

RICHARD RIVERA,
Plaintiff-Petitioner,

v.

UNION COUNTY PROSECUTOR'S
OFFICE and JOHN ESMERADO in
his official capacity as
Records Custodian for the
Union County Prosecutor's
Office,
Defendants-Respondents,

and

CITY OF ELIZABETH,
Defendant-Intervenor-
Respondent

SUPREME COURT OF NEW JERSEY
DOCKET No. 084867

CIVIL ACTION
ON APPEAL FROM
SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION
Appellate Docket No.
A-002573-19

Sat below:
Richard J. Geiger, J.A.D.
Arnold L. Natali, Jr., J.A.D.

**BRIEF AND APPENDIX OF AMICI CURIAE THE
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
& 24 MEDIA ORGANIZATIONS
IN SUPPORT OF PLAINTIFF-PETITIONER SEEKING REVERSAL**

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PRELIMINARY STATEMENT

Weeks ago, this Court upheld the issuance of two directives issued by the New Jersey Attorney General's Office which directly support the crucial "goal of increasing transparency of internal affairs and officer discipline in the State's law enforcement agencies, thereby making them more accountable to the communities they serve." In re Att'y Gen. L. Enf't Directive Nos. 2020-5 & 2020-6, 246 N.J. 462, 478 (2021) (citation omitted). Now, the Court has the occasion to further support that goal.

This appeal arises out of Plaintiff-Petitioner Richard Rivera's request for records originating from the investigation of the Union County Prosecutor's Office ("UCPO" or the "Office") into former Elizabeth Police Department Director James Cosgrove's workplace misconduct—namely, a history of racist and sexist insults—directed at other members of that law enforcement agency. Plaintiff-Petitioner sought access to redacted copies of the Office's investigation report—which sustained the allegations of harassment—pursuant to the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 to -13, and the common law right of access. UCPO denied the request.

The Appellate Division held that the requested internal affairs ("IA") report was exempt from disclosure under both OPRA and the common law. As to its OPRA analysis, the court held

that because the Attorney General's Internal Affairs Policies and Procedures ("IAPP") sets forth best practices that the State's law enforcement agencies should follow, and the IAPP supports the confidentiality of IA records in certain circumstances, the IAPP may function as an OPRA exemption despite being an authority separate and apart from the public records statute. See PCa36-41.¹ As to the common law, the court "consider[ed] that IA records are exempt under OPRA when considering the common law right of access," PCa52, and determined that the State's interest in nondisclosure of IA records outweighed Plaintiff-Petitioner's interest in disclosure.

Lead amicus curiae the Reporters Committee for Freedom of the Press (the "Reporters Committee") is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the

¹ Citations to the appendix refer to the appendix attached to Plaintiff-Petitioner's Brief in Support of Petition for Certification filed with this Court on September 11, 2020.

newsgathering rights of journalists.² Amici, as members and representatives of the news media, routinely rely on the common law in New Jersey, OPRA, and public records laws across the United States to inform the public. Accordingly, they have a strong interest in the outcome of this case.

Amici agree with Plaintiff-Petitioner that the IAPP does not exempt the requested records from OPRA, but write to address the right to access the IA records at issue under the common law, specifically, and to emphasize the substantial public interest served when members of the news media have access to—and report on—records reflecting government agencies' efforts to investigate and address public officials' misconduct. Access to the IA records at issue will enable journalists to report important information about behavior of government officials and the processes employed to investigate patterns of misconduct that threaten to erode public trust in government institutions. See infra pp. 10-14. Such reporting fosters accountability of public servants by deterring instances of misconduct and, when misconduct does occur, by ensuring that it is adequately responded to by agencies.

It is a "bedrock principle that our government works best when its activities are well-known to the public it serves."

² Descriptions of all amici can be found in Appendix A attached to this brief.

Burnett v. Cty. of Bergen, 198 N.J. 408, 414 (2009).

Accordingly, for the reasons herein, the Reporters Committee and 24 Media Organizations respectfully urge the Court to reverse the decision of the Appellate Division and hold that the requested records are available under the common law.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For the purpose of this brief, amici accept the statement of facts and procedural history set forth in Plaintiff-Petitioner's brief filed on April 27, 2020 in the Appellate Division.

ARGUMENT

I. Access to the internal affairs records at issue is mandated under the common law.

In adopting OPRA, the Legislature expressly and unambiguously declared that the common law right of access remained a viable and legally independent means for an individual to obtain public records. Bergen Cty. Improvement Auth. v. N. Jersey Media Grp., Inc., 370 N.J. Super. 504, 516 (App. Div. 2004); see also Gannett Satellite Info. Network, LLC v. Twp. of Neptune, No. A-4006-18, 2021 WL 1305863, at *10-12 (N.J. Super. Ct. App. Div. Apr. 8, 2021) (requiring access to IA records under common law); Br. & Appx. in Support of Pet'n for Certification ("Pl.'s Br.") at 8-11. The common law right of access reaches a broader class of documents than its statutory

counterpart. Higg-A-Rella, Inc. v. Cty. of Essex, 141 N.J. 35, 46 (1995) (citing Atl. City Convention Ctr. Auth. v. S. Jersey Publ'g Co., 135 N.J. 53, 60 (1994)).³ Access to records under the common law is predicated on three elements: "(1) [T]he records must be common-law public documents; (2) the person seeking access must establish an interest in the subject matter of the material; and (3) the [person's] right to access must be balanced against the State's interest in preventing disclosure." Keddie v. Rutgers, 148 N.J. 36, 50 (1997) (citations and internal quotation marks omitted).

- A. A growing number of states recognize there is no government interest in "preventing disclosure" of records of law enforcement misconduct.

In recent years, jurisdictions across the country have recognized the importance of access to records regarding law enforcement misconduct, in particular, by amending their public records laws. Just last year, New York's legislature voted to repeal Section 50-a of its Civil Rights Law, opening police disciplinary and IA records to public scrutiny for the first time in nearly forty-five years. See S.B. S8496, 2019-2020 Leg. Sess. (N.Y. 2020). "The repeal of Section 50-a—and the court

³ See also Pl.'s Br. at 9-10 (citing to Gilleran v. Township of Bloomfield, 227 N.J. 159 (2016) and North Jersey Media Group, Inc. v. Township of Lyndhurst, 229 N.J. 541 (2017), both of which permitted access to records under the common law right of access *despite* the same records being inaccessible under OPRA).

decisions that have followed so far—represent an important step toward greater transparency in law enforcement, as well as an opportunity for journalists and community members to use these records to identify patterns of public officer misconduct and investigate instances of harm.” Caitlyn Jordan, After Section 50-a repeal, New York police unions are fighting in court to keep misconduct records secret. So far, they’re losing, Reporters Comm. for Freedom of the Press (Nov. 5, 2020), <https://perma.cc/DFP8-EDW2>.

The California legislature similarly recently amended section 832.7 of that state’s penal code to allow for release of, *inter alia*, IA records relating to several categories of police misconduct, including where an officer employs use of force which results in death or injury; where a sustained finding was made by a law enforcement agency that an officer committed sexual assault; and where a sustained finding was made of dishonesty or concealing of evidence by an officer. S.B. 1421, 2017–2018 Reg. Sess. (Cal. 2018) (enacted). According to the bill’s author, this change in the law “open[s] up some transparency to help rebuild that trust between law enforcement and communities.” Liam Dillon, California Legislature passes major police transparency measures on internal investigations and body cameras, L.A. Times (Sept. 1, 2018),

<https://lat.ms/2TGBWbt> (quoting Sen. Nancy Skinner (D-Berkeley)).

And in Maryland just weeks ago, the legislature overrode the governor's veto to pass a bill that ensures a record relating to an investigation of misconduct by a law enforcement officer is not an exempt personnel record for purposes of that state's Public Information Act. See S.B. 178, 442d Leg. Sess. (Md. 2021). According to its author, the new law's purpose is to "inject a measure of trust between the police and the communities they are sworn to protect and serve." Jacob Steinberg, Bill could make Maryland police discipline records public, Associated Press (Feb. 4, 2021), <https://bit.ly/372Nj0t> (statement of Del. Gabriel Acevero).

These trends toward greater openness of disciplinary and IA records build upon an existing framework of openness found in numerous other states:

- In Colorado, state law mandates that upon completion of an investigation of a law enforcement officer related to a specific, identifiable incident of misconduct, "the entire investigation file, including the witness interviews, video and audio recordings, transcripts, documentary evidence, investigative notes, and final departmental decision is open for public inspection." Colo. Rev. Stat. Ann. § 24-72-303(4)(a).

- In Ohio, the Public Records Act treats police department IA documents as public records subject to disclosure. See Toledo Police Patrolmen's Ass'n, Local 10 v. City of Toledo, 641 N.E.2d 799, 801 (Ohio Ct. App. 1994).

- In Florida, "[a] complaint and information gathered in the investigation of that complaint against a law enforcement officer become public records at the conclusion of the investigation." Fla. Att'y Gen. Op. 95-59 (Sept. 28, 1995).

- In Louisiana, courts have held that IA records of police officers may be released subject to certain redactions. See City of Baton Rouge v. Capital City Press, L.L.C., 2007-1088 (La. App. 1 Cir. 2/13/09), 7 So. 3d 21.

The growing trend in favor of public access to IA records is supported by courts' long-standing recognition of the importance of transparency in facilitating trust in public institutions. See, e.g., Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982). As described by one Massachusetts court:

[T]he internal affairs process exists specifically to address complaints of police corruption[,] . . . misconduct ([including] verbal and physical abuse. . .), and other criminal acts that would undermine the relationship of trust and confidence between the police and the citizenry The

internal affairs procedure fosters the public's trust and confidence in the integrity of the police department, its employees, and its processes for investigating complaints because the department has the integrity to discipline itself. *A citizenry's full and fair assessment of a police department's internal investigation of its officer's actions promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights.*

[Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 787 N.E.2d 602, 607

(Mass. App. Ct. 2003) (emphasis added).]

Here, in New Jersey, as the trial court below correctly recognized, there is no "binding precedent prohibiting release of IA materials." PCa28. To the contrary, the Attorney General's Internal Affairs Policies and Procedures "expressly permits the release of such material by court order." Ibid. Indeed, just weeks ago, this Court upheld the issuance of two directives issued by the Attorney General's Office which directly support the "goal of increasing transparency of internal affairs and officer discipline in the State's law enforcement agencies, thereby making them more accountable to the communities they serve." In re Att'y Gen. L. Enf't Directive Nos. 2020-5 & 2020-6, 246 N.J. at 478 (citation omitted).

Together, these laws and decisions recognize that law enforcement misconduct records should not be shielded from the public, and should inform this Court's interpretation of the New Jersey common law. As these laws and decisions underscore, the state does not have an interest "in preventing disclosure" of IA records. Keddie, 148 N.J. at 50 (citation omitted).

B. The news media relies on, and has a powerful interest in, access to records of investigations of law enforcement misconduct to inform the public.

Under the second prong of the common law analysis—whether the requester has an interest in the material—"courts have previously recognized that newspapers have a strong interest in policing the workings of public agencies." N. Jersey Media Grp. Inc. v. State, Dep't of Pers., 389 N.J. Super. 527, 538 (Law Div. 2006) (citing Red Bank Register, Inc. v. Bd. of Educ. of Long Branch, 206 N.J. Super. 1, 9 (App. Div. 1985)). Indeed, "[t]he press's role as 'the eyes and ears of the public' generally is sufficient to confer standing on a newspaper that seeks access to public documents." Home News v. State, Dep't of Health, 144 N.J. 446, 454 (1996) (quoting S. Jersey Publ'g Co. v. N.J. Expressway Auth., 124 N.J. 478, 496-97 (1991)).

With respect to law enforcement, in particular, "the awesome powers exercised by police create a compelling need for public oversight and review of a police department's internal investigations." Worcester Telegram, 787 N.E.2d at 605. For

example, last year, the Aurora, Colorado Police Department released the IA investigation report⁴ related to officers Erica Marrero, Jaron Jones, and Kyle Dittrich, who took a “selfie” in which they mocked Elijah McClain, a twenty-three-year-old unarmed Black man who died from a cardiac arrest in police custody just days after the police placed him in a chokehold. Sam Tabachnik & Elizabeth Hernandez, Aurora police chief fires 3 officers as part of Elijah McClain photo investigation, The Denver Post (July 3, 2020), <https://perma.cc/SYX2-23FR>. In the photo, the officers reenacted the chokehold at the site of Mr. McClain’s violent arrest. Ibid. Aurora Police Chief Vanessa Wilson stated that “[w]hile the allegations of this internal affairs case are not criminal, they are a crime against humanity and decency.” Ibid. During the IA investigation, Officer Dittrich recalled that he took the photo to “cheer up” the suspended officer who had arrested McClain, and Officer Marrero “remember[ed] someone making a joke like oh maybe we should do the [c]arotid [control hold] in it.” See note 4 at 18, 25. The investigation resulted in the resignation and termination of the officers upon a sustained finding of “conduct unbecoming.” Id. at 226-30.

⁴ Aurora Police Dep’t, Internal Affairs Case 2020-25, <https://www.documentcloud.org/documents/6980900-IA-20-25-Public-Release-Full-Version>.

Local reporting about the incident, relying upon the IA report, provided insight into how the IA investigation was conducted. In a note included in the IA report, Police Chief Vanessa Wilson stated she wanted the investigation conducted as "expeditiously as possible." Allison Sylte & Zack Newman, Aurora officers took photo near Elijah McClain memorial to 'cheer up' coworker, documents say, 9News (July 3, 2020), <https://perma.cc/5SGD-VKWM>. The swift investigation resulting in the termination of the officers was welcomed by community leaders who observed parallels between the officers' conduct and times in this nation's history in which citizens "snapped smiling pictures of themselves at the scenes of brutal, lethal lynchings of black men, keeping the images of torture as souvenirs or even turning them into postcards to send to friends," Tabachnik & Hernandez, <https://perma.cc/SYX2-23FR>.

"On Our Watch," a new investigative podcast series produced by NPR and KQED, analyzes and reports on previously secret police internal affairs files made available in California by the passage of Senate Bill 1421. On Our Watch, KQED, <https://bit.ly/375P10t> (last updated July 8, 2021); see also S.B. 1421, 2017-2018 Reg. Sess. (Cal. 2018) (enacted). The case files covered in the series were obtained as part of the California Reporting Project, a collaboration of forty newsrooms formed in late 2018 to investigate misconduct and serious use-

of-force incidents using the internal affairs and other records recently made publicly accessible under California law. See On Our Watch, <https://bit.ly/375P10t>. One episode, titled “Conduct Unbecoming,” focuses on two California Highway Patrol (“CHP”) officers—one in Los Angeles, Morgan McGrew, who used car inspections to pursue women, and one in the Bay Area, Frank Meranda, who used police resources and databases to harass and stalk women. See On Our Watch: Conduct Unbecoming, KQED (May 27, 2021), <https://bit.ly/2V1VZBA>. The episode features audio from several of the approximately one-hundred phone calls placed by IA investigators collecting evidence about McGrew, revealing that the women he targeted experienced harassment ranging from “intrusive personal questions to outright proposing sex.” Id. at 9:49-10:15. Sergeant Jimmie Ryland, who led the IA investigation, scoured McGrew’s Outlook calendar to identify each potential lead, id. at 8:05-9:58, urging those who had interacted with McGrew to share their honest experiences, ibid.

That Sergeant Ryland’s efforts to investigate an officer—one actively harming members of the public—are readily available for the public and the press to observe for themselves encapsulates the principle that “[t]ransparency facilitates healing.” Cynthia H. Conti-Cook, A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public, 22 CUNY L. Rev. 148, 154 (2019). Indeed, “[w]ithout transparency, fear

of future harm continues, [and] officers are able to exploit the power of reliable anonymity." Ibid. However, "when police processes are perceived as procedurally just, communities are more likely to cooperate with the police, and policing, in turn, is more effective." Id. at 166 (citation omitted).

These principles apply directly to the records at issue in this case. The requested IA records concern the misconduct of James Cosgrove, the former director of the Elizabeth Police Department, and pertain to behavior so troubling that former-Attorney General Grewal demanded Cosgrove's resignation. Pl.'s Br. at 2. In "describ[ing] his staff using derogatory[,]. . . racist and misogynistic slurs" which allegedly included "the n-word and c-word," id. at 1-2, the public interest in records reflecting not just Cosgrove's actions but the Union County Prosecutor's Office's response is exceptional. The investigated conduct emanated from the highest ranks of the department, rendering disclosure of the requested IA records all the more critical in light of the fact that transparency benefits systems of investigating and issuing discipline by "mak[ing] it more likely that systemic problems will be identified, corrected, and deterred." Conti-Cook, 22 CUNY L. Rev. at 163 (citation omitted).

The trial court, below, in granting access to the records at issue expressed a "fear that serious matters are covered up

by the secrecy with which [IA] investigations have been cloaked.” PCa27. This concern aligns squarely with decisions of this Court, which have recognized that “[w]ith broad public access to information about how state and local governments operate, citizens and the media can play a watchful role in . . . guarding against corruption and misconduct.” Burnett, 198 N.J. at 414. As evidenced by the powerful journalism that can only occur with access to IA records of law enforcement agencies, disclosure of the records at issue here will result in increased accountability, trust-building, and deterrence of misconduct.

C. The Appellate Division improperly held that IA reports are categorically exempt under the common law.

That the decision of the Appellate Division erroneously went beyond the facts of this case to broadly shield IA records under the common law in virtually all circumstances is troubling. See PCa53 (noting that the “Loigman factors”—the factors to consider in balancing a requester’s interest against an agency’s interest in confidentiality—“*militate strongly against disclosure of IA records*” (emphasis added)). The courts of this state, including this Court, have rejected any such categorical approach to the application of the common law balancing test. See N. Jersey Media Grp., 389 N.J. Super. at 539 (“[The agency] merely asserts that the State has an interest

in confidentiality because OPRA precludes the disclosure of applications. The court rejects that argument because it would render the common law balancing test completely irrelevant."); see also Home News, 144 N.J. at 456 (admonishing lower court for "not tak[ing] into account the circumstances of the information request at issue," leading to a "ruling [that] would apparently bar disclosure of cause-of-death information *in all cases*" (emphasis added)).

The Appellate Division's sweeping, generalized ruling that confidentiality concerns counsel "against disclosure of IA records," see PCa53, is the *opposite* of how courts should evaluate access to such documents under the common law. And in future situations where the public's interest is particularly acute—above and beyond the ordinary heightened interest in law enforcement misconduct—the Appellate Division's ruling will improperly hinder common law requests. That would lead to the "type of blanket prohibition [that] is not consistent with the balancing approach mandated by the common law." Home News, 144 N.J. at 456.

CONCLUSION

For the foregoing reasons, the Reporters Committee and 24 Media Organizations respectfully urge the Court to reverse the decision below and hold that the requested records are publicly available under the common law.

Dated: July 28, 2021

Respectfully submitted,

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APPENDIX A: Statement of Identity of Amici Curiae

The Reporters Committee for Freedom of the Press (the "Reporters Committee") is an unincorporated non-profit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Advance Publications, Inc. is a diversified privately-held company that operates and invests in a broad range of media, communications and technology businesses. Its operating businesses include Conde Nast's global magazine and digital brand portfolio, including titles such as Vogue, Vanity Fair, The New Yorker, Wired, and GQ, local news media companies producing newspapers and digital properties in 10 different metro areas and states, and American City Business Journals, publisher of business journals in over 40 cities.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet

content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

The Atlantic Monthly Group LLC is the publisher of *The Atlantic* and TheAtlantic.com. Founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others, *The Atlantic* continues its 160-year tradition of publishing award-winning journalism that challenges assumptions and pursues truth, covering national and international affairs, politics and public policy, business, culture, technology and related areas.

Daily News, LP publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is one of the largest papers in the country by circulation. The Daily News' website, NYDailyNews.com, receives approximately 100 million page views each month.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need

to protect legitimate state secrets) and censorship of all kinds.

First Look Institute, Inc. is a non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting. First Look Institute operates the Press Freedom Defense Fund, which provides essential legal support for journalists, news organizations, and whistleblowers who are targeted by powerful figures because they have tried to bring to light information that is in the public interest and necessary for a functioning democracy.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states and Guam – together with the iconic USA TODAY – reach an estimated digital audience of 140 million each month.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MPA - The Association of Magazine Media, (“MPA”) is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100

magazine media companies with more than 500 individual magazine brands. MPA's membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Freedom of Information Coalition is a national nonprofit, nonpartisan organization of state and regional affiliates representing 45 states and the District of Columbia. Through its programs and services and national member network, NFOIC promotes press freedom, litigation and legislative and administrative reforms that ensure open, transparent and accessible state and local governments and public institutions.

National Newspaper Association is a 2,000-member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Pensacola, FL.

The National Press Club Journalism Institute is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in

best practices, professional standards and ethical conduct to foster credibility and integrity.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

NBCUniversal Media, LLC is one of the world's leading media and entertainment companies in the development, production and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns and operates the NBC television network, the Spanish-language

television network Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming. NBC News produces the "Today" show, "NBC Nightly News with Lester Holt," "Dateline NBC" and "Meet the Press."

The New Jersey Press Association ("NJPA") is a non-profit organization incorporated in 1857 under the laws of the State of New Jersey. It has a membership composed of daily newspapers, affiliate newspapers, weekly newspapers, digital news websites, as well as corporate and non-profit associate members. NJPA is a membership association formed to advance the interests of newspapers and to increase awareness of the benefits of newspaper readership. The mission of NJPA is to help newspapers remain editorially strong, financially sound and free of outside influence. NJPA pursues these goals in every way possible, as a service both to its members and to the people of New Jersey.

With an urban vibrancy and a global perspective, **New York Public Radio** produces innovative public radio programs, podcasts, and live events that touch a passionate community of 23.4 million people monthly on air, online and in person. From its state-of-the-art studios in New York City, NYPR is reshaping radio for a new generation of listeners with groundbreaking,

award-winning programs including Radiolab, On the Media, The Takeaway, and Carnegie Hall Live, among many others. New York Public Radio includes WNYC, WQXR, WNYC Studios, Gothamist, The Jerome L. Greene Performance Space, and New Jersey Public Radio. Further information about programs, podcasts, and stations may be found at www.nypublicradio.org.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

The News Media Alliance is a nonprofit organization representing the interests of digital, mobile and print news publishers in the United States and Canada. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

Public Media NJ, Inc. ("NJ PBS") is New Jersey's public television network, reaching all 21 counties in the state. It produces the weeknight broadcast *NJ Spotlight News with Briana Vannozzi*, as well as other news and public affairs programming, reaching viewers both on-air and online. NJ PBS is a non-profit, 501(c)(3) corporation, and part of The WNET Group, which operates THIRTEEN, WLIW21, ALL ARTS, and other public media platforms.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next

generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

APPENDIX B: Unpublished Opinions

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4006-18

GANNETT SATELLITE
INFORMATION NETWORK,
LLC, d/b/a ASBURY PARK
PRESS,

Plaintiff-Respondent/
Cross-Appellant,

APPROVED FOR PUBLICATION

April 8, 2021

APPELLATE DIVISION

v.

TOWNSHIP OF NEPTUNE,

Defendant-Appellant/
Cross-Respondent.

Argued February 23, 2021 – Decided April 8, 2021

Before Judges Yannotti, Mawla, and Natali.

On appeal from the Superior Court of New Jersey, Law
Division, Monmouth County, Docket No. L-2616-17.

Jonathan F. Cohen argued the cause for appellant/cross-
respondent (Plosia Cohen, LLC, attorneys; Jonathan F.
Cohen and James L. Plosia Jr., of counsel and on the
briefs).

Thomas J. Cafferty argued the cause for
respondent/cross-appellant (Gibbons, PC, attorneys;
Thomas J. Cafferty, of counsel and on the briefs; Nomi
I. Lowy, Lauren James-Weir, and Charlotte Howells,
on the briefs).

Carl R. Woodward, III, argued the cause for amici curiae New Jersey State League of Municipalities, New Jersey Institute of Local Government Attorneys, and New Jersey School Boards Association (Carella, Byrne, Cecchi, Olstein, Brody & Agnello, PC, attorneys; Carl R. Woodward, III, on the brief).

Steven R. Cohen argued the cause for amicus curiae New Jersey State Policeman's Benevolent Association (Selikoff & Cohen, PA, attorneys; Steven R. Cohen, of counsel and on the brief).

Robert A. Honecker, Jr., argued the cause for amicus curiae Monmouth County Chiefs of Police Association (Ansell Grimm & Aaron, PC, attorneys; Robert A. Honecker, Jr., of counsel and on the brief).

David L. Disler argued the cause for amicus curiae New Jersey State Association of Chiefs of Police (Porzio, Bromberg & Newman, PC, attorneys; Vito A. Gagliardi, Jr., of counsel; David L. Disler, on the brief).

Raymond R. Chance, III, Assistant Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Gurbir S. Grewal, Attorney General, attorney; Raymond R. Chance, III, of counsel; Suzanne Davies, Deputy Attorney General, on the brief).

CJ Griffin argued the cause for amici curiae American Civil Liberties Union of New Jersey, Association of Criminal Defense Lawyers of New Jersey, Libertarians for Transparent Government, Latino Leadership Alliance of New Jersey, and New Jersey Foundation for Open Government (Pashman Stein Walder Hayden, PC, and American Civil Liberties Union of New Jersey Foundation, attorneys; CJ Griffin, of counsel and on the brief).

The opinion of the court was delivered by
YANNOTTI, P.J.A.D.

In May 2017, Gannett Satellite Information Network, LLC (Gannett), an entity that publishes the Asbury Park Press, submitted a request to the Township of Neptune seeking copies of the Internal Affairs (IA) file of Philip Seidle, who had been a Sergeant in the Township's Police Department. Gannett sought access to the records pursuant to the common law and the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. The Township denied the request.

Gannett then commenced this action to compel the Township to disclose the records. The trial court determined that the records were exempt from disclosure under OPRA, but Gannett was entitled to the records under the common law. The court also awarded Gannett attorney's fees. The Township appeals and Gannett cross appeals from the trial court's judgment.

For the following reasons, we conclude the trial court correctly found that Gannett was not entitled to access to Seidle's IA file pursuant to OPRA, but disclosure was required under the common law right of access. We also conclude the trial court erred in awarding of attorney's fees to Gannett. Therefore, we affirm in part and reverse in part on the appeal, and affirm on the cross appeal.

I.

On June 16, 2015, Seidle shot and killed his ex-wife Tamara near a heavily populated area of Asbury Park, using his service revolver, in the presence of their seven-year-old daughter. On March 10, 2016, Seidle pled guilty to aggravated manslaughter. He was later sentenced to a thirty-year prison term.

The Monmouth County Prosecutor's Office (MCPO) investigated the response of law enforcement to Tamara's death and on June 30, 2016, issued a report, which detailed its findings. In the report, the MCPO recounted the Seidles' history of domestic violence.

The MCPO described in detail seven specific incidents of domestic violence reported to the Neptune Township Police Department (NTPD) involving Seidle and Tamara that occurred between 1994 and 2015. The MCPO also described an additional domestic violence incident was reported to the Tinton Falls Police Department in 2012.

The MCPO's report also noted that seven calls had been made to the NTPD concerning the Seidles' child custody issues. In addition, Seidle or Tamara made seven "traditional" calls to the NTPD but they "did not touch in any way on their relationship"

The MCPO stated that its investigation had "disclosed a critical flaw in the domestic violence policies and procedures that currently exist statewide." It found "domestic violence incidents" that do not result in the "filing of criminal charges or a temporary restraining order may still call into question the fitness-for-duty of a police officer."

The MCPO added that, "a police officer who has numerous [IA] complaints - either due to internal departmental policy violations or from complaints by citizens - raises a red flag which may warrant a fitness-for-duty evaluation by the agency." To address these concerns, the MCPO implemented an Early Warning System for all law enforcement agencies in Monmouth County.

By letter dated May 24, 2017, Gannett submitted a request to the Township for access to Seidle's IA file pursuant to OPRA and the common law. The Township denied the request. The Township provided Gannett a Vaughn¹ index describing the documents withheld, which related to twenty-eight separate incidents involving Seidle and his ex-wife.

¹ Vaughn v. Rosen, 484 F.2d 820, 826–28 (D.C. Cir. 1973).

On July 19, 2017, Gannett filed a verified complaint claiming that the Township's failure to provide it with access to Seidle's IA file was a violation of OPRA and the common law. The trial court entered an order requiring the Township to show cause why the relief sought in the complaint should not be granted. Thereafter, the Township filed a motion to dismiss the complaint.

The judge heard oral argument on the motion and ordered the Township to submit the records to the court for an in-camera review. By letter dated December 8, 2017, the attorney for the Township informed the court that Seidle opposed public disclosure of his IA file. The attorney stated that Seidle believed disclosure of the file would be an invasion of his privacy and prejudice him in the wrongful death action his children and Tamara's estate had brought against him.

Gannett objected to the court's consideration of the December 8, 2017 letter, and the judge conducted a telephone conference, in which she referred to the MCPO's report and an article that appeared in the Asbury Park Press on January 22, 2018, titled "Philip Seidle, Killer Cop: Ex-Wife 'did not become a victim until I killed her.'" The author of the article obtained information from several sources, including police reports, the MCPO's report, public court documents, and letters and records provided by Seidle.

On August 1, 2018, the judge filed a written opinion on Gannett's complaint. The judge noted that the file contained several types of documents, including IA investigative reports, citizen complaints, police and incident reports, fitness-for-duty evaluations, disciplinary notices and decisions, domestic violence records, and newspaper articles. The documents were dated from March 27, 1994, through May 10, 2016.

The judge stated that all but six of the twenty-eight incidents reflected in the Township's Vaughn index had been publicly disclosed, and facts related to the domestic violence incidents were disclosed in the MCPO's report. The judge noted, however, that the IA file "provides far more detail about the previously disclosed events" than the MCPO's report or the Asbury Park Press article.

The judge determined that the records were exempt from disclosure under OPRA. The judge noted that the Attorney General's Internal Affairs Policy and Procedures (IAPP) governed IA investigations by local law enforcement agencies. The IAPP, which was first issued in 1991 and thereafter amended, provides that records pertaining to such investigations are confidential.

The judge noted that N.J.S.A. 40A:14-181 required all law enforcement agencies to adopt and implement guidelines consistent with the IAPP, thereby bestowing "the imprimatur of statutory authority on the IAPP." The judge

concluded that "because the confidentiality provisions of the IAPP had been codified by statute," the records are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-9, which provides that OPRA shall not abrogate any grant of confidentiality otherwise established by statute.

The judge then considered whether Gannett was entitled to access to the entire IA file under the common law right of access to public records and conducted the balancing required by Loigman v. Kimmelman, 102 N.J. 98, 113 (1986). The judge stated that facts concerning most of the incidents recorded in Seidle's IA file had already been disclosed by the MCPO's report or the Asbury Park Press article and that denying access "would be tantamount to closing the barn door after the horse has bolted."

The judge recognized that there were important public policy considerations favoring confidentiality of the records but found that the unique circumstances of the case weighed in favor of disclosure. Those facts included the "widespread media attention" received by the case and that "[r]umors regarding the Seidles' history of domestic violence resulted in a public outcry by citizens who questioned how such a tragedy could have occurred at the hands of a police officer."

The judge noted that "Seidle voluntarily provided information from his [IA] file to the [Asbury Park Press] and waived any claim that the information is private." Furthermore, "[t]here [was] nothing about the nature of the [IA] incidents or the manner in which they were reported, that would lead [the] court to conclude that disclosure of part or all of the records would deter citizens or fellow officers from reporting police misconduct." The judge stated that the potential harm from disclosure was minimal because much of the information was already public and that any harm from disclosure could be mitigated by redactions that would protect the identity of other officers, complainants, or witnesses.

The judge further found that the public was "entitled to answers regarding how an officer with twenty-one . . . police involved reports of conflict with his wife, could remain on the police force, armed with a weapon that was used to murder his ex-wife." The judge stated that the public had "a right to inquire whether existing policies were in place to adequately address officers at risk or whether recent reforms or policies [had] gone far enough." The judge found that because Seidle had already pleaded guilty and would "remain in prison for decades, disclosure [would] not interfere with any investigative or disciplinary proceedings."

The judge also considered whether Gannett was entitled to the award of attorney's fees. The judge found that were it not for the court's decision, the records would not be disclosed. The judge decided, however, that because Gannett did not prevail on the OPRA claim, only a partial fee award was appropriate. The judge stated that the parties should confer and attempt to resolve the reasonable attorney's fees that should be awarded to Gannett.

The judge memorialized her decision in an order filed on August 1, 2018. Thereafter, the court granted motions by the Monmouth County Chiefs of Police Association (MCCPA) and the New Jersey State Association of Chiefs of Police (NJSACP) for leave to participate in the case as amici curiae.

On August 16, 2018, the Township filed a motion for reconsideration of the August 1, 2018 order. The judge heard oral argument and on May 13, 2019, filed an order and written opinion denying the Township's motion for reconsideration and awarding Gannett \$85,665.13 in attorney's fees and \$472.99 in costs. The judge stayed her orders pending appeal. The Township appeals and Gannett cross appeals from the court's August 1, 2018, and August 16, 2018, orders.

We granted motions for leave to appear as amici curiae by: New Jersey State League of Municipalities, New Jersey Institute of Local Government

Attorneys and New Jersey School Boards Association (collectively, the NJLM); the New Jersey State Policeman's Benevolent Association (NJSPBA); the Attorney General of New Jersey; and American Civil Liberties Union of New Jersey, Association of Criminal Defense Lawyers of New Jersey, Libertarians for Transparent Government, Latino Leadership Alliance of New Jersey and New Jersey Foundation for Open Government (collectively, the ACLU-NJ). The MCCPA and NJSACP also have participated in the appeal as amici curiae.

On November 13, 2019, the Attorney General informed the court that, pursuant to his authority under the IAPP, he intended to release Seidle's IA file, with certain redactions. On December 2, 2020, the Attorney General notified the court that he had provided the redacted IA file to all parties and amici curiae and that he would be making the records available to the public that same day.

II.

On appeal, the Township argues: (1) the trial court misapplied the common law balancing test by ruling that the public was entitled to Seidle's IA file; (2) the court erred by awarding Gannett counsel fees under the common law; and (3) the hourly fees of Gannett's attorneys should be reduced since they are "out-of-step" with fees commonly awarded in matters involving requests for public records.

In responding to the Township's appeal and in support of its cross appeal, Gannett argues: (1) the trial court correctly ruled that it is entitled to the requested records under the common law; (2) it is entitled to an award of attorney's fees under the common law; (3) the court did not abuse its discretion in the amount of attorney's fees awarded; (4) the court did not err by denying the Township's motion for reconsideration; and (5) it was entitled to the records under OPRA.

The Attorney General argues: (1) law enforcement IA records are not accessible under OPRA and can only be disclosed, if at all, pursuant to court order; and (2) attorney's fees are not available in actions brought under the common law right of access. The Attorney General does not take a position on whether the trial court erred in ordering release of Seidle's IA file under the common law.

The MCCPA contends: (1) the trial court did not consider relevant factors in concluding that Gannett has a common law right of access to Seidle's IA records; and (2) the MCPO's internal review did not constitute a definitive executive act authorizing disclosure of all IA reports related to Seidle.

In addition, the NJLM argues: (1) there is no authority for the award of attorney's fees under the common law right of access to public records; (2) a

custodian of records cannot be expected to assume the function of weighing the factors relevant under the common law in determining whether to release an IA file especially where there is no right of access to these records under OPRA; (3) the court erred in balancing Gannett's interest in access against the Township's interest in confidentiality; and (4) the counsel fees awarded were neither reasonable nor appropriate.

The NJSACP contends: (1) the trial court failed to consider the State-wide ramifications of publicly releasing IA documents to a newspaper and the effect such disclosure will have on future IA investigations; and (2) the trial court failed to properly consider the Attorney General's IAPP as part of the balancing test for the common law right of access to public records.

Furthermore, the NJSPBA contends: (1) the trial court correctly denied Gannett access to the requested documents under OPRA; and (2) the court erred by granting Gannett access to the documents under the common law.

Finally, the ACLU-NJ argues: (1) public access to IA files greatly benefits the public and police officers; (2) the Attorney General's IAPP does not exempt documents from access under OPRA; (3) the trial court correctly concluded that access to Seidle's IA file should be granted under the common

law; and (4) the trial court correctly determined that Gannett was entitled to attorney's fees under the common law.

III.

We first consider whether the issues raised on the appeal and cross appeal are moot in light of the Attorney General's release of Seidle's IA file. We conclude that the issues raised are not moot.

Mootness is a threshold "determination rooted in the notion that judicial power is to be exercised only when a party is immediately threatened with harm." Betancourt v. Trinitas Hosp., 415 N.J. Super. 301, 311 (App. Div. 2010) (citing Jackson v. Dep't of Corr., 335 N.J. Super. 227, 231 (App. Div. 2000)). "An issue is 'moot' when the decision sought in the matter, when rendered, can have no practical effect on the existing controversy." Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006) (quoting N.Y. Susquehanna & W. Ry. Corp. v. State Dep't of Treasury, Div. of Tax'n, 6 N.J. Tax 575, 582 (Tax Ct. 1984)).

In this case, the trial court awarded Gannett attorney's fees because it prevailed on its claim under the common law right of access. The Attorney General's release of Seidle's IA file does not affect the order awarding Gannett attorney's fees. Moreover, the issue of whether Gannett is entitled to access to

the records under the common law is not moot because that finding was the basis for the award of attorney's fees. In addition, the issue of whether Gannett is entitled to access to the records under OPRA is not moot because Gannett contends it is entitled to the award of counsel fees under either OPRA or the common law. Therefore, we will address the issues raised in the appeal and cross appeal.

IV.

Gannett argues that the trial court erred by finding it was not entitled to access to the IA file under OPRA. "The trial court's determinations with respect to the applicability of OPRA are legal conclusions subject to de novo review." O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 379 (App. Div. 2009).

OPRA generally provides that the public is entitled to access to certain government records. N.J.S.A. 47:1A-1. However, OPRA expressly provides that "personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access" except in certain limited circumstances. N.J.S.A. 47:1A-10. One of the limited exceptions is when such records are "required to be disclosed by another law." Ibid.

OPRA also provides that the provisions of N.J.S.A. 47:1A-5, which governs access to government records, "shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to . . . any other statute." N.J.S.A. 47:1A-9(a). In addition, OPRA states that nothing in N.J.S.A. 47:1A-5 shall

abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.

[N.J.S.A. 47:1A-9(b).]

In Fraternal Order of Police, Newark Lodge Number 12 v. City of Newark, the plaintiff challenged an ordinance that permitted the City of Newark to create a civilian oversight board that was intended "to provide a greater role for civilian participation in the review of police internal investigations and in the resolution of civilian complaints." 244 N.J. 75, 80 (2020). The Court held that the creation of the board was permitted by law and that the board could investigate citizen complaints of police misconduct. Id. at 80-81.

The Court held, however, that the board could not "exercise its investigatory powers when a concurrent investigation [was being] conducted by the Newark Police Department's [IA] unit." Id. at 81. The Court stated IA

investigations are "carefully regulated by law" and must be conducted under the supervision of the police chief and comply with procedures established by Newark's Public Safety Director and the IAPP. Ibid. The Court concluded that concurrent investigations would "conflict with specific requirements imposed on IA investigations and their results." Ibid.

In reaching that decision, the Court considered the IAPP. The Court noted that the Attorney General was authorized under N.J.S.A. 52:17B-4(d), "to adopt rules and regulations for the efficiency of the Department of Law and Public Safety's work and administration" and that he exercised that authority in 1991 when issuing the IAPP. Id. at 100. Among the mandatory provisions of the IAPP, is a requirement that "each agency establish and maintain a confidential process." Id. at 101. In 1996, the Legislature enacted N.J.S.A. 40A:14-181, which required all law enforcement agencies in the State to implement guidelines consistent with the IAPP. Ibid.

The Court found that "[s]ection 181 effectively made the . . . IAPP required policy for all municipal law enforcement agencies in New Jersey." Ibid. It concluded that "the Legislature plainly intended that the Attorney General's standards and protocols be followed uniformly by law enforcement agencies" Id. at 103.

The Court further found that N.J.S.A. 40A:14-181 and N.J.S.A. 40A:14-118, which governs the creation of a police force and the powers and duties of the police chief, "together, create an IA function that is, in the aspects discussed, rigidly regulated." Id. at 105. The Court explained that:

The Legislature, when requiring all local law enforcement agencies to adopt the Attorney General's IAPP, had to have been cognizant of the IAPP's patent intent to . . . strictly preserve the confidentiality of the IA process for reasons that the Attorney General has explained. In argument to this Court, the Attorney General emphasizes the premium placed on confidentiality during the investigatory process, finding it necessary to encourage and protect those who come forward with complaints or evidence of police misconduct or problematic behavior Although that policy is not ours to determine, those guiding principles have been plain on the face of the IAPP since its first iteration.

The Attorney General's protocols allow for careful factual development and protective procedures designed to ensure confidentiality of information collected and thus to encourage people to come forward and cooperate, sure of that confidentiality It is a key feature insisted upon in the [IAPP]. And the Legislature has required law enforcement agencies . . . to implement it as the Attorney General has directed. N.J.S.A. 40A:14-181. There is no flexibility on that point.

Thus, under present law, the IA process must remain a self-contained, confidential process as designed with respect to the personnel selected and trained to perform such investigations, responsive to

the chief who has ultimate responsibility for the IA operation, and separated on a reporting basis from others on the force. . . . The process and the information gathered in such investigations is subject to strict confidentiality requirements, as currently mandated by the [IAPP], with which local law enforcement agencies are compelled by section 181 to comply.

[Id. at 105-07.]

The Court stated that an investigation by a municipal civilian review board during an ongoing IA investigation would "interfere[] with the intended purpose of section 181's and the IAPP's requirements." Id. at 107.

After Fraternal Order of Police was decided, a panel of this court issued its opinion in Libertarians for Transparent Government v. Cumberland County, 465 N.J. Super. 11 (App. Div. 2020), certif. granted, 245 N.J. 38 (2021). In that case, a corrections officer was charged in a Preliminary Notice of Disciplinary Action (PNDA) with misconduct related to improper fraternization with inmates. Id. at 13.

After the officer cooperated in an investigation that led to charges against four other officers, he was allowed to retire in good standing pursuant to a settlement agreement and the disciplinary charges against him were dismissed. Id. at 14. The plaintiff submitted a request to Cumberland County for a copy of the settlement agreement claiming it was a government record that was subject

to disclosure under OPRA. Ibid. The County denied access to the document and the plaintiff brought an OPRA action in the Superior Court seeking access to the document. Id. at 14-15. The trial court found that the plaintiff was entitled to access under OPRA and ordered the County to release the settlement agreement with redactions. Id. at 15. The appellate panel reversed. Id. at 13.

Relying on the language in N.J.S.A. 47:1A-10, the panel noted that "a public employee's disciplinary records are personnel records not subject to public access under [OPRA]." Id. at 20. The court held that "[s]ettlement agreements by public agencies to resolve internal disciplinary charges" also are exempt from disclosure under N.J.S.A. 47:1A-10. Id. at 23. The court remanded the matter to the trial court to determine whether the settlement agreement should be released under the common law right of access to public records. Id. at 30-31.

Thereafter, a panel of this court rendered its decision in In re Attorney General Law Enforcement Directive Numbers 2020-05 and 2020-6, 465 N.J. Super. 111 (App. Div.), certif. granted, 244 N.J. 447 (2020). In that case, several law enforcement agencies challenged the Attorney General's directives, which required, among other things, every law enforcement agency in the State to publish, each calendar year, "a synopsis of all complaints in which an officer

received final discipline of termination, demotion, or a suspension of more than five days, including the name of the officer, a summary of the misconduct, and the sanction imposed." Id. at 124.

Among other contentions, the appellant law enforcement agencies argued that the Attorney General did not have authority to issue the Directives because they were in conflict with N.J.S.A. 47:1A-10, the exemption under OPRA for personnel records. Id. at 125. The appellants contended that the Attorney General lacked the authority to amend the IAPP "so as to attach an officer's name to the summary descriptions of completed discipline that local law enforcement agencies were ordered to publish annually in the 2019 version of the IAPP." Id. at 139.

The court noted that "this [was] not an OPRA case." Ibid. The court commented, however, that "[w]ere this an OPRA case, with third parties seeking the information the Attorney General has determined to release in Directives 2020-5 and 2020-6, those third parties would not be entitled to the information under OPRA." Id. at 139-40. The court referenced its recent decision in Libertarians where it held that a public employee's internal disciplinary records were personnel records exempt from disclosure under N.J.S.A. 47:1A-10. Id. at 140.

The court also recognized that the IAPP provides that "[p]ersonnel records are separate and distinct from [IA] investigation records, and [IA] investigative reports shall never be placed in personnel records, nor shall personnel records be comingled with [IA] files." Id. at 143 n.3 (first alteration in original). The court stated that the Attorney General's "characterization of the records [in the IAPP was] not controlling for purposes of OPRA." Ibid. It concluded that "[t]he disciplinary information the Attorney General has ordered made public in the Directives clearly comes under the heading of personnel records for purposes of OPRA." Ibid.

In addition, the court considered whether the Attorney General had the authority to direct that the information in the IA files be made public. Id. at 140-48. The court stated that N.J.S.A. 47:1A-10 "represents the State's public policy to protect the personnel records of public employees from disclosure[.]" id. at 142, but recognized that the statute permits the release of such records "when required to be disclosed . . . by another law." Id. at 143 (quoting N.J.S.A. 47:1A-10).

The court explained that, pursuant to N.J.S.A. 52:17B-98, "[t]he Legislature ha[d] designated the Attorney General as New Jersey's 'chief law enforcement officer,' responsible 'for the general supervision of criminal justice'

in the State." Id. at 143-44. Furthermore, under N.J.S.A. 52:17B-4(d), the Legislature "charged [the Attorney General] with 'formulat[ing] and adopt[ing] rules and regulations for the efficient conduct of the work and general administration of the [D]epartment.'" Id. at 144 (all but first alterations in original).

The court determined that the Attorney General had exercised that authority by issuing the IAPP and that N.J.S.A. 40A:14-181 "effectively made" the IAPP "required policy for all municipal law enforcement agencies in New Jersey." Ibid. (quoting Fraternal Order of Police, 244 N.J. at 101). The court found that the authority granted to the Attorney General by the Legislature "in those several statutes is 'another law' that permits the Attorney General to . . . order[] the publication of the names of New Jersey law enforcement officers sanctioned for serious disciplinary violations." Ibid. The court therefore held that the Directives did not violate N.J.S.A. 47:1A-10. Ibid.

The court also rejected the appellants' argument that the Attorney General could not abrogate N.J.S.A. 47:1A-10 by issuing the Directives. Id. at 144-45. It found the "Attorney General directives have the force of law for police entities in New Jersey because the Legislature has deemed it to be so." Id. at 145. The court stated that "[n]owhere is that clearer than in the case of the IAPP, which

the Legislature has expressly required every law enforcement agency in the State follow by 'adopt[ing] and implement[ing] guidelines' consistent with it." Ibid. (second and third alterations in the original) (quoting N.J.S.A. 40A:14-181).

It noted that "since the 2000 version of the IAPP, . . . every iteration of the IAPP has expressly provided that the information and records of an internal investigation could be released at the direction of the Attorney General, an authority the Legislature has never acted to limit or curtail." Id. at 146. After addressing several other arguments raised by the appellants, the court rejected the facial challenge to the Directives. Id. at 148-62.

Accordingly, we conclude, consistent with Libertarians and In re AG Directives, that the IA records sought by Gannett are personnel records under OPRA, which are exempt from disclosure under N.J.S.A. 47:1A-10. We also conclude, consistent with Fraternal Order of Police and In re AG Directives, that the IAPP has the force of law and pursuant to N.J.S.A. 47:1A-9, OPRA may not abrogate the IAPP's confidentiality provisions.

V.

The Township argues that the trial court erred by finding Gannett is entitled to Seidle's IA file under the common law right of access to public records. A decision by the trial court to order release of public records under

the common law is reviewed de novo. Bozzi v. Borough of Roselle Park, 462 N.J. Super. 415, 424-25 (App. Div. 2020).

To prevail on a claim for access to a public record under the common law, the party seeking access must establish that: (1) the document is a public record under the common law; (2) the party has an "interest in the subject matter" of the record; and (3) a balancing of the party's right to access and the State's interest in non-disclosure favors access. In re N.J. Firemen's Ass'n Obligation, 230 N.J. 258, 281 (2017) (citing Keddie v. Rutgers, 148 N.J. 36, 50 (1997)).

Here, the trial court correctly determined that Gannett had satisfied the first two elements of the claim under the common law. The court then addressed the third element. In Loigman, the Court identified six nonexclusive factors to be considered in determining whether a party has established the third element of the claim:

- (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government;
- (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed;
- (3) the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure;
- (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers;
- (5) whether any findings of public misconduct have been insufficiently corrected by

remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.

[102 N.J. at 113.]

The judge found that disclosure of Seidle's IA file will not discourage citizens and officers from reporting information, or "chill" agency self-evaluation, program improvement, or other decision making. In her opinion, the judge wrote:

The murder of Tamara Seidle, the mother of nine children[,] received widespread media attention. Rumors regarding the Seidles' history of domestic violence resulted in a public outcry by citizens who questioned how such a tragedy could have occurred at the hands of a police officer. These unique facts support [Gannett's] argument that its interest in disclosure outweighs the public's interest in the confidentiality of Seidle's records.

The judge also stated that there were "important public policy considerations" that weigh in favor of maintaining the confidentiality of IA records. The judge noted that the Township had argued "disclosure would discourage citizens from reporting misconduct and obstruct the purpose of the IAPP."

The judge stated that others had asserted disclosure would have a chilling effect on the willingness of an officer's colleagues to report errors or misconduct. The judge also noted that others had suggested disclosure of IA files would erode public confidence in the police, and that criminal defendants could gain access to these records for use in escaping responsibility for their own actions or bringing lawsuits against the police.

The judge found that "[d]espite these compelling reasons," she could not ignore the fact that many of the incidents recorded in Seidle's IA file "have already been disclosed to the public." The judge noted that the MCPO had released information in the file, and that Seidle had voluntarily provided information to the Asbury Park Press from the file, thereby waiving any privacy claim regarding the information. The judge added that:

[t]here is nothing about the nature of the [IA] incidents or the manner in which they were reported, that would lead [the] court to conclude that disclosure of part or all of the records would deter citizens or fellow officers from reporting police misconduct. To the extent that an [IA] investigation was prompted by a citizen complaint, there is no indication that the citizen came forward on the condition that his/her identity would not be revealed. In addition, none of the [IA] incidents were initiated by an officer who reported Seidle's alleged misconduct on the condition that his/her identity be kept secret. It is fair to say that some incidents, several of which were disclosed in the Asbury Park Press article, were initiated by supervisors

after performance issues were brought to their attention. To the extent that the identities of officers who either investigated incidents or provided information is included in the records, this information can be redacted to protect the integrity of, and relationships among, officers in the department.

To be sure, a blanket policy favoring disclosure would chill the ability of any particular police agency to investigate complaints, engage in "self-evaluation" and maintain the public's confidence in law enforcement. However, the likely harm that could result from disclosure of these records is minimal because much of the information included in the file is already in in the public domain. Any harm can be mitigated by redacting information that could reveal the identities of witnesses or complainants. With appropriate redactions, the public's interest in confidentiality does not outweigh the public's interest in disclosure.

On appeal, the Township argues that the trial court misapplied the Loigman balancing test. The Township asserts that public disclosure of IA files will harm IA investigations by revealing confidential "techniques and methodology." It contends disclosure will have a "chilling effect on civilian and law enforcement witnesses in future cases."

The Township further argues that affirmance of the trial court's judgment will have a "ripple effect" on law enforcement agencies throughout the State and open the "floodgates" to disclosures that will have a destructive effect on the IA process. It contends the IA files contain evaluative information that shows how

law enforcement officials make policy decisions on discipline and other actions arising from the alleged misconduct of an officer, and the confidentiality of such information is at the heart of the protections afforded to IA under the IAPP.

In addition, the Township argues that the public disclosure of "kernels" of information in Seidle's IA file is not a basis for the "wholesale disclosure of the records themselves." The Township asserts the trial court was "apparently unconcerned" that the release of Seidle's IA file could interfere with the ability of the United States District Court to manage discovery in the pending civil litigation against Seidle. Finally, the Township contends the MCPO's report did not reveal significant information about Seidle's disciplinary record. It claims that under the IAPP, some of the records either belong to Seidle or are unrelated to the murder of his ex-wife.

Here, the judge correctly recognized there are important public policies that are served by maintaining the confidentiality of IA files.² The judge noted

² We note that the IAPP issued in 1991 provided that "[t]he progress of [IA] investigations and all supporting materials are considered confidential information" that may only be released by a "police executive or his designee . . ." The version of the IAPP issued in December 2019 states that IA records are confidential and they may only be released: (1) to the officer and hearing officer in a related disciplinary proceeding; (2) to the attorney representing the officer, agency, or governing body in a lawsuit arising from an incident covered by the IA investigation; (3) "upon the request or at the direction of the County

that in general, disclosure of IA files would have a chilling effect on the ability of a law enforcement agency to conduct IA investigations and conduct self-critical evaluations. The judge also noted that generally, disclosure of IA files would discourage citizens and fellow officers from reporting police misconduct, which would undermine the purposes of the IAPP and also undermine public confidence in the police. The judge stated that these were "compelling reasons" to bar access to IA files.

The judge found, however, that that the unique circumstances of this matter tipped the balance in favor of disclosure. As the judge noted, the records relate to a horrific crime, in which an off-duty officer shot and killed his wife, with his service revolver, in the presence of their young child. The public has a strong interest in knowing how such an event could have occurred.

Moreover, as the judge noted, Seidle's IA file includes records pertaining to twenty-eight interactions with the NTPD by Seidle or his ex-wife. In its report, the MCPO disclosed details on at least eight reported domestic violence incidents, as well as facts regarding Seidle's disputes with other officers, his fitness-for-duty evaluations, psychological treatment, and disciplinary actions.

Prosecutor or Attorney General"; and (4) upon a court order. The IAPP also states a "law enforcement executive may authorize access to a particular [IA] file or record for good cause."

In addition, the article about Tamara's killing in the Asbury Park Press, which was written by Andrew Ford, included information from various sources, including the MCPO's report. The article revealed three complaints in which citizens alleged Seidle used excessive force, and evidence from a dismissed federal lawsuit, in which the Township's Chief of Police had testified concerning Seidle's IA investigations. Furthermore, Seidle had spoken to Ford about killing his ex-wife, and wrote him a long letter and provided him with, among other things, information from his IA file.

The judge also explained that, in this particular matter, disclosure would not discourage citizens or fellow officers from reporting police misconduct because there was no indication that any complaint was provided by a person or officer on condition of anonymity. The judge stated that any harm resulting from disclosure could be addressed by redactions of the names of witnesses, or officers who investigated the complaints.

We are convinced the trial court thoroughly considered the relevant Loigman factors and the record supports the court's conclusion that on balance, those factors weigh in favor of disclosure of Seidle's IA file. We reject the argument advanced by the Township and several amici that the MCPO's disclosure of some information from the file does not justify disclosure of the

entire file. The record supports the judge's finding that because many of the facts recorded in the IA file had been disclosed to the public, there was little, if any, justification to withhold disclosure of the other records.

We also reject the Township's contention that the trial court was apparently "unconcerned" that disclosure of Seidle's IA file would affect pre-trial discovery in the civil litigation against Seidle. Here, the trial court was charged with deciding whether Gannett was entitled to access to the records under the common law. The court carried out that responsibility and there is nothing in the record indicating the court's decision would have a significant adverse impact upon any related civil litigation.

In addition, we reject the Township's contention that disclosure of Seidle's entire IA file was not warranted because some of the information in that file had nothing to do with Seidle's relationship with his wife. As the judge's opinion reflects, Seidle's entire IA file, including other interactions with citizens and fellow officers, was relevant in assessing why the NTPD allowed Seidle to remain on the force with a service weapon.

As noted previously, the NJSACP contends the trial court failed to consider the State-wide ramifications of publicly releasing IA documents to a newspaper and the effect such disclosure will have on future IA investigations.

As we have explained, the judge carefully considered the effect disclosure of an IA file could have upon the agency's functions and other IA investigations.

The judge concluded, however, based on the specific facts and circumstances of this matter, that disclosure was required under the common law. Because the judge's decision was limited to the facts of this case, we do not share the NJSACP's concern that the trial court's decision will have an adverse impact upon IA investigations generally.

We have considered the remaining arguments of the Township and the amici on this issue and conclude that they lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

VI.

The Township argues that the trial court erred by awarding Gannett counsel fees. The Township contends attorney's fees should not be awarded under the common law right of access to public records. As noted, the Attorney General and other amici join in this argument.

Whether the trial court correctly found that attorney's fees can be awarded in a case in which a party seeks access to public records under the common law is a question of law that we review de novo on appeal. Mejia v. Quest Diagnostics, Inc. 241 N.J. 360, 370-71 (2020). For the following reasons, we

conclude the trial court erred as a matter of law in awarding Gannett counsel fees.

In Mason v. City of Hoboken, 196 N.J. 51, 57 (2008), the Court considered whether the plaintiff was entitled to attorney's fees when a government agency voluntarily disclosed records after the plaintiff filed a lawsuit claiming a right to access to the records under OPRA and the common law. The Court adopted the "catalyst theory" and held that requestors are "entitled to attorney's fees under OPRA . . . when they can demonstrate: (1) 'a factual causal nexus between [the] litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by [the requestor] had a basis in law.'" Id. at 76 (quoting Singer v. State, 95 N.J. 487, 494 (1984)).

The Court then commented that "[t]he parties ha[d] not addressed at length whether the question of attorney's fees merits different treatment in an action brought under the common law[,]" and that "[a]bsent an apparent, theoretical basis for such a distinction, we conclude that the catalyst theory applies to common law suits as well." Id. at 79. The Court found that the "defendants ha[d] carried their burden of proving that [the] plaintiff's lawsuit was not the catalyst for their release of records." Id. at 80. Therefore, the "plaintiff [was] not a prevailing party entitled to attorney's fees." Ibid.

A few years after Mason was decided, a panel of this court stated that in Mason, the Supreme Court "appear[ed] to accept, in the absence of briefing and argument to the contrary, that attorney's fees may be awarded in an action based on common law right to disclosure of public records." K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 357 n.3 (App. Div. 2011). The panel did not address the issue because it concluded fees were available to the plaintiff under OPRA. Id. at 357 n.3, 364-65.

More recently, in Stop & Shop Supermarket Co. v. County of Bergen, 450 N.J. Super. 286, 290-91, 293 (App. Div. 2017), the panel found the plaintiff was not entitled to attorney's fees because the county had provided responsive documents before the plaintiff filed litigation alleging violations of OPRA and the common law. The panel quoted from Mason, 196 N.J. at 76, and noted the requirements for awarding fees under the catalyst theory. Id. at 292. The court then commented that "[u]nder the common law right of access, litigants must make the same showing." Ibid. (citing Mason, 196 N.J. at 79). The court found that the lawsuit was not the catalyst for the plaintiff's receipt of the requested records. Id. at 293.

In this matter, the parties and amici disagree as to whether the Court's comment in Mason represents dicta or a definitive holding that attorney's fees

are available to a plaintiff that successfully pursues a common law right of access. We are required, however, to follow the decisions of the Supreme Court, and in Mason the Court stated that in a case involving the common law right of access, attorneys' fees may be awarded under the catalyst theory unless there is "an apparent, theoretical basis" for declining to apply that theory. Mason, 196 N.J. at 79.

We are convinced, however, that an award of attorney's fees was not warranted in this case. Here, the Township denied Gannett's request for disclosure of Seidle's IA file. As stated previously, an officer's IA file is not a record to which the public is entitled to access under OPRA. Moreover, in denying access to the file, the Township acted in accordance with the IAPP, which provides that IA files are confidential and can only be released to the public in certain limited circumstances.

Furthermore, there is no statutory right to an award of attorney's fees to a party who successfully pursues a claim under the common law right of access to public records. The Supreme Court in Mason commented that attorney's fees may be awarded under the common law, but the Court has not held there is an unqualified right to such an award. Thus, the award of attorney's fees under the

common law is committed to the sound discretion of the trial court, after consideration of all relevant factors.

In this case, the Township advanced good faith arguments in support of its contention that Gannett should not be granted access to the records under the common law. The trial court found a right of access but only after a careful examination of the relevant factors under Loigman. There is no reason to assume that Gannett is not able to bear the cost and expense of pursuing this lawsuit, and the denial of fees under the particular facts and circumstances presented, would not dissuade other litigants from pursuing such claims.

Moreover, we are not convinced Gannett is entitled to an award of fees under the catalyst theory. In Mason, our Supreme Court observed that the theory is premised on the recognition that, in certain circumstances, a "plaintiff's lawsuit acted as a catalyst that prompted defendant to take an action and correct an unlawful practice." 196 N.J. at 74 (quoting Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410, (App. Div. 2000)).

The Attorney General was not a defendant in Gannett's lawsuit, and he was not ordered to provide the IA file to Gannett. As we have explained, the trial court ordered the Township to provide Gannett with access to Seidle's IA

file; however, the court stayed its orders pending appeal and the Township never provided the records to Gannett.

Rather, while this appeal and cross appeal were pending, the Attorney General provided the records to the public pursuant to the IAPP, in the exercise of his separate and independent authority as chief law enforcement officer in this State. There is no indication that the Attorney General acted to correct what he perceived to be an unlawful practice.

Indeed, as noted previously, the Attorney General has taken no position on whether Gannett was entitled to access to Seidle's file under the common law. It appears the Attorney General ordered the release of the file because he decided that disclosure was warranted in the public interest. We therefore conclude that, under these circumstances, Gannett was not entitled to an award of attorney's fees for this action.

Affirmed in part and reversed in part on the appeal; and affirmed on the cross appeal.

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


CLERK OF THE APPELLATE DIVISION