

ANTONIO FUSTER and
BRIANNA DEVINE,

Plaintiff/Appellants,

v.

TOWNSHIP OF CHATHAM and
GREGORY LaCONTE, in his
official capacity as records
custodian,

Defendant/ Respondents.

SUPERIOR COURT OF NEW
JERSEY, APPELLATE DIVISION
Docket No. A-001673-22T2

Civil Action

On Appeal from
Docket No. MRS-L-1814-22

Sat Below:
Hon. Stuart A. Minkowitz, A.J.S.C.

BRIEF AND APPENDIX OF RESPONDENTS

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PRELIMINARY STATEMENT

Defendant Township of Chatham is a governmental entity with offices at 52 Meyersville Road, Chatham, New Jersey. Gregory LaConte is the designated Records Custodian for the Township of Chatham, also with an office at 52 Meyersville Road. Plaintiffs, Antonio Fuster (“Fuster”) and Brianna Devine (“Devine”), are believed to be the parents of a special needs child who is a juvenile.

Prior to May 2022, Fuster presumably was told by their son that a male relative might have perpetrated a reportable incident of sexual misconduct. As a result, Fuster, on May 25, 2022, went to the Chatham Township Police Department to report potential sexual misconduct by a male relative. While at the police station giving his report, the detective was wearing a body worn camera (“BWC”) that presumably recorded the interview.

Once the interview was over, the police notified and referred the investigation to the Morris County Prosecutor’s Office, as well as the Division of Child Protection and Permanency (“DCPP”). It should be noted under N.J.S.A. 9:6-8.10a, all records of child abuse reports shall be kept confidential. Once the initial investigation was complete, it was determined that there was not sufficient proof to establish probable cause as it related to the allegations reported and no charges would be filed, and the family was notified.

After receiving the determination from the police department, the Plaintiffs

disagreed with law enforcement's findings and believed there were discrepancies in the police reports and questioned the adequacy of the investigation. Plaintiffs justify the need for the video to review it so they can prove the reports were inaccurate and perhaps file an internal affairs complaint against the officers. It should be noted that reports are created by the investigating officer and are accurate to his or her recollection as to the totality of the investigation. If Plaintiffs were unhappy with the investigation and believe that their juvenile son is still at risk, then they should immediately, in accordance with N.J.S.A. 9:6-8.10, notify DCPD and file their concern. As it relates to the filing of an internal affairs complaint against any police officer or officers, if in fact Plaintiffs believe there was an issue with the investigation, then they should file an internal affairs complaint. To date the Respondent is unaware of any such complaints being made.

In reviewing the requests under the Open Public Meetings Act ("OPRA") and Common Law Right to Access ("CLRA") for documents filed by the Plaintiffs, the custodian of records balanced the privacy concerns of the special needs son of Plaintiffs, who is a juvenile, the privacy rights and concerns of the male relative who was accused but not charged, against the public policy of disclosure and access of government documents. Based upon that balancing test, as discussed further in Points II and III, and after notification of the county prosecutor's office of the request for the video, the records custodian provided his response in such a way as to limit any disclosure of

personal information of the unsubstantiated hearsay complaints made by Fuster captured on the BWC by denying the request and safeguarding same from public consumption.

As Plaintiffs' Verified Complaint states in footnote 1, (Pa2) "This is a highly private matter. To protect their son's privacy, this Verified Complaint refers to the allegations very vaguely. . ." The records custodian was also protecting the Plaintiffs' son's privacy, as well as the privacy of the male relative from the release of unsubstantiated hearsay complaints reviewed by the County Prosecutor and Division of Child Protection and Permanency that if released could have a devastating effect on the juvenile and male relative in accordance with North Jersey Media Group Inc., v. Bergen County Prosecutors' Office, 447 N.J. Super. 182, (App. Div. 2016).

STATEMENT OF FACTS

On or about May 25, 2022, Mr. Fuster arrived at the Chatham Township Police Department to report alleged sexual misconduct by a male relative (Pa2). The information regarding the alleged sexual misconduct was not witnessed by Mr. Fuster but was allegedly obtained from his special needs son (Pa2). A statement was obtained by a police officer who was equipped with a BWC.

Once the interview was over, the Chatham Police notified and referred the investigation to the Morris County Prosecutor's Office, as well as DCPD. It should be noted under N.J.S.A. 9:6-8.10a, all records of child abuse reports shall be kept

confidential. It should be further noted that under N.J.S.A. 9:6-8.10 New Jersey is a mandatory reporter state and Plaintiff should have notified the State Central Registry (“SCR”) who then would notify DCPD. Once the investigation was complete, it was determined that there was not sufficient proof to establish probable cause as it related to the allegations reported, and the family was notified (Pa3).

Thereafter, Mr. Fuster and his wife, Brianna Devine, obtained a copy of the initial police report from the Chatham Police Department and believed that the report did not contain all the unsubstantiated statements and accusations made during the May 25, 2022, interview (Pa2). The Plaintiffs were upset that no criminal charges were going to be filed against the male relative and intimated that they would possibly file an internal affairs complaint against the officers for how they handled the matter (Pa3).

On August 26, 2022, Mr. Fuster emailed the records custodian requesting both the report and the BWC video that was recorded during his statement from May 25, 2022 with the Chatham Township Police (Pa14-15).

On September 6, 2022, the records custodian responded with written reports but denied the request for the BWC video (Pa17-18). On September 7, 2022, again Mr. Fuster filed a request for the BWC video and for the first time requested the video under the common law. (Pa20). On September 15, 2022, by phone the records custodian notified Mr. Fuster that he needed an extension to respond to the request (Pa22). The

next day by email Mr. Fuster objected to the extension (Pa22).

On September 21, 2022, the records custodian denied Mr. Fuster's request (Pa28). On September 16, 2022, Ms. Devine, Mr. Fuster's wife, emailed a request under common law requesting a copy of the BWC footage (Pa36). On September 21, 2022, the record custodian sent Ms. Devine a denial letter (Pa6) referencing (Pa28).

PROCEDURAL HISTORY

On October 18, 2022, the Plaintiffs' attorneys filed a Verified Complaint and Order to Show Cause ("OTSC") to obtain the BWC video alleging two counts. The first count was for alleged violations under OPRA, and the second count was for alleged violation of CLRA. The Honorable Stuart A. Minkowitz, A.J.S.C., executed the OTSC on October 21, 2022. (Pa39). On November 28, 2022, Defendants filed a Verified Answer. (Pa43). Oral argument was heard on December 9, 2022. (1T).

On January 17, 2022, the trial court entered an Order entering judgment in favor of Defendants and denying Plaintiff's application for attorneys' fees. (Pa55-56). In The Honorable Stuart A. Minkowitz, A.J.S.C., opinion his conclusions of fact and law led to the finding that the video was a record by and held by law enforcement that related to someone who was investigated but not charged, and the video was exempt pursuant to North Jersey Media Group Inc., v. Bergen County Prosecutors' Office, 447 N.J. Super. 182, (App. Div. 2016) (Pa70-Pa72). For the same reasons and pursuant to Loigman v. Kimmelman, 102 N.J. 98, (1986), The Honorable Stuart A.

Minkowitz, A.J.S.C., also found that Plaintiffs were not entitled to the BWC video under the CLRA (Pa79-81). The court found that “Therefore, because plaintiffs have not met the third Keddie prong by showing that the public’s interest in disclosure outweighs the government’s interest in confidentiality, they are not entitled to the release of the BWC footage pursuant to the common law right of access. Keddie, 148 N.J. at 50”. (Pa81)

LEGAL ARGUMENT

POINT I

THE BODY CAMERA LAW AND OPRA MUST BE READ *IN PARI MATERIA* APPLYING THE ULTIMATE RESPONSIBILITY TO SAFEGUARD AND ENSURE CITIZENS RESONABLE EXPECTATION OF PRIVACY IS PROTECTED

The Plaintiffs, Antonio Fuster and Brianna Devine, argue that because an interview was captured on the body worn camera of an investigating officer and as one of the “subjects” of the video, that the video should automatically be available and disseminated pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 *et. seq.* (“OPRA”) and N.J.S.A. 40A:14-118.3. (“BWC law”). The use of body-worn cameras was mandated to be implemented and the video recorded falls into the category of a government document and as such are shielded based upon certain exemptions in OPRA and the BWC law, statutory and court-imposed limitations. In addition, the use of the BWC is further guided by the guidelines of the Attorney General’s Directive No.

2022-1.

The Attorney General’s Directive No. 2022-1, Section 10, Restrictions on access to and use and dissemination of BWC recording, state, at 10.1, entitled, “Specified authorized purpose for accessing/using stored BWC recordings:

No law enforcement officer or civilian employee of a law enforcement agency shall access, view, copy, disseminate, or otherwise use a BWC recording except for an official purpose as specified in this section and the law. BWC recording shall not be divulged or used by any law enforcement agency for any commercial or other non-law enforcement purposes. Access to and use of a stored BWC recording is permitted only.

The Directive then provides permitted access and use of the stored video limited to twelve (12), identified as subsections (a) through (l). The specific purposes that are relevant to this case are subsections (g), (h), and possibly (l).

Subsection (g) allows the law enforcement agency to review BWC’s that are stored to comply with legal obligations: “(g) to comply with the State’s obligation to turn over the recording to a person or entity;”. Footnote 5 indicates the legal obligations as responding to a subpoena, court order, a request under OPRA, or common law right-to-know. It further requires that disclosure only be allowed upon notice and presumably after authorization by the county prosecutor, director of the Division of Criminal Justice, or their designee.

Subsection (g) allows a law enforcement agency to review the stored documents based upon a request filed in accordance with OPRA in responding to a subpoena, court

order, or a common law right-to-know request. Specifically, Footnote 5 states: “In responding to a subpoena or court order or a request pursuant to the Open Public Records Act or common law right-to-know, disclosure of a BWC recording under this paragraph is permitted only after providing notice to the county prosecutor or designee, or to the director of the Division of Criminal Justice, or designee, pursuant to Section 11 of this policy”.

Prior to responding to this request, the Chatham Township Police Department, within 24 hours, notified the Morris County Prosecutor’s Office that the request was made. Pursuant to the Directive, this is not the final step, in that, to show or disseminate the recording to a civilian or non-law enforcement entity which Plaintiff is, subsection (h) must be followed. Once the request was received and notification was made as required in subsection (g), the recording was identified and reviewed and in accordance with section (h) and based on the county prosecutor’s guidance, same was denied.

The local police department could only disclose BWC to Plaintiffs if authorized to do so under subsection (h), “To show or disseminate the recording to a civilian or non-law enforcement entity, or to disseminate it to the public where the county prosecutor or designee, or director of the Division of Criminal Justice or designee, determines that disclosure to that particular person/entity or the public is warranted because the person/entity/public’s need for access outweighs the law enforcement interest in maintaining confidentiality”.

This section clearly requires that the county prosecutor or designee, or director of the Division of Criminal Justice or designee must determine that the disclosure to the particular person is warranted because the need for access outweighs the law enforcement interest in maintaining confidentiality.

The last section that allows access to and use of stored BWC video is subsection (l) which states, “(l). any other specified official purpose where the County Prosecutor or designee, or Director of the Division of Criminal Justice or designee, finds in writing that good and sufficient cause exists to authorize access to a particular BWC recording”. Although this section is not applicable here, it requires that the release of a BWC video to a civilian or non-law enforcement entity is only permissible when the county prosecutor or director of the Division of Criminal Justice finds in writing that “good and sufficient cause exists to authorize access . . .”

Upon the guidance received the Chatham Township Police Department and the records custodian appropriately responded to the OPRA request and the Common Law Right of Access request.

The above requirements echo the Attorney General’s Directive of ensuring that each local law enforcement agency provides a uniform response and safeguarding of BWC policy video storage and dissemination. The requirement to notify the county prosecutor and/or director of the Division of Criminal Justice, or their designees, before such video is disseminated to a civilian or non-law enforcement entity is consistent with

that policy goal. It provides a review of various law enforcement entities to ensure consistency throughout the State.

Plaintiffs' argument that the BWC video must be automatically turned over based upon N.J.S.A. 40A:14-118.3 is incorrect. That video can only be turned over once the county prosecutor and/or the director of the Division of Criminal Justice, or their designees, determine that the disclosure to that particular person/entity or the public is warranted. In addition, the turning over of a BWC video is also subject to the exclusions under OPRA and the common law right-to-know law, as well as other laws.

The BWC and OPRA laws need to be read *in pari materia* to achieve a fair understanding and implementation of legislative intent. The BWC law references OPRA, see N.J.S.A. 40A:14-118.5 (k), as well contains in its additional exclusions deemed non-governmental records not disclosable under OPRA, see N.J.S.A. 40A:14-118.5 (l). Our Supreme Court held in Marino v. Marino, 200 N.J. 315 (2009) at page 330:

“Statutes are considered to be *in pari materia* when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object.” 2B *Sutherland on Statutory Construction* § 51:3 (7th ed. 2008) (footnotes omitted); *accord State v. Crawley*, 187 N.J. 440, 453, 901 A.2d 924 (2006). As this Court has explained:

Statutes that deal with the same matter or subject should be read *in pari materia* and construed together as a “unitary and harmonious whole.” This maxim of statutory construction is especially pertinent when, as in this case, the statutes in question were passed in the same session.

[*St. Peter's Univ. Hosp. v. Lacy*, 185 N.J. 1, 14–15, 878 A.2d 829 (2005) (citation omitted).]

Resort to this maxim, like other tools used by courts to assist them in divining legislative intent, is helpful when the Legislature's intent is unclear. That is, “[s]tatutes *in pari materia* are to be construed together when helpful in resolving doubts or uncertainties and the ascertainment of legislative intent.” *In re Return of Weapons to J.W.D.*, 149 N.J. 108, 115, 693 A.2d 92 (1997); see *Febbi, supra*, 35 N.J. at 606, 174 A.2d 481 (stating that Legislature's intent is to be derived from considering entire statute and reading all sections together as a unified whole).

It seems clear that the production of governmental records although governed by OPRA and the overriding principal to safeguard and maintain confidentiality in those documents that members of the public have a privacy interest in is further supplemented by the new BWC law as it includes additional exemptions from public inspection of certain camera recordings. These exemptions from public inspection do not preempt OPRA but instead when read *in pari materia* only enhances the overriding principal to protect the public from disclosure of private allegations or unsubstantiated claims that could be made with malice to a police officer and then recorded requested and put up on social media to harm or injure a person reputation and character.

Based upon the Attorney General's guideline, the local police department followed the law and Directive No. 2022-1 by notifying the county prosecutor and appropriately responded to the Plaintiffs. Based upon the above, the Township of Chatham Police Department and records custodian followed the Attorney General's guideline and the denial of the BWC footage in accordance with the Appellate Divisions

holding in North Jersey Media Group Inc., v. Bergen County Prosecutors' Office, 447 N.J. Super. 182, (App. Div. 2016) and Loigman v. Kimmelman, 102 N.J. 98, (1986), was appropriate. Applying the balancing test as further set forth in Points II and III of the brief the Defendants appropriately denied the request for BWC under OPRA and CLRA as the public interest in disclosure did not outweigh the government's interest in maintaining confidentiality of allegations of a private third party citizen who was accused investigated and not charged.

POINT II

THE OPEN PUBLIC RECORDS ACT (OPRA) RECOGNIZES PRIVACY INTERESTS AND STATES A PUBLIC AGENCY HAS A RESPONSIBILITY AND AN OBLIGATION TO SAFEGUARD FROM PUBLIC ACCESS CITIZEN’S PERSONAL INFORMATION THAT IS REASONABLY EXPECTED TO BE PRIVATE.

On July 7, 2002, what is known as the Open Public Records Act (“OPRA”) became effective. The intent of the law was to provide citizens with the ability to obtain, review or copy governmental documents giving access to the same documents used in decision making processes and all other facets of government. The Legislature, however, put in certain safeguards to protect sensitive or private information of citizens that if exposed could cause embarrassment and potential harm to a private citizen.

The OPRA law states at *N.J.S.A. 47:1A-1*, Legislative findings and declarations:

The Legislature finds and declares it to be the public policy of this State that:

government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, ***with certain exceptions, for the protection of the public interest***, and any limitations on the right of access accorded by P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public’s right of access.

all government records shall be subject to public access unless exempt from such access by: P.L.1963, c. 73

(C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order;

a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and nothing contained in P.L.1963, c. 73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

The records custodian for a governmental entity subject to OPRA has a significant job in reviewing and identifying what documents are to be provided and what ones are to be shielded. When it comes to documents involving a “*citizen's reasonable expectation of privacy*” that determination is made more difficult because it is made on a case-by-case basis. In addition, any denial of the request for documents that a records custodian believes to be private or confidential must be made in such a way as to not expose the confidentiality and expectation of the citizen that the information remains private.

The Legislature stated in *N.J.S.A.* 47:1A-9(b): “b. The provisions of this act, P.L.2001, c. 404 (C.47:1A-5, *et al.*), shall not abrogate or erode 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, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record”. Thus, the records custodian can rely on judicial case law and statute to safeguard from public access personal information of a citizen.

In the case before us, the information at issue was personal, private, information of a special needs juvenile son who provided it to his father, who in turn divulged that information, in person, to the police and it was captured on a BWC. The information provided also implicated a third party, thus, there are two citizens’ privacy at issue in this instance. As pled in the Verified Complaint at ¶ 10, the Plaintiffs admit, “This is a highly private matter.” The Verified Complaint, at ¶ 10, states: “On May 25, 2022, Mr. Fuster went to the Chatham Police Department to report sexual misconduct by a male relative that was reported to him by his special needs son” (Pa2). Footnote 1 states, “This is a highly private matter. To protect their sons’ privacy, this Verified Complaint refers to the allegations very vaguely, but a more specific certification can be made under seal if necessary” (Pa2).

It is clear from the pleadings that even the Plaintiff agrees that there is an expectation of privacy in the information contained in the video statement

given to the police, specifically the BWC video of the complaint made by the Plaintiff father.

The court, in Burnett v. County of Bergen, 198 N.J. 408 (2009), addressed the privacy issue of a citizen versus the right of a citizen to documents. In so doing, the court adopted a balancing test borrowed from Doe v. Poritz, 142 N.J. 1 (1995), at page 427:

OPRA's legislative history, therefore, offers direct support for a balancing test that weighs both the public's strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy.

To balance OPRA's interests in privacy and access, we look to *Doe* for guidance. Although *Doe* considered constitutional privacy interests implicated by Megan's Law, it relied on case law concerning statutory privacy provisions under the Freedom of Information Act (FOIA). *Doe, supra*, 142 N.J. at 82–86, 662 A.2d 367. Similarly, the Government Records Council applies the factors outlined in *Doe* in addressing statutory privacy claims under OPRA. See *Merino v. Boro. of Ho-Ho-Kus*, GRC Complaint No. 2003–110 (July 8, 2004). Because *Doe* clearly identifies the key inquiries, we adopt its factors here:

(1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

[*Doe, supra*, 142 *N.J.* at 88, 662 *A.2d* 367 (citation and internal quotation marks omitted).]

Applying these factors to the facts of this case, the records custodian appropriately denied the BWC video. Factor (1) looks to the type of record which is a video of a third-party reporting a third-party's statement to him. The information was not vetted nor did the reporter have actual knowledge of the facts of the statement. Factor (2) looks at what information the document does or might have contained in it and based on the Plaintiffs own pleadings, it is private: "This is a highly private matter." Factors (3) and (4) look to the potential for harm and injury from disclosure and again from Plaintiffs' own pleadings, "This is a highly private matter."

Factors (5) and (6) look to adequacy to prevent disclosure and degree of need for access. Based on the reason put forth in Plaintiffs' papers, the need is to use the video to "prove the [police] reports were inaccurate and perhaps file internal affairs complaints", which indicates the video will certainly not be safeguarded and, in fact, will be used in further litigation. Plaintiffs fail to realize that any citizen can file an internal affairs' complaint and the actions or inactions of the officer will be appropriately reviewed so there is no need for disclosure of the BWC video.

Lastly, Factor (7) looks to see if there is public policy or statutory mandates toward access and to the contrary public policy is to protect

juvenile information from the public and protect those who are accused and investigated without a finding of probable cause to be subject to unproven allegations.

Specifically, as it relates to juvenile records R. 1:38-3 excludes (d), records of family part proceedings, to include (d)(5), Juvenile delinquency records (d)(10), Names and addresses of victims or alleged victims of domestic violence or sexual offenses. N.J.S.A. 2A:4A-60, Disclosure of juvenile information, penalties for disclosure, N.J.S.A. 2A:82-46, Child victims of certain crimes, and N.J.S.A. 9:6-8.10, reports of child abuse. These are examples of laws that protect children from disclosure of private information that could be detrimental to their mental and physical wellbeing if allowed to be consumed by the public under the guise of “right-to-know” and OPRA.

Based upon the above and the public policy behind the above identified statutes and the information requested as it relates to the juvenile, it is clearly private and personal information that under the balancing test and public policy is clearly a document the records custodian should not be required to release under OPRA.

As it relates to disclosers and the privacy rights of the accused, they too have a privacy right in non-disclosure of the BWC video. Using the

Burnett analyses, the same result of non-disclosure would be found but, more importantly, there is a specific exclusion that protects an accused's privacy right when no charges are brought against them.

In North Jersey Media Group Inc., v. Bergen County Prosecutors' Office, 447 N.J. Super. 182, at page 204, the court stated:

In sum, before OPRA was enacted, judicial decisions recognized the need to maintain "a high degree of confidentiality" for records regarding a person who has not been arrested or charged. The confidentiality accorded such information promotes both the integrity and effectiveness of law enforcement efforts for the benefit of the public at large. In addition, the grant of confidentiality protects the privacy interest of the individual who, lacking an opportunity to challenge allegations in court, would face irremediable public condemnation. The need and scope of confidentiality recognized in our courts' decisions "may duly be claimed to restrict public access to a public record or government record." *N.J.S.A. 47:1A-9(b)*. We therefore hold that, pursuant to *N.J.S.A. 47:1A-9(b)*, an exemption exists for information received or maintained by law enforcement agencies regarding a person who has not been arrested or charged with an offense.

As the court recognized in North Jersey Media above, there exists an exemption for information received or maintained by law enforcement agencies regarding a person who has not been arrested or charged with an offense as in this case.

Based on the above, the Plaintiffs' Appeal should be dismissed as the

records custodian appropriately denied the document requested, BWC video, based on the Burnett seven-point balancing test and the exemption judicially recognized in North Jersey Media Group Inc., v. Bergen County Prosecutors' Office, 447 N.J. Super. 182.

POINT III

THE COMMON LAW RIGHT OF ACCESS RECOGNIZES THAT THE PERSON SEEKING ACCESS MUST ESTABLISH AN INTEREST IN THE SUBJECT MATTER OF THE MATERIAL AND THE CITIZEN'S RIGHT TO ACCESS MUST BE BALANCED AGAINST THE STATE'S INTEREST IN PREVENTING DISCLOSURE.

As with Plaintiffs' request under OPRA, the request under the Common law right of access was also properly denied by the records custodian because the Plaintiffs failed to meet the three predicates as identified in Keddie v. Rutgers, 148 N.J. 36, 50 (1997) and Plaintiffs also fail to meet the six-factor balance test in Loigman v. Kimmelman, 102 N.J. 98, 113 (1986) to compel disclosure.

The Court in Keddie v. Rutgers, 148 N.J. 36 (1997) at page 50 stated:

The common-law right to access public records depends on three requirements: (1) the records must be common-law public documents; (2) the person seeking access must "establish an interest in the subject matter of the material," *South Jersey Publishing Co. v. New Jersey Expressway Auth.*, 124 N.J. 478, 487, 591 A.2d 921 (1991); and (3) the citizen's right to access "must be balanced against the State's interest in preventing disclosure." *Higg-A-Rella*, *supra*, 141 N.J. at 46, 660 A.2d 1163.

In this case, the Plaintiff, Antonio Fuster, meets the first predicate but fails to meet the second predicate and third predicate. The Plaintiff, Antonio Fuster, did not establish an interest in the subject matter of the material, only stating in the request, “I am requesting copies of the BWC video of my in-person report from [M]ay 25th 2022 under the common law right of access.” (Pa20) Plaintiff, Brianna Devine, never requested any documents under OPRA and as such she has no claim pursuant to Count One of the Verified Complaint. Next, we must analyze if Plaintiff, Antonio Fuster’s, right to access is balanced against the State’s interest in preventing disclosure.

The court, in Loigman v. Kimmelman, 102 N.J. 98, (1986), at page 113, stated:

If the court deems it necessary to view the materials *in camera*, it will thereafter make a final determination as to whether, by further excision or deletion of privileged and confidential materials, it can appropriately order the materials released. In doing so, some of the considerations that may be examined will include: (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 ****967** 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 findings of public

misconduct have been insufficiently corrected by remedial measures instituted 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. *See Martinelli v. District Court, supra*, 199 Colo. at 171, 612 P.2d at 1089 (quoting *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D.Pa.1973)), and noting these and other factors in evaluating right of access to police investigative file). Against these and any other relevant factors should be balanced the importance of the information sought to the plaintiff's vindication of the public interest.

When analyzing the first two factors, Factor (1) and (2), if highly personal information about a juvenile is released, it would undoubtedly cause people and potential good Samaritans to second guess getting involved. Additionally, the special needs juvenile would also potentially be harmed in that was it his intention that the disclosure he made to his father be subject to OPRA or the common law right to access public records regarding him? The third (3) factor also goes against disclosure in that if interviews of this type are made public, the decision to initiate investigation might be postponed or referred to the Division of Child Protection and Permanency pursuant to N.J.S.A. 9:6-8.10, Reports of child abuse, where such documents are statutorily exempt. Factor (4) also goes against disclosure as the information sought was hearsay from a third party that was not vetted or verified. The informant had no first-hand factual knowledge of the events

he was told by his special needs juvenile son. As for factors (5) and (6), these are not applicable to this case.

Based upon the above and after analyzing the six factor Loigman test, the records custodian's decision not to disclose the BWC video was appropriate because the State's interests to protect the privacy interests and future investigations of this type of incident is greater than disclosing the BWC video to the Plaintiffs. As such, Count Two of the Verified Complaint was appropriately dismissed along with Count One. This Court should dismiss Plaintiffs' appeal as the custodian of records was protecting the privacy rights of an accused where no probable cause was found or accusations sustained and that of a special needs juvenile who, even in their own complaint and brief, the Plaintiffs agree that "This is a highly private matter."

(Pa2)

POINT IV

PLAINTIFFS ARE NOT ENTITLED TO ATTORNEYS' FEES AND LITIGATION COSTS

OPRA provides that a party who prevails "shall" be entitled to reasonable attorneys' fees and litigation costs. N.J.S.A. 47:1A-6. The trial court concluded that Plaintiff was not entitled to attorneys' fees because they did not prevail.

Based on the unique issues presented as it relates to the alleged horrific allegations of sexual abuse perpetrated upon a special needs juvenile together with the fact that the accused was not charged and the stigma that such requested information if publicly disclosed could have on both the accused and juvenile legal fees should not be awarded as the denial was appropriate.

Defendants' responsibility and obligation under OPRA and CLRA to safeguard from public access personal information effecting a citizen who has an expectation of privacy that police investigations will not be divulged where there has been no crime committed or probable cause found as well as the protection of the juveniles right to privacy in this matter should be and has been protected. This Court should deny any request for attorneys' fee or costs.

CONCLUSION

For all the reasons argued above, this Court should affirm the sound decision of the Honorable Stuart A. Minkowitz, A.J.S.C.

Respectfully submitted,

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Dated: June 14, 2023

By: *Peter J. King*
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