SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-004205-18T2

ERNEST BOZZI,	:	Civil Action
Respondent/Plaintiff,	:	**ON APPEAL FROM**
v.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY
JERSEY CITY and IRENE McNULTY,	:	DOCKET NO.: HUD-L-354-19
Appellants/Defendants.	:	**SAT BELOW** Honorable Francis B. Schultz

APPENDIX ON BEHALF OF APPELLANTS/DEFENDANTS,
JERSEY CITY and IRENE McNULTY

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TABLE OF APPENDIX

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Attorney for the Plaintiff

Ernest Bozzi, *Plaintiff,* vs. Jersey City and Irene McNulty, *Defendants.*	: NEW JERSEY SUPERIOR COURT : Hudson County- LAW DIV. : DOCKET NO. HUD-L- : : VERIFIED COMPLAINT :

Plaintiff complains against the Defendants as follows:

1. This is a summary action brought pursuant to the New Jersey Open Public Records ("OPRA"), N.J.S.A. 47:1A-l.l *et. seq*.

COUNT ONE - OPEN PUBLIC RECORDS ACT

2. Plaintiff Ernest Bozzi sought government records from the Defendants.

3. a. Defendant Jersey City is a New Jersey municipality located in Hudson County that is subject to the Open Public Records Act.

   b. Defendant Irene McNulty is a Jersey City employee identified as a/the Deputy City Clerk and functioned as the records custodian for the request made by the Plaintiff.

4. Plaintiff is a licensed home improvement contractor seeking to identify pet owners to market, sell and install "invisible fencing" for pet containment.

5. On November 27, 2018, Plaintiff submitted an OPRA request to the Defendants seeking the municipality's latest dog licensing records. Plaintiff consented to the removal or redaction of all information other than the names and addresses of the dog owners, a step he undertook after engaging another municipality over purported privacy concerns. Ex. 1

6. On December 10, 2018, Jersey City, acting Irene McNulty, rejected the request on the basis of Executive Order 21 and GRC rulings relying on it. Ex. 2

7. Over 190 other municipalities Plaintiff had reached out to via OPRA requests for the same information have provided the records he sought.

8. Defendants are in violation of their obligations under OPRA.

COUNT TWO - (Common Law Access)

9. The records sought by the Plaintiff are public records pursuant to New Jersey common law.

10. Plaintiff has a legitimate private interest in the records, intending to use same for commercial purposes.

11. Plaintiff's interest in the records is greater than the need of the Defendants' to keep the material from the public.

12. Defendants' conduct violates New Jersey's common law right of access.

WHEREFORE, Plaintiff requests judgement as follows:

a. Directing the immediate release of the records sought;
b. Awarding counsel fees and costs of suit;
c. Awarding other such relief as may be fair, equitable and necessary.

DONALD M. DOHERTY, JR., Esq.

RULE 4:5-1 CERTIFICATION

The undersigned hereby certifies that the matter in controversy is not the subject of any other pending action or arbitration proceeding. The undersigned does not know of the names of any other parties who should be joined in the action.

DONALD M. DOHERTY, JR., Esq.

VERIFICATION

I, Ernest Bozzi, do hereby verify the following statements on the following bases:

Paragraphs 1- 7 and 10 are made based upon my personal knowledge.

The information contained in the balance of the paragraphs are upon based information and belief, as I am not an attorney and this is my understanding of the law as it has been explained to me.

I certify the foregoing statements made by me are true and that if the statements are willfully false or misleading, I understand that I am subject to punishment.

Ernest Bozzi

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

OPEN PUBLIC RECORDS ACT REQUEST FORM

Important Notice

The last page of this form contains important information related to your rights concerning government records. Please read it carefully.

Requestor Information – Please Print

First Name Ernest MI G Last Name Bozzi

E-mail Address BozziBuilders@gmail.com

Mailing Address 649 Powell Rd

City Eastampton State NJ Zip 08060

Telephone 609 534 6916 FAX

Preferred Delivery: Pick Up _____ US Mail _____ On-Site Inspect _____ Fax _____ E-mail ✓

If you are requesting records containing personal information, please circle one: Under penalty of N.J.S.A. 2C:28-3, I certify that I HAVE / (HAVE NOT) been convicted of any indictable offense under the laws of New Jersey, any other state, or the United States.

Signature Ernest Bozzi Date [redacted]

Payment Information

Maximum Authorization Cost $

Select Payment Method

Cash Check Money Order

Fees: Letter size pages - $0.05 per page
Legal size pages - $0.07 per page
Other materials (CD, DVD, etc) – actual cost of material

Delivery: Delivery / postage fees additional depending upon delivery type.

Extras: Special service charge dependent upon request.

Record Request Information: Please be as specific as possible in describing the records being requested. Also, please note that your preferred method of delivery will only be accommodated if the custodian has the technological means and the integrity of the records will not be jeopardized by such method of delivery.

I am requesting copies of your most recent dog license records that you have.

You may redact
...the breed/type of dog
...the name of the dog
...any information about why someone has the dog (comfort animal, handicap assistance, law enforcement or any other reason) if that information is in the record
...any phone numbers whether unlisted or not.

I am trying to get the names and addresses of dog owners for our invisible fence installations (we are a licensed home improvement contractor) and I allow you to remove any information beyond that so there are no privacy concerns as determined by the Government Records Council in Bernstein v. Allendale.

AGENCY USE ONLY

Est. Document Cost _____
Est. Delivery Cost _____
Est. Extras Cost _____
Total Est. Cost _____
Deposit Amount _____
Estimated Balance _____

Deposit Date _____

AGENCY USE ONLY

Disposition Notes
Custodian: If any part of request cannot be delivered in seven business days, detail reasons here.

In Progress - Open _____
Denied - Closed _____
Filled - Closed _____
Partial - Closed _____

AGENCY USE ONLY

Tracking Information

Tracking # _____
Rec'd Date _____
Ready Date _____
Total Pages _____

Final Cost

Total _____
Deposit _____
Balance Due _____
Balance Paid _____

Records Provided

Custodian Signature Date

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

Gmail

Ernest Bozzi <bozzibuilders@gmail.com>

[Records Center] Open Public Records Request :: R003526-112718

1 message

Jersey City OPRA Center <jerseycity@mycusthelp.net>
To: "BozziBuilders@gmail.com" <BozziBuilders@gmail.com>

Mon, Dec 10, 2018 at 10:51 AM

--- Please respond above this line ---

RE: OPEN PUBLIC RECORDS REQUEST of November 27, 2018, Reference # R003526-112718

Ernest Bozzi:

The City received a public information request from you on November 27, 2018. Your request mentioned:

> I would like your most recent compiling of dog license records (annual/yearly). You can redact the breed , name of dog, any information about why they have the dog and any phone numbers whether they are unlisted or not. I am only looking for the names and addresses of dog owners for my invisible fence installations (I am a licensed home improvement contractor). Please remove any information beyond the names and addresses for there are no privacy concerns as outlined by the Government Record Council in Bernstein v Allendale.

Pursuant to N.J.S.A. 47:1A-1, Executive Order No. 21 (McGreevey, 2002), Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005) and Knehr v. Township of Franklin, GRC Complaint No. 2012-38 (December, 2012), your request is denied.

N.J.S.A. 47:1A-1 specifically states that "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." In this particular instance, the people identified on the dog licensing records would likely be subjected to unsolicited commercial contact. Additionally, "public disclosure of registered dog owners would jeopardize the security of the dog owner, the security of the non-dog owner, the property that the dog may be protecting and the dog itself from burglary, theft and other criminal activity. Many homeowners use their dogs as a means of security and that others have valuable dogs that could be subject to theft." Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005). As a result, the responsive documents in the possession of the City are exempt from disclosure pursuant to OPRA.

Sincerely,

Irene McNulty

Deputy City Clerk

Office of City Clerk

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DMD@DonaldDoherty.com
Attorney for the Plaintiff

Filed

January 25, 2019

Francis B. Schultz, J.S.C

Ernest Bozzi,	:	NEW JERSEY SUPERIOR COURT
Plaintiff,	:	Hudson County- LAW DIV.
vs.	:	DOCKET NO. HUD-L-354 -19
	:	***Order to Show Cause***
Jersey City and Irene McNulty,	:	
Defendants.	:	

This matter having been open to the court by Donald M Doherty, Jr., Esq., attorney for the Plaintiff, and seeking relief by way of summary action pursuant to rule 4:67-1 (a) based upon the facts set forth in the verified complaint and supporting papers filed here with; and the Court having determined this matter may be commenced by order show cause as a summary proceeding pursuant to N.J.S.A. 47:1A-6 and for other good cause shown,

It is on this 25th day of January 2019 ***ORDERED*** Defendants Jersey City and Irene McNulty, appear and show cause on the 15 day of March, 2019 before The Honorable Francis B. Schultz, JSC, W. J. Brennan Courthouse, 583 Newark Avenue, 4th Floor Jersey City, NJ 07306, at _____ o'clock or soon thereafter as counsel can be heard, why judgment should not be entered as follows:

a. Compelling Defendants to respond to the Plaintiff's OPRA request and provide the records requested;

b. Awarding counsel fees and costs of suit; and

c. Awarding other such relief as may be fair, equitable and necessary.

And it is ***further ORDERED*** that:

1. A copy of this order to show cause, verified complaint and all supporting affidavits or certifications submitted in support of this application be served upon the defendant(s),or by certified mail, return receipt requested, within 10 days of the date hereof, in accordance with R. 4:4-3 and R. 4:4-4, this being original process.

2. The plaintiff must file with the court his/her/its proof of service of the pleadings on the defendant(s) no later than three (3) days before the return date.

3. Defendant(s) shall file and serve a written answer, an answering affidavit or a motion returnable on the return date to this order to show cause and the relief requested in the verified complaint and proof of

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service of the same by 2/22/19, 20__. The answer, answering affidavit or a motion as the case may be, must be filed with the Clerk of the Superior Court in the county listed above and a copy of the papers must be sent directly to the chambers of Judge Schultz.

4. The plaintiff must file and serve any written reply to the defendant's order to show cause opposition by 2/29/19, 20__. The reply papers must be filed with the Clerk of the Superior Court in the county listed above and a copy of the reply papers must be sent directly to the chambers.

5. If the defendant(s) do/does not file and serve opposition to this order to show cause, the application will be decided on the papers on the return date and relief may be granted by default, provided that the plaintiff files a proof of service and a proposed form of order at least three days prior to the return date.

6. If the plaintiff has not already done so, a proposed form of order addressing the relief sought on the return date (along with a self-addressed return envelope with return address and postage) must be submitted to the court no later than three (3) days before the return date.

7. Defendant(s) take notice that the plaintiff has filed a lawsuit against you in the Superior Court of New Jersey. The verified complaint attached to this order to show cause states the basis of the lawsuit. If you dispute this complaint, you, or your attorney, must file a written answer, an answering affidavit or a motion returnable on the return date to the order to show cause and proof of service before the return date of the order to show cause. These documents must be filed with the Clerk of the Superior Court in the county listed above along with the applicable fee, if any. A directory of offices is available in the Civil Division Management Office and online njcourts.gov/forms/10153_deptyclerklawref.pdf . You must also send a copy of your answer, answering affidavit or motion to the plaintiff's attorney whose name and address appear above, or to the plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve your answer, answering affidavit or motion with the fee or judgment may be entered against you by default.

8. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJLAW (1-888-576-5529). If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available in the Civil Division Management Office in the county listed above and online at njcourts.gov/forms/10153_deptyclerklawref.pdf.

9. The Court will entertain argument, but not testimony, on the return date of the order to show cause, unless the court and parties are advised to the contrary no later than _____days before the return date.

Francis B. Schultz

THE HONORABLE FRANCIS B. SCHULTZ, JSC

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Attorney for the Plaintiff

Ernest Bozzi,	:	NEW JERSEY SUPERIOR COURT
Plaintiff,	:	Hudson County- LAW DIV.
vs.	:	DOCKET NO. HUD-L-
	:	
Jersey City and Irene McNulty,	:	**CERTIFICATION of COUNSEL**
Defendants.	:	
	:	

I, DONALD M. DOHERTY, JR., Esq., do hereby certify as follows:

1. I am counsel for the plaintiff in the above-titled action. Exhibit 1 is a true copy of the unreported appellate decision, *AC-SPCA v. Absecon, A-3047-07T3*.

2. Exhibit 2 is a true copy of the unreported appellate decision, *Bolkin v. Fair Lawn*, *A-02205-12T4.*

3. Exhibit 3 is a true copy of unreported appellate motion decision in *D'Allessandro v. Robbinsville*, *A-4181-16*. At the time, Mr. D'Allessandro was an employee of the Plaintiff here and was attempting to compile a mailing list of dog license holders to avoid having to buy the list compiled by an animal welfare agency. As page three of this exhibit is a true copy of a certification submitted by him.

4. Exhibit 4 is a true copy of the unreported appellate decision in *McQuire v. Waterford*, *A-3196-05.*

5. Exhibit 5 is true copy of Monmouth County Assignment Judge Thornton's opinion in *Bozzi v. Wall Tp. & Pagnoni*, *MON-L-494-18*.

6. I represented Nick D'Allessandro in 2015 and 2016, who was at the time a foreman for Bozzi Builders, Plaintiff's company. Mr. D'Allessandro had attempted to compile dog license records for various counties in southern New Jersey for purposes of sending brochures about their dog fence product. Nearly all municipalities provided the records in response to the OPRA request, sometimes facilitated by my further discussions with counsel. In every county there was an outlier or two that refused, always based upon the Allendale GRC decision or "privacy". That resulted in various pieces of litigation, all of which was resolved either by settlement or judicial order in Mr. D'Allessandro's favor including:

D'Allessandro v. Moorestown, BUR-L-2320-16
D'Allessandro v. Linwood, ATL-L-2277-16

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D'Allessandro v. Cranbury, MID-L-6023-16
D'Allessandro v Berkeley, OCN -L-2867-16
D'Allessandro v. Robbinsville, MER-L-2078-16

7. Between Bozzi and D'Allessandro's collective efforts over 190 municipalities have supplied dog license records in response to OPRA requests identical to the one made here. Three of those municipalities produced the records after Plaintiff prevailed in litigation before Your Honor.

I certify the foregoing statements made by me are and if they are willfully false or misleading I understand that I am subject to punishment.

Donald M. Doherty, Jr.
Donald M. Doherty, Jr., Esq.

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« Citation Data)riginal Wordprocessor Version

NOTE: The status of this decision is **Unpublished**.)

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3047-07T3

ATLANTIC COUNTY SOCIETY
FOR THE PREVENTION OF
CRUELTY TO ANIMALS,

Plaintiff-Appellant,

v.

CITY OF ABSECON, and
CARRIE A. CRONE, in her capacity
as the Acting Municipal Clerk for
the City of Absecon,

Defendants-Respondents.

« Citation Data

June 5, 2009

Argued September 29, 2008 - Decided

Before Judges Winkelstein, Gilroy and Chambers.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-16946-06.

Donald M. Doherty, Jr., argued the cause for appellant (Friedman Doherty, LLC, attorneys; Mr. Doherty, Jr., and Wesley G. Hanna, on the brief).

Michael J. Blee argued the cause for respondent (Michael J. Blee, LLC, attorneys; Mr. Blee, of counsel and on the brief).

PER CURIAM

Plaintiff, the Atlantic County Society for the Prevention of Cruelty to Animals, appeals from the January 18, 2008 order that: 1) granted defendants' motion for summary judgment, dismissing plaintiff's complaint seeking access to certain documents in defendants' possession pursuant to OPRA[1] and the common-law right of access; and 2) denied its cross-motion for summary judgment. We reverse and remand for further proceedings consistent with this opinion.

I.

The facts are not in dispute. Plaintiff is the Atlantic County affiliate of the tate Society for the Prevention of Cruelty to Animals. N.J.S.A. 4:22-11.6. As such, plaintiff is empowered to "[e]nforce all laws and ordinances enacted for the protection of animals" and "[p]romote the interests of, and protect and care for, animals within the State." N.J.S.A. 4:22-11.7c and d. Defendant City of Absecon (City) is a "[p]ublic agency" as that term is defined in OPRA. N.J.S.A. 47:1A-1.1. Defendant Carrie A. Crone is the Acting Municipal Clerk for the City and in that capacity serves as the custodian of the City's government records, N.J.S.A. 47:1A-1.1, including those pertaining to the licensing of dogs within the City, N.J.S.A. 4:19-15.1 to -15.23 and Chapter 122 of the City's Administrative Code (Code).

In October 2006, plaintiff sought to compile a list of all licensed dog owners in Atlantic County. The purpose was two-fold. First, the organization sought the information to assist in its animal cruelty enforcement efforts, explaining "we would be able to track if owners had multiple pets when a veterinarian or other person reported an instance of suspected animal cruelty. If one animal was alleged to have been abused, we would want to be alerted to the need to inquire about other animals." Second, the organization intended to use the information to solicit charitable contributions from the public.

Pursuant to its plan to marshal the information, plaintiff made informal requests for copies of "dog license applications or a list of the dog license holders" of all municipalities within Atlantic County. Except for the City, all municipalities responded affirmatively. The City rejected the informal request, advising plaintiff that it would only respond to a formal OPRA request form. Although plaintiff forwarded the requested form, the City again refused to supply the information.

On November 16, 2006, plaintiff filed its complaint against the City seeking to compel the City to provide it with copies of dog license records pursuant to

OPRA (Count One); the common-law right of access (Count Two); and the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 and -2 (Count Three). Plaintiff also sought an award of attorney's fees and costs. On April 25, 2007, plaintiff filed an amended complaint naming Crone as an additional defendant. Agreeing that the issue concerned a matter of law, the parties filed cross-motions for summary judgment supported by a stipulation of facts that included the following: "[t]he parties stipulate that the documents requested by the [plaintiff] are available and, except for the parameters [of] the Bernstein decision,[2] would normally be considered public records subject to disclosure under OPRA or the common[-]law right of access." On January 18, 2008, the trial court entered an order supported by a written opinion granting defendants' motion and denying plaintiff's motion.

In ruling on the motions, the trial court interpreted OPRA as not containing a defined list of exemptions from a public entity's obligation to permit citizens to inspect, copy, or purchase government records. "OPRA itself does not contain an exhaustive list of the exceptions, but does list some exceptions, but dog licenses are not mentioned among them." Acknowledging the parties had stipulated that the requested documents were government records, the court concluded that N.J.S.A. 47:1A-1's privacy provision required it to apply a balancing of interests test under OPRA to determine whether plaintiff's interest in disclosure of the documents outweighed the citizens' and the City's interest in withholding the information.

The City's dog licensing application requests that the applicant provide, among other information: the owner's name, address, e-mail address, and phone number; whether the owner is a senior citizen; the type of dog, and whether it is trained as a guide or assistance dog. The court determined that plaintiff possessed both a private and a wholesome public interest in obtaining that information; and dog owners had a reasonable expectation of privacy in

providing the information to the City. Particularly, the court reasoned that dog owners have an interest in maintaining confidentiality of the information for security concerns.

The court offered various examples of why dog owners might have reasonable expectations of privacy in the information provided to the City. Nefarious individuals could use the information to determine: which residences within the City are not protected by dogs; which residences are occupied by senior citizens; and which residences contain "especially highly-prized breeds," making the residences susceptible to burglary and theft, including the theft of dogs. After balancing the interests of plaintiff against the interests of the City and the dog owners, the court granted defendants' motion dismissing plaintiff's complaint under both OPRA and the common-law right of access, concluding that plaintiff "has not shown a compelling need in the face of the confidentiality concerns of the government and the reasonable expectation of privacy concerns of its citizens." The court also impliedly dismissed Count Three of the complaint as moot, determining that "[t]here is no need to reach Count III of the Amended Complaint because of the decisions on Count I and Count II."

On appeal, plaintiff argues that the trial court erred in dismissing its OPRA claim by interpreting the provisions in N.J.S.A. 47:1A-1 as "provid[ing] authority to expand upon the exceptions to disclosure." Plaintiff also asserts that the trial court erred in dismissing its common-law right of access claim, contending that the court applied the wrong balancing of interests standard. Plaintiff requests that we reverse the order granting defendants summary judgment and denying its cross-motion for summary judgment; and remand the matter for the trial court to address its request for attorney's fees.

II.

A trial court will grant summary judgment to the moving party "if the leadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). On appeal, "the propriety of the trial court's order is a legal, not a factual, question." Pressler, Current N.J. Court Rules, comment 3.2.1 on R. 2:10-2 (2009). We employ the same standard when reviewing summary judgment orders. Block 268, LLC v. City of Hoboken Rent Leveling & Stabilization Bd., 401 N.J. Super. 563, 567 (App. Div. 2008).

"The purpose of OPRA '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.'" Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). In furtherance of that purpose, the Legislature declared: "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.

OPRA defines "[g]overnment record" broadly, that is, "any paper, . . . document, . . . data [] or image processed document, information stored or maintained electronically . . . or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, . . . agency . . . of the State or of any political subdivision thereof . . . ." N.J.S.A. 47:1A-1.1. That same statute, however, contains exemptions from the definition of "[g]overnment record."

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Initially, the statute provides that government records "shall not include inter-agency or intra-agency advisory, consultative, or deliberative material." N.J.S.A. 47:1A-1.1. The statute also lists over twenty other categories of documents that fall outside the statutory definition of a government record, the Legislature considering those categories of documents confidential. N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-10; Wilson v. Brown, 404 N.J. Super. 557, 570 (App. Div.), certif. denied, _____ N.J. _____ (2009). These exemptions from the statutory definition of a government record include "criminal investigatory records, victims' records, trade secrets, various materials received or prepared by the Legislature, certain records relating to higher education, and other items." Mason v. City of Hoboken, 196 N.J. 51, 65 (2008). In addition, the custodian must redact from any document "which discloses the social security number, credit card number, unlisted telephone number, or driver license number of any person . . . ." N.J.S.A. 47:1A-1.1 and -5a.

"The common law makes a much broader class of documents available than [OPRA], but on a qualified basis." Daily Journal v. Police Dep't of Vineland, 351 N.J. Super. 110, 122 (App. Div.), certif. denied, 174 N.J. 364 (2002). Under the common law, public records available for inspection "include any records made by public officers in the exercise of their functions. As such, they include almost every document recorded, generated, or produced by public officials, whether or not required by law to be made, maintained, or kept on file." Ibid. (internal citations omitted).

Under the common-law right of access, the court applies a two-prong standard to determine whether a public entity must comply with a citizen's request for government records. Ibid. First, the person seeking access to the documents must prove standing, that is, "'establish an interest in the subject matter of the material.'" Hig-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 46 (1995) (quoting South Jersey Publ'g Co. v. N.J. Expressway Auth., 124 N.J. 478,

'87 (1991)). The required interest may be either "'a wholesome public interest or a legitimate private interest.'" Loigman v. Kimmelman, 102 N.J. 98, 112 (1986) (quoting City of St. Matthews v. Voice of St. Matthews, Inc., 519 S.W 2d, 811, 815 (Ky. 1974)).

Second, the court must balance the requestor's interest in the public records against the public entity's interest in maintaining confidentiality of the documents. Higg-A-Rella, supra, 141 N.J. at 46. The balancing "standard is flexible and adaptable, Loigman, supra, 102 N.J. at 103, and calls for an 'exquisite weighing process.'" Daily Journal, supra, 351 N.J. Super. at 123 (quoting Beck v. Bluestein, 194 N.J. Super. 247, 263 (App. Div. 1984)). In performing their balancing obligation, the Supreme Court has instructed trial courts that the process may include the following 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 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.
>
> [Loigman, supra, 102 N.J. at 113.]

III.

We first address plaintiff's OPRA claim. Plaintiff argues that the trial court erred by interpreting N.J.S.A. 47:1A-1's privacy provision as an exemption from the right of access under OPRA. Plaintiff contends that N.J.S.A. 47:1A-1's privacy provision only serves as "a precatory statement" explaining why custodians of records are required to withhold disclosure of certain items of personal information explicitly set forth in other sections of OPRA. Plaintiff also asserts that the court erred by applying a balancing of interests test to its OPRA claim.

On a challenge to a public entity's denial of a citizen's request for a public record, either in the Law Division or in the GRC, "[t]he public agency shall have the burden of proving that the denial of access is authorized by law." N.J.S.A. 47:1A-6. "If it is determined that access has been improperly denied, the court or [the GRC] shall order that access be allowed." Ibid.

The issue of whether the privacy provision in N.J.S.A. 47:1A-1.1 serves only as a precatory statement to the Act, or whether the provision is substantive, was recently addressed by the Court in Burnett v. County of Bergen, ___ N.J. ___, ___ (2009) (slip op. at 15-17). Without ambiguity, the Court held that the privacy provision "is neither a preface nor a preamble." Id. at 15. Rather, "the very language expressed in the privacy clause reveals its substantive nature; it does not offer reasons why OPRA was adopted, as preambles typically do; instead, it focuses on the law's implementation." Ibid. "Specifically, it imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests." Ibid. Acknowledging the competing expressions of legislative intent between the privacy provision in N.J.S.A. 47:1A-1.1 and the obligation of custodians to permit records to be inspected, examined and copied under N.J.S.A. 47:1-5a, the Court reconciled the provisions by "balanc[ing] the interests each section

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advances: ready access to government documents while safeguarding the citizen's reasonable expectation of privacy." Id at 19.

In weighing the public's interest in disclosure with a citizen's need to safeguard personal information in which he or she maintains that a reasonable expectation of privacy exists, the Court directed that public entities apply the following seven-prong test of Doe v. Poritz, 142 N.J. 1 (1995):

> (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.
>
> [Id. at 22 (quoting Doe, supra, 142 N.J. at 88).]

Under that test, N.J.S.A. 47:1A-1.1's privacy provision does not create an exemption from disclosure whenever a citizen's privacy interest is raised. Rather, when viewed through the lens of Burnett, the provision serves as a mechanism ensuring that a citizen's personal information will not automatically be disclosed when the citizen who provided the information reasonably expected that the information would remain private. Thus, where the privacy provision is called into question and the court applies the Burnett balancing test, the requested information may or may not ultimately be disclosed.

Here, the parties stipulated that the dog license applications constitute government records under OPRA and the common law. We discern no reason to disagree.[3] With the parties having so stipulated, the burden shifted to defendants to prove that their denial of access was authorized by law. N.J.S.A.

47:1A-6. Because defendants rely on the privacy provision for not disclosing the information requested, we consider the issue under the privacy test as directed by Burnett. Burnett, supra, (slip op. at 22). In so doing, we consider the seven-prong standard on a qualitative basis, not a quantitative basis.

The first two prongs of the Burnett standard address the nature of the records requested and the information contained therein. Id. at 24. Plaintiff requested that the City provide it with a list of names and addresses of individuals to whom the City issued dog licenses or, in the alternative, copies of the dog license applications on file with the City.

OPRA prohibits disclosure of a citizen's "social security number, credit card number, unlisted telephone number or driver license number . . . ." N.J.S.A. 47:1A-1.1 and -5a.[4] However, those statutes do not expressly prohibit the disclosure of names and addresses. We are not aware of any executive order, statute, or judicial decision, N.J.S.A. 47:1A-9a and -9b, that would authorize withholding disclosure of only the names and addresses of individuals contained in a government record, which is otherwise subject to inspection pursuant to OPRA or the common-law.[5]

Nevertheless, disclosure of names and addresses may be withheld when combined with certain personal identifiers that would place the citizen's privacy interest at risk. For example, see N.J.S.A. 56:8-161, defining "personal information" as:

> [A]n individual's first name or first initial and last name linked with any one or more of the following data elements: (1) Social Security number; (2) driver's license number or State identification card number; or (3) account number or credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account.

[(Emphasis added).]

These personal identifiers are not present here, which leads us to the third and fourth prongs of the Burnett standard that "address the potential for harm from disclosure." Id. at 28. We do not foresee a significant risk of harm from disclosure of only names and addresses of holders of dog licenses. As noted by the Burnett Court, that the land records contained the names and addresses of individuals would not by itself have prevented disclosure under the privacy provision, id. at 23; rather, it was that the names and addresses were combined with another personal identifier that caused concern. Id. at 27. See also Higg-A-Rella, supra, 141 N.J. at 55 (authorizing the release of copies of tax-assessment lists under the common-law right of access).

In Higg-A-Rella, plaintiffs requested copies of tax-assessment lists from the Essex County Board of Taxation. Id. at 40-41. Among other matters, those lists contain information for each parcel of land that included the property's street address and block and lot numbers; name and address of the owner; and if the property was residential, "whether the owner is entitled to a deduction or exemption as a senior citizen, veteran, disabled veteran, or surviving spouse of a person in one of those categories." Id. at 41-42. Applying the common-law right of access test, the Court determined that the information was not exempt from disclosure. Id. at 49. "The lists contain simple, non-evaluative data that have historically been available to the public, and that do not give rise to expectations of privacy." Ibid. (emphasis added).

The fifth prong of the test concerns "the adequacy of safeguards to prevent unauthorized disclosure" after access to the information is granted to the requestor. Burnett, supra, (slip op. at 32). Provided that the names and addresses of the holders of dog licenses are not linked to other personal identifiers of the individuals, we accord this factor little weight. Individuals'

names and addresses contained in government records have historically been available to the public. Higg-A-Rella, supra, 141 N.J. at 49.

The sixth prong addresses the requestor's need for access to the information. Burnett, supra, (slip op. at 32). The trial court found that plaintiff had a "wholesome public interest" in the information because "the alleged public purpose of seeing whether there was more than one animal at risk by an owner is a salutary one," as well as a "legitimate private interest" in gathering the information for fundraising purposes. We agree.

The last prong of the privacy test asks "whether there is an express statutory mandate, articulated public policy, or other recognized public interest" in favor of disclosing the information. Id. at 34 (internal quotations and citation omitted). As previously stated, we are not aware of any reason for withholding the names and addresses of individuals contained in government records when not combined with or linked to other personal identifiers. Thus, disclosure of the requested information furthers the Legislature's intention that OPRA should be "construed in favor of the public's right of access." N.J.S.A. 47:1A-1.

On weighing the aforementioned seven factors, we conclude that "the twin aims of public access and protection of personal information" favor disclosure of the names and addresses of individuals possessing dog licenses issued by the City. Id. at 37. Accordingly, we reverse the January 18, 2008 order and remand for the trial court to enter an order directing that defendants disclose the names and addresses of those individuals to plaintiff.

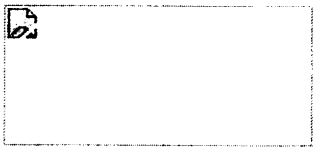
On remand, if the City possesses a list containing only the names and addresses of individuals possessing dog licenses, it must provide the list to plaintiff. If the City does not possess such a list, the custodian should redact that part of the dog license applications containing information which is expressly prohibited from disclosure by OPRA. For example, if the license

applications contain unlisted telephone numbers of the license applicants, that personal identifier must be redacted. N.J.S.A. 47:1A-1.1 and -5a. If defendants believe that other information contained in the applications should be withheld as falling under the umbrella of the privacy provision, they should redact that information and turn over the remaining portion of the applications to plaintiff. N.J.S.A. 47:1A-5g.

If there is a dispute as to any charge by the City for the cost of its services in redacting the records, N.J.S.A. 47:1A-5c, that issue should be addressed by the trial court, with the parties presenting evidence as to the number of dog license applications involved, the items of information to be redacted on each application, and the estimated hours of labor involved, together with any other relevant evidence on the issue. We also remand the issue of plaintiff's request for a reasonable attorney's fee, N.J.S.A. 47:1A-6, for the trial court to address in first instance, including any request for counsel fees on the appeal. R. 2:11-4(c).

Because we conclude that plaintiff is entitled to the information requested under OPRA, we do not address plaintiff's common-law access claim.

Reversed and remanded.



1 The Open Public Records Act, N.J.S.A. 47:1A-1 to -13.

2 In denying plaintiff's request for the dog license information, defendants cited the Government Records Council's (GRC) decision in the matter of Bernstein v. Borough of Ho-Ho-Kus, Complaint No. 2005-13, where the GRC determined that the Borough's custodian had properly denied access to dog license owners' names and addresses, concluding that the citizens had a reasonable expectation of privacy in the information. Available at http://www.nj.gov/grc/decisions/2005-13.html.

3 N.J.S.A. 4:19-15.5 governs the information required for the issuance of a dog license tag by a local municipality. Under the statute, the municipality is required to maintain the information for a period of three years. Section 122-

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9B of the City's Code, like the statute, requires that the application and registration number be maintained by the City for a period of three years.

4 Although social security numbers are generally prohibited from disclosure pursuant to N.J.S.A. 47:1A-1.1 and -5a, both statutes contain an exception: "except that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by State or Federal law, regulation or order . . . ." Because the social security numbers were contained in records that were required by law to be kept on file by the County, the Burnett Court was required to address citizens' rights of privacy in their social security numbers as it conflicted with the aforementioned exemption from disclosure.

5 In Bernstein, the GRC relied in part on Governor McGreevey's Executive Order No. 21. Paragraph No. 3 of that order prohibited public entities from, among other matters, disclosing an individual's home address "to anyone other than a person duly authorized by this State or the United States, except as otherwise provided by law, when essential to the performance of official duties, or when authorized by a person in interest." Supra, 34 N.J.R. at 2487(a). However, Paragraph No. 3 of Executive Order No. 21 was rescinded by Governor McGreevey's Executive Order No. 26. 34 N.J.R. 3043(b) (September 9, 2002).

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NOTE: The status of this decision is **Unpublished**.)

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-02205-12T4

PERRY BOLKIN,

Plaintiff-Respondent,

v.

BOROUGH OF FAIR LAWN and

JOANNE M. KWASNIEWSKI,

in her official capacity

as the Municipal Clerk

and Records Custodian of

Borough of Fair Lawn,

Defendants-Appellants.

June 16, 2014

Submitted April 1, 2014 – Decided

Before Judges Messano and Hayden.

On appeal from the Superior Court of New Jersey, Bergen County, Docket No. L-6547-02.

Ronald P. Mondello, P.C., attorneys for appellants (Mr. Mondello, on the brief)

Walter M. Luers, attorney for respondent.

PER CURIAM

Plaintiff Perry Bolkin filed a verified complaint against the Borough of Fair Lawn (Fair Lawn) and its municipal clerk, Joanne M. Kwasniewski (collectively defendants), alleging violation of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-

1 to -13. Plaintiff claimed he had requested that defendants provide him with "the names and addresses of pet owners in . . . Fair Lawn." Defendants denied the request, claiming that disclosure would violate the pet owners' reasonable expectations of privacy. Defendant's denied plaintiff's modified request, which sought "all dog and cat applications on file, or all dog and cat licenses on file, or a list of all licensed dog and cat owners, if it exist[ed]," on the same grounds. The Law Division entered an order to show cause why plaintiff was not entitled to the requested relief and counsel fees.

Defendants filed an answer, along with certifications from Fair Lawn residents who objected to having their status as pet owners disclosed. Judge Peter E. Doyne, A.J.S.C., heard oral argument on plaintiff's complaint.

Counsel explained that plaintiff, a resident of Fair Lawn and a member of the League of Humane Voters (LOHV), requested the information in order to

send pet owners political literature informing them of policy positions spoused by various candidates for office. Plaintiff wanted only the "names and the addresses" of license holders, and agreed that any records furnished by defendants could be redacted to exclude more personal information, such as the breed of dog or cat, or the age of the owner.

Defendants specifically argued that "public disclosure of . . . home address[e]s . . . implicate[d] privacy interest[s]." The certifications supplied by pet-owning citizens sounded common themes: they never anticipated public disclosure of their home addresses when they applied for a license; they did not want to receive political solicitations; and they feared potential theft of their identities. A certification supplied by Fair Lawn's Chief of Police stated that disclosure would frustrate the purpose of those who owned dogs for security reasons.

In his comprehensive written opinion, Judge Doyne initially concluded that pet license applications were "government records for purposes of OPRA."[1] The judge then balanced public disclosure, as required by OPRA, against the privacy interests of license holders. He considered the factors identified by the Court in Burnett v. County of Bergen, 198 N.J. 408 (2009), specifically

> (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.
>
> [Id. at 427 (quoting Doe v. Poritz, 142 N.J. 1, 88 (1995)).]

Judge Doyne found the first two factors favored disclosure, since "[n]ames and addresses are not exempt from disclosure under OPRA, and disclosure of this information should be favored barring significant concerns under the remaining factors." Addressing factor three, the judge noted that "plaintiff consented to retaining the information only for his personal use and distribution . . . ." Regarding the fourth factor, Judge Doyne concluded that "[t]he disclosure, while potentially causing . . . possible nuisance due to unwanted solicitation, does not include extremely personal or private information that would . . . discourage an individual from owning, and properly licensing, a dog or cat."

The judge concluded that the fifth factor was "of little concern[,]" because the information, i.e., names and addresses, was readily available and "has historically been available to the public."[2] Concerning the sixth factor, Judge Doyne reasoned that discussion of views held by political candidates was "surely in the public interest." Finally, regarding the seventh factor, the judge noted that "as there appear[ed] to be no strong reason supporting denial of the information, the Legislature's overarching intention to favor OPRA and disclosure . . . must prevail." Judge Doyne concluded that "because the privacy concerns of the individuals . . . are outweighed by the overall public interest in disclosure through OPRA, defendant[s] must disclose the requested names and addresses."

On December 14, 2012, the judge entered an order that required defendants to provide plaintiff with "the names and addresses of people who submitted cat and dog applications in Fair Lawn and acquired licenses[,]" with all other personal identifiers redacted. By consent, plaintiff agreed not to provide the information "to any other person or entity and [to] limit his use of such information to written communications through the mail[.]" The order also provided that LOHV would be permitted to access the information only

upon "application duly filed with th[e] [c]ourt" and agreement to similar restrictions on its use. Lastly, the order awarded counsel fees in an amount to be determined if the parties could not otherwise "agree to a reasonable amount."[3]

Before us, defendants contend that Judge Doyne erred because the disputed records are exempt from disclosure under OPRA's "privacy exception," and plaintiff has no "common law right of access" to the records. Defendants also argue that the license holders' due process rights entitled them to notice of the hearing and a right to be heard. Lastly, defendants contend that we should reverse the order under review, or at least stay our decision, because of legislation introduced that would exempt the names and addresses of pet license holders from OPRA and the common-law right to access public records.

We have considered these arguments in light of the record and applicable legal standards. We affirm substantially for the reasons expressed by Judge Doyne. We add only the following comments.

"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, 64-65 (2008) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). "To bring about that purpose, OPRA declares that 'government records shall be readily accessible . . . by 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.'" Id. at 65 (emphasis added) (quoting N.J.S.A. 47:1A-1).

Defendants concede that the names and addresses of pet license holders are "government records" pursuant to N.J.S.A. 47:1A-1.1, and they are not specifically exempt from disclosure under OPRA. They argue that these

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records, however, are not the "type and kind of government documents" that reflect OPRA's overriding purpose for disclosure, and that OPRA recognizes "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 Court has said that this privacy provision "is neither a preface nor a preamble[,]" but rather "part of the body of the law." Burnett, supra, 198 N.J. at 422-23 (citations omitted). In harmonizing this language with other portions of OPRA requiring disclosure, the Court adopted "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. at 427. The Doe/Burnett balancing test "must be applied case by case," with different factual circumstances potentially compelling different results. Id. at 437.

Defendants essentially contend that Judge Doyne misapplied the Burnett balancing test. We disagree. In our judgment, the judge carefully considered the issues presented, balanced the interests at stake, and properly concluded that disclosure, with appropriate redaction, was required by OPRA.[4] Having reached this conclusion, we need not consider defendants' argument regarding the common-law right to access public records.

Defendants also argue that licensed pet owners in Fair Lawn were denied due process because they were not provided with notice and an opportunity to be heard before the Law Division. However, defendants never raised this issue below. In fact, Judge Doyne specifically asked if Fair Lawn had provided notice, since only they had the names and addresses of the license holders and, thus, were the only parties who could have provided notice. Defense counsel responded in the negative and never asserted that the hearing should be

adjourned to permit such notice. "It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229, 234 (1973) (citation omitted). Although the issues in this case involve the public interest, we decline to consider defendants' argument presented for the first time on appeal.

Lastly, defendants argue we should reverse the order under review, or stay issuing our decision, pending the Legislature's consideration and presumed passage of S-2819 (2013), which was introduced by Senator Robert M. Gordon, whose district includes Fair Lawn. The proposed legislation provides that any "portion of a personal government record which discloses any personal information, including the name and address, of any person[,]" is exempt from OPRA. A "[p]ersonal government record" is defined in the bill as "a government record that pertains solely to a pet or home alarm system permit, license, or registration."

Defendants never moved to stay appellate proceedings. Moreover, they cite no authority for the proposition that the mere introduction of a piece of Legislation should compel a stay. Additionally, our review of the legislative history of S-2819 reveals that, although the bill was referred to committee, no further action was taken. See New Jersey Legislature, Bill Search of S-2819 (2012-2013), http://www.njleg.state.nj.us (last visited June 6, 2014). To our knowledge, no similar bill has been introduced during the current legislative session, which began in January 2014.

We contrast this legislative inactivity with the enactment of L. 2013, c. 116, which became effective on August 8, 2013, after Judge Doyne's decision. That legislation exempted two additional categories of government records

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from OPRA's disclosure requirements, specifically, "personal firearms records" and "personal identifying information received by the Division of Fish and Wildlife . . . in connection with the issuance of any license authorizing hunting with a firearm." N.J.S.A. 47:1A-1.1 (2013). Notably, when introduced as A-3788 (2013), the bill also included a proposed amendment to OPRA's privacy provision, N.J.S.A. 47:1A-1, that would have added the following underlined language:

> [A] public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy and to safeguard from public access information when disclosure thereof would jeopardize personal or public safety[.]

The Legislature, however, chose not to amend the privacy provision when it enacted L. 2013, c. 116.

Affirmed.

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1 The judge noted that the parties stipulated to redacting the following information from the applications: "pet breeds, SSN (if present), nature of the ownership (i.e.[,] whether the dog is used for protection, disability, etc.), the age or other descriptive data of the owner or pet, or any other data that was not merely the name and address of the owner."

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2 Judge Doyne cited Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 41-2, 55 (1995), where the Court held that the common-law right of public access applied to a computer copy of the county's tax-assessment list, which included the street address and assessed value of parcels, as well as the name and address of the owner and whether the owner was entitled to a deduction or exemption as a senior citizen, veteran or disabled veteran.

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3 The parties agreed to stay the order pending appeal. By subsequent order dated January 25, 2013, the parties also resolved the issue of counsel fees.

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4 The parties brought to Judge Doyne's attention, and now to ours, an unpublished decision of our colleagues, Atl. Cnty. SPCA v. City of Absecon, A-047-07 (App. Div. June 5, 2009), which addressed nearly identical factual circumstances. There, after considering the Doe/Burnett balancing factors, the panel concluded that the "twin aims of public access and protection of personal information favor disclosure of the names and addresses of individuals possessing dog licenses issued by the City." Id. (slip op. at 18-19). The panel compelled redaction of "unlisted telephone numbers" and other "personal identifier[s]." Id. (slip op. at 19). While the decision is not precedential, see R. 1:36-3, we find its reasoning persuasive.

ORDER ON EMERGENT MOTION

NICK D'ALLESSANDRO,

Plaintiff-Respondent,

v.

ROBBINSVILLE TOWNSHIP, MICHELLE SEIGFRIED, CLERK TOWNSHIP OF EAST WINDSOR, and GRETCHEN MCCARTHY,

Defendants-Appellants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4181-16T1
MOTION NO. M-7074-16
BEFORE PART: H
JUDGE(S): MARIE P. SIMONELLI
HARRY G. CARROLL

EMERGENT MOTION
FILED: 6/5/17 BY: Robbinsville Township and Michele Seigfried

ANSWER(S)
FILED: 6/9/17 BY: Nick D'Allessandro

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 14TH DAY OF JUNE, 2017, HEREBY ORDERED AS FOLLOWS:

EMERGENT MOTION FOR

STAY OF THE ORDERS ENTERED ON APRIL 7, 2017 AND APRIL 28, 2017

GRANTED	DENIED	OTHER
(☐)	(☒)	(☒)

SUPPLEMENTAL:

"When seeking the equitable relief of a stay pending appeal of a judgment, a movant must demonstrate that: (1) irreparable harm will result from enforcement of the judgment pending appeal; (2) the appeal presents a meritorious issue, and movant has a likelihood of success on the merits; and (3) assessment of the relative hardship to the parties reveals that greater harm would occur if a stay is not granted than if it were." McNeil v. Legislative Apportionment Comm'n of N.J., 176 N.J. 484, 486 (2003) (citing Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982)). "The moving party has the burden to prove each of the Crowe

factors by clear and convincing evidence." Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) (citing Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012)). However, if the moving party seeks only to preserve the status quo, then "the court may 'place less emphasis on a particular Crowe factor if another greatly requires the issuance of the remedy.'" Ibid. (quoting Brown, supra, 424 N.J. Super. at 183). In cases where the public interest is affected, the court must also balance the public interest in addition to the other factors. Id. at 321 (citing McNeil, supra, 176 N.J. at 484).

Robbinsville Township and Michelle Seigfried have not shown by clear and convincing evidence that any irreparable harm will result from of the enforcement of April 7, 2017 and April 28, 2017 orders pending appeal or that they have a likelihood of success on the merits.

FOR THE COURT:

MARIE P. SIMONELLI, J.A.D.

Donald M. Doherty, Jr., Esq. - Id. # 051981994
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DMD@DonaldDoherty.com
Attorney for the Plaintiff

Nick D'Allessandro, *Plaintiff,* vs. Robbinsville Tp., Michelle Seigfried, Clerk, Tp. of East Windsor and Gretchen McCarthy, Clerk, *Defendants.*	: NEW JERSEY SUPERIOR COURT : Mercer County- LAW DIV. : DOCKET NO. MER-L-2078-16 : ***Certification of Plaintiff***

I, Nick D'Allessandro, do hereby certify as follows:

1. I am the plaintiff.

2. This entire case exists because back over the summer our company was contacted by either the Humane Society or the SPCA (I do not remember which) seeking to sell us a mailing list of dog license holders at $2,500.00 per county. As builders, we are familiar with OPRA and how it is used - neighbors OPRA our permits of the homes we are working on, we OPRA planning board materials and local codes, etc..

3. Rather than pay for the various counties where we work, I just marked down to make OPRA requests on rainy days and started sending them out when I had the time. I did not think, nor can I understand, that the Humane Society or SPCA could get the records and sell them, but we could not get them ourselves.

4. By and large, we have been able to get them ourselves. We had these two towns in Mercer County refuse (now down to one because East Windsor settled by giving us all of the requested information), three in Ocean County (all of which settled by giving us the information), and three in Burlington (all of which settled by giving us the information) and two in Middlesex (one settled by giving us the information and one of which went to a hearing before Judge Francis where he ruled completely in our favor and ordered the materials turned over to us).

I certify the foregoing statements made by me are and if they are willfully false or misleading I understand that I am subject to punishment.

Copy

Nick D'Allessandro

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This case can also be found at *CITE_PENDING*.
(NOTE: The status of this decision is **unpublished**.)

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3196-05T53196-05T5

KATHY MCGUIRE,

Plaintiff-Appellant,

v.

TOWNSHIP OF WATERFORD,
DONNA HEATON, VIRGINIA L.
CHANDLER, JOHN BEKISZ, and
JOSEPH FALLON,

Defendants-Respondents.

Argued December 19, 2006 - Decided February 28, 2007

Before Judges R. B. Coleman and Gilroy.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-7502-05.

Grayson Barber argued the cause for appellant (Grayson Barber and American Civil Liberties Union of New Jersey Foundation, attorneys; Ms. Barber, Jeanne LoCicero and Ed Barocas, on the joint brief).

James P. Savio argued the cause for respondents.

PER CURIAM

Plaintiff Kathy McGuire appeals from an order of the Law Division entered on January 20, 2006, granting summary judgment to defendant Township of

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Waterford and several of its officials. We affirm in part; reverse in part; and remand to the trial court for further proceedings consistent with this opinion.

« Citation Data

Viewed most favorably for plaintiff, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), the motion record reveals the following. Plaintiff is active in a small community of individuals concerned about the safety of animals. In the past, plaintiff's group has prompted a number of investigations and instigated law enforcement actions for animal cruelty against John Tomaski, a resident of the Township.

In early February 2005, plaintiff made an anonymous telephone request of defendant Virginia Chandler, the Township Clerk, concerning the number of dog licenses issued to John Tomaski. Chandler referred plaintiff to defendant, Donna Heaton, the Township Open Public Records Act (OPRA) Coordinator, who refused plaintiff's anonymous request and instructed plaintiff to submit a written OPRA request in person. On February 7, 2005, plaintiff appeared at the Township offices and completed a formal OPRA written request asking for the "number of dogs licensed in 2004 and 2005 - John Tomaski, 2352 Ellwood, Atco [part of Township]," but did not provide her name, address, or telephone number.

On February 17, 2005, plaintiff arrived at the Township offices and was provided with a response to the request, indicating that in the year 2004, no dog licenses were issued to Tomaski, and in 2005, seven licenses were issued to him in January, and one in February. Plaintiff left the Township offices and noticed a "green van" following her as she walked to her car. After entering the car and being followed for a short distance, plaintiff turned and followed the green van back to the Township offices. The Township employee operating the van had obtained her license plate number and provided the information to defendant John Bekisz, the Township's Chief of Police, who then ran plaintiff's license plate number through the State Police database and obtained her identity.

After learning that one or more of the Township employees had provided her name to John Tomaski and to the local branch of the Society for the Prevention and Cruelty to Animals (SPCA), misrepresenting that plaintiff had held herself

out as an agent of the SPCA, plaintiff filed a complaint asserting causes of ction under OPRA; Article 1, Paragraph 1 of the New Jersey Constitution; and ıe harassment statute, N.J.S.A. 2C:33-4, alleging that she suffered emotional distress. Plaintiff sought judgment: 1) declaring that OPRA "requires records custodians to respond to anonymous requests for government records;" 2) " [p]ermanently enjoining Waterford Township, its police department and other employees and agents, from subjecting [p]laintiff to further harassment as a result of her OPRA request;" 3) compensatory and punitive damages; and 4) counsel fees and costs.

On November 18, 2005, the Township moved for summary judgment, arguing that: 1) plaintiff's claim for damages was barred for failure to file a notice of tort claim, N.J.S.A. 59:8-3, because her claims are not based on tort, but on violations of OPRA, the harassment statute and this State's Constitution. Plaintiff contends that the judge erroneously dismissed her claim for emotional distress for failure to prove that she received medical treatment contending that claims for emotional distress based on violations of state statutes and violations of constitutional rights "require a far less stringent standard of proof than that required for a tort-base emotional distress cause of action." Plaintiff asserts that the motion judge failed to address her claims for injunctive and declaratory relief, the primary remedies sought in her complaint.

A trial court will grant summary judgment to the moving party "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

On appeal, "the propriety of the trial court's order is a legal, not a factual, question." Pressler, Current N.J. Court Rules, comment 3.2.1 on R. 2:10-2

(2006). "We employ the same standard that governs trial courts in reviewing summary judgment orders." Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). It is against these principles that we address the issues raised.

We first address plaintiff's contention that the motion judge erroneously dismissed her complaint without addressing her requests for a declaratory judgment and injunctive relief. We agree that the motion judge should not have dismissed the complaint without addressing the two claims. Normally, we would reverse and remand to the trial court to address the claims. However, we choose to exercise original jurisdiction, R. 2:10-5, and decide the matters because the issues were fully briefed by both parties. AAA Mid-Atlantic v. Prudential Ins., 336 N.J. Super. 71, 78 (App. Div. 2000) (resolving without remand where "the issue has been fully briefed, in the interest of conserving judicial resources and limiting expenses to the parties").

We determine plaintiff's request for an order declaring that OPRA requires custodians of government records to respond to anonymous requests for such records is moot because plaintiff did not join any other parties as defendants, and the Township and its employees responded timely to plaintiff's request.

We next address plaintiff's argument that the judge failed to address her claim for injunctive relief enjoining the Township and its employees from subjecting her to future acts of harassment. An "[i]njunction is an extraordinary remedy that should be used sparingly." Malhame v. Borough of Demarest, 162 N.J. Super. 248, 266 (Law Div. 1978), appeal dismissed, 174 N.J. Super. 28, 31 (App. Div. 1980). Its purpose is to prevent a continuing, irreparable injury. McCullough v. Hartpence, 141 N.J. Eq. 499, 502 (Ch. 1948). A party is not entitled to injunctive relief against some unspecified future action on the part of another party. Borough of Verona v. Cedar Grove Tp., 49 N.J. Super. 293, 295 (Law Div. 1958). Therefore, the mere possibility of a remote future injury is not enough.

Here, any acts of harassment caused by defendants occurred in mid-February 2005. Although the motion for summary judgment was not heard until January 20, 2006, ten months' hence, no other allegations of harassment were

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presented to the trial court. Any concern of future acts of harassment by defendants is not supported by the evidence. Such concern is speculative at best. Because an injunction will not be granted to prevent a past act of conduct, or some possible unspecified future action of another, plaintiff is not entitled to an injunction as a matter of law. Of course, if acts of harassment were to occur in the future, plaintiff may file a new complaint.

We next address plaintiff's argument that the motion judge erred in dismissing her claim for damages under the New Jersey Tort Claims Act. This contention has merit in part.

At the time of oral argument, plaintiff conceded that OPRA does not provide a private cause of action for damages. Accordingly, we address plaintiff's claim for damages under the harassment statute, N.J.S.A. 2C:33-4 and Article I, Paragraph 1 of the New Jersey Constitution.

Plaintiff claims emotional distress based on a violation of the harassment statute. In support of her claim, plaintiff cites Paternoster v. Shuster, 296 N.J. Super. 544, 560 (App. Div. 1997), as recognizing an implicit private cause of action for damages under the harassment statute. In Paternoster, plaintiff, a school principal, filed a complaint against defendant who had formerly been employed as the school nurse in a public school where plaintiff had been principal, seeking temporary restraints enjoining defendant from harassing him, and others, together with damages. Defendant counterclaimed seeking damages and an injunction enjoining plaintiff from contacting her in the future. Id. at 558. On motion, the trial court permitted plaintiff to dismiss his damage claim and granted plaintiff's request for a permanent injunction. Id. at 554-55. The trial court also dismissed the counterclaim for failure to state a cause of action. Id. at 555.

In reversing and remanding the matter to the trial court, we concluded that the trial court erroneously dismissed plaintiff's counterclaim stating that "[i]t seems clear that defendant's counterclaim did allege a cause of action for harassment . . . ." Id. at 560. It is on this part of the opinion that plaintiff relies for support of her contention that she is entitled to pursue a cause of action for damages based on the harassment statute.

Although Paternoster implicitly recognizes a cause of action for harassment, the court "did not decide whether a cause of action for harassment gives rise to a claim of damages, as opposed to a claim for injunctive relief, and under what circumstances, if any, a claim for damages should go to the jury for its consideration." Aly v. Garcia, 333 N.J. Super. 195, 203 (App. Div. 2000), certif. denied, 167 N.J. 87 (2001). In Aly, plaintiffs filed a complaint against defendant alleging sexual harassment, negligence, intentional infliction of emotional distress, and assault. Id. at 201. The trial court submitted the case to the jury solely on the theory of harassment under N.J.S.A. 2C:33-4. Ibid. A verdict was returned for the plaintiffs. On appeal, defendant argued that the harassment statute does not provide a private cause of action for damages. In deciding to "leave for another day the decision as to whether N.J.S.A. 2C:33-4 creates a civil cause of action," id. at 203, we reversed on a basis different from that argued by defendant. Determining that plaintiffs' "only claim for damages related to their emotional distress, we consider[ed] their claim akin to one for the intentional infliction of emotional distress." Id. at 203-04. In concluding that the plaintiffs had failed to meet the threshold for an emotional distress claim under Buckley v. Trenton Sav. Fund Soc'y, 111 N.J. 355 (1988), we stated:

> [W]e conclude that under the facts here presented the evidence was insufficient to submit plaintiffs' claims for infliction of emotional distress to the jury. Neither plaintiff sought medical assistance. Nor did plaintiffs seek counseling of any kind. Although plaintiffs were understandably upset, there was no evidence from which a jury could conclude that they suffered distress so severe that a reasonable person could not be expected to endure. Nor was there any evidence introduced from which a jury could conclude that they suffered emotional distress sufficiently substantial to result in physical illness, or a mental condition of a type which may be generally recognized and diagnosed by clinicians.
>
> [Id. at 205].

Like in Aly, we need not decide the issue as to whether N.J.S.A. 2C:33-4 provides a private cause of action for damages because we are satisfied that, as a matter of law, plaintiff failed to establish a claim for intentional infliction of emotional distress.

"To recover on a claim for either intentional or negligent infliction of emotional distress, plaintiff is required to show, among other things, that [she] has suffered emotional distress '"so severe that no reasonable [person] could be

expected to endure it."" Schillaci v. First Fidelity Bank, 311 N.J. Super. 396, 06 (App. Div. 1998) (quoting Buckley, supra, 111 N.J. at 366-67 (quoting estatement (Second) of Torts, Â§ 46 comment j (1965))). "Severe emotional distress refers to any type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." Aly, supra, 333 N.J. Super. at 204. "It is not enough to establish that a party is acutely upset by reason of the incident." Ibid. "The severity of the emotional distress raises questions of both law and fact. Thus, the court decides whether as a matter of law such emotional distress can be found, and the jury decides whether it has in fact been proved." Buckley, supra, 111 N.J. at 367.

We are satisfied that plaintiff failed to present a prima facie showing that she suffered "severe" emotional distress. Accordingly, the grant of summary judgment on that claim was correct.

Lastly, we address plaintiff's constitutional claim. Plaintiff argues that Article I, Paragraph 1 of the New Jersey Constitution cloaks her with "the right to be free from harassment by state actors, and from disclosure of state-created private information." Plaintiff contends that our courts have "recognized a privacy interest that is implicated when a state actor discloses information about individual citizens," citing Doe v. Poritz, 142 N.J. 1, 87 (1985). Plaintiff asserts that "[b]y specifically providing that OPRA requests can be made anonymously, the Legislature created a cognizable and constitutionally protectable privacy interest." Plaintiff further contends that the trial court erred in dismissing her constitutional claim for failure to file a notice of claim under the New Jersey Tort Claims Act. We agree.

A plaintiff may bring a private cause of action for damages when his or her constitutional rights have been violated. N.J.S.A. 10:6-2c. The statute reads in pertinent part:

> Any person who has been deprived of any substantive due process or equal protection of rights, privileges or immunities secured . . . by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges, or immunities has been interfered with or attempted to be interfered with, by threats, intimidation, or coercion by a person acting

> under the color of law, may bring a civil action for damages . . . .
>
> [N.J.S.A. 10:6-2c].

If a plaintiff prevails on a civil rights claim, the court may award the plaintiff reasonable attorney's fees and costs. N.J.S.A. 10:6-2f. Also, unlike the tort of intentional infliction of emotional distress, a plaintiff who prevails on a claim for violation of his or her civil rights under the New Jersey Constitution may recover consequential damages for emotional distress under "a far less stringent standard of proof than that required for a tort-based emotional distress cause of action." Tarr v. Ciasulli, 181 N.J. 70, 82 (2004) (holding that in discrimination cases under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49, a plaintiff may recover all natural consequences of that wrongful conduct, including emotional distress, under a less stringent standard than Buckley). Stated another way, "[t]he Court has distinguished a cause of action in tort . . . seeking consequential damages for emotional distress from a cause of action alleging intentional infliction of emotional distress, holding that only the latter requires a heightened showing of emotional distress." Menorah Chapels v. Needle, 386 N.J. Super. 100, 116 (App. Div.), certif. denied, 188 N.J. 489 (2006). We are satisfied that the same principle of Tarr may be applied in a civil rights action for violation of one's constitutional rights.

The New Jersey Tort Claims Act does not apply to constitutional violations or civil rights violations. See Fuchilla v. Layman, 109 N.J. 319, 332-38 (1988) (holding that the Tort Claims Act does not provide immunity for claims brought under the New Jersey Law Against Discrimination), sub nom University of Medicine & Dentistry v. Fuchilla, 488 U.S. 826, 109 S. Ct. 75, 102 L. Ed.2d 51 (1988). See also Lloyd v. Stone Harbor, 179 N.J. Super. 496, 517 (Ch. Div. 1981) (holding that the Tort Claims Act does not bar claims for civil rights under the New Jersey Constitution). Therefore, plaintiff's claim for damages based on a violation of Article I, Paragraph 1 of the State's Constitution should not have been dismissed. We remand the claim back to the trial court for the parties to address after completion of discovery. Although we agree with plaintiff's argument that OPRA implicitly provides that individuals may request government records anonymously, N.J.S.A. 47:1A-5f and -5i, we

do not pass judgment as to whether the right to anonymity under OPRA supports plaintiff's constitutional claim.

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The dismissal of plaintiff's claim for damages under OPRA and N.J.S.A. 2C:33-4 is affirmed; plaintiff's claims for a declaratory judgment and injunctive relief are denied; the grant of summary judgment dismissing plaintiff's claim for damages, attorney's fees and costs under the New Jersey Constitution is reversed and remanded to the trial court for further proceedings consistent with this opinion.

0x08 graphic

The Open Public Records Act, N.J.S.A. 47:1A-1 to -13.

On information and belief, plaintiff alleges in Paragraph 15 of her complaint that this employee was defendant Joseph Fallon, Zoning Supervisor of the Township. Because defendants moved for summary judgment shortly after filing of the complaint, plaintiff's suspicions as to the identity of the employee had not been confirmed because discovery had not been completed.

N.J.S.A. 59:1-1 to 12-3.

(continued)

(continued)

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A-3196-05T5

February 28, 2007

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FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

ORDER PREPARED BY THE COURT

ERNEST BOZZI,	:	SUPERIOR COURT OF NEW JERSEY IN MONMOUTH COUNTY LAW DIVISION,
Plaintiff,	:	DOCKET NO.: MON-L-494-18
v.	:	**ORDER**
WALL TOWNSHIP, and KERI-LYN PAGNONI, Deputy Clerk,	:	
Defendants.	:	

THIS MATTER having been opened to the court by Donald M. Doherty, Jr., Esq., attorney for the Plaintiff and the Court having reviewed the papers and arguments of counsel, for the reasons stated in the accompanying opinion,

IT IS on this 1 day of August, 2018 ORDERED that defendants shall provide plaintiff with copies of the requested documents with redactions of information other than names and addresses of licensed dog owners, pursuant to Plaintiff's records request; and

IT IS FURTHER ORDERED Counsel for Plaintiff and Defendants are to confer and attempt to resolve the reasonable attorney's fees to which Plaintiff is entitled. If counsel cannot agree, Plaintiff's counsel shall submit a Certification of Services delineating the amount of fees requested. Plaintiff's counsel shall prepare and submit, under the five-day rule, R. 4:42-1, an order that comports with this Court's ruling, and if necessary, the Certification of Services delineating the amount of attorney's fees requested.

/s/Lisa P. Thornton
HONORABLE LISA P. THORNTON, A.J.S.C.

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

NOT FOR PUBLICATION WITHOUT APPROVAL FROM THE COMMITTEE ON OPINIONS

ERNEST BOZZI,	SUPERIOR COURT OF NEW JERSEY IN MONMOUTH COUNTY LAW DIVISION,
Plaintiff,	DOCKET NO.: MON-L-494-18
v.	**OPINION**
WALL TOWNSHIP, and KERI-LYN PAGNONI, Deputy Clerk,	
Defendants.	

Decided: August 1, 2018

Donald M. Doherty, Jr. for plaintiff;

Sean T. Kean for defendants (Cleary Giacobbe Alfieri Jacobs, LLC, attorneys).

THORNTON, A.J.S.C.

In this action in lieu of prerogative writs, the court considers whether defendants' denial of access for names and addresses of licensed dog owners was appropriate under the Open Public Records Act, N.J.S.A. 47:1A-1 to -13, ("OPRA") and the common law right of access. Because the privacy interest asserted is limited and the risk of harm speculative, disclosure is appropriate. More importantly, defendants' denial of access based on a rescinded Executive Order was not "authorized by law."

I.

The relevant facts are undisputed. On January 5, 2018, plaintiff, the owner of an invisible fence company, submitted an OPRA request for "the names and addresses of dog owners." On January 29, 2018, defendants denied the request based on Rich Bernestein v. Borough of Woodcliff Lake (GRC

Complaint No. 2005-2). In denying the request, defendant Keri Pagnogi relied on Executive Order 21 and the conclusions made by the General Record Council ("GRC") to support her position that disclosure would result in "unsolicited contact, intrusion or potential harm."

In support of the complaint, plaintiff correctly states that relevant portions of Executive Order 21 were rescinded long before the GRC decided Rich Bernstein v. Borough of Woodcliff Lake (GRC Complaint No. 2005-2). More importantly plaintiff relies on the Court's recent decision in Brennan v. Bergen Cty. Prosecutor's Office, 233 N.J. 330 (2018),[1] for the proposition that an analysis of the Doe factors is unnecessary because the Custodian failed to articulate a colorable claim that disclosure would violate a dog owners "objective" reasonable expectation in privacy.[2] He reasons that because dogs are walked outside and bark in public, the privacy interest is speculative.

In opposition, defendants argue that disclosure could expose licensed dog owners to security and data breaches.[3] They also argue that "unfettered access to personal information" would have a "chilling effect" on licensed dog owners and all citizens that are asked to comply with municipal ordinances.[4] Finally, defendants contend that disclosure would expose licensed dog owners to the "risk of unwanted solicitation."[5]

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[1] Pin cites for this case are not available as of yet. For purposes of this opinion, specific pin citations will refer to the respective pages in the slip opinion.

[2] See Doe v. Poritz, 142 N.J. 1, 88 (1995).

[3] Defendants provide no facts to support this assertion. It is unclear to the court how providing names and addresses in this matter, exposes citizens to a security threat more than shopping on the internet, owning a home, and exposing names and address to the public domain, or receiving a traffic ticket in municipal court, where a defendant's name and address is available to the public.

[4] The court notes that plaintiff did not make an "unfettered" claim for personal information. There is no request for personal identifiers including social security numbers, dates of birth, or even the breed of dog.

[5] Defendants failed to provide the court with any authority to indicate that the "risk of unwanted solicitation" is a factor for the court to consider. In fact requestors routinely request public documents for a commercial purpose. See Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35 (1995).

II.

Access to public records is available in three distinct ways. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 543 (App. Div. 2005) (citing Bergen County Improvement Auth. v. North Jersey Media Grp., 370 N.J. Super. 504, 515 (App. Div. 2004)). They may be obtained through a citizen's common law right of access, by asserting one's rights pursuant to OPRA, or by the discovery procedures applicable to civil disputes. Ibid.

OPRA was enacted "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, 64-65 (2008) (quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). The statute embodies New Jersey's strong tradition of favoring the public's right to be informed of government actions.

When a public agency denies a request for records, it "shall have the burden of proving that the denial of access is authorized by law." N.J.S.A. 47:1A-6; see also Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 379 (App. Div. 2003). The agency "must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. Absent such a showing, a citizen's right of access is unfettered." Courier News, 358 N.J. Super. at 382-83. A court's analysis should consider "the overarching public policy in favor of a citizen's right of access." Id. at 383.

When interpreting a statute, "[t]he primary task for the Court is to effectuate the legislative intent in light of the language used and the objects sought to be achieved." Merin v. Maglaki, 126 N.J. 430, 436 (1992) (citing State v. Maguire, 84 N.J. 508, 514 (1980)). To determine legislative intent, courts should look to the plain language of the statute and "give words their ordinary meaning absent any direction from the Legislature to the contrary." TAC Associates v. New Jersey Dept. of Environmental Protection, 202 N.J. 533, 541 (2010) (citing Serv. Armament Co. v. Hyland, 70 N.J.

550, 556 (1976)). If the "Legislature's intent is clear on the face of the statute, [courts] must apply the law as written." Carter v. Doe, 230 N.J. 258, 274 (2017).

While OPRA greatly expanded public access to government records, the statute excludes twenty-one categories of information, including "that portion of any document which discloses the social security number, credit card number, unlisted telephone number, or driver license number of any person." N.J.S.A. 47:1A-5(a). See Brennan, 233 N.J. 330 (slip op. at 14). In addition, a person's name and address are exempt from public access when they are received "in connection with the issuance of any license authorizing hunting with a firearm" or if a defendant "convicted of a crime" requests access to a victim's address or other personal identifiers. Ibid. Finally, public agencies are required to safeguard personal information from public access where disclosure would violate a citizen's reasonable expectation of privacy. Burnett v. County of Bergen, 198 N.J. 408, 414, 427-28 (2009) (citing Doe v. Poritz, 142 N.J. 88 (2009); N.J.S.A. 47:1A-1).

When confronted with privacy concerns the court must balance the citizen's interest in privacy with the public's interest in government transparency by considering:

> (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 (citing Doe, 142 N.J. at 88). However, "before an extended analysis of the Doe factors is required, a custodian must present a colorable claim that public access to the records requested would invade a person's objectively reasonable expectation of privacy." Brennan, 233 N.J. 330 (slip op. at 17). Names and addresses in public records are not confidential. See Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 42, 49 (1995), holding that the "State has no interest in

confidentiality [because the information] contain[s] simple, non-evaluative data that [has] historically been available to the public and [does] not give rise to expectations of privacy."

In addition to OPRA, disclosure of public records can be sought under the common law right of access. A requestor may gain access to records under the common law if: (1) the records are common-law public documents; (2) the requestor establishes an interest in the material; and (3) the citizen's right to access outweighs the State's interest in confidentiality. Keddie v. Rutgers, 148 N.J. 36, 49 (1997). Under the common law, a record is a "public document" if it is "created by, or at the behest of, public officers in the exercise of a public function. Id. at 50 (citing Higg-A-Rella, 141 N.J. 35).

III.

There should be little question that defendants' denial of access is not supported by law. Jurisprudence in this State makes it clear that names and addresses, without more, are subject to public access when included in public records. Higg-A-Rella, 141 N.J. at 42, 49; Brennan, 233 N.J. 330 (slip op. at 24). Defendants cite the privacy interest of dog owners in support of their denial of access. However, they fail to offer any plausible explanation why dog owners should be afforded more protection than home owners or other citizens whose names and addresses are subject to disclosure.

A review of the plain language of the statute reveals the Legislature clearly defined the instances when names and addresses should be withheld from public access. If they intended to impose a broad exemption for names and addresses, they would have done just that. While the OPRA statute fails to define "a citizen's personal information," the Legislature elaborated on the meaning of "personal information" in adopting N.J.S.A. 56:8-161, and only limited disclosure of names and addresses if

> "linked with any one or more of the following fata elements: (1) Social Security number; (2) driver's license number or State identification card number; or (3) account number or credit or debit card number, in combination with any required security code, access code, or password

> that would permit access to an individual's financial account. Dissociated data that, if linked, would constitute personal information is personal information if the means to link the dissociated data were accessed in connection with access to the dissociated data."

More importantly, OPRA does not diminish a requestor's right to records simply because the request is made for a commercial purpose. Burnett, 198 N.J. at 408. On the contrary, the statute requires "[t]he custodian of government record [to] permit the record to be inspected, examined, and copied by any person during regular business hours." N.J.S.A. 47:1A-5(a) (emphasis added).[6]

CONCLUSION

For the reasons stated above, defendants shall grant access to the most recent dog license records, redacting any additional information beyond the names and addresses. Counsel shall confer and attempt to resolve the reasonable attorney's fees to which plaintiff is entitled. If counsel cannot agree, plaintiff's counsel shall submit a Certification of Services delineating the amount of fees requested. Plaintiff's counsel shall prepare and submit, under the five-day rule, R. 4:42-1, an order that comports with this court's ruling, and if necessary, the Certification of Services delineating the amount of attorney's fees requested.

[6] Defendants fail to support any authority that names and addresses included in public documents are confidential. Consequently, a Doe analysis is unnecessary because it is so widely settled that this information is not confidential and the custodian has not offered a colorable claim that disclosure would invade a citizen's reasonable expectation of privacy.

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

Civil Case Information Statement

Case Details: HUDSON | Civil Part Docket# L-000354-19

Case Caption: BOZZI ERNEST VS JERSEY CITY
Case Initiation Date: 01/24/2019
Attorney Name: DONALD MICHAEL DOHERTY JR
Firm Name: DONALD M. DOHERTY, JR.
Address: 708 NORTH ST
OCEAN CITY NJ 08226
Phone:
Name of Party: PLAINTIFF : Bozzi, Ernest
Name of Defendant's Primary Insurance Company (if known): None

Case Type: OPEN PUBLIC RECORDS ACT (SUMMARY ACTION)
Document Type: NJ eCourts Case Initiation Confirmation
Jury Demand: NONE
Hurricane Sandy related? NO
Is this a professional malpractice case? NO
Related cases pending: NO
If yes, list docket numbers:
Do you anticipate adding any parties (arising out of same transaction or occurrence)? NO

THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

Do parties have a current, past, or recurrent relationship? NO

If yes, is that relationship:

Does the statute governing this case provide for payment of fees by the losing party? NO

Use this space to alert the court to any special case characteristics that may warrant individual management or accelerated disposition:

Do you or your client need any disability accommodations? NO
If yes, please identify the requested accommodation:

Will an interpreter be needed? NO
If yes, for what language:

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with *Rule* 1:38-7(b)

01/24/2019
Dated

/s/ DONALD MICHAEL DOHERTY JR
Signed

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

PETER BAKER
CORPORATION COUNSEL
John McKinney, ID#039742002
Assistant Corporation Counsel
JERSEY CITY LAW DEPARTMENT
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Jersey City, NJ 07302
Attorney for Defendants City of Jersey City and Irene McNulty

	:	SUPERIOR COURT OF NEW JERSEY
ERNEST BOZZI,	:	LAW DIVISION: HUDSON COUNTY
	:	
Plaintiff,	:	DOCKET NO.: HUD-L-354-19
v.	:	
	:	Civil Action
JERSEY CITY and IRENE McNULTY,	:	
	:	
Defendants.	:	**ANSWER**
	:	

Defendants, City of Jersey City and Irene McNulty, by way of Answer to the Complaint say:

1. Defendants admit the allegations contained in this paragraph of the Complaint.

COUNT ONE – OPEN PUBLIC RECORDS ACT

2. Defendants admit the allegations contained in this paragraph of its Complaint.

3. Defendants admit the allegations contained in both (a) and (b) paragraphs of the Complaint.

4. The allegations contained in this paragraph of the Complaint lack sufficient knowledge to either admit or deny and Defendants leave Plaintiffs to its proofs.

4. Defendants admit the allegations contained in this paragraph of the Complaint.

5. Defendants admit the allegations contained in this paragraph of the Complaint.

6. Defendants admit the allegations contained in this paragraph of the Complaint.

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

7. The allegations contained in this paragraph of the Complaint lack sufficient knowledge to either admit or deny and Defendants leave Plaintiffs to its proofs.

8. Defendants deny the allegations contained in this paragraph of the Complaint.

COUNT TWO – (Common Law Access)

9. Defendants admit the allegations contained in this paragraph of the Complaint.

10. Defendants deny the allegations contained in this paragraph of the Complaint.

11. Defendants deny the allegations contained in this paragraph of the Complaint.

12. Defendants deny the allegations contained in this paragraph of the Complaint.

WHEREFORE, Defendants demand judgement dismissing Plaintiffs' Complaint.

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:5.1, John McKinney, Assistant Corporation Counsel is hereby designated as trial counsel on behalf of Defendants, City of Jersey City and Irene McNulty.

CERTIFICATION

I hereby certify that a copy of the within Answer was served within the time prescribed by Rule 4:6.

Pursuant to Rule 4:5-1, it is hereby stated that the matter in controversy is not now the subject of any other action pending in any other court, or of a pending arbitration proceeding, to the best of my knowledge and belief. Also, to the best of my belief, no other action or arbitration proceeding is contemplated. Further, other than the parties set forth in this pleading and previous pleadings, at the present time, I know of no other parties that should be joined in the within action.

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

PETER BAKER
CORPORATION COUNSEL

By: /s/John McKinney
John McKinney
Assistant Corporation Counsel

DATED: March 8, 2019
JMcK/kn

R003526-112718 - Open Public Records Request

Open Public Records Request Details

Open Public Records Request Details

Describe the Record(s) Requested:	I would like your most recent compiling of dog license records (annual/yearly). You can redact the breed , name of dog, any information about why they have the dog and any phone numbers whether they are unlisted or not. I am only looking for the names and addresses of dog owners for my invisible fence installations (I am a licensed home improvement contractor). Please remove any information beyond the names and addresses for there are no privacy concerns as outlined by the Government Record Council in Bernstein v Allendale.	
Property Address Number:		If you do not know the exact address, please provide an intersection
Property Address Street:		If you do not know the exact address, please provide an intersection
Common Law Request:	Yes	If unknown, leave blank
Reason for Common Law Request:	Business owner seeking dog owners as customers	
Preferred Method to Receive Records:	Electronic via Records Center	
Please Choose:	No, I have not been convicted of a crime.	

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

PETER BAKER,
CORPORATION COUNSEL
John McKinney, ID # 039742002,
Assistant Corporation Counsel
JERSEY CITY LAW DEPARTMENT
280 Grove Street
Jersey City, NJ 07302
Attorney for Defendants City of Jersey City and Irene McNulty

ERNEST BOZZI, Plaintiff, v. CITY OF JERSEY CITY and IRENE MCNULTY Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO.: HUD-L-354-19 Civil Action **CERTIFICATION OF MICHAEL KELLY**

I, Michael Kelly, on March 8, 2019, certify as follows:

1. I am the Chief of Police in the Police Division of Department of Public Safety in the City of Jersey City (the "City").

2. I have served the City as an employee of the Police Department, including the ranks of Officer, Seargent, Liutenant, Captain, Deputy Police Chief and Chief of Police for approximately thirty (30) years.

3. Ac Chief of Police, my daily job duties include oversight and direction of the entire Police Division. Additionally, I am responsible for the administration and implementation of the policies set forth by the Department of Public Safety.

4. Based on my position and experience, I am uniquely familiar with the risks associated with the disclosure of the personal information Jersey City resident. The Police Division is exceptionally concerned about the public release of the names of all dog owners throughout the City. The public disclosure of such information will endanger the public in numerous ways, including but not limited to informing potential criminals of which properties throughout the City do not have a dog and, therefore, may be more appealing to rob or burglarize. Additionally, it might lead to the inadvertent disclosure of the names and locations of people who have been threatened, harmed or stalked by abusive malicious actors in the past. Such disclosures will enable said malicious actors to relocate their victims and also be informed of the fact that they possess a dog, thus encouraging them to potentially bring a weapon.

5. I am submitting this certification in support of the City's opposition to the Order to Show Cause filed by the Plaintiff that seeks to compel the City to produce a list of the names and home addresses of Jersey City residents that possess a dog license.

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Michael Kelly, Chief of Police
City of Jersey City, Police Division,
Department of Public Safety

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

PETER BAKER,
CORPORATION COUNSEL
John McKinney, ID # 039742002,
Assistant Corporation Counsel
JERSEY CITY LAW DEPARTMENT
280 Grove Street
Jersey City, NJ 07302
Attorney for Defendants City of Jersey City and Irene McNulty

ERNEST BOZZI,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY
Plaintiff,	:	DOCKET NO.: HUD-L-354-19
v.	:	Civil Action
CITY OF JERSEY CITY and IRENE MCNULTY	:	**CERTIFICATION OF CHRIS KEARNS**
Defendants.	:	

I, Christopher Kearns, on March 8, 2019, certify as follows:

1. I am the Project Manager in the Department of Public Safety in the City of Jersey City (the "City").

2. I have worked for the City in the Department of Public Safety for approximately four (4) years.

3. Part of my daily job duties includes access to, and administration of, the Mark43 records system, which allows for the searching of various police investigatory records created or maintained by the City.

4. On March 7-8, 2019, I conducted a search for records in the Mark43 system that document the investigations of reported thefts of dogs in Jersey City. I located records involving theft reports for a total of five (5) dogs in 2018. Three of the dogs were stolen from yards. One dog was stolen from an apartment. Finally, one dog was stolen by a friend of an individual who allowed the friend to walk the dog.

5. I am submitting this certification in support of the City's opposition to the Order to Show Cause filed by the Plaintiff that seeks to compel the City to produce a list of the names and home addresses of Jersey City residents that possess a dog license.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Chris Kearns, Project Manager
City of Jersey City, Department of Public Safety

State of New Jersey

Executive Order #21

Governor James E. McGreevey

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WHEREAS, in January, 2002, the New Jersey Legislature enacted and Acting Governor DiFrancesco signed into law Chapter 404, P.L. 2001, commonly known as the Open Public Records Act; and

WHEREAS, the Open Public Records Act contained substantial revisions to Chapter 73, P.L. 1963, the New Jersey Right to Know Law that had governed the public's access to government records for almost 40 years; and

WHEREAS, the Legislature in enacting the Open Public Records Act reaffirmed it to be the public policy of this State that public records shall be readily accessible for examination by the citizens of this State, with certain exceptions for the protection of the public interest; and

WHEREAS, the Legislature further found and declared in the Open Public Records Act that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and

WHEREAS, the Open Public Records Act provides that all government records shall be subject to public access unless exempt from such access by the provisions of the Act; any other statute; a resolution of either or both houses of the Legislature; a regulation promulgated under the authority of a statute or Executive Order of the Governor; an Executive Order of the Governor; the Rules of Court; or any federal law, federal regulation or federal order; and

WHEREAS, the Legislature has found and declared in Chapter 246, P.L. 2001 that domestic preparedness is essential to preventing and responding to the threat of terrorist attack; and

WHEREAS, the World Trade Center and Pentagon attacks and other significant events, both domestic and foreign, and the ongoing threat to security of our citizens have emphasized this State's compelling interest in developing and maintaining a precisely coordinated counter-terrorism and preparedness effort to enhance the public's safety; and

WHEREAS, in furtherance of this goal the Legislature has created the Domestic Security Preparedness Task Force and Executive Order No. 3 has established the Office of Counter-Terrorism to coordinate the State's counter-terrorism and preparedness efforts to provide for the public's safety and welfare; and

WHEREAS, the right of public access to government records as provided in the Open Public Records Act must be balanced against the risk of disclosing information that would facilitate terrorist activity and balanced against a citizen's reasonable expectation of privacy; and

WHEREAS, the Open Public Records Act does not afford county and local governments with any means for exempting access to their records, even where the public interest or a citizen's reasonable expectation of privacy would clearly be harmed by disclosure of those records; and

WHEREAS, the Open Public Records Act takes effect on July 7, 2002, the 180th day after its enactment; and

WHEREAS, the enactment of the Open Public Records Act occurred one week before this Administration took office; and

WHEREAS, it was necessary for all State agencies to conduct a comprehensive review of all records maintained by that agency, and a thoughtful analysis of those records to determine which of those records should be exempted from disclosure in order to protect the public interest or a citizen's reasonable expectation of privacy; and

WHEREAS, that review and analysis was required to be performed during a time of shifting personnel and priorities and changing the way government does business with its citizens; and

WHEREAS, that process has been largely completed and the various agencies have identified those documents that should be exempted from public disclosure in order to protect the public interest or a citizen's reasonable expectation of privacy; and

WHEREAS, the proposed regulations of the various agencies specifying which records under their jurisdiction are not to be subject to public examination have been published in the New Jersey Register on July 1, 2002; and

WHEREAS, due to the provisions of the Administrative Procedures Act and the implementing regulations adopted pursuant to that Act, the agencies' proposed rules will not be finalized until October 1, 2002 at the earliest; and

WHEREAS, it is essential to preserve the confidentiality of certain records maintained by the Office of the Governor, in order to protect the public interest;

NOW, THEREFORE, I, JAMES E. McGREEVEY, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. At all levels of government - State, county, municipal and school district -- the following records shall not be deemed to be public records under the provisions of Chapter 404, P.L. 2001, and Chapter 73, P.L. 1963, and thus shall not be subject to public inspection, copying or examination:

    a. Any government record where the inspection, examination or copying of that record would substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism.

    b. The Attorney General is hereby directed to promulgate, in consultation with the Domestic Security Preparedness Task Force, a regulation to govern the determination of which government records shall be deemed to be confidential pursuant to subsection (a).

    c. Public agencies are hereby directed to handle all government records requests in a manner consistent with the standard contained in subsection (a) of this Order, until the regulation is proposed by the Attorney General pursuant to subsection (b). Once the rule has been proposed, public agencies shall respond to records requests in a manner consistent with this Order and the proposed regulation. When that regulation is finally adopted, it shall govern all government record requests filed thereafter.

2. In addition to those records of the Office of the Governor that are exempted by the provisions of the Open Public Records Act, the following records maintained by the Office of the Governor, or any part thereof, shall not be deemed to be government records under the provisions of Chapter 404, P.L. 2001, and Chapter 73, P.L. 1963, and thus shall not be subject to public inspection, copying or

examination:

a. All records that, prior to the effective date of Chapter 404, P.L. 2001, have been found by a court to be confidential, or have been found not to be public records.

b. All records or portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege.

c. Records containing information provided by a person outside the Office of Governor who has or would have had a reasonable expectation of privacy in that information when it was provided to the Office of Governor.

3. In order to effectuate the legislative directive that a public governmental agency has the responsibility and the obligation to safeguard from public access a citizen's personal information with which it has been entrusted, an individual's home address and home telephone number, as well as his or her social security number, shall not be disclosed by a public agency at any level of government to anyone other than a person duly authorized by this State or the United States, except as otherwise provided by law, when essential to the performance of official duties, or when authorized by a person in interest. Moreover, no public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing, and thereafter in the case of unsuccessful candidates.

4. In light of the fact that State departments and agencies have proposed rules exempting certain government records from public disclosure, and these regulations have been published for public comment, but cannot be adopted prior to the effective date of the Open Public Records Act, State agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published, and the records exempted from disclosure by those proposed rules are exempt from disclosure by this Order. Once those regulations have been adopted, they shall govern all government records requests filed thereafter.

5. Executive Orders No. 9 (Hughes), 11 (Byrne), 79 (Byrne) and 69 (Whitman) are hereby continued to the extent that they are not inconsistent with this Executive Order.

6. This Executive Order shall take effect immediately.

GIVEN, under my hand and seal this 8th day
of July in the Year of Our Lord, Two Thousand
and Two, and of the Independence of the United
States, the Two Hundred and Twenty-Seventh.

James E. McGreevey
Governor

Attest:
Paul A. Levinsohn
Chief Counsel to the Governor

3/8/FILED, Clerk of the Appellate Division, September 10, 2019, A-004205-18

State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337

E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

2005-99

- Final Decision
- Findings and Recommendations of the Executive Director

Final Decision

Rich Bernstein
Complainant
v.
Borough of Park Ridge
Custodian of Records

Complaint No. 2005-99

At its July 14, 2005 public meeting, the Government Records Council ("Council") considered the July 8, 2005 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted by a majority to adopt the entirety of said findings and recommendations. The Council, therefore, dismissed the case on the basis that pursuant to N.J.S.A. 47:1A-1 and Executive Order 21 the records should not be disclosed because of the unsolicited contact, intrusion or potential harm that may result.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006.

Final Decision Rendered by the
Government Records Council
On The 14th Day of July, 2005

Vincent P. Maltese, Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

DeAnna Minus-Vincent, Secretary
Government Records Council

Decision Distribution Date: July 21, 2005

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Findings and Recommendations of the Executive Director

Rich Bernstein
Complainant
v.
Borough of Park Ridge
Custodian of Records

GRC Complaint No. 2005-99

Records Requested:

1. Names and addresses of dog license owners.

Request Made: April 25, 2005
Response Made: May 19, 2005
Custodian: Karen Hughes
GRC Complaint filed: May 20, 2005

Background

April 25, 2005
The Complainant filed an Open Public Records Act ("OPRA") request seeking names and addresses of dog license owners in the Borough.

May 19, 2005
The Custodian responded to the Complainant's OPRA request of April 27, 2005. The Custodian denied the Complaint's request by

stating that until the Government Records Council has ruled on cases relating to dog license information, his request will be denied.

May 20, 2005
The Complainant filed a Denial of Access Complaint with the Government Records Council ("Council").

May 20, 2005
The Council's staff sent Mediation information to the Complainant and Custodian.

June 3, 2005
The Custodian's filed a Statement of Information stating that the Borough had privacy concerns regarding the release of the requested records, however, they would release the records pursuant to a favorable ruling by the Government Records Council on the pending other cases involving dog license names and addresses.

June 22, 2005
The Council's staff issued a letter to the Complainant seeking the need for access to be addressed by the Complainant in order to accurately apply the common law balancing test.

June 23, 2005
The Complainant responded to the Council's staff's letter of June 13, 2005 via e-mail by referencing his letter of June 13, 2005 and stating that he is seeking the records to start his own hidden electric fence business. The Complainant further indicated that his company will comply with local ordinances on installations, plans no telemarketing and will not redistribute the records.

Analysis

Whether the Custodian unlawfully denied access to the names and addresses of dog license owners pursuant to N.J.S.A. 47:1A-1 et. seq. and Executive Order 21?

N.J.S.A. 47:1A et. seq. provides that "…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…"

"If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor." (N.J.S.A. 47:1A-5(g)).

N.J.S.A. 47:1A-5(g) provides that "[i]f the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to P.L.1963, c.73 (C.47: 1A-1 et seq.) as amended and supplemented, the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record."

Executive Order 21 provides that "…the Legislature further found and declared in the Open Public Records Act that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy…and the right of public access to government records as provided in the Open Public Records Act must be balanced against the risk of disclosing information that would facilitate terrorist activity and balanced against a citizen's reasonable expectation of privacy…"

The Complainant requested names and addresses of dog license owners. The Custodian's stated in their Statement of Information that the Borough had privacy concerns regarding the release of the requested records, however, they would release the records pursuant to a favorable ruling by the Government Records Council on the pending other cases involving dog license names and addresses.

Pursuant to OPRA, the public agency has a responsibility to safeguard a citizen's personal information and the citizen's reasonable expectation of privacy; furthermore, some security concerns arise in releasing the names and addresses of dog owners. Specifically in that a resident is legally required to license their dog and in doing so is required to supply a name and address. The dog owners entrust the Borough to protect their privacy by not disclosing their personal information and that the disclosure of this type of information would jeopardize the security of the dog owner, the security of the non-dog owner, the property that the dog may be protecting and the dog itself from burglary, theft and other criminal activity. Many homeowners use their dogs as a means of security and that others have valuable dogs that could be subject to theft.

As the request is for information that could adversely affect the privacy of the citizens that have applied for such licenses because of:

1. their reasonable expectation of privacy;
2. unwarranted commercial solicitation;
3. compromised home and personal security; and
4. exposure to theft of valuable breeds

it is necessary, therefore, to employ the balancing test set forth by the New Jersey Supreme Court and utilized in previous GRC cases.

In Merino v. Ho-Ho-Kus, GRC Complaint 2003-121 (Feb. 18, 2004), the Council addressed the citizen's reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1 and found that the New Jersey Supreme Court, Appellate Division held that the GRC must enforce OPRA's declaration, in N.J.S.A. 47:1A-1, that "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." Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 368-69 (App. Div. 2003). See also National Archives and Records Administration v. Favish, 541 U.S. 157, 124 S.Ct. 1570 (U.S. March 30, 2004) (personal privacy interests are protected under FOIA).

The New Jersey Supreme Court has indicated that, as a general matter, the public disclosure of an individual's home address "does implicate privacy interests." Doe v. Poritz, 142 N.J. 1, 82 (1995). The Court specifically noted that such privacy interests are affected where disclosure of a person's address results in unsolicited contact. The Court quoted with approval a federal court decision that indicated that significant privacy concerns are raised where disclosure of the address "can invite unsolicited contact or intrusion based on the additional revealed information." *Id.* (citing Aronson v. Internal Revenue Service, 767 F.Supp. 378, 389 n. 14 (D. Mass. 1991)).

The Supreme Court concluded that the privacy interest in a home address must be balanced against the interest in disclosure. It stated that the following factors should be considered:

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;
7. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access [*Id.* at 87-88].

The foregoing criteria was applied accordingly by the Court in exercising its discretion as to whether the privacy interests of the individuals named in the summonses are outweighed by any factors militating in favor of disclosure of the addresses.

The Council has applied the above balancing factors in Merino v. Ho-Ho-Kus, GRC Complaint 2003-121 (Feb. 18, 2004), in determining that name and address information was properly withheld from disclosure.

Therefore, the above factors were considered here with the following conclusions:

1. **Type of record request:** List of names and addresses of dog license owners.
2. **The type of information it does or might contain:** List of names and addresses of dog license owners.
3. **The potential for harm in any subsequent nonconsensual disclosure:**
   - Jeopardizing the privacy of those who have applied for such licenses, possible unsolicited contact;
   - Jeopardizing the privacy of those who have applied for such licenses by the redistribution of such lists;
   - Jeopardizing the security of those who have applied for such licenses,
   - Jeopardizing the security of those who have not applied for such licenses and jeopardizing the citizen's property including their dog.
4. **The injury from disclosure to the relationship in which the record was generated:**
   - Citizens may no longer trust the agency with this information for fear that their privacy will not be protected;
   - Citizens who license their dogs and those who do not own dogs may be targeted for theft;
   - Citizens property may be targeted for theft and vandalism;
   - Valuable dogs may be targeted for theft and some dogs may be targets for potential harm.
5. **The adequacy of safeguards to prevent unauthorized disclosure:** None. There is nothing to prevent redistribution of this information.
6. **The degree of need for access:** Access is in the form of unsolicited contact or intrusion.
7. **Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access:** OPRA 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…" (N.J.S.A. 47:1A-1).

The release of the requested names and addresses could potentially adversely affect the privacy of citizens with unwarranted solicitation and the redistribution or sale of the names and addresses. The Complainant has clearly indicated that he intends to use the records for soliciting business. Although the Complainant indicated that he would not redistribute the records, once released the public agency has no safeguards as to how the records are used. Unwarranted solicitation, however, is not the only glaring issue to consider.

The release of the requested names and addresses could also potentially adversely affect a citizen's willingness to provide personal information to a government agency knowing that their personal information may not be protected from disclosure to anyone who files an OPRA request. The names and addresses are required as a procedure for licensing a dog in New Jersey and are not optional.

The release of the requested names and addresses, additionally, has the potential for harm to citizens who have applied for a dog license, as well as citizens who do not own dogs. Permitting access to such records allows any recipient of the record to ascertain which homes are protected by or have dogs and which do not have dogs. Although the Complainant has indicated that the records are to be used in business solicitation, the release of this information could potentially jeopardize the safety and security of citizens and their property, as well as their dogs. The public agency, nonetheless, cannot guarantee how the records will be used once the records have been released. The potential for theft, physical harm, vandalism and burglary is a concern in determining the disclosure because it allows the requestor access to personal information regarding the dog owner and their property that may not otherwise be disclosed to the public.

The release of the requested names and addresses, further, has the potential for harm to citizens who own valuable dogs. Dogs of certain breeds may become potential targets for threats, theft and physical harm simply because of their breed. The public agency is without safeguards to provide assurance as to how the records will be used if released.

Pursuant to OPRA and Executive Order 21, a government agency has the obligation to protect citizens from the potential harm of disclosing their personal information. The potential harm of unwarranted solicitation, along with the harm of jeopardizing a citizen's person and property justifies the government agency to deny access to information that if disclosed would cause substantial risks and undesirable activity. No safeguards are available for the public agency to prohibit the citizen's person or property from being jeopardized by unwarranted solicitation or potential harm.

Balancing the severity of the privacy and security concerns of the residents against the public's right to access under OPRA and Executive Order 21, the Custodian should not allow public access to the dog license owners' names and addresses.

Additionally, the Council should consider the recommendations on the disclosure of home addresses given to Acting Governor Codey and the New Jersey Legislature from the New Jersey Privacy Study Commission. The Privacy Study Commission was created under OPRA to "...study the privacy issues raised by the collection, processing, use and dissemination of information by public agencies, in light of the recognized need for openness in government and recommend specific measures including legislation, the Commission may deem appropriate to deal with these issues and safeguard the privacy rights of individuals." N.J.S.A. 47:1A-1 *et.seq.*

In its final report, dated December 2004, the Privacy Study Commission acknowledged that "[t]he disclosure of home addresses and telephone numbers contained in government records is at the forefront of the privacy debate in New Jersey."[1] The report further stated "[w]hile the New Jersey Open Public Records Act favors disclosure of government records, it also states that public agencies have a responsibility to safeguard personal information when disclosure would violate a citizen's reasonable expectation of privacy. *Ibid.*

Of the six recommendations the Privacy Study Commission made regarding the disclosure of home addresses and telephone numbers, four of them exclusively related to providing additional protections surrounding the disclosure of home addresses. Thus, it appears that the Privacy Study Commission viewed the disclosure of home addresses as an important issue to which it devoted significant analysis and recommendations.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council dismiss this case on the basis that pursuant to N.J.S.A. 47:1A-1 and Executive Order 21 the records should not be disclosed because of the unsolicited contact, intrusion or potential harm that may result.

Prepared By: Erin Knoedler, Case Manager

Approved By:
Paul F. Dice
Executive Director
Government Records Council

July 8, 2005

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[1] New Jersey Privacy Study Commission, "Final Report Privacy Study Commission", (December 2004), pg. 15, (available on the New Jersey Privacy Study Commission's website at www.nj.gov/privacy).

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FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

December 18, 2012 Government Records Council Meeting

Doug Knehr
Complainant
v.
Township of Franklin (Somerset)
Custodian of Record

Complaint No. 2012-38

At the December 18, 2012 public meeting, the Government Records Council ("Council") considered the November 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because OPRA contains no specific statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is therefore without authority to impose a statute of limitations where one does not exist, no statute of limitations in OPRA bars the GRC's adjudication of the Complainant's Denial of Access Complaint in the instant matter. *See* Boudwin, Esq. (on behalf of Milford Board of Education) v. New Jersey Department of Treasury, Division of Administration, GRC Complaint No. 2011-34 (Interim Order dated August 28, 2012).

2. The proposition that unsolicited contact could result if the Custodian granted access to the requested information holds true here. The Complainant admitted in the Denial of Access Complaint that he planned to use the information to solicit business. Disclosure of this information to the Complainant will clearly result in unsolicited contact with persons that were obligated to provide the requested information in order to be in compliance with local law. As such, the Custodian lawfully denied access to same pursuant to N.J.S.A. 47:1A-1 and Executive Order 21 (Gov. McGreevey, 2002). N.J.S.A. 47:1A-6. *See* Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005), *and* Faulkner v. Rutgers University of New Jersey, GRC Complaint No. 2007-149 (May 2008).

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

Final Decision Rendered by the
Government Records Council
On The 18th Day of December, 2012

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 20, 2012

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting

Doug Knehr, Esq.[1] **GRC Complaint No. 2012-38**
Complainant

v.

Township of Franklin (Somerset)[2]
Custodian of Records

Records Relevant to Complaint: Copies of names, addresses and telephone numbers (if available) for all dog and cat owners in the Township of Franklin ("Township"), also including the type and number of animals.

Request Made: July 5, 2010
Response Made: July 6, 2010
Custodian: Ann Marie McCarthy
GRC Complaint Filed: February 14, 2012[3]

Background

July 5, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that the preferred method of delivery is e-mail in a Microsoft® Excel spreadsheet.

July 6, 2010

Custodian's response to the OPRA request. The Custodian responds in writing on the OPRA request form to the Complainant's OPRA request on the same business day following receipt of such request.[4] The Custodian states that access to the requested records is denied based on a citizen's reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1 and Executive Order No. 21 (Gov. McGreevey, 2002)("EO 21").

February 14, 2012

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated July 5, 2010 with the Custodian's response thereon (undated).[5]

[1] No legal representation listed on record.
[2] Represented by Louis N. Rainone, Esq., of DeCotiis, Fitzpatrick & Cole, LLP (Teaneck, NJ).
[3] The GRC received the Denial of Access Complaint on said date.
[4] The Custodian certifies in the SOI that she received the Complainant's OPRA request on July 6, 2010.
[5] The Complainant attached a second (2nd) document that is not relevant to the instant complaint.

The Complainant states that he submitted an OPRA request to the Custodian on July 5, 2010. The Complainant states that the Custodian denied access to the responsive information pursuant to OPRA and EO 21.

The Complainant states that he wishes to receive the addresses in order to send marketing material to registered pet owners. The Complainant asserts that possible privacy issues can be addressed by redacting the name, telephone number and type of animal.

The Complainant does not agree to mediate this complaint.

February 24, 2012
Request for the Statement of Information ("SOI") sent to the Custodian.

February 29, 2012
Custodian's SOI with the following attachments:

- Complainant's OPRA request dated July 5, 2010 with the Custodian's response thereon (undated).
- EO 21.
- Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005).

The Custodian certifies that no search was undertaken since the request was denied pursuant to EO 21 and Bernstein.

The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services. The Custodian certifies that the records have a three (3) year retention schedule and thus the first date on which the records may be destroyed is January 1, 2014.

The Custodian certifies that she received the Complainant's OPRA request on July 6, 2010. The Custodian certifies that she responded on the same day denying access to the responsive records pursuant to N.J.S.A. 47:1A-1 and EO 21.

The Custodian states that the responsive records are the 2010 listings for dog licenses, which include the names, addresses and telephone numbers of owners as well as the type and number of animals owned. The Custodian asserts that the records are exempt under EO 21 because the Township has "… a responsibility and an obligation to safeguard … personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." *Id. See also* Burnett v. County of Bergen, 198 N.J. 408 (2009). The Custodian further asserts that the Council's decision in Bernstein wherein the Council determined that names and addresses of dog license owners is exempt from access under OPRA and EO 21 "… because of the unsolicited contact, intrusion or potential harm that may result" is applicable to the instant complaint.

The Custodian's Counsel submits a letter brief in support of the Custodian's position in which she recapitulates the facts.[6]

Counsel first argues that this complaint should be dismissed as untimely pursuant to the Court's holding in Mason v. City of Hoboken, 196 N.J. 51, 68 (2008)(holding that the a 45-day statute of limitations applies to denial of access complaints filed in Superior Court). Counsel states that in Mason, *supra*, the Court reasoned that based on the inclusion of a statute of limitation in the old Right to Know Law and OPRA's expedited time frame within which a custodian must respond, "a requestor should also be required to make a prompt decision whether to file suit." *Id.* at 69. Counsel asserts that the concerns of the Mason Court are equally applicable to the GRC's complaint process: the only difference is the venue. Counsel argues that the Court's imposition of the statute of limitations should also apply to the GRC. Counsel contends that the Township should be entitled to some certainty that beyond a set time period, its actions will not be challenged or potentially penalized. Counsel thus argues that the Complainant's filing 589 days after the denial of access is not reasonable and this complaint should be dismissed.

Counsel next argues that the Complainant's OPRA request sought information rather than an identifiable government record. *See* Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) and Bart v. Passaic County Public Housing Authority, 406 N.J. Super. 445, 451 (App. Div. 2009). Counsel asserts that although the Custodian treated the Complainant's OPRA request as one for a list of dog licenses issued by the Township, said request actually sought information. Counsel contends that although the responsive list contains some of the information sought, the Complainant's OPRA request is ultimately invalid and this complaint should be dismissed.

Counsel further argues that assuming the OPRA request is deemed to be valid, the Custodian lawfully denied access to the responsive list containing information the disclosure of which would violate a citizen's reasonable expectation of privacy. Counsel states that OPRA obligates a public agency to safeguard this type of information where disclosure would "… run contrary to reasonable privacy interests." Burnett, *supra*, at 423. Counsel states that in the Burnett Court conducted used the following factors to evaluate a claim of privacy:

> "(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 ex-press statutory mandate, articulated public policy, or other recognized public interest militating toward access." (*citing* Doe v. Poritz, 142 N.J. 1, 88, 662 A.2d 367 (1995)) *Id.* at 427.

Counsel states that in Bernstein, *supra*, the Council conducted the same balancing test on a request seeking dog license information and determined that the records were exempt from disclosure. Counsel states that the Council reasoned that:

[6] Counsel notes that although the Complainant's OPRA request sought information, the Custodian treated the request as one seeking a listing of dog license holders.

> "[p]ermitting access to such records allows any recipient of the record to ascertain which homes are protected by or have dogs and which do not have dogs. Although the Complainant has indicated that the records are to be used in business solicitation, the release of this information could potentially jeopardize the safety and security of citizens and their property, as well as their dogs … The potential for theft, physical harm, vandalism and burglary is a concern in determining the disclosure because it allows the requestor access to personal information regarding the dog owner and their property that may not otherwise be disclosed to the public … The release of the requested names and addresses, further, has the potential for harm to citizens who own valuable dogs. Dogs of certain breeds may become potential targets for threats, theft and physical harm simply because of their breed." *Id.*

Counsel states that the Complainant may attempt to rely on the Appellate Division's decision in Atl. County SPCA v. City of Absecon, Docket No. A-3047-07T3 (App. Div. 2009). Counsel notes that there, the Court granted plaintiff access to similar records after conducting a balancing test. Counsel asserts that although the unpublished decision is not binding on the GRC, the decision was limited to the specific facts of that complaint. Counsel states that the Court, in conducting the balancing test, was swayed by plaintiff's role as a governmentally chartered organization authorized to enforce animal cruelty laws. Counsel states that the disclosure of the records also rested on plaintiff's stated use for the information in order to further its public purpose.

Counsel contends that the Complainant here has stated no need analogous to that in ASPCA. Counsel states that the Complainant himself stated in the Denial of Access Complaint that he wished to use the information for commercial marketing purposes. Counsel contends that in the absence of the need found in ASPCA, *supra*, the Council should determine that the Custodian lawfully denied access to the requested information.

Analysis

Is there a forty-five (45) day statute of limitations for filing a Denial of Access Complaint with the GRC?

The Custodian's Counsel asserted in the SOI that the Complainant did not timely file the instant Denial of Access Complaint. Counsel stated that the Complainant filed this complaint 589 days after the Custodian denied access to the responsive records. Counsel contended that the GRC should apply the Supreme Court's holding in Mason v. City of Hoboken, 196 N.J. 51 (2008) and dismiss this complaint as untimely.

In, Mason, *supra*, the Court determined that the appropriate statute of limitations for filing a denial of access complaint *in Superior Court* was 45 days from the date of the Custodian's denial of access. The Court noted that this statute of limitations was consistent with the limitations period in actions in lieu of prerogative writs. *Id.* The Court noted that "the former Right to Know Law specifically directed that litigants headed to

Superior Court should proceed via an action in lieu of prerogative writs. N.J.S.A. 47:1A-4 (repealed 2002). That language does not appear in OPRA. See N.J.S.A. 47:1A-6." *Id*.

The Court further noted that

> "The Legislature plainly stated that requestors denied access to public records may file an action in Superior Court or a complaint before the GRC. N.J.S.A. 47:1A-6. Those matters 'shall proceed in a summary or expedited manner.' *Ibid*. Beyond that, the Legislature specifically deferred to the Supreme Court to adopt court rules 'necessary to effectuate the purposes of this act.' N.J.S.A. 47:1A-12. The Legislature's action was consistent with our Constitution, which vests this Court with the authority to create procedural rules *for court practices*. *See* N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240, 255, 74 A.2d 406 (1950)." 196 N.J. 68 [Emphasis added].

The Court therefore held that:

> "… requestors who choose to file an action *in Superior Court to* challenge the decision of an OPRA custodian must do so within 45 days ..." *Id*. at 70. (emphasis added.)

Thus, the Court's holding in Mason, *supra*, is limited to Denial of Access Complaints filed in the Superior Court of New Jersey.

The New Jersey Legislature is empowered to delegate to an administrative agency the authority to promulgate rules and regulations interpreting and implementing a statute. An appellate court will defer to an agency's interpretation of a statute unless it is plainly unreasonable. The presumption of validity, however, is not without limits. If an agency's statutory interpretation is contrary to the statutory language, or if the agency's interpretation undermines the Legislature's intent, no deference is required. An appellate court's deference does not go so far as to permit an administrative agency under the guise of an administrative interpretation to give a statute any greater effect than is permitted by the statutory language. *See*, Reilly v. AAA Mid-Atlantic Ins. Co. of New Jersey, 194 N.J. 474 (2008).

OPRA contains no statute of limitations on Denial of Access Complaints filed with the GRC. The GRC is therefore without authority to impose a statute of limitations where one does not exist. Thus, no statute of limitations in OPRA bars the GRC's adjudication of the Complainant's denial of access complaint in the instant matter.

Because OPRA contains no specific statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is therefore without authority to impose a statute of limitations where one does not exist, no statute of limitations in OPRA bars the GRC's adjudication of the Complainant's Denial of Access Complaint in the instant matter. *See* Boudwin, Esq. (on behalf of Milford Board of Education) v. New Jersey Department of Treasury, Division of Administration, GRC Complaint No. 2011-34 (Interim Order dated August 28, 2012).

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

> "…government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*… 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" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

> "… any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* … or *that has been received* in the course of his or its official business …" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

> "…[t]he public agency shall have the burden of proving that the denial of access is authorized by law…" N.J.S.A. 47:1A-6.

OPRA further provides that:

> "The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant … 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." (Emphasis added.) N.J.S.A. 47:1A-9.a.

EO 21 provides that:

> "[i]n order to effectuate the legislative directive that a public governmental agency has the responsibility and the obligation to safeguard from public access a citizen's personal information with which it has been entrusted, an individual's home address and home telephone number, as well as his or her social security number, shall not be disclosed by a public agency at any level of government to anyone …" *Id.*

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records

responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Complainant herein sought the "names, addresses and telephone numbers for all dog and cat owners in the Township of Franklin ("Township"), also including the type and number of animals." The Custodian responded denying access to this information pursuant to N.J.S.A. 47:1A-1 and EO 21.

In the Denial of Access Complaint, the Complainant argued that the Custodian could address privacy issues by redacting all information except the addresses. The Complainant further noted that he sought at least the addresses in order to send out marketing materials. In the SOI, Counsel argued, among other things, that the Complainant's OPRA request was extremely similar to the request at issue in Bernstein, *supra*, and several other complaints decided by the GRC around the same time. Counsel further distinguished this complaint from ASPCA, *supra*, noting that the Complainant admitted he would use the addresses as a commercial tool whereas the ASPCA had a public purpose to receive the same types of records.

In Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004), the Council addressed the citizen's reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1 and found that the Appellate Division held that the GRC must enforce OPRA's declaration, in N.J.S.A. 47:1A-1. ("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." Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 368-69 (App. Div. 2003)). *See also* National Archives and Records Administration v. Favish, 541 U.S. 157, 124 S.Ct. 1570 (U.S. March 30, 2004)(personal privacy interests are protected under FOIA).

The New Jersey Supreme Court has indicated that, as a general matter, the public disclosure of an individual's home address "does implicate privacy interests." Doe v. Poritz, 142 N.J. 1, 82 (1995). The Court specifically noted that such privacy interests are affected where disclosure of a person's address results in unsolicited contact. The Court quoted with approval a federal court decision that indicated that significant privacy concerns are raised where disclosure of the address "can invite unsolicited contact or intrusion based on the additional revealed information." *Id.* (*citing* Aronson v. Internal Revenue Service, 767 F.Supp. 378, 389 n. 14 (D. Mass. 1991)).

The GRC will in complaints where privacy interests are at issue, ask the parties to submit balancing test questionnaires in order to determine whether the complainant's need outweighs the public agency's right of confidentiality. Here, the GRC has received enough evidence to make a determination absent the questionnaires.

Specifically, the facts of this complaint fall squarely within settled GRC case law. As the Custodian and Counsel noted in the SOI, this complaint is similar to Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005) because the records sought in both complaints were dog license information. Additionally, both the

complainant in Bernstein, *supra*, and the Complainant herein admitted to needing the records for commercial use. In Bernstein, *supra*, the Council, partly taking into account that the complainant planned to use the dog license information to solicit business, determined that disclosure would elicit unsolicited contacts with the citizens. Thus, the Council determined that the custodian lawfully denied access to the information.

Moreover, in Faulkner v. Rutgers University of New Jersey, GRC Complaint No. 2007-149 (May 2008), the complainant sought access to season ticket holder information for the University's football and basketball teams. The custodian denied access based on privacy interest, which led to the filing of a complaint. In the balancing test questionnaire, the complainant stated that he wanted to addresses in order to conduct a geographical survey of distribution of season tickets. The Council, citing to Avin v. Borough of Ramsey, GRC Complaint No. 2004-181 (March 2005), determined that disclosure of the records could lead to unsolicited contact and thus the custodian lawfully denied access to same.

The facts of this complaint, as pointed out by the Custodian's Counsel, are inapposite to those in Atl. County SPCA v. City of Absecon, Docket No. A-3047-07T3 (App. Div. 2009). Specifically, as noted by the Counsel, the ASPCA is a governmentally chartered organization statutorily authorized to enforce animal cruelty laws and was seeking access to further this public purpose. Conversely, the Complainant herein has no such authorization and admitted that he sought to market a product or service to the owners.

The proposition that unsolicited contact could result if the Custodian granted access to the requested information holds true here. The Complainant admitted in the Denial of Access Complaint that he planned to use the information to solicit business. Disclosure of this information to the Complainant will clearly result in unsolicited contact with persons that were obligated to provide the requested information in order to be in compliance with local law. As such, the Custodian lawfully denied access to same pursuant to N.J.S.A. 47:1A-1 and EO 21. N.J.S.A. 47:1A-6. *See* Bernstein, *supra*, *and* Faulkner, *supra*.

The GRC declines to address whether the Complainant's OPRA request was invalid because the Custodian identified records and the GRC has determined that she lawfully denied access to those records.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because OPRA contains no specific statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is therefore without authority to impose a statute of limitations where one does not exist, no statute of limitations in OPRA bars the GRC's adjudication of the Complainant's Denial of Access Complaint in the instant matter. *See* Boudwin, Esq. (on behalf of Milford Board of Education) v. New Jersey Department of Treasury,

Division of Administration, GRC Complaint No. 2011-34 (Interim Order dated August 28, 2012).

2. The proposition that unsolicited contact could result if the Custodian granted access to the requested information holds true here. The Complainant admitted in the Denial of Access Complaint that he planned to use the information to solicit business. Disclosure of this information to the Complainant will clearly result in unsolicited contact with persons that were obligated to provide the requested information in order to be in compliance with local law. As such, the Custodian lawfully denied access to same pursuant to N.J.S.A. 47:1A-1 and Executive Order 21 (Gov. McGreevey, 2002). N.J.S.A. 47:1A-6. *See* Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005), *and* Faulkner v. Rutgers University of New Jersey, GRC Complaint No. 2007-149 (May 2008).

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

November 20, 2012[7]

[7] This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to lack of quorum.

State of New Jersey

Executive Order #26

Governor James E. McGreevey

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WHEREAS, the Open Public Records Act, Chapter 404, P.L. 2001, became effective on July 8, 2002; and

WHEREAS, that Act authorizes the Governor to exempt certain government records from public access by Executive Order; and

WHEREAS, pursuant to that authority, Executive Order No. 21 was issued on July 5, 2002; and

WHEREAS, Executive Order No. 21 exempted certain records of the Office of the Governor from public disclosure; and

WHEREAS, Executive Order No. 21 further exempted from disclosure home addresses and telephone numbers of individual citizens, as well as their social security numbers; and

WHEREAS, since the issuance of Executive Order No. 21, this Administration has continued to engage in a constructive dialogue with representatives of the media and other advocates of open government concerning the proper implementation of the Open Public Records Act and Executive Order No. 21; and

WHEREAS, discussions following the issuance of Executive Order No. 21 have demonstrated the need to clarify certain provisions of that Executive Order; and

WHEREAS, this Administration remains committed to open, accessible government, and to ensuring the successful implementation of the Open Public Records Act;

NOW, THEREFORE, I, JAMES E. McGREEVEY, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. Paragraphs 2 and 3 of Executive Order No. 21 are hereby rescinded and replaced with the following paragraphs.

2. In addition to those records of the Office of the Governor that are exempted by the provisions of the Open Public Records Act, the following records maintained by the Office of the Governor, or part thereof, shall not be deemed to be government records under the provisions of Chapter 404, P.L. 2001, and Chapter 73, P.L. 1963, and thus shall not be subject to public inspection, copying or examination:

    a. Any record made, maintained, kept on file or received by the Office of the Governor in the course of its official business which is subject to an executive privilege or grant of confidentiality established or recognized by the Constitution of this State, statute, court rules or judicial case law.

    b. All portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege.

c. All portions of records containing information provided by an identifiable natural person outside the Office of the Governor which contains information that the sender is not required by law to transmit and which would constitute a clearly unwarranted invasion of personal privacy if disclosed.

d. If any of the foregoing records shall contain information not exempted by the provision of the Open Public Records Act or the preceding subparagraphs (a), (b) or (c) hereof then, in such event, that portion of the record so exempt shall be deleted or excised and access to the remainder of the record shall be promptly permitted.

3. No public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.

4. The following records shall not be considered to be government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented:

a. Records of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Enviroments in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999), whether open, closed or inactive.

b. Information concerning individuals as follows:

1. Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation;

2. Information in a personal income or other tax return;

3. Information describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed.

c. Test questions, scoring keys and other examination data pertaining to the administration of an examination for public employment or licensing.

d. Records of a department or agency in the possession of another department or agency when those records are made confidential by a regulation of that department or agency adopted pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963), or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure.

e. Records of a department or agency held by the Office of Information Technology (OIT) or the State Records Storage Center of the Division of Archives and Records Management (DARM) in the Department of State, or an offsite storage facility outside of the regular business office of the agency. Such records shall remain the legal property of the department or agency and be accessible for inspection or copying only through a request to the proper custodian of the department or agency. In the event that records of a department or agency have been or shall be transferred to and accessioned by the State Archives in the Division of Archives and Records Management, all such records shall become the legal property of the State Archives, and requests for access to them shall be submitted directly to the State Archives.

5. The Privacy Study Commission created by Chapter 404, P.L. 2001, is hereby directed to promptly study the issue of whether and to what extent the home address and home telephone number of citizens should be made publicly available by public agencies and to report back to the Governor and the Legislature within six months.

6. The remaining provisions of Executive Order No. 21 are hereby continued to the extent that they are not inconsistent with this Executive Order.

7. This Executive Order shall take effect immediately.

GIVEN, under my hand and seal this 13th day of August in the Year of Our Lord, Two Thousand and Two, and of the Independence of the United States, the Two Hundred and Twenty-Seventh.

/s/ James E. McGreevey
Governor

Attest:

/s/ Paul A. Levinsohn
Chief Counsel to the Governor

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

state of new jersey
privacy study commission

FINAL REPORT

PRIVACY STUDY COMMISSION

Submitted to Governor Richard J. Codey
and
The New Jersey State Legislature

December 2004

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

state of new jersey
privacy study commission

December 31, 2004

The Honorable Richard J. Codey, Acting Governor
Senator Richard J. Codey, President of the Senate
Assemblyman Albio Sires, Speaker of the General Assembly

Dear Acting Governor and Members of the Legislature:

On behalf of the New Jersey Privacy Study Commission, I am pleased to present to you the Commission's report on the privacy concerns and protection recommendations.

The Commission prepared this report pursuant to the Legislature's charge in N.J.S.A. 47A:1A-1 *et. seq*., establishing a Privacy Study Commission "…to study the privacy issues raised by the collection, processing, use and dissemination of information by public agencies, in light of the recognized need for openness in government and recommend specific measures, including legislation, the Commission may deem appropriate to deal with these issues and safeguard the privacy rights of individuals"; and Governor McGreevey's mandate in Executive Order 26 to study the issue of whether and to what extent the home addresses and home telephone numbers of citizens should be made publicly available by public agencies. This report is the culmination of the Commission's consideration of public comment, as well as statutory and judicial analysis on the issue.

The Commission believes that the policy recommendations for administrative and legislative action contained in this report strike an appropriate balance between the needs for openness and the transparency of government and the citizens' reasonable expectation of privacy in their personal information contained in government records. Further, it is the Commission's belief that its findings and recommendations will be useful to both the executive and legislative branches of government in New Jersey, as well as serve the best interest of the citizens of New Jersey.

Sincerely,

M. Larry Litwin, APR
Chair, New Jersey Privacy Study Commission

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

state of new jersey
privacy study commission

Final Report

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FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

Preface

Remarks of M. Larry Litwin, APR
Chair, New Jersey Privacy Study Commission

The time has come for me, as chair, to thank every member of the Commission for their dedicated service as we worked hard to research, debate, recommend and adopt a number of reports that are the framework for a final report to be sent to the Acting Governor and then . . . on to the Legislature.

The Privacy Study Commission was created under the Open Public Records Act (OPRA) to study the privacy issues raised by the collection, processing, use and dissemination of information by public agencies – balancing the recognized need for openness in government with concerns for personal privacy and security.

Over nearly two years, all of us participated to study the privacy issues in light of the recognized need for openness in government – while, at the same time – protecting the privacy rights of individuals.

As charged by the Governor, we studied home addresses and telephone numbers, the use of personal information by commercial entities for title searches, mortgage and other loan applications, and information used by private investigators and other firms that use personal information for such publications as printed and on-line directories. We spent a great deal of time studying technology and its effect on the way government operates.

We are making specific recommendations that we deem appropriate to strike a balance between openness in government and . . . protecting the individual.

We appreciate all the assistance of staff members, Marc Pfeiffer, Paul Dice, Susan Jacobucci and Erin Mallon Knoedler, but especially, early on – Catherine Starghill – who compiled a matrix consisting of legislation in every state and ranked them by effectiveness. I could not place a value on Catherine's help.

In drafting, debating and adopting our reports, we reviewed the collection, processing, use and dissemination of information by State and local government agencies here in New Jersey and in many other states.

My personal objective was for us to work together – as a Commission – so that we would achieve the overall goal of striking that balance between an individual's right to privacy and the public's right to know. It was a major challenge – one this commission has met.

Thank you to all of the chairs – Grayson Barber for chairing the Special Directive Committee on Home Addresses and Telephone Numbers . . . and for presenting a document that met with unanimous approval . . .Tom Cafferty for his work as chair of the Commercial Use Committee and Bill Kearns for chairing the Technology Committee.

Judge Karcher-Reavey chaired the Public Interest Committee, which handled the public hearings and made recommendations for the web site. Also, Karen Sutcliffe for chairing the Committee on New Jersey Practices and Ms. Barber, again, for chairing the Committee on Practices Outside of New Jersey.

While they are the chairs, none of our work could have been completed without the input of George Cevasco, Richard DeAngelis, Edithe Fulton, John Hutchison, Pamela McCauley, Jack McEntee and Lawrence Wilson.

And, thank you to any DCA staff members I may have missed. Thank you to Commissioner Susan Bass Levin for the confidence she has shown in us . . .and my personal thanks to Tara Bennett, the Rowan University graduate who served as my intern.

While our final report may not be perfect in everyone's eyes, I see it as a benchmark that other states could emulate.

It has been an honor to serve as Commission chair.

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

NEW JERSEY PRIVACY STUDY COMMISSION

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state of new jersey
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Executive Summary

An individual's right to privacy as balanced with an open and transparent government has been at the forefront of common law and statutory open public records debate in New Jersey.

The Privacy Study Commission was created as a result of the enactment of the Open Public Records Act, N.J.S.A. 47A:1A-1 *et.seq*. [OPRA]. OPRA favors disclosure of public records, yet the Act also states that public agencies have a responsibility to safeguard personal information when disclosure would violate a citizen's reasonable expectation of privacy.

The Privacy Commission studied three (3) specific areas: the disclosure of home addresses and telephone numbers; commercial use of public information held by public agencies; and the impact of technology on privacy concerns. Further, the Commission conducted a New Jersey Data Practices Survey. The full reports of these subjects areas and the survey are contained within. The reports also offered specific recommendations that are summarized below.

General Recommendations

- The Legislature should establish a permanent entity to serve as an ombudsman for privacy issues in New Jersey.
- The Legislature should provide a source of adequate funding to comply with Open Public Records Act ("OPRA") requests, so as to not unduly burden either requestors or records custodians with the expense of searching records, redactions and other requirements. Guidelines need to be developed on what constitutes an "extraordinary expense" under OPRA.
- The State should administer a "New Jersey Data Practices Survey" on a periodic basis.
- Public agencies should only collect the data they need to serve their statutorily mandated functions and refrain from collecting extraneous personal information.
- Public agencies should provide individuals with the opportunity to verify the accuracy of their personal information maintained by the agencies.
- Public agencies should notify the public that the information provided on official forms may be disclosed, unless otherwise exempt by law.
- Public agencies should program their computer systems and applications to collect, but not disclose information exempt from access as provided by law.

Privacy and the Impact of Technology

- E-mail addresses provided by individuals to government entities should be accorded the same protection as unlisted phone numbers, i.e., they should remain confidential.

- There should be thorough and mandatory training provided for all of those who have custody of government records, not just the formally designated Custodian of Records, on the impact of technology and the steps that are necessary to be taken in order to protect the authorized confidential information when records are provided to a requestor in electronic format.

- The training, and any equipment required to implement privacy protection of electronic data should be provided by the State of New Jersey as a State expense and should not be left to local government entities to provide as their limited resources will allow.

- New Jersey should establish an Office of Privacy, which would work with, and, perhaps, within the Office of Information Technology to be able to interact and to assist in identification of privacy related issues and to bring those issues to the attention of those charged with determining the appropriate boundaries for access to government records, such as the Government Records Council or the Courts.

- When agencies adopt regulations establishing certain records as not subject to disclosure, those agencies need to recognize the impact of technology on the ability to search records and to make the regulations comprehensive enough to ensure that the regulation making certain records not subject to disclosure are not evaded by the use of technology.

Home Addresses and Telephone Numbers

- Home telephone numbers, including cell phone numbers, should not be disclosed.

- Public agencies should notify individuals that their home addresses might be disclosed pursuant to OPRA requests.

- Individuals should be permitted to provide an address of record for disclosure purposes, in addition to their home address when interacting with public agencies.

- The Governor or Legislature should establish objective guidelines defining when and from which government records home addresses should be redacted.

- Individuals should be permitted to opt out of disclosure of their home addresses.

- In the future, computer systems and applications should be programmed to collect but not disclose home addresses and telephone numbers.

Commercial Use of Government Records

- The Legislature has addressed privacy concerns through exemptions in OPRA and other statutes, such as worker's compensation and insurance laws. It has also left the door open for other exemptions through regulations, further legislation and executive order of the Governor. Exemptions from access for the commercial use of information should be contained in legislation, regulations or by Executive Order of the Governor.

- The Legislature and/or the Governor should consider abuses arising from the commercial use of information, such as data-mining, as well as the benefits of access, such as aiding local businesses. Along with transparency of government comes the responsibility to safeguard citizens' reasonable expectation of privacy.

- The Legislature and/or the Governor should be mindful that any restrictions deriving from secondary or derivative uses of records that may be deemed abusive cannot and should not result in legislation restricting access, but rather, such legislation should be directed at the perceived abuse either by increasing punishment, if present punishment is inadequate, or enacting legislation defining additional actions that will be deemed abusive and imposing punishment therefore.

- The Legislature and/or Governor should consider the proposition that when the secondary or derivative use of a public record is a commercial/profit-making use, the commercial user should be expected to contribute to the cost recovery of developing and maintaining such records. Those who advocate such a position recommend that such a fee should be likened to a user fee with those gaining financially from the use of public records helping to pay a portion of the development and maintenance costs. Other states, however, have declined to impose such a "user fee" noting that the statutory right of access should not be perceived as a revenue generating mechanism.

Data Practices Survey

In an effort to determine and track the data practices of state and local government units and agencies, especially as it relates to the handling of personal information, the New Jersey Privacy Study Commission recommends that a scientifically developed and monitored data practices survey be administered every two years to a mandatory response population of state and local government units and agencies by the Department of State – Division of Archives and Records Management (DARM) or the Privacy Study Commission if this organization is adopted by the Governor or legislature as a permanent entity. The Commission believes that in doing so, the state will become better informed of how state and local government units and agencies are adhering to the policy in OPRA requiring that public agencies safeguard citizens' personal information with which they are entrusted. Further, this mandatory survey may motivate agencies that are not in compliance with OPRA's policy to safeguard personal information from public access to do so.

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Introduction

The Open Public Records Act, N.J.S.A. 47:1A-1 *et.seq.* (Chapter 404, P.L. 2001), created the Privacy Study Commission to "…study the privacy issues raised by the collection, processing, use and dissemination of information by public agencies, in light of the recognized need for openness in government and recommend specific measures, including legislation, the Commission may deem appropriate to deal with these issues and safeguard the privacy rights of individuals."

The Privacy Study Commission, through Executive Order 26 (dated August 12, 2002), was directed by the Governor to, "…promptly study the issue of whether and to what extent the home addresses and telephone number of citizens should be disclosed by public agencies in the state…"

The Commission consists of thirteen (13) members appointed by the President of the Senate (1 member), the Minority Leader of the Senate (1 member), the Speaker of the General Assembly (1 member), the Minority Leader of the General Assembly (1 member) and the Governor (9 members). In addition to the study of home addresses and telephone numbers of citizens, the Commission also specifically studied the secondary use of government records by businesses and entities other than government [Commercial Use report]; Privacy and the Impact of Technology [Technology Report]; and also conducted a New Jersey Data Practices Survey.

The Commission met, generally on a monthly basis, throughout a two-year period and formed sub-committees to study specific areas of privacy concerns. The sub-committees submitted reports that were accepted and voted on by the Commission. The compilation and finalization of these reports are hereby submitted to the Governor and the Legislation is fulfillment of the Privacy Commission's designated charge.

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Section 1:
Privacy and the Impact of Technology

Technology has developed at a rapid pace, and will continue to develop in the future, without regard for policies regarding appropriate use of that technology and the protection of the privacy interests of the people who are impacted by the technology based access to what is reasonably considered to be private information.

It is for that very reason that it is critically important to develop policies to manage and control the application of technology in order to respect the privacy interests of citizens.

The very concept of privacy is a matter of extensive public debate. In October 2000, Presidential candidate George W. Bush said, "I believe that privacy is a fundamental right and that every American should have absolute control over his or her personal information."[1]

Since then, concerns over homeland security have caused government to accumulate a broad range of personal information on individuals. That information rests in electronic databases, along with private information accumulated in the normal conduct of governmental activities as people register for government programs, obtain licenses and permits, enroll in schools, register for electronic toll passes, go to government related web sites, etc. The increasing use of technology has a very significant impact on the ease with which those outside the government can access the accumulated data.

In the name of homeland security, there were proposals that the Federal government initiate a "Total Information Awareness" project to accumulate personal records from banks, medical files, credit card companies, schools, etc. and combine them into a master data base. The public reaction was instant and very public, with an outcry resulting in Congress taking action to block the funding for the project.[2]

Prior to the development of massive databases of information, there was a natural limit on the intrusiveness of information maintained in government records. The use of paper-based records made the accumulation of the data and the cross-referencing of the data very labor intensive.

The technology revolution of the past decade and the cost effectiveness of computer based searching technologies, combined with the adoption of technology to maintain a

[1] *Privacy in Retreat.* An article by William Safire in the New York Times, March 10, 2004.
[2] *Privacy Invasion Curtailed. New York Times.* February 13, 2003.

full range of governmental records presents both an opportunity for easy use by governmental entities for valid governmental purposes as well as the serious potential for abuse of the information.

The cross-referencing of records of electrical permits, dog licenses and senior-citizen tax records, for example, carry serious security implications. Cross-referencing those records could easily reveal properties where there are no alarm systems, no dogs and are occupied by elderly or disabled residents. Such cross-referencing is easy with the technology-based records, but was virtually impossible when those records were all maintained only in a paper format. Easy access to electronic records of registrations for recreation programs with the names, addresses, phone numbers, etc. of juvenile registrants should be a basis for concern by parents and by the government custodians of that sensitive information.

Data base information about which houses in town are vacant, records of hospital admissions[3], requests to police to watch particular properties, requests to suspend delivery services for short period of time, etc. should all be treated as private and not subject to disclosure. Federal legislation has barred **commercial** web sites from collecting information on children up to the age of 12, but that legislation does not address governmental web sites. At the very least, similar protections should be applied to New Jersey governmental web sites. Action should be taken by legislation or regulation to provide that the release of personal identifiable information, such as addresses, phone numbers, e-mail addresses, gathered through governmental web sites is prohibited.

As GIS (Geographic Information System) programs develop at every level of government providing the cross-referencing of multiple information databases, it becomes critically important to develop statewide policies on privacy in order to avoid a hodgepodge of policies at state, county, municipal, authority, school district and agency levels.

There is a cost involved in applying privacy policies to data. Some governmental entities have taken an easy course in making everything available because of the cost involved in developing, applying and maintaining data where various classifications are treated as private.

Where a governmental entity or employee, such as a Tax Assessor, Health Inspector, Police Commander, may have a need for access to a broad range of information, that need does not automatically translate into making that same information available to anyone with a computer and the ability to surf the Internet.

While citizens generally are comfortable with providing information to their government, an astounding 72% have only some or very little trust in the government to use that

[3] Many hospital records are protected with regard to confidentiality by reason of federal law (HIPAA) that requires certain patient specific information to be treated with confidentiality. To the extent of the federal law, OPRA also treats that information as confidential.

information properly.[4] The manner in which government handles information that citizens regard as private will most certainly impact on the broader issue of whether citizens can trust their government at all.

The public reaction to the use of technology to cross-reference data became evident in 2003 when the news came out that an internet search engine, Google, made it possible to enter a telephone number, perform a search and have the name and address of the individual come up on the screen. A further click provided a map showing where the person was located.[5] When the news broke, people flocked to the Google web site to exercise the option to make their information private.[6]

Another issue that needs to be considered arises in situations where government entities contract out with private companies for the development, management and maintenance of data. Once that data becomes available to the private company, there is no system, no regulation, and no law to prevent that company from making the data available on a commercial basis. Government entities are enticed to the public-private partnership in the development of the technology and the database simply because of the cost involved. The private partner in the process can make the service available to government at a very low cost; precisely to gain access to the data that has a significant commercial and resale value.

It is easy to suggest that certain categories of information should be isolated from database information and should not be accessible. The implementation of such a recommendation is, however, problematic.

While the State of New Jersey and many county governments have well staffed and knowledgeable information technology departments, that is simply not the case for other levels of governments, including municipalities, school districts and authorities.

There is a need for technology support, especially for local governments in the securing of protected data. While the State has a substantial Information Technology staff to address issues, that same level of support is virtually non-existent at the local government level. When a request is received for data in electronic format, the local custodians of records[7] do not have the technical expertise to make sure that when the data is copied the fields that are private are effectively deleted and not copied as part of the record. Both training and equipment are needed. This results in a very substantial cost impact. Where privacy is identified as a matter of significant importance, the protection of the privacy

[4] *From the Home Front to the Front Lines: America Speaks Out About Homeland Security.* Council for Excellence in Government, March, 2004, page 7.
[5] *Another Online Privacy Intrusion. Philadelphia Inquirer*, March 29, 2003.
[6] *Some Search Results Hit Too Close to Home*. *New York Times*. April 13, 2003.
[7] For municipalities, the Custodian of Records, specified by the Open Public Records Law, is the Municipal Clerk. For other local entities, the official Custodian of Records is designated by the local entity.

should not be thwarted by the unavailability of the technical support required to protect that privacy.[8]

Many of those levels of government have the records being maintained by individuals who are trained in the use of computers for specific purposes, but not in the underlying technology involved. While the individual might be able to set up a database with a field that does not appear on the screen of someone simply accessing the data at a terminal in the governmental office, there is a very serious potential for breaching privacy when the individual seeking the information requests the data in an electronic format.

The simple act of copying the database to a disk for someone does not mean that the protections built in to the database to prevent certain fields from showing up will be preserved. Anyone with a basic knowledge of databases can simply go into the management aspects of the database and remove the commands that block the visibility of the hidden fields. There must be a serious and effective effort to prevent that from happening.

Municipalities, school districts and authorities simply do not have the technical capacity to address those issues and do not have the financial resources to establish that information technology management resource.

Effective protection of privacy for the information that is either currently mandated by law to be treated as private or that becomes classified as private as the result of the work of the Privacy Study Commission will require intensive training and allocation of resources. It will require significant funding and sharing of technology resources by the State with the local governmental entities.

E-Mail address lists are developed when citizens give a municipality or county or state agency an e-mail address in order to receive notifications of specific information, Those individuals do not anticipating that the e-mail address list will be made available to anyone who asks for it so that advertising and other types of unwanted spam can be sent out. E-mail addresses should be treated in the same manner as unlisted telephone numbers, i.e., they should not be made available.

Every State has a library confidentiality law[9] that prevents the dissemination of information on borrowers. The Privacy Study Commission acknowledges those protections and reaffirms that records of library usage, including internet access, should be treated as private and not be treated as a public record.[10] It is noted that the Federal

[8] It should be remembered that when the State mandates certain actions and expenditures by local governments, the State may be required to provide the funding for those mandates under the State Mandate-State Pay amendment to the New Jersey State Constitution, Article VIII, Section II, Paragraph 5, and the implementing legislation, *N.J.S.A.* 52:13H-1, *et seq.*

[9] *N.J.S.A.* 18A:73-43.2

[10] Library confidentiality laws are being challenged in the State of Michigan where a law student has demanded that 85 libraries across the state turn over records on patron names, addresses, telephone numbers and e-mail addresses. The demand has been made under the provisions of the Michigan Freedom of Information Act, notwithstanding the library confidentiality law. *Detroit News, July 6, 2004.*

Video Privacy Protection Act bars the release of video rental records. That legislation was enacted after the Senate confirmation hearings in 1987 on the nomination of Robert Bork to the Supreme Court, when records of video rentals by Mr. Bork were obtained and released. Those records came from a private video rental company, but the same principle applies to libraries that make a wide range of materials available to borrowers.

Information in governmental records regarding the location of alarm systems, surveillance cameras, etc. should be clearly and unequivocally classified as security information and should be treated as confidential. To fail to do so would be to assist potential law violators.[11]

Technology is being used in law enforcement efforts, including such technologies as "Red Light Cameras" that take pictures of vehicles at intersections. Other surveillance cameras are used at arenas, parking garages and other locations where security is important or simply where there is a perceived need to watch what employees are doing.[12] Surveillance records (to extent they include information about persons not targets of the surveillance) -- example: a video tape of drivers exceeding posted speed limit should not be available to public to demonstrate who the driver had accompanying him or her in the car.

Financial transactions with government offices are increasingly being accomplished with the use of credit and debit cards. That transactional information should be classified as private and all information relating to the user, the card numbers, expiration dates, etc. should be fully protected from any public access.

The Commission has learned of certain regulations that direct local Registrars of Vital Statistics to strictly limit the availability of certified copies of certain records, but that regulation did not address uncertified copies of records or the copying of entire databases of those records of births, marriages and deaths. The salutary purpose of the basic regulation can be easily undermined because the regulation is insufficiently comprehensive.

While e-mail records are being treated throughout the country as the equivalent of letters, there is no guidance on how to maintain those records, the cost involved in archiving, the means and cost involved in retrieving the records, the means to distinguish between the e-mail messages that should be fully public and those that are personal and private. In Florida, it is the employee who makes the determination as to which e-mail records are personal and which are business related. While OPRA is intended to apply to records that have been "made, maintained, or kept on file in accordance of his or its official

[11] It should be noted that language in OPRA does require that security measures and surveillance techniques are not subject to disclosure. That language is in the process of being supplemented and clarified by Regulations proposed by the Attorney General that are in the public comment period as this report is being prepared.

[12] New Jersey Transit has installed hidden video cameras on its trains as a safeguard against theft. Cameras are also installed in some train stations. Those cameras, however, also tape transit employees along with the passengers who are on the trains and that surveillance raises privacy issues. *Cameras Upset Riders and Crew*. *New York Times*. March 6, 2004.

business," there is a need for clear guidelines to be established to identify the e-mail records that need to be archived, how to accomplish that task and to provide the resources to make that possible.

In the field of public contracts, we are rapidly moving toward the maintenance of the records of bids in an electronic format. Responses from bidders may frequently include financial data that is used to enable the government to evaluate whether the bidder is able to undertake and perform the contract involved. That financial data needs to be safeguarded, since the release of it would give other bidders (on future contracts) a significant advantage by knowing the financial capacity, indebtedness, resources, of their competition. That would reduce the competitive nature of the public bidding. Additionally, obtaining details from unsuccessful bidders would enable other bidders to know in which areas they could increase their bids without fear of the competition. Again, that would defeat the very purpose of public bidding. While OPRA does provide an exemption for that information, the challenge in maintaining that information in an electronic format is that the confidentiality is not as easily protected as when the information is only in paper-based format. The ability to comply with the confidentiality requirements in a technology based record retention system requires both training and the hardware-software needed to prevent that information from improperly being accessed by others.

Technology is a boon for cost-effective management of data in private businesses as well as in government offices. The drive to obtain the benefits of technology, however, cannot ignore the impact that the technology has on privacy and on the rights of citizens to have confidence that their government is not the ultimate culprit in the dissemination of their private information.

Any effort to expand the use of technology must include the development of effective means to maintain the privacy of information that is deemed to be private and it is the obligation of the State to provide the technical and financial resources to accomplish that level of protection for government entities at all levels, State, County, Municipal, School District and other governmental authorities.

New Jersey should have a structured Office of Privacy, which would work with, and, perhaps, within the Office of Information Technology to be able to interact and to assist in identification of privacy related issues.

Recommendations:

In the area of the impact of technology on privacy issues relating to governmental records, the Privacy Study Commission recommends that:

1. E-Mail addresses provided by individuals to government entities should be accorded the same protection as unlisted phone numbers, i.e., they should remain confidential.
2. There should be through and mandatory training provided for all of those who have custody of government records, not just the formally designated Custodian of

Records, on the impact of technology and the steps that are necessary to be taken in order to protect the authorized confidential information when records are provided to a requestor in electronic format.

3. The training, and any equipment required to implement privacy protection of electronic data should be provided by the State of New Jersey as a State expense and should not be left to local government entities to provide as their limited resources will allow.

New Jersey should establish an Office of Privacy, which would work with, and, perhaps, within the Office of Information Technology to be able to interact and to assist in identification of privacy related issues and to bring those issues to the attention of those charged with determining the appropriate boundaries for access to government records, such as the Government Records Council or the Courts.

When agencies adopt regulations establishing certain records as not subject to disclosure, those agencies need to recognize the impact of technology on the ability to search records and to make the regulations comprehensive enough to ensure that the regulation making certain records not subject to disclosure are not evaded by the use of technology.

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SECTION 2:
REPORT ON HOME ADDRESSES AND TELEPHONE NUMBERS

Executive Summary

The disclosure of home addresses and telephone numbers contained in government records is at the forefront of the privacy debate in New Jersey. While the New Jersey Open Public Records Act favors disclosure of government records, it also states that public agencies have a responsibility to safeguard personal information when disclosure would violate a citizen's reasonable expectation of privacy.

In light of the concern over the disclosure of home addresses and telephone numbers, the New Jersey Privacy Study Commission was given the special directive to review this issue and develop recommendations before concluding on the Commission's general task of studying the privacy issues raised by state and local government's collection, processing, use and dissemination of information under OPRA.

The Commission created the Special Directive Subcommittee to specifically study whether and to what extent home addresses and telephone numbers should be disclosed by public agencies in the state. In doing so, the Subcommittee considered the arguments for and against disclosure set forth by the public at open hearings held throughout the state. Comments were received from academic experts, representatives of state and local government, the American Civil Liberties Union, organizations for open government, organizations of education professionals, victims' organizations, press organizations, commercial resellers of government records, professional investigators, attorneys and private citizens.

The Subcommittee also considered legislation enacted by other states that have specifically addressed the issue of public disclosure of home addresses and telephone numbers as examples of legislative frameworks currently in place throughout the country. Additionally, the Subcommittee reviewed the statutory interpretations of an individual's reasonable expectation of privacy regarding the disclosure of home addresses and telephone numbers in the federal Freedom of Information Act and the Privacy Act of 1974. Further, the Subcommittee considered the judicial interpretations of the same provided by the U.S. Supreme Court, U.S. Court of Appeals for the Third Circuit, and the New Jersey Supreme Court as the Subcommittee developed its policy recommendations on this issue.

In accordance with its special directive, the New Jersey Privacy Study Commission developed the following recommendations for consideration by Governor McGreevey and the Legislature:

- Home telephone numbers, including cell phone numbers, should not be disclosed.
- Public agencies should notify individuals that their home addresses may be disclosed pursuant to OPRA requests.
- Individuals should be permitted to provide an address of record for disclosure purposes, in addition to their home address when interacting with public agencies.
- The Governor or Legislature should establish objective guidelines defining when and from which government records home addresses should be redacted.
- Individuals should be permitted to opt out of disclosure of their home addresses.
- In the future, computer systems and applications should be programmed to collect but not disclose home addresses and telephone numbers.

This report, including the policy recommendations contained therein, will be incorporated in the final report of the New Jersey Privacy Study Commission at the conclusion of its complete study of the privacy issues raised by the collection, processing, use and dissemination of information by public agencies.

The Special Directive to the Privacy Study Commission

This report responds to Executive Order 26, in which Governor McGreevey directed the New Jersey Privacy Study Commission "to study the issue of whether and to what extent the home address and home telephone number of citizens should be made publicly available by public agencies and to report back to the Governor and the Legislature..." [13]

The Legislature created the New Jersey Privacy Study Commission in the Open Public Records Act to "study the privacy issues raised by the collection, processing, use and dissemination of information by public agencies, in light of the recognized need for openness in government and recommend specific measures, including legislation, the Commission may deem appropriate to deal with these issues and safeguard the privacy rights of individuals."[14]

The Privacy Study Commission ("Commission") is a temporary body consisting of 13 members representing groups that advocate citizen privacy interests and groups that

13 Executive Order 26, dated August 13, 2002, may be found at the following website: http://www.state.nj.us/infobank/circular/eom26.shtml.

14 N.J.S. 47:1A-15. The full text of the New Jersey Open Public Records Act may be found at http://www.state.nj.us/grc/act.html#privacy.

advocate increased access to government records. Its membership includes representatives of local law enforcement agencies, one local government official, attorneys practicing in the fields of municipal law and individual privacy rights, representatives of educational professionals and organizations, one crime victim advocate, one representative of the news media, one legislative expert and one retired member of the state judiciary. The Special Directive Subcommittee is a subset of the Commission created to address the specific issue of whether and to what extent home addresses and home telephone numbers of citizens should be made publicly available to public agencies (the "special directive").[15]

A. Recommendations

The New Jersey Open Public Records Act ("OPRA") favors disclosure of public records. OPRA proclaims the public policy of New Jersey to be that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this state."[16] Any limitations on the right of access are to be construed in favor of the public's right of access.

OPRA also specifically states that "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."[17] Thus, the right of privacy is secondary to the public right to access.

In establishing its recommendations regarding whether and to what extent home addresses and home telephone numbers, including cell phone numbers, should be made publicly available by public agencies, the Commission considered the legislative findings that favor disclosure while also protecting privacy.

The Commission proposes the following recommendations as a way to balance the public's recognized need for openness in government while safeguarding the privacy rights of individuals:

1. Home Telephone Numbers, Including Cell Phone Numbers, Should Not Be Disclosed

It is often difficult for records custodians to determine whether the home telephone numbers, including cell phone numbers, in government records are commercially listed

15 Members of the Special Directive Subcommittee are: Grayson Barber (Chair of the subcommittee), Thomas J. Cafferty, George Cevasco, Edithe A. Fulton, Hon. Rosemary Karcher Reavey, J.S.C. (retired), William John Kearns, Jr., M. Larry Litwin (Chair of the Privacy Study Commission) and Karen Sutcliffe. Other members of the Privacy Study Commission are: Richard P. DeAngelis, Jr., John Hutchison, Pamela M. McCauley, Jack McEntee, and H. Lawrence Wilson, Jr. The Privacy Study Commission gratefully acknowledges the assistance of its staff attorney, Catherine Starghill, and the generous support of the New Jersey Department of Community Affairs in making Ms. Starghill available to the Commission.

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

17 Id.

or unlisted by regional telephone companies. This means that for practical purposes, records custodians may not be able to comply with the provision of OPRA that directs them to redact unlisted telephone numbers from requested records.[18] Therefore, the Commission recommends that all home telephone numbers, including cell phone numbers, not be disclosed under OPRA.

While this recommendation may be implemented for future records through the inclusion of a "check box" that requires individuals to identify whether the telephone number listed on all new government forms and applications is in fact a home telephone number, it is problematic for existing records. Thus, the Commission recommends that the Governor or Legislature mandate a divided approach for implementing this recommendation. As to records created prior to the inclusion of this "check box", all telephone numbers in government records should not be disclosed pursuant to OPRA requests unless the record clearly identifies that the telephone number is not a home telephone number. This will not harm requestors since they may utilize other resources to obtain commercially listed home telephone numbers, including regional telephone directories or Internet search engines.

2. Public Agencies Should Notify Individuals that Their Home Addresses May Be Disclosed Pursuant to OPRA Requests

Many people are unaware that currently under OPRA their home address may be publicly disclosed when they give this information to public agencies. Several private citizens testified at the Commission's open public hearings that when they give information about themselves to the government they expect it to go no further.

Accordingly, the Commission recommends that the Governor or Legislature require public agencies to provide notice that home addresses may be disclosed. This may be accomplished by mandating that all public agencies include a notice widely visible in the public areas of their offices and on all new government forms and applications that reads, "Your home address may be disclosed pursuant to an OPRA request."

(This recommendation assumes that the Governor or Legislature adopts Recommendation 1. If that recommendation is not adopted and implemented, then the Commission recommends that public agencies should notify individuals that both home addresses and telephone numbers may be disclosed pursuant to OPRA requests.)

3. Individuals Should Be Permitted to Provide an Address of Record For Disclosure Purposes, In Addition to Their Home Address When Interacting with Public Agencies

In many cases, public agencies collect home addresses from individuals not for the purpose of establishing domicile or performing other statutorily required functions, but for other purposes such as future contact and correspondence. Therefore, the Commission

[18] N.J.S.A. 47:1A-1.1.

recommends that individuals who do not want their home addresses to be disclosed under OPRA should, when appropriate, have the option of also providing an address of record for disclosure purposes when public agencies respond to OPRA requests.

The Commission recommends that the Legislature implement this recommendation by mandating that all new government forms and applications request both an actual home address and an address of record. Public agencies will then have the actual home address to perform their legislatively mandated functions as necessary, but will only disclose the address of record (if one is provided) pursuant to OPRA requests. Actual home addresses should remain accessible to law enforcement, public safety and in real estate records necessary for land transactions, title searches, and property tax assessments.

4. The Governor or Legislature Should Establish Objective Guidelines Defining When and From Which Government Records Home Addresses Should Be Redacted

It is commonly understood that many records have been in the public domain as a matter of course ever since records have been collected and maintained by public agencies, such as real estate records necessary for land transactions, title searches and property tax assessments. Public agencies should continue to disclose these records to facilitate the execution of land transactions or in the fulfillment of statutorily required functions (as is the case for tax assessments). In other cases, however, the functions of public agencies do not strictly rely on the disclosure of home addresses and individuals providing agencies with this information may not expect that the agencies will disclose their information.

Since OPRA does not permit records custodians to ask requestors their reasons for requesting government records to determine whether the disclosure of the home addresses would violate an individual's reasonable expectation of privacy, records custodians need objective guidelines that define when and from which government records home addresses should be disclosed under OPRA. The Commission has identified two strategies for developing such guidelines:

a) Identify Categories of Records From Which Home Addresses Should Be Redacted

In addition to those records currently exempt from disclosure under OPRA, the Commission recommends that the Governor or Legislature identify those government records from which home addresses should not be redacted and those records from which home addresses should be redacted in the interest of safeguarding an individual's reasonable expectation of privacy. This exercise would be an enhancement to OPRA and may result in an amendment to the statute. The Commission further recommends that the Governor or Legislature garner the assistance of the Department of the State - Division of Archives and Records Management ("DARM") to execute this recommendation.

DARM's Implementation of this Recommendation

Existing DARM infrastructure may expedite the execution of this recommendation. Specifically, DARM has compiled a comprehensive list of all the records created, filed and maintained by every public agency in the State of New Jersey, along with retention schedules and other record keeping requirements established and approved by the State Records Committee. This compilation of retention schedules could become the basis for a *register* of all records of public agencies that is expanded to include detailed information on each record indicating whether the record contains home addresses that should be redacted.

DARM offered this proposed "register" for consideration and inclusion in OPRA as a keystone for the implementation of the intent of the act and had sought to secure funding for new software necessary to create it. The Commission recommends the implementation of this register as a practical and comprehensive means of establishing objective guidelines defining when and from which records home addresses should be redacted.

This recommendation is a practical approach for providing guidance to records custodians because custodians are already familiar with DARM's records retention schedules and use them often in their daily operations. Therefore, the Commission believes that records custodians may easily incorporate in their daily operations review of an expanded compilation of records retention schedules that include detailed information on each record regarding whether home addresses contained therein should be redacted when processing OPRA requests.

The Commission also recommends that the funding for the creation and maintenance of the register, which will require research to determine the privacy requirements of each record and new software to create the register, come from DARM's portion of the newly established New Jersey Public Records Preservation Account. The Public Records Preservation Account was created for the management, storage and preservation of public records from the monies received by county clerks attributable solely to the amount of increases to the document filing fees established by the Legislature in July 2003.[19]

The Commission further recommends that DARM consider several factors to determine whether home addresses should be exempted:[20]

- The type of record;
- The potential for harm in any subsequent nonconsensual disclosure;
- The injury from disclosure to the relationship in which the record was generated;
- The adequacy of safeguards to prevent unauthorized disclosure;
- The degree of need for access; and,

[19] N.J.S.A. 22A:4-4.2.
[20] These factors are enumerated in United States v. Westinghouse Electric Corp., 638 F.2d 570 (3d Cir. 1980).

- Whether there is an express statutory mandate, articulated public policy or other recognizable interest militating toward access.

In conducting its study, the Commission implores DARM to devote special attention to an individual's reasonable expectation of privacy in records of vital statistics, professional licensing records, and recreational licensing records just to name a few.[21]

b) Identify Groups of Individuals Whose Home Addresses Should Be Redacted

In addition to identifying categories of records from which home addresses should be redacted, the Governor or Legislature should exempt certain groups of individuals from the disclosure of their home address due to the demonstrable safety risks to the members of these groups.[22]

The Commission recommends that the home addresses of the following groups of individuals be redacted unless disclosure is required by 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:

1. Active and former law enforcement personnel, including correctional and probation officers;
2. Judges;
3. Current and former attorneys general, deputy and assistant attorneys general, county and municipal prosecutors, and assistant county and municipal prosecutors;
4. Crime victims;
5. Personnel of the department of human services - division of youth and family services whose duties include the investigation of abuse, neglect, exploitation, fraud, theft, and other criminal activities;
6. Personnel of the department of treasury – division of taxation or local government whose responsibilities include revenue collection and enforcement; and,
7. Current and former code enforcement officers.

[21] States maintain records spanning an individual's life from birth to death, including records of births, marriages, divorces, professional licenses, voting information, worker's compensation, personnel files (for public employees), property ownership, arrests, victims of crime, and scores of other pieces of information. These records contain personal information including a person's physical description (age, photograph, height, weight, and eye color); race, nationality, and gender; family life (children, marital history, divorces, and even intimate details about one's marital relationship); residence, and contact information (address, telephone number, value and type of property owned, and description of one's home); political activity (political party affiliation, contributions to political groups, and frequency of voting); financial condition (bankruptcies, financial information, salary, and debts); employment (place of employment, job position; salary, and sick leave); criminal history (arrests, convictions, and traffic citations); health and medical condition (doctor's reports, psychiatrist's notes, drug prescriptions, diseases and other disorders); and identifying information (mother's maiden name, and Social Security number).

[22] For example, judges and law enforcement officers may be targets of retaliation and crime victims may be targets of further intimidation and harassment.

There may be other groups of individuals whose positions create a demonstrable safety risk not set forth in this list. If that is so, the Commission believes it would be appropriate to similarly exempt such other groups of individuals by legislative regulation or Executive Order.

Members of the Commission have expressed concern over the practical difficulties associated with implementing this recommendation. Specifically, it is believed that there may be difficulties identifying whether an individual whose home address is listed in government records are members of an exempt group. However, it is also believed that this may be resolved in the future by mandating that all individuals completing government forms and applications requiring home addresses indicate whether they are members of any of the exempt groups. This may be accomplished by also mandating that all new government forms and applications that request home addresses have "check boxes" for the identification of an individual as a member of an exempt group. With regard to existing records, those entitled to this privacy protection will have an affirmative obligation to notify public agencies of their protective status.

Several members of the Commission believe that no group of individuals should be given special treatment regarding the nondisclosure of their home addresses as is provided in this recommendation.

5. Individuals Should Be Permitted To Opt Out of Disclosure of Their Home Addresses

This recommendation is offered as an alternative to Recommendation 3. discussed above. The Commission believes it may be appropriate in some cases to give individuals a means to indicate that they do not want their home addresses disclosed to the public under OPRA. Therefore, the Commission recommends that a study be conducted to determine which government forms and applications requiring home addresses are appropriate for the opt out option due to the potential for abuse (e.g. selecting such an option to avoid law enforcement). It is believed that this study may be conducted by DARM in conjunction with the Commission's recommendation 4.a. discussed above.

After determining which government forms and applications are appropriate for the opt out option, the Governor or Legislature may mandate that this option be implemented by including an "opt out" check box on all new government forms and applications in the future.

One member of the Commission specifically disagrees with this recommendation, opining that, in light of the other recommendations in this report, there is no need for this provision and further opining that this provision could lead to an incomplete public record.

6. In the Future, Public Agencies Should Program Their Computer Systems and Applications to Collect But Not Disclose Home Addresses and Telephone Numbers When Redaction is Required

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In the future most OPRA requests will likely be answered in electronic form, making computer systems and application design a technological answer to ensuring that home addresses and home telephone numbers, including cell phone numbers, are not disclosed when redaction is required. Therefore, the Commission recommends that as new computer systems and applications are phased in, they should be designed to flag the data fields for home addresses and home telephone numbers, including cell phone numbers, and automatically redact this information when required by public agencies responding to OPRA requests. This recommendation does not pertain to existing government records in hardcopy or electronic form.

B. Public Comment

The Commission held seven public hearings on the issue of whether and to what extent individuals' home addresses and home telephone numbers should be made publicly available by public agencies. The hearings were held at locations in northern, southern and central New Jersey. The Commission received live testimony and written comments from individuals and organizations throughout the state. The following section is based upon live testimony and written comments (including e-mails) from the public received by the Commission through March 2004.[23]

On the subject of home addresses in open public records, the views expressed fall into two broad categories: one asserting that home addresses should not be disclosed under OPRA and the other asserting to the contrary that they should be disclosed.[24]

1. Arguments Against Disclosing Home Addresses and Telephone Numbers Under OPRA

Academic Expert

Professor Daniel J. Solove, Associate Professor of Law at Seton Hall Law School in New Jersey, submitted written comments regarding his assertion that the disclosure of home addresses and telephone numbers under OPRA could potentially be unconstitutional, and would constitute a departure from the federal approach under the Freedom of Information Act.[25] He described groups of people who have a strong interest in keeping their home addresses confidential (including celebrities, domestic violence victims, stalking victims, witnesses in criminal cases, abortion doctors and police officers), and cited case law from federal and state courts recognizing a state interest in preserving residential privacy.

Professor Solove stated that the United States Supreme Court has recognized a substantial privacy interest in home addresses and telephone numbers, citing Department of Defense v. F.L.R.A., 510 U.S. 487 (1994) (interpreting the Freedom of Information Act and the Privacy Act of 1974). He also stated that the United States Court of Appeals for the Third Circuit held that case law "reflect[s] the general understanding that home addresses are entitled to some privacy protection, whether or not so required by statute," citing Paul P. v. Verniero, 170 F.3d 396, 404 (3d Cir. 1999).

Professor Solove also asserted that if New Jersey were to routinely give out home addresses and home telephone numbers, it may not only be violating the U.S.

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[23] The Commission meets approximately once a month and invites the public to attend and comment on its work. This report incorporates public comments from these regular meetings, as well as from special public hearings. The regular monthly meetings are not taped, so written testimony is in the record but transcripts of those meetings are not available.

[24] Most of the comments received by the Commission deal only with home address information. The Commission assumes that the points of view and courses of reasoning apply to home telephone numbers, as well as to home addresses.

[25] Professor Solove recently published a legal text entitled, "Information Privacy Law" (Aspen Publishing, 2003) (with Marc Rotenberg), and has written extensively on the subject.

Constitution (as interpreted by many federal courts of appeal including, most importantly, the Third Circuit), but it may also be repudiating the privacy protections of the federal Freedom of Information Act approach, which is the approach on which most states' open public records acts are modeled.[26]

Further, Professor Solove stated that "[t]his conclusion certainly doesn't mean that New Jersey is barred from disclosing addresses and telephone numbers in public records. But it does mean that any such disclosures will be balanced against the state's interest in disclosing them. … It is important to note that the personal information in public records is often compelled by the government. People don't give it out freely but are often forced to do so. Broad disclosure of people's addresses can compromise people's safety. It may benefit the media, which wants easy access to information, and commercial interests, which want to use addresses for marketing purposes. But in balancing under the Constitution, courts look to the extent to which the greater public interest is served by disclosure."

New Jersey Department of Human Services

The New Jersey Department of Human Services (DHS) provided a "statement of concern" in which the DHS Office of Education noted that it does not believe that the Internet is a secure medium for maintaining government records that often contain personal information.

American Civil Liberties Union of New Jersey

The American Civil Liberties Union of New Jersey (ACLU-NJ) testified that confidence in government at all levels is best sustained by access to the information necessary to promote the vigorous public discussion that a well functioning democracy requires. However, when dealing with information that individuals reasonably expect to remain private and unpublished by the government, the ACLU-NJ stated that there should be a presumption that such information remains confidential unless there is an overriding justification for its disclosure.

To that end, the ACLU-NJ urged special protection for four categories of information: home address, Social Security Number, medical information and financial information.[27] The ACLU-NJ proposed that two exceptions should apply to the confidentiality of home addresses: voter registration records and tax assessment records. They stated that these records containing home addresses should be disclosed, whereas all other records containing home addresses should remain confidential. As to financial records, the

[26] See, e.g., McClain v. College Hospital, 99 N.J. 346, 356 (1985) (noting that most state open public records acts are modeled on the federal Freedom of Information Act).

[27] OPRA already specifically exempts Social Security Numbers from disclosure. N.J.S.A. 47:1A-1.1. This report refers to Social Security Numbers for the purpose of summarizing relevant testimony. Medical and financial records are beyond the scope of this report since they are individually addressed at the federal level via the Financial Services Modernization Act and the Health Insurance Portability and Accounting Act, respectively.

ACLU-NJ recommended one exception for the disclosure of the salaries of public employees.

The ACLU-NJ stated that citizens disclose their home addresses because they are compelled to do so by state law and in order to receive basic governmental services. According to the ACLU-NJ, citizens have no choice but to give their home addresses to the government, they should reasonably expect that the government will not re-disclose their addresses to unknown third parties. The ACLU-NJ asserted a right to privacy in one's home address, under both the New Jersey Constitution and the United States Constitution citing the following Meghan's Law cases: Doe v. Poritz, 142 N.J. 1 (1995); Paul P. v. Farmer, 227 F.3d 98, 101 (3d Cir. 2000); and Paul P. v. Verniero, 170 F.3d 396 (3d Cir. 1999).

The ACLU-NJ urged the Commission to adopt an objective standard to determine whether home addresses and other confidential information should be disclosed under any circumstances. A balancing test, it argued, would put too much discretion into the hands of government officials.

The ACLU-NJ recounted a request it received from a domestic violence victim who was alarmed to find her home address on the state's web site of licensed professionals. The ACLU-NJ urged the State of New Jersey to review and assess which government records containing personal information should be redacted and which would be appropriate for full public disclosure because they shed light on governmental operations and other issues of public concern.

New Jersey Education Association

The New Jersey Education Association submitted written testimony stating "in the strongest terms possible, that public school employees have a most reasonable expectation of privacy such that their home address and telephone number should not be subject to disclosure to any member of the public at any time." The Association's representative testified that "NJEA believes in accessible and transparent government. However, we believe that in the pursuit of that ideal it is important that government not allow the privacy rights of individuals to be trampled. … We are particularly concerned about the potential impact of releasing information about school employees as a distinct class."

New Jersey School Boards Association

The New Jersey School Boards Association, a non-partisan federation representing elected officials of more than 600 school districts, stated that the Legislature should exempt from disclosure the home addresses and telephone numbers of school board members. "To promote community participation and encourage a broad pool of candidates for school board elections, the government should not require school board members to give up their reasonable expectation of privacy simply because they want to serve their community." The Association's representative further recommended that "the

home addresses and home telephone numbers of citizens should never be disclosed by public agencies unless such disclosure is required by law enforcement agencies."

New Jersey Principals and Supervisors Association

In written testimony, the New Jersey Principals and Supervisors Association stated that "if the home addresses and telephone numbers of school administrators are easily released to the public, there is the potential for harassment of these leaders and even abuse. Our past experience indicates that such incidents do occur."

Domestic Violence Victims' Organizations

The New Jersey Coalition for Battered Women submitted a written statement strongly opposing the disclosure of names, addresses, phone numbers and personal information to the general public. "No victim of domestic violence should be impeded in her or his efforts to remain safe from a batterer by the unmonitored disclosure of their contact information by the government."

Municipal Clerk of the Borough of Paramus

One submission, from the Municipal Clerk for the Borough of Paramus, described a case of alleged harassment as a result of OPRA. A requester obtained the names and addresses of all members of the Paramus Shade Tree and Park Commission, took photos of their homes and measurements of their properties, and disclosed the information to others. The requestor urged others to contact the members of the Shade Tree and Park Commission on his behalf. The chairman of the Commission complained. The clerk expressed concern that it would be difficult to attract municipal volunteers "if the public has the ability to reach workers in the public sector for harassment such as this."

Private Citizens

Dozens of individuals submitted impassioned pleas for privacy, in written and verbal testimony. Several made the point that when they provide personal information to the government, they expect the information to go no further. Two expressed fears about identity theft; two inveighed against unwanted solicitations (including "spam"). Three private citizens made specific reference to a federal law that permits disclosure of personal financial information unless a client makes the effort to "opt-out."[28] One citizen stated that "people do not want people with disabilities as neighbors," and said that if addresses and phone numbers of residential programs were made available, disabled individuals might be harassed. One individual testified that attorneys were using municipal court records to contact accident and crime victims as prospective clients.

[28] The Financial Services Modernization Act ("Gramm-Leach-Bliley"), 15 U.S.C. § 6801 (1999) (establishes "notice and opt-out" as the standard for protecting financial privacy). The witnesses that cited it urged New Jersey to adopt "opt-in" as a better standard, stressing that home address information should not be disclosed without the resident's express consent.

Several witnesses stated that the government should disclose no personal information about them.

Complaining specifically about unsolicited junk mail from mortgage services companies, one witness stated that "even though I am in the financial services business myself, I have absolutely no sympathy for the companies who mine this personal information for their own ends. The complaints from realtors groups, mortgage services companies, and credit card companies should not outweigh the right of citizens to a little privacy -- especially when concerning financial information."

Another witness complained specifically about receiving solicitations from attorneys who use motor vehicle accident reports to solicit prospective clients. One e-mail said, "I believe that the state government and state agencies are entirely too free with information that should not be public." Another answered the question of whether and to what extent home addresses and home telephone numbers of citizens should be made publicly available by public agencies as "None and NEVER."

One witness, apparently by avocation, combs the refuse of government agencies to determine how carefully their confidential files are handled. He held up a document he declared to contain a public employee's name, title, salary and Social Security Number. His point, colorfully made, was that confidential information should be adequately protected, in practice as well as by statute. Another witness frequently sued for access to governmental records at his own expense. He claimed to have brought more litigation against public agencies "than all the newspapers put together."

2. Arguments in Favor of Disclosing Home Addresses and Telephone Numbers Under OPRA

Academic Expert

Professor Fred H. Cate, Professor at Indiana University School of Law-Bloomington, submitted written comments and testified before the Commission regarding his assertion that no constitutional privacy right attached to home addresses and home telephone numbers.[29] He stated that the constitution does not prohibit public access to home addresses and telephone numbers in government records. In fact, he stated that the Constitution permits and even encourages public access to such information. He further stated that assertions to the contrary are "incorrect as a matter of law."

Professor Cate also stated that scholars and courts have identified many rights to privacy in the Constitution.[30] However, he further stated that while those rights are all important

[29] Professor Cate is a distinguished professor and director of the Center for Cybersecurity Research at Indiana University School of Law-Bloomington, IN. He has researched, taught and written about information privacy issues for 13 years.

[30] Professor Cate stated that the rights of privacy in the Constitution include the rights to be free from unreasonable searches and seizures by the government, to make decisions about contraception, abortion, and other "fundamental" issues such as marriage, procreation, child rearing, and education, the rights to disclose certain information to the government, to

rights, most of them have nothing to do with the government's disclosure of home addresses and telephone numbers in government records. According to him, few of those rights involve privacy of information at all.

Professor Cate stated that there is only one U.S. Supreme Court case that articulates a constitutional right in the nondisclosure of information, although it does so in the context of nondisclosure *to* the government, rather than any obligation of nondisclosure *by* the government, citing Whalen v. Roe, 429 U.S. 589. He further stated that the U.S. Supreme Court has never decided a case in which it found that disclosure *to or by* the government violated the constitutional right recognized in Whalen.

Professor Cate stated that there is no right to privacy guaranteed by the Constitution that would speak in any way to the government's disclosure of home addresses. For example, he stated that the United States Court of Appeals for the Fourth Circuit struck down the Drivers Privacy Protection Act, 18 U.S.C. §§2721-2725, stating that "neither the Supreme Court nor this Court has ever found a constitutional right to privacy with respect to the type of information found in motor vehicle records. Indeed, this is the very sort of information to which individuals do not have a reasonable expectation of privacy," citing Condon v. Reno, 155 F.3d. 453, 464 (4th Cir. 1998); reversed on other grounds, Reno v. Condon, 528 U.S. 441 (2000).

Professor Cate further cited U.S. West, Inc. v. FCC, 182 F.3d 1224, 1235 (10th Cir. 1999), certiorari denied, 528 U.S. 1188 (2000), for the proposition that if government agencies decline to publish information, the agencies should have the burden to show that dissemination of the information would inflict *specific and significant harm* on individuals.

New Jersey Foundation for Open Government

The New Jersey Foundation for Open Government (NJFOG) urged the Commission to reject any sweeping ban on disclosures of home addresses. NJFOG emphasized the axiom that free speech, and by extension open public records, are essential for representative democracy. NJFOG stated that to ban the disclosure of home addresses would undermine OPRA and impair the ability of the news media to do investigative reporting. The organization's representative stated that for example, to redact home addresses "would make it difficult to determine if the Mary Williams who contributed $1,000 to the county sheriff's election campaign is the same Mary Williams who billed the sheriff's department for $10,000 in consulting fees last year." NJFOG further stated that OPRA has been in effect for a year and there have been no significant privacy intrusions reported in the media.

Regarding home addresses, NJFOG pointed out that only a minority of states restrict disclosure and, within that minority, home addresses are protected only for discrete groups such as judges

associate free from government intrusion, and to enjoy one's own home free from intrusion by the government, sexually explicit mail or radio broadcasts, or other intrusions.

and law enforcement officers. NJFOG argued that the disclosure of home addresses is significantly less intrusive than the disclosure of Social Security Numbers, and further stated that most people do not seem to attach much value to the privacy of their home addresses since commercial telephone directories routinely publish this information.

NJFOG also stated that it believes that the redaction of home addresses from government records is a labor-intensive and costly proposition. NJFOG expressed concern that the burden of the expense might be imposed upon requestors of government records. The organization highlighted that OPRA provides that when requests involve an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that "shall be reasonable." N.J.S.A. 47:1A-5(c). NJFOG expressed concern that "some records requests that are now considered routine could morph into requests requiring exceptional effort. In some cases, they could be delayed or denied for that reason and others - especially those involving computer records -- could become prohibitively expensive because extra programming would be needed to redact them."

NJFOG recognized that "people, in certain circumstances, may have an interest in keeping their home address or telephone number private." But it maintained that any suggestion that the federal or state constitution could protect this information would be "philosophically flawed, administratively impractical, unnecessarily sweeping and a serious threat to the goal of open government."

New Jersey Press Association

The New Jersey Press Association stated, "there is no right of privacy protecting home addresses under the United States or New Jersey Constitution."

Asbury Park Press

Two representatives of the Asbury Park Press testified on the value of home addresses to newspapers. They stated that journalists perform a critical "watchdog" function serving as the public's eyes and ears to monitor the affairs of government. They further stated that losing access to home addresses could impair the newspaper's ability to track sources and impede the function of newspapers in fulfilling their role that may be characterized as an essential part of the system of checks and balances on government.

The representatives also stated that the newspaper's code of ethics requires that anonymous sources be corroborated and that this often requires checking public sources of information to ensure accuracy in reporting. They added that newspapers use home addresses as an extension of one's name to further ensure accuracy in reporting.

Freedom of Information Center

In written testimony, the Freedom of Information Center at the University of Missouri School of Journalism argued that blanket privacy restrictions would impair government accountability.

Society of Professional Journalists

The Society of Professional Journalists submitted e-mail comments suggesting that restrictions on the disclosure of home addresses would impair news reporting.

Commercial Resellers of Government Records

Another argument in favor of disclosing home addresses is that commercial "data mining" serves compelling governmental interests. The Commission heard testimony from Reed-Elsevier, the parent company of Lexis-Nexis and the largest commercial reseller of government records (on a subscription basis) in the United States, urging the Commission not to exempt home addresses from disclosure under OPRA. They stated that the databases compiled from government records throughout the 50 states are used for many purposes, including compelling government interests such as apprehending criminal suspects, locating witnesses to crimes, and child support enforcement.

Real Estate and Title Search Professionals

Several real estate and title search companies testified that they need government records containing home addresses for the purpose of facilitating real estate transactions. They further stated that in the current market, some real estate transactions require 24-hour turnaround. They asserted that the purchase and sale of real estate requires extensive review of government records that have traditionally been open for public inspection, such as property deeds, mortgages, municipal tax assessment records, tax liens and judgment liens. These witnesses urged the Commission not to restrict these government records now.

A California company, DataTrace, testified that it is building a database from real property records it obtains from New Jersey county clerks' offices, as well as from tax and judgment records. They stated that the database will be made available on a subscription basis and is critical to its business.

A New Jersey company, Charles Jones, LLC, indexes judgments, liens and bankruptcies, and provides advanced database management services in support of real estate transactions throughout New Jersey and the Mid-Atlantic states. Its representative specifically asked the Commission not to conclude in its final report that there could be any constitutional protection for home addresses.

A company affiliated with Charles Jones, Superior Information Services, emphasized that information from public records can be used to feed the credit reporting system, which

underlies, in large measure, the economic systems of the nation. These companies urged the Commission to recommend no restrictions on the disclosure of home addresses.

Tax Collectors and Treasurers Association of New Jersey

A representative of the Tax Collectors and Treasurers Association of New Jersey, presented his organization's concerns regarding the need for public or limited disclosure of home addresses for tax sales, foreclosures and parties of interest to real estate transactions (such as taxpayers, real estate owners and heirs, prior tax lien holders, and occupants).

Association of Municipal Assessors of New Jersey

The Association of Municipal Assessors of New Jersey emphasized the need to ensure that local assessors have the ability to ascertain home addresses from certain government records, particularly recorded property deeds. "Assessors must have an appropriate address to identify properties as a means of ensuring the fair and equitable assessment of all properties under their jurisdiction."

New Jersey Land Title Association

A representative of the New Jersey Land Title Association addressed the Commission regarding the necessity of public or limited disclosure of home addresses for title searching and tax lien verification. He stated that title search companies use property addresses to determine whether there are judgments or liens against properties.

Geographic Information Systems Professional

The Commission also heard testimony from the coordinator of Geographic Information Systems in Somerset County. He expressed concern that OPRA "neglected to address the capabilities of new technology for using data in ways that have not been thought of before."

Professional Investigators

The Commission received verbal and written testimony from several professional investigators, who emphasized the value of government records, and home addresses in particular, for performing services related to law enforcement. They asserted that these services include investigating insurance fraud, locating witnesses, pursuing deadbeat parents, and performing due diligence for law firms. One professional investigator characterized these services as the "front line for homeland security," and several others cited demands for employee background checks.

The professional investigators testified that they adhere to a voluntary code of professional conduct,[31] and that their state licensing requires a number of hours of security or police work. Accordingly, they characterized themselves as accountable for any misuse of personal information. One professional investigator urged the Commission to determine whether the crime of identity theft arose from the misuse of government records or some other means.

Attorneys

Nine attorneys sent letters opposing any effort to restrict access to home addresses, especially in reports of motor vehicle offenses. The attorneys stated that they use the records as a resource for offering their services to prospective clients, locating witnesses and conducting investigations.

Private Citizens and Other Comments

A business agent for the plumbers and pipe fitters' union said he needed home addresses to uncover cheating by unscrupulous contractors. One witness expressed a desire for home addresses in firearms records, so that he could ascertain whether his neighbors owned guns. An individual testified via e-mail that the philosophy of open government compelled the disclosure of home addresses. One letter received by the Commission expressed concern that unless home addresses were disclosed, real estate transactions would have to be processed manually which would take more time and manpower thus increasing the cost of the transactions. One individual pursued an avocation of testing the responsiveness of state agencies in responding to OPRA requests, and urged the Commission to resist, on principle, any limits on open government.

One individual urged the Commission to allow volunteer organizations the opportunity to receive names and addresses from local government. He stated that "without the access to [home addresses], volunteer organizations could not continue to serve their community. This is the primary source of income through mailings requesting donations to support the organization."

In written testimony, a landlord explained that a broad statewide rental assistance program has begun a process of requiring landlords to identify "comparable rents" when setting the rent for an assisted dwelling. In order to find such information, he stated that small landlords, in particular, require access to home addresses from government clerks.

[31] The self-regulatory framework of Individual Reference Services Group (IRSG) is outlined in a report to Congress: www.ftc.gov/bcp/privacy/wkshp97/irsdoc1.

C. Other Jurisdictions

All governments collect and use personal information in order to govern. Many of these records have long been open for public inspection. Democratic governments moderate the need for information with their obligation to be open to the people and to protect the privacy of individuals. In the United States, these needs are recognized in the federal and state constitutions and in various public laws.

In an effort to protect the privacy of individuals, many jurisdictions in the United States have enacted specific legislation regarding the disclosure of home addresses and home telephone numbers. They are as follows:

- **California.** The California Public Records Act prohibits state agencies from disclosing home addresses of crime victims, judges, elected officials, state employees and utility customers. Cal. Gov't Code § 6254.

  Home addresses in voter registration records are similarly confidential, and are not permitted to be disclosed. Cal. Gov't Code § 6254.3

  The home address, telephone number, occupation, precinct number, and prior registration number provided by people who register to vote may not be released to the public. Journalists, scholars, political researchers, and other government officials may still get the information. Cal. Election Code § 2194.

  Telephone companies may not include unlisted telephone numbers on lists they rent, except to collection agencies and law enforcement. Cal. Pub. Util. Code § 2891.1

  Anybody renting or distributing a mailing or telephone list must obtain the user's identity and a sample of the solicitation and verify the legitimacy of the business. Users or renters of lists with children's names on them must take special precautions. Cal. Penal Code § 637.9

- **Colorado.** State officials must keep the following records confidential but permit the individual to see his or her own file: medical and personnel files, library material, and the address and phone number of public school students. Colo. Rev. Stat. § 24-72-204(3)(a) and 24-90-119.

- **Florida.** The Florida "Sunshine" law creates a general and very strong presumption in favor of disclosure of government records. It has no corresponding privacy statute; instead it lists some 500 exceptions to the general rule of disclosure, including exceptions as to the home addresses of specific groups of individuals: law enforcement personnel, firefighters, judges, state attorneys, managers of local government agencies, crime victims, government employees, and the spouses and children of individuals in these groups. Fla. Stat. Ann § 119.07.

Every state agency must audit and purge its publication mailing lists biennially by giving addressees the opportunity to continue or to stop receipt of the publications. Fla. Stat. Ann. § 283.28.

- **Illinois.** Motor vehicle and driver license information may not be released to persons without a specific business reason, and there is a ten-day waiting period. Home addresses may not be released if a person has a court order of protection. The law also allows a person to "opt-out" of rentals of DMV lists for commercial mailings and requires mailing firms to disclose how they will use the lists they procure. 624 ILCS 5/2-123.

- **Indiana**. Each state agency is required to "refrain from preparing lists of the names and addresses of individuals for commercial or charitable solicitation purposes except as expressly authorized by law or [the public records] committee." Ind. Code Ann. 4-1-6.2

- **Kansas.** Most sales of state lists, including motor vehicle records, are prohibited. Kans. Stat. Ann. §§ 21-3914 and 74-2012.

- **Montana.** State agencies may not rent or exchange mailing lists without the consent of the persons on the lists, except to other state agencies. Voting and motor vehicle records not included. Law enforcement not included. Individuals may compile their own lists from publicly available documents, and certain schools may use lists of license applicants. Mont. Code Ann. § 2-6-109.

- **Vermont.** Lists compiled by public agencies, with exceptions, may not be disclosed if that would violate a person's right to privacy or would produce private gain. Vt. Stat. Ann. title 1 § 317(10).

- **Washington.** "The work and home addresses, other than the city of residence, of a person shall remain undisclosed" by state agencies if a person says in writing that disclosure would endanger life, physical safety, or property. Wash. Rev. Code Ann. § 42.17.310 (1) (BB).

  Voter registration lists are not to be used for commercial purposes. Wash. Rev. Code Ann. § 29.04.100.

- **Wisconsin.** A state or local agency may not sell or rent lists with home addresses unless specifically authorized by statute. Wisc. Stat. Ann. Subch. IV, Ch. 19.

D. Legal Analysis

1. The New Jersey Open Public Records Act and Home Addresses

OPRA favors the disclosure of public records while acknowledging the state's "responsibility and obligation" to safeguard citizens' personal information. However, OPRA does not provide a definition of "personal information" or a "reasonable expectation of privacy." Nor does it contain a general exemption for home addresses and home telephone numbers. However, certain other personal information is exempted from disclosure under OPRA, including Social Security Numbers, credit card numbers, unlisted telephone numbers and drivers license numbers.[32] The statute mandates that records custodians redact this information from government records disclosed pursuant to OPRA requests.[33]

OPRA also provides an exemption for personal information that is protected from disclosure by other state or federal statutes, regulations, or executive orders.[34] For example, OPRA may not be used to obtain the residential home address of an individual who has obtained protection through the state's Address Confidentiality Program.[35]

Conversely, OPRA specifically provides for the public disclosure of some home addresses, such as the residence of crime victims and criminal defendants listed in reports of criminal investigations.[36] However, this provision instructs records custodians to consider "the safety of the victim and the victim's family, and the integrity of any ongoing investigation" before disclosing such information.[37] It also provides that "where it shall appear that the information requested or to be examined will jeopardize the safety of any investigation in progress or may be otherwise inappropriate to release, such information may be withheld."[38] Additionally, OPRA provides that no criminal convict should be granted access to information about the convict's victim, including the victim's home address.[39]

The Commission observes an apparent contradiction regarding the accessibility of a crime victim's home address under OPRA. Although the statute provides that "a custodian shall not comply with an anonymous request for a government record which is protected under the provisions of this section,"[40] for practical purposes, records

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[32] N.J.S.A. 47:1A-1.1.
[33] N.J.S.A. 47:1A-5.
[34] N.J.S.A. 47:1A-9.
[35] The Address Confidentiality Program, N.J.S.A. 47:4-1 et seq., allows victims of domestic violence to use an alternate address for all state and local governmental purposes, including driver's licenses and registration, professional licensing, banking and insurance records, welfare, etc. New Jersey laws also enable victims of domestic violence to vote without revealing their addresses, N.J.S.A. 19:31-3.2. Victims of sexual assault and stalking may use an alternate address on their driver's license and registration. N.J.S.A. 39:3-4.
[36] N.J.S.A. 47:1A-3(b).
[37] Id.
[38] Id.
[39] N.J.S.A. 47:1A-2.2.
[40] N.J.S.A. 47:1A-2.2(c).

custodians cannot determine whether the individuals identified in the records have ever been victims of crimes. Furthermore, records custodians cannot readily discern whether requestors are criminal convicts, especially in light of the fact that OPRA permits anonymous records requests. Therefore, it may be practically impossible to completely comply, at least in the case of anonymous requests, with OPRA. However, Recommendation 4.b. provides a resolution to this situation by identifying crime victims on all new government forms and applications, and not disclosing their home addresses pursuant to OPRA requests.

Thus, OPRA currently provides divergent treatment regarding the public disclosure of home addresses of individuals contained in government records.

2. Governor McGreevey's Executive Orders 21 and 26

The state's treatment of home addresses and home telephone numbers, including cell phone numbers, has been the subject of debate since OPRA was enacted. Shortly after the new statute came into effect, the Governor issued Executive Order 21, which, among other things, directed public agencies not to disclose home addresses or home telephone numbers.[41] The Order stated that "the Open Public Records Act does not afford county and local governments with any means for exempting access to their records, even where the public interest or a citizen's reasonable expectation of privacy would clearly be harmed by disclosure of those records." Executive Order 21 was later rescinded and replaced by Executive Order 26, which restored access to home addresses and publicly listed telephone numbers, but directed the Privacy Study Commission to analyze and report on this issue.[42]

The Legislature (through OPRA) and Governor McGreevey (through Executive Orders 21 and 26) express concern over violating a citizen's reasonable expectation of privacy through the disclosure of personal information like home addresses and home telephone numbers, including cell phone numbers,. However, both acknowledged the need for additional study and understanding of what a "citizen's reasonable expectation of privacy" means in the context of the potential disclosure of this information pursuant to OPRA requests for government records.

The Commission's recommendations were developed in light of the statutory and judicial interpretations of an individual's reasonable expectation of privacy in home addresses and home telephone numbers, including cell phone numbers,, as well as policy considerations concerning the same.

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[41] Executive Order 21, dated July 8, 2002, may be found at the following website: http://www.state.nj.us/infobank/circular/eom21.shtml.

[42] Executive Order 26, dated August 13, 2002, may be found at the following website: http://www.state.nj.us/infobank/circular/eom26.shtml.

3. Reasonable Expectation of Privacy in Home Addresses and Telephone Numbers

OPRA, in its legislative findings, declares "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."[43] Because an individual's "reasonable expectation of privacy" in home addresses is not explicitly defined in OPRA, the Commission turned to interpretations in federal statutes and judicial decisions for guidance.

a.) Statutory Interpretations of "Reasonable Expectation of Privacy" Regarding the Disclosure of Home Addresses

The federal government addresses the need for "open government" through its Freedom of Information Act (FOIA)[44] which generally provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions or by one of three special law enforcement record exclusions. Of those exemptions and special exclusions, one exemption is for "private matters" and another is for "other statutes," including the Privacy Act (discussed below). Thus, although the goal of FOIA is full disclosure of government records, Congress concluded that some confidentiality is necessary.

FOIA is an information disclosure statute that, through its exemption structure, strives to strike a balance between information disclosure and nondisclosure, with an emphasis on the fullest responsible disclosure. Inasmuch as FOIA's exemptions are discretionary, not mandatory,[45] agencies may make discretionary disclosures of exempt information, as a matter of their administrative discretion, where they are not otherwise prohibited from doing so.

Congress later enacted the Privacy Act to complement FOIA.[46] After extensive hearings and careful consideration of how best to protect privacy in an era of automated information systems, Congress passed the Privacy Act of 1974.[47] It is the most comprehensive privacy law in the United States.[48] The purpose of the Privacy Act is to balance the federal government's need to maintain information about individuals with the rights of individuals to be protected against unwarranted invasions of their privacy

[43] N.J.S.A. 47:1A-1.
[44] Freedom of Information Act (FOIA), 5 U.S.C. §552.
[45] See Chrysler Corporation v. Brown, 441 U.S. 281, 293 (1979); Bartholdi Cable Co. v. FCC, 114 F.3d 274, 282 (D.C. Cir. 1997) (FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information).
[46] Freedom of Information Act (FOIA), 5 U.S.C. § 552. The Privacy Act, 5 U.S.C. §552a, was adopted with amendments to FOIA in 1974.
[47] Privacy Act of 974, 5 U.S.C. § 552a (1974).
[48] The United States Department of Justice has characterized the Privacy Act as a statute that is difficult to decipher and apply due to its imprecise language, limited legislative history, and somewhat outdated regulatory guidelines. U.S. Dept. of Justice, "Overview of the Privacy Act of 1974, May 2002 Edition" (last updated December 11, 2003).

stemming from federal agencies' collection, maintenance, use and disclosure of personal information.

The Privacy Act focuses on four basic policy objectives:

(1) To restrict disclosure of personally identifiable records maintained by agencies.

(2) To grant individuals increased rights of access to agency records maintained on them.

(3) To grant individuals the right to seek amendment of agency records maintained on them upon a showing that the records are not accurate, relevant, timely or complete.

(4) To establish a code of "fair information practices" which requires agencies to comply with statutory norms for collection, maintenance, and dissemination of records.

The New Jersey Supreme Court has looked to FOIA and the Privacy Act for guidance in cases interpreting the "Right To Know Law"[49] and the Common Law Right to Know[50]. See, e.g., Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 50 (1995); McClain v. College Hospital, 99 N.J. 346, 356 (1985). The Commission similarly looks to these statutes and the court decisions interpreting them for guidance in discerning the "reasonable expectation of privacy" articulated in OPRA.

As a starting point, we turn to the U.S. Supreme Court which has stated that individuals have a reasonable expectation of privacy with respect to their home addresses. Reading FOIA and the Privacy Act together, the Supreme Court explained this point in United States Dep't of Defense v. Fair Labor Relations Authority, 510 U.S. 487 (1994), as follows:

It is true that home addresses are publicly available through sources such as telephone directories and voter registration lists, but in an organized society, there are few facts that are not at one time or another divulged to another…An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information is made available to the public in some form … Id. at 500. "We

[49] The predecessor to OPRA was known as the "Right to Know Law." P.L. 1963, c.73 (C.47:1A-1 et seq.). The old statute provided limited access to records that were "required by law to be made, maintained or kept on file."

[50] The alternative method to using OPRA to obtain non-public government records involves litigating for a right to access. A body of case law, historically known as the "Common Law Right to Know," generally provides broader access to government records, but requires a judicial balancing test. The balancing test requires that the documents are government records, the requestor have a good reason to inspect the records, and the requestor's reasons for inspecting the records outweigh the state's interest in confidentiality. See Irval Realty, Inc. v. Board of Public Utility Commissioners, 61 N.J. 366, 294 A.2d 425 (1972). OPRA specifically provides that it is not to be construed to limit this common law right of access to government records. N.J.S.A. 47:1A-8.

are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws and traditions." Id. at 501.

b) Judicial Interpretations of "Reasonable Expectation of Privacy" Regarding the Disclosure of Home Addresses

i. U.S. Supreme Court

The U.S. Supreme Court has not yet positively ruled on a constitutional right in the nondisclosure by the government of bare home addresses in government records. However, the court has recognized a constitutional right of privacy in the nondisclosure of certain personal information. Further, the court has only upheld that right, thus shedding light on what is meant by "a reasonable expectation of privacy in personal information" generally, in one instance.

In Whalen v. Roe, 429 U.S. 599 (1977), the court held that the constitutionally protected zone of privacy included the individual interest in avoiding disclosure of personal matters. Id. However, the court held that a state statute requiring that copies of prescriptions for certain drugs be provided to the state did not infringe on individuals' interest in nondisclosure.

Similarly, in Nixon v. Administrator of General Services, 433 U.S. 425 (1977), the court held that President Nixon had a constitutional privacy interest in the personal records of his conversations with his family. However, the court also held that the challenged statute that allowed government archivists to take custody of the former President's materials for screening did not impermissibly infringe on his privacy interests.

Conversely, the court has held that even a decedent's family's privacy interest outweighed public interest in disclosure of personal information and positively held for the nondisclosure of certain death-scene photographs of the decedent. See National Archives and Records Administration v. Favish, 124 S. Ct. 1570 (March 30, 2004).

ii. U.S. Court of Appeals for the Third Circuit

The U.S. Court of Appeals for the Third Circuit (the federal appeals court that governs New Jersey), unlike the U.S. Supreme Court, has specifically held in Megan's Law cases that there are privacy interests in home addresses. In Paul P. v. Verniero, 170 F.3d 396, 404 (3d Cir. 1999), the court concluded that case law reflects the general understanding that home addresses are entitled to some privacy protection, whether or not so required by a statute. Id. at 404. The court also held that even sex offenders have a non-trivial privacy interest in their home addresses.[51] Id. (quoting Dep't of Defense at 501).

[51] See also A.A. v. New Jersey, 341 F.3d 206 (3d Cir. 2003). In this Megan's Law case, the court held that (1) sex offenders' right of privacy in their home addresses gave way to the state's compelling interest to prevent sex offenses, (2) the state's internet publication of their home addresses did not violate offenders' constitutional privacy rights, and (3) the

However, the court also held that Megan's Law does not violate sex offenders' constitutional right to privacy, either by requiring disclosure of home addresses[52] or on the ground that required disclosures may place a strain on sex offenders' family relationships[53].

This court also articulated the common law balancing test used to determine whether an individual's privacy interest outweighs the public's interest in disclosure in United States v. Westinghouse Electric Corp., 638 F.2d 570 (3d Cir. 1980). Specifically, the court stated that:

The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access. Id. at 578.[54]

While OPRA does not mandate this common law balancing test nor allow records custodians to inquire into the reason an individual has requested a particular government record, this analysis is instructive in an understanding of the meaning of a reasonable expectation of privacy regarding the disclosure of home addresses.

iii. New Jersey Supreme Court

The New Jersey Supreme Court has yet to rule on a case involving the public disclosure of bare home addresses in open government records. However, the court has addressed the public disclosure of an individual's home address when coupled with other personally identifiable information in the Megan's Law case of Doe v. Poritz, 142 N.J. 1, 84 (1995). The court's ruling and reasoning provides guidance into an understanding of an individual's reasonable expectation of privacy regarding the disclosure of home addresses.

In Doe, convicted sex offenders sought to enjoin enforcement of sex offender registration and community notification statutes (Megan's Law). The court held that public disclosure of sex offenders' home addresses, together with other information disclosed, *implicated a privacy interest* even if all the disclosed information may have been separately available to the public from other sources.

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state's compilation of information on them, including offenders' names, ages, race, birth date, height, weight, and hair color, did not violate offenders' constitutional right to privacy.

[52] Id.

[53] Id. at 405

[54] These factors are included in Recommendation 4.a. "Identify Categories of Records From Which Home Addresses Should and Should Not Be Disclosed."

However, the court highlighted the distinction between merely providing access to information and compiling and disclosing that information. In particular, the court stated that it believed a privacy interest is implicated when the government assembles those diverse pieces of information – name, appearance, address, and crime – into a single package and disseminates that package to the public, thereby ensuring that a person cannot assume anonymity (as was required under the community notification law). Id.

[T]he question of whether an individual has a privacy interest in his or her *bare* address does not fully frame the issue. The more meaningful question is whether inclusion of the address in the context of the particular requested record raises significant privacy concerns, for example because the inclusion of the address can invite unsolicited contact or intrusion based on the additional information. Id. at 83.

In the end, the court held that the state's interest in public disclosure of sex offenders' registration substantially outweighed the offenders' privacy interest. Nevertheless, it is significant to the Commission's study of the issue that the court recognized a privacy interest in home addresses when that information is disclosed with other personally identifiable information "ensuring that a personal cannot assume anonymity."

c) Reasonable Expectation of Privacy in Home Addresses Versus Non-Governmental Disclosure of Home Addresses

Some members of the public have objected to the nondisclosure of home addresses by government agencies due to the fact that this same information may be obtained from non-governmental sources. Therefore, those who support this position argue that an individual whose home address and home telephone number are publicly published cannot reasonably expect any privacy in such information.

Supporters of this position further hold that if a piece of information can be found anywhere in the public domain, it should also be readily available from the state through OPRA. For example, they argue that if a citizen's home address can be found in a commercial telephone directory, voter registration records, or property tax records, then there is no "reasonable expectation of privacy" in that information, and therefore the state should disclose the home address when it appears as part of any government record requested pursuant to OPRA.

Others assert that any inquiry on an online search engine (such as www.google.com) of a telephone number may provide a street address corresponding to the telephone number, and possibly even a map for locating the residence. Thus, the view holds that (at least for individuals with publicly listed their telephone numbers) there is no reasonable expectation of privacy in home addresses and home telephone numbers and so the state need not shield the same information from disclosure in government records.

Some individuals do not care if their addresses are published or disclosed by the government. However, for others it can be a matter of life or death. A vivid example of

this is the murder of Rebecca Shaffer, who was killed by a stalker who obtained her address from motor vehicle records.[55]
Others, who object to government's disclosure of home addresses, believe that such disclosure is not justified by the fact that some - or even most - people allow their home addresses and home telephone numbers to be published by non-governmental sources. As the Third Circuit explained:

> The compilation of home addresses in widely available telephone directories might suggest a consensus that these addresses are not considered private were it not for the fact that a significant number of persons, ranging from public officials and performers to just ordinary folk, choose to list their telephones privately, because they regard their home addresses to be private information. Indeed, their view is supported by decisions holding that home addresses are entitled to privacy under FOIA, which exempts from disclosure personal files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

Paul P. v. Farmer, 227 F.3d 98, 101 (3d Cir. 2000) (quoting the Freedom of Information Act, 5 U.S.C. § 552(b)(6)). See also Remsburg v. Docusearch, 149 N.H. 148, 816 A.2d 1001 (2003) (stalker case).

Moreover, those who oppose disclosure believe that just because a piece of information is in a "public record" doesn't mean it can be published for any purpose. Likewise, the U.S. Supreme Court explained in United States Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), that there is a "privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public." Id. at 767. "The compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of information. The dissemination of that composite of information infringes upon both the common law and the literal understandings of privacy [that] encompass the individual's control of information concerning his or her person." Id. at 763. "Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a [government-created] computerized summary located in a single clearinghouse of information." Id. at 764. "[T]he fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information." Id. at 770.

[55] This murder prompted Congress to adopt the Drivers Privacy Protection Act, 18 U.S.C. §§2721-2725, which regulates the disclosure of personal information contained in the records of state motor vehicle departments. See Reno v. Condon, 528 U.S. 441 (2000).

d) Standard for Recognizing a Reasonable Expectation of Privacy in Home Addresses

A question that has divided the courts and the members of the Commission is the standard for recognizing a "reasonable expectation of privacy." One member of the Commission, for example, proposed recommending the creation of categories of individuals whose home addresses and telephone numbers would be exempt from disclosure, or alternatively recommended that records custodians be directed to deny access when there is "clear evidence of the substantial likelihood of harm or threat resulting from the disclosure of personal information."[56]

Another member, by contrast, stated that, as a municipal clerk, he believed members of the public had a reasonable expectation of privacy when they gave their personal information to his office. He agreed there should be categories of records that are accessible and non-accessible, but did not agree with the suggestion that the safety of a particular group of individuals by virtue of the nature of their employment (i.e., judges and law enforcement officers) was any more important than that of another group.[57]

There is a split among the circuits on this issue as well. The U.S. Court of Appeals for the Tenth Circuit held that "the government must show that the dissemination of the information desired to be kept private would inflict specific and significant harm on individuals…." in U.S. West, Inc. v. FCC, 182 F.3d 1224, 1235 (10th Cir. 1999), cert. denied, 528 U.S. 1188 (2000). The District of Columbia Circuit came out the other way on a very similar issue, holding that the government may restrict disclosure of people's names and addresses in spite of a corporation's First Amendment claim of entitlement to the information. Trans Union Corporation v. FCC, 245 F.3d 809, petition for rehearing denied, 267 F.3d 1138 (D.C. Cir. 2001).

Even under a "clear evidence of substantial likelihood of harm" standard, home addresses have a constitutional dimension. In Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998), for example, the defense attorney for some drug dealers sought names and addresses from the personnel files of the police officers involved in the arrests. The court held that release of the information invaded the police officers' privacy because it exposed them to a substantial risk of harm. Not only did it implicate their fundamental interest in personal safety, it violated constitutional rights. "The City's release of private information … rises to constitutional dimensions by threatening the personal security and bodily integrity of the officers and their family members." Id. at 1064. The information extended beyond addresses, but the court's reasoning suggests that the primary concern giving rise to the privacy interest was the officers' safety, and it is the address information that is central to this safety concern.

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[56] See New Jersey Privacy Study Commission meeting minutes of September 19, 2003 at http://www.nj.gov/privacy/minutes_091903.html.

[57] See New Jersey Privacy Study Commission meeting minutes of September 19, 2003 at http://www.nj.gov/privacy/minutes_091903.html.

E. Conclusion

The Commission believes that in some cases disclosure under OPRA of personally identifiable information such as home addresses may violate a citizen's reasonable expectation of privacy.[58] People who do not want their home addresses released have limited means for preventing disclosure, and little recourse once the disclosure has been made. The Legislature has specifically articulated in OPRA its intention of not forcing individuals to sacrifice their privacy as a condition of doing business with the government when it stated that "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."[59] Likewise, Governor McGreevey articulated the same intention in Executive Orders 21 and 26.

The Commission believes an individual's reasonable expectation of privacy in his or her home address and telephone number may be violated in certain circumstances when the government discloses this information to the public. The potential for violating this reasonable expectation of privacy is exacerbated by the increased reliance on technology in governmental administration. Until recently, public records were difficult to access. Finding information about an individual used to involve making personal visits to local offices to locate records. But in electronic form, public records can be easily obtained and searched from anywhere. Once scattered about the country, public records are now often consolidated by commercial entities into gigantic databases.

In accordance with its mandate from Governor McGreevey, the Commission developed the following recommendations for consideration by the Governor and the Legislature:

- Home telephone numbers, including cell phone numbers, should not be disclosed.
- Public agencies should notify individuals that their home addresses may be disclosed pursuant to OPRA request.
- Individuals should be permitted to provide an "address of record" for disclosure purposes, in addition to their home address when interacting with public agencies.

[58] Improper disclosure of information by the government is a recognized injury. See, e.g., Greidinger v. Davis, 988 F.2d 1344 (4th Cir. 1993) (voter registration system found to be unconstitutional because it required voters to disclose their Social Security Numbers publicly in order to vote).
[59] N.J.S.A. 47:1A-1.

- The Governor or Legislature should establish objective guidelines defining when and from which government records home addresses should be redacted.

- Individuals should be permitted to opt out of disclosure of their home addresses.

- In the future, computer systems and applications should be programmed to collect but not disclose home addresses and telephone numbers.

The recommendations outlined in this report are based upon statutory and judicial interpretations of an individual's reasonable expectation of privacy regarding the disclosure by government of his or her home address and telephone number, as well as policy considerations of the same.

SECTION 3:
REPORT ON COMMERCIAL USE

EXECUTIVE SUMMARY

As computerization and online availability of government records has made access easier a market has arisen for the secondary use of those records, i.e. use by businesses and entities other than the government. This secondary use has given rise to a tension between these businesses and entities and a citizen's interest in privacy. The Legislature has addressed privacy concerns through exemptions in OPRA and other statutes, such as worker's compensation and insurance laws. It has also has left the door open for other exemptions through regulations, further legislation and executive order of the Governor.

The commercial use of government records, developed at the expense of the taxpayers, has created cost recovery issues separate and apart from the privacy concerns.

The use of government records by private businesses serves some important public purposes. It permits businesses to confirm credit history and property transactions, it permits investigators to detect insurance fraud and businesses to locate debtors. Further, it provides a data base for researchers, political parties and charities. There is concern, however, that some businesses may use government records for purely commercial benefit to themselves, at taxpayer expense and without any corresponding benefit to society. On the one hand, uses such as data mining or consumer profiling are perceived by some as abuses of access. On the other hand, the information sold by these secondary users (who are taxpayers as well) is often of assistance to local businesses, aiding their search for customers and clients and therefore playing a positive role in the economy.

Under OPRA (and the Right to Know Law preceding OPRA), a custodian may not question why the person requesting access wants the information. It is only upon a request for access to information under the common law right, where a balancing of the right of access against the need for confidentiality is required, that the reason for the request becomes relevant. Thus, in handling request for records under OPRA, if a distinction were made between those who seek the record for their own personal use and those who intend to make a secondary commercial use of the information, the custodian of the record would be required to inquire as to the use to be made of the information for each request. This would eliminate the distinction between the right of access under OPRA and the right of access under the common law. Since OPRA specifically retains the right of access under the common law it is clear the Legislature intended that the

statutory right and the common law right remain separate and the custodian may not inquire into the use of the records under OPRA.

There are those who argue that such an inquiry is ultimately beneficial if the government is permitted to impose a user fee of some sort upon the commercial user. Other states have declined to impose such a fee noting that statutory access is a right and not a revenue generating mechanism. The New Jersey courts have stated that the issue is for the Legislature to address.

The Legislature took the opportunity to review the right to access and the fees for access in OPRA and declined to make a distinction between private requestors and commercial requesters. The issue of commercial user fees is, therefore, outside the jurisdiction of the Privacy Study Commission.

FINDINGS

In 2002, the Legislature adopted the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 et seq.. In that legislation, the Legislature created the New Jersey Privacy Study Commission to "...study the privacy issues raised by the collection, processing, use and dissemination of information by public agencies, in light of the recognized need for openness in government and recommend specific measures, including legislation, the Commission may deem appropriate to deal with these issues and safeguard the privacy rights of individuals."

OPRA favors disclosure of public records. The preamble to the Act proclaims that "...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State." N.J.S.A. 47:1A-1. Any limitations on the right of access are to be construed in favor of the public's right of access."

In fulfilling its mission under OPRA, the Privacy Study Commission has created a series of subcommittees to address the issues raised by the collection, processing, use and dissemination of information by public agencies." One of the subcommittees is the Commercial Use Subcommittee.[60]

As noted in the Report of the Special Directive Subcommittee, states, including New Jersey, maintain records spanning an individual's life from birth to death, including records of births, marriages, divorces, professional licenses, voting information, worker's compensation information, personnel files (for public employees), property ownership, arrests, victims of crimes, criminal and civil court proceedings and scores of other pieces of information. These records, in turn, often contain personal information, including a person's physical description, race, nationality, and gender; family life (children, marital history, divorces); residence, location, and contact information; political activity (political party affiliation, contributions to political group, frequency of voting); financial condition (bankruptcies, financial information, salary, debts); employment (place of employment, job position, salary, sick leave). While in New Jersey some of this information is rendered non-accessible by exemptions contained in OPRA or in Executive Orders or Regulations, nonetheless some of it remains publicly accessible. The accessibility of this personally identifiable information, in turn, creates a tension between concerns for individual privacy and the policy of transparency in government and the benefits flowing from such transparency.

The benefits that flow from open public records include:

(1) Integrity of governmental operations and the political process. Specifically, open access to government records provides citizens with information necessary for critiquing government operations, evaluating the effectiveness and efficiency of government agencies, protecting against secret or illicit government activities, and

[60] William Kearns, Pamela McCauley, Grayson Barber, Catherine Starghill, Karen L. Sutcliffe and Thomas J. Cafferty constitute the members of the Commercial Use Subcommittee.

electing and monitoring public officials. This public benefit of open access to government records was perhaps best articulated by James Madison:

> "Knowledge will forever govern ignorance. And people who mean to be their own Governors, must arm themselves with the power which knowledge gives." [61]

(2) Economic Benefits. Testimony adduced before the Commission makes clear that public access to government records permits commercial enterprises to accurately and efficiently identify consumers who may be interested in a given product or service, facilitates the ability to appropriately, expeditiously and economically grant credit to prospective borrowers, allows commercial entities to verify information in order to conduct business in a responsible manner, including complying with government regulations such as verifying driver's license history for public transportation employment.

(3) Law enforcement function. In 1998, the FBI alone made more than 53,000 inquiries to commercial online data bases.[62] This was corroborated by testimony received by this Commission from a representative of Reed-Elsevier, a commercial subscription based retailer of information, who testified that their databases are often accessed by agencies engaged in compelling governmental interests such as identifying terrorists, apprehending criminal suspects, locating witnesses to crimes, and detecting insurance fraud.

(4) Research. Clearly public records are used for studies concerning public health, traffic safety, the environment, crimes by all sorts of researchers, including journalists.

As is evident from the foregoing, a regime of access to public records serves a myriad of purposes ranging from acting as a check on government, fostering economic growth, protecting citizens against crime and apprehending criminals, to assisting research. Benefits are derived from a system of public access to government records not solely from the primary purpose of government in collecting, creating and maintaining the records but also from the secondary or derivative use of those records. Secondary or derivative uses of public records have been defined as "uses for purposes other than the official purposes for which the information was originally compiled." [63] Examples of secondary or derivative uses of public records such as a labor union seeking a list of names, addresses, and phone numbers for federal employees so that it can contact employees for collective bargaining purposes. Similarly, a business seeking income data gathered as part of the U.S. Census in order to identify and target individuals for direct-

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61 Writings of James Madison 103 (G. Hunt ed,1910).

62 Statement of Louis Freeh, former Director of the Federal Bureau of Investigation, before the Senate Committee on Appropriations Subcommittee for the Departments of Commerce, Justice, and State, the Judiciary, and related Agencies, March 24, 1999.

63 Privacy Rights v. FOIA the Disclosure Policy: The "Uses and Effects" Double Standard in Access to Personally-Identifiable Information and Government Records, 12 William & Mary Bill Rights.J.1 2003.

mail advertising for products ranging from burglar alarm systems for inner-city residents to luxurious ocean cruises for upscale suburban dwellers. Other examples of derivative uses of public records include use by journalists to investigate stories, use by corporate intelligence firms to conduct individual background checks and use by political and other organizations of names and addresses contained in public records to solicit new members or disseminate literature. [64]

Tension may then arise between these secondary or derivative uses of public records with an interest in privacy of personally identifiable information contained in those records. Government records are the source of a considerable amount of personal information. Secondary or derivative users of personal information in government records include entities such as database resellers of information, direct marketing organizations, retail organizations, charitable and other non-profit organizations, and quasi-governmental and political organizations.

Many government records, particularly electronic records, have commercial value. Geographic Information Systems (GIS), a computer software program that links geographic information with descriptive information and can present layers of information with each layer representing a theme or feature of a map all of which then can be laid on top of one another creating a stack of information about the same geographic area. The systems are developed at considerable expense by the governmental entity and have clear commercial value to a private entity such as an engineering firm. Therefore, some government records, because of a commercial value derived from a particular secondary or derivative use, also implicate cost recovery issues separate from privacy issues.

These, then, are the issues to be addressed by the Commercial Use Subcommittee in this Report:

(1) The implications of secondary or derivative use of personally-identifiable information contained in a government record; and,
(2) The implications of commercial value in government records derived from a secondary use of that record, and the ability to recover that value.

[64] 12 William & Mary Bill of Rights Journal, p.1-2.

PUBLIC COMMENTS AND THE CURRENT LEGAL LANDSCAPE.

A. Public Comments

Some members of the public expressed their opposition to or support for the secondary or derivative commercial use of government records through personal testimony at the public hearings and open public meetings of the Commission, as well as written comments submitted to the Commission. The comments received by the Commission regarding the commercial use of government records are briefly summarized below.

Private Citizens

Several private citizens provided comments on the issue of commercial use of government records through the Commission's e-mail comment form. One citizen strongly urged the Commission to allow volunteer organizations to garner names and addresses from government records to solicit individuals through mailings for donations that he described as often being the primary source of income for such organizations. Other citizens, however, referred to attorneys' use of government records to identify potential motor vehicle accident and traffic violating clients as an "abuse of OPRA." Specifically, one citizen stated that, "OPRA should not be a tool used to enrich attorneys." Another citizen expressed concern with being "regularly inundated by unsolicited junk mail from mortgage services companies that have very private information" about his mortgage. He further stated that he had no sympathy for the companies that "mine this personal information for their own ends." He insisted that the complaints received by the Commission from realty groups, mortgage services companies, and credit card companies should not outweigh the right of citizens to a little privacy. He urged the Commission to take steps to stop this abuse of citizens' personal information.

Database Resellers of Information from Government Records

The Commission received testimony from a representative of Reed-Elsevier, the largest commercial subscription based retailer of information from government records in the United States. Their representative presented a plea for continued access to open government records so that they may create and maintain databases of the information contained therein for sale to their customers, who**,** Reed Elsevier claims are often engaged in compelling government interests such as identifying terrorists, apprehending criminal suspects, locating witnesses to crimes, and detecting insurance fraud.

Testimony was also received from the Direct Marketing Association (DMA), the oldest and largest trade association for businesses interested in direct marketing and database marketing. It has over 4,500 member companies in the United Stated and 53 other nations. The DMA's representative stated that commercial entities rely on open access to government records to help develop marketing campaigns and reach out to new

customers. She further stated that the ability to accurately and efficiently identify consumers who may be interested in a given product or service dramatically reduces costs, by eliminating undeliverable mail. She also stated that sending consumer offers and opportunities of interest to them enhances consumer satisfaction. She stressed the notion that new businesses that may not be able to afford mass market advertising, or that lack the customer lists of their well established competitors have the ability to reach potential customers and compete more effectively through their access to open government records.

The DMA claims to regulate its members regarding the personal privacy of consumers through the adoption by its Board of Directors of the "Privacy Promise."[65] The Privacy Promise is a public assurance that all members of the DMA will follow certain specific practices to protect consumer privacy. Those practices are allegedly designed to have a major impact on those consumers who wish to receive fewer advertising solicitations while making compliance with the promise as easy as possible for DMA members.

Real Estate Professionals and Organizations

One company that describes itself as "fulfilling the vision of a standardized title and tax information system that spans the nation, enabling title insurance companies to streamline order processing and title production"[66] launched a letter writing campaign to the Commission by its employees expressing the concerns of the real estate industry regarding the real estate industry's need for continued access to open government records. Specifically, DataTrace's employees emphasized that if access to government records is denied or restricted, ordinary consumers may find it difficult and more costly to purchase or refinance a home because the title industry and mortgage institutions may have to engage in more manual processes for the verification of information that is now largely automated.

Charles Jones, LLC, a New Jersey based company whose mission is "to provide lawyers, lenders, title companies and abstracters with reliable information concerning judgments and other records filed in state and federal courts in New Jersey," also weighed in with the Commission. This firm's representative noted that professionals in real estate practice routinely rely on personal information in government records to determine property ownership and facilitate real estate transfers. He further stated that restricting access to personal information in government records would create more instances of mistakes and false identification, delay real estate closings, and increase the cost of real estate and financial transactions. He did, however, recognize that the definitions of public and non-confidential information should be carefully considered and that some safeguards may be required for certain information contained in government records.

[65] Adopted by the DMA Board of Directors in October 1997 and became effective as of July 1, 1999.
[66] DataTrace company website, company profile (September 30, 2003).

Professional Investigators

Individual professional investigators and the New Jersey Licensed Private Investigators Association (NJLPIA) presented verbal and written testimony before the Commission. These professional or private investigators testified that they are men and women who are "the protectors of private industry, corporations, business both small and large, individual citizens and attorneys seeking information in support of litigation or for the defense of the accused." They claim that restricting their access to government records would "virtually wipe out an entire profession of persons whose lives are dedicated to helping others." In the words of the President and Legislative Chair of NJLPIA, private investigators are "the first line of homeland security."

They also stressed that, as a profession, they adhere to a voluntary code of professional conduct,[67] and that their state licensing requirements are very stringent and ensure that they are accountable for any misuse of personal information they obtain from government records.

Attorneys

Attorneys wrote to the Commission requesting that access to open government records not be restricted to members of their profession. The attorneys stated that they use government records (especially reports of motor vehicle accidents and traffic violations) as a resource for offering their services to prospective clients, locating witnesses and conducting investigations, a practice they insist is important to traffic violators, for example, because "many individuals are oblivious to what occurs to their driving record, insurance eligibility point assessment, auto insurance surcharges and the overall financial impact to them over several years as a result of a traffic offense." One attorney indicated that 95% of his firm's clients comes from the ability to obtain names and addresses from various municipal courts where complaints and summonses have been issued against traffic violators. Another attorney pointed out that the Canons of Ethics of the New Jersey Bar strictly regulate this process as a form of lawyer advertising in order to safeguard the public against any abuses emanating from it.

B. The Current Legal Landscape In New Jersey And Other Jurisdictions

Many states have legislatively addressed the increasing commercial value and/or use of government records[68], especially the commercial value of personal information contained in government records that may be used in ways that implicate a citizen's privacy. Legislators have addressed this issue by enacting laws that attempt to balance longstanding policies of public access to government records with the privacy concerns of citizens. New Jersey legislators are currently balancing and further addressing the

[67] The self-regulatory framework of Individual Reference Services Group (IRSG) is outlined in a report to Congress: www.ftc.gov/bcp/privacy/wkshp97/irsdoc1.

commercial value of personal information contained in government records with personal privacy protection through existing law and newly proposed law.

(1) Existing Law in New Jersey:

(a) Prohibition Against Commercial Use of Personal Information in Government Records.

New Jersey has one statute that prohibits the commercial use of government records.[69] This statute regulates the Department of Labor and it specifically applies to the Division of Workers Compensation. The statute limits the public's right to inspect and copy workers' compensation records for commercial use. Specifically, the statute provides that:

> "… no records maintained by the Division of Workers' Compensation or the Compensation Rating and Inspection Bureau shall be disclosed by any person who seeks disclosure of the records *for the purpose of selling or furnishing for a consideration to others information from those records* ..."[70] (Emphasis added.)

The statute further provides[71],

"… No information shall be disclosed from those records to any person not in the division, unless:

1. The information is provided in a manner which makes it *impossible to identify any claimant*;

2. The records are opened for the exclusive purpose … to conduct an investigation … in connection with any pending workers' compensation case …;

3. The records are opened for the exclusive purpose … to conduct an investigation … in connection with the case, … *and the party seeking access to the records certifies to the division that the information from the records will be used only for purposes directly related to the case*;

4. The records are subpoenaed…;

5. The division provides the information to another governmental agency pursuant to law, … *which agency shall not subsequently disclose any of the information to [others] not entitled to receive the information*;

6. The information is information about the claimant requested by the claimant, …" (Emphasis added.)

The constitutional validity of this statue withstood judiciary scrutiny when the New Jersey Supreme Court affirmed a lower court's decision that "[t]he Legislature could properly have found, in its enactment of this section relating to examination of

workmen's compensation records, without violating equal protection of the laws, a substantial good to be accomplished, that being the employment of the disabled, and an evil to be eliminated, that being commercial activities disclosing to employers for a profit the prior workmen's compensation histories of prospective employees with consequential non-hiring of victims of industrial accidents."[72]

The Superior Court found that the statute satisfied substantive due process because the distinction between who may and who may not inspect and copy the records is not invidious to the point of denying commercial entities equal protection of the laws.[73] The court further found that the statute did not violate the right to freedom of speech because that right is not absolute and may be limited in order to obviate a threat to the public welfare.[74] Presumably, in this instance, the Legislature found a threat to the public welfare existed when it enacted this statute.

The Superior Court's decision in Accident Index Bureau, Inc. has, however, been discussed but never distinguished for the benefit of commercial entities seeking unencumbered access to inspect and copy other types of government records in several cases since 1967.[75]

(b) Regulation of Commercial Use of Personal Information.

New Jersey also has one statute that regulates the commercial use of personal information – the Insurer Information Practices Act (IIPA).[76] Specifically, the Act establishes standards for the collection, use, and disclosure of information gathered by the insurance industry (as opposed to public agencies) in connection with policies, contracts or certificates of insurance for life, health, disability and property or casualty coverage.[77] IIPA applies to insurers, agents, insurance support organizations[78], and individuals requesting personal information in connection with an insurance transaction involving personal, family or household coverage.

The Act defines personal information as "any individually identifiable information gathered in connection with an insurance transaction from which judgments can be made about a person's character, habits, avocations, finances, occupation, general reputation,

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[72] Accident Index Bureau, Inc., 95 N.J.Super 39, 229 A.2d 812 (A.D. 1967), affirmed 51 N.J. 107, 237 A.2d 880, appeal dismissed 89 S.Ct. 872, 393 U.S. 530.

[73] Id. at 49.

[74] Id.

[75] See Queilhe v. Lovell, 560 P.2d 1348, 93 Nev. 111, 115 (Nev. Mar 09, 1977), In re Look Magazine, 264 A.2d 95, 98, 109 N.J.Super. 548, 554 (N.J.Super.L. Mar 25, 1970), Ortley Beach Property Owners Ass'n v. Fire Com'rs of Dover Tp. Fire Dist. No. 1, 726 A.2d 1004, 1010, 320 N.J.Super. 132, 143 (N.J.Super.L. July 29, 1998), J.H. Renarde, Inc. v. Sims, 711 A.2d 410, 413, 312 N.J.Super. 195, 201 (N.J.Super.Ch. Feb 19, 1998), Sherman v. Sherman, 750 A.2d 229, 232, 330 N.J.Super. 638, 645 (N.J.Super.Ch. Jul 25, 1999).

[76] N.J.S.A. 17:23A-1.

[77] N.J.S.A. 17:23A-1(a) and (b).

[78] An "insurance support organization" collects or assembles information about individuals for the primary purpose of providing the information to an insurer or agent for insurance transactions. N.J.S.A. 17:23A-2(m).

credit, health or other personal characteristics."[79] IIPA further defines privileged information as "individually identifiable information that relates to a claim for insurance benefits or a civil or criminal proceedings collected in connection with or in reasonable anticipation of a claim for insurance benefits or civil or criminal proceedings, and can include police investigation files as well as trade secret or other sensitive information."[80]

IIPA was based on the National Association of Insurance Commissioners' Insurance Information and Privacy Protection Model Act.[81] The New Jersey Department of Banking and Insurance has recognized that for the most part, IIPA provides more privacy protections than the Financial Services Modernization Act ("Gramm-Leach-Bliley"), 15 U.S.C. §6801 (1999).[82] While the Gramm-Leach-Bliley privacy protections were enacted in 1999, New Jersey enacted its privacy protections some fourteen years earlier.

According to the sponsor's statement, the objective of the IIPA bill when introduced before the New Jersey Senate was to balance the need for information by those conducting the business of insurance with the public's need for "fairness in insurance information practices, including the protection of personal privacy and providing mechanisms by which natural persons and residents of this State may ascertain and dispute the accuracy of information gathered about them …"[83]

In establishing a balance between insurers' need for information and the public's need for privacy, IIPA prohibits the disclosure of personal or privileged information about an individual without the written authorization of that individual, and then only if the disclosure of information is reasonably necessary to the "person" to perform a business, professional or insurance function for the disclosing institutions, agent or support organization and the person agrees not to make further disclosures.[84] Additionally, IIPA provides that any person who knowingly and willfully obtains information about an individual from an insurance institution, agent or insurance support organization under false pretenses is guilty of a crime in the fourth degree. [85]

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79 N.J.S.A. 17:23A-2(t).
80 N.J.S.A. 17:23A-2(w).
81 John P. Halvorsen, *Today's Insurance Information Privacy: Why New Jersey Leads the Pack*, 211-Oct N.J. Law 39, 40 (2001).
82 Id. (Title V of the Financial Services Modernization Act protects the non-public personal information that individuals provide to financial institutions. These privacy requirements serve as the minimum standards states must enforce and permit states to enact consistent laws with stronger standards.)
83 Senate, No. 1013—L.1985, c. 179.
84 N.J.S.A. 17:23A-13.
85 N.J.S.A. 17:23A-22.

(2) Proposed Legislation in New Jersey.

There is currently a bill before the New Jersey General Assembly that aims to exempt commercial requests for geographic information system maps from OPRA access.[86] This proposed amendment to OPRA[87] provides that,

> "[s]ince the public's access to government records is not intended for commercial gain, the custodian shall not permit a government record consisting of geographic information system (GIS) based mapping to be copied or otherwise provided for commercial use."

The bill also provides for an amendment to OPRA records request forms that would include a certification that any government record requested that consists of GIS based mapping information will not be put to commercial use. Further, the bill would add a violation provision that provides,

> "[a] person who knowingly files a request with a false certification that a government record consisting of GIS based mapping information will not be put to commercial use shall be guilty of a crime of the fourth degree and liable for a civil penalty, payable to the public agency, in an amount equal to twice the public agency's cost to develop the GIS based mapping information. The Superior Court shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by this section."[88]

(3) Other Jurisdictions.

The Legislatures in other states have addressed the issue of the commercial value of personal information in government records. These laws vary from state to state and range from strict prohibitions on the commercial use of government records to the establishment of cost recovery schemes. Some of the statutes exempt news reporting from the definition of commercial use, while others do not clearly define the commercial purposes they prohibit. The collage of states' privacy protections from commercial use of personal information contained in government records may be summarized as follows:

Arizona - The Department of Health Services may promulgate rules and regulations as are required by state or federal law or regulation to protect confidential information and no name or other information of any applicant, claimant, recipient or employer shall be made available for any political, commercial or other unofficial purpose. A.R.S. §36-107.

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[86] A2782, introduced May 10, 2004 and sponsored by Assemblymen Upendra J. Chivukula and Gordon M. Johnson.
[87] Proposed amendment to N.J.S.A. 47:1A-5(6)(d).
[88] Proposed amendment to N.J.S.A. 47:1A-12.

Another law dictates that voting precinct registers and other lists and information derived from registration forms (including name, party preference, date of registration, residence address, mailing address, zip code, telephone number, birth year, occupation, and primary and general election voting history) may be used only for purposes relating to a political or political party activity, a political campaign or an election, for revising election district boundaries and may not be used for a commercial purpose. A.R.S. §16-168.

The state's Public Records Act requires a person requesting copies, printouts or photographs of public records for a commercial purpose to provide a statement setting forth the commercial purpose for which the records will be used. The custodian of the records may then charge the requester a fee which includes: (1) a portion of the cost of the public body for obtaining the original or copies of the records, (2) a reasonable fee for the cost of time, materials, equipment and personnel required to reproduce the records, and (3) the value of the reproduction on the commercial market as best determined by the public body. A.R.S. §39-121.03(A). If the custodian determines that the commercial purpose stated is a misuse of the records, he or she may apply to the Governor to issue an executive order prohibiting the compliance with the records request. A.R.S. §39-121.03(B).

A person who obtains a public record for a commercial purpose without indicating that purpose or obtains a public record for a noncommercial purpose and uses or knowingly allows the use of the record for a commercial purpose or obtains a public record for a commercial purpose and uses or knowingly allows the use of the record for a different commercial purpose or obtains a public record from anyone other than a record's custodian and uses it for a commercial purpose shall be liable to the state or the public body from which the record was obtained for damages in the amount of three times the amount which would have been charge for the record had the commercial purpose been stated plus costs and reasonable attorney fees or three times the actual damages if it can be shown that the record would not have been provided had the commercial purpose of actual use been stated at the time of obtaining the record. A.R.S. §39-121.03(C).

For purposes of this statute, "commercial purpose" means the use of a public record for sale, resale or solicitation (not use as evidence, research for evidence in judicial or quasi-judicial action, or use for reporting by newspapers[89].) A.R.S. §39-121.03(D).

California - Under the state's Information Practices Act, an individual's name and address may not be distributed for commercial purposes, sold, or rented by an agency unless such action is specifically authorized by law. CA Civil §1798.60

Colorado - Records of official criminal actions and criminal justice records and the names, addresses, telephone numbers, and other information in such records may not be used for the purpose of soliciting business for pecuniary gain. The record's custodian may deny access to a record unless the requester signs a statement that affirms that the

[89] See Star Pub. Co. v. Parks, (App. Div.2 1993) 178 Ariz. 604, 875 P.2d 837, review denied.

record will not be used for the direct solicitation of business for pecuniary gain. C.R.S.A. §24-72-305.5.

Florida - Despite the Florida Sunshine Law's general exemption of social security numbers (SSNs) in government records, public agencies may not deny a commercial entity access to SSNs provided they will be used only in the normal course of business for legitimate business purposes (including verification of the accuracy of personal information received by a commercial entity in the normal course of its business; use in a civil, criminal, or administrative proceeding; use for insurance purposes; use in law enforcement and investigation of crimes; use in identifying and preventing fraud; use in matching, verifying, or retrieving information; and use in research activities). A legitimate business purpose does not include the display or bulk sale of SSNs to the general public or the distribution of such numbers to any customer that is not identifiable by the distributor. F.S.A. §119.0721(3).

As part of this law, the Florida Legislature acknowledged the fact that SSNs can be used as a tool to perpetuate fraud against a person and to acquire sensitive personal, financial, medical and familial information, the release of which could cause great financial or personal harm to an individual and therefore intends to monitor the commercial use of SSNs held by state agencies in order to maintain a balanced public policy. F.S.A. §119.0721(7). Thus, the law requires that every agency file a report listing the identity of all commercial entities that have requested SSNs during the preceding calendar year and the specific purpose(s) stated regarding its need for SSNs. F.S.A. §119.0721(6).

Georgia - Under its insurance statutes, this state does not allow an employee of any law enforcement agency to allow any person, including an attorney, health care provider, or their agents, to examine or obtain a copy of any motor vehicle accident report or related investigative report when the employee knows or should reasonably know that the request for access is for commercial solicitation purposes. Likewise, no person may request any law enforcement agency to permit examination or to furnish a copy of any such report for commercial solicitation purposes. Ga. Code Ann., §33-24-53(c).

The law also prohibits a person from receiving compensation, a reward, or anything of value in return for providing names, addresses, telephone numbers, or other identifying information of victims involved in motor vehicle accidents to an attorney or health care provider which results in employment of the attorney or health care provider by the victims for purposes of a motor vehicle insurance claim or suit. Ga. Code Ann., §33-24-53(d). Any person who violates this law is guilty of a misdemeanor involving moral turpitude. Ga. Code Ann., §33.24-53(e).

Idaho - A claim for property tax relief and its accompanying documentation is not deemed to be public records and may not be used for an commercial purpose. ID ST §63-703.

Indiana - The state's Fair Information Practices requires any state agency maintaining a personal information system to refrain from preparing lists of the names and addresses of

individuals for commercial or charitable solicitation purposes except as authorized by law or by a rule promulgated by the oversight committee on public records. IC 4-1-6-2(i).

Another law provides that a state agency may adopt a rule and a political subdivision may enact an ordinance prescribing the conditions under which a person who receives information on disk or tape may or may not use the information for commercial purposes, including to sell, advertise, or solicit the purchase of merchandise, goods, or services, or sell, loan, give away, or otherwise deliver the information obtained by the request to any other person for these purposes. However, use of the information in connection with the preparation or publication of news, for nonprofit activities, or for academic research is not prohibited. A person who uses the information in a manner contrary to a rule or ordinance adopted under the law may be prohibited from obtaining copies or further data in the future. IC 5-14-3-3(e).

The law further prohibits the following lists of names and addresses from being disclosed by public agencies to commercial entities for commercial purposes and may not be used by commercial entities for commercial purposes:

(1) A list of employees of a public agency;

(2) A list of persons attending conferences or meetings at a state institution of higher education or of persons involved in programs or activities conducted or supervised by the state institution of higher education; and,

(3) A list of students who are enrolled in a public school corporation if the governing body of the public school corporation adopts a policy prohibiting the disclosure of the list to commercial entities for commercial purposes or specifying the classes or categories of commercial entities to which the list may not be disclosed or by which the list may not be used for commercial purposes. IC 5-14-3-3(f).

Iowa - While the state provides that records of vital statistics are public records for certain purposes, the state registrar is allowed to refuse to permit these records to be used for purely commercial purposes. Op.Atty.Gen. (Pawlewski), March 29, 1974 (referencing I.C.A. §144.5).

Kansas - The state's Open Records Act provides that if access to public records or the purpose for which the records may be used is limited, an agency may require a person requesting the records to provide written certification that the requestor does not intend to, and will not (1) use any list of names or addresses contained in or derived from the records for the purpose of selling or offering for sale any property or service to any person listed or to any person who resides at any address listed or (2) sell, give or otherwise make available to any person any list of names or addresses contained in or derived from the records for the purpose of allowing that person to sell or offer for sale any property or service to any person listed or to any person who resides at any address listed. K.S.A. §45-220(c)(2).

Kentucky - A state law provides that a public agency from which copies of nonexempt records are requested for a commercial purpose may require a certified statement from the requestor stating the commercial purpose for which they will be used, and may require the requestor to enter into a contract with the agency. The contract will permit use of the public records for the stated commercial purpose for a specified fee which may be based on one or both of the following: (1) cost to the agency of media, mechanical processing, and staff required to produce a copy of the public record(s); and (2) cost to the agency of the creation, purchase, or other acquisition of the public records. KRS §61.874(4)(b) and (c). An agency also has discretion as to whether to provide access to public records in electronic form. If an agency does allow such access, it may require a commercial requestor to enter into a contract, license or other agreement, and may charge fees for these agreements not to exceed those elements of costs listed above. KRS §61.874(6).

This law also provides that it is unlawful for a person to obtain a copy of any part of a public record for:

(1) a commercial purpose, without stating the commercial purpose, if a certified statement from the requestor was required; or
(2) a commercial purpose, if the person uses or knowingly allows the use of the public record for a different commercial purpose; or
(3) a noncommercial purpose, if the person uses or knowingly allows the use of the public record for a commercial purpose. A newspaper, periodical, radio or television station is not held to have used or knowingly allowed the use of the public record for a commercial purpose merely because of its publication or broadcast, unless it has also given its express permission for some other commercial use. KRS §61.874(5).

Missouri - The state's law prohibits the use for commercial purposes any information contained in any state or local voter registration system, limited to the master voter registration list or any other list generated from the information. Violation of this law is a class B misdemeanor. "Commercial purposes" means the use of a public record for the purpose of sale or resale or for the purpose of producing a document containing all or part of the copy, printout, or photograph for sale or the obtaining of names and addresses from public records for the purpose of solicitation or the sale of names and addresses to another for the purpose of solicitation or for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of the public record. V.A.M.S. 115.158(6).

Nebraska - The law provides that no sales or use taxes are imposed on the gross receipts from the sale, lease, or rental of and the storage, use or other consumption of copies of public records, except those documents developed, produced, or acquired and made available for commercial sale to the general public. Neb.Rev.St. §77-2704.42.

North Carolina - The public assistance recipient check register showing a complete list of all recipients of Work First Family Assistance in Standard Program Counties and State-County Special Assistance for Adults, their addresses, and the amounts of the

monthly grants are public records, but the registers or the information contained therein may not be used for any commercial or political purpose. Any violation of this law constitutes a class 1 misdemeanor. NC ST §108A-80.

South Carolina - The state's Family Privacy Protection Act of 2002 prohibits a person or private entity from knowingly obtaining or using any personal information obtained from a state agency for commercial solicitation. A person knowingly violating this law is guilty of a misdemeanor and, upon conviction, must be fined an amount not to exceed five hundred dollars or imprisoned for a term not to exceed one year, or both. South Carolina Code 1976 §30-2-50.

The state's Freedom of Information Act provides that a public body may, but is not required to, exempt from disclosure information of a personal nature where the public disclosure thereof would constitute an unreasonable invasion of personal privacy, including the name, address, and telephone number or other such information of an individual or individuals who are handicapped or disabled when the information is requested for person-to-person commercial solicitation of handicapped persons solely by virtue of their handicap. This law is not to be interpreted to restrict access by the public and press to information contained in public records. South Carolina Code 1976 §30-4-40.

Tennessee - The local government functions law provides that if a request is made for a copy of a public record that has commercial value and requires the reproduction of all or a portion of a computer generated map that was developed by an electronic system, the board of directors of the system may establish and impose reasonable fees for the reproduction relating to the actual development costs of the maps which may include: (1) labor costs, (2) costs incurred in design, development, testing, implementation and training, and (3) costs necessary to ensure that the map is accurate, complete and current. Once the total development costs have been recouped by the local government, the fees charged may only generate the amount necessary to maintain the data and ensure that it is accurate, complete and current for the life of the system. T.C.A. §7-52-135.

Another law allows certain clerks of the court to charge a fee not in excess of five dollars for computer searches for any public record having a commercial value. T.C.A. §8-21-408.

Yet another law provides that if a request is made for a copy of a public record that has commercial value and requires the reproduction of all or a portion of a computer generated map or other similar geographic data that was developed with public funds, the state department, agency or political subdivision that is responsible for the system may establish and impose reasonable fees for the reproduction relating to the actual development costs of the maps and may include the same elements as those listed above under T.C.A. §7-52-135. The development cost recovery is limited to not more that 10% of the total development costs unless additional development cost recovery between 10% and 20% is approved. T.C.A. §10-7-506. A "record that has commercial value" means a

record requested for any purpose other than a non-business use by an individual and a news gathering use by the news media. *Id*.

Texas - Under the Business and Commerce Code, the law provides that a person who has possession of crime victim or motor vehicle accident information that the person obtained or knows was obtained from a law enforcement agency may not use the information to contact a person who is a crime victim or who was involved in a motor vehicle accident or a member of the person's family for the purpose of soliciting business and may not sell the information to another person for financial gain. The attorney general may bring action against a person who violates this law. The violation is a class C misdemeanor unless the defendant has been previously convicted under this law more than two times, in which case the offense is a felony of the third degree. V.T.C.A., Bus. & C. §35.54.

C. The Implications Of Secondary Or Derivative Use Of Public Records On Access To Public Records

OPRA balances access and privacy through various exemptions which are based on privacy concerns, e.g. criminal investigatory records, victim's records, information received by a member of the Legislature from a constituent, information kept confidential pursuant to a court order, to name just a few. The Legislature has provided two additional mechanisms to add additional exemptions without the necessity of legislative amendments: Executive Order and Regulation. Each exemption from access represents a policy judgment that the interest in keeping information private outweighs any public benefit flowing from access.

There is growing concern over secondary or derivative use of personal information contained in accessible government records. This concern may be largely attributed to the computerization of federal and state governmental operations, including the electronic collection, processing, use and dissemination of its records. This very computerization of public records, which has made access to public records meaningful to greater numbers of citizens, has also generated concern that the information contained in government records can and will be utilized by companies combining it with other personal information from private sources to create, for example, profiles on consumers - commonly referred to as data-mining.[90] These private companies include credit card companies, credit reporting agencies, financial institutions, supermarkets, telephone companies, internet service companies and other retailers. These concerns, in turn, generate suggestions that "commercial use" of public records should be regulated and/or prohibited. These suggestions focus on the secondary or derivative use of the public record for purposes such as data-mining or consumer profiling which is perceived to be an abusive secondary or derivative use.

[90] This, at first blush, presents a paradox: create a system that allows government to function in secret or expose individuals to practices such as consumer profiling and data-mining. The Committee believes the solution is not, however, to sacrifice transparency in government by restricting access but, rather, to legislatively regulate certain secondary or derivative uses of information contained in public records.

Critical in defining what is a commercial use, however, is context. For example, the use of a name, photo or even a sketch in the context of a news story is not seen as a commercial appropriation use of that name, photo or sketch because of the context - a news story, even through a newspaper is a profit making commercial enterprise. In the context of the tort of privacy appropriation, the Restatement of the Law of Torts, Section 652(c) states:

> "The value of the plaintiff's name is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his public activities.... The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes a profit, is not enough to make the incidental publication a commercial use of the name or likeness."

In short, context matters. As noted, at least some of the benefits that flow from a regime of public access to public records - research, economic growth - arise as a result of a secondary or derivative use of those public records which is commercial or profit based in nature. Any system, then, to alter the right of access to a record meeting the definition of government record in OPRA based upon a commercial secondary or derivative use of the record must, by definition, examine the context of that use. Such a regime would, however, have the effect of drastically altering the historical difference between the statutory right of access, now embodied in OPRA, and the common law right of access preserved by OPRA. In creating and maintaining these separate methods to access public records, New Jersey is unique among the states. In 1972, our Supreme Court in Irval Realty v. BPU Comm'rs, 61 N.J. 336 recognized the longstanding common law right of access to public records by stating:

> "At common law a citizen had an enforceable right to require custodians of public records to make them available for reasonable inspection and examination. It was, however, necessary that the citizen be able to show an interest in the subject matter of the material he sought to scrutinize. Such interest need not have been purely personal. As one citizen or taxpayer out of many, concerned with a public problem or issue, he might demand and be accorded access to public records bearing upon the problem, even though his individual interest may have been slight. Ferry v. Williams, 41 N.J.L. 332 (Sup. Ct. 1879); Taxpayers Association v. City of Cape May, 2 N.J. Super. 27 (App. Div. 1949); Moore v. Board of Chosen Freeholders of Mercer County, 76 N.J. Super. 396 (App. Div. 1962), mod. 39 N.J. 26 (1962). Yet some showing of interest was required."
> [Irval, supra, at 372]

The Irval Court also noted that the common law right of access existed as an avenue separate and apart from the statutory right.

> "A person seeking access to public records may today consider at least three avenues of approach. He may assert his common law right as a citizen to inspect public records; he may resort to the Right-to-Know Law, N.J.S.A. 47:1A-1 et seq., or, if he is a litigant, he may avail himself of the broad discovery procedures for which our rules of civil practice make ample provision."
> [Id.]

Prior to the passage of OPRA, there were two significant differences between the common law right of access and the statutory right of access. First, that the common law right of access encompassed, through its definition of a common law public record, a greater volume of records then the pre-OPRA Right-to-Know Law with its much more narrow definition of a public record. That distinction has largely been obliterated by OPRA's present definition of government record which essentially parallels the common law definition. Second, under the statutory right of access, if a record was a public record and not otherwise exempt under the statute, executive order or regulation, the record was available to the public, regardless of who sought the record and/or what use the requested wished to make of the record. North Jersey Newspapers v. Passaic County, 127 N.J. 9, 14 (1992). In short, there was no balancing of interest in the statutory right. The Legislature performed the balancing in the statute. This distinction persists.

The Legislature in OPRA clearly intended to preserve this second distinction between the common law right of access and the statutory right of access by preserving the common law right of access. N.J.S.A. 47:1A-8. However, adoption of a system that would limit or eliminate the right of access to records sought to be utilized for certain commercial purposes will inevitably lead to a system tantamount to the common law right of access, thereby obliterating the statutory right. This is so because it is not the record which creates the "commercial use", it is, rather, the secondary or derivative use of the record. It is then the context of that secondary or derivative use that will constitute the commercial use of the record. In order to ascertain the context of that secondary or derivative use of the record, custodians will be required to make inquiry of requestors. The inquiry will center on the purpose of the requestor and the intended use by the requestor in seeking the record. That purpose and intended use will be viewed through the prism of whatever definition of prohibited commercial use is included in the statute. This inquiry of the requestor by the custodian will inevitably transform the statutory right of access - historically marked by the absence of a necessity to define the purpose for which records are sought - into a common law right of access with an explanation to be given to the custodian by the requestor. This will have a profound chilling effect on the statutory right of access and is directly contrary to the entire structure of OPRA.

Consequently, any restrictions deriving from secondary or derivative uses of records cannot and should not result in legislation restricting access but, rather, such legislation should be directed at the perceived abuse either by increasing existing punishment, if present punishment is inadequate, or enacting legislation defining additional actions that will be deemed abusive and imposing punishment therefor.

D. Cost Of Access And Fees

Some have urged that many government records, particularly electronic government records, have a commercial value. There are those who propose that when the secondary or derivative use of a public record is a commercial/profit-making use, the government should be allowed to share in the profits. The advance the proposition that those who

stand to benefit from such derivative use of public records should be expected to contribute to the cost recovery of developing and maintaining such records. Those who advocate such a position recommend that such a fee should be likened to a user fee with those gaining financially from the use of public records helping to pay a portion of the development and maintenance costs. Such an argument was made in Florida in connection with its Open Public Records Act. The Florida Attorney General determined that providing access to public records is a statutory duty and should not be considered a revenue generating activity. 85-3 Opinion Fla. Attorney General 4 (1985). In a 1992 report, delivered after holding a series of public hearings on access to automated public records, the Florida Public Records Law Subcommittee concluded that the commercial value of a public record database and the requestor's motivation "are immaterial in determining access to that database and the fee(s) to be charged for access." [91]

The propriety of such a charge has not been decided in New Jersey under either the statutory right to know or the common law right to know. In Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 53 (1995), the Supreme Court observed:

> "The Attorney General, in representing the Essex County Board of Taxation, reflects the State's legitimate interest in preserving the potential commercial value of the State's databases, even while serving the public's need for convenient access. The cost of computerization is substantial. Under both the Right-to-Know Law and the common law, the fee must be reasonable, and cannot be used as a tool to discourage access. Moore, supra, 39 N.J. at 31, 186 A.2d 676; Home News Publishing Co. v. Department of Health, 239 N.J. Super. 172, 182, 570 A.2d 1267 (App.Div.1990). Historically, a reasonable fee meant one that did not exceed the actual cost of copying. Moore, supra, 39 N.J. at 31, 186 A.2d 676. Plaintiff's thus assert that the fee for the computer tapes of the tax-assessment lists should reflect only the cost of the physical tape and the hours required to make the copy. The trial court disagreed, noting that 'the computer tapes represent a tremendous amount of data entry, at taxpayer expense. I see no reason why defendants should not decide whether they wish to sell it, and at what price.' 265 N.J. Super. at 625, 628 A.2d 392. The Appellate Division, however, in remanding this matter for a determination of a reasonable fee, effectively ordered that the fee reflect only the direct cost of copying the tapes, and not the cost of compiling them. 276 N.J. Super. at 191, 647 A.2d 862 ('The matter is remanded to the trial judge to determine the reasonable cost to prepare a duplicate list...on the particular electronic medium sought by plaintiffs.')."

The Court further stated:

> "Defendants assert that limiting the fee to actual costs would violate the growing public policy of shifting the cost of developing and maintaining computerized public records from taxpayers generally to those who use them, and even profit from them, directly. According to defendants, such a limited fee structure would

[91] See Final Report, Growth Management Data Network Coordinating Council, Public Records Law Subcommittee, Final Report 1992.

> discourage further computerization. In Techniscan, supra, we addressed that issue, even though the plaintiff in that case sought computer printouts, and not electronic copies. We observed: 'No party discussed whether the allowable costs of any requested copying were sufficient to the circumstances. The Legislature is considering further clarification of the relative interests of for-profit information-gathering services and public bodies.' 113 N.J. at 237 n.1, 549 A.2d 1249.

We also note that the Legislature, in enacting and considering bills to update the State's public-access law in a variety of areas, has consistently addressed the impact of technology on costs and fees. Section 1(a) of L.1994, c.54 authorizes the Administrative Office of the Courts to 'develop and operate an automated data processing system that allows the public to access court information.' Section 1(b) authorizes us to adopt fee schedules, and section 1(c) provides that the 'proceeds collected...shall be deposited in the "Court Computer Information System Fund:...dedicated to the development, establishment, operation and maintenance of computerized court information systems in the judiciary.'"

[Id at 54]

The Court observed:

"Clearly, the public's right to access to government information in this technological age presents complicated issues with wide-spread ramifications. Resolution of such major policy issues lies more properly with the Legislature. Ultimately, the Legislature must determine how and at what cost the public shall be entitled to receive electronic records. Until the Legislature acts in this field, however, courts must decide those issues. Hence, we remand to the trial court to determine what is a reasonable fee to charge plaintiffs for a copy of Essex County's computer tape of the tax-assessment lists."

[Id at 55]

Viewed in its proper perspective, the issue of costs of access and fees to be charged for those secondary or derivative uses of public records which yield commercial benefit to the user/requestor do not pose issues within the purview of the Privacy Study Commission. Simply put, the issues do not, in any true sense involve privacy issues. This question - a determination of at what cost the public shall be entitled to receive records - and whether there should be some enhanced charge depending on the secondary or derivative use of the records involved complex considerations, albeit not of a privacy nature. Clearly, the temptation must be avoided to establish rates that are punitive or represent a disincentive for public access. Public policy is not served by forcing those whose secondary or derivative use of public records is of a commercial but legitimate use out of business, either directly or indirectly. Whether there should be some value pricing - a recognition that classes of business users have different information needs and different resources - or some other mechanism should be the subject of a further study but it does not properly fall within the jurisdiction of the Privacy Study Commission and more particularly this Subcommittee.

SECTION 4:
DATA PRACTICES SURVEY

EXECUTIVE SUMMARY

The New Jersey Privacy Study Commission administered its Data Practices Survey in October 2003 on a voluntary basis to almost 4,500 representatives of state and local government units and agencies in an effort to discern how personal information contained in government records is collected, processed, used and disseminated in the state of New Jersey. With a response rate of approximately 10%, the Commission was able to garner a glimpse into the data practices of these governmental organizations and analyze the results for a determination of how an individual's privacy interest in his or her personal information contained in government records is safeguarded in New Jersey.

The survey results indicate that the responding participating state and local government units and agencies in New Jersey overwhelmingly do not engage in data practices that violate an individual's privacy interest as it relates to the collection, processing, use and dissemination of personal information. However, the Commission is concerned that several data practices identified by a minority of the survey participants indicate that some records are not properly safeguarded which may result in a violation of an individual's privacy interest. These data practices are as follows:

- The use of personal information by some units or agencies for reasons other than those specified for its collection;
- The lack of a formal determination of whom within some units or agencies handle personal information;
- The unrestricted access to personal information in some units or agencies;
- The data mining of personal information by some units or agencies;
- The sharing of personal information with non-governmental third parties without obtaining consent from upper management or the person to whom the information pertains; and
- The selling, renting or leasing of personal information to non-governmental third parties by some units or agencies.

These data practices may be in violation of OPRA's policy providing that a public agency has a responsibility and an obligation to safeguard a citizen's personal information with which it has been entrusted from public access.

In an effort to determine and track the data practices of state and local government units and agencies, especially as it relates to the handling of personal information, the New Jersey Privacy Study Commission recommends that a scientifically developed and monitored data practices survey be administered every two years to a mandatory response population of state and local government units and agencies by the Department of State – Division of Archives and Records Management (DARM) or the Privacy Study Commission if this organization is adopted by the Governor or legislature as a permanent entity.

A. Introduction

One of the six subcommittees established by the New Jersey Privacy Study Commission ("Commission") to carry out its legislative mandate "to study the privacy issues raised by the collection, processing, use and dissemination of information by public agencies, in light of the recognized need for openness in government…"[92] is the New Jersey Data Practices Subcommittee. This subcommittee was specifically created to establish contacts in all state agencies and key local government professional organizations, develop and distribute a "data practices" survey to collect key information about how and why state and local government agencies collect, process, use and disseminate personal information, analyze the results of the data practices survey, and assess relevant privacy issues. This report was created by the Subcommittee and submitted to and accepted by the Commission.

The New Jersey Privacy Study Commission appreciates the efforts of the state and local government agencies and professional organizations in responding to the survey in a full and comprehensive manner. This document is intended to report on how the agencies responded to the Commission's survey with editorial comment on what the survey results mean regarding the current data practices for handling personal information contained in government records in New Jersey.

[92] N.J.S. 47:1A-15.

B. Recommendation

In an effort to determine and track the data practices of state and local government units and agencies, especially as it relates to the handling of personal information, the New Jersey Privacy Study Commission recommends that a scientifically developed and monitored data practices survey be administered every two years to a mandatory response population of state and local government units and agencies by the Department of State – Division of Archives and Records Management (DARM) or the Privacy Study Commission if this organization is adopted by the Governor or legislature as a permanent entity. The Commission believes that in doing so, the state will become better informed of how state and local government units and agencies are adhering to the policy in OPRA requiring that public agencies safeguard citizens' personal information with which they are entrusted. Further, this mandatory survey may motivate agencies that are not in compliance with OPRA's policy to safeguard personal information from public access to do so.

C. Survey Methodology

The Commission, with the assistance of the Department of State – Division of Archives and Records Management ("DARM"), developed a data practices survey consisting of six sections and thirty-six questions. The survey was divided into six sections as follows:

1. Participant Information (4 questions)
2. Data Collection (7 questions)
3. Data Processing and Storage (7 questions)
4. Data Use (7 questions)
5. Data Protection (6 questions)
6. Data Dissemination and Disclosure to Third Parties (5 questions).

The manner in which data is stored, protected, and disseminated in New Jersey is generally governed by DARM and the New Jersey Open Public Records Act ("OPRA").[93] Applicable DARM statutes and regulations govern how records are stored, protected and destroyed, while OPRA governs the dissemination or disclosure of records. Specifically, DARM requires adherence to records retention schedules and maintains certification processes for the creation and use of data handling systems. Similarly, OPRA requires records custodians to disclose all government records unless the records are specifically exempted from such disclosure under OPRA, 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.

The Data Practices Survey was administered in October 2003 on a voluntary basis to representatives of each of the 16 state departments (and their affiliated agencies), 21

[93] N.J.S.A. 47:1A-1 et seq.

counties, 566 municipalities, 615 school districts and 59 colleges and universities. More specifically, the survey was sent to those individuals within these organizations who handle personal information including state department personnel, state agency personnel, county clerks, county sheriffs, county surrogates (or attorneys), municipal clerks and administrators, municipal finance officers and tax collectors, local police and fire department personnel, fire district personnel, housing district personnel, school district personnel, and colleges and universities personnel.

The survey was completed by 483 respondents (a response rate of approximately 10%), including representatives from 12 state departments and their affiliated agencies, 20 counties, 132 municipalities, 33 school districts, and 5 colleges and universities.[94]

D. Survey Results

1. Participant Information

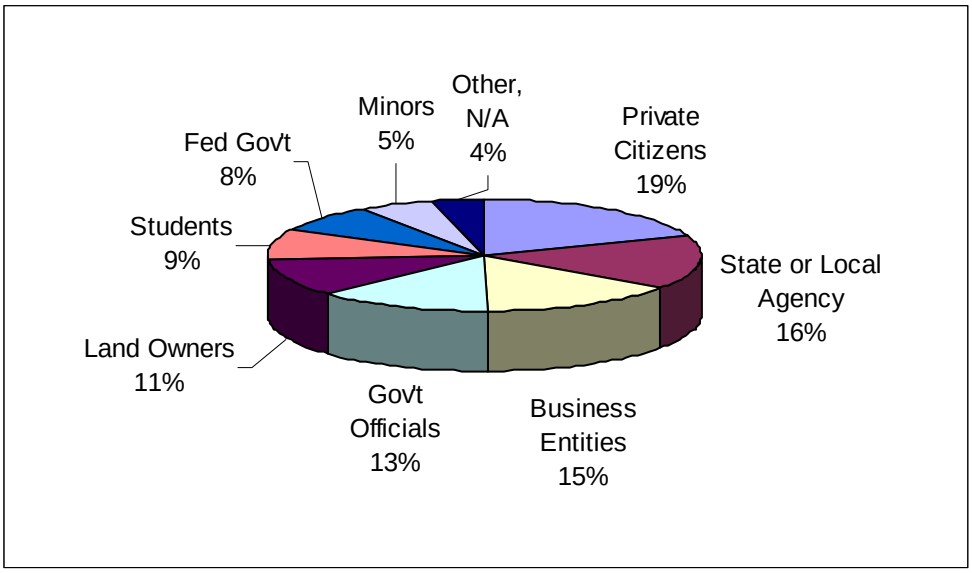
This section of the survey asked four questions relevant to the identity of the voluntary participants and their operating organizations. Specifically, the survey asked the voluntary participants to provide their name, the public agency they represent, the title or function of their unit or agency, and the type of customers their unit or agency serve.

Private Citizens are the Main Customers of Units or Agencies

According to the survey results, most respondents indicated that private citizens are the customers served by their units or agencies, followed by (in the order of the most responses to the least responses): (1) other state or local government agencies (including personnel within their own unit or agency), (2) business entities, (3) government officials, (4) land owners, (5) students, (6) the federal government, and (7) minor children. See Graph 1. Also see Appendix B for the "other" responses given by survey participants for Participant Information – Question 4.

[94] The survey response rate is based on an approximation of the entire universe of potential participants who were asked to complete the survey, including at least one representative from each of the following groups of state and local government personnel: 228 state department divisions (units) and agencies, 21 county clerks, 21 county sheriffs, 21 county surrogates (or attorneys), 566 municipal clerks, 566 municipal administrators, 566 municipal finance officers, 566 municipal tax collectors, 566 municipal police chiefs, 566 municipal fire chiefs, 182 fire district personnel, 211 housing district personnel, 616 school district administrators, and 57 colleges and universities personnel. Thus, the total survey population could have been as many as 4,483 individuals or more. Because the requests to complete the surveys were delivered to the survey population primarily by e-mail, it cannot be determined with complete accuracy the exact number of individuals who received the request.

GRAPH 1:
(Question 4. Who are the customers of your unit or agency?)



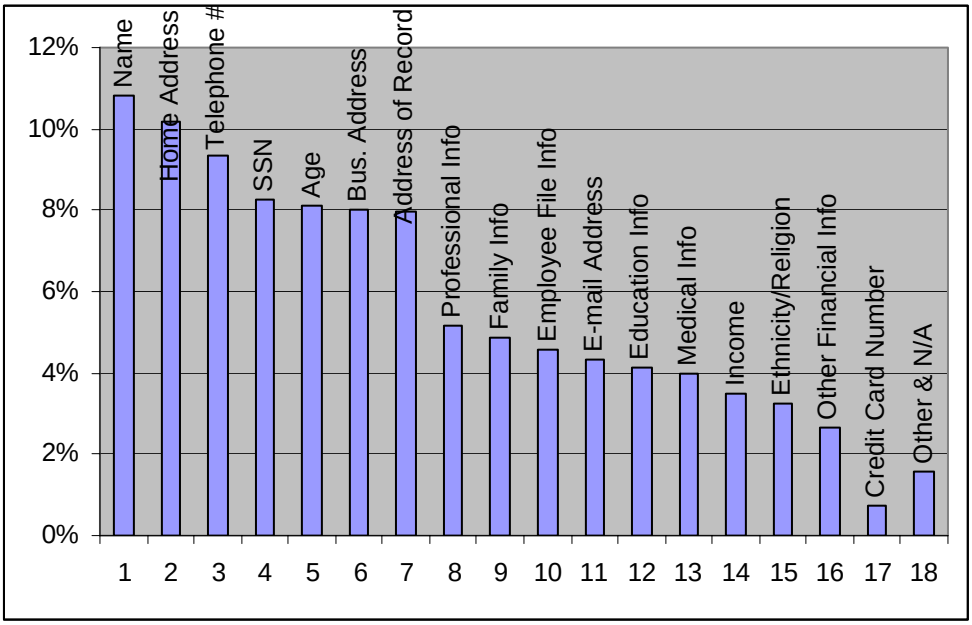
2. Data Collection

This section of the survey asked seven questions relevant to the methods used to collect personal information, the types and sources of personal information collected, whom within the unit or agency collects personal information, and the reasons personal information is collected.

Types of Personal Information Collected

According to the survey results, most participants indicated that the following types of personal information is collected by their units or agencies (in the order of the most responses to the least responses): (1) name, (2) home address, (3) home telephone number, (4) social security number, (5) age or date of birth, (6) business address, (7) address of record, (8) professional information (9) family information, (10) employee file information, (11) e-mail address, (12) education information, (13) medical information, (14) income, (15) ethnicity or religious affiliation, (16) other financial information, and (17) credit card number. See Graph 2. Also see Appendix B for the "other" responses given by survey participants for Data Collection – Question 2.

GRAPH 2:
(Question 2. Identify the types of personal information your agency collects.)



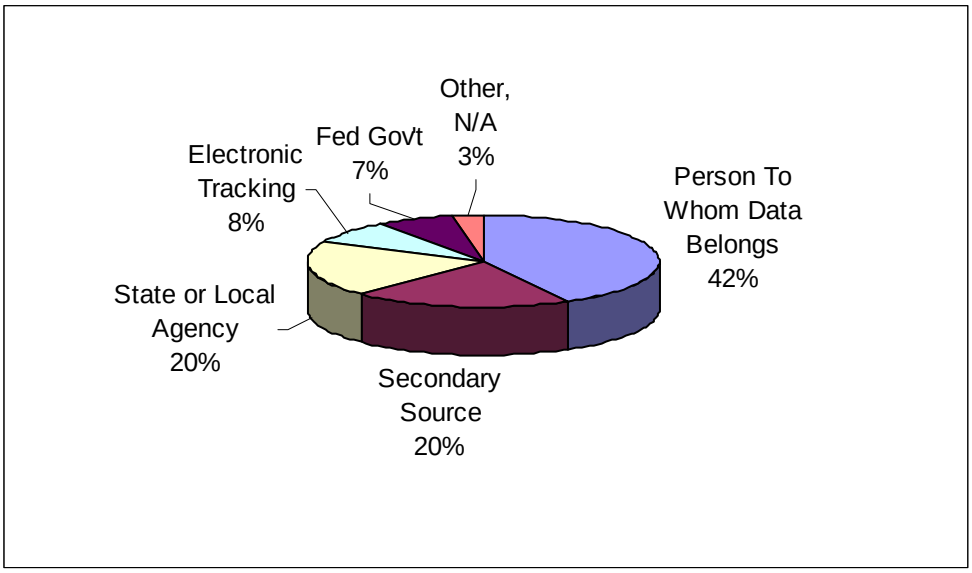
Personal Information is Collected from Individuals "In Person"

The survey results also indicated that personal information is most often collected from customers and other agency users "in person," followed by these other methods of collection (in the order of the most responses to the least responses): (1) mail, (2) hard-copy form or application, (3) telephone, (4) fax, (5) e-mail, and (6) internet form or application. See Appendix B for the "other" responses given by survey participants for Data Collection – Question 1.

Personal Information is Collected from the Person to Whom the Data Pertains

The survey results further indicated that the person to whom the data pertains is the primary source of the personal information collected. Other sources signified by the survey participants (in the order of the most responses to the least responses) are as follows: (1) secondary sources such as a guardian or lawyer, (2) another state or local government agency, (3) an electronic tracking system, and (4) the federal government. Sixty respondents indicated that their units or agencies have an accuracy verification process for personal information collected from secondary sources. See Graph 3. Also see Appendix B for the "other" responses given by survey participants for Data Collection – Question 3.

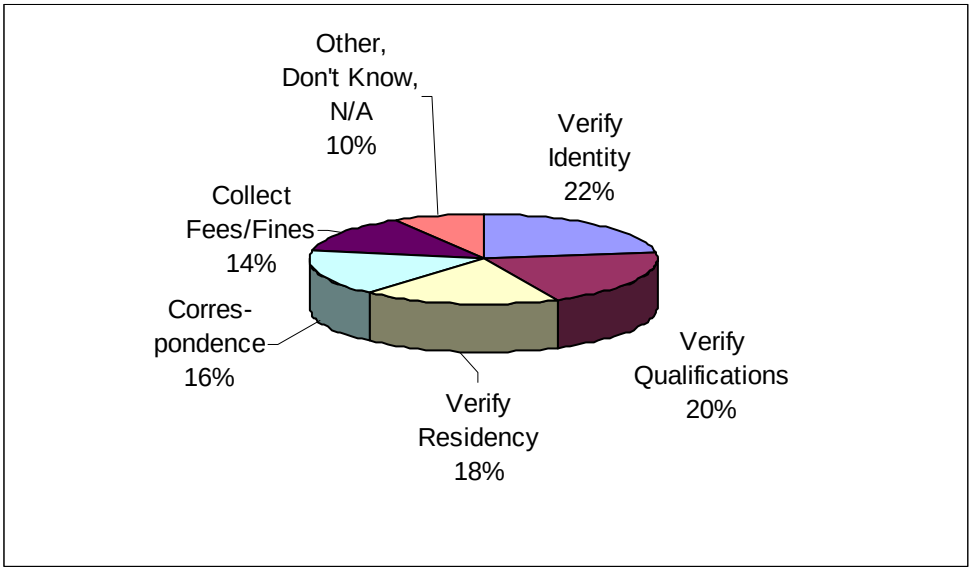
GRAPH 3:
(Question 3. Identify the source from which personal information is collected.)



Personal Information is Collected to Verify Identity

Most survey participants indicated that their units or agencies collect personal information to verify identity. Other reasons for collecting personal information (in the order of the most responses to the least responses) were: (1) to verify qualifications (for benefits, employment, licensure, registration, etc.), (2) to verify residency, (3) for correspondence purposes, and (4) to collect fees and fines. See Graph 4. Also see Appendix B for the "other" responses given by survey participants for Data Collection – Question 5.

GRAPH 4:
(Question 5. What are the reasons that your agency collects personal information?)



Public Agencies Advise Customers of the Reasons They Are Collecting Data

Also according to the survey results, participants overwhelmingly indicated that their unit or agency advises the person to whom the data pertains of the reason they collect the data and how the data will be used. The survey participants also indicated that a wide range of personnel within their units and agencies collect personal information varying from secretaries to department heads.

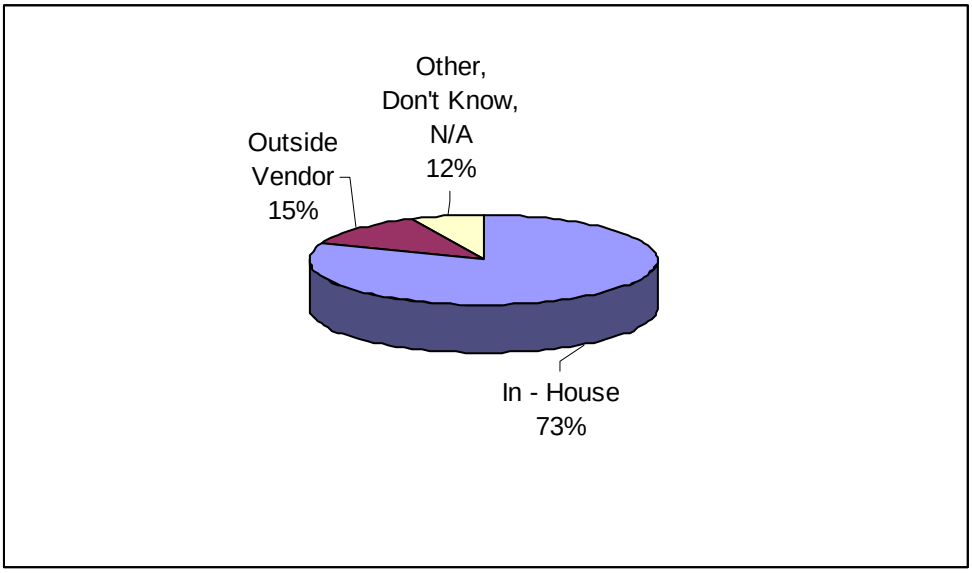
3. Data Processing and Storage

This section of the survey asked seven questions relevant to how personal information that is collected is processed, stored, and disposed. Additionally, this section asked participants about their organization's adherence to state regulations regarding certified records destruction requirements, image or scanning systems certification requirements, and retention schedule requirements for records containing personal information.

Personal Information is Processed, Stored and Destroyed In-House

The survey results overwhelming indicate that personal information is processed, stored and destroyed (including shredding) in-house, as opposed to being outsourced to non-governmental vendors or contractors. However, most outside vendors are used for record destruction (112 out of 483 responses) than for record storage (76 out of 483 responses) or data processing (72 out of 483 responses). See Graph 5 (illustrates the results of questions 8, 9, and 10 combined). Also see Appendix B for the "other" responses given by survey participants for Data Processing and Storage – Questions 8, 9, and 10.

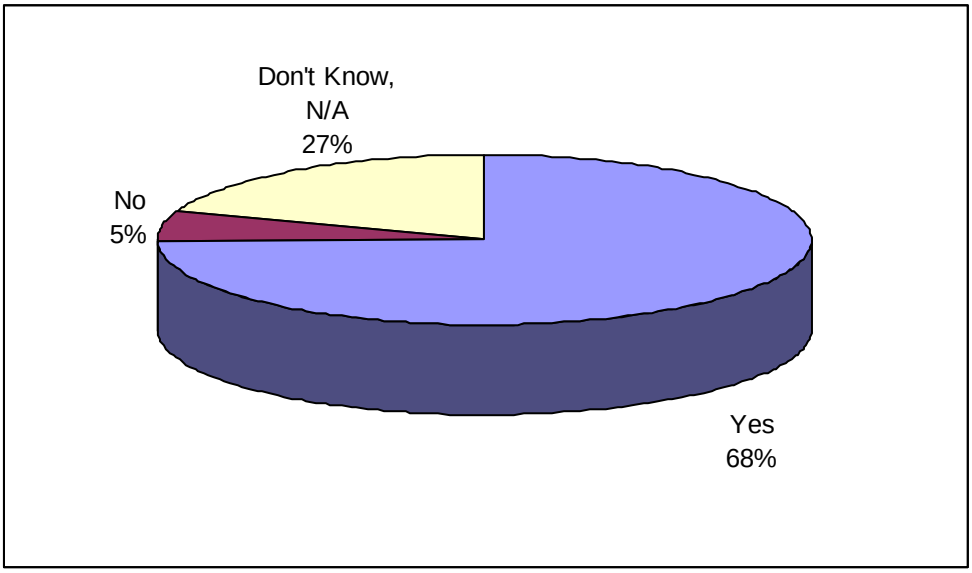
GRAPH 5:
(Question 8. Data is processed…)
(Question 9. Data or records are stored by…)
(Question 10. Disposal, destruction and shredding of records are done…)



Public Agencies Adhere to State Regulations for the Certified Destruction of Government Records

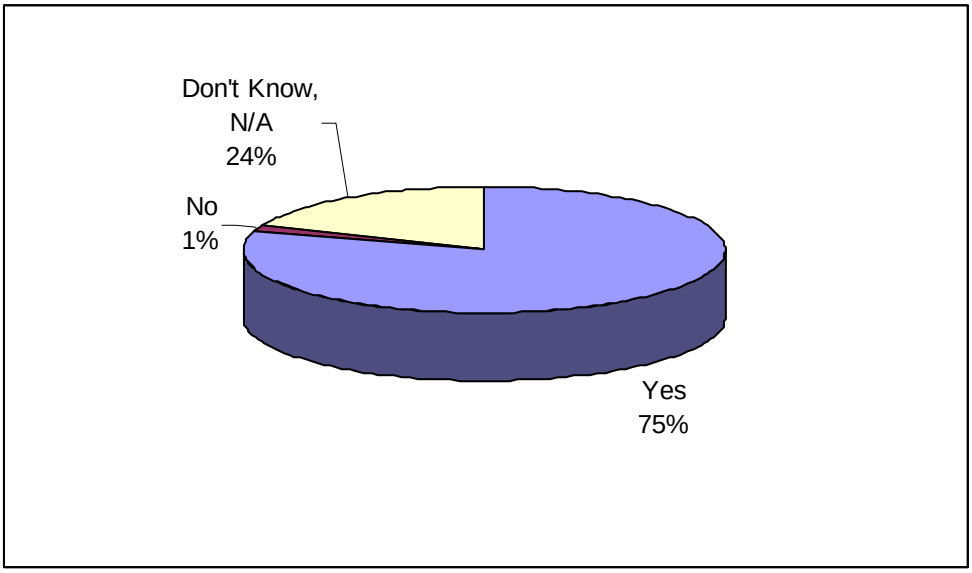
According to the survey results, most participants indicated that their units or agencies adhere to state regulations regarding the certified destruction of records containing personal information than those that do not. However, a number of the participants (85 out of 483 responses) did not know if their units or agencies adhere to these regulations and some indicated that their units or agencies do not adhere to the regulations (26 out of 483 responses). See Graph 6. Also see Appendix A for the objective responses given by survey participants for Data Processing and Storage – Question 11.

GRAPH 6:
(Question 11. Does your agency use certified destruction of records containing personal information as prescribed by the Department of State - Division of Archives and Records Management?)



Also according to the survey results, most participants indicated that their units or agencies adhere to the state's requirements for approval of disposal or destruction of records than those that do not. However, a number of survey participants (86 out of 483 responses) did not know if their units or agencies adhere to these requirements and only a few indicated that their units or agencies do not adhere to the requirements (7 responses). See Graph 7. Also see Appendix A for the objective responses given by survey participants for Data Processing and Storage – Question 12.

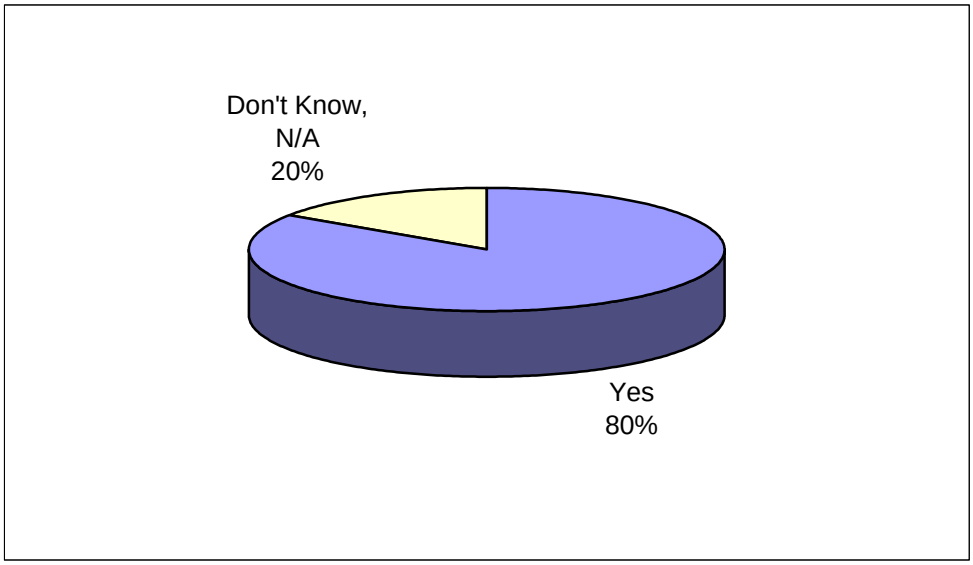
GRAPH 7:
(Question 12. Does your agency adhere to the state's requirements for approval of disposal or destruction of records by the Department of State – Division of Archives and Records Management?)



Public Agencies Adhere to the State's Records Retention Schedules

Most survey participants indicated that their units or agencies adhere to the state's records retention schedules than those that do not. However, a number of participants (71 out of 483 responses) did not know if their units or agencies adhere to the retention schedules and one participant indicated that his or her unit or agency does not adhere to them. See Graph 8. Also see Appendix A for the objective responses given by survey participants for Data Processing and Storage – Question 14.

GRAPH 8:
(Question 14. Does your agency adhere to the state's records retention schedules for all records containing personal information?



Certification of Image or Scanning Systems is Not Relevant for Most Public Agencies

The survey participants overwhelmingly responded that certification of their organization's image or scanning systems was not relevant, presumably because they do not have such systems in place. See Appendix A for the objective responses given by survey participants for Data Processing and Storage – Question 13.

4. Data Use

This section of the survey asked seven questions regarding the purposes for which personal information is used, the restrictions on access to such information within the units or agencies, the determination of whom within the units or agencies handle the personal information, sharing of the personal information, and data mining of the personal information.

Personal Information is Used for Identification Purposes

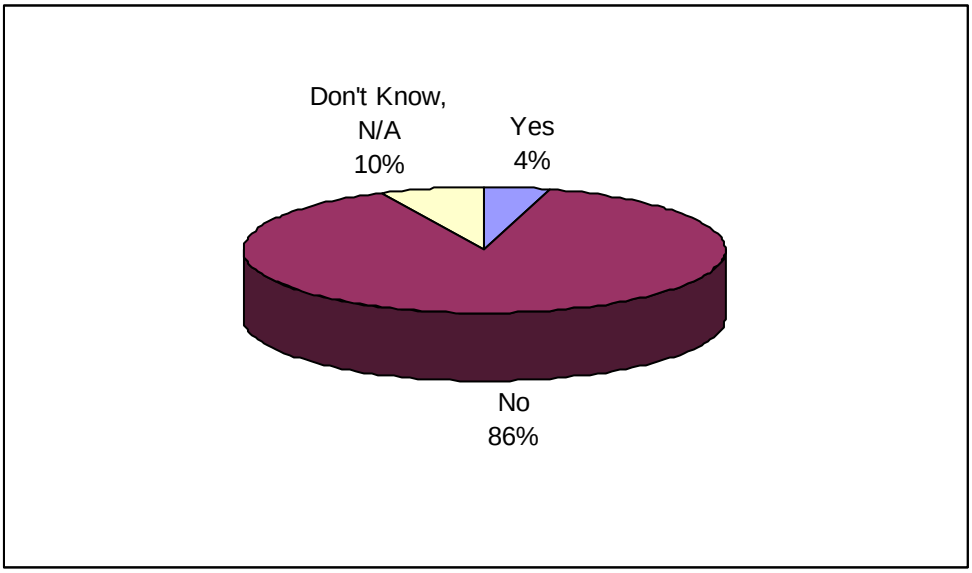
According to the survey results, most participants indicated that personal information is used by their units or agencies for identification purposes. The survey participants further indicated that personal information is also used by their organizations for the following purposes (in the order of the most responses to the least responses): (1) communication or correspondence, (2) request for services or benefits, (3) registration, (4) licensure, and (5) human resource issues. See Appendix B for the "other" responses given by survey participants for Data Use – Question 15.

Personal Information is Used Only for the Reasons Specified

The survey participants also overwhelmingly indicated that the personal information their units or agencies collect is not used for purposes other than those specified as the reasons

it is collected. However, a number of participants (21 out of 483 responses) indicated that personal information is used for reasons other than those specified. See Graph 9. Also see Appendix A for the objective responses given by survey participants for Data Use – Question 18.

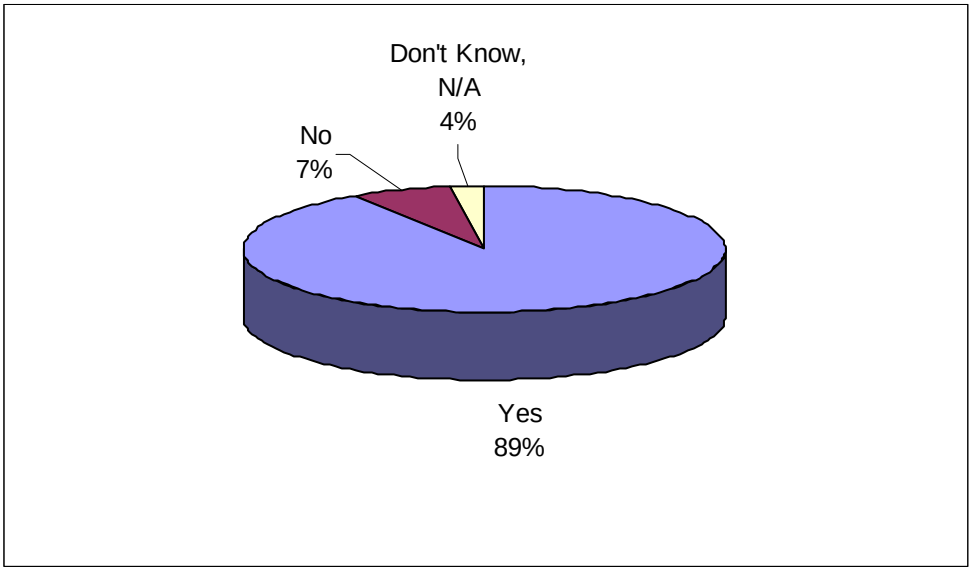
GRAPH 9:
(Question 18. Is personal information used for purposes other than those specified as the reasons for its collection?



Access to Personal Information Within Public Agencies is Based on Job Function
Most survey participants indicated that there is a formal determination of whom within their units or agencies handles the personal information they collect according to job function. However, a number of participants (53 out of 483 responses) indicated that there was no formal process or determination of whom within their units or agencies handles the personal information they collect. Survey participants also indicated (in order of the most responses to the least responses) that this determination is also made by job title and supervisor level. See Appendix B for the "other" responses given by survey participants for Data Use – Question 17.

Access to Personal Information Within Public Agencies is Restricted
The survey participants overwhelmingly indicated that access to personal information collected by their unit or agency is restricted to those persons within their organization who use the data in the performance of their job functions. However, a number of participants (32 out of 483 responses) indicated that access to this information is not restricted. See Graph 10. Also see Appendix A for the objective responses given by survey participants for Data Use – Question 16.

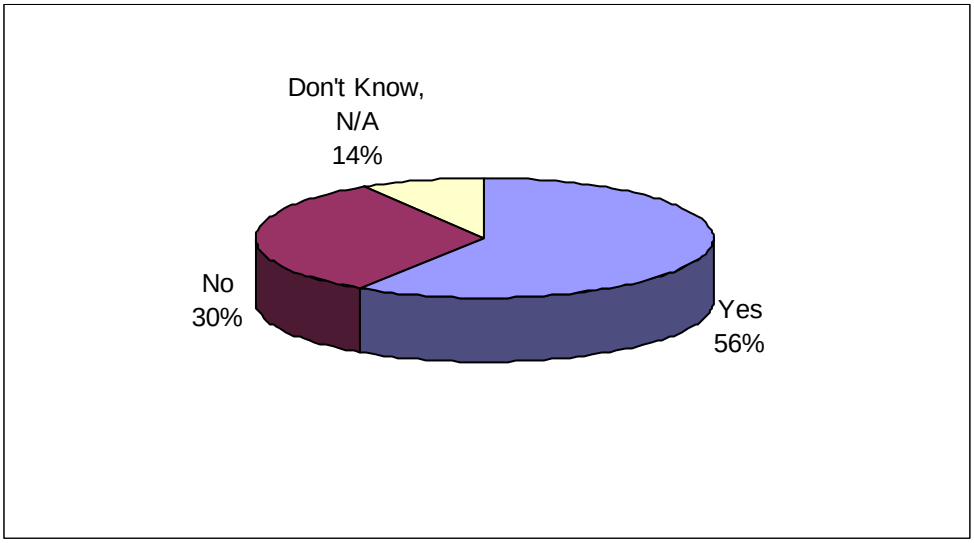
GRAPH 10:
(Question 16. Is access to personal information restricted to those persons within the agency who use the data in the performance of their job functions?)



Most Public Agencies Share Personal Information with Other Government Agencies But Only Some Engage in Data Mining

Most survey participants indicated that their units or agencies share personal information they collect with other federal, state and local government agencies. See Graph 11. Also see Appendix A for the objective responses given by survey participants for Data Use – Question 19. Survey participants were almost evenly divided on the issue of whether their units or agencies obtain consent to share personal information with other agencies (when not mandated by law). See Appendix A for the objective responses given by survey participants for Data Use – Question 20.

GRAPH 11:
(Question 20. Does your agency obtain consent to share personal information with other agencies (if not mandated by law)?)

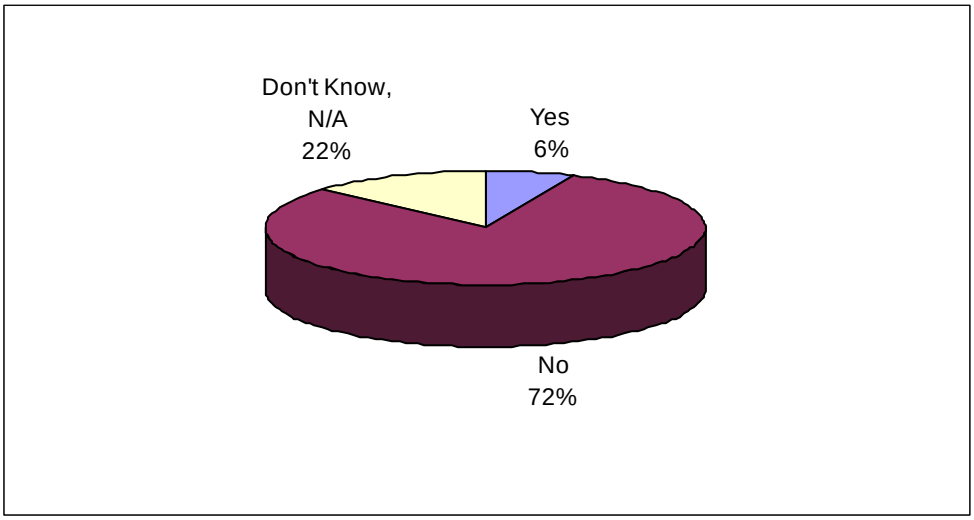


Some survey participants (29 out of 483 responses) indicated that their units or agencies engage in "data mining" of personal information.[95] However, the overwhelming majority (348 responses) indicated that their units or agencies do not engage in data mining. See Graph 12. Also see Appendix A for the objective responses given by survey participants for Data Use – Question 21.

[95] Data mining is the analysis of data in a database using tools that look for trends or anomalies without knowledge of the meaning of the data. (The Free On-Line Dictionary of Computing, 1993 – 2004 Dennis Howe) For example, some agencies may collect personal information and combine it with data obtain from other sources (both governmental and non-governmental), and then "mine" the data to reveal patterns and trends that were not previously obvious or intended by the individuals who provided the personal information.

GRAPH 12:

(Question 21. Does your agency engage in "data mining" of personal information?)



5. Data Protection

This section of the survey asked six questions regarding how units and agencies ensure data is accurate, complete and up-to-date, as well as whether personal information is protected, whether the safeguards are enforced and communicated throughout the organization, and whether agencies educate employees on the personal information that is exempt under OPRA.

Safeguards to Protect Personal Information are Enforced and Communicated

According to the survey results, participants overwhelmingly indicated that their units or agencies protect personal information against risk of loss or unauthorized access. However, a number of participants (11 out of 483 responses) indicated that their units or agencies do not. Also, the survey participants overwhelmingly indicated that that the safeguards implemented by their organizations to protect personal information are enforced and communicated throughout their organizations. The survey participants also indicated that their organizations educate employees (including temporary employees) on the types of personal information that are exempt from disclosure under OPRA.[96] See Appendix A for the objective responses given by survey participants for Data Protection – Questions 23 and 25 - 27.

[96] OPRA specifically exempts from disclosure the following personal information: social security numbers, credit card numbers, unlisted telephone numbers and drivers license numbers. N.J.S.A. 47:1A-1.1.

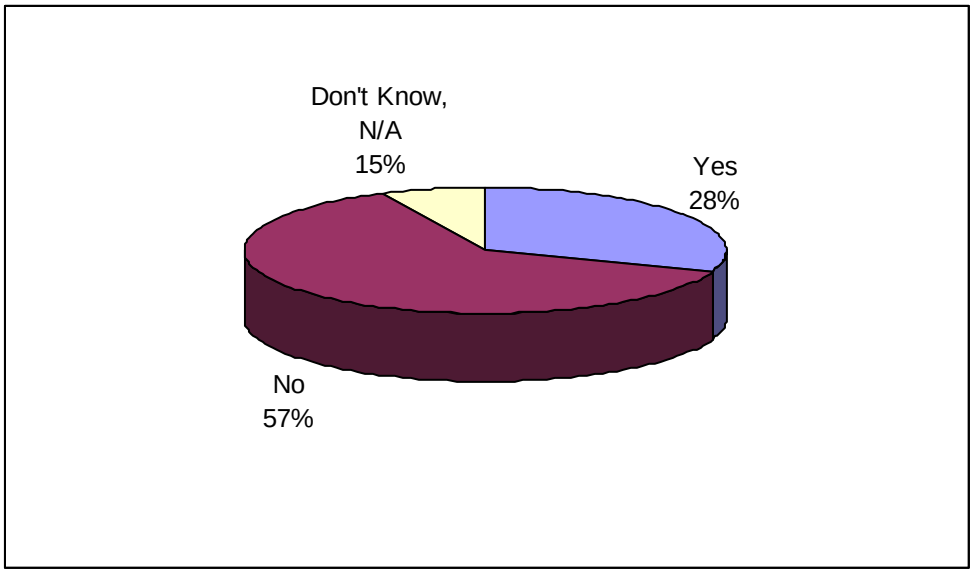
6. Data Dissemination and Disclosure to Third Parties

The final section of the survey asked five questions relevant to whether the participants' units or agencies share personal information with non-governmental third parties, whether consent is obtained to engage in such sharing, and whether organizations sell personal information to non-governmental third parties.

Public Agencies Do Not Generally Share Personal Information Outside of the Government

According to the survey results, most participants indicated that their units or agencies do not share personal information with third parties outside of the federal, state and local governments. However, some participants (133 out of 483 responses) indicated that their organizations do engage in such activity. See Graph 13. Also see Appendix A for the objective responses given by survey participants for Data Dissemination and Disclosure to Third Parties – Question 28.

GRAPH 13:
(Question 28. Does your agency share personal information with third parties outside of federal, state and local government?)



Some survey participants (59 out of 483 responses) indicated that they engage in this disclosure of personal information to non-governmental third parties without obtaining consent from upper management or the person to whom the information pertains. See Appendix A for the objective responses given by survey participants for Data Dissemination and Disclosure to Third Parties – Question 30.

The survey participants overwhelmingly indicated that their units or agencies do not sell, rent, or lease personal information. However, some participants (6 out of 483 responses) indicated that their organizations do. See Appendix A for the objective responses given

by survey participants for Data Dissemination and Disclosure to Third Parties – Question 31.

E. Conclusion

The New Jersey Privacy Study Commission administered the Data Practices Survey on a voluntary basis to representatives of state and local government agencies in an effort to discern how personal information is collected, processed, used and disseminated in the state of New Jersey. Based on the survey responses, the Commission concludes that the following are the data practices of state and local government units and agencies in New Jersey:

Data Collection

- Private citizens are the main customers of public agencies;
- Name, home address, home telephone number, social security number, age or date of birth, business address, and address of record are the most frequently requested personal information by public agencies;
- Personal information is most frequently collected from individuals in person and from the person to whom the data pertains;
- Personal information is most often collected to verify identify;
- Public agencies advise their customers of the reasons the personal information is collected;

Data Processing and Storage

- Personal information is processed, stored and destroyed in-house as opposed to by outside, non-governmental vendors;
- Public agencies adhere to state regulations for the certified destruction of government records and the state's records retention schedules;
- Certification of image or scanning systems is not relevant for most public agencies (presumably because most agencies do not have such systems in place);

Data Use

- Personal information is most often used for identification purposes;
- Public agencies do not use personal information for purposes other than those specified as the reasons it is collected;
- Access to personal information within public agencies is based on job functions and is restricted;
- Most public agencies share personal information with other federal, state and local government agencies;
- Some public agencies engage in data mining;

Data Protection

- Safeguards to protect personal information exist and are enforced and communicated within public agencies;

Data Dissemination and Disclosure to Third Parties

- Public agencies do not generally share personal information with non-governmental third parties.

The survey results indicate that participating state and local government agencies in New Jersey overwhelmingly do not engage in data practices that may violate an individual's privacy interest as it relates to the collection, processing, use and dissemination of personal information. However, the Commission is concerned that several data practices identified by a minority of the survey participants indicate that some records are not properly safeguarded which may result in a violation of an individual's privacy interest. These data practices are as follows:

- The use of personal information by some units or agencies for reasons other than those specified for its collection (21 responses);
- The lack of a formal determination of whom within some units or agencies handle personal information (53 responses);
- The unrestricted access to personal information in some units or agencies (32 responses);
- The data mining of personal information by some units or agencies (29 responses);
- The sharing of personal information with non-governmental third parties (133 responses) without obtaining consent from upper management or the person to whom the information pertains (59 responses); and
- The selling, renting or leasing of personal information to non-governmental third parties by some units or agencies (6 responses).

These data practices may be in violation of OPRA's policy providing that a public agency has a responsibility and an obligation to safeguard a citizen's personal information with which it has been entrusted from public access.[97]

In an effort to determine and track the data practices of state and local government units and agencies, especially as it relates to the handling of personal information, the New

[97] N.J.S.A. 47:1A-1.

Jersey Privacy Study Commission recommends that a scientifically developed and monitored data practices survey be administered every two years to a mandatory response population of state and local government units and agencies by the Department of State – Division of Archives and Records Management (DARM) or the Privacy Study Commission if this organization is adopted by the Governor or legislature as a permanent entity. The Commission believes that in doing so, the state will become better informed of how state and local government units and agencies are adhering to the policy in OPRA requiring that public agencies safeguard citizens' personal information with which they are entrusted. Further, this mandatory survey may motivate agencies that are not in compliance with OPRA's policy to safeguard personal information from public access to do so.

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

SECTION 5:
CONCLUSION

The Commission believes that the policy recommendations for administrative and legislative action contained in this report strike an appropriate balance between the needs for openness and the transparency of government and the citizens' reasonable expectation of privacy in their personal information contained in government records.

FILED, Clerk of the Appellate Division, September 10, 2019, **A-004205-18**

state of new jersey
privacy study commission

APPENDIX A

Data Practices Survey Results:
RESPONSES TO OBJECTIVE QUESTIONS

PARTICIPANT INFORMATION

(The following information is required to complete the survey.)

1. Name

2. Which public agency do you represent?

Department of Military & Veterans Affairs - Veterans Affairs

A. Department

Department of Banking & Insurance = 8 Responses
Department of Commerce = 2 Responses
Department of Community Affairs = 19 Responses
Department of Corrections = 45 Responses
Department of Education = 5 Responses
Department of Environmental Protection = 7 Responses
Department of Health & Senior Services = 9 Responses
Department Human Services = 16 Responses
Department of Military & Veteran Affairs = 19 Responses
Department of Personnel = 7 Responses
Department of Transportation = 17 Responses
Department of Treasury = 46 Responses

(4 departments did not respond)

B. Division

C. Unit or Agency

D. County

20 out of 21 Counties Responded

E. Municipality

132 out of 566 Municipalities Responded

F. School District

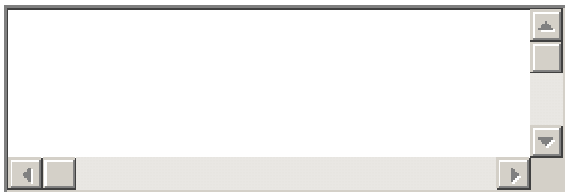
33 out of 615 School Districts Responded

G. College or University

William Paterson University of New Jersey

5 out of 59 Colleges Responded

3. What is the title and function(s) of your unit or agency?



4. Who are the customers of your unit or agency? (check all that apply):

- ☐ A. Other state or local government agencies (including other personnel within your unit or agency) — 323 Responses
- ☐ B. Government officials — 263 Responses
- ☐ C. Private citizens — 385 Responses
- ☐ D. Land owners — 214 Responses
- ☐ E. Students — 187 Responses
- ☐ F. Minor children — 111 Responses
- ☐ G. Business entities — 296 Responses
- ☐ H. Federal government — 158 Responses
- ☐ Other — 78 Responses
- ☐ N/A — 6 Responses

SURVEY

("Agency" includes your unit or office)

DATA COLLECTION

1. Identify your agency's methods of collecting personal information from customers and other agency users (check all that apply):

- ☐ A. In person — 403 Responses
- ☐ B. Telephone — 338 Responses
- ☐ C. Mail — 388 Responses
- ☐ D. Orally — 290 Responses
- ☐ E. Facsimile — 333 Responses
- ☐ F. Hard-copy form or application — 387 Responses
- ☐ G. Internet form or application — 147 Responses
- ☐ H. E-mail — 238 Responses

☐ Other
26 Responses

☐ N/A
14 Responses

2. Identify the types of personal information your agency collects (check all that apply):

☐ A. Name
466 Responses

☐ B. Social Security Number
356 Responses

☐ C. Home Address
438 Responses

☐ D. Home Telephone Number
401 Responses

☐ E. Business Address
344 Responses

☐ F. Address of Record
343 Responses

☐ G. Age or Date of Birth
349 Responses

☐ H. Ethnicity or Religious affiliation
140 Responses

☐ I. Employee File Information
197 Responses

☐ J. Credit Card Number
31 Responses

☐ K. Income
151 Responses

☐ L. Other Financial Information
115 Responses

☐ M. Family Information
210 Responses

☐ N. Education Information
178 Responses

☐ O. Professional Information
222 Responses

☐ P. Medical Information
172 Responses

☐ Q. E-mail Address
186 Responses

☐ Other
57 Responses

☐ N/A
11 Responses

3. Identify the source from which personal information is collected (check all that apply):

☐ A. The person to whom the data pertains
452 Responses

☐ B. An electronic tracking system
85 Responses

☐ C. A secondary source (guardian, lawyer, etc.)
219 Responses

☐ D. Other state or local government agency
213 Responses

☐ E. Federal government
77 Responses

☐ F. There is an accuracy verification process for personal information collected from secondary sources

60 Responses

☐ Other
31 Responses

☐ N/A
11 Responses

4. Identify, by job title or position only, those within your agency who collect personal information (List one job title or position per line):

A. See responses in separate report.

B. See responses in separate report.

C. See responses in separate report.

D. See responses in separate report.

E. See responses in separate report.

☐ F. There are many more not listed
91 Responses

☐ I do not know
5 Responses

☐ N/A
17 Responses

5. What are the reasons that your agency collects personal information? (check all that apply):

☐ A. To verify identity
340 Responses

☐ B. To verify residency
278 Responses

☐ C. To verify qualifications (for benefits, employment, licensure, registration etc.)
307 Responses

☐ D. To cross reference with other government records
132 Responses

☐ E. To collect fees and fines (other account information)
206 Responses

☐ F. For correspondence purposes
249 Responses

☐ Other
125 Responses

☐ I do not know
1 Response

☐ N/A
12 Responses

6. Does your agency need all of the personal information that it collects to perform its functions? (For example, could your agency perform a visual verification of a customer's driver license and indicate that the residency was confirmed by agency personnel in lieu of requiring the customer's home address appear on the form or application?)

☐ Yes 331 Responses ☐ No 100 Responses ☐ I do not know 52 Responses

7. Before or at the time your agency collects personal information, does it advise the person to whom the data pertains of the following (check all that apply):

A. The reason for collection of the data ☐ Yes 387 Responses ☐ No 96 Responses

B. How the data will be used ☐ Yes 342 Responses ☐ No 137 Responses

DATA PROCESSING AND STORAGE

8. Data is processed (check all that apply):

☐ A. In-house 466 Responses

☐ B. By outside vendor or contractor 72 Responses

☐ Other 38 Responses

☐ I do not know 4 Responses

☐ N/A 6 Responses

9. Data or records are stored (check all that apply):

☐ A. In-house 471 Responses

☐ B. By an outside vendor 76 Responses

☐ Other 73 Responses

☐ I do not know 4 Responses

☐ N/A 4 Responses

10. Disposal, destruction and shredding of records are done (check all that apply):

☐ A. In-house 380 Responses

☐ B. By an outside vendor 112 Responses

☐ Other 36 Responses

☐ I do not know 22 Responses

☐ N/A 31 Responses

11. Does your agency use certified destruction of records containing personal information as proscribed by the Department of State (Division of Archives and Records Management)?

☐ Yes 328 Responses ☐ No 26 Responses ☐ I do not know 85 Responses ☐ N/A 44 Responses

12. Does your agency adhere to the state's requirements for approval of disposal or destruction of records by Department of State (Division of Archives and Records Management)?

☐ Yes 359 Responses ☐ No 7 Responses ☐ I do not know 84 Responses ☐ N/A 33 Responses

13. If you image or scan your records, is the system certified by the State Records Committee?

☐ Yes 48 Responses ☐ No 26 Responses ☐ I do not know 73 Responses ☐ N/A 336 Responses

14. Does your agency adhere to the state's records retention schedules for all records containing personal

information?

☐ Yes 384 Responses ☐ No 1 Response ☐ I do not know 71 Responses ☐ N/A 27 Responses

DATA USE

15. Indicate the purposes for which personal information is used by your agency (check all that apply):

☐ A. Identification
385 Responses

☐ B. Registration
216 Responses

☐ C. Licensure
210 Responses

☐ D. Request for services or benefits
246 Responses

☐ E. Human Resources
204 Responses

☐ F. Communication or correspondence
312 Responses

☐ Other
107 Responses

☐ I do not know
0 Response

☐ N/A
11 Responses

16. Is access to personal information restricted to those persons within the agency who use the data in the performance of their job functions?

☐ Yes 428 Responses ☐ No 32 Responses ☐ I do not know 10 Responses ☐ N/A 13 Responses

17. How is it determined whom within the agency handles personal information collected by the agency? (check all that apply):

☐ A. By job *Title*
224 Responses

☐ B. By supervisor *Level*
164 Responses

☐ C. By job *function*
347 Responses

☐ D. There is no formal process or determination of whom within the agency handles the personal information the agency collects
53 Responses

☐ Other
10 Responses

☐ I do not know
6 Responses

☐ N/A
14 Responses

18. Is personal information used for purposes other than those specified as the reasons for its collection?

☐ Yes 21 Responses ☐ No 413 Responses ☐ I do not know 33 Responses ☐ N/A 16 Responses

19. Does your agency share personal information with other federal, state and local government agencies?

☐ Yes 270 Responses ☐ No 146 Responses ☐ I do not know 41 Responses ☐ N/A 26 Responses

20. Does your agency obtain consent to share personal information with the other agencies (if not mandated by law)?

☐ Yes 144 Responses ☐ No 122 Responses ☐ I do not know 71 Responses ☐ N/A 146 Responses

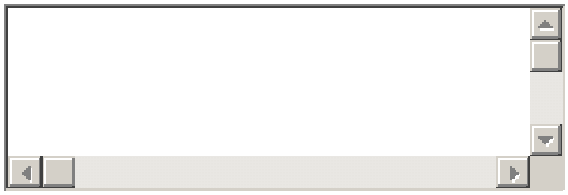
21. Some agencies may collect massive amounts of personal information from individuals, and combine it with data obtained from other sources (i.e., other governmental agencies or non-governmental organizations). Then, the data is "mined" to reveal patterns and trends that were not previously obvious.

Does your agency engage in "data mining" of personal information?

☐ Yes 29 Responses ☐ No 348 Responses ☐ I do not know 58 Responses ☐ N/A 48 Responses

DATA PROTECTION

22. Please describe how your agency ensures data is accurate, complete, and up-to-date: (If you get no such assurance, please write "N/A" in the text box)



See responses in separate report.

23. Does your agency protect personal information against risks of loss or unauthorized access?

☐ Yes 420 Responses ☐ No 11 Responses ☐ I do not know 31 Responses ☐ N/A 21 Responses

24. If so, are the safeguards manual or electronic (check all that apply):

☐ A. Manual
392 Responses

☐ B. Electronic
241 Responses

☐ Other
20 Responses

☐ I do not know
25 Responses

☐ N/A
38 Responses

25. Are the safeguards enforced?

☐ Yes 401 Responses ☐ No 2 Responses ☐ I do not know 36 Responses ☐ N/A 44 Responses

26. Are the safeguards communicated throughout the Agency?

☐ Yes 357 Responses ☐ No 48 Responses ☐ N/A 78 Responses

27. Does your agency educate employees (including temporary employees) on the personal information that is presently exempt from disclosure under the Open Public Records Act (OPRA)?

☐ Yes 343 Responses ☐ No 79 Responses ☐ N/A 61 Responses

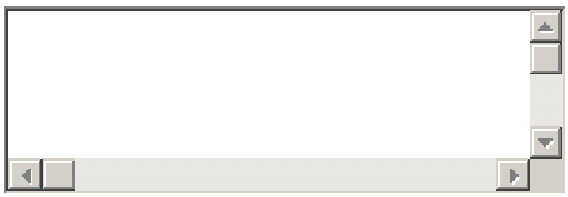
DATA DISSEMINATION AND DISCLOSURE TO THIRD PARTIES

(Please exclude disclosure of personal information your agency makes pursuant to OPRA requests when answering questions 28 thru 30.)

28. Does your agency share personal information with third parties outside of federal, state and local government?

☐ Yes 133 Responses ☐ No 275 Responses ☐ I do not know 30 Responses ☐ N/A 45 Responses

29. If so, please name the third parties and describe what data and for what purpose:



See responses in separate report.

30. If so, does your agency obtain consent to share personal information with third parties (i.e. consent from your agency's upper management or the person to whom the information pertains)?

☐ Yes 87 Responses ☐ No 59 Responses ☐ I do not know 36 Responses ☐ N/A 301 Responses

31. Does your agency sell, rent, or lease personal information?

☐ Yes 6 Responses ☐ No 399 Responses ☐ I do not know 25 Responses ☐ N/A 53 Responses

32. If so, does your agency place restrictions on the subsequent use or dissemination of personal information by third parties?

☐ Yes 33 Responses ☐ No 20 Responses ☐ I do not know 27 Responses ☐ N/A 403 Responses

APPENDIX B

Data Practices Survey Results:
OTHER ANSWER CHOICES

PARTICIPANT INFORMATION

4. Who are the customers of your unit or agency?

Anyone (needing advise, referrals, or services) = 6
General motoring public = 1
Public employees and managers = 13
Grant recipients = 1
Job applicants = 1
Institutions of higher education = 1
Attorneys = 1
Permit applicants = 1
Those in need of police assistance = 2
Elderly = 1
Law enforcement agencies/community = 3
Community based organizations = 2
Healthcare providers and hospitals = 4
Prison inmates = 17
Criminal offenders = 1
State contractors = 1
Advocates = 1
Families = 1
Correctional institutions = 1
Parents and guardians of minor children = 1
Day care centers = 2
Non-profit organizations = 3
Patient need medical care = 1
Municipalities = 1
Toll payers = 1
Passengers = 1
Consular personnel = 1
Fire companies = 1
Casino licensees = 3
Homeless veterans = 1
Media = 1
Lottery players = 1
Investment bankers = 1

Genealogists = 1
Department licensees = 1
Financial institutions and other federal banking regulators = 1
Defendants = 1

DATA COLLECTION

1. Identify your agency's methods of collecting personal information from customers and other agency users:

Media = 1
Home sales = 1
Court documents = 3
Police departments = 1
FTP cite = 1
Classification face sheets = 1
CJIS background = 1
From other agencies = 11
Field inspections = 1
Interfaces = 1
Lawyer = 1
Subpoenas = 1
Inspections = 1
Computer inquiry = 1
Deeds = 1
Electronic tracking systems = 1
Net file transfer = 1
Virtual private network = 1

2. Identify the types of personal information your agency collects:

Drivers License = 5
ADA Accommodations = 1
Criminal, civil, and background histories/records = 13
Alcohol test results = 1
Pending discipline and litigation = 1
Workforce data = 1
Federal ID number = 3
Vital statistics for marriage, birth, and gender = 2
Death certificates = 1
Insurance information = 4
Information necessary to complete police investigations = 1
Medical records (doctor's office and school nurse's office) = 1
Vehicle registration numbers = 1
Method of payment = 1
Institutional telephone = 2

Tax ID number = 5
Library materials that people borrow or reserve
Vehicle identification numbers
License plate numbers
Medicaid information = 1
Psychological information =1
Social security numbers = 1
Information collected at another agency = 1
Information required by regulation at inspection = 1
INS information (country of origin)/citizenship information = 2
Substance abuse profiles = 1
State salary
Personal financial statements/source of income/asset lists = 4
Business telephone = 1
Anonymous statistical information for the Affirmative Action Plan = 1
Emergency contact information = 1
Fire and medical training information = 1
Information necessary for individual qualification verification (financial and other personal information) = 1
Military information = 1
Lease agreements = 1
Minors' completed income tax returns and forms = 1
Disability information = 1
Utility account numbers = 1

3. Identify the source from which personal information is collected:

Medical practioners = 3
Background checks = 1
Construction permit application = 2
Field inspections = 1
Businesses (third party contractors and vendors) = 9
Investigative and incident reports = 3
Orders to produce = 1
District of residence = 1
Private agencies = 1
Current or former employers = 4
S.S. death matches = 1
Schools = 1
Certifying boards = 1
Application process = 1
Credit reports = 1
Insurers = 1
Claims data = 1
Deed = 1
Educators and educational testing vendors = 2

Licensing files = 1
Casinos = 2
Attorneys = 1
Police = 1

5. What are the reasons that your agency collects personal information?

Enforce laws and regulations = 3
Issue licenses, permits, titles, and certificates = 8
Investigative purposes = 15
Recording and reporting purposes (including birth, death, medical and election records) = 20
Informational and analysis purposes = 3
Collections (including taxes and sales of lottery tickets) = 6
Verify proof of ownership = 2
Raffles and games of chance = 1
Respond to complaints = 3
Determine and administer escrow = 1
Employment purposes = 4
Payroll purposes = 3
Verify qualifications and/or eligibility (including financial status and moral character) = 14
Process applications = 2
Screening purposes = 2
Correspondence (including emergency contact, newsletter distribution and fundraising) = 6
Process OPRA requests = 2
Return repaired equipment (for inventory purposes) = 1
Grant processing = 1
School assignment = 1
Processing payments and claims = 7
Purchase order processing = 5
Mandated disclosure = 1
Human resource purposes = 1
Develop programs (including affirmative action plans) = 2
Security access purposes = 1
Verify relationship (including guardianship) = 2
Provide services or treatment (including medical care) = 8
Block inmate calls as requested by person to whom data pertains = 1
Classify inmates = 1
Motor vehicle assignment = 1
Education purposes = 1
Ticket and pass sales = 1
Issue replacement checks = 1
Structure project financing = 1
Dispute settlement and adjudicatory purposes = 1
Donations and grant making = 1
Training = 1
Registration = 2

Identify health coverage = 1
HMO rate setting = 1
Determining sanctions = 1
Vital Statistics = 1
Probate process = 1

DATA PROCESSING AND STORAGE

8. Data is processed:

By another state or local government agency = 25
By a federal government agency = 4
Computerized records = 1
Schedules, logbooks = 1
CRAF = 1
Statewide database = 1
State and federal requirements = 1
Custodian for loans = 1
Non-profit organization = 1
E-mail = 1

9. Data or records are stored:

By another state or local government agency = 66
By a federal government agency = 2
Computer files = 1
Educational testing service = 1
CRAF = 1
Non-profit organizations = 1

10. Disposal, destruction and shredding of records are done:

Both in-house and by an outside vendor = 1
By another state or local government agency = 27
By a federal government agency = 1
CRAF = 1
Records are not destroyed = 1
Non-profit organizations = 1

17. How is it determined whom within the agency handles personal information collected by the agency?

Case by case = 1
CJIS clearance = 1
System access restriction = 2

Committee = 1
Everyone within the agency handles personal information collected = 1

DATA USE

15. Indicate the purposes for which personal information is used by your agency:

Fire or medical reports/records = 3
Criminal or fire investigations or to verify complaints = 15
Payroll functions = 2
Tax collection = 1
Billing for services = 1
Benefits qualification = 3
Research program quality = 1
Documentation and record keeping = 2
Care, custody and rehabilitation of state prison inmates = 3
Classification of inmates = 4
OPRA requests = 3
Verification of license/credentials = 1
Educational assignments = 1
Payment and billing = 9
Expense reimbursement = 1
Purchase orders = 5
Emergency notification = 1
Veteran Entitlements = 1
Employment = 2
Processing permits, certifications and licenses = 6
Pre-qualification for bidding = 1
Analysis = 2
Security access to systems = 1
Plan service delivery = 1
Quality assurance = 1
Education services = 1
Motor vehicle assignment (motor pool forms) = 2
Legal reasons = 1
Tax purposes (including tax billing) = 4
Medical care = 2
Correspondence (mail out information and referrals) = 3
Vital statistics requests/demographic analysis = 2
Emergency contact = 3
Ticket and pass sales = 1
Enforcement of court orders = 1
Business qualification = 1
Finance projects = 2
Background checks = 1
Case work = 1

Fundraising, training and grant making = 2
Appeals and hearings processing = 2
Processing insurance claims and coverage = 3
Collect tolls = 1
Screening = 1
Customer assistance = 1
Processing sanctions = 1
FEMA reporting = 1
Use agreements = 1
Government programs = 1
Processing death certificates = 1
Laboratory testing = 1
Self exclusion program = 2
Appointment of fiduciary of estates = 1
Board appointments = 1
Collection of penalties = 1
Approval of officers/directors of financial institutions = 1
Record research = 1
Membership application = 1

DATA PROTECTION

24. If your agency protects personal information against risk of loss or unauthorized access, are the safeguards manual or electronic?

Both manual and electronic = 1
Locks on file cabinets = 3
Office is locked after business hours = 3
Computer system and database is locked and password protected = 4
Security card access = 2
Security officer monitors access = 1

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Attorney for the Plaintiff

Ernest Bozzi,	: NEW JERSEY SUPERIOR COURT
Plaintiff,	: Hudson County- LAW DIV.
vs.	: DOCKET NO. HUD-L-354-19
	: ***Order***
Jersey City and Irene McNulty,	:
Defendants.	:

This matter having been open to the court by Donald M Doherty, Jr., Esq., attorney for the Plaintiff, and the Court having reviewed the moving papers and opposition as well as heard oral argument and for other good cause shown,

It is on this 22nd day of May 2019 ***ORDERED***:

a. Defendants to respond to the Plaintiff's OPRA request and provide the records requested within 5 business days, the Court having determined that access to the records was properly sought under both the Open Public Records Act and the Common Law Right of Access.

b. Counsel fees and costs of suit are hereby awarded in the amount of $9,453.51 ~~and Plaintiff counsel shall submit a certification of same within 3 business days. Defendants shall have 3 business days following the submission~~ to oppose same ~~if they choose to do so. The Court will schedule oral argument if necessary~~.

Francis B. Schultz

THE HONORABLE FRANCIS B. SCHULTZ, JSC

amount of counsel fees was by consent

New Jersey Judiciary
Superior Court - Appellate Division

Notice of Appeal

TITLE IN FULL (AS CAPTIONED BELOW)	ATTORNEY / LAW FIRM / PRO SE LITIGANT
ERNEST BOZZI **V.** **JERSEY CITY AND IRENE MCNULTY**	NAME **JOHN A MCKINNEY III, Esq.**
	STREET ADDRESS **LAW DEPT 280 GROVE ST**
	CITY: **JERSEY CITY** / STATE: **NJ** / ZIP: **07302-0000** / PHONE NUMBER: **201-547-5229**
	EMAIL ADDRESS **JMCKINNEY@JCNJ.ORG** **KIM@JCNJ.ORG**

ON APPEAL FROM

TRIAL COURT JUDGE	TRIAL COURT OR STATE AGENCY	TRIAL COURT OR AGENCY NUMBER
FRANCIS B. SCHULTZ, JSC	**HUDSON**	**HUD-L-354-19**

Notice is hereby given that **CITY OF JERSEY CITY** appeals to the Appellate Division from a ☐ Judgment or ■ Order entered on **05/22/2019** in the ■ Civil ☐ Criminal or ☐ Family Part of the Superior Court ☐ Tax Court or from a ☐ State Agency decision entered on _____

If not appealing the entire judgment, order or agency decision, specify what parts or paragraphs are being appealed.

For criminal, quasi-criminal and juvenile actions only:

Give a concise statement of the offense and the judgment including date entered and any sentence or disposition imposed:

This appeal is from a ☐ conviction ☐ post judgment motion ☐ post-conviction relief ☐ pre-trial detention
If post-conviction relief, is it the ☐ 1st ☐ 2nd ☐ other _____ (specify)

Is defendant incarcerated? ☐ Yes ☐ No

Was bail granted or the sentence or disposition stayed? ☐ Yes ☐ No

If in custody, name the place of confinement:

Defendant was represented below by:

☐ Public Defender ☐ self ☐ private counsel _____ (specify)

(*) truncated due to space limit. Please find full information in the additional pages of the form.

Notice of appeal and attached case information statement have been served where applicable on the following:

	Name	Date of Service
Trial Court Judge	**FRANCIS B. SCHULTZ, JSC**	**05/30/2019**
Trial Court Division Manager	**HUDSON**	**05/30/2019**
Tax Court Administrator		
State Agency		
Attorney General or Attorney for other Governmental body pursuant to *R.* 2:5-1(a), (e) or (h)		

Other parties in this action:

Name and Designation	Attorney Name, Address and Telephone No.	Date of Service
ERNEST BOZZI	**DONALD MICHAEL DOHERTY, Esq.** **DONALD M. DOHERTY, JR.** **125 N. ROUTE 73** **BERLIN NJ 08091** **609-336-1297** **DMD@DONALDDOHERTY.COM**	**05/30/2019**

Attached transcript request form has been served where applicable on the following:

	Name	Date of Service
Trial Court Transcript Office	**HUDSON**	**05/30/2019**
Clerk of the Tax Court		
State Agency		

Exempt from submitting the transcript request form due to the following:

☐

☐ Transcript in possession of attorney or pro se litigant (four copies of the transcript must be submitted along with an electronic copy).

List the date(s) of the trial or hearing:

☐ Motion for abbreviation of transcript filed with the court or agency below. Attach copy.

☐ Motion for free transcript filed with the court below. Attach copy.

I certify that the foregoing statements are true to the best of my knowledge, information and belief. I also certify that, unless exempt, the filing fee required by *N.J.S.A.* 22A:2 has been paid.

05/30/2019
Date

s/ **JOHN A MCKINNEY III, Esq.**
Signature of Attorney or Pro Se Litigant

BAR ID # **039742002** EMAIL ADDRESS **JMCKINNEY@JCNJ.ORG,KIM@JCNJ.ORG**

(*) truncated due to space limit. Please find full information in the additional pages of the form.

	New Jersey Judiciary Superior Court - Appellate Division Notice of Appeal
Additional appellants continued below	
Additional respondents continued below	
Additional parties continued below	
Appellant's attorney email address continued below	
Respondent's attorney email address continued below	
Additional Party's attorney email address continued below	