

LIBERTARIANS FOR TRANSPARENT
GOVERNMENT, a NJ Nonprofit
Corporation,

Plaintiff-Petitioner,

v.

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

Defendants-Respondents.

SUPREME COURT OF NEW JERSEY

DOCKET No. 084956

CIVIL ACTION ON APPEAL FROM THE
SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION
Appellate Docket No. A-001661-18

Sat below:

Clarkson S. Fisher, P.J.A.D

Allison E. Accurso, J.A.D.

Robert J. Gilson, J.A.D.

**BRIEF AMICUS CURIAE OF THE
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
AND 13 MEDIA ORGANIZATIONS
IN SUPPORT OF PLAINTIFF-PETITIONER SEEKING REVERSAL**

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PRELIMINARY STATEMENT

Amici curiae are news media organizations, publishers, and groups dedicated to protecting the freedom of information interests of the press and the public.¹ Lead amicus the Reporters Committee for Freedom of the Press (the "Reporters Committee") is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

This appeal arises out of Plaintiff-Petitioner Libertarians for Transparent Government's request under New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1 to -13 ("OPRA"), for a separation agreement² between a former Cumberland County Jail corrections officer (the "Officer") and Cumberland County (the "County"). Following allegations that the Officer had sexually abused a detainee in 2017, the County claimed that it had "charged [the Officer] with a disciplinary infraction" and

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

² The terms "separation agreement" and "settlement agreement" are used interchangeably herein.

"terminated" him, although the Officer was, in fact, permitted to retire in good standing. PCa5, PCa27.³ Libertarians for Transparent Government thereafter submitted an OPRA request to the County, seeking its separation agreement with the Officer, as well as the Officer's "date of separation and the reason therefor"—a public record under N.J.S.A. 47:1A-10. PCa3-4. The County denied access to the agreement, claiming it was exempt under OPRA's personnel records exemption. PCa4. Thereafter, Plaintiff filed the instant suit.

The trial court, below, ruled that the County violated OPRA by falsely claiming that the Officer was terminated when he was permitted to resign with a pension; the court further held that the requested separation agreement was not a personnel record, though it contained some personnel information subject to redaction. PCa5-7. The Appellate Division reversed. See PCa12-30. Specifically, the Appellate Division rejected the trial court's conclusion that the County was required to disclose a redacted version of the agreement, holding, instead, that OPRA's mandate to segregate and release non-exempt portions of public records does not apply to the records at issue in this case. PCa18-20.

³ All references to Plaintiff-Petitioner's appendix may be found in its Brief and Appendix in Support of Petition for Certification filed on October 9, 2020.

Amici write to emphasize the importance of OPRA's segregability mandate, N.J.S.A. 47:1A-5(g)—a requirement which is a cornerstone not only of OPRA but also of other public records laws—as well as the substantial public interests served when members of the news media have access to settlement agreements between public employees and employers. Access to such records enables journalists to report on the activities of local government entities and the conduct of public officials.

It is a “bedrock principle that our government works best when its activities are well-known to the public it serves.” Burnett v. Cty. of Bergen, 198 N.J. 408, 414 (2009). As recent news reporting from around the country demonstrates, see infra at 8-10, access to settlement agreements between public employees and government agencies provides for oversight of local government, allows the press and the public to learn about a public employee's terms of departure from government employment, and fosters accountability of public institutions.

Accordingly, Amici respectfully urge the Court to reverse the decision of the Appellate Division.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For the purpose of this amicus brief, Amici accept the statement of facts and procedural history set forth in Plaintiff-Petitioner's brief filed on June 5, 2019 in the Appellate Division.

ARGUMENT

I. Segregability mandates are cornerstones of public records laws, including OPRA; the Appellate Division erred in ignoring OPRA's segregability mandate.

OPRA's plain text makes expressly clear that if "part of a particular record is exempt from public access . . . the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record." N.J.S.A. 47:1A-5(g); see also ACLU of N.J. v. N.J. Div. of Crim. Justice, 435 N.J. Super. 533, 540 (App. Div. 2014) (stating that the "Legislature has carefully described the responsibility of the custodian in responding to a request for a government record under OPRA," which includes "*delet[ing] or excis[ing] from a copy of the record that portion which the custodian asserts is exempt from access and . . . promptly permit[ting] access to the remainder of the record*" (emphasis in original)); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 197 (Law Div. 2002) ("It is clear from a reading of OPRA that redaction of material from public records is legislatively recognized and sanctioned.").

This segregability requirement applies fully to the records at issue in this case, because the settlement agreement between the Officer and the County meets the definition of a government record under OPRA. See S. Jersey Publ'g Co. v. N.J. Expressway

Auth., 124 N.J. 478 (1991) (ordering disclosure of analogous “Memorandum of Understanding” setting forth terms of government employee’s resignation); N.J.S.A. 47:1A-10 (deeming a public employee’s “name . . . date of separation and the reason therefor, and the amount and type of any pension received” a public record subject to disclosure). Simply put, under OPRA’s plain language, the settlement agreement at issue must be disclosed—and any portions of that agreement constituting exempt personnel information may be redacted prior to release. See Pl.-Pet’r’s Br. & App. in Supp. of Pet’n for Certification (Oct. 9, 2020) (“Pet’n for Cert.”) at 7, 11.

Further, New Jersey’s Open Public Records Act provides that “any limitations on the right of access . . . shall be construed in favor of the public’s right of access.” N.J.S.A. 47:1A-1. Bearing in mind that directive, the “doubt” expressed by the Appellate Division as to whether the requested records constitute wholly exempt personnel records, PCa19—as opposed to public records containing some exempt material—should have been resolved in favor of public access. Cf. N.J.S.A. 47:1A-1; Asbury Park Press v. Cty. of Monmouth, 406 N.J. Super. 1, 7 (App. Div. 2009), aff’d, 201 N.J. 5 (2010) (“In the opening words of OPRA, the Legislature explicitly stated its intent favoring disclosure”); see also Pet’n for Cert. at 1-13.

Amici agree with Plaintiff-Petitioner that the trial court, below, correctly applied New Jersey law to conclude that settlement agreements are publicly accessible records that do not become "personnel records" simply because they involve an employee. See Pl.'s Opp'n Br. & App. (June 5, 2019) at 2. In light of OPRA's express statutory language, and its preference for redaction rather than withholding of a record in its entirety, the trial court's decision to permit the County to redact exempt material from the settlement agreement prior to its disclosure should have been affirmed.

Other public records laws—and decisions from around the country interpreting them—confirm the paramount importance of segregability. Because courts interpreting OPRA may look to other jurisdictions' public records laws as guidance, see, e.g., MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 547 (App. Div. 2005), Amici note that public records laws across the country similarly contain a firm mandate that agencies must redact exempt information from public records prior to disclosure, in lieu of withholding such records in their entirety. See, e.g., Ark. Code Ann. § 25-19-105(f) (Arkansas' Freedom of Information Act); Cal. Gov't Code § 6253(a) (California's Public Records Act); D.C. Code Ann. § 2-534(b) (District of Columbia's Freedom of Information Act); Fla. Stat. Ann. § 119.07(1)(d) (Florida's Public Records Law); Kan.

Stat. Ann. § 45-221(d) (Kansas' Open Records Act); Mich. Comp. Laws Ann. § 15.244 (Michigan's Freedom of Information Act); Okla. Stat. Ann. tit. 51, § 24A.5(3) (Oklahoma's Open Records Act); Or. Rev. Stat. Ann. § 192.338 (Oregon's Public Records Law); 65 Pa. Stat. Ann. § 67.706 (Pennsylvania's Right to Know Law); Vt. Stat. Ann. tit. 1, § 318(e) (Vermont's Public Records Act); Va. Code Ann. § 2.2-3704(B)(2) (Virginia's Freedom of Information Act); Wis. Stat. Ann. § 19.36(6) (Wisconsin's Public Records Law); see also Gould v. N.Y. City Police Dep't, 89 N.Y.2d 267, 275 (1996) (applying New York's Freedom of Information Law); Indus. Found. of the S. v. Tex. Indus. Accident Bd., 540 S.W.2d 668, 686 (Tex. 1976) (interpreting Texas' Open Records Act); ACLU of N.J. v. Dep't of Justice, No. CIV.A. 11-2553 ES, 2012 WL 4660515, at *11 (D.N.J. Oct. 2, 2012) (citing 5 U.S.C. § 552(b), the federal FOIA's segregability mandate).

The segregability requirement is a fixture in public records laws precisely because it is the key method for effectuating the presumption of disclosure inherent in those public records laws, including OPRA, see N.J.S.A. 47:1A-1. Yet, the Appellate Division's ruling effectively writes OPRA's segregability provision out of the statute. See PCa19 ("[W]e conclude OPRA does not generally require government agencies to make exempt personnel and pension records accessible in redacted

form.”). That ruling contravenes OPRA’s aim “to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.” Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (citation omitted).

II. Access to settlement agreements like the one at issue here enables journalists to inform the public about the conduct of public institutions and employees.

Access to settlement agreements between public employers and employees has made possible powerful journalism that has informed communities across the nation about the performance of public officials and the policies of government agencies. Plaintiff-Petitioner’s Petition for Certification contains several such examples, see Pet’n for Cert. at 15-16; other examples abound.

For example, last year, Washington’s NPR affiliate KUOW published an exposé on verbal and physical abuse by teachers against students attending Seattle’s public schools. See Ann Dornfeld, Seattle Schools knew these teachers abused kids – and let them keep teaching, KUOW (Jan. 23, 2020), <https://perma.cc/HA5Q-KA4U>. Through public records requests, “KUOW obtained records for 10 cases in which teachers were disciplined for verbal abuse, physical abuse or sexual harassment against children in Seattle Public Schools from 2012 to 2018”—including separation agreements. Ibid. The records

revealed that in one instance, after a teacher was found to have verbally and physically abused students at a Seattle elementary school, "the settlement agreement he signed . . . kept him on paid administrative leave for the rest of the school year."

Ibid. Several months later, the same teacher gained employment at a different elementary school, was again placed on administrative leave, and agreed to resign upon signing a second settlement agreement with Seattle Public Schools. See *ibid.*

Despite a clear pattern of abuse—including pushing a child off her bike, shoving children to the ground, and yelling at elementary school-aged students to the point of bringing them to tears—the school district agreed to pay him for the rest of the school year and remove evidence of wrongdoing from his personnel file. See *ibid.* Washington law prohibits school districts from entering into settlement agreements that have "the effect of suppressing information about verbal or physical abuse or sexual misconduct by a present or former employee," *ibid.*; without access to those agreements, KUOW and, in turn, the public would have no way of ensuring that public bodies are "follow[ing] the letter [or] the spirit of the law," *ibid.*

In another recent example, the Bangor Daily News reported on a Maine corrections officer placed on paid administrative leave due to sexual misconduct. Erin Rhoda, *A secret settlement hid an officer's misconduct. Outside Maine, it would have been*

different, Bangor Daily News (last updated Jan. 12, 2021), <https://perma.cc/S7BK-6TZT>. But the county did not fire him, which would have been a public decision listed in official meeting minutes. See ibid. “Instead, the county agreed to a private settlement agreement, outlining the terms of his departure. [The officer] would resign, and the county would give him a ‘neutral’ reference if prospective employers called in the future.” Ibid. The agreement, obtained by the news outlet, further stated that the officer agreed not to sue the county and was allowed to collect all his accrued sick leave and vacation time, ibid.; meanwhile, “[a]nyone who called the county seeking a reference would not be told [he] had nearly been fired—only his dates of employment and position.” Ibid.

As these examples demonstrate, press access to settlement agreements between public officials and agencies is critical to ensuring that the public is able to scrutinize the conduct of public servants and public institutions. By shedding light on instances of misconduct, and government employers’ responses, this reporting allows meaningful public oversight that can prevent future misconduct—one of the principal goals of the OPRA. See Burnett, 198 N.J. at 414 (“With broad public access to information about how state and local governments operate, citizens and the media can play a watchful role in curbing

wasteful government spending and guarding against corruption and misconduct.”).

CONCLUSION

For the foregoing reasons, Amici respectfully urge the Court to reverse the decision below.

Dated: April 2, 2021

Respectfully submitted,

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Appendix A: Descriptions of Amici

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Advance Publications, Inc. 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.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet

content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

The Atlantic Monthly Group LLC is the publisher of *The Atlantic* and TheAtlantic.com. Founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others, *The Atlantic* continues its 160-year tradition of publishing award-winning journalism that challenges assumptions and pursues truth, covering national and international affairs, politics and public policy, business, culture, technology and related areas.

The Center for Investigative Reporting (d/b/a Reveal), 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.

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 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.

The National Freedom of Information Coalition is a national nonprofit, nonpartisan organization of state and regional affiliates representing 45 states and the District of Columbia. Through its programs and services and national member network, NFOIC promotes press freedom, litigation and legislative and administrative reforms that ensure open, transparent and accessible state and local governments and public institutions.

National Journal Group LLC is the privately-held publisher of *National Journal*. Founded in 1969, National Journal's award-winning journalism covers political and public policy issues at the federal, state, and local levels, and its government affairs, advocacy communications, and policy research specialists serve government affairs professionals with the intelligence and tools they need to navigate the world of policy and politics.

NBCUniversal Media, LLC is one of the world's leading media and entertainment companies in the development, production and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns

and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming. NBC News produces the "Today" show, "NBC Nightly News with Lester Holt," "Dateline NBC" and "Meet the Press."

The New Jersey Press Association ("NJPA") is a non-profit organization incorporated in 1857 under the laws of the State of New Jersey. It has a membership composed of daily newspapers, affiliate newspapers, weekly newspapers, digital news websites, as well as corporate and non-profit associate members. NJPA is a membership association formed to advance the interests of newspapers and to increase awareness of the benefits of newspaper readership. The mission of NJPA is to help newspapers remain editorially strong, financially sound and free of outside influence. NJPA pursues these goals in every way possible, as a service both to its members and to the people of New Jersey.

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.

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.