GANNETT SATELLITE INFORMATION NETWORK, LLC d/b/a ASBURY PARK PRESS, Plaintiff/Respondent, v. TOWNSHIP OF NEPTUNE, Defendant/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-4006-18-T3 On Appeal from: Superior Court of New Jersey, Law Division, Monmouth County: Docket No. MON-L-2616-17 Sat Below: Hon. Lisa P. Thornton, A.J.S.C.

BRIEF OF AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY, LIBERTARIANS FOR TRANSPARENT GOVERNMENT, LATINO LEADERSHIP ALLIANCE OF NEW JERSEY, NEW JERSEY FOUNDATION FOR OPEN GOVERNMENT

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PRELIMINARY STATEMENT

The American Civil Liberties Union of New Jersey, the Association of Criminal Defense Attorneys of New Jersey, Libertarians for Transparent Government, Latino Leadership Alliance of New Jersey, and New Jersey Foundation for Open Government (hereinafter "the Amici") file this brief in support of the Plaintiff and in response to the briefs submitted by the Defendants and the various amici law enforcement associations. For the many reasons argued below, the Amici believe that the trial court erred in concluding that the internal affairs records of former Neptune Police Officer Phillip Seidle are exempt under the Open Public Records Act (OPRA). The Attorney General's Internal Affairs Policy and Procedures (AG IA Policy), which never once even mentions OPRA, lacks the statutory authority to exempt a record from public access because OPRA's plain language enumerates the specific types of laws that may create an exemption and the Attorney General's un-promulgated policies are not on that list. Moreover, OPRA expressly states that exemptions may only be created "for the protection of the public interest," and when it comes to internal affairs records, the public's interest weighs very heavily in favor of disclosure. As discussed in detail below, not only does the public benefit from transparency, but so do law enforcement agencies and individual law enforcement officers.

Although Defendants and the amici law enforcement associations argue that significant harm will flow to police departments, police officers, and complainants if internal affairs records are disclosed, they offer little evidence to support their speculative claims. More than half of the states in this nation make internal affairs records either fully or partially public and the types of harms that Defendants and its amici predict simply have not occurred in those jurisdictions. Thus, this Court should grant Plaintiff's cross-appeal and reverse the trial court's determination that the records were not subject to OPRA.

On the other hand, the Amici strongly believe that the trial court correctly concluded that the Plaintiff was entitled the Seidle's internal affairs records pursuant to the common law right of access because the balancing test in this particular case weighs very heavily in favor of providing the public information about Seidle's past misconduct. As a result of the decision to release public records under the common law to Plaintiff, the trial court also correctly exercised its discretion to award attorneys' fees to the Plaintiff pursuant to the Supreme Court's express instruction that the catalyst theory applies to common law records cases. Therefore, the Court should affirm the trial court's decision granting access under the common law and awarding attorneys' fees.

Statement of Interest of Amici Curiae

The Amici rely upon the attached Certification of CJ Griffin, Esq. to demonstrate their special interest and expertise in this matter.

Statement of Facts and Procedural History

The Amici adopt the statement of facts and procedural history contained in Plaintiff's briefs.

LEGAL ARGUMENT

I. PUBLIC ACCESS TO INTERNAL AFFAIRS FILES GREATLY BENEFITS BOTH THE PUBLIC AND POLICE OFFICERS

A police officer "is a special kind of public employee." In re Carter, 191 N.J. 474, 486 (2007) (quoting Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966)). A police officer "must present an image of personal integrity and dependability in order to have the respect of the public." Ibid. This high standard of conduct "is one of the obligations [a police officer] undertakes upon voluntary entry into the public service." In re Phillips, 117 N.J. 567, 577 (1990) (quoting In re Emmons, 63 N.J. Super. 136, 142 (App. Div. 1960)).

Despite this important role that police have in our society, Defendants and the amici law enforcement associations propose an entirely secretive process, permitting the public to know very little information about police misconduct or when officers fail

to live up to these very high standards. Although Defendants and the amici law enforcement associations have argued that public disclosure of internal affairs files would cause great harm, those claims are exaggerated. Moreover, as discussed at length below, disclosure of internal affairs files actually **benefits** both the public and police officers in numerous ways. Therefore, the Amici believe that internal affairs records should be subject to public access[1] pursuant to OPRA.

A. Transparency Builds Community Trust, Resulting In More Cooperative Witnesses And A Safer Community

"The police, one of the foundations of the criminal justice system, must ensure the public trust if the system is to perform its mission to the fullest." U.S. Department of Justice, Office of Community Oriented Policing Services & Office of Justice Programs, National Institute of Justice, Police Integrity – Public Service with Honor 7 (January 1997). Despite how important it is that members of the public trust law enforcement, polls show that approximately half of the public actually lacks confidence in police officers. See Erik Bakke, Predictive Policing: The Argument for Public Transparency, 74 N.Y.U. Ann. Surv. Am. L. 131, 147 (2018) (citing Jeffrey M. Jones, In U.S., Confidence in Police

[1]The Amici recognize the concerns regarding the confidentiality of complainants and notes that members of the public are permitted to file internal affairs complaints anonymously. Moreover, the Amici believe that the name of complainants should be redacted from internal affairs documents before they are disclosed to the public.

Lowest in 22 Years, GALLUP (Jun. 19, 2015)). Community trust "is the key to effective policing" and the lack of trust undermines the ability of police officers to do their jobs successfully. See International Association of Chiefs of Police, Building Trust Between the Police and the Citizens They Serve 7 (January 2014).

Shielding internal affairs records from the public is one action that causes people to distrust law enforcement and believe that corrupt officers are being protected. This secrecy undermines the legitimacy of the police, and prohibits the public from serving as an important "check" on government. Welsh v. City & Cty. of San Francisco, 887 F. Supp. 1293, 1302 (N.D. Cal. 1995) ("The public has a strong interest in assessing . . . whether agencies that are responsible for investigating and adjudicating complaints of misconduct have acted properly and wisely."); Worcester Telegram & Gazette Corp v. Chief of Police of Worcester, 787 N.E.2d 602, 607 (Mass. Ct. App. 2003) ("A citizenry's full and fair assessment of a police department's internal investigation of its officer's actions promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights.").

When police processes are transparent and considered to be fair, then communities are more likely to cooperate with police officers and, as a result, police departments are more effective in serving the community. As one scholar noted:

> Making information about police misconduct public ensures trust in law enforcement agencies. . . . People who find the government trustworthy are more likely to accept its authority as legitimate. The more likely the public accepts government authority as legitimate, the more likely the public will comply with the law.
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> [Rachel Macht, Should Police Misconduct Files be Public Record? Why Internal Affairs Investigations and Citizen Complaints Should be Open to Public Scrutiny. 45 No. 6 Crim. Law Bulletin Art (2009).]

See also Cynthia H. Conti-Cook, A New Balance: Weighing Harms of Hiding Police Misconduct Information From the Public, 22 CUNY L. Rev. 148, 166 (Winter 2019) ("[W]hen police processes are perceived as procedurally just, communities are more likely to cooperate with the police, and policing, in turn, is more effective."); Tracey Meares & Tom Tyler, Policing: A Model for the Twenty-First Century, *in* Policing the Black Man 165 (Angela J. Davis ed., 2018) ("If the police are trusted, then people are more likely to give them the benefit of the doubt, allowing them to investigate and to respond to contentious law enforcement actions. Overall the public is more willing to give trusted police officers greater discretion in their efforts to enforce the law."); Macht, Should Police Misconduct Files be Public Record?, at 5 ("Public confidence in police can result in a citizenry more likely to obey commands and more likely to cooperate with law enforcement."); Erik Luna, Transparent Policing, 85 Iowa L. Rev. 1107, 1162 (2000) ("An

individual who trusts law enforcement is more likely to follow its commands; conversely, an untrustworthy police force may confront a substantially less obedient citizenry."). Transparency "facilitates healing" and provides an "outlet[] for 'community concern, hostility, and emotions.'" Conti-Cook, A New Balance, at 155 (quoting David S. Ardia, Court Transparency and the First Amendment, 38 Cardozo L. Rev. 835, 395 (2017)).

A relationship of trust between the police and the community makes communities safer and has been shown to reduce crime:

> Clearly, focusing on public trust and confidence in the context of policing is not inconsistent with an agency's commitments to other goals, including crime reduction. . . . Studies similarly suggest that building trust in the police, the courts, and the law is as effective or even more effective a long-term crime-control approach. When people have greater trust in the police, they are more likely both to obey the law and to cooperate with the police and engage with them. Legitimacy facilitates crime control both directly, because it lower people's likelihood of committing crimes, and indirectly, because it increases public cooperation, which allows the police to solve more crimes.
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> [Meares & Tyler, Policing: A Model for the Twenty-First Century, at 167.]

Secrecy causes distrust in police to fester and that has significant negative consequences on policing. Research shows that when the police are perceived as untrustworthy or illegitimate, both police officers and prosecutors will be less effective at serving their community. See Macht, Should Police

Misconduct Files be Public Record?, at 5 ("If the public perceives the police as untrustworthy, prosecutors will have greater difficulty obtaining convictions in criminal cases where police officers are the sole witness."). Thus, "increasing transparency by publicly disclosing misconduct records should increase community faith and make police officers more effective in protecting their community." Katharine J. Bies, Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct, 28 Stan. L & Pol'y Rev. 109, 120 (2017). Where there is a lack of community trust it is harder for police officers to obtain cooperation from witnesses during investigations, and it may also make their jobs more dangerous because a lack of transparency creates hostility and anger in the community. Id. at 120 ("Transparency fosters trust and legitimacy in the government and encourages compliance with authorities.").

Courts have recognized the importance of public access to internal affairs files. Worcester Telegram, 787 N.E.2d at 607; Welsh, 887 F. Supp. at 1302. For example, the Supreme Court of Oregon has succinctly summarized why transparency over internal affairs files is important to building mutual trust between police officers and the public:

> **[T]he public interest in the transparency of government operations is particularly significant when it comes to the operation of its police departments and the review of allegations of officer misconduct.** Every day

> we, the public, ask police officers to patrol our streets and sidewalks to protect us and to enforce our laws. Those officers carry weapons and have immense power. Some members of the public fear the abuse of that power. By the same token, police officers are themselves vulnerable. Many of those who drive our streets and walk our sidewalks also carry weapons. Some officers fear their use of those weapons and their resistance to legal authority. When our system of justice works as we expect it to, officers use their authority legitimately, members of the public comply with their instructions, and the dangers of escalating violence are avoided. But for our system to work as we expect it to, the public must trust that officers are using their authority legitimately, and officers must trust that the people they stop will respond appropriately. Without mutual trust, the police cannot do their work effectively and the public cannot feel safe.
>
> **One way to promote that necessary mutual trust is to make police practices and procedures transparent and to make complaints about police misconduct and the discipline that is or is not meted out open to public inspection.** It is important for the public to know when the police overstep; it is important for the public to know when they do not. And it is important that the basis for differing results be known and understood.
>
> [Am. Civil Liberties Union of Oregon, Inc. v. City of Eugene, 380 P.3d 281, 297–98 (Or. 2016) (emphasis added).]

In other words, when the public trusts police officers, it will be easier for the police to perform their jobs, criminal cases will be easier to investigate, and communities will be safer. Transparency is a core component of building that community trust and the position that Defendants have taken will only lead to

negative outcomes in the community and make it harder for Neptune Police Officers to serve the public.

B. In Addition To Building Community Trust, Internal Affairs Transparency Benefits Police Officers Personally

Making internal affairs records available to the public helps police departments in numerous ways, beyond simply making policing itself more effective. Communities that trust police officers are more likely to advocate for them so that they are compensated fairly and given adequate resources to perform their duties:

> It is also in the police department's interest to foster a trustful relationship with the public. A public that has confidence in its police is more likely to encourage politicians to increase budgets for police. Restoring trust in law enforcement agencies also results in less pressure from political figures on chiefs and, of course, less tension between communities and street cops.
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> [Macht, Should Police Misconduct Files be Public Record?, at 5.]

Further, making it publicly known when discipline is imposed upon any particular officer can lead other officers to comply with departmental rules and regulations. "Because discipline plays a central role in teaching officers about the gravity of misconduct, it is important that a department's disciplinary decisions are known to officers and thus enable them to learn from these decisions." Carl B. Klockars, Sanja Kutnjak Ivković, & M. R. Haberfeld, Enhancing Police Integrity 258 (2007). In that regard, disclosure of disciplinary actions promotes better behavior

because officers see the consequences of rules and regulations violations.

Making internal affairs units transparent also makes it less likely that a person will file a frivolous internal affairs complaint, which protects police from defending themselves against false accusations. Ibid. ("When a person knows his complaint will be public, it may keep him more honest about the allegations he makes because he knows what he alleges may be refuted by people who witnessed the event and know the truth."). Open access to internal affairs files benefits the police "because it allows the public to hear both sides of the story" and where the allegations are false, "the public can trust that its police properly do their jobs." Ibid.

> For example, a complaint in New York City involved a woman angry at an officer who tried to usher her out of a "no stopping" zone. The woman accused the officer of cursing at her and being rude and unprofessional. The investigation yielded a tape recording of the incident where the officer was patient, polite and composed and the allegations were not sustained. Without access to the investigation in this instance the public might be led to think that the department improperly believed the officer's word over the woman's. With access to the investigation file, the public would see the investigation was thorough and the officer properly did his job.
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> [Ibid.]

A transparent internal affairs process also permits police officers to monitor their own internal affairs units to ensure

that investigations are fair and unbiased. A secretive process harms police officers because it means that officers have no real way to determine whether the discipline they receive is comparable to that other officers received for the same infractions. See Conti-Cook, A New Balance, at 166 ("When departments conceal the average penalty for any specific offense, it prevents officers who have been treated unfairly from analyzing whether their penalty was disproportionately harsh."). Making internal affairs records accessible to the public would, as a result, encourage investigators to investigate cases more carefully and discourage supervisors from imposing disparate penalties upon officers. See also Nash v. Whitman, No. 05CV4500, 2005 WL 5168322, at *5 (Colo. Dist. Ct. Dec. 2005) ("Knowing they will be scrutinized makes investigators do a better job and makes them and the departments more accountable to the public.") [Aa1][2]; Macht, Should Police Misconduct Files be Public Record?, at 5 ("The public will be able to ascertain the frivolous allegations from the substantive allegations—especially if the internal affairs investigation that is released was thorough."). This would result in fewer grievances and lawsuits being filed by police officers alleging discrimination, saving taxpayers significant expense. Ibid. (explaining the various ways that access to internal affairs files

[2] Aa = Amici's Appendix; Da = Def.'s Appendix; Pb = Pl.'s Brief

could save taxpayers money in legal fees and settlements).

C. **Secrecy Undermines The Public's Statutory Right To Hold Police Departments Accountable And Causes Numerous Societal Harms**

The Legislature enacted OPRA to enable "citizens and the media [to] play a watchful role in curbing wasteful government spending and **guarding against corruption and misconduct.**'" Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 541 (2012) (quoting Burnett v. Cty. of Bergen, 198 N.J. 408, 414 (2009)) (emphasis added). A closed internal affairs process deprives the public of the ability to hold police departments accountable and this secrecy taints the department as a whole.

> The public has an interest in gaining access to internal affairs documents also to ensure investigations are conducted thoroughly and to identify repeat offending police officers who are responsible for disproportionate numbers of complaints in police departments across the nation. These officers pose a threat to public safety. Information about police misconduct and citizen complaints, which could enable the public to identify these officers, can allow the public to pressure police departments to implement early warning systems to intervene, correctly train and discipline repeat offending officers in order to prevent widespread misconduct and minimize lawsuits for which taxpayers pay.
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> [Macht, Should Police Misconduct Files be Public Record?, at 5 ("The public cannot hold its police accountable without access to information about instances where the police have potentially failed the public.").]

These "repeat offenders" exist in New Jersey and the lack of

transparency has led to grave violations of the public trust and significant expenditures of public funds. In 2018, the *Asbury Park Press* published "Protecting The Shield,"[3] an award-winning investigative series that focused on police misconduct in New Jersey. During its two-year investigation, the *Asbury Park Press* discovered "a weave of secret investigations, quiet payouts, nondisclosure agreements and court-enforced silence" that keeps "horrendous conduct and multi-million-dollar payouts away from public scrutiny." Andrew Ford, Kala Kachmar & Paul D'Ambrosio, Dead, Beaten, Abused: New Jersey Fails to Stop Police Brutality, Asbury Park Press, Dec. 26, 2018 (explaining that of the 531 officers who were named in lawsuits that settled for a total of $42.7 million dollars, at least 231 of them remained on the job). The newspaper's reporting was deeply alarming, revealing that the secretive internal affairs process permits many officers to engage in serious misconduct and still leave their jobs in good standing:

> Through months-long open records requests and legal efforts, the *Asbury Park Press* was able to access those secret agreements in many cases. It identified at least 68 instances since 2010 in which law enforcement officers with disciplinary issues were allowed to resign, frequently with their town agreeing to drop disciplinary charges and give a neutral reference to future employers. . . .
>
> In the process, the 68 officers collectively banked at least $780,000 in payouts, often tied to unused sick and vacation days,

[3] Available online at https://www.app.com/series/theshield

> benefits they would normally receive if they had retired honorably. Thirty-three of those officers kept their pensions, collectively worth $1.6 million annually. . . .
>
> At least three officers moved on to new jobs in law enforcement after facing trouble in one town. . . .
>
> [Andrew Ford, Money and Silence Push Along Bad Cops, Asbury Park Press, Jan. 18, 2019.]

The *Asbury Park Press* is not the only publication to tackle police misconduct in New Jersey. In 2018, *NJ.com* published "The Force Report,"[4] a comprehensive statewide database that tracks more than 72,000 uses of force by police officers in New Jersey over a five-year period. The findings were disturbing: "Just 10 percent of officers accounted for 38 percent of all uses of force. A total of 252 officers used force more than five times the state average. And across New Jersey, black people were more than three times as likely to face police force than white people." Craig McCarthy & S.P. Sullivan, For 17 Years, N.J. Had the Chance to Stop Potentially Dangerous Cops. The State Failed To Do It, NJ.com, Nov. 28, 2018.

Because Use of Force Reports are publicly accessible documents under OPRA, the reporters were able to report this type of raw data to the public. See N. Jersey Media Grp. Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017) (Use of Force Reports are subject

[4] Available online at http://force.nj.com

to OPRA). The secret internal affairs process, however, precludes the reporters from digging any deeper to report whether the uses of force were found to be excessive or resulted in discipline. See S.P. Sullivan & Rebecca Everett, Residents Say This Troubled N.J. Police Department Ignores Excessive Force Complaints. Records Reveal It Hasn't Upheld A Case In Years, NJ.com, May 20, 2019 (highlighting the difficulty in ascertaining whether excessive force complaints are sustained due to the fact that internal affairs files are largely inaccessible). Therefore, although the public can learn from the database that New Jersey police officers used force more than 72,000 times in a five-year period, there is no information for the public to know how many uses of force were found to be appropriate and how many were not. When such information is kept from the public, the public often assumes the very worst. See Macht, Should Police Misconduct Files be Public Record?, at 5 ("The continued employment of problem officers creates a public perception that misconduct exists and is accepted throughout that department."). Transparency would not only permit the public to ensure that police departments are holding officers who use excessive force accountable, but would also clear the names of those officers who properly used force in full compliance with departmental policies and the law.

D. The Arguments Against Transparency Are Exaggerated And Have Not Proven To Be True In The Numerous States That Have Open Internal Affairs Files

Although those who favor secretive internal affairs processes advance numerous arguments in favor of non-disclosure, as argued further below, the claims of potential harm from disclosure of internal affairs records are significantly overstated and constitute mere conjecture unsupported by any credible evidence.

1. Releasing Internal Affairs Records Will Not Have A "Chilling" Effect

Defendants and the amici law enforcement associations argue that releasing internal affairs records would "chill" internal affairs investigations because both members of the public and officers will be discouraged from filing complaints or cooperating with investigators if they know their information will become public. Notably, Defendants and the amici did not cite to any evidence or legal authority whatsoever to support these claims of harm. A "government record does not become cloaked with confidentiality simply because the [law enforcement agency] declares it so." Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 367 (App. Div. 2003). Instead, an agency must **prove** that a record is exempt by producing "specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality." Paff v. Ocean Cty. Prosecutor's Office, 446 N.J. Super. 163, 178 (App. Div. 2016). Because the burden is so high to prove that an exemption applies, our courts have repeatedly rejected agencies' "speculative" claims of harm. See, e.g.,

Lyndhurst, 229 N.J. at 574 (rejecting detailed certifications by multiple law enforcement officers who claimed that releasing records relating to a police-involved shooting would jeopardize officer safety); Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 382-383 (App. Div. 2003) (rejecting prosecutor's claim that "fears of potential juror confusion" warranted non-disclosure of 9-1-1 call); Serrano, 358 N.J. Super. at 365-68 (rejecting prosecutor's claim that difficulties in impaneling a jury and a possible change of venue warranted non-disclosure of a 9-1-1 call).

There is little evidence to establish that transparency over internal affairs records actually has any significant chilling effect on the filing of internal affairs complaints. One need only look at the 15 states[5] that make internal affairs records fully open to the public, or the nearly 25 states[6] that make them partially open, to find that the speculative harms proffered by Defendants and amici simply have not played out in those transparent jurisdictions. One scholar has highlighted several

[5] Those states are Arizona, Colorado, Connecticut, Florida, Georgia, Maine, Minnesota, Montana, North Dakota, Ohio, Tennessee, Utah, Washington, West Virginia, and Wisconsin. See Scott Weiser, Legislation Introduced to Open Police Internal Files to the Public, The Complete Colorado, Jan. 23, 2019.

[6] Robert Lewis, Noah Veltman & Xander Landen, Is Police Misconduct a Secret in Your State, WNYC News (Oct. 15, 2015).

studies that show that transparency in those states has had no negative effects:

> Existing states that have opened records to internal affairs investigations have yet to document an increased problem with the code of silence. In fact, news reports suggest the opposite is true: cities with open access to internal affairs investigations of police officers have the highest marks for integrity in the country. For example, Florida has a policy of complete public access to police personnel and internal affairs files. A study conducted by the National Institute of Justice on police integrity found that of thirty police departments across the country, the St. Petersburg Police Department in Florida had "exemplary" integrity. St. Petersburg officers were more likely to report the misconduct of other officers. Likewise, anecdotal evidence suggests Florida's open records policy has not chilled police from filing complaints about other officers. In Georgia, where internal affairs records are public, a study conducted in 2006 compared measures of the code of silence among Georgia police officers with civilian employees in other industries. Surprisingly, the study found that the police were less likely than civilian employees to maintain a code of silence. This suggests that the concern that making the records public would make the code of silence stronger might be overstated -- police officers in a state where the records are open are about as willing to report the misconduct of fellow officers as civilian employees are willing to with respect to their colleagues.
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> [Macht, Should Police Misconduct Files be Public Record?, at 5 (internal citations omitted).]

See also Nash, No. 05CV4500, 2005 WL 5168322, at *5 ("There are several key factors that lead police officers to be frank and open

in internal affairs investigations, and promises of confidentiality are not among them.").

New Jersey courts have come to similar conclusions. For example, in Asbury Park Press, Inc. v. Borough of Seaside Heights, 246 N.J. Super. 62 (Law. Div. 1990), the court rejected the argument that witnesses to an alleged excessive use of force might refrain from providing information if they knew such information would be publicly disclosed. The court wrote, "Those giving information about the alleged beating in this case were asked to do nothing more than state facts, not opinions or impressions. A fact witness need not fear being forthright, and the self-evaluation process can only benefit from honesty." Id. at 70-71. Similarly, in Groark v. Timek, 989 F.Supp.2d 378 (D.N.J. 2013), the District Court of New Jersey flatly rejected the agency's arguments that releasing the internal affairs files would chill its internal affairs process:

> Atlantic City argues, "Unlimited disclosure will interfere with future internal affairs investigations." Atlantic City also argues that if its IA files are released parties will not be "open, honest and fully forth-coming." To the extent Atlantic City is referring to the citizen population, it underestimates their motivation, will and intelligence. The Court believes the public recognizes that a robust IA process and investigation is necessary to rein in "bad apples." If the release of their names and complaints is necessary to prevent this from occurring, the complaining public should view this as a small price to pay for helping to root out excessive

> force constitutional violations. Faced with a choice of keeping their identities secret and the possibility that their complaints could be "swept under the rug," or disclosure of their complaints that could motivate a police force to protect rather than violate citizens' rights, it is likely complainants would favor disclosure. The Court also believes that most citizens agree with the Court that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman." L. Brandeis, Other People's Money 62 (1933).
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> [Groark, 989 F.Supp.2d at 392 (emphasis added).]

Accord Torres v. Kuzniasz, 936 F. Supp. 1201, 1206 (D.N.J. 1996).

A Best Practices Guide published by the International Association of Chiefs of Police also evidences that there is little harm that results from releasing internal affairs records. As explained by Deputy Chief Beau Thurnauer of the East Hartford Police Department in Connecticut, a state which has open access to internal affairs files:

> I recognize the divergent opinions on the subject of opening files to the public. Because accountability is a major priority in my department, I prefer to make files (except medical information) available to the public. In the five years of running an IA unit, I never had anyone but the press request reports, and I never suffered negative repercussions from permitting it. In the case of Freedom of Information Law[s] or Sunshine Laws, public review of files can be permitted. As much as we may object to the request as intrusion, if the press really wants to get IA files, they will probably be successful. We as Chiefs will always be under scrutiny when we refuse to allow IA file examination. Any

> interference by the department can be construed as hiding or covering up. If officers know that all IA files will be made public unless they contain medical information, they make think twice before committing any infraction.
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> [International Association of Chiefs of Police, Internal Affairs: A Strategy for Smaller Departments 6 (2018).[7]]

Amicus curiae NJSACOP discusses the "blue wall of silence" at length.[8] Although ACLU-NJ does not dispute that the blue wall exists and is a serious challenge that causes significant harm to the public, "[m]ost research on the blue code, however, seems to overstate the extent to which the code of silence is part of the occupational culture of the police" and civilian employees or members of other professions are just as prone, if not more prone, to fail to report misconduct by their colleagues. Kim Loyens, Why Police Officers and Labor Inspectors (Do Not) Blow the Whistle: A Grid Group Cultural Theory Perspective, 36 Policing: An Int'l

[7] Available online at www.theiacp.org/sites/default/files/2018-08/BP-InternalAffairs.pdf

[8] NJSACOP discusses the Mollen Commission Report at length in its brief. That report, written 25 years ago, identified a wide variety of problems leading to the NYPD's corruption problem. Notably, this year NYPD Police Commissioner James P. O'Neill has advocated for disclosure of internal affairs records. See James P. O'Neill, Let NYC See Police Records, Now: We Must Reform State Law Keeping Disciplinary Actions Secret, N.Y. Daily News, Feb. 7, 2019 ("For neighborhood policing to maximize its potential . . . there must be mutual trust for the police and the public. Nothing builds trust like transparency and accountability.").

Journal of Police Strategies & Mgm't 29 (2013). See also Gary R. Rothwell, Whistle-Blowing and the Code of Silence in Police Agencies, 53 Crime & Delinquency 605 (2017) ("Contrary to popular belief, the results show that police are slightly less inclined than civilian public employees to subscribe to a code of silence."). The answer to fighting the code of silence in police agencies or other government agencies is transparency, not secrecy; clear written policies that require officers/employees to report misconduct and impose serious discipline when an officer/employee fails to do so; and strong laws that prohibit retaliation and protect whistleblowers. See Macht, Should Police Misconduct Files be Public Record?, at 5 ("The answer to the problem of the code of silence is not to further insulate the police. Rather, departments must create policies, and the public should pressure elected officials to see these policies are created and enforced, to attack the code of silence.").

Moreover, the argument that the internal affairs process is currently an entirely confidential process is undermined by the fact that police officers often know about ongoing investigations and the media frequently reports about them. See, e.g., Sergio Bichao, NJ Man Reported Cops Boozy Antics - Then They Retaliated, Officials Say, N.J. 101.5, Sept. 17, 2019 (reporting that officers retaliated against a complainant); Katie Sobko, Hasbrouck Heights Police Chief Faces Assault Investigation, The Record, Aug. 8, 2019

(reporting internal affairs investigation into police chief's alleged assault). This is in part due to rumors circulating around police departments;[9] because police departments selectively release details about internal affairs investigations; because personal cell phones, police body cameras, and police dash cameras capture potential misconduct that becomes subject to an internal affairs investigation; and because there is nothing that prohibits a complainant from discussing his or her internal affairs complaint with others or with the media. See, e.g., Rebecca Everett, Prosecutor Takes Over Elizabeth Police Internal Investigations After New Complaint - This One Against The Chief, NJ.com, April 23, 2019 (reporting on allegations that City of Elizabeth Police Director used the "N Word" because complainants forwarded their complaint to the media); Eric Obernauer, Vernon Police Officer Cleared In Dog Shooting, New Jersey Herald, Aug. 25, 2019 (reporting existence of internal affairs investigation after police body camera captured officer shooting dog); Bill Hutchinson, NJ Transit Police Officer Under Investigation After Video Shows Him Allegedly Dragging And Punching Man Outside Trenton Station, ABC News, Mar. 11, 2019 (agency states matter under internal affairs investigation after camera captures officer's attack on man). According to one study of three police departments

[9] The AG IA Policy also requires police departments to notify an officer as soon as a complaint is filed against him or her. [Da16].

determined to have "high integrity," even in agencies where internal affairs records were confidential, "the confidentiality of such proceedings was breached regularly . . . be it by the officer who was accused, the officer who made the accusation, the officers who served as witnesses, or those who sat in judgment." Klockars, Ivković, & Haberfeld, Enhancing Police Integrity at 258. According to the study's authors:

> **[T]he laws that seek to shield officers from exposure in cases of discipline fail miserably in doing so.** Officer anonymity cannot be preserved from fellow officers or an aggressive press. As the "true story" of the incident is spread through the department underground, it inevitably becomes infused with assorted distortions and invites speculation on racial, gender, or personal prejudice or preference. Rumors of secret deals abound and the questions of inconsistency in the application of discipline develop because of the inability to accurately compare similar cases, prompted in turn by the lack of familiarity with all the details of the cases.
>
> Departmental refusals to comment on the grounds that such incidents are protected "personnel matters" invariably create suspicions outside of the agency, and tend to exacerbate perceptions that the agency is attempting to hide something, justified or not. Similarly, if the department does not speak up officially, suspicions may be created inside the agency as well; the disciplined police officer is not bound by the rules of confidentiality in "personnel matters" in his own case and may well start to spread an adjusted version of the story.
>
> . . .

> **Wherever possible, and to the fullest extent possible . . . restrictive laws . . . should be replaced by sunshine in order to enhance police integrity.**
>
> [Id. at 259 (emphasis added).]

In other words, despite the fact that Defendants and the amici law enforcement associations predictions of significant harm if internal affairs investigation information is released to the public, the reality is that it is often already released and little harm has occurred.

The code of silence is best combatted by transparent internal affairs departments rather than a secretive process where police officers investigate other officers and the public never knows the outcome of such investigations. Therefore, the argument that members of the public or other police officers would refrain from filing complaints or cooperating as witnesses if internal affairs records are exposed is unfounded.

2. Release of the Responsive Records Will Not Chill Future Self-Evaluation

Defendants suggest that disclosure of internal affairs records will hamper their "self-evaluation," but there is little support for this argument either.

First, police departments have no choice but to conduct internal affairs investigations because they are obligated to do so according to the Attorney General's Internal Affairs Policy (AG IA Policy) and local policies. Therefore, it is absurd to suggest

that agencies might refrain from engaging in this level of "self-evaluation" if their internal affairs reports see the sunlight. See Payton v. N.J. Tpk. Auth., 148 N.J. 524, 547 (1997) ("[W]hen a deliberating body is required by law to prepare an honest report, replete with self-evaluation, we do not assume that that body will shirk its responsibilities in order to hide the truth."); Asbury Park Press, 246 N.J. Super. at 70 ("The law enforcement officers themselves, if requested, obviously have a duty to make the reports so agency functions could not be hampered in that regard.").

Second, it is troublesome that a law enforcement agency would even make an argument that it might be "chilled" from thoroughly investigating its officers if there is transparency over the facts that are uncovered during its investigations. The District Court of New Jersey has been deeply critical of such arguments, stating: "**Shame on any municipality if it 'chills' its investigation of potential police misconduct because it is concerned about what a thorough, unbiased and objective investigation would reveal.**" Groark, 989 F.Supp.2d at 392 (emphasis added).

Thus, contrary to Defendants' arguments, transparency will simply not impact the internal affairs self-evaluation process in any significant way. See Payton, 148 N.J. at 546–47 ("It is not so clear that disclosure inevitably will discourage candid self-criticism."). The harms that Defendants and the law enforcement association amici predict are purely speculative and not supported

by the experiences of numerous other states that have opted for transparency over secrecy.

II. THE ATTORNEY GENERAL'S INTERNAL AFFAIRS POLICY AND PROCEDURES DO NOT EXEMPT DOCUMENTS FROM ACCESS UNDER THE OPEN PUBLIC RECORDS ACT

The trial court ruled below that although the records are available under the common law, they are statutorily exempt under OPRA. Respectfully, the trial court erred in coming to this conclusion, as it did not consider the plain language of OPRA, the plain language of the AG IA Policy, or the public's interest in access under OPRA.

A. The Attorney General Cannot Exempt Documents From Access Under OPRA Through An Un-promulgated Policy

Although the Legislature has given the Attorney General the authority to supervise law enforcement agencies throughout the State, the Legislature has **not** given the Attorney General statutory authority to exempt government records from access under OPRA. In fact, OPRA expressly says that only the following types of laws may create an exemption: a "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-1. Furthermore, OPRA's anti-abrogation provision also makes it clear that only specific types of laws may designate a record

confidential and not subject to access under OPRA:

> a. The provisions of this act . . . shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; 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.
>
> b. The provisions of this act . . . 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, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.
>
> [N.J.S.A. 47:1A-9.]

Attorney General policies are conspicuously **not** on that list and therefore cannot create an exemption.

OPRA's legislative history further evidences that the Attorney General may only exempt records via duly promulgated regulations, not simply by issuing a written policy to subordinate law enforcement agencies. In a March 2000 public hearing to discuss the legislative bills that would become OPRA, legislators discussed the fact that the Governor would be issuing executive orders simultaneously with OPRA's effective date to serve as temporary exemptions until regulations could be promulgated. See

Public Hearing before Senate Judiciary Comm., Senate Bill Nos. 161, 351, 573, and 866, 209th Legislature (Mar. 9, 2000), at 27 ("I think that the answer probably ought to be directed, I would think, to the Attorney General's Office – say 'How fast could you come up with the appropriate executive orders to do that?'"). [Aa14]. In response, Governor McGreevey did just that.

On July 5, 2002, just days before OPRA was to take effect, Governor McGreevey signed Executive Order No. 21, which temporarily exempted hundreds of documents from access until administrative agencies had time to promulgate regulations through the formal administrative rule-making process. See Slaughter v. Gov't Records Council, 413 N.J. Super. 544, 551 (App. Div. 2010) (discussing this "stop gap" procedure to exempt records until formal regulations could be duly promulgated). Among the many temporary exemptions was one that exempted:

> Any government record where the inspection, examination or copying of that record would substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism.
>
> [Executive Order No. 21(1)(a).]

Executive Order No. 21 simultaneously directed the Attorney General to formally promulgate regulations to make the exemption permanent:

> b. **The Attorney General is hereby directed to promulgate,** in consultation with the Domestic Security Preparedness Task Force, **a regulation to govern the determination of which government records shall be deemed to be confidential pursuant to subsection (a).**
> c. Public agencies are hereby directed to handle all government records requests in a manner consistent with the standard contained in subsection (a) of this Order, **until the regulation is proposed by the Attorney General pursuant to subsection (b).**
>
> [Executive Order No. 21, Para 1(b) and (c).]

A month later, Governor McGreevey issued Executive Order No. 26. In an August 13, 2002 press release, Governor McGreevey explained that he had worked with lawmakers, newspapers, and advocacy organizations to significantly narrow the universe of records that were temporarily exempted from access. [Aa15]. McGreevey noted that, "This is how our process is designed to work. When government proposes regulations through the Administrative Procedures Act, those proposals are open to comment from the public. Where changes are appropriate, changes are made." Ibid. The temporary security exemption provided in Executive Order No. 21(1)(b) remained and Governor McGreevey explained:

> My Executive Order also addresses serious security matters that are of concern to all of us. Information can be exempted from disclosure if it would "substantially interfere" with the state's ability to protect our citizens, or would "materially increase" the risk of acts of terrorism. **This is a high standard to meet, and the Attorney General is**

> **already engaged in developing detailed regulations to ensure security concerns are addressed.** We will keep the Press Association and public interest groups engaged in this process as we move forward.
>
> [Aa16 (emphasis added).]

Ultimately, the Attorney General promulgated N.J.A.C. 13:1E-3.2(a)(5), which mirrors the temporary exemption in Executive Order No. 21. If the Attorney General had the statutory authority to exempt records via a mere policy, there would have been no need for the temporary exemption to be provided by Executive Order No. 21 or the formal promulgation of N.J.A.C. 13:1E-3.2(a)(5). Moreover, as Governor McGreevey so aptly recognized, permitting the Attorney General to exempt a document outside the Administrative Procedures Act would have deprived the public of advance notice of the proposed exemption, "broad participation of interested persons," the "presentation of the views of the public" and "the opportunity for continuing comment on the proposed" exemption before final determination. Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 331 (1984) (citing N.J.S.A. 52:14B-4).

Accordingly, because Attorney General policies are not on the list of the types of laws that can create an exemption under OPRA, and the legislative history makes its abundantly clear that power was not granted to the Attorney General, the AG IA Policy cannot exempt records from OPRA's reach.

B. The Confidentiality Provisions Of The AG IA Policy Are Not Mandatory And Do Not Even Attempt To Exempt Records From OPRA

Even assuming arguendo that an un-promulgated policy of the Attorney General could create an exemption, the AG IA Policy fails to actually do so, and its confidentiality provisions do not prohibit law enforcement agencies from responding to an OPRA request.

There is no legal requirement that law enforcement agencies adopt the AG IA Policy in its entirety. Although the trial court cited to N.J.S.A. 40A:14-181 to suggest that the AG IA Policy had the force of statutory law, that statute merely requires local law enforcement agencies to implement guidelines which are *"consistent"* with the AG IA Policy, but not **identical** to them. Previously, this court has noted that "[N.J.S.A. 40A:14-181] itself says nothing about confidentiality of investigative documents. Rather, it requires that all law enforcement agencies adopt 'guidelines' that are consistent with [. . .] the [Internal Affairs] Policy." Spinks v. Twp. of Clinton, 402 N.J. Super. 454, 461-62 (App. Div. 2008). This court went on to state: "The [AG IA Policy] itself encompasses in its eighty-seven pages all aspects of internal investigations, of which the section addressing record-keeping and confidentiality comprises just five pages."[10]

[10] At the time the Legislature adopted N.J.S.A. 40A:14-181, the AG IA Policy consisted of 31 pages and contained *only a single*

Ibid. The court therefore held that confidentiality requirements noted in the AG IA Policy could not bar access to various internal affairs documents in the context of Rule 1:2-1. Id. at 461.

Importantly, the "Introduction" to the AG IA Policy actually states that each law enforcement agency has a wide degree of latitude as to how it will implement its internal affairs policies. AG IA Policy at 3-4. [Da4]. After explaining that agencies have significant discretion in determining the precise internal affairs policies and procedures that they adopt, the AG IA Policy then lists the few mandatory components that agencies must adopt. Specifically, the Introduction states:

> [This] policy contains several mandates that, at the Attorney General's direction, every law enforcement agency must implement. However, **the manner in which these agencies must implement these mandates is a decision that is left to the individual law enforcement agency's discretion**. For instance, every agency must establish an internal affairs function. But, the manner in which the mandate is satisfied is a decision left to the discretion of the individual agencies. Individual agencies shall decide, based on the characteristics of their jurisdiction and the workload of their agency, whether the internal affairs function is a full- or part-time unit and how many officers are assigned to work in

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paragraph relating to confidentiality. [Aa38]. This makes it abundantly clear that the Legislature, in enacting N.J.S.A. 40A:14-181, was not focused on confidentiality but rather the procedural due process components of the policy. In fact, N.J.S.A. 40A:14-181 states that the policies each agency adopts "shall be consistent with any tenure or civil service laws, and shall not supersede any existing contractual agreements."

that unit.

Other policy requirements that the Attorney General has determined are critical and **must** be implemented by every law enforcement agency include the following:

- Each agency must establish by written policy an internal affairs function.

- Each agency must accept reports of officer misconduct from any person, including anonymous sources, at any time.

- Where a preliminary investigation indicates the possibility of a criminal act on the part of the subject officer, the county prosecutor must be notified immediately. No further action should be taken, including the filing of charges against the officer, until the county prosecutor so directs.

- The agency must notify the county prosecutor immediately of any use of force by an officer that results in death or bodily injury.

- Each agency must thoroughly and objectively investigate all allegations against its officers.

- Each agency must notify its officers of complaints and their outcomes.

- Each agency must notify complainants of the outcome of their complaint.

- Each agency must establish and maintain an internal affairs records system which, at a minimum, will consist of an internal affairs index system and a filing system for all documents and records. In addition, each agency shall establish a protocol for monitoring and tracking the conduct of all officers.

> • Each agency must submit quarterly reports to the county prosecutor summarizing the allegations received and the investigations concluded for that period. Each county prosecutor shall establish a schedule for the submission of the reports and specify the content of the reports.
>
> • Each agency must annually release reports to the public summarizing the allegations received and the investigations concluded for that period. These reports shall not contain the identities of officers or complainants. In addition, each agency shall periodically release a brief synopsis of all complaints where a fine or suspension of 10 days or more was assessed to an agency member. The synopsis shall not contain the identities of the officers or complainants.
>
> • Each agency shall ensure that officers assigned to the Internal affairs function complete training as mandated by the Division of Criminal Justice.
>
> **The above represent critical performance standards that every county and municipal law enforcement agency must implement.**
>
> [AG IA Policy at 4-5 (emphasis added) [Da4-Da5].]

Notably, the confidentiality provisions regarding internal affairs files that are laid out in the AG IA Policy are conspicuously absent from this list of mandatory requirements.[11]

Accordingly, any provision of the AG IA Policy related to confidentiality of records could not create an exemption under

[11] In early December 2019, the Attorney General made substantial revisions to the AG IA Policy. See Aa55. None of the revisions impact this case. Notably, the new policy similarly does not list confidentiality as a mandatory requirement. [Aa59-Aa62].

OPRA because the AG IA Policy fails to clearly mandate that agencies must comply with those provisions and fails to expressly state that such documents shall not be released in response to an OPRA request. In fact, OPRA is not referenced once in the AG IA Policy. Where a purported exemption is unclear or ambiguous, our courts refuse to apply it. See Shuttleworth v. City of Camden, 258 N.J. Super. 573, 592 (App. Div. 1992) ("In any event, given the clear 'public policy' embodied in N.J.S.A. 47:1A-1, we cannot read the Executive Orders, in the absence of more specific language, to provide an exception to the requirements otherwise embodied in [OPRA.]."); Serrano, 358 N.J. Super. at 366 (even where a public agency "could be said to have raised an ambiguity in the statute as to whether [it] could so limit production of the [records], it is plain that, as we have already noted, doubts on whether a limitation to access exists must be resolved 'in favor of the public's right of access'")(citation omitted).

The AG IA Policy's purported confidentiality provisions thus do not render the responsive records exempt from access under OPRA, even assuming arguendo that an Attorney General policy could create an exemption.

C. OPRA Exemptions Can Only Be Created "For The Protection Of The Public Interest" And The Public's Interest Is In Disclosure

Even if an Attorney General policy could exempt a record from access, which it cannot, the AG IA Policy would still not exempt

the responsive records. OPRA permits exemptions to be created only for "**for the protection of the public interest**." N.J.S.A. 47:1A-1 (emphasis added). This language, carried over from the Right to Know Law (RTKL), means that the right to exempt a record is not unlimited and that an exemption cannot be arbitrarily adopted. As to the right to exempt records, the Supreme Court has said that:

> we agree with the Appellate Division that the Legislature did not intend that the power of excluding records from the public domain, given to the Governor, and by him delegated to departments in the executive branch of government, should be unlimited. **Rather we concur in the view that the power was intended to be exercised only when necessary for the protection of the public interest.**
>
> [Irval Realty Inc. v. Bd. of Pub. Util. Comm'rs, 61 N.J. 366, 374 (1972) (granting access to investigative reports relating to gas explosions despite a regulation that exempted them).]

Accordingly, courts do not apply purported exemptions where they contradict the public's interest. Shuttleworth, 258 N.J. Super. at 593 ("Our courts have held that the power of an administrative agency to limit [RTKL] access is restricted to reasonable time and place restrictions and that they can deny access 'only when necessary for the protection of the public interest.'")(citation omitted); Accident Index Bureau v. Hughes, 83 N.J. Super. 293, 301 (App. Div. 1964) (expressing doubt that the Legislature intended to grant agencies the authority to exempt a record from public

access that was accessible before the RTKL was enacted and granting access to the record), aff'd sub nom., 46 N.J. 160 (1965)

When courts consider provisions of OPRA that contemplate "the public's interest," they consider not only the agency's interest in confidentiality, but also the public's interest in transparency. See N. Jersey Media Grp. Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 574 (2017) (stating that "the public interest" "encompasses various strands" and requires considering both the need for confidentiality and the benefits of transparency). As demonstrated in Point I above, this balance clearly weighs in favor of transparency because public access to internal affairs files benefits both the public and police officers.

D. The Court Has Authority to Review and Reverse the Police Chief's Decision Not To Release The Records For 'Good Cause"

On its face, the AG IA Policy does not render internal affairs records exempt from access under OPRA. In fact, as noted above, it does not even mention OPRA once.[12] While the policy generally requires internal affairs files to be safely stored so they are not easily accessed by any employee of the agency (including the person being investigated), the policy does provide mechanisms for public access. Specifically, the AG IA Policy states that the Prosecutor or Attorney General may grant access to internal

[12] Notably, the December 2019 revised AG IA Policy also never mentions OPRA.

records. Chiefs of Police can also grant access to internal affairs records for "good cause." Finally, courts can order the release of such records. AG IA Policy at 42.

In other words, the AG IA Policy makes it so that not just any officer or departmental employee can dig through internal affairs records without permission to do so. It also ensures that a records custodian does not grant public access to internal affairs records as a matter of course without taking the status of the investigation or implications of the release into consideration. Rather, per the policy, the Prosecutor, Attorney General, or Chief of Police should review OPRA requests for internal affairs files and grant access to such records when there is no lawful basis for withholding them.[13]

This Court has authority to review Defendants' decision not to release the internal affairs records for "good cause." New Jersey's "special constitutional structure" makes government actions **inherently reviewable** by the judiciary and it "is universally recognized that, as an aspect of the courts' duty to

[13] For example, access might be denied where an investigation is ongoing and it would be inimical to the public interest to release the records. N.J.S.A. 47:1A-3(a). Additionally, because internal affairs investigations often involve claims of excessive force, there may be medically sensitive information that should be redacted or withheld. N.J.S.A. 47:1A-1.1. Finally, other exemptions might shield the records from access or require redactions, such as where the records contain information regarding domestic violence victims or security-related information.

ensure fundamental fairness, they will root out arbitrary governmental action." State v. Leonardis, 73 N.J. 360, 376 (1977) (noting that Article VI "confers prerogative writ jurisdiction on the Judiciary. This authority has been broadly construed to give the court system review power over administrative action, inferior governmental tribunals, and 'other public officers.'"). See also Lyndhurst, 229 N.J. at 572 (rejecting State's argument that because N.J.S.A. 47:1A-3(b) gave it discretion to withhold information about crimes that its decision was not subject to judicial review).

Therefore, the trial court had inherent authority to review Defendants' decision not to release the records for "good cause" in response to a valid OPRA request. Ultimately, the trial court ordered release of the records, but only pursuant to the common law. This Court should reverse the decision to deny access under OPRA and release the records pursuant to OPRA, as the Police Chief erred in determining there was not "good cause" to do so.

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT ACCESS SHOULD BE GRANTED UNDER THE COMMON LAW RIGHT OF ACCESS

Defendants and the amici law enforcement associations argue that the trial court erred in granting access to the requested internal affairs records under the common law right of access. To avoid being repetitious, the Amici join in Plaintiff's arguments and rely primarily upon the arguments made above in Point I to establish why the common law balancing test should weigh in favor

of transparency. That said, Defendants' assertion that internal affairs files are akin to personnel files and that police officers have a privacy interest in keeping them private requires a response.

First, according to the AG IA Policy itself, internal affairs are **not** personnel records and indeed shall not be kept with personnel records. See AG IA Policy at 45 ("Personnel records are separate and distinct from internal affairs investigation records, and internal affairs investigation reports shall **never** be placed in personnel records.") [Da45]. Only where a complaint is sustained and discipline is imposed will there be any records placed into an officer's personnel file and, even then, "the only items to be placed into the employee's personnel file are a copy of the administrative charging form and a copy of the disposition form." Ibid.

Second, although the Amici are unaware of any published New Jersey opinion which reached the issue of whether internal affairs records are "personnel records," many courts in other jurisdictions have concluded that they are not. For example, a Massachusetts appellate court concluded that internal affairs records were beyond the scope of what the legislature had contemplated when it created a personnel records exemption. Worcester Telegram, 787 N.E.2d at 608. The court found:

> An internal affairs investigation is a

formalized citizen complaint procedure, separate and independent from ordinary employment evaluation and assessment. Unlike other evaluations and assessments, the internal affairs process exists specifically to address complaints of police corruption (theft, bribery, acceptance of gratuities), misconduct (verbal and physical abuse, unlawful arrest, harassment), and other criminal acts that would undermine the relationship of trust and confidence between the police and the citizenry that is essential to law enforcement. The internal affairs procedure fosters the public's trust and confidence in the integrity of the police department, its employees, and its processes for investigating complaints because the department has the integrity to discipline itself. A citizenry's full and fair assessment of a police department's internal investigation of its officer's actions promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights. See Globe Newspaper Co. v. Police Commr. of Boston, 648 N.E.2d 419 (Mass. 1995). Disciplinary action is but one possible outcome; exoneration and protection of the officer and the department from unwarranted criticism is another.

We reject the city's contention that, viewed as a whole, the entire internal affairs file is exempt "personnel [file] or information" because it is a "disciplinary report" relative to a specific complaint about a specific police officer's actions. . . .

. . . It would be odd, indeed, to shield from the light of public scrutiny as "personnel [file] or information" the workings and determinations of a process whose quintessential purpose is to inspire public confidence.

[Worcester Telegram, 787 N.E. 2d at 607-08 (footnote omitted).]

Similarly, the Maryland Court of Appeals was asked to determine whether internal affairs documents pertaining to allegations of racial profiling against specific state troopers could be withheld as personnel records under the state's public records law. Maryland Dep't of State Police v. Maryland State Conf. of NAACP Branches, 190 Md. App. 359 (Md. Ct. Spec. App. 2010). The court flatly rejected the argument of the State Police and held:

> Racial profiling complaints against Maryland State Troopers do not involve private matters concerning intimate details of the trooper's private life. Instead, such complaints involve events occurring while the trooper is on duty and engaged in public service. As such, the files at issue concern public actions by agents of the State concerning affairs of government, which are exactly the types of material the Act was designed to allow the public to see. A State Trooper does not have a reasonable expectation of privacy as to such records.
>
> [Maryland Dep't of State Police, 190 Md. App. at 368 (internal citation omitted).]

Likewise, in Gekas v. Williamson, 393 Ill. App.3d 573, 583 (Ill. App. Ct. 2009), an Illinois appellate court found that the personnel records exemption to the state's freedom of information law did not reach documents pertaining to allegations of excessive force. "Internal-affairs files that scrutinize what a police officer did by the authority of his or her badge do not have the personal connotations of an employment application, a tax form, or

a request for medical leave." Id.

Third, as a police officer - especially a law enforcement executive – Seidle had a diminished privacy interest in any records that relate to how he conducted public affairs. See New Jersey Transit PBA Local 304 v. N.J. Transit Corp., 151 N.J. 531, 561 (1997) ("[B]ecause of their law enforcement status, transit police officers have a diminished expectation of privacy."); Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 189 (1993) ("As a police officer, plaintiff had a diminished expectation of privacy"); Hart v. City of Jersey City, 308 N.J. Super. 487, 493 (App. Div. 1998) ("police officers, because they occupy positions of public trust and exercise special powers, have a diminished expectation of privacy."); Springfield Twp. v. Pedersen, 73 N.J. 1, 5 (1977) (courts treat police officers as "public officers as opposed to employees of or holders of positions in the government").[14]

[14] Courts across the nation have come to the same conclusion. See, e.g., Rutland v. City of Rutland, 48 A.3d 568, 572 (Vt. 2012) (there is "no legitimate reasonable expectation of privacy in records that concerned how [police] discharged their official duties"); The Billings Gazette v. City of Billings, 267 P.3d 11, 13 (Mont. 2011) (employees in "positions of trust", such as police officer, have no reasonable expectation of privacy regarding their wrongdoing); Kroeplin v. Wis. Dep't of Nat. Res., 725 N.W.2d 286, 301 (Wis. Ct. App. 2006) ("When individuals become public employees, especially in a law enforcement capacity, they should expect closer public scrutiny, which includes the real possibility that disciplinary records may be released to the public."); Cowles Pub. Co. v. State Patrol, 748 P.2d 597, 605 (Wash. 1988) ("[D]isclosure of the officers' names would not invade of the

Therefore, Defendants are incorrect; the internal affairs records at issue are not personnel records and Seidle has no privacy interest in them.[15]

IV. THE TRIAL COURT CORRECTLY CONCLUDED THAT PLAINTIFF WAS ENTITLED TO ATTORNEYS' FEES PURSUANT TO THE COMMON LAW

The Amici agree with Plaintiff that in Mason v. City of Hoboken, 196 N.J. 51 (2008), the Supreme Court ruled that the catalyst theory applies to common law records cases and that the language is not dicta and is binding upon this Court. See Pb42-53. Even if that language was not binding, however, there are other legal justifications to award attorneys' fees to requestors in common law records cases.

Although attorneys' fees traditionally have not been awarded in common law records cases,[16] the Amici are unaware of any

officers' right of privacy because . . . matters of police misconduct are of legitimate concern to the public."); Rinsley v. Brandt, 446 F. Supp. 850, 857-58 (D. Kan. 1977) ("A public official has no right to privacy as to the manner in which he conducts his office.").

[15] Even if Seidle did have a privacy interest, however, that would not automatically preclude disclosure. Where a defendant presents a colorable privacy claim, courts engage in the balancing test set forth in Burnett v. County of Bergen, 198 N.J. 408 (2009), which is similar to the common law balancing test. As argued earlier in this brief and in Plaintiff's brief, that balancing test weighs in favor of disclosure.

[16] In most cases, common law fees were never pursued by the plaintiff and thus the court never addressed the issue. As detailed in Plaintiff's brief, several lower courts have awarded attorneys' fees in common law cases and even those cases that did not award fees, the courts suggested that there could be an award

published opinion that analyzes the issue and concludes that attorneys' fees are not available. Beyond Mason, it appears that the only other published opinion in which a court was confronted with the question of whether fees might be available pursuant to the common law is Shuttleworth, 258 N.J. Super. 573. There, the Appellate Division dealt with a rather poorly drafted statutory and regulatory scheme relating to public access to autopsy reports. In lieu of determining whether the records were public records under the RTKL, the court opted instead to avoid that question and grant access under the common law. Id. at 594. The requestor argued it was entitled to attorneys' fees and costs as a result of securing access to the autopsy report. The court also avoided answering that question, stating:

> [I]ssues under the RKL may never be addressed with respect to documents released under the common law. This is not the occasion to decide if the RKL can be interpreted to permit fee and cost recovery thereunder when the relief requested under the RKL is granted under another theory. . . . When the remand proceedings have been completed and all disclosure has been given, plaintiffs can renew their application for fees and costs and develop these issues.[17]

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of fees under the common law in certain circumstances. See Pb49-50.

[17] ACLU-NJ was unable to locate any subsequent decision, published or unpublished, regarding whether the plaintiff ever pursued the legal fees.

> [Shuttleworth, 258 N.J. Super. at 598 (internal citations omitted).]

The question does not seem to have been addressed in a published opinion again until Mason and the Supreme Court concluded in that case that claims for attorneys' fees under the common law are subject to the same test as claims under OPRA. 196 N.J. at 79.

Notably, the public's right to access public records has significantly expanded over the past two decades, as has the right to recover legal fees in a proceeding challenging the denial of public records requests. See Lyndhurst, 229 N.J. at 556 ("OPRA replaced and significantly expanded upon the RTKL."). Under the RTKL, which was enacted in 1963, judges had the *discretion* to award attorneys' fees to a prevailing records requestor, but that amount "was not to exceed $500." N.J.S.A. 47:1A-4 (repealed by OPRA, L. 2001, c. 404). As this court explained:

> It is also clear that the repeal of N.J.S.A. 47:1A-4, shortly after N.J.S.A. 47:1A-6 and -7 were adopted, was a renunciation of a narrower attorney's fees rule (i.e., embodying a prerequisite for a court order requiring disclosure, a limitation to $500, and a discretionary authority in the trial court), in favor of the broader, mandatory standard of entitlement based on the sole test of "prevail[ing] in any proceeding," and subject to a rule of reasonableness with no expressed monetary limitation.
>
> [Teeters v. Div. of Youth & Family Servs., 387 N.J. Super. 423, 433 (App. Div. 2006).]

Thus, when the Legislature enacted OPRA in 2002, it not only made it the "public policy of this State" that "government records shall be readily accessible for inspection, copying, or examination," but it also made mandatory fee-shifting in government records cases the public policy of this State as well.

Defendants argue that the American Rule prohibits fee-shifting in a common law records case, but our courts have always recognized that "[w]hen the policies and values that undergird a principle of law have changed, the law also should change." Vega by Muniz v. Piedilato, 154 N.J. 496, 516 (1998) (citing Funk v. United States, 290 U.S. 371, 383 (1933)). This is true even with fee-shifting because "[t]he American Rule is not a sacred creed" and it has been modified numerous times "to promote equity, deter wrongful conduct, and encourage lawyers to undertake cases that further the public interest." In re Estate of Folcher, 224 N.J. 496, 516 (2016).

> The American Rule is a common-law principle, not an unalterable commandment. The common law is an expression of public policy and social values. See Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 435 (1993). As our public policy matures and our social values evolve, so must the common law, ibid., **and so must the American Rule.**
>
> [Folcher, 224 N.J. at 519 (emphasis added).]

Accordingly, our Supreme Court has expanded the common law numerous times and permitted fee-shifting "when important public policy

concerns are involved" or when "the interest of equity has demanded it." In re Niles, 176 N.J. 282, 297-298 (2003); see also Red Devil Tools v. Tip Top Brush Co., 50 N.J. 563-65 (1967) (awarding attorneys' fees to serve as a deterrent and as an equitable remedy to compensate plaintiff for its actual damages throughout the litigation).

There is no doubt that "important public policy concerns are involved" in a common law records case, especially one involving access to records about potential police misconduct. See Point I; Lyndhurst, 229 N.J. at 574 (discussing importance of transparency where officers are investigated for use of force). As the New Jersey Supreme Court has repeatedly recognized, "our government works best when its activities are well-known to the public it serves." Burnett, 198 N.J. at 414. See also Paff v. Twp. of Galloway, 229 N.J. 340 (2017) ("An informed citizenry is essential to a well-functioning democracy.").

The Supreme Court has also recognized that OPRA's fee-shifting provision permits records requestors to find competent counsel, which in turn makes our government more transparent and accountable to the public. See New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corrs., 185 N.J. 137, 153. That same principle applies to common law records requests – permitting requestors to secure competent counsel only benefits the public at

large.[18] As Plaintiff so aptly states in its brief, "there is no logical basis for permitting a fee award to a requestor who prevails in a request for government records under OPRA but not to one who prevails in a request made under the common law." [Pb54].

Even if Defendants were correct that the common law has not traditionally provided for an award of attorneys' fees to records requestors, it is time to discard that alleged old rule and replace it with a new rule that recognizes that transparency and fee-shifting in public records cases is the public policy of this state and that police transparency in particular significantly benefits the public at large. In the interim, the trial court correctly applied the plain language of Mason, applied the catalyst theory to Plaintiff's common law claim, and used its discretion to determine a reasonable amount of fees owed to Plaintiff's counsel. This Court should affirm that decision.

CONCLUSION

For all of the reasons argued above, this Court should reverse in part and affirm in part. This Court should reverse the trial

[18] For example, in Lyndhurst, the Supreme Court recognized "the public's substantial interest" in disclosure of dash cam videos of police-involved shootings. 229 N.J. at 580. Even though dash camera recordings are technically exempt under OPRA's criminal investigatory records exemption, the Supreme Court ruled that they should be released pursuant to the common law. Ibid. Without a fee-shifting provision under the common law, very few reporters or members of the public will have the ability to retain a lawyer to pursue access to such videos, undermining the public's interest.

court's decision that the internal affairs records are not subject to OPRA, affirm the trial court's decision that the internal affairs records are accessible pursuant to the common right of access, and affirm the award of attorneys' fees pursuant to the common law right of access.

Respectfully Submitted,

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January 7, 2019

/s CJ Griffin
CJ GRIFFIN, ESQ.

GANNETT SATELLITE INFORMATION NETWORK, LLC d/b/a ASBURY PARK PRESS, Plaintiff/Respondent, v. TOWNSHIP OF NEPTUNE, Defendant/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-4006-18-T3 On Appeal from: Superior Court of New Jersey, Law Division, Monmouth County: Docket No. MON-L-2616-17 Sat Below: Hon. Lisa P. Thornton, A.J.S.C.

APPENDIX OF AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY, LIBERTARIANS FOR TRANSPARENT GOVERNMENT, LATINO LEADERSHIP ALLIANCE OF NEW JERSEY, NEW JERSEY FOUNDATION FOR OPEN GOVERNMENT

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TABLE OF APPENDIX

2005 WL 5168322 (Colo.Dist.Ct.) (Trial Order)
District Court of Colorado,
City of Denver.
Denver County

Stephen NASH, et al., Plaintiffs,
v.
Gerald WHITMAN, et al., Defendants,
Adolph Chavez, et al., Intervenors.

No. 05CV4500.
December, 2005.

Ctrm: 5

Findings of Fact and Conclusions of Law

Catherine A. Lemon, District Court Judge.

INTRODUCTION

THIS MATTER is before the Court upon Plaintiffs' request for judicial review of Defendants' refusal to disclose to Plaintiffs the documents contained in two files that were generated by the Internal Affairs Bureau ("IAB") of the Denver Police Department ("DPD") during investigations of alleged police misconduct related to the "Spy Files" controversy. Plaintiffs sought disclosure of the files pursuant to the Criminal Justice Records Act ("CJRA"), § 24-72-301, *et seq.,* C.R.S., and the Colorado Open records Act ("CORA"), § 24-72-201, *et seq.,* C.R.S. Plaintiffs have not requested a declaration that all IAB files should be available upon demand. Defendants refused to disclose the files, with the exception of a handful of documents that had been received from the Plaintiffs. Defendants provided a "Vaughn Index," in which they set forth their asserted grounds for nondisclosure of each document in the files. Both sides have substantially complied with the procedural requirements of the applicable statutes.

At the inception of the case, the documents sought by Plaintiffs included a large volume of emails exchanged within DPD that were alleged to be inappropriate in a variety of ways. The Plaintiffs dropped their request for disclosure of the emails after the Colorado Supreme Court's decision in *Denver Publishing Co. v. Board of County Commissioners of the County of Arapahoe, Colorado,* 121 P.3d 190 (Colo. 2005).

FINDINGS OF FACT

Plaintiffs Stephen Nash and Vickie Nash are community activists who are involved with an organization known as CopWatch. They were among the people who learned that the Intelligence Unit of the DPD had monitored their peaceful protest activities and kept files on them.

On or about July 1, 2002, during the pendency of litigation regarding the larger "Spy Files" controversy, the Nashes filed a written complaint alleging improper monitoring by DPD of their legal expressive activities. By letter from Chief Gerald Whitman dated March 16, 2004, the Nashes were informed by DPD that their complaint had been investigated by the IAB and that "there was a preponderance of evidence to support the sustaining of violations." The letter further stated that the investigation of the Nashes'

complaint had resulted in changes to DPD policy and procedures. The letter did not identify the officers found to have violated rules or regulations, or the rules or regulations that were violated, or the policies or procedures that were changed.

By letter from Mark Silverstein dated April 14, 2004, Plaintiffs requested disclosure of the entire record of the investigation of the Nashes' complaint and the entire records of two other related investigations described in the letter. Further communications between the parties revealed that there were only two IAB files, not three, containing all of the documents sought by Plaintiffs. Plaintiffs' letter stated that it "should not be construed as a request for any portions of any documents that contain highly personal and private information about any officers' off-duty activities that are not directly related to the discharge of their official duties. Accordingly, this is not a request for, and you may redact, such information as social security numbers, home addresses, home phone numbers, personal medical and financial information, and similar information."

Plaintiffs' request was denied in its entirety in a letter from Assistant City Attorney Richard A. Stubbs on June 10, 2005. This was later followed by a Vaughn Index and an amended Vaughn Index. Defendants' primary basis for refusing to disclose the requested files is the assertion that disclosure of these or any other IAB files would be contrary to the public interest because disclosure would have a chilling effect on DPD's ability to obtain information in investigations and its ability to properly discipline its employees. They also asserted the deliberative process privilege and the attorney/client privilege as to some of the documents. Seven present and former DPD officers intervened in the case to argue that their privacy rights would be violated by disclosure of the files at issue.

The investigations embodied in both IAB files resulted in sustained violations and the imposition of discipline.

Three of Defendants' witnesses testified that civilians would likely be reluctant to make complaints or give statements or interviews in IAB investigations if they knew their involvement would be disclosed publicly. However, in this case, there were no civilian witnesses, except the Nashes. Civilians participating in IAB investigations are not given the same Garrity Advisement as officers receive (see below), but they are told that their statements are confidential.

DPD officers are required to cooperate with IAB investigations, to give statements and to answer questions truthfully and completely, without omitting any material facts. They are also forbidden to retaliate against any officer or civilian for making complaints or cooperating in IAB investigations. Officers are subject to discipline for failure to comply with these requirements. Although the potential for retaliation against cooperating officers and civilians was argued in Defendants' briefs as a significant reason for refusing to disclose IAB files, Commander Lamb, the head of IAB and the main witness for Defendants at the hearing in this matter, testified that he is not concerned about retaliatory conduct and that he is confident that officers would continue to cooperate and tell the truth in IAB investigations, as they are required to do, whether or not their statements might be disclosed.

Before giving a statement in an IAB investigation, officers are given a written "Advisement Pursuant to Internal Investigation" ("Garrity Advisement"), which they and the investigator sign. It informs the officers that they may be subject to discipline for failure to give a statement or answer questions, but only under the circumstances enumerated in the Advisement. These circumstances include that the questions be reasonably related to work performance or fitness of an officer; that neither the statement nor answers to questions be considered a waiver of his or her right against self-incrimination; that the statement or answers will not be used in any criminal proceeding against him or her and the Department will resist every effort to produce the statement or answers in any civil or criminal case; that the statement or answers will be kept confidential except that they may be disclosed to people at DPD on a need-to-know basis, they may be disclosed to the District Attorney or the City Attorney on a need-to-know basis, and they may be offered in evidence (and become part of the public record) in the event of an appeal of disciplinary action; and he or she is given the Advisement prior to giving the statement or answering any questions. Thus, officers are promised limited confidentiality before giving statements or answering questions in IAB investigations.

There have been at least three district court decisions in recent years ruling in favor of parties who, like Plaintiffs, requested IAB files from the DPD pursuant to the CJRA and the CORA. In addition, IAB files or portions thereof are ordered to be produced in discovery in criminal and civil cases approximately 18 times each year. The decisions, and the fact that disclosure may be

ordered by courts, are known within the Department, but according to Commander Lamb, have not had a chilling effect on DPD's ability to obtain information in IAB investigations or to discipline officers because the number of such cases is few in comparison to the large number of IAB investigations conducted each year.

Once an IAB investigation is completed, a summary report is prepared and sent through the subject officer's chain of command (Lieutenant, Captain, Division Chief, Deputy Chief and Chief). Commander Lamb described this summary as a summary of the facts, though it may contain "limited" impressions or opinions; summaries do not contain recommendations. The disciplinary decision is made in the chain of command, not by the IAB. An officer who is subject to discipline has a variety of appeal avenues. The officer and his or her representative are permitted to review the entire IAB file after the investigation is completed, although not before. If the officer pursues an administrative appeal, the IAB file, including witness statements made pursuant to the Garrity Advisement, may be admitted into evidence, at which point it becomes publicly available. This happens about a dozen times each year.

DPD makes serious and substantial efforts to maintain the confidentiality of IAB files within the Department. Except for the Chief of Police, the Manager of Safety and an officer who is the subject of a sustained complaint, all employees with access to IAB files are required to sign confidentiality agreements. The physical files are kept in a locked area, separate from other police files, and computer files are protected by a firewall.

IAB files do not contain personnel files.

DPD resists each and every request for disclosure of IAB files, whether the request is made pursuant to the CJRA or the CORA, or is made in discovery in a civil or criminal case. Each and every request is denied by DPD, without exception, and documents from IAB files are never disclosed except upon court order. Production of IAB files in criminal and civil discovery is usually accompanied by a protective order, limiting use of the materials to the particular case. IAB documents become part of the public record if they are admitted into evidence at trial, which happens occasionally.

Commander Lamb, whose candor and credibility were very helpful to the court, testified that civilians' and police officers' willingness to come forward would be chilled if IAB files were routinely open for inspection by the public, and that it is "amazing how forthcoming they are" now. He further testified that cooperation of civilians and officers is crucial to IAB's ability to conduct thorough investigations. If IAB files were available to the public upon demand, officers' interviews would be more difficult, with officers volunteering less and the interviewer more frequently having to follow a Q & A format. Commander Lamb was clear, however, that he was not concerned about officers not telling the truth in interviews, and that retaliation, harassment and ostracizing of cooperating officers were not significant concerns. He essentially debunked the stereotypes about police officers that were raised as justification for secrecy.

Mr. Williams, the defense expert, opined that, if IAB files were open to the public, civilians would be less likely to come forward and officers would be less forthcoming, making them "harder interviews" for IAB investigators. He testified that the public needs to be assured "in all cases" that the IAB process is fair and that resulting discipline is right. He opined that this public need can be satisfied by civilian oversight mechanisms and that public access to IAB documents is not necessary. However, Mr. Williams was not familiar with the experience of states such as Florida, Ohio, Montana and Arizona, which permit open public access to internal affairs files.

Plaintiffs' expert on police internal affairs policies and procedures was Lou Reiter. The court found his testimony more persuasive than Mr. Williams', primarily because it was more grounded in specific experience, including auditing of internal affairs files and processes around the country, and because he has had extensive experience in states, such as Florida, Ohio, Montana and Arizona, that allow open access to internal affairs files and states that do not. The court also found his analysis more logically sound and internally consistent. Accordingly, the court finds the following facts based upon Mr. Reiter's testimony. There are several key factors that lead police officers to be frank and open in internal affairs investigations, and promises of confidentiality are not among them. Internal affairs secrecy contributes to the "code of silence" or "blue wall", by creating the expectation that

things will be kept in house and away from objective outsiders. Open access to internal affairs files enhances the effectiveness of internal affairs investigations, rather than impairing them. Knowing that they will be scrutinized makes investigators do a better job and makes them and the department more accountable to the public. Transparency also enhances public confidence in the police department and is consistent with community policing concepts and represents the more modern and enlightened view of the relationship between police departments and the communities they serve. Civilian review boards are not an effective substitute for transparency.

Marcy Kaufman, a civilian member of the Disciplinary Review Board, testified that civilians might not come forward if they knew their complaints or statements might be made public, because people fear police harassment, even though it rarely if ever happens, and do not understand law enforcement. These are problems that could be ameliorated by greater transparency.

The Nashes were signatories of the May 2003 settlement agreement in the federal "Spy Files" case, which contained language by which plaintiffs released all claims against Denver, its Departments and agents "which might exist with regard to any and all claims in any way related to or arising from the matters that are the subject matter of the Lawsuit...." Defendants argue that the settlement agreement released the Nashes' claims in the instant case. The Court does not agree. This release language does not apply to the Nashes' CJRA claim, which did not accrue until 2005, when their request for records was denied. By settling the earlier lawsuit, and all related claims, they did not give up their rights under the CJRA to request documents and to seek judicial review if their request was denied.

CONCLUSIONS OF LAW

Section 24-72-305(5), C.R.S. provides that access to records of police investigations, such as those at issue here, may be denied "[o]n the ground that disclosure would be contrary to the public interest...." Section 24-72-305(7), C.R.S. provides that any person denied access may apply to the district court for an order directing the custodian "to show cause why said custodian should not permit the inspection of such record." The court must hold a hearing and "[u]nless the court finds that the denial of inspection was proper, it shall order the custodian to permit such inspection..." This statutory language casts the burden of proof upon the custodian to show that denial of access was proper. The question then becomes, what is the nature and extent of that burden? The statutory language could be construed to support the conclusion that the custodian's burden is to satisfy the court by a preponderance of the evidence that disclosure of the records would, in fact, be contrary to the public interest. This appears to have been the burden imposed in past cases. *See, e.g., Johnson v. Colorado Department of Corrections,* 972 P.2d 692 (Colo. App. 1998).

However, after the hearing in this case, the Colorado Supreme Court issued its opinion in *Harris v. The Denver Post Corp.,* No. 04SC133, slip. op. (Colo. Nov. 15, 2005), which provides that the custodian's burden is to satisfy the court that his decision that disclosure of the records would be contrary to the public interest was not an abuse of discretion. *Harris* involved the Denver Post's effort to obtain videotapes that were made by Harris and Klebold as they prepared for their 1999 attack on Columbine High School. The tapes were later seized pursuant to a valid search warrant of the Harris home. The primary issue in the case was whether the tapes were "criminal justice records", subject to the CJRA, or "public records", subject to the CORA, or whether they were, as found by the district court, private property not subject to either act. The Court concluded that the tapes were "criminal justice records", and went on to discuss the implications of that conclusion. In the instant case, the parties are all in agreement that the IAB files at issue are "criminal justice records" and subject to the CJRA.

In *Harris,* the Court held that, pursuant to the CJRA, the tapes "are subject to the sheriff's exercise of sound discretion to allow the requested inspection or not, utilizing a balancing test taking into account the relevant public and private interests." Id., slip op. at 4. The competing interests recognized by the Court in *Harris* were the privacy interests of the Harris and Klebold parents and the public purpose to be served in allowing inspection. The Court held that the sheriff's decision to allow or not allow inspection of the record "is subject to judicial review under an abuse of discretion standard." Id., slip op. at 24. In so holding, the Court emphasized the differences between the CJRA and the CORA, calling into question arguments based on earlier cases that often appeared to treat the two acts as interchangeable. Because the Sheriff had incorrectly determined that the tapes were

private property and not subject to the CJRA and did not, therefore, attempt to exercise any discretion, the Court in *Harris* remanded the case to the Sheriff to decide whether to allow inspection of the tapes.

In the instant case, the court pressed counsel for Defendants at the hearing on the question of whether there had been an exercise of discretion under the CJRA and was assured that DPD's refusal to allow inspection, as it does in every case, was an exercise of its discretion under the CJRA, which Defendants acknowledged governs this case. This is not the situation facing the *Harris* court, where the decision maker did not recognize that the CJRA applied and, therefore, made no decision under it. Accordingly, the court will proceed to review the refusal decision under an abuse of discretion standard, rather than remand the matter to DPD for reconsideration.

It should also be noted that, although defense witnesses and counsel made mention of a City Charter provision and ordinance requiring confidentiality, Defendants have not argued that these provisions govern the case or in any way excuse compliance with the CJRA. The Legislative Declaration to the CJRA states, "The general assembly hereby finds and declares that the maintenance, access and dissemination... of criminal justice records are matters of statewide concern and that, in defining and regulating those areas, only statewide standards in a state statute are workable." § 24-72-301(1), C.R.S.

Defendants make two primary arguments: that their blanket denial of all requests for IAB files constitutes a proper exercise of the discretion conferred by the CJRA because allowing inspection of any part of any IAB file would be "contrary to the public interest"; and that certain individual documents contained in the subject IAB files are protected by the attorney/client privilege and the deliberative process privilege.

Abuse of Discretion.

The court concludes that Defendants' blanket policy of denying every request for disclosure of IAB files is an abuse of the discretion conferred by the CJRA, rather than a proper exercise of it. The statutory scheme contemplates a balancing of competing interests and the exercise of judgment on a case by case basis. "In making this statutory determination, the custodian takes into account and balances the pertinent factors, which include the privacy interests of individuals who may be impacted by a decision to allow inspection; the agency's interest in keeping confidential information confidential; the agency's interest in pursuing ongoing investigations without compromising them; the public purpose to be served in allowing inspection; and any other pertinent consideration relevant to the circumstances of the particular request." *Harris,* slip. op. at 24. The exercise of discretion contemplated by *Harris* can only be done on a case by case basis, taking into account every "pertinent consideration relevant to the *circumstances of the particular request.*" [Emphasis added.]

Here, although Defendants prepared a lengthy Vaughn Index purporting to set forth on a document by document basis their reasons for nondisclosure, this was admittedly a *post hoc* effort to justify a foregone conclusion rather than a genuine consideration of whether disclosure of these particular records would be contrary to the public interest. Review of the voluminous submission from Defendants to the court reveals that most of the documents submitted for *in camera* review are devoid of sensitive content and some are devoid of any substantive content at all. Moreover, the descriptions of the documents and the asserted grounds for not disclosing them in the Vaughn index often bear little resemblance to the documents themselves. One example is Document #9 in the first IAB file, which was the subject of the following entry:

> Document number 9 is a three-page comparative discipline document. It provides information regarding discipline imposed upon officers involved in incidents other than the instant one but who were found to have violated the same Police Department rules that the involved officers in the instant matter were alleged to have violated. It contains information regarding the complainants, the substance of their complaint, and the names of officers who were possibly involved in the incident that was the subject of the complaint. It is unknown who prepared the document, with recipients being the command staff who will review the IAB file and the members of the Disciplinary Review Board. (1) The documents qualify for the deliberative process privilege because they contain information that will be used to determine the appropriate level of discipline,

> if any, to impose upon the subject officers. (2) Disclosure would be contrary to the public interest because in many instances disclosure would identify officers who had been disciplined by the Department, thereby chilling the Department's desire to discipline its officers. (3) Disclosure would also implicate officer privacy interests because in many instances disclosure would identify specific officers who had been disciplined by the Department.

Document #9 is a blank form document titled, "Main Comparative Discipline Report." It contains no information about the subject investigations or any other investigations. It contains no information about any officers. Assuming that a blank or redacted document had been submitted by mistake, the court inquired of defendants and was informed that it is, indeed, the complete document that is the subject of the above-quoted description.

The court further concludes that a decision that disclosure of these particular IAB files would be contrary to the public interest, even if such a decision had been made, would be an abuse of discretion. Defendants' primary argument, that cooperation of civilian and officer witnesses in IAB investigations would be "chilled" by fears of embarrassment, harassment, retaliation, and the like, did not find significant support in the evidence. On the contrary, there are no civilian witnesses involved in this case, the witness statements do not contain highly sensitive information about anyone, and the evidence was clear that harassment, retaliation, and the like are not significant concerns within DPD. The promise of confidentiality given to officers in the Garrity Advisement is limited and conditional, and officers understand that their statements might be disclosed in any of several circumstances. Disclosure of similar information in other cases has not had a chilling effect on the cooperation of DPD officers or the public in IAB investigations. As the Supreme Court of Colorado pointed out in *Martinelli v. District* Court, 612 P.2d 1083, 1090 (Colo. 1980), disclosure of IAB files in cases such as this is unlikely to have the chilling effects argued by Defendants.

Weighing in favor of disclosure is the public's strong interest in knowing how DPD handles IAB investigations of citizen complaints in general and how it handled these investigations in particular. There was a great deal of public and media attention paid to the "Spy Files" controversy and these investigations relate to that larger controversy. The Nashes are well-known community activists and there is significant public interest in knowing that DPD handled the investigation of their complaint thoroughly and fairly, and that the resulting discipline was fair and appropriate. The complaint was sustained and resulted both in officer discipline and in changes to DPD policies. The evidence presented at the hearing of this matter overwhelmingly supported the conclusion that disclosure of nonprivileged documents contained in these two IAB files would serve the public interest.

Privileges.

Defendants have asserted two privileges as applicable to specific documents, the attorney/client privilege and the deliberative process privilege.

Two of the documents for which the attorney/client privilege was asserted are protected by that privilege and need not be disclosed. They are Document #8 in the first IAB file, and Document #16 in the second IAB file. The third document for which the attorney/client privilege was asserted (Document # 6 in the second IAB file) is not protected by the privilege because it does not contain confidential communication to or from counsel relating to the giving of legal advice.

The Colorado Supreme Court recognized the "deliberative process privilege" in *City of Colorado Springs v. White, 967* P.2d 1042 (1998), and held that it is synonymous with the "official information," "governmental," and "executive" privileges previously recognized in *Martinelli v. District Court,* 612 P.2d 1083 (Colo. 1980). "The primary purpose of the privilege is to protect the frank exchange of ideas and opinions critical to the government's decision making process where disclosure would discourage such discussion in the future." *City of Colorado Springs,* 967 P.2d at 1051. Consequently, the privilege "protects only material that is both pre-decisional (i.e., generated before adoption of an agency policy or decision) and deliberative (i.e., reflective of the give and take of the consultative process)." *Id.* at 1051. Post-decisional documents are not protected from disclosure for

two reasons. “First, the quality of a decision will not be affected by the forced disclosure of communications occurring after the decision is finally reached. [Citation omitted.] Second, the public has a strong interest in the disclosure of reasons that do supply the basis for an agency policy actually adopted.” *Id.* In contrast, “the public has only a marginal interest in the disclosure of ‘reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground.’ ” *Id.* In order to be found to be “deliberative,” the material “must reflect the ‘give-and-take of the consultative process.’ ” *Id.* at 1052. Purely factual or investigative material is not “deliberative.” In determining whether a document is “deliberative,” a “key question...is whether disclosure of the material would expose an agency's decision making process in such a way as to discourage discussion within the agency and thereby undermine the agency's ability to perform its functions.” *Id.* at 1051.

In the discovery context, the deliberative process privilege is a qualified one, and “may be overcome upon a showing that the discoverant's interests in disclosure of the materials is greater than the government's interests in their confidentiality.” *Id.* at 1054. “In contrast to the discovery context, however, the need of the party requesting disclosure is not relevant to a request for public records...because the open records laws only require disclosure of materials which would be routinely disclosed in discovery.... Therefore, once the government has met its burden of proof by satisfying the procedural requirements, the privileged material is beyond public inspection.” *Id.* at 1056. The court understands this portion of the Supreme Court's opinion to mean that the privilege is not a qualified one when the case is a CORA or CJRA case.

Defendants assert the deliberative process privilege with respect to so many documents for which the claim is plainly inappropriate that the court will not set forth a document by document explanation of the issue, except for a few instances where the question was a close one or the court agrees that the privilege applies.

Document #10 in the first IAB file is an Inter-Department Correspondence from Marco Vasquez, Deputy Chief Administration to Gerald R. Whitman, Chief of Police, dated January 19, 2004. Its subject is the investigation of the Nashes' complaint. It contains a factual summary description of the complaint, the investigation and the conclusions reached in the investigation. It sets forth the outcome of the investigation, including the decision to sustain some alleged violations and not sustain others and the reasons for those decisions. It is not deliberative; it is not part of the give and take of the deliberative process while a decision is under consideration and disclosure of internal discussions might undermine the Department's ability to function. It also appears to be post-decisional because it was prepared after the decision to sustain and not sustain violations was made. While it may have predated the decision regarding specific disciplinary penalties for the violations, it does not address or make recommendations with respect to the imposition of disciplinary penalties. This document is not protected by the deliberative process privilege.

Document #13 in the first IAB file is an Inter-Department Correspondence from David Quinones, Lieutenant in the Internal Affairs Bureau to Marco Vasquez, Commander of the Internal Affairs Bureau, dated September 30, 2003, regarding the Nashes' complaint. It is not protected by the deliberative process privilege because it is a factual summary of the investigation and is not deliberative.

Several documents in both IAB files are witness statements. They are factual and not deliberative and, therefore, not protected from disclosure by the deliberative process privilege.

Document #6 in the second IAB file is an Inter-Department Correspondence from Lt. D.K. Dilley, Lt. Dave Quinones and Lt. Judy Will to Commander Vasquez, dated July 7, 2003. It sets forth an extensive factual summary of the history of the Intelligence Bureau and its activities under various commanders and a list of rules and regulations that might have been violated. It does not discuss whether violations occurred or make recommendations. It is not deliberative and is not, therefore, protected from disclosure by the deliberative process privilege.

Documents #46 and 47 in the second IAB file are Inter-Department Correspondence from Marco Vasquez, Deputy Chief Administration, to Gerald R. Whitman, Chief of Police, dated January 19, 2004 and May 27, 2004. They are protected by the

deliberative process privilege. They are pre-decisional and predominantly deliberative, with extensive recommendations for policy changes and accompanying opinion and analysis.

Document #51 in the second IAB file is an Intelligence Bureau Assessment Report for the Denver Police Department by the Rocky Mountain Information Network, dated September 10, 2002. It is a pre-decisional consultant's report on the Intelligence Bureau that is predominantly deliberative, including evaluative analysis of problems and recommendations for policy changes. Thus, it is protected by the deliberative process privilege.

Document #52 in the second IAB file is a draft policy for the Intelligence Bureau. It is pre-decisional and deliberative and, therefore, protected by the deliberative process privilege.

Documents #55, 59, 81 and 82 of the second IAB file are all protected by the deliberative process privilege because they are pre-decisional and deliberative. They contain and reveal the process, both substantive and procedural, by which the Department evaluated the problems of the Intelligence Bureau and developed policy changes.

Privacy Interests of the Officers

In *Martinelli v. District Court,* 612 P.2d 1083 (Colo. 1980), the Colorado Supreme Court addressed the question of the privacy interests of police officers in IAB files. The Court recognized a right to confidentiality, which it characterized as an "aspect of the right to privacy which protects 'the individual interest in avoiding disclosure of personal matters.' " The Court stated that, "this right to confidentiality encompasses the 'power to control what we shall reveal about our intimate selves, to whom, and for what purpose.' " *Id.* at 1092. Thus, the threshold question in the analysis of whether the right of confidentiality prevents disclosure is whether the information is the sort of "highly personal and sensitive" information with respect to which one may have a "legitimate expectation of privacy." In this regard, the person claiming protection "must show that the material or information which he or she seeks to protect against disclosure is 'highly personal and sensitive' and that its disclosure would be offensive and objectionable to a reasonable person of ordinary sensibilities." *Id.* Such documents were expressly excluded from Plaintiffs' request for disclosure and review of the *in camera* submission of the first IAB file makes clear that no highly personal and sensitive information about any person is included in it. However, there are several documents in the *in camera* submission of the second IAB file that contain highly personal and sensitive information that would be embarrassing to individual officers if it were disclosed. These documents all concern the inappropriate emails that were found on the computers of the officers. The emails themselves are not criminal justice records and the documents that talk about them and identify the officers who sent and received them should be redacted to delete the names, badge numbers and other identifying information of the individuals involved. This conclusion is the result of the balancing of factors called for by *Martinelli* that must be undertaken with respect to documents that are found, as a threshold matter, to contain "highly personal and sensitive" information. Disclosure of the individuals' identities would serve no purpose but to embarrass the individuals; it would not serve the public interest. These are Documents # 45 and 64 - 80 in the second IAB file. In addition, if the documents to be disclosed contain any references to individuals' home addresses, home telephone numbers or social security number, Defendants may redact them before disclosure.

Attorney fees

Section 24-72-305, C.R.S. provides for the custodian to pay the applicant's court costs and attorney fees "upon a finding that the denial was arbitrary or capricious." The court finds that the Defendants' blanket denial of every request for IAB files, without any case-by-case consideration, and their inappropriate invocation of the deliberative process privilege for most of the documents in the files, including documents with no substantive content at all, constitute arbitrary and capricious denial of Plaintiffs' rights under the CJRA. There is no legal justification for these actions. Furthermore, one apparent purpose for this conduct, and the inevitable effect of it, is to impose upon every citizen who seeks to exercise his or her rights under the CJRA the many burdens of bringing suit against the government, including the cost of litigating. The fact that the court has agreed with Defendants' withholding of ten of the documents out of the voluminous files does not argue against the finding that Defendants' blanket

denial of Plaintiffs' request and their wholesale assertion of privilege were arbitrary and capricious. If Defendants exercised their discretion as required by law and if their Vaughn index asserted only colorable grounds for withholding, Plaintiffs might have been able to discern which documents were fairly protected by the privilege and not requested them. Because of Defendants' conduct, however, such an exercise of judgment was not reasonably possible. Accordingly, Defendants shall pay the reasonable court costs and attorney fees of Plaintiffs.

ORDER

In light of the foregoing, Defendants shall disclose to Plaintiffs all of the documents submitted for *in camera* inspection, except the following documents:

First IAB file, document #8; and

Second IAB file, documents #16, 46, 47, 51, 52, 55, 59, 81 and 82. Defendants may redact from all documents to be disclosed the home addresses, home telephone numbers and social security numbers of any individuals.

Defendants shall pay the reasonable court costs and attorney fees of Plaintiffs in this matter. Plaintiffs shall file their affidavit and supporting documentation regarding costs and fees within 30 days of the date of this order. Defendants shall file any opposition to the amounts claimed within 20 days of service of Plaintiffs' affidavit and, if the amount is contested, shall set the matter promptly for a hearing on the reasonableness of the amounts claimed.

Defendants shall pick up from Courtroom 5 the documents submitted for in *camera* inspection and shall maintain them intact until the time for appeal has expired or any appeal is finally concluded.

Done this ___ day of December, 2005.

BY THE COURT:

CATHERINE A. LEMON

District Court Judge

End of Document

Public Hearing

before

SENATE JUDICIARY COMMITTEE

SENATE BILL Nos. 161, 351, 573, and 866

(Issues dealing with public access to government records)

LOCATION: Committee Room 4
State House Annex
Trenton, New Jersey

DATE: March 9, 2000
10:00 a.m.

MEMBERS OF COMMITTEE PRESENT

Senator William L. Gormley, Chairman
Senator Louis F. Kosco
Senator Robert J. Martin
Senator John J. Matheussen
Senator Norman M. Robertson
Senator John A. Girgenti

ALSO PRESENT

John J. Tumulty
Office of Legislative Services
Committee Aide

Todd Dinsmore
Senate Democratic
Committee Aide

Hearing Recorded and Transcribed by
The Office of Legislative Services, Public Information Office,
Hearing Unit, State House Annex, PO 068, Trenton, New Jersey

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I have Senator Girgenti, Senator Matheussen, then Senator Martin, and then Norm, in order, as how the hands were raised.

SENATOR GIRGENTI: I just have really one question based on what you just said in terms of the time frame. If this bill would be enacted -- the Martin bill -- would you need two -- it has like a 60-day period that this has to go into effect with the executive orders and these other resolutions that are considered. I think the time frame, at least, should be expanded. Would you agree with that?

MR. KEARNS: I would tend to agree, Senator, but I think that I'm not, probably, the one to answer that. I think that answer probably ought to be directed, I would think, to the Attorney General's Office -- say, "How fast could you come up with the appropriate executive orders to do that?"

Sixty days is a tight time frame, but I would not want to presume to give some time frame that would work because that's not something we have control on.

SENATOR GIRGENTI: Okay.

SENATOR GORMLEY: Senator Matheussen.

SENATOR MATHEUSSEN: I have several concerns, but let me just boil it down to one question. Why are you so concerned with the municipal court handling this matter? It seems to me that that's, from a consumer's standpoint, a resident living in a town, that's probably the easiest place for them to access it and the easiest place for them to file their grievance. What's your objection?

MR. KEARNS: My objection is that the municipal court deals primarily with traffic violations, deals with drunk driving, deals with ordinance

State of New Jersey

Office of the Governor

125 WEST STATE STREET
PO BOX 001
TRENTON NJ 08625-0001

JAMES E. MCGREEVEY
Governor

On Tuesday, August 13, 2002, I was pleased to join with the New Jersey Press Association, and some of New Jersey's leading open press activists to announce our strong support for the state's Open Public Records Act. We all share an unwavering commitment to this critically important law.

Our new Open Public Records Act took effect last month. This law makes it clear – records made by local and state government officials are presumed to be available for inspection and copying by citizens. The law establishes narrow exemptions for victims' records, emergency and security information, criminal investigatory records and other appropriate areas that warrant confidentiality. The law will challenge government to be responsive, accountable and open, and that is as it should be. Our citizens deserve nothing less.

To make these goals a reality I have signed Executive Order No. 26. This Executive Order is the byproduct of a lengthy positive, productive, and collaborative process. In recent weeks, Attorney General David Samson and I worked closely with editors of some of New Jersey's leading newspapers, as well as well as the League of Women Voters, Common Cause, Sierra Club, the Foundation for Open Government, Citizen Action and the New Jersey Public Interest Research Group.

We worked together to review the original Executive Order, and to review proposals made by state agencies to exempt certain records from disclosure. My staff, cabinet members and the Press Association reviewed these proposed exemptions, and we dramatically reduced them. There were 583 exemptions originally proposed, and in the end we cut that down to 75 – 52 of

which were narrowed and 23 that were not changed. The full list of our action is available on the web, at www.nj.gov/opra, and citizens will be invited to comment on these changes.

This is how our process is designed to work. When government proposes regulations through the Administrative Procedures Act, those proposals are open to comment from the public. Where changes are appropriate, changes are made.

Throughout this process, we struck a balance between the need for open government and the need to ensure the security and safety of our citizens. The Executive Order modifies a previous order by clarifying language and ensuring full compliance with the Act.

My Executive Order also addresses serious security matters that are of concern to all of us. Information can be exempted from disclosure it would "substantially interfere" with the state's ability to protect our citizens, or would "materially increase" the risk of acts of terrorism. This is a high standard to meet, and the Attorney General is already engaged in developing detailed regulations to ensure security concerns are addressed. We will keep the Press Association and public interest groups engaged in this process as we move forward. We all share a common interest in protecting the security and safety of our citizens, and that common interest was reflected in the discussions of the past few weeks.

Another byproduct of these discussions is was a line by line review with these organizations of the regulations proposed by individuals departments. In July, departments had proposed 583 exemptions to the Open Public Records Act. The law specifically provides departments with the authority to make additional exemptions.

My commitment to open government will not waver. Here are some other programs my administration is working on:

- We have set up a groundbreaking project, the Government Records Council (www.nj.gov/grc), which is an independent agency that oversees compliance with OPRA. Citizens can call a toll-free number ((866) 850-0511) to ask questions, address problems with access to records on a local or state level, or receive free dispute resolution services.

- We have established a central web site to explain the law and assist citizens in making records requests. www.nj.gov/opra.

- Last week, Attorney General Samson issued a directive to local and county law enforcement to ensure public access to appropriate police information.

- We are establishing a Privacy Study Commission to examine privacy issues over the next 18 months.

- State agencies are working throughout government to greatly expand Internet access to key documents. For example, the Department of Environmental Protection has an innovative web site (www.state.nj.us/dep), which will soon be expanded to increase access to key documents with the click of a mouse.

Justice Marshall said that public records are essential "to ensure an informed citizenry" and are "vital to the functioning of a democratic society, need to check against corruption and to hold the governors accountable to the governed." I encourage every New Jersey citizen to visit our web sites, learn more about how government is addressing real problems faced by our society, and comment on our rule proposals. Together, we will all make New Jersey State government more accessible and more accountable, and give government back to the people.

James E. McGreevey,

Governor

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
OFFICE OF THE ATTORNEY GENERAL

ROBERT J. DEL TUFO
ATTORNEY GENERAL

August 14, 1991

Dear Chief Executive:

The delivery of effective police service depends in large measure on the quality of leadership by the agency's chief executive. We all recognize the importance to police executives of timely and practical management resources.

For several years the Division of Criminal Justice and the New Jersey State Association of Chiefs of Police have worked together to develop the Police Management Manual as a standard for municipal police management. The manual is designed to provide police executives with practical guidelines necessary to address day-to-day operational concerns.

I am pleased to provide you with Chapter five of the Police Management Manual, "Internal Affairs Policy and Procedures" which deals with a matter of extreme importance to everyone in law enforcement. This chapter, which was prepared after consultation with numerous law enforcement officials, serves as a supplement to the New Jersey Law Enforcement Agency Standards Program begun in October of last year by the Division of Criminal Justice and the State Chiefs Association. It contains standards, policies and procedures for the internal affairs function.

Some highlights of "Internal Affairs Policy and Procedure" include:

- It advocates the establishment of a formal Internal Affairs Unit or function in each police agency. While assignment of personnel may be on a full or part time basis, a structure must be in place to objectively review complaints of officer misconduct.

- It calls for police departments to accept citizen complaints about police conduct

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from any person 24 hours a day, seven days a week, including anonymous complaints.

- It provides for a police department representative to visit the complainant if the complainant cannot file the report in person.

- It calls for all complaints about police officer conduct to be thoroughly and objectively investigated to their logical conclusions.

- It calls for the immediate notification of the county prosecutor in the event of any allegation of criminal misconduct by a police officer, or whenever a firearms discharge results in an injury or death.

- It provides that the accused officer is accorded all of the appropriate due process rights in the internal disciplinary process. This includes the right to be notified of the outcome of all complaint investigations.

- It instructs that citizen complainants be advised of the outcome of an internal investigation or disciplinary proceeding.

- It provides police departments with detailed information and guidelines on conducting thorough internal investigations of any complaints about police conduct.

- It provides police departments with a sample Internal Affairs policy and procedures, as well as sample formats for use in the disciplinary process.

- It calls for an annual report summarizing the types of complaints received and the dispositions of the complaints to be made available to the public. This report would not contain the names of complainants or the accused officers.

As I am sure you will agree, citizen confidence in the integrity of a police department is enhanced by the establishment of meaningful and effective complaint resolution procedures. Toward that end, this chapter is a reflection of our interest in having all police agencies in this state adopt and conscientiously implement these procedures for the handling of citizen complaints.

Recognizing the key role played by officers assigned to the internal affairs function, it is important that they are properly prepared for the task. In the near future we will be establishing a training program for those officers assigned by you to internal affairs responsibilities. Additional details concerning this program will be forthcoming in order that you may identify personnel from your agency who would benefit from such training.

If you have any questions about this chapter or any other portion of the Police Management Manual, please call the Division of Criminal Justice, Police Services Section at (609)984-0960.

Very truly yours,

Robert J. Del Tufo
Attorney General

/rs
c: Robert T. Winter
Director

Division of Criminal Justice

Police Bureau

Police Management Manual

Chapter Five

Internal Affairs Policy and Procedures

August, 1991

New Jersey Department of Law & Public Safety
Division of Criminal Justice

POLICE MANAGEMENT MANUAL
CHAPTER FIVE

INTERNAL AFFAIRS POLICE AND PROCEDURES

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PART ONE

INTERNAL AFFAIRS AND THE DISCIPLINARY PROCESS

Introduction

Achieving the desired level of discipline within the police agency is among the most important responsibilities of the police executive. Yet, this is one of the most frequently neglected and outdated processes existing within many police agencies. While the word "discipline" was originally defined as instruction, teaching or training, its meaning has shifted toward a concept of control. This emphasis on control has resulted in discipline being viewed as a negative threat rather than a mechanism for instruction and counseling. Too frequently rules of conduct and disciplinary procedures are used as an end in themselves, their purpose as an aid to reaching department goals is forgotten. This dominance of the negative aspects of discipline diminishes morale and officer productivity.

A First Step

A first step in approaching discipline positively is to rely more on emphasizing instruction and less on control. This requires the police executive to focus on organizational practices. He must first define the goals and objectives of all departmental units. He must then promulgate management's expectations to guide these units toward the realization of those goals. And finally, the police executive must establish a means to monitor performance and to correct improper actions.

This approach to management as it relates to discipline insures that all subordinates know and understand:

1. What must be done;

2. Why it must be done;

2. How it must be done;

3. When it must be done;

4. What constitutes satisfactory performance;

5. When and how to take corrective action.

To achieve this, management must establish workable procedures for documenting all expectations and advising individuals of their duties and responsibilities.

Prevention of Misconduct

Prevention is the primary means of reducing and controlling misconduct. While disciplinary actions are properly imposed on officers who engage in wrongdoing, they are of limited utility if they shield organizational conditions which permit the abuses to occur. Too often, inadequate training and lack of appropriate guidance are factors that contribute to officers' improper performance. The agency should make every effort to eliminate the organizational conditions which may foster, permit, or encourage improper performance of employees. In the furtherance of this objective, special emphasis is placed on the following areas:

Recruitment and selection. Selecting and appointing the highest quality of individuals to serve as law enforcement officers must be a priority of every law enforcement agency. During the selection process, psychological tests and individual interviews should be completed by each candidate in an attempt to identify those who would be best suited for police work. These procedures may also be used for promotional testing, as well as assignment to especially sensitive responsibilities or those that pose the greatest opportunities for abuse or wrongdoing. This procedure must be governed by local policy and contracts.

Training. Recruit and in-service training for police officers should emphasize the sworn obligation of those officers to uphold the laws and provide for the public safety of the citizenry. Police ethics should be a major component in the training curricula, as well as an in-depth examination of the rules, regulations, policies and procedures of the department, including the disciplinary process. There must also be a process to advise veteran officers of any new statutory requirements or significant procedural changes.

Proper training of agency supervisors is critical to the discipline and performance of police officers. Emphasis should be placed on anticipating problems among officers before they result in improper performance or conduct. Supervisors are expected to recognize potentially troublesome officers, identify training needs of officers, and provide professional support in a consistent and fair manner.

Community outreach. Commanding officers should strive to remain informed about and sensitive to the needs and problems of the community. Regularly scheduled meetings with citizen advisory councils as well as informal contact with community leaders should be used to hear the concerns of citizens. These meetings help commanding officers identify potential crisis situations and keep channels of communication open between the agency and the community. The disciplinary process should be publicized and clearly explained in these forums.

Data collection and analysis. The Internal Affairs Unit or function should prepare periodic reports for the police executive that summarize the nature and disposition of all misconduct complaints received by the agency. The report shall include the age, sex, race and other complainant characteristics which might signal systematic or bias motivated misconduct by any member of the department. Terminated complaints should be recorded and the reasons for termination explained. Copies of the internal affairs report should be distributed to all command and supervisory personnel.

An annual report summarizing the types of complaints received and the dispositions of the complaints should be made available to the public. The names of complainants and accused officers should not be published in this report.

Policy Management System

The department's policy management system serves as the foundation for effective discipline. A clearly defined policy management system is designed to move the organization toward its stated goals and set the standard for acceptable performance. The system must incorporate a mechanism for the distribution of policies and procedures and provide for periodic review and revision as required. The system should include a classification and numbering system which facilitates cross-referencing where necessary.

Police departments should have a policy management system that includes at least the following:

1. Rules and regulations: A set of guidelines outlining the acceptable and unacceptable behavior of personnel. The rules and regulations shall be promulgated by the appropriate authority as designated by municipal ordinance.

2. Policies: Statements of agency principles that provide the basis for the development of procedures and directives.

3. Procedures: Written statements providing specific direction for performing agency activities. Procedures are implemented through policies and directives.

4. Directives: Documents detailing the performance of a specific activity or method of operation. Directives includes general orders, personnel orders, and special orders.

The policy management system should clearly and explicitly

Wording is different from Internet version

state management's intentions. The reader must understand what management wants to accomplish and what behavior is expected. Each category of documents in the policy management system should be issued in a distinctive, readily identifiable format.

Specific categories of misconduct that are subject to disciplinary action should be precisely defined within the department's policy management system. Any incident of inappropriate behavior may fall into one or more of the following categories:

CRIME: Complaint regarding the involvement in illegal behavior, such as bribery, theft, perjury or narcotics violations.

EXCESSIVE FORCE: Complaint regarding the use or threatened use of excessive force against a person.

ARREST: Complaint that the restraint of a person's liberty was improper or unjust.

ENTRY: Complaint that entry into a building or onto property was improper or that excessive force was used against property to gain entry.

SEARCH: Complaint that the search of a person or property was improper, unjustified or otherwise in violation of established police procedures.

DIFFERENTIAL TREATMENT: Complaint that the taking, failing to take, or method of police action was predicated upon irrelevant factors such as race, attire, age, or sex.

DEMEANOR: Complaint that a department member's bearing, gestures, language or other actions were inappropriate.

SERIOUS RULE INFRACTIONS: Complaint such as disrespect toward supervisor, drunkenness on duty, sleeping on duty, neglect of duty, false statements or malingering.

MINOR RULE INFRACTIONS: Complaint such as untidiness, tardiness, faulty driving, or failure to follow procedures.

In addition, the policy management system should clearly indicate the possible penalties an officer may receive when an allegation of misconduct is substantiated. A scale of progressive disciplinary actions or penalties permitted by law should be used by the police department. Such a scale includes:

1. Counseling
2. Oral reprimand or performance notice
3. Letter of reprimand
4. Loss of vacation time[1]
5. Imposition of extra duty[1]
6. Monetary fine[2]
7. Transfer/reassignment
8. Suspension without pay
9. Loss of promotion opportunity[1]
10. Demotion
11. Discharge from employment

Each officer should have ready access to an official manual which clearly describes and defines categories of misconduct. The disciplinary process should be thoroughly explained in the manual, including precise descriptions of the proper authority of the Internal Affairs Unit, the investigation process, the officer's rights, the hearing process and all appeal procedures available to the officer.

Responsibility for Carrying Out Discipline

A system of rules and regulations specifying proper behavior will not in itself assure effective discipline. Unless there is some method of detecting violations of the rules, and bringing misconduct to the attention of the proper authorities, the written rules will have little meaning. If management fails to act promptly and appropriately when improper conduct has occurred, discipline and the agency's effectiveness will rapidly diminish. When not acted upon, violations of department rules, regulations, policies or procedures become the accepted practice making the written directives meaningless.

Authority to Discipline

Subject to the limitations set forth in N.J.S.A. 40A:14-147 et seq. and municipal ordinances, the police executive is vested with the authority and responsibility for all department discipline. Except for emergency suspensions, all disciplinary action must be approved by the police executive.

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[1] Penalties not available to agencies covered by New Jersey Department of Personnel regulations.

[2] Agencies operating under the Department of Personnel statutes (N.J.S.A. 11A:2-20) and regulations may only assess a fine in lieu of a suspension where loss of the officer from duty would be "detrimental to the public health, safety or welfare" or if the assessment is restitution or is agreed to by the employee.

To carry out disciplinary tasks successfully, however, responsibility must be delegated by the police executive to individual units within the agency. Although the levels of authority vary within the agency's hierarchy, the failure to carry out responsibilities at any level will contribute to the organization's ineffectiveness. The task of clearly delineating responsibility and authority is essential to effective discipline.

Every supervisor has a responsibility for knowing and following the procedures established by the organization to deal with employee performance which is contrary to expectations. If the supervisor fails to follow these procedures or avoids his responsibility, that supervisor is not conforming to expected behavior and must himself be subjected to some corrective action. Some supervisors occasionally need to be reminded that the fundamental responsibility for direction and control rests with the immediate supervisor at the execution or operations level, not with the police executive.

To provide such direction and control, supervisory personnel must be granted proper authority to carry out their responsibilities. Individual supervisory personnel may be permitted to take certain disciplinary measures, subject to approval of the police executive. These measures may include oral reprimand or performance notice, written reprimand, and written recommendations for other disciplinary actions. The extent of this authority must be clearly stated in the department's policy management system.

Internal Affairs Unit

The Internal Affairs Unit, or responsibility, should be established in each law enforcement agency. Depending upon the need, the Internal Affairs function can be full or part-time. In any event, this function necessitates either the establishment of a unit or officer, or the clear definition of responsibility for carrying out the Internal Affairs function on an as needed basis. The unit shall consist of those members of the department assigned to the Internal Affairs function by the police executive. Personnel assigned to the Internal Affairs function serve at the pleasure of and are directly responsible to the police executive or designated Internal Affairs commander.

The goal of Internal Affairs is to insure that the integrity of the department is maintained through a system of internal discipline where fairness and justice are assured by objective, impartial investigation and review.

Duties and Responsibilities

The Internal Affairs Unit or officer should conduct investigations of allegations of misconduct by members of the department and review the adjudication of minor complaints handled by supervisors. In addition, Internal Affairs should be responsible for the coordination of investigations involving the discharge of firearms by department personnel. Internal Affairs will also be responsible for any other investigation as directed by the police executive.

Internal Affairs may conduct an internal affairs investigation on its own initiative upon notice to, or at the direction of the police executive or Internal Affairs commander. Internal Affairs may refer investigations to the employee's supervisor for action as permitted by department policy and procedures.

Internal Affairs members or officers temporarily assigned to that function should have the authority to interview any member of the department and to review any record or report of the department relative to their assignment. Requests from Internal Affairs personnel, in furtherance of their duties and responsibilities, should be given full cooperation and compliance as though the requests came directly from the police executive.

The Internal Affairs Unit or officer designated by the chief executive shall maintain a comprehensive central file on all complaints received, whether investigated by Internal Affairs or assigned to the officer's supervisors for investigation and disposition. An Internal Affairs case log should be maintained which records the basic information on each case, including the accused officer, allegations, complainant, date received, Internal Affairs officer assigned, disposition and disposition date for each complaint.

Staff Inspections

While the primary responsibility for enforcing department policies rests with the line supervisors, management can not rely solely on those supervisors for the detection of violations. Administrators should know whether or not the plans of the organization are being implemented and carried out as intended. It is necessary for management to know if behavior is, in fact, consistent with rules and regulations, policies and procedures. The task of detecting such defects should be delegated to an Inspection Unit or function.

Large agencies might establish an Inspection Unit operating directly out of the office of the police executive . Small and medium size agencies can successfully accomplish this function by

periodically assigning the inspection task to selected unit commanders. Individuals so assigned must be of unquestioned integrity and hold sufficient rank to achieve the objectives of the inspection function.

Duties and Responsibilities

The inspection function should determine by actual on-site inspection whether the policies of management are being complied with by personnel at the operations level. This function is also responsible for reviewing and evaluating procedures. In addition, the inspection unit or function should evaluate the material resources of the department and their utilization. This includes but is not limited to motor vehicles, communications equipment, office machinery and supplies. The inspection function or unit should report any deficiencies to the police executive, as well as recommend any possible solutions and improvements.

Training

Just as the original meaning of discipline is instruction, police agencies should view "discipline problems" as possible "training problems." Inappropriate behavior on the part of an officer or group of officers should prompt supervisors to review past training and evaluate the need for future training. Perhaps a particular officer needs a refresher course in a certain subject. Or perhaps changes in the law, the police department, or even within the community have given rise to a need for some training never before given to the officer or department as a whole.

From line supervisors up to the police executive, the potential need for training should always be considered when officers exhibit inappropriate behavior. The question should be, "Could training have prevented this behavior, and can training prevent it from happening in the future?"

Training in this sense can be anything from informal counselling of an officer about a particular policy or procedure, through formal department-wide training. The department may also take advantage of other agencies, including police academies, prosecutor's office, Division of Criminal Justice, or other outside entities.

Citizen Complaints

Complaints from the public provide the police executive with invaluable feedback. These complaints, whether substantiated or not, increase awareness of actual or potential problems. The

police executive should view complaints from the public as a means of determining where the police department falls short of its intended goals. Similarly, complaints regarding officer behavior or allegations of misconduct can alert the police executive to problems which require disciplinary action or identify a need for additional training. The police executive must initiate a policy which provides that all citizen complaints are readily accepted and promptly and fully investigated.

> A properly administered complaint review system serves both the special professional interests of the police and the general interests of the community. As a disciplinary device, it can promote and maintain standards of conduct among police officers by punishing -and thereby deterring- aberrant behavior. Just as important, it can provide satisfaction to those civilians who are adversely affected by misconduct. Harold Beral and Marcus Sisk, "The Administration of Complaints by Civilians Against the Police," Harvard Law Review, 77, No. 3, January 1964, p.500.
>
> It is clearly in the interest of the police executive to initiate effective change in the administration of internal discipline. Otherwise, public or police employee groups, or court decisions in civil litigation, may force executives to follow a course other than the one they would have chosen, and thus diminish their control over their agency. National Advisory Commission on Justice Standards and Goals, Report on Police, (Washington, D.C. GPO), P. 470. Also see Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598 (1976).

Complaint Process

Agencies operating under the purview of Title 11A must comply with New Jersey Department of Personnel Rules (N.J.A.C. 4A:1-1.1 et seq.). See appendices M, N and O.

Pursuant to N.J.S.A. 40A:14-147, administrative charges must be filed within 45 days of the date the department obtains sufficient information to file charges against an officer.

Accepting Reports Alleging Officer Misconduct

All complaints of officer misconduct should be accepted from all persons who wish to file a complaint regardless of the hour or day of the week. This includes those from anonymous sources, juveniles and persons under arrest or in police custody. Internal Affairs personnel should accept complaints if available. If Internal Affairs is not available, supervisory personnel should accept reports of officer misconduct, and if no supervisory personnel are available, complaints should be accepted by any police officer. At no time should a complainant be told to return to file his report.

Citizens should be encouraged to submit their complaints in person as soon after the incident as possible. If the complainant cannot file the report in person, a department representative should visit the individual at his or her home, place of business or other location in order to complete the report.

The Internal Affairs officer, supervisor or other officer receiving the complaint will explain the department's disciplinary procedures to the person making the complaint. He should advise the complainant that they will be kept informed of the status of the complaint and its ultimate disposition. The supervisor should complete the appropriate internal affairs complaint form and have the complainant sign the completed form.

If the complaint is anonymous, the officer accepting the complaint should complete as much of the internal affairs complaint form as he can given the information he has received.

Complaints of differential treatment, demeanor and minor rule infractions should be forwarded to the supervisor or commander of the accused officer. All other complaints should be retained by or forwarded to the Internal Affairs Unit.

Complaints might also be received from other law enforcement agencies, such as neighboring municipal police agencies, the county prosecutor or the F.B.I. In such cases, the complaint should be forwarded to Internal Affairs for immediate handling.

If a complainant comes to a municipal police agency to make a complaint about another police agency, he should be referred to that agency. However, if the complainant expresses fear or concerns about making the complaint directly, he should be referred to the county prosecutor.

All complaints should be investigated, so long as the complaint contains sufficient factual information to warrant an investigation. In cases where the identity of the officer is unknown, the Internal Affairs investigator should use all

available means to determine proper identification. Each complaint should be investigated to its logical conclusion.

Some very minor complaints are merely a misunderstanding on the part of the citizen. If the supervisor accepting the complaint can resolve it to the complainant's satisfaction through an explanation of department rules or procedures, the complaint process will be terminated. In these cases, the resolution should be noted on the complaint form which should then be signed by the complainant and the officer involved, and filed with Internal Affairs.

Immediate Suspension Pending Investigation and Disposition

In cases involving allegations of serious officer misconduct, the police executive may choose to suspend the accused officer pending the outcome of the investigation and subsequent administrative charges, if any. Before immediate suspension of an officer, with or without pay, the police executive should determine if any of the following conditions warranting immediate suspension have been met.

1. The employee is unfit for duty.
2. The employee is a hazard to any person if permitted to remain on the job.
3. An immediate suspension is necessary to maintain safety, health, order or effective direction of public services.
4. The employee has been formally charged with a crime of the first, second or third degree, or a crime of the fourth degree on the job or directly related to the job.

In deciding whether or not to continue to pay an officer who has been suspended pending the outcome of the investigation or complaint, the police executive and appropriate authority should consider the seriousness of the offense as well as the possible outcomes should the officer be found guilty.

Investigation and Adjudication of Minor Complaints

Complaints of differential treatment, demeanor and minor rule infractions should be forwarded to the accused officer's commanding officer. The commanding officer should require the officer's supervisor to investigate the allegation of misconduct.

The supervisor investigating the complaint should interview the complainant, all witnesses and the accused officer, as well as review relevant reports, activity sheets, or dispatcher forms. The supervisor should then submit a report to the commanding officer summarizing the matter and indicating the appropriate

disposition. Possible dispositions include:

1. Exonerated:
   a. The alleged incident did occur, but the actions of the accused were justified, legal and proper; or,
   b. the officer's behavior was consistent with agency policy, but there was a policy failure.

2. Substantiated: The investigation disclosed sufficient evidence to clearly prove the allegation.

3. Not Sustained: The investigation failed to disclose sufficient evidence to clearly prove or disprove the allegation.

4. Unfounded: The investigation indicated that the acts complained of did not occur.

If the supervisor determines that the complaint is unfounded or not sustained and the commanding officer concurs, the investigation report is to be forwarded to Internal Affairs for review and entry in the central log and filing.

If the complaint is sustained, the commanding officer should determine the appropriate disciplinary action. If the action is no more than a written reprimand, a summary of the complaint and notification of the disciplinary action taken should be forwarded to Internal Affairs. If, however, the commander determines that the matter is of a more serious nature it should be forwarded to Internal Affairs for further investigation.

When an oral reprimand or performance notice is given, the officer or employee should be advised that the supervisor or superior officer is giving an oral reprimand. The supervisor should complete an oral reprimand report (a necessary record for progressive discipline) or performance notice and forward it to the commander. A copy should also be given to the officer being disciplined.

Upon approving the oral reprimand or performance notice, the commanding officer will forward the report to be placed in the officer's or employee's personnel file. Six months after the date of the approved oral reprimand or performance notice, the disciplinary report shall be removed from the file and destroyed, provided no other breach of discipline has occurred.

When a written reprimand is given, the supervisor or commanding officer giving such reprimand should advise the subject officer of such and complete a written reprimand report. A copy of the written reprimand report is to be provided to or retained by the officer's supervisor and one copy of the report is to be provided to the officer or employee being disciplined.

The original report, together with any supporting documentation, should be provided to the commanding officer for review.

The commanding officer should review the report and, in writing, either approve or disapprove the report. If disapproved, the commanding officer should direct what action, if any, be taken. Upon final approval, the report should be forwarded to the Internal Affairs Unit and permanently placed in the officer's or employee's personnel file.

Upon final disposition of the complaint, a letter should be sent to the complainant explaining the outcome of the investigation, and the reasons for the outcome decision.

Investigation and Adjudication of Serious Complaints

Where preliminary investigation indicates the possibility of a criminal act on the part of the accused officer, the county prosecutor must be notified immediately. No further action should be taken, including the filing of charges against the officer, until directed by the county prosecutor.

All serious complaints shall be forwarded to the Internal Affairs Unit. This includes complaints of criminal activity, excessive force, improper or unjust arrest, improper or excessive entry, improper or unjustified search, serious complaints of differential treatment or demeanor, serious rule infractions, and repeated minor rule infractions.

The supervisor or commanding officer initiating such action should complete a form recommending an internal affairs investigation. This form, together with any supporting documentation, should be forwarded through the chain of command to the Internal Affairs Unit. Where there is no full-time Internal Affairs Unit or function the report is forwarded to the police executive.

The Internal Affairs commander or police executive will direct such further investigation by the supervisor, commanding officer or Internal Affairs as deemed appropriate.

Internal Affairs shall serve the suspect officer with notification of the Internal Affairs investigation, unless the nature of the investigation requires secrecy. The Internal Affairs investigator should interview the complainant, all witnesses and the accused officer, as well as review relevant reports, activity sheets, and dispatcher forms and obtain necessary information and materials.

Upon completion of the investigation, the Internal Affairs Unit will recommend dispositions for each allegation through the chain of command to the police executive. As previously described, these dispositions may include exonerated, substantiated, not sustained, or unfounded. Each level of review may provide written recommendations and comment for consideration by the police executive.

The police executive, upon reviewing the report, supporting documentation and information gathered during any supplemental investigation, shall direct whatever action is deemed appropriate. If the complaint is unfounded or not sustained, or the subject officer is exonerated, the investigation report should be entered in the central log and filed. Internal Affairs should notify the subject officer of the disposition.

If the complaint is substantiated and it is determined that formal charges should be preferred, the police executive will direct either the commanding officer, supervisor or Internal Affairs to prepare, sign, and serve charges upon the accused officer or employee. The individual assigned shall prepare the formal notice of charges and hearing on the Charging Form. (See sample Charging Form in Appendix E.) This form will also be served upon the officer charged in accordance with N.J.S.A. 40A:14-147 et seq.

The notice of charges and hearing shall direct that the officer charged must enter a plea of guilty or not guilty, in writing, on or before the date set forth in the notice for entry of plea. The date for entry of plea should be at least five days after the date of service of the charges. If the officer charged enters a plea of guilty, the police executive officer should permit the officer to present factors in mitigation prior to assessing a penalty. Conclusions of fact and the penalty imposed will be noted in the officer's personnel file after he has been given an opportunity to read and sign it. Internal Affairs will cause the penalty to be carried out and complete all required forms.

If the accused officer makes a written request for a hearing, the police executive will set the date for the hearing as provided by statute and arrange for the hearing of the charges. Internal Affairs shall be responsible for or assist the assigned commander or prosecutor in the preparation of the department's prosecution of the charges. This includes proper notification of all witnesses and preparing all documentary and physical evidence for presentation at the hearing.

The hearing shall be held before the appropriate authority or the appropriate authority's designee. The hearing authority should be empowered to sustain, modify in whole or in part, or dismiss the charges stated in the complaint. The decision of the

hearing authority should be in writing and should be accompanied by findings of fact for each issue in the case.

If the hearing authority finds the complaint against the officer is substantiated, he should fix any of the progressive penalties which he deems appropriate under the circumstances within the limitations of statute and the department's policy management system.

A copy of the decision and accompanying findings and conclusions should be delivered to the officer or employee who was the subject of the hearing and to the police executive if he was not the hearing authority. Upon completion of the hearing, Internal Affairs will complete all required forms (Department of Personnel jurisdictions use the Final Notice of Disciplinary Action form DPF-31B) including the entry of the disposition in the central log. If the charges were sustained Internal Affairs will cause the penalty to be carried out. The report should be permanently placed in the officer's or employee's personnel file.

Upon final disposition of the complaint, a letter should be sent to the complainant explaining the outcome of the investigation, and the reasons for the outcome decision.

Confidentiality

The progress of internal affairs investigations and all supporting materials are considered confidential information. The contents of the internal investigation case files will be retained in the Internal Affairs Unit and clearly marked as confidential. Only the police executive or his designee is empowered to release publicly the details of an internal investigation or disciplinary action.

All disciplinary hearings shall be closed to the public unless the accused officer requests an open hearing.

Conclusion

A clear and comprehensive policy management system delineating the procedures for dealing with allegations of officer misconduct or the improper delivery of police services, and its uniform application, bolsters the integrity of the police department. A responsive and consistent Internal Affairs Unit or officer is an indispensable part of the police administrative process. Its clear existence in the organizational structure gives notice to both the public and employee that the police agency is willing to "police the police."

PART TWO

INTERNAL AFFAIRS INVESTIGATIONS

Selection of Personnel for the Internal Affairs Function

Internal affairs investigations must be considered as important to the community and department as any criminal investigation. An internal investigation may follow one of two divergent tracks or both simultaneously. These are the administrative proceedings track which may result in employment sanctions and the criminal prosecution track which may result in criminal sanctions. Each track may have different standards of proof. What may be admissible for one may not necessarily be admissible for the other.

Consequently, it is important that the Internal Affairs investigator be familiar with proper investigative techniques and legal standards for each type of proceeding. This is necessary so that evidence obtained will be admissible in the proper tribunal and the rights of the officer under investigation will not be inadvertently violated. Therefore, it is essential that experienced investigators be assigned to internal affairs investigations. They should be trained not only in the elements of criminal law, court procedures, rules of evidence and use of technical equipment, but also in the disciplinary and administrative law process. Each investigator must be skilled in interviewing and interrogation, observation, surveillance and report writing.

Personnel assigned to conduct internal affairs investigations should be energetic, resourceful and alert. They must have a keen memory and display a high degree of perseverance and initiative. The Internal Affairs investigator must hold the police responsibility to the community and professional commitment above personal and group loyalties. Internal Affairs personnel must be of unquestioned integrity and possess the moral stamina to perform unpopular tasks. It is important that these investigators possess the ability to withstand the rigors and tensions associated with complex investigations, social pressures and long hours of work. The investigator must possess the ability to be tactful and diplomatic when dealing with members of the department and the community. Finally, it is recommended that personnel assigned to the Internal Affairs function reflect the racial and ethnic spectrum within the community. This is helpful in gaining acceptance by and assuring access to all segments of the community.

Investigation Standards

The most critical aspect of the disciplinary process is the investigation of an allegation of police misconduct. Only after a complete, diligent and impartial investigation can a good faith decision be made as to the proper disposition of the complaint. Decisions based upon such an investigation will support the credibility of the department among its ranks as well as the public at large.

As with all other investigations, lawful procedures must be used to gather all evidence pertaining to allegations against a police officer. Investigations for internal disciplinary or administrative purposes involve fewer legal restrictions than criminal investigations. Restrictions that do exist, however, must be recognized and followed. Failure to do so may result in improperly gathered evidence being overturned during the appeal process. Legal restrictions which apply to internal investigations stem primarily from case law and collective bargaining agreements. They may also have as their basis local ordinances, administrative regulations, Department of Personnel rules or municipal personnel department rules.

Complaints must be professionally, objectively and expeditiously investigated in order to gather all information necessary to arrive at a proper disposition. It is important to document citizens' concerns, even those which might appear to be unfounded or frivolous. If such complaints are not documented or handled appropriately, citizen dissatisfaction will grow, fostering a general impression of department wide insensitivity to citizens' concerns.

By statute (N.J.S.A. 40A:14-147), administrative charges must be filed within 45 days of the date the department has developed sufficient information to file such charges against an officer. In cases involving criminal activity, the forty-five day time period does not start until the final disposition of any criminal proceedings arising out of the incident against the accused officer. Investigation status reports should be prepared every seven days for review by the police executive or Internal Affairs supervisor. A 30-day time period in which to complete the investigation is recommended. Requests for an extension of time to complete an investigation should be submitted in writing. The request should state the reasons which necessitate the extension. Only the police executive, or the officer designated by him to direct the Internal Affairs function, should be authorized to grant an extension.

The filing of legitimate complaints pertaining to department personnel is to be encouraged as a means of holding those personnel accountable to the public. However, the department must simultaneously seek to hold members of the public

responsible for the filing of false and malicious complaints. In such cases, complainants should be informed that legal proceedings may be instituted against them to rectify such deliberate actions.

Investigation Techniques

The investigator assigned an internal investigations case should initially outline the case to determine the best investigative approach and identify those interviews immediately necessary. The investigator should determine if any pending court action or ongoing criminal investigations might delay or impact upon the case at hand. If it appears that the conduct under investigation may have violated the law, the county prosecutor should be immediately notified of the internal affairs investigation.

If the investigation involves a criminal filing against the complainant, wherein the accused officer is the victim of the offense charged, an initial interview should be conducted with the complainant. However, absent extenuating circumstances, no further contact should be made until charges against the complainant are adjudicated.

The Internal Affairs investigator may use any lawful investigative techniques including inspecting public records, questioning witnesses, interviewing the subject officer, questioning fellow employees, and surveillance. Therefore, the investigator must understand the use and limitations of such techniques.

As in any criminal investigation, the following necessary materials, if available, should be obtained: physical evidence, statements or interviews of all witnesses, statements or interviews of all parties of specialized interest (such as doctors, employers, teachers, parents, etc.); all relevant documents, records and reports, activity sheets, complaint cards and radio logs. Special attention should be given to securing records which are routinely disposed of such as telephone and radio transmissions routinely recorded on department taping equipment. In addition, the investigator should check the record bureau files to determine if the subject, complainant, or witnesses have any prior police involvement.

It is generally recommended that the complainant and other lay witnesses be interviewed prior to interviewing sworn members of the department. This will often eliminate the need for having to do second and third interviews with departmental members. However, this procedure does not have to be strictly adhered to if circumstances and the nature of the investigation dictate otherwise.

While the Sixth Amendment right to counsel does not extend to internal investigations, an officer should be permitted to obtain an attorney if so desired. The Sixth Amendment applies to a criminal prosecution or to a proceeding which threatens a person's liberty. See Middendorf v. Henry, 425 U.S. 25, 34, 95 S.Ct. 1287, 47 L.Ed. 2d 556 (1976). However, a department must permit an employee to have a union representative present at an investigative interview if the employee requests representation and the employee reasonably believes the interview may result in disciplinary action. N.L.R.B. v. Weingarten, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed. 2d 171 (1975).

Where an internal affairs investigation takes the criminal prosecution track, it is important that the employee be made aware of his or her constitutional rights.

Interviewing the Complainant

The complainant should be personally interviewed if circumstances permit. If the complainant cannot travel to the investigator's office, the investigator should conduct the interview at the complainant's home or place of employment. All relevant identifying information concerning the complainant should be recorded, e.g., name, complete address (street, apartment number, city, state), telephone number and area code, race or ethnic identity, sex, date of birth, hair color, eye color, social security number, FBI and SBI numbers, and place of employment (name and address).

All relevant facts known to the complainant should be obtained during the interview. Once the interview is completed, an effort should be made to obtain a formal, sworn statement from the complainant. Depending upon the circumstances, such as a hospitalized complainant, taped statements may be considered in place of the sworn statement.

Witness Interviews

Whenever possible, all witnesses to the matter under investigation should be personally interviewed and formal statements taken. The investigator should attempt to determine if the witness is motivated by prior arrests, a personal relationship with the complainant or member of the department, or other significant factors.

Reports, Records and Other Documents

All relevant reports should be obtained and preserved as expeditiously as possible.

Internal department reports relating to an accused officer's duties should be examined. Examples of such reports are: arrest

reports and investigation reports, radio logs, patrol logs, vehicle logs and evidence logs pertaining to or completed by the officer.

Records and documents of any other agency or organization that could prove helpful in the investigation should be examined. These may include: reports from other police departments, hospital records, doctors' reports, jail records, court transcripts, FBI or SBI records, credit bureau records, corporate lookups (Secretary of State's Office), specialized licenses (real estate, insurance, medical), motor vehicle abstracts and telephone toll analysis. In some instances, subpoenas or search warrants may be necessary to obtain the information.

Physical Evidence

Investigators should obtain all relevant physical evidence. All evidence, such as clothing, hair or fabric fibers, stains, and weapons should be handled according to established evidence procedures.

With respect to radio tapes, the original tape is the best evidence and should be secured at the outset of the investigation. Transcripts or copies of the original recordings can be used as investigative leads. Tapes should be monitored to reveal the totality of the circumstances.

Photographs

In the event of a complaint involving excessive use of force, the following photographic documentation should be obtained when appropriate. Whenever possible, color photography should be used.

1. Photographs of the complainant at the time of arrest or following the alleged incident of excessive force.

2. Photographs of the subject officer in the event that officer was a victim.

3. A recent photo of the officer in the event a photo spread will be used for identification purposes. The photo spread must be properly retained for possible evidentiary purposes.

4. Photographs of the scene of the alleged incident, if necessary.

Physical Tests

Police officers who are the subjects of internal investigations may be compelled to submit to various physical

tests or procedures to gather evidence. Such evidence may be used against them in a disciplinary proceeding.

No person has a constitutional right or privilege to refuse to submit to an examination to obtain a record of his physical features and other identifying characteristics of his physical or mental condition. Evid. R. 25(a). Evidence that may be obtained or procedures that may be used to obtain evidence under this rule include:

1. Breath sample
2. Blood sample
3. Requiring suspect to speak
4. Voice recordings
5. Participation in a suspect lineup
6. Handwriting samples
7. Hair and saliva samples

Generally, a person cannot be physically forced to produce this evidence or submit to such tests, although a court order may be obtained to legally compel him to do so. Refusal to comply with the order can result in a contempt of court action, and may also result in a second disciplinary action for failure to comply with a lawful court order.

Polygraph

While a police officer who is the subject of an internal investigation may request a polygraph examination, an employer shall not influence, request or require an employee to take or submit to a lie detector test as a condition of employment or continued employment (N.J.S.A. 2C:40A-1).

An officer cannot be required to submit to a polygraph test on pain of dismissal. Engel v Township of Woodbridge, 124 N.J. Super. 307 (App.Div. 1973).

If a polygraph is used the test must be administered by a qualified police polygraph operator.

Search and Seizure

As a general rule, the Fourth Amendment applies to any action taken by government. Police officers have the right, under the Fourth Amendment, to be free from unreasonable searches and seizures. Fourth Amendment warrant requirements apply to any search of an officer's personal property including clothing, car, home or other belongings.

A voluntary consent to a search may preclude some Fourth Amendment problems from developing. A consent search eliminates the need to determine what threshold standard must be met before

conducting the search or seizure, either for an administrative or criminal investigation. Under New Jersey law, for consent to be legally valid, a person must be informed that he or she has the right to refuse to permit a search. State v. Johnson, 68 N.J. 349 (1975). If a consent search is utilized, the Internal Affairs investigator should follow standard police procedures and have the target officer sign a consent form after being advised of the right to refuse such a search.

In a criminal investigation the standard to obtain a search warrant is probable cause. Generally, a search warrant should be sought to search an area belonging to the subject officer when the officer can reasonably expect to maintain a high level of privacy in that area. Areas and objects in this category include the officer's home, personal car, bank accounts, safety deposit boxes, etc.

Generally, during either administrative investigations or criminal investigations, workplace areas may be searched without a search warrant. The critical question is whether the public employee has a reasonable expectation of privacy in the area or property the Internal Affairs investigator wants to search. The determination of a reasonable expectation of privacy must be decided on a case by case basis. There are some areas in the person's workplace where this privacy expectation can exist just as there are some areas where no such expectation exists. Areas where supervisors or other employees may share or go to utilize files or equipment would present no expectation or diminished expectation of privacy. Included here would be government provided vehicles (patrol cars), filing cabinets, etc.

If a department intends to retain the right to search property which it assigns to officers for their use, including lockers, it should put officers on notice of that fact. This notification will help defeat an assertion of an expectation of privacy in the assigned property by the officer. The agency should issue a directive regarding this matter, as well as include the notice in any employee handbook or personnel manual (including the rules and regulations manual) provided by the department. The notice should also be posted in the locker area and on any bulletin boards. The following is a sample of what the notice should contain:

> The department may assign to its members and employees departmentally owned vehicles, lockers, desks, cabinets, etc., for the mutual convenience of the department and its personnel. Such equipment is and remains the property of the department. Personnel are reminded that storage of personal items in this property is at the employee's own risk. This property is subject to entry and

inspection without notice.

In addition, if the department permits officers to use personally owned locks on assigned lockers and other property, it should be conditioned on the officer providing the department with a duplicate key or the lock combination, whichever is applicable.

At the present time, the law is unclear on the use in a subsequent criminal prosecution of evidence obtained during a warrantless administrative search or inspection of department property. It is therefore advisable to obtain a warrant whenever there exists probable cause to believe that the department property to be searched contains contraband or evidence of a crime.

Any search of departmental or personal property should be conducted in the presence of the subject officer and a property control officer.

Eavesdropping

In accordance with N.J.S.A. 2A:156A-4b, law enforcement non-third party intercepts can be used during internal affairs investigations. Pursuant to that section of the New Jersey Wiretap Act, a law enforcement officer may intercept and record a wire or oral communication using a body transmitter if that officer is a party to the communication or where another officer who is a party to the communication requests or requires that such interception be made. Procedures for such recordings are dictated by individual departmental or agency policy.

There is no prohibition against the monitoring of phones used exclusively for departmental business if an agency can demonstrate a regulatory scheme or a specific office practice, of which employees have knowledge. In such instances, there may be a diminished expectation of privacy in the use of these telephones and monitoring would be acceptable.

Lineups

A police officer may be ordered to stand in a lineup to be viewed by witnesses or complainants. There is no need for probable cause and the officer may be disciplined for refusal. In Biehunik v. Felicetta, 441 F.2d 228 (2d Cir. 1971) cert. den. 403 U.S. 932, 91 S.Ct. 2256, 29 L.Ed. 2d 711 (1971), the court upheld a police department's order to 62 police officers to appear in a lineup for possible identification by citizens alleging they had been assaulted by city police officers. The department did not have probable cause nor a search warrant for this action. The officers had been advised that they faced criminal prosecution as well as administrative sanctions. The

court applied the following test to the department's order:

> Whether upon a balance of public and individual interests, the order...was reasonable under the particular circumstances, even though unsupported by probable cause [Id. at 203].

The Biehunik holding was cited as support of a court ruling that a police department could expose a police officer's hands, uniform and wallet to a "blacklight" to determine whether he was involved in criminal activity. Los Angeles Police Protective League v. Gates, 579 F.Supp. 36 (C.D. Calif. 1984).

The lineup must be constructed so as not to be unfairly suggestive. The same rule applies to photo arrays.

Other Investigative Tools

The law regarding the use of most other investigative tools is the same for internal investigations as for criminal investigations. Constitutional precepts such as due process and right to privacy apply to investigative methods utilized in both administrative and criminal investigations. It must be considered, however, that even those constitutionally permissible methods may be restricted or prohibited by ordinance, department rule, or contract.

Interviewing Members of the Department

Interviews of fellow police officers are critical to the internal investigation process and must be carefully thought out and well planned. When interviewing a police officer as a witness, he must be made aware of the differences between a witness and the subject of the investigation. A form acknowledging that the differences were explained should then be signed by the officer. The statement should include the investigator's name, as well as the date and time the explanation was given.

If, at any time, the officer becomes a subject of the investigation, he should be apprised of that fact and sign an acknowledgment form.

Interviewing the Subject Officer

A public employer may demand that an employee answer questions specifically, directly, and narrowly related to the performance of his official duties, on pain of dismissal, without requiring him to waive his constitutional right against self-

Whenever there is a possibility that the investigation may result in criminal prosecution of the officer or that the county prosecutor may be conducting a separate investigation, the internal affairs investigator should consult with the county prosecutor prior to interviewing the officer.

incrimination. However, if the employer offers the employee the choice between giving incriminating answers or losing his job, that choice makes any answer compelled in violation of the Fifth Amendment. As a result, the answer cannot be used in a subsequent criminal proceeding. Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), Uniformed Sanitation Men Association v. Commission of Sanitation, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968). An employer cannot force an employee to choose between surrendering a constitutional right or his job.

An employer can dismiss an employee for refusing to answer questions where the employee is granted use immunity[3] for his answers and the possibility of self-incrimination is thus removed. Once use immunity has been granted, as a prerequisite to the imposition of discipline for refusal to answer, the employee must be clearly, unambiguously, and expressly advised of the grant of use immunity and of the possible imposition of discipline, including dismissal, for a refusal to answer. Silence can be the basis for a misconduct charge only when there has been a prior explanation of the use immunity to which the employee's statements are entitled. Banca v. Phillipsburg, 181 N.J.Super. 109 (App. Div. 1981).

A public employee has a duty to appear and testify, under pain of removal from office, before any court, grand jury, or the State Commission of Investigation, on matters directly related to the performance of his duties. N.J.S.A. 2A:81-17.2a1. If the employee claims the privilege against self-incrimination after having been informed that his failure to appear and testify would result in removal from office, N.J.S.A. 2A:81-17.2a2 confers use immunity on the testimony and any evidence derived from it, except where the employee is subsequently prosecuted for perjury or false swearing while testifying. This is a self-executing legislative grant of immunity. State v. Gregorio, 142 N.J.Super. 372 (Law Div. 1976). This statute has been held to apply to a departmental/internal investigation to the extent that an employee under investigation is entitled to be clearly, unambiguously, and expressly advised of the grant of use immunity

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[3]Use immunity can only be granted through the county prosecutor by the Attorney General.

at the outset as a prerequisite to the subsequent imposition of discipline for refusal to answer questions. He is further required to be told that refusal to answer could subject him to that discipline. Banca v. Phillipsburg, 181 N.J.Super. 109 (App. Div. 1981). During a departmental investigation, where an employee is granted use immunity and still refuses to answer questions, the employer's sole recourse to compel a response is to impose discipline. The employer cannot resort to any special court proceeding. In re Toth, 175 N.J.Super. 254 (App. Div. 1980).

Depending upon the circumstances and nature of the complaint, the subject officer may be required to either submit a report detailing his understanding and knowledge of the relevant facts of the investigation or provide a formal statement.

Interviews should take place at the Internal Affairs office or a reasonable and appropriate location designated by the investigating officer. The subject officer's superior should be made aware of the time and place of the interview so the officer's whereabouts are known. Interviews should be conducted at a reasonable hour when the officer is on duty, unless the seriousness of the matter requires otherwise.

Prior to the commencement of any questioning, the officer should be advised of the following:

> "You are being questioned as part of an official investigation of this agency into potential violations of department rules and regulations. You will be asked questions specifically directed and narrowly related to the performance of your official duties and your fitness for office. You are entitled to all the rights and privileges guaranteed by the laws and Constitutions of this State and the United States, including the right not to be compelled to incriminate yourself in a criminal matter. If you fail to exercise this right, anything you say may be used against you in a criminal proceeding. The right to refuse to answer a question on the grounds of your right against self-incrimination does **not** include the right to refuse to answer on the grounds that your answer may reveal a violation of a department policy, rule, or regulation that is not a criminal offense. You may therefore be subject to departmental discipline for refusal to give an answer that would not implicate you in a criminal offense. Anything that you say may be used against you not only in any subsequent department charges, but also in any subsequent criminal proceeding."

This information should be contained in a form which the subject officer signs and which signature is witnessed. See the

sample form in Appendix F.

The employee should be informed of the name and rank of the interviewing investigator and all others present during the interview. The interview can then begin. The questioning must be conducted in an orderly, non-coercive manner, without threat of punitive action or promise of reward. The questioning session must be of reasonable duration, taking into consideration the complexity and gravity of the subject matter of the investigation. The officer must be allowed time for meal breaks and to attend to personal physical necessities.

The department may make an audio or video recording of the interview. A transcript or copy of the recording should be made available to the officer as soon as possible upon request, at his expense.

Any questions asked of officers during an internal investigation must be "narrowly and directly" related to the performance of their duties and the ongoing investigation. Gardner v Broderick, 393 U.S. 273 (1968). Officers do not have the right to refuse to answer questions directly and narrowly related to the performance of their duties. All answers must be fully and truthfully given. However, officers may not be forced to answer questions having little to do with their performance as police officers or unrelated to the investigation.

Unless the officer specifically waives his Fifth Amendment rights, any incriminating statements obtained under direct order will not be admissible in a criminal prosecution, however, they will be admissible in an administrative hearing.

If during the course of an internal investigative interview an officer refuses to answer any questions specifically directed and narrowly related to the performance of duty and fitness for office on the grounds that he may incriminate himself, and if the department deems that in order to properly conduct its investigation it must have the answers to those specific questions, the department should then contact the county prosecutor to initiate procedures to obtain use immunity from the Attorney General for the answers to the questions. Upon obtaining a written grant of immunity, the department should advise the subject officer of the following:

> "You are being questioned as part of an official investigation of this agency into potential violations of department rules and regulations. You will be asked questions specifically directed and narrowly related to the performance of your official duties and your fitness for office. You are entitled to all the rights and privileges guaranteed by the laws and Constitutions of this State and the United States, including the

> right not to be compelled to incriminate yourself in a criminal matter. Despite your duty to testify and to answer questions relating to the performance of your official duties or fitness for office, you have a right to refuse to answer any question which would incriminate you in a criminal matter. You have invoked your right to remain silent and you have been granted immunity from criminal prosecution in the event your answers to the narrow questions asked implicate you in a criminal offense. You are now ordered to answer. Therefore, you must answer. No answer given by you pursuant to this order, nor evidence derived from the answer, may be used against you in any criminal proceeding. If you refuse to obey this order to answer, you may be subject to disciplinary charges for that refusal which can result in your dismissal from this agency. Further, although any statement which you make cannot be used against you in any criminal proceeding, any statement you make may be used against you in relation to any subsequent departmental disciplinary proceeding."

This information can be contained in a form which the subject officer signs and which signature is witnessed. See the sample form in Appendix G.

The department may permit officers who have been informed that they are a subject of an internal investigation to consult with counsel or anyone else prior to being questioned about matters concerning their continuing fitness for police service or matters concerning a serious violation of rules and regulations. Such counsel must be sought within a reasonable period of time, without causing the investigation to be unduly delayed.

No constitutional right to counsel exists during an internal administrative interview; therefore, in the absence of contract provisions or personnel rules providing otherwise, an officer has no right to have counsel present unless a criminal prosecution is contemplated. However, if it appears that the presence of counsel or another police officer requested by the subject will not disrupt the investigation, there is little reason to prevent their presence as observers. If the investigation involves criminal allegations, it may be inappropriate to allow a union representative to be present. In any case, the representative cannot interfere with the interview.

If the representative is disruptive or interferes, the investigator can discontinue the interview, documenting the reasons the interview was ended. The investigator must be in control of the interview and cannot allow the representative or subject to take control. It should be made clear that by allowing a representative during a specific interview, the

department is not adopting a general policy to permit counsel during other internal investigation interviews. This clarification must be made because if a subject officer is denied the opportunity to have a representative present, this decision may be deemed arbitrary and unfair.

At the conclusion of the interview, the investigator should review with the subject officer all the information furnished during the interview. This should be done to alleviate any misunderstandings or misinterpretations and to prevent any controversies during a later hearing or trial.

The Officer as a Subject of a Criminal Investigation

Throughout any internal investigation, it is necessary to determine whether the allegations and evidence warrant criminal prosecution of the officer. If it appears that a criminal charge may be warranted, the county prosecutor must be notified immediately. Pursuant to his instructions, the investigation may then proceed. The investigation must adhere to all of the restrictions of a normal criminal investigation. The Miranda warning must be given and a waiver signed prior to any questioning of the accused officer. Search and seizure restrictions and constitutional safeguards must be applied.

The Internal Affairs Report and Conclusion of Fact

At the conclusion of the internal affairs investigation, the investigator will submit a written summary report which should consider all relevant documents, evidence, and testimony in order to determine exactly what happened. A complete account of the situation and any gaps or conflicts in evidence or testimony must be noted. The following should be included in the report:

1. Statement of allegations made by the complainant.

2. Statement of the situation as described by the officer involved.

3. Description of the facts and issues to which the complainant and police officer agree.

4. Description of the issues and allegations to which the complainant and police officer disagree.

5. Evidence which supports or refutes any facts, issues or allegations made.

6. Reference to any pertinent attachments and a synopsis of the attachments.

7. Summarized statements and interviews of witnesses arranged sequentially in terms of time and significance.

8. List of the evidence obtained, its relevance, and its relationship to statements and interviews.

9. Background information on persons named in the report in order to demonstrate their character and credibility (e.g., S.B.I. or F.B.I. records, intelligence information, etc.)

The report must contain a "conclusion of fact" for each allegation of misconduct. The conclusion of fact should be recorded as exonerated, substantiated, not sustained, or unfounded.

If the conduct of any officer was found to be improper, the report shall cite the agency rule, regulation, or order which was violated. Also, any mitigating circumstances surrounding the situation, such as unclear or poorly drafted agency policy, inadequate training or lack of proper supervision, should be noted.

If the investigation reveals evidence of misconduct not based on the original complaint, this must be reported. A full-scale investigation concerning evidence of misconduct not based on the original complaint should not be instituted until disposition of the original complaint.

Investigation of Firearms Discharges

Whenever a firearms discharge results in an injury or death the county prosecutor is to be notified immediately. Internal affairs personnel will proceed in the investigation as directed by the prosecutor.

All incidents involving officer firearms discharges, whether occurring on or off duty (except at the firearms range), should be thoroughly investigated. The Internal Affairs investigator should review all administrative reports required by the department. These reports should include a description of the incident; the date, time, and location of the incident; the type of firearm used and number of rounds fired; the identity of the officer; and any other information requested by a superior officer.

Agencies that have established a "Shoot Team" to

investigate officer firearms discharge incidents should place those teams under the supervision and control of the Internal Affairs commander when they are engaged in weapons discharge investigations.

In the event of an injury or death, the Internal Affairs Unit should be notified immediately. The involved officer's superior should assist the Internal Affairs investigator as needed.

The primary goal of the internal affairs firearms discharge investigation is to determine the reasonableness of the officer's actions under the circumstances which existed at the time of the incident. In order to make such a determination, the investigator must consider relevant law, Attorney General's policies and guidelines, and department rules and regulations, and policy. In addition to determining if the officer's actions were consistent with the department regulations and policy, the Internal Affairs investigator should also examine the relevance and sufficiency of these policies. The investigator should also consider any relevant mitigating or inculpatory circumstances.

The investigation of a shooting by police should include photographs and ballistics tests as well as interviews with all witnesses, complainants, and the officer involved. All firearms should be treated as evidence according to departmental rules, regulations, and policies. A complete description of the weapon, its make, model, caliber, and serial number must be obtained and, if appropriate, N.C.I.C. and S.C.I.C. record checks should be made.

In a firearms discharge investigation, the investigator must determine if the weapon was an approved weapon issued to the officer, and if the officer was authorized to possess the weapon at the time of the discharge. The investigator must also determine if the weapon was loaded with authorized ammunition. The weapon must be examined for its general operating condition and to identify any unauthorized alterations made to it.

INTERNAL AFFAIRS POLICY & PROCEDURES

Office of the Attorney General | State of New Jersey

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Version

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1 Introduction

1.0.1 The purpose of *Internal Affairs Policy & Procedures* is to assist the State's law enforcement agencies with investigating and resolving complaints of police misconduct that originate with members of the public or are generated by the supervisors, officers, or employees of a law enforcement agency. The goals of the policy are to enhance the integrity of the State's law enforcement agencies, improve the delivery of police services, and assure the people of New Jersey that complaints of police misconduct are properly addressed. This policy can also be more broadly applied to non-law enforcement employees.

1.0.2 State and federal courts have emphasized the importance of the internal affairs function for protecting the constitutional rights and civil liberties of the State's residents. Case law generally requires that law enforcement agencies do three things under the internal affairs function. First, agencies must implement an internal affairs policy that provides for a meaningful and objective investigation of complaints and other evidence of police misconduct. Second, agencies must monitor and track the behavior of police officers for incidents of misconduct. Third, when officers are found to have engaged in misconduct, agencies must correct the behavior. The courts have with increasing frequency issued decisions that set minimum standards of performance for the internal affairs function.

1.0.3 The New Jersey Legislature also recognized the importance of the internal affairs function in 1996 with the enactment of N.J.S.A. 40A:14-181. The statute provides that:

> 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.

1.0.4 In accordance with this mandate, and recognizing that proper administration of internal affairs is a critical priority for the State's criminal justice system, Attorneys General have periodically issued updated versions of this Internal Affairs Policy & Procedures document through the Division of Criminal Justice. This most recent round of revisions reflects the need to incorporate emerging best practices into the State's internal affairs system, and to ensure that all law enforcement agencies in the State are adhering to the guidelines.

1.0.5 It is important for county and municipal law enforcement agencies to recognize that, as they conduct internal affairs investigations, they do so under the general supervision of the Attorney General. The Criminal Justice Act of 1970 designates the Attorney General as the State's chief law enforcement officer. *See* N.J.S.A. 52:17B-98. As such, the Attorney General is responsible for the general supervision of the State's law enforcement agencies to

provide for the efficient administration of the criminal justice system. Subordinate law enforcement agencies, including county and municipal police forces, have a duty to cooperate with the Attorney General to improve the administration of the criminal justice system, including the efficient delivery of police services. For county and municipal law enforcement agencies, cooperation in internal affairs matters begins with strict adherence to the Attorney General's policy requirements.

1.0.6 County and municipal law enforcement agencies must also recognize that they conduct internal affairs investigations, particularly those that involve allegations of criminal conduct, under the direct supervision of the County Prosecutors. County and municipal law enforcement agencies must inform the appropriate County Prosecutor when allegations of police misconduct involve potential criminal conduct. In addition, county and municipal law enforcement agencies must confer with and follow the instructions given by the County Prosecutor at all critical points in the investigative process. This is particularly true when the agency is in the process of gathering evidence, including the taking of statements, concerning allegations of criminal conduct. References to County Prosecutors throughout this document should also be understood to refer to the Office of the Attorney General wherever such an interpretation would be appropriate.

1.0.7 This policy contains mandates that, at the Attorney General's direction, every law enforcement agency must implement. In some areas, the manner in which these agencies must implement these mandates is a decision that is left to the individual law enforcement agency's discretion. For instance, every agency must establish an internal affairs function. But certain aspects of the manner in which the mandate is satisfied are left to the discretion of the individual agencies. Individual agencies shall decide, based on the characteristics of their jurisdiction and the workload of their agency, whether the internal affairs function is a full- or part-time unit and how many officers are assigned to work in that unit.

1.0.8 Nothing in this document displaces other existing requirements for law enforcement agencies or officers, such as those established by Attorney General Law Enforcement Directives ("AG Directives"), including AG Directive 2018-2 (mandatory random drug testing), AG Directive 2018-3 (mandatory early warning systems), and AG Directive 2019-4 (independent investigations of use-of-force and death-in-custody incidents).

1.0.9 Policy requirements that the Attorney General has determined are critical and must be implemented by every law enforcement agency include the following:

General Practices

(a) Each agency must establish by written policy an internal affairs function.
(b) Each agency must accept reports of officer misconduct from any person, including anonymous sources, at any time.

(c) Each agency must thoroughly, objectively, and promptly investigate all allegations against its officers.

(d) Each agency must notify its officers in writing of complaints made against them, unless this notification would interfere with any investigation resulting from these complaints.

(e) Each agency must notify its officers of the outcome of any Internal Affairs investigation involving them.

(f) Each agency must notify complainants of the outcome of their complaints.

(g) If an agency's internal affairs investigators are unable to complete an investigation within 45 days of receiving a complaint, they must notify the agency's law enforcement executive,[1] who may take steps to ensure prompt resolution of the matter.

Notifications to the County Prosecutor

(h) Where a preliminary investigation indicates the possibility of a criminal act on the part of the subject officer, the County Prosecutor must be notified immediately. No further action should be taken, including the interviewing of, or the filing of charges against the officer, until the County Prosecutor so directs.

(i) Pursuant to AG Directive 2019-4, the agency must notify the County Prosecutor immediately of any use of deadly force, any use of force by an officer that results in death or serious bodily injury, or any death in custody that occurs within its jurisdiction.

(j) In the rare cases where the agency has not made a charging decision within 180 days of receiving a complaint, the agency must notify the County Prosecutor, who may take whatever steps he or she deems appropriate, including supersession of the investigation, to ensure prompt resolution of the matter.

Recordkeeping & Data Reporting

(k) Pursuant to AG Directive 2018-3, each agency shall establish an "early warning" protocol for monitoring and tracking the conduct of all officers.

(l) Each agency must establish and maintain an internal affairs records system which, at a minimum, will consist of an internal affairs index system and a filing system for all documents and records.

(m) On a quarterly basis, each agency shall submit to the County Prosecutor a report summarizing the allegations received and the investigations concluded for that period. The Attorney General shall establish a schedule for the submission of the reports.

[1] For the purposes of this document, "law enforcement executive" refers to a law enforcement agency's highest ranking sworn law enforcement officer, typically the chief of police. In situations where the highest ranking officer is recused from a matter, then "law enforcement executive" refers to the next highest-ranking officer without a conflict.

(n) On an annual basis, each agency shall publish on its public website a report to the public summarizing the allegations received and the investigations concluded for that period. These reports shall not contain the identities of officers or complainants.

(o) On a periodic basis, and at least once a year, each agency shall submit to the County Prosecutor and publish on the agency's public website a brief synopsis of all complaints where a fine or suspension of 10 days or more was assessed to an agency member. The synopsis shall not contain the identities of the officers or complainants.

Training

(p) Each agency shall ensure that officers assigned to the internal affairs function complete training as mandated by the Division of Criminal Justice.

(q) Each County Prosecutor shall ensure that each agency within the Prosecutor's jurisdiction implement and maintain a system of ensuring appropriate training for all personnel involved in the agency's internal affairs function.

(r) The Division of Criminal Justice shall conduct periodic "train-the-trainer" courses for all persons assigned responsibility for internal affairs training within the County Prosecutor's Offices.

1.0.10 The above list represents critical performance standards that every county and municipal law enforcement agency must implement. Agencies that make a vigorous commitment to the internal affairs process signal their desire to comply with the highest standards of professionalism in law enforcement. They also ensure that their officers will be accountable for their actions to both the agency and the community. Agencies that fail to make such a commitment run the risk of failing to uncover policies, practices and procedures that may undermine legitimate efforts to provide the highest quality law enforcement services.

1.0.11 Indifference to the internal affairs function will have a negative impact on the administration of criminal justice and the delivery of police services to New Jersey's residents. Agencies that fail to make the internal affairs function a priority can lose the respect and support of the community. The integrity of individual law enforcement agencies, and the reputation of the State's criminal justice system, can also suffer if agencies fail to identify and correct officer misconduct. In addition, law enforcement agencies that fail to implement a meaningful and objective internal affairs process may be found liable in civil lawsuits for their failure to effectively address officer misconduct. It is for these reasons that the Attorney General has issued this revised policy and directed that the State's law enforcement agencies implement the critical mandates set forth by the policy.

1.0.12 The internal affairs process represents the agency's response to allegations and complaints that have been brought to the agency's attention either by agency employees or members of the public. Law enforcement agencies must establish and implement a process of investigation and review that is both meaningful and objective. The process must be

designed to ensure that individuals receive adequate redress for legitimate complaints of misconduct. It is not enough for law enforcement executives to adopt a policy governing the receipt, investigation and resolution of complaints of officer misconduct; rather, the policy must be implemented and executed with a commitment to the integrity of the agency and the constitutional rights of the public. Agencies with an objective and fair internal affairs process will limit their risk of civil liability.

1.0.13 This policy, the procedures set forth in the policy and the legal citations contained in the text are intended for implementation by all State, county and municipal law enforcement agencies. As made clear in AG Directive 2019-5 (issued concurrently with the publication of this December 2019 version of this policy), all law enforcement and prosecuting agencies operating under the authority of the laws of the State of New Jersey are directed to implement and comply with this policy, and to take any additional measures necessary to update their guidelines consistent with this policy, as required by N.J.S.A 40A:14-181.

1.0.14 Law enforcement agencies that fail to comply with the policies and procedures contained within this document may be subject to the same sanctions arising from any other violation of an AG Directive, including supersession of an agency's law enforcement functions by the Attorney General.

2 Fundamentals of the Disciplinary Process

2.0.1 Achieving the desired level of discipline within the law enforcement agency is among the most important responsibilities of the law enforcement executive. Yet, this is one of the most frequently neglected processes within many law enforcement agencies. While the word “discipline” was originally defined as instruction, teaching or training, its meaning has shifted toward a concept of control through punishment. This emphasis on control has resulted in discipline being viewed as a negative threat rather than a mechanism for remediation and improvement. Too frequently rules of conduct and disciplinary procedures are used as an end in themselves, and their purpose in reaching agency goals is forgotten. Focusing on the negative aspects of discipline diminishes officer morale and productivity.

2.0.2 The first step toward positive discipline is to emphasize instruction and de-emphasize control. This requires the law enforcement executive to focus on organizational practices. The executive must first define the goals and objectives of the agency's units and then announce management's expectations to guide the units toward realizing those goals. The law enforcement executive must establish a means to monitor performance and to correct improper actions.

2.0.3 This approach to management as it relates to discipline insures that all subordinates know and understand what must be done, why it must be done, how it must be done and when it must be done. Employees must be clearly told what constitutes satisfactory performance through performance evaluations and similar procedures. N.J.A.C. 4A:6-5.1. Supervisors and managers also must know when and how to take corrective action. To achieve this, management must establish workable procedures for documenting all expectations and advising individuals of their duties and responsibilities.

2.1 Policy Management System

2.1.1 The agency's policy management system serves as the foundation for effective discipline. A clearly defined policy management system is designed to move the organization toward its stated goals and set the standard for acceptable performance. The system must incorporate a mechanism for distributing rules, regulations, policies and procedures, and provide for periodic review and revision as necessary. The system should include a classification and numbering mechanism that facilitates cross-referencing where necessary.

2.1.2 Law enforcement agencies should have a policy management system that, at a minimum, includes:

(a) *Rules and regulations*. Principles of behavior that set forth acceptable and unacceptable conduct. In municipal police agencies, the rules and regulations must be

issued by the appropriate authority as designated by ordinance. *See* N.J.S.A. 40A:14-118.

(b) *Standard operating procedures (SOPs).* Written statements providing specific direction for performing agency activities. Each SOP should also include the agency's policy in that area, which is a statement of agency principles that provides the basis for the development of the procedures.

(c) *Directives or orders*. Documents detailing the performance of a specific activity or method of operation.

2.1.3 The policy management system should clearly and explicitly state management's intentions. Employees must understand what management wants to accomplish and what behavior is expected. Each category of documents in the policy management system should be issued in a distinctive, readily identifiable format.

2.2 Rules and Regulations

2.2.1 The agency's rules and regulations should form a "code of conduct" for employees. It should contain the broadly stated "do's and don'ts," without delving into specific details. For instance, an agency's rules and regulations should state that any use of force by an officer must comply with state and federal law, the Attorney General's and the County Prosecutor's policies, and the agency's S.O.Ps. The specific details of what is considered force, and what constitutes the acceptable use of force, should be found in the agency's use of force S.O.P.

2.2.2 The rules and regulations should identify general categories of misconduct or inappropriate behavior that are subject to disciplinary action. An incident of misconduct or inappropriate behavior may fall into one or more of the following categories:

(a) *Crime*. Complaint regarding the commission of an illegal act that constitutes a violation of the criminal code including disorderly and petty disorderly persons offenses.

(b) *Excessive force*. Complaint regarding the use or threatened use of excessive force against a person.

(c) *Improper arrest.* Complaint that the restraint of a person's liberty was improper, unjust, or violated the person's civil rights.

(d) *Improper entry*. Complaint that entry into a building or onto property was improper or that excessive force was used against property to gain entry.

(e) *Improper search*. Complaint that the search of a person or property was improper, unjust, violated established agency procedures or violated the person's civil rights.

(f) *Differential treatment*. Complaint that the taking of police action, the failure to take police action or method of police action was predicated upon irrelevant factors such as race, appearance, age or sex.

(g) *Demeanor*. Complaint that an agency member's bearing, gestures, language or other actions were inappropriate.

(h) *Serious rule infractions*. Complaint for conduct such as insubordination, drunkenness on duty, sleeping on duty, neglect of duty, false statements or malingering.
(i) *Minor rule infractions*. Complaint for conduct such as untidiness, tardiness, faulty driving, or failure to follow procedures.

2.2.3 The Rules and regulations shall provide for uniform classification of the resolution of complaints as follows:

(a) *Sustained*. A preponderance of the evidence shows an officer violated any law; regulation; directive, guideline, policy, or procedure issued by the Attorney General or County Prosecutor; agency protocol; standing operating procedure; rule; or training.
(b) *Unfounded*. A preponderance of the evidence shows that the alleged misconduct did not occur.
(c) *Exonerated*. A preponderance of the evidence shows the alleged conduct did occur, but did not violate any law; regulation; directive, guideline, policy, or procedure issued by the Attorney General or County Prosecutor; agency protocol; standing operating procedure; rule; or training.
(d) *Not Sustained*. The investigation failed to disclose sufficient evidence to clearly prove or disprove the allegation.

2.2.4 In addition, the rules and regulations should set forth a schedule of possible penalties an officer might receive when discipline is imposed. The rules and regulations may incorporate a system of progressive discipline. Progressive discipline serves an important role in the process by which the agency deals with complaints of misconduct or inappropriate behavior. In lieu of discipline, counseling, re-training, enhanced supervision, oral reprimand and performance notices can be used as instructional or remedial devices to address deficiencies or inadequate performance.

2.2.5 In providing a range of penalties, the agency can use the disciplinary process to achieve the basic goals of instruction and address inappropriate behavior before minor problems escalate into major problems. At the same time, the subject officer should be made aware that repeated violations of the agency's rules will result in progressive discipline. An internal affairs complaint that has a disposition of exonerated, unfounded or not sustained should not be used to effect progressive discipline.

2.2.6 A system of progressive discipline can include the following elements:

(a) Oral reprimand or performance notice;
(b) Written reprimand;
(c) Monetary fine;[2]
(d) Suspension without pay;

[2] Agencies operating under Civil Service Commission statutes (N.J.S.A. 11A:2-20) and regulations may only assess a fine in lieu of a suspension where loss of the officer from duty would be "detrimental to the public health, safety or welfare" or if the assessment is restitution or is agreed to by the employee.

(e) Loss of a promotional opportunity;
(f) Demotion; and
(g) Discharge from employment.

2.2.7 The disciplinary process should be thoroughly explained in the agency's rules and regulations, including a description of the officer's rights, the identity of the hearing officer, an outline of the hearing process and, if applicable, appeal procedures available to the officers.

2.2.8 An agency's rules and regulations, which include the description of the disciplinary process, shall be distributed to all employees. The agency should document that this distribution has taken place. In addition, a copy of the rules and regulations and a copy of the agency's internal affairs S.O.P. shall be made available to a representative of any employee collective bargaining unit.

2.3 Responsibility for Discipline

2.3.1 The successful implementation of discipline requires the law enforcement executive to delegate responsibility for the disciplinary process to individual units and supervisors within the agency, and perhaps to Human Resources. Although the levels of authority may vary within an agency's chain of command, the failure to carry out disciplinary responsibilities at any level in that chain will contribute to the organization's ineffectiveness. The task of clearly delineating the authority and responsibility to initiate and impose discipline is essential to the agency’s administration.

2.3.2 Every supervisor must establish a familiarity with the agency's disciplinary process and develop an understanding of how to implement specific disciplinary procedures when called upon to deal with inappropriate behavior or misconduct. If a supervisor fails to follow these procedures or avoids their responsibility, that supervisor is not conforming to expected behavior and must receive some sort of corrective action. Some supervisors occasionally need to be reminded that the fundamental responsibility for direction and control rests with the immediate supervisor at the operational level, not with the law enforcement executive.

2.3.3 To provide such direction and control, supervisory personnel must be granted the proper authority to carry out their responsibilities. To properly exercise this authority, supervisory personnel must be fully familiar with applicable agency rules and regulations. Based on the size and needs of the individual agency, supervisory personnel may be permitted to impose specific disciplinary measures (subject to approval of the law enforcement executive) including oral reprimands or performance notices, written reprimands and suspensions. In addition, the supervisor should be permitted to make written recommendations for other disciplinary actions. The extent of this authority must be clearly stated in the agency's disciplinary rules and regulations.

2.4 Fitness for Duty

2.4.1 One of the areas that often involves internal affairs is an employee's fitness for duty. This is not exclusively an internal affairs issue; an officer's fitness may be impacted for reasons other than misconduct. For instance, an officer may become unfit for duty because of a medical problem unrelated to the job. There are occasions, however, when internal affairs may be called upon to assist in determining whether or not an officer is fit for duty.

2.4.2 It is incumbent upon a law enforcement agency to ensure that its members are fit to safely and effectively perform the duties of their profession. If, for whatever reason, an officer's fitness for duty is questioned, the agency must have the officer evaluated by competent professionals to answer that question. If a law enforcement executive, commander, supervisor or internal affairs investigator has reasonable concerns about an officer's fitness for duty, they are obligated to begin the process necessary to obtain that evaluation. If the officer in question is obviously unfit for duty, the officer in authority may effect an immediate suspension pending the outcome of the evaluation and investigation. *See* Section 5.2 ("Immediate Suspension Pending Investigation and Disposition").

2.4.3 At the same time, law enforcement work places an extraordinary mental and emotional toll on officers, and all officers must be free to seek treatment and support that enables them to cope with those pressures. Accordingly, under no circumstances shall an officer face any sort of discrimination or adverse internal affairs consequences for the sole reason that the officer decided to seek medical or psychological treatment for a mental health concern, including depression, anxiety, post-traumatic stress disorder, or substance use disorder. All officers are encouraged to take advantage of the resources provided by the New Jersey Resiliency Program for Law Enforcement, as well as the other resources identified in AG Directive 2019-1, also known as the "Officer Resiliency Directive."

3 Prevention of Misconduct

3.0.1 Prevention is the primary means of reducing and controlling inappropriate behavior and misconduct. Although disciplinary actions are properly imposed on officers who engage in wrongdoing, they have limited utility if they shield or obscure organizational conditions that permit the abuses to occur. Inadequate training and a lack of appropriate guidance too often are factors that contribute to inappropriate behavior and misconduct. An agency should make every effort to eliminate the organizational conditions that may foster, permit or encourage an employee's inappropriate behavior. In the furtherance of this objective, special emphasis should be placed on the following areas.

3.1 Recruitment and Selection

3.1.1 Selecting and appointing the highest quality individuals to serve as law enforcement officers must be a priority of every law enforcement agency. During the selection process, written tests, psychological tests, background investigations and individual interviews should be completed by each candidate in an attempt to identify those who would be best suited for law enforcement employment. Background investigations must include a review of the prior internal affairs files of any candidate.

3.1.2 New Jersey law enforcement agencies are required by this policy to disclose the entire internal affairs file of a candidate to prospective law enforcement employers. *See* Section 9 ("Internal Affairs Records"). Candidates with out-of-state law enforcement experience must sign waivers of confidentiality regarding their internal affairs files so that they may be reviewed by the prospective employer, where legally permissible. These procedures may also be used for promotional testing, and assignment to especially sensitive responsibilities or those that pose the greatest opportunities for abuse or wrongdoing. Each agency should establish policies and procedures for recruitment, oral and written examinations, selection and the promotional process.

3.2 Training

3.2.1 Basic and in-service training for law enforcement officers should emphasize the sworn obligation of those officers to uphold the law and ensure public safety. Police ethics should be a major component in the training curricula. In addition, the rules, regulations, policies and procedures of the agency, including the disciplinary process, should be stressed. There must also be a process to advise veteran officers of any new statutory requirements or significant procedural changes.

3.2.2 An agency's supervisory personnel should always consider the need for training when officers engage in inappropriate behavior or misconduct. The question should be, "Could training have prevented this behavior and can training prevent it from happening in the

future?" Perhaps a particular officer or group of officers needs a refresher course in a certain subject. In addition, changes in the law, the agency or even within the community may trigger the need for a type of training never before given to the officer or agency. Training in this sense can be anything from informal counseling of an officer about a particular policy or procedure to formal agency-wide training. The agency may also take advantage of training offered by other agencies, including police academies, the County Prosecutors, the Division of Criminal Justice, other public or private entities or web-based programs.

3.3 Supervision

3.3.1 Proper supervision is critical to the discipline and management of a law enforcement agency. To maximize their effectiveness, agency supervisors should receive appropriate supervisory training as close as possible to the time of their promotion. Emphasis should be placed on anticipating problems among officers before they result in improper performance or conduct. Supervisors are expected to recognize potentially troublesome officers, identify training needs of officers and provide professional support in a fair and consistent manner.

3.4 Early Warning and Risk Management

3.4.1 Although the internal affairs process is frequently triggered by the filing of a civilian complaint, law enforcement agencies must also proactively work to detect troubling patterns in police conduct before that conduct escalates into more serious internal affairs issues.

3.4.2 To enhance its integrity, provide an optimal level of service to the community and reduce its exposure to civil liability, every law enforcement agency should establish procedures for dealing with problem employees. Law enforcement agencies have a duty to monitor their employees' behavior, and establish mechanisms that provide the internal affairs function and the law enforcement executive with the ability to track the complaint records of individual officers and identify those officers with a disproportionate number of complaints against them. Law enforcement agencies must utilize the information developed by these mechanisms to prevent individual officers from engaging in conduct or behavior that violates the constitutional liberties every member of the community enjoys. It also is expected that law enforcement agencies will utilize the information to prevent development of patterns, practices or trends of inappropriate behavior or conduct.

3.4.3 Per AG Directive 2018-3 v2.0, also known as the "Early Warning Systems Directive," law enforcement agencies are required to implement a specific mechanism to track employee behavior, commonly known as an "early warning system." An early warning system should be designed to identify any pattern or practice by any member of the agency that warrants intervention or remediation before it develops into a more serious problem.

3.4.4 Any mechanism or procedure a law enforcement agency establishes to monitor and track the behavior and performance of individual police officers must have as two of its linchpins quality supervision and an objective and impartial internal affairs process. Supervisors who have sufficient time and resources to properly perform their duties should be able to timely identify officers with performance and misconduct issues. Supervisors can react to problems they identify through direction, counseling and effective performance evaluations. Proper training of agency supervisors is critical to the discipline and performance of law enforcement officers. Emphasis should be placed on anticipating problems among officers before they result in improper performance or misconduct. Supervisors are expected to recognize potentially troublesome officers, identify training needs of officers and provide professional support in a consistent and fair manner.

3.4.5 Many different measures of officer performance can be regularly examined for any of these troubling patterns or practices. Law enforcement executives shall determine what performance measures are appropriate for the communities they serve, but at a minimum an agency must track the following performance indicators:

(a) Internal affairs complaints against the officer, whether initiated by another officer or by a member of the public;
(b) Civil actions filed against the officer;
(c) Criminal investigations of or criminal complaints against the officer;
(d) Any use of force by the officer that is formally determined or adjudicated (for example, by internal affairs or a grand jury) to have been excessive, unjustified, or unreasonable;
(e) Domestic violence investigations in which the officer is an alleged subject;
(f) An arrest of the officer, including on a driving under the influence charge;
(g) Sexual harassment claims against the officer;
(h) Vehicular collisions involving the officer that are formally determined to have been the fault of the officer;
(i) A positive drug test by the officer;
(j) Cases or arrests by the officer that are rejected or dismissed by a court;
(k) Cases in which evidence obtained by an officer is suppressed by a court;
(l) Insubordination by the officer;
(m) Neglect of duty by the officer;
(n) Unexcused absences by the officer;
(o) Any other indicators, as determined by the agency's chief executive.

3.4.6 This information should be maintained to facilitate analysis as to individual members, supervisors, squads, districts and assignments, and the agency as a whole. Depending on the size of the agency and the complexity of this data, computerized software that utilizes mathematical algorithms may be best suited to assist in revealing the presence of particular patterns of incidents. However, not all law enforcement agencies have the computer capabilities for such an in-depth screening process. At a minimum, every law enforcement agency should establish a protocol for tracking employee behavior and

reviewing all internal affairs complaints made against its officers, regardless of outcome, for evidence of a pattern or practice of inappropriate or unconstitutional conduct.

3.4.7 For further information regarding the Attorney General's requirements for early warning systems, agencies should consult the Early Warning Systems Directive.

3.5 Staff Inspections

3.5.1 While the primary responsibility for enforcing agency policies rests with the line supervisors, management cannot rely solely on those supervisors for detecting violations. Administrators should establish a mechanism to determine whether an agency's policies and procedures are being properly implemented. It is necessary for management to know if behavior is, in fact, consistent with the agency's rules and regulations, policies and procedures. The task of detecting such defects should be delegated to an inspection unit or function.

3.5.2 Large agencies might establish an inspection unit operating directly out of the office of the law enforcement executive. Small and medium size agencies can successfully accomplish this function by periodically assigning the inspection task to selected unit supervisors. Individuals so assigned must be of unquestioned integrity and hold sufficient rank to achieve the objectives of the inspection function.

3.5.3 The inspection function should determine by actual on-site inspection whether personnel are properly implementing management's policies at the operational level. This function is also responsible for reviewing and evaluating procedures. In addition, the inspection unit or function should evaluate the material resources of the agency and the utilization of those resources. This includes, but is not limited to, motor vehicles, communications equipment, computers, office machinery and supplies. The inspection function or unit should report any deficiencies to the law enforcement executive, and recommend any possible solutions and improvements.

3.6 Community Outreach

3.6.1 Commanding officers should strive to remain informed about and sensitive to the community's needs and problems. Regularly scheduled meetings to discuss community concerns should be held with public advisory councils, religious groups, schools, businesses and other community leaders. These meetings help commanding officers identify potential crisis situations and keep channels of communication open between the agency and the community. The disciplinary process should be publicized and clearly explained in these forums.

4 Internal Affairs Unit or Function

4.0.1 Every law enforcement agency shall establish, by written policy, an internal affairs unit or function. Depending upon the need, the internal affairs function can be full- or part-time. In either case, this requires the establishment of a unit or the clear allocation of responsibility and resources for executing the internal affairs function. The unit will consist of agency personnel assigned to internal affairs by the law enforcement executive. Personnel assigned to the internal affairs function serve at the pleasure of and are directly responsible to the law enforcement executive or the designated internal affairs supervisor.

4.1 Duties and Responsibilities

4.1.1 The purpose of the internal affairs function is to establish a mechanism for the receipt, investigation, and resolution of officer misconduct complaints. The goal of internal affairs is to ensure that the integrity of the agency is maintained through a system of internal discipline where an objective and impartial investigation and review assure fairness and justice.

4.1.2 The internal affairs function or officer will investigate alleged misconduct by members of the agency and review the adjudication of minor complaints handled by supervisors. In addition, internal affairs shall receive notice of:

(a) Any firearm discharge by agency personnel, whether on-duty or off-duty, unless the discharge occurred during the course of: (1) a law enforcement training exercise; (2) routine target practice at a firing range; (3) a lawful animal hunt; or (4) the humane killing of an injured animal;
(b) Any discharge of an agency-owned firearm by anyone other than agency personnel;
(c) Any use of force by agency personnel that results in injury to any person,
(d) Any vehicular pursuit involving agency personnel; and
(e) Any collision involving agency-owned vehicles.

Upon receiving notification, the agency’s internal affairs function shall document the incident and determine whether additional investigation is necessary.

4.1.3 An internal affairs function also has an obligation to investigate or review any allegation of employee misconduct that is a potential violation of an AG Directive or Guideline, a Directive issued by a County Prosecutor in that jurisdiction, the agency's rules and regulations, or any allegation that indicates the employee is unable, unwilling or unfit to perform their duties. The obligation to investigate includes not only acts of misconduct that are alleged to have occurred while the subject officer was on-duty, but also acts of misconduct that are alleged to have occurred outside the employing agency's jurisdiction or while the subject officer was off-duty.

4.1.4 An internal affairs function may conduct an internal investigation on its own initiative or upon notice to or at the direction of the law enforcement executive or the internal affairs supervisor. Internal affairs may refer investigations to the employee's supervisor for action as permitted by agency policy and procedures.

4.1.5 Internal affairs investigations must be considered as important to the agency as any criminal investigation. Members of the internal affairs function therefore should have the authority to interview any member of the agency and to review records and reports of the agency relative to their assignment. In addition, the agency's personnel should be instructed that the internal affairs function acts at the behest of the law enforcement executive in all internal affairs investigations. The agency's personnel should be further instructed that during an internal affairs investigation, every member of the agency, regardless of rank, shall treat an order or a request from a member of the internal affairs function as if the order or request came directly from the law enforcement executive.

4.1.6 The internal affairs function shall maintain a comprehensive central file on all complaints received, whether investigated by internal affairs or assigned to the officer's supervisors for investigation and disposition. In addition, internal affairs should establish protocols for tracking all complaints received by the agency and the conduct of all officers. The protocols must include criteria for evaluating the number of complaints received by the agency and the number of complaints filed against individual officers.

4.2 Selection of Personnel for the Internal Affairs Function

4.2.1 Personnel assigned to conduct internal affairs investigations should be energetic, resourceful and committed to the agency's mission and the internal affairs function. They must display a high degree of perseverance and initiative. The internal affairs investigator must maintain an appropriate balance between professional commitment and personal and group loyalties. Internal affairs personnel must be of unquestioned integrity and possess the moral stamina to perform unpopular tasks. It is important that these investigators possess the ability to withstand the rigors and tensions associated with complex investigations, social pressures and long hours of work. The investigator must possess the ability to be tactful when dealing with members of the agency and the community. It is recommended that personnel assigned to the internal affairs function provide the agency with the opportunity to access all segments of the community. For example, if a particular community has a significant proportion of the population that speaks a foreign language, the law enforcement executive may wish to consider assigning an officer to the internal affairs function who speaks that language.

4.2.2 Law enforcement executives should assign personnel to internal affairs who have sufficient experience and rank to effectively handle sensitive investigations that may include investigations of supervising officers. In addition, law enforcement executives should

encourage (but need not require) officers to complete a tour in the agency's internal affairs function prior to promotion to a leadership position in the agency.

4.2.3 Investigations of officer misconduct may proceed in one of two ways. An investigation may be conducted for the purpose of imposing a disciplinary sanction or initiating a criminal prosecution. The distinction between the two is important because each type of investigation has differing legal requirements. Consequently, it is important that the internal affairs investigator be familiar with proper investigative techniques and legal standards for each type of proceeding. It is essential that experienced investigators be assigned to internal affairs investigations. Each investigator must be skilled in interviews and interrogation, observation, surveillance and report writing.

4.2.4 Internal affairs investigators should be trained not only in the elements of criminal law, court procedures, rules of evidence and use of technical equipment, but also in the disciplinary and administrative law process. Initially upon assignment, and on an ongoing basis, these investigators should receive training in internal affairs and disciplinary procedures, including training required by the Division of Criminal Justice.

4.2.5 Law enforcement executives shall not assign to the internal affairs function any person responsible for representing members of a collective bargaining unit. The conflict of interest arising from such an assignment would be detrimental to the internal affairs function, the subject officer, the person so assigned, the bargaining unit and the agency as a whole.

4.2.6 Investigators must recuse from cases where they have a conflict of interest that may prevent them from being impartial in the investigation of a subject officer. One example is if the investigator and the officer are family members or close personal friends. Additionally, agencies should ensure, if feasible, that the initial investigator of a subject officer is not an officer who is a supervisor within the subject officer's chain of command. In rare cases, this requirement may prove difficult to fulfill because an agency is particularly small.

4.2.7 Under no circumstances may a law enforcement agency's internal affairs investigatory function be contracted or delegated to a private entity. Instead, when necessary, law enforcement agencies may request that an internal affairs complaint be investigated directly by the County Prosecutor, who shall determine whether to investigate the matter, refer the matter to the Internal Affairs function of another law enforcement entity, or return the matter to the originating law enforcement agency if the County Prosecutor determines that the original agency can appropriately investigate the matter.

4.2.8 Where appropriate, an agency may enter into an agreement with another law enforcement agency to conduct an Internal Affairs investigation, and smaller law enforcement agencies that consistently have difficulty carrying out the internal affairs function are encouraged to

explore regional internal affairs arrangements in concert with other law enforcement agencies.

4.2.9 Nothing in this policy shall prevent a law enforcement agency from retaining a qualified private individual to serve as a hearing officer or an expert witness.

4.3 Training of Internal Affairs Personnel

4.3.1 Each agency shall ensure that officers assigned to the internal affairs function complete training as mandated by the Division of Criminal Justice.

4.3.2 Each County Prosecutor shall ensure that each agency within the Prosecutor's jurisdiction implement and maintain a system of ensuring appropriate training for all personnel involved in the agency's internal affairs function.

4.3.3 The Division of Criminal Justice shall conduct periodic "train-the-trainer" courses for all persons assigned responsibility for internal affairs training within the County Prosecutor's Offices. These trainers shall be responsible to train the internal affairs officers of agencies within their jurisdiction of the County Prosecutor.

5 Accepting Reports of Officer Misconduct

5.0.1 Every law enforcement agency shall establish a policy providing that any complaint from a member of the public is readily accepted and fully and promptly investigated. Allegations of officer misconduct or complaints of inappropriate behavior can alert the law enforcement executive to problems that require disciplinary action or identify the need for remedial training. In addition, executives must also recognize that complaints from the public provide them with an invaluable source of feedback. Such complaints, whether substantiated or not, increase the executive's awareness of both actual or potential problems and the community's perceptions and attitudes about police practices and procedures. The executive should use complaints from the public as one means of determining whether the agency is falling short of its intended goals.

5.1 Accepting Reports Alleging Officer Misconduct

5.1.1 All complaints of officer misconduct shall be accepted from all persons who wish to file a complaint, regardless of the hour or day of the week. This includes reports from anonymous sources, juveniles, undocumented immigrants, and persons under arrest or in custody. Internal affairs personnel, if available, should accept complaints. If internal affairs personnel are not available, supervisory personnel should accept reports of officer misconduct, and if no supervisory personnel are available, complaints should be accepted by any law enforcement officer. At no time should a complainant be told to return at a later time to file their report.

5.1.2 Members of the public should be encouraged to submit their complaints as soon after the incident as possible. If the complainant cannot personally appear at the agency to file the complaint, a member of the agency, preferably a member of the internal affairs function, should visit the complainant at their home, place of business or other location if necessary to complete the report. Law enforcement agencies are encouraged to establish systems to enable complaints to be accepted by telephone or by email if a complainant does not wish to be interviewed in person or wishes to remain anonymous. Under no circumstances shall it be necessary for a complainant to make a sworn statement to initiate the internal affairs process. Furthermore, every police agency shall accept and investigate anonymous complaints.

5.1.3 The internal affairs investigator, supervisor or other officer receiving the complaint will explain the agency's disciplinary procedures to the person making the complaint. The officer shall advise the complainant that he or she will be kept informed of the status of the complaint, if requested, and its ultimate disposition. To best accomplish this, the agency shall prepare a fact sheet or brochure that includes information on the agency's internal affairs process and what role the complainant can expect to play. If feasible, the fact sheet or brochure should be provided to the complainant at the time the complaint is made. A sample fact sheet is found in Appendix B.

5.1.4 The supervisor or other officer receiving the complaint shall complete the appropriate internal affairs report form. The report form should have adequate instructions for proper completion. Attached to this directive is a standardized statewide public complaint form that will be available in multiple languages in electronic format on the Attorney General's website. Agencies shall make available to complainants versions of the standardized form in all of those languages in their offices and, if the agency has a website, online.

5.1.5 Upon receipt of an internal affairs complaint, the internal affairs investigator can advise the complainant of the importance of providing accurate and truthful information. However, when providing such advice, internal affairs investigators must remember that it is important to balance the need for receiving complaints of officer misconduct against the danger of discouraging members of the public from coming forward with their complaints. Therefore, any language that would serve to dissuade or intimidate a member of the public from coming forward should be avoided. Accordingly, at no point during the initial intake of a complaint should any officer affirmatively warn a complainant that consequences could potentially result from making misrepresentations or a false report. This does not preclude officers from explaining the potential consequences of false reports to complainants if the officer is specifically asked about this.

5.1.6 Although there are complaints against officers that are legitimate and based upon facts, others are contrived and maliciously pursued, often with the intent to mitigate or neutralize the officer's legal action taken against the complainant. The law enforcement agency must fully and impartially investigate the former, while taking a strong stand to minimize the latter. The law enforcement agency should notify the County Prosecutor in any case where a complainant has fabricated or intentionally misrepresented material facts to initiate a complaint of officer misconduct.

5.1.7 Anonymous reports of improper conduct by an officer shall be accepted. All efforts will be made to encourage full cooperation by the complainant. The investigation of anonymous complaints can be troublesome. However, accurate information about officer wrongdoing may be provided by someone who, for any number of reasons, does not want to be identified. Therefore, an anonymous report must be accepted and investigated as fully as possible. In the event an agency receives an anonymous complaint, the officer accepting it should complete as much of the internal affairs report form as he or she can given the information received.

5.1.8 Complaints against a law enforcement executive, or a member of the executive's senior management team, may originate from a member of the public or from an employee of the agency. All such complaints shall be documented and referred to the County Prosecutor for review. If the subject of the Internal Affairs investigation is the Police Chief, Police Director, Sheriff or Head of Internal Affairs, the County Prosecutor or the Attorney General's Office shall handle the investigation. The investigation may involve any type of alleged employee misconduct, as described in Section 4.1.3, and shall be conducted pursuant to Section 6 (Investigation of Internal Complaints). At the conclusion of the investigation, the internal

affairs investigator and/or the investigating agency shall make factual findings, summarize the matter, and indicate the appropriate disposition (Sustained, Unfounded, Exonerated, or Not Sustained) as to each allegation of misconduct. *See* Sections 6.2.3, 6.3.9. In cases involving Police Chiefs, final dispositions and recommendations shall be forwarded to the appropriate authority. While the appropriate authority must make the final decision regarding discipline, the County Prosecutor may make a non-binding recommendation regarding the discipline to be imposed by the appropriate authority. The County Prosecutor or the Attorney General's Office also may determine that it is appropriate to handle other internal affairs investigations of high-level officials in their discretion.

5.1.9 Complaints may also be received from other law enforcement agencies, such as neighboring municipal police agencies, the County Prosecutors, the Division of Criminal Justice or federal law enforcement agencies. Those complaints should be forwarded to internal affairs for immediate investigation. In some jurisdictions, law enforcement agencies may be subject to the oversight of a civilian review board authorized to accept complaints directly from members of the public. If a civilian review board refers a complaint to a law enforcement agency, then those complaints should be forwarded to internal affairs for immediate investigation.

5.1.10 If a person comes to a particular law enforcement agency to make a complaint about a member of another law enforcement agency, he or she should be referred to that agency. The complainant should also be advised that if they have fear or concerns about making the complaint directly to the agency, they may instead file a complaint with the County Prosecutor or the Attorney General's Office.

5.1.11 All complaints should be investigated if the complaint contains sufficient factual information to warrant an investigation. In cases where the officer's identity is unknown, the internal affairs investigator should use all available means to determine proper identification. Where civil litigation has been filed and the complainant is a party to or a principal witness in the litigation, the internal affairs investigator shall consult with legal counsel to determine whether an investigation is appropriate or warranted.

5.1.12 In some cases, a complaint is based on a misunderstanding of accepted law enforcement practices or the officer's duties. Supervisors should be authorized to informally resolve minor complaints, whenever possible, at the time the report is made. If the complainant is not satisfied with such a resolution, the complaint should be forwarded to internal affairs for further action as warranted. The process of informally resolving internal affairs complaints requires the exercise of discretion by supervisors. The proper exercise of discretion in such matters cannot be codified.

5.1.13 Even if the complainant is satisfied with the informal resolution, the process should be recorded on an internal affairs report form. Regardless of the means of resolution, the integrity of the internal affairs process, particularly the receipt of complaints, demands that complaints and inquiries from any member of the public be uniformly documented for

future reference and tracking. The form should indicate that the matter was resolved to the satisfaction of the complainant and sent to internal affairs for review and filing. The internal affairs supervisor should periodically audit those reports indicating that the complaint was informally resolved to ensure that the agency's supervisors are properly implementing their authority to resolve complaints from members of the public.

5.1.14 Once a complaint has been received, the subject officer shall be notified in writing that a report has been made and that an investigation will commence. This notification is not necessary if doing so would impede the investigation. An example of a notification form is found in Appendix F.

5.2 Immediate Suspension Pending Investigation and Disposition

5.2.1 In certain serious cases of officer misconduct, the agency may need to suspend the subject officer pending the outcome of the investigation and subsequent administrative or criminal charges. To effect an immediate suspension pending the investigation, at least one of the following conditions must be met:

(a) The employee is unfit for duty;
(b) The employee is a hazard to any person if permitted to remain on the job;
(c) An immediate suspension is necessary to maintain safety, health, order, or effective direction of public services;
(d) The employee has been formally charged with a first, second or third degree crime; or
(e) The employee has been formally charged with a first, second, third or fourth degree crime or a disorderly persons offense committed while on duty, or the act touches upon their employment.

5.2.2 Before the immediate suspension of an officer, the law enforcement executive or authorized person should determine which of those criteria apply. The decision whether or not to continue to pay an officer who has been suspended pending the outcome of the investigation rests with the law enforcement executive and appropriate authority, who should carefully consider all ramifications of these choices.

5.2.3 It should be clear that the suspension of an officer before completing an investigation or disposing of a case is a serious matter. Such suspensions may be immediately necessary, as in the case of an officer reporting for work under the influence of alcohol. In other cases, however, a suspension need not be immediate but rather would follow a preliminary investigation into the matter that indicates that one of the above criteria has been met. In any case, suspension prior to disposing of the case must be clearly documented and justified. At the time of the suspension, the individual shall be provided with a written statement of the reasons the action has been taken. In the event of a refusal by the individual to accept that written statement, a copy shall be provided to the individual's

collective bargaining representative as soon as possible. If a supervisor or commander authorized to do so imposes an immediate suspension, the law enforcement executive must be advised without delay. He or she will then determine the status of the suspension given the facts of the case in light of the above criteria. In no case shall an immediate suspension be used as a punitive measure.

6 Investigation of Internal Complaints

6.0.1 All allegations of officer misconduct shall be thoroughly, objectively, and promptly investigated to their logical conclusion.

6.1 Time Limitations

6.1.1 It is vitally important that agencies complete internal affairs investigations in a prompt manner. Long, unnecessary delays do not simply create additional uncertainty for the subject officer; they can also threaten the integrity of an investigation and the trust of the community.

6.1.2 Most internal affairs complaints are straightforward, and most of these routine complaints can be investigated and resolved quickly. In many cases, an internal affairs investigation will take no more than 45 days from the receipt of the complaint to the filing of disciplinary charges. The simpler the case, the quicker the inquiry should be completed.

6.1.3 In more complex matters, however, investigators sometimes need additional time to collect evidence, interview witnesses, or take other necessary investigative steps. In addition, when an officer's alleged conduct gives rise to a criminal investigation, ordinarily, internal affairs investigators should stay their own inquiry pending the resolution of the criminal matter.

6.1.4 If investigators are unable to complete an internal affairs investigation within 45 days of receiving a complaint, they must notify the agency's law enforcement executive on or about the 45th day.[3] In such situations, the law enforcement executive should seek to identify the reasons for the extended investigation and whether the internal affairs function requires additional resources or oversight to complete the inquiry in a prompt manner. In addition, the law enforcement executive should ensure compliance with the "45-day rule" established by N.J.S.A. 40A:14-147, which requires that certain disciplinary charges be filed within 45 days of the date the person filing the charge obtained "sufficient information" to do so.

6.1.5 Investigators are required to provide further notice to the law enforcement executive every additional 45 days that the internal affairs investigation remains open (*i.e.*, on or about the 90th, 135th, and 180th days from the receipt of the complaint), and the law enforcement executive should exercise increasing scrutiny of the investigators' work the longer the case remains open.

[3] The purpose of this notice is to facilitate prompt resolution of internal affairs investigations, not to create an impediment to discipline in cases that take longer to resolve.

6.1.6 In the rare cases where the agency has not filed disciplinary charges (or decided not to do so) within 180 days of receipt of the complaint, the agency must notify the County Prosecutor. The County Prosecutor, or their designee, shall investigate the reasons for the extended investigation and shall also examine whether the agency's internal affairs function faces any systemic issues that require additional resources or oversight. The County Prosecutor may take any steps necessary to ensure prompt resolution of the pending matter, including supersession of the agency's investigation. The agency shall provide further notice to the County Prosecutor every additional 90 days that the investigation remains open (*i.e.*, on or about the 270th and 360th days from the receipt of the complaint). The chart in Figure 1 provides an overview of that information.

Figure 1.

Timing of Internal Affairs Investigations	
Length of investigation from receipt of complaint	**Special notice required**
1 to 44 days ("Routine")	None. Case resolved in the ordinary course.
45 days ("More complex")	Law enforcement executive
90 days	Law enforcement executive
135 days	Law enforcement executive
180 days ("Rare cases")	County Prosecutor Law enforcement executive
225 days	Law enforcement executive
270 days	County Prosecutor Law enforcement executive

6.1.7 The law enforcement executive should consult with counsel about compliance with the 45-day rule, which includes several exceptions and tolling provisions. For example, the "45-day rule" does not apply to internal affairs investigations alleging incapacity. In addition, members of the public are not required to make their complaint within 45 days of the incident. But once the agency has received the individual's complaint, the 45-day rule applies.

6.1.8 Commencing a criminal investigation into the subject matter of an internal affairs complaint will suspend the 45-day rule pending the disposition of that investigation; such suspension remains until the disposition of the criminal investigation. (Similarly, a criminal investigation will toll the notice requirements established in Sections 6.1.4 – 6.1.6.) Upon disposition of the criminal investigation, agencies will once again be bound by the 45-day rule, with the 45-day period starting anew upon termination of the criminal investigation.

Therefore, in the event a County Prosecutor has initiated a criminal investigation of an internal affairs matter, the internal affairs function must remain in contact with the County Prosecutor on a regular basis to determine the investigation's progress. Where a County Prosecutor has decided to terminate a criminal investigation and return the matter to the agency for appropriate disciplinary action, the internal affairs investigator and County Prosecutor must be able to document the date on which the County Prosecutor disposed of the criminal investigation.

6.1.9 When an agency can conduct an internal affairs investigation and file disciplinary charges within 45 days of the receipt of a complaint, the 45-day rule does not become an issue. In many instances this will be possible. However, if an agency cannot do so, the burden is on the investigator and ultimately the agency to identify the point at which "sufficient information" was developed to initiate disciplinary action. Therefore, it is important that a detailed chronology be maintained of each investigation so that critical actions and decisions are documented.

6.1.10 Along these same lines, it is important that there is no unreasonable delay between the conclusion of the investigation by the assigned investigator and the decision to file charges by the person who has that responsibility. Although the 45-day clock begins at the time the person who has the responsibility to file charges has sufficient information, an agency would have a difficult time justifying an extensive bureaucratic delay once any member of that agency has established sufficient information. The need to eliminate bureaucratic delay is one of the reasons that the internal affairs function should be closely aligned with the office of the law enforcement executive in the agency's organizational structure.

6.1.11 In addition, all agencies must comply with the time limitations established by N.J.S.A. 40A:14-200 et seq. regarding the imposition of discipline. Lastly, agencies operating under the purview of Title 11A must comply with the deadlines for disciplinary action imposed by Civil Service Commission Rules. *See* N.J.A.C. 4A:1-1.1, *et seq*.

6.2 Investigation and Adjudication of Minor Complaints

6.2.1 Following the principle that the primary goal of internal affairs and discipline is to correct problems and improve performance, management in the subject officer's chain of command should handle relatively minor complaints. Complaints of demeanor and minor rule infractions should be forwarded to the supervisor of the subject officer's unit because it is often difficult for an immediate supervisor to objectively investigate a subordinate. In addition, that arrangement might obscure the possibility that part of the inappropriate conduct was the result of poor supervision. While the structure of each law enforcement agency is different, it is recommended that minor complaints be assigned to and handled by a commanding officer at least one step removed from the officer's immediate supervisor. Often Human Resources may need to be notified and involved.

6.2.2 Supervisors investigating minor complaints of inappropriate behavior must strive to conduct a thorough and objective investigation without violating the rights of the subject officer or any other law enforcement officer. Accordingly, all officers who may be called upon to do an internal investigation must be thoroughly familiar with the agency's entire internal affairs policy, including the protection of the subject officer's rights and the procedures for properly investigating internal complaints.

6.2.3 The investigator should interview the complainant, all witnesses and the subject officer, and review relevant reports and documents, gather evidence and conduct any other investigation as appropriate. The investigator should then submit a report to the law enforcement executive or appropriate supervisor summarizing the matter and indicating the appropriate disposition. Possible dispositions include:

(a) *Sustained*. A preponderance of the evidence shows an officer violated any law; regulation; directive, guideline, policy, or procedure issued by the Attorney General or County Prosecutor; agency protocol; standard operating procedure; rule; or training.
(b) *Unfounded*. A preponderance of the evidence shows that the alleged misconduct did not occur.
(c) *Exonerated*. A preponderance of the evidence shows the alleged conduct did occur, but did not violate any law; regulation; directive, guideline, policy, or procedure issued by the Attorney General or County Prosecutor; agency protocol; standard operating procedure; rule; or training.
(d) *Not Sustained*. The investigation failed to disclose sufficient evidence to clearly prove or disprove the allegation.

6.2.4 If the investigator determines that the complaint is unfounded, exonerated or not sustained, the investigative report is to be forwarded to internal affairs for review and entry in the index file and filing. The subject officer shall be notified in writing of the investigation’s outcome.

6.2.5 If the complaint is sustained, the superior officer so authorized should determine the appropriate disciplinary action. Typical disciplinary actions for minor infractions include performance notices, oral reprimands or written reprimands. The superior officer shall complete the appropriate disciplinary document and provide a copy of that document to the officer being disciplined. A copy of the disciplinary document shall be forwarded to the law enforcement executive or appropriate supervisor for review, placed in the officer's personnel file and sent to internal affairs for entry into the index file and filing.

6.2.6 Each agency should establish its own protocol for reviewing and purging performance notices and oral reprimands from an employee's personnel file. Written reprimands should remain permanently in the employee's personnel file.

6.2.7 A letter shall be sent to the complainant explaining the outcome of the investigation. If the allegation was unfounded or the officer was exonerated, this conclusion shall be stated and defined for the civilian complainant. If the allegation was not sustained, the letter shall provide the complainant with a brief explanation why the complaint was not sustained (e.g., insufficient proof, lack of witnesses, etc.). If the allegation was sustained and discipline was imposed, the letter shall state that the allegation was sustained and that the officer has been disciplined according to agency procedures. *See* Appendix K.

6.3 Investigation and Adjudication of Serious Complaints

6.3.1 All serious complaints shall be forwarded to the internal affairs function. This includes complaints of criminal activity, excessive force, improper or unjust arrest, improper entry, improper or unjustified search, differential treatment, serious rule infractions and repeated minor rule infractions.

6.3.2 Unless otherwise directed to do so by the County Prosecutor, the prosecutor's office must be immediately notified of all allegations of criminal conduct. The internal affairs investigator shall refrain from taking any further investigative action until directed to do so by the County Prosecutor unless an imminent threat exists to the safety or welfare of an individual. Once a complaint has been forwarded to the prosecutor's office, that office shall endeavor to review the allegation within 30 days and advise the law enforcement agency whether a criminal investigation will be conducted. In the event the prosecutor's office cannot reach a decision within the initial 30 day period, the deadline may be extended in 30 day increments at the discretion of the County Prosecutor. The law enforcement agency shall be advised of any extensions of the deadline.

6.3.3 If a criminal investigation is initiated, the law enforcement agency shall receive periodic and timely updates concerning the course of the investigation. While a criminal investigation is pending, complainants and witnesses may be referred by the law enforcement agency to the county victim witness office for information concerning the criminal investigation. Once the criminal investigation is complete and a disposition of the allegation has been made, the prosecutor's office shall provide the law enforcement agency with its investigative file for use in the internal affairs investigation subject to applicable state statutes, court rules and case law. If the prosecutor's office declines to initiate a criminal investigation or the investigation is administratively closed, it shall notify the law enforcement agency of the outcome in writing.

6.3.4 As for administrative complaints, the internal affairs supervisor or law enforcement executive will direct that an internal affairs investigator conduct an appropriate investigation. Investigators must strive to conduct a thorough and objective investigation without violating the rights of the subject officer or any other law enforcement officer. Internal affairs investigators, and anyone who may be called upon to do an internal investigation, must be thoroughly familiar with the agency's entire internal affairs policy,

including the protection of the subject officer's rights and the procedures for properly investigating internal complaints.

6.3.5 Internal affairs shall notify the suspect officer in writing that an internal investigation has been started, unless the nature of the investigation requires secrecy. The internal affairs investigator should interview the complainant, all witnesses and the subject officer, review relevant reports and documents, and obtain necessary information and materials.

6.3.6 If an officer subject to an administrative investigation has a good-faith basis to question the impartiality or independence of the investigation, then they may report their concerns to the County Prosecutor. Law enforcement officers employed by a County Prosecutor's Office or the Division of Criminal Justice may report concerns to the Office of Public Integrity & Accountability (OPIA). The County Prosecutor may, within their discretion, conduct their own review of the internal affairs investigation and determine whether any further action is warranted, including potential reassignment of the investigation to a different entity.

6.3.7 An administrative investigation may commence with the disposition of a complaint against the subject officer by the Superior Court or a municipal court. In the alternative, an administrative investigation may commence with a county or municipal prosecutor's decision to dismiss a complaint against a subject officer. A finding of guilt by the Superior Court or a municipal court may assist in resolving an administrative investigation because such a finding requires proof beyond a reasonable doubt, which is more than is required to meet the burden of proof in administrative matters.

6.3.8 A disposition that does not involve a finding of guilt by the courts or where a complaint is dismissed by a county or municipal prosecutor means that proof beyond a reasonable doubt has not been found. However, it does not mean that an administrative investigation cannot be pursued or should be closed. The absence of proof beyond a reasonable doubt does not foreclose the possibility that an investigation may reveal evidence that meets the burden of proof in administrative matters. Thus, the internal affairs investigator must continue the administrative investigation to determine whether evidence exists or can be developed that meets the "preponderance of the evidence" burden of proof for administrative proceedings. Under no circumstances shall an internal affairs administrative investigation be closed merely because a criminal investigation was declined or terminated. In all cases where an investigation is returned to internal affairs because the prosecutor declined or terminated the criminal investigation, internal affairs shall inform the County Prosecutor as to the disposition of the complaint, including any discipline imposed, once the administrative investigation is completed.

6.3.9 Upon completing the investigation, the internal affairs investigator will recommend dispositions for each allegation through the chain of command to the law enforcement executive. As previously described, these dispositions may include exonerated, sustained,

not sustained or unfounded. Each level of review may provide written recommendations and include comment for consideration by the law enforcement executive.

6.3.10 The law enforcement executive, upon reviewing the report, supporting documentation and information gathered during any supplemental investigation, shall direct whatever action is deemed appropriate. If the complaint is unfounded or not sustained or the subject officer is exonerated, the disposition shall be entered in the index file and the report filed. The determination must remain within the discretion of the law enforcement executive.

6.3.11 If the complaint is sustained and it is determined that formal charges should be made, the law enforcement executive will direct either internal affairs or the appropriate commanding officer to prepare, sign and serve charges upon the subject officer or employee. The individual assigned shall prepare the formal notice of charges and hearing on the charging form. This form will also be served upon the officer charged in accordance with N.J.S.A. 40A:14-147. An example of a charging form is in Appendix N.

6.3.12 The notice of charges and hearing shall direct that the subject officer may: (1) enter a plea of guilty to the charges; (2) enter a plea of not guilty to the charges; or (3) waive their right to a hearing. If the officer enters a plea of guilty or waives their right to a hearing, he or she is permitted to present mitigating factors prior to being assessed a penalty. Conclusions of fact and the penalty imposed will be noted in the officer's personnel file after he or she has been given an opportunity to read and sign it. Internal affairs will cause the penalty to be carried out and complete all required forms.

6.3.13 If the subject officer enters a plea of not guilty and requests a hearing, the law enforcement executive will set the date for the hearing as provided by statute and arrange for the hearing of the charges. Internal affairs may assist the assigned supervisor or prosecutor in preparing the agency's prosecution of the charges. This includes proper notification of all witnesses and preparing all documentary and physical evidence for presentation at the hearing.

6.3.14 The hearing shall be held before the designated hearing officer. The hearing officer shall recommend a disposition of the charges, including modifying the charges in any manner deemed appropriate. The decision of the hearing officer must be in writing and should be accompanied by findings of fact for each issue in the case.

6.3.15 If the hearing officer finds that the complaint against the officer is sustained by a preponderance of the evidence, he or she should recommend any of the penalties which he or she deems appropriate under the circumstances and within the limitations of state statutes and the agency's disciplinary system.

6.3.16 A copy of the decision and accompanying findings and conclusions shall be delivered to the officer or employee who was the subject of the hearing and to the law enforcement executive (if he or she was not the hearing officer) for the imposition of discipline. Upon

completion of the hearing, internal affairs will complete all required forms (Civil Service Commission jurisdictions use the Final Notice of Disciplinary Action form DPF-31C), including the entry of the disposition in the index file. If the charges were sustained, internal affairs will cause the penalty to be carried out. Documentation of the charge and the discipline shall be permanently placed in the officer's or employee's personnel file.

6.3.17 Upon final disposition of the complaint, in cases where the officer was not notified of the outcome through some written form of discipline, the officer shall be notified of the outcome of the case through a written internal agency communication.

6.3.18 In all cases, a letter shall be sent to the complainant explaining the outcome of the investigation. If the allegation was unfounded or the officer was exonerated, this conclusion shall be stated and defined for the civilian complainant. If the allegation was not sustained, the letter shall provide the complainant with a brief explanation why the complaint was not sustained (e.g., insufficient proof, lack of witnesses, etc.). If the allegation was sustained and discipline was imposed, the letter shall state that the allegation was sustained and that the officer has been disciplined according to agency procedures.

6.4 Domestic Violence Incidents Involving Agency Personnel

6.4.1 Law enforcement personnel may become involved in domestic violence incidents. It is important to the integrity of the agency, the safety of the victim and the career of the officer that such matters are handled appropriately. Thus, it is imperative that every law enforcement agency establish a policy for investigating and resolving domestic violence complaints involving its employees. A sample policy is in Appendix Q.

6.4.2 Whenever an officer is involved in a domestic violence incident, either as an alleged perpetrator or as a victim, internal affairs must be promptly notified. Where the officer was the alleged perpetrator, investigating officers must seize their service weapon or any other weapon possessed, as mandated by AG Directives 2000-3 and 2000-4. The directives are in Appendix R.

6.4.3 Every law enforcement agency should promulgate a rule which requires any officer or employee to notify the agency if he or she has been charged with an offense, received a motor vehicle summons or been involved in a domestic violence incident. In cases of domestic violence, the investigating agency should also notify the employing agency's internal affairs investigators as soon as possible.

6.4.4 The primary responsibility for investigating the domestic violence incident itself, along with any related offenses, belongs to the agency with jurisdiction over the incident. The processing of domestic violence complaints, restraining orders, criminal complaints, etc., will remain with that agency. In many cases, this will not be the officer's employing agency.

6.4.5 The employing agency's internal affairs officers will be responsible for receiving the information and documenting the matter as they would any other misconduct allegation. If the report is that the officer is the victim of domestic violence, it should still be recorded and followed up in case employee assistance is warranted.

6.4.6 If a criminal charge has been filed, internal affairs must notify the County Prosecutor immediately even if the incident took place in another county. As the chief law enforcement officer of the county, it is critical that a prosecutor be made aware of any outstanding criminal charges against any law enforcement officer in their county.

6.4.7 Internal affairs is responsible for reviewing the incident's investigation and conducting whatever further investigation is necessary to determine if the officer violated agency rules and regulations or if the officer's fitness for duty is in question. In addition, internal affairs will track the proceedings of any criminal charges or civil matters that may arise out of the incident. Internal affairs will also work with the Division of Criminal Justice or the County Prosecutor to determine if and when an officer may have their weapon(s) returned.

7 Internal Affairs Investigation Procedures

7.0.1 Only after a thorough and impartial investigation can an informed decision be made as to a complaint's proper disposition. Decisions based upon such an investigation will support the credibility of the agency both among its ranks and the public at large.

7.0.2 As with all other investigations, lawful procedures must be used to gather all evidence pertaining to allegations against a law enforcement officer. Investigations for internal disciplinary or administrative purposes involve fewer legal restrictions than criminal investigations.

7.0.3 Restrictions that do exist, however, must be recognized and followed. Failure to do so may result in improperly gathered evidence being deemed inadmissible in court. Restrictions that apply to internal affairs investigations may have their basis in state statutes, case law, collective bargaining agreements, local ordinances, Civil Service Commission rules or agency rules and regulations. Internal affairs investigators shall familiarize themselves with all of these provisions.

7.0.4 Complaints must be professionally, objectively and expeditiously investigated in order to gather all information necessary to arrive at a proper disposition. It is important to document complainants' concerns, even those that appear to be unfounded or frivolous. If such complaints are not documented or handled appropriately, public dissatisfaction will grow, fostering a general impression of agency insensitivity to community concerns.

7.0.5 The internal affairs investigator may use any lawful investigative techniques including inspecting public records, questioning witnesses, interviewing the subject officer, questioning agency employees and surveillance. The investigator therefore must understand the use and limitations of such techniques.

7.0.6 It is generally recommended that the complainant and other lay witnesses be interviewed prior to interviewing sworn members of the agency. This will often eliminate the need to do repeated interviews with agency members. However, this procedure does not have to be strictly adhered to if circumstances and the nature of the investigation dictate otherwise.

7.1 Interviewing the Complainant and Civilian Witnesses

7.1.1 The investigator assigned an internal investigations case should initially outline the case to determine the best investigative approach and identify those interviews immediately necessary. The investigator should determine if any pending court action or ongoing criminal investigation might delay or impact upon the case at hand. If it appears that the conduct under investigation may have violated the law or the investigation involves the

officer's use of force that resulted in serious bodily injury or death, the County Prosecutor shall be immediately notified of the internal affairs investigation.

7.1.2 If the investigation involves a criminal charge against the complainant, an initial interview should be conducted with the complainant. However, the investigator must realize that the complainant is simultaneously a criminal defendant arising out of the same incident and must be accorded all of the appropriate protections. Thus, all further contact with the complainant should be arranged with and coordinated through the County Prosecutor and the complainant's defense attorney.

7.1.3 The complainant should be personally interviewed if circumstances permit. If the complainant cannot travel to the investigator's office, the investigator should conduct the interview at the complainant's home or place of employment if feasible. If not, a telephonic interview may be conducted. All relevant identifying information concerning the complainant should be recorded, e.g., name (unless the complainant wishes to remain anonymous), complete address, telephone numbers and area codes, race or ethnic identity, sex, date of birth, place of employment, social security number if necessary and place of employment (name and address). The investigator should grant reasonable requests for accommodations to protect the complainant's identity, such as meeting the complainant at a place other than the investigator's office if the complainant's identity cannot be kept confidential at that location.

7.1.4 All relevant facts known to the complainant should be obtained during the interview. An effort should be made to obtain a formal statement from the complainant at the initial interview. Whenever possible, all witnesses to the matter under investigation should be personally interviewed and formal statements taken.

7.1.5 When taking a formal statement from a civilian, the investigator shall video- or audio-record the statement according to the same protocols that would apply if the civilian were being interviewed in connection with a criminal investigation. If a witness objects to the recording of the interview, the investigator may proceed with the interview without recording, but must document in writing the reasons for doing so.

7.1.6 When taking a formal statement from an officer, the investigator shall video- and audio-record the statement, except that in cases that did not arise from a civilian complaint, the investigator need not record the statement unless the officer being interviewed requests such.

7.2 Reports, Records and Other Documents

7.2.1 All relevant reports should be obtained and preserved as expeditiously as possible. Internal agency reports relating to a subject officer's duties should be examined. Examples of such

reports include arrest and investigative reports, and radio, patrol, vehicle and evidence logs pertaining to or completed by the officer.

7.2.2 The investigator should also examine and retrieve all electronic, computer, digital and video records. These may include analog and digital records created by radio and telephone recorders, computer aided dispatch systems, mobile data terminals, in-car video systems, video surveillance systems and other forms of audio and video recording. In these cases, the relevant data should be copied to an appropriate medium as soon as possible and retained by internal affairs.

7.2.3 Records and documents of any other individual or entity that could prove helpful in the investigation should be examined. These may include reports from other law enforcement agencies, hospital records, doctors' reports, jail records, court transcripts, F.B.I. or S.B.I. records, motor vehicle abstracts and telephone and cellular phone records. In some instances, a search or communications data warrant or a subpoena may be necessary to obtain the information.

7.3 Physical Evidence

7.3.1 Investigators should obtain all relevant physical evidence. All evidence, such as fingerprints, clothing, hair or fabric fibers, bodily fluids, stains and weapons should be handled according to established evidence procedures.

7.3.2 With respect to radio and telephone recordings, the original recording is the best evidence and should be secured at the investigation’s outset. Transcripts or copies of the original recordings can be used as investigative leads. Entire tapes or transmissions should be reviewed to reveal the totality of the circumstances.

7.4 Photographs

7.4.1 Photographs and video recording tapes can be useful tools if relevant to the investigation. If a complaint involves excessive use of force, photographs of the complainant and the officer should be taken as close as possible to the time of the incident. Photographs also can be used to create a record of any other matter the investigator believes is necessary. Whenever possible, digital color photography should be used.

7.4.2 The law enforcement agency should maintain a recent photograph of each officer. These can be used if a photo array is needed for identification purposes. If a photo array is used, it must be properly retained for possible evidentiary purposes.

7.5 Physical Tests

7.5.1 Police officers who are the subjects of internal investigations may be compelled to submit to various physical tests or procedures to gather evidence.

7.5.2 N.J.R.E. 503(a) states that "no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics or his physical or mental condition." Evidence that may be obtained or procedures that may be used to obtain evidence under this rule include:

(a) Breath sample;
(b) Blood sample;
(c) Buccal swab;
(d) Requiring suspect to speak;
(e) Voice recordings;
(f) Participation in a lineup;
(g) Handwriting samples;
(h) Hair and saliva samples;
(i) Urine specimens;
(j) Video recording; and
(k) Field sobriety tests.

7.5.3 For internal affairs investigations that may result in a criminal prosecution, physical tests should be conducted pursuant to a court order or an investigative detention under Rule 3:5A. Officers that refuse to perform or participate in a court-ordered physical test may be subject to a contempt of court sanction and agency discipline for failing to comply with the order.

7.5.4 For internal affairs investigations that may result in an administrative disciplinary proceeding, the internal affairs investigator or the appropriate supervisor may order subject officers to perform or participate in a physical test. The order must be reasonable and relevant to the investigation at hand. Officers that refuse to perform or participate in a lawfully ordered physical test can be disciplined for their refusal.

7.6 Drug Testing

7.6.1 The testing of law enforcement officers in New Jersey for the illegal use of drugs is strictly regulated by the Attorney General's Law Enforcement Drug Testing Policy. This policy permits the testing of applicants and trainees for law enforcement positions. It further specifies that veteran law enforcement officers may be tested for drugs if reasonable suspicion exists that they are using drugs or if they have been chosen as part of a random drug testing program. In any case, drug testing is done through an analysis of urine samples by the State Toxicology Laboratory within the Department of Health.

7.6.2 The Attorney General's Law Enforcement Drug Testing Policy identifies specific responsibilities that may be assigned to internal affairs. These include the collection of specimens, the establishment of a chain of custody and the maintenance of drug testing records. Every officer assigned to internal affairs should be familiar with the Attorney General's Law Enforcement Drug Testing Policy.

7.7 Polygraph

7.7.1 N.J.S.A. 2C:40A-1 states that an employer shall not influence, request or require an employee to take or submit to a lie detector test as a condition of employment or continued employment. To do so constitutes a disorderly persons offense. Therefore, a law enforcement officer should never be asked to take a polygraph examination as part of an internal affairs investigation. The investigator should not even suggest to the officer that a polygraph examination would be appropriate or that it "might clear this whole thing up." However, the subject officer may voluntarily request to take a polygraph examination.

7.7.2 Polygraph tests of civilian complainants and witnesses should only be used when a reasonable suspicion exists that their statements are false. Polygraph examinations should not be used routinely in internal affairs investigations. Under no circumstances should polygraph examinations be used to discourage or dissuade complainants. In addition, a victim of sexual assault cannot be asked or required to submit to a polygraph examination.

7.8 Search and Seizure

7.8.1 All people, including police officers, have a Fourth Amendment right to be free from unreasonable searches and seizures. In an internal affairs investigation, the Fourth Amendment applies to any search the employing agency undertakes. The internal affairs investigator must be cognizant of the various principles governing search and seizure, particularly where the investigator will conduct a search as part of a criminal investigation or will search personal property belonging to the subject officer.

7.8.2 Criminal investigations generally require the investigator to obtain a search warrant to conduct a search. Search warrants require probable cause to believe that the search will reveal evidence of a crime. In internal affairs investigations, a search warrant should be obtained before a search is conducted of a subject officer's personal property, including any home, personal car, bank accounts, safety deposit boxes, briefcases, etc. A warrant also may be necessary where a search of the subject officer's workplace is conducted and it is determined that the officer has a high expectation of privacy in the place to be searched. The internal affairs investigator should consult with the County Prosecutor’s Office before undertaking the search of any workplace area in a criminal investigation.

7.8.3 The law is somewhat less restrictive as to searches conducted during an administrative investigation. While it appears that an employing agency does not need a warrant to conduct a search during an administrative investigation, the investigator should exercise great care when searching property or items in which the subject officer has a high expectation of privacy. Internal affairs investigators should document their reasons for conducting the search and limit its intrusiveness. If any doubts or concerns exist about the propriety or legality of a search, the investigator should seek advice from legal counsel before proceeding with the search.

7.8.4 During either administrative or criminal investigations, generally workplace areas may be searched without a warrant. The critical question is whether the public employee has a reasonable expectation of privacy in the area or property the investigator wants to search. The determination of this expectation must be decided on a case-by-case basis. There are some areas in a person's workplace where this privacy expectation can exist just as there are some where it does not. Areas that several employees share or where numerous employees go to utilize files or equipment would present no expectation, or a diminished expectation, of privacy. Included here would be squad rooms, lobby areas, dispatch areas, government- provided vehicles (patrol cars), general filing cabinets, etc.

7.8.5 However, employees may have a greater expectation of privacy in their own lockers, assigned desks or possibly in a vehicle assigned to them solely for their use. If an agency intends to retain the right to search property it assigns to officers for their use, including lockers and desks, it should put officers on notice of that fact. This notification will help defeat an assertion of an expectation of privacy in the assigned property. The agency should issue a directive regarding this matter and provide notice of the policy in any employee handbook or personnel manual (including the rules and regulations) the agency provides. Notice should also be posted in the locker area and on any bulletin boards. The following is a sample of what such a notice should contain:

> *The agency may assign to its members and employees agency-owned vehicles, lockers, desks, cabinets, etc., for the mutual convenience of the agency and its personnel. Such equipment is and remains the property of the agency. Personnel are reminded that storage of personal items in this property is at the employee's own risk. This property is subject to entry and inspection without notice*.

7.8.6 In addition, if the agency permits officers to use personally owned locks on assigned lockers and other property, it should be conditioned on the officer providing the agency with a duplicate key or the lock combination.

7.8.7 With the introduction of new technologies in law enforcement, it may become necessary to search computers and cell phones or other digital devices, (hereafter “devices”), and seize their contents. The critical question remains whether the public employee has a reasonable expectation of privacy in information stored in a device. While the determination of a

reasonable expectation of privacy must be decided on a case-by-case basis, the law enforcement agency should take steps to actively and affirmatively diminish this expectation. The agency should state, in writing, that it retains the right to enter and review the contents of any agency-issued device at any time. This notice may be worded as follows:

> *The agency may assign to its members and employees agency-owned electronic devices, including computers and smartphones, for business purposes. Such equipment and its contents are and remain the property of the agency. Personnel are prohibited from installing unauthorized software and from storing personal information in the device, regardless of any password protection or encryption. The devices, their contents, and any email or electronic correspondence originating from or arriving at the device are the property of the agency and are subject to entry and inspection without notice.*

7.8.8 The courts routinely examine agency practice in evaluating the expectation of privacy. Written notification thus would quickly be nullified if representatives of the agency never entered or inspected any of these areas. In addition to notifying employees of the agency's right to search and inspect, the agency should also, with some regularity, inspect these areas to establish the practice coinciding with the policy. Any search of agency or personal property should be conducted in the presence of the subject officer and a property control officer.

7.8.9 A voluntary consent to a search may preclude some Fourth Amendment problems. A consent search eliminates the need to determine what threshold standard must be met before conducting the search or seizure, either for an administrative or criminal investigation. For consent to be legally valid in New Jersey, a person must be informed that he or she has the right to refuse to permit a search.[4] If a consent search is undertaken, the internal affairs investigator shall follow standard law enforcement procedures and have the subject officer sign a consent form after being advised of the right to refuse such a search.

7.9 Electronic Surveillance

7.9.1 N.J.S.A. 2A:156A-1 et seq. governs the use of electronic surveillance information in New Jersey. This statute specifically covers the areas of:

(a) *Wire communication,* which essentially means any conversation made over a telephone, N.J.S.A. 2A:156A-2a;
(b) *Oral communication*, which means any oral communication uttered by a person who has an expectation that such communication will not be intercepted, N.J.S.A. 2A:156A-2b;

[4] State v. Johnson, 68 N.J. 349 (1975).

(c) *Intercept*, which means to acquire the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device, N.J.S.A. 2A:156A- 2c; and

(d) *Electronic communication*, which means the transfer of signs, signals, writings, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio or other system, N.J.S.A. 2A:156A-2m.

All of these forms of communication are protected from intrusion and interception except under very narrowly defined exceptions.

7.9.2 One such exception is when one person in a communication decides to intercept (e.g., record) the conversation. As long as this person is a part of the conversation, such recording is lawful. But if the person stops being a party to the conversation (e.g., he or she walks away from the group or turns the telephone over to someone else), it is no longer lawful for him or her to intercept the conversation.

7.9.3 Another exception exists where a person, acting at the direction of an investigative or law enforcement officer, gives prior consent to intercept a wire, electronic or oral communication and is a party to the communication. This "consensual intercept" can only be made after the Attorney General or a County Prosecutor, or their designee, approves it.

7.9.4 Pursuant to N.J.S.A. 2A:156A-4b, a law enforcement officer may intercept and record a wire or oral communication using a body transmitter if that officer is a party to the communication or where another officer who is a party requests or requires that such interception be made. Individual departmental or agency policy dictates procedures for such recordings. This kind of law enforcement non-third party intercept can be used during internal affairs investigations.

7.9.5 Generally, the use of evidence derived from an authorized wiretap is limited to criminal investigations and prosecutions. Agencies that wish to use wiretap information in a disciplinary proceeding should consult with their County Prosecutor because it may be necessary to obtain a court order to so use it.

7.9.6 The monitoring of 9-1-1 telephone lines is required by law. Nothing prohibits the monitoring of other telephones used exclusively for agency business if the agency can demonstrate a regulatory scheme or a specific office practice of which employees have knowledge. In such instances a diminished expectation of privacy exists in the use of these telephones, and monitoring would be acceptable.

7.9.7 The New Jersey Wiretap Act applies only to oral, wire and electronic communications. While not specifically covered by this law, reasonable limitations should exist on video surveillance. The primary issue is one of privacy. Video surveillance, especially covert surveillance, should not be used in areas where employees have a high expectation of privacy, such as locker rooms and bathrooms. In public areas, video surveillance may be

used. In many law enforcement agencies, certain areas such as lobbies, cell blocks and sally ports have video surveillance for security reasons. Video obtained from these sources is applicable to internal investigations. Questions about the specific application of video surveillance, especially covert surveillance, should be addressed to the County Prosecutor's Office. It must be emphasized that this refers to video surveillance with no sound recording component.

7.9.8 Many law enforcement agencies use in-car video systems, which record the video image from a camera mounted in the car and an audio signal from a microphone worn by the officer. These recordings can be used in internal investigations because the video image is not restricted at all and the officer is a party to the audio portion of the recording at all times.

7.9.9 Some agencies equip their patrol vehicles or other vehicles with GPS devices. These devices can locate a vehicle with great accuracy. Information gleaned from these devices may be used in internal affairs investigations because the subject officer has no expectation of privacy in their whereabouts when performing police duties.

7.10 Lineups

7.10.1 A law enforcement officer may be ordered to stand in a lineup to be viewed by witnesses or complainants. Probable cause need not exist, and the officer may be disciplined for refusal.[5]

7.10.2 The lineup must be constructed so as not to be unfairly suggestive. The same rule applies to photo arrays. See Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures; October 4, 2012, Memorandum and Revised Model Eyewitness Identification Procedure Worksheets.

7.11 Investigation of Firearm Discharges

7.11.1 An agency's internal affairs function shall receive notice of any incidents involving:

(a) Any firearm discharge by agency personnel, whether on-duty or off-duty, unless the discharge occurred during the course of (1) a law enforcement training exercise; (2) routine target practice at a firing range; (3) a lawful animal hunt; or (4) the humane killing of an injured animal; or

(b) Any discharge of an agency-owned firearm by anyone other than agency personnel.

7.11.2 Upon receiving notice, the internal affairs function shall determine whether additional investigation is necessary and whether information must be reported to the County

[5] Biehunik v. Felicetta, 441 F.2d 228 (2d Cir.), cert. denied, 403 U.S. 932 (1971).

Prosecutor and/or OPIA, pursuant to AG Directive 2019-4, also known as the "Independent Prosecutor Directive," and other state law. If the firearm discharge occurs while the agency employee is on duty, then the County Prosecutor must be notified. If the firearm discharge results in a fatality, the matter shall be investigated by OPIA or another entity pursuant to the Independent Prosecutor Directive.

7.11.3 Any public statements by a law enforcement agency about the conduct of law enforcement officers involved in a firearm discharge require approval by the County Prosecutor or the Attorney General's Office, depending upon which entity is supervising the investigation.

7.11.4 Agency law enforcement officers including internal affairs personnel will participate in the initial investigation only if directed to do so by the County Prosecutor, OPIA, or other designee of the Attorney General. In the general course, employees of the same agency as the subject officer shall not participate in the investigation or attend any investigative activities. This does not, however, preclude any officer from acting as a first responder to the scene of a use-of-force incident, helping to secure the scene, or participating in a be-on-the-lookout search or pursuit related to the incident. All officers are also obligated to comply with any orders of recusal that may be issued pursuant to the investigation.

7.11.5 No law enforcement officer shall share, either directly or indirectly (i.e., through another person), any information learned in the course of the use-of-force investigation with any witness without authorization. Nor shall any law enforcement officer who was a witness to the use-of-force incident receive any such information from any sworn or civilian employee of a law enforcement agency without first obtaining authorization from the authority in charge of the investigation or their designee. If any law enforcement officer learns of such an unauthorized dissemination or receipt of information, then they must immediately report that to the authority in charge of the investigation or their designee.

7.11.6 Officers who are directed to assist with an initial firearm discharge investigation may be required to operate independently of their ordinary chain of command and report directly to the authority in charge of the investigation or their designee. In all such circumstances, officers shall comply with that requirement.

7.11.7 In cases where discharge of a firearm does not result in criminal charges, the prosecutor, OPIA, or other designee of the Attorney General will refer the incident back to the agency for an internal affairs administrative review.

7.11.8 Officers conducting administrative investigations of firearm discharges must strive to conduct a thorough and objective investigation without violating the rights of the subject officer or any other law enforcement officer. All supervisors and any other officer who may be called upon to participate in a firearm discharge investigation therefore must be thoroughly familiar with the agency's entire internal affairs policy, including protection of the subject officer's rights and the procedures for properly investigating firearm discharges. Investigators should review all administrative reports the agency requires. These reports

should include a description of the incident, the date, time and location of the incident, the type of firearm used, the type of ammunition used and number of rounds fired, the identity of the officer, and any other information a superior officer requests. The involved officer's supervisor must assist the internal affairs investigator as needed.

7.11.9 The investigator must consider relevant law, any Attorney General or County Prosecutor policies and guidelines, and agency rules, regulations and policy. In addition to determining if the officer's actions were consistent with agency regulations and policy, the internal affairs investigator should also examine the relevance and sufficiency of these policies. The investigator should also consider any relevant aggravating or mitigating circumstances.

7.11.10 The investigation of a shooting by an officer should include photographs, ballistics tests, and interviews with all witnesses, complainants and the officer involved. All firearms should be treated as evidence according to agency procedures. A complete description of the weapon, its make, model, caliber and serial number must be obtained and, if appropriate, N.C.I.C. and S.C.I.C. record checks should be made.

7.11.11 In a firearm discharge investigation, the investigator must determine if the weapon was an approved weapon for that officer and if the officer was authorized to possess and carry it at the time of the discharge. The investigator must also determine if the weapon was loaded with authorized ammunition. The weapon must be examined for its general operating condition and to identify any unauthorized alterations made to it.

7.12 Collateral Issues

7.12.1 The work of an internal affairs function should not be limited to resolving complaints by narrowly focusing on whether the subject officer engaged in misconduct. In many cases, the examination of collateral issues presented by the complaint can be as important as the resolution of the allegation itself. For example, while investigating an allegation of excessive force during an arrest, the officer’s actions in making the arrest may be improper. In such cases, even though the investigation may exonerate the officer of the excessive force allegation, internal affairs must still examine whether the officer should have been effecting the arrest at all.

7.12.2 Examining collateral issues can provide the law enforcement agency and its executive officers with information concerning:

(a) The utility and effectiveness of the agency's policies and procedures.
(b) The competency and skills of individual law enforcement officers.
(c) Appropriate topics for in-service training programs.
(d) The allocation of resources by the law enforcement agency and other municipal agencies.

7.12.3 The identification and examination of collateral issues is critically important to the internal affairs process. Internal affairs investigators are in the unique position of examining law enforcement operations from the inside. Their insight, if properly used, can be extremely helpful to management. In contrast, the failure to use this resource can deprive the law enforcement agency of the ability to identify and correct problems with personnel and procedures through self-critical analysis. It can also lead to an erosion of community support for the agency. An internal affairs process that is objective and complete is critical to the credibility and reputation of the law enforcement agency within the community.

8 Interviewing Members of the Agency

8.0.1 The interview of a police officer as either the subject of an internal affairs investigation or as a witness to an incident that is the subject of such an investigation represents a critical stage in the investigative process. The information gained during such an interview often will go a long way toward resolving the matter, regardless of the outcome.

8.0.2 The difficulty in conducting officer interviews, particularly subject officer interviews, is the differing legal principles that apply depending on the nature of the interview and the type of investigation being conducted. For example, a subject officer suspected of criminal conduct will be interviewed in a manner far different than an officer suspected of committing just a disciplinary infraction. A further distinction may be made when the officer to be interviewed is believed to be a witness to either criminal conduct or an administrative infraction.

8.0.3 While a police officer has the same constitutional rights as any other person during a criminal investigation, their status as a police officer may create special concerns. For the most part, the internal affairs investigator should utilize the same procedures and apply the same legal principles to the subject officer as he or she would to any other target or suspect in a criminal investigation. However, the internal affairs investigator should recognize that the interview process of a police officer is somewhat different than that of civilians.

8.0.4 A police officer has the same duty and obligation to their employer as any other employee. Thus, where an internal affairs investigation is being conducted solely to initiate disciplinary action, the officer has a duty to cooperate during an administrative interview. The officer also must truthfully answer all questions put to him or her during the course of the investigation. Failure to fully cooperate with an administrative investigation and/or to be completely truthful during an administrative interview can form the basis for disciplinary action separate and apart from the allegations under investigation.

8.0.5 For the internal affairs investigator, it is critical to distinguish between those investigations involving potential criminal conduct and those limited to administrative disciplinary infractions. The investigator also must be able to identify and apply the appropriate procedures to be utilized during the interview process in either a criminal or an administrative investigation. Failure to identify and apply the appropriate procedures can compromise and render inadmissible evidence gathered during the interview process in a criminal investigation or needlessly complicate the interview process during an administrative investigation.

8.0.6 The vast majority of internal affairs investigations will be limited to alleged disciplinary infractions and the vast majority of law enforcement officer interviews conducted during an internal affairs investigation will be limited to gathering evidence of disciplinary

infractions. But in cases of a potential criminal violation, it is absolutely necessary that the internal affairs investigator coordinate officer interviews with the County Prosecutor's Office.

8.0.7 Because the County Prosecutor is ultimately responsible for prosecuting criminal cases, the internal affairs investigator shall defer to the prosecutor's supervision and direction in conducting officer interviews. The investigator shall consult with the County Prosecutor prior to initiating an officer interview in matters that could involve criminal conduct, and shall pay particular attention to the County Prosecutor's instructions concerning the types of interviews to be conducted and procedures to be utilized (e.g., *Miranda* warning, *Garrity* warning,[6] etc.).

8.0.8 Police officer interviews during an internal affairs investigation are rendered difficult by the conflict that exists between the officer's right against self-incrimination in criminal interviews and the obligation to answer questions truthfully during an administrative investigation. So while an agency may compel an officer to answer questions posed during the course of an administrative investigation, an officer cannot be forced to give answers that could be used against him or her in a criminal prosecution. Officers who have been compelled by order to produce incriminating information, with the belief that a failure to do so will result in termination or other serious disciplinary action, cannot have that evidence used against them in a criminal prosecution. However, an officer can be compelled to provide answers during an internal affairs investigation if those answers are to be used as evidence only in a disciplinary proceeding.

8.0.9 A subject officer who reasonably believes that what he or she might say during an internal affairs interview could be used against him or her in a criminal case cannot ordinarily be disciplined for exercising their *Miranda* rights. However, an officer can be disciplined for refusing to answer questions during an internal affairs interview if he or she has been told that whatever he or she says during the interview will not be used in a criminal case. Informing an officer that their statement will not be used against him or her in a criminal case is called a *Garrity* warning. This warning informs the officer being interviewed that he or she must cooperate with the investigation and can be disciplined for failing to do so because the County Prosecutor has decided to provide the officer with "use immunity."

8.0.10 It is for this reason that the internal affairs investigator must continually reassess the nature of an internal affairs investigation as evidence is being gathered. Having initially determined that a particular allegation is criminal or administrative in nature, it is important for the internal affairs investigator to revisit that decision during the course of an investigation to determine whether any of the evidence gathered following the initial determination changes the investigation's nature and scope. If the nature and scope of an investigation change, the investigator must be prepared to change the methods and procedures he or she utilizes to reflect the new focus. For example, if an investigator

[6] *Garrity v. New Jersey*, 385 U.S. 493 (1967) (coerced statements obtained by threat of removal from office cannot be used in criminal proceedings); see Appendix J.

initially determines that an allegation appears to be a disciplinary matter but later evidence leads the investigator to conclude that criminal conduct may have occurred, he or she must cease using the methods and procedures appropriate for an administrative investigation and notify the County Prosecutor immediately before proceeding further.

8.1 Overview of Interviews

8.1.1 In the sections that follow, the details of interviewing law enforcement officers in internal matters will be discussed. The chart in Figure 2 provides an overview of that information.

Figure 2.

	Investigation is **CRIMINAL**	Investigation is **ADMINISTRATIVE**
Officer is **SUBJECT**	• Prosecutor notification • Treat as any other defendant • *Miranda* warning if appropriate • No *Garrity* warning unless prosecutor approves • May require routine business reports • No special reports • Right to counsel (attorney)	• Obligation to cooperate • Administrative interview form • May require special reports • Cannot charge as a subterfuge • Right to representative
Officer is **WITNESS**	• Obligation to cooperate • No *Miranda* warning • Witness acknowledgement form • May be entitled to a *Weingarten* representative[7]	• Obligation to cooperate • Witness acknowledgement form • May be entitled to a *Weingarten* representative

8.1.2 Serious allegations of officer misconduct may implicate both a violation of a criminal statute and of an agency's rules and regulations. As a result, a criminal investigation and an administrative disciplinary investigation may be needed to properly resolve a misconduct complaint. In general, criminal investigations and administrative investigations should be kept separate to the extent possible, with criminal investigations led by the County Prosecutor's Office preceding internal affairs disciplinary investigations. However, in some cases where both a criminal and an administrative disciplinary investigation are needed, the internal affairs investigator from the subject officer's agency may be expected to help conduct both. Under these circumstances, the methods employed in the criminal investigation conflict with those used in the administrative investigation.

8.1.3 Typically, this conflict will become most apparent during subject officer interviews. As already explained, a subject officer has the right to remain silent during a criminal

[7] *N.L.R.B. v. Weingarten*, 420 U.S. 251 (1975) (unionized employee who reasonably believes that an investigatory interview may result in disciplinary action against him or her is entitled to union representation).

investigative interview. But the same officer must cooperate and answer questions posed by their employer during an administrative disciplinary interview. So while the internal affairs investigator cannot require a subject officer to answer questions during a criminal interview, he or she can require that officer to answer questions during an administrative disciplinary interview.

8.1.4 The confusion caused by these issues can be alleviated several ways. One way is to separate the investigations by time—the criminal investigation is completed first and then the administrative investigation may follow. Another way is to conduct bifurcated investigations. In a bifurcated investigation, the responsibility for a criminal investigation is separated from that for an administrative investigation. Thus, one investigator (typically from the prosecutor's office) is assigned the responsibility of gathering evidence of criminal wrongdoing while a second (typically the internal affairs investigator from the subject officer's agency) is assigned the responsibility of gathering evidence of a disciplinary infraction.

8.1.5 With a bifurcated investigation, the internal affairs investigator will not be forced to juggle the roles of criminal and administrative investigator during an internal affairs investigation. This is particularly important during the subject officer interview for three reasons. First, the internal affairs investigator will not be forced to decide whether and when to issue a *Miranda* or a *Garrity* warning during the interview. In a bifurcated investigation, the criminal investigator will be limited to issuing a *Miranda* warning while the administrative investigator will be limited to issuing a *Garrity* warning. Second, by assigning distinct roles to each investigator, there will be no confusion on the part of the subject officer as to the particular interview's purpose. Third, because a bifurcated investigation permits both the criminal and administrative investigations to take place simultaneously, the administrative investigator can be confident that, once the criminal investigation has been completed, the administrative investigation will also be substantially complete. As a result, the subject officer's agency will have no difficulty complying with the 45-day rule under N.J.S.A. 40A:14-147.

8.1.6 In all cases where a subject officer is interviewed pursuant to an administrative or criminal investigation, the interview must be audio- or video-recorded by the investigator.

8.2 When the Investigation is Criminal and the Officer Is a Subject

8.2.1 Criminal interviews should be conducted only with the prior approval, or at the direction, of the County Prosecutor. Once an investigation becomes criminal in nature, the subject officer shall be advised that he or she is not required to answer questions as a condition of employment. Of course, an officer who is the subject of a criminal investigation may elect to voluntarily answer questions with or without an attorney so that the facts known to him and his perspective are available to the investigators.

8.2.2 *Miranda* warnings generally are triggered whenever an individual's questioning is custodial in nature. For custodial interviews, the question is whether a reasonable person would believe that he or she is free to leave. So a subject officer who is not free to leave a criminal interview should be provided a *Miranda* warning. See Appendix I.

8.2.3 However, the internal affairs investigator should be aware that other factors may also serve to affect a subject officer's decision to answer questions during a criminal interview. For example, directing an officer to appear at a particular time and place may generate confusion on the officer's part as to whether he or she is being required to participate in the interview. When these circumstances or any other questions as to the need to provide a warning in criminal interviews are present, the internal affairs investigator should always consult with the County Prosecutor regarding whether the subject officer should be advised of their right against self-incrimination.

8.2.4 If the subject officer agrees to voluntarily provide a statement or waives his rights, the interview may then continue. Unless the officer specifically waives their Fifth Amendment rights, any incriminating statements obtained under direct order will not be admissible in a criminal prosecution but will be admissible in an administrative hearing. The subject officer should be afforded the opportunity to consult with an attorney prior to a compelled interview.

8.2.5 If the officer has invoked their *Miranda* rights but the agency deems that it must have the answers to specific questions to properly conduct its investigation, the agency must contact the County Prosecutor to request use immunity for the interview to continue. This contact should be made timely so that the County Prosecutor can review all relevant reports and have a full briefing prior to determining whether to grant use immunity. Use immunity provides that anything the officer says under the grant of immunity, and any evidence derived from their statements, cannot be used against him or her in a criminal proceeding (except for perjury or false swearing if the information is not truthful). But use immunity does not eliminate the possibility that the subject officer will be prosecuted. A criminal prosecution may proceed even though the target or defendant has received use immunity.

8.2.6 If the County Prosecutor grants use immunity, the agency shall advise the subject officer in writing that he or she has been granted such immunity in the event their answers implicate him or her in a criminal offense. The officer must then answer the questions specifically and narrowly related to the performance of their official duties, but no answer given nor any evidence derived from the answer may be used against this officer in a criminal proceeding. At this point, any officer refusing to answer is subject to disciplinary charges and possible dismissal from employment.

8.2.7 A grant of use immunity shall be recorded on a form the subject officer signs and whose signature is witnessed. The completed form must be made a part of the investigative file.

See the sample form in Appendix J. In all cases, approval from the authorizing assistant prosecutor or deputy attorney general must be obtained before giving the *Garrity* warning.

8.3 When the Investigation is Criminal and the Officer Is a Witness

8.3.1 When interviewing a law enforcement officer as a witness, he or she must be made aware of the differences between being a witness in a criminal investigation and being the subject of a criminal investigation. The officer also shall be advised that he or she is not the subject of the investigation at this time. Appendix G provides a model form that may be used for this purpose. If at any time the officer becomes a subject of the investigation, he or she shall be advised of that fact and the appropriate procedures must be followed.

8.3.2 Officers who are witnesses must cooperate. They must truthfully answer all questions narrowly and directly related to performing their duty. "Performance of duty" includes an officer's actions, observations, knowledge and any other factual information of which they may be aware, whether it concerns their own performance of duty or that of other officers. If the officer feels their answer would incriminate him or her in a criminal matter, the officer must assert their *Miranda* rights.

8.4 When the Investigation is Administrative and the Officer Is a Subject

8.4.1 A public employee must answer questions specifically, directly and narrowly related to the performance of their official duties, on pain of dismissal. This obligation exists even though the answers to the questions may implicate them in a violation of agency rules, regulations and procedures that may ultimately result in some form of discipline up to and including dismissal. In short, no “right to remain silent” exists in administrative investigations.

8.4.2 However, internal affairs investigators in civil service jurisdictions should be aware that, under civil service rules, an employee cannot be forced to testify at their own disciplinary hearing.[8] As a matter of fairness, the internal affairs investigator in a civil service jurisdiction should refrain from questioning a subject officer about a particular disciplinary offense if the officer has already been charged with that offense and is awaiting an administrative hearing on the charge.

8.4.3 Prior to the start of any questioning, the officer shall be advised that he or she is being questioned as the subject of an investigation into potential violations of agency rules and regulations, or fitness for duty. He or she should be advised of the subject matter under investigation, and that he or she will be asked questions specifically related to performing their official duties.

[8] N.J.A.C. 4A:2-2.6(c).

8.4.4 This information shall be recorded on a form which the subject officer signs and whose signature is witnessed. The completed form must be made a part of the investigative file. See the sample form in Appendix H. The form in Appendix H shall only be used for administrative, non-criminal investigations.

8.4.5 If the subject officer refuses to answer questions during this interview, the interviewer should inquire about the reason for that refusal. If the officer states that he refuses to answer any questions on the grounds that he may incriminate himself in a criminal matter, even though the investigators do not perceive a criminal violation, the agency should discontinue the interview and contact the County Prosecutor.

8.4.6 If the agency wants to continue its administrative interview and the County Prosecutor agrees to grant use immunity, the agency shall advise the subject officer in writing that he or she has been granted use immunity if their answers implicate him or her in a criminal offense. The officer must then answer the questions specifically related to performing their official duties, but no answer given, nor evidence derived therefrom, may be used against the officer in a criminal proceeding. If the officer still refuses to answer, he or she is subject to disciplinary charges for that refusal, including dismissal. This information shall be contained in a form that the subject officer signs and whose signature is witnessed. The completed form must be made a part of the investigative file. See the sample form in Appendix J.

8.4.7 If the subject officer refuses to answer on any other grounds, he or she should be advised that such refusal will subject him or her to disciplinary action, including dismissal, in addition to discipline for the matter that triggered the interview in the first place. If the officer still refuses, the interview should be terminated and appropriate disciplinary action initiated.

8.4.8 The courts have decided that a public employer must permit an employee to have a representative present at an investigative interview if the employee requests representation and reasonably believes the interview may result in disciplinary action.[9] However, a representative shall be permitted to be present at the interview of a subject officer whenever he or she requests a representative. While the Sixth Amendment right to counsel does not extend to administrative investigations, an officer shall be permitted to choose an attorney as their representative if he or she so desires.

8.4.9 If it appears that the presence of counsel or another representative the subject requests will not disrupt or delay the interview, no reason exists to prevent their presence as an observer. But the representative or attorney cannot cause undue delay in scheduling interviews or interfere in the interview process. If the representative or attorney is disruptive or interferes, the investigator can discontinue the interview and should document the reasons for doing so. The investigator must control the interview and cannot allow the representative or subject to take control.

[9] N.L.R.B. v. Weingarten, 420 U.S. 251 (1975).

8.5 When the Investigation is Administrative and the Officer Is a Witness

8.5.1 When interviewing a law enforcement officer as a witness, he or she must be made aware of the differences between being a witness in an administrative investigation and being the subject of an administrative investigation. The officer also should be advised that he or she is not the subject of the investigation at this time. Appendix G provides a model form that may be used for this purpose. If at any time the officer becomes a subject of the investigation, he or she should be advised of that fact and the appropriate procedures followed.

8.5.2 Officers who are witnesses must cooperate and truthfully answer all questions narrowly and directly related to performing their duty. "Performance of duty" includes an officer's actions, observations, knowledge and any other factual information of which they may be aware, whether it concerns their own performance of duty or that of other officers. If the officer feels their answer would incriminate him or her in a criminal matter, the officer must assert their *Miranda* rights.

8.6 Interviewing Procedures

8.6.1 Interviews should take place at the internal affairs office or a reasonable and appropriate location the investigator designates. The subject officer's supervisor should be made aware of the time and place of the interview so the officer's whereabouts are known. Interviews shall be conducted at a reasonable hour when the officer is on duty, unless the seriousness of the matter requires otherwise.

8.6.2 The employee shall be informed of the name and rank of the interviewing investigator and all others present during the interview. The questioning session must be of reasonable duration, considering the subject matter’s complexity and gravity. The officer must be allowed time for meal breaks and to attend to personal physical necessities.

8.6.3 In cases of potential criminal conduct, interviews of subject officers should be recorded consistent with AG Directives 2006-2 and 2006-4. A copy of the directives may be found in Appendix T. As to serious disciplinary infractions, the agency should audio or video record the interview. A transcript or copy of the recording shall be made available to the officer, if applicable, at the appropriate stage of a criminal or disciplinary proceeding. If the subject officer wishes to record the interview, he or she may do so, and a copy of the recording shall be made available to the agency upon request, at the agency's expense. Agencies should consider adopting a policy requiring officers to inform the agency or internal affairs investigator if the officer plans to record the interview.

8.6.4 Any questions asked of officers during an internal investigation must be "narrowly and directly" related to performance of their duties and the ongoing investigation.[10] Officers must answer questions directly and narrowly related to that performance. All answers must be complete and truthful, but officers cannot be compelled to answer questions having nothing to do with their performance as law enforcement officers, that do not implicate a rule or regulation violation, or that are unrelated to the investigation.

8.6.5 At the interview's conclusion, the investigator should review with the subject officer all the information obtained during the interview to alleviate any misunderstandings and to prevent any controversies during a later proceeding.

[10] Gardner v Broderick, 392 U.S. 273 (1968).

9 Internal Affairs Records

9.0.1 Every law enforcement agency shall maintain a system for documenting the work of its internal affairs function and preserving records of this work.

9.1 The Internal Affairs Report

9.1.1 At the conclusion of the internal affairs investigation, the investigator shall submit a written report consisting of an objective investigative report recounting all of the case's facts and a summary of the case, along with conclusions for each allegation, and recommendations for further action.

(a) *Investigative report*. The first part of the report will be an objective recounting of all the relevant information the investigation disclosed, including statements, documents and other evidence. This part of the report is similar in all respects to a standard law enforcement investigative report, and should contain a complete account of the investigation.
(b) *Summary and Conclusions*. The investigator should summarize the case and provide conclusions of fact for each allegation. These conclusions of fact should be recorded as exonerated, sustained, not sustained or unfounded.

9.1.2 If the conduct of an officer was found to be improper, the report must cite the agency rule, regulation, or SOP violated. Any aggravating or mitigating circumstances surrounding the situation, such as unclear or poorly drafted agency policy, inadequate training or lack of proper supervision, shall also be noted.

9.1.3 If the investigation reveals evidence of misconduct not based on the original complaint, this too must be reported. An investigation concerning this secondary misconduct should be conducted.

9.2 Internal Affairs Index File

9.2.1 The purpose of the internal affairs index file is to serve as a record control device to maintain an inventory of internal affairs case files and to summarize each case's status for authorized personnel. The instrument used for such an index file will vary by agency and could include a log book, index cards or a computerized data base.

9.2.2 All internal affairs complaints shall be recorded in the index file. Entries should record each case's basic information, including the subject officer, allegations, complainant, date received, investigator assigned, disposition and disposition date for each complaint. A unique case number assigned to each internal affairs complaint will point to the complete investigation file's location and will simplify case tracking.

9.3 Investigation Files

9.3.1 An internal affairs investigation file is needed for all internal affairs reports. Given the wide range of internal affairs allegations a law enforcement agency receives, these investigation files might consist of only the initial report form and the appropriate disposition document. On the other hand, investigation files might include extensive documentation of an investigation.

9.3.2 The internal affairs investigation file should contain the investigation's entire work product, regardless of the author. This includes investigators' reports, transcripts of statements, and copies of all relevant documents. The file should also include all related material from other agency incidents that may be applicable. For instance, if an allegation is made of excessive force during an arrest, the internal affairs investigation file should contain copies of the reports from that arrest.

9.3.3 Where an internal affairs investigation results in the filing of criminal charges, the file shall be made available to the County Prosecutor's Office. It will be the responsibility of that office to decide which items are discoverable and which are admissible. In these cases, the agency must follow the County Prosecutor's instructions.

9.4 Retention Schedule

9.4.1 Investigative records created during an internal affairs investigation are included in the "Records Retention and Disposition Schedule for Local Police Departments" issued by the New Jersey Division of Archives and Records Management. Under the schedule, files concerning a criminal homicide must be permanently maintained. The schedule also requires that any other file involving a criminal matter resulting in the subject officer's arrest must be maintained for 75 years. While the schedule further suggests that all other criminal or administrative internal affairs investigative records be maintained for at least 5 years, agencies should maintain these files as they relate to a particular officer for that officer's career plus 5 years.

9.4.2 Agencies are not required to purge their records at the intervals outlined above, and may adopt longer retention schedules if such schedules benefit the agency. In the case of internal affairs investigative records, longer retention times will provide agencies with the resources and evidence necessary to assist with defending civil lawsuits.

9.4.3 While the internal affairs records of other types of law enforcement agencies are not yet specified by the Division of Archives and Records Management, it would be appropriate for all law enforcement agencies to follow essentially the same retention schedule.

9.5 Security of Internal Affairs Records

9.5.1 Internal affairs personnel shall maintain a filing system accessible only to unit personnel and the law enforcement executive. Other personnel may be given access based on a specific need, such as a deputy chief in the law enforcement executive's absence. Access to these records must be specifically addressed with agency policy and procedures. The list of those authorized to access these files must be kept to a minimum.

9.5.2 Physical security measures also should be taken, such as using securely locked filing cabinets in secured offices. If a law enforcement agency uses computers to maintain internal affairs records of any kind, special security measures must be taken. A stand-alone personal computer is the most secure system to limit unauthorized access to internal affairs records. If a stand-alone computer is not feasible, reasonable measures, including the use of fire walls and/or password protected software, should be utilized to control access to investigative files and related materials.

9.6 Confidentiality

9.6.1 The nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information. The contents of an internal investigation case file, including the original complaint, shall be retained in the internal affairs function and clearly marked as confidential. The information and records of an internal investigation shall only be released or shared under the following limited circumstances:

(a) If administrative charges have been brought against an officer and a hearing will be held, a copy of all discoverable materials shall be provided to the officer and the hearing officer before the hearing;
(b) If the subject officer, agency or governing jurisdiction has been named as a defendant in a lawsuit arising out of the specific incident covered by an internal investigation, a copy of the internal investigative reports may be released to the attorney representing the subject officer, agency or jurisdiction;
(c) Upon the request or at the direction of the County Prosecutor or Attorney General; or
(d) Upon a court order.

9.6.2 In addition, the law enforcement executive may authorize access to a particular file or record for good cause. The request and the authorization should be in writing, and the written authorization should specify who is being granted access, to which records access is being granted and for what time period access is permitted. The authorization should also specify any conditions (i.e., the files may be reviewed only at the internal affairs office and may not be removed). In addition, the law enforcement executive may order any redactions necessary to protect sensitive or privileged information, including an officer’s medical or mental health records or the details of an ongoing criminal investigation. The

law enforcement executive should grant such access sparingly, given the purpose of the internal affairs process and the nature of many of the allegations against officers.

9.6.3 As a general matter, a request for internal investigation case files may satisfy the good cause requirement:

(a) If a Civilian Review Board that meets certain minimum requirements requests access to a completed or closed investigation file, subject to the conditions described in this section; or
(b) If another law enforcement agency requests the files because it is considering hiring an officer who was formerly employed at the agency with the internal investigation files.

9.6.4 Agencies may receive law enforcement or judicially sanctioned subpoenas directing the production of internal affairs investigative records. Before responding to the subpoena, the law enforcement executive or internal affairs investigator should consult with the agency's legal counsel to determine whether the subpoena is valid and reasonable. Courts may modify or quash invalid or unreasonable subpoenas, but will require the agency seeking to so modify or quash to file an appropriate motion. Similar considerations may provide grounds for opposing a records request from a Civilian Review Board that otherwise satisfies the minimum requirements described below. For that reason, the appropriate agency personnel should consult with legal counsel to determine under what circumstances it would be appropriate to provide notice to any individual who is referenced in records requested by a Civilian Review Board.

9.6.5 If the release of internal affairs documents is appropriate, the agency should inventory the reports released and obtain a signed receipt.

9.7 Coordination with Civilian Review Boards

9.7.1 Internal investigation case files generally are not releasable to Civilian Review Boards, but the “good cause” standard may be satisfied when a Civilian Review Board requests records from a completed or closed investigation file and the Civilian Review Board has in place certain minimum procedural safeguards, as described in Section 9.7.2, to preserve the confidentiality of the requested records and the integrity of the internal affairs function, in addition to complying with all other applicable legal requirements. A violation of any of these requirements may result in the revocation of a Civilian Review Board’s access to confidential law enforcement information, including internal affairs records, and potentially may result in other adverse or remedial actions under federal, state, or local law.

9.7.2 For the purposes of satisfying the requirements of Section 9.7.1, a Civilian Review Board must implement the following minimum procedural safeguards:

(a) Avoidance of Interference with Ongoing Investigations or Proceedings

The Civilian Review Board must establish policies to avoid interference with ongoing investigations or proceedings, similar to the policies that an internal affairs function must adopt to avoid interference with ongoing criminal investigations or proceedings. Specifically, the policy must make clear that the Board may not commence an investigation of a particular civilian complaint or incident until after any criminal and/or internal affairs investigations have concluded and any resulting discipline has been imposed. This requirement applies regardless of whether the Civilian Review Board is granted authority to recommend discipline, or request reconsideration of any findings or disciplinary decisions, or is limited in its authority to auditing completed investigations. This requirement also applies regardless of whether, as a general matter, the Civilian Review Board is granted access to redacted or unredacted internal affairs records.

After reviewing the relevant internal affairs records and conducting any other lawful investigation that the Civilian Review Board deems appropriate, the Board may, to the extent permitted by law, present its conclusions to the law enforcement executive or appropriate authority; request additional information or clarification regarding the findings or decisions made in the course of the internal affairs investigation; and/or request that the internal affairs investigation be re-opened. Whether to re-open an internal affairs investigation remains within the discretion of the law enforcement executive and, with regard to criminal matters, the County Prosecutor's Office.

The Civilian Review Board may not override any finding or decision made as part of the internal affairs process, impose discipline, require that another official impose discipline, or render any finding or decision that requires deference from any other official. If a law enforcement agency declines to re-open an investigation at the request of the Civilian Review Board, the Board may issue a final public report regarding the complaint or incident after appropriately redacting the report in accordance with instructions from the law enforcement executive. The personal identity of specific subject officers, complainants, or witnesses may not be disclosed to the public.

Under no circumstances may a Civilian Review Board immunize any person from prosecution or take any other action that would have the effect of conferring immunity on any person.

(b) Confidentiality

The Civilian Review Board must establish and adhere to written policies and procedural safeguards to preserve the confidentiality of internal affairs records and other confidential information, which shall include at least the following requirements:

(1) *Closed sessions for reviews or investigations*. The Board must be in a closed session whenever the content of internal affairs records are discussed or testimony or other evidence regarding a specific incident is presented.

(2) *Protection of internal affairs information*. No part of any internal affairs file may be disclosed by the Civilian Review Board under any circumstances to any person who is not a Board member or employee, the law enforcement executive, or a member of the law enforcement agency's internal affairs function, except in a final public report appropriately redacted in accordance with instructions from the law enforcement executive. This prohibition on disclosure includes any statement made by police officers to law enforcement investigators under the provisions of *Garrity v. New Jersey*, 385 U.S. 493 (1967).

(3) *Personal identifiers*. Even in the Civilian Review Board's final public report, the Board may not disclose the personal identity of subject officers, complainants, or witnesses.

(4) *Dedicated location for reviewing internal affairs records*. Whenever Civilian Review Board members and staff are granted access to internal affairs records, that review shall take place only in a secure location designated by the law enforcement executive and no internal affairs records may be copied or removed from the designated location.

(5) *Training*. All Civilian Review Board members and staff shall undergo training approved by the County Prosecutor's Office on the confidentiality of internal affairs records and other investigative material prior to being granted access to such information.

(6) *Attestation*. All Civilian Review Board members and staff shall receive a copy of the Board's written confidentiality policies and sign a sworn statement that they will comply those policies prior to being granted access to internal affairs records.

The law enforcement executive may condition the Civilian Review Board's access to internal affairs records on the Board's agreement to other protections that the law enforcement executive reasonably considers necessary to safeguard their confidentiality.

(c) Conflicts of Interest

The Civilian Review Board must adopt a written conflicts-of-interest policy that addresses both inherent conflicts—which preclude a person's service entirely as a Board member or staffer—and incident-specific conflicts—which require a Board member or staffer's recusal from particular matters. Prior to commencing their service,

Board members and staff must sign a sworn statement that they will comply with the Civilian Review Board's written conflicts-of-interest policy.

The Civilian Review Board's conflicts-of-interest policy must include, at a minimum, the following stipulations:

(1) *Incident-specific conflicts*. Any Board member or staffer with an incident-specific conflict must immediately recuse from all proceedings related to that matter.

(2) *Inherent conflicts*. At least the following categories of persons are considered inherently conflicted and may not serve as a Board member or staffer:

   a. A sworn officer or employee of a law enforcement agency within the Board's jurisdiction, or any person who has held such a position in the last five years;
   b. A sworn officer or employee of any other state, county, or local law enforcement agency;
   c. A prosecutor or criminal defense attorney currently practicing in the county within the Board's jurisdiction;
   d. A relative of any of the aforementioned individuals, as defined in the New Jersey Conflicts of Interest Law at N.J.S.A. 52:13D-21.2(2)(d);
   e. A current candidate for public office; or
   f. With respect to Board membership, a current officer or employee of the municipality.

(3) *Duty to disclose*. Board members and staff have an ongoing duty to affirmatively disclose any conflict of interest that they may reasonably become aware of, whether that conflict is inherent or incident-specific.

(4) *Screening.* If a Board member or staffer has a close personal or business relationship with an interested party or any individual who meets any of the criteria listed under the "inherent conflicts," the Board member or staff should establish a screen to ensure the non-disclosure of sensitive information involving the Board.

(d) Criminal History of Board Members and Staff

All Civilian Review Board members and staff who support the Board's work, on a full- or part-time basis, must undergo a criminal history background check. A person who has been convicted of a crime or offense may not be granted access to the content of internal affairs records unless both the law enforcement executive and the County Prosecutor consent to that person being granted such access.

9.8 Coordination with Other Law Enforcement Agencies

9.8.1 In some instances, an officer who was formerly an employee of one law enforcement agency may apply to join a different law enforcement agency. It is imperative that the law enforcement agency that may hire the officer has access to all internal investigative files related to that officer's previous employment. Without such information, a law enforcement agency is unable to make a fully informed hiring decision.

9.8.2 Accordingly, in any case where a law enforcement agency has reason to believe that a candidate for employment was previously a sworn officer of another law enforcement agency, the hiring agency has an affirmative obligation to identify all such former employers. The hiring agency shall then request all internal affairs files for cases where the candidate was the subject officer, regardless of the ultimate disposition or status of the complaint.

9.8.3 If a law enforcement agency receives such a request regarding a former employee, then it shall immediately share copies of all internal investigative information related to that candidate with the hiring agency. Confidential internal affairs files shall not be disclosed to any other party.

9.8.4 This disclosure requirement does not apply when the agency responsible for sharing internal affairs files is unable to do so because the information is clearly subject to a non-disparagement or non-disclosure agreement. Such agreements must be followed even though they inhibit the ability of law enforcement agencies to fully evaluate candidates applying for positions of public trust, and therefore have the potential to compromise public safety. Given the public safety risks that such agreements pose, county and municipal governing entities and their counsel are strongly discouraged from entering into them.

9.8.5 In all cases, law enforcement executives retain the authority to defer a decision on hiring a particular candidate until all extant internal affairs information has been received and reviewed.

9.9 Reporting to Law Enforcement Executive

9.9.1 The internal affairs function should prepare periodic reports for the law enforcement executive that summarize the nature and disposition of all misconduct complaints the agency received. This report should be prepared at least quarterly, but may be prepared more often as directed by the executive. The report should include the principal officer; the allegation; the complainant; the age, sex, race and other complainant characteristics that might signal systematic misconduct by any member of the agency; and the investigation's status.

9.9.2 Concluded complaints should be recorded and the reasons for termination explained. See example in Appendix P.

9.9.3 This report shall be considered a confidential, internal work product. Dissemination of the report should be limited to command personnel, the County Prosecutor, the appropriate authority, or a civilian review board that meets the minimum requirements for access to internal affairs information, if mandated by the governing body.

9.10 Reporting to County Prosecutor

9.10.1 On a quarterly basis, every law enforcement agency shall report internal affairs activity to the County Prosecutor on an internal affairs summary report form. Each County Prosecutor will provide those law enforcement agencies—including municipal police departments—in their jurisdiction with the report forms to be used, instructions on completing the forms, and a reporting schedule.

9.10.2 The summary report forms must contain sufficient information to enable the County Prosecutor to identify warning signs of potential deficiencies in the internal affairs process. At a minimum, each report must include a brief summary of each internal affairs complaint that was pending before the agency at any point during the reporting period. The summary shall at least include the nature of the complaint, the date the complaint was received, the current status of the complaint, and, if the case is closed, the final disposition of the complaint with any discipline imposed.

9.10.3 Honesty is an essential job function for every New Jersey law enforcement officer. Officers who are not committed to the truth, who cannot convey facts and observations in an accurate and impartial manner and whose credibility can be impeached in court cannot advance the State's interests in criminal matters. In addition, defendants in criminal matters may be entitled to certain evidence the prosecutor has concerning the credibility of prosecution witnesses, including police officers. Prosecutors are considered to possess such evidence even when law enforcement agencies create and maintain information concerning the honesty of individual officers. Furthermore, prosecutors may be required to provide such evidence to the court. It is therefore imperative that the internal affairs investigator assist prosecutors with their legal duty to review and, if necessary, disclose evidence that may impact the credibility of police officers. Thus, the following matters shall be reported to the County Prosecutor so that he or she may evaluate the material's relevance:

(a) A finding that a police officer has filed a false report or submitted a false certification in any criminal, administrative, employment, financial or insurance matter in their professional or personal life;[11]
(b) A pending court complaint or conviction for any criminal, disorderly persons, petty disorderly persons, municipal ordinance or driving while intoxicated matter;
(c) A finding that undermines or contradicts a police officer's educational achievements or qualifications as an expert witness;
(d) A finding of fact by a judicial authority or administrative tribunal that is known to the officer's employing agency that concludes that a police officer intentionally did not tell the truth in a matter;
(e) A sustained finding that a police officer intentionally mishandled or destroyed evidence; and
(f) A sustained finding that a police officer is biased against a particular gender or ethnic group.

9.10.4 That law enforcement agencies report the above-listed incidents to the County Prosecutor's Office does not constitute a mandate or requirement that the information be disclosed to the court. Prosecutors should conduct an independent review of the information provided to determine whether it needs to be disclosed and whether the officer can participate in the prosecution of criminal cases.

9.10.5 Once a decision is reached as to a particular case or defendant, the prosecutor shall, if necessary, discuss their decision with the internal affairs investigator and the law enforcement executive. If it is determined that an officer cannot participate in a criminal prosecution, the prosecutor must advise the agency whether the officer's disability is limited to a particular case, a particular category of cases or all criminal matters.

9.11 Public Reports

9.11.1 On an annual basis, every law enforcement agency shall publish on its public website a report summarizing the types of complaints received and the dispositions of those complaints. This report can be statistical in nature, and the names of complainants and subject officers shall not be published.

9.11.2 On a periodic basis, and at least once a year, every agency shall submit to the County Prosecutor and publish on the agency's public website a brief synopsis of all complaints where a fine or suspension of ten days or more was assessed to an agency member. This

[11] This provision is not intended to require that law enforcement agencies initiate internal affairs investigations into the accuracy of every statement, report or certification that may be filed with respect to civil litigation, including matrimonial and employment matters or any other personal or financial matters not directly related to the officer's employment. In most cases, such investigations would be inappropriate. Determinations as to the credibility of statements or certifications made in the context of litigation should be made by the courts or administrative tribunals. Determinations as to the credibility of statements or certifications in other personal or financial matters should be addressed if they arise in the context of an ongoing internal affairs investigation.

synopsis shall not contain the identities of the officers or complainants, but should briefly outline the nature of the transgression and the fine or suspension imposed. An example of a synopsis is found in Appendix U.

9.12 Personnel Records

9.12.1 Personnel records are separate and distinct from internal affairs investigation records, and internal affairs investigative reports shall never be placed in personnel records, nor shall personnel records be co-mingled with internal affairs files. When a complaint has a disposition of exonerated, not sustained or unfounded, there shall be no indication in the employee's personnel file that a complaint was ever made.

9.12.2 Where a complaint is sustained and discipline imposed, the only items to be placed into the employee's personnel file are a copy of the administrative charging form and a copy of the disposition form. See form DPF-31C in Appendix O for an example. No part of the internal affairs investigative report shall be placed in the personnel file.

10 The Responsibilities of County Prosecutors

10.0.1 County Prosecutors are responsible for conducting substantive oversight to ensure that the internal affairs functions of all law enforcement agencies within their jurisdiction are operating professionally and effectively. As specialists with deep experience in the criminal justice system and working in the community, prosecutors are well situated for identifying procedural deficiencies before serious issues emerge with an agency's internal affairs function. As such, County Prosecutors must review the information they receive from law enforcement and the public regarding internal affairs, and swiftly follow up if there are any signs of trouble.

10.0.2 County Prosecutor Offices are an important alternative venue for the filing of internal affairs complaints against an officer of any law enforcement agency in their jurisdiction. Prosecutors must be especially alert to any indication from complainants or the public that the process for receiving and investigating complaints of misconduct is not operating in accordance with the guidelines in this document. For instance, any indication that a member of the public who attempted to file a complaint was turned away or dissuaded is extremely serious and must be immediately investigated.

10.0.3 It is also critical that County Prosecutors substantively review the summary reports that they receive from the internal affairs functions of agencies in their jurisdiction, including municipal police departments. The role of the prosecutor is not limited to ensuring that such reports are submitted on time. Instead, prosecutors must examine the reports, and conduct follow up investigation when concerning patterns emerge. For instance, if an agency consistently appears to summarily close administrative investigations in instances where criminal investigations are declined, then that would be cause for further investigation. Or, if an agency's officers have been the subjects of numerous serious complaints over a long span of time, but no such complaint has ever been sustained, then that would merit a close review. County Prosecutors are at all times empowered to direct that an agency's internal affairs files be shared with prosecutors for the purposes of facilitating further investigation.

10.0.4 County Prosecutors should conduct reviews of agencies with concerning patterns, as well as instituting a process for random reviews of the internal affairs functions of agencies in their jurisdiction. For instance, a County Prosecutor might direct a randomly selected agency to share all internal affairs files for cases that were closed in the previous quarter, so that the prosecutor can ascertain whether the internal affairs guidelines are being rigorously observed both in the procedures being employed and in the substance of the results. Likewise, if excessive force complaints are never sustained by an agency, the County Prosecutor may elect to review the body worn camera footage of force incidents to make an independent assessment. Even if the County Prosecutor's Office finds that there have been no substantive errors in an agency's dispositions or disciplinary decisions, periodic reviews might uncover procedural deficiencies that, if allowed to continue, might

result in serious errors in the future. In instances where a County Prosecutor reviewed a matter for potential criminal prosecution, declined prosecution and referred back for administrative action, the County Prosecutor must review the ultimate disposition of those matters.