GANNETT SATELLITE INFORMATION NETWORK, LLC and STATES NEWSROOM, INC., Plaintiffs, v. OFFICE OF THE ATTORNEY GENERAL and IVONNELY COLON-FUNG, in an official capacity as Records Custodian, Defendants.	SUPERIOR COURT OF NEW JERSEY MERCER COUNTY LAW DIVISION – CIVIL PART DOCKET NO. MER-L-1248-23 CIVIL ACTION

BRIEF IN OPPOSITION TO PLAINTIFFS' ORDER TO SHOW CAUSE AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS IN LIEU OF ANSWER PURSUANT TO R. 4:6-2

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On the Brief

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

RULES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Alternative Responses to Reduce Instances of Violence & Escalation Together Program ("ARRIVE") was created in response to the stark reality that two out of every three uses of force by law enforcement involve a civilian experiencing a mental health emergency or who is under the influence of illicit substances. ARRIVE is designed to improve these outcomes by fostering collaboration between law enforcement and mental health professionals under a framework that takes advantage of existing state contracts with mental health providers, most often "screeners," who are qualified to assess, diagnose, and conduct follow-up visits with members of the community who are experiencing mental and behavioral health emergencies. In short, ARRIVE facilitates the general public's access to mental health professionals who are qualified to provide members of the community with the help they need, and who are conducting the same analysis they are charged with under this State's comprehensive mental health statutes, which are designed to promote and improve mental health services for the public at large.

Records that deal with individuals suffering from mental health or medical crises, regardless of why they are created, are protected under State and Federal laws designed to safeguard these individuals' reasonable expectations of privacy at an extremely vulnerable time in their lives. As a natural extension of its

primary purpose and framework, the records that result from the ARRIVE program and that are at issue in this case likewise contain the most sensitive information, including, but not limited to, names, dates and details of interactions, detailed mental health diagnoses, and clinical recommendations for follow-up treatment for private citizens who called for aid. These records, and the lives of the citizens they depict, must remain protected.

Plaintiffs' interest in ARRIVE, and their desire to obtain records that reveal details of the interactions between ARRIVE teams and individuals in need, does not compel a different conclusion. Allowing the public access to ARRIVE records would reveal confidential information about people in crisis and significantly disincentivize these same individuals from seeking help from trusted sources. It also would propound the stigma associated with mental and behavioral health, which is the precise reason that our State and Federal laws protect mental health and substance use records so strongly, and chill future operations of ARRIVE, which is designed to broaden access to treatment and support. If or when encounters under the ARRIVE program cross the line into an exercise of law enforcement authority, such as use of force, an arrest, or criminal charges, those records are made available as appropriate through law enforcement. But until that time, Plaintiffs' requests must be denied.

PROCEDURAL HISTORY COUNTERSTATEMENT OF FACTS[1]

A. Protections for Mental Health and Substance Use Records

Records of mental health and substance use are sensitive records of medical needs and treatment that are protected by both State and Federal law. These protections include statutory and regulatory provisions, all of which have one thing in common: they are designed to ensure that individuals' privacy is protected so that they are not stigmatized or presumed to be mentally incapacitated solely by reason of receiving an assessment or treatment for a mental health crisis.[2]

Mental health records in New Jersey are insulated from disclosure by N.J.S.A. 30:4-24.3, which requires confidential treatment of "[a]ll certificates, applications, records, and reports made pursuant to the provisions of Title [30] and directly or indirectly identifying any individual presently or formerly receiving services in a non-correctional institution." (emphasis added). Likewise, N.J.A.C. 10:37-6.79, which makes confidential the records of individuals receiving institutional and/or community mental health services, provides that "[a]ll

[1] Because they are closely related, the procedural and factual histories are combined to avoid repetition and for the court's convenience.

[2] These provisions include: N.J.S.A. 26:2B-7; N.J.S.A. 26:2B-20; N.J.S.A. 30:4-24.3; N.J.A.C. 10:37-6.79; N.J.A.C. 10:161A-27.1; 42 C.F.R. § 2.2; 42 C.F.R. § 2.12; 45 C.F.R. § 164.514(a); 45 C.F.R. § 160, Subpart E.

certificates, applications, information and records directly or indirectly identifying persons who are receiving or have received mental health services from a provider licensed by the Department [of Human Services], or for whom such services were sought, shall be kept confidential and shall not be disclosed by any person[.]"

These provisions protect records about mental health services even if the services were recommended for the individual, but not ultimately provided. Ibid.; N.J.A.C. 10:37-6.79. Disclosure is permitted only under certain narrow exceptions, including by authorization of the individual or by court order. N.J.A.C. 10:37-6.79(a)1-2. Where disclosure is permitted, certain protections are required, including written notice that disclosure without authorization from the subject of the records is prohibited. N.J.A.C. 10:37-6.79(h)(1).

On the federal level, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") is designed to safeguard the privacy of an individual's protected health information ("PHI") while ensuring that their health information is available for treatment and other appropriate purposes. Under HIPAA, PHI is broadly defined as "individually identifiable health information" held or transmitted by a covered entity. 45 C.F.R. § 160.103. HIPAA generally prevents PHI from being used or

disclosed unless the individual signs an authorization or an exception applies. See 45 C.F.R. § 160, Subpart E.

The HIPAA Privacy Rule does permit the disclosure of information if personal identifiers have been removed such that the data neither identifies an individual nor provides a reasonable basis to believe that the information can be used to identify an individual. 45 C.F.R. § 164.514(a) (emphasis added). Methods of "deidentification" vary; one method includes removing or altering eighteen enumerated identifiers from the information, including names, dates directly related to an individual, addresses, and zip code information "for all . . . geographic units containing 20,000 or fewer people[.]" 45 C.F.R. § 164.514(b). The key component to sufficiently removing identifying information is that there is no "actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information." 45 C.F.R. § 164.514(b)(2)(iii).

The United States Department of Health and Human Services' ("USDHHS") comments to the rules further support that information can only be deemed not PHI if it is redacted in accordance with the de-identification standards. These comments note that to meet the standard for not individually identifiable health information, either an expert must determine that the information is not PHI, or the information must be de-identified in accordance with the

requirements of 45 C.F.R. § 164.514. Department of Health and Human Services, 45 C.F.R. Parts 160 and 164 Standards for Privacy of Individually Identifiable Health Information; Final Rule at 53232 (August 14, 2002). They reflect the rule's underlying rationale, including that the agency is "cognizant of the increasing capabilities and sophistication of electronic data matching used to link data elements from various sources and from which therefore, individuals may be identified." Ibid.

Like mental health laws, Federal and State provisions that make substance use treatment records confidential aim to encourage treatment by preventing stigmatization. See N.J.S.A. 26:2B-7; 42 C.F.R. § 2.2. State law and regulations protect the confidentiality of substance use treatment records. N.J.S.A. 26:2B-20; N.J.A.C. 10:161A-27.1. Federal regulations likewise create strict requirements and safeguards to ensure the confidentiality of records that "[w]ould identify a patient as having or having had a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person." 42 C.F.R. § 2.12. These disclosure restrictions "are intended to ensure that a patient receiving treatment for a substance use disorder in a [substance use diagnosis or treatment] program is not made more vulnerable by reason of the availability of their

patient record than an individual with a substance use disorder who does not seek treatment." 42 C.F.R. § 2.2(b)(2).

B. The ARRIVE Together Program

ARRIVE aims to enhance responses to mental and behavioral health crisis calls, enable trained mental health professionals to respond directly to 9-1-1 calls that are truly behavioral health calls, and divert individuals in crisis from unnecessary entry into the criminal justice system. See McNally Cert., Exhibit 2. To achieve these goals, ARRIVE facilitates a joint response to emergency calls between Mental Health Service Providers ("MHSPs") and participating law enforcement agencies. Ibid.; see also McNally Cert., Exhibit 1.

MHSPs are practitioners trained and certified in behavioral health treatment, such as crisis intervention therapists, social workers, psychiatrists, and psychologists, who accompany law enforcement officers in responding to emergency service calls that involve mental health concerns.[3] Ibid. ARRIVE applies to emergency calls, received either by the participating police department's 9-1-1 dispatch system or by MHSPs directly, involving behavioral or mental health, a confused or disoriented

[3] The ARRIVE Program, which has now expanded to nine counties, includes various response models. In Union County and Cumberland County, the model includes the joint response described in this brief.

person, a welfare check, suicide, or other categories related to behavioral health. Ibid.

1. ARRIVE's Development and Framework

ARRIVE began in 2021 with an initial pilot program operated with the New Jersey State Police's Cumberland County stations. See Certification of Derick D. Dailey dated October 25, 2023, at ¶ 7 ("Dailey Cert."). It expanded to a second pilot program, operated with the Elizabeth Police Department and the Linden Police Department, both in Union County, in 2022. Ibid.

ARRIVE is administered through Memoranda of Understanding ("MOUs") between State agencies, participating law enforcement agencies, and MHSPs. It is designed to take advantage of existing contracts between DHS and MHSPs for mental health screening services under the Screening Outreach Program, which is governed by N.J.S.A. 30:4-27.1 to -11 and N.J.A.C. 10:31-1.1 to -11.4. See McNally Cert., Exhibit 1.

The Screening Outreach Program was enacted based on the State's policy of developing the public mental health system "in a manner which protects individual liberty and provides advocacy and due process for persons receiving treatment and insures that treatment is provided in a manner consistent with a person's clinical condition." N.J.S.A. 30:4-27.1. It aims to encourage "the development of screening services as the public mental health system's entry point in order to provide

accessible crisis intervention, evaluation and referral services to mentally ill persons in the community." Ibid; see also Warren Hosp. v. New Jersey Dept. of Human Services, Division of Mental Health Services, 407 N.J. Super. 598 (App Div. 2009) (discussing purpose of Screening Law and Regulations). It "is designed to provide screening and crisis stabilization services, 24 hours per day, 365 days per year, in every geographic area in the State of New Jersey." N.J.A.C. 10:31-1.1.

Under the Screening Program, DMHAS designates one or more mental health facilities in each county in the State as a screening service. See N.J.S.A. 30:4-27.4. They are accessible 24 hours per day, 7 days per week, through the hotline corresponding with the caller's county of residence. See https://www.nj.gov/humanservices/DMAHS/home/hotlines/MH_Screening_Centers.pdf. Once designated, "the screening service shall have, for the period of designation, the sole authority to provide screening in, and for, the geographical area in which it is located." N.J.A.C. 10:31-10.1(c). To maintain its designation status, a screening service is required to comply with all applicable State and Federal confidentiality laws, including HIPAA. N.J.A.C. 10:31-10.1(d).

A central function of the screening service is to "determine what mental health services are appropriate for the person and where those services may be most appropriately

provided in the least restrictive environment." N.J.S.A. 30:4-27.5. Screening services assess the crisis situation; identify stabilization, diversion, and support services needed; and/or evaluate individuals to determine if they meet the criteria for inpatient or outpatient civil commitment. N.J.A.C. 10:31-2.1(a). This includes linkages and referrals to mental health services for those individuals not recommended for civil commitment. Ibid. The Screening Program is designed "[t]o provide outreach for the purpose of crisis intervention and stabilization." N.J.A.C. 10:31-1.2(a)(3).

The screening service is comprised of a clinical team that includes a psychiatrist and screeners certified by DMHAS, and may also include crisis intervention specialists, social workers, registered professional nurses, psychologists, and/or other mental health professionals. N.J.A.C. 10:31-3.1; N.J.A.C. 10:31-3.3. Screeners evaluate an individual in psychiatric crisis "in order to ascertain his or her current and previous level of functioning, psychosocial and medical history, potential for dangerousness, current psychiatric and medical condition, factors contributing to the crisis, and support systems that are available," N.J.A.C. 10:31-1.3, and "ensure that the screening process is documented in the clinical record," N.J.A.C. 10:31-2.3(l). As part of their assessment, screeners are required to record sensitive, protected client

information, including, but not limited to: "(i) basic identifying data as it relates to the presenting crisis; (ii) the history and nature of the presenting problem; (iii) the psychiatric and social history; (iv) the medical history, including current medical status problems, allergies and current medication; (v) the mental status and level of functioning; (vi) any drug and alcohol use and history; (vii) any indication of dangerousness; (viii) exploration of available resources and natural support system; and (ix) preliminary diagnosis." N.J.A.C. 10:31-2.3.

2. ARRIVE's Operation

ARRIVE incorporates the goals of the Screening Program to expand the availability of screening services to the public, and relies on the same MHSPs who already offer services under the Screening Program. See McNally Cert., Exhibit 1.

The specific terms of ARRIVE are detailed in MOUs between participating MHSPs and local law enforcement agencies, each of which covers a different set of municipalities and outlines the parties' specific responsibilities. See Dailey Cert. Cert. at ¶ 8; McNally Cert., Exhibit 2. ARRIVE's partners each provide key aspects of the ARRIVE response. The participating police department provides one or more experienced law enforcement officers, who are certified in crisis intervention training, to respond to behavioral health service calls in collaboration with

the MHSPs. See McNally Cert., Exhibit 2; Dailey Cert. at ¶ 11. MHSPs conduct crisis intervention and screening services consistent with their statutory and regulatory duties. See McNally Cert., Exhibit 2.

An ARRIVE Together team responds specifically to 9-1-1 calls that deal with a mental or behavioral health need rather than a law enforcement need. Dailey Cert. at ¶ 13. When a participating police department receives a 9-1-1 call that involves a law enforcement matter, such as criminal activity or a threat of violence, it responds in the normal course and dispatches only law enforcement officers. Id. at ¶ 14. But when an incoming 9-1-1 call is identified as solely involving an individual experiencing a mental health emergency or a behavioral health crisis, the call is routed to the law enforcement officer and MHSP staffing ARRIVE. Id. at ¶ 13.

Once the service call is confirmed as appropriate for ARRIVE, the participating law enforcement officer and MHSP respond to the caller together. See McNally Cert., Exhibit 2. The law enforcement officer drives an unmarked vehicle and does not wear a full uniform. Ibid. On the scene, the MHSP leads the interaction based on their assessment of the call and the mental health needs of the caller or the individual in distress. Dailey Cert. at ¶ 13. The MHSP interacts directly with the individual in distress, collects information about their

symptoms, diagnoses, and medications, and develops a recommendation for support or treatment as needed. Ibid. Depending on the severity of the crisis, the MHSP may initiate the process of voluntary hospitalization or involuntary commitment. Ibid. The MHSP also creates a clinical record as they would in the normal course of their clinical duties and as required by the Screening Regulations. See N.J.A.C. 10:31-2.3. When not responding to reactive calls, the ARRIVE team follows up with individuals who have been previously served and proactively visit individuals in the community known to law enforcement that the MHSPs and officers collectively determine would benefit from mental health services outreach. Dailey Cert. at ¶ 12.

Both the participating police department and the MHSP must "comply with all applicable federal, State, and local laws, statutes, and regulations, including all requirements of [HIPAA]." See McNally Cert., Exhibit 2. Under ARRIVE, MHSPs perform screening services under the Screening Law and Screening Regulations, which require compliance with State and Federal confidentiality regulations. See N.J.A.C. 10:31-2.6; N.J.A.C. 10:31-10.1(d)(3). Finally, records dealing with the MHSP's response fall under the mental health record protections of N.J.S.A. 30:4-24.3 and N.J.A.C. 10:37-6.79 because MHSPs are not only licensed by, but also contracted and paid by, DHS to

perform screening services and to participate in ARRIVE. See McNally Cert., Exhibit 1.

3. Records Relating to ARRIVE

During ARRIVE's pilot stage in Cumberland County, using data from participating entities, staff in the Office of the Attorney General compiled narrative summaries of ARRIVE service call responses ("narratives") to monitor the program's progress and gain a high-level understanding of its efficacy by reviewing details and outcomes of each response. See Dailey Cert. Cert. at ¶ 17.

These narratives detail the entire interaction between the ARRIVE team and the subject of the call, which often includes clinical assessment by the MHSP specialist, discussion of medical, psychological, and psychiatric diagnoses, and referral or transportation to mental health services. See Dailey Cert. Cert. at ¶ 18. They also contain, in some places, references to an individual's name, age, gender, and mental health diagnosis, and describe the scene of the response, including whether family members or other individuals were involved, the presence of an ambulance, and details of the location, such as the names of local schools, businesses, and other details that would clearly identify where the law enforcement officer and MHSP responded to assist the individual in need. Ibid.

In Union County, the Linden and Elizabeth police departments created and maintained a working spreadsheet with data of the prior week's program response calls. Certification of Eugenia Haverty dated October 24, 2023, at ¶¶ 3-4 ("Haverty Cert."). The logs list the date, dispatch time, and arrival time of the law enforcement officer and MHSP, and the age, race, ethnicity, and gender of the individual involved. Id. at ¶ 8. The logs also include a notation of the outcome, including the individual's behavior, symptoms, and/or diagnosis, a notation of the follow-up actions taken, such as referrals to mental health services, orders for involuntary treatment, and involuntary commitment, and notation of whether the call resulted in an arrest. Ibid. Both the narratives and the spreadsheets contain geographic and demographic information that could identify a person to neighbors and onlookers, and highly sensitive and protected medical information.

The Elizabeth and Linden logs were created for internal monitoring purposes and to inform future ARRIVE Program calls. Id. at ¶ 10. More specifically, these logs provide ARRIVE officers from Union County, who are assigned across Elizabeth and Linden, with useful information regarding individuals' mental health status so the officers can conduct follow-up calls or visits as necessary. Id. at ¶ 11. These logs also provide crucial information to officers who may have to interact with the subjects

of the call again in the future. Ibid. These logs contain sensitive mental health information that would not be present in records created by law enforcement outside of the ARRIVE Program, including clinical impressions and mental health diagnoses. Id. at ¶ 9. They also include multiple pieces of information that could lead to identification of an individual suffering from a mental health crisis who called or was the subject of a call for assistance. Ibid.

4. Evaluation of the ARRIVE Program

To assess the efficacy of the ARRIVE Together Program, the Brookings Institution ("Brookings"), the Elizabeth Police Department ("Elizabeth"), the Linden Police Department, ("Linden"), and LPS executed an MOU ("Brookings MOU"). See McNally Cert., Exhibit 3. The analyses contemplated by the Brookings MOU include a process evaluation of the Program, an assessment of how data collection can be improved, and the publication of a report containing Brookings' initial findings. Ibid. As a result of this agreement, Brookings issued a report on March 16, 2023. See McNally Cert., Exhibit 4.

The Brookings MOU notes that Elizabeth and Linden "shall, to the extent possible, provide anonymized Data to Brookings by removing all Personally Identifiable Information (PII)," which is defined as "any information which may be used to determine an individual's identity, such as name, social security number,

or biometric records, alone or when combined with other personal or identifying information which is linked or linkable to a specific individual[.]" See McNally Cert., Exhibit 3, ¶ V.3. If "Brookings has inadvertently been provided with PII in any materials, documents, files, data or other information in connection with the Research Project, no intelligence or research product or final draft intended for public consumption shall include any PII whatsoever that could, directly or indirectly cause the person to be identified." Ibid.

Under the Brookings MOU, Brookings received both the narrative reports and the Elizabeth/Union logs described in Part A.3. Dailey Cert. at ¶¶ 22-23. As described above, the narrative reports include the date of the call and a detailed synopsis of the response and outcome, including descriptions of the location, while the logs include the date and time, demographic data on the individual involved, and a notation of the individual's symptoms and the response outcome. Dailey Cert. at ¶¶ 18, 26-27; Haverty Cert. at ¶ 8.

The Brookings Report, issued on March 16, 2023, explained that Brookings analyzed data from 342 police calls for service and follow-ups from December 2021 to January 2023. See McNally Cert., Exhibit 4. The records Brookings assessed were limited to the pilot's operation in Union and Cumberland counties over a period of less than three years, and the data and records

provided to Brookings contain, in some places, names, dates of birth, and mental health diagnoses, assessments, and recommendations for follow-up, as well as dates and locations of interactions between the subjects and MHSPs. Dailey Cert. at ¶ 18; Haverty Cert. at ¶ 8.

The Report made eight recommendations for the Program, and concluded that "ARRIVE Together is a highly effective program for reducing arrests and use of force (even across racial groups and other demographic outcomes), providing people experiencing mental health symptoms with specialized services, and reducing the workload and lack of specialized training among law enforcement[.]" McNally Cert., Exhibit 4. The Brookings Report provides anonymized, aggregated statistics, including demographics of served individuals, response call time-of-day, and the percentage of calls resulting in arrest. Ibid.

Under the Brookings MOU, Brookings was required to exclude any inadvertently shared PII from the research product and final draft intended for public consumption. See McNally Cert., Exhibit 3, ¶ V.3. The data displayed and referenced in the Brookings Report does not contain the names, ages, locations, or other personally identifying information of individuals who were served by the law enforcement officer and MHSP under the Program. See McNally Cert., Exhibit 4.

C. Plaintiffs' OPRA Requests

On March 23, 2023, The Record, a publication owned by Plaintiff, Gannett Satellite Information Network LLC, submitted a request under New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1.1 to -13 ("OPRA"), to the Office of the Attorney General ("OAG") seeking "copies of logs detailing ARRIVE together program interactions (as referenced by Attorney General Matt Platkin during a Feb. 8, 2023 press conference announcing the expansion of the program) or officer narrative reports from the launch of the program in December 2021 through the processing date of this request." See Complaint, Exhibit C.

On May 18, 2023, OAG responded to the request, advising that the requested narratives contain sensitive medical and mental health information and are thus exempt from disclosure under Executive Order No. 26 and N.J.S.A. 47:1A-9(a). Ibid. OAG further advised that the logs requested not only contain sensitive medical, psychiatric, and psychological information of private persons but were also created for the internal purpose of monitoring the program, and are exempt from disclosure under OPRA. Ibid.

On May 9, 2023, The New Jersey Monitor, a website published by Plaintiff, States Newsroom Inc., submitted a request under OPRA to OAG seeking "Officer narrative reports in ARRIVE Together calls for service from December 2021 to January 2023

(as referenced by Rashawn Ray from Brookings Institut[ion] at roughly 11 minutes and 50 seconds into this video https://www.youtube.com/watch?v=PyDku9_CzYw&t=706s)." See Complaint, Exhibit D. On May 18, 2023, OAG responded to the request by advising that the requested records contain sensitive mental health information and are thus exempt from disclosure under Executive Order No. 26 and N.J.S.A. 47:1A-9(a). See Complaint, Exhibit D.

On June 30, 2023, Plaintiffs filed this Verified Complaint and Order to Show Cause ("OTSC"). On July 25, 2023, the court set deadlines for the Parties' responses to the OTSC. On September 5, 2023, the parties entered a consent order under which Plaintiffs agreed to an extension of 30 days, setting Defendants' response deadline as October 10, 2023. Thereafter, Defendants filed an adjournment request, and Plaintiffs consented to an adjournment of Defendants' deadline to October 25, 2023. This opposition follows.

ARGUMENT

POINT I

PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED BECAUSE THE RESPONSIVE RECORDS CONTAIN SENSITIVE MEDICAL AND MENTAL HEALTH INFORMATION THAT ARE EXEMPT FROM OPRA AND THEIR RELEASE WOULD VIOLATE INDIVIDUALS' REASONABLE EXPECTATIONS OF PRIVACY.

OAG properly denied Plaintiffs' requests for ARRIVE records. These records contain sensitive medical and mental health

information exempt from OPRA, and their release would violate individuals' reasonable expectations of privacy.

"OPRA's purpose is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). In enacting OPRA, the Legislature declared that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access . . . shall be construed in favor of the public's right of access[.]" N.J.S.A. 47:1A-1.

But "the public's right of access [is] not absolute." Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 284 (2009). N.J.S.A. 47:1A-1 "instructs a public agency to refrain from disclosing 'a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.'" Paff v. Ocean Cnty. Pros. Office, 235 N.J. 1, 26 (2018) (citing N.J.S.A. 47:1A-1). When responding to a request for disclosure that implicates privacy concerns, agencies should apply "a balancing test that weighs both the public's strong interest in disclosure with the need to safeguard from public access personal

information that would violate a reasonable expectation of privacy." Burnett v. Cnty. of Bergen, 198 N.J 408, 427 (2009).

In Doe v. Poritz, 142 N.J. 1, 88 (1995), our Supreme Court adopted a multi-factor test to determine whether a public interest justifies disclosure of personal information in a government record. Those factors include:

> (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.
>
> [Burnett, 198 N.J. at 427 (quoting Doe, 142 N.J. at 88.]

Admittedly, courts do not need to analyze the Doe factors every time a party asserts that a privacy interest exists. See also Paff v. Ocean Cnty. Pros. Office, 235 N.J. at 27-28. But where disclosure would violate a "reasonable expectation of privacy," application of the Doe factors will guide a court's hand in decision-making. Burnett, 198 N.J. at 341. (emphasis added). Because it cannot seriously be disputed that an individual has a reasonable expectation of privacy over their personal mental health information, an analysis of the Doe factors is required here.

All of these factors favor non-disclosure. Plaintiffs' requests seek records generated as the result of calls placed to 9-1-1 by individuals seeking help, or others who have observed an individual whom they believed are in need of help, because they are experiencing mental health crises. These records contain detailed information including the callers' or subjects' name, age, race, mental health diagnoses, symptomatology, and/or recommendations for treatment that are protected by Federal and State laws and regulations designed to ensure that these individuals in need are not stigmatized or penalized for seeking help. Divulging the records of individuals who were the subjects of 9-1-1 calls at a time of crisis in their lives would not only significantly injure those individuals who received needed services, but also threaten the ability of MHSPs and the ARRIVE Program to continue providing the precise services the Screening Law was designed to encourage. OAG's denial should be upheld.

A. The Records Reflect Interactions With Mental Health Providers Called to Assess, Evaluate, and Make Recommendations for Vulnerable Individuals in Crisis.

Turning to Doe factors 1 and 2, this Court must consider both the type of record requested and "the information it does or might contain." Here, both factors favor non-disclosure.

The ARRIVE Program is designed to rely on the expertise of MHSPs, who are trained to interact with individuals in need of mental health services. Dailey Cert. at ¶ 6. When engaging with the subject of a 9-1-1 call during an ARRIVE response, MHSPs are conducting precisely the same analysis that they are charged with - and contracted for - under the Screening Law and Regulations. McNally Cert., Exhibit 2. Thus, the heart of the matter here is that the records responsive to the requests – narratives created for the purpose of monitoring the interactions between the MHSP and the individual in need, and an internal log designed to provide this same information to ARRIVE officers interacting with private citizens who are experiencing mental health crises – are not law enforcement records, but rather records reflective of mental health assessments or evaluations.

As a direct result of ARRIVE's goals, the records at issue here contain incredibly sensitive medical and mental health information, including PHI, gathered under circumstances where individuals have a more-than-reasonable expectation that the information they share, and their identities, will not be made public. The narratives detail the entire interaction between MHSPs and the subject of the 9-1-1 call, which often includes clinical assessments by the MHSP specialist, discussion of medical, psychological, and psychiatric diagnoses, and referral

or transportation to mental health services. Dailey Cert. at ¶ 18. They also describe the scene of the response, including whether family members or other individuals were involved, the presence of an ambulance, and details of the location, such as the names of local schools or businesses. Ibid.

The logs likewise list the date, dispatch time, and arrival time of the law enforcement officer and MHSP and the age, race, ethnicity, and gender of the individual involved, and include a notation of the outcome, including the individual's behavior, symptoms, and/or diagnosis, a notation of the follow-up actions taken, such as referrals to mental health services, orders for involuntary treatment, and involuntary commitment, and notation of whether the call resulted in an arrest. Dailey Cert. at ¶ 23. As the court in Rivera v. Office of the County Prosecutor recognized when determining whether identifying information about individuals who had experienced mental health crises could be redacted from Use of Force reports, "this is the type of information which could easily have an adverse impact on every facet of one's life." Docket No. BER-L-4310-12, slip op. at *26 (Law Div. Aug. 8, 2012).[4] "There is an obvious potential for harm from a personal standpoint and may have further

[4] A copy of this unpublished decision is included with this filing, consistent with Rule 1:36-3. Counsel is unaware of any contrary opinions.

consequences relating to employment, creditworthiness, reputation in the community and the like." Ibid.

The context in which this information was shared and gathered only underscores that Doe factor two militates in favor of non-disclosure. See Rise Against Hate v. Cherry Hill Twp., Docket Nos. A-3421-20, A-1440-21, A-1517-21, slip op. at *28-29 (App. Div. March 29, 2023) (holding that "the context" in which personal email addresses were obtained "underscores the reasonableness of an expectation that the email addresses would not be further disclosed to non-government organizations"), cert. granted, 254 N.J. 435 (2023).[5]

ARRIVE teams are activated when law enforcement receives a 9-1-1 call from someone who is experiencing or who observes someone who is experiencing a mental health crisis; when the team arrives and after the law enforcement officer confirms that the scene is secure, the MHSP takes the lead in his or her role as a licensed mental health provider. Dailey Cert. at ¶ 13. All of the information given to the MHSP is provided consistent with their role under the Screening Law, which is expressly

[5] A copy of this unpublished decision is included with this filing, consistent with Rule 1:36-3. While it is not contrary to the assertion that the context in which information was shared is relevant to a Doe analysis, Counsel also includes a copy of Brooks v. Kennedy, Docket No. A-3769-20 (App. Div. March 29, 2023), which was decided the same day as Rise Against Hate by the same panel, and reached a contrary conclusion, for completeness.

designed to develop this State's mental health system "in a manner which protects individual liberty and provides advocacy and due process for persons receiving treatment and ensures that treatment is provided in a manner consistent with a person's clinical condition." N.J.S.A. 30:4-27.1. It would be difficult to think of a more reasonable expectation of privacy than that which characterizes an exchange between an individual who is at their most vulnerable and a mental health specialist trying to get that individual the help they need. These factors thus weigh in favor of non-disclosure.

B. There Are No Meaningful Safeguards To Prevent Disclosure or Re-Identification of Individuals Who Suffer From Mental Health Emergencies.

Doe factor 5 asks whether meaningful safeguards can prevent disclosure of the information sought to be protected. See New Jersey Firemen's Assoc., 230 N.J. at 280.

Here, not only is there "no meaningful control over dissemination" of the records after they are provided, Burnett, 198 N.J. at 434, but redaction of the records would not solve this problem. Plaintiffs postulate that "because the records have been fully de-identified, they no longer contain 'information' that 'concerns' any individual." (Pb16).[6] But clarification is needed here.

[6] "Pb" refers to Plaintiffs' Brief.

The Record specifically requested "logs" reviewed by the Attorney General or "officer narrative reports from the launch of the program in December 2021 through the processing date of this request." See Complaint, Exhibit C. The narrative reports, which were created specifically for internal monitoring purposes, include detailed descriptions of the interactions between the ARRIVE team and the subject of the call, including references in some places to the individual's age, name, gender, or the location of the incident (including names of schools or businesses). Dailey Cert. at ¶¶ 17-18. Because they clearly "concern" individual ARRIVE responses, Plaintiffs' argument stumbles out of the gate.[7]

The Monitor's request sought "[o]fficer narrative reports in ARRIVE Together calls for service from December 2021 to January 2023 (as referenced by Rashawn Ray from Brookings Institut[ion] at roughly 11 minutes and 50 seconds into this video https://www.youtube.com/watch?v=PyDku9_CzYw&t=706s)." See Complaint, Exhibit D. Both the narrative reports and the logs are responsive. And while the logs do not include the same detailed description of the interaction, the problem persists.

[7] The Brookings MOU confirms that any identifying information inadvertently provided to Brookings must be kept strictly confidential. McNally Cert., Exhibit 3.

Our courts recognize that even de-identified information, when combined with other publicly available data, can lead to re-identification of individuals. Burnett, 198 N.J. at 430. It is well-established that "few characteristics are needed to uniquely identify a person." L. Sweeney, Simple Demographics Often Identify People Uniquely, Carnegie Mellon University, Data Privacy Working Paper 3 (Pittsburgh, 2000); see also P. Ohm, Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization, 57 UCLA L. Rev. 1701, 1742 (2010) ("[W]e must abandon the pervasively held idea that we can protect privacy by simply removing personally identifiable information[.]").

HIPAA's Privacy Rule itself, which the MSHPs are subject to here, acknowledges this risk; disclosure of records stripped of personal identifiers is appropriate only where the data does not identify an individual or provides no reasonable basis to believe that the information can be used to identify an individual. 45 C.F.R. § 164.514(a); see also 45 C.F.R. § 164.514(b)(2)(iii) (permitting release of information where there is no "actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information").

Said another way, this Court must consider not just whether names or dates of birth or diagnoses can be removed from the logs, but rather whether the information as a whole, or

individual pieces of it, may nevertheless lead to identification of the subjects of the ARRIVE interactions. When viewed through this lens, the risk of re-identification is high, even if the records were stripped of personal identifiers or diagnoses.

The records Brookings assessed were limited to the pilot's operation in Union and Cumberland counties over a period of less than three years, and the data and records at issue contain, in some places, names, dates of birth, and mental health diagnoses, assessments, and recommendations for follow-up, as well as dates and locations of interactions between the subjects and MHSPs. Dailey Cert. at ¶ 18, 23; Haverty Cert. at ¶ 8. The pilot's limited reach means that the population of individuals who could conceivably be in the records is very small to begin with, and the 342 calls for service Brookings assessed is far smaller than the 20,000-person threshold established by 45 C.F.R. § 164.514.

The inclusion of dates, gender, race, and additional identifiers in the logs (and more in the narratives) only increases the likelihood that a member of the local community could recognize and identify those involved. L. Sweeney, Simple Demographics Often Identify People Uniquely (2000), available at https://dataprivacylab.org/projects/identifiability/paper1.pdf (analyzing data to conclude that removing explicit identifiers such as names is not sufficient to prevent re-identification because of combinations of unique attributes); see also

Anonymous Data Might Not Be So Anonymous, Study Shows, available at https://www.cnbc.com/2019/07/23/anonymous-data-might-not-be-so-anonymous-study-shows.html ("As part of their research, the trio published an online tool to help people understand how likely it is for them to be re-identified, based on just three common demographic characteristics: gender, birth date and ZIP code. On average, people have an 83% chance of being re-identified based on those three data points, the researchers said.").[8]

The risk that the subject of the interaction could be re-identified is further heightened when the requested records are viewed alongside publicly available records. Burnett, 198 N.J. at 430. 9-1-1 calls, for example, are generally subject to OPRA, see Serrano v. S. Brunswick Tp., 358 N.J. Super. 352, 369 (App. Div. 2003), although courts have acknowledged concerns about release of 9-1-1 calls that may implicate reasonable expectations of privacy, see Courier News v. Hunterdon Cnty. Pros. Office, 358 N.J. Super. 373, 380 n.5 (App. Div. 2003) (granting release of 9-1-1 calls but cautioning that privacy concerns may apply); Asbury Park Press v. Ocean Cnty. Pros. Office, 374 N.J. Super. 312, 331 (Law Div. 2004) (rejecting newspaper's request for redacted 9-1-1 call from homicide

[8] The online tool is available at https://cpg.doc.ic.ac.uk/individual-risk/.

victim, finding that "release of even a redacted transcript would intrude on the reasonable expectation of privacy").

Likewise, Computer Aided Dispatch ("CAD") reports are regularly released under OPRA. See N. Jersey Media Group v. Twp. of Lyndhurst, 229 N.J. 541, 569 (2017) ("Because defendants produced the CAD report that existed, we do not consider whether CAD reports may be exempt from disclosure under OPRA."). The narrative reports provide the date and county of each Program response, as well as a detailed description of the location and local landmarks. The logs, while stripped of names, nevertheless provide even more detail - the exact time of dispatch and the age, race, and gender of the individual in crisis. When cross-referenced with other publicly available documents, such as 9-1-1 calls or CADs, a member of the public could easily discern the mental health symptoms, diagnosis, and treatment plan for a specific individual in the community. This potential for identification of served individuals should compel non-disclosure under Doe factor 5.

C. Individuals Who Suffer From Mental Health Crises and Are or Could Be Aided Through the ARRIVE Program Will Be Significantly Harmed by Disclosure of The Records.

Doe factors 3 and 4 "address the potential for harm from disclosure." Burnett, 198 N.J. at 432. They ask whether there is "potential for harm in any subsequent nonconsensual

disclosure" and assess potential "injury from disclosure to the relationship in which the record was generated[.]" Ibid. (quoting Doe, 142 N.J. at 88).

Here, the harm from disclosure of information that identifies or could lead to identification of an individual who has suffered from a mental health crisis and called for needed aid is significant. The stigma associated with mental illness, while unfortunate, is real. See Executive Order No. 40 (Codey 2005) ("[I]t is critical that the State of New Jersey and its governmental agencies foster the movement of New Jersey's mental health system away from a status quo characterized by stigma and isolation, towards a Treatment, Wellness and Recovery model, in as expeditious a manner as possible[.]"), available at https://www.nj.gov/humanservices/providers/orders/ExecOrder_40.pdf. It is also dangerous. See Executive Order No. 58 (Codey 2005) (creating the Governor's Council on Mental Health Stigma because "the stigma of mental illness is the primary barrier to the achievement of wellness and recovery and full social integration"), available at https://www.nj.gov/humanservices/providers/orders/ExecOrder_58.pdf; see also https://www.nj.gov/mhstigmacouncil/ ("[M]any people do not seek help for mental illnesses or substance use disorders because of stigma, whether that is felt by the individuals themselves or expressed by other people in their lives.").

State and Federal laws mitigate this danger by protecting the records of individuals who receive assessments or treatments for a mental health emergency or substance use. See N.J.S.A. 30:4-27.11c; 42 C.F.R. § 2.2(b)(2) (protections for substance use records "are intended to ensure that a patient receiving treatment for a substance use disorder . . . is not made more vulnerable by reason of the availability of their patient record than an individual with a substance use disorder who does not seek treatment"); see also Smith v. Am. Home Products Corp., 372 N.J. Super. 105, 130 (Law Div. 2003) ("One area where state law is more stringent than HIPAA is related to mental health care practice."); N.J.R.E. 505, 518, and 534 (privileging interactions and communications between a mental health service provider and a patient).

Here, the records provide demographic and geographic data that are potentially sufficient to identify the subject to neighbors and onlookers, and mental health data that is highly sensitive and therefore protected. The consequences of release are enormous. Releasing records that could reveal the identities of individuals who have suffered from mental health crises would not only expose vulnerabilities explicitly protected by State and Federal law; it also would discourage private citizens from calling for desperately-needed help. See In re New Jersey Firemen's Assoc. Obligation to Provide Relief

Applications Under Open Public Records Act, 230 N.J. 258, 280 (2017) (finding that disclosure revealing who applied for financial aid would cause "individuals seeking benefits [to] fear that sensitive information could be made public"). In the context of the ARRIVE Program, which is designed both to provide access to mental health services to a wider swath of individuals who need help and to reduce violent interactions between law enforcement and the public, this risk is only heightened. Not only would individuals who have already sought help be harmed, but it would chill ARRIVE interactions going forward. This outcome is inconsistent with this State's longstanding commitment to promoting mental wellness and destigmatizing mental health emergencies. These factors compel non-disclosure.

D. Plaintiffs' Asserted Need For Access Is Already Satisfied By Publicly-Available Data.

"As a general rule, [courts] do not consider the purpose behind OPRA requests." Burnett, 198 N.J. at 435. That said, under Doe factor 6, "when legitimate privacy concerns exist that require a balancing of interests and consideration of the need for access, it is appropriate to ask whether unredacted disclosure will further the core purposes of OPRA: 'to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Ibid. (quoting Mason, 198 N.J. at 64).

Plaintiffs contend that the logs and narratives should be disclosed because they have an "interest in independently evaluating the data." (Pb18). But this interest is well-satisfied by the Brookings Report itself, which already provides all of the aggregated data points that could realistically be produced without compromising the identity of individuals who have sought mental health treatment and been served through ARRIVE. See McNally Cert., Exhibit 4. Among other data, the Brookings Report establishes that the average age of the individual served was 41; that 63% were male and 37% were female; and that the breakdown of race included 26% White non-Hispanic, 39% Black non-Hispanic, 35% Hispanic, 59% White (including Hispanic), and 41% Black (including Hispanic). Ibid. It also provides a myriad of other details, including various outcomes that were reported; a generalized description of the callers who initiated the interaction; and more. Ibid.

Plaintiffs' request for the underlying data is outweighed by the risk of releasing records that could directly or indirectly identify the identities of the individuals sought to be served by ARRIVE. If or when an ARRIVE interaction crosses the line into an exercise of law enforcement authority, such as use of force, those records are made available with redactions as appropriate through requests to law enforcement. But until that time, these records remain protected.

E. Existing Law, Public Policy, and the Public Interest All Militate Non-Disclosure.

The final Doe factor "focuses on 'whether there is an express statutory mandate, articulated public policy, or other recognized public interest' in favor of public access." Burnett, 198 N.J. at 435. Here, Doe factor 7 weighs in favor of non-disclosure because State and Federal law, public policy, and the public interest all recognize that protecting records pertaining to mental health interactions and diagnoses are of paramount importance.

Begin with legislative protections for mental health records. Mental health records are insulated from disclosure by N.J.S.A. 30:4-24.3, which requires confidential treatment of "[a]ll certificates, applications, records, and reports made pursuant to the provisions of Title [30] and directly or indirectly identifying any individual presently or formerly receiving services in a non-correctional institution." Federal and State law likewise prioritize the protection of records pertaining to mental health emergencies or substance use disorders at least in part to reduce the stigma associated with seeking help. N.J.S.A. 26:2B-7; N.J.S.A. 26:2B-20; N.J.S.A. 30:4-24.3; N.J.A.C. 10:37-6.79; N.J.A.C. 10:161A-27.1; 42 C.F.R. § 2.2; 42 C.F.R. § 2.12; 45 C.F.R. § 164.514(a); 45 C.F.R. § 160, Subpart E.

But protections do not end there. In addition to protections afforded to mental health records under Executive Orders 40 and 58, Executive Order No. 26 (McGreevey 2002) declares information regarding an individual's health history is not a government record subject to public access. Specifically, the Order provides that "information concerning individuals . . . relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation" shall not be considered to be government records subject to public access. Because N.J.S.A. 47:1A-9(a) does not abrogate exemptions from public access granted by Executive Order, OPRA also protects this information from disclosure.

Courts considering these issues under OPRA have reached the same conclusion. In Rivera v. Union County Prosecutor's Office, 250 N.J. 124, 150 (2022), our Supreme Court recognized the need to redact "personal information that would violate a person's reasonable expectation of privacy if disclosed, such as medical information." Likewise, in Rivera v. Office of the County Prosecutor, the court considered whether certain information in Use of Force reports ("UFRs"), which are otherwise subject to disclosure under OPRA, see O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 385 (App. Div. 2009), was shielded from disclosure under Executive Order No. 26. Docket No. BER-L-4310-12, slip op. at *18. It found that "[n]ames listed on UFRs

which include an indication of 'suicidal,' 'emotionally disturbed person,' 'EDP,' or the like cannot be released as they are not subject to disclosure under OPRA." Ibid. The court explained that:

> While a UFR is not, and does not contain, a medical diagnosis, it certainly does contain information relating to the psychiatric or psychological history of the subject of force, namely he or she suffered a psychological incident which may require treatment. As such, the information is not a public record subject to disclosure under OPRA.
>
> [Ibid.]

The records here do not simply contain the same type of information the Law Division found exempt from access in Rivera, they are designed to specifically capture it. And, unlike UFRs, which indisputably pertain to police action, the ARRIVE records at issue here contain far more details than UFRs and cannot be easily redacted without risking re-identification. Thus, both legislative intent and precedent support non-disclosure.

Public policy and the public interest are in accord. The same laws that protect mental health records recognize the public's interest in promoting statewide improvement of mental health systems and in protecting individuals from the stigma associated with mental health and substance use to encourage those individuals to seek and continue receiving treatment. E.O. 40; E.O. 58. And protection for mental health records "not

only serves the private interest of the patient by protecting confidential communications . . . from involuntary disclosure, but it serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem; the mental health of the citizenry, no less than its physical health, is a public good of transcendent importance." 44 A.L.R. 3d 24.

These concerns are all implicated by release of the records at issue here. At their heart, the narrative reports and logs being withheld are not law enforcement records. They are mental health records concerning individuals' mental health history, diagnosis, treatment, and evaluation, and are no less deserving of protection simply because they originated from a 9-1-1 call rather than a direct call to the Screening Hotline. Doe factor 7 strongly favors non-disclosure.

F. The Records Are Also Exempt as Advisory, Consultative, or Deliberative Material.

The narrative reports requested by Plaintiffs were created for the express purpose of reviewing and monitoring ARRIVE's performance, and were used to provide updates to the Attorney General by his counsel. Dailey Cert. at ¶¶ 17-18. Likewise, the logs were created by the Union County participating police departments for the participating police departments, and were used to inform future interactions between ARRIVE officers and

the members of the public the program is designed to serve. Haverty Cert., at ¶¶ 10-11. Provision of these records to Brookings under a data-sharing agreement that expressly made Brookings LPS' consultant for the purpose of assessing ARRIVE did not break this chain of privilege.

When requested material appears on its face to encompass legislatively recognized confidentiality concerns, a court should presume that the release of the government record is not in the public interest. Paff v. Ocean Cty. Prosecutor's Office, 446 N.J. Super. 163, 179 (App. Div. 2016). Although OPRA broadly defines the term "government record," it expressly provides that it "shall not include inter-agency or intra-agency advisory, consultative, or deliberative material." N.J.S.A. 47:1A-1.1. "This exemption has been construed to encompass the deliberative process privilege, which has its roots in the common law." Ciesla v. N.J. Dep't of Health & Senior Servs., 429 N.J. Super. 127, 137 (citing Educ. Law Ctr., 198 N.J. at 284).

The deliberative process privilege "permits the government to 'withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which [its] decisions and policies are formulated.'" Ciesla, 429 N.J. Super. at 137 (quoting In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000)). Its purpose is to "'ensure free and uninhibited communication within governmental agencies

so that the best possible decisions can be reached.'" Id. at 137 (quoting Educ. Law Ctr., 198 N.J. at 286). "[T]he privilege is necessary to ensure free and uninhibited communication within governmental agencies so that the best possible decisions can be reached[.]" Educ. Law Ctr., 198 N.J. at 286. It "bars the 'disclosure of proposed policies before they have been fully vetted and adopted by a government agency,' thereby ensuring that an agency is not judged by a policy that was merely considered." Ciesla, 429 N.J. Super. at 137-38 (quoting Educ. Law Ctr., 198 N.J. at 286).

"In order to invoke the deliberative process privilege, an agency must initially prove that a document is 'pre-decisional,' i.e., 'generated before the adoption of an agency's policy or decision,' and also 'deliberative,' in that it 'contain[s] opinions, recommendations or advice about agency policies.'" Id. at 138 (alteration in original) (quoting Integrity, 165 N.J. at 84-85). The relevant inquiry is "how closely the material relates to the 'formulation or exercise of . . . policy oriented judgment or [to] the process by which policy is formulated.'" Educ. Law Ctr., 198 N.J. at 275 (quoting Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)).

"The deliberative nature of the material sought must be functionally determined based on the document's nexus to the decision-making process and its capacity to expose the agency's

deliberations during that process," rather than on a "purely semantic exercise" of labeling it "fact" or "opinion." Educ. Law Ctr., 198 N.J. at 297. "Pre-decisional documents do not lose their protection from unwarranted public scrutiny merely because they may contain numerical or statistical data or information used in the development of, or deliberation on, a possible governmental course of action." Ciesla, 429 N.J. Super. at 139 (quoting Educ. Law Ctr., 198 N.J. at 295).

Here, disclosure of the narrative summaries and logs would directly undermine the deliberative process privilege. The ARRIVE Program was created by the Attorney General in an effort to improve the outcomes in law enforcement's response to emergency behavioral health crisis calls, to divert individuals in crisis from unnecessary entry into the criminal justice system, and reduce the threat of violence during interactions between law enforcement and individuals in crisis. Dailey Cert. at ¶ 4. It began with a limited pilot program, operational in two counties, and was marked by ongoing monitoring not just by OAG and the Attorney General, but also the participating police departments themselves. The narratives were created to permit counsel-level monitoring and review of how the program was progressing and to enable appropriate decision-making regarding the pilot program, and fall squarely within the advisory, consultative, or deliberative exemption. Id. at ¶¶ 17-18.

Likewise, the logs were designed specifically to inform participating officers' future interactions with individuals who had already been served and aided by their colleagues. Haverty Cert. at ¶¶ 10-11. While concededly factual in nature, the combination of the sensitive information and the purpose for which these records were created support non-disclosure under N.J.S.A. 47:1A-1.1. See Educ. Law Ctr., 198 N.J. at 296 ("The mere use of the word 'process' in the name of the [deliberative process] privilege suggests that the material can include factual components and still be protected from disclosure if it was used in the agency's efforts to reason through to an ultimate decision, including a decision to reject all options and not to act.").

POINT II

PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED BECAUSE THE NARRATIVES AND LOGS SHOULD NOT BE DISCLOSED TO PLAINTIFFS UNDER THE COMMON LAW RIGHT OF ACCESS.

This Court should dismiss Plaintiffs' request for records under the common law because the State's interest in protecting the confidentiality of sensitive behavioral health information and the privacy interests of the individuals documented in the records far outweighs any interest in disclosure.

It is well-settled that the right to access common law records "is a qualified one." Keddie v. Rutgers, 148 N.J. 36,

49-50 (1997). While potentially broader than the statutory right to a "government record" under OPRA, "[t]he trade-off is that, '[u]nlike a citizen's absolute statutory right of access, a plaintiff's common-law right of access must be balanced against the State's interest in preventing disclosure.'" Educ. Law. Ctr., 198 N.J. at 302 (second alteration in original) (quoting Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 46 (1995)). To gain access to public records under the common law, three criteria must be met:

> (1) the records must be common-law public documents; (2) the person seeking access must establish an interest in the subject matter of the material; and (3) the citizen's right to access must be balanced against the State's interest in preventing disclosure.
>
> [Mason v. City of Hoboken, 196 N.J. at 68 (2008) (quoting Keddie, 148 N.J. at 50) (internal quotation marks and citations omitted).]

Defendants do not dispute that the first prong of the test is met. And while Defendants acknowledge Plaintiffs' interest in the requested records, the balancing test reveals that it is far outweighed by the State's interest in protecting the records from disclosure.

When balancing a citizen's right of access against the State's interest in preventing disclosure, courts must consider:

> (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government;
>
> (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed;
>
> (3) the extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure;
>
> (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers;
>
> (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and
>
> (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.
>
> [Educ. Law Ctr., 198 N.J. at 303 (quoting Loigman v. Kimmelman, 102 N.J. 98, 113 (1986))].

Significantly, "when engaging in the balancing test required under the common law, a court may look to the exclusions in OPRA as expressions of legislative policy on the subject of confidentiality." Bergen Cty. Improvement Auth. v. N. Jersey Media Group, 370 N.J. Super. 504, 520 (App. Div. 2004). "[W]hen the requested material appears on its face to encompass legislatively recognized confidentiality concerns, a court should presume that the release of the government record is not

in the public interest." Michelson v. Wyatt, 379 N.J. Super. 611, 621 (App. Div. 2005).

Here, as articulated in Point I, N.J.S.A. 47:1A-1 bars disclosure of an individual's personal information when such disclosure would violate their reasonable expectation of privacy. See Paff, 235 N.J. at 26. This exclusion expresses a legislative policy of protecting records in which individuals have a reasonable expectation of privacy. See Rivera v. Union Cnty. Pros. Office, 250 N.J. at 150 (noting that disclosure of personal information, such as medical information, would violate a person's reasonable expectation of privacy.).

Moreover, when confidentiality is raised in a common law right of access claim, "courts balance the requestor's interest in disclosure against the government's interest in confidentiality." In re Firemen's Assoc., 230 N.J. at 281-82. At the center of the balancing process are "'[t]he relative interests of the parties in relation to the specific materials in question.'" Ibid. (quoting Piniero v. N.J. Div. of State Police, 404 N.J. Super. 194, 206-07 (App. Div. 2008)). "When there is a confidentiality claim, the 'applicant's interest in disclosure is more closely scrutinized.'" Ibid. (quoting Keddie, 148 N.J. at 51). "With this in mind, courts consider whether the confidentiality claim is 'premised upon a purpose which tends to advance or further a wholesome public interest

or a legitimate private interest.'" Ibid. (quoting Loigman, 102 N.J. at 112).

Plaintiffs contend that the logs and narratives should be disclosed because they have an "interest in independently evaluating the data." (Pb18). But this justification pales in comparison to the public's irrefutable interest in non-disclosure of sensitive records of behavioral health response and treatment, especially where the release of such records could readily lead to the identification of individuals suffering behavioral health and the public disclosure of their diagnosis and treatment. In addition to the concerns raised by each and every Doe factor described above, the applicable Loigman factors – specifically factors one, two, and three – compel the conclusion that the narrative report and logs should remain confidential.

These factors speak to the impact disclosure will have on agency functions, persons who may provide such information, or on agency decision-making. Without guarantees of confidentiality, ARRIVE's goals would be severely undermined, and future expansion of the program significantly chilled. Dailey Cert. at ¶¶ 28-29. But even more significantly, disclosure will have a tremendous impact upon persons who have provided information to the MHSP specialist on scene in an ARRIVE response call. See Educ. Law Ctr., 198 N.J. at 303 (quoting Loigman v. Kimmelman, 102 N.J. 98, 113 (1986)). During a behavioral health crisis response, the

individual in crisis is relying on the trust and expertise of the mental health professional, and given the stigma surrounding mental health, is most certainly relying on the idea "their identities would not be disclosed." Ibid. Plaintiffs cannot seriously disagree that records created by MHSPs who responded to calls to the Screening Hotline under the Screening Program cannot and should not be disclosed to the public. It is equally ludicrous to suggest that the records of individuals who may have been unaware of the Screening Program, but received the exact same services through ARRIVE, should somehow be treated differently.

In short, Plaintiffs' interest in disclosure of the narrative report and logs cannot overcome the overwhelming public interest in maintaining their confidentiality. Since Plaintiffs' interests fail to outweigh the government's interest in maintaining confidentiality, Plaintiffs' request for access under the common law must also be denied.

POINT III

PLAINTIFFS ARE NOT PREVAILING PARTIES AND THEREFORE ARE NOT ENTITLED TO ATTORNEY'S FEES AND COSTS.

Finally, OPRA authorizes the award of reasonable attorney's fees to a requestor who prevails in any proceeding where the "custodian [of the record] unjustifiably denied access to the record in question[.]" N.J.S.A. 47:1A-6; see also New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr., 185 N.J.

137, 153 (2005). The New Jersey Supreme Court has adopted the catalyst theory as the framework for determining whether a litigant is entitled to counsel fees in an OPRA matter. Mason, 196 N.J. at 76. "The catalyst theory . . . . empowers courts to award fees when the requestor can establish a 'causal nexus' between the litigation and the production of requested records." Id. at 79.

To be a "prevailing party," a litigant must satisfy a two-prong test. Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001). First, the litigant seeking fees must "establish that the lawsuit was causally related to securing the relief obtained; a fee award is justified if [the party's] efforts are a necessary and important factor in obtaining the relief." Ibid. (internal citations omitted). Second, he or she must "prove that the relief granted has some basis in law. The party seeking fees need not obtain all relief sought, but there must be a resolution of some dispute that affected the defendant's behavior towards the prevailing plaintiff." Ibid. (internal citations omitted).

Here, as discussed above, Defendants lawfully denied Plaintiffs' requests for access to deliberative records containing sensitive, personally identifiable information of behavioral health as they are exempt from disclosure under both OPRA and the common law. Accordingly, Plaintiffs are not prevailing parties entitled to attorney's fees and costs of suit pursuant to either N.J.S.A. 47:1A-6. Counsel fees are not available under the common

law right of access. Gannett Satellite Network v. Twp. of Neptune, 254 N.J. 242, 264 (2023).

CONCLUSION

For all of these reasons, Defendants respectfully request that the court deny Plaintiffs' Order to Show Cause and dismiss Plaintiffs' Verified Complaint in its entirety, with prejudice.

Respectfully submitted,

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