SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1041-24

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| NEW JERSEY OFFICE OF THE THE PUBLIC DEFENDER,<br><br>Appellant,<br><br>v.<br><br>NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF CRIMINAL JUSTICE, OFFICE OF PUBLIC INTEGRITY & ACCOUNT-ABILITY AND RECORDS & IDENTIFICATION BUREAU IN ITS OFFICIAL CAPACITY AS RECORDS CUSTODIAN,<br><br>Respondent . | : | CIVIL ACTION<br><br>Hon. Robert Lougy, A.J.S.C. |

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# BRIEF ON BEHALF OF APPELLANT

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[1] Copies of the briefs are supplied in accordance with R. 2:6- 1(a)(2) because they were relied on by the trial court and necessary to establish the arguments raised below.

## CONFIDENTIAL APPENDIX



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## PRELIMINARY STATEMENT

Standing in a forest, all we can see are the trees around us. Without a map, we could not know how vast the forest is, where the paths lead or where the obstacles lay. When the full extent and contours of a societal problem are shrouded in claims of confidentiality, the public is denied access to knowledge crucial to meaningful change. The common law right of public access recognizes this truth and puts a check on such claims by requiring disclosure of public records when the public need for access outweighs the interest in confidentiality.

Disclosure of redacted versions of summary reports of police misconduct is warranted because the OPD has established an overwhelming public interest in access,[2] which easily outweighs any interest in confidentiality. Transparency is critical to understanding the societal problem of police misconduct, to ensuring the internal affairs process is working adequately, and to promoting effective public defense. In contrast, the State's interest in confidentiality is minimal because the summary reports only include high-level

[2] As discussed below, the OPD is seeking this information on behalf of its own organization in furtherance of public interests, not on behalf of a particular defendant in a pending criminal case. Thus, the pretrial discovery rules and jurisprudence are inapplicable.

information about the complaint and because any sensitive information can be redacted. Thus, balancing of the interests requires disclosure.

The Attorney General's position in this case is in tension with its own directives. Over the past five years, the Attorney General has determined that the public interest mandates disclosure of substantiated major discipline. As a result, the nature of the complaint and discipline, as well as the officer name, are publicized once a year on the Attorney General's website. In addition, more detailed findings are subject to disclosure upon request pursuant to the common law right of access. Although these directives are prospective, they confirm what the OPD argues here – that the disclosure of all sustained findings of discipline or, at a minimum, all sustained findings of major discipline is in the public interest.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY[3]

Pursuant to Section 9.10.1 of the Attorney General's current Internal Affairs Policy and Procedures manual (the "IAPP"), on a quarterly basis, "every law enforcement agency shall report internal affairs activity to the County Prosecutor on an internal affairs summary report form," known as "Appendix K." See Internal Affairs Policy and Procedures, Section 9.10.1

[3] The Statement of Facts and Procedural History are related and therefore combined for the court's convenience.

(Revised, November 2022). Such summaries "shall at least include the nature of the complaint, the date the complaint was received, the current status of the complaint, and, if the case is closed, the final disposition of the complaint with any discipline imposed." Id. at Section 9.10.2. The IAPP directs the County Prosecutor to submit Appendix K summaries "from all agencies in its jurisdiction to the Office of Public Integrity and Accountability." Id. at Section 9.11.1.

In November 2022, the Office of the Public Defender (the "OPD") identified an Appendix K submission published by the Essex County Prosecutor's Office (the "ECPO") on their website which listed complete index information regarding Internal Affairs cases resolved or pending during 2021.[4] (Aa 5; Ca 1-109)[5] This submission, entitled "Internal Affairs Case Reporting: County Summary," indicates that during the 2021 reporting period, police officers in Essex County were subject to 22 internal affairs cases alleging domestic violence, 40 cases alleging improper arrest, 57 cases alleging improper searches, 66 cases alleging differential treatment, 130 cases alleging

[4] The Attorney General has explained that this disclosure was inadvertent and that the policy was to publicize statistical information only. (Aa 87)

[5] Aa – Appellant's Appendix
Ca – Appellant's Confidential Appendix
1T – 7/30/2024 (motion)
2T – 11/7/2024 (motion)

an officer committed a criminal violation, and 159 cases alleging excessive force. (Aa 5; Ca 1-109) In total, the internal affairs allegations against officers in Essex County were sustained in 534 cases while 145 cases were subject to criminal review. (Aa 5; Ca 1-109)

To identify other Appendix K submissions or summary reports from the ECPO regarding Essex County law enforcement, the OPD filed a request pursuant to OPRA and the common law on or about December 9, 2023. (Aa 5, 12-13) The request sought Internal Affairs index information from Appendix K or Internal Affairs County Summary reports submitted by the Essex County Prosecutor's Office to the Attorney General or to the Office of Public Integrity and Accountability (the "OPIA") from January 1, 2013 to date. (Aa 6, 12-13)

On February 9, 2024 – two months after the initial request – the OPIA responded by providing publicly available statistical summaries of Internal Affairs case information and stating that the OPD's "request was considered closed at this time." (Aa 6, 14-17) That same day, the OPD responded that the requested materials had not been provided and that the request should therefore remain open. (Aa 6, 14-17)

Following a phone call between DAG Alessandra Baldini and ADPD Benjamin Van Meter, during which Baldini proffered that the county summaries were not collected by the Attorney General prior to 2021, the OPD

agreed to narrow its request to "the County Summary from 2021 through the present for those reports submitted by Essex County Prosecutor's Office." (Aa 6) To further assist the Office of the Attorney Geneal in searching for these documents and specify the type of information sought, the OPD provided the OPIA with copies of the Internal Affairs index information from the 2021 County Summary that had previously been made public. (Aa 6, 14-17)

On April 3, 2024, after repeated inquiries from the OPD, the OPIA denied the OPD's request stating:

> Please be advised that all records provided to you on February 9, 2024 (and attached again for reference) remain those that are responsive to your request.
>
> Please be advised that, to the extent your request seeks specific internal affairs matters, including the names of officers involved, N.J.S.A. 47:1A-9(b) exempts from access any records recognized to be confidential by statute. Because N.J.S.A. 40A:14-181 directs all law enforcement agencies to "adopt and implement guidelines which shall be consistent" with the Attorney General's Internal Affairs Policy and Procedures Manual ("IAPP"), and "[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information and remain exempt from access under [OPRA]," see IAPP § 9.6.1 (Nov. 2022), any such records may not be disclosed under OPRA. See also Rivera v. Union Cnty. Pros. Office, 250 N.J. 124, 142-43 (2022) (recognizing the confidentiality of internal affairs records under the IAPP and N.J.S.A. 47:1A-9).

> Furthermore, to the extent that you are seeking information that has since been removed from other agencies' websites, please be advised that this information is not subject to release under OPRA. Pursuant to the IAPP, the report you are seeking is "considered a confidential, internal work product." IAPP 9.9.3. Only the summary report (as contained within Appendix K), which does not contain officer names and is "statistical in nature" and "summarizes the types of complaints received and the dispositions of complaints" may be released publicly. IAPP 9.11.1.
>
> The Office reserves the right to claim additional grounds for denial not raised in this response. This request is considered closed at this time.

(Aa 6, 14-17) The OPD responded the same day, stating that although the OPIA's denial letter did not address the OPD's common law right of access claim, it understood the letter to be a denial of the common law claim as well. (Aa 7, 14-17) To date, the OPIA has not produced any of the requested information from Appendix K submissions and/or Internal Affairs County Summaries. Indeed, since the OPD informed the OPIA of where such information was already publicly available, that information has since been removed from the relevant websites.[6] (Aa 7)

On May 20, 2024, the OPD filed a Complaint against the OPIA, alleging that the OPIA violated the common law right of access to public records by

[6] The 2021 Appendix K Summary Report was publicly available on the ECPO's website for over a year before being taken down. (Aa 188-191)

refusing to turn over the requested records. (Aa 8) The OPD asserted "a compelling public interest in information summarizing efforts to hold police officers accountable, deter official misconduct, assess whether the internal affairs process is working properly, and foster trust in our system of law enforcement." (Aa 8) It also set forth "a significant interest in accessing such summary information contained within Appendix K submissions from the Essex County Prosecutor's Office in order to provide effective assistance of counsel by accurately assessing the strength of criminal cases against its clients, evaluating the credibility of police witnesses against its clients, and determining the State's compliance with discovery obligations to its clients." (Aa 8) In support of this latter interest, it submitted a certification from Deputy Public Defender Diane Carl, establishing that OPD attorneys have effectively used the information from the 2021 Appendix K published by the ECPO in the course of:

(1) moving to compel discovery and moving for disclosure of internal affairs files pursuant to State v. Higgs, 253 N.J. 333 (2023);

(2) identifying exculpatory evidence and other discoverable material that prosecutors have not disclosed as required under Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), and our rules governing discovery, e.g. Rule 3:13-3;

(3) negotiating favorable plea deals in cases involving police officers with relevant histories of misconduct; and

(4) preparing a defense for trial, especially in cases reliant on the credibility of law enforcement personnel.

See (Aa 188-190) Carl explained that in each of the enumerated cases discussed in her certification, the State had failed to turn over any Brady/Giglio information or to otherwise provide the defense with exculpatory and impeaching IA records. (Aa 188-191) The assigned attorneys only learned of – and were able to obtain and effectively use – the records due to the ECPO's inadvertent disclosure of the 2021 Appendix K report. (Aa 188-190)

The OPD argued that the articulated interests in the summary reports outweighed the State's need for confidentiality. (Aa 8) It contended that the OPIA could not explain how disclosure of the limited information in the summary report would jeopardize legitimate confidentiality concerns, such as "encourag[ing] witnesses to come forward and cooperate"; "protect[ing] personal information about witnesses, victims, the subject of an investigation, and others;" and "avoid[ing] impairing the internal affairs process." (Aa 20-22) Importantly, it observed that the requested submissions do not identify complainants or provide sufficient information for identification to be possible – they only state whether the complaint originated from an "agency" or a "civilian," and if the latter, the race/ethnicity of the civilian. (Aa 181) Likewise, the submissions contain no information identifying witnesses or victims and disclose only a generalized label characterizing the internal affairs

investigation itself, such as "improper arrest," "excessive force," or "other rule violation." (Aa 181) Further, the submissions only contain the name and employer of officers accused of misconduct and do not jeopardize disclosure of their non-public, personal information, such as "home addresses," "phone numbers," or "medical information." (Aa 181) Thus, the OPD summarized that while the OPIA alluded to the potential confidentiality concerns recognized in Rivera and alleges generally that disclosure of the requested records might threaten "the integrity of internal affairs investigations," it failed to connect its claimed interest in confidentiality to the specific information sought by the OPD. (Aa 181-82) Additionally, and importantly, the OPD noted that the OPIA failed to establish any harm that resulted from the online publication of the 2021 Appendix K, even though the information had been publicly available on the ECPO's website for over a year and had been used by OPD in its representation of clients for over two years. (Aa 182)

Finally, the OPD explained that State v. Higgs, 253 N.J. 333, 340 (2023), did not preclude its common law claim. (Aa 186-87) Although the Higgs Court established a procedure for access to IA files as a part of pretrial discovery in a pending criminal proceeding, requiring a criminal defendant to file a motion setting forth the relevance of particular IA files, the OPD is not seeking IA files in a particular criminal case as part of pretrial discovery. (Aa

186-87) Instead, it is seeking IA summary reports on behalf of the OPD to further the public goods of transparency, accountability, police reform and effective public defense. (1T 27-12 to 25)

In response, the OPIA contended that the OPD was not entitled to the requested records for two main reasons. First, it argued that the OPD had no right under the common law right of access because the New Jersey Supreme Court in Higgs had recently considered criminal defendants' interests in obtaining internal affairs records to use in their defense and set forth a procedure for obtaining those records. (Aa 51-54) Accordingly, the OPIA reasoned, Higgs preempted the OPD's right to seek internal affairs information under the common law right of access. (Aa 51-54)

In the alternative, the OPIA contended that the State's interest in confidentiality outweighed the OPD's and the public's need for the requested records. In support, it argued that disclosure of pending internal affairs investigations would jeopardize the integrity of the investigatory process. (Aa 56-57) It also argued that disclosure could undermine the interests of complainants in anonymity and discourage complainants from coming forward. (Aa 57) Beyond the concerns regarding disclosure of pending complaints and information pertaining to the identity of complainants, the

OPIA articulated no other need for confidentiality, even when pressed by the trial court to set forth a "concrete" interest or harm. (2T 22-1 to 23-25)

After holding argument on July 30, 2024, the Honorable Robert Lougy, A.J.S.C., dismissed the complaint with prejudice on September 3, 2024. (Aa 192-215) The court first opined that the OPD was seeking the records on behalf of its clients and that the instant action was therefore precluded by State v. Higgs. (Aa 211) In the alternative, it found that disclosure was unwarranted under the common law right of access. (Aa 212) As a preliminary matter, it stated that because the records sought were not "IA reports," with conclusions and recommendations, it was "arguable" that the records were not "public records." (Aa 212-215) Turning to the weighing of the interests, the Court found that the Rivera and Loigman factors weighed against disclosure, specifically noting that the OPD sought access to pending, nonserious and unsubstantiated complaints, as well as some identifying information about the complainant. (Aa 212-215) The Court opined that the disclosure of the records would release information regarding ongoing investigations, have a chilling effect on witnesses and victims, and impair the IA process. (Aa 215)

The OPD then filed a reconsideration motion, on the bases that the court failed to consider the use of redactions to address the court's concerns and issued a decision based on an incorrect reading of the law. (Aa 216-221; 2T

14-2 to 11) First, the OPD contended that redactions could be readily used to eliminate reference to unsubstantiated and minor complaints, and to any information related to the identity of the complainant, thereby addressing the court's concerns. (Aa 218-221; 2T 6-5 to 9-10) The OPD observed that the disclosure of historical evidence of substantiated, serious misconduct was compelled by Rivera and in accordance with the OPIA's own policy of disclosing prospective findings of serious discipline. (2T 8-20 to 9-10)

In addition, in responding to the court's conclusion that a common law request was barred by Higgs, the OPD reiterated that it "is not filing this on behalf of either a specific client" or "clients," in the private interest of a client or clients, but "on behalf of [its] own organization," in the pursuit of "a legitimate . . . and fulsome public interest." (2T 9-11 to 9-22, 10-12 to 15) It further argued that Higgs did not hold that criminal defendants and criminal defense attorneys no longer have any common law rights. (2T 10-23 to 11-11-13)

In response, the OPIA stated that the OPD had not established that the court erred in relying on State v. Higgs to deny the complaint. (Aa 227) The OPIA also argued that Rivera was inapplicable because Rivera contemplated exhaustive internal affairs reports, as opposed to summary reports. (Aa 227) Next, the OPIA contended that the proposed redactions would entirely negate

the defense's need for the requested records because evidence of major discipline is already available to the public. (Aa 228) When pressed by the court as to its position regarding historical evidence of major discipline, the OPIA indicated that such disclosure would be "burdensome." (2T 13-7 to 12)

After holding additional argument on November 7, 2024 (2T), Judge Lougy denied the reconsideration motion on November 13, 2024. (Aa 230-236) In support, the court stated that the OPD failed to establish that the court's decision relying on Higgs to dismiss the complaint was palpably incorrect. (Aa 235) In addition, the court stated that the OPD had not initially asked the Court to consider the possibility of redactions and therefore it had not "overlooked" their potential use. (Aa 236) Finally, the court acknowledged that the proposed redactions would affect the balancing of the factors, but stated that they would limit the disclosure to information that is already publicly available and would therefore "have no real effect" or "significance on the matter." (Aa 236)

The OPD's Notice of Appeal was timely filed. (Aa 237-241) This brief follows.

# LEGAL ARGUMENT

## POINT I

### DISCLOSURE OF REDACTED VERSIONS OF THE SUMMARY REPORTS OF INTERNAL AFFAIRS PROCEEDINGS IS WARRANTED UNDER THE COMMON LAW RIGHT OF ACCESS. (Aa 192-215, 221-229)

This Court should order the disclosure of redacted versions of summary reports of internal affairs proceedings under the common law right of access. Because such reports are created pursuant to the Internal Affairs Policy and Procedures (the "IAPP"), they are public records subject to disclosure where the interest in access outweighs the State's need for confidentiality. As any confidentiality concerns regarding pending internal affairs proceedings and complainant confidentiality can be addressed with redactions, the State's need for confidentiality is minimal or non-existent and is outweighed by the public interest in transparency, police accountability and effective public defense. Therefore, disclosure of redacted versions of the reports containing sustained findings of discipline, or at the very least, sustained findings of major discipline, is warranted.

In 1991, the Attorney General adopted the IAPP, which established procedures for addressing complaints of police misconduct. Rivera v. Union Cnty. Prosecutor's Off., 250 N.J. 124, 142 (2022); In re Att'y Gen. Directive,

246 N.J. 462, 482-86 (2021) (summarizing the history of the IAPP and related Attorney General directives). In 1996, the Legislature codified the IAPP in N.J.S.A. 40A:14-181, which requires all law enforcement agencies to "adopt and implement guidelines which shall be consistent with the guidelines governing the [IAPP]." The current version of the IAPP, effective November 15, 2022, was last amended by Attorney General Directive 2022-14.

Every New Jersey law enforcement agency is required to establish an independent IA unit to investigate and adjudicate police misconduct. IAPP §§ 4.0.1 to 4.1.6. The IAPP groups misconduct into nine categories:

- Crime;
- Excessive force;
- Improper arrest;
- Improper entry;
- Improper search;
- Differential treatment (i.e., discrimination);
- Demeanor (e.g., inappropriate "bearing, gestures, language or other actions");
- Serious rule infractions (e.g., "insubordination, drunkenness on duty, sleeping on duty, neglect of duty, false statements or malingering"); and
- Minor rule infractions (e.g., "untidiness, tardiness, faulty driving, or failure to follow procedures").

[IAPP § 2.2.2.]

When an agency receives a complaint (from a civilian, another officer, another law enforcement agency, a civilian review board, or an anonymous source), it must conduct a formal IA investigation so long as the complaint contains

"sufficient factual information" to do so; however, supervisors may resolve minor complaints informally, subject to review by the IA unit. IAPP §§ 5.0.1 to 5.1.14, 6.0.1 to 6.2.7.

The IA investigation should comprise all relevant evidence, including, for all civilian-initiated complaints, a recorded statement by the involved officer. IAPP §§ 7.01 to 7.1.6. It should be completed within 45 days of the date the complaint is received, IAPP § 6.1.2; N.J.S.A. 40A:14-147, but often takes much longer, (Ca 1-109). The burden of proof to substantiate the complaint is "preponderance of the evidence." IAPP §§ 6.2.3, 6.3.8.

At the conclusion of the investigation, the IA investigator recommends a disposition, but the ultimate conclusion is up to the agency's highest ranking law enforcement officer, generally the chief of police. IAPP §§ 6.3.9 to 6.3.10. If the highest-ranking officer decides to bring formal charges, a hearing is held (unless waived by the involved officer), after which the hearing officer issues a written decision with findings of fact for each allegation. IAPP §§ 6.3.11 to 6.3.14. Generally, discipline is not imposed until the investigation is complete; however, certain serious allegations may warrant immediate suspension pending the investigation. See IAPP §§ 5.2.1 to 5.2.3.

There are four possible findings in IA matters:

(1) "Sustained. A preponderance of the evidence shows an officer violated any law; regulation; directive, guideline, policy, or procedure issued by

the Attorney General or County Prosecutor; agency protocol; standing operating procedure; rule; or training";

(2) "Unfounded. A preponderance of the evidence shows that the alleged conduct did not occur";

(3) "Exonerated. A preponderance of the evidence shows the alleged conduct did occur, but did not violate any law; regulation; directive, guideline, policy, or procedure issued by the Attorney General or County Prosecutor; agency protocol; standing operating procedure; rule; or training. (For example, at the conclusion of an investigation into an excessive force allegation, the agency finds that the officer used force (alleged conduct) but that the force was not excessive (alleged violation)"; and

(4) "Not Sustained. The investigation failed to disclose sufficient evidence to clearly prove or disprove the allegation."

[IAPP §§ 2.2.3, 6.2.3, 6.3.9.]

A "sustained" finding may also include a plea or settlement where there is "sufficient credible evidence to prove the allegation," and the involved officer did not favorably challenge the finding. See IAPP § 9.11.2 (defining "sustained" in the context of the public disclosures discussed below). Discipline for misconduct may include oral reprimand or performance notice, written reprimand, monetary fine, suspension without pay, loss of a promotional opportunity, demotion, and discharge from employment. IAPP § 2.2.6. Mandatory remedial training may also be ordered. IAPP § 3.2.2.

At the conclusion of every IA investigation, the investigator must produce two reports: an "Investigative Report," containing a complete account

of the evidence considered; and a "Summary and Conclusions Report," containing a summary of the allegations, a summary of the factual findings, any discipline imposed, any specific rule violated, and any secondary misconduct discovered during the investigation. IAPP §§ 9.1.1 to 9.1.3. All investigative IA records should be maintained for the entirety of the involved officer's career plus five years (longer retention periods apply in cases of homicide and other criminal matters). IAPP § 9.4.1.

Pursuant to Section 9.10.1 of the current IAPP, on a quarterly basis," "every law enforcement agency shall report internal affairs activity to the County Prosecutor in an internal affairs summary report form attached as Appendix K".[7] IAPP § 9.10.1. Such summaries "shall at least include the nature of the complaint, the date the complaint was received, the current status of the complaint, and, if the case is closed, the final disposition of the complaint with any discipline imposed." IAPP § 9.10.2. The IAPP directs county prosecutors to submit Appendix K summaries "from all agencies in its jurisdiction to the Office of Public Integrity and Accountability." IAPP § 9.11.1. Indeed, the Office of Public Integrity and Accountability and the Office

[7] Although such summary reports were only more recently referred to as "Appendix K," the same reports have been required by the IAPP since at least 2019. IAPP § 9.10.2 (2019 Version). This brief is seeking disclosure of redacted versions of all summary reports in the possession of the OIPA, including the reports that predated the term "Appendix K."

of Justice Data oversee and direct the collection and publication of statistical information "summarizing the types of complaints received and the dispositions of those complaints" as gleaned from these Appendix K submissions. IAPP § 9.11.1.

The IAPP states that the "information and records of an internal investigation" are generally confidential but nevertheless subject to disclosure under certain circumstances. IAPP § 9.6.1. IA records and information may be shared at the direction of a county prosecutor or the Attorney General, or upon a court order. IAPP § 9.6.1.

In the interests of transparency and accountability, the Attorney General has ordered the prospective public disclosure of the identifies of officers who commit serious disciplinary violations. First, on June 15, 2020, the Attorney General amended the IAPP to require every law enforcement agency to publicly report, on an annual basis, instances of "major discipline," including the disciplined officers' names, misconduct, and sanctions imposed. Directive 2020-5 at 3-4. At first, "major discipline" was limited to instances in which an officer (1) was terminated; (2) received a reduction in rank or grade; or (3) was suspended for more than five days. Id. at 4. Then, on January 1, 2023, "major discipline" was expanded to also include instances in which an officer (1) was charged with an indictable offense; (2) regardless of the sanction imposed, had

a "sustained" finding for discrimination or bias, excessive force, untruthfulness, false reports or certifications, intentional illegal searches or seizures, intentional destruction of evidence, or domestic violence; or (3) left the agency while an IA investigation was pending, and the misconduct or sanction imposed falls within any of the above categories. Directive 2022-14 at 7-9; IAPP § 9.11.2 (describing each category in more detail).

The Attorney General also initially sought to publicize historical instances of major discipline in 2020 but abandoned that effort following In re Att'y Gen. Directive, 246 N.J. 462 (2021).[8] See Directive 2020-6, retracted by Directive 2022-14 at 2 n.2 ("This Directive retracts Directive 2020-6, which sought to disclose certain major discipline information on a retroactive basis

[8] In that case, the police unions sought to preclude the Attorney General from releasing the historical information on promissory estoppel grounds, claiming the State had promised to keep such information confidential. In re Att'y Gen. Directive, 246 N.J. 462, 497-505 (2021). The Court remanded for an evidentiary hearing as to those claims, ultimately leading the Attorney General to abandon the cause. In re Att'y Gen. Directive, 246 N.J. at 497-505; Directive 2022-14 at 2 n.2. The question before this Court in the present case is entirely distinct, as it concerns the OPD's common law right to access these records, not whether the Attorney General can publicize this information on its own accord. Of course, the State could not promise courts would not disclose public records pursuant to the common law right of access. See In Re Attorney General Law Enforcement Directive Nos. 2020-5 and 2020-6, 246 N.J. at 502 (noting that "no promise of confidentiality could attach to [] affirmative legal obligations," such as those under Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972) or the civil discovery rules).

and was never implemented due to litigation."). As a result, major discipline disclosures are prospective only (for the first category, from June 15, 2020; for the second, from January 1, 2023). Directive 2022-14; Directive 2021-6 at 2.

In 2022, the Attorney General also mandated disclosure of IA Summary and Conclusions Reports for the above categories of major discipline, as well as in other cases on a case-by-case basis, in response to requests under the common law right of access made "by any member of the public or press." Directive 2022-14. This Directive was released following Rivera v. Union County Prosecutor's Office, 250 N.J. 124 (2022), which, as explained further below, held that internal affairs records are publicly accessible under the common law right of access where the public's interest in disclosure outweighs the need for confidentiality. 250 N.J. at 147-51. Because the balance of interests would "always require" disclosure of certain records, the Attorney General mandated the automatic disclosure of the IA Summary and Conclusions Reports of major discipline in order to avoid unnecessary litigation and to promote the public's ease of access. Directive 2022-14. Again, the Directive was clear that it only applied to IA Summary and Conclusions Reports that post-dated the applicable Directive. Directive 2022-14; IAPP § 9.6.2. As the Directive acknowledged, however, there will be additional records not covered by the mandatory disclosure requirement subject to

disclosure based on the common law balancing test. Directive 2022-14 at 2. For the reasons set forth below, the records the OPD seeks in this case are of that kind.

### A. The Summary Reports Are Public Records Subject to Disclosure Based on the Balancing of Interests.

This Court should order the disclosure of the requested records under the common law right of public access because the public's and the OPD's interest in access and transparency outweighs the State's need for confidentiality. At minimum, the OPD is entitled to redacted versions of the summary reports with sustained findings of major discipline (including historical major discipline) because the Attorney General has already determined that the public's interest in such findings warrants automatic disclosure of prospective major discipline. In addition to major discipline, it contends that disclosure of all sustained findings of discipline is warranted because the State's minimal interest in confidentiality is outweighed by the countervailing interests in transparency, accountability and effective public defense.

Public records are subject to disclosure under the common law right of access when the established private or public "interests that favor disclosure outweigh concerns for confidentiality." Rivera, 250 N.J. at 144 (citing N. Jersey Media Grp., Inc. v. Township of Lyndhurst, 229 N.J. 541, 578 (2017));

Keddie v. Rutgers, State University, 148 N.J. 36, 50 (1997) ("The common-law right . . . 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;" and (3) the citizen's right to access "must be balanced against the State's interest in preventing disclosure." (citations omitted)). Any "written memorial" "made by a public officer . . . authorized to make it" constitutes a "common law public record" subject to such disclosure. Rivera, 250 N.J. at 144 (quoting Nero v. Hyland, 76 N.J. 213, 222 (1978)).

In Rivera, the plaintiff made a common law request for internal affairs records after the Attorney General issued a press release indicating that an officer had engaged in sexist and racist conduct. 250 N.J. at 136. Specifically, the plaintiff requested access to "all internal affairs reports" regarding the officer, which included all "objective investigative report[s] recounting all of the case's facts and a summary of the case, along with conclusions for each allegations, and recommendations for further action." Id. at 142, n.1. In considering the request, the Rivera Court first found that the IA reports were "written memorials" by "public officer[s] . . . authorized to make [them]" and therefore constituted public records under the broad standard, before carefully

weighing the right of access against the State's interest in preventing disclosure. Id. at 144.

The Court in Rivera confirmed the relevance of six factors previously identified by the Court in Loigman as relevant to that balancing:

(1) "the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government";

(2) "the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed";

(3) "the extent to which agency self-evaluation, program improvement, or other decisionmaking 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."

Id. at 144 (quoting Loigman v. Kimmelman, 102 N.J. 98, 113 (1986)). The Court found, however, that the Loigman factors principally focused on the State's need for confidentiality, while failing to adequately account for the public's interest in transparency. Id. at 144-47.

Thus, in considering the public interest, the Court held that "[i]n general, the public has an interest in internal affairs reports in order to hold officers

accountable, to deter misconduct, to assess whether the internal affairs process is working properly, and to foster trust in law enforcement." Id. at 147; see also id. at 150 ("Public access helps deter instances of misconduct and also helps ensure an appropriate response when misconduct occurs. In the long run, access to reports of police misconduct . . . promotes public trust."); Libertarians for Transparent Gov't v. Cumberland County, 250 N.J. 46, 59 (2022) ("[A]ccess to public records fosters transparency [and] accountability."). Furthermore, the Court found that "the public interest in transparency may be heightened in certain situations depending on a number of considerations," including:

(1) *the nature and seriousness of the misconduct.* Serious misconduct gives rise to a greater interest in disclosure. For example, misconduct that involves the use of excessive or deadly force, discrimination or bias, domestic or sexual violence, concealment or fabrication of evidence or reports, criminal behavior, or abuse of the public trust can all erode confidence in law enforcement and weigh in favor of public disclosure;

(2) *whether the alleged misconduct was substantiated*. Unsubstantiated or frivolous allegations of misconduct present a less compelling basis for disclosure;

(3) *the nature of the discipline imposed*. Investigations that result in more serious discipline, like an officer's termination, resignation, reduction in rank, or suspension for a substantial period of time, favor disclosure;

(4) *the nature of the official's position*. Wrongdoing by high-level officials can impair the work of the department as a whole, including the functioning of the internal affairs process; and

(5) *the individual's record of misconduct*. The public's interest in disclosure extends to all officers -- regardless of rank -- whose serious or repeated misconduct may pose a danger to the public.

Id. at 147-48. The Court stated that, "[a]s to all of those areas, transparency can expose problems that need to be addressed or reassure the public about police conduct." Id. at 148.

The Court cautioned that courts should not "rely on" whether the IA incident at issue has already been the subject of public interest, and official statements or leaks should not "drive the disclosure analysis." Id. Finally, it stated that in camera review of the IA records would not be required to assess the factors in "every case," but was necessary to address the State's confidentiality concerns in the case at hand. Id. at 146-47, 149.

Notwithstanding the incomplete record, the Court in Rivera ordered that "some form" of the IA report had to be disclosed to the plaintiff. Id. at 149-51. It noted that the public interest was especially great because the serious misconduct at issue violated the public's trust in law enforcement and undermined confidence in law enforcement generally. Id. As to the State's need for confidentiality, the Court explained that it could not "fully evaluate defendant's concerns about confidentiality because they are supported by generic arguments." Id. It deferred to the trial court on remand to "assess any potentially legitimate confidentiality concerns by reviewing the report in camera and making appropriate redactions," including "the names of complainants, witnesses, informants, and cooperators, as well as information

that could reasonably lead to the discovery of their names; non-public, personal identifying information about officers and others, such as their home addresses and phone numbers; and personal information that would violate a person's reasonable expectation of privacy if disclosed, such as medical information." Id. See also L.R. v. Camden City Public School District, 452 N.J. Super. 56, 88-89 (2017) ("[C]ourts are authorized to require the redaction of the records to maintain confidentiality." (citing S. Jersey Publ'g Co. v. N.J. Expressway Auth., 124 N.J. 478, 499 (1991)).

Turning to the case at hand, redacted versions of the summary reports are also subject to disclosure under the common law right of access. First, they clearly are public records under the common law as they were created by public officers pursuant to the IAPP. Id. at 136; see also Keddie, 148 N.J. at 49-50 ("A common-law record is one that is made by a public official in the exercise of his or her public function, either because the record was required or directed by law to be made or kept, or because it was filed in a public office." (citations omitted)). Second, there appears to be no dispute that the OPD has at least established "an interest in the public record." See L.R., 452 N.J. Super. at 88-89 (noting that the public's concern about a "public problem" or "about how public institutions carry out decisions" constitutes a legitimate public interest (citing Home News v. State, Dep't of Health, 144 N.J. 446, 454

(1996)); see also S. Jersey Pub. Co., Inc. v. New Jersey Expressway Authority, 124 N.J. 478, 925-926 (1991) (explaining that a party has standing under the common law if he voices a concern regarding a "public problem or issue," such as "keeping a watchful eye on the working of public agencies" (quoting Red Bank Register v. Board of Educ., 206 N.J. Super. 1, 9 (App. Div. 1985)). Third, for the reasons discussed below, the State's purported interest in confidentiality is outweighed by the established countervailing public interests in transparency, accountability and effective public defense.

**1. Disclosure of Sustained Findings of Major Discipline Is Warranted.**

Before balancing the competing interests in this case, it is important to delimit the contours of the OPD's request. It is not seeking access to entire investigative files or even to Summary and Conclusions Reports, but only to the summary index information included in Appendix K and the historical analogues – principally, the nature of the complaint and the name of the officer. In addition, as explained in its reconsideration motion below and reiterated here, the OPD consents to the redaction of all possibly sensitive information relating to the identity of the complainant, as well as all information relating to pending, unsustained, unfounded and exonerated matters.

The OPD's position is that, at minimum, summary information on sustained acts of major discipline should be disclosed – specifically the nature of the major discipline and the officer's name. In ordering the prospective publication of major discipline and mandatory disclosure of Summary and Conclusions Reports of such discipline upon request, the Attorney General determined that the need for confidentiality is outweighed by the public's interest in disclosure of findings of this kind. See Directive 2022-14; Directive 2021-6. Although the Attorney General ultimately abandoned the effort to publicize or automatically turn over historical major discipline after the police unions raised promissory estoppel claims, the fact remains that the Attorney General also initially determined the disclosure of historical major discipline was in the public interest. See Directive 2020-6. Thus, the OPD is at the very least entitled to redacted versions of the Appendix K and summary reports, with sustained findings of major discipline and officer names.

As the court and the OPIA indicated below, the nature of the plaintiff's request does differ from that in Rivera. (Aa 40, 212) But that difference does not render Rivera or the Rivera factors inapplicable. The ultimate question in evaluating every request for common law access to public records is whether the interest in access and need for transparency outweighs the State's need for confidentiality, regardless of the type of public record requested. See Loigman,

102 N.J. at 113. Thus, the non-exhaustive Rivera factors, which help evaluate the seriousness of any police misconduct and the consequent importance of public access, are relevant whenever a plaintiff seeks information on police misconduct, regardless of the specific type of record sought.

Nevertheless, the difference between the request in Rivera and in this case is important to the balancing of interests for two other reasons. First, the fact that the plaintiff in Rivera requested access to the entire internal affairs report after learning of the nature of the officer's misconduct only highlights the public's need for access to that summary information; without such summary information, members of the public will be unaware that officers have been subject to internal affairs proceedings and will not know what IA reports to seek.[9] See also Rivera, 250 N.J. at 148 (explaining that a leak or the disclosure of public information should not drive the disclosure analysis). Second, the much more limited nature of the information sought in this case

[9] Additional cases support this same proposition. See N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 551-53 (2017) (ordering disclosure of dash camera footage in a case that the Attorney General issued press releases about); Paff v. Ocean Cnty. Prosecutor's Off., 235 N.J. 1, 9-10 (2018) (remanding to consider the release of dash camera footage in a case that resulted in the officer being indicted by the local prosecutor); Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 467 N.J. Super. 385, 391-93 (App. Div. 2021), aff'd as modified, 254 N.J. 242 (2023) (upholding release of a police officer's internal affairs records after the local prosecutor published a report detailing an officer's history of domestic violence).

diminishes the State's need for confidentiality and, in turn, the OPD's burden in justifying the disclosure. See Lyndhurst, 229 N.J. at 580 (explaining that "[m]ore detailed disclosures" present greater confidentiality concerns and instructing courts to "look in particular at the level of detail contained in the materials requested" in considering a request pursuant to the common law right of access); see also Keddie, 148 N.J. at 51 ("[W]here the interest in confidentiality is 'slight or non-existent,' standing alone will be sufficient to require disclosure."). Thus, while a plaintiff seeking detailed IA reports may need to demonstrate a "heightened" interest by pointing to one or more of the Rivera factors, the public's general interest in access to findings of police misconduct may be sufficient to warrant disclosure of the more limited kind sought in this case. See Rivera, 250 N.J. at 147-148 (finding that the public has a broad interest in IA records "in order to hold officers accountable, to deter misconduct, to assess whether the internal affairs process is working properly, and to foster trust in law enforcement" and that that the public's interest may be "heightened" when any of the Rivera factors apply).

Turning to the application of the Loigman and Rivera factors, these factors demonstrate that the need for confidentiality is minimal for three main reasons. First, as explained above, the OPD is not seeking disclosure of the personal information of complainants or witnesses. As the records will not

include any information as to the identity of complainants or witnesses, disclosure will not discourage complainants or witnesses from participating in the internal affairs process or otherwise impair the process (Loigman factors (1), (2) & (3)). See Rivera, 250 N.J. at 147 ("[C]onfidentiality in internal investigations can be important in certain matters to encourage witnesses to come forward and cooperate; to protect personal information about witnesses, victims, the subject of an investigation, and others; and to avoid impairing the internal affairs process, among other reasons." (citing Loigman, 102 N.J. at 113)). Second, and as also explained above, the only information sought is summary or index information of the nature of the sustained misconduct and the officer's name, not narratives, witness statements, detailed findings or other sensitive or personal information (Loigman factor (4)). See Rivera, 250 N.J. at 147 (citing Loigman, 102 N.J. at 113). Third, there is no or very minimal risk that the disclosure of sustained major discipline will affect agency decision-making or involvement for the added reason that major discipline is already subject to publication and disclosure pursuant to the previously discussed Attorney General Directives (Loigman factor (3)). See Rivera, 250 N.J. at 147 (citing Loigman, 102 N.J. at 113). Because officers already know and expect that major discipline will be subject to disclosure going forward, disclosure of historical major discipline and of additional

sources of prospective major discipline will not affect officers' willingness to cooperate with internal affairs. As a final important note, the OPIA has not established any harm that resulted from the inadvertent online publication of the 2021 Appendix K report, undermining the conclusion that disclosing a much more limited version of such reports would have any detrimental effect. See Rivera, 250 N.J. at 146 ("[T]he certifications chiefly contain generalized statements about how disclosure of the internal affairs report might not protect the privacy interests of witnesses and employees, could have a chilling effect on their willingness to report violations in the future, and could thus hamper future investigations into police misconduct"). For these reasons, the State's need for confidentiality is minimal.

The remaining Loigman and Rivera factors demonstrate an overwhelming need for transparency. Police misconduct is a glaring issue in the State of New Jersey that has not been adequately addressed by remedial or disciplinary measures imposed by internal affairs. (Loigman factors (4) & (5)). See Rivera, 250 N.J. at 147 (citing Loigman, 102 N.J. at 113). Indeed, decisions and Attorney General directives have increasingly recognized compelling policy rationales that favor disclosure under certain circumstances, including transparency, police accountability, community trust in policing, and deterrence of police misconduct. See, e.g., Rivera, 250 N.J. at 147 ("In

general, the public has an interest in the disclosure of internal affairs reports in order to hold officers accountable, to deter misconduct, to assess whether the internal affairs process is working properly, and to foster trust in law enforcement."); In re Att'y Gen. Directive, 246 N.J. at 474, 495 (explaining "George Floyd's death on May 25, 2020 prompted nationwide protests and calls for greater accountability of police officers," and "[the Attorney General directives disclosing major discipline] acted to enhance public trust and confidence in law enforcement, to deter misconduct, to improve transparency and accountability in the internal affairs process, and to prevent officers from evading the consequences of their misconduct"); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 579–80 (2017) (noting the public interest in ascertaining whether the police acted professionally and lawfully); Higgs, 253 N.J. at 359 ("At a time when the Attorney General's Directives have signaled a massive shift in policy regarding the confidentiality of internal affairs records and this Court has held that the general public, under certain circumstances, can obtain internal affairs files through the common law right of access, there is no logical reason why criminal defendants, whose life and liberty are at stake, should have less access to those records than the general public."); Directive 2022-14 at 1 ("Transparency regarding law enforcement internal affairs investigations is necessary to foster strong police-community

relationships and public trust . . . ."); N.J. Att'y Gen., Excellence in Policing (available online at: nj.oag.gov/programs/excellence) (discussing Attorney General initiative aimed at promoting a "culture of professionalism, accountability, and transparency" in policing and "strengthening trust between law enforcement officers and the communities they serve").

In addition to the public's general interest in transparency, the public and the OPD have interests in accessing this information in order to promote effective public defense, as well as to ensure that the internal affairs process is working properly and that prosecutors are complying with their Brady and Giglio obligations. As set forth by the Carl certification, the State has previously failed to turn over impeaching and exculpatory IA records, which defense attorneys only became aware of as a result of the ECPO's inadvertent publication of the 2021 summary report. (Aa 188-191) See also "Botched Essex County Bust Shows Need for Better Police Misconduct Disclosure, Advocates Say," New Jersey Monitor (Apr. 15, 2024)[10] (setting forth evidence that prosecutors, particularly those in Essex County, routinely fail to comport their obligations under Brady and Giglio, without sanction). OPD has a very significant interest in obtaining access to the high-level information included

[10] https://newjerseymonitor.com/2024/04/15/botched-essex-county-bust-shows-need-for-better-police-misconduct-disclosure-advocates-say/

in the summary reports so that its attorneys know when relevant internal affairs records exist and when to file motions to compel discovery of internal affairs reports in individual criminal cases. In addition, access will allow the OPD to ascertain whether the internal affairs process has broken down, either because internal affairs failed to tell prosecutors about misconduct, in violation of the requirements of the IAPP, or because prosecutors withheld information, in violation of their ethical duties and Brady and Giglio obligations. See IAPP § 9.10 (requiring that internal affairs activity be submitted to the county prosecutors, including "sufficient information to enable the County Prosecutor to identify warning signs of potential deficiencies in the internal affairs process," and "evidence that may impact the credibility of police officers" in "criminal matters"). In sum, there is a critical need for this information, despite the existence of the internal affairs process and internal remedial measures.

In addition, at least with respect to the OPD's request to access evidence of sustained acts of major discipline, three out of five of the Rivera factors evincing "heightened" interest apply. Rivera, 250 N.J. 124 at 147-48. By definition, disclosed instances of misconduct will be substantiated, of a more serious nature, and have resulted in more serious discipline (Rivera factors (1), (2) and (3)). See Rivera, 250 N.J. 124 at 147-48. As the Attorney General

agreed in ordering the disclosure of major discipline, including detailed Summary and Conclusions Reports, the public generally and the OPD specifically have an overwhelming interest in findings of serious and substantiated police misconduct. Transparency is necessary to understand and address the problem of police misconduct, hold individual officers accountable, ensure that the internal affairs process is working properly, and be aware of which officers have engaged in serious acts of major discipline.

The fact that major discipline is now publicized by the OPIA does not undermine the OPD's request but instead bolsters it. First, and critically, as the practice is prospective only, access under the common law right of access is necessary to uncover historical evidence of major discipline. See Directive 2022-14; Directive 2021-6. Second, with respect to prospective major discipline, which is or will be otherwise available, the Rivera Court cautioned that the balancing should not turn on whether evidence of misconduct has already been leaked or made available to the public. 250 N.J. at 148. To the extent the publication of major discipline is relevant, it only establishes that the State's need for confidentiality is non-existent. See also Keddie, 148 N.J. at 51 ("The availability of the legal-submissions documents elsewhere is significant only with respect to demonstrating the absence of any need for confidentiality. . . . The obligation for disclosure . . . is not diminished because

the information is publicly available from another source or because the information has been disclosed to or by another entity." (citations omitted)).

The rights under the common law right of access should not be subject to the whims of the Attorney General – if the balancing of interests favors disclosure, then the information should be disclosed, regardless of the fact that the information or that some of the information is or will be available elsewhere. Thus, the public and the OPD should be permitted to access the summary findings of major discipline included in Appendix K, which are released on a quarterly basis, rather than having to wait months for the (routinely delayed) annual publicized findings. (1T 13-1 to 16)

In sum, disclosure of major discipline is required because the State's interest in confidentiality is minimal to non-existent with the proposed redactions, and the OPD's and public's need for transparency is substantial. The Attorney General has found that Rivera compels the automatic disclosure of major discipline that postdates the issuance of the applicable Directives. There is no reason to conclude the disclosure of much less detailed, high-level information of the same kinds of historical major discipline would not also be in the public interest. Reversal of the trial court's order is therefore required.

**2. Disclosure of All Sustained Findings of Discipline Is Warranted.**

In addition to information on sustained findings of major discipline, the OPD also contends that it is entitled to the summary information on sustained findings of non-major discipline because the State's interest in the confidentiality of this high-level summary information is minimal and easily outweighed by the overwhelming public interest. As acknowledged in Rivera and explained above, the public has a broad interest in the transparency of findings of police misconduct and IA records. In addition to that broad interest, the OPD has established an interest in using the requested records to further the public interest in effective public defense.[11] (Aa 188-91) Furthermore, under Rivera, there is a "heightened" need for access to substantiated findings of misconduct (Rivera factor (2)). These interests outweigh the State's minimal interest in keeping the nature of a sustained complaint and the officer's name confidential.

Again, the OPD is not seeking the "Summary and Conclusions" document to which we are entitled in every major discipline case that postdates the respective directives; we are only asking for high-level summary information. Whether the OPD would be entitled to more detailed information on any of these incidents through a public records request, a criminal

[11] As set forth in the certification, defense attorneys have used evidence of "other rule violations," in addition to major discipline, to move for discovery, negotiate plea deals, and prepare for trial. (Aa 188-91)

discovery request or some other vehicle is a fact-specific endeavor that may raise confidentiality concerns. But here, given the summary nature of the information, there is no legitimate confidentiality concern. Therefore, redacted versions of the summary reports including the officer's name, nature of the complaint and the discipline should be disclosed for all sustained complaints.

### B. State v. Higgs Does Not Preempt or Negate the OPD's Right to Seek Common Law Right of Access.

Contrary to the trial court's finding, Higgs did not silently abrogate the common law right of access. (Aa 211) Confronted with an individual criminal defendant's request to review an officer's IA file, the Higgs Court considered the defendant's discovery rights and constitutional rights to exculpatory and impeachment evidence. 253 N.J. at 354-355. The question before the Court was clear: "[W]hen [do] the above-referenced principles require the disclosure of police internal affairs records to a criminal defendant in pretrial discovery?" Id. at 355. The Court held: "To ensure that defendants in criminal trials are provided with the discovery necessary to adequately prepare for trial, defendants must be allowed, under certain circumstances, to access documents in law enforcement's internal affairs files." Id. at 357-58. In balancing the defendant's constitutional and statutory rights against the IAPP's guarantee of

confidentiality, the Court promulgated a procedure which allows an individual criminal defendant in a particular case to file a motion seeking in camera review of the file by specifying the category of information sought and the relevance of that information to the defendant's case. Id. at 358. If the trial court determines relevant information is present in the IA file, the pertinent portions should be disclosed to the parties. Id. at 359.

Different rights and interests, albeit related, drove the decisions in Higgs and Rivera. The Higgs Court fashioned a remedy it deemed necessary to protect a criminal defendant's right to relevant, exculpatory and impeaching evidence. In contrast, the Rivera Court considered New Jerseyans' right to access IA records in the interests of transparency and the benefits that result from such transparency, including accountability and reform.

The existence of one right does not negate the existence of the other. Rather than suggesting it was abrogating the common law right of access, Higgs cited the doctrine approvingly. The Court referenced Rivera as an example of the "massive shift in policy regarding the confidentiality of internal affairs records" and restated Rivera's holding that internal affairs records "can and should be disclosed under the common law right of access when interests that favor disclosure outweigh concerns for confidentiality." Higgs, 253 N.J. at 357, 359 (citing Rivera, 250 N.J. at 135). The Court then continued the trend

of disclosure by providing individual criminal defendants with a means of securing IA reports through criminal discovery. See id.

The holding of Higgs is limited by its terms. Unlike Higgs, the OPD is not: (1) filings its request on behalf of an individual client in connection with a specific criminal case; (2) requesting detailed or exhaustive records or reports from an internal affairs file; (3) seeking to vindicate the discovery rights of an individual defendant by making arguments related to the contours of a criminal defendant's rights. See, e.g., Higgs, 253 N.J. at 358. Instead, it is: (1) filing its request on behalf of its organization and attorneys; (2) requesting summary information; and (3) seeking to further the general public interests of transparency and accountability recognized as valid by the Court in Rivera, as well as the additional public interest in effective public defense. For these reasons, OPD's request for summary reports plainly falls outside of Higgs' scope and squarely within the ambit of OPD's common law right of access.

For these same reasons, this case falls outside the ambit of State v. Marshall, 148 N.J. 89, 272-74 (1997). In Marshall, our Supreme Court considered a criminal defendant's request on postconviction review for access to the prosecutor's entire investigative file pursuant to the statutory predecessor to the Open Public Records Act (OPRA) and the common-law right of public access. 148 N.J. 89, 272-74 (1997). After rejecting the statutory

claim, to the Court turned to and denied the common law request. Id. Citing the importance of confidentiality in pending criminal cases and identifying concerns that common law requests would delay criminal cases and replace criminal discovery, the Court concluded that the common law right of access "may not be invoked in a pending criminal case by a defendant seeking discovery rights beyond those granted by [the discovery rules]." Id. at 274-75. See also Constantine v. Twp. of Bass River, 406 N.J. Super. 305, 324 (App. Div. 2009) (noting that the common law right of public access "is not intended to replace or supplement the discovery of private litigants," but rather "to inform the public about agency action" (citing Marshall, 148 N.J. at 274)).

Marshall is inapposite because, as repeatedly explained above, the OPD is not seeking to vindicate or supplement the discovery rights of a particular defendant, much less use the common law right of access to demand unbridled access to a prosecutor's entire investigatory file of a pending criminal case. Instead, the OPD is seeking summary information, which may lead to separate claims for additional and more detailed information in other appropriate settings, such as under Higgs. Unlike in Marshall, here is no concern that a decision granting the OPD's request for access to summary reports on its own behalf will replace criminal discovery or result in delays in criminal cases.

Thus, the distinctions between the requesting party and the basis for the requests are determinative and render Marshall irrelevant.

Despite these crucial differences, it is worth noting that the Court more recently rejected an argument that a criminal defendant seeking access to public records is limited to the criminal discovery procedures and remedies. Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581 (2011). In Kovalcik, the Court considered an Open Public Records Act (the "OPRA") request by a criminal defendant, which he had filed after a judge denied a motion to compel the records in the criminal case against him. 206 N.J. at 583-84. As an initial matter, the Court noted that the Marshall Court "was focused on the fact that defendant was seeking access to the State's entire investigative file." 206 N.J. 581, 591 (2011) (citing Marshall, 148 N.J. at 272-75). More importantly, however, the Kovalcik Court ultimately rejected the Attorney General's "suggesti[on] that there is some broader limitation on disclosure . . . that relates solely to criminal defendants," namely "that this Court limit one's exercise of the statutory right to disclosure of documents pursuant to OPRA based upon an evaluation of the requestor's status." Id. In addition to finding no basis for such a limitation in the statute, the Court noted that if it were to "impose a limitation on the use of OPRA that applied to criminal defendants generally," criminal defendants "could easily evade [the limitation] by

employing others to make requests on their behalf." Id. Therefore, it would be "crafting a remedy that would be unenforceable as a practical matter." Id.

While Kovalcik demonstrates that it is improper to conclude an individual criminal defendant lacks any other statutory or common law rights to access solely because he also has discovery rights, this Court does not need to delve into the implications of Marshall and Kovalcik to decide this case. At the risk of repeating the same refrain: the request in this case was not made on the behalf of an individual criminal defendant to vindicate or expand pretrial discovery. In addition, there is no basis in law for concluding that the OPD or defense attorneys lack a right to request records based on the common law right to access. Indeed, one of the seminal cases on the common law right to access contemplated such a claim. See Loigman, 102 N.J. at 101 (considering a request by a practicing attorney to access records from the county prosecutor's confidential accounts pertaining to disbursements made to conduct undercover operations, reward informers and perform other sensitive law-enforcement functions).

For these reasons, the method for obtaining pretrial discovery in a criminal case set forth in Higgs does not preempt the OPD's claim under the common law right of access.

## CONCLUSION

Disclosure of redacted versions of the IA summary reports is warranted under the common law right of access. Because any legitimate need for confidentiality can be addressed by the use of redactions, the State's interest in confidentiality is minimal, if not non-existent, and is easily outweighed by the public interests in transparency, accountability and effective public defense. The redacted versions of the reports should disclose all sustained findings or, at a minimum, all sustained findings of major discipline.

Respectfully submitted,

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Dated: March 24, 2025

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| NEW JERSEY OFFICE OF THE PUBLIC DEFENDER,<br><br>Appellant,<br><br>v.<br><br>NEW JERSEY DEP'T OF LAW AND PUBLIC SAFETY, DIVISION OF CRIMINAL JUSTICE, OFFICE OF PUBLIC INTEGRITY & ACCOUNTABILITY, AND RECORDS & IDENTIFICATION BUREAU IN ITS OFFICIAL CAPACITY AS RECORDS CUSTODIAN,<br><br>Respondent. | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br><br>DOCKET NO. A-1041-24-T3<br><br>**Civil Action**<br><br>On Appeal from an Order of the Superior Court of New Jersey, Law Division, MER-L-974-24<br><br>Sat below: Hon. Robert Lougy, A.J.S.C. |

# RESPONDENT OFFICE OF PUBLIC INTEGRITY AND ACCOUNTABILITY'S BRIEF IN OPPOSITION TO APPEAL

**Date Submitted: May 13, 2025**

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## PRELIMINARY STATEMENT

Pursuant to a 2020 revision of the Attorney General's Internal Affairs Policies and Procedures (IAPP), every law enforcement agency must submit to its County Prosecutor a quarterly report listing every allegation of police misconduct under investigation during the quarterly reporting period—including allegations of relatively minor misconduct, allegations still being investigated, and allegations determined not to be true. As of 2021, these submissions identify by name the officer accused of misconduct, and specify the officer's and complainant's race and ethnicity. The IAPP requires the County Prosecutor to compile all of this information in a document called Appendix K. The purpose of Appendix K is to help identify patterns of alleged misconduct, gauge the performance of local Internal Affairs (IA) functions, and facilitate the disclosure of information at the appropriate time, in the appropriate form, and under the appropriate circumstances. In short, these quarterly submissions advance the broader project of law enforcement accountability and transparency.

Because the quarterly information in Appendix K is both expansive and provisional, the document is not disclosed to the public. In 2021, however, as agencies were still adapting to this reporting framework, the Essex County Prosecutor's Office (ECPO) inadvertently posted one iteration of Appendix K

on its website. The Office of the Public Defender (OPD) discovered the document and, while not disputing that its publication was a mistake, requested access to all Appendix K submissions from 2021 to present under the common law right of access.

As the trial court correctly held in denying OPD's request, the Supreme Court's decision in State v. Higgs forecloses the wholesale release of the information that OPD seeks. In Higgs, the Supreme Court established a process for adjudicating disclosure whereby a court must balance a criminal defendant's interest—which is at least as strong as OPD's asserted interests here—against the State's interest in confidentiality. Courts must perform that balancing test even for documents that are relevant to a criminal defendant's case. While this is not a criminal matter, there is simply no way to grant OPD's request without subverting the Supreme Court's holding in Higgs. And even if there were, OPD's request would fail under Rivera v. Union County Prosecutor's Office, as the trial court also correctly held. This Court should affirm.

## PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

The New Jersey Office of the Public Defender (OPD) appeals the Law Division's September 3 and November 13, 2024 orders and decisions finding that the Office of Public Integrity & Accountability (OPIA) did not unlawfully deny OPD access under the common law right of access to Appendix K submissions from Essex County Prosecutor's Office (ECPO) to OPIA containing details of all Essex County IA complaints.

### A. The IAPP and IA Reporting and Disclosure

In 1991, the Attorney General issued the first IAPP under N.J.S.A. 52:17B-4(d), which governed the conduct of law enforcement internal affairs matters in this State. Rivera v. Union County Prosecutor's Office, 250 N.J. 124, 142 (2022). Relevant here, that first iteration of the IAPP contained confidentiality provisions that strictly safeguarded the release of IA records. Ibid. (citing In re Atty Gen. Law Enforcement Directive Nos. 2020-5 and 2020-6, 246 N.J. 462, 483 (2021) (In re Directives)). In 1996, the Legislature enacted N.J.S.A. 40A:14-181, codifying the requirement that all law enforcement agencies "adopt and implement guidelines which shall be consistent with the"

[1] The procedural history and counterstatement of facts are inextricably intertwined, and have been combined for the court's convenience.

IAPP. Rivera, 250 N.J. at 142. As such, all law enforcement agencies in this State are bound by law to abide by the provisions of the IAPP, including its confidentiality provisions. Id. at 142-43.

The IAPP has been revised over time, including most recently in 2022. See, e.g., Attorney General Directive No. 2022-14 (Nov. 15, 2022). And while all versions of the IAPP have contained confidentiality provisions that permit only limited access to IA records, see, e.g., Directives, 246 N.J. at 484 (listing IAPP confidentiality provisions), in 2020 the Attorney General adopted Directives 2020-5 and 2020-6, which—for the first time—required that officers subject to major discipline (defined as five or more days suspension) be identified publicly, id. at 484-85. See also ibid. (upholding the Attorney General's authority to mandate such reporting, reasoning that "the Attorney General's decision to release the names of law enforcement officers subject to major discipline is consistent with his delegated authority and grounded in reason" and "is not arbitrary, capricious, or unreasonable").

In 2022, the Attorney General again amended the IAPP to further expand public reporting on police misconduct. See Attorney General Directive 2022-14 (Nov. 15, 2022). Under Directive 2022-14, "[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the

resulting materials" are still considered "confidential information" exempt from access under New Jersey's Open Public Records Act (OPRA), N.J.S.A. 47:1A-1.1 to -13, and can only be released under certain enumerated circumstances, including "at the direction of the County Prosecutor or Attorney General" or "upon a court order." Id. at § 9.6.1; see also Rivera, 250 N.J. at 143 (confirming that IA reports and records are exempt from access under N.J.S.A. 47:1A-9(b)).

Despite this grant of confidentiality, under § 9.11.2, every law enforcement agency shall submit annual reports of misconduct that meets certain criteria, including where a member was: terminated; reduced in rank or grade; received major discipline; had sustained findings of discrimination or bias based on protected characteristics; had a sustained finding that the officer used excessive force in violation of the Attorney General's Use of Force Policy; was untruthful or demonstrated a lack of candor; filed a false report; intentionally conducted an improper search or seizure; intentionally mishandled or destroyed evidence; engaged in domestic violence as defined in N.J.S.A. 2C:25-19; resigned or retired while an IA complaint was pending and where the misconduct if "ultimately sustained" would have required disclosure; or was charged with an indictable crime under New Jersey or federal law. IAPP § 9.11.2.[2]

[2] The Attorney General also promulgated a form known as "Appendix L" to

An allegation of misconduct is sustained when it is shown by a preponderance of evidence. IAPP § 9.11.2. However, allegations that ultimately "cannot be sustained, are not credible, or have resulted in . . . exoneration," or have been subsequently vacated or overturned on the merits, are not considered sustained, and are not subject to publication. Ibid. Thus, even under the IAPP's expanded reporting requirements, allegations generally must be investigated to conclusion and sustained to mandate public reporting. Ibid. To that end, the IAPP requires all local law enforcement agencies to report the status and summary details of pending and recently closed IA investigations to their relevant Count Prosecutor on a quarterly basis. IAPP § 9.10.1. From there, County Prosecutors are required to substantively review the summary reports and determine whether any further investigation of any allegations contained therein is warranted. IAPP § 10.0.3.

In addition to such public reporting, and consistent with the Supreme Court's decision in Rivera, which found that IA reports are exempt from OPRA but may, under certain circumstances, be released under the common law right of access, see 250 N.J. at 143, 148-49, the IAPP also provides a mechanism for release under the common law right of access. In response to common law

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ensure agencies correctly report the information required by IAPP § 9.11.2.

requests, where an incident meets the criteria in § 9.11.2(a)-(l), law enforcement agencies are directed to release a redacted "Summary and Conclusions Report," which includes a recitation of the alleged facts, the agency's findings, and the discipline imposed. See id. at § 9.6.2(a).

Even then, the Summary and Conclusions Reports must be redacted to protect the names of complainants, witnesses, informants, victims, and cooperators, as well as any information "that could reasonably lead to discovery of their identities"; non-public personal identifying information about individuals in the Report; medical information or history; or information regarding any criminal investigation or prosecution not already contained in a public filing or that would impede or interfere with pending criminal or disciplinary proceedings; records prohibited from disclosure by law; juvenile records; information subject to court orders compelling confidentiality; information would create a risk to the safety of any person; or any other information that would violate a person's reasonable expectation of privacy. Id. at § 9.6.2(b)(1)-(9). See also Rivera, 250 N.J. at 150 ("At a minimum, judges should redact the names of complainants, witnesses, informants, and cooperators, as well as information that could reasonably lead to the discovery of their names; non-public, personal identifying information about officers and

others, such as their home addresses and phone numbers; and personal information that would violate a person's reasonable expectation of privacy if disclosed, such as medical information.").

**B. Appendix K.**

To aid state and local law enforcement agencies in the reporting mandated by Directive 2022-14, the Attorney General provides publicly-available guidance and sample documents.[3] IAPP § 9.10.1; (Aa93-155).[4] Appendix K, the record at issue in this case, was created in 2020 and has been revised over time. As contemplated in this litigation, Appendix K currently exists as an excel spreadsheet containing nine tabs, including two that are titled "Cases Pending from Prior Years" and "Cases Opened" during the reporting year. (Aa85-86; Aa93-155). These two tabs contain columns that require reporting of detailed information about the allegation, including the officer's name, race, and ethnicity; the date the complaint was received; the source of the complaint; the complainant's race and ethnicity; whether there are criminal violations; the case

[3] [].njoag.gov/iapp/ (last accessed April 21, 2025). Web addresses throughout the brief have been modified to disable all hyperlinks.

[4] "Aa" refers to Appellant's Appendix, "Ab" refers to Appellant's Brief and "Ra" refers to Respondent's Appendix.

length; whether it has been suspended; its status (including whether it is still pending); and the internal disposition. Ibid.

The remaining five tabs include aggregate data on IA complaints lodged during the reporting year.[5] (Aa93-155; Aa86). For the four quarters of the year, the four corresponding tabs document interim data about the number of allegations reported; the type of allegations reported and by whom; and the frequency and type of discipline. (Aa86). Finally, the "Annual Report" tab summarizes these four quarters, requiring the agency to document overall statistics of IA complaints from the reporting year. Ibid. This tab, the "Annual Internal Affairs Summary," shall be used to satisfy the requirements of § 9.11.1, which requires each law enforcement agency to publish a report on its public website that is "statistical in nature" and that "summarize[es] the types of complaints received and the dispositions of those complaints." IAPP § 9.11.1. Thus, this tab is the only tab made public under the IAPP. (Aa86). Appendix K submissions are otherwise confidential.

[5] The first two tabs of Appendix K contain an introduction and instructions for completing the form. (Aa95-99).

**B. Essex County's Appendix K and OPD's OPRA Request.**

At some point prior to December 2023, while transitioning to a new website, the Essex County Prosecutor's Office (ECPO) inadvertently posted, instead of just Appendix K's "annual summary," the entire Appendix K. (Aa87). As soon as ECPO became aware of this inadvertent posting, it acted immediately to remove the posting, leaving only the Annual Report for public access. Ibid. Furthermore, ECPO also took the step of contacting the "Wayback Machine"[6] to request that all previous iterations of the website that included the full Appendix K likewise be disabled. (Aa87-88). The Wayback Machine complied with ECPO's request and removed Appendix K from its archive. (Aa88). Thus, at present, ECPO's Appendix K is no longer publicly posted. (Aa87-88).

On December 9, 2023, evidently after having discovered ECPO's inadvertent Appendix K posting and before it was removed, OPD submitted OPRA Request W211352 to OPIA seeking:

[6] The Wayback Machine styles itself as a "digital library of Internet sites and other cultural artifacts in digital form." See []archive.org/about/ (last accessed May 2, 2025). It permits users to access snapshots in time of internet websites, even after those websites have been changed or deleted.

> all reports entitled "Internal Affairs Case Reporting: County Summary" submitted by the Essex County Prosecutor's Office to the Attorney General's Office or to the OPIA between January 1, 2013, and the present.
>
> [(Aa12-13).]

OPD claimed in its request that Appendix K should be disclosed under OPRA because it was not exempt from OPRA as an IA report and, in any event, it was releasable under the common law right of access. Ibid. OPD further claimed that ECPO's inadvertent disclosure of the complete 2021 Appendix K demonstrated that such information was not confidential or protected from public disclosure. Ibid.

After seeking appropriate extensions, OPIA responded on February 9, 2024 with copies of ECPO's Annual Summaries dating back to 2013, which listed aggregated public data that ECPO had submitted under the IAPP. (Aa157-58; Aa161-66). In response, OPD denied that these summaries were responsive to its request. (Aa158; Aa170). Following cooperative exchanges between OPD and OPIA to clarify what documents OPD sought, during which time OPIA explained that Appendix K only was submitted to OPIA beginning in 2021, OPD eventually agreed to seek Appendix K submissions from 2021 to the present, including all Internal Affairs information contained in the "Cases Pending" and "Cases Opened" tabs. (Aa158; Aa167-70).

On April 3, 2024, OPIA denied OPD's clarified request for complete Appendix K submissions from 2021 through the time of the request as exempt from disclosure under OPRA based on the IAPP's confidentiality provisions and Rivera. (Aa174-77).

**C. Trial Court Proceeding**

On April 8, 2024, OPD filed a verified complaint and order to show cause before the Honorable Robert Lougy, A.J.S.C., seeking access to complete ECPO Appendix K submissions from 2021 to the present under the common law right of access.[7] (Aa1-11).

In support of its application, OPD argued that the requested records must be disclosed under the common law right of access because its interest in providing effective assistance of counsel to its criminal defendant clients outweighed the State's interest in confidentiality. (Aa23-27).[8] In response, OPIA asserted that its denial was appropriate, pointing out that OPD's interest

[7] OPD's Verified Complaint sought access to complete unredacted copies of Appendix K under the common law right of access only and did not challenge OPIA's denial under OPRA. (Aa8).

[8] OPD initially filed the full, unredacted copy of ECPO's inadvertently-disclosed Appendix K on the public docket. Following communications between the parties, OPD eventually agreed to jointly request a takedown Order for Appendix K, (Ra1), and to instead submit it for in camera review.

in obtaining IA records to defend its clients in criminal proceedings had been squarely adjudicated just one year prior by the Supreme Court in State v. Higgs, which set forth a carefully crafted process by which criminal defendants could obtain access to IA records that was explicitly designed to avoid "a fishing expedition into the disciplinary records of law enforcement." 253 N.J. 333, 357 (2023); (Aa50-53).

Following oral argument, the trial court dismissed OPD's Verified Complaint, agreeing with OPIA that Higgs resolved the matter in its entirety. (Aa211). Relying on OPD's articulation of its interest in Appendix K as "'critical to OPD's ability to vindicate its indigent clients' right to effective representation,'" the court concluded that it was seeking Appendix K "on behalf of the clients it represents." (Aa211) (citing OPD's brief in support of its Order to Show Cause). But it found that "this instant action is not the proper vehicle for Plaintiff to seek such materials." Ibid. The trial court recognized that the Supreme Court's decision in Higgs set forth a definitive process by which criminal defendants may access IA records to aid in their defense, which requires defendants to file a motion with the criminal court identifying the "specific category" of information the defendant seeks and requesting in camera review of the record. Ibid. (quoting Higgs, 253 N.J. at 358). Thus, the court

found that OPD's request for the entire, unredacted Appendix K—including "information related to all investigations and allegations, whether substantiated or not, and regardless of whether [OPD] represents those victims"—was improper under Higgs and specifically resembled the "'fishing expedition into the disciplinary records of law enforcement'" that Higgs was designed to prevent. Ibid. (quoting Higgs, 253 N.J. at 358).

While finding that Higgs was dispositive, the court nonetheless also engaged in a substantive common law right of access analysis and ultimately held that OPD failed its burden under both Rivera and Loigman v. Kimmelman, 102 N.J. 98, 101 (1986). (Aa212). Recognizing that Appendix K contains all misconduct, not just "serious" misconduct; pending and unsubstantiated conduct; conduct involving all levels of discipline; and summary information by all officers as opposed to a single officer, the court found that Rivera factors one (the seriousness of the conduct), two (whether the conduct was substantiated), three (the nature of the discipline imposed), and five (the individual's record of misconduct) all favored non-disclosure. (Aa212-13). Likewise, the court found that all the Loigman factors,[9] except factor four, favor non-disclosure. (Aa214-

[9] The six factors in Loigman 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

15). Of particular concern of the court was the fact that if Appendix K were to be disclosed, the integrity of the IA process could be undermined due in part to Appendix K identifying information of complainants. Ibid.

OPD sought reconsideration, contending that the court's September 3, 2024 decision failed to consider that concerns regarding disclosure of information about unsubstantiated allegations, minor misconduct, or witness identities included in Appendix K could be addressed through redactions, protective orders or other measures. (Aa216-17). On October 17, 2024, OPIA opposed. (Aa222-29). OPD did not file a reply.

On November 13, 2024, the court denied OPD's motion for reconsideration. (Aa230-36). In its decision, the court found that OPD had failed to address why Higgs was not controlling. (Aa235-36). With respect to redactions, the court held that redacting identifying information and publishing

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given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement or other decision making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any 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. 102 N.J. at 113.

only sustained major discipline would be both unnecessary and inappropriate since that information is already published annually. (Aa236).

This appeal follows.

## ARGUMENT

### THE TRIAL COURT CORRECTLY CONCLUDED THAT OPD WAS NOT ENTITLED TO SUMMARY REPORTS OF INTERNAL AFFAIRS PROCEEDINGS UNDER THE COMMON LAW RIGHT OF ACCESS.

This court should affirm Judge Lougy's decision upholding OPIA's denial of access to all ECPO Appendix K submissions for two, independent reasons. First, granting access to Appendix K submissions so that OPD can more effectively represent its clients and "assess the strength of the State's case" would subvert the carefully-crafted process the Supreme Court implemented in Higgs, which was designed to balance the exact competing concerns at issue in this matter. [10] And second, even if OPD's interest could be couched as a "wholesome public interest" under the common law right of access, the trial court properly applied the Loigman and Rivera factors to conclude that OPD had

[10] Furthermore, to the extent OPD seeks "historical analogues" for Appendix K submissions prior to 2021, no such analogues exist. (Ab28; Aa158; Aa167-70).

not carried its burden to obtain the full Appendix K submissions from 2021 through the time of the request under the common law right of access.

"If there is a basis in the record to do so," this court "generally defer[s] to the trial judge's determination, after reviewing the documents and balancing the parties' interests," about the disclosure or withholding of records under the common law right of access. Shuttleworth v. Camden, 258 N.J. Super. 573, 588 (App. Div. 1992); see also N. Jersey Media Grp. v. Twp. of Lyndhurst, 441 N.J. Super. 70, 89 (App. Div. 2015), rev'd in part on other grounds, 229 N.J. 541 (2017) (noting that a "deferential standard of review" is appropriate "when a court conducts an in camera review of documents and balances competing interests in disclosure and confidentiality in connection with a common-law-based request to inspect public records") (emphasis added). Given both the sensitivity of IA records and the "exquisite" balancing test undertaken by the court in common law right of access cases, deference to the trial court's conclusion—particularly here, where the court reviewed ECPO's Appendix K—is appropriate.

It is well-settled that the right to access common law records "is a qualified one." Keddie v. Rutgers, 148 N.J. 36, 49-50 (1997). While the common law definition of "public record" is broader than OPRA's definition of

"government record," "[t]he trade-off is that, '[u]nlike a citizen's absolute statutory right of access, a plaintiff's common-law right of access must be balanced against the State's interest in preventing disclosure.'" Educ. Law Ctr. v. New Jersey Dep't of Educ., 198 N.J. 274, 302 (2009) (second alteration in original) (quoting Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 46 (1995)). To gain access to public records under the common law, three criteria must generally be met: first, the record must be a common-law public document; second, the person seeking access must establish an interest in the record; and three, the right to access must be balanced against the State's interest in preventing disclosure. Keddie, 148 N.J. at 50.

The crux of this case rests within factor three: the balancing test between the State's interest in preventing disclosure and an individual requestor's interest in the records. That balancing test has been refined since its initial conception in Loigman, including in Rivera, where the Supreme Court articulated the now well-recognized test for access to IA reports under the common law right of access. 250 N.J. 124, 148 (2023). In addition to the Loigman factors, the Rivera Court identified five additional factors to help guide whether IA reports should be released under the common law right of access. They include:

> (1) the nature and seriousness of the misconduct. Serious misconduct gives rise to a greater interest in disclosure.
>
> (2) whether the alleged misconduct was substantiated. Unsubstantiated or frivolous allegations of misconduct present a less compelling basis for disclosure;
>
> (3) the nature of the discipline imposed. Investigations that result in more serious discipline, like an officer's termination, resignation, reduction in rank, or suspension for a substantial period of time, favor disclosure.
>
> (4) The nature of the official's position. Wrongdoing by high-level officials can impair the work of the department as a whole, including the functioning of the [IA] process; and
>
> (5) The individual's record of misconduct. The public's interest in disclosure extends to all officers – regardless of rank – whose serious or repeated misconduct may pose a danger to the public.
>
> [Rivera, 250 N.J. at 148].

Here, the trial court correctly considered both OPD's specific asserted interest (to gain access to IA records to represent its clients) and any purported "wholesome public interest" (in transparency), Higg-A-Rella, 141 N.J. at 47, and concluded that neither outweighed the government's need to keep confidential IA records that contain hundreds of complaints and include pending

and unsustained allegations and complainant demographics and identifying information. Its decision should be affirmed.

### A. OPD's Particularized Interest Is Already Protected By Its Right to Access IA Records Under Higgs.

First, OPD overstates its interest in "seeking Appendix K materials on behalf the clients it represents." [Op. 20]. As the trial court correctly noted, OPD's clients already have access to relevant disciplinary history through a process that the Supreme Court established in Higgs. Through that process, courts weed out irrelevant material in camera, and then "appropriately balance" the individual's right to discovery of relevant material against the State's countervailing interest in confidentiality. 253 N.J. at 357 (quoting Rivera, 250 N.J. at 135). The fact that Higgs so methodically calibrated access to disciplinary materials in the criminal setting—where the interests of OPD's clients are must acute—fatally undermines OPD's asserted interest in the larger universe of materials it seeks here.

Just one year after finding in Rivera that IA reports are accessible under the common law right of access, the Court in Higgs addressed a separate but related issue: how criminal defendants seeking to vindicate their right to a full and fair trial may access IA records in ongoing criminal litigation. 253 N.J. at 340. There, the Court (citing Rivera) balanced the traditional grant of

confidentiality to internal affairs records with the rights of individual criminal defendants and the obligations of prosecutors to produce exculpatory and impeachment information. It held that a criminal defendant must first file a motion with the trial court seeking in camera review of the file. Id. at 358. Because this newly-adopted "procedure should not be a fishing expedition into the disciplinary records of law enforcement," the Court also elaborated on the requirements of such a motion: to succeed on a motion for in camera review, defendant must "identify the specific category of information the defendant seeks and the relevance of that information to the defendant's case." Ibid. Crucially, "[a] general allegation that the defendant is in search of information relevant to a law enforcement officer's credibility for impeachment purposes would be insufficient to obtain review of the file." Ibid.

As the trial court rightly found, Higgs makes this an easy case. (Aa211). Both before the trial court and here, OPD continues to maintain that its generalized interest in obtaining access to Appendix K is "so that its attorneys know when relevant internal affairs records exist and when to file motions to compel discovery of internal affairs reports in individual criminal cases" and to "ascertain whether the internal affairs process has broken down[.]" (Ab35-36). But the Court in Higgs rejected precisely this type of free-ranging, broad-based

interest as insufficient to merit release of IA records. 253 N.J. at 358. That decision is dispositive of OPD's claim: as the Higgs Court held, a motion to obtain internal affairs information on behalf of a criminal defendant must be case- and officer-specific and adjudicated before the judge presiding over the criminal case. Id. at 359-60. OPD's recycling of the same arguments it made before the Court in Higgs—including that the burden is too onerous—remain unpersuasive. Compare (Ab35-36) (Aa188-91) (submitting on reply a certification detailing ECPO's prior alleged failures to turn over inculpatory information), with (Aa63-71) (excerpt from OPD's brief in Higgs, urging the Court to adopt an iterative process that allows criminal defense counsel to gain access to an internal affairs file, in lieu of or in addition to an in camera review by the court, to determine "whether the records are in fact relevant to the defense case").

Said another way, OPD cannot be permitted to circumvent the Court's carefully-considered process for balancing a criminal defendant's right to mount a full and complete defense against the confidentiality afforded to the IA process through a public records challenge. Similar prohibitions apply to requestors in

both civil and criminal cases alike.[11] See Ass'n for Governmental Responsibility, Ethics & Transparency v. State, Docket No. A-2647-20, slip op. at 38-39 (App. Div. Feb. 1, 2023),[12] certif. denied, 257 N.J. 521 (2024) (rejecting plaintiff's attempt to improperly obtain documents she was denied in her civil suit); Constantine v. Twp. of Bass River, 406 N.J. Super. 305, 324 (App. Div. 2009) ("OPRA is a public disclosure statute and is not intended to replace or supplement the discovery of private litigants. Its purpose is to inform the public about agency action, not necessarily to benefit private litigants.") (quotations and citations omitted); State v. Marshall, 148 N.J. 89, 274 (1997) (holding that the common law right of access cannot be invoked by a criminal defendant to obtain records beyond those available in criminal discovery).

That prohibition is particularly applicable here, where the contents of the record at issue—Appendix K submissions that contain scores of IA information relating to hundreds of investigations, including but not limited to complainant

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[11] This is especially compelling in light of the Legislature's recent amendment of OPRA, which now provides that "[a] party to a legal proceeding may not request a government record if the record sought is the subject of a court order, including a pending discovery request, and a custodian shall not be required to complete such a request." N.J.S.A. 47:1A-5.

[12] Appellants include this unpublished decision in their appendix. (Aa73-84). Counsel is unaware of any contrary cases. See R. 1:36-3.

information, officer information, and even pending and unsubstantiated charges—does not even necessarily relate to clients OPD represents. In short, accepting OPD's arguments would permit an end-run around Higgs process.

Alternatively, OPD points to various public interests unrelated to representing its clients: "understanding the societal problem of police misconduct, [] ensuring the internal affairs process is working adequately, and [] promoting effective public defense." [Br. 1]. While OPIA agrees that the public has a deep interest in police accountability, it does not follow that there is a "wholesome public interest" in Appendix K materials. Rather, the IAPP requires agencies to compile and submit the information in Appendix K on a confidential basis, to encourage fulsome reporting of alleged misconduct and to improve the internal affairs function. See IAPP 9.9.3. Meanwhile, OPD's asserted interest in Appendix K springs from one agency's mistaken publication. Further, OPD's interest in "promoting effective public defense" is essentially a restatement of its clients' interests, which, as discussed above, Higgs already vindicates. The trial court's decision should be affirmed.

### B. Any Wholesome Public Interest, Including In Redacted Records, Does Not Outweigh the Government's Interest in Confidentiality.

Second, even if Higgs were not enough to dispose of OPD's request, and even if OPD had a "wholesome public interest" in Appendix K submissions, the court correctly held that OPD's request fails the common law balancing test under Rivera.

On its face, the scope of OPD's request far exceeds what even the most expansive reading of Rivera would permit. Not only does Rivera contemplate the release of redacted IA reports only, see 250 N.J. at 142 n.1 (distinguishing between IA reports and records), it also requires a party seeking disclosure to "present more than generalized, conclusory statements" to overcome the Court's own recognition that "[t]here are good reasons to protect the confidentiality of internal affairs reports under the common law in many instances[,]" id. at 149. Here, OPD's only interest other than to represent its clients is in "transparency," writ large. And yet OPD, in the narrowed request before the trial court, see infra Point I.C, asked explicitly for the name of every officer who has been accused of misconduct in Essex County since 2021 (along with their demographic information, the demographic information of the complainants, and the outcome of those investigations—even where that outcome remained pending). When

weighed against the scope of sensitive information at issue in this case, OPD's thin and conclusory interest fails out of the gate.

Apart from these threshold issues, the court's detailed, fact-sensitive application of Loigman and Rivera is entitled to significant deference and should be affirmed. See (Aa212) ("OPD's right to access does not outweigh the State's interest in preventing disclosure."). First, the court rightly concluded that Loigman factors one, two, three, five, and six incontrovertibly weigh in favor of confidentiality. It is undisputed that Appendix K contains the source and date of IA complaints, along with the race and ethnicity of the complainant and the nature of the allegation. (Ab12; Aa220). As the Court recognized in Rivera when it expressly commanded redaction of witness and source information, disclosure of such information would discourage citizens from providing information to the government, undermine the IA process, and impede an agency's self-evaluation and improvement of internal affairs program. See 250 N.J. at 146 ("Confidentiality in internal investigations can be important in certain matters to encourage witnesses to come forward and cooperate; to protect personal information about witnesses, victims, the subject of an investigation, and others; and to avoid impairing the internal affairs process, among other reasons."); see also id. at 150 ("At a minimum, judges should redact the names

of complainants, witnesses, informants, and cooperators, as well as information that could reasonably lead to the discovery of their names[.]"). Furthermore, Appendix K contains information regarding matters that are currently under investigation or unsubstantiated, and to the extent it includes serious substantiated matters, such discipline is already subject to release pursuant to the IAPP. (Aa214-15).

The court's application of Rivera was likewise on point. As to Rivera factor one (the seriousness and nature of the offense at issue), the trial court properly recognized that "Appendix K contains all allegations of misconduct, not just 'serious' misconduct[,]" and so this factor favors non-disclosure. (Aa93-155; Aa86; Aa212). Likewise, factors two and three favor non-disclosure. As the trial court recognized, Appendix K contains a full range of unsubstantiated and substantiated conduct and matters involving all levels of discipline. Ibid. As to factor four, while the trial court found that is neutral, ample evidence in the record would support a finding that it compels non-disclosure: because Appendix K encompasses allegations against officers of all rank and position who have received allegations, factor four favors non-disclosure. Ibid. And, last, as the trial court properly found, factor five favors non-disclosure because OPD's sweeping request for summary information

without regard for specific facts forecloses consideration of any individual officer's disciplinary record, or lack thereof. Ibid.

### C. OPD's Improperly-Enlarged Request on Appeal Should Be Denied.

OPD's arguments, both on reconsideration and on appeal, do not move the needle. As a threshold matter, OPD continues to move the goalpost by expanding and contracting the scope of its request throughout its brief on appeal, to the point where it is unclear exactly what records it seeks. On the one hand, OPD claims that its "position is that, at minimum, summary information on sustained acts of major discipline should be disclosed—specifically the nature of the major discipline and the officer's name" dating back to 2013. (Ab29) (emphasis added). But in the same breath it also seeks all information related to all sustained discipline—including non-major discipline—dating back to 2013. See (Ab28) (explaining that OPD is seeking "principally, the nature of the complaint and the name of the officer" subject to sustained discipline over the last ten years); (Ab39) ("In addition to information on sustained findings of major discipline, the OPD also contends that it is entitled to the summary information on sustained findings of non-major discipline[.]").

It is well settled that "our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity

for such a presentation is available." State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). That is especially true where the party fails to show any special circumstances warranting departure from that rule. See, e.g., 809-811 Washington St. v. Grego, 253 N.J. Super. 34, 50 (App. Div. 1992) (declining to consider issues raised for the first time on appeal noting "[p]laintiff has not demonstrated the kind of extraordinary circumstances which might lead [the court] to depart from this general rule"). Here, where OPD and OPIA engaged in a cooperative process that resulted in a narrowed request—which OPRA was specifically designed to encourage, see Mason v. City of Hoboken, 196 N.J. 51, 63 (2008)—OPD should not now be permitted to upend that process by expanding its request for the first time on appeal. Thus, any request for records beyond the unredacted Appendix K submissions from 2021 through the present should be disregarded.

But even if the court is willing to entertain any form of an enlarged request, it still should affirm the trial court's decision, because all permutations of OPD's request fail. First and foremost, officers' names were not included in reporting formats until 2020. Compare November 2017 IAPP, Requirement 9 and Appendix S ("Every law enforcement agency will report internal affairs activity to the county prosecutor on an internal affairs summary report form.

This form simply summarizes the number of cases by type of case received and disposed of during the reporting period"), with August 2020 IAPP § 9.10.1 and 9.11.1 (first version of the IAPP that included Appendix K, which includes a field for officer name). (Ra44-45; Ra105-112). Further, officer and complainant demographic information including names was not submitted to OPIA until 2021 (see Office of Justice Data's "New Jersey Law Enforcement Internal Affairs (IA) Investigations" dashboard, [].njoag.gov/iadata/ (last accessed May 8, 2025)). This means that OPIA—to which OPD's OPRA request was actually directed—does not even have records responsive to OPD's expanded request on appeal.

Furthermore, to the extent OPD seeks access to officer names and complaints against them for any "sustained finding" of major discipline where final review has been exhausted or occurred post-June 2020, that information is already available as a result of Attorney General Directive 2020-5. See In re Directives, 246 N.J. at 504 ("For major discipline imposed after the Attorney General issued the Directives [on June 15, 2020], officers can expect that their identities will be released to the public."). OPD acknowledges this. (Ab37).[13]

[13] To be clear, OPIA has never asserted a confidentiality interest in the names of officers who sustained major discipline after Directive 2020-5 – that would be patently absurd in light of the IAPP's publication requirements. (Ab37).

Therefore, as the trial court rightly found, release of redacted Appendix K submissions dating back to 2021 is duplicative, unnecessary, and ultimately would have "no real effect." (Aa236).[14]

In addition, putting aside the fact that the Attorney General did not collect demographic data (or officer names, for that matter) prior to 2021, to the extent OPD seeks "summary information," including officer names and the type of complaint, on any sustained discipline dating back to 2013, two additional problems arise. First, OPD does not differentiate between investigations that were sustained at the local level but may later have been overturned by the County Prosecutor, OPIA, or even on appeal, and sustained findings considered "final" under the IAPP. See IAPP § 9.11.2 ("'Sustained finding' refers to any finding where a preponderance of the evidence shows an officer violated any law, regulation, directive, guideline policy or procedure issued by the Attorney General or County Prosecutor; agency protocol; standard operating procedure, rule or training, following the last supervisory review of the incident(s) during the internal affairs process where the deadline for appeal has passed or following

[14] In addition, records of IA investigations since 2021 are reported, albeit without the identifying officer's names, to the Office of Justice Data, which publishes that information. A searchable portal is available here: [].njoag.gov/iadata/ (last accessed May 8, 2025).

a ruling by a hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission, or the Superior Court where the deadline for any subsequent appeal has passed.") (emphasis added). Thus, the fact that an allegation of misconduct may initially be substantiated at the local level does not foreclose further investigation at the county level or beyond. IAPP §§ 9.10.1, 10.0.3.

Second, OPD's request for all sustained discipline relating back to 2013 runs headlong into the Court's holding in In re Directives. While the Court there affirmed the Attorney General's authority to prospectively command the release of names of officers who were subject to major discipline, and rejected the bulk of the challengers' arguments in opposition, it found that "one claim require[d] more careful attention": the one made by officers who say they relied on promises of confidentiality when agreeing to accept major discipline prior to June 2020. 246 N.J. at 473. To resolve that claim, the Court ordered "a judge to hear and evaluate testimony and decide if the elements of the doctrine of promissory estoppel have been met."[15] Ibid.

To be sure, In re Directives does not categorically bar the release of pre-June 2020 IA reports (though Appendix K is not a report). But to properly

[15] When adopting Directive 2022-14, the Attorney General expressly withdrew Directive 2020-6.

balance the competing interests in any common law right of access case—and particularly in cases seeking access to IA reports, where the Court has already recognized an interest in confidentiality—the analysis must always be guided by the "exquisite" balancing test articulated in Rivera and Loigman to determine "whether the misconduct in question is rightly a matter of public interest, even if the information has not yet been revealed." Rivera, 250 N.J. at 148. When properly assessed, disclosure of IA reports serves to "expose problems that need to be addressed or reassure the public about police conduct." Ibid.

But that is not what OPD seeks here. Instead, OPD seeks the categorical release of every name of every officer who had any sustained finding (major or minor) for the last ten years, even where that finding may have later been overturned, and where even the broadest application Rivera would not otherwise contemplate such release. See, e.g., Major Discipline Reporting (Dec. 31, 2023)[16] (including summaries for chronic lateness, failure to call in sick time, etc.). And it does so notwithstanding the fact that the Supreme Court has expressly provided an alternative path to serve its precise articulated interests (criminal defense) through Higgs. Thus, even if OPIA had this information—

[16] Available at [].njoag.gov/wp-content/uploads/2024/08/Major-Discipline-1-01-23-to-12-31-23.pdf (last accessed April 28, 2025).

and it does not—the scope of OPD's request belies the fact-sensitive balancing test the common law right of access demands. See, e.g., Gannett Satellite Network v. Neptune Twp., 254 N.J. 242, 250 (2023) (holding that common law right of access "claims impose significant burdens on municipal clerks and other records custodians; they require a careful balancing of competing interests and the application of an array of factors that can challenge even a seasoned judge").

In short, even if OPD's enlarged request for records is considered, it must fail. Not only did the Attorney General not require demographic reporting until 2021 (and therefore OPIA does not even have responsive records), but OPD's request seeking the name of every Essex County officer who had any sustained finding since 2013 based only on its generalized assertions about transparency would end-run the procedure the Supreme Court created in Higgs, upend the carefully-calibrated test the Court laid out in Rivera, and implicate the "serious" concerns observed by the Court in In re Directives. Because OPD cannot justify disclosure under either Higgs or Rivera, the trial court properly dismissed its verified complaint and denied its order to show cause and motion for reconsideration. This court should affirm.

## CONCLUSION

For all of these reasons, the trial court's decision should be affirmed.

Respectfully submitted,

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| NEW JERSEY OFFICE OF THE PUBLIC DEFENDER,<br><br>Appellant,<br><br>v.<br><br>NEW JERSEY DEP'T OF LAW AND PUBLIC SAFETY, DIVISION OF CRIMINAL JUSTICE, OFFICE OF PUBLIC INTEGRITY & ACCOUNTABILITY, AND RECORDS & IDENTIFICATION BUREAU IN ITS OFFICIAL CAPACITY AS RECORDS CUSTODIAN,<br><br>Respondent | : | SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION,<br>Docket No. A- 1041-24-T3<br><br><u>A Civil Action</u><br><br>On Appeal from an Order of the Superior Court of New Jersey, Law Division,<br>Docket No. MER-L-974-24<br><br>Sat Below:<br>Hon. Robert Loughy, A.J.S.C. |

# *AMICUS CURIAE* BRIEF ON BEHALF OF LIBERTARIANS FOR TRANSPARENT GOVERNMENT

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## STATEMENT OF INTEREST OF AMICUS CURIAE

Libertarians for Transparent Government (LFTG) is a New Jersey non-profit organization devoted to transparency and openness in government. LFTG's founder is John Paff, a longtime transparency advocate and citizen journalist who has litigated volumes of open government cases, many of which are published. Among other things, these cases have struck down unlawful regulations that limited transparency, In re Adoption of N.J.A.C. 5:105-1.6(a)(1), 479 N.J. Super. 301 (App. Div. 2024), expanded access to settlement agreements involving police misconduct, Libertarians for Transparent Gov't v. Cumberland Cty., 245 N.J. 38 (2021), ensured public access to dash camera videos, Paff v. Ocean Cnty. Pros. Office, 235 N.J. 1 (2018), and provided access to metadata, Paff v. Galloway Twp., 229 N.J. 340 (2017).

LFTG has participated as amicus curiae in numerous transparency cases, providing its knowledge and expertise in both requesting public records and litigating public records disputes to assist courts in reaching a resolution on the issue in the case. See, e.g., Am. Civil Liberties Union of New Jersey v. Cnty. Prosecutors Ass'n of New Jersey, 257 N.J. 87 (2024); Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 254 N.J. 242 (2023); Bozzi v. City of Jersey City, 248 N.J. 274 (2021); In re Att'y Gen. Directive, 246 N.J. 462 (2021); L.R.

v. Camden City Pub. Sch. Dist., 238 N.J. 547 (2019); Kean Fed. of Teachers v. Morel, 233 N.J. 566 (2018); Brennan v. Bergen Cnty. Pros. Office, 233 N.J. 330 (2018); Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 467 N.J. Super. 385 (App. Div. 2021); In re Att'y Directive, 465 N.J. Super. 111 (2020).

LFTG is interested in this case because it believes that disclosure of Appendix K reports would serve the public's interest in police transparency and accountability. Paff and LFTG have long focused on police accountability, filing numerous requests for IA materials or police settlement agreements and publishing the results. Access to Appendix K (and similar reports) would allow the public to fact-check the annual summary reports and major discipline reports that police departments have published for years, as well as shed a light on demographic information that reveals racial disparities in the IA process.

LFTG is also concerned with the trial court's holding that suggests certain classes of individuals (such as defendants in criminal cases or their defense attorneys) cannot utilize the common law right of access. LFTG knows that when OPD is effective at serving its clients, it can and does expose police or prosecutorial misconduct. That results in greater accountability overall, which benefits the public. Allowing OPD to access materials under the common law means that it will be able to proactively identify misconduct and get bad cases

thrown out earlier in the process, which advances civil rights and saves taxpayers money from lengthy prosecutions that are overturned when misconduct is discovered on appeal or during post-conviction relief.

Pursuant to Rule 1:13-9:

> an application to appear as amicus curiae in any court shall be made by motion in the cause stating with specificity the identity of the applicant, the issue intended to be addressed, the nature of the public interest therein and the nature of the applicant's special interest, involvement or expertise in respect thereof. The court shall grant the motion if it is satisfied under all the circumstances that the motion is timely, the applicant's participation will assist in the resolution of an issue of public importance, and no party to the litigation will be unduly prejudiced thereby.
>
> [R. 1:13-9.]

"Rule 1:13-9 has been interpreted as establishing 'a liberal standard for permitting amicus appearances.'" K.D. v. A.S., 462 N.J. Super. 619, 633 (App. Div. 2020) (explaining that amicus curiae need not be impartial).

The Court should grant LFTG's motion to appear as amicus curiae because it has fully complied with Rule 1:13-9. LFTG has explained its interest and submitted a timely brief, and no party is prejudiced by its participation.

## PRELIMINARY STATEMENT

The trial court committed three glaring errors in this case. First, the court is wrong that the Office of the Public Defender's (OPD) common law records request is barred by State v. Higgs, 253 N.J. 333 (2023). Higgs did not bar criminal defendants from using the common law right of access. Instead, Higgs created a special right of access to defendants, beyond the common law rights of the public, so that they can obtain any IA material that is relevant to their cases without proving their need for the records outweighs any confidentiality claim. Even where IA material is not accessible to the public because the balancing test weighs against disclosure, a defendant can access it by simply establishing relevancy. If an IA document is not relevant to a defendant's case, then the defendant's level of access is equal to the public's common law rights. The trial court's decision contradicts the Supreme Court's dictate in Higgs that "there is no logical reason why criminal defendants, whose life and liberty are at stake, should have less access to those records than the general public."

Second, assuming arguendo that a defendant is prohibited from using the common law, OPD did not file this request for any specific case. Rather, OPD explained that the information is helpful to its attorneys generally so that they have proactive knowledge about the misconduct in certain departments, which

is helpful in future cases. Public defender entities across the nation gather police misconduct records and place them into databases so that they can build profiles on officers even before a case comes in relating to that officer, fact-check prosecutors in their discovery disclosures and inform the public about misconduct. The trial court's decision threatens OPD's proactive work.

Moreover, like anyone else, OPD is allowed to assert the public's interest in transparency. The trial court's third mistake was deciding that the common law balancing test weighed against access. In a public records case, the custodian bears the burden of proof and must submit more than generalized and conclusory claims of confidentiality to justify nondisclosure. That was all that was presented here and there is no basis to withhold Exhibit K in its entirety. A trial court has an obligation to withhold only those portions of a document where the agency met its burden of proving non-disclosure.

LFTG believes the Appendix K reports should be released with minimal redactions because Defendants failed to meet their burden of proof. But, as OPD explained, at a minimum, the trial court should have disclosed redacted versions that list all sustained major discipline cases because those redactions fully addressed the vague claims of confidentiality in the certification. Although Defendants claim the Appendix K reports prior to 2020 do not contain officer

names, that fact undermines their asserted need for secrecy. Since 2011, police departments were required to publish an annual report that described the misconduct that led to major discipline, without officer names. Thus, nothing confidential would be disclosed if agencies, whether the Attorney General or the county prosecutors, disclose redacted Appendix Ks with the same information.

What such disclosure would do, though, is allow OPD (and the public) to factcheck historical public reports to determine whether agencies accurately reported the number and types of major discipline cases to the public. Agencies have been caught falsely reporting major discipline data or otherwise failing to comply with the IAPP. Alternatively, redacted Appendix K reports would allow OPD (and the public) to easily access major discipline information without having to file records requests with the more than 500 law enforcement agencies in New Jersey to obtain the old major discipline reports. Defendants have no reason to shield these redacted reports, other than to make it harder for OPD to obtain accurate data about police misconduct and advocate for their clients.

This Court should reverse, rule that OPD's request is not barred by Higgs, and order redacted disclosure of the Appendix K reports.

# LEGAL ARGUMENT

## I. THE TRIAL COURT ERRED BY DENYING ACCESS TO REDACTED APPENDIX K REPORTS

### a. Higgs Does Not Limit Anyone's Ability to Use the Common Law Right of Access to Obtain IA Material

LFTG adopts the arguments by OPD regarding the trial court's erroneous conclusion that defendants are barred from accessing IA material outside criminal discovery via the process set forth in Higgs. LFTG adds the following:

As stated above, the Supreme Court mandated in Higgs that a "criminal defendant[], whose life and liberty are at stake, should [not] have less access to [IA] records than the general public." Higgs, 253 N.J. at 359. But that is exactly what the trial court's decision does in this case: it singles out defendants and their attorneys and bars them from utilizing the common law to gain access to IA reports altogether, even if the public at large is entitled to those documents.[1]

[1] Defendants cite the recent OPRA amendments, which prohibit a party to a legal proceeding from accessing records under OPRA if the record is subject to a court order or discovery request in a pending proceeding. N.J.S.A. 47:1A-5. Clearly that provision does not apply here because OPD filed this on its own behalf, not on behalf of any client or case, and there is no pending discovery request for it. Moreover, OPRA expressly states in multiple places that it does not abrogate the common law right to access any record. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-9. Thus, even a party to a legal proceeding can still use the common law.

Instead, Higgs can be accurately characterized as recognizing that everyone is able to access certain IA records pursuant to Rivera v. Union County Prosecutor's Office, 250 N.J. 124 (2022), where the balancing test weighs in favor of disclosure. But, because a defendant's life and liberty are on the line, he has a special right to access to IA materials that does not hinge upon proving that his need for disclosure outweighs the State's need for secrecy. Instead, a defendant must only establish that potential IA materials are relevant to his case (a very lenient standard) and then he is entitled to receive them via discovery, even if there was no doubt the records would be off limits for the general public.

If there is no relevancy to a defendant's case, then his rights are on par with everyone else. He can file a records request and explain the common law interest in disclosure. If the agency denies access, he can file an action under the common law just as any member of the public can do and ask a court to conduct a balancing test and determine if the records should be disclosed. To rule as the trial court did would give a defendant fewer rights to IA files than the general public has, in direct contravention with Higgs.

Although State v. Marshall, 148 N.J. 89, 274 (1997), did hold nearly thirty years ago that the defendant could not utilize the common law to evade discovery rules, the case is easy to distinguish. The defendant sought the State's

"entire file" on him.[2] Such a broad request for an "entire file" is invalid even today under either OPRA or the common law, no matter who filed it. See Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30 (App. Div. 2005) (request for "entire file" invalid); MAG Entm't, LLC v. Div. of Alcoholic Bev. Control, 375 N.J. Super. 534, 547-49 (App. Div. 2005) (requestors must identify the records sought with sufficient clarity rather than requesting every record on file).

Moreover, Marshall must be considered in the context of the significant developments in our transparency laws in the past two decades. The Marshall Court first analyzed the defendant's request under OPRA's predecessor law, concluding that the "Right–to–Know Law does not provide defendant with the right to inspect the law-enforcement files sought in this case because no law or regulation requires that such files "be made, maintained or kept." 148 N.J. at 271-72. Clearly, had any of the records been required by law to be made, maintained, or kept on file, then the defendant would have been able to access them just like anyone else and would not be limited to using discovery. See

[2] To demonstrate how substantial the case file was, Justice Stein described the volume of the material presented to the Court: "The voluminous size of the petition and its constituent documents—including a forty-five volume appendix and fifteen volume supplemental appendix, together encompassing in excess of 8000 pages—combined with the 548 claims of error on which it relies, presents the Court with a gargantuan appellate record." Marshall, 148 N.J. at 143.

Kovalcik v. Somerset Cnty. Pros. Office, 206 N.J. 581, 589-92 (2011) (concluding denial of discovery motion was not a basis to deny criminal defendant access under OPRA and distinguishing Marshall as being "focused on the fact that defendant was seeking access to the State's entire file).

Next, the Court looked to the defendant's claim that he should receive the "entire file" under the common law right of access. Importantly, at that time, law enforcement records in general were treated as highly confidential and courts routinely held that criminal investigatory records (i.e., records relating to an investigation that were not required by law to be made, maintained, or kept on file) could not be disclosed under the common law. See, e.g., Nero v. Hyland, 76 N.J. 213 (1978) (law enforcement records of a four-way character investigation into a candidate could not be disclosed under common law); Daily Journal v. Police Dep't of City of Vineland, 351 N.J. Super. 110 (App. Div. 2002) (denying access to criminal investigation reports under common law), certif. denied, 174 N.J. 364 (2002). Additionally, during this time, IA materials were highly confidential—the 1991 IAPP provided only statistics to the public.

Things began to change in 2017, when the Supreme Court held for the first time that even if a criminal investigatory record is exempt under OPRA, it should be disclosed under the common law where there was a strong public

interest in disclosure. North Jersey Media Grp. v. Twp. of Lyndhurst, 229 N.J. 541 (2017). By 2022, the Supreme Court cracked open public access to IA files for the first time in Rivera, even though the IAPP at the time permitted disclosure only of limited major discipline information. And, then in Higgs, the Court recognized that it had just granted the public significant access to IA materials, and thus a criminal defendant would of course be entitled to an even broader right of access because their lives and liberty are on the line.

In other words, the legal landscape has changed drastically since Marshall. LFTG has no doubt that if cases like Lyndhurst, Rivera, or even Higgs were presented to the Supreme Court back then, it is highly unlikely that the Court would have ruled in the same way because of the extreme secrecy regarding law enforcement records at the time and the judiciary's substantial deference to claims by law enforcement that extreme secrecy in their affairs was needed. But in recent times, the Court has recognized the value of transparency and how it benefits both the public and law enforcement, and it no longer accepts generic arguments in favor of secrecy from law enforcement agencies.

Accordingly, the trial court erred by concluding that a defendant is barred by Higgs[3] from using the common law to obtain the Appendix K reports.

**b. OPD Has a Right to Use the Common Law Right of Access**

Making matters worse, the trial court also concluded that OPD was barred from utilizing the common law even though OPD explained that it was not seeking the Appendix K reports for any pending client or case. LFTG again relies upon the arguments in OPD's brief, but adds the following:

The trial court effectively held that criminal defense firms—whether a private law firm or the public defender's office—cannot proactively use public records laws to gather information about police officers and police departments because such information could likely be helpful to a future client who could instead try to use discovery to obtain such information. This ruling ignores the modern practice of law in the information age and deprives defense attorneys of records that the public is entitled to obtain via the common law.

[3] When the Legislature enacted OPRA, it expressly ensured the public's right to access records under the common law right of access even where there may be an exemption. N.J.S.A. 47:1A-9(b). It is thus unclear whether the Supreme Court would have the authority to abrogate a person's common law rights, even if it so desired to do so.

Public defender offices across the nation have recognized that their clients and the public are best served by proactive research regarding police misconduct. For example, the San Francisco Public Defender has an award-winning database called "Cop Monitor,"[4] which not only allows the agency to build profiles on problematic officers and police departments that are helpful to its lawyers but also shares critical information with the public about police misconduct as part of its mission to increase transparency around policing. See, e.g., San Francisco Public Defender, Mano Raju receives James Madison Freedom of Information Award – Society of Professional Journalists Recognizes the SF Public Defender CopMonitor Database, Mar. 16, 2021.[5] Similarly, the New York Legal Aid Society has a "Law Enforcement Lookup" database, "which empowers organizations and communities across New York City to hold police officers accountable for civil rights violations." See https://legalaidnyc.org/law-enforcement-look-up/. These databases assist lawyers in their defense work, educate the public and are part of the offices' work to create systemic change.

[4] https://sfpublicdefender.org/copmonitor/
[5] https://sfpublicdefender.org/news/2021/03/mano-raju-receives-james-madison-freedom-of-information-award-society-of-professional-journalists-recognizes-the-sf-public-defender-copmonitor-database

Per news reports, OPD hired a police accountability director in 2024 as part of its efforts "to improve the quality of the office's investigations and promote policies to address systemic misconduct." Sophie Nieto-Munoz, Public Defender's Office Touts New Police Accountability Director, New Jersey Monitor, June 28, 2024, https://newjerseymonitor.com/2024/06/28/public-defenders-office-touts-new-police-accountability-director. Like others across the nation, a stated goal is to create a database of public records that allows the office to create an information hub so that its lawyers can search for information in one central location. The goal is not only to improve representation, but also to gather information to "change the conversation and to change the policies statewide about police accountability and police misconduct." Ibid.

The trial court's decision, though, limits OPD's ability to gather IA materials to foster its policy goals and to educate the public, solely because those same materials might be used to help a future client. This Court should reverse because the trial court's decision has no basis in law and hinders OPD from fulfilling its government functions and operating as cutting-edge defense entity.[6]

[6] The Prison Policy Initiative has stated that one of the best ways in which a state can improve its public defense system is by making law enforcement records publicly available so that defense attorneys may access them. See Ginger Jackson-Gleich, Nine Ways That States Can Provide Better Public Defense,

### c. The Public Interest in Disclosure Outweighs Any Minimal Confidentiality Interest

The trial court concluded that the common law balancing test weighs against disclosure, primarily because it held there was little value in accessing reports that were heavily redacted or contained information that was duplicative of what is already in public reports. LFTG strongly disagrees, and expands upon OPD's arguments as follows:

#### i. Appendix K Reports Allow the Public to Fact-Check Public Disclosures and to Learn More About Police Misconduct

As OPD explains, access to Appendix K reports enables it to learn about all sustained findings of misconduct or, in the alternative, to at least gain access to all sustained findings of "major discipline" as defined in Law Enforcement Directive 2022-14. That directive expanded the disclosure requirements of Directive 2022-5 to align with Rivera, 250 N.J. 124, so that any sustained misconduct that falls within Rivera's first factor must be disclosed. This means that sustained findings of bias, discrimination, falsifying reports or fabricating evidence, and other serious misconduct must be made public, even if the officer resigns to avoid punishment or the agency does not impose a serious sanction.

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Prison Policy Initiative, July 27, 2021, https://www.prisonpolicy.org/blog/2021/07/27/public-defenders.

Id. at 148. Although the directive went into effect on January 1, 2023, any IA report that relates to sustained findings of these categories of misconduct prior to that date would be disclosable under Rivera. Thus, there is no basis to justify non-disclosure of its listing with an Appendix K document.

In addition to using Appendix K to identify which reports can be accessed pursuant to Rivera, access to Appendix K reports[7] will also allow OPD and the public to factcheck other types of reports that law enforcement agencies release annually. Each year since the IAPP was first issued in 1991, law enforcement agencies have released annual statistics reports to the public that disclose how many complaints were received, what type of misconduct alleged, and what the outcome was (i.e., sustained, exonerated, etc.). These reports are notoriously inaccurate. In 2009, ACLU-NJ conducted a study and found that 1,700 cases were missing from Newark's reports and that it "did not find a single county that had accurate summary reports." American Civil Liberties Union of N.J., The Crisis Inside Police Internal Affairs (June 2009), at 21.[8] See also Charles Daye,

[7] LFTG uses "Appendix K" to refer to the specific reports that were requested in this case, but in the past these reports had other labels pursuant to whatever IAPP was in effect at the time. The court's decision in this case paves the way for OPD, LFTG, or the public to assert a common law right to the other historical reports, even if they are not in the AG's possession (which, if true, is alarming because it suggests the AG did not adequately oversee the IA process until 2020).
[8] https://www.aclu-nj.org/sites/default/files/060409ia2_0.pdf

Are Asbury Park PD Internal Investigations Really Being Conducted? A Lawsuit Seeks Answers, Asbury Park Press, Nov. 1, 2022[9] (discussing analysis that shows 110 missing IA cases from a police department's annual IA reports).[10]

Police departments have had to publicly release major discipline reports since the November 2011 revision to the IAPP. Prior to June 2020, all disclosures were made without the officer's name, but they were nonetheless made and so that information within Appendix K is not confidential. Although the trial court held that reduced the need for the Appendix K reports, access to them allows the public to fact-check the old major discipline reports, which have also been proven to contain errors and falsities. See, e.g., Paterson Police Released False Information About Officer Discipline, Says Lawsuit, Paterson Press, Sept. 21, 2020[11] (highlighting how police department claimed there were zero cases of

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[9] https://www.app.com/story/news/local/2022/11/01/asbury-nj-police-department-lawsuit-kamil-warraich/69572328007/

[10] It is no secret that police departments often ignore the dictates of the IAPP. For example, a 2023 report by the Comptroller's Office found that a majority of police departments failed to comply with the IAPP's requirements with respect to information they were required to post online about the IA complaint process and how to file a complaint. See N.J. Comptroller, A Review of Municipal Police Websites' Compliance with Internal Affairs Policies & Procedures, Police Accountability Project Review, May 3, 2023, https://www.nj.gov/comptroller/library/reports/IAPP/IA_FINAL.pdf

[11] https://patersontimes.com/2020/09/21/paterson-police-released-false-information-about-officer-discipline-says-lawsuit/

major discipline, while other records showed at least six officers received major discipline). Alternatively, access to Appendix K allows the public to more easily identify old cases of major discipline without having to undergo the Herculean effort of filing public records requests within the more than 500 law enforcement agencies in this state.[12]

Access to Appendix K (and its similar predecessor reports) could also reveal troubling patterns that are otherwise hard to discover. Since the 1991 version of the IAPP, police departments have been required to submit reports to the county prosecutors that contain the age, sex, and race of complainants, yet the annual statistical reports released to the public do not contain this information. As a result, the public is unable to see any racial disparities in how complaints are adjudicated when the officer or complainant is a person of color. These are not hypothetical concerns. A simple search of the AG's Internal Affairs Dashboard, available at http://www.njoag.gov/iapp, shows that 27 percent of complaints filed by white people were sustained in 2023, but only 11 percent of

[12] The AG recognizes what a transparency hurdle having to file more than 500 separate records requests would be, which is why since January 1, 2021, all major discipline reports are gathered and placed in one central location on the AG's website. See http://www.njoag.gov/majordiscipline. But the old reports are not there, even though they too are public information. Exhibit K thus allows a requestor to look at one report and identify those few instances where major discipline was imposed and use that information to request the IA report.

complaints by Black people and 18 percent of complaints by Hispanic/Latino people were sustained. The officer's race also seems to matter: in that same year, 31 percent of complaints against white officers were sustained, but 38 percent and 36 percent of complaints against Black and Hispanic/Latino were sustained.

These statistics are consistent from year to year and show that complaints filed by people of color are less likely to be sustained and complaints filed against officers of color are more likely to be sustained. Unfortunately, the AG's database dates back only to 2021. To conduct a similar analysis for prior years, the public needs access to Appendix K. Although OPD has stated that such information could be redacted to alleviate Defendants' argument that disclosure of race would reveal the identity of a complainant, that concern seems far-fetched (especially for old reports) and other redactions (such as to specific dates that complaints were made) could better serve that privacy interest while still allowing the public to monitor implicit bias or racism in police departments.

Accordingly, contrary to the trial court's conclusions, access to Exhibit K promotes substantial public interests beyond OPD's use of the information in its future cases.

### ii. Secrecy Serves Only to Make It Harder for OPD to Obtain Brady/Giglio Material or to File Higgs Motions, and for the Public to Learn About Misconduct

An agency has the burden of proof in a public records case. To prove that the confidentiality interest in a record outweighs the public's interest in disclosure, a public agency must "present more than generalized, conclusory statements." Rivera, 250 N.J. at 149. Defendants did not meet that burden in this case. They submitted the Certification of First Assistant Prosecutor Alexander Albu which lists the tabs that are present in the Appendix K documents and then simply asserts that harm could occur if there is disclosure:

> Indeed, the law enforcement interest in maintaining the confidentiality of the "Cases Pending" and "Cases Opened" tabs of Appendix K is particularly strong. These tabs disclose the nature and source of internal affairs allegations, the progress of internal affairs investigations, the resulting information, and the names of all officers involved. Further, these tabs identify pending and unsubstantiated complaints, including those that the target officer may be unaware of. Disclosure of these creates a significant risk of compromising internal affairs or related criminal investigations. In addition, identifying officers and providing information that could reveal complainants will likely chill the internal affairs process.
>
> [Aa87.]

In other words, Albu asserted that the nature, source, and progress of IA investigations are confidential under the IAPP, and that insisted disclosure could chill the IA process (without explaining how or providing any specific instances).

Albus's certification is far more conclusory or generic than the two certifications rejected by the Supreme Court in Rivera. The first certification in Rivera explained:

> multiple sworn law enforcement and civilian parties, throughout the investigation, . . . were extremely reticent to provide sworn statements if their statement was to be shared with any other party. The information gathering process was difficult given the sensitive nature of the inquiry. To release the information would unduly hamper and compromise the ability of the Union County Prosecutor's Office to investigat[e] police chiefs and police directors in the future for alleged misconduct investigations. Investigations of a police director, as the civilian leader of the police department is always difficult given the understandably strong sense of leadership a police director brings to a department. To preserve our ability to gather facts, internal affairs reports must maintain confidentiality.
>
> [Rivera, 250 N.J. at 137.]

The second certification explained:

> The City requires that confidentiality of the facts discovered during the [internal affairs] investigation be maintained. . . . [T]he City has a real concern that even with redactions as to the identities of any complainants or any other persons who serve as . . . witnesses, the privacy interests of its employees involved will not be protected if there is a public disclosure of the Prosecutor's report.
>
> [Id. at 137-38.]

The second certification added that disclosure "would have a 'chilling effect' upon City employees to report any future alleged violation of workplace policies.'" Id. at 138.

Both certifications in Rivera were found to be far too generic and conclusory to justify non-disclosure. Simply arguing that IA material is strictly confidential under the IAPP and cannot be released is insufficient because the very point of the common law is to disclose records that are exempt under OPRA when the interest in disclosure is greater than the purported need for confidentiality. Moreover, claiming that investigations will be harmed or chilled if a witnesses' identity is revealed is insufficient to prove that the balancing test weighs against disclosure, especially because the Court found that redactions were sufficient to protect those interests.[13] The Court's decision in Rivera signals to courts that vague claims that the IA process will not function if there is transparency no longer stands as a reason to deny access.

[13] Some of the claims in the certification are not even credible. For example, the IAPP requires officers to be notified about complaints except in very rare circumstances. IAPP, §5.1.14. Where the allegations are serious, the officer must be immediately suspended. IAPP, §5.2.1. Thus, it will be rare circumstances where Appendix K lists a matter that is so confidential that the officer does not know about it and in such instances the matter could be redacted.

Such generic and conclusory statements in the Albu certification certainly are not sufficient to withhold Appendix K reports in their entirety, even if perhaps certain entries could be redacted to protect a specific confidentiality need if one would have been presented in a certification. It is difficult to see how there is any confidentiality need here, where the Appendix K reports would disclose nothing more than a bare-bones list of IA cases without any complainant names or other truly identifying information. Defendants certainly did not submit a sufficient certification to explain how the IA process would fall apart if someone were to know the very information that exists in annual statistics reports and major discipline reports.[14] The only "new" information in the reports that does not exist elsewhere (if Defendants' uncertified claim that the reports do not contain officer names prior to 2020 is to believed) is the file number, date the complaint was received, race of the officer and complainant, date the case was closed, and length of the investigation. How could disclosure of such bare bones information possibly chill the internal affairs process? Defendants simply insist that confidentiality is required because of the IAPP's confidentiality provisions, but a public record "does not become cloaked with confidentiality

[14] Agencies became obligated to disclose major discipline to the public in the 2011 IAPP, though the disclosures did not have officer names at that time.

simply because the [law enforcement agency] declares it so." Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 367 (App. Div. 2003) (rejecting prosecutor's claim that a jury would be tainted or confused by public disclosure of a 911 call). Indeed, the Supreme Court held in Rivera that the public could access IA reports under the common law despite the IAPP's rigid confidentiality requirements.

The trial court failed to even consider redaction to protect the limited information which could potentially identify a complainant in rare circumstances, such as the specific date a complaint was filed. When that error was pointed out in a motion for reconsideration, the court refused to reconsider because it said that OPD had sought the entire report, not a redacted version. Defendants further argue that OPD has impermissibly "narrowed" its request by agreeing that the reports could be released with redactions rather than being withheld in their entirety. Both the trial court and Defendants are wrong—OPD is not stuck with an "all or nothing" disclosure. It is standard in a public records case for a requestor to file a lawsuit seeking an entire document, only to concede later in the case that portions of a document may be confidential. See, e.g., Asbury Park Press v. Cnty. of Monmouth, 406 N.J. Super. 1, 12 (App. Div. 2009) (rejecting county's argument that OPRA requestor was not entitled to fees

because its request was initially overbroad and then clarified during the litigation, noting "[a] requestor is not outright disqualified from entitlement to fees because the original request was too broad or made a week too early"), aff'd, 201 N.J. 5 (2010); N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 386, 388 (App. Div. 2009) (discussing requestor narrowing request to smaller universe of documents and agreeing to redaction during the litigation);

A requestor files an Order to Show Cause seeking public records with very little information other than what the agency wrote in its generic denial of access. The public agency opposes the Order to Show Cause and is required to present certifications to a trial court explaining in detail why the claimed exemptions or need for confidentiality exists. The requestor responds accordingly upon learning that information, which often means highlighting that a document is not wholly exempt and that the agency's asserted need for confidentiality can be served by redactions.

Thus, a requestor generally only learns more about agencies specific confidentiality claims after the litigation is filed and then it responds accordingly. Even if a requestor does not request redaction, though, courts nonetheless have an affirmative obligation to determine which portions of a

record are confidential and to disclose those portions that are not. See, e.g., N.J.S.A. 47:1A-5(g) (requiring non-exempt portions of records to be disclosed under OPRA); Rivera, 250 N.J. at 150 (requiring trial judges to redact names of complainants, witnesses, and other information that could lead to their identities before disclosing document under common law). Here, the trial court ignored that obligation and withheld the entire Appendix K from OPD, even though there is no real need for confidentiality given that the bulk of Appendix K information is already public in different forms (such as the annual internal affair statistics reports or the historical major discipline reports).

Access to Appendix K enables the public to factcheck other disclosures from law enforcement agencies in this state and Defendants have not proven that disclosure would cause any harm. Accordingly, the need for confidentiality does not outweigh OPD and the public's interest in disclosure.

## CONCLUSION

For all the reasons argued above, this Court should reverse.

Respectfully submitted,

Pashman Stein Walder Hayden P.C.

/s CJ Griffin, Esq.

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June 10, 2025

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**REPLY LETTER BRIEF ON BEHALF OF APPELLANT**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1041-24

| | | |
|---|---|---|
| NEW JERSEY OFFICE OF THE, THE PUBLIC DEFENDER,<br><br>Appellant,<br><br>v.<br><br>NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF CRIMINAL JUSTICE, OFFICE OF PUBLIC INTEGRITY & ACCOUNT-ABILITY AND RECORDS & IDENTIFICATION BUREAU IN ITS OFFICIAL CAPACITY AS RECORDS CUSTODIAN,<br><br>Respondent . | : | CIVIL ACTION<br><br>Hon. Robert Lougy, A.J.S.C. |

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

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## PROCEDURAL HISTORY & STATEMENT OF FACTS

The Office of the Public Defender (the "OPD") relies on the procedural history and statement of facts as summarized in its opening brief.

## LEGAL ARGUMENT

The OPD relies on the arguments included in its opening brief and responds to certain arguments made by the Attorney General here.

While the Attorney General criticizes the scope of the OPD's request as unclear, the OPD is simply advancing arguments in the alternative.[1] (Rb 28) The OPD is requesting redacted copies of the Essex County Prosecutors Office's internal affairs summary reports. It seeks information related to sustained[2] findings of discipline. In the alternative, it requests information related to all sustained findings of "major discipline," as currently defined by the 2022

[1] Rb – Respondent's brief
Aa – Appellant's appendix

[2] According to the IAPP, sustained findings are those "where a preponderance of the evidence shows an officer violated any law, regulation, directive, guideline policy or procedure issued by the Attorney General or County Prosecutor; agency protocol; standard operating procedure, rule or training, following the last supervisory review of the incident(s) during the internal affairs process where the deadline for appeal has passed or following a ruling by a hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission, or the Superior Court where the deadline for any subsequent appeal has passed.")." IAPP § 9.11.2.

Attorney General Directive. Additional information can be redacted from the reports, as needed.

The Attorney General claims that the proposed redactions somehow constitute an "enlarged" request for records, which should not be considered on appeal.[3] (Rb 28-29) To the contrary, the proposed redactions narrow, rather than "enlarge," our request. In addition, even putting aside the fact that the OPD specifically proposed redactions in a reconsideration motion before the trial court, the trial court could have – and should have – considered the use of such redactions without any request by OPD's counsel. Where redactions would address confidentiality interests, such that the public interest in disclosure outweighs any remaining confidentiality interest, disclosure is warranted. See Rivera v. Union Cnty. Pros. Office, 250 N.J. 124, 149-51 (2022) (instructing that court on remand to consider and order redactions as necessary); L.R. v. Camden City Public School District, 452 N.J. Super. 56, 88-89 (2017) ("[C]ourts are authorized to require the redaction of the records to maintain confidentiality." (citing S. Jersey Publ'g Co. v. N.J. Expressway Auth., 124 N.J. 478, 499 (1991)).

[3] The Attorney General also contends that the OPD should not be permitted to seek additional records from 2013-2020, in addition to those from 2021 through the present, because OPD's trial counsel excluded those records from its request after the Attorney General indicated it did not collect such reports from the prosecutor's office until 2021. (Db 28-30; Aa 5-6, 12-13) To the extent the Attorney General has copies of summary reports from 2013-2020, it should turn those over, too.

The Attorney General's arguments against disclosure under the common law right of access are nonresponsive to the OPD's requests. (Rb 25-28) First, the Attorney General argues against disclosure because the summary reports contain information related to pending and therefore unsubstantiated complaints, without recognizing that the information pertaining to pending complaints can be redacted. Second, it contends that disclosure would expose witnesses and fails to acknowledge that the summary reports do not include any witness information, apart from the complainant's race, which can also be redacted, if necessary. Third, it argues that the summary reports will lead to disclosure of non-serious offenses and neglects to adequately grapple with the OPD's alternative request for access to sustained findings of major discipline. At bottom, the OPD's argument is that summary reports should be turned over because redactions can address any and all confidentiality concerns found by the courts. So redacted, the OPD's and public's interest in the information included in the summary reports obviously outweighs any State interest.

Notably, the Attorney General concedes that it has "never asserted a confidentiality interest in the names of officers who sustained major discipline after Directive 2020-5." (Db 30) Yet it fails to acknowledge what must follow. If the State has no confidentiality interest in the names of officers who have sustained major discipline, then the public interests in transparency, oversight

over the internal affairs process and effective public defense outweigh that nonexistent confidentiality interest, and disclosure is required. For the same reasons the Attorney General has determined that the public's interest in major discipline outweighs any confidentiality interest and therefore that publication is required, the information in summary reports relating to major discipline is subject to disclosure under the common law right of access.

The Attorney General's only response to this argument appears to be that adopted by the trial court: because major discipline is already published online, the "release of redacted Appendix K submissions dating back to 2021 is duplicative, unnecessary, and ultimately would have 'no real effect.'" (Rb 31) These are not considerations contemplated by the common law right of access. In fact, and to the contrary, the New Jersey Supreme Court has specifically said that disclosure should not turn on whether the information included in the records is otherwise made available through other means. See Rivera v. Union Cnty. Pros. Office, 250 N.J. 124, 148 (2022) (cautioning that courts should not "rely on" whether the IA incident at issue has already been the subject of public interest and that official statements or leaks should not "drive the disclosure analysis"). This makes sense. The public's right to access public records should not turn on the whims of the Attorney General's office, or any other entity or person. Rather, if the public's interest in access to certain records outweighs the

interest in confidentiality, then the common law right of access requires that the courts order their disclosure.

Additionally, it is not true that disclosure the redacted versions of the summary reports with information related to sustained findings of major discipline would be entirely duplicative and "unhelpful." Although major discipline was first publicized in 2020, the definition of major discipline was significantly expanded in 2023.[4] Because those additional categories and publication requirements only apply prospectively, the 2020, 2021 and 2022 annual reports do not contain all sustained findings of major discipline as currently defined. Directive 2022-14; Directive 2021-6 at 2. Therefore, if this Court orders disclosure of sustained findings of major discipline, the OPD will obtain additional information not contained in the annual reports. Moreover,

[4] First, on June 15, 2020, the Attorney General amended the IAPP to require every law enforcement agency to publicly report, on an annual basis, instances of "major discipline," including the disciplined officers' names, misconduct, and sanctions imposed. Directive 2020-5 at 3-4. At first, "major discipline" was limited to instances in which an officer (1) was terminated; (2) received a reduction in rank or grade; or (3) was suspended for more than five days. Id. at 4. Then, on January 1, 2023, "major discipline" was expanded to also include instances in which an officer (1) was charged with an indictable offense; (2) regardless of the sanction imposed, had a "sustained" finding for discrimination or bias, excessive force, untruthfulness, false reports or certifications, intentional illegal searches or seizures, intentional destruction of evidence, or domestic violence; or (3) left the agency while an IA investigation was pending, and the misconduct or sanction imposed falls within any of the above categories. Directive 2022-14 at 7-9; IAPP § 9.11.2 (describing each category in more detail).

disclosure of summary information of major discipline would be helpful because the summary reports are created four times a year, rather than once a year. Thus, the OPD would be able to obtain this summary information sooner, rather than having to wait for the Attorney General to complete and publish their annual reports.

Because the OPD's and general public's interest in transparency, oversight over the internal affairs process and effective public defense outweighs the State's interest in confidentiality in redacted versions of the internal affairs summary reports, disclosure is required.

## CONCLUSION

For these reasons, and those set forth in the OPD's opening brief, this Court should reverse and order disclosure, or remand for additional findings.

Respectfully submitted,

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Dated: June 10, 2025