

ANTONIO FUSTER
and
BRIANNA DEVINE,
Plaintiffs-Petitioners,
v.

TOWNSHIP OF CHATHAM
and
GREGORY LaCONTE, in his
official capacity as Records
Custodian,
Defendants-Respondents

SUPREME COURT OF NEW
JERSEY

DOCKET No. A-33-23

CIVIL ACTION
ON APPEAL FROM
SUPERIOR COURT OF NEW
JERSEY, APPELLATE DIVISION
Appellate Docket No.
A-1673-22

Sat below:

Hon. Lisa Rose, J.S.C.

Hon. Morris G. Smith, J.S.C.

Hon. Lisa Perez Friscia, J.S.C (t/a)

**BRIEF OF AMICI CURIAE
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
& 7 MEDIA ORGANIZATIONS
IN SUPPORT OF PLAINTIFFS-PETITIONERS SEEKING REVERSAL**

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STATEMENT OF INTEREST OF AMICI

Lead amicus curiae the Reporters Committee for Freedom of the Press (“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. Amici, as members and representatives of the news media, routinely rely on state public records laws, including OPRA, and the common law to gather news and inform the public. Amici—Reporters Committee, Dow Jones & Company, Gannett, Hearst, The New Jersey Press Association, The New York News Publishers Association, New York Public Radio, and The New York Times Company—thus have a strong interest in the outcome of this case.

PRELIMINARY STATEMENT

This appeal arises out of the Township of Chatham’s (“Township” or “Defendant-Respondent”) denial of a request by Plaintiff-Petitioner Antonio Fuster for the body-worn camera footage of his own oral report to police that his

child accused an adult male relative of sexual misconduct. PCa27.¹ Fuster sought access to the footage pursuant to the Open Public Records Act (“OPRA”), N.J.S.A. 47:1A-1 to -13, and the common law right of access. Both New Jersey statutory and common law require disclosure of the footage; its release to Plaintiffs-Petitioners would fulfill the promise of New Jersey’s newly enacted body-worn camera access law by “increasing transparency . . . in the State’s law enforcement agencies, thereby making them more accountable to the communities they serve.” *In re Att’y Gen. L. Enf’t Directive Nos. 2020-5 & 2020-6*, 246 N.J. 462, 478 (2021) (citation omitted).

The Appellate Division held that the requested footage was exempt from disclosure under both OPRA and the common law. As to its OPRA analysis, the court determined that N.J.S.A. 47:1A-9(b), together with pre-OPRA case law permitting confidentiality of records related to “individual[s]. . . not arrested or charged,” allow withholding. *See* PCa2. As to the common law, the court concluded that the balance of interests weighed against access because disclosure would undermine law enforcement and discourage witnesses from coming forward.

¹ Citations to the appendix refer to the appendix attached to Plaintiff-Petitioners’ Brief in Support of Petition for Certification filed with this Court on January 29, 2024.

Amici agree with Plaintiffs-Petitioners that New Jersey’s body-worn camera law, N.J.S.A. 40A:14-118.3–118.5, does not subsume OPRA’s exemptions to disclosure,² and therefore that reversal of the Appellate Division’s decision is warranted. Amici emphasize the necessity of releasing the body-worn camera footage at issue in this matter even assuming, *arguendo*, that OPRA’s exemptions are incorporated into New Jersey’s body-worn camera law. Amici also emphasize that the public interest is served when journalists and news organizations have access to, and report on, records that neutrally and accurately reflect law enforcement personnel’s interactions with the public.

It is a “bedrock principle that our government works best when its activities are well-known to the public it serves.” *Burnett v. County of Bergen*, 198 N.J. 408, 414 (2009). Accordingly, for the reasons herein, the Reporters Committee and seven Media Organizations respectfully urge the Court to reverse the decision of the Appellate Division and hold that the requested records are available under OPRA and the common law.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici adopt the statement of facts and procedural history set forth in Plaintiffs-Petitioners’ brief filed in the Appellate Division.

² See N.J.S.A. 40A:14-118.5(l) (stating that “only [four types of] body worn camera recordings shall be exempt from public inspection”).

ARGUMENT

I. **Access to the Body-Worn Camera Footage Is Mandated under OPRA and the Common Law.**

In adopting OPRA, the Legislature unambiguously declared that the common law right of access remained a viable and legally independent means for an individual to obtain public records. *See, e.g., Bergen Cnty. Improvement Auth. v. N.J. Media Grp., Inc.*, 370 N.J. Super. 504, 516 (App. Div. 2004); *Gannett Satellite Info. Network, LLC v. Township of Neptune*, No. A-4006-18, 2021 WL 1305863, at *10–12 (N.J. Super. Ct. App. Div. Apr. 8, 2021) (requiring access to IA records under common law).

Here, both OPRA and the common law require disclosure of the requested body-worn camera footage.

A. OPRA requires disclosure of the footage or, at minimum, all nonexempt portions of the footage.

OPRA’s enumerated exemptions do not apply to the body-worn camera footage sought by Plaintiffs-Petitioners. *See* N.J.S.A. 40A:14-118.5(1). New Jersey’s body-worn camera law states that “only [four types of] body worn camera recordings shall be exempt from public inspection.” None of these exemptions apply here. *Id.* (emphasis added). But even assuming that an exemption to disclosure applies, OPRA requires the redaction of any purportedly exempt information; wholesale withholding of the record is impermissible.

OPRA’s segregability mandate, N.J.S.A. 47:1A-5(g), is a cornerstone of the Act; it is also a bedrock feature of many other states’ public records laws and the federal Freedom of Information Act. *See, e.g.*, 5 U.S.C. § 552(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt[.]”); 65 Pa. Stat. Ann. § 67.706 (similar mandate in Pennsylvania’s Right to Know Law); *Gould v. N.Y.C. Police Dep’t*, 89 N.Y.2d 267, 275 (1996) (applying redaction mandate in New York’s Freedom of Information Law). When a court determines that a public record implicates legitimate privacy concerns, an agency must redact only those portions of the record that would invade a legitimate privacy interest, not deny access to the record in its entirety. This segregability requirement applies to video and audio recordings. Indeed, courts across the country have determined that targeted redaction of video is both viable and necessary to comply with public records requests:

- *Conrad v. Reno Police Dep’t*, 530 P.3d 851, 854 (2023) (providing redacted body-worn camera footage to requester where “nontrivial” privacy interests warranted redaction);

- *King v. Paxton*, 576 S.W.3d 881, 900–03 (Tex. App. 2019) (stating same; explaining that much of the requested body-worn camera footage at issue was

of legitimate public concern, and “[t]he information that is not a matter of legitimate public concern has . . . been ordered to be redacted from the records”;

- *Nissen v. Pierce County*, 183 Wash. 2d 863, 885, 357 P.3d 45, 57 (2015)

(“Though technology evolves, segregating public records from nonpublic ones is nothing new for agencies responding to a P[ublic] R[ecords] A[ct] request.”);

- *Cent. Dauphin Sch. Dist. v. Hawkins*, 286 A.3d 726, 742–43 (Pa. 2022)

(where video footage was at issue, it “[wa]s not at all clear” to the court “why [the government] cannot segregate the portions of the record that do not invade privacy” (internal brackets omitted);

- *Stahl v. Dep’t of Justice*, No. 19-cv-4142, 2021 WL 1163154, at *7 (E.D.N.Y. 2021) (explaining that courts now acknowledge that “because [video] editing is routine and inexpensive, an agency cannot credibly claim that it lacks access to this technology”).

Baltimore Action Legal Team v. Office of State’s Attorney, No. 1251, 2021 WL 4786936 (Md. Ct. Spec. App. Oct. 14, 2021) (“*BALT*”)—a case arising under Maryland’s public records law—is instructive. There, the state’s attorney’s office refused to release body-worn camera footage to a requester, claiming that the footage was exempt, and that “where privacy issues are concerned, the [Public Information Act’s] scope should be read narrowly.” *Id.* at *7. The appellate court rejected this argument, emphasizing that the

“overarching aim” of Maryland’s public records law “is to ‘allow access to public records,’” *id.* at *7 (quoting *Kirwan v. The Diamondback*, 721 A.2d 196, 200 (Md. Ct. App. 1998)), and reminded the agency that the law “requires agencies to utilize the principle of severability in responding to requests for public records[.]” *id.* at *9 (citation omitted). The court concluded, accordingly, that the agency “could have served the purposes of the [law] while maintaining confidentiality by redacting . . . any information . . . that might be considered confidential”), *id.*

So, too, here. To the extent the Township can demonstrate that non-trivial privacy interests of third parties referenced in the requested body-worn camera footage who have not been criminally charged would be undermined by disclosure, it can redact any such references from the footage. *See* N.J.S.A. 47:1A-5(g). It cannot lawfully withhold the video in its entirety.

B. The common law compels disclosure of the requested footage given the paramount public interest therein.

The common law right of access reaches a broader class of documents than OPRA. *See, e.g., Higg-A-Rella, Inc. v. County of Essex*, 141 N.J. 35, 46 (1995).³ Access to records under the common law is predicated on three

³ *See also Gilleran v. Township of Bloomfield*, 227 N.J. 159 (2016), and *North Jersey Media Group, Inc. v. Township of Lyndhurst*, 229 N.J. 541 (2017), both of which permitted access to records under the common law right of access despite the same records being inaccessible under OPRA).

elements: “(1) [T]he records must be common-law public documents; (2) the person seeking access must establish an interest in the subject matter of the material; and (3) the [person’s] right to access must be balanced against the State’s interest in preventing disclosure.” *Keddie v. Rutgers*, 148 N.J. 36, 50 (1997) (citations and internal quotation marks omitted).

In addition to the public interest in access to the specific footage at issue in this case,⁴ which is addressed in Plaintiffs-Petitioners’ Brief, the public has a powerful interest in access to body-worn camera footage in general. As discussed below, there is a national trend towards increased public access to law enforcement records, including body-worn camera footage. And, as the examples of news reporting below illustrate, such access has myriad public benefits.

⁴ This Court in *Libertarians for Transparent Gov’t v. Cumberland County*, 250 N.J. 46, 59 (2022), expressly concluded that disclosure in that case was vital where the agency had deceived the public regarding the basis for which one of its employees ended his employment: specifically, “the County stated that [the employee] was terminated”—“a misrepresentation” in light of the fact that “in reality, . . . he was allowed to retire in good standing with only a partial forfeiture of his pension.” *Id.* Here, Plaintiffs-Petitioners seek the instant footage because they allege the Township’s reports do not accurately reflect what Fuster communicated to police about the alleged abuse of their special needs child. Plaintiffs-Petitioners should not be denied their rights of access guaranteed by OPRA and the common law in a matter directly involving them.

- i. A strong public interest in oversight of law enforcement underpins a nationwide trend towards increased public access to body-worn camera footage.*

In recent years, jurisdictions across the country have recognized the importance of access to records documenting the conduct of law enforcement personnel. In particular, states have amended their public records laws or enacted entirely new laws designed to increase public access to police body-worn camera footage. These measures evidence the benefits to the public of affording access to such records—a factor to be considered in the common law analysis. *Loigman v. Kimmelman*, 102 N.J. 98, 104, 505 A.2d 958, 962 (1986).

For instance, in Colorado, the legislature enacted Colorado Revised Statute § 24-31-902, which went into effect in 2023. It provides that when any “complaint of peace officer misconduct” is reported to the officer’s law enforcement agency, the agency must release all unedited body-worn camera videos of the incident within 21 days of receiving the request. C.R.S. § 24-31-902(2)(a). Further, in connection with a complaint of misconduct, any video raising “substantial privacy concerns for criminal defendants, victims, witnesses, [or] juveniles”—including any personal information of an individual not arrested, charged or cited—can simply be blurred “to protect the . . . privacy interest while still allowing public release.” *Id.* § 24-31-902(b)(II)(A).

In Kentucky, the legislature amended its public records law in 2022 to provide that records that are “requested by a person . . . or the personal representative [there]of . . . directly involved in the incident contained in the body-worn camera recording . . . shall be made available . . . for viewing on the premises of the public agency[.]” Ky. Rev. Stat. Ann. § 61.168(5)(d). And in Minnesota, where the law had already declared that “data are public if a subject of the data requests it be made accessible to the public,” Minn. Stat. Ann. § 13.825 (subd. 2(a)(2)), legislators amended the law last year to require law enforcement to disclose more body-worn camera footage than previously accessible, and more quickly as well. *See* 2023 Minn. Sess. Laws - 2023, Reg. Sess., Art. 9, avail. at <https://www.revisor.mn.gov/laws/2023/0/52/>. These authorities should inform the Court’s common law analysis.

ii. The news media relies on, and has a powerful interest in, access to records of investigations of law enforcement misconduct to inform the public.

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*, 58 Mass. App. Ct. 1, 4, 787 N.E.2d 602, 605 (2003). For example, as USA Today reported, release of body-worn camera footage answered some questions (and generated others) about a police shooting

of a Black airman in Okaloosa County, Florida. *See* Tom McLaughlin, *et al.*, *Attorney for Slain Airman, Sheriff Dig In After Release of Shooting Body-camera Footage*, USA Today (May 10, 2024), <https://www.usatoday.com/story/news/nation/2024/05/10/roger-fortson-shooting-police-video-released/73636102007/>.

According to the video footage examined and published by USA Today, Roger Fortson, age 23, arrived at his door bearing a downward facing firearm that was reported to be registered and legally acquired. *See id.* Fortson was given “no verbal commands” to relinquish his weapon and was fatally “shot multiple times within a split second of the door being opened.” *Id.* Disclosure and analysis of the footage allowed members of the press and public to ask important questions of the law enforcement personnel involved in the incident, such as whether the sheriff who shot and killed Fortson and/or other personnel present were “trained to give verbal warnings,” trained “to initiate life-saving measures,” or trained “to deal with law-abiding citizens who are registered gun owners.” *Id.*

Release of body-worn camera footage can also serve to corroborate law enforcement accounts and demonstrate that police have acted properly under the circumstances. A recent NBC Los Angeles story describes the Fontana, California, Police Department’s release of body camera footage of a routine

traffic stop turned shooting after an armed man put an officer in a headlock. Amber Frias & Missael Soto, *Fontana Police Release Bodycam Footage of Traffic Stop Turned Shooting*, NBC Los Angeles (May 13, 2024), <https://perma.cc/P7ZE-53R7>. “In a frightening moment captured on body cam footage,” an individual who was pulled over on account of a missing license plate “put the officer in a headlock, prompting her partner to intervene. Faced with the threat of a firearm, lethal force was used to subdue [the individual], resulting in him being shot while the officer managed to escape with minor injuries.” *Id.*

A key purpose undergirding public access to government records is to “enable[] the public to play a role in ‘guarding against corruption and misconduct.’” *Libertarians for Transparent Gov’t.*, 250 N.J. at 59. Moreover, “[t]ransparency facilitates healing.” Cynthia H. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 CUNY L. Rev. 148, 154 (2019). “[W]hen police processes are perceived as procedurally just, communities are more likely to cooperate with the police, and policing, in turn, is more effective.” *Id.* at 166 (citation omitted).

This principle applies directly to the body-worn camera footage at issue in this case. The Court should order disclosure of the footage to Plaintiffs-Petitioners, subject to minimal redactions if shown to be necessary.

CONCLUSION

For the foregoing reasons, the Reporters Committee and Media Organizations respectfully urge the Court to reverse the decision below and order the requested footage to be released to Plaintiffs-Petitioners under OPRA and the common law.

Dated: June 20, 2024

Respectfully submitted,

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