

21st Century Media LLC,

Plaintiff/Appellant,

v.

EWING TOWNSHIP, et al.,

Defendants/Respondents.

SUPERIOR COURT OF NEW
JERSEY, APPELLATE DIVISION
DOCKET NO. A-00178-22T4

On Appeal from a Final Order of
the Superior Court of New Jersey,
Law Division, Mercer County,
Docket No. MER-L-00801-22

Sat Below:
Hon. Robert Lougy, A.J.S.C.

**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS & 20 MEDIA ORGANIZATIONS IN
SUPPORT OF PLAINTIFF/APPELLANT 21st CENTURY MEDIA LLC,
SEEKING REVERSAL IN PART**

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Thomas Zambito, Justice Department calls for federal monitor of Newark Police Department, NJ Advance Media (July 22, 2014), <https://perma.cc/6HCR-5CVF> 5

PRELIMINARY STATEMENT

It is a “bedrock principle that our government works best when its activities are well-known to the public it serves.” Burnett v. Cnty. of Bergen, 198 N.J. 408, 414 (2009). Accordingly, New Jersey courts have long recognized that, as “the eyes and ears of the public,” the news media has a compelling interest in access to public records. S. Jersey Publ’g Co. v. N.J. Expressway Auth., 124 N.J. 478, 496 (1991). This is particularly true when journalists “seek[] access to information to further a public good,” such as transparency and accountability with respect to law enforcement. N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 579 (2017) (citation omitted) (finding news organization had “compelling interests” in police use of force reports and other records). For these reasons, the New Jersey Supreme Court recognized the press and the public’s common law right of access to police internal affairs (“IA”) records in Rivera v. Union County Prosecutor’s Office, 250 N.J. 124 (2022).

This appeal arises out of multiple public records requests made by Plaintiff/Appellant 21st Century Media LLC, publisher of the Trentonian newspaper (the “Trentonian”), to Defendant/Respondent Ewing Township (“Ewing” or the “Township”) for access to IA records concerning three current and former Ewing police officers who participated in the forcible arrest of a Black teenager in January 2018. (Pb6–Pb7). A federal grand jury later indicted

the officers for civil rights violations for their actions during that arrest. Ibid. In addition to requesting access to the IA records concerning the January 2018 arrest (the “2018 Records”), the Trentonian also sought access under the common law to any IA records for the officers dating back to January 2010 (the “Pre-2018 Records”). Ibid. The Township denied the Trentonian’s requests. Ibid.

Based on a detailed balancing of the common law right of access factors pursuant to Rivera that spanned multiple pages, the trial court ordered the Township to disclose the 2018 Records. (Pa15–Pa28). But the trial court failed to conduct the requisite analysis for the Pre-2018 Records. Instead, the court cursorily denied access to these records in just three sentences. (Pa28).

As members and representatives of the news media,¹ amici and their members routinely rely on access to historical IA records, like the Pre-2018 Records, to report on law enforcement agencies’ efforts to investigate and address police misconduct. Transparency is critical to ensuring that the public has the information it needs to evaluate the conduct of the law enforcement officers sworn to serve their communities, and to ensure that investigations into potential misconduct are conducted effectively and fairly.

¹ Descriptions of all amici can be found in Appendix A attached to this brief.

Amici agree with the Trentonian that the trial court failed to undertake the detailed analysis for the Pre-2018 Records that Rivera requires. Amici also write to emphasize the importance of access to historical IA records to the news media and the public, and to provide the Court with examples of how information gleaned from such records has produced powerful reporting that has spurred institutional reforms.

For the reasons herein, amici respectfully urge the Court to reverse the trial court's denial of the Trentonian's request for an order requiring the Township to produce the Pre-2018 Reports and remand for a careful, "fact-sensitive balancing" under the common law right of access. Rivera, 250 N.J. at 144–47.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For the purpose of this brief, amici accept the combined procedural history and statement of facts set forth in the Trentonian's brief filed in this Court on February 3, 2023.

ARGUMENT

I. News reporting on IA records helps the public evaluate the work of police oversight boards and identify areas for reform.

The May 2020 murder of George Floyd by Derek Chauvin, a Minneapolis police officer with numerous past misconduct complaints, underscores the value of effective public oversight of investigations into officer misconduct. See

Shaila Dewan & Serge F. Kovalski, Thousands of Complaints Do Little to Change Police Ways, N.Y. Times (updated June 8, 2020), <https://perma.cc/XS5L-F2HJ>. Indeed, with respect to law enforcement in particular, “the awesome powers exercised by police create a compelling need for public oversight and review of a police department’s internal investigations.” Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 787 N.E.2d 602, 605 (Mass. App. Ct. 2003). Investigative reporting made possible by access to such records — including where claims of misconduct were found to be unsubstantiated — aids the public in fulfilling this vital oversight role and, in many cases, drives meaningful reforms, both in New Jersey and around the country.

For example, access to historical IA records was key to media coverage of the federal investigation into the Newark Police Department (“NPD”). As calls mounted for federal oversight, the Star-Ledger documented NPD’s repeated failure to report the outcome of internal affairs investigations to the Attorney General, as well as the low rate at which NPD sustained complaints against officers. See Chris Megerian, Reports show 1 in 10 complaints against Newark police officers are not fully reported to N.J., Star-Ledger (Sept. 13, 2010), <https://perma.cc/TR96-7KYQ>; James Queally, Former Newark Internal Affairs boss target of investigation, accused of racist remarks, Star-Ledger (Apr.

28, 2014), <https://perma.cc/46GV-MK42>. The U.S. Department of Justice investigation confirmed this reporting, finding that NPD had sustained only one excessive force complaint between 2007 and 2012. Thomas Zambito, Justice Department calls for federal monitor of Newark Police Department, NJ Advance Media (July 22, 2014), <https://perma.cc/6HCR-5CVF>.

In 2020, investigative reporting by The New York Times revealed that a Woodlynne police officer's history of infractions at multiple prior departments went undetected because New Jersey at the time lacked a central licensing system for officers. Rukmini Callimachi, 9 Departments and Multiple Infractions for One New Jersey Police Officer, N.Y. Times (June 24, 2020), <https://perma.cc/G795-F8UR>. Findings about the officer's track record catalyzed legislation to require central police licensing in New Jersey, which passed in 2022. Nikita Biryukov, N.J. moves to license cops in bid to increase public trust in policing, N.J. Monitor (May 18, 2022), <https://perma.cc/VBF2-G2JB>.

New Jersey reporters have similarly relied on IA records to investigate, for example, whether use-of-force investigations were thorough, and whether disciplinary charges were filed in retaliation. See Rebecca Panico, Internal affairs cleared cop accused of breaking man's ribs without interviewing him, attorney says, NJ Advance Media (Nov. 12, 2020), <https://perma.cc/N6VP->

SBXE; Anthony G. Attrino, N.J. cop files notice of lawsuit, faces IA charges the next day, NJ Advance Media (Feb. 22, 2023), <https://perma.cc/TDU3-UMBL>. Earlier this year, NJ Advance Media published a sweeping examination of how police-involved deaths are investigated by the New Jersey Attorney General’s Office. Kevin Shea & Riley Yates, N.J. has investigated 75 police-involved death cases in four years. See them all here, NJ Advance Media (Feb. 24, 2023), <https://perma.cc/47RU-8Q8J>. Based on a review of seventy-five such investigations conducted over the last four years, reporters found that only one had resulted in criminal charges, and that some former advocates in favor of assigning responsibility for these investigations to the Attorney General now worry the process provides too little public accountability. Riley Yates et al., N.J. promised to change how it probes police shootings. Critics say it isn’t working, NJ Advance Media (Feb. 23, 2023), <https://perma.cc/9PKC-3HFM>.

Similarly, outside of New Jersey, journalists routinely rely on access to historical IA records to help the public oversee law enforcement. For example, in recent officer-involved killings, reporting on IA records has helped to provide crucial context to the public, such as whether the officer was previously investigated for misconduct. See, e.g., Olivia Jaquith, Report: Virginia trooper involved in deadly shooting of Xzavier Hill previously investigated as Richmond cop, WRIC/ABC8 News (Feb. 21, 2023), [6](https://perma.cc/MRG5-</p></div><div data-bbox=)

XBZZ; Ryan Young & Devon M. Sayers, Louisiana officer charged with killing of Alonzo Bagley has resigned from police department, CNN (Mar. 20, 2023), <https://perma.cc/H2QD-NPV2>. Indeed, following the death of Anton Black in 2018 in Maryland, reporters found one of the officers involved in Black’s killing had failed to disclose dozens of use-of-force reports from his decade of service at another agency in Delaware. Glynis Kazanjian, State Agency to Investigate Hiring of Police Officer Who Pursued Anton Black Before He Died, Maryland Matters (Feb. 8, 2019), <https://perma.cc/MR2X-3VNB>. Accordingly, the Maryland legislature enacted “Anton’s Law” to expand the public’s access to police IA records by removing records of police misconduct investigations from the Maryland Public Information Act’s investigatory records exception. Bryn Stole, How Maryland policing laws will change: Here’s a breakdown of the bills the General Assembly has passed, Baltimore Sun (Apr. 11, 2021), <https://perma.cc/DC44-RNW3>.

And in New York, BuzzFeed News analyzed a collection of disciplinary findings for approximately 1,800 New York Police Department (“NYPD”) officers, including records of disciplinary proceedings in which officers were found not guilty. Kendall Taggart & Mike Hayes, Here’s Why BuzzFeed News Is Publishing Thousands of Secret NYPD Documents, BuzzFeed News (Apr. 16, 2018), <https://perma.cc/XK2L-9NZB>. BuzzFeed’s reporting based on these

records revealed unequal and inconsistent application of NYPD disciplinary policies, ibid., prompting the commission of an independent panel to investigate the NYPD’s disciplinary system. Kendall Taggart, NYPD Discipline Needs More Transparency, A Panel of Experts Said, BuzzFeed News (Feb. 1, 2019), <https://perma.cc/2MGV-ELUX>.

As these examples illustrate, access to records of police misconduct investigations — such as the Pre-2018 Records at issue here — plays a vital role in increasing accountability, trust-building, and deterrence of misconduct. The public has a legitimate interest in evaluating whether police oversight boards are fairly and effectively investigating incidents of potential misconduct. Without access to historical IA records, the public cannot do so — to the detriment of the public and law enforcement officers alike.

II. The trial court failed to conduct the careful, fact-sensitive review of the Pre-2018 Records required by Rivera.

In Rivera, the Supreme Court recognized that “[i]n general, the public has an interest in the disclosure of internal affairs reports.” 250 N.J. at 147 (citing Lyndhurst, 229 N.J. at 579–80). The Court then offered a list of non-exclusive factors to help determine whether there was a “heightened” public interest in particular IA records. Ibid. at 147–48. However, the public’s more “general” interest in disclosure applies to all IA records, and trial courts must balance

those interests — both general and heightened — against any asserted confidentiality interests.

Here, the trial court properly satisfied its obligations with respect to IA records that were directly related to the January 2018 incident. Over multiple pages, the trial court enumerated the Rivera factors, and addressed these factors systematically as they related to the public’s heightened interest in access to the 2018 Records. (Pa23–Pa28).

However, the trial court failed to conduct a careful, fact-intensive review regarding the Trentonian’s right of access to the Pre-2018 Records. Instead, in half a paragraph that addressed just one of the Rivera factors, the court denied access to the Pre-2018 Records on the ground that “[n]othing in the record establishes or suggests that the indicted officers engaged in ‘repeated misconduct.’” (Pa28 (quoting Rivera, 250 N.J. at 148 (factor 5: “the individual’s record of misconduct”))). The trial court made no further factual findings regarding the Pre-2018 Records nor explained how such facts would inform the balancing of interests in light of the remaining Rivera factors and other potential considerations favoring disclosure.

As the Supreme Court underscored in Rivera, it is the trial court’s obligation to conduct a “careful weighing of the competing interests,” which requires conducting “a fact-sensitive balancing test” based on a well-developed

record, including, often, the documents in dispute. Rivera, 250 N.J. at 144–47. The trial court is the “best forum to elicit facts about the parties’ interests under the common law,” ibid. at 146, which must go beyond “generalized, conclusory statements,” ibid. at 149. Indeed, without a “complete record and factual findings to review, [appellate courts] are not in a position to determine the scope of what can be released” under the common law. Ibid. at 151. Accordingly, this Court has held that Rivera “require[s]” trial courts to “conduct a common law right of access analysis [and] balance the parties’ interests,” and has remanded on that basis. Afr. Am. Data & Rsch. Inst., LLC v. Franchetta, No. A-2846-20, 2022 WL 1613271, at *3 (N.J. Super. Ct. App. Div. May 23, 2022)²; see also Salvero v. City of Elizabeth, No. A-0759-21, 2022 WL 1021780, at *1 (N.J.

² The Rivera court drew on decades of precedent establishing the trial court’s obligations under the common law right of access. In South Jersey Publishing Co. v. New Jersey Expressway Authority, after determining a memorandum met the threshold requirement of being a public record for common law purposes, the Supreme Court remanded to the trial court “to balance [the government’s] interest in confidentiality against the public interest in disclosure,” 124 N.J. at 498, and to review the records in camera, if necessary, ibid. at 498–99. Similarly, in Southern New Jersey Newspapers, Inc. v. Township of Mt. Laurel, the Supreme Court agreed with lower courts that the requested documents were “public records, subject to the common-law right of access,” but remanded due to concerns that both courts “might have concluded prematurely that the State’s interest in confidentiality outweighed plaintiff’s interest in access.” 141 N.J. 56, 75 (1995). “[I]n determining whether partial access, redacted access, or no access is the proper response, a careful evaluation of the interest in disclosure is indispensable to an appropriate resolution of the trial court’s balancing function.” Ibid. (emphasis added).

Super. Ct. App. Div. Apr. 6, 2022) (“[B]efore we consider this matter, the motion judge here, in the first instance, should reconsider his determination, this time with the benefit of the Court’s directions in Rivera.”).

This case exemplifies the importance of careful, document-by-document balancing with respect to evaluating the common law right of access to IA records in particular. The Township provided very little information about the Pre-2018 Records. In a brief certification, Ewing Police Chief Albert Rhodes indicated that the Pre-2018 Records run the gamut of issues that might reach an internal affairs officer’s desk, from seemingly minor personnel matters such as “shift disputes” to more serious “citizen complaints” requiring deeper “investigations, reports and resolutions of same.” (Pa87 ¶ 18). The competing interests in disclosure versus confidentiality of a given IA record might vary significantly depending on the subject matter, but the trial court failed to differentiate between them.

Similarly, Chief Rhodes indicated that at least some of the Pre-2018 Records concerned matters that were “ultimately dismissed as unsubstantiated or frivolous.” (Pa87–Pa88 ¶ 20). Certainly, the final outcome of an IA investigation is relevant, and itself is of interest to the public. Rivera, 250 N.J. at 148. Indeed, as evidenced by reporting in New Jersey and throughout the country, see Section I, supra, access to records concerning allegations of officer

misconduct — even when such allegations are not substantiated — helps the public to evaluate the efficacy of the disciplinary process. See Rivera, 250 N.J. at 147 (recognizing that one of the crucial interests in disclosure of IA records is for the public “to assess whether the internal affairs process is working properly” (citing Lyndhurst, 229 N.J. at 579–80)); see also Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 467 N.J. Super. 385, 410 (App. Div. 2021) (holding that an “entire IA file, including other interactions with citizens and fellow officers, was relevant in assessing why the [department] allowed [the officer] to remain on the force”).

If the public is unable to access information that would permit it to determine, for example, why complaints against a police officer were deemed unsubstantiated, the public cannot evaluate whether police oversight boards are effectively addressing instances of repeated misconduct or proactively identifying troubling trends in officer behavior. Access to IA records enables the news media to meaningfully report on the results of such investigations, allowing the public to evaluate the effectiveness of the investigatory process, the evidence collected, and the reasoning behind the agency’s conclusions. Such transparency also serves as a “key step along the way to repairing [] relationships” between law enforcement and the communities they serve. See John Kelly & Mark Nichols, Tarnished Brass, USA Today (last updated June

11, 2020), <https://perma.cc/W3QY-JRNS> (quoting Laurie Robinson, co-chair of the 2014 White House Task Force on 21st Century Policing). Indeed, a “citizenry’s full and fair assessment of a police department’s internal investigation of its officer’s actions promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights.” Worcester Telegram, 787 N.E.2d at 607; see also Lyndhurst, 229 N.J. at 579 (recognizing that there is a “legitimate public interest” in IA records that “reassure the public that the police acted professionally and lawfully”). The trial court was required to determine the public’s interest in disclosure and the agency’s interest, if any, in confidentiality, and carefully balance these interests; it did not do so.

Here, “without a more complete record and factual findings to review” regarding the Pre-2018 Records, this Court is poorly “position[ed] to determine the scope of what can be released” under the common law. Rivera, 250 N.J. at 151. Because the trial court failed to undertake “a fact-sensitive balancing” under the common law right of access for the Pre-2018 Records, ibid. at 144–47, remand to the trial court is warranted to allow it to conduct the fulsome findings of fact and balancing of interests as required under Rivera and other common law right of access precedents.

CONCLUSION

For the reasons stated herein, amici respectfully urge the Court to reverse the trial court's denial of the Trentonian's request for an order requiring the Township to produce the Pre-2018 Records and remand with instructions to the trial court to conduct the requisite careful, fact-sensitive balancing under the common law right of access.

Dated: April 27, 2023

Respectfully submitted,

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APPENDIX A: Statement of Identity of Amici Curiae

The Reporters Committee for Freedom of the Press (the “Reporters Committee”) is an unincorporated non-profit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Advance Publications, Inc. is a diversified privately-held company that operates and invests in a broad range of media, communications and technology businesses. Its operating businesses include Conde Nast’s global magazine and digital brand portfolio, including titles such as Vogue, Vanity Fair, The New Yorker, Wired, and GQ, local news media companies producing newspapers and digital properties in 10 different metro areas and states, and American City Business Journals, publisher of business journals in over 40 cities.

The Center for Investigative Reporting (d/b/a Reveal), founded in 1977, is the nation’s oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website <https://www.revealnews.org/>, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

The Media Law Resource Center, Inc. (“MLRC”) is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. It counts as members over 125 media companies, including newspaper, magazine and book publishers, TV and radio broadcasters, and digital platforms, and over 200 law firms working in the media law field. The MLRC was founded in 1980 by

leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

The National Freedom of Information Coalition is a national nonprofit, nonpartisan organization of state and regional affiliates representing 45 states and the District of Columbia. Through its programs and services and national member network, NFOIC promotes press freedom, litigation and legislative and administrative reforms that ensure open, transparent and accessible state and local governments and public institutions.

The National Press Club Journalism Institute is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The New Jersey Press Association (“NJPA”) is a non-profit organization incorporated in 1857 under the laws of the State of New Jersey. It has a membership composed of daily newspapers, affiliate newspapers, weekly newspapers, digital news websites, as well as corporate and non-profit associate members. NJPA is a membership association formed to advance the interests of newspapers and to increase awareness of the benefits of newspaper readership. The mission of NJPA is to help newspapers remain editorially strong, financially sound and free of outside influence. NJPA pursues these goals in every way possible, as a service both to its members and to the people of New Jersey.

With an urban vibrancy and a global perspective, **New York Public Radio** produces innovative public radio programs, podcasts, and live events that touch a passionate community of 23.4 million people monthly on air, online and in

person. From its state-of-the-art studios in New York City, NYPR is reshaping radio for a new generation of listeners with groundbreaking, award-winning programs including Radiolab, On the Media, The Takeaway, and Carnegie Hall Live, among many others. New York Public Radio includes WNYC, WQXR, WNYC Studios, Gothamist, The Jerome L. Greene Performance Space, and New Jersey Public Radio. Further information about programs, podcasts, and stations may be found at www.nypublicradio.org.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

The News/Media Alliance represents news and media publishers, including nearly 2,000 diverse news and magazine publishers in the United States—from the largest news publishers and international outlets to hyperlocal news sources, from digital-only and digital-first to print news. Alliance members account for nearly 90% of the daily newspaper’s circulation in the United States. Since 2022, the Alliance is also the industry association for magazine media. It represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands, on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The Alliance diligently advocates for news organizations and magazine publishers on issues that affect them today.

The Online News Association is the world’s largest association of digital journalists. ONA’s mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

Pro Publica, Inc. (“ProPublica”) is an independent, nonprofit newsroom that produces investigative journalism in the public interest. It has won six Pulitzer Prizes, most recently a 2020 prize for national reporting, the 2019 prize for feature writing, and the 2017 gold medal for public service. ProPublica is supported almost entirely by philanthropy and offers its articles for republication, both through its website, propublica.org, and directly to leading news organizations selected for maximum impact. ProPublica has extensive regional and local operations, including ProPublica Illinois, which began publishing in late 2017 and was honored (along with the Chicago Tribune) as a finalist for the 2018 Pulitzer Prize for Local Reporting, an initiative with the Texas Tribune, which launched in March 2020, and a series of Local Reporting Network partnerships.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based

journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Student Press Law Center (“SPLC”) is a nonprofit, nonpartisan organization which, since 1974, has been the nation’s only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

Tribune Publishing Company is one of the country’s leading media companies. The company’s daily newspapers include the Chicago Tribune, New York Daily News, The Baltimore Sun, Sun Sentinel (South Florida), Orlando Sentinel, Hartford Courant, The Morning Call, the Virginian Pilot and Daily Press. Popular news and information websites, including www.chicagotribune.com, complement Tribune Publishing’s publishing properties and extend the company’s nationwide audience.

VICE Media is the world's preeminent youth media company. It is a news, content and culture hub, and a leading producer of award-winning video, reaching young people on all screens across an unrivaled global network.

Vox Media, LLC owns New York Magazine and several web sites, including Vox, The Verge, The Cut, Vulture, SB Nation, and Eater, with 170 million unique monthly visitors.

APPENDIX B: Unpublished Decisions

2022 WL 1021780

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Barbara SALVERO, Plaintiff-Appellant,

v.

CITY OF ELIZABETH and James

Cosgrove, Defendants-Respondents,

DOCKET NO. A-0759-21

|

Argued March 14, 2022

|

Decided April 6, 2022

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Union County, Docket No. L-3295-19.

Attorneys and Law Firms

[Paul Castronovo](#) argued the cause for appellant (Castronovo & McKinney, LLC, attorneys; [Paul Castronovo](#), of counsel and on the briefs; [Michael K. Fortunato](#), on the briefs).

[Robert F. Varady](#) argued the cause for respondent City of Elizabeth (La Corte, Bundy, Varady & Kinsella, attorneys; [Robert F. Varady](#), of counsel and on the brief; Christina M. DiPalo, on the brief).

[Moshood Muftau](#), First Deputy County Counsel, argued the cause for intervenor Union County Prosecutor's Office ([Bruce H. Bergen](#), Union County Prosecutor, attorney; Moshood Muftau, on the brief).

Before Judges [Rothstadt](#) and [Mayer](#).

Opinion

PER CURIAM

*1 In this action filed under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -50, we granted plaintiff Barbara Salvero, a police officer with defendant City of Elizabeth, leave to appeal from the Law Division's November 18, 2021 order confirming an earlier order¹ the same motion

judge entered that quashed a subpoena to produce documents served upon the UCPO. The documents that plaintiff sought were those relating to the UCPO's internal affairs (IA) investigation into the conduct of Elizabeth's former Police Director, defendant James Cosgrove.

On remand from the Court, the motion judge confirmed his earlier decision to quash, quoting substantially from his initial decision and determining again the files were not relevant to plaintiff's claim of discrimination against her and therefore her need for disclosure did not outweigh the UCPO's need for confidentiality.

Thereafter, the parties filed their briefs with us and the matter was scheduled for oral argument, which we considered on March 14, 2022. However, as counsel advised us on that date, one hour before oral argument that day, the Supreme Court issued its opinion in [Rivera v. Union County Prosecutor's Office](#), 250 N.J. 124, 270 A.3d 362 (2022).

In [Rivera](#), the Court considered the discoverability of the same documents as the motion judge reviewed in this case, but did so under both the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common law right of access. As explained in its opinion, the Court concluded that the records were not disclosable under OPRA but "should be disclosed under the common law right of access when interests that favor disclosure outweigh concerns for confidentiality." [Id.](#) at 135, 270 A.3d 362 (slip op. at 3). In its remand to the trial judge, the Court in [Rivera](#) set forth "factors to help courts evaluate the other side of the balancing test -- the need for public disclosure." [Ibid.](#)

Under these circumstances, we conclude that before we consider this matter, the motion judge here, in the first instance, should reconsider his determination, this time with the benefit of the Court's directions in [Rivera](#).

In addition, based on our review to this point, while it appears the motion judge generally considered on the earlier remand the relationship of the subject documents to plaintiff's claim that she was the victim of workplace discrimination, the motion judge's decision reveals little, if anything, about her claim against Elizabeth for failure to maintain an effective policy against workplace discrimination. Moreover, as far as we can determine, the judge did not provide a document-by-document review that is necessary to inform the parties and this court why a document was not discoverable.

*2 For those reasons, we direct the motion judge to reconsider his earlier determination anew in light of [Rivera](#), as well as plaintiff's need for discovery as it relates to her claim against Elizabeth, and to do so with specific references to the documents, while using redactions where necessary to maintain the confidentiality of documents that are not disclosed, if any. We further direct that the remand be completed within the next thirty days.

Vacated and remanded for further proceedings consistent with our opinion. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2022 WL 1021780

Footnotes

- 1 On appeal from the earlier order, in its July 29, 2021 order granting plaintiff leave to appeal, the New Jersey Supreme Court summarily remanded the matter to the Law Division judge for reconsideration with instructions to conduct an in camera review of the Union County Prosecutor's Office (UCPO) files and "balance the need for confidentiality against the need for disclosure." [Salvero v. City of Elizabeth](#), 248 N.J. 217, 257 A.3d 672 (2021).

End of Document

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2022 WL 1613271

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

AFRICAN AMERICAN DATA
AND RESEARCH INSTITUTE
("AADARI"), LLC, and Obafemi ("Baffi")
Simmons, Plaintiffs-Respondents,

v.

Richard G. FRANCHETTA, City of
Vineland Police Department, and City
of Vineland, Defendants-Appellants.

DOCKET NO. A-2846-20

|
Argued March 29, 2022

|
Decided May 23, 2022

On appeal from the Superior Court of New Jersey, Law
Division, Cumberland County, Docket No. L-0087-20.

Attorneys and Law Firms

Alan G. Giebner, Associate Solicitor, argued the cause for
appellants (Alena Broshchan and Richard Tonetta, Solicitors,
attorneys; Alan G. Giebner, on the briefs).

Rotimi A. Owoh argued the cause for respondents.

Before Judges Currier and Berdote Byrne.

Opinion

PER CURIAM

*1 Defendants appeal from the trial court's decision granting
plaintiffs' request for certain records under the New Jersey
Open Public Records Act¹ (OPRA), and the common law
right of access, as well as the subsequent award for counsel
fees. After the court's decision, our Supreme Court issued
two OPRA opinions that govern these appeals. Therefore,
although we affirm the trial court's order for disclosure of
certain documents, we do so for different reasons. In addition,

we vacate a portion of the order and remand for the required
balancing analysis under the common law right of access. We
affirm the award of counsel fees.

Plaintiffs requested defendants produce certain records under
OPRA and the common law right of access. Requests three
and nine are the subject of this appeal:

3. Copies of the requests for documents or records that
were sent to Chief Rudy Beu by the civilian authorities at
Vineland. It is our understanding that Chief Beu refused to
comply with part of the request. Please specify the items
that Chief Beu complied with (released) and the items that
Chief B[eu] refused to release.^[2]

....

9. Names, date of hire, date of separation and reason for
separation and salary of individuals who either resigned
or were terminated in the last [seven] years from your
Vineland Police Department.

In responding to request three, defendants stated because it
"references an ongoing investigation[,] ... [it] is not releasable
as per N.J.S.A. 47:1A-1.1(4)." Defendants responded to
request nine by providing a spreadsheet containing officers'
names, hiring dates, termination dates, reasons for the
termination, and the officers' base salaries. In addition,
defendants stated they would provide a more thorough
response within ten days.

Plaintiffs responded to defendants' email, stating "You did
not provide records showing the reason(s) for separation and
demotion(s) regarding item [nine] Your data showed the
employment actions but does not show the reason(s) for
the employment actions."^[3] Please respond soon so we can
resolve the issues amicably." Defendants did not provide
any additional documents outlining the reasons for the
employment actions.

Thereafter, plaintiffs filed an order to show cause and
verified complaint seeking production of the requested items,
reasonable counsel fees and costs, and other equitable relief.
After hearing oral argument, the trial court found in an oral
decision that plaintiffs were entitled to the documents under
request three pursuant to the OPRA exception delineated
in N.J.S.A. 47:1A-3. Under the statute, if requested records
pertained to an ongoing investigation by a public agency, "the
right of access provided [in the statute] ... may be denied if the

inspection, copying, or examination of such record or records shall be inimical to the public interest.” N.J.S.A. 47:1A-3.

*2 The trial court found defendants did not make the requisite showing that the provision of records under request three would be inimical to the public interest. Therefore, the records were subject to disclosure under OPRA after appropriate redactions.

In addressing request nine, the court found that in seeking the specific reason behind an officer's separation from employment, plaintiffs were asking for information in an employee's personnel record. And personnel records were exempted from disclosure under OPRA.

However, the trial court found the common law right of access permitted the disclosure of the records sought in request nine, stating that the State's interest in preventing the disclosure was outweighed by the citizen's right to access the information.

The trial court also found that because plaintiffs were entitled under OPRA to the disclosure of records under request three, they were a prevailing party entitled to reasonable attorney's fees under N.J.S.A. 47:1A-6. They were not entitled to fees for the disclosure of the request nine documents because those records were ordered to be disclosed under the common law right of access.

Thereafter, the trial court considered plaintiffs' certification of services and the applicable principles of law and awarded plaintiffs \$2995 in counsel fees and costs. The court noted plaintiffs had challenged three items denied by defendants in the verified complaint.⁴ And plaintiffs only prevailed under OPRA on one of the requests. Therefore, plaintiffs were only entitled “to roughly one-third of the amount” of the requested fees. The court addressed each entry in the certification of services, reducing much of the billed time.

On appeal, defendants contend the court erred in ordering the disclosure of records under OPRA regarding request three and in compelling the disclosure of records responsive to request nine under the common law right of access, and in its award of counsel fees.

Our review of the statutory interpretation of OPRA is de novo. [Simmons v. Mercado](#), 247 N.J. 24, 38 (2021) (citing [In re N.J. Firemen's Ass'n Obligation](#), 230 N.J. 258, 273-74 (2017)).

As stated, during the pendency of this appeal, the Supreme Court issued two decisions that essentially resolve the issues presented here. We begin with request three.

In [Rivera v. Union Cnty. Prosecutor's Off.](#), 250 N.J. 124 (2022), the Court held that N.J.S.A. 47:1A-9(b) exempted the disclosure of the requested internal affairs report. [Id.](#) at 143. However, the [Rivera](#) Court found that “OPRA does not limit the right of access to government records under the common law.” [Ibid.](#) (citing [N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst](#), 229 N.J. 541, 578 (2017)). Under the common law right of access, the definition of a “public record” is broader than under OPRA. [Ibid.](#) (citing [Mason v. City of Hoboken](#), 196 N.J. 51, 67 (2008)). Therefore, the Court held that the internal affairs report qualified as a record under the common law right of access. [Id.](#) at 149.

Here, defendants denied plaintiffs' request for internal affairs reports regarding an ongoing investigation of Chief Beu. The trial court found OPRA required the records' disclosure. The [Rivera](#) holding mandates we reverse the trial court's ruling.

*3 However, the reports are subject to disclosure under the common law right of access, as internal affairs reports are public records. [Rivera](#), 250 N.J. at 149. But, prior to a court ordering disclosure, the requestor must demonstrate they have an interest in the subject matter of the material and that the requestor's right to access outweighs the State's interest in preventing disclosure. [Id.](#) at 144.

Because the trial court found OPRA required the disclosure of request three records, it did not conduct a common law right of access analysis or balance the parties' interests as required under [Rivera](#). Therefore, we remand for the trial court to conduct this analysis and to redact any sensitive information.

A second recent Supreme Court opinion controls the issue raised regarding the disclosure of records under request nine. In [Libertarians for Transparent Gov't v. Cumberland Cnty.](#), 250 N.J. 46 (2022), the Court held that a settlement agreement involving an internal disciplinary action against a public employee, which included personnel records, was subject to disclosure under OPRA because it was a “government record” and not precluded under any exemption. [Id.](#) at 57. The Court further held that the portion of the settlement agreement detailing the reasons why a government employee was separated from government service qualifies as a government record under N.J.S.A. 47:1A-10 and must be disclosed after it is properly redacted. [Id.](#) at 56-58.

Therefore, under Libertarians, plaintiffs are entitled under OPRA to review documents that contain information regarding the reason why an employee was separated from their employment at the police department. The documents must be properly redacted. Therefore, the trial court's order to produce those documents is affirmed, albeit for different reasons.

We turn then to a consideration of the counsel fees award. As stated, the court awarded fees to plaintiffs as a prevailing party under request three and not under request nine. In light of our determination today, plaintiffs are still a prevailing party under OPRA and entitled to attorney's fees—although that entitlement is now under request nine and not under request three.

The fact that plaintiffs are entitled to fees under a different OPRA request does not affect the court's fee award. The trial judge carefully considered the fee application, reviewing the certification of services and hourly rate. The court

also acknowledged plaintiffs only prevailed on one of the three challenged requests (which has not changed under this decision) and tailored the award accordingly. The amount of counsel fees was supported by sufficient reasoning. We see no reason to disturb the fee award.

We affirm the court's order regarding the disclosure of documents under request nine. We also affirm the counsel fee award. We vacate the portion of the court's order disclosing records under request three and remand for the court to conduct the appropriate analysis under Rivera for disclosure and redaction under the common law right of access.

Affirmed in part, vacated in part, and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2022 WL 1613271

Footnotes

- 1 [N.J.S.A. 47:1A-1](#) to -13.
- 2 Chief Beu was the subject of an ongoing investigation by the Vineland Police Department.
- 3 On the spreadsheet, defendants listed “other” as the reason for termination for a majority of the officers.
- 4 Plaintiffs did not appeal from the court's denial of the third requested item.

Jeremy A. Chase, Esq. (Atty #293052020)

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*Attorney for Proposed Amici the Reporters Committee for Freedom
of the Press & 20 Media Organizations*

21st Century Media LLC,

Plaintiff/Appellant,

v.

EWING TOWNSHIP, et al.,

Defendants/Respondents.

SUPERIOR COURT OF NEW
JERSEY, APPELLATE DIVISION
DOCKET NO. A-00178-22T4

**NOTICE OF MOTION FOR
LEAVE TO APPEAR AS
AMICI CURIAE**

TO: ALL COUNSEL OF RECORD

PURSUANT to R. 1:13-9, the Reporters Committee for Freedom of the Press and 20 Media Organizations hereby apply to this Court for an Order granting leave to appear in this action as amici curiae.

Proposed amici shall rely upon the attached Certification of Jeremy A. Chase, Esq. and accompanying amici curiae brief in support of this Motion.

Dated: April 27, 2023

Respectfully submitted,

/s/Jeremy A. Chase

Jeremy A. Chase, Esq.

Jeremy A. Chase, Esq. (Atty #293052020)

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*Attorney for Proposed Amici the Reporters Committee for Freedom
of the Press & 20 Media Organizations*

21st Century Media LLC,

Plaintiff/Appellant,

v.

EWING TOWNSHIP, et al.,

Defendants/Respondents.

SUPERIOR COURT OF NEW
JERSEY, APPELLATE DIVISION
DOCKET NO. A-00178-22T4

**CERTIFICATION OF JEREMY A.
CHASE IN SUPPORT OF
MOTION TO ALLOW THE
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND
20 MEDIA ORGANIZATIONS TO
FILE AN AMICI CURIAE BRIEF**

JEREMY A. CHASE, OF FULL AGE, HEREBY CERTIFIES:

1. The Reporters Committee for Freedom of the Press (the “Reporters Committee”) and 20 Media Organizations move for leave to file an amici brief urging the Court to reverse the decision of the Superior Court.

2. Plaintiff/Appellant consents to the filing of the amici brief. Defendants/Respondents do not consent to the filing of the amici brief.

3. The Reporters Committee is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. Descriptions of all amici can be found in Appendix A attached to the proposed amici brief.

4. The Reporters Committee has previously filed amicus briefs in numerous freedom of information, newsgathering, and public records cases before the Courts of this state, including in Schwab, et al. v. Blay, et al., A-001312-21T2 (N.J. Super. Ct. App. Div. 2022); Rivera v. Union County Prosecutor's Office, et al., No. 084867 (N.J. 2021); In re Attorney General Law Enforcement Directive Nos. 2020-5 & 2020-6, No. 085017 (N.J. 2020); Libertarians for Transparent Government v. New Jersey State Police, No. 083079 (N.J. 2019); Gilleran v. Township of Bloomfield, No. 076114 (N.J. 2016); Scheeler v. Atlantic County Municipal Joint Insurance Fund, No. A-002092-15 (N.J. Super. Ct. App. Div. 2016); and North Jersey Media Group v. Bergen County Prosecutor's Office, No. A-2393-13T3 (N.J. Super. Ct. App.

Div. 2014). Additionally, Reporters Committee attorneys advise and represent journalists and news organizations engaged in journalism and reporting on matters relevant to and affecting communities in New Jersey. As such, the Reporters Committee has a strong interest in this case.

5. The news media depend on government transparency—through public records laws, the common law right of access, and other disclosures of information—to report on the conduct of law enforcement officers and agencies in New Jersey and across the country. Public access to information about the conduct and discipline of law enforcement officials, including through disclosure of internal affairs records, enables journalists to inform the public about important matters regarding the actors entrusted with protecting our communities. Therefore, the Reporters Committee and 20 Media Organizations seek to explain in their brief the value of access to the internal affairs records at issue in this case, including historical records that allow the public to evaluate whether misconduct investigations are conducted effectively and fairly.

6. The Reporters Committee and 20 Media Organizations are well-positioned to discuss the particular interest that the news media have in information related to law enforcement. The Reporters Committee has written numerous amici briefs about access to police disciplinary records, specifically,

and other issues concerning transparency of law enforcement more generally. See, e.g., Br. of Amici Curiae the Reporters Comm. for Freedom of the Press & 24 Media Orgs. in Support of Pl.-Pet'r. Seeking Reversal, Rivera v. Union County Prosecutor's Office, et al., No. 084867 (N.J. 2021); Br. of Amici Curiae the Reporters Comm. for Freedom of the Press & 16 Media Orgs. in Support of Pl.-Pet'r. Seeking Reversal, Gannett Satellite Information Network LLC d/b/a Asbury Park Press v. Township of Neptune, No. 085719 (N.J. 2022); Br. of Amici Curiae the Reporters Comm. for Freedom of the Press & 31 News Media Orgs. in Support of Intervenor-Def.-Appellee-Cross-Appellant & Urging Affirmance in Part & Reversal in Part, Uniformed Fire Officers Ass'n v. DeBlasio, No. 20-2789 (2d Cir. 2020); Br. of Amici Curiae the Reporters Comm. for Freedom of the Press & 26 Media Orgs. in Opp'n to Pet'rs/Pls.' Mot. for Prelim. Inj., Buffalo Police Benevolent Ass'n v. Brown, No. 807664/2020 (N.Y. Sup. Ct. 2020). In this case, the Reporters Committee and 20 Media Organizations' amici brief will address the interest of the news media in accessing historical internal affairs records, particularly in light of the press's role in informing the public, assessing the conduct of public officials, and serving as a check on government power; specifically, their amici brief will

explain that the trial court failed to conduct the detailed analysis required under the common law right of access.

7. The Reporters Committee and 20 Media Organizations' participation as amici will not prejudice the parties or delay this case.

8. For the reasons set forth herein, the Reporters Committee and 20 Media Organizations respectfully request this Honorable Court to allow them to submit an amici brief in this case.

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.

/s/Jeremy A. Chase
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