

New Use of Force Policy Makes Positive Changes, But Also Raises Questions - *NJ OPRA Blog*

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On December 21, 2020, New Jersey Attorney General Gurbir S. Grewal announced changes to the statewide “Use of Force Policy,” the first revision to the policy in two decades. Among other things, **the new policy** prohibits the use of deadly force against citizens “except as an absolute last resort.” Because the Attorney General is New Jersey’s “chief law enforcement officer,” this policy is binding upon every law enforcement agency in the state.

The new policy **has been widely applauded** by both the law enforcement community and the civil rights community. In terms of transparency, we find that it contains positive changes but also raises some questions.

Changes to Use of Force Reporting

Readers may recall that there has been significant litigation regarding public access to Use of Force Reports (UFRs), which are reports that law enforcement officers are required to complete, per the policy, any time force is used against another person. In 2017, the New Jersey Supreme Court ruled that UFRs are subject to OPRA in [North Jersey Media Group Inc. v. Township of Lyndhurst](#), 229 N.J. 541 (2017). In 2020, the Appellate Division rejected an agency’s attempt to withhold UFRs that relate to juveniles, ruling in [Digital First Media v. Ewing Township](#), 462 N.J. Super. 389 (App. Div. 2020), that the agency must instead redact the juveniles name from the UFR and release them. Both cases were litigated by Pashman Stein Walder Hayden.

The new Use of Force Policy maintains the requirement that officers complete UFRs after each and every use of force, but it modifies the requirement in some positive ways.

First, **the old policy** did not specify a deadline for completing a UFR and many officers would wait weeks or months to fill them out. This kept the public from learning important details about the incident. The updated policy now requires UFRs to be completed within 24 hours. This will ensure prompt public access.

Second, under both the old policy and the new policy, pointing a firearm at someone is considered “constructive authority” and not a “use of force.” Under the old policy, only uses of force had to be reported on a UFR and therefore there was no requirement that police officers complete a report when they pointed a firearm at anyone. Under Section 3.4 of the new policy, officers are required to report anytime they point a firearm at a person. Section 3.7.5 also requires officers to report Conductive Energy Device (tasers) spark displays as well.

Third, under the old policy, force was reported on a one-page hard copy UFR. Under the new policy, force is reported through an online “Use of Force Portal.” Thus, UFRs now exist in electronic form and they will also capture much more information than ever before, making it much easier to analyze trends in how force is used and which officers are using force more than others.

Questions About Public Access

Despite the positive changes, we do have some questions and concerns regarding transparency under the new Use of Force Policy.

First, the Attorney General announced that “a version of the portal will be accessible for public review in the first quarter of 2021.” It is unclear what that public version will look like and whether it will contain as much information as the internal version of the portal. It is also important that the public have access to raw data rather than mere summaries of information and it would be a shame if people still had to file OPRA requests to obtain individual UFRs. We are hopeful that the public portal will be expansive and allow people to download UFRs and analytical reports and that the data is available in real time as UFRs are completed, not on a delay.

Second, we have concerns regarding reporting on deadly force incidents. The old policy required the completion of a UFR for *all* uses of force, including deadly force. Section 7.3 of the new policy suggests that the new portal will be used to report only *non-deadly force* because it states: “When an officer uses force as defined in Section 3 of this Policy *and the result is not fatal*, the officer shall complete a report in the Use of Force Portal[.]” Section 7.1 then dictates a separate procedure for reporting deadly force: “Notification of fatal and serious bodily injury law enforcement incidents shall be made in accordance with AG Directive 2019-4.”

It is unclear how that deadly force notification actually occurs because **Directive 2019-4** simply states: “As soon as any local, county, or state law enforcement agency learns of a Law Enforcement Incident, the agency should immediately notify the County Prosecutor’s Office of the county in which the incident occurred, who shall in turn immediately notify the OPIA Director or their designee.” If those fatal force notifications are made verbally, then there would be no

documentation for the public to access. In prior years, agencies would complete a “**Police Use of Deadly Force–Attorney General Deadly Notification Report**,” but those do not seem to be completed as often now.

If UFRs are no longer required under the new Use of Force Policy for fatal uses of force, that would be a significant departure from the old policy and would shield important details from the public about deadly force incidents. If the Use of Force Portal does not include data about deadly force incidents, that is alarming and would skew the data in the public portal. The use of deadly force is obviously of significant interest to the public.