

CJ GRIFFIN
Member of the Firm
cgriffin@pashmanstein.com
Direct: 201.270.4930



April 9, 2018

Via Overnight Mail

Mark Neary, Clerk
Supreme Court of New Jersey
Hughes Justice Complex
25 W. Market Street
Trenton, New Jersey 08625-0970

Re: *Shabsi Ganzweig v. Township of Lakewood, et al.*
Supreme Court Docket No. 080061

Dear Honorable Justices of the Supreme Court:

Please accept this letter brief, in lieu of a more formal brief, on behalf of proposed *amicus curiae* American Civil Liberties Union of New Jersey.

TABLE OF CONTENTS

Preliminary Statement	2
Legal Argument	2
 I. THE PUBLIC'S SIGNIFICANT INTEREST IN DASH CAMERA FOOTAGE OF POLICE MISCONDUCT TILTS THE BALANCE IN FAVOR OF ACCESS UNDER BOTH OPRA'S ONGOING INVESTIGATION EXEMPTION AND THE COMMON LAW RIGHT OF ACCESS	2
 A. The Public's Interest in Disclosure Far Outweighs Any Need for Long-Term Secrecy	3
 B. OCPO Has Not Met Its Burden of Proving That Non-Disclosure of the Video Was Warranted	9
 II. EXECUTIVE ORDER NO. 69 DOES NOT APPLY TO DASH CAMERA FOOTAGE	13
 Conclusion	17

Court Plaza South 21 Main Street, Suite 200 Hackensack, NJ 07601	Phone: 201.488.8200 Fax: 201.488.5556 www.pashmanstein.com
--	--

PRELIMINARY STATEMENT

The American Civil Liberties Union of New Jersey ("ACLU-NJ") files this *amicus curiae* brief asking the Court to affirm the Appellate Division's decision below and grant access to the dash camera footage pursuant to the Open Public Records Act ("OPRA"). Because ACLU-NJ presumes that the Court's forthcoming decision in Paff v. Ocean County Prosecutor's Office will fully resolve whether dash camera footage is "required by law to be made, maintained or kept on file," this brief focuses the public's significant interest in dash camera footage that depicts police misconduct and how that interest tilts the balance in favor of disclosure under both OPRA's ongoing investigation exemption and the common law right of access. ACLU-NJ further argues that Executive Order No. 69 does not exempt dash camera footage from disclosure under OPRA.

LEGAL ARGUMENT

II. THE PUBLIC'S SIGNIFICANT INTEREST IN DASH CAMERA FOOTAGE OF POLICE MISCONDUCT TILTS THE BALANCE IN FAVOR OF ACCESS UNDER BOTH OPRA'S ONGOING INVESTIGATION EXEMPTION AND THE COMMON LAW RIGHT OF ACCESS

The Court's forthcoming decision in Paff v. Ocean County Prosecutor's Office will greatly impact public's right to access dash camera footage. If the Court decides in Paff that dash camera footage is a "criminal investigatory record," N.J.S.A. 47:1A-1.1, and thus categorically exempt from access under OPRA

forever, then the common law right of access will be the only way the public can gain access to dash camera footage. If the Court instead decides in Paff that dash camera footage is not a criminal investigatory record (a position that was urged by *amicus* ACLU-NJ in that case), then public agencies may still withhold such footage if they prove that OPRA's ongoing investigation exemption applies. Because both the ongoing investigation exemption¹ and the common law right of access consider the public's need for access compared to a law enforcement agency's need for secrecy, ACLU-NJ addresses them together.

A. The Public's Interest in Disclosure Far Outweighs Any Need for Long-Term Secrecy

In Lyndhurst, this Court stated that "[t]he public's interest in transparency favors disclosure . . . in matters of great public concern" and thus the public was entitled to dash camera footage of a police-involved shooting. Lyndhurst, 229 N.J. at 576. In fact, the Court recognized that non-disclosure of police videos could actually *undermine* the public's trust in law enforcement and "fuel the perception that information is

¹ To prove that this exemption applies, a public agency must show that disclosure would be "inimical to the public interest." North Jersey Media Group Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 573 (2017) (quoting N.J.S.A. 47:1A-3(a)). In Lyndhurst, the Court's analysis of access under the ongoing investigation exemption was mirrored its analysis for access under the common law.

being concealed." Ibid. Sadly, many agencies have construed Lyndhurst very narrowly, arguing that it applies *only* to dash camera videos that depict police deadly shootings. Indeed, OCPO made that argument below in its post-Lyndhurst supplemental briefing. [Da99].² This Court must make it clear that the Lyndhurst decision is not limited to videos of police-involved shootings, but instead applies broadly to *all* matters "of great concern." Police misconduct is undoubtedly a matter of great concern and thus the dash camera footage in this case must be released.

"[P]olice officers are members of quasi-military organizations, called upon for duty at all times, armed at almost all times, and exercising the most awesome and dangerous power that a democratic state possesses with respect to its residents--the power to use lawful force to arrest and detain them." Policemen's Benev. Ass'n of New Jersey, Local 318 v. Washington Twp. (Gloucester Cty.), 850 F.2d 133, 141 (3d Cir. 1988) (noting that the "need in a democratic society for public confidence, respect and approbation of the public officials on whom the state confers that awesome power" is significant). Law enforcement officers take an oath to uphold the law and their position "require[s] a high level of honesty, integrity, sensitivity, and fairness in dealing with members of the public,

² Da= OCPO's Appendix

knowledge of the law, and a pattern and exhibition of law-abiding conduct." State v. Gismondi, 353 N.J. Super. 178, 185 (App. Div. 2002). "[A] police officer is a special kind of public employee. . . . He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). See also Hartmann v. Police Dept. of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (police officers are those "who stand[] in the public eye as an upholder of that which is morally and legally correct.").

Accordingly, "[t]he public has a strong interest in assessing the truthfulness of allegations of official misconduct, and whether agencies that are responsible for investigating and adjudicating complaints of misconduct have acted properly and wisely." Welsh v. City & Cty. of San Francisco, 887 F. Supp. 1293, 1302 (N.D. Cal. 1995). "A citizenry's full and fair assessment of a police department's internal investigation of its officer's actions promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights." Worcester Telegram & Gazette Corp v. Chief of Police of Worcester, 787 N.E.2d 602, 607 (Mass. Ct. App. 2003).

As the Oregon Supreme Court recently said:

[T]he public interest in the transparency of government operations is particularly significant when it comes to the operation of its police departments and the review of allegations of officer misconduct. Every day we, the public, ask police officers to patrol our streets and sidewalks to protect us and to enforce our laws. Those officers carry weapons and have immense power. Some members of the public fear the abuse of that power. By the same token, police officers are themselves vulnerable. Many of those who drive our streets and walk our sidewalks also carry weapons. Some officers fear their use of those weapons and their resistance to legal authority. When our system of justice works as we expect it to, officers use their authority legitimately, members of the public comply with their instructions, and the dangers of escalating violence are avoided. But for our system to work as we expect it to, the public must trust that officers are using their authority legitimately, and officers must trust that the people they stop will respond appropriately. Without mutual trust, the police cannot do their work effectively and the public cannot feel safe.

One way to promote that necessary mutual trust is to make police practices and procedures transparent and to make complaints about police misconduct and the discipline that is or is not meted out open to public inspection. It is important for the public to know when the police overstep; it is important for the public to know when they do not. And it is important that the basis for differing results be known and understood.

[Am. Civil Liberties Union of Oregon, Inc. v. City of Eugene, 380 P.3d 281, 297-98 (Or. 2016).]

Transparency serves as a protection against the "blue wall" of silence, which often shields the misconduct of police officers or lets them escape more severe punishment. See State v. Morais, 359 N.J. Super. 123, 132 (App. Div. 2003) ("The term 'blue wall' is 'common parlance for police officers' reluctance to incriminate their fellow officers.'"). Video is a unique form of government record that is critical to the public's ability to "play a watchful role in . . . guarding against corruption and misconduct." Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 541 (2012). Police recordings in particular "protect the public and the police alike in that the videos can expose misconduct and debunk false accusations." Lyndhurst, 229 N.J. at 576.

Here in New Jersey, police dash camera and body camera recordings have exposed police misconduct on multiple occasions. Most recently, *The Trentonian* has reported on a series of body camera recordings that have revealed problematic conduct by members of the Trenton Police Department, including its upper brass. In one recording, Trenton police officers were caught on a tape bragging about using excessive force against suspects. See Isaac Avilucea, "Trenton Cops Brag About Brutality On Body Cam," *THE TRENTONIAN* (Sept. 7, 2017) (quoting an officer as saying, "Boom, I hit him so hard I broke the battery inside" of a flashlight and another encouraging officers to

focus on hitting the "major muscle groups"). In another body camera recording, Trenton's Police Director was heard calling certain city residents "hood rats," a racist term that sparked a strong response by the NAACP of New Jersey. See Isaac Avilucea, "Race Expert Cries Foul On 'Hood Rats' Comment, Trenton Mayor Won't Address Police Director's Status," THE TRENTONIAN (Sept. 24, 2017). Finally, a third body camera recording contradicts statements a Trenton police officer made in a sworn affidavit of probable cause and showed other officers asking that the body camera be turned off, an act that would have been a violation of police department policy. See Isaac Avilucea, "WATCH: Body Cam Shows Trenton Cop Lied About Finding Gun," THE TRENTONIAN (April 1, 2018).

Police misconduct is of course not limited to the City of Trenton. Public access to police dash camera and body camera videos has revealed excessive use of force by various police officers in this State, even against teenagers. See Craig McCarthy, "Cops Say Fellow Officer Crossed Line In Bloody Arrest. Here Are The Candid Conversations," NJ ADVANCE MEDIA (Mar. 24, 2018) (describing dash camera video that reveals officers discussing how a fellow officer used excessive force on a 16-year-old "but believed that the department would cover" for the officer); Chris Shelton, "Cop Who Struck 13-Year-Old Girl Charged With Assault," NJ ADVANCE MEDIA (April 6, 2018) (showing

body camera footage of police officer striking 13-year-old girl in the face for no apparent reason); Bill Wichert, "Cops Found Guilty of Official Misconduct for False Police Reports," NJ ADVANCE MEDIA (Nov. 5, 2015) (story about two police officers convicted of official misconduct after dash camera footage revealed that they lied about being assaulted by a suspect when in fact it was the officers who assaulted the suspect).

A narrow reading of Lyndhurst would not have resulted in any of the above videos being released, yet they clearly involve "matters of great public concern" and assist the public in holding law enforcement agencies accountable and exposing police misconduct. The OCPO's position that Lyndhurst does not require disclosure of the video because it does not depict a police-involved deadly shooting must be rejected.

B. OCPO Has Not Met Its Burden of Proving That Non-Disclosure of the Video Was Warranted

The Lyndhurst decision recognizes that there may be some instances where a law enforcement agency can establish that non-disclosure is justified, even where the public has a strong interest in disclosure. The OCPO, however, did not meet its burden of proving that non-disclosure was warranted in this case.

To support its argument that release of the dash camera footage would be inimical to the public interest and that access

should be denied under both OPRA's ongoing investigation exemption and the common law right of access, the OCPO submitted the certification of Michel Paulhus, Executive Assistant Ocean County Prosecutor. That certification is conclusory in nature and states:

8. The investigation into the actions of Officer Felder is still pending. The investigation will continue up until trial. The reports by the officers during the motor vehicle stop as well as the audio and video recording are the foundation of the official criminal charges pending against Officer Felder. The release of criminal investigatory records at this state of the investigation would impair the ongoing investigation and have a detrimental impact on the pending proceeding.

9. The [OCPO] often handles criminal allegations involving police officers. These cases often rely on information obtained from sources who wish to have their identities protected for fear of retribution. The fear of retribution is especially prevalent when the allegations do not rise to a criminal level or where the investigation does not yield sufficient evidence to prosecute. The [OCPO] relies heavily upon information obtained from cooperators who wish to remain anonymous. Releasing criminal investigatory records related to investigation of police officers under OPRA would further fuel these fears and would chill the reporting of police misconduct and be harmful to a bona fide law enforcement purpose.

[Da104].

The Appellate Division correctly held that OCPO did not meet its burden of proving that disclosure of the dash camera footage

would be inimical to the public interest and its decision should be affirmed. [Da99].

OPRA places the burden of proving that an exemption applies solely upon the public agency. N.J.S.A. 47:1A-6. This is a very heavy burden because OPRA requires that exemptions be construed narrowly in favor of public access. N.J.S.A. 47:1A-1. A "government record does not become cloaked with confidentiality simply because the prosecutor declares it so." Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 367 (App. Div. 2003). Instead, an agency must prove that a record is exempt by producing "specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality." Paff v. Ocean Cty. Prosecutor's Office, 446 N.J. Super. 163, 178 (App. Div. 2016) (quoting Courier News v. Hunterdon Cty. Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003)). Because the burden is so high to prove that an exemption applies, our courts have repeatedly rejected "speculative" and "generic" claims of harm. See, e.g., Lyndhurst, 229 N.J. at 574 (rejecting detailed certifications by multiple law enforcement officers who claimed that releasing records relating to a police-involved shooting would jeopardize officer safety); Courier News, 358 N.J. Super. at 382-383 (rejecting prosecutor's claim that "fears of potential juror confusion" warranted non-disclosure of 9-1-1 call); Serrano,

446 N.J. Super. at 368 (rejecting prosecutor's claim that difficulties in impaneling a jury and a possible change of venue warranted non-disclosure of a 9-1-1 call).

In Lyndhurst, the Court reviewed three certifications from law enforcement supervisors within the Division of Criminal Justice, all of which stated that the investigation would be harmed if the dash camera video was released and that officer safety would be jeopardized if their names were disclosed. 229 N.J. at 571-72. The Court noted that the certifications presented generic claims of harm that would "apply to nearly all cases" and held that "generic reasons alone" cannot justify non-disclosure of a police video. Ibid. ("A more particularized showing is required" to prove that one of OPRA's exemptions applies."). No such particularized showing was made here. Paulhus' certification refers to "these cases" generically and does not present any case-specific reasons why release of the video would be "inimical to the public interest." Thus, it does not sufficiently establish that non-disclosure was lawful.

The dash camera recording must be released. Plaintiff's OPRA request was filed in March 2014, *seven months* after the dash camera recording was made. The OCPO has presented no case-specific evidence to demonstrate that the recording could not have been released a few days after the incident once witnesses had been interviewed, which is what this Court required in

Lyndhurst. 229 N.J. at 581. Moreover, it certainly could have been released at any point over the past two-and-a-half years, given that the police officer was sentenced in September 2015. See Kathleen Hopkins, "*Ex-Lakewood Cop Sentenced In Cover-Up*," ASBURY PARK PRESS (Sept. 26, 2015). The OCPO's intention to keep the recording from the public forever is obvious and it undermines the public's trust in law enforcement.

III. EXECUTIVE ORDER NO. 69 DOES NOT APPLY TO DASH CAMERA FOOTAGE

In its opinion below, the Appellate Division refused to consider OCPO's argument that Executive Order No. 69 exempts the dash camera footage from public access under OPRA because it was "raised by defendants for the first time on appeal." [Da97-Da98]. In her dissenting opinion, Judge Reisner stated that because "release of these records implicates state-wide concerns, and for the sake of completeness," she would permit the OCPO to argue on remand that Executive Order No. 69 applies. OCPO now asks this Court to consider the argument rather than remand the matter back to the trial court. If the Court accepts that invitation, it should rule that Executive Order No. 69 does not apply.

Executive Order No. 69 exempts "fingerprint cards, plates and photographs and similar criminal investigation records that are required to be made, maintained or kept by any State or

local governmental agency." By its plain language, this does not include dash camera footage. OCPO's argument that dash camera footage falls within the scope of "similar criminal investigation records" is without merit.

When faced with a question of interpretation of a law, the first thing to be considered is the plain meaning of the law. Saunders v. Capital Health Sys. at Mercer, 398 N.J. Super. 500, 507 (App. Div. 2008). *Noscitur a sociis*, "an ancient maxim of statutory construction[,] " stands for the principle "that the meaning of words may be indicated and controlled by those with which they are associated." Herzog v. Twp. of Fairfield, 349 N.J. Super. 602, 607 (App. Div. 2002). In fact, "where general words follow specific words in a statutory enumeration, the general words are construed to embrace *only objects similar in nature* to those objects enumerated by the preceding specific words." Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 367 (2007)" (emphasis in original).

Pursuant to these tenets of statutory construction, the phrase "and similar criminal investigation records" means that such records must be similar to fingerprint cards and plates and photographs. Police dash camera footage, which consists of both audio and video, has nothing in common with fingerprint cards and plates, let alone with photographs. The commonality between the enumerated records in Executive Order No. 69 is that they

are all records that are required to be made immediately after a person's arrest - fingerprints, plates, mugshots, and other records relating to the "booking" process. See N.J.S.A. 53:1-13 ("The supervisor of the state bureau of identification shall procure and file for record, fingerprints, plates, photographs, pictures, descriptions, measurements and such other information as may be pertinent, of all persons who have been or may hereafter be convicted of an indictable offense within the state"); N.J.S.A. 53:1-15 (requiring fingerprints and photographs to be taken immediately after arrest).

Therefore, Executive Order No. 69 may apply only to other criminal investigation records that also relate to the booking process. These might include processing records, index cards, and "rap sheets." See, e.g., N.J.S.A. 2C:52-1 (listing items in an arrest or conviction file that would be expunged). Thus, Executive Order No. 69's exemption for "photographs" would apply to mug shots taken at the station during booking, but not to videos taken by police officers from their vehicles as they record the crimes unfolding in their dash camera's view. Put another way, the items provided to illustrate the limits of the Executive Order's reach (i.e., fingerprints, plates, mugshots, and like items) clearly exclude non-related items such as dash cam videos, which have nothing to do with the routine booking process.

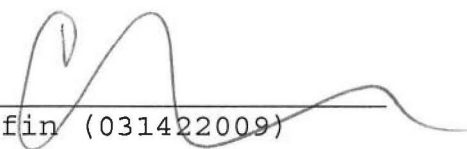
Additionally, New Jersey courts also recognize the principle of *inclusio unius est exclusio alterius*, which holds that the expression or inclusion of one thing in a statute implies the exclusion of another. See, e.g., Ryan v. Renny, 203 N.J. 37 (2010); In re Estate of Santolino, 384 N.J. Super. 567, 581 (Ch. Div. 2005) ("[i]f the drafter of a statute mentions one circumstance specifically, the implication is that the other circumstances, which just as logically could have been mentioned, were intentionally omitted."). The use of video cameras by police officers was widespread in 1997 when Governor Whitman signed Executive Order No. 69. See, e.g., State v. Bottomly, 208 N.J. Super. 82, 86 (Ch. Div. 1984), aff'd, 209 N.J. Super. 23 (App. Div. 1986) ("Videotaping of breathalyzer testing or the defendant's refusal to take such test is now a common practice among New Jersey police departments.") (emphasis added); State v. Nemesh, 228 N.J. Super. 597, 603 (App. Div. 1988) (noting that the administration of defendant's breathalyzer was recorded on video); State v. Wilson, 135 N.J. 4 (1994) (police use of video to record crime scene). Governor Whitman's decision not to include video -- a technology widely used by police departments at the time -- in the list of exemptions is telling and the principle of *inclusio unius est exclusio alterius* thus makes it clear that Executive Order No. 69 does not apply to video footage.

Accordingly, because the plain language of Executive Order No. 69 does not include dash camera audio and video and therefore the executive order cannot exempt dash camera footage from access from public access.

CONCLUSION

For all of the reasons argued above, the ACLU-NJ asks this Court to affirm the Appellate Division's decision.

Respectfully Submitted,


CJ Griffin (031422009)

Edward L. Barocas (026361992)
Jeanne LoCicero (024052000)
Alexander Shalom (021162004)
AMERICAN CIVIL LIBERTIES
UNION OF NEW JERSEY
P.O. Box 32159
Newark, New Jersey 07102
(973) 854-1715

Of Counsel and On the Brief

PASHMAN STEIN WALDER HAYDEN
A Professional Corporation
Court Plaza South
21 Main Street, Suite 100
Hackensack, New Jersey 07601
(201) 488-8200

Attorney for *Amicus Curiae*
American Civil Liberties Union
of New Jersey and On the Brief