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| ANTONIO FUSTER and BRIANNA DEVINE,<br><br>Plaintiffs-Petitioners,<br><br>v.<br><br>TOWNSHIP OF CHATHAM and GREGORY LaCONTE, in his official capacity as records custodian,<br><br>Defendants-Respondents. | SUPREME COURT OF NEW JERSEY<br>DOCKET NO.: 089030<br><br>Civil Action<br><br>On Petition for Certification from a Final Judgment of the Appellate Division, Docket No. A-1673-22<br><br>Sat Below:<br><br>Hon. Lisa Rose, J.S.C.<br>Hon. Morris G. Smith, J.S.C.<br>Hon. Lisa Perez Friscia, J.S.C. (t/a) |

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# BRIEF AND APPENDIX OF AMICUS CURIAE MATTHEW J. PLATKIN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY (AGa1-AGa26)

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## PRELIMINARY STATEMENT

Enacted in November 2020, the Body Worn Camera Law (BWCL) fosters accountability for police-civilian interactions and thus improves public trust in law enforcement in multiple crucial ways. For the first time, the Legislature required that law enforcement create body worn camera (BWC) footage—which had previously been required by Attorney General Directive alone. And alongside that pathbreaking choice, the Legislature adopted a reticulated scheme to regulate not only when BWC footage had to be created, but when it must be retained, and for how long. Those choices, too, were important: they ensured that such videos are preserved for use in, inter alia, internal investigations and court proceedings.

The BWCL also expands access to BWC footage in important ways. For one, subsection (k) of the statute affords "subjects" of BWC footage the right to "review the [BWC] recording," so long as that review is "in accordance with" the provisions of the Open Public Records Act (OPRA). It does this for a narrow but important reason: the BWCL allows "subjects" to request the video be retained for a particular extended period (for three years), and their special right to "review" the video (though not to possess it) helps facilitate the decision whether to make that request. For another, subsection (*l*) of the law addresses public access, and makes clear that BWC footage cannot be withheld as a

"criminal investigatory record" (CIR)—though OPRA's remaining exemptions, along with the four exclusions laid out in the BWCL, may nevertheless apply. The BWCL thus not only requires the creation and retention of BWC footage, but it also lays out ground rules for access by subjects and (separately) by the public.

But as the Appellate Division held, the BWCL does not, as Petitioners claim, require that law enforcement agencies produce BWC videos even when the footage falls within an established OPRA exemption. OPRA has since 2002 promoted transparency in government, and for just as long has enumerated a series of exemptions where the Legislature found certain needs for confidentiality remain paramount. Courts always strive to harmonize related laws, and here, the language of the BWCL powerfully indicates that OPRA's exemptions continue to apply. After all, the Legislature in enacting the BWCL established that one specific OPRA exemption for CIR must not apply to BWC footage, which strongly implies that the remaining OPRA exemptions apply, or there would have been no reason to single one out. And a contrary reading of the BWCL that abrogates all of OPRA's usual exemptions lacks support in the laws' structure or logic: were Petitioners correct, law enforcement agencies could no longer withhold BWC footage even where release would harm third-party privacy interests, undermine active law enforcement operations, or

threaten the safety of a sensitive building. There is no evidence that the Legislature intended such a dramatic result.

Instead, when a standard requestor seeks a copy of BWC footage, courts must engage in the usual analyses under OPRA (except for CIR) and the common law right of access. In many cases, that will require a law enforcement agency to produce the BWC footage. But in this case, it does not. Here, the requestor seeks a video record of himself accusing a relative, who was ultimately never charged, with a crime. Under Section 9(b) of OPRA, there is a recognized grant of confidentiality for governmental records revealing untested or uncharged assertions of criminality leveled by one civilian against another, which protects both the individual's privacy and the integrity of criminal investigations. The recordings are thus not subject to general public access—a result that protects not only the privacy of the relative that Petitioners accused, but also the privacy of Petitioners and their child, as well as the government's own reactions to those accusations. And for similar reasons, the videos are not subject to release under the common law right of access—though the common law remains a means of obtaining access to records exempted from OPRA in fact-specific cases. This Court should thus affirm as modified.

## PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

The Attorney General relies upon and incorporates the statement of facts and procedural history in the Appellate Division's opinion, Fuster v. Township of Chatham, 477 N.J. Super. 477 (App. Div. 2023), adding the following:

Plaintiffs-Petitioners Antonio Fuster and Brianna Devine are parents of a child. Fuster, 477 N.J. Super. at 483. In May 2022, Fuster went to the Chatham Police Department (Department) to allege sexual misconduct by a relative against Fuster and Devine's child. Id. at 484; (Pa2).[2] At the police station, Fuster provided a statement that was video-recorded by BWC. Fuster, 477 N.J. Super. at 484. After the interview, the Department notified both the Morris County Prosecutor's Office (MCPO) and the Division of Child Protection and Permanency (DCPP). (Db6); Fuster, 477 N.J. Super. at 484.

Subsequently, Petitioners obtained a copy of the police report memorializing Fuster's statement to the police. (Pa2). Petitioners contacted the Department and shared their view that the report did not fully and accurately document Fuster's statement. Ibid. The Department created a supplemental report memorializing Petitioners' reported inaccuracies and omissions.

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[1] These sections are combined for the Court's convenience.

[2] "Pcb" refers to Petitioners' petition for certification; "Pb" refers to Petitioners' Appellate Division brief; "Pa" refers to the appendix to that brief; "Db" refers to Respondents' Appellate Division brief.

After further interviews, the Department determined that it lacked probable cause to proceed, and informed Petitioners of this decision in late August 2022. Fuster, 477 N.J. Super. at 484; (Pa3). Petitioners were "deeply upset," and "question[ed] the adequacy of the criminal investigation." (Pa3).

On August 26, 2022, after the investigation was closed, Fuster submitted an OPRA request for the resulting police reports and the BWC recording of his interview. Fuster, 477 N.J. Super. at 484; (Pa14). On September 6, the Department provided the reports, but not the video. (Pa17-18). The Department explained that it was denying access to the footage because it "relates to a juvenile case [and] there are no charges." (Pa18).

The next day, Fuster submitted a new request to the Township, seeking the video under the common law. (Pa20). While that request was under review, Devine requested "to review" the recording "Under Common Law," in order "to determine whether or not to file a request for a 3 year retention period." (Pa36). The same day, Fuster requested the video be retained for the extended period. (Pa22; Pa25). The Township denied Petitioners' requests for the video under both OPRA and the common law. (Pa28). It explained that "disclosure would not advance the public interest" and could instead "impede agency investigative functions by providing information potentially involving third parties[.]" (Pa28). It separately acknowledged the extended-retention request. (Pa26).

Petitioners filed an order to show cause and a verified complaint seeking release of the video under OPRA, the BWCL, and the common law. (Pa7-9). They alleged that they were seeking the BWC recording of Fuster's statement "so they could prove that the [initial police] report was inaccurate and perhaps file an internal affairs complaint against the officers for their handling of the matter." (Pa3). The Law Division upheld the Township's decision to withhold access to the video. Fuster, 477 N.J. Super. at 485.

The Appellate Division affirmed. Id. at 484. It rejected Petitioners' argument "that the BWCL's exemption provision, N.J.S.A. 40A:14-118.5(*l*), abrogates OPRA's exemptions," id. at 482, and instead held that the exemptions to public access listed in subsection (*l*) of the BWCL "are in addition to OPRA's exemptions[,]" id. at 491. In other words, a request for a BWC recording properly may be denied if any of the subsection (*l*) exemptions apply to the recording or if any of OPRA's exemptions apply to the recording.

As to the footage at issue, the Appellate Division acknowledged that none of the subsection (*l*) exemptions applied, but it explained that the recording was properly withheld pursuant to "the long-recognized confidentiality exemption afforded to uncharged individuals by judicial case law" and incorporated into OPRA by Section 9(b). Fuster, 477 N.J. Super. at 491-92. "[B]ecause information received by law enforcement regarding 'a person who has not been

arrested or charged' is confidential and not subject to disclosure" under precedent that long predated OPRA, and Defendants had established that releasing the footage could harm the accused but uncharged third party, the panel affirmed the trial court's ruling. Id. at 492 (quoting N. Jersey Media Grp. v. Bergen Cnty. Pros. Office, 447 N.J. Super. 182, 204 (App. Div. 2016) (BCPO)).

As to the common law right of access, the Appellate Division recognized that the BWC recording was a "public record" under the common law and that Petitioners had "demonstrated a recognized interest in the disclosure of the video." Id. at 495. The panel also recognized that Fuster sought "release of his own statement, which he undoubtedly recollects." Id. at 492. But while Fuster "can waive his privacy interest and consent to disclosure," the panel reasoned, the "accused does not have the same opportunity." Id. at 492-93. Thus, the panel determined that the Department's interest in protecting "'the privacy interest of the individual who ... would face irremediable public condemnation' from disclosure of uncharged accusations," id. at 497 (quoting BCPO, 447 N.J. Super. at 204), outweighed Petitioners' interest in disclosure.

This Court granted Petitioners' petition for certification.

# ARGUMENT

## POINT I

## THE BWCL OPERATES IN HARMONY WITH OPRA—INCLUDING OPRA'S EXEMPTIONS.

The BWCL enhances public accountability for police-civilian interactions in multiple important ways. The statute generally requires both the creation and the retention of substantial new BWC footage, which can be used to substantiate or dispel citizen complaints in investigations or court proceedings—subject to appropriate protective orders. Subsection (k) further ensures that subjects of a BWC video have a right to review the video—though not to possess or disseminate it—to decide whether the video should be retained for an extended period. And subsection (*l*) confirms that a specific and broad OPRA exemption, for criminal investigatory records, is no bar to public disclosure of these videos. The BWCL thus serves significant transparency goals without contravening OPRA's other time-honored exemptions, including those that protect security or third-party privacy.

### A. The BWCL Ensures Creation And Retention Of BWC Footage.

Understanding how the BWCL achieves its central purposes—increased accountability for police-civilian interactions—is crucial to analyzing the law's meaning. See State v. Maguire, 84 N.J. 508, 517 (1980) ("As in all cases of statutory construction, our task is to interpret the words of the statute in light of

the purposes the Legislature sought to further."). The BWCL achieves its goals by, inter alia, ensuring that substantially more police-civilian interactions are recorded on video, that all of those videos are retained for a minimum period (180 days), and that videos of greatest importance for police accountability—for instance, those that record an officer's use of force or are the subject of a civilian complaint—are retained for a longer period (at least three years). N.J.S.A. 40A:14-118.5(j)(1), (j)(3)(b). This extended retention ensures such videos are available in investigations and court proceedings, including to substantiate or to dispel citizen complaints.

Begin with the history of BWCs in New Jersey, which have been used in our State for nearly a decade. See Att'y Gen. Law Enf't Directive No. 2021-5 (Directive 2021-5), at 1 (noting that "the first cameras were activated in New Jersey in 2015"). There followed "a steady increase in the number of agencies that have equipped their officers with them." Ibid. And though adoption of BWCs was initially voluntary, many departments did adopt them, ibid., and an Attorney General Directive further regulated their use, including by defining the circumstances in which BWCs must be activated, see Att'y Gen. Law Enf't Directive 2015-1 (Directive 2015-1), at 2, 5-6, 8-11. Thus, at least so long as Directive 2015-1 remained in effect, officers in the departments that had BWCs were required to activate them under certain circumstances.

In November 2020, in the wake of the murder of George Floyd, the Legislature enacted the BWCL. See L. 2020, c. 128 and L. 2020, c. 129 (operative June 1, 2021) (codified at N.J.S.A. 40A:14-118.3 through N.J.S.A. 40A:14-118.5); Governor Murphy Signs Legislation to Bring Changes to the Use of Body Worn Cameras by New Jersey Law Enforcement, Office of the Gov., (Nov. 24, 2020) (Governor's Press Release) (AGa1-5). On passage, the law was supported by a diverse array of stakeholders who heralded its salutary purposes, including: "to promote transparency and boost public confidence in law enforcement," ibid. (Statement of Governor); to advance "the uniform, statewide use of body worn cameras," ibid. (Statement of Attorney General); and to "strengthen[] the bonds of trust between police departments and communities while fostering greater transparency and accountability," ibid. (Statement of New Jersey State Police Superintendent). As a subsequent implementing Directive by the Attorney General noted, the law "codif[ied] many of the provisions of Directive 2015-1"—which had regulated BWCs but without itself mandating their adoption—while "usher[ing] in a rapid expansion of BWC use across the State." Directive 2021-5, at 1-2.

The BWCL thus primarily achieves its goals by ensuring that an audio-and-video record is generated for an enormous number of police-civilian encounters. Subject only to limited exceptions, the law requires uniformed

police officers to wear prominently placed BWCs "while acting in the performance of [their] official duties," N.J.S.A. 40A:14-118.3(a); see N.J.S.A. 40A:14-118.5(b), and it requires them to activate those BWCs, again subject only to limited exceptions, "whenever … responding to a call for service or at the initiation of any other law enforcement or investigative encounter" with "a member of the public, in accordance with applicable guidelines or directives promulgated by the Attorney General," N.J.S.A. 40A:14-118.5(c)(1), (3)-(5). The law also requires officers to keep BWCs activated—again subject only to limited exceptions. N.J.S.A. 40A:14-118.5(c)(2), (6), -118.5(e). These provisions promote accountability and verifiability—protecting officers and civilians alike—by ensuring the creation of audio-video evidence that would not have otherwise existed, and which can then be referred back to if disputes arise.

In addition to mandating and regulating BWC usage—thus ensuring the creation of an enormous amount of new audio-video content—the BWCL also promotes accountability by ensuring that BWC recordings are retained for a set period. The law achieves that goal primarily by setting out a retention protocol that, essentially, requires longer retention for videos that are most salient to the statute's goals. While the default retention period for even the most quotidian video is 180 days, N.J.S.A. 40A:14-118.5(j), that period is extended to three years where a "subject" of the BWC recording registers a complaint concerning

an encounter that was captured by the recording, N.J.S.A. 40A:14-118.5(j)(1), or if she otherwise requests a video be retained for a three-year period, N.J.S.A. 40A:14-118.5(j)(2)(e). See N.J.S.A. 40A:14-118.5(a) (defining a "subject" as anyone "who appears on the [BWC] recording" more than "incidentally").[3]

Moreover, independent of any three-year retention period triggered by a subject's complaint or request, subsection (j)(3) sets out "additional retention requirements" for a BWC recording that "pertains to a criminal investigation," N.J.S.A. 40A:14-118.5(j)(3)(a); records an arrest or the use of police force, N.J.S.A. 40A:14-118.5(j)(3)(b); or "records an incident that is the subject of an internal affairs complaint," N.J.S.A. 40A:14-118.5(j)(3)(c). A law enforcement officer who is a subject of a BWC recording or "whose [BWC] made the video recording" and/or that officer's supervisor may also request three-year retention if either "reasonably asserts the recording has evidentiary or exculpatory value," or "for police training purposes." N.J.S.A. 40A:14-118.5(j)(2)(a)-(d).

The creation, retention, and extended retention of these recordings serve essential transparency and law enforcement accountability aims. By ensuring that BWC recordings exist, and exist for extended periods, the law ensures that

[3] If a subject of a recording is a minor or deceased, the subject's parent/legal guardian or their next of kin/authorized designee may also request a three-year retention period. See N.J.S.A. 40A:14-118.5(j)(2)(f), (g). For simplicity, this brief refers to all such requests as requests by a "subject."

such footage is available to serve as "crucial evidence for use in investigations and court proceedings" and can "be used to support or dispel" complaints. See Governor's Conditional Veto to A. 4312 (October 19, 2020) (AGa6-18).[4] This is especially important because a civil complainant would, in appropriate cases, be entitled to a recording in discovery—which, of course, is only possible where the video is retained. Videos provided in discovery, meanwhile, are commonly subject to protective orders, reducing the risk that further dissemination or broad public disclosure would undermine third-party privacy or harm law enforcement investigations or operations.

### B. Subsection (k) Permits Subjects To "Review" BWC Videos, But Does Not Abrogate OPRA's Exemptions.

The BWCL also accords special rights of access for subjects of videos to review the footage—although it does not authorize them to possess or disseminate the footage. It does so for an important reason: to ensure individuals like Fuster can watch BWC footage that features them, to determine whether to request an extended three-year retention period, such that the footage will be available as evidence should they request an internal investigation or file a complaint in court. But the BWCL does not abrogate OPRA's protections

[4] Available at https://nj.gov/governor/news/news/562020/docs/bills/20201019/A4312CV.pdf (last accessed June 24, 2024).

regarding whether a copy of the record may be obtained, let alone abrogate the portions of OPRA that protect the privacy of third parties.

The language of subsection (k)—one of the two subsections at the center of Fuster's challenge—is clear. As noted above, the BWCL authorizes any subject of a particular video to request an extended three-year retention period for such video. See N.J.S.A. 40A:14-118.5(j)(2)(e). Subsection (k) helps the subject determine whether or not they wish to do so, by granting them a right to review the video as they decide whether to make such request—even if they would not otherwise be permitted to do so (if, for example, they were a standard requestor).[5] Specifically, subsection (k) says a subject "shall be permitted to review the body worn camera recording in accordance with the provisions of P.L.1963, c. 73 ([N.J.S.A.]47:1A-1 et seq.) to determine whether to request a three-year retention period." N.J.S.A. 40A:14-118.5(k). The subsection thus

[5] By granting subjects of the video additional rights to review footage, the BWCL reflects a pre-existing tradition in state law of permitting individuals with a particular and heightened interest to obtain some form of access to records not accessible to the public as a whole. See, e.g., N.J.S.A. 47:1A-10 (permitting an "individual in interest" to access personnel records otherwise exempt from public access under OPRA); N.J.S.A. 47:1A-1.1 (exempting "victims' records," from public access under OPRA, "except that a victim of a crime shall have access to the victim's own records"); N.J.S.A. 2C:25-23.1 (permitting domestic violence (DV) victims pursuing DV complaints to access records related to the alleged act of DV so long as access will not "jeopardize an ongoing criminal investigation or the safety of any person," and otherwise permitting access subject to redactions or a protective order).

has three central features: (1) it permits "review" of the footage, but not possession; (2) it subjects that review to other OPRA exemptions; and (3) it permits that review for a particular purpose. This section takes each in turn, and explains why subsection (k) does not provide a right to receive (and potentially further disseminate) the footage in contravention of OPRA's exemptions.

First, subsection (k) establishes a right to "review"—not a right to receive, possess, or otherwise disseminate the footage, of the kind a requestor would have under OPRA. Courts "ascribe to" a statute's "words their ordinary meaning and significance, and read them in context with related provisions so as to give sense to the legislation as a whole." DiProspero v. Penn, 183 N.J. 477, 492 (2005) (citations omitted). To "review" something means "to view or see [it] again" or "examine or study [it] again." Review, Merriam-Webster.[6] It therefore follows that the Legislature expected subjects of BWC recordings to be able "to view or see," or to "examine or study," videos in which they are featured—i.e., to watch "again" a record of an interaction that they already experienced (or, for statutorily-designated individuals like parents and guardians, something a specific relation experienced). See ibid. These meanings connote re-viewing, not possessing.

[6] Available at: https:// www. merriam-webster.com/dictionary/review (last visited June 24, 2024).

Indeed, the word "review" is also telling in comparison to other statutory terms, especially language in OPRA. "Courts read every word in a statute as if it was deliberately chosen and presume that omitted words were excluded purposefully." State v. Scott, 429 N.J. Super. 1, 6-7 (App. Div. 2012) (quoting Singer & Singer, Sutherland Statutory Construction § 72:3, at 802 (7th ed. 2010)). Courts also read "[s]tatutes that deal with the same matter or subject … in pari materia," construing them "together as a unitary and harmonious whole." St. Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 14-15 (2005) (quotation omitted) (cleaned up). Thus, where a legislative body "includes particular language in one section of a statute but omits it in another section of the same act"—or, by extension, a closely related act—courts should "generally presume[] that" the drafters acted "intentionally and purposely in the disparate inclusion or exclusion." N.J. Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 552 (2012) (quoting Rodriguez v. United States, 480 U.S. 522, 525 (1987)). Here, the BWCL's usage of "review" is distinct, in comparison to OPRA, which does not refer to allowing requestors to "review" records, but rather permits the "inspection, copying, or examination" of records. See N.J.S.A. 47:1A-1 (emphases added). If our Legislature had wanted subjects to obtain a "copy" of the BWC recordings that featured them, it could have said so, as it said in OPRA. That it did not is telling.

Second, subsection (k) also incorporates consistent OPRA provisions by permitting "review … in accordance with" OPRA's provisions. See N.J.S.A. 40A:14-118.5(k). As Petitioners note, (Pcb9), "[i]t is a well-established precept of statutory construction that when two statutes conflict, the more specific controls over the more general." State v. Anicama, 455 N.J. Super. 365, 381 (App. Div. 2018) (quoting N.J. Transit Corp. v. Borough of Somerville, 139 N.J. 582, 591 (1995)). Here, subsection (k) references OPRA when it provides that the subject "shall be permitted to review the [BWC] recording in accordance with" N.J.S.A. 47:1A-1 et seq.—that is, with OPRA.[7] See N.J.S.A. 40A:14-118.5(k). The sensible and harmonious reading of that language is that even when subjects may review the video, OPRA's limits otherwise continue to govern—as when individuals (whether the subject or a broader member of the public) wish to obtain a copy of the government record. Said another way, subsection (k) confers a special right of access to subjects (allowing them to view videos that non-subject requestors may not view), but that right exists "in accordance with" OPRA and thus does not abrogate OPRA's exemptions (except to the extent it permits subjects to engage in this special form of review).

[7] Technically, the reference to L.1963, c.73, is a reference to the Right to Know Law, formerly N.J.S.A. 47:1A-1 to -4, which OPRA amended and expanded on. But it is common ground the Legislature meant to reference OPRA itself. See, e.g., Fuster, 477 N.J. Super. at 488; (Pcb2).

Thus, even when the BWC recording is protected from public access under OPRA generally, a subject still should be able to view it for purposes of determining whether to request extended retention. That access may, of course, require blurring, redacting, or excising portions of a video recording before the subject reviews them, as Petitioners appear to agree, because the video could capture personal information about other subjects. See N.J.S.A. 47:1A-1.1 (requiring public agencies to "safeguard from public access" information the disclosure of which would violate a "reasonable expectation of privacy"); N.J.S.A. 47:1A-5(g) (requiring redaction where "part of a particular record is exempt from public access pursuant [OPRA]"); accord (Pcb7 n.5) (acknowledging "OPRA might justify redacting a video"—for instance, "[i]f a video shows gory images, nudity, or someone's driver's license"). After all, while subsection (k) allows the subject to "review" his own interactions with the officer, the subject has no right of "review" for interactions capturing only other individuals. See N.J.S.A. 40A:14-118.5(k).

Finally, subsection (k) permits review for the specific purpose of assessing "whether to request a three-year retention period." Ibid.; see, e.g., Maguire, 84 N.J. at 517. This provision aligns with the purpose of the BCWL—to allow for the creation, retention, and extended retention of footage that may serve as evidence should law-enforcement conduct be challenged. Supra at 10-12. For

another, it makes clear whether and when access is needed: before, not after, a subject has made a request for a three-year retention period. It is an important tool for subjects to decide whether the record is relevant to a complaint they wish to make or suit they wish to file. But it is not a right for the subject to review the recording for any purpose at any time; it confers no right, for example, upon a subject who wishes to refresh their recollection prior to trial testimony. Further, this language confirms that subsection (k) is not a general access provision, because the BWCL does not authorize non-subject members of the public to request three-year retention in the first place.

For all these reasons, and especially taken together, subsection (k) enables subjects of a video to review that video to consider their rights under the BWCL to seek extended retention of covered footage, but it does not allow the subjects to obtain copies of videos in contravention of OPRA's traditional exemptions.

### C. Subsection (*l*) Confirms OPRA's CIR Exemption Does Not Limit Public Access, But Does Not Otherwise Contravene OPRA.

In contrast to subsection (k), subsection (*l*) addresses requests for possession of the footage by anyone—subject or not. This provision clarifies that a particular OPRA exemption for "criminal investigatory records" does not apply to such requests for footage. But nothing in the text, structure, or logic of

subjection (*l*) abrogates OPRA's other exemptions. Petitioners thus cannot justify the unprecedented results that would follow from their reading.

To understand why subsection (*l*) does not go so far as Petitioners contend, it is important first to understand the subsection's actual role. Subsection (*l*) states that, "[n]otwithstanding that a criminal investigatory record does not constitute a government record under section 1 of [OPRA], only the following [BWC] recordings shall be exempt from public inspection[.]" N.J.S.A. 40A:14-118.5(*l*) (emphasis added). It then enumerates four categories:

- The first covers BWC recordings that are, in essence, less salient to the BWCL's purposes, and thus subject only to the default 180-day retention period. N.J.S.A. 40A:14-118.5(*l*)(1).[8]
- The second and fourth cover a subset of BWC recordings likely to implicate the subject's privacy. They cover videos subject to the three-year retention "solely and exclusively" because a subject registered a complaint, N.J.S.A. 40A:14-118.5(*l*)(2), or requested such retention, N.J.S.A. 40A:14-118.5(*l*)(4)—but only if the subject has requested that the "recording not be made available to the public."

[8] Formally, that means any BWC recording for which no subject or officer has requested longer retention, concerning which there is no criminal investigation or internal affairs complaint, and which does not record an arrest or use of force. See N.J.S.A. 40A:14-118.5(j).

- Finally, the third category covers BWC recordings that are subject to a three-year retention period "solely and exclusively" because such retention was requested by a law enforcement officer or her supervisor based on the recording's asserted evidentiary or exculpatory value, or for police training. N.J.S.A. 40A:14-118.5(*l*)(3).

Importantly, none of these categories addresses the privacy of a third party who is not a subject of the video. Nor does any address the privacy of subjects who do not know that they can ask for the videos to remain confidential.

The plain text and structure make clear the function and goal of subsection (*l*): to ensure that the long-established CIR exemption under OPRA poses no barrier to disclosure of BWC footage, while at the same time addressing four categories of BWC footage the Legislature did intend to exempt. OPRA broadly exempts from disclosure "criminal investigatory record[s]," which it defines as material "held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding." N.J.S.A. 47:1A-1.1. But where records are "required by law to be made, maintained or kept on file," they are not exempt as CIR. Ibid.; see, e.g., N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 565 (2017). Prior to passage of the BWCL, the only reason that BWC footage was subject to any public access was because an Attorney General Directive required that BWC footage be made and retained in

certain instances. See Richard Rivera, LLC v. Twp. of Bloomfield, No. A-3338-17, 2020 WL 109639, at *2-3 (App. Div. Jan. 9, 2020) (Rivera v. Bloomfield) (relying on Lyndhurst).[9] But with the BWCL, the Legislature made clear that it was requiring the footage be made; that the retention and thus the access to such footage would no longer depend on the presence or absence of a Directive; and thus that public access would be possible under OPRA "notwithstanding that a criminal investigatory record does not constitute a government record." N.J.S.A. 40A:14-118.5(*l*). In short, subsection (*l*)'s "notwithstanding" clause codifies that BWC recordings are not categorically exempt from OPRA as CIR.

Subsection (*l*) does not, however, do what Petitioners claim: it does not upend every other OPRA exemption, including exemptions that govern third-party privacy. As an initial matter, Petitioners bear a considerable burden in asserting that the BWCL trumps all of OPRA's exceptions, because our courts make every effort to harmonize related statutes. See, e.g., State v. Gomes, 253 N.J. 6, 15 (2023) ("When interpreting different statutory provisions, we are obligated to make every effort to harmonize them, even if they are in apparent conflict." (citation omitted)); see also St. Peter's Univ. Hosp., 185 N.J. at 14-15 ("Statutes that deal with the same matter or subject should be read in pari materia

[9] A copy of this unpublished decision is included within the Attorney General's Appendix. Counsel is unaware of any contrary cases. See R. 1:36-3.

and construed together as a unitary and harmonious whole." (cleaned up)). Because there is no question that OPRA and the BWCL deal with the same subject matter of public access to government records (and the latter even cross-references the former), this Court's method is to seek harmony if possible.

Particularly against that backdrop, the text of subsection (*l*) cannot be read to isolate BWC recordings from all of OPRA's other exemptions. It is a time-honored interpretive rule that "expression of one thing suggests the exclusion of another left unmentioned." Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 112 (2004). Here, subsection (*l*) provides that BWC recordings are not exempt from access "notwithstanding" the usual rule that governs a "criminal investigatory record." N.J.S.A. 40A:14-118.5(l). Said another way, the language makes clear that one specific type of OPRA exemption (the CIR exemption) does not apply to shield BWC recordings from public access. But by the same token, it also indicates that the Legislature did not think it was exempting BWC recordings from all of OPRA's exemptions, or else there would have been no reason to single out the CIR exemption specifically.

Petitioners' reliance on the word "only" in subsection (*l*) misunderstands the issue. After establishing that BWC recordings are available "notwithstanding" the CIR exemption, subsection (*l*) then includes a clause stating, "only the following [four kinds of] [BWC] recordings shall be exempt

from public inspection." Ibid. The contrast is clear: if an agency wishes to withhold a recording that it might have previously sought to withhold as CIR (the "notwithstanding" clause), the BWCL provides only four (narrower) exemptions to public access in its place (the "only" clause).

That in no way suggests, however, that OPRA's other exemptions are displaced. Had the Legislature stated, "notwithstanding N.J.S.A. 47:1A-1 et seq., only [these four] recordings shall be exempt"—the reference it used to OPRA in subsection (k)—it would have achieved just what Petitioners claim. That it chose to vary from the language it used in subsection (k), and to instead refer only to the CIR exemption rather than to OPRA as a whole, shows its intent to clarify the role of one specific exemption, not abrogate all the others. See C.R. v. M.T., 257 N.J. 126, 140 (2024) ("When the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded." (quotation omitted) (cleaned up)).

The structure of the statute points the same way. Most importantly, the BWC recordings that fall within subsection (*l*)'s four categories strongly indicate that the Legislature did not think they would be the sole exemptions to public access. As noted, those four categories capture: first, videos that are less likely to implicate the BWCL's aims (those for which no extended retention is required), N.J.S.A. 40A:14-118.5(*l*)(1); second, videos that receive extended

retention "solely and exclusively" because a subject either registered a complaint or requested retention, if the subject requested that the video remain confidential, N.J.S.A. 40A:14-118.5(*l*)(2), (4); and third, videos that receive extended retention "solely and exclusively" because an officer or her supervisor requested extended retention for evidentiary, exculpatory, or training purposes, N.J.S.A. 40A:14-118.5(*l*)(3).

It makes sense that our Legislature would have wanted to ensure that no videos falling into those four categories would be subject to public access under OPRA. After all, those four categories focus on either videos that are highly sensitive—as where the subjects themselves have already expressed a desire to keep them confidential, see N.J.S.A. 40A:14-118.5(*l*)(2), (4)—or are so wide-ranging that public access would allow requestors to obtain video footage of nearly all police activity, see N.J.S.A. 40A:14-118.5(*l*)(1). But it is impossible to conclude that the Legislature meant those to be the exclusive grounds for withholding a recording from public access. For one, none of those categories address third-party privacy for non-subjects—a glaring omission, if indeed the four categories were meant to be exclusive. For another, those four categories do not even wholly address the privacy interests of the videos' subjects, because they apply only when the videos are retained "solely and exclusively" pursuant

to those subjects' requests, and even then they will not apply if a subject does not realize she must affirmatively request confidentiality.

Indeed, treating the BWCL as unmoored from OPRA's exemptions would lead to untenable results—none of which Petitioners can show were intended by the Legislature. See In re Johnny Popper, Inc., 413 N.J. Super. 580, 589 (App. Div. 2010) (noting "statutes should be interpreted in a manner that avoids unreasonable or absurd results" and rejecting an interpretation that would defeat the purpose of the law). OPRA contains a number of key provisos not repeated in the BWCL, including exempting records depicting "any portion of" a dead body "taken by or for the medical examiner at the scene of death"; "victims' records"; "emergency or security information or procedures for any buildings or facility" that would present a security risk if made public; "security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software"; and any portion of document that reveals an individual's "social security number, credit card number, unlisted telephone number or driver license number." N.J.S.A. 47:1A-1.1. If Petitioners are correct that BWC footage must be turned over to any requestor[10] unless it

[10] As explained above, although subjection (k) grants special review to a subject of the video, subsection (*l*) does not distinguish between subjects and members of the general public. As a result, to the degree Petitioners believe Fuster has a

falls within one of the four subsection (*l*) exemptions, see (Pcb7-9; Pb18-20), then each one of those longstanding protections would immediately fall away.

A number of examples demonstrate the dramatic results—ones the Legislature could not have intended. Law enforcement would have to produce a recording of a victim's death even in the immediate aftermath of a murder should any member of the public request it, even if notifications to the victim's family remained underway. Compare N.J.S.A. 40A:14-118.5(*l*), with N.J.S.A. 47:1A-3(a). Custodians would similarly be required to release to any requestor any video footage revealing "security information" that would "jeopardize security of [a] building," including for a school or house of worship, or video footage that reveals "surveillance techniques," the disclosure of which would "create a [safety] risk," compare N.J.S.A. 47:1A-1.1. And of special concern to law enforcement, construing subsection (*l*) as overriding OPRA's exemptions would require the production of a BWC recording that "pertain[s] to an investigation in progress" even where its release would be "inimical to the public interest." See N.J.S.A. 47:1A-3(a); compare Lyndhurst, 229 N.J. at 578 (explaining importance of investigation-in-progress exemption in protecting investigations by withholding "[w]itness statements and investigative reports

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right to obtain a video under subsection (*l*), irrespective of OPRA's longstanding and traditional exceptions, so too would everyone else.

with narrative details"). Under a reading that renders subsection (*l*) the sole word on exemptions, however, none of these concerns matter.

Petitioner's reading would also upend third-party privacy interests, again without a whit of evidence that the Legislature intended to do so. After all, were Petitioner's reading of subsection (*l*) correct, unredacted disclosure would be mandated even if such disclosure "would violate [a] citizen's reasonable expectation of privacy." N.J.S.A. 47:1A-1. See, e.g., Paff v. Ocean Cnty. Prosecutor's Off., 235 N.J. 1, 28 (2018) (recognizing a potentially heightened privacy interest in recordings that depict "a sexual assault or similar crime"); Asbury Park Press v. Ocean Cnty. Prosecutor's Off., 374 N.J. Super. 312, 330-31 (Law. Div. 2004) (upholding non-disclosure of recording of gunshot victim's dying words). This is to say nothing of the protections OPRA imports for victims of domestic violence or sexual assault from Rule 1:38-3(c)(12); from the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35; or from New Jersey's Crime Victim Bill of Rights, N.J.S.A. 52:4B-36.2(b). See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9. Because these protections can only apply to BWC recordings via OPRA (they are clearly not captured by subsection (*l*) of the BWCL), they would fall away under Petitioners' reading. It is inconceivable that the Legislature intended this result.

The scheme Petitioners propose would be especially illogical because it would apply to BWC footage alone, not to other video footage in the government's possession. For instance, where release of a recorded witness interview pertaining to an ongoing investigation would be inimical to the public interest, it could be withheld under N.J.S.A. 47:1A-3(a) if the interview was conducted by a non-uniformed detective and captured by a stationary camera rather than BWC. See N.J.S.A. 40A:14-118.3 (requiring only uniformed officers to wear BWCs). But if that interview was conducted by a uniformed officer and captured by that officer's BWC, then under Petitioner's reading, OPRA would fall away—even if the video equally jeopardized an investigation, would reveal the identity of a minor charged as delinquent, see Digital First Media v. Ewing Twp., 462 N.J. Super. 389, 393 (App. Div. 2020), or otherwise triggered an OPRA exemption. It is hard to believe that the Legislature intended for the protection of such sensitive recordings to hinge on that kind of fortuity.

Petitioners seem to recognize the extraordinary sweep of their reading, but the remedy they offer finds no support in the statute, and does not satisfactorily address the issue. Petitioners offer that "[a] provision of OPRA might justify redacting a video"—for instance, "[i]f a video shows gory images, nudity, or someone's driver's license, OPRA's privacy provision would likely justify blurring." (Pcb7 n.5). This is welcome as a matter of common sense, but

Petitioners never square that concession with how they suggest subsection (*l*) operates. After all, if the word "only" in subsection (*l*) means that no exemption applies beyond the four enumerated categories, (Pcb7-9; Pb18-20), it is unclear how "OPRA's privacy provision," (Pb7 n.5), could ever apply. Nor, for that matter, is it clear how a custodian could withhold any "portion" of such a video under OPRA, because OPRA permits custodians only to "delete or excise from a copy of [a] record that portion which the custodian asserts is exempt from access." N.J.S.A. 47:1A-5(g). That is an insuperable hurdle for Petitioners' theory that the BWCL's four enumerated categories are exclusive, and that OPRA's non-CIR exemptions are categorically inapplicable to BWC recordings. Instead, subsection (*l*) speaks to public access vis-à-vis one OPRA exemption, but does not trump them all.

* * *

Because the Attorney General is charged with implementing and enforcing the BWCL's provisions, N.J.S.A. 40A:14-118.4, deference to his interpretation is "particularly fitting," Digital First, 462 N.J. Super. at 398; see also State v. Coviello, 252 N.J. 539, 557 (2023) ("[A]lthough we are not bound by it, we commonly pay significant attention to the legal position of the Attorney General, the 'sole legal adviser' to state government concerning the interpretation of 'all statutes' that affect state agencies."). Yet no deference is needed to find that

OPRA's non-CIR exemptions survive. The BWCL seeks to foster accountability in policing and improve police-community trust, e.g., Governor's Press Release, by ensuring that countless hours of footage are created, and can thus be referred back to if necessary to address alleged misconduct. Subsection (k) ensures that subjects have special rights to review, so that they can decide whether to ensure recordings that capture them are retained for extended periods. And subsection (*l*) confirms that BWC footage is not automatically shielded from public access as CIR. But nothing in the law suggests the Legislature intended subsection (*l*) to supplant rather than supplement OPRA's non-CIR exemptions, or intended any of the dramatic results that would otherwise follow. This Court should therefore affirm that OPRA's non-CIR exemptions remain applicable.

## POINT II

## THE BWCL THEREFORE DOES NOT REQUIRE PRODUCTION OF THESE VIDEOS.

Because the BWCL does not trump longstanding protections under OPRA, the Appellate Division correctly held that the particular videos at issue were not subject to mandatory public disclosure. As an initial matter, Fuster—the subject of the footage—had a right to review the videos under subsection (k) in order to decide whether to request their extended retention to effectuate the BWCL's goal of ensuring that recordings are available to help resolve investigations and complaints. In this case, however, that is not what Petitioners are seeking—they

want to possess a copy of the video, after they already requested the extended three-year retention period.[11] As to that request, a long-established confidentiality applies—for allegations of criminal misconduct against a person who was neither arrested nor charged with a crime. See BCPO, 447 N.J. Super. at 188-89. The panel below both properly identified and applied that grant of confidentiality here.

### A. Section 9(b) Of OPRA Exempts These Records.

If this Court agrees that the BWCL does not abrogate OPRA's exemptions, then one of OPRA's long-established exemptions applies. Enacted in 2002 to amend the prior Right To Know Law (RTKL), OPRA reflects the crucial goal of "maximiz[ing] public knowledge about public affairs," Bozzi v. City of Jersey City, 248 N.J. 274, 283 (2021), while simultaneously guarding against specific forms of disclosure that are contrary to "the public interest," Mason v. City of Hoboken, 196 N.J. 51, 65 (2008) (quoting N.J.S.A. 47:1A-1); see Burnett v.

[11] To be clear, Fuster did have a right to view BWC footage under subsection (k), and he appears not to have gotten that opportunity despite requesting access. See (Pa3; Pa14) ("My name is Antonio Fuster and I'm requesting both the report and the Video that was filming during my statement from May 25th 2022"). The Attorney General is aware of no reason why Fuster should not be permitted to view the video at Department headquarters. But while this Court could therefore issue a limited remand for the Appellate Division or trial court to assess what, if any, remedy would be appropriate, the text of the BWCL makes clear that no remand is strictly necessary—as he has since elected to request the three-year retention period, the entire object of the subsection (k) review.

Cnty. of Bergen, 198 N.J. 408, 414 (2009) (describing Legislature's "twin aims" of "ready access to government records and protection of a citizen's personal information"). See also Kovalcik v. Somerset Cnty. Prosecutor's Off., 206 N.J. 581, 588 (2011). OPRA therefore both defines "government records" broadly and "exempts more than twenty categories of records" from its scope. Rivera v. Union Cnty. Prosecutor's Off., 250 N.J. 124, 141 (2022) (Rivera).

OPRA also incorporates other sources of confidentiality. Most relevantly, N.J.S.A. 47:1A-9(b) (Section 9(b)) permits records to be withheld or redacted pursuant to "any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law." That provision has long played an important role in our State's public records jurisprudence, "codif[ying] the Legislature's unambiguous intent that OPRA not abrogate or erode existing exemptions to public access." BCPO, 447 N.J. Super. at 202. Section 9(b) is how New Jersey law incorporates bedrock protections for federal grand jury subpoenas, Gannett N.J. Partners, L.P. v. Cnty. of Middlesex, 379 N.J. Super. 205, 214 (App. Div. 2005); telephone billing records, Middlesex, 379 N.J. Super. at 216-17; and attorney work product, Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 542 (2012). It provides a primary source of authority for law-enforcement officials to issue familiar "Glomar responses"—i.e., responses that avoid

confirming or denying the existence of a criminal investigation. See BCPO, 447 N.J. Super. at 203-04; see also id. at 196-201 (detailing legal history of the Glomar response). And it renders police internal-affairs reports exempt from access under OPRA, while leaving them subject to the more delicate balance authorized by the common law right of access. See Rivera, 250 N.J. at 141-43. Section 9(b) is a core part of OPRA.

As the Appellate Division properly recognized in this case, consistent with Section 9(b), there is an applicable "grant of confidentiality … recognized by … judicial case law": confidentiality for law enforcement records concerning criminal allegations that result neither in charges nor an arrest. Fuster, 477 N.J. Super. at 489-90 (citing BCPO, 447 N.J. Super. at 189)). BCPO is illustrative. There, the North Jersey Media Group submitted an OPRA request to the Bergen County Prosecutor's Office, seeking "[a]ll law enforcement reports filed against or involving" A.B.C. and "[a]ll complaints … made to law enforcement officials concerning" A.B.C., despite A.B.C. having "not been charged with any crime." 447 N.J. Super. at 189-90. In response, the BCPO declined "to confirm or deny the existence of such records," explaining that to answer in either direction could risk unduly impacting an uncharged person. Ibid. In rejecting a challenge to that response, BCPO canvassed both history and case law and identified the longstanding common law grant of confidentiality for law enforcement "records

regarding a person who has not been arrested or charged." Id. at 203-04. As it noted, this rule protects not only "the privacy interest of the individual," but "the integrity and effectiveness of law enforcement efforts"—ensuring that investigative methods, techniques, and other aspects of an investigation are not unnecessarily disclosed and/or that witnesses are not unnecessarily chilled from coming forward with useful information. Id. at 204.

Indeed, courts have long recognized that governments require discretion to withhold information about those who have been privately accused, but not publicly charged, with crimes. From grand jury secrecy rules, which protect both the accused and the integrity of the criminal process itself, see, e.g., United States v. Proctor & Gamble Co., 356 U.S. 677, 681 n.6 (1958); State v. Doliner, 96 N.J. 236, 246-52 (1984); to the confidentiality traditionally afforded to a State's own criminal file, see, e.g., State v. Marshall, 148 N.J. 89, 273-74 (1997); to standards of professional conduct that limit a prosecutor's discussion of its decisions not to charge an individual to "already publicized matter[s]" and then, only "where justice so requires," see ABA Standards for Criminal Justice: Prosecutorial Investigations § 1.5(a)(v)[12] (AGa25), it is well understood that

[12] Available at https:// www. americanbar.org/groups/criminal_justice/publications/criminal_jus tice_section_archive/crimjust_standards_pinvestigate/#1.5 (last accessed June 24, 2024).

publicizing private allegations of criminal wrongdoing is a weighty matter. As this Court explained five years before the enactment of OPRA, because "[t]he receipt by appropriate law enforcement officials of information concerning the existence or occurrence of criminal activities is critical to the uncovering and the prosecution of criminal offenses, the law has long treated the information as confidential and privileged against disclosure, thereby protecting witness security, the State's relationship with its informants and witnesses, and other confidential relationships, among other things." Marshall, 148 N.J. at 273 (quotation omitted). That grant of confidentiality is incorporated into OPRA through Section 9(b).

Indeed, the structure of OPRA confirms that this grant of confidentiality remains applicable. In addition to the statute's general protection for privacy interests, see N.J.S.A. 47:1A-1, the text of N.J.S.A. 47:1A-3(b) treats criminal accusations differently based on whether an "arrest has been made[.]" If an arrest has been made, OPRA's Section 3(b) requires the release of a wide array of information—including "the defendant's name, age, residence, occupation, marital status, and similar background information," as well as the complainant's identity. N.J.S.A. 47:1A-3(b). But "where a crime has been reported but no arrest yet made," Section 3(b) requires release only of "information as to the type of crime, time, location and type of weapon, if

any"—but nothing that would identify the suspect. Ibid. (emphasis added). In that respect, the design of OPRA confirms what Section 9(b) and BCPO already plainly established: individuals who have been privately accused but not publicly charged with a crime have considerable protections.

Section 9(b) and the time-honored protections it incorporates resolve this particular OPRA request for video footage. The footage at issue undisputedly involves a civilian's accusations of criminality leveled against a third party, where those accusations resulted in no charges. See Fuster, 477 N.J. Super. at 484; (Pa2-3). Where videos capture not only a witness's accusations, meanwhile, but also law enforcement's reactions to those accusations—including responses that may reflect an investigative method or practice, rather than a considered expression of law enforcement's views about a matter—their dissemination necessarily risks lending the government's imprimatur to private accusations. And while Petitioners correctly note that in each of the cases that the Appellate Division relied on in BCPO, the record at issue was not a "public record" within the meaning of the then-governing RTKL, (Pb22-23), that is irrelevant to those cases' core teachings: that there is a longstanding, precedent-grounded grant of confidentiality for information law enforcement receives concerning allegations of criminal activity against a person who was neither arrested nor charged. Nor is it relevant whether the RTKL incorporated judicial

grants of confidentiality, see (Pb23), because Section 9(b) of OPRA clearly does so. See BCPO, 447 N.J. Super. at 204. Consequently, allowing a requestor to receive a copy of this recording as a public record under OPRA—and thereby to be free to disseminate it further—would violate this longstanding grant of confidentiality.[13]

Nothing about this result is inconsistent with Lyndhurst, 229 N.J. at 551, 580, or Attorney General Law Enforcement Directive 2018-1, as amended by Attorney General Law Enforcement Directive 2019-4. Lyndhurst held that the government's interest in the confidentiality of certain dash-camera recordings was outweighed by the particular plaintiff's interest in accessing them, thus requiring disclosure under the common law; it did not address whether BWC recordings are subject to disclosure under OPRA. 229 N.J. at 551, 581; see also, e.g., Rivera, 250 N.J. at 143-44 (explaining that documents can be disclosed under the delicate balance of the common law but nevertheless not subject to broader public disclosure under OPRA). Moreover, public access to videos

[13] Disclosure of this footage under OPRA would also have the effect of making public information protected under other exceptions too, including the exceptions for allegations relayed to DCPP—such as the child's name and information about his medical and social history, see N.J.S.A. 9:6-8.10a—as well as personal information about other individuals shielded by OPRA's overarching privacy provision, see N.J.S.A. 47:1A-1. Nor can this footage be redacted to protect this information while meeting Petitioners' stated need, given that they seek to compare all the information in the police reports to the details of Fuster's recorded allegations. (Pa3).

featuring police uses of force does not generally implicate the grant of confidentiality for one civilian's allegations against another who was never charged, which encourages witnesses to share information with law enforcement and protects the privacy of civilians who have been accused but never charged. See BCPO, 447 N.J. Super. at 204. While these concerns are implicated by the video recording of a civilian's allegations of criminal misconduct by a relative, they are not similarly implicated by a video of force used by police.

Finally, although this longstanding grant of confidentiality may be pierced when the requestor's need for the records outweighs the State's interest in maintaining confidentiality, that general weighing of interests is appropriate under the common law right of access, not OPRA. Compare (Pb25-26).[14] After all, with limited exemptions such as certain personnel or victims' records, see N.J.S.A. 47:1A-1.1, -10, the typical OPRA analysis turns only on what the item is—not on the requestor's personal interest, see MAG Entm'mt, LLC v. Div. of Alcoholic Beverage Ctrl., 375 N.J. Super. 534, 543 (2005) (noting "the purpose or motive for which information is sought is generally immaterial to the disclosure determination under OPRA"); N.J. Builder's Ass'n v. N.J. Council on

[14] And, in any event, the BWCL generally and subsection (k) specifically already account for one particular interest a requestor could have by enabling subjects to review relevant footage to decide whether to request extended retention. See supra Point I.B.

Affordable Housing, 390 N.J. Super. 166, 182 (App. Div. 2007) ("[A] requestor's status in separate proceedings neither diminishes nor expands the requestor's right of access to government records under OPRA[.]"). It is under the common law, by contrast—or under a similar rubric in the context of a civil discovery dispute—that a requestor's particularized interest generally comes in. E.g., Rivera, 250 N.J. at 144; Piniero v. N.J. Div. of State Police, 404 N.J. Super. 194, 207 (App. Div. 2008) (referring to Loigman factors in civil discovery dispute). Petitioners' OPRA claim, in short, is foreclosed by Section 9(b).

### B. The Common Law Continues To Provide For Additional Access, But Has Not Been Satisfied In This Particular Case.

Unlike OPRA, the common law right of access relies upon an "exquisite" fact-sensitive balancing test that considers the requestor's particularized interest in the record, and weighs that interest against the government's interest in keeping that record confidential. Loigman v. Kimmelman, 102 N.J. 98, 108, 113 (1986) (quotation omitted); see Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 254 N.J. 242, 264 (2023); Rivera, 250 N.J. at 144. Because OPRA's statutory exemptions do not apply to the common law, and the common law's definition of a public record is broader than OPRA's, the common law crucially offers an independent source of access even if OPRA otherwise precludes disclosure. See, e.g., Rivera, 250 N.J. at 135; Lyndhurst, 229 N.J. at 578-81. The common law thus operates as a safety valve to ensure disclosure can occur

in a particular case, even where an OPRA exemption applies, so long as the case-specific balance favors release.

This Court has provided criteria for that inquiry. To gain access to records under the common law, a requestor must show that: (1) the records are common-law public documents; (2) the requestor has an interest in the subject matter; and (3) "the citizen's right to access" outweighs "the State's interest in preventing disclosure." Keddie v. Rutgers, State Univ., 148 N.J. 36, 50 (1997) (quotation omitted). The balancing of interests under the third criterion requires looking at both sides of the ledger—for disclosure and for confidentiality. See Rivera, 250 N.J. at 147. As to the requestor, the court evaluates "the importance of the information sought to the plaintiff's vindication of the public interest." Ibid. (quoting Loigman, 102 N.J. at 113). Given the myriad different materials captured by BWCs and the wide-ranging reasons a person may request footage, this will depend on the nature of both the individual's need and the materials they request. Cf. id. at 147-48 (detailing considerations in the internal-affairs context). On the other side of the ledger, courts consider:

> (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government;
>
> (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed;

> (3) the extent to which agency self-evaluation, program improvement, or other decision-making will be chilled by disclosure;
>
> (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers;
>
> (5) whether any finding of public misconduct have been insufficiently corrected by remedial measures instated by the investigative agency; and
>
> (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.
>
> [Loigman, 102 N.J. at 113.]

See also Rivera, 250 N.J. at 146.

The Appellate Division appropriately found that Petitioners' interests in obtaining the BWC recording do not outweigh legitimate concerns with publicly releasing a record of allegations that did not result in criminal charges. See Fuster, 477 N.J. Super. at 497. Consider Petitioners' interests first. No one disputes that Petitioners were "deeply upset" by the Department's decision not to charge their relative, and they assert a desire to obtain the BWC recording of Fuster's interview to prove the initial police report is "inaccurate or perhaps file an IA complaint against the officers." (Pa3). But for three primary reasons, their interests do not require disclosure.

First, Fuster "undoubtedly" recalls his own interview; indeed, he contacted the Department to allege inaccuracies in the initial report, and the Department memorialized them in a supplemental report. See supra at 4, 7. Possessing the video is not necessary for Petitioners to form an opinion about the Department's actions. Second, as explained above, although Petitioners have no right to a copy of the video, Fuster did have a right to review the footage to decide whether to request an extended retention period for the video. See N.J.S.A. 40A:14-118.5(j)(2)(e), (k). And third, if the Department mishandled Petitioners' allegations, Fuster is entirely able—without possession of the video—to file an IA complaint; after all, under subsection (j), the video must now be retained and thus is available for any such investigation. Moreover, to the degree Petitioners assert a need for the video in any subsequent civil litigation, they could obtain the BWC footage in that action, where it would properly be subject to a protective order—a kind of order that is unavailable in the context of a common law request.

Contrast these interests against the Department's interests in protecting individual privacy rights and the integrity of its investigation. As discussed, see supra at 35-36, long before OPRA, courts recognized the importance of allowing governments to keep confidential allegations offered by civilians against other individuals who were never charged. This grant of confidentiality not only

protects the privacy of the accused where no charges have issued, but also ensures the integrity of investigations by protecting investigative methods and ensuring that individuals are not unnecessarily deterred from producing information. See, e.g., BCPO, 447 N.J. Super. at 203-04; supra at 37-39. And while Petitioners themselves are already aware of the accused's identity (and thus could theoretically decide to accuse their relative publicly regardless of whether they possess the video), (Pcb13-14), a law enforcement agency has strong interests in not potentially lending "veracity, notoriety, [or] approbation" to accusations that it found insufficiently supported by probable cause to pursue, see BCPO, 447 N.J. Super. at 192, particularly where, as here, the recording does not just capture a complainant's statements, but also the reactions of the officers who interviewed him.[15]

Non-disclosure also protects the law enforcement interest in conducting investigations animated by the facts uncovered rather than later public scrutiny. However disappointed Petitioners are by the decision not to charge, they have never asserted that the officers who interviewed Fuster were unsympathetic, demeaning, or inappropriate. Requiring disclosure of law enforcement footage

[15] Petitioners disclaim any intent to publicize the video. (Pcb13-14 & n.10). But the proper common law balancing recognizes that, unlike a record in civil discovery subject to a protective order, the disclosure of a government record under the common law leaves entirely up to the third party the choice whether to disseminate or publish it further.

whenever a complainant believes charges should have been filed would not only risk chilling officers' decision-making about how to respond to the complainant's assertions, see Loigman, 102 N.J. at 113, but would also entail an "intolerable level of intrusion" into settled discretion protecting the ultimate decision whether to charge, see In re Grand Jury Appearance Request by Loigman, 183 N.J. 133, 147 (2005) (denying attorney's request to present claims of misconduct directly to a grand jury because permitting him to do so would constitute an "erosion of the prosecutor's screening authority" and "be disruptive of the orderly and fair disposition of cases"). It would also trouble victims and third-party witnesses or informants who provide valuable information, who have the expectation that their claims will not become public unless and until any charges are brought. See Loigman, 102 N.J. at 113 ("extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government").

To be clear, there are undoubtedly instances in which the release of a BWC recording will be appropriate under the common law right of access even where one of the OPRA exemptions applies. But like every other common law right of access claim, that outcome depends on the strength of the requestor's assertions, weighed against any interests that would be adversely impacted by release, including third-party rights to privacy and law enforcement's interest in

non-disclosure. Here, Petitioners' primary interests have been served by extended retention of the recording, which Fuster expressly requested and the Township acknowledged. (Pa22, 25-26). Thus, the public's interest in protecting individual privacy and in ensuring the integrity of criminal investigations outweighs Petitioner's interests, and the court below properly resolved this claim. BWC footage is a crucial and welcome tool for improving accountability and policy-community trust, and like any other record, it remains subject to OPRA's well established exemptions and to the traditional, fact-intensive balancing under the common law.

## CONCLUSION

This Court should affirm the Appellate Division's decision as modified.

Respectfully submitted,

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