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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1893-20

JOSEPH KRAKORA, Public Defender of the State of New Jersey, and THE OFFICE OF THE PUBLIC DEFENDER,

Plaintiffs-Appellants,

v.

CHRISTINE A. HOFFMAN, Assistant Attorney General as, and only as, Acting Gloucester County Prosecutor, GLOUCESTER COUNTY PROSECUTOR'S OFFICE, COUNTY OF GLOUCESTER AND ITS BOARD OF COUNTY COMMISSIONERS, CHAD M. BRUNER, Gloucester County Administrator, GLOUCESTER COUNTY DEPARTMENT OF EMERGENCY RESPONSE, and DENNIS P. McNULTY, Director of the Gloucester County Department of Emergency Response,

Defendants-Respondents.[1]

Argued April 25, 2022 – Decided May 16, 2022

Before Judges Sabatino, Rothstadt and Mayer.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1456-20.

Katherine Constantine Blinn, Assistant Deputy Public Defender, argued the cause for appellants (Joseph E. Krakora, Public Defender, attorney; Katherine Constantine Blinn, of counsel and on the briefs).

Michael J. Miles argued the cause for respondents (Brown & Connery, LLP, attorneys; Michael J. Miles and Alyssa I. Lott, on the briefs).

PER CURIAM

This case arises from Gloucester County's replacement of its computer server that stores, on a centralized basis, recordings of all 9-1-1 emergency response calls made within the County. Upon switching to the new server, the County drastically reduced the retention time for storing the call data from a period of six years to thirty-one days. That shortened time frame corresponds with the minimum retention period prescribed by a state regulation, N.J.A.C. 17:24-2.4(a)(1).

[1] The caption has been updated in accordance with Rule 4:34-4 to reflect the current offices and officeholders.

The Public Defender contends his office does not have the institutional or administrative ability, or the awareness of the potential evidential relevance of every specific 9-1-1 recording, to submit requests for all such recordings within the County's new thirty-one-day deadline. The Public Defender asserts the new policy jeopardizes the constitutional rights of its clients who it defends in criminal prosecutions.

Seeking relief from the new policy, the Public Defender and his office filed suit in the Law Division against various units of Gloucester County's government.[2] Plaintiffs requested that the court compel the retention of the 9-1-1 recordings beyond the minimum thirty-one days. Plaintiffs also sought retention and forensic analysis of the old server to determine what data remains accessible.

The trial court granted defendants' motion to dismiss the complaint under Rule 4:6-2(e) for failure to state a claim on which relief can be granted. Plaintiffs appealed, and this court issued a stay halting the implementation of the shortened retention policy, pending the disposition of the appeal. We

[2] The defendants are: the Gloucester County Prosecutor's Office and the Acting Gloucester County Prosecutor; Gloucester County and its Board of Chosen Freeholders (now known as the Board of County Commissioners), N.J.S.A. 40:20-1, and County Administrator; and the Gloucester County Department of Emergency Response and its Director.

simultaneously invited the Attorney General to participate in the appeal, although that invitation was declined.

For the reasons that follow, we vacate the trial court's dismissal order and remand for discovery and other proceedings. In doing so, we do not foreclose plaintiffs from pursuing other avenues of potential relief on a statewide basis concerning the administrative regulations.

I.

We summarize the factual background based on the parties' written submissions, mindful that no discovery or evidential proceedings have been conducted.

The Parties and the Interconnectedness of Their Work

The Gloucester County Department of Emergency Response ("GCDER") is funded by Gloucester County, and organizationally it is located within the County's Department of Public Safety, under the supervision of the County Administrator and the Board of County Commissioners. The GCDER maintains a call center that provides a centralized dispatch service for the Gloucester County Prosecutor's Office, all police and fire departments in the County, as well as the County SWAT and emergency response teams, six ambulance

squads, and four paramedic units. It records such communications and stores that data on a computer server.

Attorneys employed by the Office of the Public Defender represent indigent defendants charged with indictable crimes under the New Jersey Criminal Code, and juveniles charged with acts of juvenile delinquency. N.J.S.A. 2A:158A-5. They have constitutional and professional obligations to provide their clients with effective assistance of counsel. U.S. Const. amends. VI and XIV; N.J. Const., art. I, ¶ 10; R.P.C. 1.1; N.J.S.A. 2A:158A-5 and -13; Strickland v. Washington, 466 U.S. 668, 687 (1984).

The Prosecutor's Office is funded by the County, N.J.S.A. 2A:158-7, and organizationally it is located within the County's Department of Building and Government Services, under the County Administrator and the Board of County Commissioners. As a matter of law, the County Prosecutor is the chief law enforcement officer in the County, and the County Prosecutor and her office are supervised by the State Attorney General. See N.J.S.A. 2A:158-1 and -5; State v. W.B., 205 N.J. 588, 608 (2011); see also N.J.S.A. 52:17B-98 (providing that Attorney General is "chief law enforcement officer of the State" and responsible for "the general supervision of criminal justice" in the State); N.J.S.A. 52:17B-101 ("All the functions, powers and duties of the Attorney General relating or

pertaining to the enforcement and prosecution of the criminal business of the State and of any county of the State shall be exercised by the Attorney General through the Division of Criminal Justice established hereunder."); N.J.S.A. 52:17B-112 (establishing New Jersey county prosecutors' and law enforcement officials' duty to cooperate with the Attorney General).

Attorneys employed by the Prosecutor's Office are responsible for investigating and prosecuting all alleged crimes and acts of juvenile delinquency in the County, except for those cases initiated or assumed by the Attorney General. N.J.S.A. 2A:158-5. They are obligated to preserve evidence and provide it to defense counsel in discovery. R. 3:13-3; R.P.C. 3.8(d); State v. Richardson, 452 N.J. Super. 124, 131-34 (App. Div. 2017). This includes a constitutional obligation to provide defense counsel with exculpatory and impeachment evidence in the prosecutor's possession. That includes evidence held by law enforcement officials over whom the prosecutor has supervisory powers, knowledge of which is imputed to the prosecutor. U.S. Const. amends. V, VI, and XIV; Kyles v. Whitley, 514 U.S. 419, 432-40 (1995); United States v. Agurs, 427 U.S. 97, 103-13 (1976); Brady v. Maryland, 373 U.S. 83, 87 (1963). Our state's case law likewise confirms that obligation. See, e.g., State

v. Nash, 212 N.J. 518, 544 (2013); State v. Nelson, 155 N.J. 487, 497-500 (1998).

A prosecutor's failure to preserve potentially relevant evidence can comprise a violation of due process, if there is a showing of bad faith or connivance on the part of the government, the evidence lost or destroyed was material to the defense, and the defendant was prejudiced by the loss or destruction of the evidence. Arizona v. Youngblood, 488 U.S. 51, 57-58 (1988); California v. Trombetta, 467 U.S. 479, 488-90 (1984); State v. Marshall, 123 N.J. 1, 110 (1991); State v. Robertson, 438 N.J. Super. 47, 67 (App. Div. 2014), aff'd as amended, 228 N.J. 138 (2017). The suppression or destruction of exculpatory evidence violates due process, regardless of the government's good faith. Youngblood, 488 U.S. at 57; Brady, 373 U.S. at 87; State v. Knight, 145 N.J. 233, 245-48 (1996); State v. Vigliano, 50 N.J. 51, 60-61 (1967).

Discovery supplied in criminal cases often entails the production of 9-1-1 recordings and other dispatch records. Indeed, in many cases those records provide crucial evidence for the prosecution, the defense, or both sides of the case. See, e.g., Davis v. Washington, 547 U.S. 813, 826-29 (2006); State v. Morton, 155 N.J. 383, 454-55 (1998); State v. Outland, 458 N.J. Super. 357,

362-65 (App. Div.), certif. denied, 239 N.J. 503 (2019), cert. denied, 140 S. Ct. 1151 (2020).

The GCDER dispatchers are essential to the operation of law enforcement in Gloucester County, including the operation of the Prosecutor's Office. State v. Handy, 206 N.J. 39, 53 (2011). Even so, within the political structure of the County, the Prosecutor's Office does not have automatic custody, control, or possession of GCDER data. In order to obtain such data, the Prosecutor's Office must submit a request to the GCDER, after which it eventually provides the data to the Public Defender or retained criminal defense counsel in discovery. The GCDER's 9-1-1 recordings, subject to potential exceptions, constitute public records under the Open Public Records Act, N.J.S.A. 47:1A-1 to 47:1A-13, as to which the Public Defender may submit its own requests. See, e.g., Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 364-67 (App. Div. 2003).

The limited motion record reflects that neither the Prosecutor's Office nor the Public Defender have the institutional or administrative capacity to request all pertinent 9-1-1 recordings from the GCDER within thirty-one days of a criminal incident. In this regard, sometimes arrests are not made until more than thirty-one days after a crime is committed. Even when an arrest occurs within

a thirty-one-day time frame, the Public Defender is often not assigned to represent a defendant until after thirty-one days have passed.

Subject to verification in the discovery phase of this case, the motion record also suggests that the GCDER does not have the operational capacity, nor do its employees have the requisite training or skill, to review all of the calls the GCDER receives on a daily basis and determine whether they relate to a crime, or the nature of the crime to which they relate.

The Change in the GCDER's Procedures Prompts Litigation

By email on July 29, 2020, the GCPO notified the Public Defender that the server on which the GCDER stored 9-1-1 calls for service and dispatch communications had been "irreparably damaged[.]" In addition, notwithstanding that some records on the old server remained recoverable, the old server was scheduled to be destroyed on or about August 7, 2020, and after that no recordings of calls or dispatches occurring prior to June 1, 2020 would be recoverable.

After receiving this notification, the Public Defender filed an emergent motion for an order to show cause to prohibit destruction of the old server. The motion was heard by the trial court on August 6, 2020.

At that initial hearing, there was some dispute as to whether any data remained recoverable from the old server. The Prosecutor's Office represented that no data was recoverable, apparently because the server was "offline" and therefore "not responsive to any inquiry[.]" However, the Public Defender questioned that representation. It provided an example of a request for data recorded on January 9, 2020, which had been submitted on June 6, 2020, and fulfilled on June 17, 2020, notwithstanding the assertion that data from that time frame was inaccessible.

During the course of the August 2020 hearing, although not directly relevant to the Public Defender's motion to preserve the old server, the Prosecutor's Office also provided information about how data would be stored on the new server. Specifically, the Prosecutor's Office indicated that, consistent with N.J.A.C. 17:24-2.4(a)(1), the GCDER would be retaining all recordings on the new server for only thirty-one days. See also N.J.A.C. 17:24-3.3. The Prosecutor's Office argued that the thirty-one-day retention period was lawful, but acknowledged that it represented a change from prior practice within

the County,[3] and admitted that it would affect the Prosecutor's own ability to access records of emergency calls. For example, the Prosecutor stated:

> [W]e are, frankly, we're done now to figure out how to get what we think we need before it is raised because if the police department takes 32 days to investigate a case, and has not requested the 9-1-1 call and then charging on the 32nd day were out of time and that is already gone.

The Prosecutor's Office further acknowledged that it was not possible for it to review all 9-1-1 records within thirty-one days, stating:

> So, I am in no way saying that we are responsible for reviewing every 9-1-1 call that comes in. What I am saying is that in support of our investigation if we find something evidentiary, then it needs to be preserved.
>
> I am not representing that the State is able to look, that the prosecutor's office is able to review every single solitary piece of evidence including 9-1-1 calls within 31 days. That just simply is not practical.

In response, the Public Defender argued that the Prosecutor's Office was misreading N.J.A.C. 17:24-2.4(a)(1), which only sets a minimum retention period and does not preclude any organization from retaining records for a longer time period. The Public Defender stressed that, in the past, the GCDER

[3] Elsewhere the record reflects that the GCDER had previously retained records for approximately six years.

had retained records for much longer than thirty-one days, and the Public Defender had relied upon that practice in handling its cases.

The trial court expressed concern about the thirty-one-day retention period for the new server, but noted that this was not an issue before the court that day. The only issue presented was the preservation and expert analysis of the old server, and the court was inclined to order that the server be preserved until such analysis was performed.

On August 12, 2020, the court entered an order for preliminary injunctive relief, which mandated the following:

> (1) The Gloucester County Prosecutor's Office, the Gloucester County Call Center, and all their respective officers, agents, servants, employees, attorneys, and persons acting in concert of participation with them are all prohibited from destroying the VPI call center server (i.e. the server said by Defendants to have been used at the call center until June 6, 2020), and shall all take immediate measures to ensure that the server and all contents of the server are preserved;
>
> (2) This Order shall remain in effect unless and until expressly permitted otherwise by an order of this court;
>
> (3) Should Defendants Gloucester County Prosecutor's Office and/or Gloucester County Call Center obtain the report of a computer forensics expert, and should Defendants provide a copy of said report to this court, and to the Plaintiff, together with any supporting documents, then another hearing will be scheduled before the [court], at which time the parties shall argue

> as to whether the VPI server may be destroyed, and, if so, under what conditions.

After the August 6, 2020 hearing, in response to the prosecutor's statement that GCDER records hereafter would be destroyed after thirty-one days, the Public Defender began submitting requests to the Prosecutor and the GCDER for 9-1-1 calls as soon as it was assigned to represent a criminal defendant. In some instances, the GCDER responded that it could not process such requests without further information, such as the date of the call and the police case number, which the Prosecutor's Office possessed but the Public Defender did not, because the cases were at their earliest stages.

In other instances, the GCDER and the Prosecutor's Office informed the Public Defender that the data requested had already been destroyed because it was past the thirty-one-day retention period. This loss of data particularly occurred: (1) where an arrest was not made within thirty-one days after the incident; and (2) in cases in which a defendant was charged on a complaint summons, when the Public Defender was not assigned until after the thirty-one-day retention period had passed.

Still further, in cases in which the Public Defender requested data from the old server, the GCDER and the Prosecutor's Office responded that the evidence was not available due to a server malfunction.

The Second Litigation Now on Appeal

In December 2020, the Public Defender and his office filed a verified complaint in lieu of prerogative writs against defendants. In count one, plaintiffs alleged that defendants were denying them discovery materials from the old server in violation of their obligations under state and federal law. In the prayer for relief, plaintiffs sought forensic analysis of the old server to determine what data was salvageable, and preservation of the server for at least five years.

In count two, plaintiffs alleged that the retention of data recorded on the GCDER's new server for only thirty-one days violated due process protections afforded to criminal defendants under state and federal law. Plaintiffs sought to compel defendants to retain the records for a longer period of time. In the prayer for relief, plaintiffs sought an order "prohibiting, on an interim basis, the Defendants from deleting or allowing to be deleted, erased, or otherwise lost any and all GCDER data until this action is resolved[.]" Plaintiffs sought a final judgment, among other things:

> a. requiring Defendants to modify the automatic deletion of recordings to ensure that data be preserved for a minimum of 5 years, which is the criminal statute of limitations in most cases, so as to allow appropriate review on an as needed basis pursuant [to] the established practice and procedure; and

> b. requiring Defendants to preserve any and all data relating to homicides and sexual assault cases indefinitely, in accord with the statute of limitations. These cases are few and far between and are easily identifiable when properly reviewed by the State[.]

Along with the complaint, plaintiffs filed a motion for interim restraints and an order to show cause as to why defendants should not be required to preserve all evidence during the pendency of the case. On December 23, 2020, the court entered an order, with defendants' consent, restraining defendants from destroying any recordings pending a further hearing on injunctive relief.

However, before a hearing could be held, defendants moved to dismiss the complaint under Rule 4:6-2(e), and to dissolve the temporary restraints. In their motion papers, defendants stated that they had preserved the old server, consistent with the court's August 12, 2020 order for preliminary injunctive relief, but they had not performed a forensic analysis of it.

With respect to the new server, defendants stated that the GCDER presently was retaining records for six months, with the intention to move to a thirty-one-day retention period, which was a reduction from the former practice of retaining records for approximately six years. Defendants further stated that, at the current call volume, the GCDER's new server had the capacity to retain about one year's worth of data. They also asserted the GCDER did not have the

operational capacity or legal training necessary to sift through its data to determine the nature of the communications (and whether they may relate to a particular offense).

Finally, defendants argued that State law mandated that the 9-1-1 recordings be retained only for a minimum of thirty-one days. However, according to partial data gathered by defendants, different counties in the State have different retention schedules for emergency calls, albeit with most retaining the data for more than the minimum, as follows:

County	**Retention Period**
Bergen	90 days
Burlington	6 months
Camden	90 days
Cape May	91 days
Cumberland	1 year
Mercer	31 days
Monmouth	88-90 days
Salem	31 days
Somerset	62 days
Union	60 days

Defendants also represented that the State Police retains call data for two years, plus the remainder of the year in which the call is processed.

The Trial Court's Grant of the Dismissal Motion

On February 5, 2021, the court heard oral argument on defendants' motion. It issued an oral opinion and order that same day, dismissing the complaint with prejudice, and dissolving the temporary restraints that had been entered on December 23, 2020.

The court dismissed count one of the complaint on entire controversy and res judicata grounds, finding that its earlier August 5, 2020 order for preliminary injunctive relief entered in the first litigation was a "final order" requiring that the old server be preserved, but not mandating that the old server undergo forensic analysis as sought in count one.

As for count two, the court found that the GCDER, which the court found to be a non-law enforcement agency, did not have any constitutional or other legal obligation to maintain its data for longer than the thirty-one day minimum period mandated under N.J.A.C. 17:24-2.4(a)(1), and the Prosecutor's Office had no obligation to maintain the GCDER's data, over which the Prosecutor had no custody, control, possession, or supervision.

The trial court did acknowledge the validity of the Public Defender's concerns about the loss of potentially relevant 9-1-1 data, and noted that it shared those concerns. However, the court found that the issue was something that should be addressed to the Legislature or negotiated with the County, stating:

> I would note that I appreciate the concern of the Public Defender's position in this case. I find that it's a position that's . . . maybe not legally based and maybe this is something that should be addressed with the [L]egislature, but their concern is a fair concern and it's a legitimate concern and it's one that . . . is based upon their concerns for future and perhaps some past criminal defendants, because they want to make sure that there is a fair hearing. And . . . fairness is very important to this Court too . . . but . . . I must follow the law first.
>
> I would hope that there would be some time of consideration . . . of maintaining these records for at least a little longer period of time just because . . . it would give time for the Public Defender's Office to get involved with the case and they could make a determination as to whether or not there's any relevancy or seek these records through an OPRA request. And my concern is that the 31 day period, they may not even be in the case yet. And I would hate again to see justice not get done.
>
> And my concern is justice may not get done from a twofold position. Number one is there could be exculpable evidence or evidence that's helpful to a defendant and I do not want to see defendants convicted

> of offenses that they didn't commit because that evidence isn't available.
>
> And along those same lines, from a prosecution standpoint there may be evidence . . . that would be very helpful in the State meeting its proofs . . . beyond a reasonable doubt and I would hope the State would be able to have those proofs.
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> The Court is only concerned about fairness . . . So with that being said, my fairness discussion is really consistent with what [the Public Defender] has been arguing and so I wanted to indicate I appreciate [those] arguments, but it's . . . not based in any legal support.

Plaintiffs moved for a stay pending appeal, which the trial court denied. Thereafter, plaintiffs filed an appeal and an emergent application for a stay, which this court granted on March 25, 2021.

II.

We review this appeal in the distinctive procedural posture of an order dismissing a lawsuit, with prejudice, based upon the perceived failure of plaintiffs to state a claim upon which relief may be granted. R. 4:6-2(e). The case law applying that Rule instructs that such dismissal motions should be "at once painstaking and undertaken with a generous and hospitable approach." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989).

The court's "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Ibid. (citing Rieder v. Dep't of

Transp., 221 N.J. Super. 547, 552 (App. Div. 1987)). The court must read the plaintiffs' complaint in depth and with liberality, giving plaintiffs every reasonable inference of fact, with the understanding that "the test for determining the adequacy of a pleading is whether a cause of action is 'suggested' by the facts." Ibid. (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). "At this preliminary stage of the litigation [we are] not concerned with the ability of plaintiffs to prove the allegation contained in the complaint." Ibid.; accord Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005).

In keeping with these principles, the Supreme Court has declared that motions made under Rule 4:62-2(e) should be approached "with great caution" and should be granted "only in the rarest of instances." Printing Mart-Morristown, 116 N.J. at 771-72. Nevertheless, a complaint should be dismissed if it states no valid claim, and discovery could not give rise to a claim. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021).

Our appellate review of the trial court's dismissal of a case under Rule 4:6-2(e) is de novo. Ibid.; see also Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl, P.C., 237 N.J. 91, 108 (2019). We owe no special

deference to the court's conclusions. Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011).

Applying these principles, we respectfully conclude the trial court dismissed plaintiffs' lawsuit prematurely. The court should have allowed the parties to develop discovery on the key facts, including, among other things, the undisclosed reasons for exactly why the County severely and abruptly shortened the retention period for 9-1-1 calls from approximately six years to thirty-one days.

Defendants' reliance upon the thirty-one-day minimum period in the state regulations, while of some relevance, does not conclusively resolve whether that limited period adopted by the Executive Branch is sufficient to safeguard the rights of criminal defendants under both the Due Process Clause of the Fifth, Sixth, and Fourteenth Amendments, as well as parallel rights under the New Jersey Constitution. An administrative regulation cannot subordinate constitutional rights.

The thirty-one-day regulation was adopted thirty-two years ago in 1990. See 22 N.J.R. 3453(a) (Nov. 19, 1990) (rule proposal); 23 N.J.R. 704(b) (Mar. 4, 1991) (rule adoption). It has not materially changed since that time, despite significant changes in recording devices and digital technology.

The regulation derives from a statutory scheme enacted in 1989. That year, the Legislature passed a statute addressing emergency telecommunications services. L. 1989, c. 3 (codified as amended at N.J.S.A. 52:17C-1 to -20). The key regulation at issue in this litigation, N.J.A.C. 17:24-2.4(a)(1), which addresses recordkeeping by "public safety answering points" ("PSAPs"),[4] was adopted under authority granted by that statute. See N.J.S.A. 52:17C-15(b).

N.J.A.C. 17:24-2.4(a)(1) provides:

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[4] A PSAP is defined by statute as:

> a facility, operated on a 24-hour basis, assigned the responsibility of receiving 9-1-1 calls and, as appropriate, directly dispatching emergency response services or transferring or relaying emergency 9-1-1 calls to other public safety agencies. A public safety answering point is the first point of reception by a public safety agency of 9-1-1 calls and serves the jurisdictions in which it is located or other participating jurisdictions[.]
>
> [N.J.S.A. 52:17C-1(l).]

See also N.J.A.C. 17:24-1.2 ("'Public Safety Answering Point (PSAP)' means the first point of reception of a 9-1-1 call.").

A "public safety agency" is defined as "a functional division of a municipality, a county, or the State which dispatches or provides law enforcement, firefighting, emergency medical services, or other emergency services[.]" N.J.S.A. 52:17C-1(j). See also N.J.A.C. 17:24-1.2 ("'Public safety agency' means a functional division of a public agency which provides firefighting, police, EMS, or other emergency service.").

> (a) Each PSAP shall maintain the following:
>
> 1. Recordings produced by the logging recorder and all documents or records related to 9-1-1 calls in a secured area for no less than 31 days[.]

See also N.J.A.C. 17:24-3.3(a)(1) ("Each [public safety dispatch point ("PSDP")] shall maintain . . . [a]ll documents or records related to 9-1-1 calls in a secured area for no less than 31 days.").[5]

The only change to the regulation occurred in 2000, to substitute the word "recordings" for "tape recordings." See 32 N.J.R. 1912(a) (June 5, 2000) (rule proposal); 32 N.J.R. 3174(b) (Aug. 21, 2000) (rule adoption). At the time of the 2000 rule amendment, a longer minimum retention period was requested by several commenters. However, their request was rejected in light of then-existing technology, with a statement that the issue could be reconsidered in future rulemaking. 32 N.J.R. 3174(b) (Aug 21, 2000).[6] We underscore that observation was made some twenty-two years ago.

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[5] A "Public Safety Dispatch Point" is defined as "a location which provides dispatch services for one or more public safety agencies." N.J.A.C. 17:24-1.2.

[6] More specifically, at the time of the 2000 amendment, one commenter recommended that the retention period be one year, while another recommended ninety or 100 days in consideration of the time to file a notice of intent to sue under the Tort Claims Act. 32 N.J.R. 3174(b) (Aug 21, 2000). The response, as follows, was that a longer retention period would place a burden on PSAPs

On its face, N.J.A.C. 17:24-2.4(a)(1) does not mandate that recordings be retained for only thirty-one days. Instead, it sets a thirty-one-day regulatory floor for the retention of such records.

As noted above, the limited, pre-discovery record reflects that different counties apparently have made varying decisions about the length of time to retain such records. Indeed, before June 2020, Gloucester County retained such records for about six years. It was only with the purchase of a new server that

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that continue to use older-style recording devices, but the issue could be reconsidered in further rulemaking:

> Current rules require PSAPs to maintain recordings produced by the logging recorder and all documents or records related to 9-1-1 calls in a secured area for no less than 31 days. This requirement of 31 days was established in 1990 and readopted in 1995 when many recording devices utilized bulky and expensive magnetic tapes. It should be noted that PSDPs are not mandated to have logging recorders. Over the past few years, many PSAPs have up-graded to logging recorder devices that utilize less expensive and more compact recording media. Imposing a one-year retention at this time would place a burden on those PSAPs that continue to utilize older logging recording devices; however, as a result of these comments, this subject will be considered in future rulemaking.
>
> [32 N.J.R. 3174(b) (Aug. 21, 2000).]

Notwithstanding the move to digital technology, the thirty-one-day minimum retention period has not been re-visited.

the County decided to move to a thirty-one-day retention period. However, there is no explanation in the record as to why the County chose a thirty-one-day retention period.

The choice does not seem to be based upon technological limits, because—as confirmed by defendants—the new server has the capacity to retain records for at least a full year. Indeed, this court's stay of the trial court's order was issued over a year ago in March 2021, and defendants' counsel represented to us at the appellate oral argument that defendants have complied with the stay.

Although the thirty-one-day retention period is legally permitted as a regulatory matter under N.J.A.C. 17:24-2.4(a)(a), see also N.J.A.C. 17:24-3.3, the record reflects that it is not feasible for the Public Defender (or, for that matter, the County Prosecutor) to request all such records within thirty-one days. Therefore, accepting the facts as pled by plaintiffs—as we must under the Printing Mart standard—the implementation of a thirty-one-day retention period in the County will seemingly result in the loss of relevant, and potentially exculpatory, evidence in numerous criminal cases, and thus the denial of many defendants' constitutional rights to a fair trial and the effective assistance of counsel. The trial court was rightly concerned about those consequences, but nonetheless opted to halt the litigation.

To be sure, in individual cases, some opinions have held that the routine destruction of such 9-1-1 recordings did not actually result in a deprivation of due process. See State v. Reynolds, 124 N.J. 559, 569 (1991); James v. Singletary, 957 F.2d 1562, 1567 n.4 (11th Cir. 1992); United States v. Robinson, 855 F.Supp.2d 419, 420-24 (E.D.Pa. 2012). The point of the present civil litigation is not to seek a remedy for past violations. Rather, it is to prevent, in the first instance, the destruction of evidence and violations of criminal defendants' rights under the federal and state constitutions, U.S. Const. amends. V, VI, and XIV, N.J. Const. art. 1, ¶ 10, and the doctrine of fundamental fairness, see Doe v. Poritz, 142 N.J. 1, 108-09 (1995), State v. Sugar, 84 N.J. 1, 14-15 (1980).

Given the facts as alleged, plaintiffs have sufficiently pled a cause of action for an as-applied challenge to the County's implementation of N.J.A.C. 17:24-2.4(a)(1). The court's role at this juncture is only to identify whether the complaint states a viable claim. It does. Therefore, the merits of the claim should be explored and evaluated on remand, "in the factual context presented and in the light of circumstances as they appear." Abbott ex rel. Abbott v. Burke, 199 N.J. 140, 235 (2009). See, e.g., State Farm Mut. Auto. Ins. Co. v. State, 124 N.J. 32, 63 (1991) (noting that plaintiffs were "free to institute as-applied

challenges to the Reform Act in the event that the relief afforded to them under N.J.A.C. 11:3-16.11 is either substantively or procedurally inadequate to assure a constitutionally fair rate of return.").

We are mindful that defendant, the GCDER, argues that it is not a "law enforcement agency" that can owe constitutional duties to prospective criminal defendants when they are prosecuted. See N.J.A.C. 1:4B-2.1 (defining a "law enforcement agency"). We are equally mindful that the co-defendant Prosecutor's Office argues that it allegedly has no control over how long the GCDER stores 9-1-1 call data. At the early stage of the litigation, we decline to resolve whether this allocation of functions within County government appropriately creates an impenetrable barrier to the vindication of the constitutional rights at stake.

Without deciding the question here, it is conceivable the County Prosecutor may have the power as the chief law enforcement officer of the County under N.J.S.A. 2A:158-1 and -5 to mandate that all law enforcement agencies within the County obtain and retain all 9-1-1 recordings in delineated circumstances, such as whenever a homicide or sexual assault or some other category of crime is reported. Such a hypothetical directive might provide plaintiffs with access to those recordings beyond the GCDER's thirty-one-day

retention period. By no means do we rule at this time that the Prosecutor has a duty to take such action, but it seems to be among the options worth exploring on remand and on a much fuller record.

We disagree with the trial court that plaintiffs' present case must be procedurally barred by the doctrines of res judicata and entire controversy, due to the earlier litigation. That first lawsuit focused on the demise of the former server. The present complaint asserts new harms and new facts. Despite the court's August 12, 2020 order in the first case directing the GCDER to retain the old server until a forensic analysis was conducted in response to the Public Defender's requests, that server has allegedly remained in "offline" status and the analysis has not been performed.

The entire controversy doctrine does not apply to unknown or unaccrued claims. Dimitrakopoulos, 237 N.J. at 99. Moreover, the doctrine must not be applied inequitably. Ibid. Here, it would be manifestly inequitable to deprive plaintiffs a fair opportunity to vindicate the constitutional rights of their clients in assuring that 9-1-1 data is not irretrievably purged too soon. Similarly, the doctrine of res judicata does not strictly bar non-identical claims that were not adjudicated in the earlier litigation, or bar claims in a second proceeding that would be unfair to preclude. Velasquez v. Franz, 123 N.J. 498, 505 (1991)

(noting that res judicata is founded upon, among other things, principles of fairness). Moreover, this case involves matters of substantial public interest that deserve plenary exploration.

Our decision to reinstate plaintiffs' complaint to the Law Division should not be read to foreclose other avenues for possible redress. On inquiry at oral argument, plaintiffs' counsel advised us that she is unaware that anyone has yet attempted to pursue a petition for administrative rulemaking with the State Office of Information Technology under N.J.S.A. 52:17C-15(b), seeking to update and revise the thirty-one-day minimum retention period in N.J.A.C. 17:24-2.4(a)(1), as was envisioned in the 2000 response to the commenters.

Given that several counties apart from Gloucester appear likewise to have a thirty-one-day retention policy, a statewide approach may be more efficacious than a lawsuit against one County that would not necessarily bind the others. Nor has a declaratory judgment action been filed challenging the constitutional sufficiency of the regulation. We mention these possibilities not to encourage or endorse them, but simply to make clear they are not supplanted by this one lawsuit that is only in its incipient stage.

The trial court's dismissal order is consequently vacated, and the case is remanded to the trial court for discovery and other further proceedings. The

stay of defendants' implementation of the thirty-one-day retention policy shall continue in force on an interim basis, unless and until such time as the trial court may receive and rule upon a meritorious motion to dissolve it. A case management conference to plan the case's reactivation shall be conducted within thirty days.[7]

Vacated and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION

[7] Nothing prevents the trial court from extending to the Attorney General a renewed invitation to participate in this matter at the trial level, either as an amicus or intervenor.