

LIBERTARIANS FOR TRANSPARENT
GOVERNMENT, A NJ NONPROFIT
CORPORATION,

Plaintiff-Petitioner,

v.

NEW JERSEY STATE POLICE AND DAVID
ROBBINS, IN HIS OFFICIAL CAPACITY AS
RECORDS CUSTODIAN FOR THE NEW JERSEY STATE
POLICE,

Defendants-Respondents.

SUPREME COURT OF NEW JERSEY
DOCKET No. 083079

CIVIL ACTION
ON APPEAL FROM
SUPERIOR COURT OF NEW
JERSEY, APPELLATE DIVISION
Appellate Docket No.:
A-5675-16T2

Sat below:
Hon. Allison E. Accurso
Francis J. Vernoia

BRIEF AMICI CURIAE OF
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
AND 16 OTHER MEDIA ORGANIZATIONS
IN SUPPORT OF PLAINTIFF-PETITIONER SEEKING REVERSAL

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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 significant public interests that are served when members of the news media are able to obtain personnel records explicitly authorized to be released under New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1 *et seq.* ("OPRA") to report on matters of public concern, and to keep the public informed about the conduct of government agencies and officials.

Amici frequently rely on public records, including those obtained pursuant to OPRA, to report on police-community relations and to shed light on the conduct of law enforcement. Because "OPRA's promise of accessible public records enables 'citizens and the media [to] play a watchful role in . . . guarding against corruption and misconduct,'" Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 541 (2012) (quoting Burnett v. Cty. Of Bergen, 198 N.J. 408, 414 (2009)), amici have a strong interest in this case.

This dispute arises out of an OPRA request submitted by Plaintiff-Petitioner seeking the "name, title, date of separation and reasons therefor" for a former state trooper who, according to

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

a 2015 report prepared by the Office of Professional Standards within the Division of State Police entitled "Internal Investigation and Disciplinary Process," "pled guilty to acting in an unofficial capacity to the discredit of the Division while off-duty by having questionable associations, engaging in racially offensive behavior and publicly discussing police patrol procedures." Plaintiff/Appellant's Brief and Appendix in Support of Appeal ("Pl.-Appellant's Br.") at 4. The State denied the request, claiming it sought personnel records exempt from disclosure under N.J.S.A. 47:1A-10. Id. at 5.

This Court should require the release of the information at issue because OPRA unambiguously compels such a result. See N.J.S.A. 47:1A-1. That this matter appears before the Court at a time when government entities in states across the country are providing greater public access to particular personnel and/or disciplinary records of law enforcement officers, see infra at 5-8, only underscores the purpose of the OPRA provision at issue here.

The information sought by Plaintiff-Petitioner in this case will enable members of the news media to tell important stories bearing directly on readers' communities, while providing oversight, fostering accountability, and building institutional trust. Accordingly, for the reasons herein, amici urge the Court

to reverse the decision of the Appellate Division and order the disclosure of the requested information.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For the purpose of this brief, amici accept the statement of facts and procedural history set forth in Plaintiff-Appellant's April 5, 2018 brief filed in the Appellate Division.

ARGUMENT

- I. Public access to government records relating to the conduct and/or discipline of state actors, including police officers, is required by OPRA.

The plain language of N.J.S.A. 47:1A-10 explicitly requires disclosure of a state trooper's name, title, and "date of separation and the reason therefor." Such information unmistakably constitutes a public record subject to the disclosure provisions of OPRA.

Statutory interpretation necessarily begins with the language employed by the legislature and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. Milner v. Dep't of Navy, 562 U.S. 562 (2011). This fundamental rule of interpretation is regularly applied to public records laws. See id.; see also Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review, 830 F.3d 667 (D.C. Cir. 2016) (holding that there was no statutory basis for redacting non-responsive but non-exempt information from records deemed responsive to a FOIA request, because to hold otherwise would be

to condone the creation of new exemptions found nowhere in the text of FOIA).

Here, the New Jersey Legislature has chosen to make personnel records confidential, *except* for specific, enumerated categories of information, including an employee's name, title, separation, and the "reason therefor." N.J.S.A. 47:1A-10. Simply put, when a public officer's misconduct rises to the level of termination, the Legislature has made clear that the public is entitled to know why. See id.; Pl.- Pet'r's Pet. for Certification at 9-10.

The Superior Court, in upholding Defendants-Respondent's denial of Plaintiff-Petitioner's OPRA request, erroneously relied on only *part* of 47:1A-10. Noting that the provision states that "records relating to any grievance filed by or against an individual, shall not be considered a government record," the Superior Court ignored the clear exceptions that follow that general rule. Compare Op. of the Appellate Division at 8 with N.J.S.A. 47:1A-10. The Appellate Division affirmed "essentially for the reasons" stated by the Superior Court. Op. of the Appellate Division at 2. This disregard of 47:1A-10's plain language warrants reversal by this Court.

As Plaintiff-Petitioner has described in detail in its briefs, this Court in South Jersey Publishing v. N.J. Expressway Authority, 124 N.J. 478 (1991) expressly held that a public employee's "name, title . . . date of separation and the reason

therefor" were public records subject to disclosure per Governor Byrne's Executive Order No. 11 (1974). See Pl.-Pet'r's Pet. for Certification at 2-4; Pl.-Appellant's Br. at 10-13. This Court interpreted the "reason therefor" language of Governor Byrne's Executive Order to mean that the public was entitled to know the real reason(s) a government employee separated from their employment. South Jersey Publishing, 124 N.J. at 498. In that case, where the employee allegedly misused government credit cards, this Court compelled disclosure of executive-session minutes, holding that disclosure of the "reason" for separation "include[d] the results of the [agency's] investigation, as revealed in the executive-session minutes." Id. at 496.

In 2002, the New Jersey Legislature imported Executive Order 11 "wholesale" into OPRA's personnel records exemption. Pl.-Appellant's Br. at 1-3; Pl.-Pet'r's Pet. for Certification at 5; N.J.S.A. 47:1A-10, choosing to extend New Jersey's history of accessibility of such information into current law. That decision mirrors that of many other jurisdictions that make records implicating misconduct and/or disciplinary action involving public officials available to the public. For example, under Indiana's public records law, Ind. Code Ann. § 5-14-3, while agencies have discretion to refuse to disclose personnel records to those other than the employee at issue, Ind. Code § 5-14-3-4(b)(8), the following (non-exhaustive) list of information *must* be disclosed

to the public: the name, job title, and job description of the employee; information relating to the status of any formal charge against the employee; and the factual basis for any disciplinary actions in which final action has been taken and resulted in the employee being disciplined. Ind. Code § 5-14-3-4(b)(8)(C).

Similarly, in Iowa, the "fact that [an] individual resigned in lieu of termination, was discharged, or was demoted as the result of a disciplinary action, and the documented reasons and rationale for the resignation in lieu of termination, the discharge, or the demotion" "shall be public records" available to the press and the public. Iowa Code Ann. § 22.7. Other examples abound:

- Alabama recognizes a presumption in favor of disclosing personnel records implicating disciplinary actions against public employees. See Water Works & Sewer Bd. of Talladega v. Consol. Pub., Inc., 892 So. 2d 859, 866 (Ala. 2004) (quoting Op. Att'y Gen. No. 96-00003 (October 4, 1995), in which the state's attorney general concluded that "[in] general, applications, disciplinary actions, and memoranda of reprimand are documents reasonably necessary to conduct business, and thus subject to disclosure . . .").
- The Alaska Supreme Court recognized the importance of the release of such records in Jones v. Jennings, 788 P.2d 732, 739 (Alaska 1990) (holding that with respect to the officer

personnel files at issue, the officers' privacy interests were outweighed by the need to "insure that police behavior conforms to the code of conduct required of a democratic society").

- In Georgia, personnel records of municipal employees are not entitled to any blanket exemption from the state's Open Records Act, Ga. Code Ann. § 50-18-70, and have been required to be disclosed. See Fincher v. State, 231 Ga. App. 49 (1998) (where investigatory report into alleged misconduct of official was public record subject to disclosure under Public Records Act).
- North Carolina requires the disclosure of a state employee's name; position; date and type of each demotion, suspension, separation, or other change in position classification; date and type of each dismissal, suspension, or demotion for disciplinary reasons, and if the disciplinary action was a dismissal, a copy of the written notice of the final decision of the department head setting forth the specific acts or omissions forming the basis of the dismissal. N.C. Gen. Stat. Ann. § 126-23.
- Tennessee law makes personnel records of law enforcement officers public record. See Tenn. Code Ann. § 10-7-503(c)(1).
Indeed, with respect to police disciplinary records, in particular, there is a clear trend toward increased transparency.

Last year, the California legislature voted to pass S.B. 1421, a new law which, according to its author, "open[s] up some transparency to help rebuild that trust between law enforcement and communities." Liam Dillon, Bid to open California's secret police misconduct files takes major step forward, Los Angeles Times (Aug. 16, 2018), <https://perma.cc/6CSP-4EH5> (quoting Sen. Nancy Skinner (D-Berkeley)). Senate Bill 1421 amended California Penal Code section 832.7 to allow the release of records relating to officer misconduct and discipline that had been treated as confidential under California law for decades. Similarly, New York's legislature is considering a bill to repeal N.Y. Civ. Rights Law § 50-a, which restricts public access to law enforcement personnel records. See, e.g., Jake Bittle, The law that shields police records, explained, Brooklyn Daily Eagle (April 23, 2019), <https://perma.cc/YT6F-JZ7V>.

New Jersey's OPRA was adopted to *expand* the scope of records available to the public. See Pl.-Appellant's Br. at 2; Pl.-Pet'r's Pet. for Certification at 4 (discussing how OPRA's predecessor, the Right to Know Law, provided insufficient public access to government records, inspiring passage of OPRA). The Act makes emphatically clear that the records requested by Plaintiff-Appellant must be disclosed.

Amici accordingly urge the Court to reverse the Appellate Division's decision, which disregards the clear intent of the Legislature.

II. The news media plays an essential role in helping the public understand and evaluate the performance of public employees; by ensuring access to certain personnel 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 [this] important role in the discussion of public affairs." Mills v. Alabama, 384 U.S. 214, 219 (1966).

Because members of the news media rely heavily on public records laws in order to inform the public about the operations of government, they have an enduring interest not only in access to the records at issue in this case, but also in ensuring that statutes such as OPRA are interpreted in accordance with their purpose to facilitate public access.² As one legal commenter put it:

Although open records statutes allow nearly anyone to ask for government information, the media has assumed

² Any limitation on the right of access must be construed "in favor of the public's right of access." N.J.S.A. 47:1A-1; see also S. Jersey Publ'g, 124 N.J. 478 (1991) (New Jersey has a "tradition favoring the public's right to be informed about governmental actions.").

the role of "surrogate" of the public to disseminate information and hold government officials accountable, often using FOIA statutes [T]he task [of acting as government watchdogs] has fallen to the media, which act as a sort of independent auditor of the government on behalf of the people

Laura Danielson, Giving Teeth to the Watchdog: Optimizing Open Records Appeals Processes to Facilitate the Media's Use of FOIA Laws, 2012 Mich. St. L. Rev. 981, 989-90 (2012); see also Derigan Silver, The News Media and the FOIA, 21 Comm. L. & Pol'y 493, 493-94 (2016) (discussing the legislative history of the federal Freedom of Information Act, stating that "the law was intended to help the media inform the public about government operations and thus advance democratic participation in government and facilitate the press's ability to act as a check on government abuse, two of the most fundamental theories concerning the role of freedom of expression and the press in a democratic society").

OPRA plays a critical role in the press's ability to gather and report information about government conduct in New Jersey, especially with respect to law enforcement. OPRA's pro-disclosure structure³ 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 . . .

³ See supra note 2.

guarding against corruption and misconduct." Burnett, 198 N.J. at 414.

The records at issue in this case pertain to a former New Jersey State Police Officer who was terminated for, among other things, "having questionable associations" and "engaging in racially offensive behavior." Pl.-Appellant's Br. at 2. Access to the personnel information made public by 47:1A-10 enables members of the press to report meaningful and socially relevant information about racial bias among law enforcement officers and how law enforcement agencies respond. See, e.g., Kenya Downs, FBI warned of white supremacists in law enforcement 10 years ago. Has anything changed?, PBS News Hour (Oct. 21, 2016), <https://perma.cc/M5N5-B2Z5>. PBS's reporting on this issue, for example, discusses how "the problem of racial bias among police isn't new. In fact, it's been a concern of the FBI for at least a decade." Id. Over ten years ago, the Federal Bureau of Investigation (FBI) warned of the potential consequences of white supremacist groups infiltrating local and state law enforcement, indicating it was a significant threat to national security. Id.; see also Alice Speri, The FBI Has Quietly Investigated White Supremacist Infiltration of Law Enforcement, The Intercept (Jan. 31, 2017), <https://perma.cc/W2E7-RFUX>.

Likewise, The Intercept's in-depth reporting on this subject revealed that after a series of internal investigations uncovered

substantial numbers of white supremacists in the military, the Department of Defense moved to impose stricter screenings and discharged those found to espouse racist views. Id. Similar measures for local law enforcement are more challenging, however, because of the decentralized way in which the thousands of police departments across the country operate and the "historical affinity of certain police departments with the same racial ideologies espoused by extremists." Id. This renders the role of the news media in reporting on specific local law enforcement agencies even more important.

Access to government records concerning police misconduct and consequent discipline has made possible powerful journalism relevant to communities across the nation. For example, USA Today has created a database of 85,000 officers who have been investigated or disciplined for misconduct. See John Kelly and Mark Nichols, Tarnished Brass, USA Today (last updated Oct. 14, 2019), <https://perma.cc/7YHS-PX5L>. As part of this database, USA Today relied on state open records laws to obtain information about more than 110,000 internal affairs investigations by hundreds of individual departments, and more than 30,000 officers who were decertified by 44 state oversight agencies.⁴ See id. Obtained

⁴ For a detailed discussion of which states disclose the identities of law enforcement officers investigated for misconduct through public records laws, see supra at 4-7.

from thousands of state agencies, prosecutors, police departments and sheriffs, the records detail at least 200,000 incidents of alleged misconduct, much of it previously unreported.

USA Today's reporting was motivated, in part, by the notion that "[d]espite their role as public servants, the men and women who swear an oath to keep communities safe can generally avoid public scrutiny for their misdeeds." Id. The reporting seeks to help identify decertified officers who continue to work in law enforcement, id., and to more broadly use transparency as the vehicle with which to build the trust that Laurie Robinson, co-chair of the 2014 White House Task Force on 21st Century Policing, says is "a very key step along the way to repairing our relationships" between law enforcement and the communities they serve. Id.

Also notable is the Citizens Police Data Project published by the Invisible Institute, which contains the disciplinary records of Chicago police officers in a comprehensive, searchable format, from which copious examples of meaningful analysis and reporting have flowed. The data covers more than 30,000 officers and almost 23,000 complaints between 2000 and 2018. Invisible Institute, Citizens Police Data Project (last updated July 2018), <https://perma.cc/EF6M-W47N>. Reporting based on this data has discussed striking trends in how misconduct spreads by way of example when new officers are exposed to the problematic tendencies

of other officers. See, e.g., Rob Arthur, [Bad Chicago Cops Spread Their Misconduct Like a Disease](#), The Intercept (Aug. 16, 2018), <https://perma.cc/3SQU-524T> ("The data shows that [officers prone to misconduct] also may be teaching their colleagues bad habits The officers who had been exposed to the . . . misconduct-prone cops . . . went on to show complaint rates nine times higher over the next ten years than those who hadn't."). A consent decree between the state of Illinois and the City of Chicago entered earlier this year responds to the troubling trend illuminated by the Citizens Police Data Project by formalizing an "early intervention" prescription to "proactively identify at-risk behavior by officers" in an effort to stem the deleterious ripple effect of officer misconduct. Illinois v. City of Chicago, Case No. 1:17-cv-06260, N.D. Ill., Dkt. 703-1, Consent Decree, issued Jan. 31, 2019.

When members of the news media can scrutinize the conduct of law enforcement personnel, journalists can tell stories that have a meaningful impact. The Court should order the disclosure of the requested records in this case not only because they are required to be released under the plain language of the law, N.J.S.A. 47:1A-10, but also because doing so will serve the very purpose of OPRA by, ensuring that the public is informed about the actions of government agencies and officials.

CONCLUSION

For the foregoing reasons, amici respectfully urge the Court to reverse the decisions below and hold that access to the requested records is required under OPRA.

Dated: December 20, 2019

Respectfully submitted,

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APPENDIX AMICI CURIAE OF
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 16 OTHER MEDIA
ORGANIZATIONS IN SUPPORT OF PLAINTIFF-PETITIONER SEEKING
REVERSAL

DESCRIPTION OF AMICI

Reporters Committee for Freedom of the Press is a voluntary, unincorporated nonprofit association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

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.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states and Guam - together with the iconic USA TODAY - reach an estimated digital audience of 140 million each month.

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.

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.

MediaNews Group Inc. publishes the Mercury News, the East Bay Times, St. Paul Pioneer Press, The Denver Post, the Boston Herald and the Detroit News and other community papers throughout the United States, as well as numerous related online news sites.

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.

National Newspaper Association is a 2,400 member organization of community newspapers founded in 1885. Its members include weekly

and small daily newspapers across the United States. It is based in Missouri.

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.

With an urban vibrancy and a global perspective, **New York Public Radio** produces innovative public radio programs, podcasts, and live events that touch a passionate community of 23.4 million people monthly on air, online and in person. From its state-of-the-art studios in New York City, NYPR is reshaping radio for a new generation of listeners with groundbreaking, award-winning programs including Radiolab, On the Media, The Takeaway, Nancy, and Carnegie Hall Live, among many others. New York Public Radio includes WNYC, WQXR, WNYC Studios, Gothamist, The Jerome L. Greene Performance Space, and New Jersey Public Radio. Further information about programs, podcasts, and stations may be found at www.nypublicradio.org.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

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.

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.

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