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May 16, 2024

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

Re: A-33-23 Antonio Fuster v. Township of Chatham (089030)

Honorable Chief Justice and Associate Justices:

Pursuant to Rule 2:6-2(b), kindly accept this letter brief in the above-captioned case on behalf of amicus curiae the American Civil Liberties Union of New Jersey (ACLU-NJ).

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PRELIMINARY STATEMENT

Like all jurisdictions that considered mandating the use of Body-Worn Cameras (BWCs), New Jersey gave careful consideration to the policies needed to make BWCs effective tools for accountability. The Legislature had to balance the value of transparency and accountability against legitimate privacy concerns. And the law New Jersey passed struck that balance, rather than leaving it to courts to settle. The BWC Law sets forth an exclusive list of situations in which recordings may be withheld. In interpreting the statute, courts cannot add their own considerations when the Legislature, after evaluating various policy implications during the legislative process, provided a complete list of when recordings may be withheld. That does not mean that everything recorded on a BWC will automatically be available to the public if it does not fit an enumerated exception. Custodians may still be able to make redactions or blur faces when those modifications are otherwise required by the Open Public Records Act (OPRA). (Point I).

Even outside the context of BWCs, a judicially-created exception to OPRA for records relating to people who have been investigated but not formally charged, to the extent that it exists, cannot be justified for investigations into low-level, non-indictable offenses. Also, where the Legislature created an exception for ongoing investigations, the limitations on

that exception – that records should be disclosed unless the government agency shows that disclosure will “be inimical to the public interest,” must apply with equal force – to any exception for completed investigations. (Point II).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus relies upon the procedural history and statement of facts contained in Plaintiffs’/Appellants’ Appellate Division brief, adding that on December 27, 2023, in a published opinion, the Appellate Division affirmed. *Fuster v. Twp. of Chatham*, 477 N.J. Super. 477 (App. Div. 2023). On April 5, 2024, the Court granted the Fuster and Devine’s Petition for Certification. *Fuster v. Twp. of Chatham*, 257 N.J. 18 (2024). This brief follows.

ARGUMENT

I. The Body Worn Camera Law provides an exclusive list of instances where those recordings may be withheld; courts cannot create additional bases for withholding.

New Jersey, like other jurisdictions that considered mandating the use of body-worn cameras, had to balance interests in transparency against interests in privacy. Although BWCs can provide accountability, without transparency the benefits wain. *See, e.g.,* Radley Balko, *Police Cameras Without Transparency*, Wash. Post (Aug. 21, 2015) (explaining that without appropriate policies, police agencies will resist disclosure and warning that “In

a room with no light, even a thousand cameras can only record the dark”);¹ Jake Bleiberg, *Value of police body cameras limited by lack of transparency*, Associated Press (June 16, 2020) (detailing instances where police have resisted release of unfavorable BWC footage).²

Indeed, some advocates – including the ACLU – have voiced opposition to BWCs unless accompanied by robust policies mandating public release in most instances. *See, e.g.*, Chad Marlow, *A Tale of Two Body Camera Videos*, ACLU (Dec. 23, 2020) (contending that “when the police are given the discretion to publicly release favorable body camera footage but withhold negative footage, police body cameras become nothing more than a police propaganda tool”);³ Adam Schwartz, *No Police Body Cams Without Strict Safeguards*, Electronic Frontier Foundation (Nov. 2, 2020) (explaining that EFF opposes BWCs, “unless they come with strict safeguards to ensure they actually promote officer accountability without surveilling the public.”).⁴

New Jersey heeded concerns about how BWCs would operate without a promise of transparency and set forth a system that only exempted recordings

¹ <https://www.washingtonpost.com/news/the-watch/wp/2015/08/21/police-cameras-without-transparency/>.

² <https://apnews.com/article/99a772c44f58cde36dc33c91c4ee72de>.

³ <https://www.aclu.org/news/privacy-technology/a-tale-of-two-body-camera-videos>.

⁴ <https://www.eff.org/deeplinks/2020/11/no-police-body-cams-without-strict-safeguards>.

from public access in certain defined situations. The BWC Law creates mechanisms for subjects to initially view BWC recordings to determine if they want them retained beyond the presumptive retention period and also allows for public access to retained recordings except under limited, defined circumstances.

As to the initial inspection, the BWC Law creates a limited, 180-day retention period for most BWC recordings. N.J.S.A. 40A:14-118.5(j). But that extension period may be extended to three years if it captures certain encounters (N.J.S.A. 40A:14-118.5(j)(1)), is requested by an officer under some circumstances (N.J.S.A. 40A:14-118.5(j)(2)(a) to (d)), or is requested by certain members of the public who are the subject of the recording or who stand in for the subject of the recording who cannot themselves assert an interest in retention. N.J.S.A. 40A:14-118.5(j)(2)(e) to (g). In order to give effect to the statutory right to request a longer retention period, the BWC Law allows those members of the public with a direct interest in the recordings to “review the body worn camera recording . . . to determine whether to request a three-year retention period.” N.J.S.A. 40A:14-118.5(k).

The statute instructs that the preliminary review be made “in accordance with the provisions of” OPRA. *Id.* Subsection (k) permits inspection of the recordings to allow people to decide whether to request retention of videos in

which they (or their children or deceased family members) are depicted. The statutory language would make no sense if government agencies were allowed to cite OPRA exemptions as a basis to deny an initial review of the recording when, as will be discussed below, the BWC Law explicitly limits the use of most exemptions when requests are made under OPRA for retained recordings.

Subsection (1) of the law acknowledges that, generally, criminal investigatory records do not constitute government records and, therefore, are not subject to OPRA. N.J.S.A. 40A:14-118.5(1). Still, “notwithstanding” that typical practice, the BWC Law makes recordings generally available providing that “only” four types of recordings “shall be exempt from public inspection” (*id.*): recordings that are subject only to the 180-day retention period (N.J.S.A. 40A:14-118.5(1)(1)), recordings where the person making a complaint against a police officer and requests non-disclosure (N.J.S.A. 40A:14-118.5(1)(2)), recordings subject to a longer retention period based only on an officer’s request (N.J.S.A. 40A:14-118.5(1)(3)), and recordings subject to a three-year retention period based on the request of a subject of the recording, where that subject requests non-disclosure. N.J.S.A. 40A:14-118.5(1)(4). Where, as here, none of those exceptions apply, the public must have access to the recording. Otherwise, if the full panoply of OPRA exceptions applied, the Legislature’s use of the word “only” would lose all meaning.

That the BWC Law limits government agencies' ability to "exempt" or withhold recordings from public inspection does not mean that agencies have no ability to protect sensitive or private information that appears on the recordings. Plaintiff acknowledged that "[i]f a video shows gory images, nudity, or someone's driver's license, OPRA's privacy provision would likely justify blurring." P. Cert. at 7.⁵ One could envision other circumstances where blurring or redaction might be appropriate: Where the identity of a confidential source is revealed or medical information is discussed, blurring or limited redaction could satisfy privacy interests without compromising the express legislative intent of circumscribing the instances where BWC recordings could be withheld altogether. In future cases there might be disputes about whether redactions are necessary or whether they are so pervasive as to constitute an effective withholding. In deciding that sort of dispute, courts should ask whether the redaction interferes with the viewer's ability to fully, completely, and accurately comprehend the events captured on the footage.

⁵ P. Cert. refers to Fuster and Devine's Petition for Certification; PCa refers to the Appendix accompanying the Petition for Certification.

II. To the extent that OPRA prevents disclosure regarding investigations that did not result in the issuance of formal charges, that exemption must be limited to investigations into serious criminal cases where disclosure would be inimical to the public interest.

The Appellate Division affirmed the trial court's denial of access, citing *N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Off.*, 447 N.J. Super. 182, 204 (App. Div. 2016) [hereinafter *BCPO*]. PCa 2-3. In that case, the Appellate Division allowed the Bergen County Prosecutor's Office (BCPO) to neither confirm nor deny the existence of records related to the criminal investigation of a person that neither resulted in an arrest nor charge. *BCPO*, 447 N.J. Super. at 188, 190. For the reasons set forth in Point I, even if an OPRA exception exists for investigations not resulting in arrests or charges, it cannot apply to BWC records without undermining the Legislature's clear intentions to make those recordings generally available. But, even if the exception discussed in *BCPO* could apply, it would nonetheless need to be constrained to specific situations where the interests discussed in that case are at their apex.

BCPO dealt with an inquiry into criminal accusations that had been made against a particular person. *Id.* at 189-90. The Prosecutor contended, and the Appellate Division agreed, that even acknowledging the existence of an investigation could irreparably harm the reputation of that person. *Id.* at 206.

And there is a certain logic to that: one can understand how a report, for example, that a person was being investigated for child molestation could ravage the reputation of a person. But as the seriousness of an allegation decreases, so too does the reputational damage. It is harder to imagine lost job opportunities, damaged friendships, or wounded reputations that would flow from a report that a person was being investigated for jaywalking. In investigations of offenses and non-criminal investigations, the subject of the investigation does not face the risk of “irremediable public condemnation” feared by the panel. *Id.* at 204. Indeed, in *BCPO*, the Prosecutor’s Office relied on the need for law enforcement to receive information to advance the “uncovering and . . . prosecution of *criminal* offenses.” *Id.* at 203 (emphasis added). The BCPO likened its rationale for neither confirming nor denying the existence of an investigation to the purposes for grand jury secrecy. *Id.* at 190. Grand juries, of course, play no role in investigations into disorderly persons offenses, ordinance violations, or administrative complaints. So, to the extent this Court adopts an exception to OPRA for records related to criminal investigations of a person that neither resulted in an arrest nor charge, it should limit the exception to investigations of indictable crimes.

The Court should also read into any OPRA exception for investigative materials that do not result in an arrest a requirement that the agency establish

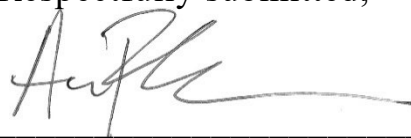
that disclosure would “be inimical to the public interest.” Otherwise, and paradoxically, the public would have more access to documents related to criminal investigations while they are ongoing than they would once they resulted in a decision not to charge. To withhold documents under the ongoing investigation exception to OPRA, records custodians must show, among other things, that “disclosure will ‘be inimical to the public interest.’” *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 229 N.J. 541, 573 (2017) (quoting N.J.S.A. 47:1A–3(a)). If a record is available during the period where an investigation is pending – because the agency could not shoulder its burden of demonstrating that harm to the public would flow from release of the record – it makes little sense to require a custodian to later withhold it because law enforcement did not file charges.

Although the BWC Law limits the applicability of OPRA exceptions to requests for BWC footage to only those set forth in the Law, to the extent the Court considers application of an exception for investigations that do not result in charges, it should limit it to 1) criminal investigations where 2) the agency can show that disclosure would be inimical to the public interest.

CONCLUSION

Because the BWC Law sets forth the *only* situations where BWC recordings are exempt from public access and because none of those situations are present here, the Court should reverse the judgement of the Appellate Division.

Respectfully submitted,



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