



**THE OPEN PUBLIC RECORDS ACT: THE
PEOPLE'S BASTION AGAINST POLICE
MISCONDUCT IN NEW JERSEY**

Drew Ruzanski

I. Introduction

In the United States of America, police brutality and overreach have been and continue to be insidious problems. Protests erupted in Ferguson, Missouri, in 2014, after the shooting death of an unarmed African-American teenager at the hands of a Ferguson police officer.¹ A subsequent United States Department of Justice (USDOJ) investigation into the conduct of the officer and the Ferguson Police Department² uncovered “clear racial disparities that adversely impact African Americans,” which were partly motivated by “discriminatory intent.”³ The report indicated that an “emphasis on revenue has compromised the institutional character of Ferguson's police department...”⁴ While these issues were ultimately uncovered in Ferguson, the investigation was initiated only after the shooting and riots, and irrevocable damage had already been done to the victim and his community.⁵

¹ *Ferguson unrest: From shooting to nationwide protests*, BBC NEWS, Aug. 10, 2015, <http://www.bbc.com/news/world-us-canada-30193354> (last visited Apr. 1, 2019).

² *Id.*

³ U.S. DEP'T OF JUST. CIV. RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, March 4, 2015, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

⁴ *Id.*

⁵ *Id.* at 18 (A flagrant example of gross overreach described in the USDOJ report paints a disturbing picture: “[I]n the summer of 2012, an officer detained a 32-year-old African-American man who was sitting in his car cooling off after playing basketball. The officer arguably had grounds to stop and question the man, since his windows appeared more deeply tinted than permitted under Ferguson’s code. Without cause, the officer went on to accuse the man of being a pedophile, prohibit the man from using his cell phone, order the man out of his car for a pat-down despite

The protests in Ferguson, fueled by other incidents of police brutality against African Americans, developed into the Black Lives Matter movement.⁶ The movement grew to become a center of controversy in the National Football League when players began kneeling during the playing of the National Anthem.⁷ The level of controversy continued to increase after President Donald Trump began tweeting about it.⁸

African-Americans are not the only group of people to be disproportionately targeted by police misconduct. The Muslim community has also been the victim of police profiling in the wake

having no reason to believe he was armed, and ask to search his car. When the man refused, citing his constitutional rights, the officer reportedly pointed a gun at his head, and arrested him. The officer charged the man with eight different counts, including making a false declaration for initially providing the short form of his first name (e.g., “Mike” instead of “Michael”) and an address that, although legitimate, differed from the one on his license. The officer also charged the man both with having an expired operator’s license, and with having no operator’s license in possession. The man told us he lost his job as a contractor with the federal government as a result of the charges.”).

⁶ Daniel Funke & Tina Susman, *From Ferguson to Baton Rouge: Deaths of black men and women at the hands of police*, LOS ANGELES TIMES, Jul. 12, 2016, <http://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmlstory.html> (last visited Apr. 1, 2019) (Some of the men and women who the movement holds as victims of the oppression of African-Americans include Tamir Rice, a twelve-year-old boy who was playing in a park with a toy gun when he was shot and killed by a police officer, and Freddy Gray who died when his neck was broken after a ride in the back of a police transport van where he did not have a seat belt.).

⁷ Ken Belson & Kevin Draper, *Trump Criticizes N.F.L. for not Penalizing Anthem Kneeling*, NY TIMES, Oct. 17, 2017, <https://www.nytimes.com/2017/10/17/sports/football/nfl-anthem-protests-trump.html> (last visited Apr. 1, 2019).

⁸ *Id.*

of the September 11, 2001 terrorist attacks.⁹ In New Jersey, Muslim business owners, businesses, students, and even an Iraq war veteran claimed their Fourth Amendment privacy rights were violated after the Associated Press discovered the New York City Police Department (NYPD) was conducting an unconstitutional blanket surveillance operation on the Muslim community.¹⁰ The NYPD eventually settled several lawsuits, however police wiretap protocols continue to be an ongoing problem.¹¹ In Riverside County, California, an inadequate process for screening wiretap applications resulted in drastically more wiretaps than any other county in the United States.¹² These Orwellian stories of unchecked police power and general disregard for the right to privacy should raise an alarm for any American, particularly because of how difficult these violations are to detect.

⁹ Anna Werner, *NJ Muslims take NYPD surveillance program to court*, CBS NEWS, Jan. 13, 2015, <https://www.cbsnews.com/news/nj-muslims-take-nypd-surveillance-program-to-court> (last visited Apr. 1, 2019).

¹⁰ *Id.*

¹¹ Monsy Alvarado, *NYPD SETTLES LAWSUIT OVER SPYING ON MUSLIMS AT NJ MOSQUES, SCHOOLS AFTER 9/11* NORTH JERSEY, 2018, <https://www.northjersey.com/story/news/2018/04/05/nypd-reaches-settlement-nj-muslim-groups-over-surveillance-program/488081002/> (last visited Apr. 1, 2019).

¹² Brad Heath & Brad Kelman, *Police used apparently illegal wiretaps to make hundreds of arrests*, USA TODAY, Nov. 19, 2015, <https://www.usatoday.com/story/news/2015/11/19/riverside-county-wiretaps-violated-federal-law/76064908> (last visited Apr. 1, 2019) (The Number of wiretaps in Riverside County, California in 2014 was 624 while the next highest was 175 in Clark County, Nevada. USA Today estimated there were as many as 738 illegal wiretaps from the middle of 2013-November 2015, which affected more than 52,000 people. The rise was caused by the District Attorney handing off the requests to assistants because there were too many requests for him to review.).

To promote transparency, New Jersey, like many other states, has adopted a public right of access to government records: the Open Public Records Act (OPRA).¹³ OPRA was designed to update and expand the *Right to Know Law* and is intended to grant public access to government records, create an appeals process for parties who are denied access, and define what documents are included as open public records.¹⁴ This article will discuss how open access to government records, through the common law and OPRA, creates a tool to reduce police misconduct in the state of New Jersey. This article will review legislative history and two major opinions, *Katon v. NJ Dep't of Law & Pub. Safety*,¹⁵ and *North Jersey Media Group v. Lyndhurst*,¹⁶ to determine whether OPRA can be used to hold police accountable for illegal surveillance and brutality, and if so, how effective of a tool it is and can be.

II. O.P.R.A. Legislative History and Intent

OPRA was enacted in 2001 to replace and expand previous editions of the same bill which followed and repealed New Jersey's *Right to Know* statute.¹⁷ Two competing versions of OPRA were

¹³ The Open Public Records Act, N.J. STAT. ANN. §47:1A-1.1 et seq. (LEXIS through 2018 Legis. Sess.).

¹⁴ N. J. GOV'T REC. COUNS., A CITIZEN'S GUIDE TO THE OPEN PUBLIC RECORDS ACT 5, (2d ed. 2011) [hereinafter CITIZEN'S GUIDE TO OPRA] available at [http://www.nj.gov/grc/public/docs/Citizen's%20Guide%20to%20O.P.R.A.%20\(July%202011\).pdf](http://www.nj.gov/grc/public/docs/Citizen's%20Guide%20to%20O.P.R.A.%20(July%202011).pdf).

¹⁵ *Katon v. NJ Dep't of Law & Pub. Safety*, No. A-0183-13T2, 2015 N.J. Super. Unpub. LEXIS 256 (Super. Ct. App. Div. Feb. 12, 2015).

¹⁶ *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst (Jersey Media Grp. III)*, 229 N.J. 541 (2017).

¹⁷ *Right to Know P.L. 1963, c. 73 (C.47:1A-1 et seq.) repealed by Open Public Records Act, §47:1A-1.1 et seq.*

proposed, one championed by Sen. Norman Robertson, the other by Sen. Robert Martin.¹⁸ The legislature has included its policy considerations for OPRA in the text of the statute, in the section titled “Legislative findings, declarations.”¹⁹ The right of access has been greatly expanded from previous versions of New Jersey's *Right to Know* law.²⁰ While the text under “Legislative findings, declarations” is a title section, which is generally not part of the law, New Jersey Superior Court Judge Eugene Serpentelli, presiding over *Asbury Park Press v. Ocean Cty. Prosecutor's Office*, determined that rules of statutory construction should not impede what is clear legislative intent, and the title section, like most declarations of purpose, is part of the body of the statute.²¹ This holding was later adopted by the New Jersey Supreme court who continues to cite *Asbury Park Press*.²²

The text succinctly summarizes the rest of the act:

The Legislature finds and declares it to be the public policy of this State that:

¹⁸ See generally, *Public hearing before Senate Judiciary Committee: Senate Bill Nos. 161, 351, 573, and 866: Issues dealing with public access to government records, 2000*, available at <https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/22417/A6732000.pdf?sequence=1&isAllowed=y> [hereinafter *Public Hearing*].

¹⁹ N.J. STAT. ANN. § 47:1A-1.

²⁰ Compare *id.* with P.L. 1963, c. 73 C.47:1A-1.

²¹ *Asbury Park Press v. Ocean Cty. Prosecutor's Office*, 374 N.J. Super. 312, 324-325 (Super. Ct. 2004) (court used OPRA title section to justify keeping private a 911 recording and transcript for a call that was received in relation to a double homicide).

²² *Mason v. City of Hoboken*, 196 N.J. 51, 64 (2008).

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 accorded by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access;

all government records shall be subject to public access unless exempt from such access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order;

a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and nothing contained in P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.²³

The text of this section was left intentionally ambiguous for two reasons. First, private information of individuals may be kept private, even if their information is stored in a government record, regardless of the form of the document.²⁴ Sen. Robertson's

²³ N.J. STAT. ANN. § 47:1A-1.

²⁴ See *Asbury Park Press*, 374 N.J. Super. at 324-25; See also *Public Hearing*, *supra* note 18, at 10 ("Well, we have a good common law

intention, in his version of the Open Public Records Bill contained a detailed enumeration of records to create simplicity so that “it shouldn't have to go to a judge,” unlike a common law.²⁵ However, Sen. Robertson also explained the need to expand the definition of records so government institutions would not be able to avoid disclosure by stating that the document sought was not a document as per the Act.²⁶

A. OPRA Statutory Construction and Interpretation

The enumerated forms of documents were not meant to be exhaustive, but include: any paper, books, maps, plans, images, microfilms, electronic data, and sound recordings.²⁷ The only requirement to be a public record, by definition, is that the information be kept on file in the course of regular business.²⁸

The definitions section enumerates certain areas that are not to be considered public records for the purposes OPRA.²⁹ Some of the key exceptions to the public records definition include personal

balancing test for those items that might be unanticipated, and my only concern about a statute that doesn't recognize that there are different classifications of documents is that we could create a situation where we have inadvertently created an unqualified right to many, many documents that will impact on the legitimate privacy interest of citizens in the state.”).

²⁵ *Public Hearing*, *supra* note 18, at 8.

²⁶ *Id.* at 5-6 (“Under the current scheme, because the definition is so narrow, those records that are required to be maintained, there’s an awful lot of room for municipal government, school boards, whatever it might be, to deny someone access, and that just isn’t right.”).

²⁷ N.J. STAT. ANN. § 47:1A-1.1.

²⁸ *Id.*

²⁹ *Id.*

information, images of a deceased person taken by a medical examiner outside of a murder investigation, criminal investigatory records, victim records, trade secrets, attorney-client privileged documents, information that would give an unfair competitive or bidding advantage, information that jeopardizes safety, academic research, test questions or results, records that allow legislators to prepare for their duties, deliberative process of an agency, and any information to be kept confidential pursuant to a court order.³⁰ This list of exceptions may be used to withhold documents that should be disclosed.³¹ There are also several exceptions for when a defined public record is exempt, including information which may jeopardize an ongoing investigation, provided it was not previously accessible before the investigation.³² Of particular interest for the purpose of examining the police and other investigatory agencies are records pertaining to ongoing-investigations, the attorney-client privilege, criminal investigatory records, deliberative process, and legislative records.

With the exceptions given due weight, the purpose of the statute is clear; “to maximize public knowledge about public affairs in order to ensure an informed citizenry and minimize the evils inherent in a secluded process.”³³ New Jersey Supreme Court Chief Justice Stuart Rabner explained the role of OPRA in his opinion in *Burnett v. County of Bergen*:

Underlying that directive is the bedrock principle that our government works best when its activities are well-known to the public it serves. With broad public

³⁰ *Id.*

³¹ *Katon v. NJ Dep't of Law & Pub. Safety*, No. A-0183-13T2, 2015 N.J. Super. Unpub. LEXIS 256 (Super. Ct. App. Div. Feb. 12, 2015).

³² N.J. STAT. ANN. § 47:1A-3.

³³ *Asbury Park Press v. Ocean Cty. Prosecutor's Office*, 374 N.J. Super. 312, 329 (Super. Ct. 2004).

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.³⁴

To actuate this purpose, the New Jersey Legislature included procedural safeguards that would help to ensure that the government would not be able to shirk its responsibility to disclose information. The most important aspect is that the government agency bears the burden of proof to assert privilege.³⁵ The government agency must produce a detailed and accurate index for each denied record so that it may be reviewed by the requester and if required, the Government Records Council.³⁶ This index must include for each and every item:

- (1) the search undertaken to satisfy the request;
- (2) the documents found that are responsive to the request;
- (3) the determination of whether the document or any part thereof is confidential *and* the source of the confidential information;
- (4) a statement of the agency's document retention/destruction policy *and* the last date on

³⁴ *Burnett v. Cty. of Bergen*, 198 N.J. 408, 414 (2009) (determining the redaction of social security numbers was necessary to protect individual privacy and cost of redaction was prohibitively expensive when operator of land record database sought eight million pages of land title records from county).

³⁵ N.J. STAT. ANN. § 47:1A-6.

³⁶ *Paff v. N.J. Dep't of Labor*, 392 N.J. Super. 334, 341 (Super. Ct. App. Div. 2007).

which documents that may have been responsive to the request were destroyed.³⁷

The index must be designed to facilitate a reviewer in conducting an *in camera* review of the withheld documents.³⁸ To further dissuade obfuscation, all offices of custodians that are open or frequented by the public must also openly display a clear and concise explanation of these privileges as well as the procedures involved with the OPRA process.³⁹

The second major safeguard to ensure government accountability is the expedited timeline for requested records to be provided or denied. The custodian is granted a maximum of seven business days to respond to an OPRA request.⁴⁰ If the records requested are in storage or archived, the requester should be notified by the custodian within the seven days.⁴¹ If the records are not provided or a written explanation of a need for an extension is not provided within seven days, the inaction will be deemed a denial of access, giving the requester a cause for legal remedy.⁴² The short time line is consistent with the desire to avoid litigation

³⁷ See *id.* (citing *Harzt Mountain Indus., Inc. v. N.J. Sports & Exposition Auth.*, 848 A.2d 793 (App. Div. 2004)) (“The index is essentially a ‘privilege log’ that must provide sufficient information ‘respecting the basis of the privilege-confidentiality claim vis a vis each document.’”); see also *Katon v. NJ Dep’t of Law & Pub. Safety*, No. A-0183-13T2, 2015 N.J. Super. Unpub. LEXIS 256, *13 (Super. Ct. App. Div. Feb. 12, 2015) ([T]he index must “list[] all responsive documents which are not being produced, and particularize[] the claim of privilege for each document.”).

³⁸ *Katon*, No. A-0183-13T2, 2015 N.J. Super. Unpub. LEXIS at *13.

³⁹ N.J. STAT. ANN. § 47:1A-5(j).

⁴⁰ N.J. STAT. ANN. § 47:1A-5(i).

⁴¹ *Id.*

⁴² *Id.*

over records requests, and so the records may be provided cheaply when they are needed without requiring legal aid.⁴³ Furthermore, a speedy response allows for a speedy resolution if the files are withheld and the requesting party wishes to contest the withholding.⁴⁴

Perhaps the strongest safe-guard to abuse is the harsh penalties for non-adherence to OPRA, and the relatively low threshold for proving non-adherence. The state agency has the burden of proof to explain that the denial of access was legal, which includes the assertion of privilege or the non-adherence to a deadline.⁴⁵ The statute also provides for attorney's fees so that "the law becomes self-executing."⁴⁶

Beyond penalties to the agencies, custodians or other responsible employees can also face personal penalties for withholding records unlawfully.⁴⁷ Civil penalties include a fine of \$1,000 for the first offense, \$2,500 for the second, and \$5,000 for the third, provided that the second or third offenses occurred within a ten-year period.⁴⁸ Furthermore, the civil penalties are not exclusive, and "[a]ppropriate disciplinary proceedings may be initiated ... against whom a penalty has been imposed."⁴⁹ Sen.

⁴³ *Public Hearing, supra* note 18, at 80 ("I'm going to get the records a lot more quickly than I am, and a lot less expensively, than having to litigate under common law.").

⁴⁴ *Id.* at 39-40.

⁴⁵ N.J. STAT. ANN. §47:1A-1.1, 5(i).

⁴⁶ *Id.*; *Public Hearing, supra* note 18, at 40.

⁴⁷ N.J. STAT. ANN. §47:1A-11

⁴⁸ *Id.*

⁴⁹ *Id.*

Robertson intended for the penalties to be clear enough that the law “says enough is enough to a public official who willfully and knowingly defies the legislative intent.”⁵⁰ Automatic removal from a position was heavily debated in the New Jersey senatorial hearing, but ultimately it was decided that automatic removal may make judges reluctant to find intentional wrong-doing.⁵¹

The procedures for the requester are made so the average citizen may file a request.⁵² The offices of custodians must be open during all regular business hours, unless the town is small or has a small budget, in which case the law mandates a minimum of six hours a week over three days.⁵³ Each custodian must have a form ready for those who wish to request documents, and that form must have a line for the requester to sign and date and the custodian to sign and date when the request is completed.⁵⁴ The requirements for the form are also designed to inform the layperson; it must include information about the appeals process and the time frame the custodian has to respond to a request.⁵⁵ If the request is in writing and contains the information that would be included on the

⁵⁰ *Public Hearing*, *supra* note 18, at 17.

⁵¹ *Id.* at 42.

⁵² *Id.* at 5.

⁵³ N.J. STAT. ANN. §47:1A-5(a) (to qualify for reduced hours a municipality must have a population under 5000, a school district must have enrollment under 500, and a public authority must have less than \$10 million in assets).

⁵⁴ N.J. STAT. ANN. 47:1A-5(f).

⁵⁵ *Id.*

form, the request must still be honored even though the form is not used.⁵⁶

A custodian is not allowed to charge for this service and may only ask for a nominal fee for the price of copying the files, and reasonable fees if copying the records is particularly burdensome.⁵⁷ The fee per page was drastically decreased when the bill was amended in 2010 to reflect the decreased costs of copying documents.⁵⁸ Furthermore, a custodian may only request a deposit that represents the labor cost if the request is made anonymously.⁵⁹

The appeals process allows a rebuffed requester the option of appealing the decision to a judge or the Government Records Council (GRC).⁶⁰ Filing an appeal with the GRC is the cheaper alternative as it allows the requester to avoid a \$175 filing fee, and a \$20 service fee required to sue government agencies.⁶¹ The GRC is intended to decrease litigation, unburden the court system, and expedite the resolution process.⁶² The GRC can solve problems quickly by simply calling a custodian on the phone to reach a solution faster and without the need for a trial.⁶³

⁵⁶ See *Renna v. County of Union*, 407 N.J. Super. 230, 232 (App. Div. 2009).

⁵⁷ N.J. STAT ANN. 47:1A-5(b).

⁵⁸ CITIZEN'S GUIDE TO OPRA, *supra* note 14, at 19-22.

⁵⁹ *Id.*

⁶⁰ N.J. STAT. ANN. 47:1A-6.

⁶¹ *Public Hearing*, *supra* note 18.

⁶² *Id.* at 37.

⁶³ *Id.* at 88.

OPRA is not intended to limit or replace New Jersey's common law regarding public records, and it does not remove the privileges of the government to withhold documents.⁶⁴ OPRA is simply a tool to obtain files in a faster manner.⁶⁵ However, if a record is unobtainable via OPRA, the record may still be accessed through a balancing of interests test via the common law.⁶⁶ Either through OPRA or the common law, the gathering of records and data allows the media, citizens, and other interested parties to get a clearer picture of not only how the government functions in a bureaucratic sense, but also the conduct and practices of police forces in the state.⁶⁷

III. Surveillance

A. The Harm of Surveillance Generally

George Orwell, in his popular book, *1984*, painted a bleak picture of a world where nearly every facet of a person's life is monitored and controlled by the government.⁶⁸ In *1984*, posters and television-like devices stationed in every home displayed the slogan "Big Brother is watching you," while the television-like devices also monitor the viewers.⁶⁹ While the dystopian portrayal has not come to fruition, the possibility of government agencies reaching out into our seemingly private affairs is entirely possible. When Edward Snowden released files indicating broad surveillance

⁶⁴ N.J. STAT. ANN. § 47:1A-8.

⁶⁵ *Public Hearing*, *supra* note 18, at 4, 14, 86.

⁶⁶ *See generally* N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst (Jersey Media Grp. III), 229 N.J. 541 (2017).

⁶⁷ *Id.*

⁶⁸ *See* GEORGE ORWELL, *1984* (1949).

⁶⁹ *Id.*

of American citizens by the U.S. National Security Agency (NSA), he indicated the use of a program named GUMFISH, which commandeers web cameras (which are installed in virtually every laptop), to stream or snap photos without alerting the user.⁷⁰ Even if a webcam is physically covered to prevent a hacker (government, criminal, or mischief maker) from viewing through it, there is no easy fix to a hacked microphone.⁷¹ Phones, too, can be hacked, and the microphone can even be accessed while the phone is turned “off.”⁷²

There is no doubt the government has the ability to enter into homes without anyone knowing, and installing listening devices is not required because most people already carry the perfect tools for surveillance in the form of cell phones. The intrusion would normally go unnoticed, unless the collected information is used to build a case against an alleged criminal, if there is a leak of information, if an agent goes public, or if there is enough information to warrant a public records request.⁷³

⁷⁰ Kim Zetter, *How to Keep the NSA from Spying Through Your Webcam*, WIRED, Mar. 13, 2014, <https://www.wired.com/2014/03/webcams-mics/> (last visited Apr. 1, 2019).

⁷¹ *Id.* (The recommendation from Wired was to insert a dummy microphone into the microphone jack so that if it were accessed it would not generate any sound. This technique would not work on any laptops that use an internal microphone (like all Mac Books).).

⁷² Andy Greenburg, *How the NSA Could Bug Your Powered-Off Iphone and How to Stop Them*, WIRED, Jun. 3, 2014, <https://www.wired.com/2014/06/nsa-bug-iphone/> (last visited Apr. 1, 2019) (if a phone is infected by a virus the phone could enter into a dummy powered down state that would still allow hackers to access it).

⁷³ See Glen Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, THE GUARDIAN, Jun. 6, 2013, <https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order> (last visited Apr. 1, 2019); see also Andrea Peterson, *Here's how privacy advocates shined light on the NSA's unconstitutional*

Why does government surveillance of private citizens matter? The “you don't need to worry if you have nothing to hide” argument is the most common refrain for those who would sacrifice privacy for perceived security.⁷⁴ Daniel J. Solove responds to this argument in his article *Why Privacy Matters Even If You Have Nothing to Hide*.⁷⁵ Solove, a professor at George Washington University Law School, has written extensively on privacy law and founded TeachPrivacy, an organization that trains businesses, firms, government organizations, and other entities in security and privacy awareness.⁷⁶ In *Why Privacy Matters Even If You Have Nothing to Hide*, Solove begins by explaining that even people who are dismissive of government surveillance still have some degree of information they would prefer to keep private.⁷⁷ For example, people generally oppose the dissemination of pictures of their naked bodies taken without their consent.⁷⁸ Solove acknowledges that the parlor argument does not work against the government

surveillance, WASH. POST, Aug. 22, 2013, https://www.washingtonpost.com/news/the-switch/wp/2013/08/22/heres-how-privacy-advocates-shined-light-on-the-nsas-unconstitutional-surveillance/?utm_term=.fod5f36922f6 (last visited Apr. 1, 2019).

⁷⁴ Daniel J. Solove, *Why Privacy Matters Even if You Have 'Nothing to Hide'*, THE CHRONICLE OF HIGHER EDUCATION, May 15, 2011, <https://www.chronicle.com/article/Why-Privacy-Matters-Even-if/127461> [hereinafter SOLOVE].

⁷⁵ *Id.*

⁷⁶ Daniel J. Solove, *Bio*, <https://www.danielsolove.com/> (last visited Nov. 7, 2018).

⁷⁷ SOLOVE, *supra* note 74.

⁷⁸ *Id.*

unless the government was intending on collecting the data or sharing it.⁷⁹

Instead Solove indicates that invasions of privacy have two facets: surveillance and data processing.⁸⁰ These are essentially the collection of data and what is done with that data.⁸¹ He uses Orwell to describe surveillance, and indicates that the paradigm of our laws deals primarily with this aspect of privacy and the effects of the data processing are largely ignored in discourse.⁸² The harms that Solove cites for data processing are “indifference, error, abuse, frustration, and lack of transparency and accountability.”⁸³ Similarly, little pieces of unprotected information can be assembled to create strong inferences to protected information, such as a book on cancer and a wig leading to the conclusion that a person is undergoing chemotherapy.⁸⁴

Similarly, inferences can be drawn incorrectly, such as a person researching how to make methamphetamine for a book they are writing.⁸⁵ The person may then be placed on a watch-list because the government lacks the context of the information, and this is all done without the person even knowing.⁸⁶ One such hidden list, compiled by the Federal Bureau of Investigation (FBI),

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ SOLOVE, *supra* note 74.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

is the No Fly List, which consists of suspected terrorists who are prohibited from boarding aircraft.⁸⁷ Often, those on the list only learn they are on the it when they attempt to board an airplane and are turned away, which frequently happens in public.⁸⁸ A person placed on the No Fly List is not given a chance to rebut this presumption of guilt before harm is suffered.⁸⁹ Some particularly embarrassing No Fly List inaccuracies include the repeated stopping and interrogation of U.S. Sen. Ted Kennedy, and the removal of an eighteen-month-old girl from a Jet Blue flight in Florida.⁹⁰

Collection of data can be damaging, particularly if those being monitored do not know they are being watched and do not have an ability to answer for it. Damage can also be done to one's pride and identity as an American if he learns that he is being investigated as a potential terrorist.⁹¹ While stories regarding the No Fly List and Solove's article touch on federal law and surveillance, state law enforcement agencies occasionally engage in this sort of surveillance as well.

⁸⁷ *Know Your Rights: What to Do if You Think You Are On the No-Fly List*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/know-your-rights/what-do-if-you-think-youre-no-fly-list> (last visited Feb. 24, 2019).

⁸⁸ *Id.*

⁸⁹ Gregory Krieg, *No-fly nightmares: The program's most embarrassing mistakes*, CNN, Dec. 7, 2015, <http://www.cnn.com/2015/12/07/politics/no-fly-mistakes-cat-stevens-ted-kennedy-john-lewis/index.html> (last visited Feb. 24 2019).

⁹⁰ *Id.*

⁹¹ THE ASSOCIATED PRESS, *Report: Newark police allowed NYPD to spy on Muslims, build secret files*, NJ.COM, Feb. 22, 2012, http://www.nj.com/news/index.ssf/2012/02/newark_police_allowed_nypd_to.html (last visited Apr. 1, 2019) [hereinafter THE ASSOCIATED PRESS].

B. Redressability of Surveillance Violations

Electronic surveillance harm arises as violations of the U.S. Constitution's Fourth Amendment, which protects the right of all persons against unreasonable searches and seizures, and infers the fundamental right to privacy.⁹² This type of surveillance is considered akin to wiretapping which requires a court order under Title III of the Omnibus Crime Control and Safe Streets Act of 1986 (OCCSSA).⁹³ OCCSSA includes the following section which allows for recovery of damages:

(a) In general. Except as provided in section 2511(2)(a)(ii) [18 USCS § 2511(2)(a)(ii)], any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter [18 USCS §§ 2510 et seq.] may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

(b) Relief. In an action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

⁹² U.S. CONST. amend. IV; *Wikimedia Found. v. NSA/Central Sec. Serv.*, 857 F.3d 193, 209 (4th Cir. 2017); *Griswold v. Connecticut*, 381 S. Ct. 479, 484-85 (1965) (the fundamental right to privacy was recognized as the pen-umbra of the fourth and fifth amendments).

⁹³ Omnibus Crime Control and Safe Streets Act of 1983, 18 U.S.C. §§ 2510–2522 (1994 & Supp. V 1999).

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.⁹⁴

Section (c) of the OCCSSA strictly applies to laypersons, so damages for police-conducted illegal surveillance would not permit recovery of damages.⁹⁵ Subsection (d) insulates any outsourced information that was gathered by providing a good faith exception for reliance on instructions from law enforcement.⁹⁶

The United States District Court for the District of New Jersey adopted the holding that the word “entity” included government entities.⁹⁷ New Jersey has an additional statute that prohibits wiretapping without a court order called the Wiretapping and Electronic Surveillance Control Act (WESC).⁹⁸ WESC also provides a remedy, including legal fees, if a party is subjected to unconstitutional wiretapping, however recovery is only allowed from persons, not government institutions.⁹⁹ If a party wishes to sue a municipality for wrongfully obtaining data, it may do so only under the federal statute.¹⁰⁰

It is clear then, that if one were to discover they were being illegally monitored, they should have a cause of action. While the

⁹⁴ 18 U.S.C.S. § 2520(a)-(b).

⁹⁵ 18 U.S.C.S. § 2520 (c).

⁹⁶ 18 U.S.C.S. § 2520 (d).

⁹⁷ *PBA Local No. 38 v. Woodbridge Police Dep't*, 832 F. Supp. 808, 823 (D.N.J. 1993).

⁹⁸ New Jersey Wiretapping and Electronic Surveillance Control Act, N.J. STAT. ANN. § 2A:156A (LexisNexis, Lexis Advance through New Jersey 217th Second Annual Session, L. 2017, c. 240, and J.R. 18).

⁹⁹ N.J. STAT. ANN. § 2A:156A-24.

¹⁰⁰ *PBA Local No. 38*, 832 F. Supp. at 824-825.

Fourth Amendment is predominantly used to exclude illegally obtained evidence, the government should not be permitted to freely fish for data with impunity. Fourth Amendment rights apply to all citizens, not only those who have committed a crime. Therefore, it would be unreasonable for there to be no action when one's fundamental right to privacy has been violated. The Supreme Court held that "the rights of privacy and personal security protected by the Fourth Amendment" are to be regarded as of the very essence of constitutional liberty; and that the guaranty of those rights are as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen."¹⁰¹

Despite the legal protections provided by the Constitution, and federal and state statutes, many people who are subjected to unconstitutional surveillance are left without recourse. If one does not have evidence they are under surveillance, there is no recourse. Not only must you prove that you have enough evidence in court to prevail, a lack of evidence will destroy standing as well.¹⁰² In *Wikimedia v. NSA/Central Security Service*, Wikimedia and eight other organizations challenged the constitutionality of the Foreign Intelligence Surveillance Act (FISA).¹⁰³ The trial court dismissed all claims for lacking standing because the harm was speculative.¹⁰⁴ The Supreme Court only overturned the dismissal of Wikimedia's claim because Wikimedia was able to prove they were affected by information collecting procedures to a degree of certainty due to the sheer size of the site.¹⁰⁵ The holding in *Wikimedia* took us one step

¹⁰¹ *Harris v. United States*, 331 U.S. 145, 150 (1947), *overruled on other grounds by* *Chimel v. California*, 395 U.S. 752 (1969).

¹⁰² *Wikimedia Found. v. NSA/Central Sec. Serv.*, 857 F.3d 193, 209 (4th Cir. 2017).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 200.

¹⁰⁵ *Id.* at 204-05 (The court found the plaintiff's statistical analysis compelling in that "even if one assumes a 0.00000001% chance . . . of the

closer to an Orwellian future. The holding allows the government to collect data from anyone it chooses so long as the scale of the website is not so great that the site will be able to prove with reasonable certainty that it was affected. “Big Brother” can watch what we do, and violate the people’s Fourth Amendment rights, so long as it remembers to cover its tracks just well enough to not leave enough evidence. Therefore, a party who merely has reason to suspect it is being monitored has no cause of action.

In New Jersey and other states with similar open public records laws, OPRA serves as a transparency mechanism for those who believe they are being monitored. However, using OPRA and the common law, is neither easy nor free from further attempts at obfuscation, as demonstrated in *Katon v. Department of Law and Public Safety*.¹⁰⁶

C. The Muslim Advocates Ordeal

In the wake of the terrorist attacks on September 11, 2001, the NYPD conducted a large-scale secret surveillance program that far exceeded its territorial jurisdiction.¹⁰⁷ The program continued for ten years and culminated in a sixty page document titled *Newark, New Jersey Demographics Report* which effectively created a dossier of every property that Muslims in the area frequented, from Mosques to stores to private residences.¹⁰⁸ To call

NSA copying and reviewing any particular communication, the odds of the government copying and reviewing at least one of the Plaintiffs’ communications in a one-year period would be greater than 99.9999999999%”).

¹⁰⁶ *Katon v. NJ Dep’t of Law & Pub. Safety*, No. A-0183-13T2, 2015 N.J. Super. Unpub. LEXIS 256 (Super. Ct. App. Div. Feb. 12, 2015).

¹⁰⁷ THE ASSOCIATED PRESS, *supra* note 91.

¹⁰⁸ NEW YORK POLICE DEPARTMENT: INTELLIGENCE DIV. DEMOGRAPHICS UNIT, NEWARK, NEW JERSEY DEMOGRAPHICS REPORT, 2007, available at

this report (conducted well outside of the NYPD's jurisdiction) appalling would be an understatement. Not only is the report disparaging, the information is so vague that it is devoid of anything potentially useful.¹⁰⁹ The location descriptions include an “Information of Note” section which has such 'vital' information as what kind of food may be sold, whether it is close to a mosque and what ethnicity or race the owners and operators are.¹¹⁰ With the quality of the report, any reader can understand why the entire project did not result in a single criminal lead, according to the Chief of the NYPD Intelligence Division, Lt. Paul Galati.¹¹¹

The NYPD has settled multiple lawsuits as a result of the surveillance program, paying out more than \$1 million and promising to develop new policies and training materials for its Intelligence Bureau with input from Muslims.¹¹² Aside from the

<https://assets.documentcloud.org/documents/296764/nypd-newark-muslim-investigation.pdf> [Hereinafter N.Y.P.D. INTEL. DIV.].

¹⁰⁹ *Id.* at 47 (An example of an “Identified Location” description is: “Location Name: Newark Fried Chicken | Location Type: Restaurant | Ethnicity: Afghani | Address: 942 Broad Street | City: NEWARK | State: New Jersey | Telephone: 973-824-1780 | Zip Code: 07102 | Precinct: 3rd | Information of Note: | Owned and Operated by Afghans. | Location is a medium size fast food restaurant that sells fried chicken, pizza and cold drinks. | Location is in good condition and has seating capacity for 10 to 15 customers.”).

¹¹⁰ *Id.* at 44-58.

¹¹¹ THE MUSLIM AM. CIVIL LIBERTIES COAL., THE CREATING LAW ENF’T ACCOUNTABILITY & RESPONSIBILITY PROJECT, THE ASIAN AM. LEGAL DEF. AND EDUC. FUND, DIALA SHAMLAS & NERMEEN ARASTU, MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS 4 (Ramzi Kassem et al. eds., 2013) *citing* Handschu v. Special Servs. Div., No. 71CIV.2203, Galati Dep. 128-129 (June 28, 2012), available at http://www.nyclu.org/files/releases/Handschu_Galati_6.28.12.pdf.

¹¹² Abigail Hauslohner, NYPD SETTLES THIRD LAWSUIT OVER SURVEILLANCE OF MUSLIMS, WASH. POST, 2018,

tremendous cost to the NYPD and taxpayers, the damage to the Muslim community was vast. The program hampered the First Amendment rights of Muslims to practice their religion, hindered their freedom of speech, sowed distrust within Muslim communities, chilled Muslim interactions with the police, and limited political, social, and religious expression of Muslim students on college campuses.¹¹³

The then-Attorney General of New Jersey stated in a press release that:

[his] office has taken steps to improve law enforcement coordination and address concerns expressed by Muslim community leaders following a three-month fact-finding review of intelligence-gathering conducted by the New York Police Department (NYPD) in New Jersey. The fact-finding review, which is on-going, has revealed no evidence to date that NYPD's activities in the state violated New Jersey civil or criminal laws.¹¹⁴

In response to the press release, Glenn Katon, on behalf of Muslim Advocates (a party in the suit against the NYPD), filed an OPRA request with the Department of Law and Public Safety of the

https://www.washingtonpost.com/national/nypd-settles-third-lawsuit-over-muslim-surveillance/2018/04/05/710882b2-3852-11e8-9c0a-85d477d9a226_story.html?utm_term=.fecc48daac91 (last visited Apr. 1, 2019).

¹¹³ See generally THE MUSLIM AM. CIVIL LIBERTIES COAL., *supra* note 111.

¹¹⁴ Katon v. NJ Dep't of Law & Pub. Safety, No. A-0183-13T2, 2015 N.J. Super. Unpub. LEXIS 256, *1-2 (Super. Ct. App. Div. Feb. 12, 2015).

Office of the Attorney General.¹¹⁵ Specifically, Muslim Advocates requested:

All records collected and/or created as part of the "fact-finding review" of intelligence-gathering conducted by the New York Police Department (NYPD) in New Jersey, including but not limited to all records reflecting communications with the NYPD, such as emails, audio recordings, notes of telephone and other communications, and memos[.]communications, and memos[.]¹¹⁶

All records upon which the Office of the Attorney General relied for its determination that the NYPD's activities in the state did not violate New Jersey civil or criminal laws; [and]

All records reflecting the Office of the Attorney General's determination that the NYPD's activities in the state did not violate New Jersey's civil or criminal laws[.]¹¹⁷

Muslim advocates also requested any documents involving the agreement the Attorney General had with the NYPD, the formalized notification protocols, and any documents the Attorney General had in regards to Muslim Advocates, itself.¹¹⁸ In response, the office of the Attorney General released six documents: five in regards to the Muslim outreach group and a copy of the Attorney General's

¹¹⁵ *Id.* at *1.

¹¹⁶ *Id.* at *4.

¹¹⁷ *Id.* at *7.

¹¹⁸ *Id.* at *3.

directive to satisfy the notification protocol request.¹¹⁹ The Attorney General claimed that the agreement to work with the NYPD was oral and therefore his department had no documents relating to the event.¹²⁰ In regard to the first three requests, the Attorney General asserted privilege and did not release any documents.¹²¹ Muslim Advocates appealed to the GRC which affirmed the documents were privileged, so Muslim Advocates then appealed its case to the Superior Court of New Jersey, Appellate Division.¹²²

The first request of “[a]ll records collected and/or created as part of the “fact-finding review” of intelligence-gathering conducted by the New York Police Department (NYPD) in New Jersey, including *but not limited to* all records reflecting communications with the NYPD, such as emails, audio recordings, notes of telephone and other communications, and memos” was met with the following statement: “While the OAG met with and discussed intelligence gathering with the [NYPD], OAG is not in possession of records created by the NYPD pertaining to counter-terrorism investigations or intelligence gathering.”¹²³ The court noted that the denial of records made no notice of any documents that were made by the Office of the Attorney General, and thus only accounted for one half of the possible documents.¹²⁴

To make matters worse, the Attorney General, in his press release, mentioned the creation of 610 pages of documents which

¹¹⁹ *Id.*

¹²⁰ *Katon*, No. A-0183-13T2, 2015 N.J. Super. Unpub. LEXIS at *3.

¹²¹ *Id.* at *4.

¹²² *Id.* at *1.

¹²³ *Id.* at *4-5.

¹²⁴ *Id.*

the court viewed as matching the bounds of the first request.¹²⁵ The third request, “[a]ll records reflecting the Office of the Attorney General’s determination that the NYPD’s activities in the state did not violate New Jersey’s civil or criminal laws[,]” was considered by the Appellate Division to be similar in nature to the first request, and the court again pointed to the same 610 pages.

The Office of the Attorney General argued that the second request was invalid by its own terms. The Attorney General stated that by culling the documents down to those that were used, the deliberative process would have been revealed.¹²⁶ The court agreed with the rationale that explaining the culling process used by the Attorney General would exceed the disclosure required by OPRA.¹²⁷ The Attorney General was exempted from complying with the second request, however, in accordance with requests one and three, he should have provided the documents from which request two would draw from, with any deliberative notes redacted.¹²⁸

The Attorney General, and Custodian of Records, also asserted that the six-hundred pages of documents mentioned were protected by attorney-client privilege, attorney work product, and deliberative process.¹²⁹ The court asserted the need for a privilege index as was detailed in *Paff v. N.J. Dep’t of Labor*.¹³⁰ The Court ultimately decided that the Custodian of Records at the Office of the Attorney general must write an index that would facilitate the

¹²⁵ *Id.* at *4-5.

¹²⁶ *Katon*, No. A-0183-13T2, 2015 N.J. Super. Unpub. LEXIS *10.

¹²⁷ *Id.* at *10-11.

¹²⁸ *Id.* at *11.

¹²⁹ *Id.* at *7.

¹³⁰ *Paff v. N.J. Dep’t of Labor*, 392 N.J. Super. 334, 341 (App. Div. 2007).

GRC's review.¹³¹ The court went on to describe how the Office of the Attorney General must give the specific grounds for the specific privilege of each document it seeks to withhold.¹³²

What is particularly troubling about this case is that the GRC merely rubber stamped the denial of access. The approach of the Attorney General was not well hidden, and he did not provide the required index.¹³³ It is inconceivable that the GRC, whose role is to provide a check for privileged documents, was so unfamiliar with the protocol that it did not know that an index was required. The only possibilities that remain are that the GRC was working with the Attorney General in the obfuscation of the surveillance, the Attorney General was able to intimidate the GRC into not second guessing its decision, the GRC did not wish to spend the time necessary to review the documents in question, or the GRC was merely serving as a rubber stamp.

Recall that one of the purposes of OPRA is to guard against wasteful spending and to prevent misconduct and corruption.¹³⁴ The rubber stamping of an invalid denial of records is precisely what OPRA was intended to prevent. Either the government is making deals between administrations contrary to the law, the GRC is discharging its duty negligently, or as a best-case scenario, the government agencies are just too busy to comply. In any case, "the evils inherent in a secluded process" become common place because

¹³¹ *Katon*, No. A-0183-13T2, 2015 N.J. Super. Unpub. LEXIS at *14-15.

¹³² *Id.*

¹³³ *See Paff*, 392 N.J. Super. at 341.

¹³⁴ *Burnett v. Cty. of Bergen*, 198 N.J. 408, 414 (2009).

the agency whose role it is to shed light to the process of law is too lazy to bare the torch.¹³⁵

Furthermore, the denial of records leads to wasteful spending because the government will be charged attorney's fees incurred by plaintiff's due to the improper denial of access to records. As the agency continues to fight the request, the requesting party's legal fees likely increase. If there was nothing to hide, the Attorney General should have no problem producing redacted files. Alternatively, if the records contain something worth hiding, it will come to light eventually. The Attorney General cannot wait out a large law firm that is looking for its legal fees.

The state should cut its losses, pay up, speak up, and move on, instead of racking up a larger and larger bill. Ultimately, the Government is wasting tax payers' money by hiding information from the public. Hopefully a new administration at the Office of the Attorney General will do right by the people of New Jersey and end the charade of the past administration.

IV. Police Brutality

To complete George Orwell's nightmare view of the world, not only must the government watch, but the police must respond to minor transgressions with great brutality. Police brutality is not a new issue within the United States but it has gained wide spread media attention in recent years which has led to public outcries. It is likely that fewer Americans now turn a blind eye to incidents of unjustified police shootings. While the appropriate use of force applied by the police has been hotly debated, the attention has resulted in demands that police wear body cameras to determine whether or not the level of force was justified.¹³⁶ A study conducted

¹³⁵ *Asbury Park Press v. Ocean Cty. Prosecutor's Office*, 374 N.J. Super. 312, 329 (Super. Ct. 2004).

¹³⁶ *The Economist Explains: Why the Police Should Wear Body Cameras*, THE ECONOMIST, Oct. 20, 2016, <https://www.economist.com/the->

by the University of Cambridge, RAND Europe, and Hebrew University infers that police wearing cameras improves the behavior of both the public and officers, and reduces the number of complaints against officers by up to 93%, so long as the cameras are not under the control of the officers wearing them.¹³⁷ A reduced number of complaints could lead to an increased trust in law enforcement agents and agencies. If that is the case, then wearing cameras could not only protect those susceptible to arrest but also the police themselves, as their improved status in the community could lead to more cooperation, though this is merely speculative.

In any case, the presence of cameras is likely rendered useless if law enforcement agencies have complete control over the footage. If the footage is not made available, it may neither bely community fears nor raise valid concerns about police conduct and public safety, and for this reason it must be discoverable. This line of thought reflects the New Jersey Supreme Court's holding in *North Jersey Media Group v. Township of Lyndhurst*.¹³⁸

A. The Battle for Dash-Cam Footage

On September 16, 2014, around one month after the police killing which inspired riots in Ferguson Missouri,¹³⁹ police in New

economist-explains/2016/10/19/why-the-police-should-wear-body-cameras (last visited Apr. 2, 2019).

¹³⁷ Barak Ariel et al., *Paradoxical effects of self-awareness of being observed: testing the effect of police body-worn cameras on assaults and aggression against officers*, 14 JOURNAL OF EXPERIMENTAL CRIMINOLOGY 19–47, 35 (2017).

¹³⁸ *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst* (Jersey Media Grp. III), 229 N.J. 541 (2017).

¹³⁹ *Timeline: The Black Lives Matter Movement*, ABC NEWS, Jul. 13, 2016, updated Feb. 22, 2018, <http://www.abc.net.au/news/2016-07-14/black-lives-matter-timeline/7585856> (last visted Apr. 2, 2019) (Michael Brown was killed on August 9, 2014).

Jersey shot and killed a man after a high speed chase.¹⁴⁰ The incident reportedly began when a woman called 9-1-1 to report someone trying to break into a car in her driveway.¹⁴¹ The suspected thieves were reportedly scared off by the woman after she came outside.¹⁴² A description of the a getaway car was relayed to police who spotted the vehicle and confirmed it was stolen.¹⁴³ The driver evaded police and led them on a high speed chase before losing control of the vehicle, and crashing into a guard rail at an overpass.¹⁴⁴ According to police, when officers boxed in the getaway car, the driver began moving the SUV back and forth in an attempt to escape, after previously trying to ram officers.¹⁴⁵ Police then reportedly opened fire on the driver of the SUV, and took the passenger into custody.¹⁴⁶

A few days after the event journalists discovered there was footage of the incident caught by a police cruiser dashboard camera and requests were made to release the footage to the public.¹⁴⁷ Two news organizations filed requests for records connected to the

¹⁴⁰ *Jersey Media Grp. III*, 229 N.J. at 550.

¹⁴¹ *Id.* at 551.

¹⁴² Abbott Karloff, *Newly released videos reveal conflicting accounts of 2014 police shooting in Rutherford*, NORTHJERSEY.COM, Jul. 17, 2017, <https://www.northjersey.com/story/news/watchdog/2017/07/17/newly-released-videos-reveal-conflicting-accounts-2014-police-shooting-rutherford/482541001/> (last visited Apr. 2, 2019).

¹⁴³ *Jersey Media Grp. III*, 229 N.J. at 551-52.

¹⁴⁴ *Id.* at 552.

¹⁴⁵ *Id.*

¹⁴⁶ Karloff, *supra* note 142.

¹⁴⁷ *Id.*; *Jersey Media Grp. III*, 229 N.J. at 550.

incident and both were denied access.¹⁴⁸ The parent company for both news organizations, North Jersey Media Group Incorporated (NJMG), appealed the denial and brought suit.¹⁴⁹ The requests were originally filed with three different municipal police departments, but the police departments referred NJMG's requests to the New Jersey Attorney General who also denied it access.¹⁵⁰ In response to the request, NJMG received several redacted documents and some audio recordings from the Rutherford Police Department.¹⁵¹ NJMG cited both common law and OPRA as grounds to receive the records, or at least review them *in camera*.¹⁵² The Defendants, the police departments and the Office of the Attorney General, repeatedly requested additional time to process the requests, often without citing reasons for the delay that far exceeded the seven days required under OPRA.¹⁵³

1. The Trial Court

On January 12, 2015, the case was reviewed by Judge Peter E. Doyne, who began his analysis by chastising the responses of the police departments for turning a records request into a game of "hide the key."¹⁵⁴ His opinion stated that there are no grounds to shift the responsibility of disclosure and each Defendant should

¹⁴⁸ N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst (Jersey Media Grp. I), 2015 N.J. Super. Unpub. LEXIS 76 *7, *10, *rev'd*, 441 N.J. Super. 70 (App. Div. 2015), *aff'd in part*, 229 N.J. 541 (2017).

¹⁴⁹ *Jersey Media Grp. III*, 229 N.J. at 550.

¹⁵⁰ *Jersey Media Grp. I*, 2015 N.J. Super. at *7-*9.

¹⁵¹ *Id.* at *10-*18.

¹⁵² *Id.* at *2-*3.

¹⁵³ *Id.* at *19-*23; N.J. STAT. ANN. § 47:1A-5(i).

¹⁵⁴ *Jersey Media Grp. I*, 2015 N.J. Super. at *35.

provide records unless exempt.¹⁵⁵ The tone of his summary of each Defendant's response shows little patience for the games they were playing:

the positions taken by each entity defendant and their custodian(s) with respect to their respective OPRA duties and its mandate of unfettered access to government records were:

(1) Lyndhurst — No records were provided, but after much back and forth, it was determined the Attorney General's Office is handling the OPRA response, notwithstanding, the records are exempt as criminal investigatory records and were records pertaining to an ongoing investigation;

(2) North Arlington — No records were provided as every responsive record was exempt under the ongoing criminal investigatory exception to OPRA;

(3) The BCPD — No records were provided as every responsive record was exempt under the criminal investigatory records exception to OPRA;

(4) The State Police — No records were provided as it took at least 45 days to determine if they were investigating the police fatally shooting a citizen, and they asserted the unilateral right to extend OPRA's express directive of allowing a maximum of seven days to respond to a request; and

(5) Rutherford — No records were initially provided as they pertained to an ongoing criminal investigation and deferred the requestor to the Attorney General's Office. Following the filing of

¹⁵⁵ *Id.* at *37-*38.

this matter and a subsequent change in its position, certain responsive records were released to NJMG on December 5, 2014.

Only in late December 2014 did the State Police release the audio from the 9-1-1 call and redacted versions of CAD reports that State Police possessed from North Arlington, the BCPD and Lyndhurst.¹⁵⁶

Judge Doyne ultimately found that all of the records were unjustly withheld under both common law and OPRA, and the Defendants failed to meet their burden of proof in their denial and delay, and thus NJMG was entitled to both the documents and legal fees.¹⁵⁷

2. The Appellate Division

The case was appealed, and the lower court was reversed by the Appellate Division, with an opinion authored by Judge Mitchel E. Ostrer under *de novo* review.¹⁵⁸ The Appellate Division took a radically different interpretation of criminal case files, and instead of reading the statute as promising all records unless very specifically exempt, the court delved into the legislative intent to expand the exception for active investigations.¹⁵⁹ It also appears the

¹⁵⁶ *Id.* at *45-*47.

¹⁵⁷ *Id.* at *76-*77.

¹⁵⁸ *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst (Jersey Media Grp. II)*, 441 N.J. Super. 70, 89 (App. Div. 2015), *rev'd in part*, 229 N.J. 541 (2017).

¹⁵⁹ *Id.* at 96-97.

Appellate Division gave greater weight to the more restrictive Right to Know laws which were amended by OPRA.¹⁶⁰

After reading the New Jersey senate discussion of OPRA, the Appellate Division noted that OPRA included strong exemptions for disclosure, as strong as its predecessor, despite that the explicit purpose of OPRA was to expand access.¹⁶¹ In its discussion, the Court analyzed the requests and the laws around them:

First, the court must consider whether the requested document is a 'criminal investigatory record[],' which is excluded from the definition of government record generally subject to disclosure under OPRA ...

Second, even if the document does not qualify as a "criminal investigatory record" — for example, because it is a "required by law" document — the court must consider whether the document may be withheld as a document that "pertain[s] to an investigation in progress by any public agency . . . if the inspection, copying or examination of such record or records shall be inimical to the public interest."¹⁶²

The Appellate Division also analyzed whether any information was required to be disclosed as mandated by N.J.S.A. 47:1A-3(b):

where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;

¹⁶⁰ *See generally Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 90-91.

if an arrest has been made, information as to the name, address and age of any victims unless there has not been sufficient opportunity for notification of next of kin of any victims of injury and/or death to any such victim or where the release of the names of any victim would be contrary to existing law or court rule. In deciding on the release of information as to the identity of a victim, the safety of the victim and the victim's family, and the integrity of any ongoing investigation, shall be considered;

if an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or court rule; information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;

information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;

information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police; and

information as to circumstances surrounding bail, whether it was posted and the amount thereof. ¹⁶³

¹⁶³ *Id.* at 91.

As the first step in its decision, the Appellate Court examined whether the requested records were a “criminal investigation record.”¹⁶⁴ In order to get a better understanding of what constitutes a criminal investigation record, the Court looked to the senate hearings regarding OPRA to determine whether the case law regarding the state’s former *Right to Know* law could apply to the case under review.¹⁶⁵ The court found that because the state senate decided to modify the criminal investigation record exception to state merely “government record” and then changed the standard back to “criminal investigation record” in the process of drafting the bill, the senate intended to carve out the same broad exception to public access to information.¹⁶⁶ The court also noted that parts of the *Right to Know* law was incorporated into OPRA’s Legislative findings, Declarations which state 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 accorded by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public’s right of access.¹⁶⁷ As a result of using the old *Right to Know* law for determining the definition of “criminal investigation record,” the Appellate Division applied outdated case law and a gubernatorial order which were far more restrictive than OPRA.¹⁶⁸

Ultimately the Appellate Division ruled against access for nearly all of the records on the basis that they were criminal investigatory materials, with the exception of the 9-1-1 call, motor vehicle- accident reports, and portions of the record that did not

¹⁶⁴ *Jersey Media Grp. II*, 441 N.J. Super. at 92.

¹⁶⁵ *See generally id.*

¹⁶⁶ *Id.* at 92-96.

¹⁶⁷ N.J. STAT. ANN. § 47:1A-1 (internal quotations omitted).

¹⁶⁸ *Jersey Media Grp. II*, 441 N.J. Super at 94-95.

pertain to the investigation.¹⁶⁹ The court then discussed policy consideration for why records may still be excluded.¹⁷⁰ The primary concerns the court cited were witness protection and to protect the integrity of witness testimony and jurors.¹⁷¹

3. Supreme Court

a. Section 3(b) discussion

On further appeal to the Supreme Court of New Jersey the witness protection and jury concerns were rejected as unspecified and inaccurate to the case.¹⁷² The court directly countered a referenced argument made by Paul Morris, The Attorney General's Chief of Detectives at the Division of Criminal Justice.¹⁷³ Morris asserted that merely releasing the names of the officers involved in the shooting would stigmatize the officers and their families, even if the shooting was justified.¹⁷⁴ He instead suggested that only the names of officers who were found to be guilty of improper use of force should be released.¹⁷⁵ The court dismantled the argument by stating that Morris' position would rewrite the law, because Section 3(b) of OPRA states that the exception should be narrowly construed, and requires in a particularized way, that the disclosure would "jeopardize the safety of any person... or any investigation in

¹⁶⁹ *Id.* at 107.

¹⁷⁰ *Id.* at 107-08.

¹⁷¹ *Id.* at 107-11.

¹⁷² *See generally* N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst (Jersey Media Grp. III), 229 N.J. 541 (2017).

¹⁷³ *Id.* at 571.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

progress” or “would be harmful to the bona fide law enforcement purpose of public safety.”¹⁷⁶

The Supreme Court’s reversal was a great victory for the public’s right to access as it relates to police records. To elaborate on the Court’s point, Morris’ defense of social harm would first rewrite the exception of Section 3(b) by changing the language from “jeopardize the safety” to “may cause harm.” Safety infers a strong physicality, whereas the law recognizes harm far more broadly. Furthermore, if a social harm is included in “safety,” the exception would swallow the rule in any case where force is used by the police.

Also, one of the basic premises of statutory construction is that the legislature is considered to act purposefully when language is included in one section but omitted in another.¹⁷⁷ In Section 3(b), OPRA explicitly mentions protecting the safety of victims, honoring court orders and laws, and protecting criminal defendants.¹⁷⁸ Meanwhile, there are no additional protections offered to law enforcement officers, beyond the catch all provision of exempting disclosure where it would jeopardize safety, an investigation, or would “be otherwise inappropriate to release.”¹⁷⁹ The diminishing levels of protections mentioned would indicate that the legislature intended to exempt information to protect first the victims and their families, the defendants, and then finally the arresting officers and any other party.

Furthermore, the inclusion of the wording “resistance, if any, pursuit, possession and nature and use of weapons and

¹⁷⁶ *Id.* 571-72.

¹⁷⁷ LEGAL INFORMATION INSTITUTE, *Statutory Construction*, CORNELL LAW SCHOOL (2008), https://www.law.cornell.edu/wex/statutory_construction.

¹⁷⁸ N.J. STAT. ANN. § 47:1A-3.

¹⁷⁹ *Id.*

ammunition by the suspect and by the police” in the list of what must be disclosed under OPRA, would indicate the legislature considered use of force while drafting the bill.¹⁸⁰ To excuse disclosure when force was involved, as was suggested by Morris, would directly contradict the statute. The Supreme Court's analysis was appropriate and consistent with the intent to minimize the evils inherent in a secluded process.”¹⁸¹ If any information should be disclosed, it should be information about police, as the dangers inherent in an unaccountable police force were vividly illustrated by USDOJ's investigation into the Police Department in Ferguson, Missouri.¹⁸²

b. Supreme Court 3(a) Discussion

The New Jersey Supreme Court divided its Section 3(a) OPRA analysis to evaluate each category of records for which the Attorney General asserted as “criminal investigatory record[s].”¹⁸³ The court's analysis began with a rejection of the Appellate Division's application of the *Right to Know* interpretations, stating that the explicit intent to expand access under OPRA would contravene the notion that the Legislature intended the old interpretations of narrow access be applied.¹⁸⁴ In effect, the Court stated that the Legislature intended to reset the judicial interpretation of an exception, using a new directive for open access. This interpretation is consistent with the Legislature's stated intentions for OPRA, as the very first reason given for

¹⁸⁰ *Id.*

¹⁸¹ *Asbury Park Press v. Ocean Cty. Prosecutor's Office*, 374 N.J. Super. 312, 329 (Super. Ct. 2004).

¹⁸² U.S. DEP'T OF JUST. CIV. RIGHTS DIV., *supra* note 3, at 2.

¹⁸³ *See generally* *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst* (Jersey Media Grp. III), 229 N.J. 541 (2017).

¹⁸⁴ *Id.* at 555-56.

amending *Right to Know* was to reform the requirement for documents to be kept on file.¹⁸⁵ To apply old case law to a topic that was one of the first explicit reasons to change the law would be counter to Legislative intent and would effectively reinstate *Right to Know*.

Instead, the Supreme Court applied an OPRA-era case which held that Use of Force Reports¹⁸⁶ were required to be maintained, and thus the exception did not apply.¹⁸⁷ The court cited two OPRA cases rejecting the *Right to Know* interpretation that Use of Force Reports were not government records.¹⁸⁸ In defense of the Appellate Division, it did not have the benefit of guidance from *Paff v. Ocean County Prosecutors Office*, as that case was written in the following year, and *O'Shea v. Township of West Milford* may be differentiated from *North Jersey Media Group* because the officers were not under investigation for their use of force.¹⁸⁹

Conceding the distinction between *O'Shea* and *North Jersey Media Group*, *O'Shea's* primary reasoning first establishes that Use of Force Reports should be considered "required by law."¹⁹⁰ While Use of Force Reports are not required by law and are instead a

¹⁸⁵ *Public Hearing*, *supra* note 18, at 1-2.

¹⁸⁶ Police Use of Force Reports (New Jersey), PROPUBLICA DATA STORE, <https://www.propublica.org/datastore/dataset/police-use-of-force-new-jersey> (last visited Apr. 3, 2019) (use of force reports contain basic information about incidents in which police use physical force).

¹⁸⁷ *Jersey Media Grp. III*, 229 N.J. at 555-56.

¹⁸⁸ *Id.*

¹⁸⁹ *See generally* *O'Shea v. Twp. of W. Milford*, 410 N.J. Super. 371 (App. Div. 2009); *Paff v. N.J. Dep't of Labor*, 392 N.J. Super. 334 (App. Div. 2007).

¹⁹⁰ *O'Shea*, 410 N.J. Super. at 385.

directive of the Attorney General, the directives of the Attorney General carry the weight of law for police officers.¹⁹¹ Furthermore, the court in *O'Shea* indicated that Use of Force Reports were clearly contemplated by the Legislature because the required information for disclosure in section 3(b), would be contained in Use of Force Reports be granted on an accelerated time line.¹⁹² The reasoning in *O'Shea* is compelling and the Supreme Court was correct to rely on that case instead of pre-OPRA case law.

The Court next examined whether the dash-cam footage should be exempt as an investigatory record.¹⁹³ The court agreed with the Appellate Division, which found that the camera being turned on by the officer in response to an emergency call would indicate the earliest stages of an investigation.¹⁹⁴ The only remaining issue was whether the footage was “required by law” to be made.¹⁹⁵ The court held that the officer's ability to turn the camera on made the record discretionary.¹⁹⁶

The court seemed to take a conservative stance by holding that only routine dash-cam footage be subject to OPRA. By reiterating the chief's command, this conservative stance may have unintended consequences. Namely, the holding rewards law enforcement agencies that leave dash-cams as a tool to be used at an officer's discretion. If the distinction is held as the primary take away from the holding, it could lead down the same road that mandated the creation of OPRA: “And what has happened is that

¹⁹¹ *Id.* at 382.

¹⁹² *Id.* at 385.

¹⁹³ *Jersey Media Grp. III*, 229 N.J. at 567-68.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 567.

¹⁹⁶ *Id.* at 567-568.

many records, which the public, I think, would expect to be available to them, are not required by law to be made -- to be maintained.”¹⁹⁷

However, the potential for that dash-cam categorization was essentially mitigated by the court's holding that the footage should have been disclosed under common law. Unfortunately, case by case weighing of public interests gives more discretion to judges than holding a statutory basis for a release of dash-cam footage, and the results are thus less predictable.¹⁹⁸ Furthermore, common law right-to-know does not provide the ease of access for the public that OPRA was designed to provide.

The court decided disclosure of the footage would not have been “inimical to public interest,” as per Section 3(a).¹⁹⁹ The inquiry involved the consideration of officer safety, the reliability of ongoing investigations, and transparency, taking into account that non-disclosure can undermine confidence in police.²⁰⁰ Similarly, the court found disclosure may jeopardize the integrity of an investigation if the request for information comes before the state has an opportunity to finish its inquiry, let alone introduce the issue to a grand jury.²⁰¹

In Summary, the holding of *North Jersey Media Group v. Township of Lyndhurst* provides grounds for a temporary withholding of dash-cam footage and discourages mandatory use of

¹⁹⁷ *Public Hearing*, *supra* note 18, at 1.

¹⁹⁸ *Jersey Media Grp. III*, 229 N.J. at 580.

¹⁹⁹ *Id.* at 577.

²⁰⁰ *Id.* at 576-77.

²⁰¹ *Id.*

dash-cams in lieu of granting officers discretion.²⁰² The positive effects of cameras are negated by officers being granted the freedom to turn the cameras off.²⁰³ If an officer fears their conduct may not be appropriate, they need only to stop recording. Even if a camera is recording, the footage is not required to be immediately disclosed because it can only be discovered through the common law right of access which requires a balancing of interests' test. While access was ultimately granted, OPRA is limited by the Supreme Court's holding.

If the Supreme Court had held differently, that all footage which was not relevant to an active investigation was discoverable through OPRA, police may have been dissuaded from using cameras altogether. However, a total absence of cameras from police cruisers would be more likely to cause a public outcry than officers maintaining control over those cameras. The increased visibility of the issue would subject law enforcement agencies to a greater deal of scrutiny from the public and Legislature, even though the effects are the same in terms of police conduct and accountability.²⁰⁴

B. Non-Disclosure to Protect Officers

As the Appellate Division indicated in *North Jersey Media Group v. Lyndhurst*, the safety of officers and fear of a revenge killing may provide a valid concern that justifies the non-disclosure of information.²⁰⁵ The news is periodically dotted with accounts of police officers being killed in retaliation for excessive use of

²⁰² *Id.*

²⁰³ Ariel et al., *supra* note 137, at 35.

²⁰⁴ *Id.*

²⁰⁵ *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst (Jersey Media Grp. II)*, 441 N.J. Super. 70, 107-11 (App. Div. 2015), *rev'd in part*, 229 N.J. 541 (2017).

force.²⁰⁶ Perhaps the most heinous example of retaliation occurred in Dallas, Texas on July 7, 2016.²⁰⁷ In Dallas, an African-American military veteran who had served in Afghanistan, shot and killed five police officers during a rally against police violence.²⁰⁸

Fox News reported that violence against police officers was on the rise with an eighteen-percent increase in officer deaths from the midyear points in 2016 to 2017.²⁰⁹ Additionally, the report noted 2016 was the deadliest year for police in five years.²¹⁰ Ultimately less police died in 2017 than in 2016 (129 as opposed to 135), which undermines the Fox News narrative of the increasing trend.²¹¹ The FBI also noted an increase in violence towards police

²⁰⁶ Manny Fernandez, Richard Pérez-peña & Jonah Engel Bromwich, *Five Dallas Officers Were Killed as Payback, Police Chief Says*, NY TIMES, July 8, 2016, <https://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html> (last visited Apr. 6, 2019).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Lauren Goldstein, *Police officer deaths on duty have jumped nearly 20 percent in 2017*, FOX NEWS, July 5, 2017, <https://www.foxnews.com/us/police-officer-deaths-on-duty-have-jumped-nearly-20-percent-in-2017> (last visited Apr. 6, 2019).

²¹⁰ *Id.*

²¹¹ *Id.*; *Honoring Officers Killed in 2017*, THE OFFICER DOWN MEMORIAL PAGE, <https://www.odmp.org/search/year/2017> (last visited Jan 29, 2018), [hereinafter ODMP] (data also includes non-violent causes of death such as heart attacks, automobile crashes and poisoning); *FBI Releases 2016 Statistics for Law Enforcement Officers Killed and Assaulted in the Line of Duty*, FBI NATIONAL PRESS OFFICE, <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2016-statistics-for-law-enforcement-officers-killed-and-assaulted-in-the-line-of-duty> (last visited Oct. 16, 2017), [hereinafter FBI NATIONAL PRESS OFFICE] (The FBI released the results of a fact

from 2015 to 2016, stating there was a twenty-five percent increase in felonious killings of police officers, and indicating a rise from the rates in 2012 and 2007.²¹²

Furthermore, the FBI indicated that seventeen of those killings occurred as the result of a premeditated ambush on police officers, and not as the result of an arrest or investigation.²¹³ That same report also indicated that 57,180 officers were assaulted while on duty, and 28.9% of those officers were injured.²¹⁴ This data should not be misconstrued to assume that every assault was on specific officers. The report does not indicate whether the assaults and ambushes were targeting specific officers or merely anyone holding a badge. If the killings were targeting police in general, or if the names of the targeted officers were common knowledge, the fear of revenge killings as a result of an OPRA request may be over-inflated. This over-inflation is particularly relevant for New Jersey because there have only been six officers feloniously killed in New Jersey from 2007 to 2016, and only one of those occurred after 2011.²¹⁵

Violence is a reality for police officers, and the threat of being killed may be seeming to increase. The question remains whether transparency, which OPRA attempts to provide, would lead to an increase or decrease in violence against officers. *North Jersey*

finding study it conducted which found 118 officers were killed in the line of duty.).

²¹² FBI NATIONAL PRESS OFFICE, *supra* note 211 (the number increased from 41 to 66).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *2016 Law Enforcement Officers Killed & Assaulted*, FBI CRIM. JUST. INFO. SERVICE DIV., <https://ucr.fbi.gov/leoka/2016/officers-feloniously-killed/tables/table-1.xls>.

Media Group v. Lyndhurst provided a strong precedent for common law access to dash-cam footage, but it is still too early to determine whether the holding will have an appreciable impact.²¹⁶ In the immediate wake of this holding, before data can be collected, the best that can be offered is a theoretical analysis of the rationale for and against disclosure.

The elements leaning towards an increase in violence against officers would include: (1) that the disclosure of the names of officers involved in a fatal shooting would provide targets for those who may wish to seek revenge; (2) that the police may not be able to control the narrative as strongly; (3) that the graphic nature of police use of force caught on camera may arouse passions, unlike a detailed report; and (4) disclosure of footage would provide more material for those who wish to further an anti-police sentiment, by framing an incident out of context or cherry-picking examples of bad behavior.

The elements that may reduce the likelihood of violence against officers include: (1) the increased trust and respect for police officers that comes from a transparent process; (2) increased accountability that may lead to an improvement in police behavior, which would decrease a desire for retaliation;²¹⁷ (3) police would be able to counter false witness testimonies made to the press; (4) the prevalence of full context videos would help provide context for smart-phone or security footage that is given to the press by private citizens; (5) the police would have the ability to explain footage as it is released instead of merely reacting to leaked footage or footage from private citizens; and (6) the unwillingness to share information may be seen as an attempt to obfuscate the truth and

²¹⁶ N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst (Jersey Media Grp. III), 229 N.J. 541 (2017).

²¹⁷ Ariel et al., *supra* note 137, at 35.

lead to presumptions of amoral conduct and corruption by law enforcement agencies.

Regardless of whether OPRA and common law access increases a risk for law enforcement officers, there is still a valid concern for the public's right to a transparent government and accountable police force. That was the primary concern cited by the court of *North Jersey Media Group v. Lyndhurst*.²¹⁸

V. The Cost of O.P.R.A.

The New Jersey State budget for 2017 allotted \$618,000 to the GRC which oversees OPRA training on a state level and handles appealed requests.²¹⁹ While \$618,000 seems like a staggering amount, it only comprises around two one-thousandths of a percent of the state budget.²²⁰ In 2015, the cost of settlements in open records cases for the State's Office of the Attorney General was \$154,000.²²¹ This amount does not seem to include additional costs accrued from OPRA requests made to state-funded agencies, as it asserts that the cost was incurred by the Administration of Former

²¹⁸ See generally *Jersey Media Grp. III*, 229 N.J. 550.

²¹⁹ OFFICE OF MGMT. & BUDGET D-59, THE GOVERNOR'S FY 2017 BUDGET: DETAILED BUDGET, 2016, available at <http://www.nj.gov/treasury/omb/publications/17budget/pdf/FY17BudgetBook.pdf>.

²²⁰ *Id.* at B-3 (The total state appropriation for 2017 was \$34,828,692,000, and the \$618,000 allotted for the Government Records Council comprises .0017% of the state's discretionary spending. This budget does not include the salaries for the records custodians, settlements, or salaries for government lawyers involved with resisting requests.).

²²¹ Matt Arco, *Fighting Open Records Cost State \$154k in Taxpayer Money Last Year*, NJ.COM, March 2, 2016, http://www.nj.com/politics/index.ssf/2016/02/records_requests_battles_cost_taxpayers_154000_in.html (last visited Apr. 6, 2019).

Governor Chris Christie and his appointed Attorney General.²²² Taxpayers thus bear the costs of avoiding bad press by delaying information.²²³ There is insufficient data to compare the cost of compliance with non-compliance, so it is difficult to determine how much of the cost of OPRA is from the favoring of transparency, and how much is a result of government actors dragging their feet.

One such records keeper which refuses to comply is the New Jersey Society for the Prevention of Cruelty to Animals (NJSPCA), a private, non-profit group which is granted police powers.²²⁴ The State Commission of Investigation claimed in its report on the NJSPCA that the “findings of this inquiry make plain that permitting a part-time policing unit staffed by private citizens to serve as the primary enforcers of New Jersey’s animal cruelty laws is illogical, ineffective and makes the entire system vulnerable to abuse.”²²⁵ In an attempt to use the organization’s non-profit status as a shield, the NJSPCA asserted that it did not need to comply with OPRA because it did not believe it was a public agency.²²⁶ The policing power of the NJSPCA was found, in combination with performing a government function, to render the NJSPCA a

²²² *Id.*

²²³ *Id.*

²²⁴ See generally *Wronko v. N.J. SPCA*, No. A-1737-15T1, 2018 N.J. Super. LEXIS 13 (Super. Ct. App. Div. Jan. 26, 2018); S.P. Sullivan, *NJSPCA Is a Broken Agency Run by 'Wannabe Cops' State Report Finds*, NJ.COM, Oct. 20, 2017, http://www.nj.com/politics/index.ssf/2017/10/nj_spca_is_a_broken_agency_run_by_wannabe_cops_sta.html (last visited Apr. 3, 2019).

²²⁵ Sullivan, *supra* note 224.

²²⁶ See generally *Wronko*, No. A-1737-15T1, 2018 N.J. Super. LEXIS 13 (records requested regarded a seized animal shelter).

government agency and thus included in the purview of OPRA.²²⁷ NJSPCA also attempted to use its non-profit status to claim it did not have the budget to pay for attorney's fees after an improper denial of records.²²⁸ The Appellate Division held that lack of a budget is not grounds to deny recovery for attorney's fees and excuse an agency any obligations it carries under OPRA.²²⁹ This holding created legal, if not real, accountability for the NJSPCA. Unfortunately, reports by a government investigation in 2000 had already uncovered problems with the organization, but that report was unheeded.²³⁰ The entire matter lends itself to an additional problem with OPRA, that perhaps the value of information is over-emphasized by lawyers and scholars and does not lead to real change.

VI. The Value of Information and an Informed Citizenry

OPRA is based on the assumption that an open political system and informed population leads to a better system of governance, but how important is an informed public to affecting change?²³¹ The value of an informed citizenry was praised as early as 1765 by John Adams, and commentators continue to look back with rose-tinted lenses to a time when politics were more informed.²³² The importance of an informed (and conversely the

²²⁷ *Id.* at 10.

²²⁸ *Id.* at 10-11.

²²⁹ *Id.* at 12-13.

²³⁰ Sullivan, *supra* note 224.

²³¹ Burnett v. Cty. of Bergen, 198 N.J. 408, 414 (2009).

²³² Michael Schudson, *The Informed Citizen in Historical Context*, NATIONAL COUNCIL OF TEACHERS OF ENGLISH vol. 30 no. 3, 361-369, Oct. 1996, available at <http://www.jstor.org/stable/40171371> ("Let every order and decree among the people rouse their attention and animate

danger of a misinformed) population is again being reviewed in light of the 2016 presidential election due to the prevalence of 'fake news' stories that were propagated largely across social media.²³³ Included in this discussion are the indictments of thirteen Russian nationals for disseminating false news stories and inflammatory memes in an attempt to sway the 2016 election.²³⁴

Despite beliefs to the contrary, the actual effects of an informed voting population seem to be overstated. Throughout much (if not all) of U.S. history, more people tend to support and vote for candidates according to party lines instead of discussions on policy.²³⁵ This effect is exaggerated because people are more likely to consume media that conforms with their preexisting views which provides a psychological utility to them.²³⁶ An increasing use of social media also feeds into the decreased exposure of alternate viewpoints because “Facebook friend networks are ideologically segregated.”²³⁷ Another factor that would lean toward minimizing

resolution. Let them become attentive to the grounds and principles of government, ecclesiastical and civil.”); *See also Id.* at 361-362 (Lewis Lapham's article “Ignorance Passes the Point of No Return” bemoaned the lack of historical knowledge of school children in 1995).

²³³ *See generally*, Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. OF ECON. PERSP. 2, 211-236 (Spring 2017).

²³⁴ *Read Robert Mueller's indictment of 13 Russians for election interference*, QUARTZ, available at <https://qz.com/1209619/russian-election-interference-read-the-full-text-of-robert-muellers-indictment-of-13-russian-nationals> (indictment found at U.S.A. v. Internet Research Agency LLC et al.).

²³⁵ Schudson, *supra* note 232, at 363-65.

²³⁶ Allcot & Gentzkow, *supra* note 233, at 218-19.

²³⁷ *Id.* at 221.

the value of information is a decreased faith in mass media that is concurrent with the increasing polarization of voters.²³⁸

Despite increasing party loyalty, polarization and reaffirmation of preexisting beliefs, polling information reflects how public opinion changes after shocking revelations. As an example, the approval rating of former New Jersey Gov. Chris Christie quickly dropped after the 'Bridgegate' scandal revealed he had ordered the shutdown of access lanes to the George Washington Bridge as an act of political retaliation.²³⁹ Christie's low approval ratings were harnessed in the following gubernatorial debates, when Democratic Candidate, Phil Murphy, was able to weaponize Republican Candidate Kim Guadagno's connection to Christie as she served as Christie's Lieutenant Governor.²⁴⁰ Matthew Hale, a professor of political science, colorfully explained, "Phil Murphy turned Chris Christie into a prefix to put in front of Guadagno and beat her with it."²⁴¹

Even if information from open public records did not have a bearing on the polls, the increased accountability of government

²³⁸ *Id.* at 215-16.

²³⁹ Philip Bump, *Christie lists the reasons he's unpopular: 1. Trump, 2. A thing about a bridge*, WASH. POST, Oct. 27, 2017, https://www.washingtonpost.com/news/politics/wp/2017/10/27/christie-lists-the-reasons-hes-unpopular-1-trump-2-a-thing-about-a-bridge/?utm_term=.2d208141a48f (last visited Apr. 3, 2019).

²⁴⁰ New Jersey Gubernatorial Debate, 27:00 (C-Span television broadcast Oct. 10, 2017) available at <https://www.c-span.org/video/?435236-1/candidates-face-jersey-governors-debate>. ("You've been along-side Governor Christie every step of the way for 2,821 days...").

²⁴¹ Brent Johnson, *12 reasons why Phil Murphy crushed Kim Guadagno on Election Day*, NJ.COM, Nov. 8, 2017, http://www.nj.com/politics/index.ssf/2017/11/11_reasons_why_phil_murphy_crushed_kim_guadagno_on.html (last visited Apr. 3, 2019).

agencies is its own a worthy goal. A prime example of the value of public outcry and awareness is the case of the Ferguson Police Department.²⁴² The DOJ's report on the Ferguson Police Department does not cite a reason why the investigation was commenced one month after the shooting death of Michael Brown.²⁴³ It is possible the DOJ would have conducted a thorough investigation without the public outcry, but the timing seems to infer the outcry at least played a factor.

Similarly, in the case of the NYPD's surveillance of Muslims, investigative journalism led to the uncovering of the operation.²⁴⁴ The NYPD was held accountable, and in response the agency created a list of reforms which included the disbanding of the unit responsible.²⁴⁵ Equally valuable, the revelation gave the victims a form of redress which would not have been possible without journalism.²⁴⁶

²⁴² See generally U.S. DEP'T OF JUST. CIV. RIGHTS DIV., *supra* note 3.

²⁴³ Compare U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 4 (2015) available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf with U.S. DEP'T OF JUST. CIV. RIGHTS DIV., *supra* note 3, at 1.

²⁴⁴ See generally *Katon v. NJ Dep't of Law & Pub. Safety*, No. A-0183-13T2, 2015 N.J. Super. Unpub. LEXIS 256 (Super. Ct. App. Div. Feb. 12, 2015).

²⁴⁵ Settlement Reached in NYPD Muslim Surveillance Lawsuit, CENTER FOR CONSTITUTIONAL RIGHTS, <https://ccrjustice.org/home/press-center/press-releases/settlement-reached-nypd-muslim-surveillance-lawsuit> (last visited Apr. 3, 2019).

²⁴⁶ *Id.*

The more tangible benefits of progress and policy are not the only benefits of the dissemination of information and transparency. A belief that government is accountable and responsible for its actions can lead to an increased faith in that government. Alternatively, the Kantian concept of 'justice for its own sake' is furthered by hindering the government from hiding its own misdeeds.

VII. Balancing and Solution

The benefits of government accountability and redressability of wrongs are the very bedrock of our democracy. Certainly, common law right-to-know may help stave off some corruption, but the careful structure of OPRA gives a vessel for those without means to request and receive records without the necessity of a lawyer. OPRA excels at giving the commoner access to attorneys who know they may recover fees from the government in due time by granting the recovery of legal fees. The progress that accountability brings is observable. The value of a transparent government is vast and arguably priceless.

Arguably, the costs associated with the right to know law are largely generated by non-adherence to it. There is a cost of researching and providing records that agencies have to absorb, but each unlawful denial of records may lead to years of disputes in courts which rack up phenomenal legal fees. Certainly, some unlawful denials would occur in any case as humans will inevitably try to hide their mistakes, or a request may simply be lost in the shuffle. But if these events are limited to isolated incidents, the cost of OPRA could be reduced. Furthermore, fears that OPRA is open for abuse would be mitigated if denials were less common. Lawyers would be less willing to defer payment if the outcome is less sure.

The Law as it is drafted is achieving its goals of making records more available, and building a foundation which favors access. Perhaps it is time to amend OPRA, not to limit it as some have suggested, but instead to create a firmer definition for personal accountability so that fines are enforced when

appropriate.²⁴⁷ How likely would one be to attempt to obfuscate another's misdeeds if their own well-being was on the line? Perhaps the changing political tides in New Jersey will lead to a different outlook on access to public records. If, however, a change of administration does not equate to a change in policy, then it may well be time to again expand the public's access. How else can a citizen hope to weather the onslaught of police brutality and ever-increasing presence and ease of police surveillance.

²⁴⁷ Barak Ariel et al., *supra* note 137, at 35.