

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)

**DEFENDANTS' RESPONSE TO SUPPLEMENTAL BRIEF FILED  
BY PETITIONERS**

**MCMANIMON, SCOTLAND &  
BAUMANN, LLC**

75 Livingston Avenue, 2<sup>nd</sup> Floor

Roseland, New Jersey 07068

Ph: (973) 622-1800

[wnorthgrave@msbnj.com](mailto:wnorthgrave@msbnj.com)

[tdelguercio@msbnj.com](mailto:tdelguercio@msbnj.com)

[jsilva@msbnj.com](mailto:jsilva@msbnj.com)

Attorneys for Defendants,  
Township of Chatham and Gregory  
LaConte

On the brief:

William W. Northgrave, Esq. (039201990)

Ted J. Del Guercio, III, Esq. (036901997)

Jessica F. Silva, Esq. (333342020)

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## PRELIMINARY STATEMENT

Defendants, Township of Chatham and its records custodian, Gregory LaConte (together and for ease of reference, the “Township”) submit this Supplemental Brief in opposition and response to the Supplemental Brief filed with this Court on July 8, 2024 by Plaintiffs Petitioners Antonio Fuster (“Fuster”) and Brianna Devine (“Devine” and together with Fuster, collectively the “Petitioners”).

As a threshold matter, the Township incorporates by reference its June 14, 2023 Appellate Merits Brief and other papers filed with the Appellate Division below, which both already address the core merits of this matter, and upon which the Township relied in opposing any grant of Certification in this matter. Beyond that, the Township offers the following additional preliminary remarks respecting the Supplemental Brief of Petitioners.

The Appellate Division’s December 27, 2023 decision which is the subject of this grant of Certification was correct as a matter of law, and should not be disturbed. That is particularly true with respect to that court’s interpretation of both the New Jersey Body Worn Camera Law (“BWCL”) and the Open Public Records Act (“OPRA”), and how those enactments, when read *in pari materia*, support application of a privacy exemption precluding disclosure of the body worn camera (“BWC”) footage which is the subject of this litigation. While Plaintiffs assert rights

of access to the subject BWC footage under subsections (k) and (l) of the BWCL respectively (subsection (k) with respect to Fuster, and subsection (l) with respect to access by both Plaintiffs), rights of access under the BWCL must, per the express statutory language of that legislation, yield to the OPRA. And, as discussed below, OPRA permits application of, among others, judicially recognized and similar exemptions to government records disclosure.

It is clear that the exemptions to disclosure enumerated within the BWCL are not in abrogation of those set forth in OPRA, but rather, are supplemental to it. Therefore, insofar as OPRA, which governs general access to government records within this State, continues to recognize case and common law exceptions to disclosure – including those protecting the privacy of those who were never criminally arrested or charged with a crime – those exemptions will continue to apply. Even with respect to evaluation of requests for BWC footage within the intendment of the BWCL.

To suggest – as Plaintiffs do – that the BWCL exemptions to disclosure be read narrowly separate and apart from those recognized by OPRA, would render meaningless the plain language within the BWCL which renders that enactment subject to OPRA. That cannot be countenanced.

Case law is beyond clear that our courts do indeed recognize the privacy rights of those who are investigated for a crime, but are neither arrested nor charged. That

is not tethered to the common law right of access, but stands apart as a recognized privacy right. That is discussed further below.

Similarly, although OPRA – as well as the BWCL – are the current statutory iterations of rights of access as they pertain to government records (including BWC footage), they do *not* abrogate either the common law right of access, or any judicially recognized privacy rights shielding records from access. Simply because case law might precede the 2002 enactment of the OPRA does not mean it was categorically abrogated. Indeed, even OPRA continues to recognize common law rights of access which existed before it was adopted.

The December 27, 2023 decision of the Appellate Division was correct as a matter of law, and its application should be upheld and affirmed for the reasons both expressed herein, and in the Township's Appellate Merits Brief and supporting papers.



## LEGAL ARGUMENT

### POINT ONE

#### **THE BODY WORN CAMERA LAW'S EXEMPTIONS SET FORTH AT *N.J.S.A.* 40A:14-118.5(l) ARE IN ADDITION TO THOSE SET FORTH UNDER THE OPEN PUBLIC RECORDS ACT (PCa1)**

The plain language of the BWCL's inspection provision found at *N.J.S.A.* 40A:14-118.5(k) directs that review of body worn camera video is in fact subject to the OPRA. As a result, the Appellate Division rightly concluded that the exemptions to disclosure set forth in *N.J.S.A.* 40A:14-118.5(l) are *in addition to* OPRA's wider disclosure exemptions. To interpret the BWCL otherwise would ignore the fact that the inspection provision at subsection (k), which provides for general review subject to OPRA, in fact precedes the four exemptions enumerated in subsection (l). *See, N.J.S.A.* 40A:14-118.5(k) and (l), respectively.

Subsection (l) expressly directs that BWC recordings are not criminal investigatory records under OPRA, and then sets forth four enumerated exemptions to disclosure which relate to the BWC recordings created. *N.J.S.A.* 40A:14-118.5(l). However, the analysis does not end there. The BWCL and OPRA need to be read *in pari materia* to achieve a reasoned understanding and implementation of the overall legislative intent. The BWCL expressly directs that it is subject to OPRA in the general sense (contrary to Plaintiffs' arguments that the reference pertains to mere reference to OPRA's procedural requirements), and contains *additional* exclusions



to disclosure under OPRA. *N.J.S.A.* 40A:14-118.5 (l). Both enactments must therefore be read together.

This Court, in *Marino v. Marino*, 200 N.J. 315, 330 (2009), was clear:

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 (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 (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 (1997); *see, Febbi, supra*, 35 N.J. at 606 (stating that Legislature’s intent is to be derived from considering entire statute and reading all sections together as a unified whole).

Bearing the forgoing in mind, it is clear that the production of government records in this State, although governed by OPRA and its overarching principal of safeguarding and maintaining confidentiality in those documents that members of the public have a privacy interest in, is further supplemented by the BWCL, as the

latter includes additional exemptions from public inspection of certain BWC camera recordings. The BWCL exemptions from public inspection do not preempt or abrogate those available under OPRA, but instead, when read *in pari materia* with them, only enhance and buttress the strong public policy to protect the public from disclosure of private allegations or unsubstantiated claims that could be made with malice. The instant matter is just such a case.

The mere adoption of exemptions to disclosure within the BWCL, without more express within the statutory language, does not amount to any abrogation of otherwise applicable statutory exemptions to disclosure under both OPRA itself, or those recognized thereunder which exist pursuant to case law. This is **not** a case of *expressio unius est exclusio alterius*. Rather, this is more akin to certain provisions set forth within the Local Public Contracts Law, *N.J.S.A. 40A:11-1 et seq.* (“LPCL”) at *N.J.S.A. 40A:11-23.2*. *N.J.S.A. 40A:11-23.2* sets forth a list of items which, if required by bid specifications in connection with public bidding, *must* be included with a bid response. If they are not so included, their absence is statutorily deemed a material, fatal defect in a public bid response, which a contracting unit has **no** discretion to waive under the common law. However, although *N.J.S.A. 40A:11-23.2* enumerates very *specific* items which must be included with a bid response, that statute does *not* abrogate the right of a contracting unit under common law to evaluate and determine whether *other* items missing from a bid response constitute

a material or a waivable bid effect. *P & A Const., Inc. v. Twp. of Woodbridge*, 365 N.J. Super. 164, 177 (App. Div. 2004) (concluding that *N.J.S.A.* 40A:11-23.2 should be construed as a legislative directive that a bidder's failure to submit any of the mandatory items enumerated therein shall automatically be considered a nonwaivable and therefore fatal bid defect, *but any other* bid defect shall continue to be considered under the *River Vale* common law criteria of bid materiality under *Twp. of River Vale v. R.J. Longo Constr. Co.*, 127 N.J. Super. 207 (Law Div 1974)). This is the same exact scenario under the BWCL vis-à-vis its incorporation of OPRA exemptions.

**A. The OPRA Confidentiality Exemption Must Be Read Together With The BWCL**

The OPRA exemption at issue in the instant matter, set forth at *N.J.S.A.* 47:1A-9(b), precludes disclosure of government records that “judicial case law” has “established or recognized” as “privilege[d]” or “confidential[ ].” It is well established that disclosure of government records may be precluded, because “confidentiality [exists] to protect innocent persons whose names have been mentioned, but [who] have not been charged.” *Daily Journal v. Police Dep’t of Vineland*, 351 N.J. Super. 110, 124 (App. Div. 2002). “Information received or maintained by law enforcement agencies regarding a person who has not been arrested or charged with an offense” is confidential and protected under common



law. See, *N. Jersey Media Grp. Inc. v. Bergen Cnty. Prosecutor's Office*, 447 N.J. Super. 182, 203-04 (App. Div. 2016). In *N. Jersey Media Grp.*, the Appellate Division reasoned that the “confidentiality accorded [to investigatory records of uncharged persons] promotes both the integrity and effectiveness of law enforcement efforts for the benefit of the public at large,” and “the privacy interest of the individual who, lacking an opportunity to challenge allegations in court, would face irremediable public condemnation.” *Id.* at 204. Thus, not all exemptions to disclosure are “those enumerated as protected categories within the four corners of OPRA.” *Id.* at 201<sup>1</sup>.

Judicial recognition of confidentiality where an individual has not been charged makes clear that the BWC video which is the subject of this action was exempt from disclosure under applicable case law. Contrary to Plaintiffs' arguments, the BWCL did not abolish the long-recognized confidentiality exemption afforded to uncharged individuals by judicial case law, but preserved the application of existing OPRA exemptions by rendering the BWCL as subject to the provisions of OPRA – which recognizes judicially recognized exemptions to disclosure. A review of the plain language of both the BWCL and OPRA, taken together, makes clear that the Legislature did not intend to preclude the application of OPRA's recognized exemptions by enactment of the BWCL. As noted, subsection (l) of *N.J.S.A.*

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<sup>1</sup> Or, those within the four corners of the BWCL.



40A:14-118.5, which sets forth the BWCL's four additional exemptions to disclosure, is preceded by subsection (k), which requires even a member of the public who is the subject of a recording (or a subject's parent or legal guardian) to nonetheless "review the [BWC] recording **in accordance with the provisions of [OPRA].**" *N.J.S.A.* 40A:14-118.5(k) (Emphasis added). Had the Legislature intended to either (a) preclude the application of OPRA's confidentiality exemption or the judicially recognized confidentiality exemption; or, (b) limit OPRA's application to only its procedural requirements, as Plaintiffs have argued, it would have expressly provided for such an exclusion or limitation. *See, Est. of Burns*, 468 N.J. Super. at 319 (quoting *Brewer v. Porch*, 53 N.J. 167, 174 (2009)). And notably, the Legislature did not amend OPRA to limit its application to the BWCL – which it could have easily done had it wanted to.

**i. The Township Properly Denied Petitioners Access to the Requested BWC Footage**

It is clear that the BWC video footage recorded in this case was property withheld from disclosure. While the footage is a government record, it is shielded from disclosure based upon the exemptions noted by the Township in its Appellate Division briefing and herein, including those set forth in both the OPRA and the BWCL, and within case law (pertaining to both the common law right of access, and judicially recognized confidentiality on the part of those not charged with a crime).

Given both the nature and content of the BWC footage at issue here, and that the Township's denials of the subject OPRA requests explain that no charges were filed and therefore release of the footage would affect a third party's privacy interest, the Township properly denied the Petitioners' OPRA requests pursuant to *N.J.S.A.* 47:1A-9(b).

In evaluating the propriety of an OPRA denial of access, the Court must measure "the sufficiency of the response," "against whether the proffered reasons prove the applicability of a specific exemption." *Id.* Here, the Township's OPRA responses did not specifically cite to *N.J.S.A.* 47:1A-9(b) or *N. Jersey Media Grp.* as the basis for the denial, but both courts below nevertheless correctly concluded that the Township's responses are sufficient to prove the applicability of the OPRA exemptions, consistent with *N.J.S.A.* 47:1A-9(b). The first denial noted there had been "no charges" filed against the third party in the BWC footage, and the second response cited to the "privacy right" of the third party named in Fuster's police interview. *See*, Plaintiffs' Verified Complaint, Pa1, Exs. B and E thereto. These statements by the Township denying access encompassed the rationale underlying the OPRA exemption for "information received or maintained by law enforcement agencies regarding a person *who has not been arrested or charged* with an offense," because they reference the potential harm to the uncharged third party if the BWC

footage were to have been released. *See, N. Jersey Media Grp., supra*, at 204-05.

As the Appellate Division properly noted in this case below:

Fuster seeks release of his own statement, which he undoubtedly recollects. Conversely, *the accused has not had an opportunity to object or challenge the recorded allegations in court*. The accused here, as in *many uncharged investigations, may not know the video exists*. Fuster can waive his privacy interest and consent to disclosure; *the accused does not have the same opportunity*. Under OPRA, the Department has the “responsibility and an obligation to *safeguard from public access*” *the BWC video which contains confidential information “with which it has been entrusted [as] disclosure thereof would violate the citizen’s reasonable expectation of privacy.” N.J.S.A. 47:1A-1. Fuster and Devine v. Twp. of Chatham, 477 N.J. Super. 477, 492-93 (App. Div. 2023) (Emphasis added)*

The Appellate Division below rightly recognized that the confidentiality exemption established by existing case law is implicated here, because information received by law enforcement regarding “a person who has not been arrested or charged” is confidential and not subject to disclosure. *N. Jersey Media Grp., supra*, at 204. The Township has met its burden of establishing the exemption applied here, because of the potential harm to the uncharged third party, if the BWC footage were released.

In sum, the plain language of the BWCL’s exemption provision does *not* abrogate the application of OPRA (and by extension, neither does it abrogate OPRA’s independent statutory and/or its judicially recognized bases for non-disclosure), but rather, supplements OPRA’s exemptions. Here, the OPRA exemption found at *N.J.S.A. 47:1A-9(b)*, which excludes from disclosure a public



record deemed privileged or confidential pursuant to established judicial case law (such as that discussed on privacy grounds), precludes release of the BWC video recording of Fuster's accusations against an uncharged relative.

**POINT TWO**

**THE "INVESTIGATED BUT NOT ARRESTED OR CHARGED" GRANT OF CONFIDENTIALITY WAS PROPERLY APPLIED BY THE APPELLATE DIVISION IN THIS MATTER (PCa1)**

The intent of OPRA when it was enacted in 2002 (and as amended since) was to provide citizens with the ability to obtain, review or copy governmental records, giving access to the same documents used in decision making processes and all other facets of government, with certain enumerated exemptions. The Legislature, consistent with those exemptions, put in place certain safeguards to protect sensitive or private information of citizens that, if exposed, could cause embarrassment and potential harm to a private citizen. OPRA states, at *N.J.S.A.* 47:1A-1, the following 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. (Emphasis added)*

When it comes to documents involving a “citizen’s reasonable expectation of privacy”, the determination as to which documents are to be provided and which are to be shielded, is made more difficult because the determination is often made on a case-by-case basis. Moreover, as discussed under Point One above, the Legislature has expressly provided at *N.J.S.A. 47:1A-9(b)* that:

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. (Emphasis added)*

Thus, a records custodian can continue to rely on judicial case law, as well as statute, to safeguard from public access personal and private information of a citizen.

In the case pending before this Court, the information at issue was the personal, private information of a special needs juvenile son, who provided certain information to his father, who in turn divulged that information, in person, to the police - where it was captured on the BWC which is the subject of this action. The information provided also implicated a third party, and therefore, there are two citizens' privacy considerations at issue in this instance. As stated in Petitioners' Verified Complaint at Footnote 1, "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 Plaintiffs agree that there is an expectation of privacy in the information contained in the video statement given to the police, and specifically, the BWC video of the complaint made by Mr. Fuster. As it relates to disclosures and the privacy rights of the accused, they too have a privacy right in non-disclosure of the BWC video, all as set forth at *N.J.S.A.* 47:1A-9(b), and discussed at length in Point One above. As the court rightly recognized in *N. Jersey Media Grp.*, there exists an exemption to disclosure 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. That has not been abrogated by

specific exemptions to disclosure set forth in the BWCL, contrary to Plaintiffs' arguments.

Petitioners' Supplemental Brief at Point III, in support of their argument to reject the "investigated but not arrested or charged" privilege or to otherwise significantly reduce its scope, cites to various cases involving *public employees* (chiefly, police officers), where disclosure of records was nonetheless required in instances where such employees were not arrested or charged. *See, e.g.*, Petitioners' Supplemental Brief, at Pb17-18, 20, 21-24. This argument, however, is a red herring with no application here. *Loigman v. Kimmelman*, 102 N.J. 98, 113 (1986), which addresses the necessary balancing of public versus private interests when considering disclosure of records under the common law right of access, provides that the need for confidentiality in undertaking that balancing must be weighed against "the importance of the information sought to the plaintiff's vindication of the public interest." In the case of allegations of wrongdoing against a public employee (and particularly a member of law enforcement), the public interest is certainly implicated to warrant disclosure of information and records, even when the same did not result in a criminal arrest or charge. However in the present case, the public interest in the release of the subject BWC footage is diminished, because it concerns an investigation into a separate third party who is a private citizen, rather than an investigation into the conduct of a public employee. *See, Rivera v. Union Cnty.*



*Prosecutor's Office*, 250 N.J. 124, 150 (2022) (“[i]n a matter like this [concerning the conduct of a public official], the public interest in disclosure is great. Racist and sexist conduct by the civilian head of a police department violates the public’s trust in law enforcement. It undermines confidence in law enforcement officers generally, including the thousands of professionals who serve the public honorably”). Moreover, the BWC footage at issue here is highly sensitive in nature, the accused third party was never charged, and the Petitioners have willfully ignored and/or failed to even address or consider the risk of harm to the accused. Petitioners have not, and cannot, show that the public’s interest in disclosure outweighs the government’s interest in confidentiality in these circumstances.

### CONCLUSION

For all of the foregoing reasons, and for those previously set forth in the Township’s June 14, 2023 Appellate Merits Brief, the Court should affirm the Appellate Division’s decision.

Respectfully submitted,

*/s/ William W. Northgrave*

William W. Northgrave

DATED: August 6, 2024