BOROUGH OF SPOTSWOOD and INTERVENOR JACQUELINE PALMER, Plaintiffs/Respondents, v. MIDDLESEX COUNTY PROSECUTOR'S OFFICE, Defendant/Respondent, v. GANNETT SATELLITE INFORMATION NETWORK, Defendant-Intervenor/Appellant/Cross-Respondent, STEVE WRONKO, Defendant-Intervenor/Respondent/Cross-Appellant:	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, Docket No. A- 003457-23T4 A Civil Action On Appeal from Docket No. MID-L-000563-24 Sat Below: Michael A. Toto, A.J.S.C.

BRIEF OF APPELLANT/CROSS-RESPONDENT GANNETT SATELLITE INFORMATION NETWORK

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Rules

PRELIMINARY STATEMENT

In January 2024, Spotswood Police Officer Richard Sasso filed a whistleblower lawsuit against the Borough of Spotswood and Mayor Jackie Palmer. Sasso alleged the mayor had made "racially charged" statements about a Black resident that she twice tried to have ejected from Borough Hall in April 2022. Her profanity-laced "verbal tirade" was spewed at officers, who recorded it on body-worn cameras (BWCs). The suit drew significant news coverage.

Spotswood and Mayor Palmer (hereinafter, "Plaintiffs") filed this action against the Middlesex County Prosecutor's Office (MCPO) to permanently enjoin it from disclosing a copy of the BWC video in response to Open Public Records (OPRA) requests. They went so far as to mark every filing sealed from public view, without seeking leave of court to do so. The court held closed courtroom hearings without making findings to support the confidentiality of the proceedings.

Plaintiffs argued the April 28, 2022 BWC video of the mayor's tirade is not subject to access because police did not tell her she was being recorded. An internal affairs (IA) complaint was filed against the officers for the failure to warn the mayor she was being recorded. It was sustained, but no discipline was imposed—the officers were retrained on the BWC policy (which was new at the

time). However, Plaintiffs argue the Body-Worn Camera Law (BWCL) required the video to be destroyed.

Gannett Satellite Information Network, publisher of *Courier News*, moved to intervene to unseal the record and to oppose the request for an injunction, as did a resident of Spotswood. Gannett also filed a crossclaim for access to all IA materials relating to the incident. The court granted both intervention motions and unsealed the record. It allowed all counsel to review the IA report and redacted BWC footage as "attorneys' eyes only" and ordered additional briefing.

Ultimately, the trial court concluded that the BWC footage of the mayor should be withheld from the public because the officers should not have had their BWCs running during the meeting because it was not part of a "continuous event" and because they failed to give her notice. It found the IA materials were subject to common law access but released them with redactions to any quotations of what the mayor said.

As argued below, the BWCL requires disclosure of the video. The officers wore their BWCs on the front of their uniforms and they beeped more than thirty times during the meeting. The mere failure to give verbal notice does not require destruction. Moreover, MCPO, which has authority to adopt policies for BWCL compliance, explained to the court that the BWCL requires officers to record

every interaction with potential witnesses and it prohibits officers from turning their BWCs off until a matter has fully concluded. The mayor was a key witness because she and her staff twice called the police on the Resident, and because the Resident had just filed a racial bias complaint against her that was under investigation. Had the officers not recorded her, they would have violated the BWCL and failed to record statements relevant to an investigation. In fact, MCPO's Bias Unit reviewed the video and determined that the mayor's comments "contradicted the Spotswood Borough's conclusion that none of the actions taken by the mayor or her staff were motivated by race, or that race did not play a factor[.]"

There is a very strong public interest in disclosure, to prove or disprove Sasso's allegations. The public needs to hear what the mayor said and the tone in which she said it. At a minimum, the trial court should have disclosed the video pursuant to the common law. To the extent the video contains material that is exempt, like attorney-client privileged material, it can be redacted. Indeed, those comments were redacted from the version that counsel was able to review as "attorneys' eyes only" and it allowed counsel to confirm the veracity, or lack thereof, Sasso's allegations. Gannett deserves the same right of access, so it can accurately update the public. This Court should reverse.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

In January 2024, Spotswood Police Officer Richard Sasso filed a whistleblower lawsuit against Spotswood and Mayor Palmer. (Pa108-Pa113; Pa79).[2] Among other things, Sasso alleges that Mayor Palmer made "racially charged" statements about a Black male resident (hereinafter "the Resident")[3] that she twice tried to have ejected from Borough Hall in April 2022. (Pa109-Pa111). Sasso alleges she screamed at the police "everyone is going to get an (expletive) chewing because if I (expletive) call downstairs and say get this (expletive) guy out of here . . . I don't give a (expletive) if (expletive) Spotswood is on fire, there's got to be someone downstairs that can two foot this (expletive) stairs to find out what's happening." (Pa110). Mayor Palmer was hostile and told the officers, "we don't need some (expletive) crazy person who's constantly around here and the elephant in the room is that he is (expletive) Black and this

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[1] For convenience, Gannett combines the statement of facts and procedural history because they are closely entwined. The trial court also combined the two in its opinion below.

[2] Pa = Plaintiff's Appendix; 1T = Jan. 29, 2024 hearing ; 2T = March 1, 2024 hearing ; 3T = March 28, 2024 hearing; 4T = May 10, 2024 hearing

[3] Throughout this case, the Resident has been referred to by his real name, initials and other pseudonyms. The trial court's opinion refers to him as the "Complainant." Gannett refers to him as "Resident" because there are multiple types of complaints and thus multiple complainants.

is not a diverse town, let's be honest." (Pa118). She then said, "I don't need BLM and the KKK fighting on our front steps over this." (Pa118). This "verbal tirade" was recorded by BWCs. (Pa110).

These allegations drew widespread coverage, not only because her comments were offensive but also because the lawsuit is one of many that have been filed against the Borough due to tensions in the police department and with the mayor. (Pa114-Pa117).

Shortly after Sasso's lawsuit was filed, moved to seal Sasso's whistleblower complaint so that the details about her alleged tirade would not remain on the public docket. (Pa108-110). They also filed this action against MCPO to ensure that the public would never see the BWC videos of the tirade. This fact section is drawn from the record below, including the IA reports the trial court reviewed *in camera* and ultimately released.

A. The April 22, 2022 Arrest

On April 22, 2022, Spotswood police officers were dispatched to Borough Hall to escort the Resident off the premises. (Pa198). The Resident was in the hallway on the second floor, near the administrative offices. He was homeless and visited Borough Hall to use the restroom. (Pa202; Pa208). While he was looking at images on the wall, he was approached by Mayor Palmer in an

"aggressive, antagonistic and demeaning manner," which he claimed was due to his race. She told him that she felt "uncomfortable." (Pa208).

The mayor's staff called the police. (Pa190). Upon arrival, officers heard Mayor Palmer and the Resident having a "verbal argument." (Pa198). The Resident was asked to leave, but he became agitated and insisted he had a right to stay in a public building. He was warned that he was creating a disturbance, but he refused to leave. (Pa199). He was arrested for disorderly conduct, loitering, and disobeying the officer's instructions. (Pa201).

On or about April 25, 2022, the Resident went to the police headquarters—which is on the first floor of Borough Hall—to complain that he was the target of racial profiling by Mayor Palmer and Captain Genovese. (Pa203). The police completed bias incident reports and interviewed the Resident about his claims. (Pa204-Pa209).

B. The April 28, 2022 Incident

On April 28, 2022, the Resident returned to the police headquarters at 7:40 a.m. to check the status of his complaints. (Pa211). The BWC video footage, which all counsel in this case were eventually allowed to see as "attorneys' eyes only," shows that Sgt. Schapley met with the Resident and told him to contact the borough attorney, who would handle any complaints against Mayor Palmer.

Thereafter, the Resident went to the second floor of Borough Hall, again reading materials posted on the walls. Per the CAD report, officers were dispatched at 9:09 a.m. "at the request of Mayor Palmer and Sgt. Schapley." The Resident said he was going to "remain on premises until [the] Boro Attorney calls him." (Pa211). The responding officers—Fedak and Cereas—spoke to the business administrator on their way to meet with the Resident. He explained that the mayor was nervous and wanted the police to address the situation. After engaging with the Resident, Ceres indicated he "was not causing a disturbance or disruption to the municipal business." (Pa213).

At 9:30 a.m, the officers turned off their BWCs and entered headquarters. A command staff meeting with Chief Corbisiero took place. (Pa214). Schapley contacted MCPO, which advised that if the Resident was not creating a disturbance, then removing him "would be a civil rights violation." (Pa214).

At 9:40 a.m., Chief Corbisiero and the command staff went to the second floor to speak with Mayor Palmer. The Chief ordered Fedak and Ceres to have their BWCs on because the conversation would be the continuation of an ongoing incident and because the Resident was still inside. (Pa214; Pa231).

Thereafter, a heated conversation with Mayor Palmer took place in her office, which all counsel of record in this case reviewed as "attorneys' eyes

only." Fedak and Ceres did not tell the Mayor their BWC cameras were running, but their BWCs were visible on the front of their uniforms and beeped more than thirty times during the approximately thirty-six-minute meeting. Schapley was not wearing a BWC, despite having interacted with the Resident. The meeting ended at 10:14 a.m. and Fedak and Ceres turned off their BWCs.

At 10:41 a.m., Schapley turned on his BWC. He encountered the Resident, sitting with the business administrator doing paperwork. Schapley turned off his BWC at 10:45 a.m. as he leaves the Resident with the business administrator. The CAD report closed the incident out at 11:45 a.m. that day. (Pa211).

Ceres' report described the mayor's comments as "inappropriate and unprofessional comments that should not be made by someone in her position."[4] The report concludes by saying, "At the conclusion of the meeting due to the comments made by Mayor Palmer and the previous bias incident report that was filed, it was requested by a supervisor this incident be documented." (Pa214).

C. The Resident's Subsequent Complaints

On May 13, 2022, the Resident returned to file complaints against Chief Corbisiero and Shapley for violating his rights. (Pa216-Pa220).

[4] The specific comments he documented were redacted from the report by the trial court before releasing them and the redactions are part of this appeal.

A letter dated May 16, 2022 by the borough attorney updated the Resident on the complaint he had filed against Mayor Palmer. According to the letter, the borough attorney spoke to the Resident on April 28, 2022 and he agreed to withdraw his complaint and "would accept the assistance of the Mayor's office for supportive social services." (Pa233). Thereafter, the business administrator immediately worked to secure him food and temporary housing (which appears to be what was documented on Schapley's final BWC video recording).

The letter concluded:

> [T]his correspondence memorializes the fact that you made a complaint against the Mayor and advised me that you wished to withdraw that complaint. It should be further noted that if there was any evidence that you were treated differently because of race, this would have resulted in further investigation. However, a review of the entire situation indicates that the Mayor's administrative was very focused upon provid[ing] you with support and available services and there is no evidence that anyone was motivated by racial animus in their interactions with you. When the Mayor came out of her office to speak with you, she only intended to ascertain what municipal services you required. Since April 22, 2022, the Mayor and her administration have been focused upon securing you adequate social services.
>
> As a result, this matter is closed.
>
> [Pa234.]

Sasso's lawsuit alleges that the borough provided the Resident a hotel room in exchange for him withdrawing his complaint against the mayor, as part of a

"coverup." Janelle Griffith, N.J. Mayor Asked Police to Remove Black Man From Municipal Building, Lawsuit Says, Yahoo News, Jan. 24, 2024.

D. MCPO's Investigation of the Resident's Complaints

MCPO's Bias Unit investigated the Resident's complaints of bias filed against Corbisiero, Shapley, and Genovese and found no criminal conduct. (Pa193). MCPO's IA Unit found that Corbisiero had not violated any internal policy regarding the Resident's April 22, 2022 arrest. (Pa194).

Because an IA Unit "is not responsible for investigating inappropriate comments made by politicians," MCPO's Bias Unit also investigated the bias complaint against Mayor Palmer. (Pa193). MCPO concluded:

> On May 20, 2022, [Assistant Prosecutor] completed his review of the reported Bias incident. In his review he determined that the incident did not rise to the level of bias intimidation under N.J.S.A. 2C:16-1. Furthermore, there was no identifiable crime that was committed by Mayor Palmer considering that [Resident's] excited behavior on April 22nd did disrupt business activities when he began yelling. [Assistant Prosecutor] did indicate, however, that Mayor Palmer's comments were inappropriate and contradicted the Spotswood Borough's conclusions that none of the actions taken by the mayor or her staff were motivated by race, or that race did not play a factor, based on her comment regarding [redacted].
>
> To be clear, although the mayor's comments were unprofessional and inappropriate, it did not rise to the level of criminality. . . .

[Pa192 (emphasis added).]

E. The IA Complaint Against the Officers

In July 2022, an anonymous person filed an OPRA request with Spotswood seeking BWC video from the April 28, 2022 incident and identified the Spotswood case number for the incident. (Pa61). The borough attorney contacted Corbisiero and MCPO because Mayor Palmer said she did not know she had been recorded. (Pa61; Pa78). Sasso's lawsuit alleges the IA complaint was really filed to ensure the video becomes part of a confidential IA file so that the investigation could be a basis to deny OPRA requests for it. (Pa110).[5]

An IA investigation sustained policy violations against Fedak and Ceres for failing to verbally notify Mayor Palmer that their cameras were recording. (Pa69). Retraining was recommended because the BWC policy was new, having only been implemented a few weeks before the incident. The IA investigation was conducted by Sgt. Schapley, who recounted the events that took place on April 28, 2022 in an internal affairs investigation report. (Pa233-234). In relevant part, the report states:

> The whole time while investigating the incident Ptl. Fedal and Ptl. Ceres had their BWCs activated as per Attorney General guidelines. The guidelines state that all BWCs must be active during any type of Criminal Investigation including the

[5] Indeed, that was a cited basis for denying access to the BWC video. (Pa125).

> interviewing of witnesses when conducting investigation of criminal offenses.
>
> At this point this information was conveyed to command staff and it was determined by Chief Corbisiero to go up and speak to the Mayor regarding this incident and try to come up with a solution and rectify the situation. Chief Corbisiero gave a lawful order that the BWCs continue to record at this point because [the Resident] was still in the building and there was a high likelihood of contact being made with him, in addition it was a continuous event. All the command staff along with Ptl. Fedal and Ptl. Ceres proceeded to the Mayors office upstairs and had a conversation with Mayor Palmer while the BWCs were still recording. It should be noted the BWCs while in recording mode beep every minute and in addition the red light on the camera is continuously glowing indicating it is activated. The BWCs remained activated in this matter until the end of the meeting and investigation.
>
> [Pa234.]

A letter confirming the finding was sent to the borough attorney. (Pa69).

F. The Legal Proceedings in This Action Commence

On January 25, 2024, MCPO notified the borough attorney that it received an OPRA request and determined that the April 28, 2022 BWC video was subject to disclosure and would be released on January 29, 2022. (Pa65; Pa71).

1. Plaintiffs Sue to Block Release of the Video

On January 26, 2024, Spotswood filed a complaint and order to show cause seeking to permanently block MCPO from releasing the video. (Pa60). On January 29, 2024, Mayor Palmer moved to intervene, asserting that she was

being "publicly harassed" by officers like Sasso, that her privacy was violated because she was "illegally recorded," and that her "heated conversation with command staff" was "intended to be a private conversation." (Pa72; Pa79-Pa82). She maintained that "release of this video will further victimize me, which is the intent of the abusers." (Pa80).

Both Plaintiffs unilaterally marked all their pleadings and briefs "confidential" in E-Courts, which meant that the public could not view them.[6] No leave of court was sought or obtained to seal these documents. Without any legal findings, the trial court also held a hearing in a closed courtroom on January 29, 2024. (1T). That date, he granted the motion to intervene. (Pa84).

On January 30, 2024, the trial court temporarily restrained MCPO from releasing the video. The court also ordered that the person who requested the BWC video be notified of the litigation. (Pa85-Pa99).

On February 13, 2024, the trial court ordered MCPO to produce all BWC footage and all IA files for *in camera* review. (Pa102-Pa104).

[6] The pleadings attached in the Appendix are versions that were re-filed publicly after the trial court granted Gannett's motion to unseal.

2. The Trial Court Allows Gannett and Wronko to Intervene and Unseals Court Records and Proceedings

On February 13, 2024, Gannett moved to intervene to unseal the court records and to oppose the OTSC. Certifications explained that Gannett had an interest in the litigation both because it had reported on the Mayor's alleged racist tirade, and because it had filed an OPRA request seeking the April 28, 2022 BWC video and other records relating to the incident. (Pa105-Pa140).

Moreover, Gannett explained that newspapers often intervene to unseal court records. Gannett argued that the trial court erred by allowing Plaintiffs to self-seal their pleadings and by holding closed proceedings without making any finding that confidentiality was justified, as required by Rule 1:38 and Hammock by Hammock v. Hoffmann-LaRoche, Inc., 142 N.J. 356 (1995).

On February 23, 2024, Steve Wronko, the Spotswood resident who filed the OPRA request that sparked MCPO's notification to Spotswood, also moved to intervene to unseal the record and oppose the OTSC. (Pa141).

On March 1, 2024, the trial court heard arguments on the motions and then granted the intervention motions. (2T). The order also unsealed all records of prior proceedings and provided five days for the Plaintiffs to re-file their pleadings with limited redactions. Finally, the order required MCPO to produce

an IA report (Pa230) to all counsel for "attorneys' eyes only"[7] and required additional briefing. (Pa151).

Gannett filed its answer, counterclaim, and cross-claims on March 11, 2024, asserting claims under OPRA and the common law right of access for BWC videos from April 22 and April 28, 2022, as well as internal affairs documents relating to those incidents. (Pa157-Pa166). Wronko filed his answer, counter-claims, and third-party complaint on March 11, 2024, similarly asserting his right to the April 28, 2022 BWC video footage. (Pa167-Pa185).

3. The Trial Court Holds Another Argument, Then Allows Counsel to See the April 28, 2022 Video

On March 28, 2024, the trial court held argument to hear the parties' positions after viewing the IA report. (3T). The court decided that counsel should also view the April 28, 2022 BWC videos to better inform their arguments. Thus, it entered a March 28, 2024 order compelling MCPO to provide the BWC video to the court with redactions to protect privacy, police procedures, and attorney-client privileged information. (Pa186). The parties were to submit briefing "on the issue of whether the recording was part of a continuous event." (Pa187).

[7] This report was ultimately released as part of the final order, with redactions.

On April 22, 2024, the trial court sent a letter to all counsel explaining the types of redactions that should be made to the supplemental briefing. The letter further stated that the supplemental briefing should focus on whether the BWC video was part of a continuous event, whether the recording could be deemed surreptitious, and/or whether the footage was in contravention of the Body-Worn Camera Law (BWCL), N.J.S.A. 40A:14-118.3 to -118.5, and Attorney General directives. (Pa188).

The general nature content of the April 28, 2022 video is discussed above. There were four BWC videos from Schapley; four BWC videos from Fedak; and two BWC videos from Ceras.[8] The videos reveal that every interaction with the Resident was recorded and officers turned their BWCs off as they entered private police offices. The officers also turned their cameras on when they interacted with staff and the mayor. Only Fedak and Ceres recorded the interaction with the mayor, and their BWCs beeped more than thirty times during the meeting.

4. <u>The Trial Court Hears Argument About the April 28, 2022 Video</u>

[8] Gannett does not have copies of the unredacted videos that the trial court viewed or the unredacted IA reports. MCPO maintains the copies and should produce them to the Appellate Division in a confidential appendix, then this Court should review the videos *in camera*.

On May 10, 2024, the trial court heard argument once again. (4T). MCPO asserted that the April 28, 2022 video was not recorded in violation of the law. It stated that because there was an initial call for service, the officers were obligated to have their BWCs recording with each interaction with potential witnesses. (4T31-21 to 4T32-1). It further stated that "recording of the interactions with [the Resident] and the individuals who requested police service is appropriate" under law and "if anything, not recording these interactions would have been inappropriate, particularly if the individuals that called for service revealed information that provided cause for further investigation or culminated in the [Resident's] arrest." It similarly noted that it would have been prejudicial to the Resident if the officers had not recorded the conversation with the mayor, "particularly if those conversations contained indications that the [Resident's] race may have been a factor in the request for service." Finally, it added that the BWCL requires recording interactions in full and the "propriety in continuing to record interactions with a person who calls for service should not be judged based on what was said, but what could have potentially been said" and how it could be potentially relevant to the investigation.

In response to the trial court's inquiry at argument whether the cameras should have stopped recording when the mayor's conversation had to do with "future events and future planning," Assistant Prosecutor Jason Boudwin stated:

> Regarding Your Honor's last question about whether or not the camera should have been turned off. I can tell you in my capacity at the prosecutor's office, when I'm asked for advice about these types of things, the instructions I usually give to agencies is that if there's any doubt, you should always just leave the camera recording because we can make the redactions later and we preserve those redactions and can notify the parties involved and I'm of course, we're talking about criminal defendants then we can give the defendant and the Court notice in your police report that at the conclusion of the event, the footage was reviewed and it was determined that this should be redacted and that way defendants have an opportunity to request the Court to review it in camera or whatever other remedy they think be necessary.
>
> . . .
> . . . the better practice is always to leave it recording, because those redactions can be made later on, but the whole point of the body worns is to promote transparency and they're good for police because it shows that the police are doing their job.
>
> [4T33-18 to 4T35-8.]

5. The Trial Court Grants the Permanent Injunction Barring Release of the April 28, 2022 Videos, But Releases the April 22, 2022 Videos and All Internal Affairs Reports

On May 29, 2024, the trial court issued an order granting Plaintiffs' request to permanently enjoin MCPO from releasing the April 28, 2022 BWC videos; granting Gannett's request for the April 22, 2022 BWC videos, with

redactions to protect the Resident's identity; and granting Gannett's request for all IA documents relating to the both incidents. (Pa1-Pa2).

The trial court concluded that the April 28, 2022 BWC video of the mayor was not a "government record" under OPRA or a "public record" under the common law because it was not made in the course of the officers' official duties. (Pa15). It reached this conclusion by determining that the BWC video "was not a continuation of the earlier incident involving the [Resident]," because the video began just before the officers entered Mayor Palmer's office. See Pa15 ("If the officers were concerned about running into the [Resident], as suggested in the Spotswood IA report, then the BWCs should have been initiated upon exiting the police headquarters, as portrayed in other recordings." (Pa15). The court also based its conclusion that the video was not a official business or a continuation of the overall incident because: 1) Chief Corbisiero asked for the meeting with the mayor, not vice versa (Pa20); 2) There were three officers who interacted with the Resident, but only two recorded the mayor (Pa19-Pa20); 3) No one asked the mayor any questions about the incident. (Pa16).

The court also concluded because the officers did not give Mayor Palmer verbal notice that she was being recorded that it meant the video had to be

destroyed pursuant to the BWCL due to the failure to warn and the fact that the video was "surreptitious." (Pa17-Pa18; Pa36-Pa37).

Finally, the trial court held that even if the officers believed it was a continuation of the call for service, "as soon as the supervisors began to discuss policy and procedures, the officers should have turned off or at least muted the BWC." (Pa23). The court stated:

> Ultimately, the conversation between the police and the mayor was not about the earlier incident. The meeting was about the response time for police to address a call from staff, future planning, and the police and administration, all being on the same page moving forward when addressing similar concerns. Even if this Court were to conclude that the meeting was part of a continuous investigation, most of the recording would have to be redacted as the meeting and discussion had little to do with the incident in question.
>
> [Pa24.]

The court thus concluded, "If the BWC recording of the meeting with the mayor was not a continuation of the earlier call for service or obtained in contravention of the BWC statute and AG Directives, then it was not made in the performance of official duties" and thus not subject to OPRA or the common law. (Pa24).

Even though the trial court concluded the records were not "government records" or "public records," it nonetheless analyzed access under OPRA and the common law. The court then applied the BWCL, concluding that the videos

were exempt. The court concluded that Fuster v. Twp. of Chatham, 447 N.J. Super. 477 (App. Div. 2023), certif. granted, 257 N.J. 18 (2024), applies because the mayor was criminally investigated by MCPO's Bias Unit—an investigation that is not disclosed by the BWC video itself, but only due to the court's opinion and the release of the IA reports. (Pa25-Pa27).

The trial court also applied common law balancing factors, determining they weighed against access. (Pa45-Pa49). It agreed that allegations of racism are serious and that the "comments made by the mayor to the police have been described as inappropriate" and it "would be difficult to argue otherwise," but it nonetheless concluded that Gannett "appears to have access to information from other sources" based on its news articles about Sasso's lawsuit. (Pa44).

The court released the April 22, 2022 recordings, which depict interactions with the Resident. (Pa51). Redaction protected his identity.

As to the IA files that were part of Gannett's cross-claims, the trial court granted access under the common law after finding that the public deserved transparency regarding the Resident's allegations of bias against the officers and the chief, as well as the officers' failure to notify Mayor Palmer that she was being recorded. (Pa53-Pa55).

On June 12, 2024, the trial court released the responsive redacted IA records to the parties with redactions. (Pa189). The redactions primarily redacted the Resident's name, but also redacted the comments Mayor Palmer made during the April 28, 2022 encounter with police.

On July 9, 2024, Gannett filed a notice of appeal. Gannett files this appeal challenging the trial court's denial of access as to the April 28, 2022 BWC video footage of the meeting with the mayor, as well as redactions to the IA materials. (Pa235). Gannett challenges all redactions in the IA materials to comments made by the mayor, which include:[9] Pa191; Pa192; Pa213; Pa214.

On July 22, 2024, Wronko filed a cross-appeal of the trial court's denial of the April 28, 2022 BWC footage. (Pa238)

LEGAL ARGUMENT

I. THE APRIL 28, 2022 BWC VIDEOS OF THE MAYOR SHOULD HAVE BEEN DISCLOSED UNDER OPRA (Pa1; Pa9-36)

"An informed citizenry is essential to a well-functioning democracy." Paff v. Twp. of Galloway, 229 N.J. 340 (2017). "OPRA's promise of accessible

[9] Because there is no redaction log, Gannett is unable to determine if other redactions are made to the mayor's comments. The redactions to the Resident's name are unlawful because the name of a person who has been arrested is subject to OPRA. N.J.S.A. 47:1A-3b. However, Gannett does not challenge those redactions since the name is already public in multiple places, including the record below.

records enables "citizens and the media [to] play a watchful role in curbing wasteful government spending and guarding against corruption and misconduct.'" Sussex Commons Assoc., LLC v. Rutgers, 210 N.J. 531, 541 (2012) (quoting Burnett v. Cty. of Bergen, 198 N.J. 408, 414 (2009). In fact, the "bedrock principle" underlying OPRA is that "our government works best when its activities are well-known to the public it serves." Burnett, 198 N.J. at 414.

OPRA provides that "any limitations on the right of access . . . shall be construed in favor of the public's right of access." N.J.S.A. 47:1A–1 (emphasis added). At all times, the public agency bears the burden of proving the denial of access is lawful. N.J.S.A. 47:1A-6. This case must viewed through this lens, with any ambiguities in the law being construed in favor of disclosure.

A. The BWC Video is a "Government Record" (Pa12)

OPRA defines "government record" to include essentially any record that "has been made, maintained or kept on file" in the course of an agency's "official business" or that "has been received in the course" of an agency's official business. N.J.S.A. 47:1A-1.1. This definition as "broad." See Simmons v. Mercado, 247 N.J. 24, 39 (2021).

The trial court concluded that the April 28, 2022 BWC video of the mayor was not a government record because it was not made in the course of the

officers' "official business." It hinged its decision on the conclusion that the meeting with the mayor was not a continuation of the call for service regarding the Resident. Respectfully, this is the wrong analysis.

Whether the officers were recording a continuous event is irrelevant to whether the video is a government record. Even if the video was somehow not made during the *officers'* "official business," which is a preposterous conclusion since only police business was discussed, it was unequivocally received and maintained as *MCPO's* official business. The OPRA requests at issue in this litigation were filed with MCPO, which obtained the video on May 6, 2022 as part of its investigation of the bias complaints against Mayor Palmer, Corbisiero, and others. (Pa192). After reviewing the video, it described the mayor's comments as inappropriate, unprofessional, and contradictory to the Borough's "conclusion that none of the actions taken by the mayor or her staff were motivated by race, or that race did not play a factor[.]" (Pa192). Thus, the video is unequivocally a government record because it was received and maintained by MCPO as part of its official business.

Because the BWC video is a government record, the only remaining question is whether there is a lawful basis under OPRA to deny access. As argued below, there is no lawful basis for non-disclosure.

B. The BWC Video is Not Subject to Any Exemption (Pa9-36)

i. None of the BWCL's Four Exemptions Apply (Pa34-36)

In November 2020, the Legislature enacted the Body-Worn Camera Law, L.2020, c. 128 and L.2020, c. 128, which requires every uniformed officer to wear a BWC except in limited circumstances. N.J.S.A. 40A:14-118.5(c). The BWCL also regulates the retention of BWC videos and public access to them.

Generally, all BWC videos are subject to a minimum 180-day retention period. N.J.S.A. 40A:14-118.5(j). However, N.J.S.A. 40A:14-118.5(j) lists the types of BWC videos that must be maintained for a longer period of time. Whether a video is subject to public access hinges upon whether a video must be retained for longer than the standard 180-day period:

> Notwithstanding that a criminal investigatory record does not constitute a government record under [OPRA], only the following body worn camera recordings shall be exempt from public inspection:
>
> (1) [BWC] recordings not subject to a minimum three-year retention period or additional retention requirements pursuant to subsection j. of this section;
>
> (2) [BWC] recordings subject to a minimum three-year retention period solely and exclusively pursuant to paragraph (1) of subsection j. of this section[10] if the

[10] This provision requires a three-year retention period if it "captures images involving an encounter about which a complaint has been registered by a subject of the body worn camera recording."

> subject of the body worn camera recording making the complaint requests the body worn camera recording not be made available to the public;
>
> (3) [BWC] recordings subject to a minimum three-year retention period solely and exclusively pursuant to subparagraph (a), (b), (c), or (d) of paragraph (2) of subsection j. of this section; [11] and
>
> (4) [BWC] recordings subject to a minimum three-year retention period solely and exclusively pursuant to subparagraph (e), (f), or (g) of paragraph (2) of subsection j. of this section if a member, parent or legal guardian, or next of kin or designee requests the [BWC] recording not be made available to the public.[12]
>
> [N.J.S.A. 40A:14-118.5(l) (emphasis added).]

As Plaintiffs conceded below, the April 28, 2022 video does not fall within any of these four enumerated exemptions. Exemption one does not apply because the BWC video fell within a retention period longer than the standard 180-day retention. Specifically, N.J.S.A. 40A:14-118.5(j)(3)(a) required additional retention because the video "pertains to a criminal investigation" (i.e., the officers investigating the Resident's presence in the building for potential

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[11] These provisions require three-year retention periods where a law enforcement officer or his supervisor requested it for training purposes or because it was thought to be evidential or exculpatory.

[12] This provision require a three-year retention period if the subject of the video, or their parent/guardian, next of kin, or legal designee requests the retention.

criminality, as well as MCPO's bias investigations) and N.J.S.A. 40A:14-118.5(j)(3)(c) required additional retention because the video recorded "an incident that is the subject of an internal affairs complaint." The remaining exemptions cannot apply because even if those retention provisions were relevant, they are not the "sole" or "exclusive" reason for retention—N.J.S.A. 40A:14-118.5(j)(3)(a) and (c) also separately required retention.

Accordingly, because N.J.S.A. 40A:14-118.5(l) sets forth the "only" four categories of BWC videos that "shall be exempt from public inspection," the video is not exempt and should be disclosed.

ii. No Other OPRA Exemption Applies (Pa25-27)

In Fuster, the Appellate Division held that despite N.J.S.A. 40A:14-118.5(l)'s plain language, the four enumerated exemptions "are in addition to OPRA's exemptions." 477 N.J. Super. at 490. Although that decision is not binding on this Court and is under Supreme Court review, Gannett addresses the trial court's decision that the video is nonetheless exempt because the mayor was criminally investigated, but not arrested or charged.

The Supreme Court will decide in its review of Fuster whether there is an exemption for records relating to a person who was ultimately not arrested or charged and whether exemptions beyond the "only" four stated in the BWCL

can apply. But even accepting the Appellate Division's decision in Fuster as accurate, it clearly does not apply in this case. In Fuster, the BWC video was of a parent who went to the police department to report that a male relative had been sexually inappropriate around his child. Thus, the video did not simply record conduct, but instead revealed that someone had filed charges of sexual assault against the male relative and the precise details of the criminal allegations. Accord N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Off., 447 N.J. Super. 182 (App. Div. 2016) (finding criminal complaints filed against a person were confidential where the person was not arrested or charged).

Here, the video simply records conduct—Mayor Palmer's verbal tirade at the police. Disclosure of the video does not reveal that any criminal allegations were filed against her, nor that MCPO's Bias Unit investigated her.[13] By merely watching the video, the public would only be able to hear what the mayor said, the tone in which she said it, and her body language, which will confirm or deny the allegations that have already been publicly made by Sasso's lawsuit. After watching the video, the public would not learn what Fuster purports to keep

[13] The video was redacted so the Resident's identity is not disclosed.

"secret"—the fact that she was criminally investigated, but not charged.[14] Ironically, it is the trial court's decision and disclosure of the IA reports that disclosed the existence of the investigation. Thus, the Fuster exemption, if it exists, does not apply to the facts of this case and the trial court has already publicly disclosed what Fuster sought to protect. See N. Jersey Media Grp., 447 N.J. Super. at 201 (permitting the agency to "neither confirm nor deny" response because "acknowledging even the existence of certain records would reveal information entitled to be protected").

C. The BWCL Was Not Illegally Recorded, Nor Was Destruction Required (Pa28-31)

The BWCL provides that "[a]ny recordings from a [BWC] recorded in contravention of this or any other applicable law shall be immediately destroyed and shall not be admissible as evidence in any criminal, civil, or administrative proceeding." N.J.S.A. 40A:14-118.5(r). Applying this provision, the trial court concluded the videos were not subject to OPRA because the videos were illegally recorded. It held that the cameras should not have recorded the mayor's

[14] To further demonstrate this point: a video that depicts an officer using excessive force is disclosable under OPRA. Fuster would not justify non-disclosure because the video itself does not reveal that there is a criminal investigation into whether the force was lawful. It simply shows the public what the officer did, which is the very reason why BWCs exist.

meeting because it was not a continuation of the call for service about the Resident and, even if the officers believed it was going to be, they should have turned their cameras off once the mayor talked about what the trial court called "future planning" and "strategic discussions." Additionally, it found the officers' failure to verbally tell the mayor that she was recorded also required destruction.

Gannett disagrees that a video is not subject to OPRA simply because it should have been destroyed. If it still exists—as it does in MCPO's files[15]—and it meets the definition of "government record," then it is "presumptively accessible to the public unless an exemption applies." In re Carter, 230 N.J. 258, 276 (2017). Putting that aside, the trial court is wrong that the video was illegally recorded or that the BWCL requires it to be destroyed.

i. The Video Was Not Unlawfully Recorded (Pa15-24; 36-37)

N.J.S.A. 40A:14-118.3(a) requires every officer to wear a BWC "while acting in the performance of the officer's official duties." Shortly after the BWCL was enacted, the Attorney General explained that the BWCL, as well as his Body-Worn Camera Policy ("BWC Policy") implementing it, creates a "broad requirement that BWCs be activated in almost all police-civilian

[15] MCPO obtained the video on May 6, 2024, long before any IA complaint against the officers was filed for the failure to give notice.

encounters[.]" Attorney General Law Enforcement Directive 2021-5 at 3. Officers are specifically required to activate their BWCs in a long list of circumstances, including for a "call for service" or "any other law enforcement or investigative encounter between an officer and a member of the public." N.J.S.A. 40A:14-118.5(c)(1). This includes when "the officer is interviewing a witness in the course of investigating a criminal offense." BWC Policy, §5.2(d).

Importantly, the BWCL and the Attorney General's BWC Policy mandate that a BWC "shall remain activated until the encounter has fully concluded and the officer leaves the scene." N.J.S.A. 40A:14-118.5(c)(1). This means the BWC must record everything that happens from the beginning of a call for service until BWC-equipped officer has left the scene; all civilians involved in the encounter have left the scene; the officer has informed the dispatcher or a supervisor that the event has concluded; the event is 'closed' on the department's [CAD] system, etc." BWC Policy, §5.3.1.

Here, there is simply no colorable claim that the officers were acting outside of official police duties—they were wearing their uniforms; the conversation took place while they were on duty; the mayor and her staff had initiated the call for service about the Resident's presence in the building both on April 22 and April 28, 2022; the meeting was going to be about the Resident;

the Resident was still in the building; and the officers had been ordered by the police chief to record. Moreover, MCPO asserts that recording was appropriate because the mayor might have said something relevant to the investigation or to the Resident's bias complaints against the mayor (which were under investigation at the time).[16] Nonetheless, the trial court found that the video was illegally recorded because it found the meeting with the mayor was not a continuation of the call for service.

The trial court erred for three reasons. First, the trial court should have deferred to MCPO's conclusion that the officers did not violate the law by recording the mayor. The BWC Policy states that:

> Nothing in this Policy shall be construed to in any way limit the authority of a County Prosecutor to issue directives or guidelines to the law enforcement agencies subject to his or her supervisory authority, setting forth additional procedural or substantive requirements or restrictions concerning BWCs and BWC recordings, provided that such directives or guidelines do not conflict with any explicit provision of this Policy. For example, a County Prosecutor may: specify additional circumstances when a municipal police department BWC must be activated . . .
>
> [BWC Policy, §12 (emphasis added).]

[16] The quotes attributed to Mayor Palmer in Sasso's complaint certainly are relevant to that bias investigation and indeed they were reviewed by the MCPO investigator, who determined that they contradicted the Borough's conclusion that race was not a factor in how the Resident was treated. (Pa192).

Additionally, the BWC Policy vests the authority in the county prosecutor to determine whether a recording was illegally recorded and whether it should be destroyed. See BWC Policy at 5.1 (stating that any video recorded in contravention of the law "shall be immediately brought to the attention of the agency command staff and immediately destroyed by command staff following consultation and approval by the County Prosecutor[.]").

During the May 10, 2024 hearing, Assistant Prosecutor Boudwin expressly told the court that MCPO instructs officers to always record when it is possible that an encounter might produce information relevant to an investigation. (4T33-4T35). MCPO also explained why recording was appropriate in these specific circumstances, considering the pending bias complaints that were under investigation. The trial court should have deferred to MCPO's finding that the mayor was not recorded in violation of BWC policies and that the videos did not need to be destroyed.

Second, even if the meeting with the mayor was not a "continuation of the call for service" regarding the Resident, that does not mean that the video was recorded in contravention to the BWCL. The BWCL requires recording of nearly every encounter that relates to an investigation or complaint and Boudwin explained the MCPO's policy of instructing officers to record every interaction.

Additionally, the officers were following a lawful command of their superior. N.J.S.A. 40A:14-118.3(a)(6) (providing officers should record when directed by a superior officer). Thus, even if the meeting was not considered a continuation of the original call for service, the recording was nonetheless still authorized by the BWCL because the interaction had the potential to be relevant to the Resident and to the pending bias complaints. And indeed, relevant statements were in fact made.

Third, the trial court is wrong—the video clearly *was* a continuation of the call for service about the Resident's presence in the building, which was initiated by Borough employees and the mayor on April 22 and then again on April 28. The CAD report was opened at 7:41 a.m. and was not closed until 11:48 a.m. (Pa211). The conversation with the mayor took place at 9:41 a.m. until 10:14 a.m, and the last BWC video shows Shapley turning off his camera at approximately 10:45 a.m. while the business administration was speaking with the Resident, presumably providing the services that borough attorney refers to in her letter to the Resident. (Pa233). Thus, per the BWC Policy, the officers were obligated to have their BWCs recording during any interaction with the Resident or any civilian staff who possibly had information about his presence

in the building on April 22 or April 28. In accordance with the law, the officers not only recorded the mayor, but also recorded all interactions with other staff.

Further, the police department had completed the bias incident interview just a few days earlier that documented the Resident's allegations against the mayor. It would have been highly improper for the police to record their interactions with the Resident, but not record their interactions with the mayor that could have provided evidence to support or disprove the Resident's claims. It was important to document whatever it was she was going to tell them when they spoke with her about the Resident's presence in the building.[17] Her conversation with the police was relevant to the bias investigation. Ultimately, MCPO concluded that while the mayor did not violate criminal law, the video nonetheless proved that race played a factor in the arrest. (Pa192).

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[17] Indeed, failing to record the mayor could have resulted in liability for the Borough. The BWCL provides that if an officer fails to record something that is required to be recorded "there shall be a rebuttable presumption that evidence supporting the plaintiff's claim was destroyed or not captured in favor of a civil plaintiff suing the government, a law enforcement agency, or a law enforcement officer for damages based on police misconduct if the plaintiff reasonably asserts that evidence supporting the plaintiff's claim was destroyed or not captured." N.J.S.A. 40A:14-118(q)(3). The Resident filed formal complaints that the mayor and others had discriminated against him. Had the officers not recorded the conversation with her, the Resident might have been entitled to a rebuttal presumption of liability.

None of the facts the trial court considered constitute proof that the recording was not part of the continuous investigation. The trial court notes that Schapley did not wear his BWC, even though he would have been obligated to do so under the BWCL since he was the first to interact with the Resident. (Pa20). But this simply means that Schapley might have violated the BWCL, unless there was another legal basis to remove his BWC. The trial court also found it significant that Chief Corbisiero asked for the meeting, not the other way around. (Pa20). But police are almost always the ones to follow up with complainants and witnesses to get more information about an incident. Lastly, the court said that the conversation consisted of "plans and strategies to prevent these types of incidents from happening in the future," and such information is sensitive. (Pa21). But it is not unusual for police officers who respond to a call for service to give advice to the person who called about what to do if the incident happens again. For example, if someone calls the police about a disturbance with a neighbor, the police are likely to advise them what can be done if it happens again, how to keep safe, etc. And, with counsel having viewed the video, it can hardly be argued that the lengthy conversation was solely

information that could be labeled as strategy or planning—the video will confirm whether the mayor said the terrible things that Sasso alleges.[18]

ii. The Failure to Give Notice Does Not Require Destruction (Pa15-37)

The BWCL provides:

> A law enforcement officer who is wearing a body worn camera shall notify the subject of the recording that the subject is being recorded by the body worn camera unless it is unsafe or infeasible to provide such notification. . . . The failure to verbally notify a person pursuant to this section shall not affect the admissibility of any statement or evidence.
>
> [N.J.S.A. 40A:14-118.5(d).]

Here, the officers did not verbally warn the mayor that she was being recorded when they entered her office. However, as explained in the IA report, the BWCs beep every minute to audibly notify a person that they are being recorded and a red glowing light shines from the BWCs on the front of the officers' chest. (Pa231). Gannett's counsel counted more than thirty beeps that took place during the meeting and the BWCs appear visible on the front of the

[18] For example, what the trial court generously labels statements regarding "how officers can improve response times to calls for service" could relate to Sasso's allegation that the mayor screamed, "everyone is going to get an (expletive) chewing because if I (expletive) call downstairs and say get this (expletive) guy out of here . . . I don't give a (expletive) if (expletive) Spotswood is on fire, there's got to be someone downstairs that can two foot this (expletive) stairs to find out what's happening." (Pa110).

uniforms.[19] Moreover, at one point when the chief discussed BWCs generally, he motioned towards the two officers who were recording.

But even if the notice had to be verbal, the remedy for failing to give notice is not destruction of the video. N.J.S.A. 40A:14-118.5(r) requires destruction only of a video "recorded in contravention of this or any other applicable law shall be immediately destroyed and shall not be admissible as evidence in any criminal, civil, or administrative proceeding." N.J.S.A. 40A:14-118.5(r) (emphasis added). A failure to provide notice does mean that the video itself was recorded in violation of the law. It was perfectly legal—indeed required—for the officers to record the interaction with the mayor, because she

[19] This negates the trial court's conclusion that the officers "surreptitiously" recorded the mayor. The officers took no actions to conceal their BWCs from plain view, red lights flashed as they recorded, and they beeped loudly more than thirty times during the conversation. The fact that the mayor might not have understood she was being recorded despite these facts does not mean the officers were surreptitious. See State v. Zembreski, 445 N.J. Super. 412 (defining "surreptitiously" as "stealthily and usu[ually] fraudulently done"); "Surreptitious," Black's Law Dictionary (11th ed. 2019) ("unauthorized and clandestine; done by stealth and without legitimate authority"); The Purpose Behind the Beep: Understanding Policy Body Cameras, Kingtop ("Regular beeping continues at intervals to indicate that the device is actively recording. . . . The devices are intended to audibly notify the surrounding individuals that they are being captured on camera.), https://www.kingtoptec.com/body-worn-cameras/the-purpose-behind-the-beep-understanding-police-body-cameras#:~:text=In%20essence%2C%20the%20beep%20sound,users%20(police%20officers)%20only

was a potential witness both to the Resident's presence in the building and his pending complaints against her.

Moreover, although violating the notice requirement might result in discipline, the BWCL is clear that "[t]he failure to verbally notify a person . . . shall not affect the admissibility of any statement or evidence." N.J.S.A. 40A:14-118.5(d). Clearly a video cannot be admitted as evidence if it is deleted. This statement regarding admissibility directly contradicts with the BWCL's more general provision that a video "recorded in contravention of this or any other applicable law shall be immediately destroyed and shall not be admissible as evidence in any criminal, civil, or administrative proceeding." N.J.S.A. 40A:14-118.5(r). As the more specific provision dealing with a violation of the notice provision, N.J.S.A. 40A:14-118.5(c)(6)(d) controls and the video does not need to be deleted and may be admissible as evidence. See Bergen Cnty. PBA Local 134 v. Donovan, 436 N.J. Super. 187, 199 (App. Div. 2014) ("It is also a general principle of statutory construction that specific laws prevail over inconsistent general laws.").

The conflict between the two provisions demonstrates that the Legislature did not intend for a mere failure to give notice to require destruction and inadmissibility. In other words, even if an officer fails to warn the subject that

they are being recorded, that video would still be retained and used as evidence in a criminal trial or an administrative proceeding. It should not be destroyed.[20] To hold otherwise could result in the destruction of important evidence that could be used to convict the guilty or could even incentivize officers to withhold notices so that evidence of misconduct or excessive force is immediately destroyed. In this case, it would have resulted in the destruction of the BWC video of the mayor saying things relevant to the Resident's potential civil claims, because MCPO concluded that the comments established the mayor was motivated by race. (Pa192). This is why the BWCL requires officers to record almost every interaction, to ensure that important evidence is captured on film.

iii. The Officers Were Not Obligated to Stop Their BWCs at Any Point During the Mayor's Conversation (Pa23)

The trial court also concluded that even if the officers went into the meeting with the mayor believing that the conversation was part of their

[20] Given that officers activate BWCs in almost every interaction, the simple alleged failure to warn a criminal defendant would result in endless motions before trial courts. BWC audio generally does not record for the first thirty to sixty seconds, so courts would have to hold hearings to determine whether the was indeed a failure to warn or whether it was given but not recorded. Or they would need to determine whether it was "unsafe" or "infeasible" to warn. This could result in cases being dismissed if a video could not be used as evidence. Instead, the Legislature provided that a failure to give notice does not affect admissibility or require destruction.

investigative process, they should have turned their BWCs off once the mayor began talking about "the response time for the police to address a call from staff, future planning, and the police and administration all being on the same page moving forward when addressing similar concerns."[21] (Pa24). But the BWCL requires leaving cameras activated to ensure that any potentially relevant information is recorded, as Assistant Prosecutor Boudwin explained. (4T32-4T34). Although the BWCL provides that an officer may turn the camera off while he is participating in "criminal investigation strategy and planning," such is not mandatory. N.J.S.A. 40A:14-118.5(c)(2)(c). And any suggestion that the conversation constituted "counseling, guidance sessions, personnel evaluations, or any similar supervisory interaction" that should not have been recorded is belied by the fact that the mayor was also a complainant and that she has no supervisory authority over the officers or the chief of police because she is not the agency's "appropriate authority." See N.J.S.A. 40A:14-118 (providing that the police chief is the agency's supervisor and he is supervised only by the "appropriate authority"); Spotswood Code §28-3(A) (designating the Director of Public Safety as the "appropriate authority" who is "directly responsible for the efficient and routine day-to-day operations" of the police department).

[21] This is a very generous way to describe what is on the recording.

There will inevitably be times when a BWC records something that might be confidential or exempt from access under OPRA and in such instances, such material should be redacted. N.J.S.A. 47:1A-5(g) (requiring custodians to redact government records rather than withholding them in their entirety). That does not allow an officer to turn the camera off during the middle of a conversation, though. The BWC recordings were produced for "attorneys' eyes only" to all counsel of record with attorney-client privilege, police procedures, the Resident's name, and other material redacted from the audio. Despite these redactions to the lengthy conversation, counsel was still able to hear the relevant remarks by the mayor that MCPO deemed to be "unprofessional and inappropriate"[22] and in contradiction to the "Borough's conclusion that none of the actions taken by the mayor or her staff were motivated by race, or that race dis not play a factor[.]" (Pa192). Non-disclosure serves only to keep the public from verifying whether Sasso's allegations are true.

[22] The trial court itself said, "The comments made by the mayor to the police have been described as inappropriate. It would be difficult to argue otherwise." (Pa48).

II. ALTERNATIVELY, ACCESS TO THE APRIL 28, 2022 BWC VIDEOS OF THE MAYOR SHOULD HAVE BEEN GRANTD UNDER THE COMMON LAW (Pa37-49)

"The common law definition of a public record is broader than the definition contained in OPRA." Mason v. City of Hoboken, 196 N.J. 51, 67 (2008). A record meets the definition of "public record" under the common law if it has been retained and serves "as evidence of its activities or because of the information contained therein." Keddie v. Rutgers, 148 N.J. Super. 36, 46 (1997); See also Higg-A-Rella Inc v. Cnty. of Essex, 141 N.J. 35, 46 (1995) (common law records are "records 'made by public officers in the exercise of public functions.'"). To access records under the common law, a court must determine that the public's interest in disclosure outweighs the need for confidentiality. Rivera v. Union Cnty. Prosecutor's Office, 250 N.J. 124, 144 (2022).

The common law balancing test generally consists of the following confidentiality factors:

> 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.
>
> [Loigman v. Kimmelman, 102 N.J. 98, 113 (1986).]

However, in Rivera, 250 N.J. at 148, the Supreme Court made it clear that those factors are not exhaustive. The transparency factors set forth in Rivera should also be considered. Those include: 1) the nature and seriousness of the misconduct, including whether there are allegations of discrimination or bias; 2) whether the alleged misconduct was substantiated; 3) the nature of the discipline imposed; 4) the nature of the official's position; and 5) the individual's record of misconduct. Ibid. Additionally, courts may apply other considerations as well.

There is a very strong public interest in disclosure of the BWC videos. Sasso's lawsuit alleges that the mayor said inflammatory and "racially-charged" things, which was reported by numerous print and television media. But Sasso's complaint cherry picks only eight alleged statements from a conversation that was more than thirty-five minutes long. Disclosure of the BWC video will confirm whether the mayor said those things, as well as whether she made any

other offensive statements. The public already knows what Sasso alleged was said, and it can certainly make assumptions about whether the mayor would be fighting so hard to keep the video confidential if it cleared her of wrongdoing. But non-disclosure keeps the public and press from knowing whether the allegations are true, and whether her tone or demeanor negates the sting of the allegations. Moreover, the public should also hear what the police said and how the police and the mayor interacted with each other. There are allegations in multiple lawsuits by officers that the mayor unlawfully interferes with the police department. The video will provide information on that issue.

Newspapers are the eyes and ears of the public. Home News v. State, Dep't of Health, 144 N.J. 446, 454 (1996). The trial court insisted that Gannett's access "has not been circumscribed" because it has written extensively about this incident, but the one thing it has not been able to do is verify whether Sasso's allegations are truthful. And although the trial court felt that discovery in Sasso's litigation may ultimately give the public that information,[23] most discovery is produced pursuant to a confidentiality order and most cases settle without a public trial. Thus, gaining access to the BWC video via OPRA or the common

[23] Based on the decision in this case, trial court in Sasso's case entered a consent order allowing portions of the complaint that recited what the mayor allegedly said to be redacted.

law is the only real path to verify the truth of what occurred and report it to the public.

The public's interest in disclosure far outweighs any purported privacy right. The mayor is a public official with a diminished right to privacy, especially when performing her duties and interacting with police. See Kenny v. Byrne, 144 N.J. Super. 243, 252 (App. Div. 1976), aff'd o.b., 75 N.J. 458 (1978). The same is true for the police officers. The videos were redacted for "attorneys' eyes only" review to protect the privacy of the Resident and to protect information about police procedures and attorney-client privileged material. There is no reason they cannot be released to the public in this form, allowing the public to determine what was said by the mayor and police officers.

Regarding the precise application of the common law balancing factors, which are not particularly relevant to the circumstances here:

Loigman factors 1 and 2 weigh in favor of access because disclosure will not discourage any citizens from providing information to the police and no promises of confidentiality were made. Broad access to police BWCs is the public policy of this state and most BWC videos are accessible under the BWCL.

Loigman factors 3 and 4 weigh in favor of access because the video is a real-time recording of what the Mayor said and disclosure will not chill future decisionmaking.

Loigman factors 5 and 6 weigh in favor of disclosure because the mayor's misconduct has not been corrected by any remedial measures. The public can now see the IA reports, in which MCPO finds that the mayor's comments were offensive and demonstrated that her actions were "motivated by race." It noted that the video contradicted the Borough's position that race played no role. Sasso's lawsuit alleges that the Borough essentially bribed the Resident to drop his complaint against the mayor in exchange for a hotel room, so there was never any internal investigative finding to report to the Borough Council. The video will help the public understand whether they should advocate for accountability.

Rivera factor 1: the video will confirm whether the mayor made "inappropriate" and "racially charged" comments about the Resident. The trial court agreed this factor weighs in favor of disclosure.

Rivera factors 2 and 3: the trial court held these factors weigh against access because MCPO did not find that the mayor engaged in criminal conduct. But the Rivera factors come from an IA setting and have to do with misconduct in general, even if it does not rise to the level of criminality. MCPO's report

clearly stated that the mayor might not have violated a criminal statute, but that her behavior was inappropriate and demonstrated that race was a factor in how the Resident was treated. Thus, the trial court should have found these factors weigh in favor of access.[24]

Rivera factor 4: the trial court correctly held this factor weighs in favor of access since the mayor is a top-ranking government official.

Rivera factor 5: Sasso's lawsuits and others filed allege a pattern of problematic behavior by the mayor toward the police department. Disclosure of the video will shed light on her overall conduct and the truth of those allegations, which have cost taxpayers significant sums of money to defend.

Accordingly, for all the reasons argued above, the trial court should have granted access to the April 28, 2022 BWC videos of the meeting with the mayor pursuant to the common law right of access.

[24] Strangely, the trial court found these factors weighed in favor of access as to the investigations into the police chief and other officers regarding how they treated the Resident, even though there were no sustained criminal complaints or internal affairs complaints against them. The court rightly concluded the public has a strong interest in transparency. That same interest also applies to an elected official.

III. THE INTERNAL AFFAIRS REPORTS CONTAIN UNLAWFUL REDACTIONS (Pa53-55)

The trial court correctly determined that the common law balancing factors weigh in favor of disclosing the IA reports. But it redacted any references to what the mayor said, essentially allowing the public to see all the allegations against the police officers and none of the inappropriate behavior from the mayor. Although access to the BWC video will give the public the full information they deserve—i.e., what the mayor said, her tone, and the context—at a minimum access to these portions of the IA report may verify whether Sasso's allegations are true. Gannett appeals the redactions at Pa191; Pa192; Pa213; and Pa214, and as any other redactions to what the mayor said.

The trial court's amplified opinion asserts that disclosure is improper because the IA reports include "direct quotes included by the investigating police officers who reviewed the BWC footage and then quoted portions of the footage in the IA report." (Pa59). This is not a basis to keep what the mayor said from the public under the common law. Moreover, although that may be true of the MCPO report, it does not appear to be true of the supplementary investigation report completed by Ceres, who documented the entire incident from start to finish and witnessed the mayor's conversation firsthand.

The trial court's decision to not only withhold the videos, but also to redact the reports, wholly deprives Gannett of its ability to accurately report to the public about this incident. This Court should reverse.

CONCLUSION

For the reasons argued above, this Court should reverse the trial court's opinion and order the April 28, 2022 video to be disclosed so that Mayor Palmer's comments can be heard by the public. Additionally, all redactions to quotations of the mayor's comments in the IA reports should be removed.

Respectfully Submitted,

Pashman Stein Walder Hayden, P.C.

/s/ CJ Griffin

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December 16, 2024

VIA ECOURTS
Superior Court, Appellate Division
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08650

Re: Borough of Spotswood, et al. v. Middlesex County Prosecutor's Office
Trial Docket No. : MID-L-000563-24
Sat Below: Hon. Michael A. Toto, A.J.S.C.
Court Below: Superior Court of New Jersey, Middlesex County Law Division – Civil Park
Our File No.: 40759-10
Appellate Docket No.: A-003457-23T4

Honorable Judges of the Appellate Division:

In lieu of a formal brief, we submit this letter brief in support of the cross-appeal filed by Intervenor/Cross-Appellant Steven Wronko ("Mr. Wronko").

TABLE OF CONTENTS

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A-003457-23T4
December 16, 2024

STATEMENT OF FACTUAL & PROCEDURAL HISTORY[1]

Mr. Wronko joins in the factual and procedural history provided by Appellant/Cross-Respondent Gannett Satellite Information Network ("Gannett") in its merits brief.

LEGAL ARGUMENT

THE TRIAL COURT ERRED BY PERMANENTLY ENJOINING THE MCPO FROM RELEASING THE APRIL 28, 2022 BODY WORN CAMERA VIDEOS AND NOT GRANTING INTERVENORS ACCESS TO THOSE VIDEOS

We join the legal arguments previously made by Gannett in its merits brief, and we add only the following comments.

To the extent that the Trial Court considered the December 2019 IAPP in determining that the April 28, 2022 BWC footage which is the subject of this appeal was confidential, this was erroneous, because when the April 28, 2022 BWC recordings were made there was no existing internal affairs investigation. The recording was created on April 28, 2022, and the internal affairs complaint was filed

[1] The factual and procedural history are combined because the factual and procedural history contained in Gannett's merits brief, which we join without addition, was so combined.

on May 13, 2022. (Pa192). It is well-established that public records do not become retroactively confidential.

In Serrano v. South Brunswick Township, 358 N.J. Super. 352 (App. Div. 20023), the plaintiff sought a 911 call recording made by a defendant in a murder prosecution "a few hours prior to the alleged homicide for which the defendant has been indicted." Id. at 355. The Government Records Council ("GRC") had held that the 911 call recording was a public record because it was created before any criminal investigation had been initiated. Id. at 358. On appeal, the Appellate Division affirmed. The Court held that the 911 call in question "did not become retroactively confidential simply because the prosecutor [investigating a crime] obtained the tape." Id. at 367. That is because records that are publicly available before an investigation commenced remain open to the public after the investigation is initiated. Ibid.

The same principle applies here. The Mayor was recorded as a witness to a call to service which related to interactions with one of her constituents, and at the time she was recorded, there was no internal affairs investigation. Therefore, the

existence of the internal affairs investigation was irrelevant to whether the recordings are a public record subject to disclosure under OPRA.

Furthermore, neither Fuster v. Township of Chatham, 477 N.J. Super. 477 (App. Div. 2023) nor North Jersey Media Group Inc. v. Bergen County Prosecutor's Office, 447 N.J. Super 182 (App. Div. 2016) apply to the present situation because those cases only involve criminal investigations, and it was error for the Trial Court to rely on them in coming to its decision. The Mayor did not allege that she was under criminal investigation, and there was no evidence before the Trial Court that she was under criminal investigation, and as such, the criminal investigatory records exception did not apply.

Moreover, whether or not the Mayor was informed she was recorded or not, as required by N.J.S.A. 40A:14-118.5(d), this does not require destruction of the recording. As noted by Gannett, N.J.S.A. 40A:14-118.5(r) requires destruction only of a video "recorded in contravention of this or any other applicable law." As noted by Assistant Prosecutor Boudwin on January 29, 2024, "both the Spotswood Police Department and the Middlesex County Prosecutor's office on their own investigations determined that these recordings were made properly." (1T15:2-5; see

also 3T24:7-18). As such, the recordings were not made in violation of any statute, and destruction was not required under N.J.S.A. 40A:14-118.5(r); furthermore, any question of whether the recordings were part of a continuous event is moot.

Finally, the Trial Court appears to have misunderstood certain facts underlying the dispute. Namely, at the oral argument held on May 10, 2024, the Trial Court stated that "initially I want to start off by saying that that particular video should have been turned over to the Prosecutor's Office way back in 2022. Now, I say that because I don't know when it was turned over and pursuant to the Attorney General Guidelines and statute, the question is whether it should have been destroyed at that time." (4T5:15-21). However, a reading of the Internal Investigations report dated July 12, 2022 makes clear that the April 28, 2022" BWC footage was preserved and forwarded to the Middlesex County Prosecutor's Office of Professional Standards . . . on May 6, 2022." (Pa192). As such, though it is unclear the extent to which these facts played any part in the Trial Court's decision, to the extent that the Trial Court based its decision on its misunderstanding that the footage was not forwarded to the MCPO, this was error.

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A-003457-23T4
December 16, 2024

CONCLUSION

For these reasons, as well as for the reasons set forth in Gannett's merits brief, the May 29, 2024 Order of the Trial Court which denied access to the April 28, 2022 BWC footage should be reversed and remanded to the Trial Court for further proceedings.

Respectfully submitted,

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BOROUGH OF SPOTSWOOD and INTERVENOR JACQUELINE PALMER Plaintiffs/Respondents v. MIDDLESEX COUNT PROSECUTOR'S OFFICE, Defendant/Respondent v. GANNETT SATELLITE INFORMATION NETWORK, Defendant/Intervenor/ Appellant/Cross-Respondent STEVE WRONKO, Defendant/Intervenor/ Appellant/Cross-Appellant	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO.: A-003457-23T4 Civil Action On Appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No.: MID-L-00563-24 SAT BELOW: Michael A. Toto, A.J.S.C.

BRIEF OF RESPONDENT, MIDDLESEX COUNTY PROSECUTOR'S OFFICE

Of Counsel and On the Brief:

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TABLE OF CONTENTS

TABLE OF JUDMENTS, ORDERS AND RULINGS

TABLE OF CITATIONS

Cases

Statutes

PRELIMINARY STATEMENT

This matter involves a request for the public disclosure of Police Body-Worn Camera ("BWC") footage that involves a meeting between the Spotswood Mayor Jacqueline Palmer and various Spotswood Police Officers. The underlying dispute began on April 22, 2022, when the Spotswood Police arrested an individual ("Resident") who had a confrontation with Spotwood Mayor Jacqueline Palmer ("Mayor Palmer") at the Borough Hall and the Resident was charged with loitering. The Resident filed a complaint against the Spotswood Police and Mayor Palmer alleging that racial bias played a role in the decision to arrest him.

While the bias complaint was being investigated, on April 28, 2022, the Resident returned to Borough Hall. The Mayor, along with other Borough employees, requested police service. On that day the police officers activated their cameras to document their interactions with the Resident and also during a meeting with Mayor Palmer that occurred while the Resident remained on the premises.

The trial court erroneously determined that the April 28, 2022 body-worn camera footage was not subject to disclosure under the Open Public Records Act ("OPRA") because it was not captured in performance of official police duties. However, the Attorney General guidelines make clear that Body-Worn Cameras should be activated during a call for service and remain activated until the encounter has fully concluded. The policy encourages openness and transparency and

apparently recognizes the obvious corollary that events that are not recorded can never be recovered, but that video capturing confidential matters can be tagged for further review and redacted subsequently.

The appropriateness of activating a BWC should not be judged based on what occurs in the footage, but what could potentially have occurred. Here, it was entirely appropriate for the Spotswood Police to activate their body-worn cameras to document a discussion with Mayor Palmer who was both the subject of an ongoing bias complaint, as well as a person involved in the decision to request police service to address the Resident's present at Borough Hall. Given the appropriateness of initiating the body-worn camera footage, the trial court's decision that the body-worn camera footage was not captured in the performance of official police duties and hence not a government record should be reversed.

However, in this case a remand is appropriate to provide the parties additional opportunities to address whether certain portions of the April 28, 2022 body-worn camera footage should be subject to redaction based on various exceptions to disclosure set forth under OPRA.

STATEMENT OF FACTS & PROCEDURAL HISTORY

The Middlesex County Prosecutor's Office does not dispute and joins in the factual and procedural history set forth in Appellant's submission to the Court.

LEGAL ARGUMENT

I. THE APRIL 28, 2022 BWC VIDEOS WERE LAWFULLY RECORDED IN THE PERFORMANCE OF THE OFFICER'S DUTIES AND ACCORDINGLY ARE NOT SUBJECT TO DESTRUCTION [Pa9-Pa39].

The Middlesex County Prosecutor's Office agrees with Appellant Gannett's assertion that the April 28, 2022 BWC was lawfully recorded in the performance of the officer's official duties. Specifically, we emphasize that during the April 28, 2022 interaction with Mayor Palmer[1], the Spotswood officers were simultaneously interacting with both the subject of an ongoing bias investigation and also a person who made a call for service while that call for service remained ongoing [Pa191, Pa204-Pa209, Pa211]. As Appellant Gannett correctly asserts, it was appropriate and consistent with the BWC statute and the Attorney General BWC Policy for the Officers to record all such interactions with Mayor Palmer as any statement made during that discussion may have been material to the ongoing bias investigation or the Mayor's call for service. N.J.S.A. 40A:14-118.5(c)(1); see accord BWC Policy at §5.3.1 (stating that "when a BWC is required to be activated by an officer pursuant to this Policy, the device must remain activated throughout the entire encounter/event/episode and shall not be deactivated until it is concluded (e.g., the

[1] While Plaintiff/Respondent Palmer no longer serves as Mayor, we will continue to refer to her by the title she has been referred to throughout this litigation and that she carried at the time of the April, 2022 body worn camera recordings.

BWC-equipped officer has left the scene; all civilians involved in the encounter have left the scene; the officer has informed the dispatcher or a supervisor that the event has concluded; the event is "closed" on the department's computer-aided dispatch ("CAD") system, etc.)).

As Appellant Gannett correctly asserts, the decision to activate a body-worn camera cannot be evaluated based on what occurs in the footage, but what could potentially have occurred. In this case, the possibility that Mayor Palmer, a person who was both a subject and a complainant in separate police investigations, could say something pertinent about either investigation warranting documentation is boundless. Specifically, during the April 28, 2022 meeting with the Spotswood Police, she may have provided useful information that culminated in the Resident[2]'s subsequent arrest. On the other hand, she may have made admissions giving credence to the possibility that bias played a role in the April, 22, 2022 arrest of the Resident or alternatively demonstrated that such invidious bias played no role. On top of that, it is axiomatic that that which is not recorded can never be recovered, but that which is erroneously recorded can be tagged for further review and redacted subsequently. [4T33-18]; BWC Policy § 9.3. For that reason, it is better to err on the side of recording consistent with BWC statute and policy. Additionally, this

[2] For uniformity and to avoid confusion, we have adopted the Appellant's references to the unnamed individual.

would provide clear guidance to officers in the field who have to make on the spot decisions whether or not to active a BWC. In this case, the decision to activate body-worn cameras prior to meeting with Mayor Palmer was appropriate and consistent with the body-worn camera law.

Moreover, we agree with Appellant Gannett's position that while the Spotswood Officers failed to advise Mayor Palmer that their body-worn cameras had been activated, such a violation does not require the destruction of the footage. This is because the section (d) of the body-worn camera statute which provides that a failure to warn shall not affect the admissibility of evidence should govern over the generalized provision under section (r) that provides that video recorded in contravention of the policy should be immediately destroyed. See N.J.S.A. 40A:14-118.5.

II. NONE OF THE EXEMPTIONS SET FORTH IN THE BODY-WORN CAMERA STATUTE APPLY. [Pa33-Pa37]

As Appellant Gannett correctly asserts, none of the exemptions to disclosure set forth under N.J.S.A. 40A:14-118.5(l) apply to the April 28, 2022 BWC footage. That section of the BWC statute excepts from public disclosure BWC footage that is not subject to enhanced retention periods, or BWC footage that is subject to enhanced retention periods but only for select and exclusive reasons. N.J.S.A. 40A:14-118.5(l). For example, under the statute, BWC footage that is only retained longer than the 180-day minimum period for police training purposes would not be subject to public disclosure, whereas BWC footage retained longer than the 180-day minimum period that captures a use of police force would generally be subject to public disclosure. N.J.S.A. 40A:14-118.5(l)(3) & (j)(2)(d).

In this case, sections (j)(3)(a) (recording pertains to a criminal investigation) and (j)(3)(c) (recording pertains to an incident that is the subject of an internal affairs complaint) of the Body Worn Camera statute apply. These sections generally permit the public disclosure of BWC footage captured pursuant to these sections. For its part, the trial court asserted that the BWC was not available for inspection because it was retained pursuant to section (j)(1) after Mayor Palmer, the subject of the footage, objected to its disclosure. N.J.S.A. 40A:14-118.5(l)(2) [Pa34] Even assuming that these sections of the BWC statute that the trial court relied upon apply, the video was subject to an extended retention period under (j)(3)(a) and (j)(3)(c)

and therefore was not held "solely and exclusively" for any of the reasons set forth in N.J.S.A. 40A:14-118.5(l)(1)-(l)(4) (stating that BWC footage retained for longer than 180 days pursuant to these sections is not subject to public disclosure but only if it is retained "solely and exclusively" pursuant to these sections).

Instead, the Body Worn Camera statute inferentially provides that video retained for an extended period pursuant to sections (j)(3)(a) (criminal investigation) and (j)(3)(c) (internal affairs investigation) is subject to public disclosure under the statute. Accordingly, the trial court's reliance upon section (l) of the BWC statute to withhold the April 28, 2022 BWC footage is misplaced and should be reversed.

Lastly, we agree with Appellate Gannett's position that the April 28, 2022 BWC footage was not captured surreptitiously insofar as the BWC was not secreted or disguised but visibly apparent with a red light and audibly beeping every minute it remained in recording mode. A mere failure to warn a subject that the BWC is activated is not enough to demonstrate that the BWC was activated surreptitiously. That the Legislature included a separate section for surreptitious recording under section (g) clearly indicates that surreptitious conduct involves more than a mere failure to warn as set forth under section (d). N.J.S.A. 40A:14-118.5.

III. IN LIGHT OF THE SUPREME COURT SUBSEQUENT DECISION TO REVERSE THIS COURT'S DECISION IN FUSTER, THE TRIAL COURT'S RELIANCE UPON FUSTER IS MISPLACED AND REQUIRES REVERSAL. [Pa25-Pa27]

In its May 29, 2024 decision, the trial court held that this Court's decision in Fuster[3] controlled and that the footage of Mayor Palmer was exempt from disclosure because BWC footage of persons who were neither arrested nor charged is exempt from disclosure under OPRA. [Pa27] It is not disputed that at the time of the trial court's decision, this Court's decision in Fuster controlled, but the Supreme Court has subsequently reversed that decision in Fuster v. Twp. of Chatham, 259 N.J. 533 (2025).

In doing so, the Supreme Court emphasized the "heretofore" in OPRA's catchall-provision when it stated that

> The provisions of this act, P.L.2001, c. 404 (C.47:1A-5 et al.), shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.
>
> N.J.S.A. 47:1A-9 (emphasis added).

[3] Fuster v. Twp. of Chatham, 477 N.J. Super. 477 (App. Div. 2023), rev'd, 259 N.J. 533 (2025)

The Supreme Court then reviewed the judicial case law in existence at the time OPRA was enacted and determined that "judicial case law in this State had not established or recognized any automatic grant of confidentiality for all law enforcement records related to a person not arrested or charged with an offense." Fuster, 259 N.J. at 557. Therefore, the judicially recognized grant of confidentiality for persons who were not arrested or charged with an offense did not apply under OPRA as such an exemption was recognized after the passage of the law. Id.

In light of the Supreme Court's subsequent decision in Fuster, the trial court's determination that the body worn camera footage of Mayor Palmer is confidential because she is a person who was neither arrested nor charged should be reversed as that is no longer a judicially recognized OPRA exception.

IV. THE MIDDLESEX COUNTY PROSECUTOR'S OFFICE DOES NOT TAKE A POSITION WITH REGARD TO WHETHER THE APRIL 28, 2022 BODY-WORN CAMERA FOOTAGE SHOULD BE DISCLOSED UNDER THE COMMON LAW. [Pa37-Pa49]

Consistent with the MCPO's position before the trial court, insofar as the interests for and against disclosure are well represented by the Spotswood Appellees and Appellants, the parties whose interests would be most affected, MCPO does not take a position whether the April 28, 2022 body-worn camera should be disclosed pursuant to the common law balancing factors set forth in Rivera v. Union County Prosecutor's Office, 250 N.J. 124 (2022) and Loigman v. Kimmelman, 102 N.J. 98 (1986).

V. WHILE THE SPOTSWOOD POLICE DEPARTMENT'S DECISION TO ACTIVATE BODY-WORN CAMERAS WHEN THE OFFICERS MET WITH MAYOR PALMER WAS APPROPRIATE UNDER THE BODY WORN CAMERA STATUTE AND ATTORNEY GENERAL GUIDELINES, IT WOULD BE APPROPRIATE TO REMAND THIS MATTER SO THAT THE TRIAL COURT CAN CONSIDER ALTERNATIVE OPRA EXEMPTIONS THAT WERE NOT ADDRESSED BELOW. [Pa24]

At the trial court, the parties were permitted to review the April 28, 2022 body-worn camera video via a Court Order limiting the disclosure to "attorneys eyes only." (Pa186-Pa188) In that Order, the trial court requested briefing on very specific issues principally whether the body-worn camera footage captured a continuous event. (Pa188)

While the parties never briefed addressed these issues at length, the trial court asserted that other OPRA exceptions to disclosure may apply with regard to portions of the body-worn camera footage such as instances when the parties discussed building security or engaged in deliberative discussions. (Pa23) (citing N.J.S.A. 47:1A-1.1). Insofar as the parties largely did not address these issues but instead focused principally on the subjects referenced in the trial court's April 22, 2024 correspondence to the parties, a remand is appropriate to address whether portions

of the April 28, 2022 video should be redacted pursuant to OPRA's statutory exemptions. (Pa188).

CONCLUSION

Based upon the foregoing reasons, the Middlesex County Prosecutor's Office respectfully requests that this Court reverse the trial court's determination that the April 28, 2022 body worn camera was not made in the course of the officers' official duties. However, a remand would be appropriate to permit Spotswood an opportunity to assert whether portions of the April 28, 2022 video are exempt under other OPRA exemptions involving security, etc.

Respectfully submitted,

Michael S. Williams
Deputy County Counsel

Dated: February 14, 2025

BOROUGH OF SPOTSWOOD and INTERVENOR JACQUELINE PALMER, Plaintiffs/Respondents, vs. MIDDLESEX COUNTY PROSECUTOR'S OFFICE, Defendant/Respondent, v. GANNETT SATELLITE INFORMATION NETWORK, Defendant-Intervenor/ Appellant/Cross-Respondent, v. STEVE WRONKO, Defendant-Intervenor/ Respondent/Cross-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Appellate Docket No. A-3457-23 CIVIL ACTION On Appeal From: Docket No. MID-L-563-24 Sat Below: Hon. Michael A. Toto, A.J.S.C.

BRIEF OF PLAINTIFF/RESPONDENT INTERVENOR JACQUELINE PALMER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

In January 2021, Jacqueline Palmer ("Mrs. Palmer") became the first female mayor of Spotswood. As mayor, Mrs. Palmer worked tirelessly to reform the Spotswood Police Department ("Spotswood PD"). Given her efforts, she became victim to the same culture she sought to eradicate, which included retaliation, intimidation, and harassment by those who did not wish to see reform within the Spotswood Police Department. On April 28, 2022, Mrs. Palmer became the victim of a surreptitious recording when two members of the Spotswood PD secretly recorded her during a private meeting, in violation of the Body Worn Camera Law ("BWCL").

On appeal, this Court is asked by Appellants to overturn the trial court's thorough, well-reasoned opinion, which balanced the public's right of access to legitimate government records against an intentional abuse of police body worn cameras and the weaponization of OPRA to facilitate an ongoing smear campaign. The holding requested by Appellants would suggest that body worn cameras can simply be turned on all the time, whether proper or not, and then turned into a government record with access rights by the public. The body worn camera law requires no such holding, nor does OPRA.

This Court should uphold the trial court's decision, which properly concluded that the April 28, 2022 recordings of Mrs. Palmer are not subject to release, and the

MCPO Internal Affairs Report was properly redacted to protect Mrs. Palmer's statements.

STATEMENT OF FACTS

On April 22, 2022, Borough employees contacted the Spotswood Police Department to escort a ("Resident")[1] off the Borough Hall premises. After the Police arrested him, the Resident filed a complaint against Mrs. Palmer, alleging he was targeted and treated differently because of his race. On April 26, 2022, the Spotswood PD forwarded the Residents' complaint to the Middlesex County Prosecutor's Office ("MCPO") for review.

On April 28, 2022, the Resident returned to the Spotswood PD headquarters, seeking an update on the complaint he filed. Sgt. Schapley was dispatched to speak with the Resident who was on the first-floor lobby, outside the PD's Office. At 8:17 AM, Sgt. Schapley turned his BWC off, as he returned to headquarters. (Schapley's BWC footage). At 8:22 AM, prior to leaving the PD's Office, Sgt. Schapley turned his BWC on and then proceeded to the lobby to provide the Resident with the Borough attorney's contact information. (Id.). The interaction with the Resident concluded at 8:23 AM, after Sgt. Schapley instructed the Resident not to go to the second floor to speak with Mrs. Palmer, to which he agreed (Id.).

[1] Mrs. Palmer will also refer to the Complainant as Resident to be consistent with Gannett's brief.

Regardless, the Resident went to the second floor where Mrs. Palmer's office is located. (Id.). Dispatch received several calls for service from Mrs. Palmer's staff who represented they were in "fear" because the Resident was upstairs. (Pa18). When these phone calls went unanswered, Mrs. Palmer inquired about the response time, given that her staff were nervous, and no one was responding. (Pa22). The dispatcher informed Officers Ceras and Ferak that Mrs. Palmer called to ask them to keep an eye on the cameras because her staff were nervous. (Id.).

Officers Ceras and Ferak asserted this was not a complaint and wanted to know whether Mrs. Palmer's staff needed their assistance. (Id.). At the time, the Spotswood PD command staff were in a meeting but requested that Ceras and Ferak handle the situation. (Id.). At Sgt. Schapley's request, Officers Ceras and Ferak headed to the second floor to investigate. Ferak's BWC footage indicates he was dispatched at 9:06 AM.

A CAD Report documented that a male subject was on the second-floor loitering and would not leave the premises until he spoke with the Borough attorney. Pursuant to BWC footage, Officers Ceras and Fedak are seen interacting with the Resident and Borough staff to ameliorate the situation. Their intervention ended at approximately 9:31 AM, at which point they returned to headquarters and turned their BWCs off. Approximately nine minutes later, Chief Corbisiero took it upon

himself to go to Mrs. Palmer's office with several command staff to provide an update on the Resident's incident. (Pa21; Pa24).

Unlike the other recordings which begin upon exiting police headquarters, the BWC footage at issue commences when the officers are on the stairs, heading to Mrs. Palmer's office. (Pa15; Pa20). At this point in time, the command staff had already passed the lobby where they would have likely encountered the Resident. (Pa20). In fact, as the officers stood on the stairs, Chief Corbisiero spoke with the Resident downstairs. (Id.). It is unclear whether anyone recorded Chief Corbisiero's conversation with the Resident, as no BWC footage of the conversation was presented to the trial court. (Id.).

While on the stairs, Captain Genovese is seen pointing to the officers' cameras, as if to inquire whether their BWCs are on. (Pa15). Although Sgt. Schapley, Officer Ceras and Officer Ferak were involved in the original call for service, only Ceras and Ferak turned their cameras on. (Pa19). Sgt. Schapley was the only officer who interacted with the Resident prior and after the subject meeting, yet he did not even wear his BWC while heading to Mrs. Palmer's office. (Id.).

Ceras's and Fedak's investigation reports state that Chief Corbisiero requested a meeting with Mrs. Palmer, and she responded affirmatively. (Pa24). BWC footage illustrates that as Mrs. Palmer entered her office, Chief Corbisiero asked to meet with her, to which she agreed. (Pa20). When Chief Corbisiero began conversing with

Mrs. Palmer, he indicated he had spoken with the prosecutor and Borough attorney about how to prevent future incidents. (Id.). He further represented he wanted all parties to be on the same page about how to handle future encounters with the Resident. (Id.). Chief Corbisiero then called the rest of the command staff into Mrs. Palmer's office even though some were wearing civilian clothing. (Pa16).

Albeit being the only officers wearing BWCs, Officers Ceras and Ferak positioned themselves at the rear of Mrs. Palmer's office, next to the exit and in a position furthest away from Mrs. Palmer. (Pa19; Pa36). Chief Corbisiero sat directly across from Mrs. Palmer and Sgt. Schapley positioned himself right behind Chief Corbisiero. (Pa19). Even though Officers Ceras and Ferak had just turned their cameras on, they did not notify Mrs. Palmer she was being recorded. (Id.; Pa16) The Officers' actions are inconsistent with prior events. Footage of Officer Ceras's BWC indicates he provided notice to everyone else he interacted with on April 28th, except for Mrs. Palmer. (Pa16).

At no point during the meeting did the command staff ask Mrs. Palmer about the earlier incident, nor was she questioned by any of the officers involved in earlier events. (Pa16). Instead, the conversion focused on how to handle future incidents, police procedures, the response time to calls for service, and legal advice provided by the Borough attorney. (Id.). During the meeting, Chief Corbisiero even

commended Officers Ceras and Fedak for how they conducted themselves with the Resident and Borough staff. (Pa21).

Out of the three officers involved in the original call for service, Sgt. Schapley was the only officer who spoke directly with Mrs. Palmer, yet he did not wear his BWC while meeting with her. (Pa19). Officers Ceras and Fedak who had their BWCs on did not participate in the conversation (Pa36). The meeting seemed to pertain to future strategy and contained supervisory interactions in the form of guidance. (Pa23).

Neither before, during, nor after the meeting did the officers notify Mrs. Palmer she was being recorded. (Pa16). The BWC footage and subsequent reports failed to explain why providing notice to Mrs. Palmer was unsafe or unfeasible, although an explanation is statutorily required whenever notice is not provided. (Id.). When Mrs. Palmer and Chief Corbisiero discussed policy and procedures, Officers Ceras and Ferek did not turn their BWCs off, as they had previously done while speaking with each other, with their supervisors and upon entering headquarters. (Pa23). After the meeting, Mrs. Palmer did not know she was being recorded and did not expect to be recorded as she knew it was against policy for BWCs to be used in this manner. (Pa78).

On May 6, 2022, the MCPO's Office of Professional Standards received a copy of the April 28th BWC footage. On May 13, 2022, the Resident returned to the

Spotswood PD to file an Internal Affairs complaint against Chief Corbisiero and Sgt. Schapley for alleged violation of his civil rights, given he was asked to leave the second floor of the Borough's Hall on April 28, 2022. The Resident was upset he was forced to remain on the first-floor lobby and threatened to be arrested if he returned to the second floor. The Resident eventually withdrew his Complaint against Mrs. Palmer.

On May 16, 2022, the Borough attorney sent a letter to the Resident, indicating the matter was closed and if there was any evidence he was treated differently because of race, the matter would have resulted in further investigation. The Borough attorney forwarded a copy of the letter to the MCPO's Bias Crimes Unit On May 20, 2022, an Assistant Prosecutor reviewed the Bias complaint against Mrs. Palmer and determined the incident did not rise to the level of bias intimidation under N.J.S.A. 2C:16-1.

The Assistant Prosecutor, however, opined that Mrs. Palmer's comments were inappropriate and contradicted Spotswood's conclusion that "none of the actions taken by the mayor or her staff were motivated by race, or that race did not play a factor." In an Internal Affairs Report dated July 12, 2022, the MCPO clarified that Mrs. Palmer's comments did not constitute a crime, stating:

> To be clear, although the mayor's comments were unprofessional and inappropriate, it did not rise to the level of criminality. Mayor Palmer utilized her phrase in the context as to describe her constituents and borough

> employees, and not her actions. Mayor Palmer expressed that she feared that [the Resident] may potentially attack her based on what appeared to be her belief that [the Resident] may be suffering from mental illness."

On July 12, 2022, the MCPO completed the Internal Affairs investigation into the Resident's allegations. Notably, the MCPO's IA Report does not state Mrs. Palmer made racists remarks about the Resident, as alleged by Appellant.

On July 21, 2022, shortly after the MCPO completed their investigation, the Borough received an anonymous OPRA request from a person disguised as "Concerned Citizen". (Pa60; Pa67). The requestor had knowledge of non-public information, as he/she demanded records and BWC footage pertaining to the April 28, 2022 incident, which the requestor identified by case number. (Pa59; Pa60). When the Borough attorney received the OPRA request, she contacted Chief Corbisiero and Captain Genovese to discuss the matter. (Pa60). The Borough attorney also notified the MCPO out of concern that an anonymous source was requesting information by way of an internal case number and possible violation of BWC policies. (Id.).

Prior to this OPRA request, Mrs. Palmer was unaware the Spotswood PD command staff recorded her on April 28, 2022. (Pa26). After Mrs. Palmer learned of the BWC recordings, she filed an Internal Affairs complaint. (Pa16). Sgt. Schapley handled the investigation, even though he participated in the subject meeting with Mrs. Palmer. On September 22, 2022, Chief Corbisiero notified the

Borough attorney that the IA investigation was sustained, meaning the BWC was taken without Mrs. Palmer's consent in violation of Attorney General guidelines. (Id.). Because Officers Ceras and Ferak violated the notice provisions of the BWC policy, the entire Police Department was retrained on the policy. (Pa26; Pa69).

Upon completion of the IA investigation, the Spotswood Police Department failed to consult with the MCPO regarding destruction of the BWC footage, as required by N.J.S.A. 40A:14-118.5(r) and Attorney General guidelines. (Id.).

Mrs. Palmer believes the Spotswood PD command staff recorded her for the purpose of harassing, intimidating and retaliating against her. (Pa78). She believes members of the Spotswood PD disseminated confidential information to harm her. (Pa79). Mrs. Palmers' beliefs are corroborated by an October 2023 Council meeting, in which the local PBA packed the room with law enforcement officers from around the State who demanded Mrs. Palmer's resignation as Mayor. (Id.). During the meeting, a mobile billboard was placed outside the Spotswood Municipal building expressing that the PBA had "no confidence in Mayor Jackie Palmer." (Id.).

Mrs. Palmer subsequently learned that many members of the Spotswood PD and PBA were forced to agree to the "unanimous" decision that called for her resignation. (Id.). At the time, Officer Sasso was the PBA President. (Id.). On January 11, 2024, Officer Sasso even filed a complaint against Mrs. Palmer in Middlesex County Superior Court, in which he briefly referred to the confidential

IA investigations and accused Mrs. Palmer of a race-laced tirade and illegal cover-up, related to the April 2022 incidents. He did that even though his allegations against Mrs. Palmer have nothing to do with that incident, which Officer Sasso was not involved. Instead, it was included solely to smear the reputation of Mrs. Palmer and further attack her. Additionally, that Complaint also alleges that members of the police department were routinely recording Mayor Palmer and other supporters of Mayor Palmer without their knowledge. (Pa4).

PROCEDURAL HISTORY

In December 31, 2023, Steven Wronko submitted an OPRA request to Spotswood, seeking the BWC recordings from April 28, 2022. (Pa142-43). On January 22, 2024, he submitted a similar request to the MCPO. (Id.). Three days later, on January 25, 2024, the MCPO notified the Borough attorney it would release the BWC footage on Monday, January 29, 2024 at 3:00 PM, absent a court order prohibiting same. (Pa71).

On January 24, 2024, Spotswood filed an Order to Show Cause ("OTSC") in Middlesex County Superior Court, seeking to bar the MCPO from releasing the April 28, 2022 BWC recordings. (Pa3). Thereafter, Mrs. Palmer moved to intervene, arguing she was an interested party because the footage was obtained during a private meeting. (Id.). On January 29, 2024, the court allowed Mrs. Palmer's

intervention. (Pa85). The next day, the OTSC was granted with preliminary restraints, barring release of the BWC footage pending resolution of the case. (Pa86).

On January 31, 2024, a reporter for Courier News, Home News Tribute, MyCentralJersey.com and Gannett NJ submitted an OPRA request to Spotswood and the MCPO, seeking a copy of the BWC footage from April 2, 2022 and April 28, 2022, as well as any related Internal Affairs complaints and reports. (Pa137). On February 8, 2024, the MCPO denied the request. (Id.).

The same date, the court ordered the MCPO to provide all investigative and incident reports related to the April 22, 2022 and April 28, 2022 incidents for *in camera* review. (Pa99). On February 15, 2024, the court entered an additional order, requesting the MCPO to provide the BWC footage and Internal Affairs files/reports for *in camera* review. (Pa102).

On February 13, 2024 and February 23, 2024, Appellant Gannett Satellite Information Network ("Gannett") and Cross-Appellant Steven Wronko ("Wronko") filed respective motions to intervene and unseal the record. (Pa3). The court held a hearing on March 1, 2024, where it granted Gannett's and Wronko's motions to intervene. (Pa4). After an opportunity to propose redactions to pleadings, the trial court unsealed the court hearings, released the Spotswood Internal Affairs Report for attorney's eyes only, and requested additional briefing. (Id.).

Because factual inconsistencies prevented the parties from advancing comprehensive arguments, on March 28, 2024, the court ordered the MCPO to redact the April 28, 2022 recordings. (Pa4; Pa14). The footage was then released to counsel for attorney's eyes only.[2] (Pa4). Once the parties obtained a redacted copy of the BWC videos, the trial court requested additional briefing to determine whether the recordings of Mrs. Palmer were part of a continuous event, surreptitious, and obtained in contravention of the Body Worn Camera Law and Attorney General Directives. (Id.). During one of the proceedings, the court was notified that the April 28th recordings were subject to a civil lawsuit. (Pa14).

On May 10, 2024, the trial court held a final hearing but did not render a decision on the record. (Pa5). Instead, on May 29, 2024, the court issued an order, permanently enjoining the MCPO from releasing the April 28, 2022 recordings. (Id.). It further ordered release of the April 22, 2022 BWC footage and requested the MCPO to remove personal identifying information from the recordings. (Id.). The trial court also ordered release of the MCPO IA file, after redaction by the court and confirmation from the MCPO that no investigation was pending. (Id.). On June 12, 2024, the trial court released a redacted copy of the MCPO IA Report. That report

[2] BWC recordings produced: BWC Schapley, BWC Schapley 2, BWC Schapley 3, BWC Schapley 4, BWC Fedak, BWC Fedak 2, BWC Fedak 3, BWC Fedak 4, BWC Ceras and BWC Ceras 2.

was not provided to the parties prior to its release and the substance of that file was not any part of the Court's opinion below.

This appeal ensued. On July 9, 2024, Gannett[3] appealed the May 29, 2024 order, contesting the denial of access to the April 28, 2022 BWC footage and the redactions made to the Internal Affairs files and the April 22, 2022 videos. On July 22, 2024, Wronko also filed a Notice of Appeal, challenging the permanent injunction issued against the MCPO and the denial of access to the April 28th BWC recordings.

Mrs. Palmer submits this brief in support of the trial court's decision, enjoining the MCPO from releasing the April 28th BWC footage and any redactions that prevent disclosure of Mrs. Palmer's unlawfully recorded statements.

LEGAL ARGUMENT

I. OFFICERS CERAS AND FERAK VIOLATED THE BODY WORN CAMERA LAW AND APPLICABLE ATTORNEY GENERAL DIRECTIVES WHEN THEY SECRETLY RECORDED MRS. PALMER DURING A PRIVATE MEETING HELD IN HER OFFICE.

There are two separate violations of the BWCL at issue before the Court. The first question is whether Officers Ceras and Ferak properly turned their cameras on when meeting with Mrs. Palmer. The Spotswood IA report claims it was proper to do so because the Resident "was still in the building and there was a high likelihood of contact being made with him, in addition it was a continuous event." The trial

[3] On July 19, 2024, Gannett filed an Amended Notice of Appeal to correct the caption.

court agree with Mrs. Palmer and Spotswood that that the Officers should not have turned on their BWCs during the meeting with Mrs. Palmer. The second question is whether, once the cameras were turned on, did the officers fail to properly notify Mrs. Palmer she was being recorded in contravention of BWC guidelines. Indisputably, the answer to that question is yes, and no one disputes otherwise. However, Appellants argue that the lack of notification does not have any impact on whether the BWC videos should be released. However, since the recordings were improperly taken – and intentionally so – the second issue is never reached. Surreptitiously recorded videos are not "government records" and are not subject to OPRA. Nor does the common law right of access support release of illegal records obtained as part of an ongoing effort to harass and intimidate the Borough's mayor by police officers.

a. The Spotswood command staff should not have turned their BWCs on while meeting with Mrs. Palmer.

Officers Ceras and Ferak violated the BWCL, Attorney General Directives, and Spotswood Police Department Policy when they turned their BWCs on. Pursuant to N.J.S.A. 40A:14-118.5(c)(1), a law enforcement officer shall activate the video and audio recording functions of a BWC "whenever the officer is responding to a call for service or at the initiation of any law enforcement or investigative encounter between an officer and a member of the public." If the officer's life or safety makes activating the BWC impossible or dangerous, the officer shall activate his camera at

the first reasonable opportunity to do so. Id. Once activated, the BWC shall remain on until the encounter has fully concluded, and the officer leaves the scene. Id.

N.J.S.A. 40A:14-118.3 sets forth the use of BWCs generally, stating that a "municipal patrol law enforcement officer shall wear a body worn camera that electronically records audio and video while acting in the performance of the officer's official duties," except as otherwise required. For example, an officer shall not wear a BWC while serving in an administrative position or as may otherwise be provided by guidelines or directives promulgated by the Attorney General. N.J.S.A. 40A:14-118.3(a)(3) and (8).

Attorney General Directive 2022-1, Section 5.1 confirms that "[a] BWC shall be activated only while in performance of official police duties." Att'y Gen. Law Enf't Directive No. 2022-1, Update to Body Worn Camera Policy, (Jan. 19, 2022). The Attorney General guidelines, however, establish the following exceptions:

> A BWC shall not be activated while the officer is on break or otherwise is not actively performing law enforcement functions (e.g., while eating meals, while in a restroom, etc.). A BWC shall not be activated or used by an officer for personal purposes, or when engaged in police union business. Nor shall a BWC be used to record conversations involving counseling, guidance sessions, personnel evaluations, or any **similar supervisory interaction**.

Attorney General Directive 2022-1, Section 5.1 (emphasis added).

> A BWC shall not be used surreptitiously. Additionally, a BWC shall not be used to gather intelligence information based on First Amendment protected speech, associations,

> or religion, or to record activity that is **unrelated to a response to a call for service or a law enforcement or investigative encounter between a law enforcement officer and a member of the public**.

Attorney General Directive 2022-1, Section 7.7 (emphasis added).

The Spotswood PD issued similar guidelines via a General Order dated February 23, 2022, which states in relevant part:

> Section II(B)(2): BWC shall only be utilized for legitimate law enforcement purposes.
>
> Section II(E)(4): BWCs to be used only in performance of official duties and not for personal purposes.
>
> Section II(G): BWC is intended for official police department use only and not to be used for frivolous or personal activities. Intentional misuse or abuse of the units will result in disciplinary action.
>
> Section II(K)(2)(d): BWCs shall not be used to record in any location where individuals have a reasonable expectation of privacy.
>
> Section II(K)(4): BWCs shall not be used surreptitiously.
>
> Section II(K)(5): BWCs shall not be used to gather intelligence information based on 1st Amendment protected speech, associates, or religion, or to record activity that is unrelated to a response to a call for service or a law enforcement or investigative encounter between a law enforcement officer and a member of the public.
>
> Section IV(A)(1): Officers are not required to activate their BWCs in police headquarters unless they are investigating a walk-in complaint, processing an arrestee, or other similar related functions.

> Section IV(E): To identify BWC recordings that may raise special privacy or safety issues, officers shall notify the shift supervisor or division commander via electronic messaging.

Based on applicable BWC policy, Officers Ceras and Ferak should not have activated their BWCs while meeting with Mrs. Palmer, as the meeting was not a continuation of earlier events. First, the record indicates the encounter between the Officers and the Resident terminated at approximately 9:31 AM, at which point both Ceras and Ferak deactivated their BWCs and returned to headquarters. The trial court found that approximately 9 minutes later, at around 9:40 AM, Chief Corbisiero unilaterally decided to update Mrs. Palmer on the Resident's incident. Mrs. Palmer did not initiate the meeting and only agreed to meet with the command staff at Chief Corbisiero's request.

Second, unlike all other BWC recordings which began upon leaving headquarters, the BWC footage of Mrs. Palmer commenced when the Spotswood PD command staff ascended the stairs. While on the stairs, Captain Genovese pointed to the Officers cameras, as if to inquire whether their BWCs were on, which shows a deliberate intent to record the meeting with Mrs. Palmer.

Third, the trial court found inconsistencies with the Spotswood IA report. The report concluded there was a high likelihood of contact being made with the Resident, which prompted the Officers to turn their BWCs on. However, if this was true, as the lower court noted, Ceras and Ferak would have activated their cameras

upon leaving headquarters, given the Resident was waiting on the first-floor lobby. When Ceras and Ferak activated their BWCs, they had already passed the lobby where the Resident was located. In fact, the record indicates that while the command staff stood on the stairs, Chief Corbisiero spoke with the Resident downstairs. (Pa20). Yet, the trial court was never presented with BWC footage of Chief Corbisiero's conversation with the Resident. (Id.).

Fourth, when Chief Corbisiero began speaking with Mrs. Palmer, he indicated he had spoken with the prosecutor and Borough attorney about how to prevent future incidents. The Chief represented he wanted all parties to be on the same page about how to handle future encounters with the Resident. However, at no point during the meeting did the command staff ask Mrs. Palmer about the earlier incident, nor was she questioned by any of the officers involved in earlier events. The meeting focused on how to handle future incidents, police procedures, the respond time to calls for service, and legal advice provided by the Borough attorney. Sgt. Schapley who engaged with the Resident prior and after the subject meeting did not even wear his BWC while meeting with Mrs. Palmer, which the trial court found notable.

Although Appellants argue that the command staff were required to wear their BWCs out of concern for what might be said in the meeting, the trial court did not find this argument persuasive. The lower court found that even if the Officers continued to record out of an abundance of caution, once the officers realized the

meeting was not a continuation of the investigation, the video should have been tagged for a supervisor's review and ultimately brought to the attention of the MCPO for either separation or destruction, in accordance with Spotswood's BWC policy, which did not occur here. (Pa19). At the very least, Officers Ceras and Ferak should have muted their BWCs, as they had previously done while speaking with their supervisors, conversing with each other, and entering headquarters, which also did not occur.

Lastly, on April 28, 2022, the Resident came to Spotswood PD headquarters to request an update on his recently filed complaint. The initial calls for service were placed by Mrs. Palmer's staff, not by Mrs. Palmer herself. But for the fact that the staff's calls were not addressed, Mrs. Palmer would not have intervened in the matter. Therefore, it was not reasonable for the Spotswood PD to think that Mrs. Palmer was a key witness to the incident. Consistent with the trial court's findings, when Mrs. Palmer met with the PD command staff, she did so from a supervisory/evaluative perspective. In accordance with existing BWC policy, Officers Ceras and Ferak should not have recorded a supervisory meeting in which consultative comments were made and attorney-client communications were discussed.

b. Officers Ceras and Ferak failed to notify Mrs. Palmer she was being recorded, in violation of applicable law.

The parties concede Mrs. Palmer did not receive verbal notification of the BWC recordings. Yet, Appellants contend the beeping and red light emanating from the BWCs should serve as notification. Appellants' argument is unavailing. To be effective, an officer must provide verbal notice of the BWC recording and an opportunity to opt out. The applicable BWC guidelines state as follows:

> A law enforcement officer who is wearing a body worn camera **shall notify** the subject of the recording that the subject is being recorded by the body worn camera unless it is unsafe or infeasible to provide such notification. Such notification shall be made as close to the inception of the encounter as is reasonably possible. If the officer does not provide the required notification because it is unsafe or infeasible to do so, the officer shall document the reasons for that decision in a report or by narrating the reasons on the body worn camera recording, or both. The failure to **verbally notify** a person pursuant to this section shall not affect the admissibility of any statement or evidence.

N.J.S.A. 40A:14-118.5(d) (emphasis added).

> Section 4.2: Requires an officer who is wearing a BWC to notify the subject of the recording that the subject is being recorded by the BWC, unless it is unsafe or infeasible to provide such notification. Id. If the officer does not provide the required notification, the officer shall document the reasons for that decision in a report or by narrating the reasons on the BWC recording, or both.

Attorney General Directive No. 2021-5.

> Section III (G): When wearing a BWC, officers shall notify the subject of a recording that they are being recorded unless it is unsafe or unfeasible to provide such notification. If the officer decides not to provide notification of BWC activation because it is unsafe or

> unfeasible to do so, the officer shall document the reasons for that decision in the investigation report of the incident.

Spotswood PD General Order dated February 23, 2022.

All the relevant BWC provisions specifically require officers to notify the subject of a recording that they are being recorded. The only exception is when it is unsafe or unfeasible to provide such notification. Here, that exception does not apply. Mrs. Palmer was recorded during a prescheduled meeting in an administrative office where multiple command staff were present. The Officers voluntary and unilaterally sought an audience with Mrs. Palmer.

Nothing in the footage appears to be threatening or unsafe. On the contrary, a review of the recordings suggests the Officers deliberately turned their BWCs on prior to entering Mrs. Palmer's office. Despite the close temporal proximity between activating the BWCs and entering Mrs. Palmer's office, Ceras and Ferak failed to notify Mrs. Palmer she was being recorded. Furthermore, the Officers did not provide an explanation as to why it was unsafe or unfeasible to notify Mrs. Palmer of the recording, as required by the BWCL.

Even if the Officers' cameras beeped or displayed a small red light, the trial court found that Ceras and Ferak positioned themselves at the rear of Mrs. Palmer's office, near the exit and in a position furthest away from Mrs. Palmer. (Pa19; Pa36). As part of the lower court proceedings, Mrs. Palmer certified she did not know she

was being recorded and did not expect to be recorded as she knew it was against policy for BWCs to be used in an administrative setting. (Pa78).

A finding in favor of Appellants on this issue would radically change the notification requirements of the BWCL. It would be mean that New Jersey residents can be lawfully recorded without explicit notification, in contravention of the Legislature's intent. So long as the subject of a recording has reason to believe she/he is being recorded, it would satisfy the BWC notice requirements, regardless of whether the person was in fact aware of the recording. As evidenced by a plain reading of N.J.S.A. 40A:14-118.5(d) and Attorney General guidelines, the Legislature did not intend for BWCs to be used in this manner. Otherwise, it would permit an intentional abuse of BWCs, as was the case here.

A finding in favor of Appellants would also negate the prohibition on surreptitious BWC recordings, in violation of N.J.S.A. 40A:14-118.5(g). The trial court found that several actions of the command staff indicated the recording in Mrs. Palmer's office was done surreptitiously. (Pa36). For example, Ceras and Ferak were asked to record while already on the stairs instead of activating their BWCs when they exited headquarters. The Officers positioned themselves in the rear of the office near the exit, in a position furthest away from Mrs. Palmer.

The Officer closest to Mrs. Palmer did not have his BWC activated, nor was he even wearing a BWC. The Officers' recordings were not part of the conversation.

Ceras and Ferak neither asked any questions nor engaged in any discussion with Mrs. Palmer. The Officer who promptly notified every other person he encountered that they were being recorded did not inform Mrs. Palmer she was being recorded. The lower court further found inconsistencies between the CAD report and the BWC recordings time stamps, which, in the court's opinion, supported Plaintiff's arguments that the BWC footage was surreptitious. (Pa36). For these reasons, the Court should find that actual notification is required to be compliant with BWCL.

c. Because the BWC footage was unlawfully recorded, it should have been destroyed.

When the Spotswood Police Department sustained a violation of the Borough's BWC policy, the recordings of Mrs. Palmer should have been destroyed. Pursuant to N.J.S.A. 40A:14-118.5(r), "[a]ny recordings from a body worn camera **recorded in contravention of this or any other applicable law shall be immediately destroyed** and shall not be admissible as evidence in any criminal, civil, or administrative proceeding." This is consistent with Attorney General Directive 2022-1, Section 5.1, which states in relevant part:

> Any recordings from a BWC recorded in contravention of this Policy or any other applicable law **shall be immediately brought to the attention of agency command staff and immediately destroyed by command staff following consultation and approval by the County Prosecutor or Director of the Office of Public Integrity and Accountability**. Such footage shall not be admissible as evidence in any criminal, civil, or

> administrative proceeding, except as evidence in any proceeding related to the unauthorized use of a BWC.

Attorney General Directive 2022-1, Section 5.1 (emphasis added).

> Any recordings from a BWC recorded in contravention of this general order or any other applicable law shall be immediately brought to the attention of the command staff and immediately destroyed by the command staff following consultation and approval by the Middlesex County Prosecutor or Director of the Office of Public Integrity and Accountability. Such recordings shall not be admissible as evidence in any criminal, civil, or administrative proceeding, except as evidence in any proceeding related to the unauthorized use of a BWC.

February 23, 2022 Spotswood PD General Order, Section II(K)(6).

Despite the plain language of the BWCL, Appellants argue the remedy for failure to provide verbal notice is not destruction of the recordings. (Gannett's Br. 38). Appellants contend a video cannot be admitted as evidence if it is deleted. Therefore, this statement regarding admissibility directly contradicts the BWCL's more general provision, requiring immediate destruction of a video recorded in contravention of the BWCL. (Gannett's Br. 39). The trial court rejected Appellants' argument. (Pa29). The court did not find N.J.S.A. 40A:14-118.5(r) general when compared to N.J.S.A. 40A:14-118.5(d), especially when Section (r) is read in concert with Attorney General Directive 2022-1, Section 5.1. (Pa30). This Court should uphold the trial court's decision.

When interpreting a statute, the court's task is to determine and effectuate the Legislature's intent. D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 119 (2007) (citing Wollen v. Borough of Fort Lee, 27 N.J. 408, 418 (1958)). "There is no more persuasive evidence of legislative intent than the words by which the Legislature undertook to express its purpose[.]" Perez v. Zagami, LLC, 218 N.J. 202, 209-10 (2014). Therefore, the court must first look at the plain language of the statute. Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009) (citing Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 263 (2008)). In the event the statute's plain language is not clear or unambiguous on its face, the court can then look to other interpretative aids to ascertain the Legislature's intent. Pizzullo, 196 N.J. at 264.

In statutory construction, "words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language." N.J.S.A. 1:1-1. To this end, "statutes must be read in their entirety; each part or section should be construed in connection with every other part or section to provide a harmonious whole." Bedford v. Riello, 195 N.J. 210, 224 (2008) (citations omitted). "When two or more statutory schemes are analyzed, they 'should be read in *pari materia* and construed together as a unitary and harmonious whole.'" Liberty Ins. Corp. v.

Techdan, LLC, 253 N.J. 87, 103-04 (2023) (quoting State v. Nance, 228 N.J. 378, 395 (2017)).

When N.J.S.A. 40A:14-118.5(r) is read in concert with Attorney General Directive 2022-1 and other provisions of the BWCL, it appears that a lawful BWC recording requires a law enforcement officer to be acting in the performance of official duties and to provide actual notice of the recording, unless an exception applies. Under the BWCL, an officer's BWC cannot be used surreptitiously. Otherwise, the BWC footage is recorded in contravention of the BWLC.

Here, the Officers did not act in the performance of official duties when they recorded Ms. Palmer. The trial court found the recordings of Mrs. Palmer were done in a surreptitious manner. It is uncontended that the Officers did not provide notice of the recordings to Mrs. Palmer. As discussed *supra*, in the case at hand, the unsafe/unfeasible exception to the notice requirement does not apply. On September 22, 2022, the Spotswood PD even sustained a violation of the Borough's BWC policy, given that Officers Ceras and Ferak did not notify Mrs. Palmer she was being recorded during the April 28, 2022 meeting. Because the IA report sustained a BWC violation, Spotswood PD should have immediately destroyed the BWC footage, as required by N.J.S.A. 40A:14-118.5(r).

d. Even though the Spotswood PD failed to destroy the BWC footage of Mrs. Palmer, its existence does not make it a government record under OPRA nor a public record under the common law.

The trial court properly found the BWC footage obtained in Mrs. Palmer's office on April 28, 2022 is neither a government record nor a public record subject to disclosure. (Pa15). The lower court reasoned that the cumulative violations of the BWC statute and AG Directives indicated the BWC recordings were not part of a continuous event or recorded in the performance of official duties. (Pa24). As a result, the recordings neither constitute a government nor public record available for disclosure under OPRA or the common law right of access. (Id.).

Under the Open Public Records Act, a government record is defined as follows:

> any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file **in the course of his or its official business** by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

N.J.S.A. 47:1A-1 (emphasis added).

Under the common law right of access, a public record must be made by a law enforcement officer who is **authorized by law to make it**. Gannett Satellite Info.

Network, LLC v. Twp. of Neptune, 254 N.J.242, 256-57 (2023) (quoting N. Jersey Media Grp., Inc. v. Tp. of Lyndhurst, 229 N.J. 541, 578 (2017)).

While OPRA requires that a record be maintained in the course of official business, the common law mandates that an officer be authorized by law to make it. For the reasons discussed *supra,* the trial court properly found that Officer Ceras and Ferak did not act in the course of official business and were not authorized by law when they recorded Mrs. Palmer. The trial court properly characterized the Officers' recording as surreptitious given the lack of notice and disconnected chain of events.

Appellants argue that the subject recordings must be a government record because they were sent to the MCPO in the course of official business. Appellants, however, overlooked that when the BWC footage was sent to the MCPO on May 6, 2022, the Spotswood PD were in violation of the BWCL, AG Directive 2022-1, and Borough BWC policy. The Spotswood PD's failure to comply with applicable law neither cured nor legitimized the violations of the BWCL. Furthermore, such an argument would eviscerate the very policies that dictate such records are improper. It would mean that every time an infraction of the BWCL is made or a request for destruction is made, a new government record is created mandating the retention and potential release of the very documents or records, which were not supposed to be obtained or recorded in the first place.

In addition, when the BWC footage was sent to the MCPO, Mrs. Palmer was unaware of the recordings. It was not until the July 21, 2022 OPRA request was submitted that Mrs. Palmer learned about the footage. At that point, Mrs. Palmer and the Borough attorney properly filed an IA report with the Spotswood Police Department, which was investigated by one of the Officers involved in the April 28th meeting. In September 2022, the Spotswood PD sustained a violation of the BWCL's notice requirement. Once this violation was sustained and the Police Department realized the footage was recorded in contravention of the BWCL, they should have followed up with the MCPO about destruction of the video. Yet, at all steps of the process, the Spotswood PD failed to comply with applicable law.

As a matter of public policy, the repeated violations of the BWCL should not be condoned by making the BWC footage accessible for public inspection. Otherwise, it would set a dangerous precedent and would incentivize the creation of surreptitious BWC recordings, in clear violation of the Legislature's intent.

II. EVEN IF THE COURT FINDS THE SUBJECT FOOTAGE IS A GOVERNMENT RECORD, MRS. PALMER'S STATEMENTS SHOULD STILL BE WITHHELD .

a. The provisions of the Open Public Records Act apply to BWC recordings.

When the trial court decided the subject case on May 29, 2024, it relied on Fuster v. Twp. of Chatham, 477 N.J. Super. 477 (App. Div. 2023) for the proposition that OPRA's exclusions apply to BWC footage. (Pa24). On January 21, 2025, the

New Jersey Supreme Court reversed Chatham on other grounds. Fuster v. Twp. of Chatham, 2025 N.J. LEXIS 14 (2025). The Court did not decide whether the BWCL abrogates OPRA's exemptions as no OPRA exemption prevented disclosure under the facts of that case. Id. at *10. In dicta, however, the Court stated as follows:

> Subsection (l) provides: "Notwithstanding that a criminal investigatory record does not constitute a government record under [OPRA's definitions section], only the following body worn camera recordings shall be exempt from public inspection." It then lists four exemptions, none of which are relevant to this case. N.J.S.A. 40A:14-118.5(l). Plaintiffs maintain that the provision clearly states that these four exemptions are the only body worn camera videos that can be exempt from public access under OPRA, and that none of OPRA's exemptions can apply to a body worn camera video. **We disagree.** Given the Legislature's repeated citations to OPRA in the BWCL, it is not clear that the Legislature intended for the exemptions in subsection (l) to supplant, rather than supplement, OPRA.

Ibid. (emphasis added).

The record here allows for the application of various OPRA exemptions. Therefore, Fuster is not detrimental to trial court's holding, nor this Court's review of the BWC under OPRA, if the Court finds that the records are "government records."

b. OPRA does not authorize disclosure of Mrs. Palmer's statements.

The lower court properly recognized that although public officials have a diminished expectation of privacy, that does not mean Mrs. Palmer has no

expectation of privacy. (Pa42). Under OPRA, the custodian of records "has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy[.]" N.J.S.A. 47:1A-1.

Any record within the attorney-client privilege does not qualify as a government record for purposes of OPRA. N.J.S.A. 47:1A-1.1. Inter-agency or intra-agency advisory, consultative, or deliberative material is also exempted as a non-government record. Ibid. "To qualify for this privilege, two conditions must be satisfied: (1) the document must be predecisional, meaning it was 'generated before the adoption of an agency's policy or decision,' and (2) it 'must be deliberative in nature, containing opinions, recommendations, or advice about agency policies.'" Gannett N.J. Partners, LP v. Cty. of Middlesex, 379 N.J. Super. 205, 219 (App. Div. 2005) (citations omitted).

When the Spotswood PD command staff met with Mrs. Palmer on April 28, 2022, their conversion focused on how handle future incidents, police procedures, the response time to calls for service, and legal advice provided by the Borough attorney. (Pa16). Mrs. Palmer's discussion with the police staff is covered under the attorney-client privilege and OPRA's consultative/deliberative exemption. Therefore, even if this Court were to find that the April 28th footage constitutes a

government record under OPRA, the recordings are still not subject to disclosure as they fall under specific OPRA exemptions.

Although Appellants contend that the footage can be released with appropriate redactions, Mrs. Palmer submits that redaction of selected statements will materially change the recordings. In fact, the trial court found that the BWC footage contained many discussions about the attorney-client privilege, police protocols and procedures, and other investigative information. (Pa45). The trial court concluded that after redactions, "only a limited amount of the video would be available for public disclosure, severely diminishing the accuracy of the factual nature and context of the recordings." (Id.). This Court should defer to the trial court's findings of fact and withhold release of the BWC recordings.

c. The BWC footage is not subject to public inspection under the common law right of access.

Under the common law, a citizen has a right for access separate and apart from OPRA. To qualify as a public record under the common law, an item must (1) be a written memorial, (2) made by a public officer, and (3) the officer must be authorized by law to make it. Rivera v. Union County Prosecutor's Office, 250 N.J. 124, 143-44 (2022) (quoting Nero v. Hyland, 76 N.J. 213, 222 (1978)). Under this standard, a BWC video recorded in contravention of the BWCL, for which the officer had no legal authority to make, is not a public record. The Court should deny access to the April 28, 2022 recordings on this basis alone.

But even if the Court finds that the subject footage meets the definition of public record, Appellants are unable to overcome Mrs. Palmer's interest in confidentiality. A requestor at common law "must make a greater showing than OPRA requires." Rivera, 250 N.J. at 144 (citations omitted). To meet that standard, "(1) the person seeking access must establish an interest in the subject matter of the material;" and (2) the [person's] right to access must be balanced against the State's interest in preventing disclosure.'" Twp. of Lyndhurst, 229 N.J. at 578 (2017) (quoting Mason v. City of Hoboken, 196 N.J. 51, 67-68 (2017)).

Rivera and similar cases are intended to prevent police departments from shielding bad police conduct from public scrutiny. For example, in Rivera, the Supreme Court recognized the public interest in internal affairs reports to hold officers accountable, deter misconduct, assure the internal affairs process is working and foster trust in law enforcement. 250 N.J. at 147. Rivera and Loigman v. Kimmelman, 102 N.J. 98 (1986) set forth the relevant factors to analyze a requestor's common law right of access:

Confidentiality Factors, Loigman, 102 N.J. at 113:

> (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.

Transparency Factors, Rivera, 250 N.J. at 148:

> 1) the nature and seriousness of the misconduct, including whether there are allegations of discrimination or bias; 2) whether the alleged misconduct was substantiated; 3) the nature of the discipline imposed; 4) the nature of the official's position; and 5) the individual's record of misconduct.

In the case at hand, the trial court found that Appellants were improperly analyzing the common law balancing factors through the lens of a private citizen who called the police for service. (Pa43). However, as the trial court concluded, the meeting in Mrs. Palmer's office was not a continuation of earlier events nor did the meeting qualify as a call for service. Notably, on April 18, 2022, Mrs. Palmer did not initiate a call for service to the Spotswood PD. The only reason Mrs. Palmer became involved in the incident is because her staff's calls were not timely addressed.

Appellant Gannet alleges that disclosure of the April 28th recordings will confirm or deny Sasso's allegations that Mrs. Palmer said inflammatory and racially charged remarks, which was reported by numerous printed and television media.

(Gannett's Br. 44). Appellants grossly misinterpret Mrs. Palmer's statements. The record does not indicate Mrs. Palmer made inflammatory and racially charged remarks. The trial court, having conducted *in camera* review of the footage, did not find Appellants' arguments persuasive. The court noted that although allegations of racial bias are serious, it did not automatically require the release of BWC footage for public consumption. (Pa46).

Regarding the nature and seriousness of the alleged misconduct, the trial court's findings are corroborated by the MCPO Bias Unit investigation, which did not substantiate the allegations against Mrs. Palmer. Although the MCPO found some comments inappropriate, it clarified that Mrs. Palmer's remarks did not raise to the level of criminality. Even if Mrs. Palmer was investigated, no charges were ever filed against her and no discipline was imposed. Therefore, the nature of the discipline imposed does not apply here.

Regarding the confidentiality factors, the trial court found it was objectively reasonable for Mrs. Palmer to expect the contents of the April 28th meeting would remain private. In addition, the BWC footage contains discussions about attorney-client privilege, police protocols and procedures, and other investigatory information that would require substantial redactions. (Pa45).

Under the present facts, "releasing the BWC footage could chill agency decision-making and conceivably impact future policies and departmental

procedures." (Id.). In addition, "the exposure of internal conversations among leadership and command staff could undermine the governing body's discretion, hinder its ability to deliberate and govern effectively, and thereby significantly impede its decision-making processes." (Id.). For these reasons, the Court should find that Appellants are not entitled to access under the common law.

III. THE BODY WORN CAMERA LAW DOES NOT AUTHORIZE RELEASE OF MRS. PALMER'S STATEMENTS.

Lastly, even if the Court finds that the BWC footage is subject to release under OPRA and the common law, disclosure of the recordings is not appropriate under the BWCL. Whether a video is subject to public access depends on its retention period. Generally, BWC recordings shall be retained for 180 days. N.J.S.A. 40A:14-118.5(j). N.J.S.A. 40A:14-118.5(l) sets forth specific exemptions under which a BWC recording is not subject to public inspection. In relevant part, N.J.S.A. 40A:14-118.5(l)(2) exempts footage that captures images involving an encounter about which a complaint has been reregistered by a subject of the BWC recording, if the subject of the BWC recording making the complaint requests the BWC footage not to be released to the public.

Here, N.J.S.A. 40A:14-118.5(l)(2) applies because the Spotswood PD and the MCPO were required to retain the BWC footage when Mrs. Palmer, the subject of the recording, made a complaint that triggered the Spotswood PD IA investigation. In fact, the alleged reason for not destroying the subject recordings is because it was

part of the MCPO's investigative file. Therefore, in the interest of justice, this exemption should apply to prevent disclosure of the April 28th recordings and the unredacted statements of Mrs. Palmer.

In sum, the subject BWC footage of Mrs. Palmer should have been immediately destroyed, as it was recorded in contravention of the BWCL; failure to destroy the recordings does not mean they are government or public records subject to disclosure, as they were created and maintained in violation of applicable law; but even if they are government records, the recordings fall under two OPRA's exemptions; similarly, even if the recordings are public records, the balancing of the common law factors does not warrant disclosure; and the recordings are further exempted under the BWCL. For the same reasons, the MCPO Internal Affairs Report was properly redacted to protect Mrs. Palmer's unlawfully recorded statements.

CONCLUSION

For the foregoing reasons, this Court should uphold the trial court's decision, which denied access to the April 28, 2022 BWC footage and authorized redactions to the MCPO's Internal Affairs Report to prevent disclosure of Mrs. Palmer's unlawfully recorded statements.

Respectfully Submitted,

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DATED: February 14, 2025

BOROUGH OF SPOTSWOOD and INTERVENOR JACQUELINE PALMER, Plaintiffs/Respondents, v. MIDDLESEX COUNTY PROSECUTOR'S OFFICE, Defendant/Respondent, v. GANNETT SATELLITE INFORMATION NETWORK Defendant-Intervenor/Appellant/Cross-Respondent, STEVE WRONKO, Defendant-Intervenor/Respondent/Cross-Appellant	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-3457-23 T4 ON APPEAL FROM A FINAL JUDGMENT OF THE SUPERIOR COURT, LAW DIVISION, MIDDLESEX COUNTY Trial Court Docket No. MID-L-563-24 SAT BELOW: HONORABLE MICHAEL A. TOTO, J.S.C.

BRIEF OF PLAINTIFF/RESPONDENT BOROUGH OF SPOTSWOOD

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

PRELIMINARY STATEMENT

This brief is submitted on behalf of Plaintiff/Respondent, the Borough of Spotswood ("Respondent"), in opposition to Defendant-Intervenor/Appellant/Cross-Respondent Gannett Satellite Information Network's ("Appellant") appeal of the Law Division's May 29, 2024 Order granting respondent's application for an order enjoining the Middlesex County Prosecutor's Office (MCPO) from releasing body-worn camera recordings from April 28, 2022 (the "BWC Footage"). In addition to arguing that the Law Division wrongfully ordered that the BWC Footage not be released, Appellant also argues in its Appeal that redactions that the Law Division made to an internal affairs file (the "IA File") were improper.

As set forth more fully herein, the Law Division clearly, rationally, and with a permissible basis explained not only why it came to its decision that the BWC Footage was not subject to release under the Open Public Records Act, the Body Worn Camera Law (BWC LAW), or the Common Law, but did the same with regard to its decision as to the redactions that it made to the IA File. The Law Division's decision rested on established statutory and case law, and does not suggest any abuse of discretion. As such, Respondent respectfully requests that the Court deny Appellant's appeal and allows the Law Division's sound decision to remain intact.

STATEMENT OF FACTS

On April 22, 2022, Spotswood police officers were dispatched to Borough Hall to escort a resident, whose identity has been redacted throughout filings in this matter (the "Resident"), off the premises. Pa198.[1] After Spotswood Mayor Jacqueline Palmer (the "Mayor") interacted with the Resident, her staff called the police to escort the Resident off the premises because, as the MCPO later acknowledged as part of its investigation, the Resident's "excited behavior…did disrupt business activities when he began yelling." Pa190; Pa192. When the Resident was asked to leave, he became agitated and insisted he had a right to stay in a public building. He was warned that he was creating a disturbance, but he refused to leave. Pa199. Ultimately, he was arrested for disorderly conduct, loitering, and disobeying the officer's instructions. Pa201.

On or about April 25, 2022, the Resident went to police headquarters—which is on the first floor of Borough Hall—to complain that he was the target of racial profiling by Mayor Palmer and Captain Leslie Genovese ("Genovese"). Pa203. The police completed bias incident reports and interviewed the Resident about his claims. Pa204-Pa209.

[1] Pa = Plaintiff's Appendix; Pb = Plaintiff's Brief; 1T = Jan. 29, 2024 hearing; 2T = March 1, 2024 hearing; 3T = March 28, 2024 hearing; 4T = May 10, 2024 hearing.

On April 28, 2022, the Resident returned to police headquarters at 7:41 a.m. to check the status of his complaints. Pa211. Thereafter, the Resident went to the second floor of Borough Hall, and officers were dispatched at 9:09 a.m. "at the request of Mayor Palmer and Sgt. Schapley." Id.

After the officers completed their interaction with the Resident, they returned to police headquarters and held a command staff meeting with Chief Philip Corbisiero ("Corbisiero") and contacted the MCPO. Pa214. It was not until after this command staff meeting and contact with the MCPO that Corbisiero suggested that he and his command staff meet with Mayor Palmer. Id. ("at this time, Chief Corbisiero requested myself, Ptl. Fedak and the rest of his command staff (Capt Genovese, Sgt. Mayo, Sgt. Nichols and acting Sgt. Drude) proceed [to the] Mayor's office to follow up on this incident"); Pa231 ("it was determined by Chief Corbisiero to go up and speak to the Mayor regarding this Incident and try and come to a solution and rectify the situation.") Despite the officers' interaction with the Resident having already completed, officers Louis Ceras ("Ceras") and John Fedak ("Fedak"), who had turned their body worn cameras off after their last interaction with the resident, turned their body worn cameras back on and recorded their meeting with the Mayor. Pa191; Pa214; Pa231. The Mayor was not informed that she was being recorded, nor do any of the relevant report documentation claim that she was, and Appellant

admits to same in its moving brief. Id.; Pa78; Pb8. The meeting between the Mayor and the police department command staff was a strategy meeting to discuss concerns over the department's slow response in responding to calls for assistance in the municipal building regarding the Resident and the Mayor's concerns that the department was not taking adequate action to protect Borough staff, and was intended as a private conversation. Pa78; Pa81.

MCPO's Bias Unit investigated the Resident's complaints of bias filed against Corbisiero, Sgt. Edward Schapley ("Schapley"), and Genovese and found no criminal conduct. Pa193. Additionally, because an Internal Affairs Unit "is not responsible for investigating inappropriate comments made by politicians," the MCPO's Bias Unit also investigated the bias complaint against the Mayor. Pa193. The MCPO likewise concluded that the alleged incident of racial profiling brought by the Resident against the Mayor "did not rise to the level of bias intimidation under N.J.S.A. 2C:16-1. Furthermore, there was no identifiable crime that was committed by Mayor Palmer considering that [Resident's] excited behavior on April 22nd did disrupt business activities when he began yelling." Pa192.

After the Borough began receiving OPRA requests for the BWC Footage from the officers' meeting on April 28, 2022 with the Mayor and the Mayor learning that she had been recorded, the Borough attorney filed an Internal

Affairs complaint, alleging that Fedak and Ceres improperly recorded their interactions with the Mayor and did not inform her that they were recording her. Pa230. The Internal Affairs complaint was sustained and Ceras and Fedak were required to undergo retraining on the police department's BWC Policy. Pa69; Pa229; Pa231.

PROCEDURAL HISTORY

On January 25, 2024, the MCPO notified the borough attorney that it received an OPRA request and determined that the April 28, 2022 BWC Footage was subject to disclosure and would be released on January 29, 2022. Pa65; Pa71. On January 26, 2024, Spotswood filed a complaint and order to show cause seeking to permanently block the MCPO from releasing the video. Pa60. On January 29, 2024, Mayor Palmer moved to intervene, asserting that she was being "publicly harassed" by Spotswood Police Officers, that her privacy was violated because she was "illegally recorded," and that her "heated conversation with command staff" was "intended to be a private conversation." Pa72; Pa79-Pa82. She maintained that "release of this video will further victimize me, which is the intent of the abusers." Pa80. Appellant and Intervenor/Cross-Appellant Steve Wronko ("Wronko") later moved to intervene, and both motions were granted. Pa104-140; Pa141; 2T.

After the parties briefed and argued whether, among other issues, the BWC Footage was subject to release by the MCPO, the Court issued its decision on May 29, 2024, in which it, among other things, granted (1) Respondent and the Mayor's request to permanently enjoin the MCPO from releasing the April 28, 2022 BWC Footages; (2) Gannett's request for BWC Footage recorded on April 22, 2022, with redactions to protect the Resident's identity; and (3) Gannett's request for all IA documents relating to the both incidents, with redactions made by the Court. Pa1-Pa2.

The Law Division enumerated several reasons that the April 28, 2022 BWC Footage could not be released by MCPO. It found that the BWC Footage was not a government record under the Open Public Records Act (OPRA) because it fit within several exceptions thereto, including that because the BWC Footage video pertains to future strategy and contains supervisory interactions in the form of guidance, "this would be an instance where the BWCs should not have been activated as outlined under the [OPRA] statute and AG Directives," citing N.J.S.A. 47:1A-1.1's ban on disclosure of security measures and surveillance techniques. Pa23 (the BWC Footage "appears to pertain to future strategy and contains supervisory interactions in the form of guidance. As such, this would be an instance where the BWCs should not have been activated as outlined under the [BWC LAW] and AG Directives").

The Law Division also found that the provisions of N.J.S.A. 40A:14-118.5 (the "BWC Law") dictated that the BWC Footage should not be released pursuant to exceptions within the BWC Law. It found that an exception to the BWC Law contained in N.J.S.A. 40A:14-118.5(l)(2) may be triggered when it is read alongside N.J.S.A. 40A:14-118.5(j)(1). Pa34. The Law Division found that these portions of the BWC Law suggest that BWC footage is unavailable for public inspection if it is retained solely and exclusively because it captures images involving an encounter about which a complaint was made by the mayor, who was the subject of the BWC recording, and because the mayor has made it eminently clear by virtue of this litigation that she requests that the BWC not be made available to the public. Id. It held that "[t]his exception could apply to the instant matter because Spotswood PD and the MCPO were required to retain the BWC recording when the mayor, a subject of the recording, made a complaint that triggered the Spotswood Police Department IA Investigation." Id.

The Law Division stated further that a second exception to the BWC Law, namely the exception contained in N.J.S.A. 40A:14-118.5(l)(3), may also be triggered in this case when is read alongside N.J.S.A. 40A:14-118.5(j)(2)(a) and (c). Pa35. It found that, when those statutes are read together, it suggests that BWC footage is unavailable for public inspection if it was retained solely and exclusively because the officer who made the recording or their immediate

supervisor reasonably asserts that the recording has evidentiary or exculpatory value. Id. The Law Division found that the subject officers had justified the BWC recording as necessary due to the previous "bias incident report," thus providing an indication that the subject officers assert that the recording has evidentiary or exculpatory value. Id.

In supporting its decision that the BWC Footage should not be released, the Court found that the BWC Footage was taken surreptitiously. It enumerated several reasons why it believed that the recording was surreptitious, relying on the facts that:

> First, the two officers were asked to record while already on the stairs instead of activating when they exited headquarters. Second, the officers were positioned in the rear of the office near the exit and in a position furthest away from the mayor. Third, the officer closest to the mayor did not have his BWC activated, nor was he even wearing a BWC. Fourth, the officers who were recording were not involved in the conversation. Neither officer asked any questions nor engaged in any discussion with the mayor. Fifth, the officer who promptly notified every other person he encountered that they were being recorded did not inform the mayor that she was being recorded. Lastly, the inconsistencies between the CAD report and the BWC recording time stamps support Plaintiff's arguments that the BWC was surreptitious.

Pa36. These facts led the Law Division to conclude that the BWC Footage was taken surreptitiously, "which is a clear violation of N.J.S.A. 40A:14-118.5(d) and (g), along with AG Directives 4.2 and 7.7." Pa37.

Despite having already found that the BWC Footage was not subject to release due to exceptions in OPRA, the Law Division addressed Appellants' arguments that the BWC Footage should be released under the common law. To do so, the Law Division thoroughly analyzed the factors outlined in three on-point cases: Loigman v. Kimmelman, 102 N.J. 98, 113 (1986), Rivera v. Union Cnty. Prosecutor's Off., 250 N.J. 124, 141 (2022), and Doe v. Poritz, 142 N.J. 1, 88 (1995).

Regarding the Loigman factors, the Law Division determined that the BWC Footage was not subject to release. First, it noted that the fact that "the improper recordings can then be separated and preserved if needed" and that such a process "had been deployed in the instant matter" rendering it "likely that most of the requested BWC recordings would not have been available for disclosure" weighed in favor of nondisclosure on factors one and two. Pa44. As to factors three and four, the Law Division found that "the exposure of internal conversations among leadership and command staff could undermine the governing body's discretion, hinder its ability to deliberate and govern effectively, and thereby significantly impede its decision-making processes" weighed in favor of non-disclosure. Pa45. As to factor five, the Law Division found that MCPO's Bias Unit's investigation of the allegations against the mayor and decision not to bring charges weighed in favor of non-disclosure. Id.

Finally, as to factor six, while the Law Division did not explicitly state whether the factor weight in favor of disclosure or non-disclosure, its statement that "[a]lthough this Court agrees that allegations of racial bias are serious, it does not automatically require the release of the BWC footage for public consumption" implied that it favored non-disclosure. Pa46.

Regarding the factors outlined in Rivera, the Law Division determined that the MCPO Bias Unit investigation's finding which did not substantiate the allegations, the fact that the mayor is a civilian and, therefore, not subject to an internal affairs investigation, and her accountability for the complaints against her weighed in favor of disclosure as to factor one and against disclosure for factor two. Pa47. The Law Division held that factor three did not apply since no charges were filed, but held that factor four favored disclosure since the mayor held substantial power. Pa48. Finally, the Law Division held that factor five favored nondisclosure, as nothing in the record supported the notion of "repeated misconduct." Id.

The Law Division similarly analyzed several of the factors set forth in Doe and determined that the BWC Footage should not be released. It held that, regarding factors one and two, it's finding that the BWC recording requested is neither a government nor public record favored nondisclosure. Pa43. Similarly, the Law Division found that the fact that the BWC recording included

confidential information, police procedures, and other safety concerns favored nondisclosure as to factor three because the BWC recording could harm more than just the mayor's reputation. Id. The Law Division concluded that "the factors outlined in Doe favor nondisclosure." Pa44.

Finally, the Law Division noted that the fact that a third-party complaint allegedly provided some information to the press or public through court submission "does not dilute other confidentiality concerns," noting that the Attorney General's Office December 2019 Internal Affairs Policy and Procedures ("IAPP") has a longstanding interest in confidentiality. Pa44. It noted that the IAPP, which would have been in effect at the time of this incident, states:

> The nature and source of internal allegations, the progress of internal affairs investigations, *and the resulting materials are confidential information*. The contents of an internal investigation case file, including the original complaint, shall be retained in the internal affairs function and clearly marked as confidential. The information and records of an internal investigation shall only be released or shared under the following limited circumstances.

Id. (emphasis in the original).

The Court granted Appellants' request that the Spotswood Police Department's IA File be released, but with redactions which the Court itself would make. Pa2. When the Court later released the IA File with redactions, it

explained the redactions it made in an Amplified Order, stating that it had redacted any mention of the BWC Footage because "[t]he IA files contained direct quotes included by the investigating police officers who reviewed the BWC footage and then quoted portions of that footage in the IA report. The quotes included conversations between the Spotswood mayor and Spotswood police. This court prohibited the release of the body worn camera footage from which the quotes were taken. As such, this Court redacted the content of the IA files where the officers were directly quoting from the BWC footage." Pa59.

LEGAL ARGUMENT

STANDARD OF REVIEW

Decisions regarding the granting of equitable remedies such as permanent injunctions are left to the sound discretion of the trial courts and are not disturbed "unless there is a clear showing of abuse of discretion." Feigenbaum v. Guaracini, 402 N.J. Super. 7, 17 (App. Div. 2008) (quoting Kurzke v. Nissan Motor Corp. in U.S.A., 164 N.J. 159, 165 (2000)). Abuse of discretion occurs when a decision: 1) has no rational explanation, 2) departs from established policies without explanation, or 3) rests on an impermissible basis. Id.; Flagg v. Essex County Prosecutor, 171 N.J. 561, 571, 796 A.2d 182 (2002) (quoting Achacoso-Sanchez v. Immigration and Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir.1985)).

POINT I

THE LAW DIVISION PROPERLY FOUND THAT THE UNLAWFULLY RECORDED BWC FOOTAGE OF THE MAYOR WAS NOT SUBJECT TO OPRA, FELL WITHIN EXCEPTIONS TO THE BWC LAW, AND WARRANTED DESTRUCTION. (Pa1, Pa9-36).

The Open Public Records Act (OPRA) was implemented to provide citizens with the ability to obtain, review, or copy governmental documents. Specifically, OPRA states at N.J.S.A. 47:1A-1 that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest . . .." However, OPRA contains numerous exceptions and "exempts more than twenty categories of records" from disclosure. Rivera v. Union Cnty. Prosecutor's Off., 250 N.J. 124, 141 (2022) (citing N.J.S.A. 47:1A-1.1).

A. The BWC Footage is Not a Government Record Because It Falls Within an Exception to OPRA Which Excepts the Disclosure of Security Measures and Surveillance Techniques (Pa12, Pa23).

If a document falls within one of the exceptions to OPRA, "it is not a government record and not subject to disclosure pursuant to OPRA." Commc'ns Workers of Am. v. Rousseau, 417 N.J. Super. 341, 355 (App. Div. 2010) (holding that a trade secret is not subject to OPRA); Newark Morning Ledger Co. v. New Jersey Sports & Exposition Authority, 423 N.J. Super. 140, 161 (App. Div. 2011).

In their brief, appellant argues that there is no lawful basis under OPRA to deny access to the BWC Footage because the BWC Footage is not subject to any exception to OPRA. Appellant is incorrect, as the BWC Footage is subject to an OPRA exception, the basis for which the Law Division clearly explained, rendering it outside of the definition of a government record.

N.J.S.A. 47:1A-1.1, specifically exempts from disclosure under OPRA "security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons." See also Gilleran v. Bloomfield, 227 N.J. 159, 164 (2016) (reversing the Appellate Division and holding that the release of footage from a police surveillance camera, "which is part of a government facility's security system protecting its property, workers, and visitors, would reveal information about the system's operation and also its vulnerabilities, jeopardizing public safety").

Here, the Law Division correctly found that "[t]he entire BWC recording appears to pertain to future strategy and contains supervisory interactions in the form of guidance. As such, this would be an instance where the BWCs should not have been activated as outlined under the [BWC LAW] and AG Directives." Pa23. Because the meeting between the Mayor and the police officers was clearly a strategic meeting held to address the parties' concerns regarding these sorts of interactions, see Pa78, Pa81, the Law Division held that the video

pertains to future strategy and contains supervisory interactions in the form of guidance. Id. In so holding, the Law Division cited N.J.S.A. 47:1A-1.1's exception on disclosure of security measures and surveillance techniques. Id. The Court properly considered the contents of the video and, importantly, provided a rational, well-reasoned analysis thereof that was within established policies and relied on permissible bases. As such, the Court's determination that the release of the BWC Footage fell within an exception to OPRA should not be disturbed.

B. The BWC Footage is Subject to Exceptions to the BWC Law (Pa34-35).

Appellant incorrectly argues in its brief that the trial court wrongly decided the issue of whether the BWC Footage should be released because the BWC Footage is not subject to any exception under the BWC Law. While Appellant correctly cites to N.J.S.A. 40A:14-118.5(l), it ignores other relevant portions of that statute. Specifically, N.J.S.A. 40A:14-118.5(l) provides:

> Notwithstanding that a criminal investigatory record does not constitute a government record under [OPRA], only the following body worn camera recordings shall be exempt from public inspection:
>
> 1. body worn camera recordings not subject to a minimum three-year retention period or additional retention requirements pursuant to subsection j. of this section;

> 2. body worn camera recordings subject to a minimum three-year retention period solely and exclusively pursuant to paragraph (1) of subsection j. of this section if the subject of the body worn camera recording making the complaint requests the body worn camera recording not be made available to the public;
>
> 3. body worn camera recordings subject to a minimum three-year retention period solely and exclusively pursuant to subparagraph (a), (b), (c), or (d) of paragraph (2) of subsection j. of this section; and
>
> 4. body worn camera recordings subject to a minimum three-year retention period solely and exclusively pursuant to subparagraph (e), (f), or (g) of paragraph (2) of subsection j. of this section if a member, parent or legal guardian, or next of kin or designee requests the [BWC] recording not be made available to the public.

N.J.S.A. 40A:14-118.5(l).

However, an additional portion of the BWC Law, N.J.S.A. 40A:14-118.5(j), supplements the above-referenced exception:

> j. A body worn camera recording shall be retained by the law enforcement agency that employs the officer for a retention period consistent with the provisions of this section, after which time the recording shall be permanently deleted. A body worn camera recording shall be retained for not less than 180 days from the date it was recorded, which minimum time frame for retention shall be applicable to all contracts for retention of body worn camera recordings executed by or on behalf of a law enforcement agency on or after the effective date of this act, and shall be subject to the following additional retention periods:

> 1. a body worn camera recording shall automatically be retained for not less than three years if it captures images involving an encounter about which a complaint has been registered by a subject of the body worn camera recording;
>
> 2. subject to any applicable retention periods established in paragraph (3) of this subsection to the extent such retention period is longer, a body worn camera recording shall be retained for not less than three years if voluntarily requested by:
>
> a. the law enforcement officer whose body worn camera made the video recording, if that officer reasonably asserts the recording has evidentiary or exculpatory value;
>
> …
>
> c. any immediate supervisor of a law enforcement officer whose body worn camera made the recording or who is a subject of the body worn camera recording, if that immediate supervisor reasonably asserts the recording has evidentiary or exculpatory value;
>
> …

N.J.S.A. § 40A:14-118.5(j)

Here, the Law Division recognized and clearly articulated that the exception to the BWC Law contained in N.J.S.A. 40A:14-118.5(l)(2) may be triggered when it is read alongside N.J.S.A. 40A:14-118.5(j)(1). Pa34. The Law Division recognized that these two portions of the BWC Law statutes suggest that BWC footage is unavailable for public inspection if it is retained solely and exclusively because the recording captures images involving an encounter about

which a complaint was made by the mayor, who was the subject of the BWC recording, and because the mayor has made it eminently clear by virtue of this litigation that she requests that the BWC not be made available to the public. Id. The Law Division held that "[t]his exception could apply to the instant matter because Spotswood PD and the MCPO were required to retain the BWC recording when the mayor, a subject of the recording, made a complaint that triggered the Spotswood Police Department IA Investigation." Id.

As the Law Division further recognized, a second exception to the BWC Law contained in N.J.S.A. 40A:14-118.5(l)(3) may also be triggered in this case when is read alongside N.J.S.A. 40A:14-118.5(j)(2)(a) and (c). Pa35. In this regard, when those statutes are read together, it suggests that BWC footage is unavailable for public inspection if it was retained solely and exclusively because the officer who made the recording or their immediate supervisor reasonably asserts that the recording has evidentiary or exculpatory value. Id. The Law Division found that the subject officers had justified the BWC recording as necessary due to the previous "bias incident report," thus providing an indication that the subject officers believed that the recording had evidentiary or exculpatory value. Id.

The Law Division arrived at this conclusion through a practical, thorough reading of the BWC Law. Rather than apply a facial reading of N.J.S.A. 40A:14-

118.5(l) as Appellant suggests, the Court applied the long-held maxim that "statutes must be read in their entirety," Burnett v. Cnty. of Bergen, 198 N.J. 408, 421 (2009), and that "[w]hen two or more statutory schemes are analyzed, they 'should be read in pari materia and construed together as a unitary and harmonious whole.'" Liberty Ins. Corp. v. Techdan, LLC, 253 N.J. 87, 103-04, (2023) (quoting State v. Nance, 228 N.J. 378, 395 (2017)). The Law Division's well-reasoned finding that the BWC Footage fell within the exceptions to the BWC Law was supported by a clear rational explanation, and as such should not be disturbed.

C. The BWC Footage Was Unlawfully Recorded (Pa15-24; Pa36-39)

Appellant argues in its Brief that the BWC Footage was not illegally recorded. The very text of the BWC Law, which the Law Division recognized and cited in its decision, makes clear that Appellant is incorrect. Specifically, the BWC Law expressly states that "[a] law enforcement officer who is wearing a body worn camera shall notify the subject of the recording that the subject is being recorded by the body worn camera unless it is unsafe or infeasible to provide such notification." N.J.S.A. 40A:14-118.5(d).

Moreover, elsewhere within the BWC Law, N.J.S.A. 40A:14-118.3(a)(8) provides that every uniformed officer "shall wear a body worn camera that electronically records audio and video while acting in the performance of the

officer's official duties, except: . . . as may be otherwise provided in accordance with guidelines or directives promulgated by the Attorney General." 40A:14-118.3(a)(8) (emphasis added). To that end, Attorney General Directive No. 2022-1 Section 5.1 provides such a directive, specifying that "[a] BWC shall be activated only while in performance of official police duties," while sections 5.2, 5.3, and 5.3.1 outline the circumstances under which a BWC should be activated or deactivated. Att'y Gen. Law Enf't Directive No. 2022-1, Update to Body Worn Camera Policy, (Jan. 19, 2022). Additionally, N.J.S.A. 40A:14-118.5(g) states, "[a] body worn camera shall not be used surreptitiously." The AG Directive Section 7.7 elaborates on the surreptitious use of a BWC by adding that the BWC shall not be used "to record activity that is unrelated to a response to a call for service or a law enforcement or investigative encounter between a law enforcement officer and a member of the public." Finally, another portion of the BWC Law, N.J.S.A. 40A:14-118.5(d), requires an officer to "notify the subject of the recording that the subject is being recorded unless it is unsafe or infeasible to provide such notification."

Here, the lower court ruled that the recording of the incidents contained on the BWC Footage violated the BWC Law and Attorney General Directive. Pa16. It found that numerous portions of the BWC Law and Attorney General Directive had been violated through a reading of the clear text of these

directives, finding that 40A:14-118.3(a), (c), (d) (g), and (r), along with AG Directive 5.1, 5.2, 5.3, and 5.3.1 had been violated. Pa13; Pa16-17; Pa28. It further supported its decision that the BWC Footage should not be released by enumerating the factors that it considered in determining whether the BWC Footage was taken surreptitiously. Pa36. Those facts led the Law Division to conclude that the BWC Footage was indeed taken surreptitiously, "which is a clear violation of N.J.S.A. 40A:14-118.5(d) and (g), along with AG Directives 4.2 and 7.7." Pa37. The Law Division's reasoning was thorough and provided a rational explanation as to why the recording of the BWC Footage was illegal, and as such should not be disturbed.

D. The Officers' Failure to Give Notice Required the BWC Footage's Destruction (Pa31)

Appellant and Wronko argue that the subject officers' failure to give notice that their BWCs were recording does not require the BWCs' destruction. The text of the BWC Law and its interpretation by the Law Division dictates otherwise.

Appellant is correct that N.J.S.A. 40A:14-118.5(d) states that an officer wearing a BWC "shall notify the subject of the recording that the subject is being recorded by the body worn camera unless it is unsafe or infeasible to provide such notification." N.J.S.A. 40A:14-118.5(d). If the officer does not provide the required notification because it was "unsafe or infeasible to do so, the officer

shall document the reasons for that decision in a report or by narrating the reasons on the body worn camera recording, or both." Id. However, when a recording is made in contravention of the BWC Law, the statute provides that "any recordings from a body worn camera recorded in contravention of this or any other applicable law shall be immediately destroyed and shall not be admissible as evidence in any criminal, civil, or administrative proceeding. N.J.S.A. 40A:14-118.5(r). This rule supports the BWC LAW's statement that "[a] body worn camera shall not be used surreptitiously." N.J.S.A. 40A:14-118.5(g).

Appellant and Wronko's argument that the subject officers' failure to provide notice to the mayor did not render the actual recording of the video illegal is a nonsensical distinction without a difference. The Law Division, on the other hand, read the clear language of the aforementioned statutes and determined that destruction was warranted, stating that, particularly when read alongside the AG Directive, there was nothing "general or ambiguous about [the text of the BWC Law]. As such, this Court finds that the harmonious reading of the BWC statute and AG Directives may have resulted in the destruction of the BWC footage because it was recorded in contravention of the BWC statute." Pa31.

Once again, the Law Division offered a rational explanation for its well-reasoned holding regarding destruction of the BWC Footage. Indeed, the Law Division consistently provided clear, rational explanations as to why the applicable statutes dictated that the BWC Footage be withheld that were within established policies and relied on permissible bases, and its decision should not be disturbed.

POINT II

THE LAW DIVISION PROPERLY HELD THAT APPELLANT HAD NO COMMON LAW RIGHT TO THE BWC FOOTAGE (Pa43-48)

Appellant's argument that the lower court should have granted it access to the BWC Footage under the common law must be rejected. While those requesting government records may, under certain circumstance, be entitled to same under the common law, one requesting such documents "must establish an interest in the subject matter of the material," and "the citizen's right to access must be balanced against the State's interest in preventing disclosure." Paff v. Ocean Cnty Prosecutor's Office, 235 N.J. 1, 29 (2018) (quoting N. Jersey Media Grp., Inc. v. Township of Lyndhurst, 229 N.J. 541, 578-579 (2017)). Such a demand should be "premised upon a purpose which tends to advance or further a wholesome public interest or a legitimate private interest." Loigman v. Kimmelman, 102 N.J. 98, 113 (1986). To access records under the common law,

a court must determine that the public's interest in disclosure outweighs the need for confidentiality. Rivera v. Union Cnty. Prosecutor's Office, 250 N.J. 124, 144 (2022).

As Appellant argues and the Law Division acknowledged and analyzed, courts in Loigman, Rivera, and elsewhere have enumerated factors that courts consider when analyzing whether a requestor is entitled to government documents. The court in Loigman identified six factors to consider in balancing the interests:

> (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 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.

Id.

More recently in Rivera, the Court outlined "transparency factors" that courts should consider in determining whether a requestor is entitled to access of government documents, including: (1) the nature and seriousness of the misconduct; (2) whether the alleged misconduct was substantiated; (3) the nature of the discipline imposed; (4) the nature of the official's position; and (5) the individual's record of misconduct. Rivera, 250 N.J. at 148. Serious misconduct, such as 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 and gives rise to a greater interest in disclosure. Id. 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. Id.

Moreover, in the seminal decision in Doe v. Poritz, our Supreme Court noted seven factors considered

> (1) the type of record requested;
>
> (2) the information it does or might contain;
>
> (3) the potential for harm in any subsequent nonconsensual disclosure;

> (4) the injury from disclosure to the relationship in which the record was generated;
>
> (5) the adequacy of safeguards to prevent unauthorized disclosure;
>
> (6) the degree of need for access; and
>
> (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

Doe v. Poritz, 142 N.J. 1, 88 (1995).

Here, the Law Division thoroughly analyzed the factors outlined in Loigman, Rivera, and Doe. Regarding the Loigman factors, the Law Division noted that the fact that "the improper recordings can then be separated and preserved if needed" and that such a process "had been deployed in the instant matter" rendering it "likely that most of the requested BWC recordings would not have been available for disclosure" weighed in favor of nondisclosure on factors one and two. Pa44. As to factors three and four, the Law Division found that "the exposure of internal conversations among leadership and command staff could undermine the governing body's discretion, hinder its ability to deliberate and govern effectively, and thereby significantly impede its decision-making processes" weighed in favor of non-disclosure. Pa45. As to factor five, the Law Division found that MCPO's Bias Unit's investigation of the allegations against the mayor and decision not to bring charges weight in favor of non-

disclosure. Id. Finally, as to factor six, while the Law Division did not explicitly state whether the factor weighed in favor of disclosure or non-disclosure, its statement that "[a]lthough this Court agrees that allegations of racial bias are serious, it does not automatically require the release of the BWC footage for public consumption" implied that it favored non-disclosure. Pa46.

The Law Division undertook a similar analysis regarding the factors enumerated in Rivera. The Court found that the MCPO Bias Unit investigation's finding which did not substantiate the allegations, the fact that the mayor is a civilian and, therefore, not subject to an internal affairs investigation, and her accountability for the complaints against her weighed in favor of disclosure as to factor one and against disclosure for factor two. Pa47. The Law Division held that factor three did not apply since no charges were filed, but held that factor four favored disclosure since the mayor held substantial power. Pa48. Finally, the Law Division held that factor five favored nondisclosure, as nothing in the record supported the notion of "repeated misconduct." Id.

The Law Division similarly analyzed several of the factors set forth in Doe. It determined that, regarding factors one and two, its finding that the BWC recording was neither a government nor public record, favoring nondisclosure. Pa43. Similarly, the Law Division found that the fact that the BWC recording included confidential information, police procedures, and other safety concerns

favored nondisclosure as to factor three because the BWC recording could harm more than just the mayor's reputation. Id. The Law Division concluded that "the factors outlined in Doe favor nondisclosure." Pa44.

While the Appellant argues that access to the BWC Footage should have been granted under the common law, the Law Division disagreed and clearly enumerated its decisions for doing so. It did so by analyzing the factors of Loigman and Rivera, which Appellant concedes are the proper tests, and applied an additional test from Doe. The Law Division clearly explained its reasoning, step-by-step, as it made findings as to the factors of each test. Yet again, the Law Division provided a rational explanation for its decision that was within established policies and relied on permissible bases, providing no suggestion that it abused its discretion in determining that Appellant did not have a right to the BWC Footage under the common law. As such, the Law Division's decision should not be disturbed.

POINT III

THE LAW DIVISION PROPERLY RELIED ON THE ATTORNEY GENERAL'S IAPP (Pa44)

In his Cross-Appeal, Wronko argues that the Law Division impermissibly relied on the IAPP in its decision, citing to Serrano v. South Brunswick Township, 358 N.J. Super. 352 (App. Div. 2003) for the proposition that "public

records do not become retroactively confidential." Wronko's argument ignores not only the language of the very case that he cites to, but the well-reasoned logic that the Law Division applied when considering the IAPP.

While Wronko is correct that in Serrano, the Appellate Division upheld a lower court's decision that a recording of a 911 call was a public record subject to disclosure, holding that the tape did not become retroactively confidential simply because the prosecutor obtained the tape, his suggestion that this decision created a rule of law is demonstrably false. In a concurrence, the Serrano Court made clear that it was not creating a rule that 911 tapes (or any other type of document) were public records under OPRA. Id. at 371 (Coburn, J., concurring) ("I write to emphasize that in approving publication of the tape here, where there happened to be no objection from the caller, the court is not concluding that all 911 tapes are open to the public under OPRA. Rather, we have decided only that under the circumstances of this case, the prosecutor was not entitled to withhold this 911 tape from the public.") (emphasis added).

Here, Serrano did not import a rule upon the Law Division or this Court dictating that the BWC Footage cannot become retroactively confidential. Moreover, Wronko's objection to the Law Division's reliance on the IAPP ignores its clear, reasoned application of the law which read the verbatim language of the IAPP. Pa44. Indeed, the Law Division determined that the IAPP

made clear that the resulting materials from an internal affairs investigation are confidential and applied that language to the case in front of it. Id. Once again, the Law Division's reliance on this statute was reasoned and had a clearly rational basis, and there is no reason why this Court should disturb its decision on the ground argued by Wronko.

POINT IV

THE REDACTIONS TO THE INTERNAL AFFAIRS REPORTS ARE APPROPRIATE AND LAWFUL (Pa53-55).

Appellant argues that the redactions to the IA File which were ordered by the trial court were unlawful. This position again ignores the clear rationale that the trial court came to in making its decision.

To determine whether to release the IA files, the Law Division employed the factors from Loigman, ultimately determining that the internal affairs reports should be released with redactions. Pa53-55 ("[t]he request to release the IA file is GRANTED with redactions.") As Appellant concedes, the Court later explained exactly what the redactions should look like, stating in an amplified opinion that "[t]he IA files contained direct quotes included by the investigating police officers who reviewed the BWC footage and then quoted portions of that footage in the IA report. The quotes included conversations between the Spotswood mayor and Spotswood police. This court prohibited the release of

the body worn camera footage from which the quotes were taken. As such, this Court redacted the content of the IA files where the officers were directly quoting from the BWC footage." Pa59 (emphasis added).

The trial court clearly and logically explained its reasoning in making redactions. It initially explained its reasoning that the internal affairs reports should be released through a detailed analysis of the Loigman factors. Then, when it released the reports with redactions, it clearly enumerated the reasons for making the redactions that it made, logically reasoning that because it determined that the BWC footage should not be released, neither should direct quotes from the BWC footage. To have applied redactions otherwise would have undercut the Law Division's ruling as to the BWC by allowing the release of verbatim quotes of video that it deemed should be protected. One final time, the Law Division offered a rational explanation for its well-reasoned holding and redactions, and as such its holding on this point should not be disturbed.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that Appellant's appeal be denied and that the Law Division's enjoining release of the BWC Footage and redactions to the IA File be affirmed.

Respectfully submitted,

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By: */s/ Kathryn V. Hatfield*
Kathryn V. Hatfield, Esq.

Dated: February 14, 2025

Borough of Spotswood and Intervenor Jacqueline Palmer,	:	Superior Court of New Jersey, Appellate Division,
Plaintiffs/Respondents,	:	Docket No. A- 003457-23T4
V.	:	A Civil Action
Middlesex County Prosecutor's Office,	:	On appeal from Docket No. Mid-l-000563-24
Defendant/Respondent,	:	Sat below:
V.	:	Michael a. Toto, A.J.S.C.
Gannett Satellite Information Network,	:	
Defendant-Intervenor/Appellant/ Cross-Respondent,	:	
Steve Wronko,	:	
Defendant-Intervenor/Respondent/ Cross-Appellant:	:	

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT GANNETT SATELLITE INFORMATION NETWORK

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

PRELIMINARY STATEMENT

In opposing Gannett Satellite Information Network's appeal, the Borough of Spotswood and Mayor Jacqueline Palmer continue their preposterous arguments that she is somehow the victim of unauthorized recording by police officers and therefore the residents of Spotswood should be permanently barred from ever hearing the alleged racially charged statements she made. Gannett primarily relies upon its prior briefing but notes that the Middlesex County Prosecutor's Office (MCPO) fully agrees with Gannett that the officers were not only authorized to record the mayor, but that they were *obligated* to do so per the Body-Worn Camera Law (BWCL) and the Attorney General's BWC Policy.

Had the officers not recorded the conversation with the mayor, they would have been in violation of those provisions of law and subject to discipline. They also would have faced discipline for violating a direct order from their supervisor to record. More importantly, if they had not turned their camera on, they would have failed to record important evidence related to the pending bias complaint that the Resident had lodged against the mayor. Indeed, the trial court called the mayor's comments "inappropriate" and MCPO's bias investigators said her remarks undermined any claim that race did not play a factor in how she treated the Resident in having him ejected from Borough Hall. Thankfully,

as they were obligated to do, the officers recorded the conversation and captured what she and other officers said so that the videos could be used as evidence in MCPO's bias investigation, in the pending internal affairs investigations, or in any lawsuit that the Resident could have filed.

Although the officers failed to give verbal notice to the mayor and may have committed other BWCL violations (such as some officers not wearing BWCs), those facts only make disclosure even more important. The public deserves to see not only how its former mayor (Mayor Palmer lost her recent election in a landslide) behaved but also what the officers said and whether they complied with the law. Those officers are still in the force, many with pending lawsuits against the Borough. The public deserves the truth.

For all the reasons argued below, this Court should reverse the trial court's permanent injunction and order MCPO to fulfill Mr. Wronko and Gannett's requests for the BWC videos. It should also order the redactions to MCPO's investigation report to be removed.

LEGAL ARGUMENT[1]

I. THE BWC VIDEOS ARE "GOVERNMENT RECORDS" UNDER OPRA AND "PUBLIC RECORDS" UNDER THE COMMON LAW

Mayor Palmer argues as a threshold matter that the April 28, 2022 BWC videos are not "government records" at all because they were not made in the course of the officers' "official business." See N.J.S.A. 47:1A-1.1. This is preposterous. The videos were not recorded after hours, during a work social function or lunch break, or in any situation that made it ambiguous whether the officers were "on the clock." Rather, the officers were in Borough Hall, on duty, and in uniform, having just responded to the mayor's complaints about the Resident and interacted with the Resident about his bias complaints against her and others. Per Mayor Palmer's own arguments, the meeting included conversations about the officers' response to the Resident and how to handle future encounters—i.e., official public business.

For the same reasons, the videos meet the definition of "public record" under the common law. The mayor, however, continues to argue that the officers were not "authorized" to record the videos and so the videos cannot be accessed under the common law because a "public record" must be one that is "authorized

[1] Pa = Plaintiff's Appendix; Pb = Plaintiff's Appellant Brief;
Mb = MCPO's Respondent Brief

to be made." It is true that *some* cases have referred to a "public record" being made by a public officer "who is authorized to make it." See, e.g., Rivera v. Union County Prosecutor's Office, 250 N.J. 124, 144 (2022). Other cases, however, have not included the "authorized by law" language and have simply focused on whether the record relates to public business. See, e.g., Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 549 (2012) (stating "the common law right extends" to "written records 'made by public officers in the exercise of public functions'"); Keddie v. Rutgers, 148 N.J. Super. 36, 46 (1997) (stating a public record is one that has been retained by an officer or agency "as evidence of its activities or because of the information contained therein"). Moreover, courts have repeatedly held that the definition of "public record" is extremely "broad," and includes "almost every document recorded, generated, or produced by public officials." A.C.L.U. v. County Prosecutor's Assoc. of N.J., 257 N.J. 87, 121 (2024) (Wainer-Apter, J, dissenting) (quoting Shuttleworth v. City of Camden, 258 N.J. Super. 573, 582-83 (App. Div. 1992)). Accord Higg-A-Rella Inc v. Cnty. of Essex, 141 N.J. 35, 46 (1995); O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 387 (App. Div. 2009).

Here, the officers were authorized to make the videos. As MCPO correctly explains, they were obligated to do so under the BWCL because the mayor was

a complainant on both April 22 and April 28, 2022, those investigations were ongoing and she had information relevant to the investigations, and because there were a pending bias complaint against her. (Mb4-6; Pb25-Pa26). The Police Chief also ordered them to record. If the Mayor's argument was accepted, the definitions of "government record" and "public record" would be very narrow and would lead to secrecy in areas where transparency is most needed.

For example, if a police chief wrote an email to his team in which he made racially discriminatory statements or promoted unlawful policies, such an email was clearly not authorized by law, but it nonetheless is exactly the type of document that should be—and would be—made public under OPRA and the common law.[2] Similarly, if a business administrator stole from taxpayers by writing himself checks from a town's bank account, such payments would clearly be unauthorized yet disclosure would be required because they were nonetheless made as part of his official duties or public functions. Yet, according

[2] This is not hypothetical; there have been many instances in which officials have sent messages that are discriminatory or otherwise violate the law. See, e.g., Dan Krauth, Police Officers in Monmouth County, New Jersey Sent Racist Texts To Each Other, Records Show, ABC New York, Dec. 20, 2024 (discussing racist messages officers sent to each other); Steve Janoski, Palisades Park Councilman Sent Racist, Sexist Chain Letters to Friends, NorthJersey.com, Nov. 30, 2018 (discussing councilman's anti-immigrant and anti-Muslim emails); Marsha A. Stoltz, Suspended Wyckoff Police Chief to Retire, NorthJersey.com, Nov. 23, 2016 (discussing email sent by police chief that encouraged officers to engage in racial profiling).

to the Mayor Palmer, these documents would be available because the officials were not "authorized" to send discriminatory emails or to write fraudulent checks.

This Court should reject such an absurd argument, which in this case would shield the public from learning whether Mayor Palmer made the remarks that MCPO's investigators considered contradictory to the Borough's conclusion "that none of the actions taken by the mayor or her staff were motivated by race, or that race did not play a factor." (Pa192). Even if the recordings were not authorized, such circumstances—where the law is broken—is where OPRA plays its core function of exposing misconduct and waste, and where transparency is most needed. See Red Bank Register, Inc. v. Bd. of Educ. of Long Branch, 206 N.J. Super. 1, 9, n.3 (App. Div. 1985) ("[W]e have no occasion to comment on whether a public agency could withhold documents otherwise qualifying as common law public records on the ground it had acted unlawfully in having the documents prepared. Arguably the case for disclosure in such circumstance would be stronger rather than weaker than a case in which the preparation of the documents had been authorized.").

So long as a record relates to an employee's work functions, it meets the general definitions of both "government record" and "public record." Thus, the

threshold question required for both OPRA and the common law is met—the videos are "government record" and "public records" and the Court must move on to ascertain whether an exemption applies or whether the balancing test weighs in favor of access.

II. THERE IS NO EXEMPTION THAT WHOLLY EXEMPTS THE VIDEOS FROM ACCESS UNDER OPRA

The Borough and the mayor argue that the BWC videos are wholly exempt from access due to some confidential material within them. They are wrong.

A. The BWCL Does Not Exempt the Videos

Both the Borough and the mayor argue that the videos are exempt pursuant to N.J.S.A. 40A:14-118.5(l)'s second exception because the mayor filed an internal affairs complaint and desires that the video "not be made available to the public." But they ignore the BWCL's plain language, as did the trial court. The second exception to Subsection (l) renders videos exempt only if a video is retained for three years "solely and exclusively" because it "captures images involving an encounter about which a complainant has been registered by a subject of the [BWC] recording." N.J.S.A. 40A:14-118.5(l)(2) and (j)(1). These

videos, however, are not retained "solely and exclusively" because of the mayor's internal affairs complaint[3] and thus the second exception cannot apply.

As Gannett previously argued, and as MCPO agrees, there are multiple reasons that the BWC videos were retained for a longer retention period than the standard 180 days. In addition to the complaint filed by the mayor, the videos also relate to internal affairs complaints filed by the Resident against the officers, so Subsection (j)(3)(c) applies. Additionally, the BWC videos pertain to the criminal bias investigation conducted by MCPO because of the Resident's complaint against the mayor, so Subsection (j)(3)(a) also applies. Thus, there are several reasons why the BWC videos were retained for a longer period than 180 days and the BWCL exceptions cited by the Borough and the mayor do not apply.

B. No OPRA Exemption Applies to Wholly Exempt the Videos

Both the Borough and the Mayor insist that the videos cannot be disclosed because they contain some potentially exempt information, like information falling within the attorney-client privilege, information about security measures,

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[3] The trial court held, and the Borough repeats, that two separate provisions of Subsection (j) required the video to be maintained and thus two separate exceptions of Subsection (l) apply. (Bb17-18; Pa35). This is illogical because each exception applies only if a single provision of Subsection (j) is the "sole[] and exclusive[]" reason for maintaining the video for three years. If there are multiple reasons that a video is maintained for a longer retention period, then it simply cannot fall within Subsection (l)'s exemptions.

or discussions about how to handle the Resident should he return to the building.[4] OPRA, however, rarely authorizes the denial of an entire record. Rather, OPRA requires agencies to redact exempt material from a record and disclose the rest of the record. N.J.S.A. 47:1A-5(g). This is entirely possible, as the trial court disclosed it to Gannett and Mr. Wronko's counsel as "attorneys' eyes only" with redactions to protect those confidential things, yet the videos still allowed counsel to see and hear how the mayor behaved and learn whether she used the offensive words and phrases as set forth in the Sasso lawsuit.[5]

Accordingly, this Court should reverse the trial court's permanent injunction and allow MCPO to produce the BWC videos pursuant to OPRA, with any lawful redactions that it deems to be justified.

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[4] The Supreme Court issued a reversal in Fuster v. Twp. of Chatham, 259 N.J. 533 (2025), and therefore the trial court's conclusion that the BWC videos were exempt because the Mayor was investigated but not arrested or charged must be reversed. The Supreme Court left open the question of whether OPRA's ordinary exemptions can apply in addition to the BWCL's exemptions. For purposes of *this* case, Gannett does not object to limited redactions for content like the trial court redacted from the "attorneys eyes only" version. Thus, Gannett asks this Court to also not reach the question of whether OPRA's ordinary exemptions can apply in addition to the BWCL's exemptions, because it is not an issue under dispute in this case and should be litigated in other contexts.

[5] Given that three years has passed since the videos were recorded, it is doubtful that any need for confidentiality even still exists. The "advice" discussed by the officers was extremely generic. Nonetheless, Gannett has never objected to such limited redactions.

III. THE BWC VIDEOS AND AN UNREDACTED MCPO REPORT SHOULD BE DISCLOSED UNDER THE COMMON LAW

Gannett primarily relies upon its moving brief (Pb43-49) regarding application of the common law balancing test and adds only that the Borough and Mayor Palmer's arguments against common law disclosure rest solely upon their erroneous arguments that 1) the videos were unauthorized and should have been destroyed and 2) the videos contain some confidential material and therefore must be withheld in their entirety. When those two arguments are correctly rejected, there is no colorable claim that the balancing test weighs against disclosure.

The records at issue expose whether a mayor—who set the tone for the entire public entity—used racially charged language, which MCPO's investigation report (obtained only through this litigation) considered contradictory to the conclusion "that none of the actions taken by the mayor or her staff were motivated by race, or that race did not play a factor." (Pa192). The public was so outraged by her alleged conduct, as well as her quest for extreme secrecy,[6] that she lost re-election in November 2024 by a 3,355 to 526 margin.

[6] The Borough, under the mayor's direction, and the mayor, not only sought to permanently enjoin the public from ever seeing the BWC videos, but they also sought to have these legal proceedings sealed so that the public could not even learn

See Susan Loyer, Rich O'Brien Sweeps Embattled Spotswood Mayor Jackie Palmer Out of Office, MyCentralJersey.com, Nov. 6, 2024.

Although the mayor is no longer in office, the public still has a strong interest in learning the truth. The trial court's findings, and the arguments made by the Borough and Mayor Palmer, suggest that police officers may have violated the BWCL, and the public deserves to verify those allegations. Moreover, the public deserves to see how the police officers treated the mayor and how they responded to the alleged remarks she made. There are also comments made by officers about the Resident and about BWCs in general that the public also deserves to hear. These officers are still in the force, many of them wrapped up in litigation against the Borough and each other. The public deserves the truth, and we have robust public records laws to expose the truth.

In contrast, there are no real confidentiality concerns given the passage of time. It is a stretch to label the conversation with the mayor as containing any specific legal guidance or any specific security measures. It was a very generic discussion. The passage of time, approximately three years, renders those confidentiality concerns moot. To the extent that the video might still contain

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that the proceedings were taking place. The public saw through these actions, assuming it must mean that the mayor must be "hiding something."

some material that should remain confidential, it can easily be redacted to protect those confidentiality interests while allowing the public to see how the mayor and these officers behaved.

Therefore, the Court should reverse the trial court's order and find that the BWC videos are subject to access under the common law and that the redactions to the MCPO report should be removed.

IV. AS THE RECORDS CUSTODIAN, MCPO HAS A LEGAL OBLIGATION TO TAKE A POSITION ON DISCLOSURE UNDER OPRA AND THE COMMON LAW

Gannett would be remiss if it did not address MCPO's refusal to take a position regarding whether the BWC videos should be disclosed to OPRA or the common law. As the custodian of the BWC videos, MCPO has a legal *obligation* to determine whether the videos are subject to OPRA and to grant access to them or state a legal basis for denying access to them. N.J.S.A. 47:1A-5(g). The same obligation to apply the common law balancing test also exists. Gannett Satellite Info. Network LLC v. Twp. of Neptune, 254 N.J. 242, 264 (2023) (stating the common law balancing test "requires a *records custodian* to conduct a fact-sensitive analysis of the competing interests at stake, with or without the advice of counsel, and to undertake the often difficult task of redacting information not subject to disclosure from documents before producing them to a requestor")

(emphasis added). Yet here, MCPO refuses to fulfil those legal obligations and instead has left it to the trial court to effectively be the records custodian for its office. It is concerning that MCPO evaded its statutory obligations and enticed the Borough and Mayor Palmer into filing this action, when it should have instead released the video to Mr. Wronko because there is no basis to withhold it under OPRA or the common law.

Therefore, Gannett disagrees that the Court should remand to the trial court for yet more arguments over whether exemptions apply. Such a remand only further delays access and causes the parties unnecessary expenses—expenses that would have been completely unnecessary had MCPO simply fulfilled Mr. Wronko's request. MCPO is the records custodian, and it has a legal obligation to make such determinations itself. The parties briefed the claimed exemptions below, so MCPO can benefit from those arguments—as well as viewing what the trial court redacted when he released the videos for "attorneys' eyes only"—when it decides what to redact before releasing the videos to Gannett and Mr. Wronko. It should be abundantly clear to MCPO, however, that it should not redact anything from the videos simply because it might embarrass the mayor or make her look bad.

CONCLUSION

For the reasons argued above, this Court should reverse the trial court's opinion and order the April 28, 2022 videos to be disclosed by MCPO so that Mayor Palmer's comments can be heard by the public. Additionally, all redactions to quotations of the mayor's comments in the internal affairs reports should be removed.

Respectfully Submitted,

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/s/ CJ Griffin

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April 10, 2025

VIA ECOURTS
Superior Court, Appellate Division
Richard J. Hughes Justice Complex
25 Market Street
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Re: Borough of Spotswood, et al. v. Middlesex County Prosecutor's Office
Trial Docket No. : MID-L-000563-24
Sat Below: Hon. Michael A. Toto, A.J.S.C.
Court Below: Superior Court of New Jersey, Middlesex County Law Division – Civil Park
Our File No.: 40759-10
Appellate Docket No.: A-003457-23T4

Honorable Judges of the Appellate Division:

In lieu of a formal brief, we submit this letter brief in further support of the cross-appeal filed by Intervenor/Cross-Appellant Steven Wronko ("Mr. Wronko").

TABLE OF CONTENTS

A-003457-23T4
April 10, 2025

LEGAL ARGUMENT

THE BODY WORN CAMERA VIDEOS AND THE UNREDACTED MCPO REPORT SHOULD BE PRODUCED UNDER THE OPEN PUBLIC RECORDS ACT AND THE COMMON LAW RIGHT OF ACCESS

We join the legal arguments previously made by Gannett in its merits reply brief, and we add only the following comments.

If the BWC footage should be produced under OPRA, then so should the portion of the Internal Affairs report which quoted the BWC footage. As the Trial Court stated

> The IA files contained direct quotes included by the investigating police officers who reviewed the BWC footage and then quoted portions of that footage in the IA report. The quotes included conversations between the Spotswood mayor and Spotswood police. This court prohibited the release of the body worn camera footage from which the quotes were taken. As such, this Court redacted the content of the IA files where the officers were directly quoting from the BWC footage.

(Pa59). Consequentially, if this Court were to reverse and remand for release of the BWC footage quoted in the IA report, as Mr. Wronko and Gannett believe is correct, then there is no reason to continue to withhold the IA report itself.

Furthermore, it should be emphasized that the MCPO agrees with the assertion that the BWC footage was lawfully recorded, and that it does not have to be destroyed. As stated in Gannett's merits brief, the Attorney General's Body-Worn Camera Policy states that:

> Nothing in this Policy shall be construed to in any way limit the authority of a County Prosecutor to issue directives or guidelines to the law enforcement agencies subject to his or her supervisory authority, setting forth additional procedural or substantive requirements or restrictions concerning BWCs and BWC recordings, provided that such directives or guidelines do not conflict with any explicit provision of this Policy. For example, a County Prosecutor may: specify additional circumstances when a municipal police department BWC must be activated . . .

(BWC Policy, § 12). Elsewhere, the BWC Policy places authority with the MCPO to determine whether a particular recording was illegally recorded and whether it should be destroyed. See BWC Policy § 5.1 (any video recorded in contravention of the law "shall be immediately brought to the attention of the agency command staff and immediately destroyed by command staff following consultation and approval by the County Prosecutor[.]").

Here, the MCPO has made the determination that the BWC footage was not recorded illegally, and that it does not need to be destroyed. This determination should be accorded a level of deference.

And potentially more important, the Attorney General of New Jersey agrees with Appellants' positions that the BWC footage does not need to be destroyed.[1] As the AG explains, to require the destruction of any unauthorized recordings could be to allow the destruction of ones depicting serious misconduct or crimes and would obviate the provisions of the BWCL which permit retention of authorized recordings, in contravention of well-established case law which governs statutory construction. ACb. at 13, 17. This determination should also be afforded a level of deference, especially since policies issued by the Attorney General's office have "the force of law for police entities." N. Jersey Media Grp., Inc. v. Tp. of Lyndhurst, 229 N.J. 541, 565 (2017).

Furthermore, Mr. Wronko does not believe that this matter needs to be remanded to the Trial Court for further proceedings to determine whether other

[1] The AG appears to take no position on whether the footage was lawfully recorded. ACb. at 15, fn. 4.

OPRA exemptions apply, because the BWC footage, and the unredacted MCPO report, are clearly government records which are not subject to any other exemption, and this Court has the *de novo* authority to order their disclosure without further proceedings.

CONCLUSION

For these reasons, as well as for the reasons set forth in the prior briefing by this office and by Appellant Gannett, the May 29, 2024 Order of the Trial Court which denied access to the April 28, 2022 BWC footage and the unredacted MCPO report should be reversed and the footage and the unredacted report should be released.

Respectfully submitted,

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BOROUGH OF SPOTSWOOD and JACQUELINE PALMER,	:	SUPERIOR COURT OF NEW JERSEY,
	:	APPELLATE DIVISION
Plaintiff-Respondent,	:	DOCKET NO.: A-3457-23T4
	:	
v.	:	CIVIL ACTION
	:	
MIDDLESEX COUNTY PROSECUTOR'S OFFICE,	:	ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY
Defendant-Respondent,	:	
	:	LAW DIVISION – MID-L-000563-24
and	:	MIDDLESEX COUNTY
	:	
	:	SAT BELOW:
GANNETT SATELLITE INFORMATION NETWORK	:	Michael A. Toto, A.J.S.C.
Defendant-Intervenor/	:	
Appellant/Cross-Respondent,	:	
	:	
and	:	
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STEVE WRONKO,	:	
Defendant-Intervenor/	:	
Respondent/Cross-Appellant.	:	

BRIEF OF AMICUS CURIAE MATTHEW J. PLATKIN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

Date Submitted: April 11, 2025

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TABLE OF CONTENTS

PAGE NO.

TABLE OF APPENDIX

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

PRELIMINARY STATEMENT

This OPRA matter concerns footage captured on April 28, 2022, by a body-worn camera during an intense exchange between then-Spotswood Mayor Jacqueline Palmer and Spotswood police command staff about a resident. During the exchange, Palmer alluded to the resident's race, criticized the police response, and discussed the building's security.

The trial court enjoined the release of the recording based on its erroneous view that the recording was surreptitious and not "made" in the "course of official business" and therefore not a "government record[]" under OPRA. That reasoning is flawed for two reasons.

First, the recording is a "government" record that Spotswood appropriately "maintained" as part of its Internal Affairs function, and then forwarded to MCPO for its investigation. Because Spotswood "maintained" the recordings in the course of official business, and MCPO likewise "received" and "maintained" the recordings as it carried out its investigation, the recordings are "government records." Because they are disclosable under OPRA, the court should remand so that the trial court should determine if the recording is subject to any statutory exceptions.

Second, the court misapplied subsection (r) of the Body Worn Camera Law (BWCL), N.J.S.A. 40A:14-118.3 to -5, in concluding that the footage

should have been destroyed as a recordings made "in contravention" of the BWCL. Other provisions of BWCL qualify subsection (r) by requiring retention (not destruction) of some unauthorized recordings, including those at issue here. Reading subsection (r) to swallow those provisions could permit the destruction of all unauthorized recordings, including ones depicting serious misconduct or crimes. The trial court's reading conflicts with the statutory text and the goals of transparency and accountability underlying the BWCL and OPRA. In fact, the court's entire discussion of destruction in this case was unnecessary—destruction and disclosure are separate issues, each requiring a separate analysis, and this action concerns only disclosure.

This court should find that the recordings are "government records" and vacate and remand for the trial court to determine whether any OPRA exemptions apply; whether the common law right of access compels release; with or without redactions.

STATEMENT OF FACTS & PROCEDURAL HISTORY

The Attorney General relies on the factual and procedural history set forth in Appellant's submissions to the Court.

ARGUMENTS

POINT I

THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT THE APRIL 28, 2022 BWC RECORDINGS ARE NOT "GOVERNMENT RECORDS" UNDER OPRA.

The trial court held that the April 28 BWC recordings were not "government records" under OPRA or "made" in the "course of official business" because they were created in violation of the BWCL and AG Directive. But OPRA's broad definition of "government record" also includes records "received" and "maintained" in the course of official business. Here, Spotswood's Internal Affairs function "maintained" the recordings, and MCPO "received" and "maintained" them for official investigative purposes. Thus, the recordings fall squarely within OPRA's definition of "government record."

To "maximize public knowledge about public affairs in order to ensure an informed citizenry," Mason v. City of Hoboken, 196 N.J. 51, 64 (2008), OPRA employs an "expansive" definition of the term "government record" which captures any record "that has been made, maintained or kept on file in the course of" official business or "that has been received in the course of" official business by any "officer, commission, agency, or authority of the State." N.J.S.A. 47:1A-1.1 (emphasis added). See also Commc'ns Workers of Am. v. Rousseau, 417 N.J. Super. 341, 355 (App. Div. 2010) (referring to OPRA's definition of

"government record" as "expansive"); Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005) (same). Indeed, while "[the Act]'s definition of 'government record' demarks the outer limits of the statute's reach[,]" Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 36 (App. Div. 2005), nevertheless the precise terms employed in the statute, including '[m]ade,' 'maintained,' 'kept on file,' or 'received[,]' are broad terms that encompass almost all ways an agency might obtain a record. Johnson & Connell, New Jersey Open Public Records & Public Meetings (GANN) § 4:3 (2024).

Taken together, the BWCL and Attorney General Directive 2022-1 require that BWC recordings be "made", "maintained", and "kept" in the official course of police business. Thus, the recordings here meet OPRA's definition of "government records." Specifically, the BWCL governs creation and the retention of BWC footage. Subject to limited exceptions, every uniformed law enforcement officer shall wear a body worn camera while acting in the performance of the officer's official duties. N.J.S.A. 40A:14-118.3(a). With exceptions, the BWCL requires those officers, to activate those BWCs whenever "responding to a call for service or at the initiation of any other law enforcement or investigative encounter" with "a member of the public, in accordance with

applicable guidelines or directives promulgated by the Attorney General." N.J.S.A. 40A:14-118.5(c)(1), (3)-(5).

The BWCL includes a complicated retention protocol that generally requires longer retention periods for recordings that are most pertinent to the statute's goals of transparency and accountability. N.J.S.A. 40A:14-118.5(j) sets forth a minimum retention period of 180 days for all BWC recordings, and expands this period based on specific attributes of the footage. For instance, recordings capturing an encounter about which a complaint has been registered, or which capture an arrest, use of force, or "records an incident that is the subject of an internal affairs complaint" are subject to longer retention periods. See N.J.S.A. 40A:14-118.5(j)(2)(a); N.J.S.A. 40A:14-118.5(j)(2)(e); N.J.S.A. 40A:14-118.5(j)(3)(a)-(c).

Directive 2022-1 underscores the BWCL's mandate to "make" and "maintain" BWC recordings. See generally BWCL, N.J.S.A. 40A:14-118.4 (authorizing the Attorney General to "promulgate or revise guidelines or directives, as appropriate, to implement and enforce" the BWCL). For one, § 1.3 of this Directive makes clear that "[t]he decision to activate a BWC must be based on objective criteria." Likewise, § 5.2 expressly requires activation of those BWCs whenever, among other circumstances, "the officer is responding to a call for service or at the initiation of any other law enforcement or

investigative encounter between an officer and a member of the public" (emphasis added); and §§ 8.1 to 8.4 confirm that BWC footage must be retained in accordance with the statute.

The trial court correctly recognized that BWC recordings are generally "government records" under OPRA, but erred in two respects in concluding that that the BWC recording at issue here did not fall within OPRA's expansive definition of a "government record." First, the court conflated "destruction" and "disclosure," based on its view that records that should have been destroyed, but were not, cannot be a "government record" under OPRA. Second, it failed to recognize that OPRA defines "government record" to include not only recordings "made" in the "course of official business," but also those "maintained" or "received." N.J.S.A. 47:1A-1.1. That distinction is important because MCPO—the entity enjoined from disclosing the recordings—clearly "received" and "maintained" that footage in the course of its official business, regardless of whether the officers violated the BWCL or Directive 2022-1 by making the recordings.

Those errors can be traced to the court's incorrect assumption that recordings that facially qualify for destruction under subsection (r)—"any recording[]" that contravenes any portion of the BWCL or other law—are categorically excluded from OPRA's definition of "government record." But

whether a recording must be destroyed and whether it is disclosable are distinct questions of law that require separate analysis. Here, the Amended Complaint does not seek destruction, and as the court acknowledged, "discussion of the actual destruction of the video is now moot." (PSa153; PSa14).[1] To be sure, destruction and disclosure may depend on similar facts and considerations, and a destroyed recording obviously cannot be disclosed, but they are separate inquiries, and melding them together yielded a confusing opinion that may be read to sanction improper destruction of BWC recordings in future cases.

Moreover, nothing in OPRA or the BWCL can be read to authorize custodians to unilaterally remove the designation "government record" just because that record is determined to contain or constitute evidence of misconduct. While N.J.S.A. 40A:14-118.5(r) contemplates destruction of "recordings from a body worn camera recorded in contravention of this or any other applicable law," that requirement is subject to other provisions of the BWCL that require retention—not destruction—of certain unauthorized recordings, including the recordings here. See infra at 30-38; 40A:14-118.5(s)

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[1] "PSa" refers to the appendix filed by Appellant/Cross Respondent "Gannett Satellite Information Network, LLC," dated November 6, 2024, and "Ab" refers to Appellant/Cross Respondent Gannett's brief dated November 15, 2024. "AGa" refers to the appendix to this brief.

("Nothing in this act shall be deemed to contravene any laws governing the maintenance and destruction of evidence in a criminal investigation or prosecution.").

Apart from conflating "destruction" with "disclosure," the court failed to recognize that the definition of "government record" in N.J.S.A. 47:1A-1.1 plainly includes the April 28 recordings. The court held that the recordings were not "made" in the course of the officers' official duties reasoning amongst other things that it was not a continuation of the earlier incident. (PSa19-21). But a record may be created in the course of official business even if its creation reflects imperfect or incorrect decision-making. Cf. Educ. Law Ctr. v. Dep't. of Educ, 198 N.J. 274, 286 (2009) (recognizing that the deliberative process privilege protects, in part, the ability of agency employees to engage in thoughtful discourse about the proposed course of action, even if that action is not ultimately chosen).

Here, when the officers reported to Mayor Palmer's office, they did so in their official capacities as police officers—not as private citizens. Regardless of whether activating their BWC was the correct decision, the officers' actions were related to official law-enforcement business. Cf. Directive 2022-1 § 5.1 (listing "eating meals" or "[using] the restroom" as examples of non-official activities). Further, the Spotswood Internal Affairs report found that Officers

Ceras and Fedak were acting under a "lawful order" of the chief of police to record the interaction. (PSa231). Thus, the officers were on duty, in uniform, and following a supervisor's order. These facts strongly suggest the recordings were made in the official course of business for purposes of OPRA. See O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534, 538 (App. Div. 2007) (evaluating statutory language requiring a secretary to "record the minutes of all proceedings of the board" to conclude that preparation of formal minutes are a Secretary's "official business"); see also Rosetti v. Ramapo-Indian Hills Reg'l High Sch. Bd. of Educ., ___ N.J. Super. ___, ___ (App. Div. 2025) (finding that email logs, even when kept on personal servers, constitute "government records" when they are "made" by government employees "in the course of their official business").[2] Therefore, the recordings captured by both Officer Ceras and Fedak fit within the definition of government records that are "made" under OPRA. N.J.S.A. 47:1A-1.1.

Second, even if the recordings were not properly "made" in the course of the officers' official duties, they were "maintained" by the Spotswood Police Department within the meaning of N.J.S.A. 47:1A-1.1. Indeed, the trial court

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[2] This Opinion is not yet published in the official reporter. However, it is included in the Attorney General's appendix to this amicus brief for the Court's convenience. (AGa132-AGa152).

recognized that the Spotswood Police Department was responsible for maintaining the recordings, at a minimum for the purpose of consulting with command staff, the County Prosecutor, or the Office of Public Integrity and Accountability, to determine whether they should be destroyed. (PSa30-31); Directive 2022-1 § 5.1.

Even more importantly, once the Borough attorney lodged an Internal Affairs complaint about the recordings on August 4, 2022, Spotswood was obligated to "maintain" these recordings for purposes of its investigation. N.J.S.A. 40A:14-118.5(j)(3)(c) ("[W]hen a body worn camera records an incident that is the subject of an internal affairs complaint, the recording shall be kept pending final resolution of the internal affairs investigation and any resulting administrative action."); accord Directive 2022-1 § 8.4(c) (same). In other words, even if there was some question about the officers' decision to activate their BWCs during this incident, because Spotswood maintained these records for purposes of its Internal Affairs investigation pursuant to statute and directive, they were indisputably "maintained" as government records for purposes of OPRA. Indeed, the trial court acknowledged that the "BWC footage should have been presented to the MCPO once the Spotswood IA determined the recordings were obtained in contravention of AG directives[.]" (PSa14). And

the footage was duly presented to MCPO, but the court did not recognize that the significance of that fact for the purposes of its "government record" analysis.

Lastly, the MCPO "received" and "maintained" these same recordings in the course of its official business within the meaning of N.J.S.A. 47:1A-1.1. See Attorney General's Bias Incident Investigation Standards (April 5, 2019), at 13 ("The County Prosecutors' Offices shall be notified of a suspected or confirmed bias incident as soon as possible, not to exceed 24 hours. The County Prosecutors' offices shall monitor the investigation of all suspected or confirmed bias incidents, within one's jurisdiction, as necessary.").[3] As the trial court acknowledged, the MCPO properly reviewed the recordings during its investigation of complaints against Chief Corbisiero, Sergeant Shapley, and Captain Genovese for allegedly violating the individual's rights when they arrested him on April 22, 2022, and its investigation of the bias complaint against Mayor Palmer. (PSa192-94; PSa219-20; PSa45-46). Therefore, because MCPO "received" the BWC recordings to discharge its official obligations, the court erred by finding they were not "government records" under OPRA.

By digressing into whether the recordings should have been destroyed under subsection (r), the court failed to properly assess whether and why the

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[3] Available at https://www.nj.gov/oag/dcj/agguide/Bias-Invest-Standards_040519.pdf (last accessed April 7, 2025).

multiple public officers and agencies involved "created," "maintained," or "received" it under N.J.S.A. 47:1A-1.1. Its decision should be reversed.

POINT II

THE TRIAL COURT ALSO ERRED BY INTERPRETING THE BWCL TO REQUIRE DESTRUCTION OR NONDISCLOSURE OF THESE BWC RECORDINGS.

In addition to misreading OPRA's definition of "government records," the court misinterpreted several provisions of the BWCL that require retention (and preclude destruction) of the April 28 recordings. Specifically, subsections (s) and (j) of the BWCL require retention of the April 28 recordings even if they were created in violation of the BWCL.

A. Failure to Warn Does Not Require Destruction of BWC Recordings.

First, the text of the BWCL forecloses the trial court's conclusion that the officers' failure to warn Mayor Palmer required the destruction of the recordings. As Gannett, Wronko, and MCPO all pointed out, both the BWCL and Directive 2022-1 clearly articulate the consequences of failing to notify a subject that a BWC is activated, and destruction is not among them.

N.J.S.A. 40A:14-118.5(d) requires a law enforcement officer to "notify the subject of the recording that the subject is being recorded by the body worn camera unless it is unsafe or infeasible to provide such notification" and further requires that notification to be "made as close to the inception of the encounter

as is reasonably possible." Accord Directive 2022-1 § 4.2 (same). However, subsection 118.5(d) and § 4.2 of Directive 2022-1 both expressly provide that the failure to warn "shall not affect the admissibility of any statement or evidence." (emphasis added). Said another way, while a failure to warn may (and should) be addressed accordingly through the administrative process where warranted—for example, here, through a sustained finding and recommended retraining for both officers—the remedy for a failure to warn is not to destroy the evidence. Destruction would obviously "affect the admissibility" of the recording and its contents, in direct contravention of both the BWCL and Directive 2022-1.

The trial court's alternative construction, which gives subsection (r)'s general language about destruction greater effect than the specific language in subsection (d), contravenes the "cardinal rule of statutory construction that full effect should be given, if possible, to every word of a statute." Gabin v. Skyline Cabana Club, 54 N.J. 550, 555 (1969). A corollary of that rule is that "a more specific statutory provision usually controls over a more general one." State v. Gomes, 253 N.J. 6, 28 (2023). Here, the more specific provision, subsection (d), expressly applies to one specific violation of the BWCL—the failure to warn—whereas the more general, subsection (r), applies generally to violations of the BWCL or another law. Reading the statute to require destruction of a

video for failure to warn would nullify the language in subsection (d) which states that such failure "shall not affect admissibility." The court's reading simply contravenes well-established principles of statutory construction.

The trial court's conclusion also undermines the BWCL's transparency and accountability goals in cases where those goals are most important. The BWCL was passed in November 2020, in the wake of the murder of George Floyd. See L. 2020, c. 128 and L. 2020, c. 129 (operative June 1, 2021) (codified at N.J.S.A. 40A:14-118.3 through N.J.S.A. 40A:14-118.5); Governor Murphy Signs Legislation to Bring Changes to the Use of Body Worn Cameras by New Jersey Law Enforcement, Office of the Gov., (Nov. 24, 2020) (Governor's Press Release) (AGa127-AGa131) (BWCL mandates the creation and retention "crucial evidence for use in investigations and court proceedings" and can "be used to support or dispel" complaints). BWCL's retention protocol reflects the BWCL's goals of transparency and accountability. See, e.g., N.J.S.A. 40A:14-118.5(j)(1) (extended retention where "subject" of the BWC recording registers a complaint concerning an encounter that was captured by the recording); N.J.S.A. 40A:14-118.5(j)(3)(b) (extended retention where BWC recording captures an arrest or police use of force); N.J.S.A. 40A:14-118.5(j)(3)(c) (extended retention where BWC "records an incident that is the subject of an internal affairs complaint").

The BWCL directs officers to provide notice, but it also expressly recognizes there may be occasions when such notice is unsafe or infeasible, N.J.S.A. 40A:14-118.5(d), like when police are responding to a fast-moving incident requiring the use of force. Yet, under the trial court's reading of N.J.S.A. 40A:14-118.5(d) and (r), such recordings would be subject to destruction because of this lack of notice and deny public access in cases where transparency and accountability are most important.

B. A Finding That a BWC Recording Violates the BWCL Does Not Automatically Require Destruction If the BWC Recording Is Required to be Maintained for Other Purposes.

The court also erred by finding the recordings should have been destroyed under N.J.S.A. 40A:14-118.5(r) because they were made "surreptitiously" in violation of subsection N.J.S.A. 40A:14-118.5 (g). Although subsection (r) calls for destruction of footage "recorded in contravention of this or any other application law," other provisions of the BWCL create exceptions to that rule and require preservation even when a recording was unauthorized.[4] Three such provisions apply here.

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[4] This brief takes no position on whether there is sufficient evidence to support a finding that the recordings were "surreptitious." Notably, however, the officers who made the recordings were on duty, in uniform, and wearing devices that beeped and projected a red light when recording.

First, subsection (s) states that "[n]othing in this act shall be deemed to contravene any laws governing the maintenance and destruction of evidence in a criminal investigation or prosecution." N.J.S.A. 40A:14-118.5(s). Here, as the trial court acknowledged, Spotswood forwarded the recordings to MCPO's Bias Crimes Unit in connection with allegations against Mayor Palmer. MCPO appropriately maintained and reviewed the recordings for investigative purposes, ultimately concluding that Mayor Palmer's conduct did not "rise to the level" of criminal bias intimidation under N.J.S.A. 2C:16-1. (PSa192).

Two provisions of subsection (j) also called for retaining the April 28 recordings. First, N.J.S.A. 40A:14-118.5(j)(1) states that "a recording shall automatically be retained for not less than three years if it captures images involving an encounter about which a complaint has been registered by a subject of the [BWC]," while, under (j)(3), any recording of "an incident that is the subject of an internal affairs complaint [] shall be kept pending final resolution of the [IA] investigation and any resulting administrative action." The recordings here fall within both provisions: they were the subject of Internal Affairs complaint made by the Borough attorney and civil litigation brought by Officer Sasso against Spotswood and Mayor Palmer, (PSa64; PSa108-13; PSa228; PSa232).

This plain reading of the BWCL accords with the principles of accountability and transparency underlying both the BWCL and OPRA. Conversely, the trial court's expansive reading of subsection (r) and disregard of subsection (j)(1) and (3) and subsection (s) could lead to destruction or non-disclosure of a broad swath of recordings, including recordings made in good-faith depicting serious misconduct or violent crime, where any aspect of the BWCL was violated.

The trial court's skewed interpretation of the BWCL could have other undesirable effects, too. Officers may feel compelled to err on the side of prematurely deactivating their BWC or delaying activation until after a "law enforcement or investigative encounter" has already begun, N.J.S.A. 40A:14-118.5, leaving important events undocumented. This, in turn, could undermine confidence in investigations and judicial proceedings. See N.J.S.A. § 40A:14-118.5(q)(2) (creating "rebuttable presumption that exculpatory evidence was destroyed" where an officer "fails to adhere to the recording or retention requirements.").

All of this why, as the trial court recognized, in scenarios where there has been a perceived violation of the BWCL, the Attorney General has charged the County Prosecutor or the Office of Public Integrity and Accountability with assessing whether subsection (s) requires destruction. Directive 2022-1 § 5.1

("Any recordings from a BWC recorded in contravention of this Policy or any other applicable law shall be immediately brought to the attention of agency command staff and immediately destroyed by command staff following consultation and approval by the County Prosecutor or Director of the Office of Public Integrity and Accountability.") (emphasis added); see also N.J.S.A. 40A:14-118.4 ("The Attorney General is authorized to promulgate or revise guidelines or directives, as appropriate, to implement and enforce the provisions of" the BWCL).

C. The Court's Application of the BWCL's Exemptions to these Recordings Was Incorrect.

Lastly, putting aside the question of destruction, the trial court's application of the exemptions to public access articulated in N.J.S.A. 40A:14-118.5(l) was incorrect.

Subsection (l) enumerates four circumstances when BWC recordings are exempt from public disclosure.[5] Here, the trial court relied on subsection (l)(2) and (l)(3) to conclude that the BWCL's own provisions exempted the recording from access, (PSa32-35), but it misread those provisions.

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[5] The Attorney General maintains the position he advanced in Fuster v. Twp. of Chatham, 259 N.J. 533 (2025): these exemptions are in addition to potential exemptions under OPRA. However, that issue is not squarely implicated by this appeal.

First, both provisions speak to retention "solely and exclusively" for specific purposes. In the case of (l)(2), exclusion from public access is warranted if footage is retained "solely and exclusively" because the subject of the recording made a complaint under subsection (j)(1). Likewise, exclusion from public access is appropriate under (l)(3) only if footage is retained "solely and exclusively" if the law enforcement officer who captured or is the subject of the recording or a supervisor "reasonably asserts" that the recording has "evidentiary or exculpatory value," or if the recording is kept exclusively for training purposes, under subsections (j)(2)(a)-(d).

Neither provision applies to this footage. The BWC recording was not retained "solely and exclusively" because of Mayor Palmer's complaint—it was related to a criminal bias investigation (requiring retention under N.J.S.A. 40A:14-118.5(j)(3)(a)) as well as an Internal Affairs investigation (requiring retention under N.J.S.A. 40A:14-118.5(j)(3)(c)). And for the same reasons, it was also not retained "solely and exclusively" at the officers' requests under subsections (j)(2)(a)-(d). Therefore, the court's conclusion that the BWC footage was exempt from public access under the BWCL was incorrect and must be reversed.

Accordingly, because the recordings are "government records" under OPRA and do not fall within any BWCL exemptions, this court should remand

for a determination of whether any OPRA exemptions apply to all or part of the footage and, likewise, whether the common law right of access compels disclosure.

CONCLUSION

For all of these reasons, this court should reverse the trial court's decision enjoining release of the April 28, 2022 BWC recording and remand for analysis of the recording under OPRA and the common law right of access.

Respectfully Submitted,
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DATED: April 11, 2025