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Hon. Lisa F. Chrystal, J.S.C.
Superior Court – Law Division
Union County Courthouse
2 Broad Street
Elizabeth, New Jersey 07207

Re: ***Renna v. County of Union, et al.***
Docket No. UNN-L-003161-13

Dear Judge Chrystal:

We submit this letter brief in reply to the opposition papers filed by Defendants. First, this matter is not a criminal matter, as made clear by the June 10, 2013 Romankow Memorandum, which stated that "the employees' actions do not rise to the level of criminal activity." Second, the personnel exemption does not apply because the report by the Union County Prosecutor's Office was not part of an internal personnel investigation. Third, in the event the Prosecutor's report is not disclosed under OPRA, then the Prosecutor's report should be disclosed under the common law right of access because, in the words of Union County Prosecutor Romankow, "it is important that our residents have faith that government equipment is being used for the public good, not for the personal benefit of the employees who are supposed to be serving those same residents." (Exhibit E to the County's papers).

LEGAL ARGUMENT

POINT I

THE REPORT IS NOT A CRIMINAL INVESTIGATORY RECORD; ALTERNATIVELY, INFORMATION SHOULD BE PRODUCED PURSUANT TO N.J.S.A. 47:1A-3(b)

The Union County Prosecutor's report regarding the unauthorized use of County property ("Report") is not a criminal investigatory record for two reasons. First, the Report was shared with the County Freeholders and County Administration. Criminal investigatory records are those records that are "held by a law enforcement agency[.]" *N.J.S.A.* 47:1A-1.1. Here, the Union County Prosecutor shared the Report with Union County administration. That Report has now become the basis for administrative proceedings against Union County employees. Thus, the Report is no longer "held" by a law enforcement agency. The Report has now been distributed outside of the Prosecutor's office. Thus, the report cannot be considered a criminal investigatory record. Second, the Report concluded that there was no criminal conduct. This was not a matter where the Prosecutor's office found some criminal conduct and exercised its discretion not to prosecute, or that potential charges could not be proven beyond a reasonable doubt. This is a matter in which the Prosecutor found no criminal activity whatsoever. Therefore, the Report does not constitute a criminal investigatory record.

Should the Court determine that the Report constitutes a criminal investigatory record, all of the information set forth in *N.J.S.A.* 47:1A-3(a) should be disclosed, including "information as to the type of crime, time, location and type of weapon, if any" and "information as to the identity of the investigating and arresting personnel and agency and the length of the investigation." N.J.S.A. 47:1A-3(b).

Defendants argue that no information should be disclosed based on the Russo Certification. However, that Certification is purely conclusory and, in terms of its evidentiary value, worthless. The Russo Certification contains one paragraph that, in purely conclusory terms, states that "Based on my training and experience in criminal investigations, disclosing investigative information would be detrimental to the State's interest in bringing individuals responsible for criminal activity to justice while at the same time impede law enforcement's mission to protect the public and the community." The Certification does not bother to discuss why (except with respect to witness identities, discussed below) disclosure of this particular investigation would harm this investigation. Rather, Russo states that disclosure of the results of this investigation will compromise all future investigations, forever. If Russo's statement were accepted, then with one sentence Russo can neutralize the will of the Legislature as expressed through *N.J.S.A.* 47:1A-3(b).

To the extent that the Russo Certification may be read to express an expert opinion or is submitted as an expert opinion, it is a net opinion that should be disregarded by the Court. "The net opinion rule has been succinctly defined as a prohibition against speculative testimony." *Koruba v. Am. Honda Motor Co.*, 396 N.J. Super. 517, 525 (App. Div. 2007) (quoting *Grzanka v. Pfeifer*, 301 N.J. Super. 563, 580 (App. Div. 2008)) (internal quotation marks omitted). An expert's opinion must be founded on facts or data; thus, the net opinion rule "requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion." *Rosenberg v. Tavorath*, 352 N.J. Super. 385, 401 (App. Div. 2002). Here, the Russo Certification is merely conclusory, and does not contain any of the facts or data upon which is overly broad conclusion might be based. For this additional reason, the Russo conclusion must be disregarded.

For the foregoing reasons, the Report should be produced or, in the alternative, a redacted version that discloses information consistent with *N.J.S.A.* 47:1A-3(b).

POINT II

THE REPORT IS NOT A PERSONNEL RECORD

Under no construction of *N.J.S.A.* 47:1A-10 can the Report be construed as a personnel record. First of all, the Report was not a personnel record when it was created by the Prosecutor's Office. Documents that may have been prepared by the County as a result of the report may be personnel records, such as preliminary notices of discipline, but Plaintiff is not seeking copies of those reports here. The Report is not a document that triggers Union County's internal procedures regarding employee discipline. Rather, that internal discipline process is triggered by the issuance of preliminary notices of discipline. (Brief of Defendants at 10). The fact that the Report may have been annexed to the notices of discipline is irrelevant, because documents cannot become retroactively confidential, even if they are part of an investigation. *Serrano v. South Brunswick Township*, 358 N.J. Super. 352, 367 (App. Div. 2003) ("Assuming the [record] was a public record when created, it did not become retroactively confidential simply because the prosecutor obtained the [record]."). This exception includes civil investigation, because *N.J.S.A.* 47:1A-3(a) applies to "any public agency." *Id.* Therefore, the Report's use after it was created cannot retroactively cloak the Report in confidentiality. The County argues how the disciplinary proceedings and employee statements made during them are confidential; this would be a fine argument if that's what Plaintiff sought. We do not seek employee statements made during disciplinary proceedings or notices of discipline. We seek the Report, which contains neither of these things.

In any event, the Report is not a "personnel record." While there is no hard and fast definition of a personnel record, Courts have held that County investigators' requests for outside employment, emails about an employee's performance and records showing educational courses taken voluntarily by police officers are personnel records. *North Jersey Media Group, Inc. v. Bergen County Prosecutor's Office*, 405 N.J. 386 (App. Div. 2009) (requests for outside employment); *McGee v. Township of East Amwell*, 416 N.J. Super. 602 (App. Div. 2010) (personnel emails); *Kovalcik v. Somerset County Prosecutor's Office*, 206 N.J. 581 (2011) (voluntary education). The Report at issue here is nothing like other circumstances in which courts have held that documents constitute personnel records. The Report was created by the Prosecutor's Office, not internally by the County of Union. In any event, even if the Report is held to be a personnel record, the County in its OPRA response has already conceded that the entire Report is not a personnel record, only "significant portions." (Exhibit B to the County's papers). Therefore, even if the Report is held to be a personnel record, the non-exempt portions must be provided to us.

POINT III

ALTERNATIVELY, THE REPORT SHOULD BE DISCLOSED UNDER THE COMMON LAW RIGHT OF ACCESS

The Prosecutor's investigation is closed, with no finding of criminal wrongdoing. Thus, the County's interest in non-disclosure does not "survive." "While there is a real need to deny access where there is an ongoing law enforcement investigation, or where the protection of witness information or a witness's identity is at stake, the same values do not survive a balancing after the investigation is closed." *Shuttleworth v. City of Camden*, 258 N.J. Super. 573, 587 (App. Div. 1992); *see also Keddie*, 148 N.J. at 54 ("Obviously, the need for confidentiality is greater in pending matters than in closed cases.").

The grounds that disclosure of the Report would reveal the "means, techniques and methodologies by which the criminal investigation" was conducted is, we believe, a vast overstatement of the facts. This wasn't an international sting operation; in all likelihood, the County's investigators identified eyewitnesses to the conduct they were investigating and conducted interviews of witnesses and subjects. We request that the Court conduct an *in camera* review of the report so that any truly sensitive law enforcement investigative techniques can be redacted. In addition, the names and identifying information of witnesses who were promised confidentiality may also be redacted. There should also be some mechanism for confirming which witnesses were promised confidentiality, especially if those assurances do not appear in the report itself. But the identities of subjects should not be redacted, especially of those who waived their Fifth Amendment rights and spoke with investigators.

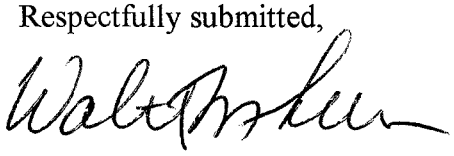
With respect to ongoing disciplinary hearings, half of these proceedings have been concluded. (The lawyers for Union County ignore this fact in their brief, although it is disclosed in the Certification of Rachel Caruso at paragraph 9). Thus, the sections of the Report that address employees whose disciplinary proceedings have concluded (or against whom no disciplinary proceedings were initiated) should be disclosed. With respect to ongoing disciplinary proceedings, these matters are not going to be tried by a jury. The personnel proceedings are essentially held in secret. Thus, disclosure of the Report cannot reasonably be thought to affect proceedings that are otherwise held in secret.

The bottom line is that the County's arguments against disclosure are a series of conclusions that are not supported by any evidence. As shown by the press coverage of this issue, we can say with only a little hyperbole, nothing gets angrier madder than the personal use

of County-owned generators while regular citizens were deprived of power during and after Hurricane Sandy.

Disclosure of the Report in this case will not hurt future investigations of the Prosecutor or chill any ongoing administrative actions. To say otherwise is mere speculation. In point of fact, Defendants do not point to a single instance where disclosure chilled anything. Here, disclosure will give the public a full account of Union County employee misconduct and reduce the likelihood that such misconduct will happen again. This Report would appear to be an embarrassing and unflattering narrative regarding the conduct of County employees. But they only have themselves to blame for that unfortunate circumstance.

Respectfully submitted,



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