

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

September 14, 2010

Walter M. Luers, Esq.
Walter M. Luers, LLC
105 Belvidere Ave.
P. O. Box 527
Oxford, N.J. 07863

Alexandra De Fresco, Esq.
Assistant County Counsel
County Administration Bldg.
Elizabethtown Plaza
Elizabeth, N.J. 0207

Re: Renna v. County of Union
Docket No. UNN-L-2589-10

LETTER OPINION

Dear Counsel:

This is an action brought by the plaintiff Tina Renna pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 to -13 (“OPRA”) and the common law right of access to public records to obtain access to the home addresses utilized by the County of Union (“County”) to mail its senior newsletter. The matter proceeded in a summary manner as required by the statute and the facts are not in dispute. Based on the papers filed, and the oral argument on July 23, 2010, the court has entered an order granting the plaintiff’s request for the reasons set forth below.

I. Procedural History and Findings of Fact.

On May 2, 2010, the plaintiff Tina Renna, a resident of Union County, requested a copy of the Senior News Mailing List (“the list”) from the custodian of records of the County by email pursuant to OPRA and the common law right of access. On May 18, 2010, the custodian responded to the plaintiff by email stating that the list was being provided to the plaintiff with the home addresses removed, based upon the privacy exemption of OPRA.

On July 2, 2010, the plaintiff filed the Verified Complaint in this matter, alleging that the County's refusal to provide the home addresses is a violation of OPRA and the common law right of access. Plaintiff seeks an order directing the County to provide a complete, unredacted copy of the list and awarding her costs and reasonable attorney's fees pursuant to OPRA and the common law right of access.

In her Verified Complaint, the plaintiff stated that she has a strong interest in acquiring the mailing addresses of the individuals on the list because, through an organization called the Union County Watchdog Association, Inc., ("the Watchdog"), she operates a website entitled "Union County Watchdog," that provides the public with information regarding Union County, including county meeting minutes, ordinances, resolutions and public employee salary information. Ms. Renna seeks access to the mailing addresses on the list so that the Watchdog may contact the persons on the list in furtherance of its nonprofit, civic activities, which include monitoring the Union County government, and providing a public resource for information to hold elected officials accountable, and to solicit their membership. The plaintiff also seeks to contact the persons on the list because she is concerned that the County's senior newsletter may be used for partisan political purposes, and because she believes that the recipients of the newsletter are entitled to receive different or opposing viewpoints.

On July 15, 2010, the County filed an Answer to the Verified Complaint admitting that it is a "public agency" as that term is defined by OPRA, N.J.S.A. 47:1A-1.1, and that the documents sought by the plaintiff are "public records" within the definition of N.J.S.A. 47:1A-1.1. The County admitted that it provided a copy of the list to the plaintiff in response to her request for the list, after redacting the home addresses of

the individuals whose names are on the list, in reliance upon the privacy exemption under OPRA, but denied that the redaction was a violation of OPRA or the common law right of access.

In a Certification submitted in support of the County's position, Sebastian D'Elia, the Communications Director in the County Office of Communication and Public Information since 2003, explained that his duties include overseeing the dissemination of information through the Union County Senior Newsletter ("Newsletter") and the compiling of the mailing list for the Newsletter.

Mr. D'Elia certified that the list is used to send a hard copy of the Newsletter to a senior constituent's home address and that neither the Newsletter nor the list is used for a campaigning or partisan political purpose. He explained that the Newsletter provides information on services and programs offered by the County to interested senior citizens, and that topics in the Newsletter concern issues that affect the senior community such as paratransit services, the Meals-on-Wheels program, information on H1N1 flu and senior assistance. The list is generated by senior constituents who add their name to it at various sign ups and events throughout the County. He further certified that the County never notified anyone who added their name to the mailing list of the possibility that their home address could be subject to disclosure, and that the County never anticipated any use being made of the information on the list other than what he described.

At oral argument, county counsel represented that it would be possible for a person who was not a senior citizen to add their name to the list if they were interested in receiving the information it provides, and that since the list was begun in 2000, no requests have ever been made for access to the list.

Counsel agreed at oral argument that there is no requirement that a person add their name to this list, that those who do so identify themselves as interested in the information provided in the newsletter, and that the list is a public record under both OPRA and the common law right of access to records.

II. Legal Discussion.

A. The Plaintiff's Request for a Copy of the Unredacted List under OPRA.

The Open Public Records Act, ("OPRA"), mandates that government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded under the statute as amended and supplemented, shall be construed in favor of the public's right of access." Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J.Super. 136, 139 (App. Div. 2006), citing N.J.S.A. 47:1A-1. "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 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).

OPRA places on the custodian of the record the burden of proving that the denial of access is authorized by law. O'Shea v. Twp. of West Milford, 410 N.J.Super. 371, 380 (App. Div. 2009), citing N.J.S.A. 47:1A-6.

In this case, the parties agree that the list requested by the plaintiff is a government record as defined under N.J.S.A. 47:1A-1 as "a document made, maintained or kept in the course of official government business," but the County relied upon the

privacy provision of the statute in support of its redaction of the home addresses of the individuals on the mailing list from the copy that it provided to the plaintiff. In its brief in opposition to the relief sought by the plaintiff in this action, the County more specifically bases its refusal to provide the home addresses on N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-5(a), Executive Order 21, and the holdings of the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995) and Burnett v. County of Bergen, 198 N.J. 408 (2009).

The privacy provision contained in N.J.S.A. 47:1A-1 commands that public agencies have “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 the Burnett case, the Supreme Court addressed the issue of whether that provision only serves as a precatory statement to the Act, or whether the provision is substantive. The plaintiff was a technology company who sought the release from the Bergen County Clerk of millions of pages of land title records extending over a period of twenty-two years for inclusion in a searchable database. The realty records contained various personal identifiers including names, addresses, social security numbers, (“SSNs”), signatures, and information on marital status. The plaintiff based its request on OPRA and the common law right of access. Id. at 416-417.

The Supreme Court concluded that the privacy provision of OPRA as well as N.J.S.A. 47:1A-5(a) which directs that, “Prior to allowing access to any government record, the custodian thereof shall redact from that record any information which discloses the social security number, credit card number, unlisted telephone number, or driver license number of any person; ...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 is not otherwise prohibited by” law, are both substantive parts of the OPRA statute. Id. at 422.

At the trial and appellate levels, the major focus of the courts was on whether the privacy interests at stake required the redaction of the SSNs. The issue of whether the addresses should also be redacted was not raised. Id. at 417-419. The Supreme Court ultimately concluded, after analyzing the statute, that OPRA’s language provides for a balancing of the interests in privacy and disclosure under the two sections of the statute, and for redaction of the SSNs under the circumstances of that case. Id. at 420.

In order to balance OPRA’s interest in privacy and access, the Supreme Court adopted the factors it had previously identified in Doe v. Poritz, supra, 142 N.J. at 88 to consider the constitutional privacy interests implicated by Megan’s Law, because the Court found that those factors clearly identified the key inquiries under OPRA. The factors include:

- 1) The type of record requested;
- 2) The information it does or does not 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 v. Bergen, supra, 198 N.J. at 427, citing Doe v. Poritz, supra, 142 N.J. at 88 (citation and internal quotation marks omitted).

In this case, with respect to the first two factors, the plaintiff seeks a complete copy of the Senior News Mailing List, including the addresses of the individuals on the list, which were redacted by the custodian. The potential for harm in any subsequent nonconsensual disclosure would be unsolicited contact through mail or door-to-door canvassing by the plaintiff's organization, or any other person or organization to which the names and addresses on the list may subsequently be disclosed.

With respect to the injury from disclosure to the relationship in which the record was generated, the list is generated by senior citizens in Union County, and any other persons who are interested in receiving the information that the Newsletter provides, who add their names and addresses to the list at various events in the county. These individuals have never been told that their home addresses could be subject to disclosure. The County never anticipated any use being made of the information on the list other than to mail out the Newsletter.

No request for the information sought by the plaintiff has ever been made since the Newsletter began in 2000, and the County is concerned that if the plaintiff's request for the unredacted list is granted, many more organizations will make a similar demand for the list in order to have access to this group, which will multiply the effect upon the individuals on the list. In addition, although it is possible to access the Newsletter on line, the County is concerned that many seniors are not familiar with that technology, and the County's efforts to provide outreach to its senior citizens about programs and services of importance to them may be hindered because seniors may be less willing to sign up to receive the hard copy of the Newsletter by mail.

With respect to the adequacy of safeguards to prevent unauthorized disclosure of the addresses, there is nothing to prevent disclosure of the names and addresses on the list once they are provided, although plaintiff's counsel correctly points out that they are not linked to any other personal identifiers.

The degree of need for the addresses is that the plaintiff is particularly interested in contacting this population of Union County citizens to acquaint them with the Watchdog, to solicit their membership and provide them with the information that the Watchdog has compiled. The plaintiff's argument that she needs to contact the persons on the list because she is concerned that the Newsletter may be used for partisan political purposes, is not supported by any evidence. Mr. D'Elia, the Communications Director in the County Office of Communication and Public Information since 2003, denies that the the Newsletter has ever been used for a partisan political purpose. Because the Newsletter is accessible on line, the plaintiff could easily have monitored each issue to verify whether there is any basis for her concern, and no evidence has been presented that any past issues of the Newsletter have contained any partisan political information.

Finally, as to whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access, plaintiff's counsel has pointed out that non-profit civic, political and religious organizations like the Watchdog enjoy a First Amendment free speech right to contact citizens in their homes to discuss issues, recruit members and solicit contributions. See, Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed. 2d 73 (1980), (unconstitutionality of ordinance regulating door-to-door solicitation of contributions),

and Martin v. City of Struthers, Ohio, 319 U.S.141, 63 S.Ct. 862, 87 L.Ed. 1313(1943), (unconstitutionality of ordinance prohibiting door-to-door canvassing).

Nevertheless, as county counsel points out, the public disclosure of an individual's home address may implicate privacy interests where the disclosure of the person's address results in unsolicited contact. Doe v. Poritz, *supra*, 142 N.J. at 82, (citing Aronson v. Internal Revenue Service, 767 F. Supp. 378, 389, n.14 (D. Mass. 1991), *modified*, 973 F. 2d 962 (1st Cir. 1992)).

In the Doe case, the Supreme Court recognized that home addresses are publicly available through sources such as telephone directories and voter registration lists, but that an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form. Id. at 84 (internal citations omitted). However, the Court pointed out that the issue was "not whether plaintiff has a privacy interest in his address, but whether the inclusion of plaintiff's address, along with other information, implicates any privacy interest." Id. at 83. In this case, no other personal information is included in the list beyond the names and addresses of the individuals on it.

In Burnett v. County of Bergen, *supra*, 198 N.J. at 420, the Court found that because the language of the OPRA statute itself provides for a balancing of the interests in privacy and disclosure, it was not necessary to reach the constitutional question the Appellate Division had addressed. In this case, there are no specific statutes other than OPRA which are applicable to the plaintiff's request for access to the home addresses of the individuals on the list that would militate toward access.

The County has indicated that it relies on Governor McGreevey's Executive Order 21 of July 8, 2002 in support of the custodian's decision to redact the home addresses from the copy of the list released to the plaintiff. Paragraph No. 3 of that Order prohibited public entities from disclosing an individual's home address "to anyone other than a person duly authorized by this State or the United States, except as provided by law, when essential to the performance of official duties, or when authorized by a person in interest."

However Paragraph No. 3 of Executive Order 21 was subsequently rescinded on September 9, 2002 by Governor McGreevey in his Executive Order No. 26.

Therefore, this Court finds that the custodian cannot rely on Executive Order No. 21 to meet its burden to prove that its denial of access to the home addresses of the individuals on the list was authorized by law.

In the Burnett case, supra, the focus of the balancing test was upon the Social Security Numbers (SSN's) which were on some of the records, although they were not required to be placed there. No objection was raised to the disclosure of the addresses on the realty records. SSN's are included among the personal identifiers specifically listed in N.J.S.A. 47:1A-5(a) which must be redacted from a public record by the custodian before providing access to the record. The legislature did not include home addresses in that list.

As part of the weighing process conducted in Burnett, the Court placed significance upon the uniqueness of an SSN as a personal identifier and recognized the significance of the link between disclosure of SSN's and identity theft by the New Jersey legislature when it passed the Theft Prevention Act in 2005. The Court also noted the federal

sources which indicated the use made by SSN's in creating false identities for financial misuse or to assume another identity and the extent of the problem throughout the country. Id. at 431-32. The Court further found that there were no adequate safeguards to prevent misuse of the SSN's if they were released, and the plaintiff conceded that it had no need for that information. It only wanted the underlying documents which did not require SSN's to add to its commercial database. Id. at 434.

With respect to the sixth factor, the Court noted that both the New Jersey legislature and Congress had expressed strong concerns against the disclosure of SSN's in recent years, including N.J.S.A. 47:1-16(a), effective October 1, 2005 which expressly prohibits the printing or displaying of a Social Security number on any document intended for public recording with any county recording authority. Id. at 435-36.

Ultimately, the Supreme Court concluded on balancing the factors that, "The twin aims of public access and protection of personal information weigh in favor of redacting SSNs from the requested records before releasing them." Id. at 437. Although the Court specifically limited its holding to the unique facts before it, and cautioned that the balancing of interests must be applied case by case, it is important to recognize that the harm due to identity theft and misuse of financial information identified with the release of SSNs is not a factor in this case, and there are no statutes which prevent or limit the disclosure of home addresses.

Prior to the enactment of OPRA in 2002, in Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35 (1995), the Supreme Court considered an application made to Essex County by a private New Jersey company in the business of selling municipal tax-assessment data to real estate brokers, attorneys, appraisers, and others for a computer tape of the tax-

assessment records of every municipality in the county. The hard copy of the property tax list maintained by the county pursuant to N.J.S.A. 54:4-55 contained the street address and block and lot numbers for each parcel, the name and address of the owner if different from the parcel and, if residential, whether the owner was 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. The Supreme Court found that although the defendants were required to maintain the lists, they were not required to make computer tapes of the lists, and therefore the tapes did not fall within the definition of a "public record" under the Right-to-Know Act. N.J.S.A. 47:1A-2. Id. at 43-45.

Nevertheless, the Court found that the computer tapes were common law records, and under the balancing test of Loigman v. Kimmelman, 102 N.J. 98, 112 (1986), the plaintiffs had the right to obtain computer copies of the tax-assessment lists. Id. at 48-49. This Court finds that the Supreme Court's discussion of the defendants' initial privacy claim is instructive for purposes of the balancing test under OPRA required by the Supreme Court in Burnett, supra:

Initially, defendants claimed that release of certain information in computer form would risk unwarranted intrusion into the privacy of property taxpayers. Before this Court, defendants, represented by the Attorney General, have rescinded that argument. We find that, given the very public nature of the information in the lists, defendants properly chose not to pursue the confidentiality/privacy claim. The State has no interest in confidentiality: 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. See, Szikszay v. Buelow, 107 N.J. Misc. 2d 886, 436 N.Y.S. 2d 558, 563 (requiring county to provide computer copy of property tax-assessment roll in part because of "the history of public access to assessment records." Id. at 49-50.

There is, of course, a distinction to be made between the names and addresses on tax-assessment documents and the names and addresses on the list being sought by the plaintiff in this case, because the individuals on the list have never been explicitly told that their addresses would be subject to disclosure, and the information on the list is not required by any statute. It is purely voluntary, but the only potential harm identified from the release of the addresses is that the individuals might not wish to be contacted by the plaintiff's organization. On the other hand, the individuals might welcome the opportunity to receive the information that the Watchdog supplies and they may wish to join the organization. If they do not wish the contact, they need only ignore it.

Research by counsel and the court have not revealed any published cases in which the court has been asked to apply the Burnett factors to an OPRA request for addresses contained in a public record denied by the custodian based upon the privacy provision of the statute. However, in Atlantic County Society for the Prevention of Cruelty to Animals v. City of Absecon, Docket No. A-3047-07T3, (App. Div. June 5, 2009), the Appellate Division did address the issue in an unpublished opinion. Pursuant to R. 1:36-3, no unpublished opinion shall constitute precedent or be binding upon any court. However, it has been called to the attention of this Court by plaintiff's counsel, and it may constitute secondary authority. Pressler, Current N.J. Court Rules, comment 2 on R. 1:36-3.

In the ACSPCA case, supra, the plaintiff sought to compile a list of all licensed dog owners in Atlantic County to assist in its animal cruelty enforcement efforts to identify owners of multiple pets in instances of suspected abuse for purposes of its investigation, and to solicit charitable contributions from the public. In balancing the

Burnett factors, the court noted that the names and addresses were not linked to any personal identifiers that would specifically place the citizen's privacy interest at risk, and that in the Higg-A-Rella case, supra, the Supreme Court had found that reference to the names and addresses of the property owners on the tax-assessment lists did not give rise to expectations of privacy. Given the lack of linkage to personal identifiers and the wholesome nature of the plaintiff's public interest and its legitimate private interest, the court reversed the order of the trial court denying the request for access to the names and addresses under OPRA, and remanded the case for the trial court to enter an order directing that defendants disclose the names and addresses of those individuals possessing dog licenses issued by the City to the plaintiff. (slip op. at 8).

In balancing the Burnett factors in this case overall, the lack of linkage of the names and addresses of the individuals to any other personal identifiers greatly reduces any potential effect on their privacy interests. The County's concern that some members may not welcome the contact is not supported by any actual evidence, and there may well be individuals who will welcome the contact. Those that do not may simply ignore it. The public purpose of the plaintiff's organization is a good one, and its private purpose of seeking to solicit membership is legitimate. OPRA itself directs that, "The right of access accorded under the statute as amended and supplemented, shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1.

This Court finds that the balance is in favor of access to the addresses of the individuals on the list. This Court concludes that the custodian has not met its burden under N.J.S.A. 47:1A-6 to prove that the denial of access to the addresses on the list was

authorized by law, and the County will be directed to provide the plaintiff with an unredacted copy of the list.

III. Conclusion.

For the foregoing reasons, this Court will enter an order directing that the custodian of records of the defendant County provide the plaintiff with an unredacted copy of the Senior News Mailing List pursuant to OPRA.

The plaintiff asked the court to consider her right to an unredacted copy of the list under the common law right of access, only if the court found that she was not entitled to access under OPRA. Therefore this Court declines to address the plaintiff's claim of common law access.

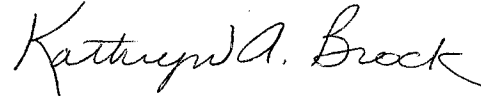
The plaintiff is the prevailing party and has requested an award of counsel fees and costs. Accordingly, plaintiff's counsel is directed to file and serve a Certification of Services which addresses the factors of RPC 1.5(a) and includes a copy of the billing records for this case within 20 days of receipt of the enclosed Order. Defense counsel may file and serve any papers in opposition to the plaintiff's request for fees and costs within 10 days of receipt of the Certification of plaintiff's counsel. The court will advise counsel of a time for oral argument.

Defense counsel has requested a stay of the Order directing the release of an unredacted copy of the list pursuant to R. 2:9-5, and plaintiff's counsel has no objection to that request. This Court finds that there is a meritorious issue on appeal as to which there is some likelihood of success, and that there would be irreparable harm if the unredacted copy of the list were provided to the plaintiff, and the order of this Court were

subsequently reversed. Crowe v. DeGioia, 90 N.J. 126, 133 (1982). Therefore, an Order for a stay will be entered.

Filed copies of the Order for disclosure and the Order for a Stay are enclosed.

Yours very truly,

A handwritten signature in cursive script that reads "Kathryn A. Brock".

KATHRYN A. BROCK, J.S.C.

Encl.