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Strong, Cheap, and Ready Access to Body-worn Camera Footage under New Jersey's Open Public Records Act (OPRA) Will Promote Police Accountability and Transparency
Nicholas Delaney*

I. Introduction

Consider the following hypothetical: Officer Owen equipped with a body-worn camera (BWC) is in hot pursuit of Suspect Sam, allegedly eluding after attempting to steal an automobile. While fleeing, Sam loses control of his SUV and strikes a guardrail. Three more officers arrive at the scene. According to Owen, Sam peels out his tires and fills the road with smoke in an attempt to dislodge Sam's vehicle from the guardrail. Gaining a moment of traction, Sam's vehicle lunges toward the nearby officers. The four officers discharge thirteen rounds toward Sam. Sam is black.¹ Suppose further that Owen's department is under investigation for discriminatory use of force practices and that Owen ran up to Sam after the shooting and recorded graphic details of Sam's last words.² Should the public have full access to the footage? Should the government be able to withhold the footage while it conducts an investigation? Should the suspect's family have a say?

This Comment argues New Jersey courts should interpret the state's Open Public Records Act (OPRA)³ as generally granting the public access to BWC footage, such that the requestor should rarely need to prove her interest in disclosure outweighs the government's interest in confidentiality.

In the wake of fatal police shootings and nationwide race polemics, law enforcement agencies across the nation have deployed BWCs to promote police accountability and

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¹ Except for the events being captured by a dashcam not a BWC, these facts track those in *North Jersey Media Group, Inc. v. Township of Lyndhurst*, 163 A.3d 887, 892 (N.J. 2017).

² These facts now diverge from *North Jersey Media Group*.

³ N.J. STAT. ANN. § 47:1A-1 to -13 (2002).

transparency.⁴ New Jersey is no exception to the trend; the state’s executive branch has invested millions into BWC equipment for its law enforcement officers.⁵ According to statewide policies issued by the Attorney General, law enforcement agencies favor increased use of BWC to promote accountability in police departments, to foster the public’s confidence in police departments, and to make communities safer.⁶ Both research and common sense dictate, however, that these policy goals will be achieved only if the public can access the footage.⁷ Yet, the public’s right to access BWC footage in New Jersey remains *terra incognita*: neither the judiciary nor the legislature has provided guidance in this nascent field of government recordkeeping.

In New Jersey, the public may demand access to public records under OPRA or the common law.⁸ Under OPRA, the requestor has a right to access public records, without stating her reasons; OPRA rights can be overcome only where the government makes a clear showing that an enumerated exception to the statute applies.⁹ The government has seven business days to respond to an OPRA request.¹⁰ The requestor may enforce the statute with fee-shifting

⁴ Karson Kampfe, *Police-worn Body Cameras: Balancing Privacy and Accountability Through State and Police Department Action*, 76 OHIO ST. L.J. 1153, 1153 (2015); Brian Liebman, *The Watchman Blinded: Does the North Carolina Public Records Law Frustrate the Purposes of Police Body Cameras?*, 94 N.C. L. REV. 344, 344 (2015); David K. Bakardjiev, *Officer Body-Worn Cameras—Capturing Objective Evidence with Quality Technology and Focused Polies*, 56 JURIMETRICS J. 79, 79 (2015).

⁵ See Samantha Marcus, *Body Cams Coming to a Cop Near You As N.J. Pledges Millions to Equip Officers*, NJ.COM (July 28, 2015), http://www.nj.com/politics/index.ssf/2015/07/body_cams_coming_to_a_cop_near_you_as_nj_pledges_millions_to_equip_officers.html.

⁶ John J. Hoffman, Attorney General Law Enforcement Directive No. 2015-1 (2015), http://nj.gov/oag/newsreleases15/AG-Directive_Body-Cams.pdf [hereinafter *Directive*].

⁷ Steve Zansberg, *As Body-Worn Cameras Proliferate, States’ Access Restrictions Defeat Their Purpose*, 32 COMM. LAW., 12, 14 (2016) (“[T]he cause of improving accountability, transparency and public trust is undercut when footage is not released . . .”).

⁸ N.J. STAT. ANN. § 47:1A-8 (providing that OPRA does not limit the common law right of access to a government record); see *Gilleran v. Bloomfield*, 149 A.3d 800 (N.J. 2016).

⁹ N.J. STAT. ANN. § 47:1A-1; *N. Jersey Media Grp., Inc. v. Twp. Of Lyndhurst*, 163 A.3d 887, 895 (N.J. 2017) (citation omitted).

¹⁰ N.J. STAT. ANN. § 47:1A-5(i).

provisions¹¹ and statutory penalties up to \$5,000 per violation.¹² New Jersey also recognizes a limited common law right to access public records.¹³ The common law requestor must state her reasons for seeking records and must always demonstrate that her interests in disclosure outweigh the government's interest in confidentiality.¹⁴ The requestor may not demand fees or compel disclosure through summary procedures.¹⁵

Although New Jersey courts have not yet examined any OPRA or common law requests for BWC footage, the judiciary has heard requests for dashcam and surveillance footage.¹⁶ Based on this precedent, the Supreme Court of New Jersey (SCONJ) appears poised to grant the public limited access to BWC footage under the common law, but disinclined to hold that OPRA guarantees a right to such footage.¹⁷

SCONJ should not adopt the common law approach. Routinely subjecting requests to common law analysis—even if legally defensible—will frustrate the accountability and transparency goals of the BWC program.¹⁸ In contrast to OPRA, common law requests move slowly,¹⁹ lack uniformity,²⁰ and fail to reach documents in which the government's interest in

¹¹ N.J. STAT. ANN. § 47:1A-6.

¹² N.J. STAT. ANN. § 47:1A-11.

¹³ *See, e.g.,* Loigman v. Kimmelman, 505 A.2d 958 (N.J. 1986).

¹⁴ *See, e.g.,* Paff v. Ocean Cty. Prosecutor's Office, 141 A.3d 300 (N.J. Super. Ct. App. Div. 2016), *cert. granted*, 157 A.3d 831 (N.J. 2016).

¹⁵ *Compare* Loigman v. Kimmelman, 505 A.2d 958 (N.J. 1986), *with* N.J. STAT. ANN. § 47:1A-6.

¹⁶ Gilleran v. Bloomfield, 149 A.3d 800, 803 (N.J. 2016); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 163 A.3d 887 (N.J. 2017); Paff v. Ocean Cty. Prosecutor's Office, 141 A.3d 300 (N.J. Super. Ct. App. Div. 2016), *cert. granted*, 157 A.3d 831 (N.J. 2016).

¹⁷ *See infra* Parts IV and V.

¹⁸ *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, POLICE EXECUTIVE RES. F., 64 (2014) ("Agencies should always communicate their public disclosure policies to the public.").

¹⁹ *Compare* N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 163 A.3d 887 (N.J. 2017) (granting common law access to dashcam footage two years after filing a complaint in the superior court), *with* N.J. STAT. ANN. § 47:1A-5(i) (requiring government respond to records requests with seven days), *and* N.J. STAT. ANN. § 47:1A-6 (providing that an OPRA "proceeding shall proceed in a summary or expedited manner.").

²⁰ Shuttleworth v. City of Camden, 610 A.2d 903, 908 (N.J. Super. Ct. App. Div. 1992) (finding records requests languish in courts without OPRA's procedural guarantees, and disposition of requests is not uniform when dependent upon access to competent (costly) counsel to plead requests well in court).

confidentiality outweighs the requestor's interest in disclosure.²¹ Common law requests also regularly pitch the judiciary against the political branches, implicating separation of powers questions.²² In order to effectuate the policy goals of BWC programs, the public must have OPRA's presumption of access, fee-shifting provisions, and summary procedures. The common law, which requires the requestor prove a stronger interest in disclosure than in governmental confidentialities,²³ places the burden on the requestor. Such a burden is antithetical to transparency: the government's doors are always shut, unless courts permit the citizen to push in.²⁴ Common law requestors must wait months, if not years, for requests to be decided and must bear all costs and fees of the suit.²⁵ The limited and delayed access afforded by the common law will contribute to the perception that agencies purposely withhold footage to bury misconduct and frustrate meritorious lawsuits against officers.²⁶ Only statutory rights granting access to BWC footage can effectuate the policy goals of the BWC program.²⁷

In the BWC hypothetical above, the public is likely to assume the government has something to hide if the police attempt to withhold the footage recorded by Owen's BWC.²⁸ If the

²¹ *Loigman v. Kimmelman*, 505 A.2d 958 (N.J. 1986).

²² *Id.* at 967.

²³ *Id.* at 961.

²⁴ New Jersey citizens have had a statutory right to access public records since 1963. N.J. STAT. ANN. § 47:1A-1 et seq., L. 1963 (repealed 2002). Turning the clock back to an age before statutory access—barring the door to citizens seeking BWC and other police footage—might evoke comparisons to Kafka's parable "Before the Law" wherein the old man seeking to peek into "the law" is kept outside by several gatekeepers so long, the information seeker dies before the door. Frank Kafka, *Before the Law*, in *FRANZ KAFKA: THE COMPLETE STORIES AND PARABLES* 3-4 (New York: Quality Paperback Book Club ed., 1971) (Willa & Edwin Muir trans.).

²⁵ *Shuttleworth v. City of Camden*, 610 A.2d 903, 908 (N.J. Super. Ct. App. Div. 1992) (finding records requests languish in courts without OPRA's procedural guarantees and disposition of requests is not uniform when dependent upon access to competent (costly) counsel to plead requests well in court).

²⁶ *N. Jersey Media Grp., Inc. v. Twp. Of Lyndhurst*, 163 A.3d 887, 907 (2017).

²⁷ See Toby McIntosh and Lauren Harper, *Backlash Develops over Body Cam Footage*, FREEDOM INFO. (Feb. 26, 2015), <http://www.freedominfo.org/2015/02/backlash-develops-over-release-of-body-cam-footage> (noting that "[i]f the footage isn't available, 'body cam' supporters say, the promise of having silent watchdogs over police-citizen interactions will go unfulfilled").

²⁸ *N. Jersey Media Grp., Inc.* 163 A.3d at 907.

camera manages to record the salient events, the footage will either show Sam lunged his SUV toward officers or that Sam gave the officers no reason to fear for their safety.²⁹ Policy would best be served by OPRA’s right to access records swiftly which shifts fees onto agencies resistant to transparency.³⁰

The judiciary may be inclined to balance the competing interests in disclosure and nondisclosure of BWC footage under the common law as a means of addressing the thorny problems inhering in such footage.³¹ SCONJ may prefer to grant common law access in BWC cases even more so than in other cases requesting dashcam footage of other police recordings because—unlike dashcams fixed to police vehicles on public roadways or surveillance videos affixed to public buildings—BWCs can record up-close images and high-quality audio within realms traditionally deemed private,³² thus meriting special consideration. BWC cameras can capture an overwhelming amount and variety of images—which can implicate serious privacy concerns³³ and jeopardize the safety of informants, witnesses, and victims.³⁴ Rather than circumventing OPRA’s mandates and shunting requests for BWC footage to the common law, courts should earnestly engage in an OPRA analysis. OPRA permits courts to weigh privacy

²⁹ *Cf. id.* at 909.

³⁰ N.J. STAT. ANN. § 47:1A-6 (2002).

³¹ *Cf. Gilleran v. Bloomfield*, 149 A.3d 800, 803 (N.J. 2016) (declaring the court’s preference for common law balancing in right of access to government surveillance footage).

³² *Directive*, *supra* note 6, 3-4.

³³ Marc Jonathan Blitz, *Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats*, 2015 WAKE FOREST J. BUS. & INTELL. PROP. L. 1, 18–19 (“[M]ost state open records laws were written before the use of body-worn cameras and may not take into account the privacy issues presented by their use.”) (citing THE CONSTITUTION PROJECT, THE USE OF BODY-WORN CAMERAS BY LAW ENFORCEMENT 5 (2015), <https://constitutionproject.org/wp-content/uploads/2015/02/TCP-The-Use-of-Police-Body-Worn-Cameras.pdf> (suggesting citizens should have to consent to dissemination of video)).

³⁴ *See, e.g., Directive*, *supra* note 6, 4; *Gilleran v. Bloomfield*, 149 A.3d 800, 802 (N.J. 2016); N.J. STAT. ANN. § 47:1A-1 to -13.

concerns³⁵ and governmental needs for confidentiality to secure safety³⁶; the common law is not the only means available to the courts to balance public and private interests.³⁷

Part II of this Comment notes policy goals promoted by BWCs nationwide and in the State of New Jersey. Part III summarizes access to government records under OPRA and New Jersey's common law. Part IV examines New Jersey precedent addressing the right to access dashcam and surveillance footage. Part V argues the courts should find that OPRA provides a statutory right to access BWC footage and criticizes precedent that broadly construes OPRA exemptions to deny requests for government surveillance and dashcam footage. Part V also explains OPRA's privacy protections. Part VI concludes.

II. Policies Generally Animating the Use of BWCs Nationwide and in New Jersey

Numerous policy goals underpin the use of BWCs throughout the United States. Chief among these are government transparency and accountability, demanded in the wake of police shootings of African Americans including Michael Brown in Ferguson, Mississippi.³⁸ BWCs are also associated with a civilizing effect; the cameras arguably promote a concept of self-awareness, thought to civilize police officers and citizens alike.³⁹ BWCs create reviewable records useful in investigating allegations of police misconduct, ranging from unconstitutional searches to excessive force.⁴⁰ Thus where footage captures misconduct or its absence, the inculpatory or exculpatory

³⁵ See, e.g., N.J. STAT. ANN. § 47:1A-1 (“[A] public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy.”).

³⁶ N.J. STAT. ANN. § 47:1A-1.1 (“[E]mergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein; security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software.”).

³⁷ *Serrano v. South Brunswick Twp.*, 817 A.2d 1004, 1014–15 (N.J. Super. Ct. App. Div. 2003); see also *infra* Part VI.

³⁸ *Kampfe*, *supra* note 4, at 1153; *Liebman*, *supra* note 4, at 344; *Bakardjiev*, *supra* note 4, at 79.

³⁹ *Kampfe*, *supra* note 4, at 1161.

⁴⁰ *Id.* at 1162.

footage obviates the need for prolonged investigations and enables police departments to act swiftly.⁴¹ BWCs are associated with a decrease in complaints against officers for misconduct, attributable to the deterrence of filing false complaints, the civilizing effect, or both.⁴² Although not strictly objective, BWCs preserve footage from the officer’s perspective which contextualizes any recordings made by the public—an important consideration in the age of ubiquitous smart phone cameras.⁴³ Footage of appropriate and inappropriate conduct may be used for training purposes and performance evaluations.⁴⁴ BWCs generate powerful evidence which prosecutors can use to secure guilty pleas and convictions, thereby promoting judicial efficiency.⁴⁵ BWCs empower prosecutors to press cases with BWC evidence, even absent a complainant in matters such as domestic violence where a victim refuses to testify.⁴⁶ Lastly, BWCs can provide for “democratic accountability” even where judicial accountability fails: even though footage of the chokehold that killed Eric Garner grounded no conviction, the footage led to public condemnation.⁴⁷

The goals of the BWC program in New Jersey track the majority of the goals throughout the nation.⁴⁸ The Attorney General Directive No. 2015-1 (Directive) sent to law enforcement

⁴¹ Josh Divine et al., *Police Body Cam Footage: Just Another Public Record*, THE MEDIA FREEDOM & INFORMATION ACCESS CLINIC, 7 (2015).

⁴² Kampfe, *supra* note 4, at 1165.

⁴³ *Id.* 1167.

⁴⁴ Camden Cty. Police Depart., Special Order No. 2016-014, Body Worn Camera Program, § II, B(6)–(9) May 20, 2016, https://www.rcfp.org/bodycam_policies/NJ/Camden_BWC_Policy.pdf.

⁴⁵ Bakardjiev, *supra* note 4, at 81.

⁴⁶ See Email from Jessica Miles, Assoc. Clinical Prof. of Law, Seton Hall University School of Law, to author (Nov. 4, 2017, 9:10 EST) (on file with author) (regarding New Jersey’s “no drop” prosecution policy); see generally Sandra Tibbettes Murphy, *Police Body Cameras and Sexual Assault Investigations: Considerations and Unanswered Questions*, Battered Women’s Justice Project (n.d.), <http://www.bwjp.org/assets/documents/pdfs/police-body-cams-in-domestic-and-sexual-assault-inve.pdf>.

⁴⁷ *Id.*

⁴⁸ The *Directive* does not reference “no drop” prosecution of domestic violence cases, or use of footage for police training and performance reviews. *Directive*, *supra* note 6. The omission to training and evaluation makes it less likely police departments may withhold footage pursuant to a common law exception for “self-critical” training and performance. See *Loigman v. Kimmelman*, 505 A.2d 958, 963 (N.J. 1986). This omission also makes it less likely

officers in 2016 explains the State’s reasons for using BWCs and sets minimum statewide standards for BWC use: “It is decidedly in the public interest to establish foundational statewide standards with respect to certain critical policy issues, such as how an agency explains its BWC policy to the general public”⁴⁹ The Directive enumerates several discrete goals: (1) to promote police accountability and transparency; (2) to establish compliance with the Fourth Amendment, *Miranda*,⁵⁰ and other legal requirements; (3) to curb false accusations of police misconduct; (4) to promote a civilizing effect on officers and civilians who are aware of the activated BWC; (5) to create objective records to supplemental and corroborate written reports useful in the prosecution of crimes; and (6) to limit discretion of individual officers in the field, thereby prohibiting racially-influenced activation/de-activation of BWCs and the impression that officers film events only for self-serving purposes.⁵¹ An agency deploying BWCs must publish a statement on its website.⁵² “The web posting shall include a picture showing what the device looks like, and how it is to be worn by uniformed officers or plainclothes detectives so that citizens will be able to determine whether an officer is equipped with the device.”⁵³ The Directive stops short of declaring a disclosure policy for the footage and simply states footage may be available to the public pursuant to OPRA and the common law.⁵⁴

III: Public Access to Government Records Under OPRA and the Common Law

footage may be exempted as part of an officer’s personnel file pursuant to N.J. STAT. ANN. § 47:1A-10 (2002). *See* Liebman, *supra* note 4, at 353, n.63 (noting police chiefs in North Carolina argued BWC footage should be exempt as personnel records under the state public disclosure laws).

⁴⁹ *Directive*, *supra* note 6.

⁵⁰ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵¹ *Id.* at 2, 7. The Directive also declares goals in tension with these policies, such as minimizing privacy intrusions and eschewing the chilling effect on cooperation with police. *Directive*, *supra* note 6, 1; *see infra* Part V-C.

⁵² *Id.* at 7.

⁵³ *Id.*

⁵⁴ *Directive*, *supra* note 6, 7.

An individual seeking access to public records initiates her request by sending a written request to the relevant government agency in charge of maintaining the government record.⁵⁵ The requestor may seek access under OPRA, under state common law, or under both.⁵⁶

A. The Public's Right to Access Under OPRA

New Jersey has long appreciated “that openness [in government] reduces public corruption.”⁵⁷ The legislature has declared that, “secrecy in public affairs undermines the faith of the public in government and the public’s effectiveness in fulfilling its role in a democratic society.”⁵⁸ In 1963, the legislature enacted OPRA’s predecessor, known as the Right to Know Law (RTKL).⁵⁹ From 1963 to 2002, RTKL guaranteed the public access to records which were “required by law to be made.”⁶⁰ Contemporaneous courts touted RTKL as a high water mark in the State’s “long and proud tradition[] of . . . hostility to secrecy in government.”⁶¹ But RTKL actually excluded heaps of government records, and granted access only to records “required by law to be made”—a term of art which grew increasingly crabbed over the course of statute’s

⁵⁵ N.J. STAT. ANN. § 47:1A-5 (2002) (providing that a requestor may also inspect records during regular business hours).

⁵⁶ *Cf.* N.J. STAT. ANN. § 47:1A-1.

⁵⁷ *Cf. Tarus v. Borough of Pine Hill*, 916 A.2d 1036, 1043 (N.J. 2007) (“[O]ur civic forefathers have long recognized that spores of corruption cannot survive the light of public scrutiny.”) (citing *Polillo v. Deane*, 379 A.2d 211 (N.J. 1977) (quoting Woodrow Wilson’s observation that “[C]orruption thrives in secret places, and avoids public places.”) (citation omitted); Earl Warren, *Governmental Secrecy: Corruption’s Ally*, 60 A.B.A.J. 550, 552 (1974) (“It would be difficult to name a more efficient ally of corruption than secrecy.”)).

⁵⁸ OPRA, N.J. STAT. ANN. § 10:4-7 (2006).

⁵⁹ N.J. STAT. ANN. § 47:1A-1 et seq. (1963) (repealed 2002).

⁶⁰ N.J. STAT. ANN. §. 47:1A-2 (1963).

⁶¹ *Educ. Law Ctr. v. N.J. Dep’t of Educ.*, 966 A.2d 1054 (2009) (citing *N.J. Newspapers v. Passaic Cty. Bd. Of Chosen Freeholders*, 601 A.2d 693 (1992)). *See also S. Jersey Pub v. N.J. Expressway Auth.*, 591 A.2d 92, 928 (N.J. 1991) (quoting James Madison’s letter to W.T. Barry, Aug. 4, 1822, in 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910)) (“A popular Government without popular information, or the means to acquiring it, is but a Prologue to a Farce of a Tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”).

lifespan.⁶² As RTKL's scope narrowed, requestors relied increasingly on their common law right of access, requiring courts to engage in common law analysis.⁶³

In 2002, the legislature repealed RTKL and enacted OPRA in order to expand the public's statutory rights to public records in 2002.⁶⁴ OPRA vests the public with a presumption of access to government records⁶⁵ and mandates that "government records . . . be readily accessible for [public] inspection, copying, or examination."⁶⁶ "Government records" means "any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained *electronically or by sound-recording or in a similar device . . .*"⁶⁷ OPRA's broader definition of government records guarantees greater access to government records and therefore "maximize[s] public knowledge about public affairs," "ensure[s] an informed citizenry," "minimize[s] the evils inherent in a secluded process,"⁶⁸ and "promote[s] good government."⁶⁹ With "broad public access to information about how state and local governments operate, citizens and the media can play a watchful role in curbing wasteful government spending and guarding against corruption and misconduct."⁷⁰ In grander terms:

OPRA is founded on the premise that society as a whole suffers far more if governmental bodies are permitted to operate in secrecy. As Justice William O. Douglas has said: "The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to

⁶² N. Jersey Media Grp, Inc. v. Twp. of Lyndhurst, 116 A.3d 570, 584 (N.J. Super. Ct. App. Div. 2015).

⁶³ See, e.g., Loigman v. Kimmelman, 505 A.2d 958, 967 (N.J. 1986); Nero v. Hyland, 386 A.2d 846, 852 (N.J. 1978); see *infra* Part III-B.

⁶⁴ N.J. STAT. ANN. 47:1A-1 to -13; Gilleran v. Bloomfield, 149 A.3d 800, 815, n.6 (N.J. 2016) (Rabner, C.J., dissenting).

⁶⁵ N.J. STAT. ANN. § 47:1A-1.

⁶⁶ *Id.*

⁶⁷ *Id.* § 47:1A-1.1 (emphasis added).

⁶⁸ Educ. Law Ctr. v. N.J. Dep't of Educ., 966 A.2d 1054 (N.J. 2009) (citing Mason v. City of Hoboken, 951 A.2d 1017 (N.J. 2008) (internal quotations omitted)).

⁶⁹ N. Jersey Media Grp, Inc. v. Bergen Cty. Prosecutor's Office, 146 A.3d 656, 664 (N.J. Super. Ct. App. Div. 2016)

⁷⁰ Burnett v. Cty. of Bergen, 968 A.2d 1151, 1151 (N.J. 2009).

the principle that a democracy cannot function unless the people are permitted to know what their government is up to.”⁷¹

Unlike its predecessor, OPRA guarantees citizens access to “all government records . . . unless exempt” under one of the twenty-one enumerated carve-outs within the statute or within other statutes, regulations, and executive orders.⁷² OPRA often grants a broader access to government records than the common law.⁷³ The Act does not require the requestor to state reasons for seeking the records⁷⁴ and compels agencies to respond to requests within seven days.⁷⁵ If denied, a requestor may sue the opaque agency.⁷⁶ Exemptions to the statute are construed in favor of public access.⁷⁷ The agency denying access bears the burden of clearly showing an exemption applies.⁷⁸ If a court orders records released after an improper denial, the requestor is entitled to counsel fees.⁷⁹ Litigation frequently arises where agencies deny access to records pursuant to an exemption.⁸⁰

i. **Statutory Exceptions to OPRA—Criminal Investigations, Ongoing Investigations, and Security Exceptions**

⁷¹ *Asbury Park Press v. Ocean Cty. Prosecutor’s Office*, 864 A.2d 446, 488 (N.J. Super. Ct. 2004) (citing *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting) (quoting omitted).

⁷² N.J. STAT. ANN. § 47:1A-1.1. (carving out additional exemptions for state statutes, executive orders, rules of court, administrative rules, federal law, federal regulations, and federal orders); *see also* N.J.S.A. 47:1A-9 and *N. Jersey Media Grp, Inc. v. Bergen Cty. Prosecutor’s Office*, 146 A.3d 656, 667 (N.J. Super. Ct. App. Div. 2016) (recognizing administrative regulations as further carve outs); N.J.S.A. 47:1A-12 (providing that SCONJ may adopt court rules to effectuate the purposes of this act); OPRA further recognizes privileges and grants of confidentiality carved out in judicial case law before 2002, which do not, of course, address the use of BWCs. N.J.S.A. 47:1A-1. BWC literature suggests officers only began being equipped with BWCs in the United States around 2009. *Kampfe*, *supra* note 4, 1153.

⁷³ N.J. STAT. ANN. § 47:1A-1.1.

⁷⁴ *See* N.J. STAT. ANN. § 47:1A-5.

⁷⁵ N.J. STAT. ANN. § 47:1A-5(i).

⁷⁶ N.J. STAT. ANN. § 47:1A-6 (permitting the requestor to bring the issue before the Government Records Council). The Council may provide informal mediation, undertake investigations, and impose penalties against government agencies for wrongful nondisclosure. N.J. STAT. ANN. § 47:1A-6.

⁷⁷ N.J. STAT. ANN. § 47:1A-1.

⁷⁸ N.J. STAT. ANN. § 47:1A-6.

⁷⁹ *Id.*

⁸⁰ *See, e.g., N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 163 A.3d 887 (N.J. 2017); *Gilleran v. Bloomfield*, 149 A.3d 800 (N.J. 2016).

OPRA exempts records pertaining to criminal investigations, ongoing investigations, and government security.

Criminal investigatory records are as those which: (1) are “not required by law to be made”; and (2) “pertain[] to any criminal investigation or related civil enforcement proceeding.”⁸¹ Both factors must be met, and the government must make a “clear showing” that the OPRA exemption applies.⁸²

OPRA also exempts records related to an ongoing investigation.⁸³ To qualify for the exemption the government must show: (1) the records clearly “pertain to an investigation in progress by any public agency”; (2) disclosure will be inimical to the public interest; and (3) the records were not “open for public inspection, examination, or copying before the investigation commenced.”⁸⁴ The public interest exception is met where it appears, “the information requested . . . will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release.”⁸⁵

OPRA exempts records related to security of public buildings and police surveillance.⁸⁶ OPRA provides that “emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein.”⁸⁷ OPRA further exempts disclosure of “security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software.”⁸⁸

⁸¹ N.J. STAT. ANN. § 47:1A-1.1.

⁸² N.J. STAT. ANN. § 47:1A-6; *see also* N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 163 A.3d 887 (N.J. 2017) (7-0 decision) (citing *Asbury Park Press v. Ocean Cty. Prosecutor’s Office*, 864 A.2d 446 (N.J. Super. Ct. 2004)).

⁸³ N.J. STAT. ANN. § 47:1A-3(a), (b).

⁸⁴ N.J. STAT. ANN. § 47:1A-3(a).

⁸⁵ N.J. STAT. ANN. § 47:1A-3(b).

⁸⁶ N.J. STAT. ANN. § 47:1A-1.1.

⁸⁷ *Id.*

⁸⁸ *Id.*

ii. Executive Exceptions to OPRA—Attorney General’s Directive No. 2015-1 and Governor Whitman’s Executive Order No. 69

SCONJ has not ruled whether BWC footage is a government record and whether BWC footage is required to be recorded by law under OPRA. As an initial matter, SCONJ held that *dashcam* footage was a public record under OPRA in *North Jersey Media Group v. Township of Lyndhurst* (“*NJMG*”).⁸⁹ It seems the court will duly deem BWC footage a public record under OPRA. As a second matter, the Attorney General’s Directive No. 2015-1 may require as a matter of law that some BWC footage be recorded in certain circumstances, which would preclude the government from exempting BWC under the criminal investigation exception. It is also possible, however, Governor Whitman’s Executive Order No. 69 simplifies the criminal investigation exception inquiry and would permit the government to exclude BWC footage upon a simple showing that the video pertains to a criminal investigation.

OPRA recognizes the executive’s power to create exemptions not otherwise enumerated within the Act.⁹⁰ For instance, courts have repeatedly recognized that the standing order of a local police chief carries the force of law.⁹¹ In *Paff v. Ocean County Prosecutor’s Office*, the Appellate Division found that a local police chief’s standing order required the creation and maintenance of dashcam footage by law in certain circumstances.⁹² As the standing order had the force of law, the records custodian could not exclude dashcam footage under OPRA’s criminal investigation exception.⁹³ After all, the exception excludes only records “*not* required by law to be made.”⁹⁴

⁸⁹ *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 163 A.3d 887 (N.J. 2017) (7-0 decision).

⁹⁰ N.J. STAT. ANN. § 47:1A-9.

⁹¹ *Paff v. Ocean Cty. Prosecutor’s Office*, 141 A.3d 300 (N.J. Super. Ct. App. Div. 2016), *cert. granted*, 157 A.3d 831 (N.J. 2016); *O’Shea v Twp. of W. Milford*, 982 A.2d 459 (N.J. Super. Ct. App. Div. 2009), *aff. in part*, *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 163 A.3d 887, 901 (N.J. 2017).

⁹² *Paff v. Ocean Cty. Prosecutor’s Office*, 141 A.3d 300 (N.J. Super. Ct. App. Div. 2016), *cert. granted*, 157 A.3d 831 (N.J. 2016).

⁹³ N.J. STAT. ANN. § 47:1A-6.

⁹⁴ *Id.* (emphasis added).

As a local police chief in *Paff* had the power to require dashcam footage be recorded by law, the Attorney General should have, *a fortiori*, the authority to require records such as BWC footage be made.⁹⁵ Indeed, as “the State’s chief law enforcement officer,” the Attorney General “has the authority to adopt guidelines, directives, and policies that bind police departments throughout the State.”⁹⁶

The Attorney General’s Directive No. 2015-1, discussed in Part II above, directs law enforcement officers when to activate and deactivate BWCs.⁹⁷ The Attorney General claims to derive his authority to issue the Directive from Title 52, Section 17B-98 of New Jersey Statutes Annotated, a provision authorizing him to ensure uniform and efficient enforcement of criminal laws.⁹⁸ Title 52, Section 17B-112(c) of New Jersey Statutes Annotated further orders enforcement officers to cooperate and aid the Attorney General.⁹⁹ The Directive authorizes county prosecutors to ensure compliance and prevent violations of the Directive’s mandates.¹⁰⁰ This all suggests the Directive carries the force of law. More than a mere generic set of rules about record retention, the Directive is a “clear, pointed statement of policy from the chief law enforcement officer to all officers” which requires BWC footage be recorded by law under numerous circumstances.¹⁰¹

The Directive may therefore make the footage “required by law.” Should SCNJ determine that the Directive carries the force of law, the Directive is likely to remove much BWC

⁹⁵ A singular Appellate Division decision has ruled the Directive does “not constitute an administrative rule” under the state’s Administrative Procedure Act. *State Troopers Fraternal Ass’n of N.J. v. State*, No. A-5239-14T3, 2016 WL 2746056 (N.J. Super. Ct. App. Div. May 12, 2016).

⁹⁶ *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 163 A.3d 887, 900 (N.J. 2017) (citations omitted).

⁹⁷ *Directive*, *supra* note 6.

⁹⁸ *Id.* at 1.

⁹⁹ N.J. STAT. ANN. § 52:17B-112(c) (1970).

¹⁰⁰ *Directive*, *supra* note 6.

¹⁰¹ *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 163 A.3d 887, 900 (N.J. 2017); *see also* *O’Shea v Twp. of W. Milford*, 982 A.2d 459 (N.J. Super. Ct. App. Div. 2009).

footage from OPRA’s criminal investigation exemption, which excludes only records “not required by law to be made.”¹⁰²

This said, Governor Whitman’s Executive Order No. 69 adds a significant wrinkle to this prediction. It is well settled that an executive order, as much as any directive, can create an exemption under OPRA.¹⁰³ Executive Order No. 69 exempts “fingerprint cards, plates and photographs and *similar criminal investigation records* that are required to be made, maintained or kept by any State or local governmental agency.”¹⁰⁴ This language tracks Executive Order No. 9, issued by Governor Hughes on September 30, 1963, and Executive Order No. 123, issued by Governor Kean on November 12, 1985.¹⁰⁵ In interpreting the clause “similar criminal investigation records,” one Law Division court relied on *eiusdem generis*—the cannon of construction assuming the scrivener intended to list items of the same kinds, class or nature—holding that “similar criminal investigation records” did not apply to “incident reports and statements of witnesses prepared by police officers which bear no similarity to fingerprint cards, plates or photographs.”¹⁰⁶ Following this rationale, similar criminal investigation records may very well include dashcam, surveillance, and BWC footage, which are arguably similar to photographs. On procedural grounds, courts have twice declined to rule whether Executive Order No. 69 is still in effect and whether it renders the first prong of the OPRA’s criminal investigation

¹⁰² N.J. STAT. ANN. § 47:1A-6.

¹⁰³ *Slaughter v. Gov’t Records Council*, 997 A.2d 235, 239 (N.J. Super. Ct. App. Div. 2010).

¹⁰⁴ Exec. Order No. 69, Laws of New Jersey 1997, Vol. 2 at 2321 (1997) (emphasis added).

¹⁰⁵ *Asbury Park Press, Inc. v. Borough of Seaside Heights*, 586 A.2d 870, 873 (N.J. Super. Ct. 1990).

¹⁰⁶ *Id.*

exemption nugatory,¹⁰⁷ such that any records pertaining to a criminal investigation would be exempt whether “required by law” or not.¹⁰⁸

To summarize, whether BWC footage can be excluded under OPRA depends on whether Governor Whitman’s Executive Order No. 69 applies to BWC footage and whether the Order is still in effect. If both questions are answered affirmatively, BWC footage pertaining to a criminal investigation will be exempt from disclosure under OPRA. If a court answers no to either question, footage pertaining to a criminal investigation will be excluded only as part of a criminal investigation where another law requires the footage be made.

B. The Public’s Right to Access Under State Common Law

Even where an exception precludes the public from gaining access to public records under OPRA, New Jersey citizens may still demand access to public records under the state’s common law—a right traceable to at least 1879.¹⁰⁹ *Ordinarily*, to avail herself of this right, the requestor need only show that she is a citizen or taxpayer of New Jersey and that she is seeking the records in good faith.¹¹⁰ A newspaper’s interest in “keep[ing] a watchful eye on the workings of public agencies” is sufficient to accord standing.¹¹¹ Yet, the government can frustrate the *ordinary*

¹⁰⁷ Paff v. Ocean Cty. Prosecutor’s Office, 141 A.3d 300 (N.J. Super. Ct. App. Div. 2016), *cert. granted*, 157 A.3d 831 (N.J. 2016). It is no surprise that courts latch on to procedural grounds to avoid deciding which political branch or department should control the release of such footage. Justice O’Hern wisely called on the legislature to craft a comprehensive access of information law to avoid such problems. Loigman, 505 A.2d 958, 958.

¹⁰⁸ It may be argued the governor could not have intended to include BWC in 1997 as a “similar” record because the technology did not exist. After all, researchers have generally traced the use of BWC in the United States only as far back as 2010 in Oakland, California. Kampfe, *supra* note 4, at 1156, n.13 (tracing one of the earliest implementations of BCWs in the world to the United Kingdom around 2007). This argument is generally unavailing. *Cf.* Tarus v. Borough of Pine Hill, 916 A.2d 1036, 1043–44 (N.J. 2007) (noting the court’s willingness to evolve and adapt as technology advances). The governor may have expressly opened the list to similar records to include new technology.

¹⁰⁹ *In re. Ferry v. Williams*, 41 N.J.L. 332 (1879).

¹¹⁰ Good faith means some purpose other than harassment, disparagement, or intimidation. *Cf.* Loigman v. Kimmelman, 505 A.2d 958, 962 (N.J. 1986).

¹¹¹ *Shuttleworth v. City of Camden*, 610 A.2d 903, 908 (N.J. Super. Ct. App. Div. 1992).

situation by asserting the record is confidential.¹¹² The courts must then weigh the requestor's interest in disclosure against the government's interest in the maintaining confidentiality (the "Loigman test").¹¹³ Courts apply a sliding scale.¹¹⁴ Where there is a slight or non-existent governmental need in confidentiality, citizenship status will ordinarily warrant disclosure.¹¹⁵ As the government's need for confidentiality increases, something more than mere taxpayer or citizenship status coupled with good faith is required to demand production.¹¹⁶ The requestor must clearly show an advancement of a "wholesome" public interest or legitimate private interest to warrant disclosure.¹¹⁷ In weighing competing interests, the court may consider: (1) the extent to which disclosure will chill cooperation with the government; (2) the effect disclosure may have on persons who gave the government information, *e.g.*, whether disclosure was conditioned on anonymity; (3) whether findings of public misconduct have been insufficiently corrected; and (4) whether disciplinary or investigatory proceedings that diminish the citizen's need for the records have taken place.¹¹⁸

Ultimately, the common law approach has several drawbacks: it moves slowly, lacks uniformity, and the *Loigman* test limits its reach. Common law requests are slower because litigation can languish, and the common law does not permit the requestor to move summarily.¹¹⁹ Disposition of common law requests lack uniformity because access to competent counsel shapes the ultimate outcome¹²⁰ and because the *Loigman* test requires a fact-intensive inquiry calling for

¹¹² *Loigman*, 505 A.2d at 962.

¹¹³ *Id.*; *see also* *Nero v. Hyland*, 386 A.2d 846, 852 (N.J. 1978).

¹¹⁴ *Loigman*, 505 A.2d at 962.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 966.

¹¹⁸ *Id.* at 966–67.

¹¹⁹ *See e.g.*, *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 163 A.3d 887 (N.J. 2017) (granting movant common law access to dashcam footage two years after filing complaint in Superior Court).

¹²⁰ *Shuttleworth v. City of Camden*, 610 A.2d 903, 908 (N.J. Super. Ct. App. Div.1992).

detailed testimony as to the parties' competing interests and perhaps even *in camera* review of the requested records.¹²¹

As citizens may request access to any record prepared by a State agency regardless of statutory exceptions, it is sometimes argued the common law grants a broader right to records than OPRA¹²²; in the main, this view can be debunked. First, judges have created numerous common law exceptions to the right of access under the common.¹²³ In fact, the legislature codified these judicial exceptions into OPRA.¹²⁴ Accordingly, the holes in OPRA closely track the holes in the common law.¹²⁵ Further, the *Loigman* test will weed out numerous requests which would prevail under OPRA, and only citizens and taxpayers can make applications.

What's more, requests for access under the common law force the judiciary to intrude into activities of the executive and legislative branches.¹²⁶ Whereas courts decide OPRA requests in accordance with the laws promulgated by the legislature and the exceptions carved out by the executive, the judiciary pulls from its inherent powers to enforce common law requests. In 1986, the unanimous *Loigman* court recognized that the very common law balancing test it was fleshing in *Loigman* out flew in the teeth of separation of powers¹²⁷:

“[W]e are in the position of having to resolve a dispute between a citizen and another branch of government. Rather than involving courts in balancing the

¹²¹ *Loigman*, 505 A.2d at 966.

¹²² *Loigman*, 505 A.2d at 961; *see also* Educ. Law Ct. v. N.J. Dep't of Educ., 966 A.2d 1054, 1071 (N.J. 2009).

¹²³ *Loigman*, 505 A.2d at 966.

¹²⁴ *See e.g.*, N.J. STAT. ANN. § 47:1A-1.

¹²⁵ N.J. STAT. ANN. § 47:1A-1; N.J. STAT. ANN. § 47:1A-9.

¹²⁶ *Loigman*, 505 A.2d at 961.

¹²⁷ For some of the delicate issues the court has been called to resolve, *see* Nero v. Hyland, 386 A.2d 846, 853 (N.J. 1978) (recognizing the governor's qualified constitutionally-based privilege of confidentiality based in the separation of powers); N. Jersey Newspapers Co. v. Passaic Cty. Bd. of Chosen Freeholders, 601 A.2d 693, 697 (N.J. 1991) (denying wholesale release of public official's telephone records, as executive privilege protects names of individuals calling government); Gannett N.J. Partners, LP v. Cty. of Middlesex, 877 A.2d 330, 337 (N.J. Super. Ct. App. Div. 2005) (remanding to determine whether politician's notes were deliberative); Educ. Law Ctr. v. N.J. Dept. of Educ., 966 A.2d 1054 (N.J. 2009) (denying request for records about school district plans under deliberative process privilege); Pineiro v. Div. of State Police, 961 A.2d 1. 7 (N.J. Super. Ct. App. Div. 2008) (denying request of politician's character investigation of potential candidate, not appointed after failed vetting).

interests involved, the better policy may be that of comprehensive freedom-of-information acts that give citizens an unqualified right of access to public records, subject to defined exemptions, without a showing of need.”¹²⁸

With this, Justice O’Hern challenged the wisdom of the very test the court’s opinion refined in *Loigman*. OPRA is arguably the legislature’s comprehensive, if somewhat untimely response to O’Hern’s exhortation to reform RTKL. Lamentably, recent SCONJ decisions appear unperturbed by O’Hern’s warning that a comprehensive act is preferable to the *Loigman* test.

IV: New Jersey Surveillance and Dashcam Precedent

Although New Jersey’s judiciary has yet not examined any requests for BWC footage, courts have addressed demands for dashcam and surveillance footage. Part III-A examines SCONJ opinions. Part III-B examines opinions of the state’s intermediate court.

A. SCONJ Denies Access to Security and Dashcam Footage under OPRA

In *Gilleran v. Bloomfield*¹²⁹ and *NJMG*,¹³⁰ SCONJ limited public access to police footage by construing OPRA exemptions broadly.

Over dissent, the *Gilleran* court generally exempted government security footage from OPRA requests where such footage tended to show the limitations of the surveillance system.¹³¹ The majority denied a private citizen’s OPRA request for the “wholesale release” of fourteen hours of footage recorded by a stationary security camera concealed by smoked glass, attached to a second-story pole, and directed at the rear area of the town hall adjacent to the city’s police

¹²⁸ *Loigman v. Kimmelman*, 505 A.2d 958, 967 (N.J. 1986) (unanimous decision).

¹²⁹ *Gilleran v. Bloomfield*, 149 A.3d 800, 811 (N.J. 2016) (4-2 opinion) (Rabner, C.J., dissenting).

¹³⁰ *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 163 A.3d 887 (N.J. 2017) (7-0 decision).

¹³¹ *Gilleran*, 149 A.3d at 803.

station.¹³² Since disclosure could reveal the camera’s geographic scope and recording times,¹³³ the majority found the government’s denial of the citizen’s OPRA request justified under the Act’s security exceptions: “[1] emergency or security information or procedures for any buildings or facility which, if disclosed, *would* jeopardize security of the building or facility or persons therein; [2] security measures and surveillance techniques which, if disclosed, *would* create a risk to the safety of persons, property, electronic data or software.”¹³⁴

The majority relied on the certification from the township clerk—though neither the clerk nor anyone else had reviewed the entire footage—that release of the footage “could” jeopardize the safety of those potentially surveilled in the footage.¹³⁵ SCONJ held the township need only show release of such footage “*can lead to* the undermining of the legislative public-interest policy embedded in the security exclusion.”¹³⁶ After noting that “[c]urrent events since the new millennium [create] difficulties of maintaining daily security,”¹³⁷ SCONJ called for a “sensible application” in construing OPRA’s security exceptions.¹³⁸ The court found OPRA did not intend to create a right of access to footage from a single camera or “a combination of cameras” from police stations, court houses, correctional institutions, and the like that might permit a person to “dismantle the protection” provided by such systems.¹³⁹ The court concluded public requests for

¹³² *Id.*

¹³³ *Id.* at 802. Although the Township had not yet reviewed the entire video, the government also argued the video might expose identities of confidential informants, witnesses, victims of domestic violence, and others seeking to report crimes. *Id.* The majority did not rely on these grounds to reach its opinion. *Id.*

¹³⁴ N.J. STAT. ANN. § 47:1A-1.1 (2002) (emphasis added).

¹³⁵ *Gilleran*, 149 A.3d at 804.

¹³⁶ *Id.* at 809 (emphasis added).

¹³⁷ *Id.* at 809.

¹³⁸ *Id.*

¹³⁹ *Id.*

surveillance footage “protecting public facilities are *better* analyzed under common law . . . where the asserted need for access can be weighed against the needs of governmental confidentiality.”¹⁴⁰

The Chief Justice, authoring the dissent, criticized the majority’s “sensible approach” as a derogation from OPRA’s mandate to construe exceptions to the Act in favor of the public’s right of access.¹⁴¹ The majority liberally construed the “*would*” in OPRA’s security exceptions, permitting the government to simply assert that safety “could” be jeopardized—this without anyone ever having reviewed the footage.¹⁴² Although the majority’s construction of the security exemptions “may be a sensible approach as a matter of policy,”¹⁴³ wrote the Chief Justice, “OPRA does not *say* that all security footage is categorically exempt from public disclosure.”¹⁴⁴ The Chief Justice intimated the majority’s belief that requests are *better* analyzed under common law is irrelevant.¹⁴⁵ Once stripped of OPRA’s right to fees, fewer parties will pursue claims under common law,¹⁴⁶ and OPRA will give agencies no pause before issuing pat denials to citizens requesting surveillance footage. The majority remanded with instructions to resolve the request under the common law.¹⁴⁷

SCONJ once again construed OPRA exemptions liberally to deny an OPRA request for dashcam videos in *NJMG*,¹⁴⁸ this time exempting police dashcam footage from disclosure pursuant

¹⁴⁰ *Id.* (emphasis added) (suggesting citizens might be entitled, under common law, to surveillance footage capturing an accident or an incident of police brutality).

¹⁴¹ *Gilleran*, 149 A.3d at 812 (Rabner, C.J., dissenting).

¹⁴² *Id.* at 809. Nonetheless, in his dissent, Chief Justice Rabner underlined OPRA’s directive to construe “any limitation of the rights of access . . . in favor of the public’s right of access.” *Id.* at 815 (Rabner, C.J., dissenting) (citing N.J. STAT. ANN. § 47:1A-1 (2002)).

¹⁴³ *Id.* at 814 (Rabner, C.J., dissenting) (emphasis in original).

¹⁴⁴ *Id.* at 812 (Rabner, C.J., dissenting).

¹⁴⁵ *Id.* at 815 (Rabner, C.J., dissenting).

¹⁴⁶ *Id.* at 816 (Rabner, C.J., dissenting).

¹⁴⁷ *Gilleran*, 149 A.3d at 811.

¹⁴⁸ *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 163 A.3d 887 (N.J. 2017) (7-0 decision).

to OPRA’s criminal investigation.¹⁴⁹ The plaintiff, a news agency, requested the dashcam footage from three different law enforcement vehicles.¹⁵⁰ The footage depicted events leading up to and including the fatal shooting of Kashad Ashford wherein officers responded to a 911 call reporting that a black man had attempted to steal a car.¹⁵¹ Mr. Ashford was suspected of committing the crime and attempting to elude in his own vehicle.¹⁵² As police pursued, Mr. Ashford struck a guardrail with his SUV.¹⁵³ Trying to dislodge the vehicle from the guardrail, Mr. Ashford caused his tires to spin out, filling the road with smoke,¹⁵⁴ and reportedly caused his SUV to jerk toward nearby officers.¹⁵⁵ The pursuit ended with “four law enforcement officers discharg[ing] a total of thirteen rounds towards Mr. Ashford.”¹⁵⁶

The Record and the South Bergenite, newspapers owned by NJMG, demanded the police department produce copies of the dashcam videos pursuant to OPRA.¹⁵⁷ The records custodian declined¹⁵⁸ claiming the department could make a clear showing that the footage satisfied OPRA’s criminal investigation exception as the recording was: (1) “not required by law;” and (2) “pertained to criminal investigation.”¹⁵⁹ The court noted it was not briefed on the existence of any statewide directives¹⁶⁰ or local standing police orders relating to the use of dashboard cameras.¹⁶¹ As such,

¹⁴⁹ *Id.* at 903.

¹⁵⁰ *Id.* at 901.

¹⁵¹ *Id.* at 892.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Myles Ma, *Man Fatally Shot by Police in Rutherford Rammed Police Car, Attorney General Says*, NJ.COM, (Sept. 16, 2014),

http://www.nj.com/bergen/index.ssf/2014/09/man_shot_by_police_rammed_cop_car_attorney_general_says.html

(last visited Oct. 29, 2017).

¹⁵⁵ *N. Jersey Media Grp.*, 163 A.3d at 892.

¹⁵⁶ *Id.* at 897.

¹⁵⁷ *Id.* at 893.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 896; *see also* N.J. STAT. ANN. § 47:1A-1.1 (2002).

¹⁶⁰ It is unclear if any such directives actually exist.

¹⁶¹ *N. Jersey Media Grp.*, 163 A.3d at 902.

the court was unable to determine whether the footage was “required by law” or not.¹⁶² SCONJ reasoned the footage fell within OPRA’s criminal investigation exemption because, extraordinarily, the requestor failed to show the footage was not exempt under the first prong of the exemption.¹⁶³ As to the second prong, the court found the footage of a motor vehicle pursuit indeed “pertained to” an investigation.¹⁶⁴ But as the footage was never shown to not be “required by law,” the newspapers’ request for the footage was properly denied under OPRA.¹⁶⁵

SCONJ further held that OPRA’s ongoing investigation exception did not apply.¹⁶⁶ The government failed to show the footage did not pertain to an investigation in progress, disclosure was inimical to public interest,¹⁶⁷ and the footage was not open for public inspection before the investigation.¹⁶⁸ The court announced that, in general, dashcam footage will not pertain to an investigation in progress and is generally available to the public before the investigation.¹⁶⁹ SCONJ dedicated most of its analysis to the public interest prong.¹⁷⁰ Contrary to the government’s position, public interest actually favored releasing the footage of the police shooting.¹⁷¹ Disclosure of dashcam footage “protect[s] the public and police alike in that videos can expose misconduct and debunk false accusations.”¹⁷² Generic allegations of the need for police anonymity for safety reasons will not justify the exemption.¹⁷³ The court should weigh “the nature of the details to be

¹⁶² *Id.*

¹⁶³ *Id.* The Court followed its long tradition of declining to give the force of law under OPRA to general retention schedules generated to implement the Destruction of Public Records, N.J. STAT. ANN. § 47:3-15 to -32. *Id.*

¹⁶⁴ *Id.* at 903.

¹⁶⁵ *Id.*

¹⁶⁶ *N. Jersey Media Grp.*, 163 A.3d at 903-4.

¹⁶⁷ N.J. STAT. ANN. § 47:1A-3(b) (“It shall appear that the information requested or to be examined will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release.”).

¹⁶⁸ *N. Jersey Media Grp.*, 163 A.3d at 905.

¹⁶⁹ *Id.* at 903.

¹⁷⁰ *Id.* at 905–06.

¹⁷¹ *Id.*

¹⁷² *Id.* at 907.

¹⁷³ *Id.* While the court ruled that the state need not show particularized threat of harm, it seemed to weigh this factor against the state in applying the public interest test. *Id.*

revealed, how extensive they are, and how they might interfere with an investigation.”¹⁷⁴ The completion of interviews of principal witnesses and the public’s interest in transparency in matters of great concern (including fatal shootings) militates in favor of disclosure.¹⁷⁵ Non-disclosure can “fuel the perception that information is being concealed.”¹⁷⁶

The court further held the footage should be released under the news agency’s common law right of access.¹⁷⁷ Having already determined that the public had a great interest in obtaining video evidence of a fatal shooting, SCONJ expressly ruled that the government’s interests in confidentiality were less than the public’s interest in disclosure.¹⁷⁸ As such, three years after the fatal shooting, the dashcam video became available to the newspapers.¹⁷⁹ As access was granted pursuant to common law, the requestors were denied fees and costs.¹⁸⁰

B. N.J. Appellate Division Decisions (on Certification to SCONJ) Granting Access to Dashcam Footage

New Jersey’s intermediate court has twice held the government must grant the public access to police dashcam footage.¹⁸¹ Both cases elicited dissent.¹⁸² The majority in both cases reasoned disclosure was required after construing OPRA exemptions narrowly.¹⁸³ The

¹⁷⁴ *N. Jersey Media Grp.*, 163 A.3d at 907.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 910.

¹⁷⁸ *Id.*

¹⁷⁹ The videos were made on September 16, 2014. *See id.* at 893; SCONJ’s decided the matter on July 11, 2017. *N. Jersey Media Grp.*, 163 A.3d at 887.

¹⁸⁰ *Id.* at 910.

¹⁸¹ *Paff v. Ocean Cty. Prosecutor’s Office*, 141 A.3d 300 (N.J. Super. Ct. App. Div. 2016), *cert. granted*, 157 A.3d 831 (N.J. 2016); *Ganzweig v. Twp. of Lakewood*, No. A-4613-14T2, 2017 WL 3687522, *3 (N.J. Super. Ct. Aug. 28, 2017) (unpublished).

¹⁸² *Id.*

¹⁸³ *Id.*

government appealed to SCONJ in *Paff* as a matter of right¹⁸⁴—SCONJ heard oral argument in February 2018.¹⁸⁵

In *Paff v. Ocean County Prosecutor’s Office*, the Appellate Division granted a blogger’s request for the footage recorded by two dashcams mounted in police cars.¹⁸⁶ The cameras recorded the stop of a motorist which resulted in charges filed against the responding officer for misconduct, aggravated assault, and misuse of a police dog.¹⁸⁷ The officer allegedly “sicked his dog, Gunner, on [the driver Wendy Tucker] in the Barnegat municipal lot after she was already in custody.”¹⁸⁸ The court held the government failed to show the footage was confidential under OPRA’s exceptions for either criminal investigations or ongoing investigations.¹⁸⁹

The Appellate Division repeatedly emphasized the government bore the burden to show OPRA authorized denial of access.¹⁹⁰ The *Paff* Court rejected that government’s position that it need only make a facial showing of a statutory exemption under OPRA, after which the requestor would bear the burden of rebutting the facial showing.¹⁹¹ The government failed to prove the footage pertained to an investigation and was “not be required by law.”¹⁹² Because the local police chief had issued an order that Tuckerton officers must activate the dashcam with the activation of sirens and emergency lights, the footage was “required by law.”¹⁹³ The standing order carried the

¹⁸⁴ New Jersey Court Rule 2:2-1 provides that a party may “take to the Supreme Court from final judgments as of right” any case in which there is a dissent in the Appellate Division.

¹⁸⁵ Interview with Justice Timpone’s clerk, Chambers in Newark, N.J. (Feb. 14, 2018).

¹⁸⁶ *Paff*, 141 A.3d at 303.

¹⁸⁷ *Id.*

¹⁸⁸ Kathleen Hopkins, Dog Attack Dash Cam Video on the Docket, APP. (Feb. 1, 2016) <http://www.app.com/story/news/crime/jersey-mayhem/2016/02/01/police-dog-attack-dash-cam-video-docket/79488144>.

¹⁸⁹ *Paff*, 141 A.3d at 318.

¹⁹⁰ *Id.* at 307–10 (citing N.J. STAT. ANN. § 47:1A-6 (2002) and *Asbury Park Press v. Monmouth Cty.*, 966 A.2d 75 (N.J. Super. Ct. App. Div. 2009), *aff’d* 986 A.2d 678 (N.J. 2010)).

¹⁹¹ *Id.* at 309.

¹⁹² *Id.* at 314–15.

¹⁹³ *Id.* at 305–06.

force of law as it was a “clear expression of policy pertaining to citizen encounters with members of law enforcement,” binding on local officers.¹⁹⁴ The footage did not pertain to an investigation as traffic stops generally do not.¹⁹⁵ Tacitly approving the Appellate Division’s analysis, SCONJ tipped its cards on this issue in 2017: “a routine traffic stop, in which a suspect obeyed the police and pulled over, would [not] necessarily ‘pertain’ to a criminal investigation.”¹⁹⁶ As such, the criminal investigation exception was not applicable.¹⁹⁷

The Appellate Division further found the government failed to prove an ongoing investigation. The video did not pertain to an investigation in progress; release was not inimical to public interest; and the footage was available for inspection before the investigation as the officer had activated the dashcam before any investigation began.¹⁹⁸ The subsequent investigation into the officer’s misconduct did not permit the government to drop the footage into a privileged “ongoing investigation” folder.¹⁹⁹ As the court ordered release under OPRA, it did not analyze the facts under common law.²⁰⁰

The dissent found the footage pertained to an investigation and was not required under law, inasmuch as local police directives could not carry the force of law under the OPRA exception.²⁰¹ Judge Gilson would have nevertheless remanded with instruction to analyze the request under the common law.²⁰²

¹⁹⁴ *Id.* at 312.

¹⁹⁵ *Paff*, 141 A.3d at 312.

¹⁹⁶ *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 163 A.3d 887, 903 (N.J. 2017).

¹⁹⁷ *Paff*, 141 A.3d at 312.

¹⁹⁸ *Paff*, 141 A.3d at 306, 315.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 318.

²⁰¹ *Id.* (Gilson, J., dissenting).

²⁰² *Id.* (Gilson, J., dissenting).

In a similar matter, the *Ganzweig* court ordered the release of dashcam footage depicting the stop of a driver who made an illegal left turn.²⁰³ The officer permitted the driver to leave, but then grew suspicious that the driver and passenger had provided false names.²⁰⁴ The officer stopped the vehicle a second time, discovered illegal drugs, and issued summons.²⁰⁵ The county prosecutor dismissed the charges against the driver and passenger and instead indicted the responding officer for misconduct, namely conducting an illegal search and falsifying his wrongdoing.²⁰⁶ The majority found the footage was not a criminal investigatory record under OPRA because a local police order required the incident be recorded.²⁰⁷ The ongoing investigation exception was also inapplicable because the government failed to show release would be inimical to public interest.²⁰⁸

The dissent echoed the *Paff* dissent in finding the record pertained to an investigation and was not required under law, inasmuch as local police directives could not carry the force of law under the OPRA exception.²⁰⁹ *Ganzweig* was not appealed to SCONJ as a matter of right.

V. Predicting SCONJ’s “Preference” Regarding Release of BWC Footage

New Jersey courts should interpret OPRA as generally granting the public access to BWC footage, such that a requestor should rarely be required to prove her interest in disclosure outweighs the government’s interest in confidentiality. Law enforcement agencies across New Jersey have deployed BWCs to promote police accountability and transparency.²¹⁰ These policy

²⁰³ *Ganzweig v. Twp. of Lakewood*, No. A-4613-14T2, 2017 WL 3687522,*3 (N.J. Super. Ct. Aug. 28, 2017) (unpublished).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at *4.

²⁰⁷ *Id.* at *7.

²⁰⁸ *Id.*

²⁰⁹ *Ganzweig*, 2017 WL 3687522, at *11–12 (Reisner, J., dissenting).

²¹⁰ *See supra* Part II (discussing BWC policies in New Jersey).

goals will be met only if the public has strong, cheap, and ready access to BWC footage.²¹¹ OPRA alone provides the public with the right to ready access to government records; common law requests are slow, expensive, and weak.²¹² These drawbacks will frustrate the goals of BWC programs.²¹³

As a threshold matter, SCONJ is likely to hold that BWC footage is a public record for OPRA purposes as SCONJ has already held that dashcam footage is a public record under OPRA.²¹⁴ Recent SCONJ decisions, analyzed in Part V-A below, suggest that the court is nevertheless poised to construe exemptions broadly to limit disclosure of BWC footage under OPRA. Part V-B argues SCONJ, in reviewing the *Paff* decision, should construe OPRA’s exemptions narrowly.

A. SCONJ’s Derogation from OPRA

The *Gilleran* court announced SCONJ’s “preference” for analyzing requests for government surveillance footage under the common law.²¹⁵ It does not fall with SCONJ’s remit to decide by fiat that requests are *better* analyzed under the common law than OPRA.²¹⁶ The judiciary’s role is to interpret OPRA, not circumvent it.²¹⁷ The majority characterized its interpretation of OPRA’s security exemption as “sensible.”²¹⁸ Whether sensible or not, the majority’s finding that the release of the footage “could” jeopardize safety—not that it “*would*” as OPRA requires—is a derogation from OPRA’s mandate to construe exceptions to the statute in

²¹¹ Zansberg, *supra* note 7, at 14 (“[T]he cause of improving accountability, transparency and public trust is undercut when footage is not released . . .”).

²¹² See *supra* Parts III-A and III-B (comparing the right of access under OPRA and the common law).

²¹³ Zansberg, *supra* note 7, at 14.

²¹⁴ N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 163 A.3d 887 (N.J. 2017) (7-0 decision).

²¹⁵ *Gilleran v. Bloomfield*, 149 A.3d 800, 803 (N.J. 2016).

²¹⁶ *Id.* at 815 (Rabner, C.J., dissenting).

²¹⁷ Cf. *Winberry v. Salisbury*, 74 A.2d 406 (1950) (discussing separation of powers).

²¹⁸ *N. Jersey Media Grp.*, 149 A.3d at 812 (Rabner, C.J., dissenting).

favor of the public’s right of access.²¹⁹ The court’s inflammatory evocation of September 11, 2001 in its opinion²²⁰ smacks more as an acknowledgement of overreach than as a rationale for straying from OPRA. Chief Justice Rabner, dissenting, aptly criticized the majority for failing to construe OPRA exceptions narrowly.²²¹ In rejecting the OPRA’s unambiguous mandates, the majority arrogated onto itself the power to determine the degree of secrecy—that “instrument of Old World tyranny” in Justice Douglas’s colorful words—in which the government may operate.²²²

In the years to come, the requestor seeking BWC footage will likely attempt to distinguish *Gilleran*, and its holding that OPRA grants no right to demand the “wholesale release” of surveillance footage that “could” jeopardize the safety of any person. Litigants requesting access to BWC under OPRA will no doubt argue the *Gilleran* camera was an inconspicuous second-floor camera obscured by smoked glass and that BWCs are much more conspicuous.²²³ Requestors may also argue that a citizen could legally record many of the events captured by an officer’s BWC.²²⁴ Requestors will insist the first security exception in OPRA applies only to buildings and facilities.²²⁵ These distinctions are likely to prove unavailing: the *Gilleran* court bottomed its ruling on commonsense need to conceal surveillance limitations.²²⁶ Further, citizens cannot follow officers for their entire shifts as officers enter the private spheres to interview informants, witnesses, and victims. As officers with BWCs can enter private realms, security concerns are

²¹⁹ *Id.* at 804 (majority opinion).

²²⁰ *Id.* at 809 (majority opinion).

²²¹ *Id.* at 812 (Rabner, C.J., dissenting).

²²² *Loigman v. Kimmelman*, 505 A.2d 958, 967 (N.J. 1986) (unanimous decision).

²²³ *See Gilleran v. Bloomfield*, 149 A.3d 800, 803 (N.J. 2016).

²²⁴ *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 163 A.3d 887 (N.J. 2017) (finding police officer’s interest in privacy *de minimis*); *cf. Villanova v. Innovative Investigations, Inc.*, 420 N.J. Super. 353 (N.J. Super. Ct. App. Div. 2011) (holding in dicta there would be no tort liability for taking photographs of anyone open to the public eye).

²²⁵ N.J. STAT. ANN. § 47:1A-1.1 (2002) (providing “[1] emergency or security information or procedures for any buildings or facility which, if disclosed, *would* jeopardize security of the building or facility or persons therein”).

²²⁶ *Gilleran*, 149 A.3d at 806.

much greater in the BWC context than in the context of a fixed surveillance or dashcam.²²⁷ The government will rely on the second security exception in OPRA which concerns the safety of all persons and is not limited to those in buildings and facilities.²²⁸

As BWC cases ripen, SCNJ is likely to expand the *Gilleran* ban of “wholesale” release of surveillance footage to ban “wholesale” release of BWC footage. Courts will no doubt uphold denials for BWC footage depicting an officer’s entire shift. The footage taken by the entire force for an entire day or week will, *a fortiori*, be denied. SCNJ is keenly aware of the concerns raised by the aggregation of data and will likely construe OPRA’s security exceptions liberally to protect the safety of officers equipped with BWCs.²²⁹

As an officer patrols her beat, she defines the general geographic scope and general recording times of her observations. Wholesale release of footage would permit a citizen to analyze where an officer generally does and does not patrol; such analysis could enable a requestor to identify “security measures and surveillance techniques which . . . *would* create a risk to the safety of”²³⁰ the officer and the public. The danger is heightened not only by the length of footage, but by the number of cameras. Wholesale release of all BWCs and dashboard footage on a given

²²⁷ Further support for limiting the amount of access to footage may lie in analogy to other OPRA cases where the court ordered partial release of records. *Burnett v. County of Bergen*, 954 A.2d 483, 491 (N.J. App. Div. 2008) (denying company access to masses of recorded realty documents with SSNs, which would have been disclosable for individual house sales); *cf.* *State v. Garcia*, 618 A.2d 326, 328 (1992) (holding “official information privilege” based on Evidence Rule 34, exempted disclosure of exact local of the law agency’s surveillance of drug traffickers; defendant entitled to cross-examine an officer on his ability to make accurate observations, but must stop short of adducing where the officer’s hidden observation point was located). By analogy, an hour of BWC footage will let the public see what officer sees; twenty-four hours of the BWC footage will let the public know where the officer generally is and can lead to a plan of illegal activities. *But see* *State v. Zenquis*, 618 A.2d 335, 337 (N.J. 1992) (disclosing exact location of surveillance).

²²⁸ N.J. STAT. ANN. § 47:1A-1.1 (2002) (providing “[2] security measures and surveillance techniques which, if disclosed, *would* create a risk to the safety of persons, property, electronic data or software.”).

²²⁹ The *Gilleran* court’s rationale is akin to the logic employed by the Court in *U.S. v. Jones*, wherein the Court reasoned that gathering many small and ostensibly disparate bits of intelligence may permit the information miner to piece together a unified, aggregate picture of intelligence. 132 S. Ct. 945 (2012) (holding installation of GPS tracking device and aggregate data collected over twenty-eight days constituted illegal search).

²³⁰ N.J. STAT. ANN. § 47:1A-1.1 (2002).

week would enable citizens to plot and predict the geographic limits and general frequency of police surveillance of all officers equipped with cameras.²³¹ Criminals might pay for maps aggregating this data in an effort to target officers or to plan crimes where officers rarely patrol.

Extending *Gilleran* to BWCs would sensibly limit the public access to BWC footage under OPRA. Yet, SCONJ need not derogate from OPRA’s mandate to exempt only records that “would create a risk to the safety”²³² to protect law enforcement officers. SCONJ should cabin *Gilleran*. The government should be required to make a clear showing that release of BWC *would* endanger officers or others. Further, *Gilleran*’s ban on disclosure should also not be overstated. *Gilleran* upheld the denial of a request for fourteen hours of footage.²³³ This bears little resemblance to a request for one hour of BWC footage, which would not enable the viewer to determine the geographic and temporal limits of an officer patrol.

Once again construing OPRA’s criminal exemption broadly, SCONJ denied an OPRA request for police footage in *NJMG*.²³⁴ The government sought to exclude dashcam footage as part of a criminal investigation.²³⁵ Although this exception is only applicable where the government makes a clear showing that the records is both “not required by law” and “pertains to an investigation,” the court did not require the town to prove the first prong.²³⁶ No witness testified to the absence of standing orders or other laws requiring officers to record traffic stops such as the one captured in the requested video.²³⁷ The parties did not submit or brief SCONJ on the existence

²³¹ Add to this, footage from surveillance cameras at the police station, within interview rooms, courthouses, and even from Taser guns.

²³² N.J. STAT. ANN. § 47:1A-1.1 (2002).

²³³ *Gilleran*, 149 A.3d at 803.

²³⁴ *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 163 A.3d 887, 903 (N.J. 2017).

²³⁵ *Id.* at 909.

²³⁶ *Id.*

²³⁷ *Id.*

of any Attorney General directives or local standing orders.²³⁸ Under OPRA, the government is required to make a “clear showing” that the footage was not required by law to be made.²³⁹ But SCONJ deviated from OPRA and ruled that since the court was unable to determine whether the footage was “required by law” from the record, the exemption applied.²⁴⁰

Perhaps this approach is reasonable, inasmuch as no orders or directive may actually exist. Yet, the ruling ignores OPRA’s mandate: (1) that the government marshal clear evidence to justify nondisclosure,²⁴¹ and (2) that the judiciary construe all exemptions to OPRA in favor of public access.²⁴² A more prudent course may have been to remand the case to determine whether any directives existed. *NJMG* shifts the burden—without comment—to the requestor, who must now prove that the record is “required by law” to be made.²⁴³ The Appellate Division correctly rejected such burden shifting in *Paff*.²⁴⁴

Rather than remand the matter to determine whether directives or other laws required the officer to record the stop, SCONJ instead analyzed the request under common law.²⁴⁵ Chief Justice Rabner, now writing for the majority, abandoned the concerns he voiced in his *Gilleran* dissent: that the court should not *prefer* to analyze some requests under common law.²⁴⁶ After all, only affluent requestors can press their case without OPRA’s summary procedures and fee-shifting

²³⁸ It is unclear if any such directives actually exist. *Id.* at 902.

²³⁹ *Id.* at 909

²⁴⁰ *N. Jersey Media Grp.*, 163 A.3d at 909.

²⁴¹ N.J. STAT. ANN. § 47:1A-6 (2002).

²⁴² N.J. STAT. ANN. § 47:1A-1.

²⁴³ This, no doubt, is a sensible approach; proving a negative, to wit that a record is not “not required by law to be made” may prove an awkward test. Yet, as Chief Justice Rabner wrote in his *Gilleran* dissent, SCONJ’s concern is what OPRA says, not in creating and imposing its own “sensible approach as a matter of policy.” Further, simply a certification from the local law enforcement agency could satisfy the government’s burden that the footage is not required by law to be made.

²⁴⁴ *Paff v. Ocean Cty. Prosecutor’s Office*, 141 A.3d 300, 307–10 (N.J. Super. Ct. App. Div. 2016), *cert. granted*, 157 A.3d 831 (N.J. 2016);

²⁴⁵ *N. Jersey Media Grp.*, 163 A.3d at 909.

²⁴⁶ *N. Jersey Media Grp.*, 163 A.3d 800.

provisions.²⁴⁷ Perhaps the Chief Justice viewed the OPRA denial in *NJMG* as a proper result of the newspapers' failure to brief the court on the existence of relevant dashcam directives.²⁴⁸ Perhaps the court inferred no such directives existed. A savvy litigant may, at the time of its initial request, seek all of the local and state directives requiring the records be made by law. But this is not what OPRA requires of the requestor.²⁴⁹ The government bears the burden to show an exemption applies.²⁵⁰ SCONJ does not have the authority to circumvent OPRA's mandates where it finds the common law expedient.²⁵¹ Although the town was ordered to release the dashcam footage,²⁵² *NJMG* is also not a case of "no harm, no foul." The court's bypass of OPRA denied the prevailing requestor's right under OPRA to recover significant attorney's fees.²⁵³

In future cases, SCONJ will likely extend *NJMG* to requests for BWC footage, finding that the criminal investigation exemption applies where no directive requires the recording be made and the matter also pertains to a crime. *NJMG* also suggests that the ongoing investigation exemption should not apply where the recording was activated prior to investigation.²⁵⁴ As the Attorney General's Directive instructs law enforcement officers to activate BWCs in numerous situations other than investigations and encourages willing precincts to use the cameras in as many situations as it is safe and legal to record,²⁵⁵ *NJMG* suggests that the ongoing investigation exemption will have limited applicability to the BWC context. *NJMG* also announces policy

²⁴⁷ *Gilleran v. Bloomfield*, 149 A.3d 800, 815–16 (N.J. 2016) (Rabner, C.J., dissenting).

²⁴⁸ *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 163 A.3d 887, 896 (N.J. 2017).

²⁴⁹ *N. Jersey Media Grp.*, 163 A.3d at 895.

²⁵⁰ *Id.*

²⁵¹ *Loigman v. Kimmelman*, 505 A.2d 958, 967 (discussing inter-branch comity as a basis for comprehensive right of access statutes).

²⁵² *N. Jersey Media Grp.*, 163 A.3d at 910.

²⁵³ N.J. STAT. ANN. § 47:1A-6 (2002).

²⁵⁴ *N. Jersey Media Grp.*, 163 A.3d at 902.

²⁵⁵ *Directive*, *supra* note 6.

reasons favoring the release of dashcam footage,²⁵⁶ policy declarations which will torpedo future efforts by the government to apply the ongoing investigation exception to police footage. The government will no doubt argue in BWC cases that *NJMG* should be distinguished. Dashcams reveal images overwhelmingly taken from public roadways.²⁵⁷ Footage generally lacks detail.²⁵⁸ Reflections on windshields, particularly from police lights at night, distort recordings.²⁵⁹ Trial courts releasing BWC under the common law are to consider, the “nature of the details,” their extent, and their potential to interfere with an investigation.²⁶⁰ Given the likelihood that footage from BWCs will generally contain greater details than footage from surveillance and dashcams, it is likely access to BWCs will be more restricted than access to dashcams under the common law factors set forth in *NJMG*.

B. SCONJ’s Next Move

SCONJ has an opportunity to return to the strict interpretation of OPRA’s exceptions in *Paff*.²⁶¹ The government argued in *Paff* that OPRA requests for police dashcam footage should be denied because the footage falls under OPRA’s criminal investigation exception, as being required by law and pertaining to criminal acts.²⁶² SCONJ should uphold the Appellate Division’s finding that the local police chief’s order, having the force of law under OPRA, required the responding

²⁵⁶ *N. Jersey Media Grp.*, 163 A.3d at 909 (declaring, by way of example, that “[f]ootage of an incident captured by a police dashboard camera . . . can inform the public’s strong interest in a police shooting that killed a civilian.”).

²⁵⁷ New Jersey Courts have recognized “a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his [or her] movements from one place to another.” *Villanova v. Innovative Investigations, Inc.*, 21 A.3d 650, 656 (N.J. Super. Ct. App. Div. 2011) (quoting *U.S. v. Knotts*, 460 U.S. 276, 281 (1983)).

²⁵⁸ Bakardjiev, *supra* note 4, at 79 (discussing second generation BWC with wide-angle lens, high definition resolution, zoom, and high-sound recording quality); *cf.* Liebman, *supra* note 4, at 356.

²⁵⁹ Bakardjiev, *supra* note 4, at 79.

²⁶⁰ *N. Jersey Media Grp.*, 163 A.3d. at 907.

²⁶¹ Despite the litigants’ right to appeal as a matter of right, it seems the parties have not submitted a notice of appeal in *Ganzweig*.

²⁶² *Paff v. Ocean Cty. Prosecutor’s Office*, 141 A.3d 300, 309–10 (N.J. Super. Ct. App. Div. 2016), *cert. granted*, 157 A.3d 831 (N.J. 2016).

officers to activate the cameras when sirens and emergency lights were activated.²⁶³ Indeed, the vehicle was wired such that the camera automatically turned on with the sirens and emergency lights.²⁶⁴ On the other hand, SCONJ should not find that the footage pertained to an investigation. As the Appellate Division aptly reasoned, in most instances, a traffic stop and pursuit of a suspecting criminal violation of the law does not pertain to an investigation.²⁶⁵ SCONJ appears to have tacitly approved of this reasoning in *NJMG*: “a routine traffic stop, in which a suspect obeyed the police and pulled over, would [not] necessarily ‘pertain’ to a criminal investigation.”²⁶⁶ As such, the criminal investigation exception should not apply.

SCONJ should not conclude that the dashcam recordings pertain to an investigation because the camera was activated “to investigate an in-progress eluding incident,” as Judge Gilson argued in his dissent.²⁶⁷ Permitting the government to exclude video from disclosure in routine traffic stops is a slippery slope. It could be argued that all traffic stops, initiated by a *bona fide* belief that the driver has violated a motor vehicle statute, trigger investigative actions beyond those related to the underlying violation. The officer determines whether the vehicle is registered, inspected, or stolen; whether the driver has a valid license, acts suspiciously, conceals contraband, attempts to flee. Common experience should lead the court to recognize the officer seeks to elicit an admission from the driver, “Do you know why I pulled you over?”²⁶⁸ By these lights, the officer

²⁶³ *Id.*

²⁶⁴ The court declined to review claims that the footage should be exempted under Governor Whitman’s Executive Order, Exec. Order No. 69, ¶2 (May 15, 1997), Laws of New Jersey 1997, Vol. 2 at 231, providing that “fingerprint cards, plates and photographs and similar criminal investigation records that are required to be made, maintained or kept by any State or local governmental agency” shall not be “deemed to be public records subject to inspection and examination and available for copying.” Had the court reached the Order, the result would have been the same because it deemed footage of the traffic violation and subsequent police assault on the driver did not pertain to a crime.

²⁶⁵ *Id.*

²⁶⁶ *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 163 A.3d 887, 903 (N.J. 2017).

²⁶⁷ *Paff*, 141 A.3d at 323 (Gilson, J., dissenting).

²⁶⁸ *See, e.g., State v. Barlow*, No. A-4132-05T5, 2007 N.J. Super. Unpub. LEXIS 1210, at *2 (N.J. Super. Ct. App. Div. Mar. 12, 2007) (“I asked him if he knew why I was pulling him over. . . .”)

is almost always attempting to investigate, either to strengthen the State’s case against the driver for the moving violation or to find grounds for additional citations. According to such reasoning, it would be rare that a “traffic stop, in which a suspect obeyed the police and pulled over, would [not] necessarily ‘pertain’ to a criminal investigation.”²⁶⁹ Yet, these same arguments can be made of nearly every police caretaking duty. The officer with a *bona fide* belief that a woman leaving a bar may be intoxicated approaches her to determine such facts as: (1) whether she intends to drive; (2) whether she has a joint; and (3) whether she has paid her bar bill.

Rather than apply the exception to nearly all police interactions, SCONJ must interpret OPRA’s exemption narrowly. Narrow construction will maximize the Act’s policy goals of government transparency.²⁷⁰ *Paff* presents SCONJ with the opportunity to limit OPRA’s criminal investigation exception to felonies. Traffic violations and violations of ordinances, where investigations are nearly invariably limited to the violation itself, should not permit the State to conceal either dashcam footage or—when such cases come before the court—BWC footage.

C. Privacy Concerns Do Not Require Balancing Interests Under the Common Law

Because the common law approach seems well suited to weigh privacy concerns, exempting BWCs from OPRA appeals to some courts as well as some in the political branches.²⁷¹ This approach is not required. OPRA permits courts to balance countervailing interests in privacy.

OPRA charges public agencies with the duty to safeguard “personal information” with which it has been “entrusted” which might violate a citizen’s “reasonable expectation of

²⁶⁹ *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 163 A.3d 887, 903 (N.J. 2017).

²⁷⁰ *See* Steve Zansberg, *supra* note 7, at 14; *see also* S. Zansberg, *Why We Shouldn’t Hide What Police Body Cameras Show*, GOVERNING (Aug. 29, 2016), <http://www.governing.com/gov-institute/voices/col-police-body-camera-recordings-transpar-ency.html>.

²⁷¹ *See, e.g.*, *Gillera v. Bloomfield*, 149 A.3d 800, 810 (N.J. 2016).

privacy.”²⁷² In *Serrano v. South Brunswick Township*, one of the earliest cases interpreting OPRA, the court explained that the privacy provision of the Act requires the court to balance public and private interests before ordering the release of records.²⁷³ After reasoning that neither the ongoing nor criminal investigation exceptions applied, the *Serrano* court held that public interest in disclosure of the 911 tapes made by a murder suspect several hours before allegedly killing his father militated in favor of release, especially where release was unopposed by the caller.²⁷⁴ The court noted that it was appropriate to consider and balance the interests of: the specific 911 caller, 911 callers in general, and individuals specifically mentioned during the 911 call.²⁷⁵ Further, courts may consider the need for individual notice to those whose privacy is implicated in the request as well as the interplay between OPRA’s mandate to construe the right of access in the public’s favor and citizen’s reasonable expectation of privacy.²⁷⁶ In sum, the Act authorizes the court to consider specific and general privacy rights of citizens, even those who are not parties to the dispute.²⁷⁷ When privacy is implicated, the court may engage in balancing test very similar to the *Loigman* test, and the requestor will be entitled to all of OPRA’s added procedural and substantive protections.

²⁷² N.J. STAT. ANN. § 47:1A-1 (2002) (“The Legislature finds and declares it to be the public policy of this State that . . . a public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy[.]”). More than a mere policy declaration, the privacy provision in this section is substantive. *Burnett v. County of Bergen*, 954 A.2d 483, 491 (N.J. Super. Ct. App. Div. 2008).

²⁷³ 817 A.2d 1004, 1014 (N.J. Super. Ct. App. Div. 2003).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 1014–15.

²⁷⁷ While some decisions suggest the privacy provision protects only identifiers such as SSNs, names, and telephone numbers, the *Serrano* Court’s adopts the better interpretation of the Act because this construction avoids finding surplusage in the Act, as section 47:1A-5 directs custodian of records to redact SSNs, credit card numbers, unlisted telephone numbers, and driver license numbers of any person. N.J. STAT. ANN. § 47:1A-5. Further, extensive discussion during the legislature’s hearing on the Act and early drafts of the Act support the construction that the privacy provision was intended to protect more than numerical identifiers such as SSNs. *Asbury Park Press v. Ocean Cty. Prosecutor’s Office*, 864 A.2d 446 (N.J. Super. Ct. Law Div. 2004).

In addition to the broad privacy provision of section 47:1A-1, OPRA exempts the disclosure of SSNs, names, and telephone numbers.²⁷⁸ OPRA further recognizes carve outs to the statute created by New Jersey’s statutes and constitution.²⁷⁹ Identifiers of informants and of witness are exempt.²⁸⁰ Victims are also shielded.²⁸¹

Thus footage of an overwrought mourner²⁸² or victim’s bodies²⁸³ might be exempt,²⁸⁴ especially where survivors object to disclosure. Images of children may be exempt.²⁸⁵ Images of nudity may be exempt.²⁸⁶ Improperly disclosed records may give rise to a tort action.²⁸⁷ Finally,

²⁷⁸ N.J. STAT. ANN. § 47:1A-5

²⁷⁹ N.J. STAT. ANN. § 47:1A-9

²⁸⁰ *See, e.g.*, *N. Jersey Media Grp., Inc. v. Bergen Cty. Prosecutor’s Office*, 146 A.3d 656, 669 (N.J. Super. Ct. App. Div. 2016) (denying newspaper access to prosecutor’s investigation file of individual not arrested or charged; the record would have a chilling effect on witnesses and informants willingness to cooperate with police.) (“We are mindful that the person whose privacy would be irreparably invaded had no opportunity to press the case against disclosure.”).

²⁸¹ *See* N.J. STAT. ANN. § 47:1A-2.2 (barring convicted person’s from using OPRA to obtain information about the victim); N.J. CONST. art. I, ¶ 22 (the so-called “Victim’s Rights Amendment” providing, “[a] victim of a crime shall be treated with fairness, compassion and respect by the criminal justice system”); *see also* *Asbury Park Press v. Ocean Cty. Prosecutor’s Office*, 864 A.2d 446, 488 (N.J. Super. Ct. Law Div. 2004).

²⁸² *Kampfe*, *supra* note 4, at 1169.

²⁸³ *Id.* at 1171.

²⁸⁴ *Cf.* *Asbury Park Press v. Ocean Cty. Prosecutor’s Office*, 864 A.2d 446 (N.J. Super. Ct. Law Div. 2004) (denying newspaper’s request for 911 audio recording of woman’s dying words).

²⁸⁵ N.J. STAT. ANN. § 2A:4A-60 (“Social, medical, psychological, legal and other records of the court and probation division, and records of law enforcement agencies, pertaining to juveniles charged as a delinquent or found to be part of a juvenile-family crisis, shall be strictly safeguarded from public inspection.”); *cf.* N.J. STAT. ANN. § 9:6-8.10a (confidentiality of DCPD records); N.J. STAT. ANN. § 9:3-52 (adoption proceedings); N.J. STAT. ANN. § 9:17-42 (termination of parental rights); N.J. CT. R. 5:3.2 (family actions involving welfare of child); N.J. CT R 5:8-4 (custody investigations).

²⁸⁶ *See* N.J. STAT. ANN. § 2A:58D-1(a) (2002) (“[[A]n actor who, without license or privilege to do so, photographs, films, videotapes, records, or otherwise reproduces in any matter, the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, without that person’s consent... shall be [civilly] liable to that person.”).

²⁸⁷ Title 59 generally affords government agencies immunity for negligent acts. N.J. STAT. ANN. § 59. Kelly Freund suggests the tort will create a limit on release of improperly obtained footage, *e.g.*, illegal searches of homes. *See* Kelly Freund, *When Cameras Are Rolling: Privacy Implications of Body-Mounted Cameras on Police*, 49 COLUM. J.L. & SOC. PROBS. 91, 124 (2015). The New Jersey Constitution may provide for a tort akin to a federal *Bivens* claim: “The right to privacy has been defined as the “right of an individual to be . . . protected from any wrongful intrusion into his private life which would outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.” *Burnett v. County of Bergen*, 954 A.2d 483, 491 (N.J. Super. Ct. App. Div. 2008). *Soliman v. Kushner Cos*, 77 A.3d 1214 (N.J. Super. Ct. App. Div. 2013) (tort of invasion lied where employer intentionally filmed employees in a bathroom). But there was no tort “for observing [a plaintiff] or even taking his photograph while he is walking on a public highway, since he is not then in seclusion, and his appearance is public and open to the public eye.” *Villanova v. Innovative Investigations, Inc.*, 21 A.3d 650, 655 (N.J. Super. Ct. App. Div.

OPRA in no way abrogates common law privacy exceptions,²⁸⁸ which empower judges to foreclose access to records that would be extremely offensive to the sensibilities of a reasonable person.²⁸⁹ The general privacy interests of police officers have been found to be inconsequential,²⁹⁰ although personnel files are protected.²⁹¹

As such, under current law, for instance, the family of hypothetical Suspect Sam has the right to oppose the release of the footage graphically showing Sam's last words. Once opposed, the courts should balance the requestor's and the public's interest in disclosure against the family's interest in privacy. This will occur only where the family asserts its privacy right; the government would be required to notify the family to inquire whether the family wishes to oppose release.²⁹²

Further, it appears that BWC footage showing a citizen's driver's license in a traffic stop would be exempt from disclosure, while footage of the rest of a routine traffic stop would be accessible.²⁹³ By extension, BWC footage of a person requesting police assistance might be opposed by the individual and could be redacted to protect the privacy of the individual.²⁹⁴

Finally, the Directive on the use of BWCs obviates many privacy concerns. The Directive declares the program shall minimize intrusion of privacy of persons captured on BWC and avoid the chilling effect on victim and witness cooperation with police which might result from disclosure.²⁹⁵ The Directive generally achieves this by ordering law enforcement agents to

2011)(finding tort where wife planted tracking device in husband's car, as car never entered secluded locations out of public view).

²⁸⁸ N.J. STAT. ANN. § 47:1A-9.

²⁸⁹ *Asbury Park Press v. Ocean Cty. Prosecutor's Office*, 864 A.2d 446, 458 (N.J. Super. Ct. Law Div. 2004).

²⁹⁰ *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 163 A.3d 887, 887 (N.J. 2017).

²⁹¹ N.J. STAT. ANN. § 47:1A-10 (personnel files are exempt).

²⁹² *Cf. L.R. v. Camden City Pub. Sch. Disc.*, 452 N.J. Super. 56, *cert. granted/denied* (N.J. 2018).

²⁹³ *N. Jersey Media Grp. Inc.*, 146 A.3d 656 (noting OPRA bars the release of "identifying information about a person that originates with the individual and is 'entrusted' to the government").

²⁹⁴ *Cf. Serrano v. South Brunswick Twp.*, 817 A.2d 1004, 1014 (N.J. Super. Ct. App. Div. 2003).

²⁹⁵ *Directive*, *supra* note 6, 1.

deactivate cameras in places where greater privacy concerns have traditionally been recognized: private residences, hospitals, schools, and places of worship.²⁹⁶

As such, OPRA is suited to weigh competing interests in privacy and in disclosure. The courts have no reason to find the common law is better suited to analyze cases involving sensitive government footage.

VI. Strong Statutory Rights of Access to BWC Footage Will Promote Police Accountability and Transparency

This Comment began by posing three questions about footage depicting Suspect Sam's death. (1) Should the public have full access to the footage? (2) Should the government be able to withhold the footage while it conducts a criminal investigation? (2) Should the suspect's family have a say?

Yes, in general, OPRA should grant the public access to BWC footage; the Act's exceptions should be narrowly construed. More facts must be given to determine whether the criminal investigation exemption might apply. Was the footage not required by law and pertaining to a criminal investigation? If the BWC runs nonstop or nearly so, the footage should not be exempt, as it is not commenced as part of an investigation. Footage of a routine traffic stop should also not be exempt, as it does not pertain to a criminal investigation. Footage that was recorded in compliance with a local standing order, for example to activate a BWC camera whenever starting an investigation, could be exempt. Accordingly, more facts are needed to answer this question satisfactorily. Lastly, the family should have a say. If the family opposes the release of the graphic video, the court should weigh the family's privacy interests against the requestor's and the public's

²⁹⁶ *Directive, supra* note 6, 1.

right to know whether the officers wrongfully caused Suspect Sam's death. The public interest in such video would generally outweigh the family's interest in privacy according to *NJMG*.²⁹⁷

In conclusion, strong statutory rights of access to BWC footage are required to promote police accountability and transparency. If the release of the footage in the above hypothetical is delayed or frustrated, the public may assume the police wish to hide some wrongdoing. SCONJ should engage in a strict OPRA analysis, hewing to the mandates of the Act, rather than subjecting requests to common law balancing tests to make sure that all videos available under OPRA become available to the public as quickly as possible. *Paff* enables SCONJ to clarify the scope of the criminal law exemption. The exemption should also never be applied to investigations where the defendant is accused of some violation less than a felony.

²⁹⁷ *N. Jersey Media Grp.*, 163 A.3d at 887.