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RICHARD RIVERA, Plaintiff-Respondent, v. UNION COUNTY PROSECUTOR'S OFFICE and JOHN ESMERADO in his official capacity as Records Custodian for the Union County Prosecutor's Office, Defendants-Appellants, and CITY OF ELIZABETH, Defendant-Intervenor-Appellant.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, DOCKET No. A-002573-19 Civil Action ON LEAVE TO APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY, DOCKET NO: UNN-L-2954-19 Sat Below: HON. JAMES HELY, J.S.C.

PLAINTIFF'S BRIEF IN SUPPORT OF RECONSIDERATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF APPENDIX

PRELIMINARY STATEMENT

In this case, the trial court held that the internal affairs (IA) reports relating to the former Police Director of Elizabeth, who resigned because an IA investigation concluded that he used racist and sexist slurs in the workplace, were subject to the Open Public Records Act (OPRA). The trial court, however, did not immediately release the records but instead ordered an *in camera* review so that the it could make redactions to protect the identities of the complainants and witnesses and other information. Before that review happened, however, this Court entered a stay and agreed to hear Defendants' interlocutory appeal. Thus, no court has seen the actual records at issue.

On June 19, 2020, nearly a month into nationwide protests against police brutality and racism, this Court issued an opinion reversing the trial court's opinion and depriving Plaintiff and the public of any opportunity to review IA reports about racism that occurred within the Elizabeth Police Department. Although Plaintiff of course disagrees with this Court's opinion that the IA reports are not subject to OPRA, that portion of the decision is not the subject of this motion for reconsideration. Rather, Plaintiff takes issue with the Court's common law decision, which is at odds with volumes of case law. Respectfully, the only proper course of action was a remand to the trial court for a common law balancing test and an *in camera* review.

This Court was, of course, free to provide guidance to the trial court as to why it felt that protecting the identities of

complainants and witnesses would be difficult, if not impossible, through redaction and to explain the other types of material the trial court should protect, but the Court's decision went much further than that. It was palpably incorrect for this Court to conduct that balancing test in the first instance. *Trial courts* conduct balancing tests on the first instance, *not* appellate courts.

This Court's decision to reach the common law is especially problematic given that: (1) the trial court never reached the issue; (2) the parties never briefed common law access before this Court; (3) the parties never discussed common law access at oral argument; and (4) this Court has never even seen the actual IA reports at issue. Without any *in camera* review of the actual IA reports in this case, this Court's multiple conclusions as to what the documents "likely" contain or that the documents "probably" could not be sufficiently redacted to protect the identity of the complainants and witnesses is speculative. Mere speculation has never, ever been sufficient to deny access to public records. Our Courts, including this Court, have repeatedly made that clear.

The trial court is in the best position to a conduct balancing test and to make fact-sensitive determinations based on the actual documents at issue as to whether the identities of witnesses and complainants and other sensitive information can be protected by redaction. Perhaps it cannot (and perhaps not all identities warrant protection, a common law argument Plaintiff was never permitted to make), but that decision must be made by the trial

court only after an *in camera* review of the actual IA reports and not just in reliance on the arguments made by Defendants' counsel or based on speculation as to what material *might* be within the documents. It was palpably incorrect for the Court to reach a common law decision without a remand first.

Accordingly, this Court should grant reconsideration and enter a remand order so that the trial court can review the records *in camera* and issue an opinion. If Defendants disagree with that opinion they are free to appeal from it, but it was palpably incorrect to deprive Plaintiff of the opportunity to make his case under the common law.

LEGAL ARGUMENT

I. THE COURT ERRED IN REACHING A DECISION UNDER THE COMMON LAW WHERE THAT ISSUE WAS NOT REACHED BY THE TRIAL COURT, NOT BRIEFED BY THE PARTIES, NOT DISCUSSED AT ORAL ARGUMENT, AND WHERE THE DOCUMENTS WERE NOT REVIEWED BY ANY COURT *IN CAMERA*

Reconsideration should be granted where either: (1) the court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the court either did not consider, or failed to appreciate the significance of probative, competent evidence. Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 455, 462 (App. Div. 2002). Here, the court's decision is clearly palpably incorrect and at odds with volumes of case law that makes it clear that common law balancing tests must be conducted by trial courts on the first instance, not appellate courts. Moreover, this Court reached its decision under

the common law without any briefing on that issue by the parties, no discussion of the common law at oral argument, and without ever having even seen the actual documents at issue. As argued further below, this Court should grant reconsideration and remand this matter back to the trial court for an *in camera* review and common law balancing test.

A. Common Law Balancing Tests are Fact-Sensitive and Must Be Conducted by the Trial Court

Because the trial court never reached Plaintiff's common law right of access claim, the common law was not an issue before this Court as part of Defendant's appeal. Moreover, none of the parties briefed the common law or addressed it at oral argument. Where an issue has not been reached by the trial court or briefed by the parties, this Court should not reach it. See, e.g., Franklin v. New Jersey Dep't of Human Servs., 225 N.J. Super. 504, 527 (App. Div. 1988) ("[C]ourts ordinarily do not consider arguments sua sponte that have not been briefed or argued by the litigants."), aff'd, 111 N.J. 1 (1988).

This is especially true in common law access cases. For decades, our courts have repeatedly held that "a trial court is better able than an appellate tribunal to . . . balance the parties' interests when that must be done to determine whether there is a common-law right of access." Philadelphia Newspapers, Inc. v. State, Dep't of Law & Pub. Safety, 232 N.J. Super. 458,

466 (App. Div. 1989). See also L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56, 91–92 (App. Div. 2017) ("Because none of the trial courts in the present appeals addressed these common-law balancing issues, we do not resolve them here. Instead, the balancing of interests should be adjudicated in the first instance in the trial court on remand."), aff'd, 238 N.J. 547 (2019); Paff v. Ocean Cty. Prosecutor's Office, 235 N.J. 1, 30 (2018) (remanding to trial court for common law balancing test to determine access to dash camera video of police brutality incident); Gilleran v. Twp. of Bloomfield, 227 N.J. 159, 178 (2016) (concluding that surveillance video was not subject to OPRA and remanding to trial court for common law balancing test); Drinker Biddle & Reath LLP v. New Jersey Dep't of Law & Pub. Safety, 421 N.J. Super. 489, 501 (App. Div. 2011) ("Although the judge mentioned the Loigman factors, he did not consider them, nor did he carefully evaluate Drinker's asserted public interest or whether the transcripts are relevant to the vindication of that public interest. Accordingly, we remand for the court to conduct the appropriate balancing test."); Keddie v. Rutgers, State Univ., 148 N.J. 36, 53–54 (1997) (remanding to trial court to conduct balancing test where one was never performed); S. New Jersey Newspapers, Inc. v. Twp. of Mt. Laurel, 141 N.J. 56, 75 (1995) (remanding to trial court for balancing test where interest in records was not briefed because "in determining whether partial access, redacted access, or no

access is the proper response, a careful evaluation of the interest in disclosure is indispensable to an appropriate resolution of the trial court's balancing function."); Atl. City Convention Ctr. Auth. v. S. Jersey Pub. Co., 135 N.J. 53, 70 (1994) ("[B]ecause the trial court did not determine what portions of the tapes could be released without interfering with the deliberative processes of the agency involved, without interfering with the privacy interests of the employee, or without imposing an undue burden on the court to review the materials, we conclude that the matter should be remanded to the Chancery Division."); S. Jersey Pub. Co. v. New Jersey Expressway Auth., 124 N.J. 478, 498 (1991) ("Because we conclude that the Memorandum constitutes a public record, we remand this case to the trial court to balance respondents' interest in confidentiality against the public interest in disclosure of the Memorandum."); Shuttleworth v. City of Camden, 258 N.J. Super. 573, 589 (App. Div. 1992) ("The record does not clearly reflect why the trial judge did not review in camera all the documents listed in the Vaughn index, and our review of the index compels us to conclude that such a review is required.10 However, *that review should initially be conducted by the trial judge*.").

The fact that balancing should be left to the trial court in the first instance is true even in a situation, unlike here, where the appellate court has actually seen the records at issue. See

Red Bank Register, Inc. v. Bd. of Educ. of Long Branch, 206 N.J. Super. 1, 10 (App. Div. 1985) ("While we have seen the reports we think that in the first instance the trial court should balance the interests for which the parties contend.")

Therefore, this Court's decision to apply the common law balancing test where the trial court had never applied it below was palpably incorrect. This is especially true where no party even briefed the issue for the Court and Plaintiff was not given the opportunity to explain why the factors set forth in Loigman v. Kimmelman, 102 N.J. 98, 110 (1986), weighed in favor of access. Respectfully, the Court's June 19, 2020 decision deprived Plaintiff of his right to argue his common law claim.

B. It Was Palpably Incorrect to Reach a Common Law Decision Without Ever Having Seen the Actual Documents at Issue Because Mere Speculation Cannot Justify Non-Disclosure of Public Records

The IA reports at issue in this case are not part of the record, nor were they ever reviewed by the trial court or this Court.[1] Without having seen the actual reports at issue, and perhaps never having seen *any* internal reports in any other case before either, this Court blindly concluded that the Loigman factors weighed in favor of non-disclosure. The Court did so in large part because:

[1] It is unclear if the counsel for Elizabeth and UCPO or their records custodians have ever even seen them and no one certified as to their *actual* contents.

> While we recognize that the trial court intended to redact the names and identifying circumstances to protect the complainants and witnesses from retribution and intimidation, **that task would likely prove very difficult, if not impossible. . . .** Because the complainants and witnesses are members of the EPD, their statements disclosing the racist and sexist slurs that Cosgrove uttered, and his other discriminatory actions, would likely disclose their identity or narrow the field to only a few individuals, even if all personally identifiable information is redacted. **Other members of the EPD, as well as Cosgrove himself, could probably deduce who reported the behavior.**
>
> We question the adequacy of a redaction process that simply deletes "names and circumstances" while leaving other information that would need to be scrubbed from the records to prevent identification of the complainants and witnesses from the redacted document. **The identity of those persons can often be readily determined from context or information that a judge conducting an *in camera* review may deem innocuous.** The ability to identify the complainants and witnesses may well impair their safety and otherwise put them at risk of retribution or intimidation.
>
> [Pa22-23 (emphasis added).]

Respectfully, without seeing the actual documents, this Court had no way whatsoever to know whether those concerns ring true and it should have remanded the matter back to the trial court for an *in camera* review.

Our courts have repeatedly held that mere speculation is insufficient to warrant a denial of access. See, e.g., North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 574 (2017) (rejecting detailed certifications by multiple law enforcement officers who claimed that releasing records relating to a police-involved shooting would jeopardize officer safety).

Moreover, this Court has firmly instructed that "the court is *obliged*, when a claim of confidentiality or privilege is made by the public custodian of the record, to inspect the challenged document *in camera* to determine the viability of the claim." Hartz Mountain Indus., Inc. v. N.J. Sports & Exposition Auth., 369 N.J. Super. 175, 183 (App. Div. 2004) (emphasis added). Accordingly, our appellate courts have repeatedly reversed lower courts who have failed to review material *in camera* to determine whether a party was correct in its assessment that a privilege or exemption applies to content within a record. See e.g., Payton v. New Jersey Tpk. Auth., 148 N.J. 524, 554 (1997) (remanding matter back to trial court for *in camera* review to determine whether attorney-client privilege or work product privilege applies); Shuttleworth, 258 N.J. Super. at 589 (remanding matter back to trial court for a complete *in camera* review of police records where court reviewed only some of the records *in camera*). An *in camera* review is especially appropriate "when the dispute turns on the contents of the withheld documents[.]" Quinon v. F.B.I., 86 F.3d 1222, 1228 (D.C. Cir. 1996).[2]

Respectfully, this Court made *assumptions* about what the IA reports would "likely" or "probably" contain, but it never verified

[2] Our courts frequently look to federal jurisprudence regarding the Freedom of Information Act for guidance in OPRA matters. See, e.g., MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 548 (App. Div. 2005).

those assumptions by looking at the documents. Plaintiff is all too familiar with how these assumptions often end up being false. In Rivera v. Borough of Fort Lee, Docket No. A-4006-16T1 (App. Div. May 3, 2019), Plaintiff requested standard operating procedures (SOPs) from the Fort Lee Police Department. It responded by producing the SOPs with substantial redactions, in many instances blacking out entire policies. Plaintiff sued, arguing that the documents were over-redacted and requesting that the trial court order them to be produced in a more narrowly redacted form. Ibid.

The trial court dismissed Plaintiff's complaint and concluded that the agency's black out redactions to the SOPs were lawful without ever having reviewed the actual SOPs *in camera*. [Pa33]. Instead, it reviewed *in camera* an *ex parte* Vaughn index by the agency and accepted the agency's arguments that the redactions were necessary to protect public safety.

Plaintiff appealed, arguing that the court erred by not even looking at the documents and making assumptions about what they contained solely based on the agency's arguments. This Court granted Plaintiff's appeal and stated, "We agree with plaintiff and remand for *in camera* review of the SOPs. Absent this review, the trial court cannot perform its function of assessing defendants' exemption claim, nor can we perform our *de novo* review of the court's legal conclusion that the exemption applies." Ibid. On

remand, the trial court reviewed the records *in camera* and removed substantial portions of the redactions from almost every SOP and ordered several SOPs to be produced without any redactions whatsoever. [Pa36]. In other words, the assumptions the trial court made proved to be wrong when it reviewed the actual records *in camera*.

In reaching its decision in this matter, this Court expressed doubt about an *in camera* review, stating: "The identity of those persons can often be readily determined from context or information that a judge conducting an *in camera* review may deem innocuous." [Pa22]. That does not, however, justify automatic non-disclosure. Rather, it justifies a careful *in camera* review and the submission of a Vaughn index to help guide the court's review. As this Court itself noted, in rare cases that may require an *in camera, ex parte* Vaughn index, so that the agency can more thoroughly explain why certain information would be harmful to release. See Pa22 (citing N. Jersey Media Group Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015), aff'd in part, rev'd in part, 229 N.J. 541 (2017)). If the trial court looks at the records and the information provided by Defendants to help guide its review, considers the parties' interests, and concludes the records cannot be sufficiently redacted, then so be it. But Plaintiff is entitled to have that *in camera* review.

All Plaintiff is asking is for this Court to follow decades

of case law that holds that trial courts should perform common law balancing tests and courts must issue decisions based upon the actual content of the records before them, not their assumptions about what the records may contain. Plaintiff was never afforded any opportunity to make any common law arguments to this Court, such as what the precise public interest in disclosure is or why redaction of all of the names of witnesses or complainants may not even be warranted.[3]

This Court's decision deprived Plaintiff of his day in court and it is palpably incorrect, as argued above. But more importantly, it is the people of Elizabeth who are losing out on information they need to hold their public officials and police department accountable. At a time when the nation is engaged in large scale protests against police brutality and racism, this Court issued an opinion that deprives the people of Elizabeth the right to know how long Cosgrove's racist and sexist behavior went on and whether there are other City officials or police department

[3] For example, at least one woman who is likely a complainant or witness filed a public lawsuit alleging that Cosgrove called her sexist slurs. See Salvero v. City of Elizabeth, Docket No. UNN-L-3295-19. Moreover, where witnesses are police department superiors or elected officials who provided information that they knew about Cosgrove's racist and sexist behavior, clearly the public's interest would outweigh any privacy interest in such circumstances. There are numerous other common law arguments that Plaintiff would make in the context of an *in camera* review before the trial court, but he was deprived of his opportunity to make those arguments or ever have any court look at the actual records to even see what they contain.

superiors who knew about it and let it continue. And it did so without even hearing any arguments whatsoever on why common law access should be granted and without having even glanced at the records in dispute.

Such a decision was palpably incorrect and this Court should take the opportunity to fix its error by granting Plaintiff's motion for reconsideration.

CONCLUSION

Accordingly, this Court should grant Plaintiff's motion for reconsideration and remand this matter back to the trial court for an *in camera* review and proper consideration of the applicability of the common law right of access to Plaintiff's request.

Respectfully submitted,

/s CJ Griffin