



## **NEW JERSEY LAW REVISION COMMISSION**

### **Final Report Regarding the Defense and Indemnification of Non-State Personnel in Legal Actions N.J.S. 59:10A-1 to -2**

**December 16, 2021**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes in order to determine the law of the State.

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## Project Summary<sup>1</sup>

The New Jersey Tort Claims Act and the statutes concerning Municipalities and Counties both address the identity of the party required to provide a defense for employees against whom legal action is brought in connection with their employment.<sup>2</sup> The Tort Claims Act provides that the Attorney General “shall, upon the request of a[ ] [current] or former employee of the State, provide for the defense of any action brought against the employee on account of an act or omission in the scope of his employment.”<sup>3</sup> The governing body of a county is required to provide a member of the county police or park police with the necessary means for the defense of any action or legal proceeding arising out of or incidental to the performance of the officer’s duties.<sup>4</sup>

County employees are, with some frequency, called to act as an ‘arm of the State’ in criminal cases.<sup>5</sup> The services these individuals are required to perform might not arise from, or be incidental to, the performance of their duties as county employees.<sup>6</sup> Instead, these services are provided for the sole benefit of, and at the exclusive direction of, the State.

In *Kaminskas v. State*, the New Jersey Supreme Court considered the Attorney General’s denial of the requests by two county police officers to indemnify them in a civil action brought against them for alleged misconduct that occurred while they performed services to aid in the prosecution of a criminal case.<sup>7</sup>

The Commission recommends statutory modifications to clarify that the Attorney General must defend current or former “non-State” personnel who are called upon to participate in a State criminal prosecution and are subsequently sued in a civil action by the criminal defendant.

## Statutes Considered

### **N.J.S. 59:10A-1 provides:**

Except as provided in section 2 hereof, the Attorney General shall, upon a request of an employee or former employee of the State, provide for the defense of any action brought against such State employee or former State employee on account of an act or omission in the scope of his employment....

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<sup>1</sup> Preliminary work on this topic was performed by Julianna Dzwierzynski, a former Legislative Law Clerk with the N.J. Law Rev. Comm’n.

<sup>2</sup> N.J. STAT. ANN. § 59:10A-1 (West 2021); N.J. STAT. ANN. § 40A:14-117 (West 2021).

<sup>3</sup> N.J. STAT. ANN. § 59:10A-1 (West 2021).

<sup>4</sup> N.J. STAT. ANN. § 40A:14-117 (West 2021).

<sup>5</sup> *Kaminskas v. Off. of the Att’y Gen.*, 236 N.J. 415, 420 (2019).

<sup>6</sup> *Id.* See N.J. STAT. ANN. § 40A:14-17 (West 2021).

<sup>7</sup> *Id.* at 415.

**N.J.S. 40A:14-117 provides:**

Whenever a member or officer of a county police, or county park police, department or force is a defendant in any action or legal proceeding arising out of or incidental to the performance of his duties, the governing body of the county, or county park commission, as the case may be, shall provide said member or officer with necessary means for the defense of such action or proceeding....

**Background**

In 2006, Emmanuel Mervilus was arrested and charged with first-degree robbery, aggravated assault, and third-degree possession of a weapon for an unlawful purpose.<sup>8</sup> He agreed to take a polygraph examination.<sup>9</sup> The Union County Prosecutor’s Office did not employ a polygraphist, and therefore requested the services of Lieutenant Kaminskas, an officer with the Union County Police Department.<sup>10</sup>

At trial, Lieutenant Kaminskas testified that the polygraph exam was a “truth indicator” and that in his opinion Mervilus “wasn’t telling the truth.”<sup>11</sup> Mervilus was subsequently convicted of first-degree robbery and aggravated assault.<sup>12</sup> On appeal, the Court found that Lieutenant Kaminskas’ testimony was improper, since it may have led the jury to “perceive polygraph evidence as infallible.”<sup>13</sup> On remand, Mervilus was acquitted of all charges.<sup>14</sup>

In November 2014, Mervilus filed a complaint against Lieutenant Kaminskas, his Chief (collectively, “the officers”), and two Union County prosecutors, asserting claims for wrongful prosecution and conviction under federal and state statutes and the common law.<sup>15</sup> Each of the civil defendants requested that the Attorney General defend and indemnify them in the civil suit pursuant to *Wright v. State*.<sup>16</sup> The Attorney General only agreed to defend and indemnify the county prosecutors, asserting that *Wright* does not extend to county police officers and that N.J.S. 40A:14-117 requires each county to defend its own police officers.<sup>17</sup>

On appeal, the officers contended that they were entitled to both defense and indemnification by the Attorney General because they were “non-state employee who [were] acting as an ‘arm of the State.’”<sup>18</sup> In addition, they argued that their “actions in [the criminal case] did not arise of and were not incidental to their employment with the county police

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<sup>8</sup> *Id.* at 418.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 419.

<sup>15</sup> *Id.*

<sup>16</sup> See *Wright v. State*, 169 N.J. 422 (2001) (holding that the State could be vicariously liable, under the Tort Claims Act for the alleged torts of county prosecutors and subordinates, as well as indemnification and legal defense).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 420.

department, but were instead undertaken for... the sole benefit and at the exclusive direction of the [State] in all matters connected to [the] case.”<sup>19</sup>

The Appellate Division affirmed the decision of the Attorney General. The Court determined that N.J.S. 40A:14-117 requires each county to defend its police officers. Additionally, the Court said that the Attorney General’s duty to defend applies only to “active and former ‘state employees.’”<sup>20</sup> Finally, the Appellate Division reasoned that the “narrow exception established in *Wright* ... applies only to county prosecutors and their employees” and that it would be inappropriate to extend *Wright* to cover county police officers since doing so would “create an unnecessary conflict between N.J.S.A 40A:14-117 and N.J.S.A. 59:10A-1 to-6.”<sup>21</sup>

The officers’ petition for certification was granted.<sup>22</sup>

### Analysis

The New Jersey Tort Claims Act (TCA) requires the Attorney General to provide for the defense of State employees, or former employees, in an action brought against them on account of an act or omission in the scope of their employment.<sup>23</sup>

The term “employee” is defined in the TCA<sup>24</sup> in N.J.S. 59:1-3 as “an officer, employee, or servant, whether or not compensated or part-time, who is authorized to perform any act or service.” The term does not include those who are considered independent contractors.<sup>25</sup>

At the county level, law enforcement officers may also find themselves subject to litigation. Similar to the protections set forth in the TCA, N.J.S. 40A:14-117 provides that, “[w]henever... a[n] officer of a county police [force]... is a defendant in any action or legal proceeding arising out of or incidental to the performance of his duties, the governing body of the county... shall provide [the]... officer with necessary means for the defense of such action.”<sup>26</sup> To qualify for indemnification, the action or legal proceeding must arise out of or be incidental to the performance of the officer’s duties.<sup>27</sup>

County officers may be called upon to provide the State with services that would otherwise be unavailable to a Prosecutor’s Office. In *Kaminskas*, the county officer administered polygraph examinations on behalf of the Prosecutor’s Office because that office did not employ a

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 420.

<sup>22</sup> *Id.*

<sup>23</sup> N.J. STAT. ANN. § 59:10A-1 (West 2021).

<sup>24</sup> N.J. STAT. ANN. § 59:1-3 (West 2021).

<sup>25</sup> N.J. STAT. ANN. § 59:10A-1 (West 2021).

<sup>26</sup> N.J.S. 40A:14-117 also covers members of a county police force, and the county park police department or force. For purposes of this memorandum and in the interest of succinctness, references have been limited to those of county police officers similar to those in *Kaminskas v. Off. of the Att’y Gen.*, 236 N.J. 415 (2019).

<sup>27</sup> N.J. STAT. ANN. § 40A:14-117 (West 2021).

polygraphist.<sup>28</sup> Services provided by a county officer while acting as an ‘arm of the State’ may be unrelated to the officer’s work with the county, neither arising out of nor incidental to that work. The county officer in *Kaminskas* contended that the work giving rise to the litigation against him was neither “part of” nor “incidental to” his county employment.<sup>29</sup> Instead, he argued that the work was “for the sole benefit and at the exclusive direction of the [State].”<sup>30</sup> The Attorney General, however, maintained that county officers “remain under their employing county’s control at all times.”<sup>31</sup> The Court determined that the county officer’s work for the State “[arose] out of...the performance of [their] duties” and therefore found that N.J.S. 40A:14-117 mandated that the County, not the State, provide indemnification to the officers in the civil action.<sup>32</sup>

*Kaminskas v. Office of the Att’y Gen.* reveals that there is a class of individuals who may not be covered by either N.J.S. 59:10A-1 or N.J.S. 40A:117, and that county officers subsequently sued for their role in a State prosecution may find themselves in a situation in which both the State and the County decline to assist in the defense of the action. Such a result may discourage counties from allowing their officers to work with the State in criminal prosecutions.<sup>33</sup>

• *Gramiccioni v. Dept. of Law & Public Safety*<sup>34</sup>

In *Gramiccioni v. Dept. of Law and Public Safety*, the New Jersey Supreme Court examined whether the Department of Law and Public Safety’s (Department) determinations<sup>35</sup> regarding defense and indemnification for federal civil rights claims filed against the Monmouth County Prosecutor’s Office (MCPO) and its employees were in keeping with the Court’s holding in *Wright v. State*.<sup>36</sup>

In 2015, Tamara Wilson-Seidle was murdered by her ex-husband, Philip Seidle, an off-duty sergeant who used his service weapon to end her life.<sup>37</sup> Wilson-Seidle’s estate and survivors filed civil rights complaint against the MCPO, the Prosecutor, and three former MCPO assistant prosecutors.<sup>38</sup> In response to the initial complaint and each of three amended versions, the MCPO sought defense and indemnification from the Department pursuant to N.J.S. 59:10A-1.

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<sup>28</sup> *Kaminskas*, 236 N.J. at 418.

<sup>29</sup> *Id.* at 420.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 421-22. The County of Hudson and the New Jersey Association of Counties contend that “when county police officers work under the prosecutor’s supervision, they are not supervised by the county....”

<sup>32</sup> *Id.* at 427.

<sup>33</sup> *Id.* at 422.

<sup>34</sup> *Gramiccioni v. Dept. of Law & Public Safety*, 243 N.J. 293, 296 (2020). At the June 20, 2020, meeting of the Commission, Staff was asked to examine the impact of this decision on the instant project.

<sup>35</sup> This case involved four final agency determinations regarding indemnification – one determination for the original complaint and one for each of the three amended versions of the complaint.

<sup>36</sup> *Id.* at 296 (citing *Wright v. State*, 169 N.J. 422 (2001)).

<sup>37</sup> *Id.* at 297.

<sup>38</sup> *Id.* at 299.

The Department agreed to defend and indemnify the MCPO defendants for allegations concerning their law enforcement functions but declined to defend them against claims that were not related to the detection, investigation, arrest, or prosecution of criminal defendants.<sup>39</sup> The Department utilized this approach for each subsequent complaint against the MCPO and the named employees.<sup>40</sup>

The Supreme Court reversed the judgment of the Appellate Division and remanded the matter to the trial court after finding that the Department's determinations reflected shifting and conflicting positions that were both arbitrary and capricious.<sup>41</sup>

The *Gramiccioni* Court did not address the issue of indemnification of county law enforcement officers and employees who provide services for the sole benefit of, and at work at the exclusive direction of the State. The Court did recognize, however, that the indemnification statute should not be applied like a stencil to all cases because "some factual settings call for [a] more nuance[d] [analysis] than others"<sup>42</sup>

## Outreach

In connection with this Report, Staff sought comments from knowledgeable individuals and organizations including: the Attorney General of New Jersey; the New Jersey Administrative Office of the Courts; the New Jersey State Municipal Prosecutors Association; New Jersey Legal Services; each County Prosecutor's Office; the New Jersey State Association of Chiefs of Police; the New Jersey State League of Municipalities; the New Jersey Association of Counties; the New Jersey Institute of Local Government Attorneys; each of the County Counsel's Office; the New Jersey State Law Enforcement Officers Association; the New Jersey Sheriff's Association; the New Jersey Police Traffic Officers Association; several private practitioners; the New Jersey State Law Enforcement Officers' Association.

### • *In Support*

The Office of the Atlantic County Counsel offered support for this project.<sup>43</sup> Counsel noted, "I have read the report, and couldn't agree more with the proposed modifications. They are long overdue."<sup>44</sup> In the context of his Title 59 defense work, he noted that "it is not uncommon for situations to occur where county employees, particularly in the law enforcement sector, perform duties which are clearly for the benefit of the State, yet the Attorney General's Office consistently takes a very narrow view of defense and indemnification under Wright v.

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<sup>39</sup> *Id.* at 301.

<sup>40</sup> *Id.* at 305.

<sup>41</sup> *Id.* at 318.

<sup>42</sup> *Id.* at 29 (citing *Lavezzi v. State*, 219 N.J. 163 (2014) and observing that an act or omission that would ordinarily be part of prosecutorial performance over which the State would exercise supervision may fall into the realm of administrative responsibility based on the facts and circumstances – i.e., securely, and safely housing of seized evidence may involve both state law enforcement functions and administrative functions).

<sup>43</sup> E-mail from Chandra Anderson, Confidential Aide to James F. Ferguson, Atlantic County Counsel to Samuel M. Silver, Dep. Dir., N.J. Law Rev. Comm'n (Oct. 05, 2021, 9:41 AM EST) (on file with the NJLRC).

<sup>44</sup> *Id.*

State.”<sup>45</sup> Ultimately, “the Commission’s proposed statutory amendments would solve the problem and make it much easier for county employees to claim the benefit of defense and indemnification....”<sup>46</sup>

Another practitioner, in his personal capacity, offered additional support for the Commission’s proposed modifications. The practitioner, “agree[s] with the Commission’s recommendations for basic fairness reasons, to encourage subordinate agencies to generously provide their staff and resources to the State and lesson unfair burdens on local and county governments.”<sup>47</sup>

• *N.J.S. 59:10A-1b.(2)(C)*

A question was raised by a practitioner regarding the necessity of N.J.S. 59:10A-1b.(2)(C).<sup>48</sup> It was suggested that subsections (B) and (C) provide adequate limitation and that the use of the word “sole” may open up the question of “benefit” to interpretation.<sup>49</sup>

Then language of subsection (B) and (C) was derived from the arguments of the affected officers in *Kaminskas*<sup>50</sup> and reflects the general direction provided by the Commission.<sup>51</sup>

### **Pending Legislation**

To this date, there is no legislation currently pending regarding either N.J.S. 59:10A-1 or N.J.S. 40A: 14-117.

### **Conclusion**

The New Jersey Tort Claims Act does not provide for the representation of “non-State” personnel who act as an “arm of the State” and who are subsequently sued for an act or omission that occurs during in the scope of their investigation and enforcement of the criminal laws.

The Appendix that follows sets forth proposed modifications to N.J.S. 59:10A-1 and N.J.S. 59:10A-2 to make it clear that the Attorney General shall provide for the defense of an employee or former employee of a public entity who was acting for the sole benefit and at the exclusive direction of the State during the investigation and enforcement of the criminal laws and is subsequently the subject of civil litigation as a result of their conduct.

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<sup>45</sup> *Id.* Citing *Wright v. State*, 169 N.J. 422 (2001) (underscore original).

<sup>46</sup> *Id.*

<sup>47</sup> E-mail from Richard Cushing, Esq., in his personal capacity to Samuel M. Silver, Dep. Dir., N.J. Law Rev. Comm’n (Sept. 28, 2021, 4:48 PM EST) (on file with the NJLRC).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> 236 N.J. at 420 (arguments of affected officers). *See also*, discussion *infra* at 8-9 regarding subsection b.

<sup>51</sup> N.J. Law Revision Comm’n, *Minutes NJLRC Meeting*, \*5-6 Sep. 16, 2021, www.njlrc.org (last visited Nov. 28, 2021).

## Appendix

The proposed modifications to the following statute are shown with underlining for inserted language and ~~striketrough~~ for deletions.

### **N.J.S. 59:10A-1. Attorney General's duty to defend State employees**

a. ~~Except as provided in section 2 hereof~~ N.J.S. 59:10A-2, the Attorney General shall, upon a request ~~of an~~ from a current or former employee or former employee of either of the State, of New Jersey or of any other public entity who also satisfies the requirements of subsection b., provide for the defense of any action, cross-action, counterclaim, or cross-complaint ~~brought against such State employee or former State employee on account of alleging~~ an act or omission in the scope of ~~his~~ the requesting party's employment.

b. A request pursuant to subsection a. may be made by a current or former employee of:

(1) the State of New Jersey; or

(2) a public entity other than the State of New Jersey, who, during an investigation and enforcement of the criminal laws, acted:

(A) in a capacity that did not arise from and was not incidental to the individual's performance of duties for the public entity;

(B) at the request of the State;

(C) for the sole benefit of the State; and

(D) at the exclusive direction of the State.

~~For the purposes of this section, the Attorney General's duty to defend shall extend to a cross action, counterclaim or cross complaint against an employee or former employee.~~

#### **Comments**

Originally enacted as two block paragraphs, the statute has been formatted so that it is consistent with contemporary legislative drafting and to make each provision easily identifiable, and comprehensible.

- Subsection a.

The reference to "section 2" of the New Jersey Tort Claims Act has been replaced with an explicit statutory reference to N.J.S. 59:10A-2 to eliminate possible ambiguity regarding the statutory cross-reference.

The proposed language clarifies the identity of the individual making the request to the Attorney General for representation.

As enacted in 1972, the second paragraph of the statute extended the Attorney General's duty to defend cross actions, counterclaims or cross-complaints against an employee or former employee. The reference to these actions has been incorporated into subsection a. to provide a comprehensive list of actions that the Attorney General has a duty to defend.



This section has been modified so that it is gender neutral.

• Subsection b.

In 1924, L.1924, c. 139, § 1, p. 311 [1924 Suppl. § \*\*192-113], the law prior to N.J.S. 59:10A-1 permitted the Attorney General to “defend all criminal actions and proceedings in which the [State Police] or any member thereof [was] concerned as a party....”<sup>52</sup> The Attorney General was granted this authority “to protect the interests of the State as may be necessary for the purposes of the department or the members thereof....”<sup>53</sup>

The New Jersey Supreme Court case of *Kaminskas v. Office of the Att’y Gen.* involved a class of individuals who may not be covered by either N.J.S. 59:10A-1 or N.J.S 40A:117 because their work was for the “sole benefit and at the exclusive direction of the State”<sup>54</sup> and did not arise out of nor was it incidental to the performance of the duties for which they were employed by the public entity.<sup>55</sup> County officers subsequently sued for their role in a State prosecution may find themselves in a situation in which both the State and the County decline to assist in the defense of the action. Such a result may discourage counties from allowing their officers to work with the State in criminal prosecutions.<sup>56</sup>

Subsection b. has been drafted to address the potential gap in representation for individuals who are employed by a public entity other than the State and perform work for the sole benefit and at the exclusive direction of the State during a criminal investigation and subsequent prosecution. The term “public entity” is defined in New Jersey’s Tort Claims Act to include “the State, and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State.”<sup>57</sup> The term was selected to ensure that governmental actors who act on behalf of the State during the investigation and enforcement of criminal laws are afforded legal representation.

In the Commission’s Tentative Report, the language set forth in Subsection b.(2)(A) appeared as subsection b.(2)(D). This subsection has been moved and to the first of the subsections enumerated requirements. If the work performed by the requesting party does not satisfy this condition precedent, then the analysis ceases. This subsection has been re-lettered, subsection (A). The references to the remaining factors, (B) – (D) have been re-lettered in serial order.

## **N.J.S. 59:10A-2. Grounds for refusal to provide defense**

The Attorney General may refuse to provide for the defense of an action referred to in ~~section 1~~ N.J.S. 59:10A-1 if ~~he~~ the Attorney General determines that:

a. the act or omission by a current or former employee of the State of New Jersey was not within the scope of the requesting party’s employment with the State; or

b. the current or former employee of a public entity other than the State of New Jersey, was not acting in the manner described in N.J.S. 59:10A-1(b)(2); or

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<sup>52</sup> L.1924, c. 139, § 1, p. 311 [1924 Suppl. § \*\*192-113].

<sup>53</sup> *Id.*

<sup>54</sup> *Kaminskas*, 236 N.J. at 420 (arguments of affected officers).

<sup>55</sup> *Cf.* N.J. STAT. ANN. § 40A:14-117 (West 2021) (which provides that “[w]henver a member or officer of a county police... department... is a defendant in any action or legal proceeding **arising out of or incidental to the performance of his duties**, the governing body of the county...shall provide said member or officer with the necessary means for the defense of such action or proceeding....” (Emphasis added).

<sup>56</sup> *Kaminskas*, 236 N.J. at 422.

<sup>57</sup> N.J. STAT. ANN. § 59:1-3 (West 2021).

~~b. c.~~ the act or the failure to act was because of actual fraud, willful misconduct or actual malice; or

~~e. d.~~ the defense of the action or proceeding by the Attorney General would create a conflict of interest between:

(1) the State and the employee or former State employee; or

(2) between either the State or a public entity who employed the requesting party and the requesting party.

#### Comments

The reference to “section 1” of the New Jersey Tort Claims Act has been replaced with an explicit statutory reference to N.J.S. 59:10A-1 to eliminate possible ambiguity regarding the statutory cross-reference.

- Subsection a.

An explicit reference to the requesting party’s employment with the State of New Jersey has been proposed to clarify that this subsection applies only to state employees.

- Subsection b.

Utilizing a direct reference to N.J.S. 59:10A-1(b)(2), subsection b. permits the Attorney General to refuse to provide for the defense of an action in which the public entity employee’s act or omission was neither for the sole benefit nor at the exclusive direction of the State. Under such circumstances, the public entity employee may seek the necessary means for a defense pursuant to N.J.S. 40A:14-117. The explicit reference to N.J.S. 59:10A-1 will also connect the two statutes in future judicial decisions. If the Legislature modifies N.J.S. 59:10A-1(b)(2), these changes will be automatically incorporated into this statute by means of the statutory reference.

- Subsection d.

The proposed modification of subsection d. addresses situations in which the Attorney General receives a request from an employee of a public entity that is not the State of New Jersey and undertaking such representation would create a conflict of interest between the parties. Consistent with contemporary legislative drafting practices, the form of this subsection has been modified to make it easier to read.

## For Reference

### N.J.S. 59:1-3. Definitions

As used in this subtitle:

“Employee” includes an officer, employee, or servant, whether or not compensated or part-time, who is authorized to perform any act or service; provided, however, that the term does not include an independent contractor.

“Employment” includes office; position; employment; or service, under the supervision of the Palisades Interstate Park Commission, in a volunteer program in that part of the Palisades Interstate Park located in New Jersey, as an emergency management volunteer or as a volunteer doing work for the Division of Parks and Forestry, the Division of Fish and Wildlife, or the New Jersey Natural Lands Trust, as authorized by the Commissioner of Environmental Protection, or for the New Jersey Historic Trust.

“Enactment” includes a constitutional provision, statute, executive order, ordinance, resolution or regulation.

“Injury” means death, injury to a person, damage to or loss of property or any other injury that a person may suffer that would be actionable if inflicted by a private person.

“Law” includes enactments and also the decisional law applicable within this State as determined and declared from time to time by the courts of this State and of the United States.

“Public employee” means an employee of a public entity, and includes: a person participating, under the supervision of the Palisades Interstate Park Commission, in a volunteer program in that part of the Palisades Interstate Park located in New Jersey.

**“Public entity” includes the State, and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State.<sup>58</sup>**

“State” shall mean the State and any office, department, division, bureau, board, commission or agency of the State, but shall not include any such entity which is statutorily authorized to sue and be sued. “State” also means the Palisades Interstate Park Commission, but only with respect to employees, property and activities within the State of New Jersey.

“Statute” means an act adopted by the Legislature of this State or by the Congress of the United States.

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<sup>58</sup> Emphasis added.