ROBERTS
CARROLL
FELDSTEIN
& PEIRCE
ATTORNEYS AT LAW RCFP.COM

jcullen@rcfp.com

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Sean Lyness, Special Assistant Attorney General
Rhode Island Office of Attorney General
150 South Main Street
Providence, RI 02903

RE: Appeal of April 18, 2019 Denial of Request for Records from the Woonsocket Police Department
Our File No. 5588-1

Dear Sir:

Please consider this an appeal, pursuant to R.I. Gen. Laws § 38-2-8(b), of a denial of a request for public records by the Woonsocket Police Department. I file this appeal as a cooperating attorney for the ACLU of Rhode Island on behalf of Mr. Dimitri Lyssikatos and his organization, the Rhode Island Accountability Project, in relation to the Woonsocket Police Department's response to an April 18, 2019 public records request he filed.

The Woonsocket Police Department's response is a flagrant breach of Rhode Island's Access to Public Records Act. Further, we believe the Department's denial highlights the faulty and problematic nature of an opinion issued by your office two years ago in Piskunov v. Town of Narragansett (PR 17-05), and which has become an increasingly-used tool by police departments to shield themselves from public accountability.[1]

The facts of this appeal are as follows. On April 18, 2019, Mr. Lyssikatos submitted a request for the "last years [sic] worth of internal affairs reports dating back from today 4/18/19. Also I would also like Anselmo Morale's arrest report from today 4/18/19." See Exhibit A.

[1] See, e.g., Lyssikatos v. Goncalves (C.A. No. PC 2017-3678, R.I. Superior Court), where the Pawtucket Police Department has relied on Piskunov to deny Mr. Lyssikatos access to records relating to alleged police misconduct.

The Woonsocket Police Department sent its response on April 22, 2019. In his response, Det. Lt. Christopher Brooks wrote, "I spoke to Lt. Galipeau, the Internal Affairs/Professional Standards officer. The internal affairs reports that you requested are not public records. The arrest report that you requested is a public record and is attached." See Exhibit B.[2] This general, unsupported assertion that the requested documents are not public records does not comply with the APRA and is an erroneous interpretation of the law.

The Woonsocket Police Department's position that the internal affairs reports requested by Mr. Lyssikatos are not public documents is unsupported by any statutory or legal authority. Rhode Island law is clear that internal affairs reports—whatever their source—are public records and must be disclosed pursuant to an appropriate request, although personally identifiable information may be redacted from them.[3] See The Rake v. Gorodetsky, 452 A.2d 1144 (R.I. 1982), and Direct Action for Rights and Equality v. Gannon, 713 A.2d 218 (R.I. 1998) ("DARE"). As such, the Woonsocket Police Department should be compelled to provide the internal affairs reports at issue in this appeal.

Further, to the extent your office's opinion in Piskunov – making a distinction between citizen-generated and internally-generated complaints of police misconduct, and claiming the latter records may be kept confidential – is applicable, we request that its reasoning and holding be reconsidered and rejected as contrary to both the spirit and letter of the APRA and The Rake and DARE decisions.

I. Argument:

i. The APRA is a disclosure statute and must be construed in a manner that promotes its purpose of promoting the free flow and disclosure of information to the public

The purpose of the APRA is undisputed and indisputable; it is a disclosure statute intended to "enlarge the scope of the public's access to documents in the possession of governmental agencies." DARE, 713 A.2d at 222. See also Pawtucket Teachers All. Local No. 920, AFT, AFL-CIO v. Brady, 556 A.2d 556, 558 (R.I. 1989) (stating "[w]e are mindful that the **basic policy of the act is in favor of disclosure.**" (Emphasis added)); In re New England Gas Co., 842 A.2d 545, 548 (R.I. 2004) (emphasizing the "strong public policy in the APRA in favor of public

[2] Notably, the Woonsocket Police Department's response fails to include and information—or even reference to—a right of appeal or the appeals process. This is, at best, misleading and would invite the uninitiated to assume that they have no further recourse following a denial of their APRA request. This should not be permitted.

[3] R.I. Gen. Laws § 38-2-3(b) requires agencies to release "[a]ny reasonably segregable portion of a public record … after deletion of the information which is the basis of the exclusion."

disclosure"); and Providence Journal Co. v. Rhode Island Dep't of Pub. Safety ex rel. Kilmartin, 136 A.3d 1168, 1173 (R.I. 2016), (recognizing that the underlying policy of the APRA favors the "free flow and disclosure of information to the public."). All provisions of the APRA must be reviewed with this primary goal—disclosure—in mind. It is, therefore, no surprise that the Rhode Island Supreme Court has concluded that all exemptions to the disclosure of public records must be narrowly construed because they conflict with the "dominant public-disclosure objective of APRA." Providence Journal Co. v. Convention Ctr. Auth., 774 A.2d 40, 53 (R.I. 2001). This is the lens through which this appeal should be analyzed.

ii. The Woonsocket Police Department's failure to provide a specific basis for their decision to withhold the requested internal affairs reports is in violation of §38-2-7(a) of the APRA and mandates disclosure of the requested documents

While the Woonsocket Police Department has asserted that the records in question are not public records, it has failed to meet the requirements of § 38-2-7(a):

> Any denial of the right to inspect or copy records, in whole or in part provided for under this chapter shall be made to the person or entity requesting the right in writing giving the specific reasons for the denial within ten (10) business days of the request and indicating the procedures for appealing the denial. **Except for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the public body.**

(Emphasis added). In particular, the Woonsocket Police Department did not provide any specific—much less any general—basis for its conclusion that the records in question are not public. As such, any argument that the Woonsocket Police Department could make in support of their decision to withhold the requested records has been waived.

The conclusion that the Woonsocket Police Department's assertion that the records in question "are not public records" is insufficient under section 38-2-7 is supported by the opinion in Boss v. Woonsocket Superintendent's Office, PR 14-31, wherein it was noted that:

> The APRA requires that public bodies provide "specific reasons" for denying requests and even the Superintendent's affidavit acknowledges this level of specificity (for the privacy exemption codified at R.I. Gen. Laws § 38-2-2(4)(A)(I)(b)) was not satisfied. Respectfully, the phrase "is not a public document for several reasons" could signify any one of the APRA's twenty-seven (27) exemptions and is, therefore, not sufficient to comply with the requirements of R.I. Gen. Laws § 38-2-7(a).

2014 WL 7934400, at *3 (R.I.A.G. Dec. 1, 2014). The same analysis should be deployed here; the absence of a specific reason for the Woonsocket Police Department's decision to withhold the requested internal affairs reports is dispositive and the Woonsocket Police Department should be compelled to produce the responsive internal affairs reports.

iii. Internal affairs reports are public records subject to disclosure under the APRA

R.I. Gen. Laws § 38-2-3(a) provides that "[e]xcept as provided in § 38-2-2(4), all records maintained or kept on file by any public body, whether or not those records are required by any law or by any rule or regulation, shall be public records and every person or entity shall have the right to inspect and/or copy those records at such reasonable time as may be determined by the custodian thereof." In this case, the Internal Affairs reports requested by Mr. Lyssikatos qualify as a record maintained by a "public body" and are therefore public.

Public records are defined as:

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, magnetic or other tapes, electronic data processing records, computer stored data (including electronic mail messages, except specifically for any electronic mail messages of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities), or other material regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

R.I. Gen. Laws §38-2-2(4). Further, the Woonsocket Police Department clearly meets the definition of an "agency" which is defined as:

> any executive, legislative, judicial, regulatory, or administrative body of the state, or any political subdivision thereof; including, but not limited to: any department, division, agency, commission, board, office, bureau, authority; any school, fire, or water district, or other agency of Rhode Island state or local government that exercises governmental functions; any authority as defined in § 42-35-1(b); or any other public or private agency, person, partnership, corporation, or business entity acting on behalf of and/or in place of any public agency.

R.I. Gen. Laws Ann. § 38-2-2(1). As such, a plain reading of the statute mandates the conclusion that these records are public records unless they fall within one of the exemptions enumerated in section 38-2-2(4).

Even assuming that the Woonsocket Police Department's response was sufficient under § 38-2-7(a), a careful analysis of the APRA compels the conclusion that the internal affairs reports at issue in this appeal are public records subject to disclosure. None of the exemptions in the APRA applies in this case.

A review of the 27 exemptions in R.I. Gen. Laws § 38-2-2(4) does not provide any basis for the Woonsocket Police Department's decision to withhold the internal affairs reports at issue in this appeal. The only potentially applicable exemption is found in 38-2-2(4)(A)(I)(b)—the personnel and individually identifiable records exemption. However, the exemption is not applicable here.

In analyzing the exemptions under the APRA, the decision maker is required to construe all exemptions narrowly because they conflict with the "dominant public-disclosure objective of APRA." Providence Journal Co. v. Convention Ctr. Auth., 774 A.2d 40, 53 (R.I. 2001).

a. The personnel and individually identifiable records exemption is inapplicable in this case

Analyzing the plain language of the personnel and individually identifiable records exemption in R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), it is clear that this exemption has no application if the records are redacted pursuant to R.I. Gen. Laws 38-2-3(b) ("[a]ny reasonably segregable portion of a public record excluded by subdivision 38-2-2(4) shall be available for public inspection after deletion of the information which is the basis of the exclusion.") and The Rake and DARE.

§ 38-2-2(4)(A)(I)(b) provides that the following may be exempt from disclosure, "Personnel and other personal **individually identifiable records** otherwise deemed confidential by federal or state law or regulation, **or the disclosure of which would constitute a clearly unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552 et seq."** (Emphasis added).

In The Rake, students and editors of the Brown University publication requested copies of reports concerning civilian complaints of police brutality from the Providence Police Department. 452 A.2d at 1146. The Providence Police Department rejected this request and a lawsuit ensued. Id. In opposing the plaintiff's requests for the release of the records, the Providence Police Department, in essence, asserted that the records were protected from disclosure by the personnel records/privacy exemption in the APRA. Id. at 1147-48. This Court rejected the application of this exemption noting that:

> [t]he statute requires that the records must be identifiable to an individual applicant in order for the exemption to take effect. In the present case, the reports do not identify the citizen complainants or the police officers because the names of both have been deleted as ordered by the Superior Court justice. Consequently, an important prerequisite for application of the exception has not been met.

Id. at 1148. This analysis is not changed by the nature of the reports in question; the statutory question remains the same whether the reports are generated as a result of citizen complaints or internal complaints. If the reports are redacted such that they are not individually identifiable, then the exemption does not apply and no balancing is necessary.

This Court arrived at an identical conclusion in DARE, holding that the defendant must disclose internal affairs reports that are substantively identical to the records at issue in this case, 713 A.2d at 225, on the basis that "a rule has evolved that **permits the disclosure of records that do not specifically identify individuals** and that represent final action." Id. at 224 (emphasis added). In so holding, this Court cited its decision in The Rake with approval, noting that, "[in The Rake] we also held that the personnel records exemption was inapplicable **because the information identifying the police officers or the civilian complainants had been redacted.**" DARE, 713 A.2d at 223 (emphasis added).

While the exemption at issue in The Rake and DARE, §38-2-2(d)(1)—which provided that an agency or public body was not required to disclose "records which are **identifiable** to an individual ... employee; including, but not limited to, *personnel,* medical treatment, welfare, employment security, and pupil records and all records relating to a client/attorney relationship and to a doctor/patient relationship" (emphasis added)—was amended in 2012 to create § 38-2-2(4)(A)(I)(b), the legislature retained the concept of identifiability as an important prerequisite to the application of the exception. Therefore The Rake and DARE apply with equal, if not greater, force today, and are dispositive in this case.

While both The Rake and DARE required redaction of the internal affairs reports at issue in order to justify their disclosure, redaction is no longer necessary; § 38-2-2(4)(A)(I)(b) explicitly allows a public body to disclose un-redacted records. A comparison of § 38-2-2(4)(A)(I)(b) with its predecessor is instructive.

Prior to 2012, § 38-2-2(d) provided an exemption for:

> All records which are **identifiable to an individual** applicant for benefits, clients, patient, student, or employee; including, but not limited to, personnel, medical treatment, welfare, employment security, and pupil records and all records relating to a client/attorney relationship and to a doctor/patient relationship.

(Emphasis added). This exemption applied to "all records which are identifiable to an individual" and, as such, did not contemplate the production of records that were identifiable to an individual. This has now changed; while § 38-2-2(4)(A)(I)(b) continues to mandate identifiability as a prerequisite to the application of the exception, it also created a class of individually identifiable records that are deemed to be public under the statute despite the privacy interests of the identified individuals. The statute provides:

> Personnel and other personal individually identifiable records otherwise deemed confidential by federal or state law or regulation, or the disclosure of which would constitute a clearly unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552 et seq.

The legislature, therefore, explicitly contemplated circumstances where the public interest in the records would be such that their disclosure would be appropriate even in the absence of redaction. This legislative gloss is significant because it explains why the balancing test ("clearly unwarranted invasion of privacy") is included in § 38-2-2(4)(A)(I)(b). The balancing test should be employed to determine whether a requestor is entitled to records that contain information that identifies individuals. Whereas when the records are requested with redactions, no balancing test is necessary and the Supreme Court's holdings in The Rake and DARE are controlling.[4]

It is also significant that the legislature, when it amended the personnel records/privacy exemption in the APRA, stated that the exemption for personnel and individually identifiable records would only apply if the disclosure would result in a "**clearly** unwarranted invasion of personal privacy." See § 38-2-2(4)(A)(I)(b) (emphasis added). This represents an explicit departure from the hortatory language contained in § 38-2-1 which states that:

> The public's right to access to public records and the individual's right to dignity and privacy are both recognized to be principles of the utmost importance in a free society. The purpose of this chapter is to facilitate public access to public records. It is also the intent of this chapter to protect from disclosure information about particular individuals maintained in the files of public bodies when disclosure would constitute **an unwarranted invasion of personal privacy.**

(Emphasis added). The clear implication of this deviation from the default is that the legislature is willing to tolerate a greater invasion of privacy in situations where personnel and other individually identifiable records are requested than in other circumstances under the act. This

[4] However, Mr. Lyssikatos does not seek to invoke the balancing test here to obtain the names of police officers or other identifying information in the reports.

should guide the Attorney General in analyzing appeals like this, as the legislative intent is clear—a thumb should be placed on the scale in favor of disclosure.

b. The Attorney General should reverse the opinion in Piskunov v. Town of Narragansett on the grounds that it is wrongly decided and draws a false distinction between internal affairs reports generated as a result of citizen complaints and internal affairs reports generated from other sources. There is no rational basis for distinguishing between internal affairs reports based on the source of the complaint.

It is anticipated that the Woonsocket Police Department will attempt to justify its decision to withhold some/all of the internal affairs reports on the basis of the Attorney General's opinion in Piskunov v. Town of Narragansett, PR 17-05, wherein it was held that there was a distinction between citizen generated internal affairs reports and non-citizen initiated internal affairs reports and that there was less public interest in the non-citizen generated internal affairs reports. This, however, is a false dichotomy. In this appeal, we respectfully request the Attorney General to correct its prior opinion in order to align it with the legislature's purpose and intent.

The decision in Piskunov appears to be based on a mistaken assumption that a balancing test is required under § 38-2-2(4)(A)(I)(b) in all circumstances. This is simply incorrect. As we have seen, a comparison of the personnel and other individually identifiable records exemption under the APRA with its federal counterpart reveals a significant different between the two; the application of § 38-2-2(4)(A)(I)(b) hinges on the concept of identifiability.[5]

The Rhode Island Supreme Court's analysis of the personnel and other individually identifiable records exemption in The Rake and DARE is based on a plain reading of the statutory text. No distinction can or should be drawn between internal affairs reports based on their origin—the same statutory language applies whether they are generated as a result of a citizen complaint or from an internal complaint. As such, identifiability is the hallmark of the analysis. If the records are redacted, then the exemption does not apply and no balancing is required—regardless of the source of the complaint. On the other hand, if the records are identifiable to individuals then they must be produced unless there is a "clearly unwarranted" invasion of personal privacy.

In addition, the Attorney General's opinion in Piskunov appears to suggest that internal affairs reports are not discoverable under the APRA because they do not reveal anything about the

[5] While the 2012 amendments to the APRA brought it into closer alignment with the federal Freedom of Information Act, 5 U.S.C. § 552 et. seq. (the "FOIA"), there remains a significant and dispositive distinction between the two acts. While both § 38-2-2(4)(A)(I)(b) and its equivalent under FOIA, 5 U.S.C. § 552(b)(6) call for a balancing test when exploring the disclosure of personnel and similar records, FOIA's personnel records/privacy exemption does not contain the prerequisite that the records be individually identifiable before the balancing applies.

agencies' own conduct. See Piskunov, 2017 WL 1154201, *2. This is incorrect. Unlike the situation in United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, at 743 (1989), which the Attorney General relies on for this proposition, the records of the internal affairs investigations conducted by any police force reveal a lot about what the police force is doing; indeed, they are the records of its doings! In Reporters Committee, the Supreme Court of the United States concluded that "rap sheets" represented a compilation of data created by a government agency that revealed more about the individuals identified therein than the FBI itself. Here, however, the internal affairs reports tell us what the Woonsocket Police Department has been doing. Indeed, they provide a lot of important information for the public. Disclosure of all internal affairs reports will allow the public to analyze the conduct of its police forces by demonstrating: (1) the types of complaints being made against its police officers; (2) the number of complaints that are being made; (3) the types of complainant;[6] (4) how those complaints are investigated and handled; (5) whether the complaints are treated differently depending upon who the complainant is; (6) the outcomes of the complaints and (7) whether the outcomes are fair. At base, the significant public interest in those reports remains the same no matter who the complainant is.

In addition, the Attorney General's conclusion in Piskunov appears to have been reached because Mr. Piskunov did not provide a description of the public interest that would be served by disclosure of the non-citizen initiated internal affairs report—a fact that is referenced on at least six occasions in the Attorney General's opinion. Unlike Piskunov, here, Mr. Lyssikatos has explained the public interest in the disclosure of all internal affairs reports that would justify disclosure without redactions.

While some have tried to justify the decision in Piskunov by pointing to a concern that redaction may not protect some officers from identification, such concerns about incidental identification have been rejected by the Rhode Island Supreme Court Court. Acknowledging that "the facts set forth in each report could be matched with newspaper accounts that gave rise to the complaint" resulting in the identification of the parties involved the Rhode Island Supreme Court rejected the argument that such a concern would justify withholding the records in question. The Rake, 452 A.2d at 1149. "While recognizing that the scenario defendant presents us with could occur, we feel that on balance the public's right to know outweighs such a possibility." Id. Similarly, in Brady, 556 A.2d 556, this Honorable Court held that "the public's right to know under APRA, we stated, outweighed the fortuitous possibility that police officers' identities might

[6] The type of complainant—whether a citizen, a police officer or someone else—as well as a comparison between the scrutiny given to internally generated complaints when compared with that given to citizen complaints will provide important and useful information regarding the management and direction of a police department. The fact that this analysis would serve to enhance the public's understanding of the management and direction of Rhode Island police departments further bolsters the need for disclosure of the reports at issue in this case.

be ascertained by matching the reports with newspaper accounts of the incidents." Id. at 559 (emphasis added).

Further, the position taken by the Attorney General in Piskunov is in tension with §38-2-3(j), which bars agencies from requiring requestors to provide a reason for a records request, particularly where there is no legitimate claim of a clearly unwarranted invasion of privacy to be rebutted. In any event, and despite having no obligation to do so, here Mr. Lyssikatos provided a description of the interests served by the release of the reports in question.

c. An analysis of § 38-2-2(4)(D) supports the release of all internal affairs reports requested in this case.

The Rhode Island Supreme Court has held that legislation should not be given a meaning that leads to an unjust, absurd, or unreasonable result. In re John Doe, 435 A.2d 330 (R.I. 1982). In addition, it has stated that, "we presume that the drafters intended each word or provision of a statute to express a significant meaning, and the court will give effect to every word, clause, or sentence, whenever possible." Prew v. Employee Ret. Sys. of City of Providence, 139 A.3d 556, 561 (R.I. 2016) (quotations omitted). Indeed, "it is a well-settled principle of statutory interpretation that an isolated part of a particular statute cannot be viewed in a vacuum; rather, each word and phrase must be considered in the context of the entire statutory provision." Power Test Realty Co. P'ship v. Coit, 134 A.3d 1213, 1221 (R.I. 2016).

Reading § 38-2-2(4)(A)(I)(b) in a vacuum, and ignoring the specifics of § 38-2-2(4)(D) in Piskunov was, therefore, a mistake. § 38-2-2(4)(A)(I)(b) must be considered in the context of the full statutory scheme. In this regard, the provisions of §38-2-2(4)(D) are telling. § 38-2-2(4)(D) explicitly excludes from its ambit records "relating to management and direction of a law enforcement agency."

In addition, because § 38-2-2(4)(D) is specific, dealing directly with records relating to the management and direction of a law enforcement agency, its provisions should prevail over less specific provisions in § 38-2-2(4)(A)(I)(b). See R.I. Gen. Laws § 43-3-26; S. Cty. Post & Beam, Inc. v. McMahon, 116 A.3d 204, 215 (R.I. 2015). As such, § 38-2-2(4)(A)(I)(b) is inapplicable in this case.

There can be no question that records "relating to management and direction of a law enforcement agency" include internal affairs reports like those at issue in this case. Indeed, in DARE, the Rhode Island Supreme Court, stated that:

> DARE also directs our attention to § 38–2–2(d)(4), as amended by P.L.1991, ch. 208, § 1. In pertinent part this provision excludes from disclosure:

> "All records maintained by law enforcement agencies for criminal law enforcement; and all records relating to the detection and investigation of crime, including those maintained on any individual or compiled in the course of a criminal investigation by any law enforcement agency * * * *provided, however, records relating to management and direction of a law enforcement agency* and records reflecting the initial arrest of an adult and the charge or charges brought against an adult *shall be public.*" (Emphases added.)
>
> Here DARE argues that the emphasized portion of this subsection was added by the General Assembly in 1991 **"in recognition of the overwhelming public interest in allowing open scrutinization of the Providence police department's civilian complaint process"** and thus provides additional evidence supporting the disclosure of the requested records. With respect to request (d) [Reports on all disciplinary action that's [*sic*] been taken as a result of recommendations made by the Hearing Officers['] Division since 1986 to present.] **we agree.**

DARE, 713 A.2d at 224 (emphasis in italics original, emphasis in bold added). The Court in DARE concluded that "**the manner in which a law enforcement agency addresses the concerns of its citizens regarding civilian complaints 'relat[es] to management and direction of a law enforcement agency.'**" Id. at 224 (emphasis added). The same rationale can, and must, be applied to all investigations conducted by internal affairs.[7] As such, the requested records clearly and indisputably relate directly to the Department's management and direction and fall within the provisions of § 38-2-2(4)(D). Thus, the documents sought by Mr. Lyssikatos should be disclosed, with the understanding that the Police Department may redact personally identifiable information.

II. Conclusion:

Under the APRA, the public body has the burden of proof; it must show that the requested records are not subject to disclosure. R.I. Gen. Laws § 38-2-10 states that, "[i]n all actions brought under this chapter, the **burden shall be on the public body** to demonstrate that the record in dispute can be properly withheld from public inspection under the terms of this chapter." (Emphasis added). Further, it has the obligation of producing "[a]ny reasonably segregable portion of a public record excluded by subdivision 38-2-2(4)[.]" § 38-2-3(b). The Woonsocket Police Department has failed to meet this burden and the internal affairs reports for the year prior to April 18, 2019 should be produced to Mr. Lyssikatos without charge.

[7] In one sentence, and with no analysis, the Piskunov opinion stated that this quote from DARE "has no application to . . . non-citizen initiated complaints." If anything, however, complaints generated internally would seem to implicate the agency's "management" *even more* than citizen-generated complaints.

In addition, we believe that the Piskunov opinion has cast a pall over police department accountability and transparency and is being used to hinder the public's right to know in significant ways. We request that your office take this opportunity to reconsider and reverse that pronouncement, and conclude that the text and intent of the APRA, as well as The Rake and DARE decisions, compel the conclusion that internally-generated reports regarding alleged police misconduct, no less than citizen-generated reports, are public records.

Sincerely yours,

James D. Cullen

JDC/kag