

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

Attorneys for Plaintiffs
*Richard Rivera, and the
 Latino Leadership Alliance of
 New Jersey*

| | | |
|------------------------------------|---|------------------------------|
| Richard Rivera, and the Latino | : | |
| Leadership Alliance of New Jersey, | : | |
| a community advocacy organization | : | SUPERIOR COURT OF NEW JERSEY |
| located in New Brunswick, New | : | LAW DIVISION: Mercer County |
| Jersey, | : | |
| Plaintiffs, | : | Docket No.: |
| | : | |
| v. | : | Civil Action |
| | : | |
| Ismael E. Vargas, in his capacity | : | |
| as OPRA Custodian for the New | : | |
| Jersey State Police, and the New | : | <u>VERIFIED COMPLAINT</u> |
| Jersey Division of State Police, a | : | |
| public agency formed under the | : | |
| laws of the State of New Jersey, | : | |
| | : | |
| Defendants. | : | |
| | : | |
| | : | |

Plaintiffs, through their undersigned counsel, Pashman Stein, A Professional Corporation, by way of verified complaint against Defendants, state as follows:

PRELIMINARY STATEMENT

1. This is an action under the Open Public Records Act, N.J.S.A. 47:1A-1 et seq. ("OPRA"), and the common law right of access, seeking to require disclosure of policies and procedures

of the New Jersey State Police concerning promotions of uniformed employees.

PARTIES

2. Plaintiff Richard Rivera ("Mr. Rivera") is an individual who resides in Hudson County, New Jersey. Mr. Rivera serves as the Chair of Plaintiff Latino Leadership Alliance of New Jersey's Civil Rights Protection Project.

3. Plaintiff Latino Leadership Alliance of New Jersey ("LLANJ") is a non-partisan coalition of community groups that advocates in the interests of Latinos throughout New Jersey. It is the largest such advocacy group in the state, with a primary place of business located at 100 Jersey Avenue, Suite B104, New Brunswick, New Jersey 08901.

4. Defendant Ismael E. Vargas ("custodian") is the OPRA Custodian for Defendant New Jersey Division of State Police. The custodian maintains an office at Division Headquarters, River Road, P.O. Box 7068, West Trenton, New Jersey 08628.

5. Defendant New Jersey Division of State Police ("NJSP") is a public agency formed under the laws of the State of New Jersey, with a primary place of business located at Division Headquarters, River Road, P.O. Box 7068, West Trenton, New Jersey 08628. NJSP is a nationally accredited agency that received a highly coveted law enforcement certification from The Commission of Law Enforcement Accreditation ("CALEA").

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

VENUE

7. Venue is properly laid in Mercer County because Defendant is a public agency located in Mercer County and because the cause of action arose in Mercer County. N.J. Court Rule 4:3-2(a).

BACKGROUND & FACTUAL ALLEGATIONS

8. Defendant NJSP has promulgated agency regulations that seek to exempt from disclosure what otherwise would be publicly accessible government records. See N.J.A.C. 13:1E-3.

9. One such regulation exempts from public access all "Standard Operating Procedures and training materials." Id. § 3.2(a) (1).

10. Another such regulation exempts from disclosure all "[r]ecords relating to or which form the basis of discipline, discharge, promotion, transfer, employee performance, employee evaluation or other related activities, whether open, closed or inactive, except for the final agency determination." Id. § 3.2(a) (4).

11. Plaintiff Richard Rivera is a retired police officer who regularly investigates and conducts State-wide research

regarding police policies and practices. Mr. Rivera, as Chair of Plaintiff LLANJ's Civil Rights Protection Project, sought from the State Police its policies concerning officer promotions to ensure that there is no disparate treatment of minorities. To learn more information about Defendant NJSP's general promotion policies, Mr. Rivera used Defendant NJSP's online OPRA request form to submit a request for public records on July 25, 2012. See Exhibit "A" submitted herewith (State of New Jersey Government Records Request Receipt for Request W68911).

12. Mr. Rivera made his request pursuant to both OPRA and the common law right to access public records. Id. at 2.

13. Mr. Rivera requested "1. [a]ll written policies, procedures, orders, or other directives of the New Jersey State Police that reflect the criteria, basis, method, process, etc., of promotions o[f] uniformed employees (i.e. troopers, detectives, sergeants, lieutenants, or majors) that are in effect as of the date of this request; [and] 2. Any proposed changes to the policies, procedures, orders, or other directives of the New Jersey State Police regarding promotions of uniformed employees as defined above." Id.

14. Mr. Rivera's request cited the Attorney General's response to comments received during the public hearing to reauthorize N.J.A.C. 13:1E-3, which stated in reference to subsection 3.2(a)(4) that the exemption pertaining to employment

records does not apply to a request for general policies and procedures:

promotion, transfer, employee performance, employee evaluation or other related activities refer to factual records relating to an individual employee, not to general policies and procedures. The rule is not intended to make confidential any information concerning an employee that is currently available to the public. The Department agrees that records that were public prior to the institution of an employee discipline or other action would not become confidential merely by inclusion in a record under this subsection.

See id. (emphasis added); see also Summary of Public Comments and Agency Responses to N.J.A.C. 13:1E-3, Comments to 13:1E-3.2(a)(4), 43 N.J.R. 3188(b).

15. On August 2, 2012, Defendant Vargas denied Mr. Rivera's request, stating that it was "Improper and Overbroad;" that "a valid request must seek specific, identifiable records and not merely 'any and all' records" and that "[a] custodian is under no obligation to research files to discern which records may be responsive to a request." Defendant further stated that any otherwise responsive documents are exempt from disclosure pursuant to N.J.A.C. 13:1E-3.2(a)(1) and (4). See Exhibit "A".

16. Although not cited in Mr. Rivera's records request, it is worth noting that the Attorney General attempted to justify exempting from public access Standard Operating Procedures and Training Manuals, 3.2(a)(1), by stating that such records do not

concern the general public and, furthermore, are necessary for security purposes:

[Standard Operating Procedures] and training materials are management documents affecting internal operations and do not generally impact the public's interactions with agencies in the Department [of Law and Public Safety]. They may also provide insight into law enforcement techniques, legal strategy, and other confidential matters that may put lives at risk.

43 N.J.R. 3188(b).

17. In denying access to general policies concerning officer promotions, the NJSP utterly disregarded the Attorney General's intent to limit application of N.J.A.C. 13:1-3.2(4) to individualized employment records as opposed to general policies and procedures.

18. Moreover, restricting the public from examining rudimentary police procedures is at-odds with the basic tenets of the State Police's CALEA accreditation, the hallmarks of which are public input, accountability, and transparency. As stated in an NJSP official press release, the CALEA accreditation signifies "using the best practices in modern policing and being a model for other law enforcement agencies." See NJ State Police Awarded Accreditation, 2007 New Jersey State Police News Release, available at <http://www.njsp.org/news/>

pr072807.html. Defendants' denial of access to standard procedures that are of public concern violates the spirit, intent and principles of its CALEA accreditation.

19. To date, Defendants have not disclosed to Plaintiffs any records responsive to Request W68911.

FIRST COUNT

(Violation of OPRA)

20. Plaintiffs repeat and incorporate by reference the allegations set forth in the preceding paragraphs as though fully set forth herein.

21. Pursuant to N.J.S.A. 47:1A-1, all government records must be "readily accessible" to the public unless specifically exempted by law.

22. If the custodian does not provide access to the requested information, the custodian must indicate a "specific basis" in law for the denial; if only part of a record is exempt from disclosure, the custodian must redact the relevant portion and promptly disclose the remainder of the record. Id. § 5(g).

23. The public agency has the burden of proving that any denial of access is authorized by law. Id. § 6.

24. Here, the statements and actions of Defendant Vargas constitute a denial of Plaintiffs' access to the records sought in Request W68911. See id. §§ 5(g).

25. The documents Plaintiffs seek are "public records" within the meaning of because they were "made, maintained or kept on file" by Defendant NJSP, or "received in the course of . . . its official business." See id. § 1.1.

26. Promotion policies of general application are not "personnel or pension records of any individual in the possession of a public agency." See id. § 10.

27. Such promotion policies also are not subject to any other recognized exemption to OPRA. See N.J.S.A. 47:1A-9; see also N.J.S.A. 47:1A-1 to -3.

28. The custodian's purported application of N.J.A.C. 13:1E-3 is inappropriate and inapplicable to the information requested by Plaintiffs.

29. In enacting the exemption upon which the defendant relies, the New Jersey Attorney General has made clear that employment related records under subsection 3.2(a)(4) do not apply to promotion policies of general application. See supra ¶ 14; see also 43 N.J.R. 3188(b).

30. Furthermore, the records sought in Request W68911 are not the type of Standard Operating Procedures and Training Manuals sought to be exempt under N.J.A.C. 13:1E-3.2(a)(1) because policies and procedures concerning promotions of uniformed officers do not, in any way, "provide insight into law enforcement techniques, legal strategy, and other confidential

matters that may put lives at risk." See supra ¶ 16; see also 43 N.J.R. 3188(b). It is also untrue that promotion policies "do not generally impact the public's interactions with agencies in the Department [of Law and Public Safety]" as the Attorney General's comments to the Regulation suggest. See id.

31. Plaintiffs' request was also not "Improper and Overbroad" as the Defendants' response maintains. See supra ¶ 14; see also Exhibit "A." OPRA requests must "specifically describe" records that are "identifiable" without obliging the custodian "to conduct research . . . and correlate data from various government records." See N.J. Builders Ass'n v. N.J. Council on Afford. Hous., 390 N.J. Super. 166, 176-77 (App. Div.), certif. denied, 190 N.J. 394 (2007); Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); MAG Ent'ment, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546, 549 (App. Div. 2005).

32. In asking for general policies regarding a particular type of agency action, Plaintiffs "specifically describe[d]" records that were "identifiable" without obliging Defendant "to conduct research . . . and correlate data from various government records." The documents requested, therefore, should have been produced.

33. Accordingly, Defendant violated OPRA by:

- a. Failing to disclose nonexempt government records or nonexempt portions of government records, in violation of N.J.S.A. 47:1A-5(g);
- b. Failing to provide a lawful basis for denying access to government records, in violation of N.J.S.A. 47:1A-5(g); and
- c. Failing to provide an index of all responsive documents deemed by the public agency to be exempt in whole or in part, with an accurate description of the documents or portions deemed exempt, as required by Paff v. Dep't of Labor, 392 N.J. Super. 334 (App. Div. 2007).

SECOND COUNT

(Common Law Right of Access)

34. Plaintiffs repeat and incorporate by reference the allegations set forth in the preceding paragraphs as though fully set forth herein.

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

36. Defendant generates and/or maintains the requested public records, which are "necessary to be kept in the discharge

of a duty imposed by law" (among other possible qualifying conditions). S. Jersey Publ'ing Co., 124 N.J. at 487.

37. There is a strong public interest in favor of disclosing requested information, and no overriding, countervailing interest in maintaining their confidentiality.

38. Plaintiffs and the public alike have an interest in knowing what general policies govern promotion of uniformed police officers, in order to determine the extent to which those policies have or have not resulted in the promotion of substantial numbers of officers belonging to various racial and ethnic groups.

39. Accordingly, Defendants' failure to disclose the requested documents violated Plaintiffs' common law right of access to public records.

WHEREFORE, Plaintiffs demand judgment against Defendants:

- (a) Declaring Defendants in violation of OPRA and the common law right of access to public records;
- (b) Enjoining Defendants from denying access to government records pertaining to general policies, rules and procedures;
- (c) Ordering the Defendants to determine and implement standard guidelines for OPRA requests regarding

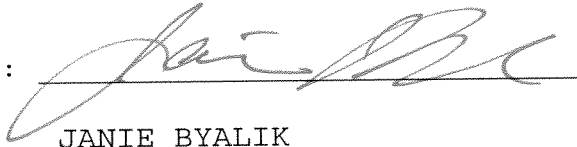
general policies and procedures consistent with the findings of this Court;

- (d) Compelling Defendants to immediately provide access to all of the requested records;
- (e) Granting attorney's fees and costs of suit pursuant to N.J.S.A. 47:1A-6; and
- (f) Granting such other relief as this Court may deem just and proper.

PASHMAN STEIN

A Professional Corporation,
Attorneys for Plaintiffs
*Richard Rivera, and the
Latino Leadership Alliance of
New Jersey*

By: _____



JANIE BYALIK

Dated: September 17, 2012


CERTIFICATION PURSUANT TO R. 4:5-1

Plaintiffs, by their attorneys, hereby certify that the matter in controversy is not the subject of any other pending or contemplated judicial or arbitration proceeding.

PASHMAN STEIN

A Professional Corporation,
Attorneys for Plaintiffs
*Richard Rivera, and the
Latino Leadership Alliance of
New Jersey*

By: _____


JANIE BYALIK

Dated: September 17, 2012

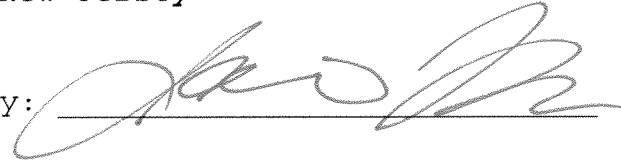
CERTIFICATION PURSUANT TO R. 4:69-4

There are no necessary transcripts in this case because the review of administrative actions sought does not involve that of agency proceedings at which a stenographic record or sound recording was made.

PASHMAN STEIN

A Professional Corporation,
Attorneys for Plaintiffs
*Richard Rivera, and the
Latino Leadership Alliance of
New Jersey*

By: _____


JANIE BYALIK

Dated: September 17, 2012

VERIFICATION

STATE OF NEW JERSEY)
) SS.
COUNTY OF BERGEN)

Richard Rivera, of full age, deposes and says:

1. I am the Chair of Latino Leadership Alliance of New Jersey's Civil Rights Protection Project and am one of the plaintiffs in this action.

2. I have read the foregoing Verified Complaint and know the factual contents of paragraphs 1 to 39 thereof to be true of my own knowledge or upon a plain reading of any documents referred to therein and appended thereto, except for any matters alleged on information and belief, which I believe to be true for the reasons indicated.

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



RICHARD RIVERA

Latino Leadership Alliance of New
Jersey
100 Jersey Avenue, Suite B104
New Brunswick, New Jersey 08901

Dated: September 14, 2012

CERTIFICATION OF FAXED SIGNATURE

Janie Byalik, Esq., of full age, certifies and says as follows:

1. I am an attorney at law with the law firm of Pashman Stein. I make this certification of the genuineness of the signature of Richard Rivera.
2. I hereby certify that Mr. Rivera acknowledged to me the genuineness of his signature on the foregoing Certification.

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

PASHMAN STEIN
A Professional Corporation
Attorneys for Plaintiffs,
Richard Rivera and the
Latino Leadership Alliance of
New Jersey

Dated: September 17, 2012

By: _____

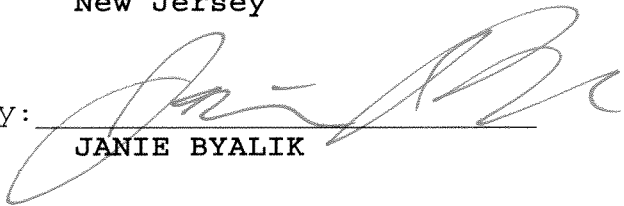

JANIE BYALIK

EXHIBIT "A"

Requestor Information

Richard Rivera
 po box 2032
 Secaucus, NJ 07096

 201-600-1769

 Request Date: July 25, 2012
 Maximum Authorized Cost: \$10.00
 US Mail

Request Number: W68911
 Request Status: Denied Closed
 Ready Date:

Custodian Contact Information
 Division of State Police
 Records Custodian
 PO Box 7068
 SP Headquarters - Bldg 15 - River Road
 West Trenton, NJ 08628
 dsp.records@lps.state.nj.us
 609-538-6087
 By

Status of Your Request

Your request for government records (# W68911) from the Division of State Police has been reviewed and has been Denied Closed. Detailed information as to the availability of the documents you requested appear below and on following pages as necessary.

The cost and any balance due for this request is shown to the right. Any balance due must be paid in full prior to the release / mailing of the documents.

If you have any questions related to the disposition of this request please contact the Custodian of Records for the Division of State Police. The contact information is in the column to the right. Please reference your request number in any contact or correspondence.

Cost Information

| | |
|--------------------|--------|
| Total Cost: | \$0.00 |
| Deposit: | \$0.00 |
| Total Amount Paid: | \$0.00 |
| Balance Due: | \$0.00 |

Document Detail

| Div | Doc # | Doc Name | Redaction Req | Pages | Legal Size | Electronic Media | Other Cost |
|-----|-------|---|------------------|-------|---------------|---------------------|---------------|
| SP | 0001 | S.O.P. Records Denial: 39.Improper and Overbroad --- | N | | N | N | |
| SP | 0002 | S.O.P. Records Denial: 05.Exception by State Regulation (specify) --- N.J.A.C. 13:1E-3.2(a)(1)&(4) | N | | N | N | |
| SP | 0003 | "Proposed changes" Denial: 02.Inter/Intra-Agency Advisory, Consultative or Deliberative Material --- | N | | N | N | |

State of New Jersey
Government Records Request
Receipt

Mr. Rivera,

(Thursday, August 02, 2012)

This office is in receipt of your recent OPRA request which is reprinted below.

Please be advised that your request, as written, is considered improper and overbroad under the OPRA statute. A valid request must seek specific, identifiable records and not merely "any and all" records. A custodian is under no obligation to research files to discern which records may be responsive to a request.

However, to the extent that I can reasonably interpret your request, please be advised that the records you seek are not considered government records subject to public access under OPRA pursuant to N.J.A.C. 13:1E-3.2(a)(1)&(4). In addition, "proposed changes" to such records, if they even existed, would be considered advisory, consultative and deliberative materials also exempted from public access under OPRA.

Therefore, I must deny your request at this time. I regret I could not assist you further.

Respectfully,

Det. I E Vargas #6764
OPRA Custodian
New Jersey State Police

Your request for government records (# W68911) is as follows:

Dear Records Custodian: This is a request for information pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 et seq., and the common law right of citizens of the state to obtain access to public documents. South Jersey Publishing Co. v. New Jersey Expressway Auth., 124 N.J. 478, 487-89 (1991). Please note that this letter contains the statutory requirements for a written OPRA request and I am not required to fill out an official form. Renna v. County of Union, 407 N.J. Super. 230 (App. Div. May 21, 2009). This request is made on behalf of the Civil Rights Protection Project of the Latino Leadership Alliance. We seek copies of the following records: 1. All written policies, procedures, orders, or other directives of the New Jersey State Police that reflect the criteria, basis, method, process, etc., of promotions or uniformed employees (i.e. troopers, detectives, sergeants, lieutenants, or majors) that are in effect as of the date of this request; 2. Any proposed changes to the policies, procedures, orders, or other directives of the New Jersey State Police regarding promotions of uniformed employees as defined above. As expressed in the response of the Attorney General in passing N.J.A.C. 13:1E-3, these general personnel and promotion policies were not intended to be treated as confidential thereunder. The relevant Attorney General Response states: RESPONSE: Records that form the basis of discipline, discharge, promotion, transfer, employee performance, employee evaluation, or other related activities [that were made confidential under N.J.A.C. 13:1E-3] refer to factual records relating to an individual employee, not to general policies and procedures. The rule is not intended to make confidential any information concerning an employee that is currently available to the public. The Department agrees that records that were public prior to the institution of an employee discipline or other action would not become confidential merely by inclusion in a record under this subsection. If you determine that any portion of the requested materials are exempt from release, we request that you redact the portion that you believe exempt and provide us with copies of the remaining, non-exempt portions. Also, if any or part of this request is denied, please send us a letter describing the material and listing the specific exemption(s) on which you rely. If the cost of copies for this request does not exceed \$10, proceed without further approval and send me an invoice with the records. Otherwise, please advise me of the costs before filling the request so that we can discuss arrangements. Thank you for your attention to this matter and for your assistance. If you have any questions, please feel free to contact me. Richard Rivera Chairperson, Civil Right Protection Project Latino Leadership Alliance of New Jersey