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MAY 08 2015

J. JOHNSON, JR.

COURT INITIATED

JOHN PAFF,

PLAINTIFF,

VS.

CAPE MAY COUNTY PROSECUTOR'S
OFFICE,

DEFENDANT.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY
DOCKET NO. CPM-L-265-14

ORDER

THIS MATTER having been opened to the Court by Richard Gutman, Esquire, attorney for the Plaintiff, John Paff, by way of an Order to Show Cause; and Assistant Cape May County Counsel, James B. Arsenault, Jr., Esquire, appearing on behalf of the Defendant, Cape May County Prosecutor's Office ("CMCPO"); and Joseph D. Rodgers, Esquire, appearing on behalf of Capt. David J. Meyer (Ret'd.), an interested party; and Michelle J. Douglass, Esquire appearing on behalf of Lt. Michael Hawthorne, an interested party; and William G. Blaney, Esquire, Doreen Y. Corino, Esquire, appearing on behalf of the Borough of Wildwood Crest, an interested party; and the Court having *sua sponte* granted Mes. Corino and Douglass, and Messrs. Rodgers and Blaney permission to enter an appearance in these proceedings; and the Court having considered the papers submitted by the parties and conducted an *in camera* review of the documents tendered by Messrs. Arsenault and Blaney under cover of their letters of January 16th and 20th of 2015, respectively; and having heard oral argument on May 6, 2015; and for the reasons set forth in the Court's Memorandum of Decision of even date herewith and for good cause shown;

IT IS ON THIS 8th day of MAY, 2015, **ORDERED** as follows:

1. The records of the internal affairs investigation, to wit, the “Fallon Report” of March 21, 2014, shall remain confidential.
2. The Separation and Release Agreements executed by Messrs. Mayer and Hawthorne at the time of leaving their employment with the Borough of Wildwood, shall remain confidential.
3. The 4 letters listed in the original Vaughn Index shall be provided by Defendant, CMCPO to Plaintiff’s counsel, Richard Gutman, Esquire.
 - a. Each party shall have thirty (30) days from the date of this Order to decide whether or not any of them wishes to appeal this decision and may submit a proposed form of Order staying the release of these letters to the Plaintiff.

IT IS FURTHER ORDERED that a copy of this Order shall be served on all counsel within seven (7) days of service of this Order.



NELSON C. JOHNSON, J.S.C.



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NELSON C. JOHNSON, J.S.C.

SUPERIOR COURT OF NEW JERSEY

NELSON C. JOHNSON, J.S.C.

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MEMORANDUM OF DECISION

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RE: Paff vs. Cape May County Prosecutor's
Office

DOCKET NO. CPM-L-265-14

Preliminarily, the court extends its apology to all counsel and their clients for the delays sustained in the handling of this litigation. Another matter delayed the court's examination of the copious documents submitted under cover of letters of Mr. Blaney dated January 16, 2015, and Mr. Arsenault dated January 20, 2015. Finally, the necessary *in camera* review has been completed.

This matter was opened to the court via the filing of a Verified Complaint and Petition of the Plaintiff, John Paff, represented by Richard Gutman, Esquire. Said Complaint was filed on June 11, 2014, and an Order to Show Cause was entered on June 23, 2014. The Defendant, Cape May County Prosecutor's Office ("CMCPO"), is represented by Assistant Cape May County Counsel, James B. Arsenault, Jr., Esquire. Capt. David J. Meyer (Ret'd.), an interested party, is represented by Joseph D. Rodgers, Esquire, and Lt. Michael Hawthorne, an interested party, is now represented by Michelle J. Douglass, Esquire.

Plaintiff's Petition seeks access to certain public records in the possession of the CMCPO regarding the performance of three police officers.

Plaintiff's original request was as follows:

Records Requested:

I would like all letters (or other forms of notification) made by the Cape May County Prosecutor's Office of such exculpatory or favorable information to defendants concerning the following Wildwood Crest Officers:

1. Chief DePaul
2. Captain Mayer
3. Lt. Hawthorne

Subsequent thereto, the court was advised by Wildwood Crest Solicitor Doreen Y. Corino, Esquire, that additional records had been requested. Those items are referenced at page 6 herein, and discussed in the court's ruling. [NOTE: there are no "letters" pertaining to Chief DePaul.]

At the return date of the original Order to Show Cause, the court conducted oral argument on July 22, 2014 regarding the Plaintiff's demand for release of these records under the Open Public Records Act ("OPRA"). The court found the reply pleadings of the Defendant to be wanting and made little effort to describe the information in the possession of the CMCPO. Defense counsel asserted that the records sought were "Inter-agency or intra-agent advisory, consultative or deliberative material ... exempt from the definition of government record provided by OPRA."

As counsel proceeded through his reply for the Defendant, each of these exemptions were discussed, without regard to the substance of the records, nor was there any effort to characterize which type of exempt record they might be. It was not until the day of the Show Cause hearing,

that defense counsel tendered a “Vaughn Index” to his adversary and the court. Defense counsel also provided the court with copies of the correspondence referenced in the Vaughn Index; the same tendered under seal, for the court’s review.

Based upon the submissions made and the arguments of counsel, the court deemed it necessary to conduct an *in camera* review of the disputed documents received under seal. The court found that Plaintiff was not entitled to the four letters under OPRA, because Prosecutor Taylor was writing to inform the Mayor – as Director of Public Safety – that there were significant problems with the two mentioned officers ever testifying in a criminal proceeding. The court found that such communications were “inter-agency advisory materials,” to wit, advising the Mayor that should either gentleman be named as a witness in a future criminal proceeding, then the Prosecutor would issue a “Brady Letter” as to whomever was to testify, such letters required by the U.S. Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963).

Nonetheless, after conducting a careful *in camera* inspection and applying the tests set forth in *Loigman v. Kimmelman*, 102 N.J. 98 (1986) and *Keddie v. Rutgers*, 148 N.J. 36 (1997), the court found that Plaintiff was entitled to the four letters listed in Defendant’s Vaughn Index under the Common Law Right to Access (“CLRA”). The court noted that Defendant did not comment on access to the aforementioned documents under the CLRA, nor did CMCPO assert the need for confidentiality as to the two police officers. The court was satisfied that: (a) the public’s interest in said letters outweighed any government interest in confidentiality; (b) disclosure of the letters in question will not impede CMCPO functions; and (c) nor will it have a chilling effect on citizens who wish to provide information to the government anonymously.

Further, the court found that disclosure of the letters will have a minimal impact, if any, on the decision-making of CMCPO. The letters contained findings of fact, as opposed to an in depth evaluation or analysis. Furthermore, the letters contain no formal findings of public official misconduct, but rather are harbingers of “Brady Letters” which would be written by the Prosecutor in the future should either Captain Mayer or Lieutenant Hawthorne be called to testify as witnesses in a criminal case wherein the CMCPO is involved. [The court’s August 21, 2014 Memorandum of Decision is incorporated by reference herein.]

The CMCPD subsequently filed a Motion for Reconsideration of the court's August 21, 2014 decision and included a supporting Certification from Prosecutor Robert J. Taylor. This was the first occasion in which the court was advised of the Prosecutor's concerns and prior to the petition for reconsideration, the court was essentially uninformed as to the Prosecutor's position on this matter, other than the blanket opposition presented by Mr. Arsenault. Plaintiff also filed a cross-motion to strike the Certification of Prosecutor Taylor as untimely. Following oral argument on October 24, 2014, the court granted the Prosecutor's Motion for Reconsideration and Denied the Plaintiff's Cross-Motion to strike Prosecutor Taylor's Certification.

The court found that such relief was appropriate in the interest of granting everyone affected the opportunity to be heard on a ruling that may impact upon personal privacy and matters which people genuinely believe must remain confidential. Because neither the Plaintiff nor the CMCPD had moved to join three interested parties whose interests could be impacted by any ruling in this matter, the court on its own motion, elected to permit the interests of Messrs. Mayer and Hawthorne, and the Borough of Wildwood Crest, to be heard at a Plenary Hearing scheduled for December 12, 2014. At that hearing, Hawthorne was represented by J. David Meyer Esquire, (now, Ms. Douglass), and Mayer was represented by Joseph J. Rodgers, Esquire. The Borough was represented by Doreen Y. Corino, Esquire. [The court's November 18, 2014 Memorandum of Decision is incorporated by reference herein.]

Thereafter, as a consequence of delays experienced by the court, this matter was not rescheduled for hearing until May 6, 2015, at which time the court received the benefit of the arguments of counsel.

ARGUMENTS OF INTERESTED PARTIES

Captain David Mayer (Retired)

Counsel for Captain Mayer, Joseph J. Rodgers, Esquire, emphasizes that the CMCPD's disciplinary investigation was confidentially concluded and, therefore, documents related to the investigation should not be disclosed. The CMCPD initiated the disciplinary investigation, declined to prosecute and referred the matter to the Borough of Wildwood Crest for an

administrative disciplinary investigation. New Jersey State Police Major James Fallon (Retired) completed the investigation for the Borough consistent with the guidelines of the New Jersey Attorney General's Office for conducting an Internal Affairs investigation. However, Captain Mayer was represented by legal counsel who met with the labor attorney for the Borough and reached a settlement agreement which called for Captain Mayer to terminate his service as of May 21, 2014. Thus, the investigation of Captain Mayer led to his resignation in lieu of any formal disciplinary action.

Counsel argues that Captain Mayer will be irreparably harmed if the letters detailing the investigation are revealed – viz. “publically tried and convicted” - because he could not have anticipated the consequence of non-confidentiality. Counsel asserts that Captain Mayer would have challenged the allegations had he anticipated the disclosure of the investigation, but cannot challenge the allegations now because he is barred by time and the settlement. Captain Mayer's legal arguments focus primarily on the Open Public Meetings Act, *N.J.S.A.* 10:4-12, which allows a public body to exclude from the public matters involving employment, or discipline of an employee.

Counsel also argues that Plaintiff is not entitled to the letters in question because of the decision in *Paff v. Director, Office of Attorney Ethics*, 399 *N.J. Super.* 632 (Law Div. 2007). That case involved Mr. Paff's right to the investigative materials surrounding an attorney's disbarment for misappropriation of funds and a criminal investigation that did not lead to prosecution. The court found that the investigatory documents sought by the Plaintiff were confidential and held that the reports and analyses created and prepared by the Office of Attorney Ethics were shielded from public access by the Work Product Doctrine and the Deliberative Process Privilege, pursuant to *R.* 1:20-9. *Id.* at 637. At oral argument, Mr. Rodgers expressed opposition to the release of any documents.

Lt. Michael Hawthorne (Retired)

Counsel for Lt. Hawthorne, Michelle J. Douglass, Esquire, reiterates that Lt. Hawthorne has waived any personal or confidentiality interest in the letters from Prosecutor Taylor to Mayor Groon. The cumulative impact of certain factors has led Lt. Hawthorne to reasonably conclude that his only hope of remedying the public misunderstanding is through public disclosure of his

letter, and all of the related letters and reports concerning himself and his superiors. These factors include: the court's finding, which was published by local media, that the letters contain findings of official misconduct; the Prosecutor's expressed intention to issue Brady Letters; the Prosecutor's determination which compelled Lt. Hawthorne to enter into his Separation Agreement with the Municipality; and the dismissal of Lt. Hawthorne's alleged violations through the Separation Agreement. [NOTE: a review of the Findings of Fact of the court's Memorandum of Decision of August 21, 2014 makes no finding of misconduct by Lt. Hawthorne.] At oral argument, Ms. Douglass expressed support for the release of all documents.

Borough of Wildwood Crest

Counsel for the Borough of Wildwood Crest, Solicitor Doreen Y. Corino, Esquire, brings to the court's attention three separate but related OPRA requests that were received subsequent to the court's November 18, 2014 Order. Two requests are from John Paff regarding: (1) all reports by James Fallon or his company; and (2) the Separation Agreement between Captain David Mayer and the Borough of Wildwood Crest. Citizen Barbara Hunt requests (3) all correspondence pertaining to Lt. Hawthorne's termination, including his Separation Agreement.

The Borough has denied those requests based on exemptions to OPRA, the Attorney General guidelines pertaining to internal affairs investigations, and personnel and employee confidentiality provisions. Ms. Corino very ably expressed that the Borough is likewise concerned with the potential impact of the release of the records sought, namely the potential chilling effect upon police officers who testified in connection with the investigation conducted by Major Fallon in anticipation of their statements remaining confidential. At oral argument, Mr. Rodgers expressed opposition to the release of any documents.

Prosecutor's Office

Prosecutor Taylor asserts that publication of these letters would negatively impact candid communication with civilian officials and impede his duty to supervise local police departments. Prosecutor Taylor states that, as a result of disclosure, he will hesitate to use written communication to a municipal Mayor or Public Safety Director to set forth his evaluation or

analysis of certain matters. According to Prosecutor Taylor, disclosing the letters will discourage members of the Police Department from providing information in any investigation.

Prosecutor Taylor argues that the letters refer to criminal investigatory records and ongoing internal affairs (“IA”) or administrative investigations in Wildwood Crest and, therefore, should remain confidential under the Guidelines adopted by the New Jersey Attorney General. These records can be released upon a court order, but generally a court order for a release comes during a plaintiff’s suit for damages and violations of civil rights. Prosecutor Taylor further states that there was clearly an ongoing investigation at the time the letters were written which weighs against disclosure. At oral argument, Mr. Arsenault expressed opposition to the release of any documents.

PLAINTIFF AND THE NEED FOR PUBLIC DISCLOSURE

Reconsideration of OPRA

As an initial matter, Plaintiff Paff argues that the court should reconsider his right to the letters under OPRA because facts were disclosed at the October 24, 2014 hearing that established Plaintiff’s right to the requested records under OPRA. The court found on August 21, 2014 that the four letters were exempt under OPRA “by virtue of their status as an inter-agency advisory communication between the County Prosecutor and the Mayor of the Borough by virtue of the Prosecutor’s broad supervisory authority over the operation of municipal police departments... he was writing to inform the Mayor – as Director of Public Safety – that there were major problems with the two mentioned officers ever testifying in a criminal proceeding.”

For Plaintiff, the Personnel Records Exemption does not apply because the letters are the reason for Captain Mayer’s and Lt. Hawthorne’s separation. Thus, Plaintiff believes that the public has a statutory right to know, under OPRA Section 10, the reasons for the officer’s termination because the letters include the “date of separation and the reasons therefor.” Additionally, Plaintiff asserts that the Deliberative Process Exemption does not apply because the letters embody a decision and its reasons, not mere recommendations, and contain facts. This OPRA exemption for “inter-agency or intra-agency advisory, consultative, or deliberative material” applies to recommendations and opinions that are part of a decision-making process. For Plaintiff, the letters at issue were not recommendations during a decision-making process;

rather, the letters embody the Prosecutor's decision to issue Brady Letters if the officers were ever called to testify.

Furthermore, Plaintiff argues that the Criminal Investigatory Records Exemption does not apply because the letters do not pertain to a criminal investigation. According to Plaintiff, the letters address the consequences of the Borough's administrative investigation of the two officers, and were not created as part of a criminal investigation. Nor do the letters describe a breach of any New Jersey statute or regulation applicable to police officers. Plaintiff states that any reference to a criminal investigation in the letters can be redacted. Finally, Plaintiff argues that the letters were not created as part of a public employee grievance process so the Public Employee Grievance Exemption does not apply.

Common Law Right of Access: The Need for Public Disclosure v. The Need for Secrecy

For Plaintiff, since the Prosecutor's letters contain findings of serious deceitful and/or untruthful conduct, rather than mere allegations, there is a much greater need for public disclosure. Furthermore, police officers play a unique role in society. They have the power to use deadly force and to arrest. With such authority comes a critical need for public oversight. New Jersey courts have applied the common law to grant public access to records of municipalities' investigations of police misconduct even without any finding of official misconduct.

Plaintiff emphasizes that the two officers were in leadership positions at the time the letters were issued and, therefore, there is a much greater public need to know than with mere patrol officers. Plaintiff also alleges that the letters disclose greater misconduct than that of the two officers because they reveal Lt. Hawthorne was punished for exposing misconduct in the Wildwood Crest Police Department. Thus, the public has a right to know the Prosecutor's findings in order to determine whether the Borough punished a "whistleblower."

Addressing Captain Mayer's arguments opposing disclosure, Plaintiff argues that the Open Public Meetings Act only applies to meeting minutes. For Plaintiff, Captain Mayer fails to distinguish between excluding the public from a meeting to deliberate in private and denying public access to the resulting minutes after a decision has been made. Rather, deliberations that are closed to the public pursuant to the Meetings Act are not permanently confidential.

Furthermore, Plaintiff refutes Captain Mayer's slippery slope argument regarding Plaintiff's heightened ability to obtain similar records in the future. For Plaintiff, this is irrelevant to the issue of whether or not the Prosecutor's four letters are public records, especially considering Captain Mayer's arguments refer to confidentiality of deliberation, investigatory records and a Separation Agreement. Plaintiff also distinguishes *Paff v. Director, Office of Attorney Ethics* because the letters in this instance are not confidential under R. 1:20-9 and that case concerned misconduct by a private citizen while the case at bar concerns misconduct by public officials.

Plaintiff also addresses the arguments of Prosecutor Taylor against disclosure. The Court found, on August 21, 2014, that disclosure of the letters would not impede CMCPD function. Likewise, Plaintiff asserts that it is not reasonable that a prosecutor would abandon his professional responsibility to report police misconduct to a municipality in order to avoid public disclosure. Furthermore, Plaintiff argues that the Prosecutor's actions reflected in his letters were independent of the Borough's internal investigation because the Borough hired James Fallon to carry out the internal investigation. For Plaintiff, the letters at issue were merely descriptions of an internal affairs investigation and the purpose of the letters was to inform the Mayor about the Prosecutor's decision to issue Brady Letters if the officers ever testified in a criminal prosecution.

Finally, Plaintiff states the Borough is attempting to circumvent OPRA and the court rules. Citing *N.J.S.A. 47:1A-6*, Plaintiff argues that only record requestors, not public agencies such as the Borough, are authorized to initiate legal actions under OPRA. Thus, only Mr. Paff or Ms. Hunter may choose to litigate their recent requests. Likewise, Plaintiff states that the Borough is proposing that instead of going through the procedures required by OPRA and the court rules, it procure an advisory opinion without the filing of a lawsuit. For Plaintiff, interjecting other OPRA requests would delay the "quick action" required in this type of litigation.

ANALYSIS AND RULING

Notwithstanding the excellent arguments of counsel for Mr. Mayer, none of the provisions of the Open Public Meetings Act, N.J.S.A. 10: 4-1 et seq. come into play or are

controlling here. Although the court appreciates and respects Mr. Rodgers' concerns regarding the need for confidentiality of the terms of a settlement of a dispute between a public employer and employee, this litigation is not about Mr. Mayor's separation from the Police Department, but rather about specific records in the possession of public officials and whether or not, when balancing the competing interests, any of those records should be released to the public. This is a "right to know," OPRA, CLRA matter, not an Open Public Meetings claim.

"New Jersey provides access to public records in three ways: (1) through the citizen's common law right of access; (2) OPRA; and (3) through the discovery procedures applicable to civil disputes." *Bergen County Imp. Authority v. North Jersey Media Group, Inc.*, 370 N.J. Super. 504, 515 (App. Div. 2004).

Under the CLRA, "any citizen, without any showing of personal or particular interest, has an unqualified right to inspect such documents if they are, in fact, such public records." *Loigman v. Kimmelman*, 102 N.J. 98, 101 (1986). Under CLRA, a public record "is one that is made by a public official in the exercise of his or her public function, either because the record was required or directed by law to be made or kept, or because it was filed in a public office." *Keddie v. Rutgers*, 148 N.J. 36, 49 (1997). As noted, *infra*, the court finds the documents sought by Plaintiff in this instance are public records within this definition.

"Ordinarily, only an assertion of citizen or taxpayer status is necessary for production of common-law records, subject to a showing of good faith." *Loigman, supra*, 102 N.J. at 104. However, "[a] court should balance, in each case, the individual's right to the information against the public interest in the confidentiality of the file." *Ibid.* "[I]f the governmental need in confidentiality is slight or non-existent, citizen-taxpayer status will ordinarily warrant that the matters be disclosed." *Id.* at 105. "On the other hand, when the public interest in confidentiality is greater, the citizen's right of access is qualified." *Ibid.* In essence, "when reasons for maintaining a high degree of confidentiality in the public records are present, even when the citizen asserts a public interest in the information, more than citizen's status and good faith are necessary to call for production of the documents." *Id.* at 105-106.

In deciding whether to disclose a government agency's investigative materials, the court may consider the following:

- (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government;
- (2) the effect disclosure

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

Loigman, supra, 102 *N.J.* at 113. “Against these and any other relevant factors should be balanced by the importance of the information sought to the plaintiff's vindication of the public interest.” *Ibid.*

Additionally, OPRA provides that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest” *N.J.S.A.* 47:1A-1. One such exception to OPRA exists “where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency. *N.J.S.A.* 47:1A-3. “[T]he right of access [...] may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.” *N.J.S.A.* 47:1A-3.

Also, under OPRA, “government record” means,

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

N.J.S.A. 47:1A-1.1 (emphasis added). 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.” *Mason v. City of Hoboken*, 196 *N.J.* 51, 64 (2008).

What follows hereinafter is the court’s ruling as to the several categories of documents sought by the Plaintiff.

FALLON REPORT(s)

In or about November of 2013, the Borough sought the assistance, and retained the services of New Jersey State Police Major James Fallon (Retired) in connection with the need for an investigation consistent with the guidelines of the New Jersey Attorney General’s Office for conducting an Internal Affairs investigation. The two police officers whose conduct the Borough believed required examination were the interested parties herein, namely, David Mayer and Michael Hawthorne.

The records provided to the court reveal that the chain of events, which ultimately led to the separation of service from the Borough Police Department by both gentlemen, commenced with certain allegations made by Hawthorne concerning the conduct of Mayer. According to Borough Solicitor, Doreen Y. Corino, Esq., Hawthorne initially approached her with his concerns and after due consideration – including her contacting the Prosecutor’s Office - the Borough elected to retain an “independent” investigator at the urging of Hawthorne.

The record reveals that Major Fallon’s undated report, entitled “Administrative Internal Investigation” (hereinafter “the Fallon Report”) was completed on or about March 21, 2014. The Fallon Report is a thorough examination of the various issues raised concerning the conduct of both gentlemen. Information was solicited by Major Fallon, and was received, from multiple persons who no doubt relied upon the confidentiality of their communications to the investigator. Were the court to release an un-redacted copy of the Fallon Report, the names and information provided by various witnesses would become known and the potential for a chilling effect on future investigations by the Borough in which candid and confidential testimony is necessary might not be forthcoming. In considering an effort to redact the Fallon Report, the court concludes that Ms. Corino is correct that it would likely do little to insulate witnesses from their identities being divulged. The year-round population of the Borough is little more than 3,000

people and its municipal employees and police officers are all well known in the community. Redaction would serve no practical purpose.

The court agrees with the Borough and the CMCPD that, in this instance, the records of an internal affairs investigation must remain confidential. This is so because the court cannot ignore the Attorney General's guidelines by which all local police departments are bound. As noted by the Appellate Division in *O'Shea v. Township of West Milford*, 410 N.J. Super. 371, 383.

AG guidelines, directives and policies of this type are not "administrative rules" as defined in *N.J.S.A. 52:14B-2(e)*, and, thus, do not require formal promulgation under the Administrative Procedure Act, *N.J.S.A. 52:14B-1 to -15*. See *Doe v. Poritz*, 142 N.J. 1, 98, 662 A.2d 367 (1995). Those guidelines, directives or policies cannot be ignored, however: they are binding and enforceable on local law enforcement agencies, see *Carroll, supra*, 339 N.J. Super. at 442-43, 772 A.2d 45; and, at a minimum, they are " 'statements concerning the internal management or discipline of an[] agency.' " *Id.* at 442, 772 A.2d 45.

This claim is not a civil lawsuit (e.g. LAD, CEPA, 42 USC 1983) where an internal affairs report is frequently be released pursuant to a Protective Order as part of pre-trial discovery. Neither is the Plaintiff a complainant who filed charges against a police officer resulting in an internal affairs investigation, nor are the records sought as relevant to on-going litigation involving one of the police officers whose conduct was investigated. Absent some such compelling circumstance the court is obligated to respect the Attorney General's guidelines and will do so.

Finally, as discussed with counsel at oral argument, among the documents reviewed by the court *in camera*, there were a limited number of miscellaneous reports and memos initially prepared by the CMCPD, prior to the Fallon investigation. Although none of these documents are being sought, the record should reflect that the court is satisfied that they are quite preliminary in nature and the substance of such records was subsumed by the Fallon Report.

SEPARATION AGREEMENTS

The agreements entered into between Messrs. Mayer and Hawthorne are not of the type contemplated by the New Jersey Legislature in adopting *N.J.S.A. 47:1A-10* which requires release of records memorializing the "date of separation and the reason therefor, and the amount

and type of any pension received.” As this court understands section 10 of the OPRA, the purpose is to permit access to records confirming when and how a person left public service and the financial terms of such separation. Although the agreements in question address some of those items, they address more, and the “more” goes to the very concerns raised by Mayer’s counsel, Mr. Rodgers.

The agreements reviewed *in camera* by the court, address the individual situations of the two gentlemen and their separation from the police department. Yet they are not merely “Separation Agreements” but rather are “releases” with both the employee and the Borough waiving any claims one might have against the other. The court agrees with counsel for Mr. Mayer that release of this document would prejudice his client’s rights. Although Mr. Hawthorne would apparently be content with granting public access to the “release,” he takes that position without any knowledge of the contents of the release involving Mr. Mayer. The court is satisfied that were public access granted to either or both of the release agreements the net effect would very likely be more questions than it answers, none to either gentleman’s benefit.

PROSECUTOR’S LETTERS

Nothing learned from the *in camera* review of the documents provided alters the court’s decision as to the need to release the four letters listed in Mr. Arsenault’s original Vaughn Index. In considering these letters, two things are apparent: (a) the Prosecutor, in substantial part, relied upon the findings and conclusions of the Fallon Report, some of which, unto themselves, speak convincingly, demonstrating that there was nothing rash, inaccurate or ill-considered regarding the Prosecutor’s decision to issue the letters; (b) the Prosecutor is not suggesting to the Mayor (as Public Safety Director) how he should proceed, he is declaring how his office will handle the situation should either Mayer or Hawthorne be witnesses in a criminal proceeding involving the CMCPO; and (c) the Prosecutor had to have known the consequences flowing from issuing those letters, namely, it was only a matter of time and process before Messrs. Hawthorne and Mayer would no longer be members of the Police Department, and he supported that result.

Additionally, as to the four letters, and their accessibility under the CLRA, the court concludes as follows: (1) police officers play a unique and fundamental role in preserving order in civilization; they are our society’s social sanitation workers, handling problems no one else

wants to tackle. In doing so, they have the authority to use deadly force and to arrest people, yet with such power comes a critical need for public oversight; (2) Hawthorne and Mayer were in leadership positions which heightens the need for oversight and release of these letters is something they should reasonably expect; (3) the letters do not discuss any other individuals and will not have a “chilling effect” on future internal affairs investigations; (4) because the facts of this situation are so idiosyncratic to Messrs. Mayer and Hawthorne, the disclosure of these letters will not impede the CMCPO’s ability to perform its duties, including issuance of similar letters in the future; and finally, (5) the public’s interest in access to these letters outweighs both the Borough’s and the CMCPO’s interest in confidentiality.

In considering the standards and applying the tests set forth by our Supreme Court in *Loigman, supra*, the court is satisfied that Plaintiff is entitled to access the four letters listed in the original Vaughn Index.

Each party shall have thirty (30) days from the date of this Order to decide whether or not any of them wishes to appeal this decision and may submit a proposed form of Order staying the release of these letters to the Plaintiff. An appropriate Order has been entered. Conformed copies accompany this Memorandum of Decision.



NELSON C. JOHNSON, J.S.C.

Date of Decision: May 8, 2015