

**SUPREME COURT OF NEW JERSEY**  
**Docket No. 084956**

LIBERTARIANS FOR  
TRANSPARENT  
GOVERNMENT, A NJ NONPROFIT  
CORPORATION,

Plaintiff-Petitioner,

v.

CUMBERLAND COUNTY  
and BLAKE HETHERINGTON  
in her official capacity as Custodian of  
Records for Cumberland County,

Defendants-Respondents.

CIVIL ACTION

ON PETITION FOR  
CERTIFICATION FROM A FINAL  
JUDGMENT OF THE  
SUPERIOR COURT  
OF NEW JERSEY,  
APPELLATE DIVISION,  
DOCKET NO. A-001661-18

Sat Below:

Clarkson S. Fisher, P.J.A.D  
Allison E. Accurso, J.A.D.  
Robert J. Gilson, J.A.D.

---

**BRIEF OF *AMICUS CURIAE***  
**THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY**

---

Alexander Shalom (021162004)  
Julia T. Bradley\*  
Jeanne LoCicero  
American Civil Liberties Union  
of New Jersey Foundation  
570 Broad Street, P.O. Box 32159  
Newark, New Jersey 07102  
(973) 854-1714  
ashalom@aclu-nj.org

Counsel for Proposed *Amicus Curiae*

\* *Practicing law in New Jersey pursuant to R. 1:21-3(c).*

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** ..... ii

**INTEREST OF *AMICUS CURIAE*** ..... 1

**PRELIMINARY STATEMENT** ..... 2

**STATEMENT OF FACTS AND PROCEDURAL HISTORY** ..... 6

**ARGUMENT** ..... 6

**I. ABUSE IN NEW JERSEY’S PRISONS IS RAMPANT AND UNDERREPORTED.** ..... 6

        A. A culture of abuse persists in New Jersey’s prisons. .... 6

        B. Abuse is chronically underreported..... 10

        C. New Jerseyans want to know when prisons fail to hold their employees accountable for abuse..... 13

**II. ACCESS TO SETTLEMENT AGREEMENTS BETWEEN A GOVERNMENT AGENCY AND ITS EMPLOYEES BENEFITS THE PUBLIC.**..... 16

        A. Public access to settlement agreements curbs abuse by creating accountability..... 16

        B. The privacy interests that animate OPRA’s personnel records exemption are not compromised here. .... 21

        C. The Appellate Division’s decision adds an additional layer of secrecy by permitting an agency to summarize government record information, then places a burden on requestors who wish to verify that information..... 24

**CONCLUSION**.....26

**TABLE OF AUTHORITIES**

**CASES**

*Asbury Park Press v. Cnty. of Monmouth*, 406 N.J. Super. 1 (App. Div. 2009), *aff'd*, 201 N.J. 5 (2010)..... 22, 23

*Burnett v. Cnty. of Bergen*, 198 N.J. 408 (2009) .....2, 16

*Capone v. Kean University*, 2017-60 FD.....26

*Cielesz v. N.J. State SPCA*, 2017-218 FD.....25

*Colon v. Passaic Cnty.*, 2012 WL 1457764 (D.N.J. Apr. 24, 2012) .....1

*Doe v. Poritz*, 142 N.J. 1 (1995).....2

*Kovalcik v. Somerset Cnty. Prosecutor’s Off.*, 206 N.J. 581 (2011)..... 1, 21-22

*Mason v. City of Hoboken*, 196 N.J. 51 (2008) .....17

*McFarland v. N.J. Inst. of Tech.*, 2018-289 FD .....25

*Mejia v. N. J. Dep’t of Corr.*, 446 N.J. Super. 369 (App. Div. 2016) .....1

*Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth.*, 423 N.J. Super. 140 (App. Div. 2011) .....22

*North Jersey Media Grp. Inc. v. Twp. of Lyndhurst*, 229 N.J. 340 (2017).....1

*Paff v. N.J. Dep’t of Lab., Bd. of Rev.*, 379 N.J. Super. 346 (App. Div. 2005).....25

*Paff v. Ocean Cnty. Prosecutor’s Office*, 235 N.J. 1 (2018) .....1

*Scutro v. City of Linden*, 2019-167 ..... 25-26

*State v. Earls*, 214 N.J. 564 (2013).....2

*State v. Reid*, 194 N.J. 386 (2008) .....2

*Tarus v. Borough of Pine Hill*, 189 N.J. 497 (2007) .....23

*United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) .....18

<i>Wronko v. N.J. Society for the Prev. of Cruelty to Animals</i> , 453 N.J. Super. 73 (App. Div. 2018).....	1
---	---

**STATUTES & LEGISLATION**

N.J.S.A. 47:1A-1.....	16, 22
N.J.S.A. 47:1A-6.....	25
L. 2019, c. 288 § 8(b).....	20
L. 2019, c. 408 § 3.....	14
L. 2019, c. 410 § 2.....	14

**OTHER AUTHORITIES**

Alene Tchekmedyan & Andrea Castillo, <i>ICE released a sick detainee from Adelanto immigration facility. He died three days later</i> , L.A. Times (Mar. 20, 2021), <a href="https://www.latimes.com/california/story/2021-03-20/adelanto-detainee-death">https://www.latimes.com/california/story/2021-03-20/adelanto-detainee-death</a> .....	13
Andrea C. Armstrong, <i>No Prisoner Left Behind?</i> 25 Stan. L. & Pol. Rev. 435 (2014).....	17
Benjamin Steiner & John Wooldredge, <i>Prison Officer Legitimacy, Their Exercise of Power, and Inmate Rule Breaking</i> , 56 Criminology 750 (2018).....	17
Benjamin Weiser, <i>Violence at Rikers at an ‘All-Time High’ Despite City’s Promise to Curb It</i> , NY Times (Aug. 6, 2020), <a href="https://www.nytimes.com/2020/08/06/nyregion/rikers-island-violence-guards.html">https://www.nytimes.com/2020/08/06/nyregion/rikers-island-violence-guards.html</a> .....	8
David Fathi, <i>The Challenge of Prison Oversight</i> , 47 Am. Crim. L. Rev. 1453 (2010).....	10, 18
Jessica A. Roth, <i>Prosecutorial Declination Statements</i> , 110 J. Crim. L. and Criminology, 477 (2020) .....	19, 20
Joe Atmonavage, <i>N.J. man brutally beaten by correctional officers, left in own feces, lawsuit alleges. He died days later</i> , NJ.com (Mar. 3, 2021),	

<https://www.nj.com/news/2021/03/nj-inmate-brutally-beaten-by-officers-left-in-own-feces-lawsuit-alleges-he-died-days-later.html>.....9

Joe Atmonavage, *Prison guard was focus of complaints before alleged attack at women’s prison, lawmaker says*, NJ.com (Feb. 9, 2021), <https://www.nj.com/news/2021/02/prison-guard-was-focus-of-complaints-before-alleged-attack-at-womens-prison-lawmaker-says.html> .....7, 20

Joe Atmonavage & Blake Nelson, *I was beaten, stomped and sexually assaulted. Inmate alleges brutal attack at N.J. women’s prison*, NJ.com (Jan. 27, 2021), <https://www.nj.com/news/2021/01/i-was-beaten-stomped-and-sexually-assaulted-inmate-alleges-brutal-assault-at-nj-womens-prison.html>.....6

Kelly Heyboer & Susan K. Livio, *Forced to have sex in exchange for toilet paper: Ex-inmates detail abuse by guards in N.J. women’s prison*, NJ.com (July 2, 2020), <https://www.nj.com/news/2020/07/trading-sex-for-toilet-paper-and-bubble-gum-inmates-detail-abuse-by-guards-in-njs-womens-prison.html> ..... 7-8, 11

Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 Yale L. & Pol’y Rev. 1 (2010) .....11

Matt Katz, *ICE Deports Cabbie Despite Ongoing Investigation into His Alleged Abuse at Essex Jail*, WNYC News (Aug. 15, 2019), <https://www.wnyc.org/story/ice-deports-detainee-despite-ongoing-investigation-alleged-abuse-essex-county-jail/> .....12

Press Release, Governor Murphy Signs Dignity for Incarcerated Primary Caretaker Parents Act (Jan. 9, 2020), <https://nj.gov/governor/news/news/562020/approved/20200109b.shtml> .....15

Press Release, Vera Institute of Justice, *17 States Open Up Prisons and Jails to Local Communities* (Nov. 11, 2016), <https://www.vera.org/newsroom/17-states-open-up-prisons-and-jails-local-communities-national-prison-visiting-week> ..... 10, 13

Ramona R. Rantala, U.S. Dep’t of Justice Bureau of Justice Statistics,  
*Sexual Victimization Reported by Correctional Authorities, 2012-15* (July 2018),  
<https://www.bjs.gov/content/pub/pdf/svraca1215.pdf> ..... 10, 17

*Report of the Workgroup on Harassment, Sexual Assault and Misogyny in New Jersey Politics* (Jan. 14, 2021),  
<https://d1ung6i9j8i9xc.cloudfront.net/wp-content/blogs.dir/123/files/2021/01/Workgroup-Report-Final.pdf> .....15

Sentencing Project, *Detailed State Data: New Jersey*,  
<https://www.sentencingproject.org/the-facts/#detail?state1Option=U.S.%20Total&state2Option=New%20Jersey> .....10

U.S. Dep’t of Justice, Civil Rights Division & U.S. Att’y’s Office, Dist. of NJ., *Investigation of the Cumberland County Jail* (Jan. 14, 2021),  
<https://www.justice.gov/usao-nj/press-release/file/1354736/download>  
.....8, 9

U.S. Dep’t of Justice, Civil Rights Division & U.S. Att’y’s Office, Dist. of NJ., *Investigation of the Edna Mahan Correctional Facility for Women* (Apr. 2020),  
<https://www.justice.gov/opa/press-release/file/1268391/download>  
..... 7, 8, 11

Valerie Vainieri Huttel, *Opinion: Legislator: Edna Mahan needs even more oversight*, NJ.com (Feb. 19, 2021),  
<https://www.nj.com/opinion/2021/02/legislator-edna-mahan-needs-even-more-oversight-opinion.html>.....14

## INTEREST OF AMICUS CURIAE

The ACLU-NJ's mission sits squarely at the intersection of the issues raised in this case: it works to uphold the rights of incarcerated people, it champions the value of open government, and it advocates to protect privacy rights. Indeed, the ACLU-NJ has appeared before courts in this state advocating all three positions.

For example, *Amicus* has advocated for the fair treatment of incarcerated people in *Mejia v. New Jersey Dep't of Corr.*, 446 N.J. Super. 369 (App. Div. 2016) (addressing extreme disciplinary sanctions for prisoners with mental illnesses) and *Colon v. Passaic Cnty.*, 2012 WL 1457764 (D.N.J. Apr. 24, 2012) (challenging the overcrowded and unsanitary living conditions at the Passaic County Jail).

ACLU-NJ has served as *Amicus Curiae* before New Jersey appellate courts in numerous Open Public Records Act cases involving law enforcement records. *See, e.g., Paff v. Ocean Cnty. Prosecutor's Office*, 235 N.J. 1 (2018) (dash camera video of police use of force incident); *North Jersey Media Grp. Inc. v. Twp. of Lyndhurst*, 229 N.J. 340 (2017) (dash camera video of deadly police-involved shooting); *Kovalcik v. Somerset Cnty. Prosecutor's Off.*, 206 N.J. 581 (2011) (balancing transparency interest in law enforcement training records with privacy rights); *Wronko v. N.J. Society for the Prev. of Cruelty to Animals*, 453 N.J. Super. 73 (App. Div. 2018) (whether animal cruelty enforcement organization was subject to OPRA).

And, of course, the ACLU-NJ has appeared in numerous cases addressing the privacy rights of New Jerseyans. *See, e.g., State v. Earls*, 214 N.J. 564 (2013) (recognizing expectation of privacy in cell phone location information); *Burnett v. Cnty. of Bergen*, 198 N.J. 408 (2009) (finding privacy interest in Social Security Numbers); *State v. Reid*, 194 N.J. 386 (2008) (finding expectation of privacy in Internet Service Provider records); *Doe v. Poritz*, 142 N.J. 1 (1995) (addressing privacy impact of Megan's Law).

As discussed below, these three issues are all implicated in this case. *Amicus* contends that they can be harmonized in a way that brings transparency and accountability to correctional facilities, thereby providing increased protection to incarcerated people who suffer abuse, without compromising important privacy interests.

### **PRELIMINARY STATEMENT**

*Amicus* offers this brief to highlight the important public interest in transparency and accountability inside correctional facilities and to explain how public access to separation agreements like the one at issue in this case furthers this interest.

Days before this Court granted certification in this case, reports surfaced alleging that corrections officers brutally attacked and sexually assaulted several women during a forced extraction from cells inside the Edna Mahan Correctional



Facility. So far, eight corrections officers have been charged in the ongoing investigation. These reports were only the latest in New Jersey's long legacy of prison abuse, which includes documented patterns of constitutional violations following two Department of Justice civil rights investigations – including an investigation of Respondent Cumberland County Jail – within the past year. (Point I, A).

The reality inside New Jersey's prisons is likely even bleaker than the reports suggest. People who are incarcerated are often deterred from reporting abuse at the hands of correctional officers out of fear of retaliation or punitive institutional procedures. When abuse is reported, corrections facilities do not promptly investigate allegations, if they do at all. Because of the closed and hidden nature of prisons and the vulnerability of the people inside them, open records laws allow the public rare glimpses into prison operations and decision-making. (Point I, B).

What happens next at Edna Mahan and the Cumberland County Jail is of profound interest to the public. As prisoner advocates and state legislators have recently demonstrated, New Jerseyans want to know how prisons in their state address abuse and whether they are holding their staff accountable. But the success of those efforts, while laudable, also depends on the Open Public Records Act's promise of transparency if they are to be effective. (Point I, C).

The information contained in settlement agreements between a correctional facility and its employee following a disciplinary investigation – *especially* when disciplinary charges are dismissed, as they were in this case – lets the public know whether prison officials have made good on their promises to curb violence and misconduct inside prisons and jails. But by permitting correctional facilities to fully withhold settlement agreements resolving an employee’s disciplinary investigation, the Appellate Division’s decision denies the public an opportunity to understand how officials are addressing abuse, weakening one of the few mechanisms for transparency that exists for correctional facilities. (Point II, A).

*Amicus* recognizes the privacy interests animating OPRA’s personnel records exemption, but the release of redacted records containing information that agencies and employees already expect to be public under the first exception to N.J.S.A. 47:1A-10 does not compromise those interests. As the trial court in this case recognized, the release of a separation agreement in redacted form strikes the appropriate balance between protecting truly sensitive “personnel” information, on the one hand, and permitting the public to see for themselves an agency’s actual, not post-hoc, decision-making surrounding its employee’s departure following a disciplinary investigation, on the other. Instead of grappling with the transparency interests at stake in this case, however, the Appellate Division analogized the personnel records exemption to N.J.S.A. 47:1A-1’s exclusion of information related

to “sexual harassment complaints filed with a public employer,” and drew a sharp distinction between any records relating to internal complaints or agreements, which it held are not subject to disclosure under OPRA, and complaints filed in a public forum, which are. In so doing, the Appellate Division’s analysis neglected to consider the important public interest of accountability in prisons, which warrants *more* transparency in government decision-making following an employee’s disciplinary investigation. (Point II, B).

As Respondent Cumberland County Jail demonstrated when it stated that its former employee was “terminated” when, in fact, that officer had been permitted to retire in good standing, prison officials are incentivized to gloss over decisions that they believe may reflect poorly on them when communicating those decisions to the public. Permitting an agency to summarize information to which the public is entitled not only thwarts OPRA’s purpose of eradicating corruption, but places the burden on the requestor to verify the government agency’s account, prolonging wait times for access to public records. (Point II, C).

Transparency as to how corrections officials do or do not hold their staff accountable for inhumane treatment of individuals under their care – in part through settlement agreements – is part and parcel of New Jersey’s ongoing project to eradicate abuse in its prisons. Because this crucial public policy interest can be

vindicated at no cost to New Jerseyans' privacy, *Amicus* urges this Court to reverse the decision below.

## **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

*Amicus* accepts the statement of facts and procedural history found in Petitioner's Brief and Appendix in the Appellate Division in this matter.

## **ARGUMENT**

### **I. ABUSE IN NEW JERSEY'S PRISONS IS RAMPANT AND UNDERREPORTED.**

#### **A. A culture of abuse persists in New Jersey's prisons and jails.**

According to press accounts, on January 11, 2021 over two dozen corrections officials, dressed in full body armor, entered jail cells to initiate forced "cell extractions" of several women housed at the Edna Mahan Correctional Facility. Those women were kicked, punched, groped, stomped on, maced, and spit on while handcuffed. Joe Atmonavage & Blake Nelson, *I was beaten, stomped and sexually assaulted. Inmate alleges brutal attack at N.J. women's prison*, NJ.com (Jan. 27, 2021).<sup>1</sup> According to one of the women, officers dragged her out of the cell by her hair and sexually assaulted her. *Id.* Two other women, including one transgender woman, were beaten so badly they needed to use wheelchairs. *Id.* One woman was left with a broken eye socket; another with a broken arm left "dangling" while she

---

<sup>1</sup> <https://www.nj.com/news/2021/01/i-was-beaten-stomped-and-sexually-assaulted-inmate-alleges-brutal-assault-at-nj-womens-prison.html>.

waited for medical attention for three days. *Id.* No corrections officers involved reported the unauthorized use of force, and prison officials did not return phone calls from the injured women’s family members seeking information. *Id.* At least one officer has been charged with tampering with public records in an attempt to cover up the assault. Joe Atmonavage, *Prison guard was focus of complaints before alleged attack at women’s prison, lawmaker says*, NJ.com (Feb. 9, 2021).<sup>2</sup>

The brutal attack is the latest episode in a persistent pattern of sexual, emotional, and physical abuse at Edna Mahan that is still coming to light. In April 2020, the Department of Justice released a report on conditions at Edna Mahan describing a decades-long “pervasive [culture of acceptance of sexual abuse that] has enabled Edna Mahan staff to abuse their authority by preying on vulnerable women . . . for sexual gratification.” U.S. Dep’t of Justice, Civil Rights Division & U.S. Att’y’s Office, Dist. of N.J., *Investigation of the Edna Mahan Correctional Facility for Women* (Apr. 2020) (internal quotations and citation omitted) at 5.<sup>3</sup> Formerly incarcerated women would later testify at a public hearing that corrections officers frequently “sexually assaulted inmates, groped prisoners and demanded sexual favors for access to essential items, including sanitary pads[.]” Kelly Heyboer & Susan K. Livio, *Forced to have sex in exchange for toilet paper: Ex-*

---

<sup>2</sup> <https://www.nj.com/news/2021/02/prison-guard-was-focus-of-complaints-before-alleged-attack-at-womens-prison-lawmaker-says.html>.

<sup>3</sup> <https://www.justice.gov/opa/press-release/file/1268391/download>.

*inmates detail abuse by guards in N.J. women's prison*, NJ.com (July 2, 2020).<sup>4 5</sup>

These conditions, the Department of Justice alleged, violate the Eighth Amendment of the U.S. Constitution and the Civil Rights of Institutionalized Persons Act. U.S. Dep't of Justice, *Investigation of the Edna Mahan Correctional Facility for Women*, at 1.

The Department of Justice released another report on January 14 of this year alleging that the Cumberland County Jail's ("CCJ") medical neglect of people in its custody experiencing opiate withdrawal violated the Constitution through a pattern or practice of deliberate indifference to those individuals' medical needs. U.S. Dep't of Justice, Civil Rights Division & U.S. Att'y's Office, Dist. of NJ., *Investigation of the Cumberland County Jail* (Jan. 14, 2021) at 1, 4, 22.<sup>6</sup> The report found that CCJ's protocols around opiate withdrawal, including its failure to provide Medication-Assisted Treatment ("MAT") to those individuals despite MAT's overwhelming support in the medical community "likely contributed to the death of several inmates

---

<sup>4</sup> <https://www.nj.com/news/2020/07/trading-sex-for-toilet-paper-and-bubble-gum-inmates-detail-abuse-by-guards-in-njs-womens-prison.html>.

<sup>5</sup> Other correctional facilities with deeply entrenched cultures of abuse, such as New York City's Rikers Island, suffer from the same conditions. According to a May 2020 federal monitor report, Rikers prison guards used force an average of almost 600 times per month in 2019 compared to 390 times per month in 2016, even though the Rikers population declined over those three years. Benjamin Weiser, *Violence at Rikers at an 'All-Time High' Despite City's Promise to Curb It*, NY Times (Aug. 6, 2020), <https://www.nytimes.com/2020/08/06/nyregion/rikers-island-violence-guards.html>.

<sup>6</sup> <https://www.justice.gov/usao-nj/press-release/file/1354736/download>.

who committed suicide.” *Id.* at 9. The report further documented the reluctance of people incarcerated at CCJ to report suicidal tendencies for fear of being “treat[ed] . . . like an animal” and “torture[d],” choosing to keep “suicidal thoughts to themselves” rather than endure “the stark conditions of the jail’s suicide watch status.” *Id.* at 13. Even after six people committed suicide in the jail between 2014 and 2017 – most within mere days after arriving at the facility – Respondent CCJ continued to “expose[] prisoners to serious harm by implementing its suicide watch policies in a manner that deters inmates from reporting suicidal thoughts.” *Id.* at 12.

Other facilities in which individuals are confined and subject to corrections officers’ control are vulnerable to the same abuse. As yet another example, the assault of a man civilly confined at the Adult Diagnostic and Treatment Center in Avenel, a recent lawsuit alleges, left him nearly comatose before he ultimately died. Joe Atmonavage, *N.J. man brutally beaten by correctional officers, left in own feces, lawsuit alleges. He died days later*, NJ.com (Mar. 3, 2021).<sup>7</sup> This abuse will persist so long as the public consistently has too little information to hold public agencies accountable in the aftermath of incidents like these.

---

<sup>7</sup> <https://www.nj.com/news/2021/03/nj-inmate-brutally-beaten-by-officers-left-in-own-feces-lawsuit-alleges-he-died-days-later.html>.

## **B. Abuse is chronically underreported.**

“Prisons are among the least transparent institutions in the United States, despite the fact that they are supported by taxpayers and return approximately 95% of their residents to our communities.” Press Release, Vera Institute of Justice, 17 States Open Up Prisons and Jails to Local Communities, (Nov. 11, 2016).<sup>8</sup> “[T]he closed nature of the prison environment and the fact that prisons house powerless, unpopular people [] creates a significant risk of mistreatment of abuse.” David Fathi, *The Challenge of Prison Oversight*, 47 Am. Crim. L. Rev. 1453, 1453 (2010). Indeed, according to the latest available data from the Bureau of Justice Statistics, there were 24,661 allegations of sexual victimization in adult correctional facilities in 2015. Ramona R. Rantala, U.S. Dep’t of Justice Bureau of Justice Statistics, *Sexual Victimization Reported by Correctional Authorities, 2012-15* (July 2018) at 1.<sup>9</sup> And because of the dramatic racial disparities in incarceration and sentencing, abuse disproportionately affects people of color. Sentencing Project, *Detailed State Data: New Jersey*.<sup>10</sup> See also Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 Yale L. & Pol’y Rev. 1, 17 (2010) (“[B]lack and

---

<sup>8</sup> <https://www.vera.org/newsroom/17-states-open-up-prisons-and-jails-local-communities-national-prison-visiting-week>.

<sup>9</sup> <https://www.bjs.gov/content/pub/pdf/svraca1215.pdf>.

<sup>10</sup> <https://www.sentencingproject.org/the-facts/#detail?state1Option=U.S.%20Total&state2Option=New%20Jersey> (last visited April 3, 2021).



Latino prisoners were significantly more likely than white prisoners to report sexual victimization by prison staff,” according to a statewide survey).

Without adequate oversight, prisons often have protocols in place that “discourage prisoners from reporting sexual abuse and allow sexual abuse to occur undetected and undeterred.” U.S. Dep’t of Justice, *Investigation of the Edna Mahan Correctional Facility for Women* at 1. See also Buchanan, *Our Prisons, Ourselves* at 68 n.385 (“There is broad consensus among correctional authorities that sexual abuse is underreported.”). As the April 2020 Department of Justice report found, Edna Mahan’s policy of systematically placing people who reported abuse into solitary confinement and depriving them of programming and other privileges had this effect. U.S. Dep’t of Justice, *Investigation of the Edna Mahan Correctional Facility for Women* at 9. Grievance reports that did get filed, as one woman who was formerly incarcerated at Edna Mahan testified, might be “ripped up in front of your face.” Heyboer & Livio, *Ex-inmates detail abuse by guards in N.J. women’s prison*.

The Department of Justice’s investigation of Edna Mahan also found that raising awareness of sexual abuse among corrections officers failed to provide accountability because officers may perpetuate the culture by maintaining a “code of silence”:

[D]espite being aware of both ongoing instances of sexual abuse and sexual harassment and the means to report,

correction officers did not report sexual abuse or sexual harassment being committed by other custody staff, even anonymously. This implies either that correction officers do not trust Edna Mahan’s investigative systems; that a “code of silence” exists where Edna Mahan officers are unwilling to speak out against other officers; or that some officers are involved in actively concealing misconduct. [U.S. Dep’t of Justice, *Investigation of the Edna Mahan Correctional Facility for Women* at 26.]

The report continued by explaining that “[a]n important component to eradicating sexual abuse in correctional settings is staff participation in identifying abusive conditions and their responses to these conditions.” *Id.*

In addition to discouraging initial reports of abuse, corrections officials can evade accountability by halting investigations after a victim is out of their custody. Investigations involving detained immigrants are particularly susceptible to interruption given the ability of Immigration and Customs Enforcement to deport an individual during an ongoing investigation. In one example, the Essex County Correctional Facility halted an investigation after the detained person who had alleged abuse by corrections officers was deported, despite the fact that the investigation was still pending at the time of deportation. Matt Katz, *ICE Deports Cabbie Despite Ongoing Investigation into His Alleged Abuse at Essex Jail*, WNYC News (Aug. 15, 2019).<sup>11</sup> Experience has also shown the lengths to which a facility

---

<sup>11</sup> <https://www.wnyc.org/story/ice-deports-detainee-despite-ongoing-investigation-alleged-abuse-essex-county-jail/>.

may go to avoid disclosing unflattering facts about its operations. The death of an individual who had been detained in California’s Adelanto Immigration and Customs Enforcement processing center just three days after his release, for instance, “raise[d] questions about whether immigration officials are undercounting detainee deaths during the pandemic by releasing people just before they die.” Alene Tchekmedyan & Andrea Castillo, *ICE released a sick detainee from Adelanto immigration facility. He died three days later*, L.A. Times (Mar. 20, 2021).<sup>12</sup>

Because abuse so often goes underreported, when it *is* reported, investigated, and leads to a disciplinary proceeding, what happens next takes on outsized importance to the public. As discussed below, now more than ever, New Jerseyans want to know how correctional facilities are responding in the aftermath of these incidents.

**C. New Jerseyans want to know when prisons fail to hold their employees accountable for abuse.**

“In order to truly reimagine our incarceration system, we must first break down the barriers between prisons and larger society.” Vera Institute of Justice, *17 States Open Up Prisons and Jails to Local Communities – and National Leaders – to Foster Transparency as Part of National Prison Visiting Week* (quoting Vera Institute’s Center on Sentencing and Corrections Director, Fred Patrick). Recent

---

<sup>12</sup> <https://www.latimes.com/california/story/2021-03-20/adelanto-detainee-death>.

efforts by New Jersey advocates and legislators reflect the public’s interest in doing just that.

Bills enacted in the state legislature over the past year have sought increased transparency and accountability specifically for corrections officers who perpetuate abuse. *See* Valerie Vainieri Huttle, *Opinion: Legislator: Edna Mahan needs even more oversight*, NJ.com (Feb. 19, 2021)<sup>13</sup> (describing the introduction of a package of bills that would increase oversight of correctional facilities). Among these important new laws, one requires corrections officers to undergo specialized training in prevention of sexual misconduct and investigating allegations of sexual abuse, *see* L. 2019, c. 410, § 2; another establishes a reporting scheme through which correctional employees are required to report abuse of people incarcerated at the facility. *See* L. 2019, c. 408, § 3.

New Jersey also recently enacted the Dignity for Incarcerated Primary Caretaker Parents Act,<sup>14</sup> which, in addition to supporting relationships between incarcerated women and their families, promises to strengthen the independence of the Office of the Corrections Ombudsperson. L. 2019, c. 299; Press Release, Governor Murphy Signs Dignity for Incarcerated Primary Caretaker Parents Act (Jan. 9, 2020). The Act requires the Office, among other things, to “conduct

---

<sup>13</sup> <https://www.nj.com/opinion/2021/02/legislator-edna-mahan-needs-even-more-oversight-opinion.html>.

<sup>14</sup> <https://nj.gov/governor/news/news/562020 /approved/20200109b.shtml>.

investigations of inmate complaints,” *id.* § 8(a), and grants the Office the authority to make “both scheduled and unannounced inspections” of correctional facilities at any time, *id.* § 9(e), to “identify[] systemic issues and responses upon which the Governor and Legislature may act,” *id.* § 26(c)(3), and to make a public report that includes “a description of significant systemic or individual investigations or outcomes achieved by the ombudsperson in the preceding year,” *id.* § 28(b)(10)c.

Additionally, Senator Loretta Weinberg’s Workgroup on Harassment, Sexual Assault and Misogyny in New Jersey Politics, which was created in late 2019 and includes a number of state officials, chose to broaden its scope from its focus on misogyny in state politics after the Department of Justice released its findings on sexual assault at Edna Mahan in May 2020. *Report of the Workgroup on Harassment, Sexual Assault and Misogyny in New Jersey Politics* (Jan. 14, 2021) at 35.<sup>15</sup> As a part of this broadened scope, the workgroup focused its fourth public hearing on testimony from women formerly incarcerated at Edna Mahan. *Id.*

As these new laws and initiatives demonstrate, New Jersey’s public is intensely focused on eradicating abuse in its prisons. Though these efforts are commendable, on their own they are insufficient to achieve accountability; they complement the need for the transparency that OPRA provides, not replace it.

---

<sup>15</sup> <https://d1lung6i9j8i9xc.cloudfront.net/wp-content/blogs.dir/123/files/2021/01/Workgroup-Report-Final.pdf>.

## **II. ACCESS TO SETTLEMENT AGREEMENTS BETWEEN A GOVERNMENT AGENCY AND ITS EMPLOYEES BENEFITS THE PUBLIC.**

OPRA's "twin aims – of ready access to government records and protection of a citizen's personal information – require a careful balancing of the interests at stake." *Burnett v. Cnty. of Bergen*, 198 N.J. 408, 414 (2009). OPRA "requires public agencies 'to safeguard from public access a citizen's personal information' when disclosure would violate a person's reasonable expectation of privacy.'" *Id.* (citing N.J.S.A. 47:1A-1). At the same time, the statute instructs that "limitations on the right of access . . . shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1. For the reasons that follow, the Appellate Division's decision wholly abandoned OPRA's first aim by failing to recognize the important public policy behind public access to settlement agreements, while also overstating privacy concerns.

### **A. Public access to settlement agreements curbs abuse by creating accountability.**

"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." *Burnett*, 198 N.J. at 414. Notwithstanding the challenges that the public faces in accessing information inside prisons, transparency measures like open records laws and reporting requirements help bring instances of abuse to light. Indeed, the most

recent Bureau of Justice Statistics data report noted that the dramatic increase in allegations of abuse between in 2015 – nearly triple the allegations in 2011 – coincided with the Department of Justice’s publication of the National Standards to Prevent, Detect, and Respond to Prison Rape in 2012, which require correctional facilities to track and report information on sexual victimization. Rantala, U.S. Dep’t of Justice Bureau of Justice Statistics, *Sexual Victimization Reported by Correctional Authorities, 2012-15* at 1. OPRA therefore serves a vital role in prison transparency that is consistent with its “purpose . . . ‘to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” *Mason v. City of Hoboken*, 196 N.J. 51, 65 (2008).

Transparency and accountability in the jail and prison context have tangible results: when institutions treat people in their custody fairly, those people perceive the institutions to be more legitimate, making them safer. Andrea C. Armstrong, *No Prisoner Left Behind?* 25 *Stan. Law & Pol. Rev.* 435, 465 (2014). Empirical studies in the policing and criminal justice fields “clearly demonstrate the relationship between enhanced institutional legitimacy and fair and neutral treatment by the institution.” *Id.* Examples of such kinds of studies have also found a correlation between a reduction in violence inside prisons in which corrections officers did not use coercive tactics. *See, e.g.*, Benjamin Steiner & John Wooldredge, *Prison Officer*

*Legitimacy, Their Exercise of Power, and Inmate Rule Breaking*, 56 *Criminology* 750, 774 (2018) (describing prior studies finding that “prisons in which officers relied less on coercion and more often treated inmates with respect and fairness experienced less violence than did prisons in which officers used coercion more frequently” and that “prisons with staff who were fairer with inmates also were more orderly and had better inmate-staff relations”).

The “ultimate ‘discrete and insular minorit[y],’” incarcerated people comprise one of the most vulnerable populations. Fathi, *The Challenge of Prison Oversight*, (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)). “[N]o other group in American society is so completely disabled from defending its rights and interests.” *Id.* Because of this vulnerability, and because corrections officers control nearly every aspect of people’s lives while they are confined, corrections officers hold an exorbitant amount of power inside a facility. Officers may decide if and how discipline is meted out, or whether an incarcerated person may require life-saving medical attention; they have the authority to regulate individuals’ access to phones, mail, visitors, and the media. Many of these day-to-day decisions go unmonitored and unchecked. The dearth of oversight means that when a corrections officer is actually investigated for abusive behavior, their employer’s response to that behavior offers the public a rare and important glimpse into the facility’s decision-making. While *Amicus* recognizes that the reach of this



Court's decision implicates only the portion of such responses made through formal settlement agreements, information about a correctional facility's decision-making regarding allegedly abusive behavior is nonetheless a critical part of the transparency landscape that has developed in New Jersey.

Public access to the terms of a settlement agreement allows the public to attach accountability to a public prison following an abuse. In particular, a vital purpose is served when the public becomes aware of a public official's decision *not* to pursue discipline. When prosecutors decline to prosecute a case, for example, their announcement of that declination can promote accountability, both to the public and to other government institutions. *See* Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. Crim. L. and Criminology, 477, 500-504 (2020). "Absent a declination statement, the public can eventually surmise that a prosecutor had declined to press charges with respect to a given matter, but that decision would be hard to pin down and might surface too late for there to be any meaningful accountability for it." *Id.* at 502. Likewise, a correctional facility's decision to allow an employee facing disciplinary charges for sexual abuse to retire rather than face discipline can indicate that it is not, in fact, committed to stopping that abuse.

The importance of attaching accountability to prison officials' decision not to take action in response to abuse allegations is evident in the Department of Corrections' apparent inaction upon receipt of a letter from a New Jersey legislator,

sent several months before the January 2021 assaults on the women, advising that one of the facility's corrections officers was a known abuser. The officer in question was still employed and was alleged to have participated in the assaults on the women in January. Atmonavage, *Prison guard was focus of complaints before alleged attack at women's prison, lawmaker says*. By then, the time had long passed for the public to hold Edna Mahan accountable for its decision not to pursue disciplinary action. The same principle is also manifest in the recently-enacted Dignity for Incarcerated Primary Caretaker Parents Act, *see supra* Part I.C. Recognizing the value of communicating agency decision-making around accountability, the Act contains provisions requiring various actors involved in prison oversight to articulate the actions they take, and the reasons behind those actions, to their stakeholders. *See L. 2019, c. 288 § 8(b)* (providing that “[i]f the ombudsperson does not investigate a complaint, the ombudsperson shall notify the complainant of the decision not to investigate and the reasons for the decision” and that “[a]t the ombudsperson’s request, the [D]epartment [of Corrections] shall, within the time specified, inform the ombudsperson about any action taken on the recommendations or the reasons for not complying with the recommendations”).

Public access to settlement agreements resolving disciplinary actions can also help prison officials remain accountable to other government branches that oversee correctional facilities. *See Roth, Prosecutorial Declination Statements* at 504-05 (in

the context of prosecutorial decisions, declination statements “provide a means for [other government] agencies to check that prosecutors are in fact doing the work that the agencies understand to be their collective project.”). Likewise, given the Legislature’s intense interest in eradicating abuse in prisons, public access to settlement agreements can complement statutory reporting requirements by alerting the Legislature when a correctional facility has fallen short of its mission.

**B. The privacy interests that animate OPRA’s personnel records exemption are not compromised here.**

In its opinion, the Appellate Division reasoned that an internal settlement agreement resolving disciplinary charges constitutes a personnel record because it “*often* involves an employee accepting discipline,” and that “*some* employees [would be expected to] agree to settle disciplinary charges, at least in part, to avoid public disclosure of the charges.” *Libertarians for Transparent Gov’t v. Cumberland Cnty.*, 465 N.J. Super. 11, 20-21 (2020) (emphasis added). OPRA’s scheme does “recognize[] that there are limits” to liberal disclosure, “one of which relates to personnel records that are often sensitive, and understandably personal, in nature.” *Kovalcik v. Somerset Cnty. Prosecutor’s Off.*, 206 N.J. 581, 595 (2011) (citing N.J.S.A. 47:1A–1 (public agencies must “safeguard from public access a citizen's personal information . . . when disclosure thereof would violate the citizen's reasonable expectation of privacy”)). But the release of settlement agreements

would neither compromise employee privacy, nor would it undermine the public policy rationales behind non-disclosure.

First, the Appellate Division's holding that settlement agreements should be fully withheld because of their relatedness to disciplinary proceedings was not tethered to a specific privacy concern implicated by disclosure. *See Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth.*, 423 N.J. Super. 140, 162 (App. Div. 2011) (courts must not accept a custodian's "conclusory and generalized" statements of an exemption and "reasons for withholding documents must be specific"). As Petitioner pointed out, just because a settlement agreement may relate to or resolve a disciplinary investigation does not necessarily completely indicate the content of that settlement agreement. Plaintiff-Petitioner's Pet. for Certification (Oct. 9, 2020) at 15. Regardless, there is no reason why targeted redactions could not preserve "the privacy of truly personal information, including medical and psychological records and the contents of personnel files[.]" *Asbury Park Press v. Cnty. of Monmouth*, 406 N.J. Super. 1, 10 (App. Div. 2009), *aff'd*, 201 N.J. 5 (2010). The trial court below understood this and, accordingly, ordered the disclosure of the settlement agreement in redacted form.

Second, public policy favoring settlements is likewise not compromised by disclosing settlement agreements. As a threshold observation, this Court has already recognized, through its affirmance of the Appellate Division's ruling and reasoning

in *Asbury Park Press*, that even though “[d]efendants sometimes have an incentive to avoid exposure or embarrassment, and terms of confidentiality may promote settlement[,] . . . the policy favoring settlements is far outweighed by the importance of maintaining open government.” *Id.* at 11. Notwithstanding the Appellate Division’s emphasis in that case on the public nature of the settlement, the court took note, more generally, of “New Jersey’s strong public policy favoring open government and the general public[’s] . . . right to be fully informed on the actions of its elected officials.” *Id.* (citing *Tarus v. Borough of Pine Hill*, 189 N.J. 497, 507 (2007)).

The Appellate Division in this case also erred by transposing onto the personnel records exemption its analysis of an entirely different statutory exception examined in *Asbury Park Press*. That case held that a confidential settlement agreement resolving litigation between an employee and her public employer, whom she alleged had subjected her to sexual harassment, did not fall within the plain text of OPRA’s exclusion from disclosure any information related to “sexual harassment complaints filed with a public employer” because the employee had filed her complaint publicly in Superior Court, rather than internally with the public employer. *Id.* at 10. If an employee wishes to keep the complaint private, the *Asbury Park Press* court explained, “[t]he Legislature gave victims the opportunity to bring sexual harassment complaints to their public employers without public access.” *Id.*

Seizing on this distinction, the Appellate Division in this case reasoned that, likewise, an agency's internal settlement agreement to resolve internal disciplinary charges was analogous to the internal sexual harassment complaints exclusion. The Appellate Division thus categorically differentiated, as a matter of public policy, "between internal records maintained by a governmental entity relating to employee personnel matters, be it disciplinary records, or sexual harassment complaints and investigations, and the public airing of such matters in a civil lawsuit." *Libertarians for Transparent Gov't v. Cumberland Cnty.*, 465 N.J. Super. at 22.

It is not at all clear that the Legislature intended such a distinction within the personnel records exemption. Settlement agreements between a public entity and its employee, where the victim of the alleged conduct is not a party to the agreement, involve the separate transparency and accountability considerations discussed *supra*, Part II.A. By focusing so narrowly on the private-public forum distinction, the panel below lost sight of these important interests.

**C. The Appellate Division's decision adds an additional layer of secrecy by permitting an agency to summarize government record information, then placing a burden on requestors who wish to verify that information.**

The Appellate Division recognized the potential problem of agency dishonesty in summarizing information to which the public is entitled under the first exception to N.J.S.A. 47:1A-10, agreeing with Petitioners "that OPRA was designed to prevent public agencies engaging in such inaccurate 'spin.'" *Libertarians for*

*Transparent Gov't v. Cumberland Cnty.*, 465 N.J. Super. at 29. Rather than compel the disclosure of that information in the requested record, however, the Appellate Division reasoned that a “court has other measures, such as ordering the [agency] to correct the record following the court’s *in camera* review of the withheld documents and awarding the requestor its fees, to address the discrepancy.” *Id.*

The seemingly straightforward remedy of *in camera* review may be simple enough for a requestor who has already filed suit to obtain documents. For other requestors, the Appellate Division’s decision effectively forces them to litigate or appeal any decision to withhold a record containing “an employee’s name, date and reason for separation and pension information,” which is not exempt under N.J.S.A. 47:1A-10, in order to verify that an agency’s summary accurately represents the actual information in the record. Normally, if an agency withholds records to which an OPRA requestor believes they are entitled, the requestor’s only remedies are to file an action in Superior Court, or to file a complaint with the Government Records Council. N.J.S.A. 47:1A-6; *Paff v. N.J. Dep’t of Lab., Bd. of Rev.*, 379 N.J. Super. 346, 353 (App. Div. 2005). But because the upfront costs of a filing fee and attorney’s fees foreclose the former option for many requestors, those individuals are left instead with only one choice: either to file a complaint with the GRC, which can take years, *see, e.g., Cielez v. N.J. State SPCA*, 2017-218 FD (issuing final decision on February 25, 2021 for complaint received on November 9, 2017);

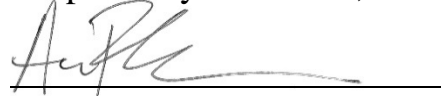
*McFarland v. N.J. Institute of Technology*, 2018-289 FD (issuing final decision on February 25, 2021 for complaint received on November 26, 2018); *Scutro v. City of Linden*, 2019-167 (issuing final decision on February 23, 2021 for complaint received on August 16, 2019); *Capone v. Kean University*, 2017-60 FD (issuing final decision on May 3, 2019 for complaint received on January 26, 2017) – greatly increasing the time a requestor can expect to spend waiting for access to a record – or else to simply accept the government’s summary at face value. Both results undermine OPRA’s purpose.



## CONCLUSION

Because transparency in government, especially in correctional facilities, promotes needed accountability, and because redactions of disclosures sufficiently protect privacy interests without undermining OPRA's purpose, the Court should reverse the Appellate Division and order disclosure of the settlement agreement.

Respectfully submitted,



Alexander Shalom (021162004)

Julia T. Bradley\*

Jeanne LoCicero

American Civil Liberties Union  
of New Jersey Foundation

570 Broad Street, 11th floor

P.O. Box 32159

Newark, NJ 07102

T: 973-854-1714

E: [ashalom@aclu-nj.org](mailto:ashalom@aclu-nj.org)

\* *Practicing law in New Jersey pursuant to R. 1:21-3(c).*

Dated: April 5, 2021