the court's conclusion would not change. The alleged distinction between "identity" and "name" that the State has offered is one without a difference. It makes no sense to require the "identity" of an arresting officer to be released but not his or her "name." When a person is asked for identification, the common sense response is to provide a document with the person's name on it. Notably, the State's brief in opposition in the juvenile shooting case uses this common sense understanding. Specifically, one of the brief's

subheadings states, "That Other Law Enforcement Agencies *Have Identified* Officers Involved In Shooting Incidents Is Not Relevant." Paff, Def.'s Opp. Br. 15 (emphasis added). The State, of course, is referring to the fact that other agencies, including some municipal police departments in New Jersey, have published the names of police officers involved in shooting incidents. Consequently, adopting the State's argument would result in a bizarre interpretation of Section 3(b)'s plain language that is completely unwarranted.

iii. The State's broad assertions do not establish a particularized countervailing public interest in withholding names.

Having established that Section 3(b) requires the publication of the names of the officers that have engaged in uses of force, the court must now determine whether the State has enunciated a countervailing law enforcement interest sufficient to block disclosure under Section 3(b), which states that:

> Notwithstanding any other provision of this subsection, where it shall appear that the information requested or to be examined will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release, such information may be withheld. This exception shall be narrowly construed to prevent disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety. Whenever a law enforcement official determines that it is necessary to withhold information, the official shall issue a brief statement explaining the decision.
>
> [N.J.S.A. 47:1A-3(b).]

Thus, Section 3(b) requires the court to weigh the public's interest and right to the disclosure of information against interests in public safety or a bona fide law enforcement purpose. Notably, this exemption from disclosure must be "narrowly construed." Ibid.

The State has supported its position by relying primarily on three arguments. First, it claims that the release of officer names will pose a safety risk to those officers. Second, it claims that the release of the officer names would violate the confidentiality interests of the shooters who were subject to a State Grand Jury investigation. Third, the State argues it has full discretionary authority to decide when to withhold the officials' names under Section 3(b). Thus, regardless of the court's evaluation of the validity of the State's concerns, the Attorney General contends

that the court must defer to the State's explanation and deny disclosure of the names.

As will be clarified below, the court concludes that all three arguments suffer from the same underlying problem: accepting the State's position would create what amounts to a blanket exemption from disclosure out of a statutory provision that was intended to create a narrow exception. Should the Attorney General determine that an absolute denial of disclosure is warranted for all police shootings, the Attorney General may seek a statutory amendment from the Legislature or consider adoption of a rule through formal rulemaking.[1] Absent such action, the court is left with the existing statutory language and must accommodate the competing concerns addressed by the Legislature. Since the State's arguments are inconsistent with the limits on discretion of the Attorney General adopted by the Legislature, the court is constrained to reject them.

a. Generalized concerns for officer safety provide an insufficient basis for withholding names under Section 3(b)

It is beyond dispute that the State has enunciated a legitimate interest in nondisclosure of officer names: the safety of law enforcement officials. But the court simply cannot reconcile

[1]Although the Attorney General is the chief law enforcement officer in the State and can bind all police officers in their law enforcement conduct, see infra at pp. 29 to 41, any limitation on access that goes beyond OPRA must be accomplished by formal rulemaking procedures.

the State's inability to provide more than an abstract concern for officer safety with the requirements of OPRA based on the record produced by the parties in these cases. The State, in other words, has failed to provide "a 'clear showing' that one of OPRA's exclusions applies," Gilleran, supra, 440 N.J. Super. at 497 (quoting Tractenberg v. Twp. Of W. Orange, 416 N.J. Super. 354, 378-79 (App. Div. 2010)), using "specific reliable evidence." Gilleran, supra, 440 N.J. Super. at 497.

The insufficiency of asserting generalized safety concerns in order to deny access to public records has repeatedly been affirmed by courts in New Jersey and elsewhere. Recently, the Appellate Division rejected a Township's protest invoking security risks and affirmed the trial court's decision to disclose video surveillance recordings. Gilleran, supra, 440 N.J. Super. at 497. Although a certification raising generalized safety concerns was provided there, the Appellate Division concluded that the description was inadequate:

> With respect to the particular camera in this case and information contained on its recordings, Administrator Ehrenburg's certification was not sufficiently specific to establish a risk to the safety of any person or property or jeopardy to the security measures taken for the building. Bloomfield provided no specific information from police officials stating that the identity of informants, crime victims, or confidential witnesses would in fact be revealed and specifying what kinds of activities occurred outside the police station

> during the period of recordings that Gilleran requested. It provided no information by the persons responsible for installing or operating the security camera to indicate that important security strategies or techniques would be disclosed. For example, there was no indication that the security camera might have blind spots in its apparent surveillance area, or that the clarity and sharpness of the imagery recorded would be revealed in a way that might compromise the strategic deterrent effect of the security camera or overall security system of the building.
>
> [Gilleran, supra, 440 N.J. Super. at 497-98.]

The court concluded that the Township's certification was too general and thus "insufficient to justify withholding the recordings from disclosure." Id. at 498.

The Township sought protection under a different provision in OPRA exempting "security information or procedures . . . which, if disclosed, would jeopardize security of the building . . . or persons therein." N.J.S.A. 47:1A-1.1. Notably, the provision lacks any reference to "narrow construction," yet the court noted that the provision's "if disclosed" phrase "would be superfluous if the statute was intended to provide a blanket exemption." Gilleran, supra, 440 N.J. Super. at 497. The approach taken by the Gilleran court is persuasive in interpreting Section 3(b)'s language to prevent the narrow construction terminology from being superfluous. Both in Gilleran and here, the defendants who invoked public safety failed to provide sufficient specificity of harm to justify nondisclosure.

Judicial concern about arguments supporting nondisclosure has also been evident in the law enforcement context. In Courier News, supra, 358 N.J. Super. at 382-83, the Appellate Division rejected the public agency's assertion that the release of a 911 tape would lead to jury confusion and thus threaten the public interest. The court noted that the agency failed to provide "specific evidence supporting this assertion" when pressed at oral argument. Ibid. The court then concluded that "a public agency seeking to restrict the public's right of access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality." Ibid.

Similar conclusions have been reached in other jurisdictions with similar public records laws. For example, the Freedom of Information Act ("FOIA") similarly requires the disclosure of public records except in narrow circumstances. See, e.g., John Doe Agency v. John Doe Corp., 493 U.S. 146, 152, 110 S. Ct. 471, 475, 107 L. Ed. 2d 462, 471 (1989) (noting that all exceptions to FOIA's disclosure requirement "must be narrowly construed"); ACLU v. Dep't of Defense, 543 F.3d 59, 66 (D.C. Cir. 2008), vacated and remanded on other grounds, 558 U.S. 1042 (2009) (noting that "FOIA's purpose is to encourage public disclosure of information in the possession of federal agencies so that the people may 'know what their government is up to.'" (quoting U.S. Dep't of Justice

v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 772-73, 109 S. Ct. 1468, 1481, 103 L. Ed. 2d 774, 795 (1988))).

Much like Section 3(b) of OPRA, one of FOIA's provisions exempts from disclosure information that "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(1)(7)(F). Though the federal provision does not require a narrow construction, the federal courts have still required something more than mere speculation of harm to justify nondisclosure. Compare Garcia v. U.S. Dep't of Justice, 181 F. Supp. 2d 356 (S.D.N.Y. 2002) (confirming the Department's denial under Section 7(F) on the basis of the requestor's violent criminal history and a specifically demonstrated propensity for retaliation); Blanton v. U.S. Dep't of Justice, 182 F. Supp. 2d 81 (D.D.C. 2002), aff'd, 64 Fed. App'x 787 (D.C. Cir. 2003) (concluding that the exemption should apply when the requestor was a member of the Ku Klux Klan and had a violent past); with ACLU v. Dep't of Defense, supra, 543 F.3d at 67 (rejecting as too speculative the Department's argument that the release of specific photographs allegedly portraying acts of brutality by members of the U.S. military should not be released because they "could reasonably be expected to incite violence against U.S. troops, other coalition forces, and civilians in Iraq and Afghanistan"); see also Maydak v. U.S. Dep't of Justice, 362 F. Supp. 2d 316, 321 (D.D.C. 2005) (noting that, while the concerns

might have merit, the Department's decision to withhold psychiatric evaluations conducted by the Bureau of Prisons from inmates because of the potential harm of allowing inmates to learn how to "manipulate the test" and avoid receiving needed treatment, "was too speculative and not based upon competent evidence" such as expert reports).

Perhaps most persuasively to this court, the Supreme Court of California recently found that a generalized concern for officer safety was an inadequate justification for withholding the names of officers engaged in a shooting under the California Public Records Act. Long Beach Police Officers Ass'n v. City of Long Beach, 325 P.3d 460 (Cal. 2014). The Court was unpersuaded by a general certification noting that, when an officer is involved in a gang member shooting, retaliation against the officer is "not uncommon." Id. at 463. The California Supreme Court acknowledged that this concern was legitimate but concluded that a "particularized showing" of harm to specific officers that could be attributed to the release of names was required in order to prevent disclosure. Id. at 468-70.

In In re Physicians Comm. for Responsible Medicine v. Hogan, 918 N.Y.S.2d 400 (Sup. Ct. 2010), a New York appellate court opinion regarding the state's Freedom of Information Law ("FOIL"), the court rejected the public agency's attempt to withhold the names of researchers who had published a study on animal research.

Despite the fact that the agency cited a frequency of threats and violence against such researchers by militant animal rights activists, the court concluded that the explanation failed to establish a specific nexus between the release of information under FOIL and an act of violence and was therefore too speculative. Ibid. Similarly, in Hechler v. Casey, 333 S.E.2d 799, 810-12 (W. Va. 1985), the West Virginia Supreme Court required a particularized showing of a risk of injury from disclosure in order to withhold information under West Virginia's Freedom of Information Act.

In short, when courts have weighed the public's statutorily protected right of disclosure against concerns for safety, they have required public entities to show a particularized connection between the release of documents and harm to specific individuals. Courts have concluded that disclosure without such a connection would frustrate the underlying purpose of public records statutes. That concern is all the more important here, when the statute itself explicitly notes that the safety exception must be narrowly construed.

But mere speculation is all that the State has presented in these cases. In response to the numerous names requested by Plaintiffs, the State has enunciated the same, generalized concern for safety. In its briefing and at oral argument, the State has repeated the same explanation: a concern that the release of an

officer's name *might* endanger him or her. When pushed at oral argument, the lack of empirical or statistical support was acknowledged by counsel, who simply stated that the State wanted to err on the side of safety.

The only evidence beyond this concern that the State has provided is a single certification from Major Mark Wondrack of the State Police. But this certification--like the State's assertions at oral argument--fails to provide anything more than speculation unrelated to the specific incidents related to the requested documents. Major Wondrack argues that releasing names would lead to a general increase in the negative stigma towards law enforcement. Major Wondrack also notes that the release of names *could* lead to practices known as "doxxing" and "swatting." "Doxxing" is the publication of names or other information without consent. "Swatting" occurs when a false report of highly dangerous crimes is given to law enforcement personnel, leading to a highly intrusive search of an innocent person's property. Lastly, Major Wondrack argues that the release of an officer's name could reveal information about his or her duty assignment. That revelation could lead to the harm if, for example, the officer was involved in undercover operations.

Notably, none of the concerns articulated by Major Wondrak demonstrates a nexus between the release of officer names and an increase in the likelihood that harm will befall those specific

officers. For example, the State has not shown that one or more of the officers involved in Plaintiffs' request for documents participate in undercover activity that would be exposed by the release of their names. Nor has the State demonstrated that there is a heightened likelihood that even one of the officers is likely to be "doxxed" and/or "swatted" by the release of their names. Had such concrete concerns been provided, the State's argument for nondisclosure would have been much stronger and more likely to have prompted agreement from this court.

In essence, the State's arguments reflect a policy position of the Attorney General that goes beyond OPRA's provisions and would render the narrow construction language of the statute meaningless. Instead, as noted above, the State's claims amount to an assertion of a blanket exemption that has not yet been endorsed by the Legislature or adopted by formal rulemaking. Notably, nothing prevents the Attorney General from taking these concerns to the Legislature itself to seek relief the court cannot grant without eroding the statutory limits on non-disclosure.

This conclusion is limited to the inadequacy of the State's showing in these cases. If, for example, the State had shown that threats to unnamed police officers had been made following the incidents at issue here, the court may very well have been satisfied with the State's explanation for withholding officer names. As the State is no doubt aware, such a showing could have

been made in a way that did not compromise the officer's confidentiality interest, such as through the use of *in camera* submissions. See, e.g. Lyndhurst, supra, 441 N.J. Super. at 111; Hartz Mountain Industries, Inc. v. N.J. Sports & Exposition Auth., 369 N.J. Super. 175, 183 (App. Div.), certif. denied, 182 N.J. 147 (2004) (noting the importance of conducting *in camera* review in OPRA matters in order to determine whether confidentiality interests are truly implicated). Indeed, this court has authorized the State to submit *in camera* certifications several times to prevent compromising legitimate interests in confidentiality.

b. Similarly, the State's concern for the confidentiality interests of police officers whose actions were subject to State Grand Jury investigations is insufficient.

The only other specific harm that the State has alleged relates to the confidentiality interests of the officers who were involved in the shootings. Notably, for these officers, a State Grand Jury investigation into their conduct had already begun by the time Plaintiffs made their OPRA requests. The State points out that, in ordinary circumstances, the targets of such investigations have protected interests in avoiding the public shame or stigma associated with a criminal investigation unless and until that target has been indicted. See, e.g., State v. Doliner, 96 N.J. 236, 247 (1984) (discussing the confidentiality interests of a target to "protect [an] innocent accused who is

exonerated from disclosure of the fact that he has been under investigation" (quoting United States v. Proctor, 356 U.S. 677, 681 n.6, 78 S. Ct. 983, 986 n.6, 2 L. Ed. 2d 1077, 1081 n. 6 (1958))). As the State argues, these police officers are "[no] less entitled to protections than other citizens who are criminally investigated but not charged." Paff, Pl.'s Br. 13.

But there is a significant difference between the ordinary circumstances surrounding the State Grand Jury investigations into civilian conduct and those surrounding investigations into police shootings. In the ordinary case, the State is developing evidence to demonstrate probable cause that a crime has been committed, typically based on strong suspicions of criminal activity. By contrast, investigations into police officers' uses of deadly force are automatic as a matter of policy, and are not prompted by a likelihood of criminal activity. The AG Guidelines and Directives clarify that investigations begin immediately after the shooting. See Office of Att'y Gen., Attorney General Law Enforcement Directive No. 2006-5 at ¶¶ 1-6 (2006). The Attorney General is only permitted to block such investigations from being turned over to a State Grand Jury when "the undisputed facts indicate the use of force was justifiable under the law." Office of Att'y Gen., Supplemental Law Enforcement Directive Amending Attorney General Law Enforcement Directive No. 2006-5 7 (2015). These procedures were developed to assure the public that an independent review

process would be initiated into police conduct when police shootings occur. Since State Grand Jury investigations of officers are initiated as a matter of policy, not in response to any suspicion of wrongdoing, the concern about stigma attached to alleged criminal wrongdoing is misplaced.

Moreover, the court has learned through the parties' submissions that the State Grand Jury investigating the officers implicated in the youth shooting has returned a "no bill." With respect to these officers, at least, any stigma from this investigation is more than erased. If anything, their actions have been vindicated.

Once again, the State has articulated policy concerns that are insufficient to overcome OPRA's strong interest in disclosure, but which can be directed to the Legislature. Absent a statutory change, the court must apply the statute in its present form, which language justifies nondisclosure only in narrow circumstances where law enforcement has provided a particularized showing of harm. The State has simply not made such a showing on the record in this case.

c. The State's various attempts to establish the binding authority of its conclusions regarding whether the Section 3(b) exemptions should apply must be rejected.

Finally, the State has attempted to demonstrate that its decision to deny release of officer names is owed what is

tantamount to absolute deference on the basis of Section 3(b) itself. It has raised three specific arguments to support this point, none of which is persuasive.

First, the State argues that the last sentence in this subprovision gives law enforcement absolute discretion to make the determination of whether it is necessary to withhold information. The sentence states:

> Whenever a law enforcement official determines that it is necessary to withhold information, the official shall issue a brief statement explaining the decision.
>
> [N.J.S.A. 47:1A-3(b).]

Contrary to the State's assertion, the sentence simply states that when a State official decides not to disclose specific information, he or she "shall issue a brief statement explaining the decision." N.J.S.A. 47:1A-3(b). On its face, then, this sentence places a procedural requirement on the public official. It does not bestow ultimate authority on law enforcement officials to determine whether the countervailing interest exists.

The paragraph's structure clarifies that a public official's decision to withhold information is subject to judicial review. Notably, the sentence in question comes at the very end of Section 3(b) and marks the first point at which decision-making by a public official is mentioned. Prior to this point, the provision discusses the countervailing interest in disclosure as an ordinary legal

rule subject to judicial interpretation and review—including the requirement that the countervailing interest be "narrowly construed."

If the Legislature had intended to bestow public officials with sole authority to decide when to withhold otherwise public information, it would have stated that intent much earlier in the provision where it actually defined the standard for withholding information. The Legislature certainly did not express that intent through this concluding sentence, whose main purpose is to require a public official to justify his or her decision. Indeed, this publication requirement itself suggests that the public official's decision be subject to review as part of a determination of whether it passes muster under the narrow construction required by the Legislature.

Second, the State has argued that the Section 3(b) exceptions—including the admonition that they be "narrowly construed"—were lifted directly from Executive Orders that granted to law enforcement officials the authority to decide whether to release names. See Exec. Order No. 69 ¶ 3 (Whitman) (May 15, 1997); Exec Order No. 123, ¶ 2 (Kean) (Nov. 12, 1985). By transplanting those Orders into Section 3(b), the State asserts that the Legislature intended to grant law enforcement officials a similar discretion. The State concludes that this court must therefore show deference to the Attorney General's exercise of discretion in this area.

But the mere fact that the statute derived its wording from Executive Orders does not permit the court to disregard the plain meaning of the text in its new statutory context. As has been repeatedly noted, Section 3(b) requires courts to mandate the release of the names of arresting officers in all but exceptional circumstances. This plain reading of the text is in full accord with the underlying policy of OPRA, which was explicitly designed to improve government transparency and ensure greater public access to government records and specific information except in narrow circumstances. Accordingly, it is fundamentally contrary to the Legislature's purposes to leave the disclosure of officers' names to the absolute discretion of State officials, who would then be empowered to return blanket denials of Section 3(b) requests on the basis of general policy concerns, as occurred here.

Moreover, the court's interpretation of the Legislature's intent is only confirmed by a closer examination of these Executive Orders. In both Orders, absolute authority was explicitly granted to the Attorney General, who was required to "resolve all disputes as to whether or not the release of records would be otherwise inappropriate." Exec. Order No. 69 ¶ 6 (Whitman) (May 15, 1997) (internal quotation marks omitted); Exec Order No. 123, ¶ 2 (Kean) (Nov. 12, 1985) The absence of such language in Section 3(b) strongly suggests that no such discretion was granted to the Attorney General in OPRA and that the Legislature intended for the

courts to replace the Attorney General as the final arbiter of proper disclosure.

Finally, the State has also raised a legitimate concern regarding the practical implication of the court's interpretation of Section 3(b). As the State points out, Section 3(b) requires agencies to provide the names of arresting or investigating officers "within 24 hours [of a request] or as soon as practicable." N.J.S.A. 47:1A-3(b). The State argues that it is difficult for any agency to discern whether the safety of an officer is at issue within that timeframe, as relevant details may come to light later on.

Here again, the court understands the State's concerns, but finds them inconsistent with the statute. The Legislature imposed this deadline to require the publication of basic information about a likely crime within a short timeframe after its occurrence. The insertion of the phrase, "as soon as practicable," delays release for uncertainties such as identification of the shooting officers, which may not be ascertainable absent ballistics testing, or other information that may only come to light as the investigation continues. In other words, the language of the section permits a certain amount of flexibility within a public agency when responding to requests for information. The length of time that is "practicable" will require a case-by-case analysis and should be

able to accommodate legitimate law enforcement concerns in specific cases.

Conversely, the State's interpretation would again expand the "narrow" exemption envisioned by the Legislature into a broad protection. As is clear from the discussion above, since the inherent risks to police officers are often speculative in nature, an agency could always credibly claim it had insufficient information to ensure the absence of a threat to officer safety.

In sum, the court, which is charged with interpreting the statute and applying it to the present circumstances, has found that the State's decision to withhold the names of arresting officers without demonstrating particularized harm to public safety or bona fide law enforcement interests is incompatible with OPRA. The court will not reach an alternative result that would be inimical to the statute's text on the basis of a strained reading of the provision and reliance on extra-textual sources that suggest, but do not mirror, the language ultimately adopted by the Legislature.

Again, the court reiterates that the State may have legitimate reasons for a policy that prevents the release of the names of arresting officers in shooting incidents. But, notably, while having rule-making authority pursuant to N.J.S.A. 52:17B-122, the Attorney General has offered no formal guidance in interpreting this statute. The matter was pressed by the court at oral argument.

When the court asked counsel for the State whether the OAG had proposed any rules, guidelines, or other formal directives regarding Section 3(b), counsel answered in the negative, although there was a suggestion that perhaps such measures had been considered.

Absent such rulemaking, the State's policy concerns must be addressed to the Legislature, where their persuasive force may be considered and debated. The court, however, is left with the task of interpreting the text of the statute. It finds the State's policy concerns to be incompatible with that text as currently written, however compelling they may be.

iv. N.J.A.C. 13:1E-3.2(a) is inapplicable.

As a final note, the State has also cited a regulation as a separate basis for its decision to withhold officer names, N.J.A.C. 13:1E-3.2(a)(7). Pursuant to this regulation, "[t]he duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment" are exempt from the definition of public records and thus may be withheld. Id. Notably, the history of this regulation demonstrates that its reach was intended to be significantly narrower than what the State urges here. It was adopted in response to the Appellate Division's decision in Slaughter v. Government Records Council, 413 N.J. Super. 544 (App. Div. 2010), certif. denied, 208 N.J. 372 (2011),

which granted plaintiff access to records concerning various New Jersey State Police Forensic Science Laboratory's policies and procedures. The Appellate Division explicitly delayed the effectiveness of its decision to afford the State the opportunity to adopt this regulation as a means of exempting such documents from OPRA's definition of "government records." Id. at 555.

The regulation itself provides seven exemptions to the definition of "government records" that clearly seek to protect the integrity of all aspects of law enforcement operations—-from employee training to each phase of a criminal investigation, including the forensic analysis procedures at issue in Slaughter. See N.J.A.C. 13:1E-3.2(a)(2). The wording of the regulation cited by the State confirms that it is concerned with the release of officer names only insofar as that release may impede law enforcement operations. Specifically, it notes that:

> The duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment, including, but not limited to, overtime data pertaining to an individual law enforcement officer.
>
> [N.J.A.C. 13:1E-3.2(a)(7).]

The primary intention of the regulation is to protect the release of duty assignments of police officers. It precludes the release of other information, including officer names, only insofar as there is some reason to believe that such release will lead to the

identification of duty assignments, thereby hindering law enforcement operations.

The State now relies on this regulation to preclude the publication of all police officer names when uses of force have been employed. Such an interpretation runs contrary to the narrower focus of the regulation. As expansively interpreted by the State in this case, the regulation is plainly irreconcilable with the explicit statutory directive under Section 3(b) *requiring* the disclosure of the identities of arresting officers. N.J.S.A. 47:1A-3(b). Accordingly, the State's interpretation must be rejected. See New Jersey Soc. for Prevention of Cruelty to Animals v. New Jersey Dep't of Agric., 196 N.J. 366, 385 (2008) (noting that, insofar as a regulation is incompatible with the statute it is designed to interpret, it must be invalidated). Invalidation is unnecessary here, however, because the rule can simply be interpreted consistently with OPRA. Moreover, when the Attorney General releases officer names under Section 3(b), there is no requirement that the duty assignment be included.

III. The court rejects Plaintiff Rivera's requests for further details surrounding the Hot 97 Summer Jam

As regards the Hot 97 Summer Jam incident, Mr. Rivera has argued that the State was also not forthcoming enough with respect to other information, aside from officer names. Specifically, Plaintiff Rivera has alleged that the State failed to provide

information "describing the circumstances behind any suspect resisting arrest, or as to any weapons or ammunition used by the suspect or by police" in connection with the Summer Jam incident. Pl. Br. (L-2026-15) at 14. As noted above, the parties have agreed to confine this request to the information to which Plaintiff would be entitled under Section 3(b). Compl. at ¶¶ 31-32.

These informational requirements are among those listed under N.J.S.A. 47:1A-3(b) *but only when incident to arrest*. Plaintiff's request makes no such distinction. Instead, Plaintiff requests information about every encounter between police and civilians at the event, whether or not it led to an arrest. To the extent the information Plaintiff seeks does not pertain to an actual arrest, it falls under the general criminal investigatory records exemption pursuant N.J.S.A. 47:1A-1.1, and was properly withheld. Thus, the State has properly denied releasing that information regarding those police actions involving crowd control that were not part of an arrest. See Rivera II, Def.'s Opp. Br. 17.

Additionally, the State has provided all UFRs created that day. The court finds that these UFRs provide sufficient detail to satisfy the information requirements of Section 3(b)—-which, notably, places no particular burden on the specificity of the description. The UFRs all provide at least some indication of the kinds of force used by the police officer. Specifically, they distinguish between purely physical force, "mechanical" force,

"enhanced mechanical" force, and "deadly" force. In addition, the UFRs provide several details about the circumstances of the altercation, including the date, time, and general location of the incident. The reports also provide the officer's intended purpose and the reason for the force used in order to achieve that purpose. Finally, the UFRs also provide a brief description of the suspect's actions.

In short, the court finds that the State has satisfied its statutory requirement regarding these details. Plaintiff Rivera's requests for further elaboration is denied.

IV. Plaintiff is entitled to the payroll information of the officers involved in the youth shooting.

Finally, the court will grant Plaintiff Paff's request for the "title, position, salary, payroll record, length of service, date of separation and the reason therefor" of the officers involved in the youth shooting. Paff, Compl. Ex. L. This information is required to be disclosed as an exception to OPRA's general exemption of personnel records from disclosure. The personnel record exemption states:

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

The statute lists three exceptions to this exemption, such that certain documents ordinarily falling under the protection of the provision would still remain available to the public:

> (1) [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.
>
> (2) [P]ersonnel 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
>
> (3) [D]ata 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]

As the Supreme Court has noted, a personnel record can be disclosed "if, and only if, [it] fits within one of the three exceptions to the general exemption for personnel records." Kovalcik v. Somerset County Prosecutor's Office, 206 N.J. 581, 592 (2011). The exemption has been consistently interpreted as providing a broad protection against disclosure with only minor exceptions. See Id. at 594 (noting that the exemption "begins with a presumption of non-disclosure and proceeds with a few narrow exceptions").

Accordingly, when interpreting this exception, "courts have tended to favor the protection of employee confidentiality." McGee v. Township of East Amwell, 416 N.J. Super. 602, 615 (App. Div. 2010).

Despite the general presumption of protection afforded to personnel records, Plaintiff's request clearly fits within one of the three exceptions to the exemption. Indeed, it directly quotes the first. Accordingly, Plaintiff has a statutorily protected right to this information under OPRA.

In attempting to defeat Plaintiff's right to this information, the State has argued that Plaintiff should not be permitted to "use Section 10 as a back-door means to identify officers who were involved in particular incidents, whose identities OPRA does not require Defendants to disclose." Paff, Def.'s Opp. 22. Clearly, the State's objection is grounded on the presumption that Plaintiff is not entitled to learn the names of the officers involved in the youth shooting. Since the court has decided that Plaintiff *is* so entitled, the State's protests against the release of this personnel information are without foundation.

V. As Plaintiffs have received vindication of their claims under OPRA, there is no need for the court to consider the common law.

In light of the foregoing analysis, there is no need for the court to address the common law claims raised by Plaintiffs. Although nothing contained in OPRA is to be construed as limiting the common law right of access to a government

record, N.J.S.A. 47:1A-8, the court need not review common law claims if disclosure is authorized under OPRA. See O'Shea, supra, 410 N.J. Super. at 387 ("If disclosure is allowed under OPRA, the court should not reach the issue regarding the common law right.").

The vast majority of Plaintiffs' claims sought the release of the various police officer names redacted by the State. The court has concluded that Plaintiffs are entitled to those names under OPRA. The court has also concluded that Plaintiff Paff is entitled to the release of the personnel information he seeks under OPRA. Additionally, although Plaintiff Rivera sought other information surrounding the Hot 97 Summer Jam event, he asserted this claim as part of his seeking information under Section 3(b). He asserted no right to this information under the common law. By denying this request, the court merely concluded that Plaintiff had already received the full extent of his statutory entitlement under OPRA. Thus, there is no further relief sought by the Plaintiffs to be vindicated under the common law.

CONCLUSION

For the aforementioned reasons, the State must reveal to Plaintiffs the names of police officers that were redacted from documents sought pursuant to N.J.S.A. 47:1A-3(b). In addition, the State must release the information requested by Plaintiff Paff under N.J.S.A. 47:1A-10. Disclosure of this information must be made by July 20, 2016, to afford the State the opportunity to

review the court's decision and decide on any appellate relief it may decide to pursue. Since Plaintiffs are the prevailing parties in this matter, they are entitled to counsel fees pursuant to N.J.S.A. 47:1A-6. Plaintiffs' counsel shall attempt to negotiate the counsel fee issue with the Attorney General's Office and file an application for fees by August 5, 2016, unless agreement on fees is reached. The court will issue an order consistent with the relief afforded in this decision.