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PRELIMINARY STATEMENT

Amicus Curiae American Civil Liberties Union of New Jersey respectfully submits this brief in support of Plaintiff-Appellant Richard Rivera in the above captioned matter, who seeks reversal of the order of the Law Division below denying relief under the Open Public Records Act, N.J. Stat. § 47:1A-1 *et seq.* and under the common law right of access to government records.

The OPRA request at issue in this case was straightforward: "copies of the Fort Lee Police Department Standard Operating Procedures." Pa39. This case therefore again raises before this Court the general question of whether, and to what extent, a law enforcement agency's standard operating procedures must be disclosed under the Open Public Records Act (OPRA) and under the common law right to access public records.¹

¹ See, *N.J. Second Amendment Soc'y v. Division of State Police of the New Jersey Dep't of Law and Pub. Safety*, 2015 N.J. Super. Unpub. LEXIS 1115 (App. Div. 2015) (addressing disclosability of NJ State Police standard operating procedures pursuant to N.J.A.C. § 13:1E-3.2, which withholds "Records, including standard operating procedures, manuals, and training materials, that may reveal: the identity of a confidential informant, a confidential source, a citizen informant, or undercover personnel; or an agency's surveillance, security, tactical, investigative, or operational techniques, measures, or procedures, which, if disclosed, would create a risk to the safety of persons, property, electronic data, or software, or compromise an agency's ability to effectively conduct investigations").

Citing Fort Lee's special status as the location of the western terminus of the George Washington Bridge, Respondents Borough of Fort Lee and its custodian of records argue that huge portions of the Standard Operating Procedures are not subject to OPRA disclosure based on two statutory exemptions:

- 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;
- security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software.

N.J.S.A. 47:1A-1.1.

Amicus ACLU-NJ concurs in the arguments expressed in the brief of Plaintiff-Appellant Richard Rivera that the redactions of the SOPs made by the Borough of Fort Lee are manifestly overbroad, and that the Borough has failed to establish a logical nexus between the wholesale redactions that it made and the generalized invocation of the need for secrecy regarding police practices in the name of security contained in the affidavit of the Police Chief Keith Bendul. Amicus will not repeat those arguments in this brief.

Amicus submits this brief to emphasize the importance of several procedural requirements that are necessary in order both

Pursuant to R. 1:36-3, the Court and counsel have already been served with copies of this unpublished opinion by Defendants-Respondents in their initial brief and appendix. Da45-51.

to enforce the Legislature's purpose in enacting OPRA, and also to fulfill the judiciary's constitutional role in exercising judicial review over agency action. See, *Monks v. N.J. State Parole Bd.*, 58 N.J. 238, 248 (1971) (N.J. Const., Art. VI, § 5, ¶4, grants prerogative writ jurisdiction including not only the review of judicial actions but also the superintendence of civil corporations, magistrates and other public officers to insure procedural fairness in the administrative process and to curb administrative abuses). Amicus ACLU-NJ believes, therefore, that at the very least this case must be remanded to the Law Division, in which the trial court must:

- (1) inspect in camera the unredacted Standard Operating Procedures, not merely the Vaughn Index, in order to assess whether the proposed redactions are actually required under the cited OPRA exemptions;
- (2) Provide Plaintiff and his counsel with the Vaughn Index so that he can properly participate in the process of discerning whether the security exemptions to OPRA are properly invoked; and
- (3) require that the Respondents go beyond articulating a general apprehension about the risks of the criminal element and demonstrate with reasonable specificity why disclosure of the redacted material would create a risk to the safety of persons or property.

PROCEDURAL HISTORY AND FACTS²

Amicus adopts the Statement of Facts and the Procedural History of the Plaintiff–Appellant Richard Rivera in its opening brief. For purposes of Amicus’s legal argument, the following two procedural irregularities are particularly relevant:

- 1) Plaintiff Rivera was not only denied access to large portions of the requested document, he was in fact denied access to the Vaughn Index cataloging the redacted portions and the reasons for withholding access;
- 2) The trial court never inspected the unredacted Standard Operating Procedures themselves, but merely relied on its ex parte in camera inspection of the Vaughn Index prepared by the defendants in order to determine that the portions of a document that it never saw would, if disclosed, create a risk to safety.

ARGUMENT

I. THE TRIAL COURT’S RULING BELOW EFFECTIVELY VALIDATED A BLANKET EXEMPTION FROM DISCLOSURE UNDER OPRA BASED UPON LAW ENFORCEMENT’S UNILATERAL PRONOUNCEMENT THAT DISCLOSURE WOULD CREATE A RISK TO SAFETY.

It is axiomatic that the Open Public Records Act, N.J.S.A. § 47:1A-1 et seq., creates a heavy presumption in favor of disclosure of public records, and “when a request for government

² For purposes of conciseness, the Facts and Procedural History sections are consolidated in this brief.

records is made, OPRA 'generally places the burden upon the custodian of a public record to state the 'specific basis' for the denial of access[.]'" *Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth.*, 423 N.J. Super. 140, 162 (App. Div. 2011) (quoting *Gannett N.J. Partners, LP v. Cnty. of Middlesex*, 379 N.J. Super. 205, 215 (App. Div. 2005) and N.J.S.A. 47:1A-5(g)). "The public agency shall have the burden of proving that the denial of access is authorized by law." N.J.S.A. 47:1A-6. Thus, courts will "simply no longer accept conclusory and generalized allegations of exemptions . . . but will require a relatively detailed analysis in manageable segments." *Newark Morning Ledger Co.*, 423 N.J. Super. at 162.

In light of this heavy burden on the defendants to articulate and demonstrate the legality of denying access to government documents, it is somewhat unfathomable to Amicus how that burden could have been successfully discharged through the truncated and summary process that occurred below, in which a somewhat conclusory certification submitted unilaterally by a police chief—laden with rhetoric about the dangers inherent in the modern world but lacking in analysis of how disclosure of a document presumably distributed widely within the police department would lead to risk to public safety—replaced the requirement that the custodian provide a "specific basis" for the denial.

A. Faithful Application of OPRA Requires a Particularized Review of the Merits of any Claimed Exemption.

As the Supreme Court noted, in creating the two "security exceptions" to OPRA at issue here:

The Legislature was not creating a blanket exception for any and all information about security measures. Such a clear and direct exclusion could have been written, but that is not how the exemptions are fairly read. *The "if disclosed" phrase must have meaning.*

Gilleran v. Bloomfield, 227 N.J. 159, 173 (2016)(emphasis added). It follows, therefore, that in order to discharge its duty as articulated in *Newark Morning Ledger* to provide more than conclusory and generalized allegations of exemptions" and give a "relatively detailed analysis" that explains the logical nexus between disclosure and the risk to safety, at the very least the defendants must go beyond the fallacious reasoning that because disclosure of *some* police practices might lead to a risk to safety, it follows that disclosure of *any* police practices that might be contained in the Standard Operating Procedures would necessarily have that effect. Rather, OPRA requires that, to the extent practicable, each practice be considered individually by the court to determine whether the statutory requirement of causation is present.

It is therefore particularly troubling that in this case, Plaintiff was not even provided with a copy of the Vaughn Index, thus contradicting this Court's directive that should be "guided

by the standard included in R. 4:10-2(e), which permits a party claiming privilege to "describe the nature of the documents . . . not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." *Paff v. N.J. Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346, 354 (App. Div. 2005). "The purpose of a *Vaughn* index is not only to facilitate the decision-maker's review of governmental records to determine whether they contain privileged material but also to provide the party seeking disclosure with as much information as possible to use in presenting his case." *Fisher v. Div. of Law*, 400 N.J. Super. 61, 76 (App. Div. 2008). It is only in "rare cases," in which an *in camera* submission of the *Vaughn* index is permissible. *Loigman v. Kimmelman*, 102 N.J. 98, 111 (1986), such as when disclosure even of the index would enable astute parties to divine with great accuracy the names of confidential informers or sources. *Id.*

There has been no explanation here of how a document of general application such as Standard Operating Procedures could have such an effect on a particular enforcement action such that even a *Vaughn* Index of the redacted portions of the SOPs cannot be supplied to the Plaintiff. Without the assistance of a reasonably informed Plaintiff who has access to the *Vaughn*

Index, a trial court cannot competently engage in the process of thorough review of the record in order to make particularized findings on the applicability of one of the security exemptions, and any conclusions reached from such a process are inherently flawed.

B. This Court Cannot Engage in Meaningful Judicial Review of Agency Action Based on a Superficial In Camera Review of a Vaughn Index and a Conclusory Affidavit from the Chief of Police.

Amicus had thought it was well-established that a "court is obliged, when a claim of confidentiality or privilege is made by the public custodian of the record, to inspect the challenged document in camera to determine the viability of the claim." *Hartz Mountain Indus., Inc. v. N.J. Sports & Exposition Auth.*, 369 N.J. Super. 175, 183 (App. Div. 2004); see *MAG Entm't, LLC v. Div. of Alcoholic Beverage Control*, 375 N.J. Super. 534, 551 (App. Div. 2005) (in an OPRA action the court is obliged when a claim of confidentiality or privilege is made by the public custodian of the record, to inspect the challenged document *in-camera* to determine the viability of the claim); *Paff v. New Jersey Dept. of Labor, Bd. of Review*, 379 N.J. Super. 346, 355 (App. Div. 2005) (OPRA statute contemplates the GRC's in camera review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption). Inexplicably, in this case the trial court

relied solely on the Vaughn Index, which it inspected in camera and ex parte, and the self-serving certification of Police Chief Bendul, and determined that redacted portions of the SOPs that the court never saw would, if disclosed, create a risk to public safety.

It is impossible for a trial court to come to any reasoned conclusion on the applicability of the statutory exemption under OPRA without looking at the relevant documents first. With great respect, failure to engage in even this basic level of scrutiny by the trial court in order to test the assertions of privilege and exemption effectively gives the custodian of records free rein to assert unilaterally—without fear of contradiction—an unsubstantiated risk to safety. Amicus's greatest fear stemming from this case is that it will validate a process by which successful assertion of the "security exemption" to OPRA will require only a sufficiently rhetorical incantation of the undeniable dangers inherent in law enforcement in order to establish, with no actual factual or logical support, that disclosure of any particular document would risk safety.

Legitimation of this procedure also draws into question the ultimate role of the courts to engage in meaningful judicial review. Like other agency actions, the Fort Lee Police departments administrative determinations are subject to

meaningful judicial review. See, *Trantino v. State Parole Board*, 154 N.J. 19, 24 (1998); see generally, N.J. CONST. Art. VI, §5, ¶4 (providing for judicial review of agency decision through action in lieu of prerogative writ). “[T]he orderly process of judicial review requires that the grounds for the administrative agency's action be clearly disclosed by it.” *Monks*, 58 N.J. at 245. For even deferential judicial review to be meaningful, the agency must state its reasons for its action grounded in the factual record. *In re Authorization for Freshwater Wetlands Gen. Permits*, 372 N.J. Super. 578, 595 (App. Div. 2004).

The requirement of articulation is far from a technicality and is a matter of substance. “It has been said that it is a fundamental of fair play that an administrative judgment express a *reasoned conclusion*.” *N.J. Bell Tel. Co. v. Communications Workers*, 5 N.J. 354, 375 (1950) (emphasis added). A conclusion requires evidence to support it and findings of appropriate definiteness to express it. *Id.* Effective judicial review requires that any administrative agency articulate its reasons for its decision with sufficient clarity. *Monks*, 58 N.J. at 244-45. New Jersey has long recognized the responsibility of agencies to provide a “*suitable expression of the controlling findings or reasons*” to afford a “‘a proper basis for effective judicial review.’” *Id.* at 244 (emphasis added) (quoting *Abbotts*

Dairies v. Armstrong, 14 N.J. 319, 332-33 (1954). "One of the best procedural protections against arbitrary exercise of discretionary power lies in the requirement of findings and reasons that appear to reviewing judges to be rational." *Monks*, 58 N.J. at 245 (quoting Davis, ADMINISTRATIVE LAW § 16.12, p. 585 (1970 Supp.)).

The record of the proceedings thus far in this case prevents the courts, including this Court, from exercising their constitutional duty to engage in meaningful judicial review over agency action. Even in areas where the courts give deference to administrative expertise and fact finding, they "do not . . . simply rubber stamp the agency's decision." *Paff v. N.J. Dep't of Labor*, 392 N.J. Super. 334, 340 (App. Div. 2007). Presented with a record that does not disclose, in any meaningful way, the reasoning behind the apparent determination that disclosure of large portions of Fort Lee PD's SOPs would risk safety, the Court would have little choice but to rubber stamp the agency determination. That conclusion is sufficient proof that the summary procedures utilized below were not sufficient to permit this Court to fulfill its constitutionally mandated function.

II. THE TRIAL COURT'S DISREGARD OF THE PUBLIC'S INTEREST IN BEING INFORMED OF POLICE PRACTICES RESULTED IN A FAILURE TO BALANCE THE COMPETING INTERESTS UNDER THE COMMON LAW RIGHT TO ACCESS PUBLIC RECORDS.

Even where the courts have found that there is no absolute

right to access public records under OPRA, they have still required a second level of analysis under the common law right of access, in which the requester's particular interest in accessing certain records is balanced against the government's interest in non-disclosure. See, e.g., *Gilleran v. Bloomfield*, 227 N.J. 159, 177 (2016) (holding that although security videotapes of public facility fell within OPRA exemption, some of those tapes may still be accessible under the common law right of access upon a balancing of the requesters interest in the information against the State's interest in non-disclosure).

In this case, the trial court gave short shrift to the plaintiff's interest in accessing the police practices contained in the Fort Lee PD SOPs. But rather than considering Mr. Rivera's interest in the documents that he actually requested (i.e. the SOPs), the trial court instead focused on Plaintiff's purported interest in the dire consequences that Chief Bendul predicted might possibly occur as a result of terrorist attacks, and then determined that avoiding those horrifying but speculative consequences "is far superior to plaintiff's quest for information. . . . There is no public interest in disclosure of such information." Opinion and Order at p.5.

Of course it cannot be gainsaid that there is no public interest in revealing information that leads to the risk of terrorist attacks, and Plaintiff never suggested otherwise. But

recasting the common law right of access inquiry in this way warps the appropriate inquiry into one whose result is preordained. This is not the balancing of interests analysis required under the common law right of access.

A. *The Public Has a Profound Interest in Police Practices that Determine the Manner in Which Law Enforcement Interacts with the Public.*

Plaintiff clearly has a significant interest, as do all members of the public, in learning about the practices and methods by which police officers interact with the public. Recent controversies over police practices, including use of deadly force, have made those practices the topic of understandable public debate. *E.g.*, *N. Jersey Media Grp., Inc. v. Tp. of Lyndhurst*, 229 N.J. 541, 580 (2017) (noting “the public's substantial interest in disclosure of MVR recordings” under common law right of access.”)

Indeed, only a few weeks ago, Attorney General Gurbir Grewal acknowledged the public interest in accessing body- and dash-camera videos of police deadly force incidents subject to public release under OPRA. In issuing a directive that mandates disclosure of videos of police use of force, the Attorney General stated:

This policy not only makes good on the promise of transparency and accountability embodied in these devices, but also reaffirms our understanding that only when there is trust in police-community relations will people have confidence in the fair administration

of justice and will officers be able to perform their difficult jobs effectively.

News Release, "Attorney General Grewal Announces Statewide Policy Governing Release of Body- & Dash-Camera Videos of Police Deadly Force Incidents," available at <http://nj.gov/oag/newsreleases18/pr20180226b.html>. Similarly, this Court has found Use of Force Reports (UFRs) subject to mandatory disclosure under OPRA, notwithstanding the law enforcement investigation and security exemptions contained in OPRA. *O'Shea v. Twp. of W. Milford*, 410 N.J. Super. 371, 379 (App. Div. 2009)

Any concern about revealing proprietary police practices would seem to be just as palpable, if not more so, with regard to body-cams and dash-cams, and Use of Force Reports, compared to the still unsubstantiated contention that wholesale redaction of the SOPs is necessary to protect the George Washington Bridge from terrorist attack. But it is premature to engage in the balancing of interests under the common law right of access at this juncture. Amicus merely urges this Court, upon remand, to make clear that the correct balancing test in applying the common law right of access involves the Plaintiff's interest in the information he seeks, *not* the plaintiff's interest (which of course does not exist and which Mr. Rivera never posited) in causing the parade of horrors that the defendants predict might occur if disclosure occurs.

CONCLUSION

For the reasons set forth herein, Amicus ACLU of New Jersey respectfully urges this Court to reverse the judgment of the Law Division denying relief under OPRA and the common law right of access to public records, and remand this matter for further and particularized consideration of whether specific portions of the Fort Lee Police Department Standard Operating Procedures might fall within one of the narrowly crafted exemptions to OPRA. If necessary, the trial court should also properly balance the interests of plaintiff in accessing information regarding police policies on how they interact with the public against Fort Lee's interest in non-disclosure under the common law right of access.

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Respectfully submitted,



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