

**PASHMAN STEIN**  
A Professional Corporation  
Court Plaza South  
21 Main Street, Suite 100  
Hackensack, NJ 07601  
(201) 488-8200  
**CJ GRIFFIN (#031422009)**

Attorneys for Plaintiff,  
*John Paff*

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JOHN PAFF	:	<b>SUPERIOR COURT OF NEW JERSEY</b>
	:	<b>LAW DIVISION: OCEAN COUNTY</b>
Plaintiff,	:	<b>DOCKET NO.:</b>
	:	
v.	:	<u>Civil Action</u>
	:	
TOWNSHIP OF STAFFORD, and	:	<b>VERIFIED COMPLAINT</b>
BERNADETTE PARK, in her capacity as Records	:	
Custodian for Township of Stafford,	:	
	:	
Defendants.	:	
	:	

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Plaintiff, John Paff, through his undersigned counsel, Pashman Stein, A Professional Corporation, complains against the Defendants as follows:

1. This is an action alleging violation of the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1, *et seq.*, (“OPRA”) and the common law right of access to public records, seeking records from the Township of Stafford.

**PARTIES**

2. Plaintiff is a New Jersey citizen whose principal mailing address is P.O. Box 5424, Somerset, New Jersey, 08875.

3. Defendant Township of Stafford (“Stafford” or the “Township”) is a public agency formed under the laws of New Jersey, with its primary place of business at 260 Bay

Avenue, Manahawkin, New Jersey, 08050. Stafford is a “public agency” as the term is defined by OPRA, N.J.S.A. 47:1A-1.1.

4. Defendant Bernadette Park (“Park”) is the Municipal Clerk and Records Custodian for Defendant Stafford. Park maintains an office at 260 Bay Avenue, Manahawkin, New Jersey, 08050.

5. Stafford “ma[kes], maintain[s] or ke[eps] on file,” or “receive[s] in the course of...its official business” government records, and is thereby subject to the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 to -13.

### **VENUE**

6. Venue is properly laid in Ocean County because Defendant Stafford is a public entity located in Ocean County and because the cause of action arose in Ocean County. R. 4:3-2(a).

### **FACTUAL ALLEGATIONS**

#### **Background Information**

7. Plaintiff is a New Jersey citizen and who is interested in investigating issues of transparency in the government. He is the Chairman of the New Jersey Libertarian Party’s Open Government Advocacy Project and its Preempted Ordinance Repeal Project.

8. On September 24, 2014, two veteran Stafford police officers, David L. McVey and Drew G. Smith, sued the Township and Police Chief claiming that a promotion for the rank of Sergeant in 2013 was unlawful, arbitrary and capricious, and was manipulated by the Police Chief and Township officials. [Attached hereto as **Exhibit A** is a true and accurate copy of the Complaint in Smith v. Stafford Twp., Civil Case 3:14-cv-05945-FLW-TJB.]

9. McVey and Smith were among sixteen police officers who applied for the position of Sergeant. The applicants underwent a two-part examination and took issue with the manner in which the exam was conducted. McVey and Smith claimed that some of the applicants were improperly allowed to continue on to the second phase of examination. [Exhibit A].

10. According to McVey and Smith's allegations, for example, officer Neil McKenna was ranked higher than either plaintiff, yet he had "pending discipline at the time" and "admitted to committing unlawful acts, and Chief Giberson was aware of said admission at the time of the evaluation. [Exhibit A, Para 67 and 68.]

11. In response to their lawsuit, the Police Chief and the Township filed a counterclaim alleging that the officers filed suit for the purposes of harassment. [Attached hereto as **Exhibit B** is a true and accurate copy of the Answer and Counterclaim in Smith v. Stafford Twp., Civil Case 3:14-cv-05945-FLW-TJB.]

12. In an attempt to gather information about the officers' lawsuit, Plaintiff filed a request for public records, some of which specifically relate to certain officers who were among the sixteen applicants participating in the examination. The denial of these requests is the subject of this Verified Complaint.

#### **Plaintiff's OPRA Request to Stafford**

13. On February 9, 2015, Plaintiff submitted via email a request for public records pursuant to OPRA and the common law right of access. [Attached as **Exhibit C** is a true and accurate copy of Plaintiff's request to Stafford dated February 9, 2015]. Plaintiff requested the following government records:

1. The civil lawsuit, counterclaim and answer to counterclaim filed in Mrazek v. Stafford, Federal Case No. 13-cv-01091.
2. Para 63 of Smith's and McVey's suit against the Township (Case 3:14-cv-0594) references "prior discipline" against Smith. Given that Smith has put his prior disciplinary record in the public realm, I would like a copy of all "Final Notice of Disciplinary Action" or similar documents issued to Smith.
3. Para 68 of Smith's and McVey's suit against the Township (Case 3:14-cv-0594) states that Neil "McKenna admitted to committing unlawful acts." I would like a copy of any writing, including but not limited to a CDR or other form of complaint, that describe any "unlawful acts" committed by McKenna.

[Exhibit C.]

14. On February 12, 2015, Christopher Dasti, attorney for the Township, responded to Plaintiff's OPRA request. [Attached as **Exhibit D** is a true and accurate copy of the Township's response dated February 12, 2015]. The Township's response enclosed documents relating to Plaintiff's first request – the complaint, answer, amended answer and counter-claim, and answer to counter-claim filed in Mrazek v. Stafford.

15. As for Plaintiff's second request, for the Final Notice of Disciplinary Action or similar documents relating to Officer Smith, the Township responded with the following: "Please be advised that no Final Notice of Disciplinary Action exists. Please be further advised that any disciplinary documents in Officer Smith's personnel file is exempt from disclosure under OPRA." [Exhibit D].

16. As for Plaintiff's third request, regarding any CDR or complaint in relation to "unlawful acts" committed by Officer McKenna, the Township responded with the following: "Finally, you have requested copies of criminal charges, criminal complaints, etc., with regard to

Officer Neil McKenna. Please be advised that no documents exist which are responsive to this request.” [Exhibit D].

17. On February 16, 2015, Plaintiff replied to the Township, via e-mail, specifically regarding his third request for a CDR or complaint describing any “unlawful acts” committed by Officer McKenna and submitted a new OPRA request. Specifically, Plaintiff wrote:

While I am not certain, Mr. Dasti’s response seems to limit the scope of my request to criminal complaints. But, my request included other, informal writings, such as an e-mail from McKenna to another person saying, for example, “On August 9, 2008, I committed an unlawful act of...” Or, it could be a memo from the police chief stating “I interviewed McKenna and during the interview, he admitted that he had...”

I realize that even if these documents exist, you may believe that they are privileged and exempt from disclosure. But, even if you believe that, I would need to know whether or not they exist because my rights under common law might trump any confidentiality or privacy concerns if it appears that a police officer committed an unlawful act and that an official decision was made to not file charges against him. So, if there are no documents responsive to my request, please so state. If there are, please at least identify the documents by author, recipient and date.

Records requested:

I would like a copy of any writings that describe or otherwise reference any “unlawful acts” committed by Officer Neil McKenna.

[Attached as Exhibit E is a true and accurate copy of February 16, 2015 OPRA Request].

18. On February 20, 2015, Mr. Dasti, on behalf of the Township, responded to Plaintiff’s February 16 OPRA request. [Attached as **Exhibit F** is a true and accurate copy of Defendant’s letter dated February 20, 2015]. Regarding Plaintiff’s request for writings describing any “unlawful acts” committed by Officer McKenna, the letter stated the following:

While it is unclear exactly what you are looking for, as you reference documents responsive to an allegation made in a pleading, please be advised that any documents relating to such an allegation would be contained in an internal affairs file for this officer. There was an internal affairs investigation for this officer which began in 2013. However, such documents are confidential and exempt from disclosure.

Our Courts have held that police department internal affairs records are exempt under OPRA pursuant to N.J.S.A. 47:1A-10. Specifically, the Government Records Council has held:

[t]he Complainant's request to review the record of complaints filed against Officer Tuttle were properly denied by the Custodian. N.J.S.A. 47:1A-10 provides in pertinent that "the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a public record and shall not be made available for public access". As a result, records of complaint filed against Office[r] Tuttle and/or reprimands he has received are not subject to public access.

[Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order March 2004). See also O'Shea v. Twp. Of West Milford, 410 N.J. Super. 371 (App. Div. 2009); Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010); Parreott v. Asbury Park Police Department (Monmouth), GRC Complaint No. 2011-78 (May 2012).]

Furthermore, the New Jersey Attorney General Guidelines on Internal Affairs Policy and Procedures clearly indicate that internal affairs records and reports are confidential information and shall not be released to the public.

The records you have requested are exempt from disclosure under OPRA. Therefore, the Township is unable to respond to your request at this time.

[Exhibit F].

19. On February 21, 2015, Plaintiff responded via e-mail to Mr. Dasti's February 20 letter. [Attached as Exhibit G is a true and accurate copy of Plaintiff's e-mail dated February 21, 2015]. In response to Defendant stating that there was an internal affairs investigation for Officer McKenna and that the record is exempt as a personnel record or because of the Attorney General's Internal Affairs Guidelines, Plaintiff stated the following:

Just because something is in an Internal Affairs file jacket doesn't mean that it's exempt from disclosure. Judge Grasso has at least once ruled (see, e.g. Paff v. Ocean County Prosecutor's Office, Docket No. OCN-L-1645-14) that documents created prior to the investigation's commencement are not confidential.

Also, I think that the exception to the exception contained in N.J.S.A. 47:1A-3(b) might come into play here. Suppose that a citizen wrote the Police Chief and truthfully told him about something McKenna did that was illegal. Suppose further that the Chief, for whatever reason, decided not to file criminal charges against McKenna but instead process him through Internal Affairs. Regardless of the Chief's election, this is a case "where a crime has been reported but no arrest yet made," which would entitle me to documents that reveal "information as to the type of crime, time, location and type of weapon, if any."

The problem here is that Stafford Township officials know what records exist and I don't. I believe that you are required, when answering this request, to identify each record that exists and then give me a detailed explanation as to why the Township can't provide me with even a redacted version of it.

Also, please keep in mind that one of the Loigman factors (i.e. Loigman v. Kimmelman, 102 N.J. 98, 113 (1986)) that courts use when balancing a requestor's common law right of access against the government's need for confidentiality asks "whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency." I need to know at least the nature of the conduct that got McKenna into Internal Affairs hot water so that I can determine whether it violated a criminal statute and whether police officials exercised their discretion appropriately in electing not to criminally charge McKenna.

Records requested:

All documents within the file of Neil McKenna's Internal Affairs investigation that was referenced in Mr. Dasti's February 20th letter.

[Exhibit G].

20. On February 27, 2015, Mr. Dasti, on behalf of the Township, once again refused to indicate what records were in McKenna's file and whether any were created prior to the commencement of any investigation: "As I have previously indicated in my February 20, 2015 correspondence, the internal affairs records are exempt from disclosure under OPRA. Therefore, the Township cannot respond to your request." [Attached as Exhibit H is a true and accurate copy of Defendant's letter dated February 27, 2015].

21. To date, Defendants have failed to provide access to the remaining requested documents.

22. To date, Defendants have failed to indicate whether any records responsive to Plaintiff's OPRA requests even exist.

**FIRST COUNT**  
**(Violation of OPRA)**

23. Plaintiff repeats and incorporates by reference the allegations set forth in the preceding paragraphs as though fully set forth at length herein.

24. Pursuant to N.J.S.A. 47:1A-1, all government records must be "readily accessible" to the citizens of this State unless specifically exempted by law.

25. Accordingly, OPRA requires a records custodian to either grant or deny access to requested records "as soon as possible, but not later than seven business days after receiving the request." N.J.S.A. 47:1A-5(i).

26. A public agency has the burden of proving that any denial of access is authorized by law. N.J.S.A. 47:1A-6.

27. A public agency must provide the specific lawful basis for each and every denial of access. N.J.S.A. 47:1A-5(g).

28. The records sought by Plaintiff are government records and are not subject to any of OPRA's exemptions.

29. The requested records therefore should have been produced by Defendants in response to Plaintiff's valid OPRA request.

30. Defendants thus have violated OPRA by:

- a. Failing to make the requested government records "readily accessible for inspection, copying or examination," in violation of N.J.S.A. 47:1A-1;
- b. Failing to provide access to the requested public records "as soon as possible, but not later than seven business days after receiving the request," in violation of N.J.S.A. 47:1A-5(i);
- c. Failing to identify the records responsive to Plaintiff's OPRA request and state the specific lawful basis for the denial of each record, in violation of N.J.S.A. 47:1A-5(g).

**WHEREFORE**, Plaintiff demands judgment against Defendants:

- a. Declaring said actions of Defendants to be in violation of OPRA, N.J.S.A. 47:1A-1 et seq., by failing to identify responsive records and grant access to the requested records, as required by OPRA;
- b. Directing Defendants to identify which responsive records exist and release the requested records to Plaintiff forthwith. Alternatively, if the Court

believes that any information is exempt from public access, Plaintiff respectfully asks the Court to review the records *in camera* and then require Defendants to delete or excise from the records the portion(s) which are exempt from public access and promptly permit access to the remainder of the record;

- c. Ordering Defendants to preserve the requested records pending resolution of these proceedings or as otherwise required by law;
- d. Ordering discovery or in the alternative, a plenary hearing to conduct discovery and resolve any factual disputes;
- e. Awarding counsel fees and costs pursuant to N.J.S.A. 47:1A-6; and
- f. For such other relief as the Court may deem just and equitable.

**SECOND COUNT**  
**(Common Law Claims)**

31. Plaintiff repeats and incorporates by reference the allegations set forth in the preceding paragraphs as though fully set forth at length herein.

32. The public enjoys a vested common law right of access to public records generated or maintained by public entities. See, e.g., *Keddie v. Rutgers*, 148 N.J. 36 (1997); *S. Jersey Publ'ing Co. v. N.J. Exp'way Auth.*, 124 N.J. 478 (1991).

33. Defendants generate and/or maintain the requested public records, which are “necessary to be kept in the discharge of a duty imposed by law” (among other possible qualifying conditions). *S. Jersey Publishing Co.*, 124 N.J. at 487.

34. There is a strong public interest in favor of disclosure of the requested information, and there is no overriding, countervailing interest in confidentiality of these records.

35. Plaintiff, and by extension the public, have a strong interest in promoting police department transparency and learning about any potentially unlawful promotion of a Sergeant.

36. Accordingly, Defendants' failure to disclose the requested documents violated Plaintiff's common law right of access to public records.

**WHEREFORE**, Plaintiff demands judgment:

- a. Declaring said actions of Defendants to be unlawful and invalid;
- b. Directing Defendants to release requested records to Plaintiff forthwith.

Alternatively, if the Court believes that any information is exempt from public access, we respectfully ask the Court to review the contract *in camera* and then require Defendants to delete or excise from the records the portion(s) which are exempt from public access and promptly permit access to the remainder of the record;

- c. Awarding attorney fees and costs of suit; and
- d. For such other relief as the Court may deem just and equitable.

**PASHMAN STEIN**  
A Professional Corporation,  
Attorneys for Plaintiff  
*John Paff*

Dated: March 24, 2015

By: \_\_\_\_\_  
**CJ GRIFFIN**

**CERTIFICATION PURSUANT TO R. 4:5-1**

Plaintiff hereby certifies that the matter in controversy is not the subject of any other action pending in any Court and is likewise not the subject of any pending arbitration proceeding. Plaintiff further certifies that he has no knowledge of any contemplated action or arbitration proceeding regarding the subject matter of this action and that Plaintiff is not aware of any other parties who should be joined in this action.

**PASHMAN STEIN**  
A Professional Corporation,  
Attorneys for Plaintiff  
*John Paff*

Dated: March 24, 2015

By: \_\_\_\_\_  
**CJ GRIFFIN**

**CERTIFICATION PURSUANT TO R. 4:25-4**

Pursuant to R. 4:25-4, CJ Griffin is hereby designated as trial counsel.

**PASHMAN STEIN**  
A Professional Corporation,  
Attorneys for Plaintiff  
*John Paff*

Dated: March 24, 2015

By: \_\_\_\_\_  
**CJ GRIFFIN**

## **VERIFICATION**

I, John Paff, of full age, hereby certifies as follows:

1. I am a citizen of the State of New Jersey, Plaintiff in the foregoing Verified Complaint.

2. The allegations of the Verified Complaint contained within Paragraphs 2-4 and 7-22 are true and based on personal knowledge and the said Verified Complaint is made in truth and good faith and without collusion, for the causes set forth herein.

3. All documents attached to the Verified Complaint and Brief are true copies and have not been redacted, changed, modified, adjusted or otherwise altered in any manner by me or my agents unless so stated.

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

---

**JOHN PAFF**

Dated: March 24, 2015

**CERTIFICATION OF FAX/ELECTRONIC SIGNATURE**

CJ Griffin, Esq., of full age, certifies and says as follows:

1. I am an attorney at law with the law firm of Pashman Stein, P.C. I make this certification of the genuineness of the electronic signature of John Paff.

2. I hereby certify that Mr. Paff acknowledges to me the genuineness of his signature on the foregoing Certification.

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

**PASHMAN STEIN**  
A Professional Corporation  
Attorneys for Plaintiff,  
*John Paff*

Dated: March 24, 2015

By: \_\_\_\_\_  
**CJ GRIFFIN**

March 24, 2015

**VIA UPS Overnight Mail**

The Honorable Vincent J. Grasso, A.J.S.C.  
Ocean County Courthouse  
P.O. Box 2191  
118 Washington Street  
Toms River, NJ 08754

***Re: John Paff v. Township of Stafford, et ano.***  
Our File No. 9932-002

Dear Judge Grasso:

This firm represents Plaintiff, John Paff, in the above-captioned matter. Please accept this letter brief, in lieu of a more formal brief, in support of Plaintiff's application for an Order to Show Cause seeking relief from Defendants' denial of the Open Public Records Act ("OPRA") requests identified in the Verified Complaint and discussed in detail below.

**PRELIMINARY STATEMENT**

This matter arises from Defendants' unlawful response to OPRA requests submitted by Plaintiff John Paff ("Paff"). Paff sent an OPRA request to Defendant Township of Stafford ("Stafford" or the "Township") for documents pertaining to a lawsuit by the Township's police officers against the Township and its Police Chief. The lawsuit, filed in federal court, alleged an improper promotion and examination process for Sergeant position(s). In the complaint, the plaintiff officers alleged that Officer Neil McKenna was ineligible for the promotion and that the Chief was aware that "McKenna admitted to committing unlawful acts." At issue here is Paff's third request, which sought any writing describing the "unlawful acts" committed by McKenna. Defendants denied the request and have repeatedly insisted that any such records would be confidential and exempt because there was an internal affairs investigation that began in 2013

and thus such records are kept in the internal affairs file. Paff has objected to that response numerous times, notifying Defendants that if any of the records were created prior to the internal affairs investigation then they cannot be exempt. He has repeatedly asked Defendants to identify which records exist so that he can determine if he would be entitled to them pursuant to OPRA or the common law. Defendants have refused to do so.

As described herein, Defendants have violated OPRA by failing to identify records that are responsive to Plaintiff's OPRA request and failing to state the specific lawful basis for denying access to them, in violation of N.J.S.A. 47:1A-5(g). Defendants' repeated refusal to indicate whether records responsive to his OPRA requests even exist deprives Paff of his ability to determine whether Defendants have unlawfully denied access to records pursuant to OPRA or whether he is entitled to them under the common law. Accordingly, Paff seeks an Order 1) Finding Defendants in violation of OPRA, 2) Compelling Defendants to identify all records responsive to Paff's OPRA request, 3) Compelling Defendants to grant access to the records or state the specific lawful basis for denying access to each identified record, and 4) Declaring Paff a prevailing party and ordering Defendants to pay reasonable attorneys' fees. Alternatively, Paff seeks access to the records pursuant to the common law.

## **STATEMENT OF FACTS**

### **Background Information**

Paff is a New Jersey citizen and who is interested in investigating issues of transparency in the government. He is the Chairman of the New Jersey Libertarian Party's Open Government Advocacy Project.

On September 24, 2014, two veteran Stafford police officers, David L. McVey and Drew G. Smith, sued the Township and Police Chief. They claimed that a promotion for the rank of Sergeant in 2013 was unlawful, arbitrary and capricious, and was manipulated by the Police Chief and Township officials. [Exhibit A to the Verified Complaint].

McVey and Smith were among sixteen police officers who applied for the position of Sergeant. The applicants underwent a two-part examination and took issue with the manner in which the exam was conducted. McVey and Smith claimed that some of the applicants were improperly allowed to continue on to the second phase of examination. Specifically, Paragraphs 67 and 68 of their Complaint alleged:

67. The officer who ranked 4<sup>th</sup> overall was officer Neil McKenna. Upon information and belief, McKenna was ineligible for promotion and had pending discipline at the time. Upon information and belief, McKenna is next on the promotion list to be promoted.

68. Moreover, upon information and belief, prior to the evaluation of the examination, McKenna admitted to committing unlawful acts, and Chief Giberson was aware of said admission at the time of the evaluation. However, Giberson intentionally withheld this information from the other supervisors when conducting the supervisor's recommendation.

[Exhibit A, Para 67 and 68.]

In response to their lawsuit, the Police Chief and the Township filed a counterclaim alleging that the officers filed suit for the purposes of harassment. [Exhibit B].

**Plaintiff's OPRA Request to Stafford**

In an attempt to gather information about claims made in the officers' lawsuit, Paff submitted a request for public records on February 9, 2015 to Defendants. Paff requested the following government records:

1. The civil lawsuit, counterclaim and answer to counterclaim filed in Mrazek v. Stafford, Federal Case No. 13-cv-01091.
2. Para 63 of Smith's and McVey's suit against the Township (Case 3:14-cv-0594) references "prior discipline" against Smith. Given that Smith has put his prior disciplinary record in the public realm, I would like a copy of all "Final Notice of Disciplinary Action" or similar documents issued to Smith.
3. Para 68 of Smith's and McVey's suit against the Township (Case 3:14-cv-0594) states that Neil "McKenna admitted to committing unlawful acts." I would like a copy of any writing, including but not limited to a CDR or other form of complaint, that describe any "unlawful acts" committed by McKenna.

[Exhibit C].

On February 12, 2015, Township Attorney Christopher J. Dasti responded to Paff's request. [Exhibit D to the Verified Complaint]. The Township's response enclosed documents relating to Paff's first request – the complaint, answer, amended answer and counter-claim, and answer to counter-claim filed in Mrazek v. Stafford. However, as for Paff's second request for the Final Notice of Disciplinary Action or other similar documents relating to Officer Smith, the Township responded with the following: "Please be advised that no Final Notice of Disciplinary Action exists. Please be further advised that any disciplinary documents in Officer Smith's personnel file is exempt from disclosure under OPRA." [Exhibit D].

As for Paff's third request, regarding any writing, including but not limited to a CDR or other complaints, in relation to "unlawful acts" committed by Officer McKenna, the Township responded with the following: "Finally, you have requested copies of criminal charges, criminal complaints, etc., with regard to Officer Neil McKenna. Please be advised that no documents exist which are responsive to this request." [Exhibit D].

On February 16, 2015, Paff replied to the Township, specifically addressing his third

request for a CDR or other such complaint describing any “unlawful acts” committed by Officer McKenna. [Exhibit E to the Verified Complaint]. Paff stated the following:

While I am not certain, Mr. Dasti’s response seems to limit the scope of my request to criminal complaints. But, my request included other, informal writings, such as an e-mail from McKenna to another person saying, for example, “On August 9, 2008, I committed an unlawful act of...” Or, it could be a memo from the police chief stating “I interviewed McKenna and during the interview, he admitted that he had...”

I realize that even if these documents exist, you may believe that they are privileged and exempt from disclosure. But, even if you believe that, I would need to know whether or not they exist because my rights under common law might trump any confidentiality or privacy concerns if it appears that a police officer committed an unlawful act and that an official decision was made to not file charges against him. **So, if there are no documents responsive to my request, please so state. If there are, please at least identify the documents by author, recipient and date.**

Records requested:

I would like a copy of any writings that describe or otherwise reference any “unlawful acts” committed by Officer Neil McKenna.

[Exhibit E (emphasis added)].

On February 20, 2015, Mr. Dasti responded to Paff’s February 16 follow-up request.

[Exhibit F to the Verified Complaint]. Regarding Paff’s request for writings describing any “unlawful acts” committed by Officer McKenna, the letter stated the following:

While it is unclear exactly what you are looking for, as you reference documents responsive to an allegation made in a pleading, please be advised that any documents relating to such an allegation would be contained in an internal affairs file for this officer. There was an internal affairs investigation for this officer which began in 2013. However, such documents are confidential and exempt from disclosure.

Our Courts have held that police department internal affairs records are exempt under OPRA pursuant to N.J.S.A. 47:1A-10. Specifically, the Government Records Council has held:

[t]he Complainant's request to review the record of complaints filed against Officer Tuttle were properly denied by the Custodian. N.J.S.A. 47:1A-10 provides in pertinent that "the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a public record and shall not be made available for public access". As a result, records of complaint filed against Office[r] Tuttle and/or reprimands he has received are not subject to public access.

[Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order March 2004). See also O'Shea v. Twp. Of West Milford, 410 N.J. Super. 371 (App. Div. 2009); Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010); Parreott v. Asbury Park Police Department (Monmouth), GRC Complaint No. 2011-78 (May 2012).]

Furthermore, the New Jersey Attorney General Guidelines on Internal Affairs Policy and Procedures clearly indicate that internal affairs records and reports are confidential information and shall not be released to the public.

The records you have requested are exempt from disclosure under OPRA. Therefore, the Township is unable to respond to your request at this time.

[Exhibit F].

On February 21, 2015, Paff responded via e-mail to Mr. Dasti's February 20th letter.

[Exhibit G to the Verified Complaint]. In response to Defendant's statement that there was an internal affairs investigation for Officer McKenna and that the record is exempt as a personnel

record or because of the Attorney General's Internal Affairs Guidelines, Paff notified Defendants of the following:

Just because something is in an Internal Affairs file jacket doesn't mean that it's exempt from disclosure. Judge Grasso has at least once ruled (see, e.g. Paff v. Ocean County Prosecutor's Office, Docket No. OCN-L-1645-14) **that documents created prior to the investigation's commencement are not confidential.**

**Also, I think that the exception to the exception contained in N.J.S.A. 47:1A-3(b) might come into play here.** Suppose that a citizen wrote the Police Chief and truthfully told him about something McKenna did that was illegal. Suppose further that the Chief, for whatever reason, decided not to file criminal charges against McKenna but instead process him through Internal Affairs. Regardless of the Chief's election, this is a case "where a crime has been reported but no arrest yet made," which would entitle me to documents that reveal "information as to the type of crime, time, location and type of weapon, if any."

**The problem here is that Stafford Township officials know what records exist and I don't. I believe that you are required, when answering this request, to identify each record that exists and then give me a detailed explanation as to why the Township can't provide me with even a redacted version of it.**

Also, please keep in mind that one of the Loigman factors (i.e. Loigman v. Kimmelman, 102 N.J. 98, 113 (1986)) that courts use when balancing a requestor's common law right of access against the government's need for confidentiality asks "whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency." I need to know at least the nature of the conduct that got McKenna into Internal Affairs hot water so that I can determine whether it violated a criminal statute and whether police officials exercised their discretion appropriately in electing not to criminally charge McKenna.

Records requested:

All documents within the file of Neil McKenna's Internal Affairs investigation that was referenced in Mr. Dasti's February 20th letter.

[Exhibit G (emphasis added)].

Despite Paff's repeated attempts to get Defendants to identify whether there were records responsive to his request so that he could determine whether or not he might be entitled to them pursuant to OPRA and the common law, Mr. Dasti wrote to Paff on February 27, 2015 and simply stated: "As I have previously indicated in my February 20, 2015 correspondence, the internal affairs records are exempt from disclosure under OPRA. Therefore, the Township cannot respond to your request." [Exhibit H to the Verified Complaint].

To date, Defendants have failed to provide access to the any records responsive to the third item on Paff's February 9, 2015 initial OPRA request or his follow-up OPRA requests. Defendants have also failed to identify whether any responsive records exist, so that Paff may determine the lawfulness of the claimed exemptions.

## **LEGAL ARGUMENT**

### **I. THE REQUESTED RECORDS ARE GOVERNMENT RECORDS SUBJECT TO THE OPEN PUBLIC RECORDS ACT**

OPRA reflects New Jersey's "history of commitment to public participation in government" and its "tradition favoring the public's right to be informed about governmental actions." South Jersey Pub. Co. Inc. v. N.J. Expressway Auth., 124 N.J. 478, 486-87 (1991). The statute's "purpose is 'to maximize public knowledge about public affairs and to minimize the evils inherent in a secluded process.'" Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (quoting Lakewood Residents Assoc., Inc. v. Twp. of Lakewood, 294 N.J. Super. 207, 225 (Law Div. 1994)). A citizen's right to access public records has been deemed "**unfettered**" absent a statutory exemption. Courier News v. Hunterdon County Prosecutor's Office, 358

N.J. Super. 373, 382-83 (App. Div. 2003). Accordingly, pursuant to OPRA,

government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and **any limitations on the right of access accorded by [OPRA] shall be construed in favor of the public's right of access.** . . .

[N.J.S.A. 47:1A-1 (emphasis added).]

It is thus the public agency's burden to prove that denial of access is authorized by law. N.J.S.A. 47:1A-6.

**A. The Requested Records are "Government Records" Subject to OPRA**

Under OPRA, the first question to be addressed is whether the requested records are, in fact, government records. OPRA broadly defines the term to include:

[A]ny 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.

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

This definition of "government records" unequivocally applies to the records subject to Paff's OPRA requests as they were all "made, maintained or kept on file in the course of [the Defendants'] official business." N.J.S.A. 47:1A-1.1. Thus, the record is accessible under OPRA unless one of OPRA's exemptions applies.

**A. Defendants Have Violated OPRA by Failing to Identify Records Responsive to Paff's OPRA Request and Failing to State a Specific Lawful Basis for Denial**

OPRA “places the burden upon the custodian of a public record to state the ‘**specific basis**’ for the denial of access[.]” Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 215 (App. Div. 2005) (quoting N.J.S.A. 47:1A–5(g)). See also N.J.S.A. 47:1A-5(g) (“If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor.”). The reasons for withholding access to [ . . . ] records must be **specific**. Newark Morning Ledger Co. v. New Jersey Sports & Exposition Auth., 423 N.J. Super. 140, 162 (App. Div. 2011).

Likewise, the New Jersey Government Records Council (“GRC”) instructs records custodians that a proper response to an OPRA request requires “a record index that identifies **each** record requested and the **specific legal basis** for a denial of access (including redactions) to **each** record.” See Gov’t Records Council, The New Jersey Open Public Record’s Act Handbook for Records Custodians 25 (2011)(emphasis added).<sup>1</sup> The GRC has further emphasized this requirement by providing a sample index or log in its “Response Template” for denying access to public records. See Gov’t Records Council, Custodian’s Toolkit: A Resource to Facilitate Easier Access to Public Records Under the Open Public Records Act 12 (2011).<sup>2</sup> Notably, as part of that template, **custodians must identify all responsive records** (including the number of pages of each responsive record) and the records being denied in whole or in part, as well as the specific legal basis for each denial and redaction. Id.

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<sup>1</sup> Attached as Exhibit 1 to the Certification of CJ Griffin (“Griffin Cert.”)

<sup>2</sup> Attached as Exhibit 2 to Griffin Cert.

In this case, Defendants have wholly failed meet their burden of providing a specific and lawfully recognized basis to deny access to government records that are responsive to Plaintiff's OPRA requests. Defendants have violated OPRA by refusing to even acknowledge what records exist in McKenna's alleged internal affairs file that might be responsive to Paff's OPRA request. While Defendants have made a **generic** claim that such records are confidential and cannot be released pursuant to the Attorney General's Internal Affairs Guidelines, they have made **no specific showing that the exemption applies to any specific government record** because they have refused to disclose what records exists.

As Paff **repeatedly** notified Defendants, there are instances in which records in an internal affairs file might not be exempt pursuant to OPRA or the common law and thus he needed to know what records exist so that he could determine whether he has any lawful claim to them. This Court has held that records that were recreated prior to the commencement of an internal affairs investigation are not exempt pursuant to OPRA and must be disclosed. See, e.g., Paff v. Ocean County Prosecutor's Office, Docket No. OCN-L-1645-14, 2014 WL 3886839 (Law Div. July 31, 2014)<sup>3</sup> ("[T]he court finds that although the surveillance video may be used as part of an internal affairs investigation into the actions of Cherry, it is nevertheless accessible via an OPRA request because it was created prior to any internal affairs investigation."); Ganzweig v. Twp. of Lakewood,<sup>4</sup> Docket No. OCN-L-2392-13 (Law Div. Sept. 27, 2013) ("The plain language of the statute makes clear that information that later forms the basis of an investigation does not become retroactively exempt from OPRA's disclosure requirement. . . . These radio or video transmissions are independent and are to be distinguished

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<sup>3</sup> Attached as Exhibit 3 to the Griffin Cert.

<sup>4</sup> Attached as Exhibit 4 to the Griffin Cert.

from those Internal Affairs records that are created once the investigation has commenced.”). See also Paff v. Egg Harbor Twp.,<sup>5</sup> Docket No. ATL-L-8976-11 (Law. Div. June 25, 2013) (“The Court finds that Sergeant Hughes’ report was a public record at the time it was created, because there was no internal affairs investigation going on at the time it was created and it merely contains a recitation of the events of that morning.”).

Defendants, however, refuse to disclose whether there are records in the file that are responsive to Paff’s request, as they are required by OPRA to do. Instead, Defendants have forced Paff to file this OTSC and Verified Complaint so that he may determine whether responsive records exist that were created prior to any internal affairs investigation and thus are not exempt, or whether any records exist that he might be entitled to under the common law right of access.

## **II. PLAINTIFF HAS A RIGHT TO ACCESS THE REQUESTED RECORDS UNDER COMMON LAW**

At common law, a citizen has an enforceable right to require custodians of public records to make records available for reasonable inspection and examination. Irval Realty v. Bd. of Pub. Util. Comm’rs, 61 N.J. 366, 372 (1972). Even where a plaintiff is denied access under OPRA, the documents may be available through the right to access under the common law. MAG Entertainment LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 543 (App. Div. 2005). The common law right to access a public record is determined by balancing the requestor’s need for the record against the government’s need for secrecy. Shuttleworth v. City of Camden, 258 N.J. Super. 573, 583 (App. Div. 1992). A requestor need not establish a personal interest as a public interest is sufficient. Id.

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<sup>5</sup> Attached as Exhibit 5 to the Griffin Cert.

Here, Paff is entitled to the government records under the common law right of access because Paff and the public have a legitimate interest in maintaining transparency in relation to police department promotions. Defendants, on the other hand, have no legitimate interest in keeping these government records at issue a secret. Accordingly, Paff should be granted access to the requested records pursuant to the common law right of access.

### **CONCLUSION**

For the foregoing reasons, Paff respectfully asks this Court to enter an Order 1) Finding Defendants in violation of OPRA, 2) Compelling Defendants to identify all records responsive to Paff's OPRA request, 3) Compelling Defendants to grant access to the records or state the specific lawful basis for denying access to each identified record, and 4) Declaring Paff a prevailing party and ordering Defendants to pay reasonable attorneys' fees. Alternatively, Paff seeks access to the records pursuant to the common law.

Respectfully Submitted,

CJ GRIFFIN