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Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-58-20, Richard Rivera v. Union County Prosecutor's Office (084867),
Appellate Division Docket No. A-2573-19T3

Honorable Chief Justice and Associate Justices:

Pursuant to Rule 2:6-2(b), kindly accept this letter brief on behalf of Amicus
Curiae American Civil Liberties Union of New Jersey.

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Preliminary Statement

The Appellate Division utilized an improper process to evaluate Plaintiff's request under the common law right of access to public information, and that improper process produced incorrect results.

Rather than remanding the case to create the required record, the intermediate appellate court engaged in speculation about what the records *might* contain and the harm that *could* flow from their release. The court made categorical assumptions about an entire class of documents, without a record to determine whether the documents sought in this case fit the archetype of records that must remain confidential. (Point I).

That process error is reason enough to reverse the judgement of the Appellate Division. But here, the process error also produced a results error: although in many cases there is a good reason to preserve the confidentiality of internal affairs records, in this case, the public's interest in knowing the details of a law enforcement executive's use of racist and sexist epithets outweighs the need for secrecy. (Point II). The court below gave too much weight to the need for secrecy (Point II, A) and insufficient weight to the need for transparency. (Point II, B).

The Attorney General's *Internal Affairs Policy and Procedure (IAPP)* mandates – in most instances – that law enforcement agencies treat internal affairs

files as confidential. Whatever impact that policy has on analysis under the Open Public Records Act, it cannot bind courts in evaluating common law claims. (Point II, A, 1). The circumstances of this case illustrate why reliance on a general interest cannot alone determine results of a common law balancing test. Although the existence of an Attorney General policy cannot determine the result, the rationale animating the policy should certainly inform a court's analysis. But here, the panel below looked only at the IAPP's concern with releasing the identity of internal affairs complainants without considering whether – under the peculiar facts of this case – the records could be released (perhaps in a redacted form) without divulging the identity of those who cooperated in the investigation. (Point II, A, 2).

This was no ordinary case. At issue were accusations that the police director in New Jersey's fourth largest city, a white man running a police department in a city that is more than eight-five percent non-white, used racist and sexist slurs to describe people who worked for him. Allegations like that impact not only the police department, but the entire city. And given the recent attention on race-based policing, the eyes of the entire state were focused on the City of Elizabeth. No law enforcement agency – or any entity, in fact – can be expected to root out discrimination in its practices if courts permit the agency to obscure the racist and sexist conduct of its leaders. The opinion below fails to acknowledge the important bases for Plaintiff's request. (Point II, B).

For these reasons, unless the Court finds a right of access under OPRA, a remand is appropriate to build a proper record and conduct the required balancing of interests.

Statement of Facts and Procedural History

Amicus American Civil Liberties Union of New Jersey relies on the Statement of the Matter Involved contained in Plaintiff/Petitioner's Petition for Certification, adding that the Court granted the Petition on May 14, 2021.

Argument

I. Appellate courts cannot conduct the balancing test required under the common law right of access to public information without a robust record.

When courts evaluate claims of access under the common law they must answer three questions: 1) whether the records are common law public documents; 2) whether the person seeking access has an interest in the subject matter of the material; and 3) whether the requester's interest outweighs the government's interest in preventing disclosure. *Keddie v. Rutgers, State Univ.*, 148 N.J. 36, 50 (1997). Two of these questions are not in dispute in this case; Defendants do not appear to contest, and the Appellate Division properly held, that the requested documents are public documents and Plaintiff Rivera has an interest in them. *Rivera v. Union Cty. Prosecutor's Off.*, No. A-2573-19T3, 2020 WL 3397794, *11 (App. Div. June 19, 2020). The common law claim, then, turns on whether the

Plaintiff's interest outweighs the government entities' interest in non-disclosure. *Educ. L. Ctr. v. New Jersey Dep't of Educ.*, 198 N.J. 274, 303 (2009).

Courts evaluating common law claims consider a series of factors set forth in *Loigman v. Kimmelman*, 102 N.J. 98, 113 (1986), but they do so only when a sufficiently robust record has been developed. Where cases reach appellate courts without enough information – on either side of the ledger – the court should remand the case for additional factual development. *See, e.g., Paff v. Ocean Cty. Prosecutor's Off.*, 235 N.J. 1, 30 (2018) (remanding case to trial court to address common law right of access claim); *Gilleran v. Twp. of Bloomfield*, 227 N.J. 159, 177 (2016) (explaining benefit of analyzing request for security footage under common law, but ordering remand because no balancing of interests had been performed); *S. New Jersey Newspapers, Inc. v. Twp. of Mt. Laurel*, 141 N.J. 56, 72 (1995) (finding record regarding public purpose insufficiently developed to allow meaningful balancing, and therefore remanding); *S. Jersey Pub. Co. v. New Jersey Expressway Auth.*, 124 N.J. 478, 498 (1991) (remanding to the trial court to balance interest in confidentiality against the public interest in disclosure); *Drinker Biddle & Reath LLP v. New Jersey Dep't of L. & Pub. Safety, Div. of L.*, 421 N.J. Super. 489, 501 (App. Div. 2011) (remanding case to trial court for balancing of interests).

Rather than order a remand to allow the development of a record, the Appellate Division endeavored to conduct the analysis on its own – without the benefit of a record that would reveal either Plaintiff’s interest in obtaining the documents or the specific reasons that the Defendant law enforcement agencies sought to prevent disclosure of the documents. As a matter of basic logic, a court cannot balance interests if it does not know the weight to be assigned to one side of the scale. *Cf. State v. Szima*, 70 N.J. 196, 201 (1976) (critiquing lower court’s application of speedy trial balancing test when it failed to consider information about one side). Indeed, as the Appellate Division explained more than three decades ago: “A trial court is better able than an appellate tribunal to . . . balance the parties’ interests when that must be done to determine whether there is a common-law right of access.” *Philadelphia Newspapers, Inc. v. State, Dep’t of L. & Pub. Safety, Div. of State Police*, 232 N.J. Super. 458, 466 (App. Div. 1989). Where, as here, an appellate court does not have sufficient information about *either* side of the equation – having received *no* evidence that had been provided on the issue – the task of balancing cannot be accomplished.

II. The Appellate Division made critical errors in its analysis of the balancing test required under the common law right of access to public information.

Even on the paltry record presented to the Appellate Division, the court made errors regarding the weight to be assigned to each side of the ledger.

A. The Appellate Division gave too much weight to the need to maintain the confidentiality of internal affairs reports.

Although the trial court did not develop any record on the common law claim, the Appellate Division relied on the IAPP to hold that the law enforcement agencies could maintain the secrecy of the internal affairs report. Courts can properly consider agency regulations (similar to the IAPP), but the existence of regulations disfavoring disclosure alone cannot end the inquiry.

1. The court improperly treated the Attorney General's policy position as dispositive of the common law inquiry.

Plaintiff's Petition for Certification contended that "[n]o reasonable person would argue that the AG could simply issue a policy tomorrow with a long list of records he considers to be exempt and instructing subordinate law enforcement agencies to withhold them. The AG lacks any such authority." P.Cert. at 3.¹ That must be true. If the Attorney General had that power, the seminal case on the common law right of access to public information, *Loigman v. Kimmelman*, 102 N.J. 98, 113 (1986), would have been unnecessary. In that case, the Attorney General sought a court determination that it could withhold an investigative audit of a prosecutor's office. *Id.* at 101. If Attorney General directives could exempt records from public view, the Attorney General could have simply issued a

¹ P. Cert. refers to Plaintiff's Petition for Certification. Eliz. Opp. Cert. refers to the City of Elizabeth's Brief in Opposition to Plaintiff's Petition for Certification.

directive doing just that and avoided litigation. Indeed, Defendant City of Elizabeth conceded as much in its opposition to Certification. *Eliz. Opp. Cert.* at 7.

An administrative agency can exempt a record from disclosure under the Open Public Records Act (OPRA) by promulgating a regulation under the authority of a statute or executive order. N.J.S.A. 47:1A-1. Whether Attorney General directives like the IAPP can achieve the same result *under OPRA* does not resolve whether the Attorney General can categorically exclude documents from public access *under the common law* by issuing a directive. As the Court has explained, in evaluating common law questions, courts look to the common law rather than to New Jersey statutes. *Higg-A-Rella, Inc. v. Cty. of Essex*, 141 N.J. 35, 50–51 (1995). Under the common law, the Court has been clear:

The existence of a regulation is not dispositive of whether there is a common-law right to inspect a public record, but it weighs “very heavily” in the balancing process as a determination by the Executive Branch of the importance of confidentiality. In the context of [OPRA’s predecessor,] the Right-to-Know Law, such regulatory exemptions preempt the balancing of the interests and preserve confidentiality on a categorical basis. That approach is not appropriate under the common law, where “the focus must always be on ‘the character of the materials sought to be disclosed.’”

[*Home News v. State, Dep’t of Health*, 144 N.J. 446, 455 (1996) (internal citations omitted).]

The Appellate Division needed to look beyond the existence of Attorney General guidance.

2. The court below focused exclusively on the generalized need to maintain confidentiality, without considering the particular facts of this case where the identity of complainants might be able to be protected.

The Appellate Division focused too much on the general category of documents at issue (internal affairs records) and failed to be “sensitive to the fact that the requirements of confidentiality are greater in some situations than in others.” *Id.* (quoting *McClain v. Coll. Hosp.*, 99 N.J. 346, 362 (1985)). The Court has consistently recognized the need for case- and document-specific inquiries as part of the common law balancing test. *See, e.g., Paff v. Ocean Cty. Prosecutor’s Off.*, 235 N.J. 1, 28 (2018) (reminding litigants to create a fact-specific record regarding privacy objections for OPRA and common law claims); *Higg-A-Rella*, 141 N.J. at 49 (explaining that “our holding is fact-specific, and may not be generalized to all cases in which people seek computer copies of common-law public records”); *Atl. City Convention Ctr. Auth. v. S. Jersey Pub. Co.*, 135 N.J. 53, 60 (1994) (requiring courts to engage in a balancing process “concretely focused upon the relative interests of the parties in relation to [the] specific materials”); *McClain v. College Hosp.*, 99 N.J. 346, 361(1985) (same).

No such case-specific inquiry happened here. Instead, the court determined that “[b]ecause the complainants and witnesses are members of the [Elizabeth Police Department], their statements disclosing the racist and sexist slurs that Cosgrove uttered, and his other discriminatory actions, would likely disclose their

identity or narrow the field to only a few individuals, even if all personally identifiable information is redacted.” *Rivera*, 2020 WL 3397794, at *8. But without reviewing the actual records, the court had no basis for that conclusion. Of course, if Cosgrove had a private conversation with Officer A in which he disparaged Officers B and C, there would be no way to reveal that Cosgrove had used slurs to reference Officers B and C without outing Officer A as the complainant. On the other hand, if Cosgrove aimed slurs at his subordinates during a rollcall meeting of the entire department (or any large subset of the department), and the court redacted the identity of the actual complainant, Plaintiff could receive the document without compromising the anonymity of those who participated in the internal affairs process.

Indeed, all internal affairs documents require this sort of individualized analysis to determine whether the laudable goal of protecting the identity of complainants requires the non-disclosure of the records. Imagine, for example, a complaint about an officer beating a suspect. Revealing the internal affairs reports might identify the victim as the source of the complaint. But in some cases, extrinsic evidence – like surveillance videos or body-worn camera footage – might provide a basis for a complaint that does not require initiation by a complainant. This is exactly the sort of individualized determination the Court recommended in *Paff v. Ocean Cty. Prosecutor’s Off.*:

[T]he driver’s privacy interest did not warrant the [office]’s decision to withhold recordings from disclosure in this case. [But i]n other settings, a third party’s reasonable expectation of privacy may warrant withholding a record from disclosure. . . . For example, if a sexual assault or similar crime were recorded by [a mobile video recorder (MVR)], the victim would have a compelling objection to the disclosure of that recording, even in redacted form. In other circumstances, the blurring of a victim’s face or other methods of redaction prior to disclosure of an MVR recording may resolve a privacy concern.

[235 N.J. at 28.]

The Appellate Division’s cramped view of what redaction could achieve and what would necessarily be revealed by the production of internal affairs files led it to improperly analyze only the government’s interest in secrecy. By failing to allow Plaintiff to create a record regarding the need for the document, the court deprived itself of the chance to properly weigh the other side of the balance.

B. The Appellate Division failed to appreciate the importance of public knowledge about racism and sexism in policing.

The Appellate Division’s analysis contains no consideration of the ways that transparency in police discipline – even when police executives have acted in racist and sexist ways – builds public confidence in police and policing. A “see no evil, hear no evil” approach to policing will not fool members of the public into thinking that police departments are operating without racism or sexism. In 2017, only 57 percent of Americans reported having “quite a lot” or “a great deal” of

confidence in police. Congressional Research Service, *Public Trust and Law Enforcement: A Discussion for Policymakers* (Dec. 13, 2018), Page 2, Table 1. Among Black Americans, that number drops to a mere 30 percent. *Id.* Indeed, even before the murder of George Floyd, a large majority (60 percent) of Americans believed that deadly encounters between Black people and police officers were signs of broader issues in police departments. Rick Morin, et al. *Police Views, Public Views*, Pew Research (Jan 11, 2017).² The perception is particularly grim in the Black community, with 79 percent of respondents saying fatal encounters are a sign of a broader issue. *Id.*

Less information about misconduct does not build confidence. An “absence of public information [about discipline] allows negative perceptions, and the belief that the police generally are not responsive to the complaints[,] to fester.” U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices* (Nov. 2018) at 61.

Distrust of police comes with profound consequences. Community trust “is the key to effective policing” and the lack of it undermines the ability of police officers to do their jobs successfully. *See* International Association of Chiefs of Police, *Building Trust Between the Police and the Citizens They Serve*, 7 (Jan.

² Available at <https://www.pewresearch.org/social-trends/2017/01/11/police-views-public-views/>.

2014). Where the public cannot learn about disciplinary action, it cannot serve its vital role as a “check” on government. *See Worcester Telegram & Gazette Corp v. Chief of Police of Worcester*, 787 N.E.2d 602, 607 (Mass. Ct. App. 2003) (“A citizenry’s full and fair assessment of a police department’s internal investigation of its officer’s actions promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights.”); *Welsh v. City & Cty. of San Francisco*, 887 F. Supp. 1293, 1302 (N.D. Cal. 1995) (“The public has a strong interest in assessing . . . whether agencies that are responsible for investigating and adjudicating complaints of misconduct have acted properly and wisely.”).

The fact that Director Cosgrove resigned – after much delay – does not obviate the need for the public to learn about the contents of the internal affairs investigation. Members of the public have a right to know whether Cosgrove was investigated appropriately. They want to know why the Mayor stalwartly defended Cosgrove against “character assassination.” Ali Watkins, *Police Director in New Jersey Resigns After Inquiry Finds He Used Racist and Sexist Slurs*, N.Y. Times (Apr. 29, 2019).³ They want to know whether large swaths of the Elizabeth Police

³Available at <https://www.nytimes.com/2019/04/29/nyregion/elizabeth-police-racism-james-cosgrove.html>.

Department sat silently as its leader disparaged women and people of color who worked for him.

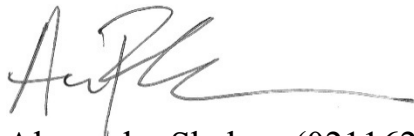
Broad distrust of police officers, particularly in communities of color, will not abate if law enforcement asks the public to simply trust that it has properly addressed racist misconduct among its leaders. After all, “[s]unlight is the greatest disinfectant when the government acts in dark corners.” *Paff*, 235 N.J. at 34 (Albin, J., dissenting) (citing *Buckley v. Valeo*, 424 U.S. 1, 67 (1976), (quoting Louis Brandeis, *What Publicity Can Do, in Other People’s Money and How the Bankers Use It* 62 (National Home Library Foundation ed. 1933))).

Justice Albin explained that “[t]he public – particularly marginalized communities – will have greater trust in the police when law enforcement activities are transparent. . . .” *Paff*, 235 N.J. at 36 (Albin, J., dissenting). The Appellate Division wholly ignored that benefit when it attempted to balance the competing interests, without reviewing the actual records or allowing Plaintiff to explain his interest in obtaining them.

Conclusion

Because the court below erred in both the process and the result of the common law analysis, unless the Court reverses the Appellate Division's decision regarding OPRA, it should remand the case to the Law Division to allow Plaintiff to explain the need for the documents and allow the Court to conduct an *in camera* inspection of the requested records.

Respectfully submitted,



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