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New Jersey OPRA Law Comes of Age

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In recent years it has at times felt as though the Open Public Records Act (OPRA) has expanded at a rate rivaling that of the universe. Recent published and unpublished holdings, however, have shown an increasing willingness at the appellate level to contract this expansion. Such decisions have been grounded both in common sense and in a strict reading of the OPRA statute itself.

Since its enactment in 2002 the OPRA statute has remained largely unchanged, while judicial application and analysis has waxed and waned regarding striking the appropriate balance of governmental transparency. Whether this recent apparent contraction of OPRA analysis will prove to be the start of a sea-change or merely a blip on the timeline will likely be determined by the Supreme Court of New Jersey and whether our justices will reverse or affirm pending cases such as *Paff v. Galloway Township*, 444 N.J. Super. 495 (App. Div. 2016), *cert. grant.*, (pending) 227 N.J. 24 (2016), and *North Jersey Media Group v. Township of Lyndhurst*, 441 N.J. Super. 70 (2015), *cert. grant.*, (pending) 223 N.J. 553 (2017)

Release of Personal Information

In *Scheeler v. Office of the Governor*, 448 N.J. Super. 333 (App. Div. 2017), request was made to the State of New Jersey for access to third-party OPRA requests. In denying the request the State relied on dicta in *Gannett N.J. Partners v. County of Middlesex*, 379 N.J. Super. 205, 877 (App. Div. 2005), stating that requests for third-party OPRA requests may be improper. Government entities also argued that the request was overly broad.

The appellate court rejected the government's arguments and held that government entities should release such records except in specific cases when entities apply the *Burnett v. County of Gloucester*, 415 N.J. Super. 506 (App. Div. 2010), balancing factors and determine that a citizen has a reasonable expectation of privacy outweighing the requestor's right to the records. Although this holding set a general guidepost regarding such claims, in concurrent unpublished appellate cases the court eroded such requirements. In *Scheeler v. New Jersey Department of Education*, A-3125-14T3 (Unpub. App. Div. 2017), the appellate panel held that the New Jersey Department of Education lawfully redacted school board members' home addresses from documents provided under OPRA.

Similarly, in *Wolosky v. Somerset County*, A-1024-15T4 (Unpub. App. Div. 2017) (defended by co-author Taylor), the OPRA requestor sought third-party OPRA requests. The responsive documents were provided, but private individuals' home addresses and email addresses were redacted. The OPRA requestor deemed the response actionable and filed a complaint seeking unredacted records. Both the trial court and the appellate court held that, in this instance, citizens' privacy rights outweighed the requestor's rights to seek the redacted address and email address information.

As the law currently stands, neither home addresses nor email addresses are on the list of expressly excluded personal information under OPRA, except in limited circumstances such as Division of Fish and Wildlife license records. However, the recently passed Assembly Bill No. 4532 (passed March 23, pending Senate approval) aims to provide additional protections for such information. Prior appellate cases had found that redacting personal addresses was not appropriate in the context of lists of pet-owners in a municipality (*Bolkin v. Borough of Fair Lawn*, A-2205-12T4 (Unpub. App. Div. 2014), or those interested in receiving a senior citizen newsletter (*Renna v. County of Union*, A-1811-10T3 (Unpub. App. Div. 2012). Accordingly, recent appellate holdings and the proposed legislation appear to represent a new course regarding the release of citizens' personal information.

Given that these holdings are unpublished and address fact-sensitive determinations, they can provide clues to finding the line in the sand between privacy interests of a citizen versus a requestor's right to information, but they obviously do not set precedent. An entity must make a specific fact-sensitive inquiry and attempt to follow the guidance provided by the Government Records Council and the courts, although the decisions may not always provide uniformity or clarity. They do appear, however, to provide at least a valid inference that in the nebulous world of OPRA law both appellate courts and the legislature are starting to implement more bright-line rules to assist in analyzing the sometimes mutually exclusive goals of privacy interests versus government transparency.

Law Enforcement Exemptions

The apparent contraction of OPRA can also be found in recent cases involving law enforcement. In *Paff v. Bergen County*, A-1839-14T1 (App. Div. 2017), an appellate panel recently found that the OPRA requestor was not entitled to the names of Bergen County corrections officers that were subject to complaints brought or referenced in internal affairs investigations. Although the trial court ruled that such records should not be redacted, the appellate court reversed stating that both the complainant name and the subject of the internal affairs investigation should be redacted consistent with attorney general requirements.

Likewise, in the recent published *Lyndhurst*decision the appellate ruling supported the broad application of criminal investigatory records exemptions. Although in *Lyndhurst* the trial court had concluded that neither the criminal investigatory nor the ongoing investigation exemption applied, the appellate court reversed. The *Lyndhurst* court noted that although the criminal investigatory exemption only applies to records that were not required by law to be made or maintained, attorney general administrative guidelines and civil retention schedules are not binding and therefore do not bar usage of criminal investigatory exemptions.

It should be noted, however, that the *Lyndhurst* court did find that CAD ("caller automated dispatch") reports, emergency 911 calls, and car accident reports may, depending upon the circumstances, be either criminal investigatory records or documents that fall outside the scope of the criminal investigatory exemption thus warranting a case-specific analysis. Indeed, in *Paff v. Ocean County Prosecutor's Office*, 446 N.J. Super. 163 (App. Div. 2016), the appellate court held that criminal investigatory exemptions could *not*, in most instances, apply to MVR ("mobile vehicle recording") records depicting an arrest.

On the Horizon: NJ Supreme Court to Weigh in

The *Lyndhurst* holding created mini-shockwaves throughout the state and provided a clear contraction of OPRA law application. Depending upon the Supreme Court of New Jersey's findings, such contraction may either prove to be a harbinger of further changes in OPRA law analysis or will merely represent a short-lived diminution. The path forward will further be defined by cases such as *Paff v. Galloway Township.*

In *Galloway*, the OPRA requestor sought logs of emails between a township's clerk and its chief of police. The request was for an itemized list rather than for the actual emails. The township denied the request stating it did not maintain such a log. The trial court held that the township should have provided such a list utilizing the "metadata" of "sender/receiver" email times and noted in dicta that creating such a list would require "little effort" on the part of the township. The appellate court overruled, noting that OPRA does not require the creation of records or research to be done to fulfill OPRA requests.

As it currently stands the *Galloway Township* case represents another instance of OPRA law being more strictly construed by the appellate judiciary than in prior periods since OPRA's inception. It also represents another instance of appellate courts overruling trial courts. Although the OPRA law states that requestors should be provided documents in the medium of their request, the *Galloway Township* court noted that the law does not require documents to actually be created even if the raw materials of a response are available to the township and its employees. This case also provides a philosophical counter-point to cases such as *Burnett*, which held that settlements executed by third parties such as counsel for government entities still constitute government records as defined by OPRA. The *Burnett* decision applies even when settlement agreements are not in a government entity's possession.

Conclusion

The creation of government records and enumerating the appropriate level of transparency for such records has been an issue dating back at least to antiquity. In recent times open public records laws have been interpreted to apply to almost every document conceivable, regardless of whether such records demonstrate the inner workings of government entities or not. As a newer law open to judicial interpretation, OPRA has had its share of growing pains in defining the appropriate intersection of the "twin aims" of protecting citizens' rights to privacy versus citizens' rights to transparent government.

OPRA appears to now be coming of age with the legislature and appellate courts recognizing the many competing factors at play such as the rights of private citizens to not

have their personal information released, the increasing burden on records custodians and government entities to comply with OPRA, the ever-increasing use of technology, the increase in OPRA requests filed, and the rights of citizens in democracy-based systems to be active and informed of government activity. Assembly Bill A-4532 even includes language that, if passed, would limit the levying of counsel fees against a governmental entity when denial is deemed to be reasonable and made in good faith after due diligence. This provision would help curtail the expenditure of taxpayer funds relating to such cases and would allow records custodians additional latitude in appropriately applying OPRA exemptions. As OPRA nears the end of its second decade, it appears OPRA is coming of age and changing in ways both expected and unexpected.•

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