ANTONIO FUSTER and BRIANNA DEVINE, Plaintiffs/Petitioners, v. TOWNSHIP OF CHATHAM and GREGORY LaCONTE, in his official capacity as records custodian, Defendants/ Respondents.	Supreme Court of New Jersey, Docket No. 089030 On Certification from a Final Judgment of the Appellate Division, Docket No. A-1673-22 A Civil Action Sat Below: Hon. Lisa Rose, J.S.C. Hon. Morris G. Smith, J.S.C. Hon. Lisa Perez Friscia, J.S.C (t/a)

PLAINTIFFS' SUPPLEMENTAL BRIEF & APPENDIX

PASHMAN STEIN WALDER HAYDEN
A Professional Corporation
Court Plaza South – Suite 200
21 Main Street
Hackensack, New Jersey 07601
Ph: (201) 488-8200
F: (201) 488-5556
cgriffin@pashmanstein.com

Attorneys for Plaintiffs,
Antonio Fuster and Brianna Devine

On the brief:
CJ Griffin, Esq. (#031422009)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes

TABLE OF APPENDIX

PRELIMINARY STATEMENT

Plaintiffs submit this Supplemental Brief to supplement the arguments made in their petition for certification brief and Appellate Division briefs.

Plaintiffs rely upon their prior briefing regarding common law access. In this brief, they focus on their statutory right of access, explaining how the Appellate Division's decision ignores longstanding cannons of statutory interpretation. (Point I). Plaintiff Antonio Fuster is entitled to review the body-worn camera (BWC) video pursuant to Subsection (k) of the Body-Worn Camera Law (BWCL). Both Plaintiffs are entitled to access the BWC video pursuant to Subsection (l) of the BWCL because the BWCL lists the "only" categories of BWC videos that shall be exempt and this BWC video falls outside those enumerated categories. The Appellate Division erred by rendering portions of the BWCL meaningless and superfluous, ignoring the BWCL's plain language, and ignoring clear statements in the legislative history that the BWCL is intended to dictate when BWC videos may be exempt.

Although the BWC video is expressly accessible to Plaintiffs and the Court's analysis could end there, Plaintiffs nonetheless address the Appellate Division's application of a purported "privilege" or "grant of confidentiality" for records relating to a person who is "criminally investigated but neither

arrested nor charged." (Point II). As argued further below, there is no such privilege or grant of confidentiality. Instead, the cases cited by the Appellate Division simply constitute old jurisprudence determining whether certain law enforcement records were accessible under the Right to Know Law or the common law right to access in the factual circumstances of those cases. Where a record is expressly accessible under OPRA or some other statute, this old case law cannot be used to trump statutory dictates and deny access to the record. Where a record is not accessible under OPRA, the fact that a person was criminally investigated but never arrested or charged should simply be one factor to consider in a common law balancing test. The Appellate Division's published decision below is being applied by lower courts in a very broad manner to keep important records from the public. It is important that this Court provide guidance.

For all the reasons argued below, this Court should reverse the Appellate Division's decision.

LEGAL ARGUMENT[1]

I. AS THE SUBJECT OF THE VIDEO, MR. FUSTER HAS A SPECIAL STATUTORY RIGHT TO REVIEW THE BWC VIDEO

The BWCL requires almost every uniformed law enforcement officer to wear a BWC and requires BWCs to be activated during most interactions with civilians. N.J.S.A. 40A:14-118.3, -118.5(c). The BWCL also requires every BWC video to be retained for at least 180 days. N.J.S.A. 40A:14-118.5(j). Several types of BWC videos, however, must be retained for longer.

At issue in this case is N.J.S.A. 40A:14-118.5(j)(2)(e), which provides that a BWC recording "shall be retained for not less than three years if voluntarily requested by: . . . (e) any member of the public who is a subject of the [BWC] recording[.]" The definition of "subject" is expansive and includes a "suspect, victim, detainee, conversant, injured party, or other similarly situated person who appears on the [BWC] recording, and shall not include a person who only incidentally appears on the recording." N.J.S.A. 40A:14-118.5(a)

[1] The record below is sparse because Chatham did not submit any certifications or other evidence in support of its opposition to Plaintiffs' lawsuit, despite having the burden of proof. N.J.S.A. 47:1A-6. Chatham's counsel admitted at the appellate oral argument that he had never viewed the BWC video at issue. Plaintiffs do not know whether more than one officer recorded the conversation. For ease of reading, Plaintiffs continue to refer to a singular BWC video throughout their brief, but Mr. Fuster may be the subject of more than one video.

(emphasis added). "To effectuate" the right provided by N.J.S.A. 40A:14-118.5(j)(2)(e), "the member of the public . . . shall be permitted to review the [BWC] recording in accordance with the provisions of [OPRA] to determine whether to request a three-year retention period." N.J.S.A. 40A:14-118.5(k) (emphasis added).

After learning in late August 2022 that there would be no charges against the male relative, Mr. Fuster immediately filed an OPRA request for the BWC video of his May 25, 2022 discussion with police because he wanted to review it to determine whether to request the longer retention schedule. The Appellate Division correctly concluded that Mr. Fuster was the subject of the BWC video and thus was statutorily entitled to request a longer retention period under N.J.S.A. 40A:14-118.5(j)(2)(e). See Fuster v. Twp. of Chatham, 477 N.J. Super. 477, 495 (App. Div. 2023); (Pa67). Nonetheless, the panel held that Mr. Fuster was not entitled to review the BWC video.

The Appellate Division concluded that access to BWC video is subject to and constrained by OPRA's exemptions because N.J.S.A. 40A:14-118.5(k) states that access shall be "in accordance with the provisions of [OPRA]." This reading impermissibly renders N.J.S.A. 40A:14-118.5(k) superfluous, inoperative, and meaningless in two ways. See In re DiGuglielmo, 252 N.J. 350,

360 (2022) (stating courts must strive "for an interpretation that gives effect to all of the statutory provisions and does not render any language inoperative, superfluous, void[,] or insignificant" (alteration in original) (quoting Sanchez v. Fitness Factory Edgewater LLC, 242 N.J. 252, 261 (2020))).

First, N.J.S.A. 40A:14-118.5(k) states that the subject "shall" be entitled to review the BWC video "[t]o effectuate" the right to request the three-year retention period. The Appellate Division never referenced this "to effectuate" language in its opinion. If access is not granted, the right to see the video and meaningfully decide whether to request the retention period is not effectuated.[2] It is denied, and Subsection (k) becomes meaningless.

Second, the Appellate Division rendered N.J.S.A. 40A:14-118.5(k) superfluous by treating Mr. Fuster's request the same as if it were filed by some other third party (i.e., the news media or a member of the public) rather than by the subject of the video. If the Legislature intended for any of OPRA's ordinary exemptions to apply and for a request by a subject of the video to be treated in

[2] A subject could still blindly request the three-year retention period without seeing the video, as Mr. Fuster ultimately did here after 114 days of the 180-day retention period had expired because he was concerned that the video would be destroyed before he could sue to challenge the denial of access and obtain an order compelling access. But the statute provides for review so that the subject can make an informed decision to either ask the agency to maintain the video for three years or allow it to be deleted at the end of 180 days.

the same manner that a third party's request would be treated, then it would not have included Subsection (k) in the BWCL. By including Subsection (k), it clearly intended for a subject to have rights of access that are different and superior to the general public's rights under OPRA. The Appellate Division's decision renders N.J.S.A. 40A:14-118.5(k) superfluous and must be rejected. DiGuglielmo, 252 N.J. at 360.

"[N]ot every statute is a model of clarity." Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 572 (2012). Where a statute is ambiguous or the plain language leads to absurd results, courts should "strive for an interpretation that gives effect to all of the statutory provisions and does not render any language inoperative, superfluous, void[,] or insignificant." G.S. v. Dep't of Human Servs., 157 N.J. 161, 172 (1999). A commonsense interpretation that gives full meaning to all of Subsection (k)'s provisions is that the reference to OPRA simply means that the Legislature intended to ensure there was a procedural mechanism in place for the subject of the BWC video to request and enforce his special right of access to the video. These procedural mechanisms include the submission of a written OPRA request, N.J.S.A. 47:1A-5(g); a prompt response from the agency within seven business days, ibid.; and the right to sue should access be denied, for which there is a presumption in favor of

access, N.J.S.A. 47:1A-1, and an entitlement to an award of reasonable attorneys' fees, N.J.S.A. 47:1A-6. These are the procedures that were utilized in this case.

The Appellate Division's decision rendered part of N.J.S.A. 40A:14-118.5(k) inoperative and deprived Mr. Fuster of his statutory right to review the video. This Court should reverse and grant access.

II. BOTH PLAINTIFFS ARE ENTITLED TO ACCESS THE BWC VIDEO BECAUSE IT DOES NOT FALL WITHIN ANY OF THE "ONLY" FOUR CATEGORIES OF VIDEOS THAT "SHALL" BE EXEMPT

The BWCL provides that "[n]otwithstanding that a criminal investigatory record does not constitute a government record under [OPRA], only the following [BWC] recordings shall be exempt from public inspection:" 1) videos that are "not subject to a minimum three-year retention" or any other additional retention requirements; 2) videos that are retained for three years solely because they "capture[] images involving an encounter about which a complaint has been registered" and the complainant requests non-disclosure; 3) videos that are retained for three years solely because law enforcement determines they are of "evidentiary or exculpatory" value or for training purposes; and 4) videos that are retained for three years solely because retention was requested by the subject of the video (or a parent, guardian, or legal designee) and the subject requested

non-disclosure. N.J.S.A. 40A:14-118.5(l) (emphasis added). The BWC video at issue here does not fall within any of the "only" four enumerated exemptions because although the subject of the video (Mr. Fuster) requested a three-year retention period pursuant to N.J.S.A. 40A:14-118.5(j), he has not requested non-disclosure. Indeed, he and his wife are the ones seeking access.

Despite this, the Appellate Division concluded that Plaintiffs cannot access the BWC because the four exemptions enumerated in the BWCL are not, in fact, the only exemptions that can apply. Instead, the court concluded that OPRA's ordinary exemptions—except for the criminal investigatory records exemption— also apply to shield a BWC video from access. Several cannons of statutory construction prove this interpretation is erroneous and that the Legislature did not intend to exempt any categories of videos other than those listed in Subsection (l).

First, the plain language of N.J.S.A. 40A:14-118.5(l) states that "only the following [BWC] recordings shall be exempt from public inspection." (Emphasis added). A statute's plain language is typically the "'best indicator' of legislative intent." W.S. v. Hildreth, 252 N.J. 506, 518 (2023) (quoting State v. Lane, 251 N.J. 84, 94 (2022)). Subsection (l) could not be clearer—there are "only" four types of BWC videos that "shall be exempt from public inspection."

Thus, the Court's inquiry should end there. Savage v. Twp. of Neptune, 257 N.J. 204, 215 (2024) ("If the plain language of a statute is clear, our task is complete.").

Second, just as it failed to mention the "to effectuate" language in N.J.S.A. 40A:14-118.5(k), the Appellate Division's decision fails even to recite the "only" language in N.J.S.A. 40A:14-118.5(l). That omission is significant. It demonstrates that contrary to cardinal rules of statutory construction, the court rendered the "only" language in N.J.S.A. 40A:14-118.5(l) completely inoperative, as if it does not exist. DiGuglielmo, 252 N.J. at 360; see also C.R. v. M.T., 257 N.J. 126, 151 (2024) (disapproving the concurrence's approach of "read[ing] the word 'only' out of [the statute]").

Third, an important principal of statutory construction is that "specific laws prevail over inconsistent general laws." Bergen Cnty. PBA Local 134 v. Donovan, 436 N.J. Super. 187, 199 (App. Div. 2014). Because N.J.S.A. 40A:14-118.5(l) of the BWCL addresses public access to BWC videos specifically and OPRA is a law that addresses access to government records generally, the language in the BWCL controls.

Finally, to the extent there is any ambiguity by the Legislature's reference to the criminal investigatory records exemption in the "notwithstanding clause,"

the legislative history makes it clear that the four exemptions enumerated in Subsection (l) are intended to be the only applicable exemptions. See DiProspero v. Penn, 183 N.J. 477, 492–93 (2005) ("[I]f there is ambiguity in the statutory language that leads to more than one plausible interpretation, we may turn to extrinsic evidence, 'including legislative history, committee reports, and contemporaneous construction.'" (quoting Cherry Hill Manor Assocs. v. Faugno, 182 N.J. 64, 75 (2004))). The sponsor statements to A. 4312/S. 101 make it clear that the "notwithstanding clause" was in response to case law such as North Jersey Media Group Inc. v. Township of Lyndhurst, 229 N.J. 541, 568 (2017) and Paff v. Ocean County Prosecutor's Office, 235 N.J. 1, 30 (2018), which held that dash camera videos and other police records pertaining to criminal investigations were exempt as criminal investigatory records. Lyndhurst specifically rejected arguments that the retention schedules set forth in the Destruction of Public Records Law (DPRL) satisfied the "required by law to be made, maintained, or kept on file" exception to the criminal investigatory records exemption. 229 N.J. at 568. Thus, the Legislature wanted to make it abundantly clear that no court could disregard the retention schedules set forth in the BWCL and hold that BWCs are exempt because they pertain to criminal investigations. Rather, the BWCL specifies precisely when videos can be exempt

under OPRA.

The sponsor's statement reads in relevant part:

> The bill also specifies when video footage from a body camera is exempt from the State's open public records act. Recent case law has held that police video recordings are exempt from public disclosure under the State's open public records act because they pertain to criminal investigations. Notwithstanding this law, the bill specifies that video footage from a body worn camera is not subject to public inspection *only* when: 1) the footage is not subject to a three-year retention period; 2) the footage constitutes a recording of an encounter about which a complaint has been registered by the subject of the footage and the subject requests the footage not be made public; 3) a law enforcement officer or superior officer reasonably asserts the video footage has evidentiary or exculpatory value or the footage is being used for police training purposes; and (4) a member of the public, parent or legal guardian, or deceased subject's next of kin requests the video footage not be made available to the public.
>
> [Sponsor's Statement to A. 4312 at 7 (L. 2020, c. 29) (emphasis added); Sponsor's Statement to S. 101 at 7 (L. 2020, c. 29); Assemb. Comm. Dev. & Affairs Comm. Statement to A. 4312 at 2 (Aug. 24, 2020); S. L. & Pub. Safety Comm. Statement to S. 101 at 2 (Aug. 21, 2020). Accord Legis. Fiscal Estimate to A. 4312 at 1 (Aug. 31, 2020) ("The bill also specifies when video footage from a body camera is exempt from the State's open public records act."); Legis. Fiscal Estimate to S. 101 at 1 (Sept. 1, 2020) (same).]

Thus, the legislative history resolves any ambiguity: the Legislature's intent is that the BWCL establishes the "only" categories of BWC videos that are exempt under OPRA. Courts must defer to that policy decision. Clymer v. Summit

Bancorp., 171 N.J. 57, 62 (2002) ("[A] court's view of public policy cannot be used to trump the plain language of the statute itself or the clearly expressed intendment of the drafters." (quoting Clymer v. Summit Bancorp., 334 N.J. Super. 252, 254 (App. Div. 2000))).

After his requests for the BWC video were denied, Mr. Fuster stated that he wanted the video to be retained for the three-year retention period because so much time had passed that he feared the standard 180-day retention period would expire before he could sue to gain access to the video. This triggered N.J.S.A. 40A:14-118.5(l)(4). Because he has not requested that the video be held confidential, none of the exemptions enumerated in Subsection (l) apply and both Plaintiffs are entitled to access it.

III. THE COURT SHOULD REJECT THE PURPORTED "INVESTIGATED BUT NOT ARRESTED OR CHARGED" PRIVILEGE OR, AT A MINIMUM, SIGNIFICANTLY NARROW ITS SCOPE

The Appellate Division held that the BWC video is exempt pursuant to N.J.S.A. 47:1A-9(b)—OPRA's anti-abrogation provision—and judicial case law that "has long-established that information received by law enforcement regarding an individual who was not arrested or charged is confidential and not subject to disclosure." Fuster, 477 N.J. Super. at 483 (citing N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Off. (BCPO), 447 N.J. Super. 182, 204

(App. Div. 2016)). As argued above in Points I and II, this purported "investigated but not arrested or charged" privilege or "grant of confidentiality," if it exists at all, cannot apply to BWC videos because Subsection (k) of the BWCL gives Mr. Fuster an express statutory right to access the video and Subsection (l) lists the only four categories of videos that are exempt from public access. Nonetheless, because there are now two published Appellate Division cases that apply this purported "privilege" and trial courts are relying upon them to keep important records from the public, the Court should provide guidance to lower courts to protect the public's right to government records.

A. The Case Law Cited by Fuster and BCPO Does Not Create a "Privilege" or "Grant of Confidentiality" That Exempts Records from Access, But Rather Simply Concluded Such Records Were Not Subject to the Right to Know Law or Common Law Access

It is true that OPRA does not abrogate any privilege or grant of confidentiality previously recognized by judicial case law. N.J.S.A. 47:1A-9(b). However, what the Appellate Division has labeled a judicially created "privilege" or "grant of confidentiality" is instead simply decades old case law recognizing that law enforcement records have largely always been shrouded in secrecy. OPRA's predecessor is the Right to Know Law (RTKL). Records were subject to the RTKL only if they were "required by law to be made, maintained, or kept on file." N.J.S.A. 47:1A-2. There were no laws requiring law

enforcement records to be made, maintained, or kept on file, so law enforcement records were not accessible under the RTKL. Thus, what the BCPO and Fuster courts have labeled a "judicial privilege" or a "grant of confidentiality" is nothing more than old jurisprudence concluding that certain law enforcement records were outside the RTKL's scope and were also not accessible under the common law right of access. See Daily Journal v. Police Dept. of Vineland, 351 N.J. Super. 110, 121-22 (App. Div. 2002) (finding police investigation reports were not subject to the RTKL[3] and denying access under the common law because records relating to grand jury proceedings are confidential); State v. Marshall, 148 N.J. 89, 272-73 (1997) (denying criminal defendant's request for the State's entire investigative file because it was not subject to the RTKL and finding that defendants could not use the common law in lieu of discovery because law enforcement investigatory files are confidential); River Edge Sav. & Loan Ass'n v. Hyland, 165 N.J. Super. 540, 543-544 (App. Div.) (denying investigative target's request for the investigation reports and the identity of witnesses who testified against him because they were not subject to the RTKL

[3] Because OPRA had been enacted during the pendency of the case, the court also concluded the investigation reports were subject to the criminal investigatory records exemption because they were not required by law to be made, maintained, or kept on file. N.J.S.A. 47:1A-1.

and because "even inactive investigatory files" are generally kept confidential), certif. den. 81 N.J. 58 (1979); Nero v. Hyland, 76 N.J. 213, 220 (1978) (finding records of a four-way character investigation were not subject to the RTKL and should not be released under the common law because of the executive and official information privileges and the longstanding confidentiality surrounding law enforcement files).

The threshold question in each of those cases was whether the records were subject to the RTKL. Because none of the records were statutorily accessible, the courts also refused to grant access under the common law due to longstanding heightened confidentiality surrounding law enforcement records. These cases did not create a "privilege" or "grant of confidentiality" relating to those who were investigated but not arrested or charged,[4] but rather concluded that the common law balancing test weighed against access because law enforcement records were strictly confidential under the existing law at the time and there was no prevailing interest in disclosure. In other words, what the Appellate Division treated as a "privilege" or "grant of confidentiality" is

[4] Neither Nero nor Marshall even related to a person who was investigated but not charged. Nero involved a four-way character investigation of a prospective political appointee and Marshall involved a charged criminal defendant who wanted access to the State's investigative file.

instead judicial determinations of what the common law right to access law enforcement records was at the time.

B. The "Privilege" Cannot Exempt Records That the Legislature Has Deemed Public

Today, most law enforcement investigation records are still statutorily inaccessible because they are shielded by OPRA's criminal investigatory records exemption, which mirrors the RTKL standard. See N.J.S.A. 47:1A-1.1 (a criminal investigatory record "means a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding"). All the records at issue in the old RTKL cases cited by the BCPO and Fuster courts—police investigation reports, records of four-way investigations, witness statements, etc.—are criminal investigatory records and therefore still statutorily exempt today as they were decades ago. But there are some law enforcement records that the Legislature intentionally made accessible under OPRA and courts cannot override that access.

The Legislature decides statutory access to government records; courts decide common law access. Although a court can conclude a record is not subject to the common law, it cannot deprive the public of access to a record that the Legislature has made subject to statutory access under OPRA. Thus, the decades

old RTKL/common law jurisprudence cited by the Appellate Division in BCPO and Fuster cannot override the statutory access that OPRA provides. See Best v. C&M Door Controls, Inc., 200 N.J. 348, 359 (2009) (noting a court rule "can never trump a statute"); State v. Fajardo-Santos, 199 N.J. 520, 529 (2009) ("Regulations may not trump the statutes that authorize them."); Clymer, 171 N.J. at 62 (noting the court's view of public policy cannot trump a statute); Commc'ns Workers of Am., AFL-CIO v. Christie, 413 N.J. Super. 229, 272 (App. Div. 2010) (holding executive order cannot override a statute).

This is obvious. For example, this Court concluded that attorney legal invoices were not subject to the RTKL and possibly also inaccessible under the common law right of access. Keddie v. Rutgers, 148 N.J. 36, 52-54 (1997). But when it enacted OPRA, the Legislature expressly stated that attorney legal invoices are subject to OPRA. N.J.S.A. 47:1A-1.1. No one would argue that Section 9(b) of OPRA can be used to apply Keddie and render the invoices confidential. Similarly, the names of officers who shoot and kill a suspect are subject to disclosure pursuant to OPRA. Lyndhurst, 229 N.J. at 570-71, 577 (applying N.J.S.A. 47:1A-3(a) of OPRA to conclude that the names of officers who use deadly force must be disclosed). This is true even though every deadly force incident is intensely investigated and presented to a grand jury to

determine whether there was any criminality. N.J.S.A. 52:17B-107 (requiring every deadly force incident to be presented to a grand jury); N.J.S.A. 52:17B-107.1 (providing that even though a deadly force incident is criminally investigated and presented to a grand jury, the officer's identity "shall remain subject to public disclosure" pursuant to N.J.S.A. 47:1A-3(a)). Such investigations rarely lead to criminal charges. Because a statute mandates disclosure, the "privilege" asserted by the Appellate Division cannot apply even though the officer was criminally investigated, but not charged.

Until the Appellate Division's decision below, no court has ever applied the so-called "privilege" created by the old RTKL/common law case law to exempt a record that is otherwise subject to access under OPRA. This Court should make it clear that such is not permissible and that courts must defer to the legislative determination that a government record should be public.

C. If the "Privilege" Exists, it is Qualified and Should Be Narrowly Construed to Serve Its Limited Purpose

If the "investigated but not arrested or charged" privilege exists, it is a qualified privilege and simply constitutes one factor to be considered in the common law balancing test. See River Edge, 165 N.J. Super. at 544 (stating that the privilege for investigative records is not absolute and yields when there are issues of fundamental fairness or other compelling considerations). Courts

should apply the "privilege" only where records are otherwise exempt under OPRA and in the narrow circumstances where the core purpose of the "privilege" is served and far outweighs the interest in disclosure.

There are several important limitations to when the "privilege" should be applied.[5] First, the "privilege" should not preclude a victim from obtaining copies of records of their own complaints. The primary purpose of the "privilege" is to shield third parties from learning that a person has been criminally investigated. Fuster, 477 N.J. Super. at 490 ("[T]he grant of confidentiality protects the privacy interest of the individual who, lacking an opportunity to challenge the allegations in court, would face irremediable public condemnation." (quoting BCPO, 447 N.J. Super. at 204). This purpose is not served by denying access to the victim, who already knows precisely what criminal allegations were made and that the alleged perpetrator was investigated. That is true in this case, where Mr. Fuster knows what he told police and that

[5] This section discusses only the "investigated but not arrested or charged" purported "privilege" and why it is inapplicable in these circumstances. That does not mean that the records might otherwise still be inaccessible under the common law for other reasons, such as if they identify confidential informants or other investigative techniques that are inappropriate to disclose.

there was a subsequent criminal investigation into the male relative's conduct.[6] Ms. Devine is also fully aware of these facts.

Second, the "privilege" should apply only to records that in fact expose that a person was criminally investigated. Some records may document alleged wrongdoing, but they do not reveal that such conduct was criminally investigated by police. For example, a video of police using force against a suspect will depict behavior that may or may not be lawful, but the video itself does not reveal that there was a subsequent criminal investigation. The "privilege" should not apply because the video does not reveal that the officer was criminally investigated but never arrested or charged.[7] Similarly, even if a public employee is secretly criminally investigated for doctoring payroll records and cleared of any wrongdoing, the "privilege" cannot justify denying access to

---

[6] Despite police investigation reports being exempt from access under OPRA, Chatham disclosed several pages of police investigation reports which detailed the interview that police had with witnesses and discussed other evidence. Thus, Mr. Fuster knows far more about the investigation than what he told the police on the BWC video.

[7] Similarly, the "criminally investigated but not arrested or charged" "privilege" should not justify shielding records from the public where the existence of a criminal investigation is a public fact. All uses of fatal force and in-custody deaths are criminally investigated and presented to a grand jury, so the public is aware of such investigations. The "privilege" thus cannot justify non-disclosure because applying it would not serve the purpose of keeping the public from learning about the existence of a criminal investigation and the public interest is so important it would outweigh any interest in non-disclosure.

the underlying payroll records because those documents do not reveal the existence of a criminal investigation and the Legislature also expressly made them public. See N.J.S.A. 47:1A-10.

Finally, the "privilege" should apply only where there was a real investigation into indictable crimes. See BCPO, 447 N.J. Super. at 203 (stating the privilege applies to records relating to the "prosecution of criminal offenses" (quoting Marshall, 148 N.J. at 273)). The purported purpose of the "privilege" is to protect against reputational harm. Fuster, 477 N.J. Super. at 490. Disclosing that one was criminally investigated for sexual assault, murder, or other serious crimes could harm one's reputation, even if no charges are ultimately filed. But the same reputational harm does not occur if police are merely responding to an incident that theoretically could have, but did not, result in a disorderly persons offense, petty disorderly persons offense, or ordinance violation, such as loitering, disorderly conduct, resisting arrest, parking complaints, or noise complaints.

Without these limitations and guidance from this Court, the Appellate Division's Fuster decision risks keeping important records from the public. This is evident from a trial court's recent decision in Borough of Spotswood v. Middlesex County Prosecutor's Office, Docket No. MID-L-543-24 (Law. Div.

May 29, 2024). (PSa1).[8]

That case stems from allegations made by a police officer from the Borough of Spotswood Police Department in a hostile work environment lawsuit filed in January 2024. See Anthony G. Attrino, N.J. Mayor Told Cops She Didn't Want Black Resident in Municipal Building, Lawsuit Says, N.J. Advance Media, Jan. 23, 2024, https://www.nj.com/middlesex/2024/01/nj-mayor-told-cops-she-didnt-want-black-resident-in-municipal-building-lawsuit-says.html. The officer's bombshell lawsuit claimed that the mayor of Spotswood had demanded that police officers remove a Black resident from Borough Hall because the man made Borough staff nervous and that a BWC video depicted the mayor screaming at officers and saying racially offensive things about the resident. This was the second time the mayor had asked officers to remove the resident—he was previously arrested for refusing to leave, but those charges were later dropped.

Shortly after these allegations about the mayor were made public, OPRA requests were filed to obtain copies of the BWC video from the Middlesex County Prosecutor's Office (MCPO). The Borough and the mayor immediately sued MCPO to block disclosure of the BWC video. The suit was filed under seal

[8] PSa = Plaintiff's Supplemental Appendix attached to this brief.

to keep the public from learning about it and the Borough also separately moved to seal the police officer's lawsuit to keep the public from seeing the allegations he made. (PSa3).

The trial court unsealed the filings after the media intervened, but ultimately ruled that MCPO was permanently enjoined from releasing the video. (PSa1; PSa3). During the lawsuit, it was revealed that the homeless man had filed complaints against the officers and the mayor, claiming that they were motivated by racial bias when they had him arrested for being in Borough Hall. (PSa26-PSa27). The complaints against the officers were investigated by the internal affairs (IA) unit and not sustained. Because IA units do not investigate civilians, the bias complaint against the mayor was investigated by MCPO. No charges were filed. (Ibid.)

The trial court concluded that the BWC video was exempt under OPRA and the common law right of access pursuant to Fuster because the mayor was investigated by the MCPO Bias Unit but never arrested or charged with any crime. This decision is being appealed but it demonstrates how the Fuster decision below can too easily operate to keep the public from learning about the conduct of police officers and public officials.

The BWC video does not reveal in any way that the mayor was

investigated by MCPO or that the officers were investigated by the IA unit. That fact is only known because of the evidence produced during the litigation to block MCPO from releasing the BWC video. Instead, the video simply reveals the mayor's interactions with the police and would prove, or disprove, whether she said the horrible things that the police officer's lawsuit alleges she said. The trial court's decision to apply the privilege makes no sense given that the written opinion itself discloses that the mayor was investigated by MCPO. It serves only the purpose of keeping the public from learning the truth of what occurred.

That is perhaps the most dangerous possible outcome of the Appellate Division's decision below—that it will quickly be utilized by law enforcement and public officials to keep the public from learning about misconduct. The Court should provide clear instructions to trial court that there is not "privilege" or "grant of confidentiality" for records relating to someone who is "criminally investigated but not arrested or charged." Instead, such a privacy issue is simply one of many factors a court should consider when deciding whether to release a record under the common law and it should be narrowly construed with the limitations addressed above to serve its limited purpose of keeping the public from knowing that a criminal investigation occurred. But if the Legislature has made a record subject to OPRA, then there is nothing to consider—the inquiry

ends there, and the court must grant statutory access under OPRA.

CONCLUSION

As argued above, the Court should reverse the Appellate Division's decision and grant access to the requested BWC video. The BWCL renders the BWC video accessible to Plaintiffs pursuant to Subsections (j), (k), and (l).

The Court should also caution lower courts that the "privilege" or "grant of confidentiality" referenced in BCPO and Fuster is not a privilege or grant of confidentiality at all, but rather is simply one consideration to factor into the common law balancing test in those instances where a record is exempt from access under OPRA. Where records, such as BWCs, are subject to access under OPRA or expressly made accessible by some other law, the "privilege" cannot apply to shield the records from access.

Respectfully Submitted,

Pashman Stein Walder Hayden, P.C.

/s/ CJ Griffin
CJ Griffin