

DIGITAL FIRST MEDIA D/B/A THE
TRENTONIAN,

Plaintiff-Appellant,

v.

EWING TOWNSHIP AND KIM J. MACELLARO,
RMC, IN HER CAPACITY AS MUNICIPAL CLERK
AND RECORDS CUSTODIAN FOR EWING TOWNSHIP,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET No. A-5779-17T2

CIVIL ACTION
ON APPEAL FROM
SUPERIOR COURT, LAW DIVISION
MERCER COUNTY

Hon. Mary C. Jacobson,
A.J.S.C.

Sat Below
No. MER-L-0495-18

**BRIEF AND APPENDIX *AMICI CURIAE* OF
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
AND 22 OTHER MEDIA ORGANIZATIONS
IN SUPPORT OF PLAINTIFF-APPELLANT SEEKING REVERSAL**

McCUSKER, ANSELM, ROSEN, &
CARVELLI, P.C.
210 Park Ave., Suite 301
Florham Park, New Jersey 07932
(T) (973) 635-6300
(F) (973) 635-6363
Attorneys for *Amici Curiae*

On the brief:

Bruce S. Rosen, Esq. (018351986)

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PRELIMINARY STATEMENT

Amici are news media organizations, publishers, and groups dedicated to protecting the freedom of information interests of the press and the public.¹ *Amici* write to emphasize the strong interest that the news media has in access to law enforcement records, particularly in light of the press's role in keeping the public informed about the actions of government officials.

Amici frequently rely on public records, including those obtained pursuant to New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1 *et seq.* ("OPRA"), to report on police-community relations and to shed light on the conduct of law enforcement in New Jersey and across the country. Indeed, the "public in general . . . has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny." Waller v. Georgia, 467 U.S. 39, 47 (1984). Because "[f]ree and robust reporting, criticism, and debate" about the justice system "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system," Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976), *amici* have a strong interest in this case.

This Court should require the release of the requested Use of Force Reports ("UFRs"), redacted to exclude all personal

¹ A full list of amici is provided in Appendix A to this brief.

identifying information pertaining to juveniles. With such redactions, the records will no longer pertain to juveniles at all, but simply to law enforcement. See Plaintiff-Appellant's Brief and Appendix at 10-17. Moreover, public access to redacted UFRs will enable members of the news media to tell important stories bearing directly on readers' communities, while also providing oversight, fostering accountability, and building institutional trust.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For the purpose of this brief, *amici* accept the statement of facts and procedural history contained in Plaintiff-Appellant's brief filed November 14, 2018.

ARGUMENT

- I. The news media plays an essential role in helping the public understand and evaluate the criminal justice system; by ensuring access to law enforcement records, OPRA is a vital tool for journalists.

Members of the news media play a key role in facilitating trust in institutions by promoting transparency. See, e.g., Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). Indeed, "[t]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs." Mills v. Alabama, 384 U.S. 214, 219 (1966). Quoting Thomas Jefferson, the United States Supreme Court wrote in Miami Herald Pub. Co. v.

Tornillo that "[where] the press is free, and every man able to read, all is safe." 418 U.S. 241, 260 (1974).

The news media's examination of, and reporting on, the criminal justice system plays a critical role in our society. As noted by the New Jersey Supreme Court in State v. Neulander, "Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of the system is of crucial import to citizens concerned with the administration of government." 173 N.J. 193, 197, 801 A.2d 255, 257 (2002) (internal quotations omitted) (quoting Nebraska Press Ass'n, 427 U.S. at 587 (Brennan, J., concurring)).

Echoing the United States Supreme Court's emphasis on "protecting the freedom of the media," Neulander at 217, 271, the court in Neulander stated that "a public benefit is performed" when the media reports on the justice system, and that "[t]he freedom of the press to publish that information [is] of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." Id. at 217-18, 271-72 (quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975)). OPRA plays a critical role in the press's ability to gather and report information about government conduct, including with respect to law enforcement. OPRA's pro-disclosure structure is based on the understanding that "with broad public access to information about how state and local governments

operate, citizens and the media can play a watchful role in . . . guarding against corruption and misconduct." Burnett v. Cty. of Bergen, 198 N.J. 408, 414, 968 A.2d 1151, 1154 (2009). Under OPRA, the records of all law enforcement agencies are open to the public unless they fall within one of the law's exceptions. N.J.S.A. 47:1A-5. The New Jersey Supreme Court has specifically recognized that OPRA broadened public access to law enforcement records as compared to the prior Right to Know Law. See N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 566, 163 A.3d 887, 901 (2017).

Use of Force Reports ("UFRs") are among the law enforcement records that are required to be disclosed under OPRA. See id.; Jones v. Paulsboro Police Dep't, No. GLO-L-1360-11, 2012 WL 140256 (N.J. Super. Ct. App. Div. Jan. 12, 2012); O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 982 A.2d 459 (App. Div. 2009). Courts have held that disclosure of UFRs is both required by OPRA, see Jones, 2012 WL 140256, at *2, and serves important public policy objectives. For example, in O'Shea v. Twp. of W. Milford, the Appellate Division affirmed a trial court's order requiring access to UFRs under OPRA. 410 N.J. Super. 371, 378, 982 A.2d 459, 463 (App. Div. 2009). In so doing, the Appellate Division highlighted, favorably, the explanation given by Judge Brogan of the New Jersey Superior Court, Law Division, Passaic County, who had noted that "if you have these [UFRs] and you don't let the

people or . . . the public at large [] review them, you're just . . . asking for a suspicious cloud [.]” Id. Judge Brogan further noted that withholding UFRs “really encourage[es] a distrust of the police report which is . . . the farthest thing we should be looking to do.” Id.

The same concerns apply to the wholesale withholding of UFRs involving instances of force used against minors. This is especially so in light of highly publicized and highly questionable incidents of force used against children and teenagers in New Jersey and across the country. See, e.g., Corina Knoll and Sharon Otterman, Video of New Jersey Teenager’s Violent Arrest Prompts Protests, The New York Times (May 22, 2019), <https://perma.cc/F6E8-CPNS>. Because redacting the requested UFRs to exclude all personal identifying information about juveniles allows disclosure consistent with N.J.S.A. 2A:4A-60, see Plaintiff-Appellant’s Brief & Appendix at 10-17, such records are required to be released under OPRA.² Doing so not only comports with the strong presumption of access established by the Legislature and the New Jersey Supreme Court, but also will foster

² Under the federal Freedom of Information Act, which this Court may find instructive, courts have consistently found that redacting personally identifying information of minors is sufficient to protect privacy interests. See, e.g., BuzzFeed Inc. v. U.S. Dep’t of Educ., No. 18-CV-01535 (CRC), 2019 WL 3718928, at *1 (D.D.C. Aug. 7, 2019) (ordering limited redactions to reports of investigations of school districts conducted under Title IX).

the type of informed reporting and public oversight that OPRA is designed to enable.

II. Public access to the government records relating to use of force and the treatment of children within the criminal justice system serves the public interest.

Access to government records concerning both police use of force and the treatment of children within the criminal justice system has made possible powerful journalism affecting communities across the nation. For example, ABC was able to obtain records under Ohio's Open Records Law last year which showed that Cincinnati police had used force against children as young as six.³ Craig Cheatham, et al., Data points to disparities in how police use force against juveniles, ABC News (Dec. 6, 2018), <https://bit.ly/2ySaauh>. WPCO, ABC's Cincinnati affiliate, spent months reviewing the records and determined that while force is used against adults more frequently than against juveniles, black juveniles were more likely than adults to have stun guns deployed against them. Id. Black juveniles were also more likely than white juveniles to be injured in use-of-force incidents. Id.

Similarly, it wasn't until WCPO obtained police body camera footage, also under Ohio's public records law, that the parents of a 14-year old boy who had been injured by police use of force were

³ The brief of *Amicus Curiae* American Civil Liberties Union of New Jersey ("ACLU Brief") at 18-19 discusses Ohio's, Texas', and Arkansas's laws which permit disclosure of UFRs irrespective of the age of the victim.

finally able to see how their son's shoulder injury occurred. Id. "He was treated like he just didn't matter," said the boy's mother; "They told us something totally different than what we saw." Id. Reporting on such matters of public concern depends on access to law enforcement records about use-of-force incidents.

A powerful example of the impact of news media coverage on the treatment of juveniles in the criminal justice system is the recent closure of Glen Mills Schools in Pennsylvania. Glen Mills, until just months ago, was the oldest existing reform school in the United States. The Philadelphia Inquirer published a comprehensive exposé of child abuse and coverups at Glen Mills, describing egregious incidents of violence and intimidation within the facility. See Lisa Gartner, Beaten, then silenced, The Philadelphia Inquirer (Feb. 20, 2019), <https://perma.cc/44RG-4QCY>. The Inquirer's reporting relied on a combination of court records, incident reports (much like the requested Use of Force reports at issue here), and interviews with students and staff. Id. In the weeks that followed publication of The Inquirer's reporting, judges around the country who had sentenced young boys to Glen Mills began pulling them out of the facility. See, e.g., Delco D.A. probes Glen Mills violence, Delco News Network (Feb. 28, 2019), <https://perma.cc/AXC8-SASH>. The Pennsylvania Department of Human Services then issued an emergency removal order for all of the remaining boys at the school. Lisa Gartner, State orders

'emergency removal' of remaining boys at Glen Mills Schools after abuse revelations, The Philadelphia Inquirer (March 25, 2019), <https://perma.cc/Z6P5-JDL5>. The Commonwealth of Pennsylvania has now revoked all of Glen Mill's licenses, effectively closing the school. See Letter from Cathy A. Utz, Deputy Secretary, Department of Public Welfare to Christopher Spriggs, Assistant Executive Director, Glen Mills Schools (April 8, 2019) (citing negligence, child abuse, and other misconduct as reasons for the revocation of all of Glen Mills' licenses to operate).

As these examples illustrate, when members of the news media are able to scrutinize records of police use-of-force incidents involving minors, or as in the case of The Inquirer's reporting about Glen Mills Schools, can obtain records about the treatment of juveniles within the criminal justice system more generally, journalists are able to tell important and impactful stories. That is true here in New Jersey, as well.

The recent publication of "The Force Report" – a database of 72,677 records documenting use of force by New Jersey police officers – is particularly valuable. See The Force Report, NJ.com, <https://perma.cc/9QN3-UVKM>. The Force Report is the product of a 16-month investigation by N.J. Advance Media involving 506 public records requests and tens of thousands of public records from New Jersey's police departments. Id. It is the most comprehensive

statewide database of police use-of-force incidents in the U.S.
Id.

The news media has been able to use the Force Report database as the basis for valuable reporting. See, e.g., Joe Amditis, WATCH: How a group of NJ reporters built a massive database of police use of force, Medium (Dec. 5, 2018) <https://perma.cc/U38W-JF8S> (featuring a "webinar" hosted by Montclair State University's Center for Cooperative Media wherein local reporters, editors, and publishers throughout New Jersey discussed the database and how they would use it to inform their own local reporting). The Force Report's findings include:

- "At least 9,281 people were injured by police from 2012 through 2016. At least 4,382 of those were serious enough that the subject was sent to the hospital[;]"
- "Statewide, a black person was more than three times more likely to face police force than someone who is white[;]"
- "New Jersey fails to monitor trends to flag officers who use disproportionately high amounts of force[;]"
- "Ten percent of officers accounted for 38 percent of all uses of force. A total of 252 officers used force more than five times the state average[.]"

Stephen Stirling & S.P. Sullivan, Hundreds of N.J. cops are using force at alarming rates. The state's not tracking them. So we did, NJ.com (Nov. 29, 2018), <https://perma.cc/QX2Z-ME7E>.

The Force Report has prompted responses from government officials, including New Jersey's Attorney General, Gurbir Singh Grewal. See Disha Raychaudhuri and Erin Petenko, AG promises to deal with violent cops. These skeptics are watching closely, NJ.com (Jan. 25, 2019), <https://perma.cc/B93P-6GBN>. The Attorney General noted in a press conference that public officials are using the Force Report data to "inform their decisions," said he has instructed county prosecutors to look at it to check for trends, and promised that New Jersey government would reform their own tools for tracking and evaluating uses of force.

The release of the redacted UFRs sought here will assist the news media in illuminating when and how law enforcement uses force against minors. Such data will shed light on situations that call for reform, just as the Force Report has already done. Access to, and reporting on, such information serves the principal purpose of OPRA: "to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329, 864 A.2d 446, 458 (Law Div.2004).

The wholesale withholding of these reports serves only one interest: sweeping potential abuses under the rug. That approach, if approved by this Court, will only make the next abuse more likely. OPRA, by making access the presumption, is designed to

prevent exactly that. By applying the terms of that statute consistent with the Legislature's intent, this court should order the release of redacted UFRs.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to reverse the Superior Court's decision and hold that access to the redacted UFRs is required under OPRA.

Dated: September 6, 2019

Respectfully submitted,

s/Bruce S. Rosen

Bruce S. Rosen
N.J. Bar No. 018351986
McCusker, Anselmi, Rosen &
Carvelli, P.C.
210 Park Ave., Suite 301
Florham Park, NJ 07932
Telephone: 973.635.6300

Counsel for *amici curiae*

Dated: September 6, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief *Amici Curiae* of the Reporters Committee for Freedom of the Press and 22 Other Media Organizations in Support of Plaintiff-Appellant Seeking Reversal was served electronically, by the eCourts Appellate System, on September 6, 2019 upon the following:

Maeve E. Cannon
Wade D. Koenecke
Stevens & Lee
Princeton Pike Corporate
Center
100 Lennox Drive, Suite 100
Lawrenceville, NJ 08648
meca@stevenslee.com
wdk@stevenslee.com
*Counsel for Defendants-
Respondents*

CJ Griffin
Pashman Stein Walder Hayden
Court Plaza South, Suite 200
21 Main Street
Hackensack, NJ 07601
cgriffin@pashmanstein.com
*Counsel for Plaintiff-
Appellant*

APPENDIX *AMICI CURIAE* OF
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
AND 22 OTHER MEDIA ORGANIZATIONS
IN SUPPORT OF PLAINTIFF-APPELLANT SEEKING REVERSAL

2012 WL 140256

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

Terence JONES, Plaintiff,

v.

PAULSBORO POLICE DEPARTMENT,
and Christine M. Dudlick, in ha official
capacity as Records Custodian of the
Paulsboro Police Department, Defendants.

Jan. 12, 2012.

Attorneys and Law Firms

Walter M. Luers, Attorney for Plaintiff (Walter M. Luers,
LLC, attorneys).

Todd J. Gelfand, Attorney for Defendants (Barker, Scott,
Gelfand, & James, attorneys).

Opinion

CURIO, A.J.S.C.

*1 This is an action by Plaintiff Terence Jones under the Open Public Records Act, *N.J.S.A.* 47:1A-1, et seq. (hereinafter OPRA) and, in the alternative, under the common law right of access to documents. Plaintiff seeks disclosure of (1) a surveillance video taken outside the Paulsboro Police Department on May 5, 2011 and (2) unredacted Use of Force reports prepared by the Paulsboro Police Department from January 1, 2009 through May 24, 2011.

Plaintiff contends that the video contains “potentially exculpatory evidence and evidence that may be relevant in a potential civil matter” stemming from an alleged altercation that occurred outside of the Paulsboro Police Department between officers and two private citizens.

On May 24, 2011, Plaintiff requested copies of Use of Force reports prepared by the Paulsboro Police Department from January 1, 2009 through May 24, 2011. On June 2, 2011, the Use of Force reports were sent to Plaintiff but with redactions of the names and ages of individuals who had been subjected

to force. Upon inquiry of the records custodian, Plaintiff was informed via email on June 21, 2011 that the redactions were made “upon the advisement of our Borough solicitor.”

On June 14, 2011, Plaintiff requested a DVD or VHS copy of surveillance video taken outside the Paulsboro Police Department on May 5, 2011 which Plaintiff contends contains information relating to two arrests. Plaintiff specifically requested, “all video footage that relate (sic) to the arrest of Shavon and Artavius Mears, outside of the Paulsboro Police Department.” On June 21, 2011, Plaintiff’s request for the video was denied and the records custodian informed Plaintiff that the video was considered part of a criminal investigation.

Plaintiff asserts he is seeking the surveillance video and Use of Force reports because he was asked to do so by Shavon and Artavius Mears who claim to have been in an altercation on May 5, 2011 with members of the Paulsboro Police Department.

On or after May 5, 2011, Shavon Mears was arrested and charged with disorderly conduct and resisting arrest and Artavius Mears was arrested and charged with disorderly conduct. On July 12, 2011, Shavon and Artavius Mears filed criminal complaints against members of the Paulsboro Police Department for simple assault and harassment and, according to Plaintiff, are contemplating filing civil complaints. Plaintiff maintains the video he is seeking is necessary for both the prosecution of the criminal complaints, which have already been filed, and for any potential civil action which may be filed.

Defendants filed a Motion to Dismiss claiming Plaintiff is not entitled to the surveillance video or the unredacted Use of Force reports under either OPRA or, alternatively, the common law right of access. Defendants also argue that Plaintiff has engaged in the unauthorized practice of law and/or detective work because he has no personal interest in the information which he has requested and is illegally acting on behalf of others. The Court has received no communication from Artavius and Shavon Mears joining in Plaintiff’s request or taking a position in the matter.

*2 Plaintiff has cross-moved for summary judgment seeking an Order directing the release of the requested unredacted Use of Force reports, to include names and ages, and the surveillance video of May 5, 2011.

Use of Force Reports

Jones v. Paulsboro Police Dept., Not Reported in A.3d (2012)

2012 WL 140256

The Use of Force reports are public records subject to disclosure under OPRA. On June 2, 2011, Defendants emailed copies of the requested Use of Force reports with names and ages of the individuals subjected to force having been redacted.¹

The redaction of names and ages made by Defendants is inappropriate. OPRA allows for the release of such information to a records requestor absent a specific basis for keeping the information confidential. OPRA does provide for certain information to be kept confidential including “that portion of any document which discloses the social security number, credit card number, unlisted telephone number or driver license number ...” *N.J.S.A. 47:1A-1*. Such redactions are authorized and would provide a specific basis for the Custodian to withhold such information but that is not the case here. In this case, names and ages were redacted and no specific basis was advanced by the Custodian for doing so. OPRA does mandate that the public agency is obligated to protect certain personal information including protecting such information “when disclosure thereof would violate the citizen's reasonable expectation of privacy ...” *N.J.S.A. 47:1A-1*. Again, that is not the case here. There is no reasonable expectation of privacy attached to reports of this nature.

The court in *O'Shea v. Two of West Milford*, 410 *N.J.Super.* 371 (App.Div.2009) dealt with a request for Use of Force reports and made clear that such reports do not qualify as criminal investigatory records, are not internal affairs documents, and that the Attorney General's Guidelines concerning confidentiality of such records is not applicable to Use of Force reports.

As to the redactions of the names and ages on the Use of Force reports, the Custodian has failed to meet her burden of proving that the denial of access to the information is authorized by law in accordance with *N.J.S.A. 47:1A-6*. There is no mandate in OPRA that such information be kept confidential. Accordingly, Plaintiff's request for the unredacted Use of Force reports, to include names and ages, is granted.

Surveillance Video of May 5, 2011

Mr. Jones, on June 14, 2011, requested a DVD or VHS of “all video footage (May 05, 2011) that relate (sic) to the arrest of Shavon and Artavius Mears, outside of the Paulsboro Police Department.” This request was made pursuant to OPRA, or, alternatively the common law right of access. The video was

created by a surveillance camera focused on the exterior of the Paulsboro Police Department. On June 21, 2011, Defendants denied the request for the video stating, “Any video possessed by this department pertaining to an investigation is part of a criminal investigation and as such, the department will not release such videos.”

*3 The Open Public Records Act, at *N.J.S.A. 47:1A-1*, states that:

“government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions for the protection of the public interest, and any limitations on the right of access ... shall be construed in favor of the public's right of access.”

When access to requested records is denied, the Custodian of those records bears the burden of proving that denial of access to the records is lawful. *N.J.S.A. 47:1A-6*. When a Custodian denies access following an OPRA request, the Custodian must “indicate the specific basis therefore” to the requestor. *N.J.S.A. 47:1A-5(g)*

OPRA specifically provides an exemption for criminal investigatory records, which are defined as “a record which is not required by law to be made, maintained, or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.” *N.J.S.A. 47:1A-1.1*. Further, *N.J.S.A. 47:1A-3* enumerates the exemptions for access to records under OPRA, including records of investigations which are in progress at the time of the request. The court in *Asbury Park Press v. Lakewood Twp. Police Dept.*, 354 *N.J.Super.* 146, 158 (Law Div.2002), wrote “In order to find a basis to deny access ... the court must find both that they pertain to an investigation in progress and that their release would be inimical to the public interest.”

It is undisputed that certain charges arose out of interaction between citizens and police officers of the Paulsboro Police Department on May 5, 2011 and that the video in question may include evidence of that event. The investigation into the alleged criminal activity on that date is currently pending. The investigations are related to the charges against Artavius

and Shavon Mears filed by the police and the charges against police officers filed by Artavius and Shavon Mears. Additionally, the Police Department has been conducting its own related internal affairs investigation since May 10, 2011.

The DVD of the police department surveillance video is a "criminal investigative record" as defined in *N.J.S.A. 47:1A-1.1* and is thus exempt from disclosure to Plaintiff under OPRA. Additionally, it is afforded protection as a confidential record by the Attorney General's Guidelines on Internal Affairs Policy & Procedures.²

Under the Attorney General's Guidelines, the confidentiality of internal affairs is of the utmost importance and release of such records is permitted in specific "exceptional circumstances." The Attorney General's Internal Affairs Policy and Procedures Guidelines states "The nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information."³ The Guidelines, revised in May 2011, state "The nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information."⁴ The court in *Courier News v. Hunterdon County Prosecutor's Office*, 358 *N.J.Super.* 373, 382-383 (App.Div.2003) wrote,

*4 "Under OPRA, a public agency seeking to restrict the public's right of access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. Absent such a showing, a citizen's right of access is unfettered. Moreover, in assessing the sufficiency of the proofs submitted by the public agency in support of its claim for confidentiality, a court must be guided by the overarching public policy in favor of a citizen's right of access. *N.J.S.A. 47:1A-1*." Here, it is clear that the video falls within the Guidelines for confidentiality as it is currently being utilized in an ongoing internal affairs investigation.

Beyond the surveillance video being a criminal investigatory record and thus exempt under OPRA, the video is provided an additional layer of protection from disclosure by the Attorney General's Guidelines while being used for an ongoing internal affairs investigation.

Plaintiff has argued that because the video was created before an investigation actually began, the video should be disclosed. *N.J.S.A. 47:1A-3* provides that the "provision shall not be construed to allow any public agency to prohibit

access to a record of that agency which was open for public inspection, examination, or copying before the investigation commenced." There is no indication that the surveillance video from outside the police department was ever available to the public. There has been no showing of any statute or regulation that exists within New Jersey that mandates the making of exterior surveillance videos of police departments. The surveillance video at issue here differs from other materials found in case law which are maintained by law enforcement agencies, such as 911 tapes, which are required to be created and stored.

As the court in *Keddie v. Rutgers*, 148 *N.J.* 36, 54 (1997) wrote, "The trial court should consider whether the requested documents relate to pending or closed cases. Obviously, the need for confidentiality is greater in pending matters than in closed cases." The video at issue fits squarely within the statutory definition of "criminal investigatory record," is therefore confidential, and exempt from disclosure under OPRA. Indeed, the video is pertinent to an active, open criminal investigation and an internal affairs investigation and its release would prematurely interfere with those ongoing investigations and as such should remain confidential.

Common Law Right of Access

Having found that the video is not to be disclosed under OPRA, the Court is required to engage in an analysis of the common law right of access. The common law right of access to records is greater than the access afforded by OPRA, and may allow access to criminal investigatory records which are otherwise inaccessible under OPRA. *N.J.S.A. 47:1A-8*.

The common law provides that records to be disclosed will "include any records made by public officers in the exercise of their functions. As such, they include almost every document recorded, generated, or produced by public officials, whether or not required by law to be made, maintained, or kept on file." *O'Shea v. Two of West Milford*, 410 *N.J.Super.* 371, 386 (App.Div.2009), citing *Daily Journal v. Police Dept. of City of Vineland*, 351 *N.J.Super.* 110 (App.Div.2002).

*5 For records to be disclosed under the common law, requestors "must make a greater showing than required under OPRA, specifically: (1) "the person seeking access must 'establish an interest in the subject matter of the material' "; and (2) "the citizen's right to access 'must be balanced against the State's interest in preventing disclosure.'" *Mason v. City of Hoboken*, 196 *N.J.* 51, 67-68 (2008), citing to *Keddie v. Rutgers*, 148 *N.J.* 36, 50 (1997).

A requestor must establish an interest in the record he is seeking. Whether Plaintiff's motivation is believed to be suspect, as posited by Defendants, is beside the point.⁵ It is well settled that the interest of the requestor may be either personal or public. See *Loigman v. Kimmelman*, 102 N.J. 98, 104 (N.J.1986), *S. Jersey Pub. Co. v. N.J. Expressway Auth.*, 124 N.J. 478 (N.J.1991), *Rosenberg v. State Dept. of Law and Public Safety, Div. of Criminal Justice*, 396 N.J.Super. 565 (App.Div.2007). Mr. Jones, as a member of the public, has the right to seek the documents he has requested and has demonstrated the requisite interest.

The court in *Asbury Park Press, Inc. v. Borough of Seaside Heights*, 246 N.J.Super. 62, 72 (Law Div.1990), a case dealing with a request for documents of alleged police misconduct spoke to the public interest in such records in these terms:

"Public officials whether elected or appointed are fiduciaries of the public weal and are under an obligation to serve with the highest fidelity. They need to be free from corrupting influences and the public must be able to judge their work. In short, a public office is a public trust and it is only through knowledge that the public can know whether its trust has been properly served." (citations omitted).

Nevertheless, the court in *Asbury Park Press v. Lakewood Two. Police Dept.*, 354 N.J. Super. 146 (Law Div.2002) wrote "... when the interest in confidentiality is greater, the citizen's right of access must be qualified. In those circumstances, more than a citizen's status and good faith are necessary to require production of the documents ... a clear showing of a public need does not exist merely because a citizen claims that there may be something corrupt which should be exposed for the benefit of the public. There is also a need to focus upon any negative effect that disclosure may have upon the public good." (citing to *Loigman v. Kimmelman*, 102 N.J. at 104–106, 108 (1986)).

In carrying out the required balancing test, the New Jersey Supreme Court, in *Loigman v. Kimmelman*, 102 N.J. 98, 114 (1986), provides that the court may consider:

"(1) the extent to which disclosures will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation,

program improvement, or other decision making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of police misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials."

*6 Analysis requires consideration, and weighing, of each of the *Loigman* factors:

Releasing the surveillance video would not discourage citizens from providing information to the government as no such information was provided;

Disclosing the video would not identify any confidential informant or witness to the alleged altercation; Disclosing the video in this matter may chill agency decision-making as there is an ongoing internal affairs investigation being conducted which could potentially lead to actions being taken within the Paulsboro Police Department Prematurely releasing the video to the public may interfere with the Police Department's reasoned evaluation of the events and actions of its officers and the video, which may prove to be critical evidence in that investigation, could lead to potential discipline of officers or dismissal of internal affairs charges;

The video is believed to be a recording of an entirely factual situation and not to contain any type of evaluation of policymakers, however the information could conceivably impact future policies and departmental procedures;

There is an ongoing internal affairs investigation of officers of the Paulsboro Police Department and so the sufficiency of remedial action, if deemed necessary, is not yet ripe for assessment.

Clearly, agency investigatory proceedings have arisen which may circumscribe the requestor's need for the material. Likewise, such need is further circumscribed by the availability of this information to Artavius and Shavon Mears in defending the criminal charges pending against them.⁶

The court in *Loigman* noted that "there was no fixed rule for determining whether disclosure is appropriate. A court should balance, in each case, the individual's right to the information against the public interest in the confidentiality of

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2012 WL 140256

the file.” (citations omitted) *Loigman v. Kimmelman*, 102 N.J. 98, 104 (1986). Evaluating the foregoing factors, the court concludes that the first two are inapplicable to the situation before the Court and the remaining four factors, in varying degrees, weigh in favor of nondisclosure of the surveillance video. In particular, factor six (6) weighs heavily in favor of confidentiality while the internal affairs investigation is pending.

Here, there is a greater interest in non-disclosure of the video while there are two pending investigations, criminal

and internal affairs, which outweigh the Plaintiffs or public's interest in disclosure.

Accordingly, for the foregoing reasons, Defendant's Motion to Dismiss Plaintiff's Complaint as to the request for the May 5, 2011 surveillance video is granted.

All Citations

Not Reported in A.3d, 2012 WL 140256

Footnotes

- 1 At oral argument, there was a suggestion by Defendants' counsel that the addresses of those against whom force was used was provided to the requestor in the redacted reports. Counsel has since confirmed that no such addresses of the individuals were provided, only the address at which the use of force occurred. The only known redactions to the Use of Force reports were names and ages of those against whom force was used.
- 2 Available at: <http://www.nj.gov/oag/newsreleases11/050611-IA-Policy.pdf>
- 3 Available at: <http://www.nj.gov/oag/newsreleases11/050611-IA-Policy.pdf>
- 4 Available at: <http://www.nj.gov/oag/newsreleases11/050611-IA-Policy.pdf>
- 5 Defendants have argued Plaintiff is engaging in the unauthorized practice of law under *R. 1:21-1(a)* and/or is in violation *N.J.S.A. 45:19-8 et seq.* which governs private detectives. The question as to whether Mr. Jones is the agent of or acting in some representative capacity on behalf of the Mears brothers is not determinative of the issues presented. Mr. Jones, as a member of the public has the right to seek the documents he has requested. The Court makes no findings or conclusions relative to Defendants' allegations and the parties are left to pursue, or not, those ancillary matters in the appropriate forum.
- 6 At oral argument, counsel for Defendants asserted that the video has been offered to Artavius and Shavon Mears, and their counsel, for viewing.

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United States District Court, District of Columbia.

BUZZFEED INC., Plaintiff,
v.
U.S. DEPARTMENT OF EDUCATION, Defendant.

Case No. 18-cv-01535 (CRC)

|
Signed 08/07/2019

Attorneys and Law Firms

Matthew Lynn Schafer, Buzzfeed Inc., New York, NY,
Matthew Topic, Loevy & Loevy, Chicago, IL, for Plaintiff.

Melanie Dyani Hendry, U.S. Attorney's Office for the District
of Columbia, Washington, DC, for Defendant.

OPINION AND ORDER

CHRISTOPHER R. COOPER, United States District Judge

*1 Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in programs and activities that receive federal funding. See 20 U.S.C. § 1681(a). As part of its responsibility to enforce Title IX, the Department of Education, through its Office of Civil Rights (“OCR”), investigates whether covered school districts are adequately responding to sexual assault complaints by students. When OCR completes an investigation, it sends a “resolution letter” to the relevant school or school district documenting its findings.

The media outlet BuzzFeed lodged two Freedom of Information Act (“FOIA”) requests with the Department of Education for resolution letters sent by OCR to fourteen separate schools or districts across the country. BuzzFeed seeks the documents to assess the agency’s Title IX enforcement efforts. When the Department failed to release the requested letters within statutory deadlines, BuzzFeed sued. The Department then released the letters in redacted form. Both sides now move for summary judgment. The sole issue raised in the motions is the propriety of the Department’s redactions.¹ The agency maintains they are necessary to protect the privacy of those involved in the investigations. BuzzFeed accepts that some of the redactions are appropriate

but complains that others unduly obscure whether OCR is fulfilling its enforcement obligations.

At BuzzFeed’s request, the Court has examined the complete, unredacted resolution letters *in camera*. Based on that review, the Court finds that the agency’s approach to redacting the letters appears to be inconsistent and that the redactions to two of the letters are significantly overbroad. The Court will not fly-speck particular redactions, however. It will instead deny each side’s summary judgment motion without prejudice and remand the requests to the Department for reprocessing in a manner consistent with this ruling. The parties may renew their motions if BuzzFeed believes the re-produced letters are still too-heavily redacted.

* * *

The Court will dispense with reciting the general legal standards governing FOIA litigation, which the parties well know. The Department invokes FOIA Exemptions 6 and 7(C) to justify its redactions. Exemption 6 covers “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). Exemption 7(C) covers “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy.” *Id.* § 552(b)(7)(C). If the Court determines that a privacy interest exists under one of the two exemptions, it “must balance ‘the privacy interests that would be compromised by disclosure against the public interest in release of the requested information.’” King & Spalding LLP v. U.S. Dep’t of Health & Human Servs., 330 F. Supp. 3d 477, 497 (D.D.C. 2018) (quoting Davis v. U.S. Dep’t of Justice, 968 F.2d 1276, 1281 (D.C. Cir. 1992)).

*2 When an agency invokes both Exemptions 6 and 7(C), courts “focus” on Exemption 7(C) because it “establishes a lower bar for withholding material.” Citizens for Responsibility & Ethics in Washington v. Dep’t of Justice, 746 F.3d 1082, 1091 n.2 (D.C. Cir. 2014) (internal quotation marks omitted). Because BuzzFeed does not dispute that the records are tied to the Department’s law enforcement efforts, the Court has “no need to consider Exemption 6 separately because all information that would fall within the scope of Exemption 6 would also be immune from disclosure under Exemption 7(C).” Rosenberg v. U.S. Dep’t of Immigration & Customs Enft., 13 F. Supp. 3d 92, 106 (D.D.C. 2014) (citing

Roth v. U.S. Dep't of Justice, 642 F.3d 1161, 1173 (D.C. Cir. 2011)).

The privacy interest that Exemption 7(C) protects “encompass[es] the individual’s control of information concerning his or her person,” U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989), including “when, how, and to what extent information about them is communicated to others,” *id.* at 764 n.16. This includes personally identifiable information (“PII”), traditionally consisting of names, addresses, dates of birth, and other specific information reasonably likely to reveal a person’s identity. *See, e.g., SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991). The interest goes further, too. When “the mosaic effect of disclosure of pieces of information could potentially lead to the identification of the third parties,” that information becomes redactable PII as well. Rosenberg, 13 F. Supp. 3d at 106. When Exemption 7(C) is invoked, the agency can “withhold only the specific information to which it applies, not the entire page or document in which the information appears; any non-exempt information must be segregated and released[.]” Mays v. DEA, 234 F.3d 1324, 1327 (D.C. Cir. 2000).

After conducting an *in camera* review of each document and considering each redaction in light of the case law and the circumstances of each school or district, the Court concludes that while some of the redactions are appropriate, others are improperly broad. Many of the redactions protect traditional PII including dates or highly specific details that would allow identification of individuals involved in the underlying events that were investigated. *See Rosenberg*, 13 F. Supp. 3d at 106; Farese v. U.S. Dep’t of Justice, 683 F. Supp. 273, 275 (D.D.C. 1987) (holding that dates of entry into a program, when revealed among other information, could allow for identification of witnesses, thus justifying redaction). For example, the resolution letters to the Imagine Prep School in Arizona and Adams County School District 12 in Colorado, both prepared by an official at OCR Denver, were minimally redacted and appear to appropriately balance the privacy interests of individuals involved (such as the dates of the allegations or other information specific enough to constitute PII) with the public’s interest in learning how OCR responded to the discrimination complaint and what its investigation found. *See Declaration of David Sumners* ¶ 3, ECF No. 15-5; Plaintiff’s Statement of Undisputed Facts (“Pl. Facts”) Ex. A, ECF No. 17-2; Pl. Facts Ex. B, ECF No. 17-3.

On the other hand, the letters to East St. Louis, Illinois School District 189 and the Baraboo School District in Wisconsin, for example—both redacted by an official in OCR’s Chicago office—have pages-long redactions. *See Declaration of Lauren Skerrett*, ECF No. 15-3, ¶¶ 7, 9; Pl. Facts Ex. C, ECF No. 17-4; Pl. Facts Ex. F, ECF No. 17-7. To the Court’s eye, the redactions in these letters conceal significant amounts of information beyond the scope of either Exemptions 6 or 7(C). These redactions hide details too general to allow for identification of individuals involved (particularly given the relatively large size of the districts), including information about the investigation that is not PII at all. For example, both letters include redacted discussions of OCR’s legal conclusions, as well as general details of how the school districts themselves investigated and responded to the complaints. If revealed, these details would illuminate OCR’s work but would not risk identifying those involved in the underlying incidents. FOIA protects “threats to privacy interests more palpable than mere possibilities.” Dep’t of Air Force v. Rose, 425 U.S. 352, 380 n.19 (1976). The government offers no basis for the Court to conclude that the risk of identification here rises to that level. Further, because these redactions withhold substantial details about the OCR’s Title IX investigations, they undermine “the citizens’ right to be informed about what ‘their government is up to,’ ” making the public interest in revealing much of the redacted information high. Reporters Comm. for Freedom of the Press, 489 U.S. at 773.

*3 The Court appreciates that these resolution letters deal with a sensitive subject and the agency must be careful not to reveal details that would expose the identities of those involved, either directly or indirectly. By the same token, BuzzFeed (and the public) has a right to examine how OCR is conducting these sensitive investigations. Exemptions 6 and 7(c) call for careful balancing when redacting information, demanding a scalpel rather than a buzzsaw. While some OCR officials were appropriately careful in their redactions, others were too aggressive. As a result, the Court will remand the matter to the agency to reprocess the records and narrow the redactions where necessary.

For the foregoing reasons, it is hereby

ORDERED that [15] Defendant’s Motion for Summary Judgment is DENIED without prejudice. It is further

ORDERED that the [17] Plaintiff’s Motion for Summary Judgment is DENIED without prejudice. It is further

ORDERED that the case shall be remanded to the Defendant with instructions to reprocess the records in a manner consistent with this Opinion. It is further

ORDERED that the Defendant shall produce the reprocessed documents to the Plaintiff on or before September 6, 2019. It is further

ORDERED that on or before September 23, 2019, the parties shall file a Joint Status Report, indicating the need for further proceedings in this case and, if necessary, proposing a briefing schedule.

SO ORDERED.

All Citations

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Footnotes

- 1 The suit originally alleged other FOIA violations, but the Department has produced the three final sets of records that BuzzFeed sought and provided details explaining the lack of responsive documents for the Charlotte-Mecklenburg, North Carolina school district. See Declaration of Karen Mayo-Tall ("Mayo-Tall Decl.") ECF No. 21-2 ¶ 2; Declaration of Kristine Minami ("Minami Decl."), ECF No. 15-2, ¶ 16. As BuzzFeed has not contested the adequacy of these productions or the search terms used to attempt to locate records for Charlotte-Mecklenburg, the issue of search adequacy is waived. The agency withdrew its assertion of Exemption 7(A) but maintains that Exemptions 6 and 7(C) cover all redacted information. Mayo-Tall Decl. ¶ 3.

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DESCRIPTIONS OF AMICI

Advance Publications, Inc., with its subsidiaries NJ Advance Media and The Star-Ledger, is a diversified privately-held company that operates and invests in a broad range of media, communications and technology businesses. Its operating businesses include Conde Nast's global magazine and digital brand portfolio, including titles such as Vogue, Vanity Fair, The New Yorker, Wired, and GQ, local news media companies producing newspapers and digital properties in 10 different metro areas and states, and American City Business Journals, publisher of business journals in over 40 cities.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for approximately 110 alternative newspapers in North America. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

First Look Media Works, Inc. is a non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting. First Look Media Works operates the Press Freedom Defense Fund, which provides essential legal support for journalists, news organizations, and whistleblowers who are targeted by powerful figures because they have tried to bring to light information that is in the public interest and necessary for a functioning democracy.

The Foundation for National Progress is the award-winning publisher of Mother Jones magazine and MotherJones.com. It is known for ground-breaking investigative journalism and impact reporting on national issues.

Gannett Co., Inc. is a leading news and information company which publishes USA TODAY and more than 100 local media properties.

Each month more than 125 million unique visitors access content from USA TODAY and Gannett's local media organizations, putting the company squarely in the Top 10 U.S. news and information category.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

KYW-TV is a television station owned and operated by CBS Broadcasting, Inc., serving the Pennsylvania and New Jersey area.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MPA - The Association of Magazine Media, ("MPA") is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Club Journalism Institute is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next

generation of news leaders committed to spreading knowledge that informs democracy.

The Online News Association is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to more than 350 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day, publishes POLITICO Magazine, with a circulation of 33,000 six times a year, and maintains a U.S. website with an average of 26 million unique visitors per month.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reveal from The Center for Investigative Reporting, founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website <https://www.revealnews.org/>, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Tribune Publishing Company is one of the country's leading media companies. The company's daily newspapers include the Chicago Tribune, New York Daily News, The Baltimore Sun, Sun Sentinel (South Florida), Orlando Sentinel, Hartford Courant, The Morning Call, the Virginian Pilot and Daily Press. Popular news and information websites, including www.chicagotribune.com, complement Tribune Publishing's publishing properties and extend the company's nationwide audience.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

WCBS-TV, New York is a television station owned and operated by CBS Broadcasting, Inc. serving the New York, New Jersey and Connecticut area.

FULL COUNSEL LISTING

Richard A. Bernstein
Vice President and Deputy
General Counsel
Advance Publications, Inc.
One World Trade Center
New York, NY 10007

Kevin M. Goldberg
Fletcher, Heald & Hildreth,
PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
*Counsel for Association of
Alternative Newsmedia*

David Bralow
First Look Media Works, Inc.
18th Floor
114 Fifth Avenue
New York, NY 10011

James Chadwick
Sheppard Mullin Richter &
Hampton LLP
379 Lytton Avenue
Palo Alto, CA 94301-1479
jchadwick@sheppardmullin.com
1-650-815-2600
*Counsel for Foundation for
National Progress, dba Mother
Jones*

Barbara W. Wall
Senior Vice President & Chief
Legal Officer
Gannett Co., Inc.
7950 Jones Branch Drive
McLean, VA 22107
(703) 854-6951

Kurt Wimmer
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001
*Counsel for The Media
Institute*

James Cregan
Executive Vice President
MPA - The Association of
Magazine Media
1211 Connecticut Ave. NW
Suite 610
Washington, DC 20036

Charles D. Tobin
Ballard Spahr LLP
1909 K Street, NW
12th Floor
Washington, DC 20006-1157
*Counsel for The National
Press Club*

Charles D. Tobin
Ballard Spahr LLP
1909 K Street, NW
12th Floor
Washington, DC 20006-1157
*Counsel for The National
Press Club Journalism
Institute*

Mickey H. Osterreicher
200 Delaware Avenue
Buffalo, NY 14202
*Counsel for National Press
Photographers Association*

Elizabeth C. Koch
Ballard Spahr LLP
1909 K Street, NW
12th Floor
Washington, DC 20006-1157
Counsel for POLITICO LLC

Kathleen A. Kirby
Wiley Rein LLP
1776 K St., NW
Washington, DC 20006
*Counsel for Radio Television
Digital News Association*

Bruce D. Brown
Katie Townsend
The Reporters Committee for
Freedom of the Press
1156 15th St. NW, Suite 1020
Washington, D.C. 20005

D. Victoria Baranetsky
General Counsel
Reveal from The Center for
Investigative Reporting
1400 65th Street, Suite 200
Emeryville, California 94608

Bruce W. Sanford
Mark I. Bailen
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
*Counsel for Society of
Professional Journalists*

Karen H. Flax
VP/Deputy General Counsel
Tribune Publishing Company
160 North Stetson Avenue
Chicago, Illinois 60601

Laura R. Handman
Alison Schary
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006

Thomas R. Burke
Davis Wright Tremaine LLP
Suite 800
500 Montgomery Street
San Francisco, CA 94111
*Counsel for Online News
Association*