

# OPRA AND PRIVACY INTERESTS

Lewis A. Scheindlin, Esq.  
New Jersey League of Municipalities  
April 16, 2018

# OPRA's Conflicting Policies

- Transparency of government records v. protection of personal privacy

# Public Policy: Transparency of Government Records

“Sunshine is said to be the best of disinfectants.”



# Public Policy: Privacy Protection

- “[T]he right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”

-Olmstead v. U.S. (1928) (Brandeis, J. dissenting)



# OPRA: Transparency v. Privacy

- N.J.S.A. 47:1A-1—Legislature declares it to be State’s public policy to make government records readily accessible for inspection, copying or examination by the public, and also:
- “[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...”

# Government Holds Much Personal Information

- Identifiers—e.g., address, phone number, date of birth, marital status, social security number
- Health
- Financial
- Records affecting reputation and privacy—e.g., video surveillance, police videos, investigative material

# OPRA and Privacy Interests

- More guidance from courts is needed.
- Developing area of OPRA law: the Supreme Court is poised to issue opinions that will have major impact on OPRA privacy issues.

# Pending Supreme Court Privacy Cases

- Brennan v. Bergen County Prosecutor- Must the names and addresses of bidders at an auction held by a public entity be disclosed? Argued Jan. 17, 2018
- Paff v. Ocean County Prosecutor — If MVR of an arrest is not an exempt criminal investigatory record, does the arrestee's privacy interest justify withholding it? Argued Feb. 27, 2018

# OPRA Basics

- Government records are presumptively accessible to the public unless exempted from access by statute, regulation, executive order, court rule, federal law, or case law.

# OPRA Basics:

## Exemptions from Disclosure

- There are approximately 30 exemptions listed in OPRA itself, plus many more in other statutes, executive orders, regulations and case law.

# Privacy-Based Exemptions within OPRA

- Social security, credit card, drivers license and unlisted telephone numbers- N.J.S.A. 47:1A-5a.
- Information describing a person's finances- Exec. Order 26 (2002).

# Privacy-Based Exemptions

- Personnel records- N.J.S.A. 47:1A-10.
  - See Kovalcik v. Somerset County, 206 N.J. 581 (2011) and McGee v. East Amwell, 416 N.J. Super. 602 (App. Div. 2010) (personnel records implicate sensitive and important privacy interests).
- Medical, psychiatric or psychological information concerning an individual-Exec. Order 26 (2002).

# Privacy-Based Exemptions

- Autopsy and crime scene photos of body of deceased person
- Personal firearms records—information in background investigation of applicant for gun permit, including name, address, phone number, email address
- Personal identifying information received by DEP from applicant for hunting with firearm license

# Privacy-Based Exemptions

- Privacy required by other statute, regulation or case law
- Example—student records
  - L.R. v. Camden City School District, etc., 452 N.J. Super. 56 (App. Div. 2017) (records pertaining to special education students are not accessible under OPRA, per privacy requirements of federal and state education laws)

# OPRA's Specific Privacy Exemption

“[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...”

N.J.S.A. 47:1A-1

# The Key Case: Burnett v. County of Bergen

Burnett v. County of Bergen, 198 N.J. 408 (2009)

Established two principles governing OPRA privacy matters:

- (1) Privacy provision (N.J.S.A. 47:1A-1) is a substantive exemption from disclosure.
- (2) Where there is a reasonable expectation of privacy, records custodian must apply a balancing test to determine whether privacy or disclosure prevails.

# Burnett

- Privacy protection is substantive requirement, even though it's set forth in the "Legislative findings and declarations" section of OPRA.

# Burnett

- Specific issue before the Court: Whether social security numbers on millions of pages of land title records should be redacted to protect privacy.
- Note: OPRA requires redaction of SSNs except where they are on a record required by law to be made, maintained or kept on file.

# Burnett

- First inquiry: Is there reasonable expectation of privacy in the information?
- Supreme Court: Yes—documents contain SSNs, plus names, addresses, signatures and marital status of individuals.
- Therefore, must apply balancing test to determine if disclosure or confidentiality is warranted.

# Burnett:

## The Balancing Test

- (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: The Court's Application of the Balancing Test

- (1) Type of record and (2) information contained in the record, considered together:

Records show personal info (SSNs, addresses, marital status, signatures), plus mortgage (financial) information.

# Burnett's Application of Balancing Test

- (3) and (4), potential harm and injury from disclosure, considered together:
  - Substantial risk of harm from disclosure due to potential for identity theft.
- (5) Adequacy of safeguards against unauthorized disclosure:
  - No safeguards--Anyone will be able to buy the info from the requestor and use it for improper purposes

# Burnett's Application of Balancing Test

- (6) Degree of need for access:
- This requestor, a data information company, had no need for access to SSNs.

# Burnett's Application of Balancing Test

- (7) Public policy regarding access:
- Legislative and public policy favors confidentiality of SSNs .
- Disclosure of the information would not further OPRA's core goal of transparent government.

# Burnett

- Held: balancing requires redaction of SSNs. Court emphasized:
  - High risk of identity theft.
  - Requestor doesn't need access to SSNs.
  - Disclosure does not further OPRA's aim of transparent government.
- Redaction costs to be borne by the requestor.

# Supreme Court's Only Other OPRA Privacy Balancing Test Opinion

- Matter of NJ Firemen's Assn. Obligation to Provide Relief Applications under OPRA, 230 N.J. 258 (2017)
- Issue: Whether privacy exemption precludes disclosure of a relief check, which shows the name of, and amount awarded to, the recipient of financial relief granted by State Firemen's Assn. to needy firefighter.

# Firemen's Assn.

- Supreme Court denied disclosure: under the Burnett balancing test, the strong privacy interest and the “unlimited” potential harm to the individual from disclosure of the information outweighs the insignificant public need for release of one person’s application information.

# Firemen's Assn.

- The Court emphasized the strong privacy interest in an individual's financial information in general, and with regard to financial assistance benefits in particular
- The Court said that the harm includes identity theft, embarrassment, loss of privacy, as well as a chilling effect on future applicants who would fear disclosure of their information

# Outside Activity Records

- North Jersey Media v. Bergen County Prosecutor, 405 N.J. Super. 386 (App. Div. 2009): Employees' privacy interest in their outside employment information outweighs public interest in disclosure.
- Strong privacy interest due to risk of harm for law enforcement employees.

# Outside Activity Records

- NY Public Radio v. Office of Gov., App. Div. (2016) (unpublished):
- Confidentiality also applies to non-law enforcement employees' outside activity records—access denied under common law, on basis that employees' privacy interest in their personal activities outweighs public interest in disclosure

# Telephone Records

- Both public officials and those who they call have expectation of privacy in these communications; therefore, telephone numbers called are confidential.
- North Jersey Newspapers v. Passaic Bd. Freeholders, 127 N.J. 9 (1992) (pre-OPRA).
- Gannett v. Middlesex County, 379 N.J. Super. 205 (App. Div. 2005) (OPRA).

# Telephone Records

- Livecchia v. North Arlington, 421 N.J. Super. 24 (App. Div. 2011): Destination—city and state—of calls made and received on public employee’s government-issued cell phone ordered disclosed.
- Balancing test favored disclosure. Requestor had legitimate need for access—claim that Boro employees were improperly using cell phones for personal calls—and there’s no impact on privacy to reveal the destination of the calls, rather than the numbers.

# Personal Cell Phone Records

- No court case on this, but the GRC has ruled that the destination of calls made and received on public employee's personal cell phone are confidential, despite requestor's claim that employee made public business calls on his personal cell phone. Verry v. Boro of South Bound Brook (2011-280).

# Personal Cell Phone Records

- ALJ's Burnett analysis (adopted by GRC):
  - Extremely strong privacy interest in personal phone records.
  - Requestor presented no reason for access to the records.
  - No public interest in disclosure because the employee, not the public, pays for personal cell phone usage.

# Personal Email Addresses

- No court case has ruled on this. However, the Supreme Court has recognized there's some expectation of privacy.
- Paff v. Galloway Tp. (2017)—held that information in database is government record, so Township must generate log showing sender, recipient, date, subject matter of emails.
- Remanded for trial court to address potential confidentiality of information about official's emails, including the “legitimate concern” raised by some parties about intrusion on privacy rights of release of citizens' email addresses.

# Personal Email Addresses

- GRC has held that personal email addresses of individuals with whom public employee corresponded are confidential under the privacy exemption. Gettler v. Tp. of Wantage (2009-73).
  - Substantial harm from disclosure—risk of spam and cyberattack, and no public need for access to email addresses, because names of the emails' recipients were known
  - Also, public policy favors confidentiality—federal law recognizes need for privacy of email addresses.

# Home Addresses

- No clear precedent as to whether home addresses are entitled to privacy under OPRA; no published court opinions.
- Supreme Court will address this issue in *Brennan v. Bergen County Prosecutor* (argued January 2018)

# Home Addresses: Brennan Supreme Court Case

- Names and addresses of bidders at County-run auction of sports memorabilia.
- Appellate Division applied Burnett balancing test and held this information confidential:
  - Heightened privacy interest due to linkage of name and address with fact of buying memorabilia, leading to risk that these collectors will be subject to unwelcome solicitation or theft.

# Home Addresses: Brennan Supreme Court Case

- Appellate Division's application of balancing test: The privacy interest outweighed the minimal disclosure interests--Requestor did not have clear need for the information, and public access will shed no light on government operations.
- Also, lack of privacy may deter bidders from participating in future government auctions.

# Home Addresses

- GRC decisions generally support confidentiality of address—theme is that potential of unwelcome contact or solicitation heightens privacy interest and outweighs interest in access.
- Knehr v. Tp. of Franklin, 2012-38--names and addresses of dog and cat owners.

# Home Addresses-GRC Cases

- Avin v. Oradell, 2004-176—Applicants for permits for fire and burglar alarms.
- Faulkner v. Rutgers, 2007-149—Names and addresses of basketball and football season ticket holders.
- Vargas v. Dept. of Ed., 2012-126—Addresses on financial disclosure forms of school board members.

# Home Addresses

- Unpublished Appellate Division opinions are mixed as to confidentiality.
- Examples of disclosure ordered:
- Bolkin v. Boro of Fairlawn (2014)—Dog and cat license holders. Requestor wanted to send political literature.
- Renna v. Union County (2012)—Mailing list for newsletter on “senior citizen issues.” Requestor (a citizen “watchdog”) wanted to provide info about Union County government operations.

# Home Addresses

- Unpublished Appellate Division Opinions  
Examples of privacy upheld:
- Wolosky v. Somerset County (2017)-Addresses on OPRA requests. Requestor showed no need for contact information of OPRA requestors.
- Scheeler v. NJ Dept. of Ed. (2017)-Addresses of school board members on financial disclosure forms. Strong privacy interest due to linkage with financial information, and requestor had no strong interest in obtaining the addresses.

# OPRA Requests

- Scheeler v. Office of the Governor, 448 N.J. Super. 333 (App. Div. 2017): OPRA requests are public records and there's no general expectation of privacy applicable to requests.
- But, court also said—in an individual case, there may be a reasonable expectation of privacy in the request.
- See Wolosky v. Somerset County, unpublished App. Div. 2017—Names, addresses and email addresses of requestors held private.

# Law Enforcement Records- Investigations

- North Jersey Media v. Bergen County Prosecutor's Office, 447 N.J. Super. 182 (App. Div. 2016): Agency may deny request for records of investigation where the person has not been arrested or charged, by saying it neither confirms nor denies the existence of responsive records.

# Law Enforcement Records- Investigations

- Holding is based on OPRA's exemption for case law providing confidentiality to investigation where no one has been arrested or charged, not on OPRA's exemption for privacy.
- But court also said that a reason for this confidentiality is to protect the affected person's privacy interest in not revealing that he or she is under investigation.

# 9-1-1 Calls

- 9-1-1 calls are public records under OPRA, but Appellate Division has recognized (in dicta) that victim and family of the victim may have reasonable expectation of privacy in preventing disclosure of the victim's words/sounds of distress.
- Serrano v. South Brunswick Tp., 358 N.J. Super. 352 (App. Div. 2003).

# 9-1-1 Calls

- Asbury Park Press v. Ocean County Prosecutor, 374 N.J. Super. 312 (Law Div. 2004)- Denied release of 9-1-1 call on privacy basis.
  - Relatives have expectation of privacy in non-disclosure of the “chilling, wrenching” dying words of homicide victim, and disclosure would not provide any insight into government operations.
- Note: Cited with approval by Supreme Court in Burnett

# Police Videos

- Privacy issues raised by motor vehicle recordings (dashcams) and body cameras.
- Do people shown in video, such as drivers, passengers, witnesses, bystanders, have protectable privacy expectation?
- No definitive case law, but Supreme Court may provide guidance soon in *Paff v. Ocean Prosecutor*

# Police Body Cameras

- AG Directive (2015) recognizes various privacy issues may arise, where video shows:
  - Crime victim
  - Child
  - Interior of residence
  - Patients at healthcare facility
  - Worshipers at place of worship
  - Person who asked officer to stop recording

# Police Body Cameras

- AG Directive (2018) on Release of Video of Police Deadly Force incidents
- Reiterates these “raise special privacy concerns,” by showing victims and witnesses

# Police MVRs

- North Jersey Media Group v. Lyndhurst, Supreme Court, July 11, 2017—MVRs of fatal police shooting exempt under OPRA, but ordered released under common law. Court did not mention any privacy issues.

# Police MVRs:

## Paff v. Ocean County Prosecutor

- OPRA privacy issue regarding MVRs is directly before the Supreme Court in Paff v. Ocean County Prosecutor (argued Feb. 27, 2108).
- OPRA request for MVRs showing arrest of a driver who had fled when officer signaled to pull over for traffic stop.

## Police MVRs:

### Paff v. Ocean County Prosecutor

- Appellate Division (446 N.J. Super. 163) held that the MVRs were not exempt as criminal investigatory or ongoing investigatory records, and privacy did not justify withholding disclosure.

# Police MVRs:

## Paff v. Ocean County Prosecutor

- Appellate Division determined that people shown in MVRs have no expectation of privacy:
- “Drivers and passengers in vehicles operating on public roadways do not have a reasonable expectation of privacy in an MVR recording. The reality of modern life is that video recordings are made in many public places.”

# Police MVRs

- Doubtful that Supreme Court will agree that there's no expectation of privacy for anyone shown in MVR.
- See State v. Stein, 225 N.J. 582 (2016)—MVRs must be provided to criminal defendant in discovery, and trial judge may redact any portion of the video that "captures people not relevant to the proceedings and whose privacy rights may be infringed...."

# Handling OPRA Requests That Raise Privacy Exemption

- Keep in mind government's obligation to protect privacy.
- If possible, give notice of the request to affected person and give him/her the opportunity to submit privacy argument.
- Consider feasibility and cost of redaction to protect privacy.

# Handling OPRA Requests That Raise Privacy Exemption

- Give notice of OPRA request to person with potential privacy interest.
- Case law favors giving notice to party with the confidentiality interest.
- As a practical matter, the party with the privacy interest is in best position to articulate the interest.

# Handling OPRA Requests That Raise Privacy Exemption

- Burnett—Cost of redaction of information covered by privacy must be borne by requestor.