

NJ Supreme Court Issues Important Decision Regarding Disclosure of Internal Affairs Records



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The New Jersey Supreme Court recently clarified when police internal affairs (IA) reports must be disclosed to the public under both the Open Public Records Act (OPRA) and the common law right of access. The court ultimately concluded that while OPRA does not permit access to internal affairs reports, records can and should be disclosed under the common law right of access — subject to appropriate redactions — when interests that favor disclosure outweigh concerns for confidentiality.

The decision in *Rivera v. Union County Prosecutor's Office* is very important for all municipalities because it suggests that not only will law enforcement agencies be forced to be more transparent, but they might also have to rethink the way they discipline employees given the heightened potential for public access and criticism.

Request for Internal Affairs Report

In February 2019, an attorney made a complaint to the Union County Prosecutor's Office on behalf of employees of the Elizabeth Police Department alleging that the Department's

Police Director used racist and sexist language to refer to employees on multiple occasions. Two months later, the Prosecutor's Office sustained the complaints. The Attorney General subsequently issued a public statement describing the investigation, its conclusion, and calling upon the Police Director to resign, which he did.

In July 2019, plaintiff Richard Rivera filed a request for records with the Prosecutor's Office pursuant to OPRA and the common law right of access. The plaintiff requested "all internal affairs reports" regarding the Director, which was denied on the basis that it was "exempt from disclosure under OPRA" and not subject to disclosure under the common law. The plaintiff subsequently filed suit. In response, the Prosecutor's Office cited the need for confidentiality based on witnesses' expectations of privacy and the need to preserve the Office's ability to gather facts in similar investigations. The City of Elizabeth intervened and similarly stressed the importance of confidentiality, noting that witnesses' identities could be determined even with redactions and that disclosure would make it less likely that employees would report alleged workplace policy violations.

The trial court concluded that the IA report should be made available under OPRA. The Appellate Division then granted leave to appeal, stayed the trial court's order, and reversed its judgment.

March 2022

The appeals court not only held that that IA report was not subject to disclosure under OPRA, but also rejected plaintiff's common law claim, determining that the Prosecutor's Office interest in preventing disclosure outweighed the plaintiff's right to the documents.

NJ Supreme Court Orders Disclosure of Redacted IA Records

The New Jersey Supreme Court reversed. It held that while an IA report is exempt from disclosure under OPRA, it is subject to disclosure under the common law right of access. "Although we find that OPRA does not permit access to internal affairs reports, those records can and should be disclosed under the common law right of access when interests that favor disclosure outweigh concerns for confidentiality," Chief Justice Stuart Rabner wrote on behalf of the unanimous court. The New Jersey Supreme Court also provided guidance to trial courts in evaluating the factors used to balance the public's right of access and the State's interest in preventing disclosure.

Disclosure Under OPRA

With regard to OPRA, the New Jersey Supreme Court concluded that IA reports are exempt from public disclosure pursuant to Section 9(b) of OPRA, which states that OPRA "shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law." As Chief Justice Rabner explained, since 1991, the Attorney General has promulgated an Internal Affairs Policy and Procedures manual (IAPP) to address complaints of police misconduct. The IAPP contains a confidentiality provision that only allows for disclosure in certain limited circumstances.

In 1996, the Legislature enacted N.J.S.A. 40A:14-181, which directs all law enforcement agencies to "adopt and implement guidelines which shall be consistent with the" IAPP manual." According to the New Jersey Supreme Court, "section 181, a statute, effectively recognizes a grant of confidentiality established by the IAPP, and OPRA may not abrogate that grant of confidentiality."

Common Law Right of Access

The New Jersey Supreme Court next addressed the common law right of access. As the Chief Justice explained, a requestor must make a greater showing than OPRA requires when seeking documents under the common law right of access. Specifically, the requestor must establish an interest in the subject matter of the material, and the requestor's right to access must be balanced against the State's interest in preventing disclosure.

In *Loigman v. Kimmelman*, 102 N.J. 98 (1986), the New Jersey Court identified six factors to consider in balancing those interests. However, as Chief Justice Rabner noted, they largely examine only one side of the test — the need for confidentiality — which "should be balanced [against] the importance of the information sought to the plaintiff's vindication of the public interest."

In *Rivera*, the New Jersey Supreme Court provided guidance regarding the second half of the balancing test as applied to IA records. It advised that the public interest in transparency may be heightened in certain situations depending on a number of considerations, including: (1) the nature and seriousness of the misconduct; (2) whether the alleged misconduct was substantiated; (3) the nature of the discipline imposed; (4) the nature of the official's position; and (5) the individual's record of misconduct.

The New Jersey Supreme Court further advised that to allow a court to assess the factors — those in favor of confidentiality as well as disclosure — the parties should present more than generalized, conclusory statements. It went on to find that while there are good reasons to protect the confidentiality of internal affairs reports under the common law in many instances, "[t]his is not one of them."

"In this case, the public interest in disclosure is great. An internal affairs investigation confirmed that the civilian head of a police department engaged in racist and sexist conduct for many years," Chief Justice Rabner wrote. "To date, defendant has raised only generalized concerns about confidentiality, and it does not appear that

any court has yet examined the actual internal affairs report.”

Based on the foregoing, the New Jersey Supreme Court held that the IA report should be disclosed after the trial court reviews it and redacts parts that raise legitimate confidentiality concerns. The court advised that judges, at minimum, should redact the names of complainants, witnesses, informants, and cooperators, as well as information that could reasonably lead to the discovery of their names; non-public, personal identifying information about officers and others, such as their home addresses and phone numbers; and personal information that would violate a person’s reasonable expectation of privacy if disclosed, such as medical information.

The New Jersey Supreme Court remanded the matter to the trial court for it to review the report, complete the necessary balancing test, and enter an order of disclosure.

Key Takeaway for NJ Municipalities

The New Jersey Supreme Court’s decision does two things. First, it clarifies that IA records are not subject to disclosure under OPRA. Second, it directs the courts to conduct a balancing test of the interests of the public vs. the interests of the State to determine whether the sought-after IA documents should be disclosed under the common law right of access. While

this balancing test already existed, the court provides additional guidance and factors to be considered when conducting the balancing test in the context of IA reports.

Moving forward, it appears likely that the New Jersey Supreme Court’s decision will impact how law enforcement agencies report major discipline in accordance with Attorney General Directive 2020-5 and Directive 2021-6, which essentially require that each New Jersey law enforcement agency publish, annually, a list of all officers who were subject to major discipline and a brief statement of the background underlying the discipline. Given that these annual reports may prompt IA record requests seeking additional information, the New Jersey Supreme Court’s decision in Rivera might also influence how law enforcement agencies determine the appropriate penalty for employee discipline and respond to requests from the public to disclose IA material.

For more information about the New Jersey Supreme Court’s decision or how your municipality may be impacted by the legal issues involved, we encourage you to contact a member of Scarinci Hollenbeck’s Government Law Group.