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**Re: *States Newsroom Inc., a Foreign Nonprofit Corporation D/B/A New Jersey Monitor v. City of Jersey City and Sean Gallagher, in His Official Capacity as Records Custodian, and Jersey City Police Superior Officers Association***  
**Docket No.: A-002721-22T1**

Honorable Judges of the Appellate Division:

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

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## PRELIMINARY STATEMENT

The trial court in this case determined that New Jersey’s expungement statute bars public access to police lieutenant Michael Timmins’s internal affairs report because the report contains facts or documents common to expunged criminal records. The court referred to the expungement statute as a “concrete wall” that prevented it from reaching the balancing test that governs disclosure under the common law right of access. In other words, it treated the operation of the expungement statute as a threshold concern. This approach broke with precedent and produced a warped outcome.

The trial court should have weighed the public’s interest in disclosure of the report against Jersey City’s confidentiality interests at square one—considering, within that framework, the impact of the adjacent expungement statute. While the Open Public Records Act (“OPRA”) occasionally yields to statutes, regulations, and privileges that compel confidentiality for classes of materials, the common law right rarely admits of categorical exceptions. Instead, those statutes, regulations, and privileges figure into the balancing test. Aired in the appropriate analytical sequence, the public’s interests in disclosure overwhelm Jersey City’s interests in confidentiality, including those that may emanate from expungement. (Point I)

The trial court committed a second error in sealing the case without finding that the need for secrecy substantially outweighed the strong presumption in favor of public access to judicial proceedings and records. Indeed, the trial court was obligated to apply this analysis to *each* document and to consider narrower means of vindicating any specific and substantiated privacy needs before drawing a curtain across the entire case. (Point II)

The trial court's decisions to deny access to Timmins's internal affairs report and to seal the case were structurally and substantively flawed. This Court should reverse and remand with instructions to perform the balancing tests that settled law requires.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

*Amicus curiae* accepts and incorporates the statement of facts and procedural history recited in Appellant's opening brief filed on October 2, 2023.

## ARGUMENT

### **I. Requests for public documents under the common law right of access must be analyzed according to a balancing test, even when the requests implicate statutory privacy protections.**

The common law right of access applies to all public records. A public record is any written memorial made by a public officer in the exercise of a public function. *N. Jersey Newspapers Co. v. Passaic Cnty. Bd. of Chosen*

*Freeholders*, 127 N.J. 9, 13 (1992) (citing *Nero v. Hyland*, 76 N.J. 213, 221–23, 386 (1978)). So long as a proper requestor seeks materials within that broad definition, the request faces the crucible of the common law balancing test. To prevail, a requestor must demonstrate an interest in the public record sufficient to “outweigh the State’s interest in non-disclosure.” *Educ. Law Ctr. v. N.J. Dep’t of Educ.*, 198 N.J. 274, 303 (2009).

In *Rivera v. Union County Prosecutor’s Office*, the New Jersey Supreme Court held that internal affairs (“IA”) records “can and should be disclosed under the common law right of access when interests that favor disclosure outweigh concerns for confidentiality.” 250 N.J. 124, 135 (2022). In assessing confidentiality concerns, courts consider the *Loigman* factors:

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

[*Loigman v. Kimmelman*, 102 N.J. 98, 113 (1986)]

The *Loigman* factors are balanced against the public interest in disclosure “to hold officers accountable, to deter misconduct, to assess whether the internal affairs process is working properly, and to foster trust in law enforcement.” *Rivera*, 250 N.J. at 147. Those interests may be heightened depending on additional considerations, including “the nature and seriousness of the misconduct, whether it was substantiated, the discipline imposed, the nature of the official’s position, and the person’s record of misconduct.” *Id.* at 135.

When a court undertakes the common law’s fact-intensive balancing test, it must do so in view of the “specific materials” requested. *Higg-a-Rella, Inc. v. Cnty. of Essex*, 141 N.J. 35, 47–48 (1995) (“[The] balancing process [is] concretely focused upon the relative interests of the parties in relation to [the] specific materials.”) (alteration in original) (internal quotation marks omitted). In turn, the court must support its decision to grant or deny access with particularized factual findings; it may not bypass the balancing process by purporting to locate whole categories of materials outside the common law’s reach. *See Rivera*, 250 N.J. at 146 (noting that an appellate court cannot evaluate a request for an IA report under the common law if the report is not in the record and no specific factual findings have been made).

**A. The trial court erred in treating the expungement statute as dispositive of States Newsroom’s public records request, rather than examining the expungement statute within the framework of the common law balancing test.**

When a statute or regulation confers confidentiality on a class of records, the statute or regulations informs, but does not displace, the common law right of access to those records. “Statutes and regulations can . . . factor into the balancing process but do not determine its outcome.” *Rivera*, 250 N.J. at 144. Instead, they function as “[e]xpressions of executive or legislative policy,” which may “weigh very heavily in the analysis, but . . . are not dispositive.” *Id.*; see also *S. N.J. Newspapers, Inc. v. Twp. of Mt. Laurel*, 141 N.J. 56, 76 (1995) (“[T]he Attorney General’s regulatory expression of the importance of confidentiality weighs very heavily, but not conclusively, in the balancing process.”).

This doctrinal resistance to codifications of confidentiality is among the features of the common law right of access that distinguishes it from OPRA. OPRA, by its own terms, may not “erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law.” N.J.S.A. 47:1A-9(b). Thus, when evaluating requests under OPRA, courts may reasonably begin by interpreting grants of confidentiality in relevant statutes, regulations, and precedent. In *Rivera*, for example, the New Jersey Supreme

Court held that the confidentiality provision in the Attorney General’s Internal Affairs Policy and Procedures (“IAPP”) manual, in combination with a statute directing all law enforcement agencies to implement the manual’s guidance, defeated an OPRA request for IA reports. 250 N.J. at 142–43. The same regulatory and statutory grants of confidentiality, however, did not foreclose consideration of a request for IA reports under the common law; common law requests, the *Rivera* Court affirmed, are decided through case-by-case interest balancing. *Id.* at 144–45.

For this reason, unlike OPRA, the common law right of access is effectively invulnerable to categorical exceptions. In *Home News v. State, Department of Health*, the New Jersey Supreme Court assessed a newspaper’s request for cause-of-death information on a death certificate under the common law and OPRA’s precursor, the Right-to-Know Law. 144 N.J. 446, 450 (1996). Principally at issue was the impact of N.J.A.C. 8:2A–1.2, a regulation promulgated to effectuate the confidentiality provisions of the Cancer Registry Act,<sup>1</sup> the Acquired Immune Deficiency Syndrome (“AIDS”)

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<sup>1</sup> N.J.S.A. 26:2-107 (“The reports made pursuant to this act are to be used only by the Department of Health and such other agencies as may be designated by the Commissioner of Health and shall not otherwise be divulged or made public so as to disclose the identity of any person to whom they relate; and to that end, such reports shall not be included under materials available to public inspection pursuant to P.L.1963, c. 73 (C.47:1A-1 et seq.).”)

Assistance Act,<sup>2</sup> and the Registration of Vital Statistics Act.<sup>3</sup> *Id.* at 451. The regulation requires that cause-of-death information be omitted from death certificates. *Id.* “In the context of the Right-to-Know Law, such regulatory exemptions preempt the balancing of the interests and preserve confidentiality on a categorical basis,” the Court explained. *Id.* at 455. But “[t]hat approach is not appropriate under the common law, where ‘the focus must always be on the character of the materials sought to be disclosed.’” *Id.* (quoting *Loigman*, 102 N.J. at 112) (internal quotation marks omitted). The Court in *Home News* did not halt at an imagined wall when it encountered the confidentiality provisions in the health statutes and related regulation. It embraced the “flexible” common law balancing process, *id.*, “sensitive to the fact that the requirements of confidentiality are greater in some situations than in others,” *id.* (quoting *McClain v. Coll. Hosp.*, 99 N.J. 346, 362 (1985)).

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<sup>2</sup> N.J.S.A. 26:5C-7 (“A record . . . which contains identifying information about a person who has or is suspected of having AIDS or HIV infection is confidential and shall be disclosed only for the purposes authorized by this act.”)

<sup>3</sup> N.J.S.A. 26:8-40.23 (“The confidential reports made pursuant to this act are to be used only by the Department of Health and other agencies that may be designated by the Commissioner of Health and shall not otherwise be divulged or made public so as to disclose the identity of any person to whom they relate; and to that end, such reports shall not be included under materials available to public inspection pursuant to P.L. 1963, c. 73 (C. 47:1A-1 et seq.).”)

Courts do likewise when faced with assertions of privilege. *See O'Boyle v. Borough of Longport*, 218 N.J. 168, 200 (2014) (privileges, including the attorney-client privilege, may give way to disclosure under the common law right of access “by a showing of particularized need.”). In *Drinker Biddle & Reath LLP v. New Jersey Department of Law and Public Safety*, the Appellate Division held that the trial court was required to apply the balancing test to a common law request for unfiled discovery, even though “[j]udicial case law has long established or recognized, without limitation, [its] confidentiality.” 421 N.J. Super 489, 497–98 (App. Div. 2011). In so doing, the trial court could not rely on the generic “rule that unfiled discovery is not accessible” to overcome the requestor’s interests. *Id.* at 501. In other words, the court could not dress a categorical exclusion in the costume of common law analysis. *Id.* It had to perform a searching and individualized assessment. *Id.*

The trial court here ignored the well-established process for analyzing records requests under the common law right of access, essentially concluding that IA reports arising from expunged conduct are categorically exempt. The trial court’s process resembled the type it might have correctly followed had it faced a request under OPRA. But it resembled not at all the balancing test it was bound to apply under the common law. The trial court did not examine the state’s interests in confidentiality. It did not examine the public’s interest in

disclosure. And it made no findings specific to the IA materials at issue. In its view, it did not “need to get to that point” because “the expungement order is the . . . concrete wall that [it] hit.” (1T:28-25 to 1T:29-4).<sup>4</sup> On the contrary, the trial court should have arrived at “that point” directly and immediately. No wall or other obstacle excused it from performing the common law balancing analysis.

**B. Under the common law balancing test, the public interest in disclosure of Timmins’s internal affairs report outweighs confidentiality interests.**

Like any common law request for IA records, States Newsroom’s request here must face a balancing test. Because this test is fact-specific, a remand to the trial court is likely warranted. Still, it bears noting at this stage that the public’s interests in disclosure are straightforward and strong, while Jersey City’s interests in confidentiality, including any interests arising from Timmins’s expungement, are minimal.

On top of the public’s general interest in disclosure of the IA report to hold Timmins accountable, to deter future misconduct by him and others in positions of trust and power, and to assess the functioning of the IA process, nearly all the *Rivera* factors that may enhance those interests are present here.

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<sup>4</sup> 1T refers to the transcript of the April 4, 2023 order to show cause hearing in Docket No. HUD-L-2055-22.

Timmins’s misconduct was serious, the IA complaint against him was sustained, he received significant discipline for it, and he was (and remains) a high-ranking officer.

Likely more contested is the role, if any, of the expungement law in the balancing test. In this case, the expungement law is largely irrelevant. First, IA reports are not among the types of records that the expungement statute shields. Expunged records include “complaints, warrants, arrests, commitments, processing records, fingerprints, photographs, index cards, ‘rap sheets’ and judicial docket records.” N.J.S.A. 2C:52-1(b). IA reports are not on this list and are unlike the criminal process materials that are. An IA report is an administrative record “prepared at the end of an investigation and ‘consist[s] of an objective investigative report recounting all of the case’s facts and a summary of the case, along with conclusions for each allegation, and recommendations for further action.’” *Rivera*, 250 N.J. at 142 n.1 (alteration in original) (quoting 2021 IAPP § 9.1.1 and distinguishing between IA “reports” and “files”).<sup>5</sup> The expungement statute’s reach is clear. Nothing in the statute’s text suggests that its protections follow the facts underlying expunged criminal

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<sup>5</sup> To the extent that States Newsroom seeks Timmins’s IA *file*, as distinct from his IA *report*, and that file contains expunged criminal records as defined by N.J.S.A. 2C:52-1(b), the trial court may assess the need for “appropriate redactions” through *in camera* document-by-document review. *Id.* at 150.

records wherever those facts may surface. *See G.D. v. Kenny*, 205 N.J. 275, 302 (2011) (“[T]he expungement statute does not transmute a once-true fact into a falsehood. It does not require the excision of records from the historical archives of newspapers or bound volumes of reported decisions or a personal diary.”).

Second, sheltering a police department from accountability or embarrassment is not among the purposes the expungement statute is intended to further. The expungement statute is meant to provide “relief to the reformed offender who has led a life of rectitude and disassociated himself with unlawful activity.” N.J.S.A. 2C:52-32. It is keenly focused on protecting the person “whom the expungement is meant to benefit: the recipient of the expungement.” *Y.H. v. T.C.*, 475 N.J. Super. 107, 120 (App. Div. 2023). Thus, the privacy interests that arise from expungement in this case reside with Timmins. Timmins is not a defendant here. Jersey City may or may not be able to articulate other grounds that support secrecy, but it cannot commandeer Timmins’s rights and expectations to insulate itself from public scrutiny.

When this Court or the trial court conducts the necessary common law balancing test, it must recognize that the public’s interest in disclosure of Timmins’s IA report is great, and that Jersey City derives no countervailing interests in confidentiality from his expungement.

**II. The trial court erred in sealing the record in this case without making required factual findings.**

The trial court ordered the permanent sealing of this matter on the same grounds as it denied access to the IA report—that is, generalizations about the operation of the expungement statute. (Pa1<sup>6</sup>; 1T:27-8 to -12). The sealing decision was a glaring abuse of discretion.

*Rule 1:2-1* requires that all judicial proceedings in New Jersey be conducted in open court and prohibits sealing the record of those proceedings except on a showing of good cause as defined by *Rule 1:38-11(b)*; see *State v. Williams*, 93 N.J. 39, 56 (1983) (“[T]he rules governing New Jersey courts have endorsed a strong and consistent policy in favor of open judicial proceedings.”). These rules are rooted in “our common law aversion to and distrust of secret trials,” *Verni ex rel. Burstein v. Lanzaro*, 404 N.J. Super. 16, 22 (App. Div. 2008), and “the first amendment’s ‘core purpose of assuring freedom of communication on matters relating to the functioning of government,’” *Lederman v. Prudential Life Ins. Co. of Am.*, 385 N.J. Super. 307, 323 (App. Div. 2006) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980)). Together, our court rules, common law, and constitutional free speech protections create a “very strong presumption in

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<sup>6</sup> “Pa” refers to Plaintiff-Appellant’s appendix.

favor of public access” to court proceedings and all documents and materials filed in connection with them. *Id.* at 316–17.

To determine whether to seal the record in a case, the court must conduct a “flexible balancing process.” *Id.* at 317 (quoting *Hammock v. Hoffmann–LaRoche, Inc.*, 142 N.J. 356, 381 (1995)). The person seeking to overcome the presumption of access must establish by a preponderance of the evidence that their interest in secrecy “substantially outweighs” that presumption. *Hammock*, 142 N.J. at 381. They do so by proving that they will suffer “a clearly defined and serious injury” if the lawsuit is opened to public scrutiny. *Lederman*, 385 N.J. Super. at 323 (quoting *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984)). In general, reputational harm is an insufficient injury to justify sealing. *Id.* at 320 (“If embarrassment were the yardstick, sealing court records would be the rule, not the exception.”).

Critically, the need for secrecy “must be demonstrated with specificity as to *each document*. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient.” *Id.* at 317 (quoting *Hammock*, 142 N.J. at 381–82). In turn, the trial court “must examine *each* document individually and make factual findings with regard to why the presumption of public access has been overcome.” *Hammock*, 142 N.J. at 382. When possible, the trial court should choose redaction over sealing so that a

protective order “will have the least intrusive effect on the public’s right-of-access.” *Id.*

The trial court here disregarded these directions. It made no findings that the need for secrecy substantially outweighed the presumption of access to the record, let alone findings specific to each document. And it made no effort to use redactions, pseudonyms, or any other tools to limit and tailor intrusion on the right of access. Instead, it entered a sweeping order to seal without proper process or justification.<sup>7</sup>

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<sup>7</sup> The trial court’s April 4, 2023 Order—on appeal here—permanently denying Plaintiff’s request to unseal also appears to leave in place a gag order prohibiting the litigants from sharing copies of their briefs with any person or entity other than the court and counsel for the parties. The gag order originated as a temporary consent order (Pa3, Pa148) and was never litigated or validated before assuming permanent status, apparently through simple judicial inaction. The Appellate Division’s October 12, 2023 Order on Appellant’s motion to share case filings with *amicus* ACLU-NJ confirms that the gag order continues to bind the parties. In fact, the Appellate Division’s Order expands the gag order, at least as to *amicus*, prohibiting it not only from providing others with copies of case filings but also from sharing any *information contained therein*. That is, *amicus* is prohibited from discussing the issues at stake in this litigation, even in an anonymized manner, and from carrying out its mission as an advocacy organization to educate the public about pressing transparency and police accountability concerns. The trial court’s gag order is a content-based restriction on speech and therefore subject to strict scrutiny and presumptively invalid. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Moreover, it represents a prior restraint on speech: “the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). The Supreme Court has frequently stated that “[a]ny system of prior restraints of expression . . . bear[s] a heavy presumption against its constitutional validity.” *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v.*

To be clear, that the parties at one point consented to sealing did not excuse the court from weighing the need for secrecy against the strong presumption of access, from narrowly tailoring restrictions on access, and from supporting restrictions with specific “event-by-event and document-by-document” findings. *Verni ex rel. Burstein*, 404 N.J. Super. at 25. As the Appellate Division in *Lederman* confirmed, the decision to seal court documents cannot rest “merely upon the agreement of the parties without a specific showing of serious injury.” 385 N.J. Super. at 319 (quoting *Universal City Studios, Inc. v. Superior Court*, 110 Cal. App. 4th 1273, 1282 (2003)). The parties to a lawsuit are not the only ones with an interest in the record compiled. The public also has an interest, and the judge is the primary representative of that interest. Indeed, “[t]he public’s interest is particularly legitimate and important where, as in this case, at least one of the parties to the action is a public entity or official.” *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994). A judge may not, consistent with New Jersey’s court rules, common law, and Constitution, rubber stamp a consent order to seal.

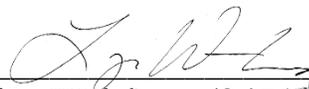
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*Sullivan*, 372 U.S. 58, 70 (1963)). The unreasoned and unnecessary gag order in this case cannot stand.

## CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's April 4, 2023 Order. It should remand the case for the trial court to pay proper heed to the public's strong interests in access to IA reports and court records.

Respectfully submitted,



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