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RECENT OPRA COURT DECISION SUMMARIES

CIVIL PENALTIES

North Jersey Media Group, Inc. v. State of N.J. Office of the Governor, __ *N.J. Super.* __ *(App. Div. 2017)*(Holding that the trial court erred in not imposing civil penalties for the agency's knowing, willful and unreasonable denial of the requestor's OPRA requests relating to the Port Authority's lane closures under N.J.S.A. 47:1A-11).

While the GRC has authority to impose civil penalties where warranted for non-compliance with OPRA, that authority is not exclusive, and the courts also have authority to impose civil penalties, where, as here, the denials of the requestor's OPRA requests were deemed knowing, willful and unreasonable under N.J.S.A. 47:1A-11.

EXEMPTIONS FROM DISCLOSURE

Bay Head-Mantoloking Land Co. v. Konopada, unpublished, Appellate Division, decided August 14, 2017 (draft appraisals furnished in anticipation of condemnation proceedings are protected from disclosure under OPRA's deliberative process exemption, at least until released to the property owner).

The court distinguished the holding in Tractenberg v. Township of West Orange, 416 N.J. Super. 354 (App. Div. 2010) on that basis that there were no ongoing or

even probable future negotiations based on the appraisals there deemed public, which were in final form. Under the reasoning of Tractenberg, even a finalized appraisal would be exempt from disclosure under OPRA's exemption for records that would give advantage to competitors, in the event there were ongoing negotiations, or even the probability of negotiations in the near future.

Finally, the court in Bay Head-Mantoloking noted the dispute was moot because, by the time the case was argued in the Appellate Division, the appraisals at issue had been released to the property owners so that the agency was now willing to release them to the requestor if another OPRA request was made.

D.F. and A.C. v. Collingswood Board of Education, unpublished, Appellate Division, decided November 10, 2016 (remanding to trial court for a more detailed in camera review to determine whether names were properly redacted from attorney billings under the attorney-client privilege).

The requestors, a parent and minor child, sought a school board's attorney's bills regarding ongoing litigation under the federal Individuals with Disabilities Act (IDEA). The trial court had initially upheld redaction of all names from the bills so as not to disclose legal strategy. The Appellate Division remanded to the trial court for a more particularized finding as to why and how the attorney client privilege warrants redaction of each name.

Paff v. Bergen County, unpublished, Appellate Division, decided March 13, 2017 (Log of complaints against county corrections officers was properly redacted to remove names of officers and complainants).

Under N.J.S.A. 47:1A-9, OPRA does not abrogate exemptions under "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." Because Attorney General Guidelines for internal affairs investigations provide for confidentiality of such complaints, and because those guidelines are regulations promulgated under statutory authority,

the complaints sought were properly redacted to remove names of officers and complainants.

In addition, the fact that the custodian initially omitted the legal basis for the redaction does not entitle the requestor to attorney's fees under N.J.S.A. 47:1A-6.

Paff v. Cape May County Prosecutor's Office, unpublished, Appellate Division, decided November 17, 2016 (holding that letters regarding police officers from the prosecutor to the mayor were exempt from disclosure under OPRA as inter-agency advisory communications).

However, the court in Paff v. Cape May, remanded to the trial court for a clearer application of the Loigman factors in weighing the requestor's interest against the agency's interest in non-disclosure under the common law.

Smith v. Swedesboro-Woolwich School District Board of Education, unpublished, Appellate Division, decided March 6, 2017 (Closed session minutes regarding personnel and other privileged matters are not subject to disclosure under OPRA).

The Open Public Meetings Act and OPRA dovetail so that the same exemption that permits a meeting in closed session protects the minutes of that meeting from disclosure under OPRA.

MOOTNESS

Stop & Shop Supermarket v. County of Bergen, unpublished, Appellate Division, decided April 6, 2017 (If requestor is provided the requested documents after denial but prior to filing its complaint in court, the complaint will be dismissed as moot.)

A requestor's desire to obtain attorney fees for an improper denial of an OPRA request is not a sufficient basis to maintain a lawsuit where the agency provided the requested document(s) prior to the lawsuit being filed. (Nor can the lawsuit

be said to have resulted in disclosure of the documents under such circumstances, under the catalyst theory or otherwise.)

PRIVACY

Privacy Background:

One key distinction between the common law right to know and OPRA is that the former requires a balancing between the requestor's interest in disclosure and government's countervailing interest in non-disclosure. The greater the requestor's interest, the greater the countervailing interest must be. Under Loigman v. Kimmelman, 102 N.J. 98, 113 (1986), the considerations to be balanced against the requestor's interest include, but are not limited to, the following six factors:

> (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 decisionmaking 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.

In contrast, under OPRA, there generally is not a balancing test: If the requested record is a government record, and not exempt from disclosure, the requestor need show no particular need or interest, and there is no need to balance any countervailing interest in non-disclosure.

But the one exception is where a requestor seeks personal information that another citizen has provided to government with a reasonable expectation of privacy under N.J.S.A. 47:1A-1. Under those circumstances, as with the common

law, the courts do apply a balancing test, albeit articulated slightly differently than under the common law. Thus, in Burnett v. County of Bergen, 968 A.2d 1151, 198 N.J. 408 (2009), our Supreme Court applied a seven-factor balancing test, to reconcile OPRA's "twin aims of public access and protection of personal information":

> (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.
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> [Burnett v. Bergen County, supra, 968 A.2d at 1162.]

In Burnett, the outcome of the balancing test weighed in favor of redacting Social Security numbers from the requested county clerk's records (namely, millions of recorded deeds) before releasing them. 968 A.2d at 1167.

The Court in Burnett reasoned that OPRA has "competing command[s]," and OPRA's "twin aims - of ready access to government records and protection of a citizen's personal information – require a careful balancing of the interests at stake." Id., 968 A.2d at 1154, 1161.

On the one hand, N.J.S.A. 47:1A-1 provides 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 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".

On the other hand, N.J.S.A. 47:1A-1 provides: "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".

The Court in Burnett observed that, while it appears at the beginning of the OPRA legislation, OPRA's provision protecting privacy is "neither a preface nor a

preamble," but is substantive in nature, and "imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests." Id., 968 A.2d at 1159.

After an analysis of the legislative history and hearings leading up to enactment of OPRA, our Supreme Court concluded: "OPRA's legislative history, therefore, offers direct support for 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." Id., 968 A.2d at 1161.

Accordingly, when a citizen entrusts government with personal information for which there is a reasonable expectation of privacy, in determining whether to release that information under OPRA, the Court in Burnett borrowed the seven-part balancing test used in Doe v. Poritz, 142 N.J. 1 (1995) (applying a seven-part balancing test in considering constitutional privacy interests in the context of Megan's Law):

In applying the balancing test, the Court noted that the individuals whose privacy interests are implicated should be given notice and an opportunity to voice their objections. And if such notice is not practical, that is a consideration to be weighed against disclosure, and in favor of redaction. Burnett v. Bergen County, 968 A.2d at 1166.

Significantly, the sixth factor requires consideration of the requestor's need for access. While generally not considered under OPRA, the requestor's purpose behind an OPRA request must be considered where a legitimate privacy interest is at stake. Thus, the court will consider both the need of the requestor for the requested items, and also whether disclosure will further the core purposes of OPRA. Those core purposes are twofold: "'to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Burnett v. Bergen County, supra, 968 A.2d at 1166 (citations omitted).

Further, the fact that citizens' personal information may be available publicly in an office, or even posted online, does not erase the privacy interest of citizens in not having their personal information compiled and combined in a computerized and searchable commercial data base. Burnett v. Bergen County, supra, 968 A.2d at 1163-4.

Finally, the cost of redaction of personal information, if substantial, is a special service charge which the requestor must pay under N.J.S.A. 47:1A-5(a)-(c).

Recent Privacy Case Summaries:

Wolosky v. Sparta Board of Education, unpublished, Appellate Division, decided January 13, 2017 (The Board of Education properly redacted students' initials from attorney bills under both OPRA and the common law).

Applying the balancing test under OPRA, and the common law balance test, a student and parents' interests in privacy, e.g., special education status, outweighed the need advanced by the requestor. While the requestor claimed he needed to know the students' initials to determine how much time was spent on each matter, the court's in camera review revealed that information was readily apparent even without students' initials.

Scheeler v. N.J. Department of Education, unpublished, Appellate Division, decided January 19, 2017 (Where no statute required the inclusion of home addresses, home addresses placed on financial disclosure forms filed by school board members need not be released under OPRA.)

Quoting from our Supreme Court, the court notes that "OPRA's twin aims – of ready access to government records and protection of a citizen's personal information – require a careful balancing of the interests at stake." (Quoting from Burnett v. County of Bergen, supra, 968 A.2d at 1154).

While the court in Scheeler relied on the seven-part balancing test set forth in Burnett, the Court in Burnett had, without comment or objection, allowed the release of deeds that contain home addresses. In addition, the balancing test in Burnett came from the Court's decision in Doe v. Poritz, supra. The Supreme Court decided Doe seven days after it decided Higg-A-Rella v. County of Essex, 198 N.J. 409 (1995). Under the now superseded Right to Know Law, the Court in Higg-A-Rella also allowed the release of home addresses. In both Burnett and Higg-A-Rella – in contrast to Scheeler - the records at issue were required to reflect to home addresses.

The court in Scheeler reasoned that, while home addresses do not fit into any express exemption from OPRA, and while home addresses alone do not "invoke" the privacy interest, "combining one personal identifier with other information can heighten the privacy interest."

Finally, while courts give deference to determinations of the Government Records Council (GRC), courts are not bound by the GRC's "interpretation of a statute or its determination of a strictly legal issue."

Scheeler v. Office of Governor, 448 N.J. Super. 333 (App. Div. 2017) (decided January 27, 2017) (Absent a specific showing in individual cases that an exemption applies, third-party OPRA requests must be provided under OPRA.)

While an OPRA request cannot compel a custodian to undertake analysis or research, identifying the time period for third-party OPRA requests sought provides the required specificity and clarity for a valid OPRA request.

While a blanket denial is improper, a custodian may in individual cases withhold a third-party OPRA requests if its release would give advantage to competitors, or violate a third-party requestor's reasonable expectation of privacy.

In order to protect potential victims of crime, the trial court had permitted redaction of personally identifiable information, other than name, for anonymous requests for third-party OPRA requests. But because that determination was not appealed, the appellate division did not address that issue.

Finally, the appellate division reasoned, because receiving and responding to OPRA requests is a government function, access to third-party OPRA requests does give citizens information about how government operates, consistent with the underlying legislative purpose of OPRA.

Wolosky v. Somerset County, unpublished, Appellate Division, decided March 30, 2017 (Because of the privacy interests of OPRA requestors under both OPRA and the common law, the requestor here was not entitled to the home addresses and email addresses reflected on third-party OPRA requests).

In allowing redaction of home addresses and email addresses from third-party OPRA requests, the court held that an OPRA requestor's privacy interest outweighed the interest of the requestor. The requestor claimed he wanted home addresses and email addresses in order to contact third-party requestors to determine what documents they received in response to their OPRA requests. The court determined that it was sufficient to provide the requestor with the OPRA requests so that he could see what documents were requested.

The court in Wolosky noted that OPRA requestors had a reasonable expectation of privacy in their home addresses and emails notwithstanding that the form OPRA request advised that the OPRA request "may be subject to disclosure; it did not say that the information would be disclosed."

William J. Brennan v. Bergen County Prosecutor's Office, et al., __ *N.J. Super.* __ *(App. Div. 2016), certif. granted,* __ *N.J.* __ *(2017)* (holding that successful bidders at an auction of public property have a reasonable expectation of privacy that outweighs a requestor's interest in disclosure of their names and addresses under OPRA and the common law).

The court noted that Governor McGreevey's Executive Order No. 21 exempted a "natural person's" financial information from disclosure under OPRA, but declined to address that issue since it was not raised by the agency in this case. Instead, the court applied Doe's seven-part test to determine whether privacy interests warranted non-disclosure under OPRA. The court similarly applied Loigman's six-part test to determine whether privacy interests warranted non-disclosure under the common law.

The court reasoned that, even if names and addresses are publicly available online, linking a name and address to a purchase of sports memorabilia gives rise to a privacy interest. In addition, a person does not lose "any expectation of privacy in their address simply because it is publicly available." The court noted with approval the GRC's recognition of privacy interest in home addresses when connected with pet ownership, permits for bugler or fire alarms, holders of sports season tickets, payroll records, and a police call sheet.

Because the court rejected the requestor's demand for disclosure, it did not reach the question raised by the agency as to whether the requestor's use of the names and addresses, if disclosed, could be limited by the court.

PUBLIC AGENCY

N.J.S.A. 47:1A-1.1 defines a public agency subject to OPRA as:

> any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

Serringer v. Choose New Jersey, Inc., unpublished, Appellate Division, decided March 31, 2017 (Even if it works closely with government in a "public-private" partnership, a non-profit corporation that is not created, controlled or funded by government, is not a "public agency" subject to OPRA under N.J.S.A. 47:1A-1).

The court distinguished the New Jersey League of Municipalities, which is legislatively created, as well as the Lafayette Yard Community Development Corporation, which was government controlled, both of which were deemed "public agencies" subject to OPRA N.J.S.A. 47:1A-1. See Fair Share Housing Center, Inc. v. N.J. League of Municipalities, 207 N.J. 489 (2011); Times of Trenton v. Lafayette Yard Community Development Corp., 183 N.J. 519 (2005).

Our Supreme Court has now further addressed the construction of this statute in Robert A. Verry v. Franklin Fire District No. 1, Supreme Court of New Jersey, decided August 7, 2017, which Tom Cafferty, Esq., will discuss.

SECURITY

Gilleran v. Township of Bloomfield, 227 N.J. 159 (2016) (exempting footage of security camera from disclosure under OPRA) (Rabner, C.J., dissenting).

N.J.S.A. 47:1A-1.1 exempts from disclosure:

> emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein;
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> security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software.

The Court in Gilleran held that releasing any footage of the security camera would reveal the capabilities and vulnerability of the security camera, which covered both the municipal building and police facilities, and would jeopardize the safety of the buildings and persons in it, particularly in this day of bombings and terroristic threats. Accordingly, the Court concluded the request was properly denied in its entirety without the need of reviewing the footage for redactions.

The Court reasoned that if a requestor had a particular interest or need for footage – e.g., relating to a crime or other misconduct – a request could be made under the common law so that the requestor's specified need could be weighed against the interest in non-disclosure. The Court remanded the matter for a common law analysis. Chief Justice Rabner dissented on the grounds that the exemption is not a blanket exemption, so that the matter should be remanded to determine whether the footage could be released with redactions under OPRA.

SUFFICIENCY OF REQUEST

Gordon v. City of Orange, unpublished, Appellate Division, June 23, 2017 (A request for all records during a specified period which "show ongoing and pending litigation" with a specified municipal employee is overbroad and properly denied.)

The request was here deemed overbroad notwithstanding that the requestor sought records confined to a specified subject matter (litigation with a specified employee) and limited to a specific period of time. The court reasoned that "requests for any and all documents on a specific subject are considered overbroad." [Internal quotation marks omitted.] OPRA permits requests for identifiable records, not requests for information, and is not a tool to compel agencies to conduct research or analysis.

The court distinguished Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012) (holding that a request for "EZ Pass benefits afforded to retirees of the Port Authority, including all ... correspondence between the Office of the Governor ... and the Port Authority..." was *not* overbroad). The court instead saw similarities with Mag Entertainment v. Division of ABC, 375 N.J. Super. 534 (App. Div. 2005) (holding that a request for, among other things, "all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident," *was* overbroad).

Finally, where a custodian denied an OPRA request on grounds of pending litigation, when there was none, the court held that the denial was knowing, willful and unreasonable, and subjects the custodian to civil penalties under N.J.S.A. 47:1A-11.

Serringer v. Office of Governor, unpublished, Appellate Division, decided June 16, 2017 (OPRA request for all correspondence between Governor's Office and "Choose NJ" during a specified time period was overbroad and properly denied).

Requests must identify the records sought with reasonable clarity, must identify a subject, and cannot be used as a research tool to force government to "identify

and siphon useful information." OPRA does not authorize a search of government property, and cannot be used to request "every document a public agency has on file." This request would have required a search of the files of approximately 140 employees "without any topic limitation whatsoever."

Examples of legitimate requests include a request for "any and all settlements, releases or similar documents entered into, approved or accepted" for a specified time period, or a "request for documents relating to E-Z Pass benefits provided to Port Authority retirees."

In this case, the Agency had sent a letter asking for a more narrowly tailored request, but the requestor did not reply and simply challenged the denial in court.

Williams v. Passaic County Prosecutor's Office, unpublished, Appellate Division, decided February 23, 2017 (Custodian properly denied an OPRA request for a transcript of a 9-1-1 Call even where no such transcript existed, notwithstanding that a recording of the call may exist.)

The court indicated that its ruling does not preclude a subsequent OPRA request for the 9-1-1 recording now that it emerged at oral argument that the recording may still exist.

Finally, the Supreme Court weighs in on sufficiency of requests in the digital age in *John Paff v. Galloway Township and Thalia C. Kay, Supreme Court of New Jersey, decided June 20, 2017.*

FOUR RECENT OPRA SUPREME COURT DECISIONS

(To be Addressed by Thomas J. Cafferty, Esq.)

John Paff v. Galloway Township and Thalia C. Kay, Supreme Court of New Jersey, decided June 20, 2017 (sufficiency of OPRA request).

North Jersey Media Group, Inc. v. Township of Lyndhurst, et al., Supreme Court of New Jersey, decided July 11, 2017 (criminal investigatory records and investigation in progress exemptions).

I/M/O the New Jersey Fireman's Association Obligation to Provide Relief Applications under the Open Public Records Act (Carter v. Doe), Supreme Court of New Jersey, decided August 3, 2017 (declaratory judgment actions and OPRA).

Robert A. Verry v. Franklin Fire District No. 1, Supreme Court of New Jersey, decided August 7, 2017 (public agency definition).