

<p>ANTONIO FUSTER and BRIANNA DEVINE,</p> <p>Plaintiffs/Petitioners,</p> <p>v.</p> <p>TOWNSHIP OF CHATHAM and GREGORY LaCONTE, in his official capacity as records custodian,</p> <p>Defendants/ Respondents.</p>	<p>Supreme Court of New Jersey, Docket No. 089030</p> <p>On Certification from a Final Judgment of the Appellate Division, Docket No. A-1673-22</p> <p><u>A Civil Action</u></p> <p>Sat Below:</p> <p>Hon. Lisa Rose, J.S.C. Hon. Morris G. Smith, J.S.C. Hon. Lisa Perez Friscia, J.S.C (t/a)</p>
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**PLAINTIFFS' RESPONSE TO THE AMICUS BRIEF FILED
BY THE OFFICE OF THE ATTORNEY GENERAL**

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PRELIMINARY STATEMENT

Pursuant to the Court’s August 6, 2024 order, Plaintiffs submit this brief in response to the amicus curiae brief filed by the Office of the Attorney General (OAG). Plaintiffs rely heavily upon their supplemental brief which they believe sufficiently rebuts the OAG’s statutory construction arguments regarding the interplay between the Body-Worn Camera Law (BWCL) and the Open Public Records Act (OPRA). They submit this short brief to respond to three specific arguments made in OAG’s amicus brief:

First, although OAG concedes that the BWCL gives “special rights of access” to the subjects of body-worn camera (BWC) videos pursuant to N.J.S.A. 40A:14-118.5(k), as does the Attorney General’s BWC policy, OAG nonetheless advances a position that wholly deprives Plaintiff Antonio Fuster of that special statutory right of access. In other words, OAG takes the troubling position that it condones local police departments ignoring not only statutory law, but also ignoring a mandatory Attorney General policy and violating the rights of a crime victim. To reach this position, OAG’s brief advances arguments not raised by Defendants, which should be ignored by this Court.

Second, Plaintiffs respond to OAG’s claims Plaintiffs’ position regarding redaction is inconsistent with the BWCL. If OAG’s position is accepted, the

Court would need to ignore the BWCL's plain language because denying access to a video in its entirety renders the video "exempt from public access" in direct contravention of Subsection (1) of the BWCL. In contrast, allowing a law enforcement agency to redact or blur certain information from a BWC video in limited circumstances does not violate the BWCL's instruction that "only" the four enumerated categories of videos shall be exempt. This is indeed the way law enforcement agencies, including OAG, have been disclosing BWC videos for years because it is a commonsense application of the law.

Third, Plaintiff responds to the false and exaggerated harms that OAG claims will occur if BWC videos are not subject to OPRA's general exemptions. To the extent some videos are accessible under the BWCL where they would otherwise be exempt if OPRA's ordinary exemptions also applied, that was a policy decision by the Legislature that this Court must respect. The Legislature chose to treat BWC differently from other types of videos and provided only four exemptions. If OAG believes that additional exemptions are necessary to protect law enforcement interests, it is free to lobby the Legislature for a statutory change. This Court, however, should apply the plain language of the BWCL, which gives Mr. Fuster an express right to review the video and specifies only four exemptions for BWC videos.

LEGAL ARGUMENT

I. OAG ASKS THIS COURT TO WHOLLY DEPRIVE PLAINTIFFS OF SPECIAL RIGHTS OF ACCESS EXPRESSLY GIVEN TO PLAINTIFFS BY THE BODY WORN CAMERA LAW AND THE ATTORNEY GENERAL’S BODY WORN CAMERA POLICY

Consistent with N.J.S.A. 40A:14-118.5(k)’s plain language, OAG fully agrees with Plaintiffs: the BWCL “accords special rights of access for subjects of videos to review the footage.” (AGb13-14).¹ OAG concedes that under Subsection (k), a subject of a video has “a right to review the video . . . even if they would not otherwise be permitted to do so (if, for example, they were a standard requestor).” (AGb14). Despite this acknowledgement that the law required Chatham to let Mr. Fuster access the video under OPRA, OAG nonetheless asks this Court to affirm the Appellate Division’s decision and deny Plaintiffs any access whatsoever to the video under both OPRA and the common law right of access:

To be clear, Fuster did have a right to review BWC footage under subsection (k), and he appears not to have gotten that opportunity despite requesting access. . . . The Attorney General is aware of no reason why Fuster should not be permitted to review the video at Department headquarters. But while this Court could therefore issue a limited remand for the Appellate Division or trial court to assess what, if any, remedy would be appropriate, the text of the BWCL makes

¹ AGb = OAG’s Amicus Brief; Pa = Plaintiff’s App.Div Appendix

clear that no remand is strictly necessary—as he has since elected to request the three-year retention period, the entire object of the subsection (k) review.

[AGb32 at n. 11 (emphasis added).]

This cannot stand—it cannot be that a person’s statutory rights are simply ignored by a police department and that such conduct is then accepted by the courts. And it is especially problematic that the Attorney General, the chief law enforcement officer of this state, whose own BWC policy also requires police departments to give subjects special access to BWC videos, is advocating such a position. See Attorney General BWC Policy at § 8.3 (closely mirroring the language in N.J.S.A. 40A:14-118.5(k)). The OAG’s argument is also wrong for the reasons detailed below.

A. OAG’s New Arguments Were Not Raised by Defendants Below and Thus Should Not be Considered by this Court on Appeal

As noted above, OAG argues that Subsection (k) bestows only a right to review the video footage at police headquarters, but not the right to receive a copy of it. It also argues Plaintiffs lost their right of access when they eventually asked for the three-year retention schedule after it was obvious Chatham was not going to let them see the video. These arguments were never made by Defendants below, nor were they even made in Defendants’ supplemental briefing before this Court. Therefore, the Court should not consider them. See

State v. J.R., 227 N.J. 393, 421 (2017) (“This Court does not consider arguments that have not been asserted by a party, and are raised for the first time by an amicus curiae.”).

B. The BWCL Does Not Limit Access to an On-Site Inspection

OAG argues that a subject of a BWC video is only entitled to review a video at police headquarters and may not obtain a copy of it. Plaintiffs disagree. Subsection (k) states the right of review is subject to the provisions of OPRA, which allows a person to review a record via several methods—inspection, examination, or copying. N.J.S.A. 47:1A-5(a). If the Legislature intended for the subject of a video only to be able to view the video on site, but not receive a copy of it, it would have clearly said so like other states have done. See, e.g., Ky. Rev. Stat. Ann. § 61.168(5)(d) (granting the subject of a video the right to view a video “on the premises of the public agency”); N.C. Gen. Stat. Ann. § 132-1.4A (providing access to the person whose voice or image is on the recording but dictating that they “shall not record or copy the recording”); Kan. Stat. Ann. § 45-254 (requiring a law enforcement agency to “allow the person to listen to the requested recording or to view the requested recording”).

Moreover, a subject of a video like Mr. Fuster has the right to access a copy of a video not only pursuant to Subsection (k), but also pursuant to

Subsection (l) because he has not yet asked that the video be exempt from public inspection. See N.J.S.A. 40A:14-118.5(l)(4) (exempting BWC footage that is subject to a three-year retention period solely and exclusively pursuant to N.J.S.A. 40A:14-118.5(j)(2)(e) if the subject “requests the [BWC] recording not be made available to the public”). Clearly, Plaintiffs would not ask that the video be exempt in response to their own records requests even if they would ask that the video “not be made available to the public” if third party asked for it.

C. Plaintiffs Should Prevail in this Appeal Because They Were Wholly Deprived of Their Statutory Right to Review the Video

Even if Plaintiffs only had a right to view the video and not to receive a copy of it, Defendants wholly denied them that right of statutory access. To be clear, had Chatham afforded Plaintiffs any opportunity to view the video(s), this lawsuit would have never been filed. Indeed, although the initial request sought “copies” of the BWC video and police reports,² subsequent communications made it abundantly clear Plaintiffs were seeking “to review the BWC video recorded from the Detective and Police Officers to determine whether or not to

² As stated in the verified complaint and prior briefing, Chatham produced the responsive police reports to Plaintiff even though they are exempt as criminal investigatory records. Those reports contained detailed information about Chatham’s investigation, including a summary of its interview with the male relative and another witness. Plaintiffs thus continue to be perplexed why they are not even allowed to see the video of Mr. Fuster’s discussion with the police.

file a request for a 3[-]year retention period.” (Pa36) (emphasis added). Ms. Devine further stated, “I am requesting to view the recorded videos immediately.” Ibid. (emphasis added). After Chatham denied both their requests, she objected and stated, “I know the body camera law that was passed in 2020 gives me a right to request this video under OPRA . . . and we have a right to request a 3-year retention schedule.” (Pa38). She asked Chatham to review the BWCL and “let me review the footage in its entirety.” Ibid. (emphasis added).

But Chatham did not grant Plaintiffs any type of access, despite the plain language of Subsection (k) of the BWCL and Section 8.3 of the Attorney General’s BWC Policy. Instead, Plaintiffs’ requests to either obtain a copy of the video or to at least view it were repeatedly denied—both under OPRA and the common law—and they were forced to file a lawsuit to enforce their statutory rights because Chatham had “not produced the responsive BWC video(s) to Plaintiffs nor allowed them to inspect it.” (Pa7). To this day, they continue to be denied any access to the video and are confounded that OAG advocates that they receive no remedy despite acknowledging that their rights were in fact violated.³

³ Making matters worse, OAG argues that Plaintiffs do not have a sufficient interest in access under the common law because “Fuster did have a right to review the footage to decide whether to request an extended retention period of the video.” (AGb43). But Fuster was denied that right of access and so it is

In denying Plaintiffs any level of access—whether it is a copy of the BWC video or the ability to review it—Chatham violated OPRA, the BWCL, and the Attorney General’s BWC Policy. This Court should reverse the Appellate Division and compel access to ensure that Plaintiffs’ statutory rights are fulfilled, making Plaintiffs prevailing parties. N.J.S.A. 47:1A-6.

D. Plaintiffs Did Not Lose Their Right of Access Simply Because They Acted to Ensure the Video Would Not Be Deleted Before They Had a Chance to Review It

OAG suggests in a footnote that Plaintiffs’ special statutory right to access the video under Subsection (k) is likely extinguished because at some point they told Chatham that they wanted the video to be retained. (AGb32). But the factual context is important—Plaintiffs only asked for the longer retention period because they were afraid the video would be deleted before they had an opportunity to obtain an order from the court granting access.

The standard retention period for a BWC video is 180 days and then a video can be destroyed. N.J.S.A. 40A:14-118.5(j). After being told in late August that the relative would not be charged, Mr. Fuster filed an OPRA request on August 26, 2022. He stated, “I am requesting both the report and the [v]ideo

preposterous to suggest that his statutory right, which he never received, would factor against him in the common law balancing test.

that was film[ed] during my statement from May 25[,] 2022 with Detective Anderson[,] PO Kelly[,] and Sgt[.] Manning.” (Pa14). At that point, ninety-three (93) days had already passed since the May 25, 2022 BWC video was recorded.

On September 6, 2022, the request was denied. (Pa18). On September 7, 2022—105 days after the BWC video was recorded—Mr. Fuster requested access again. This time he invoked his right to the video under the common law right in hopes that he would receive a different response. (Pa20).

Chatham stated that it was taking an extension until September 27, 2022 (Pa28), which would have been 125 days into the 180-day retention period. Concerned that the clock was ticking, and worried that the video could be deleted before Plaintiffs got to review it, Mr. Fuster emailed the custodian on September 16, 2022—114 days after the BWC video was recorded—to object to the delay. He explained that he had a “legal right” to access the video and that “as the father of the victim” he “can’t help but feel like [he] was . . . an inconvenience” to the custodian. (Pa22). At that point, he requested a three-year retention period to ensure the video would not be deleted before he was able to see it. Later that day confirmed with the custodian and the police department that he wanted to ensure the video was “indefinitely” preserved in its “original unaltered form.” (Pa25).

Simultaneously on September 16, 2022, Ms. Devine “request[ed] to review the BWC video recorded from the Detective and Police Officers to determine whether or not to file a request for a 3-year retention period.” (Pa36). Ms. Devine expressly warned Chatham of her concerns that the video was 124 days old⁴ and that she and her husband wanted “to view the recorded videos immediately.” Ibid.

On September 21, 2022, Chatham denied Plaintiffs’ requests. (Pa28). Ms. Devine objected on October 1, 2022, stating:

I object to the denial of my OPRA request and ask you to reconsider. I know the body camera law that was passed in 2020 gives me a right to request this video under OPRA because my juvenile child is the subject being spoken about in the video, and we have a right to request a 3-year retention schedule. I ask you to look at that law, then fulfill my OPRA request and let me review the footage in its entirety.

[Pa38 (emphasis added).]

That objection was 121 days into the 180-day retention period. The records custodian did bother to respond. (Pa6). Plaintiffs filed their verified complaint on October 18, 2022—146 days into the retention period.

⁴ Ms. Devine’s calculation was incorrect—at that point only 114 days had passed. Her miscounting, though, only further demonstrates Plaintiffs’ frustration: the clock was ticking on the retention of the video, and both Ms. Devine and Mr. Fuster were frantically filing requests with Chatham, concerned the video would be destroyed.

As evidenced by the above sequence of events, Plaintiffs invoked the retention period only after their requests were repeatedly denied. Even after receiving denials, they continued to beg for the right to simply review the video as a layperson reading the BWCL would know they are entitled to do. They were again denied access. Even after expressly asking that the video be indefinitely retained, they still feared the video would be deleted so they quickly filed a lawsuit before the 180-day retention period elapsed.

The trial court did not issue an opinion until January 17, 2023. Had Plaintiffs not asked that the video be retained, the video would have been deleted long before then (and long before any possible appeal) and Plaintiff would have had no recourse—their statutory right to view the video would have been permanently lost. It would be fundamentally unfair to conclude that Plaintiffs lost their right of review simply because they eventually expressed that they wanted the video to be retained to ensure they would not lose their ability to challenge the denial in court and eventually gain access to it.⁵

⁵ N.J.S.A. 40A:14-118.5(l)(4) makes this BWC video subject to public access unless the subject “requests the body worn camera recording not be made available to the public.” Plaintiffs did not submit a request that the video be exempt from public access precisely because they feared the very type of gamesmanship made by the OAG in its brief. No doubt, such a request would have been weaponized to say that Plaintiffs do not have a right under Subsection (l) because they requested that it be exempt.

II. THE BWCL CLEARLY DICTATES THE “ONLY” FOUR CATEGORIES OF BWC VIDEOS THAT SHALL BE EXEMPT FROM PUBLIC INSPECTION AND THUS OPRA’S ORDINARY EXEMPTIONS CANNOT WHOLLY SHIELD A VIDEO FROM PUBLIC ACCESS

In response to OAG’s statutory construction arguments, Plaintiffs rely upon their prior briefing regarding how the BWCL’s plain language makes it clear that only the four categories of videos enumerated in N.J.S.A. 40A:14-118.5(1) shall be exempt from public access. Plaintiffs submit this brief to respond to OAG’s argument that redacting a BWC video would contradict the BWCL and to rebut the various examples of harm that OAG claims would flow if only the four exemptions outlined in the BWCL could apply.

A. There is Nothing Inconsistent About the BWCL’s Instruction That Only Certain Categories of BWC Videos Shall Be Exempt and a Holding That Allows Police to Make Common Sense Redactions to a BWC Video Before Disclosing It

Plaintiffs disagree with OAG’s assertion that permitting a video to be redacted would be inconsistent with Plaintiffs’ interpretation of the BWCL. Per its plain language, “only” four categories of BWC videos “shall be exempt from public inspection.” N.J.S.A. 40A:14-118.5(1). Thus, withholding a BWC video in its entirety (as both Chatham and OAG argue in this case) violates the BWCL because a complete denial of access renders the video exempt from public inspection. Redaction, however, does not render a video exempt from public

inspection—it makes a video available to the public, even if limited information (i.e., audio or images) within it might be redacted or blurred. Had the Legislature intended that BWC videos must be released in unaltered form and no information contained with them could be redacted or blurred, it could have clearly said so as it has done with other public records. See, e.g., N.J.S.A. 39:4-131 (requiring police officers to complete motor vehicle accident reports and expressly stating “the information contained therein shall not be privileged or held confidential”).

Granting access to videos, subject to limited redaction or blurring, comports with the stated purpose of the BWCL to “specif[y] when video footage from a body camera is exempt from [OPRA].” Sponsor’s Statement to A. 4312 at 7 (L. 2020, c. 29); Sponsor’s Statement to S. 101 at 7 (L. 2020, c. 29); Assemb. Comm. Dev. & Affairs Comm. Statement to A. 4312 at 2 (Aug. 24, 2020); S. L. & Pub. Safety Comm. Statement to S. 101 at 2 (Aug. 21, 2020). Accord Legis. Fiscal Estimate to A. 4312 at 1 (Aug. 31, 2020) (“The bill also specifies when video footage from a body camera is exempt from the State’s open public records act.”); Legis. Fiscal Estimate to S. 101 at 1 (Sept. 1, 2020) (same).

Such an approach also comports with the state’s public policy construing our public records laws liberally in favor of access, N.J.S.A. 47:1A-1, as well

as the policy requiring that records be produced with redactions rather than denied in their entirety. N.J.S.A. 47:1A-5(g). Moreover, this approach is consistent with how public agencies already comply with the BWCL. For example, where an officer conducts a motor vehicle stop, the BWC will often record an image of the driver's license as the officer takes it from the driver and inspects it, but that image is blurred before the BWC video is released to the public.⁶ See, e.g., Jeff Goldman, 'Real Housewives' Star Teresa Giudice Offered Cop 'Family Business Cards' During Traffic Stop, Video Shows, NJ Advance Media, Oct. 12, 2023⁷ (detailing how reality television star offered a PBA card to an officer during a traffic stop and showing video that redacts the image of her driver license). Moreover, where a video shows images of innocent bystanders, such videos are sometimes redacted before release. See Matt Doherty, New Body Cam Video Unveils Misconduct by Former Bradley Beach

⁶ Alternatively, officers might be careful ensuring that the BWC does not capture a discernible image of the driver license, or they may put their hands over it to shield it from the camera's view. See, e.g., Suzanne Russell, Former Essex County Jail Warden's DWI Arrest Video Released, Courier News, Mar. 19, 2019, <https://www.mycentraljersey.com/story/news/crime/2019/03/19/former-essex-county-jail-warden-charles-greens-dwi-arrest-video-released/3211715002/>

⁷ <https://www.nj.com/entertainment/2023/10/real-housewives-star-teresa-giudice-offered-cop-family-business-cards-during-traffic-stop-video-shows.html>

Police Chief, TapIntoAsburyPark, Mar. 20, 2024 (discussing BWC video obtained via OPRA which redacts images of a crash victim's face but documents an altercation between a police chief and an officer).

Contrary to OAG's claim that BWC videos must be wholesale denied because they relate to minors charged as delinquent, agencies properly disclose such videos and redact them to sufficiently protect the minor's identity. For example, after the *Trentonian* newspaper won its appeal in Digital First Media v. Ewing Twp., 462 N.J. Super. 389 (App. Div. 2020)—a case cited by OAG, where the Appellate Division held that redaction of a use of force report was sufficient to protect the identity of a minor charged as delinquent—the City of Ewing disclosed a redacted BWC video of police officers kicking snow in the face of the minor. Publication of that video caused outrage and ultimately led to three Ewing police officers being criminally charged by federal officials, all without ever identifying the minor who was the target of the force. Isaac Avilucea, New Video Shows Ewing Cops Stomp Black Teen's Head, Kick Snow in Face During 2018 Arrest, *Trentonian*, Aug. 21, 2021.⁸

⁸ <https://www.trentonian.com/2021/07/26/new-video-shows-ewing-cops-stomp-black-teens-head-kick-snow-in-face-during-2018-arrest/>

The BWC video at issue here of course does not need to be redacted because the subject of the video—the witness lodging the complaint—is the one who requested it (along with his spouse), and they know the allegations made against the male relative and the outcome of the investigation.⁹ Mr. Fuster also has a special statutory right to the video pursuant to Subsection (k). But even if it were some other type of video at issue and a third person was requesting it, police departments already have tools to redact sensitive information such as driver licenses, images of nude or bloodied body parts, faces of minors, security information, *et cetera* in videos that otherwise fall outside the four types of videos that shall be exempt from public inspection. Police can make limited justifiable redactions without rendering the video “exempt from public inspection” in contravention to N.J.S.A. 40A:14-118.5(l).

⁹ OAG argues the video cannot be released because it not only shows what Mr. Fuster says, but also “the reactions of the officers who interviewed him.” (AGb44). But OAG has not reviewed the video to know what reactions law enforcement officers had—if any at all. Chatham’s counsel also acknowledged at oral argument in the Appellate Division that he also had not bothered to review the video. Conclusory, unsupported allegations of confidentiality are insufficient to deny access to a record. Rivera v. Union County Prosecutor’s Office, 250 N.J. 124, 149 (2022). Mr. Fuster saw the officer’s reactions in real time and OAG has not explained how even allowing him to see the video would violate the relative’s privacy or otherwise violate confidentiality.

B. OAG Provides Exaggerated Examples of Alleged Harm That Would Result Unless the Court Ignores the Legislature’s Policy Decision to Exempt “Only” Four Categories of Videos

OAG makes a series of false or exaggerated claims regarding the harm that would result if this Court applied the Legislature’s policy decision to make “only” four categories of BWC videos exempt from public inspection. For example, it argues that “to the extent [Plaintiffs] believe Fuster has a right to obtain a video under subsection (l), irrespective of OPRA’s longstanding and traditional exceptions, so too would everyone else.” (AGb27-27). This is false because Subsection (l)(4) expressly provides that where a BWC video is retained for three years because the subject of the video requested such, the video is exempt if the subject also “requests the [BWC] recording not be made available to the public.” N.J.S.A. 40A:14-118.5(l)(4). Thus, Fuster can access the video pursuant to Subsection (k) or Subsection (l), but he has a statutory right to keep “the public” from accessing the video.¹⁰

¹⁰ OAG argues that this provision does not “address the privacy of subjects who do not know that they can ask for the videos to remain confidential.” (AGb21). But Subsection (l)(4)’s right to request that a video remain confidential exists only where the video is subject to a retention period because the subject of the video asked that it be retained for three years. That subject should also know that there is a corresponding right to request the video be withheld from the public at large. And if he did not, police would be obligated to ask the subject about their position upon receiving a request for a video that that was retained because the subject had requested it. If a video is retained for some other

OAG also argues that if this Court does not ignore the BWCL’s express requirement that only four categories of videos are exempt then “[l]aw enforcement would have to produce a recording of a victim’s death even in the immediate aftermath of a murder should any member of the public request it, even if notifications to the victim’s family remained underway.” (AGb27). But the BWCL does not require “immediate access” to videos. It dictates the “only” four categories of BWC videos that shall be exempt from public inspection, N.J.S.A. 40A:14-118.5(l) and “specifies when video footage from a body camera is exempt from [OPRA].” Sponsor’s Statement to A. 4312 at 7 (L. 2020, c. 29). Thus, a law enforcement agency is required to comply with OPRA’s general deadline of seven business days, N.J.S.A. 47:1A-5(g), and agencies can and often do take extensions of time beyond those seven business days. OAG’s concern that police would need to disclose a video in the “immediate aftermath of a murder,” in those very rare instances where murder is captured on a BWC,¹¹

reason—such as because it records a use of force—that video is public under the BWCL even if the subject would prefer that it remain confidential. See N.J.S.A. 40A:14-118.5(j)(3)(a) and (b).

¹¹ A BWC video is much more likely to capture a use of deadly force by police than a murder of one civilian by another civilian. The very purpose of the BWCL, which was passed in response to George Floyd’s murder, is to shine a light on such uses of force and ensure the public can see the videos.

is exaggerated—OPRA already gives agencies ample time to notify families before producing responsive records.¹²

Additionally, OAG argues that agencies would be required to disclose footage “revealing ‘security information’ that would ‘jeopardize the security of [a] building,’ including for a school or house of worship, or video footage that reveals ‘surveillance techniques,’ the disclosure of which would ‘create a [safety] risk[.]’” (AGb27, citing N.J.S.A. 47:1A-1.1). This too is exaggerated. First, the BWCL generally prohibits an officer from recording in a school or house of worship. See N.J.S.A. 40A:118.5(e). Second, surveillance techniques

¹² Where a BWC captures a death caused by police, such videos are subject to OPRA pursuant to the BWCL. N.J.S.A. 40A:14-118.5(j)(3)(b); N.J.S.A. 40A:14-118.5(l). OAG is supposed to disclose such BWC videos within twenty days, pursuant to Attorney General Directive 2019-6 and this Court’s holding in North Jersey Media Group Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017), which held that police must disclose dash camera videos of deadly uses of force and may not withhold them simply because a grand jury has not yet convened. However, OAG releases only selective clips of BWC videos to the public. And, it does not allow families *full* access to *all* BWC videos of their loved ones being killed by police, nor will it allow them to have copies of the videos (even though grand jury proceedings often take more than two years, far longer than the one-year timeframe criticized by this Court in Lyndhurst). See Riley Yates, N.J. Promised to Change How It Probes Police Shootings. Critics Say It Isn’t Working, NJ Advance Media, Feb. 23, 2023, <https://www.nj.com/news/2023/02/nj-changed-the-way-it-handles-deaths-involving-police-is-the-system-working.html>. OAG clearly weighed in on this case in hopes that it can continue violating the rights of families of police violence.

protected by N.J.S.A. 47:1A-1.1 are most often exposed where a video reveals the scope of a stationary camera's recording capabilities such as "the width, depth, and clarity of the images, as well as when it operates, *i.e.* intermittently and, if so, at what intervals and are they regular." Gilleran v. Twp. of Bloomfield, 227 N.J. 159, 175 (2016). Those things are not revealed by disclosure of a BWC video—it is not a stationary camera, police departments are required to publicly post the types of BWCs they have purchased,¹³ the BWCL expressly tells the public when the BWCs must be turned on, *et cetera*. To the extent a BWC video might reveal some other security measure, such as an officer typing in a pass code to a secure door or discussing a confidential security procedure,¹⁴ such information can be blurred or redacted without violating the BWCL's dictate that the video shall not be exempt from public inspection. No reasonable person would sue if such a redaction were made, nor would any court find a violation.

¹³ See Attorney General BWC Policy at §4.1 (requiring every law enforcement agency to post a notice on its website that BWCs are deployed, which shall include pictures of the BWC and how it will be worn).

¹⁴ Per the AG BWC Policy, an officer may de-activate a BWC while participating in a discussion "about criminal investigation strategy and planning (e.g., to consider what investigative techniques to pursue, such as what questions to pose to a suspect or witness, whether to summon a drug/explosives detention canine, whether to apply for a search warrant, whether to request permission to conduct a consent search, or to conduct another type of warrantless search, etc.)." AG BWC Policy at §6.5.

OAG also argues that disclosure of a BWC video would “trouble victims and third-party witnesses or informants who provide valuable information, who have the expectation that their claims will not become public unless and until any charges are brought.” (AGb45). Again, OAG ignores the fact that it is the *victims* in this case who are seeking disclosure, not the press or the public. And if the press or a member of the public do seek access, N.J.S.A. 40A:14-118.5(1)(4) allows a victim to protect their privacy by requesting that the video “not be made available to the public.” Moreover, the BWCL expressly allows a victim or witness who wants to speak anonymously to a police officer to request de-activation of the BWCL. N.J.S.A. 40A:118.5(e)(2) and (3).

C. The Legislature Made a Policy Decision to Treat BWC’s Differently Than Other Types of Police Videos and Differently Than What Access to BWC Videos Had Been in the Past

OAG argues that Plaintiffs “scheme” is “especially illogical because it would apply to BWC footage alone, not to other video footage in the government’s possession.” (AGb29). But that is the policy decision the Legislature made when it chose to pass a law “[r]egulat[ing] [the] use of body cameras worn by law enforcement officers.” A4312 (L. 2020, c. 29). The Legislature could have passed a bill that addressed access to all types of police

videos,¹⁵ but it chose to instead treat BWC's differently and to state the four precise scenarios when they could be exempt from public inspection.

Although OAG complains that it makes no sense that OPRA's ongoing investigation exemption could shield a witness interview recorded by a stationary camera but not one recorded by a BWC, the ongoing investigation exemption is unnecessary when it comes to other police videos. OPRA's criminal investigatory records exemption renders such stationary videos exempt from access under OPRA—whether they are recorded by a dash camera, security camera, or some other stationary camera—because there is no law requiring such videos be made, maintained, or kept on file. N.J.S.A. 47:1A-1.1. In contrast, there is no colorable argument that the criminal investigatory records exemption could apply to a BWC video because the Legislature expressly said it cannot. Thus, the Legislature made a policy decision to treat BWCs differently than other police videos, which can be wholesale denied.

As to OAG's argument that privacy is not sufficiently protected if only the BWCL's four exemptions apply, this too is a legislative policy decision. The Legislature clearly contemplated privacy concerns because the BWCL contains

¹⁵ Many advocates would have preferred this course of action so that requestors have an enforceable right to access dash camera videos under OPRA rather than only under the common law.

many provisions designed to protect the privacy of individuals, such as requirements that BWCs be turned off if requested by

- an apparent crime victim, N.J.S.A. 40A:118.5(e)(3);
- a “person seeking to anonymously report a crime,” N.J.S.A. 40A:118.5(e)(2);
- a person seeking to anonymously “assist in an ongoing law enforcement investigation,” N.J.S.A. 40A:118.5(e)(2);
- an occupant of a private home, unless the officer is actively investigating a crime, responding to an emergency, or constructive authority or force will be used, N.J.S.A. 40A:118.5(e)(1); and
- a person, other than an arrestee, who seeks emergency medical attention, N.J.S.A. 40A:118.5(c)(2)(b).

Moreover, officers are not supposed to turn on BWCs inside a school or youth facility; a patient area of a healthcare facility; a place of worship; or in a courtroom. N.J.S.A. 40A:118.5(e). Where a BWC video falls outside the four exemptions enumerated in the BWCL, it shall not be exempt—but where it contains truly private information, such as a driver license number or nudity—agencies already blur such information without violating the BWCL.

“[N]ot every statute is a model of clarity.” Wilson ex rel. Manzano v. City Jersey City, 209 N.J. 558, 572 (2012). The BWCL is complex, requiring an agency who receives an OPRA request to first determine the video’s retention schedule and then to determine whether, because of the retention schedule, the video falls into one of the “only” four types of videos that “shall be exempt from public inspection.” N.J.S.A. 40A:14-118.5(1). It certainly would be less complex had the Legislature simply passed a BWCL that allowed public access to be dictated by OPRA.

Indeed, that was how public access to BWC videos was determined prior to the passage of the BWCL. BWC videos were generally accessible under OPRA because they were not criminal investigatory records because the Attorney Law Enforcement Directive 2015-1 required them to be made, maintained, and kept on file. See Richard Rivera LLC v. Twp. of Bloomfield, No. A-3338-17, 2020 WL 109639 (App. Div. Jan. 9, 2020) (AGa19) (concluding BWC videos are not criminal investigatory records). Access, however, was otherwise determined by OPRA’s exemptions.

When it enacted the BWCL, the Legislature took a very different approach than under prior law. It not only chose to dictate when BWC videos must be activated or deactivated and how long they must be retained, it also chose to

“specif[y] when video footage from a body camera is exempt from [OPRA].” Sponsor’s Statement to A. 4312 at 7 (L. 2020, c. 29); Sponsor’s Statement to S. 101 at 7 (L. 2020, c. 29). It thus set forth the “only” four categories of BWC videos that “shall be exempt from public inspection.” N.J.S.A. 40A:14-118.5(l). If it intended those exemptions to be in addition to OPRA’s other exemptions, it would have said so rather than saying “only the following body worn camera recordings shall be exempt from public inspection.” Ibid.

OAG seeks to re-write Subsection (l), so that it instead reads: “BWC videos shall not be criminal investigatory records. In addition to the exemptions set forth in N.J.S.A. 47:1A-1, et seq., the following additional four exemptions shall apply.” But that is not what the Legislature provided. If OAG disagrees with the Legislature’s approach and believes that additional exemptions should apply, it should lobby the Legislature. But it should not ask this Court to ignore the plain language of the law. As OAG concedes, Mr. Fuster has a special right to access the video pursuant to Subsection (k)—yet OAG nonetheless argues that this Court should ignore that right and provide no relief to Mr. Fuster. It then also asks this Court to ignore Subsection (l)’s plain language and allow law enforcement agencies to keep BWC videos from the public even if they fall outside the four exemptions the Legislature carefully crafted in the BWCL.

Plaintiffs find this deeply troubling, given the Attorney General’s role in upholding the constitution and the laws of this state. Crime victims are to be treated respectfully under both statutory and constitutional law, but OAG is advocating that Plaintiffs’ rights—as well as the rights of other victims who seek access to BWC videos where their perpetrator has not yet been criminally charged—be wholly ignored.

For all the reasons argued above, as well as in Plaintiff’s supplemental brief, this Court should reverse the Appellate Division’s decision.

CONCLUSION

As argued above, the Court should reverse the Appellate Division’s decision and grant access to the requested BWC video. The BWCL renders the BWC video accessible to Plaintiffs pursuant to Subsections (j), (k), and (l). A reversal would also render Plaintiffs prevailing parties entitled to an award of attorneys’ fees pursuant to N.J.S.A. 47:1A-6. Alternatively, the Court should grant Plaintiffs access under the common law right of access.

Respectfully Submitted,

Pashman Stein Walder Hayden, P.C.

/s/ CJ Griffin
CJ Griffin