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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1811-10T3

TINA RENNA,

Plaintiff-Respondent,

v.

COUNTY OF UNION,

Defendant-Appellant.

Argued October 12, 2011 - Decided February 17, 2012

Before Judges Carchman and Nugent.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-2589-10.

Alexandra DeFresco, Assistant County Counsel, argued the cause for appellant (Robert E. Barry, Union County Counsel, attorney; Ms. DeFresco, on the brief).

Walter M. Luers argued the cause for respondent.

Barbara L. Bakley-Marino, Cape May County Counsel, attorney for amicus curiae County of Cape May (James B. Arsenault, Jr., Assistant County Counsel, on the brief).

PER CURIAM

This appeal requires us to address the issue of whether a mailing list setting forth the names and addresses of self-identified "senior citizens" is subject to the dissemination provision of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. The list was compiled by defendant County of Union to allow for distribution of a Senior Newsletter. Plaintiff Tina Renna requested a copy of the mailing list, but defendant resisted providing the list in full. Instead, it redacted the addresses of persons appearing on the mailing list, asserting that the senior citizens' privacy interests precluded disclosure of this information under OPRA.

Plaintiff brought an action challenging the redaction of the addresses. The trial judge concluded that plaintiff was entitled to the addresses. In addition, the judge ordered defendant to pay enhanced fees and costs to plaintiff's attorney.

Defendant appeals both issues. While we affirm the order requiring defendant to provide an unredacted list, we urge the use of a disclaimer informing those who voluntarily submit their names and addresses for such a list that such listing is subject to disclosure under OPRA. As to the counsel fees, we remand for further proceedings, and in all other respects, we affirm.

The relevant facts are simply stated. Defendant compiled a list of names and addresses of senior citizens residing in Union County for purposes of contacting those residents through the Union County Senior Newsletter. Although the genesis of the list is not set forth in the record, according to defendant, "senior constituents may add their name to the Senior mailing list at various sign[-]ups and events throughout the County." The newsletter provides information about services and programs of interest to senior citizens in Union County. According to Sebastian D'Elia, the Communications Director in the County Office of Communications and Public Information, defendant never notified any of the individuals named on the list of the possibility that their home addresses could be disclosed to third parties. More important, the record is devoid of any limitation on those who are not senior citizens from signing up for and receiving the newsletter.

Plaintiff maintains a website titled "Union County Watchdog" (the Watchdog). Through this website, plaintiff informs the public of information related to Union County, including county meeting minutes, ordinances, resolutions and public employee salary information. Plaintiff seeks access to the mailing list so that the Watchdog may disseminate information in furtherance of the Watchdog's non-profit civic

activities, which includes monitoring the Union County government and holding government officials accountable.

To this end, plaintiff requested a copy of the list under OPRA. Defendant's custodian of records provided a list of names to plaintiff, redacting the home addresses associated with the names listed. Defendant did this based on the privacy exemption under OPRA. N.J.S.A. 47:1A-5.¹

Plaintiff then filed a complaint against defendant, alleging a violation of OPRA due to the redaction of the list members' home addresses. Plaintiff sought an order requiring defendant to provide her with a complete unredacted list and an award of counsel fees.

In a written opinion, Judge Brock determined that plaintiff was entitled to an unredacted copy of the list. The judge applied the factors enunciated by the Supreme Court in Burnett v. County of Bergen, 198 N.J. 408 (2009), to balance OPRA's twin aims of protecting a citizen's personal information, when disclosure would violate a person's reasonable expectation of privacy, and providing ready access to government records to promote transparency in government. Id. at 414. Specifically,

¹ N.J.S.A. 47:1A-5 provides in relevant part, "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"

the judge found that the lack of a nexus between the names and addresses of the individuals to any other personal identifier, such as a social security number, reduced any potential effect on those individuals' privacy interests. She found that the balance weighed in favor of granting access to the list members' addresses and that the custodian failed to establish that withholding the addresses was authorized under OPRA.

This appeal followed. On appeal, defendant asserts that the judge failed to consider that those signing up for the newsletter were never informed that their home addresses would be subject to disclosure. Defendant also claimed that in balancing the interests in the OPRA analysis, the judge failed to appropriately consider that senior citizens are particularly vulnerable to crime and fraud. As to the award of counsel fees, defendant asserts that the fee enhancement should not have been allowed because the factors identified in New Jerseyans for Death Penalty Moratorium v. N.J. Dep't of Corr., 185 N.J. 137 (2005) (NJDPM), were not properly considered.

Defendant argues that a failure to redact home addresses will result in a breach of its OPRA-mandated obligation to safeguard constituents' private information. Defendant concedes that an individual's home address is not found in OPRA's list of exceptions requiring redaction but argues that since the home

addresses are attached to another personal identifier – status as senior citizen – the addresses should not be disclosed.

In sum, defendant's argument is premised on the assertion that the trial court failed to give sufficient weight to three specific factors enunciated in Doe v. Poritz, 147 N.J. 1 (1995). It argues that the court failed to adequately consider: (1) the potential for harm in any subsequent nonconsensual disclosure; (2) the adequacy of safeguards to prevent unauthorized disclosure; and (3) the existence of any express statutory mandate, articulated public policy, or other recognized public interest militating toward access.²

Plaintiff counters by asserting that home addresses are public records, which are not subject to any categorical

² Cape May County filed an Amicus Curiae brief in support of Union County. Cape May County contends the trial court erred by mechanically applying OPRA to the facts of this case. Specifically, amicus argues that disclosure of the home addresses in this case violates the senior citizens' reasonable expectation of privacy, thereby triggering Union County's duty under N.J.S.A. 47:1A-1 to safeguard the personal information in the record. Amicus contends that after applying the Doe factors, the New Jersey Government Records Council (GRC) determined in three separate instances that a record custodian was entitled to remove names and addresses. In this regard, amicus essentially mirrors defendant's argument, which is that the trial court did not apply the Doe factors correctly. It also argues that if the trial court's decision becomes binding precedent statewide, county governments throughout the state will have to make policy decisions about whether to provide information on programs and services using newsletters in the future.

exception to disclosure. Specifically, plaintiff contends that while there is a limited privacy exception for home addresses, only when home addresses are attached to other personal identifiers does an exception apply. Plaintiff challenges the presence of any such personal identifier here.

The purposes of OPRA are 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)). OPRA directs that government records be readily accessible to the citizens of New Jersey for inspection, copying, and examination. O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 379 (App. Div. 2009). Enumerated within OPRA, however, are exceptions to the general notion that government records are to be freely accessible to the public. These exceptions reflect OPRA's alternate aim of protecting citizens' privacy. Burnett, supra, 198 N.J. at 422; N.J.S.A. 47:1A-1.1. The enumerated exceptions are listed in the following provision:

all government records shall be subject to public access unless exempt from such access by: [OPRA]; any other statute; resolution of either or both houses of the New Jersey 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.

[O'Shea, supra, 410 N.J. Super. at 379-80; see also N.J.S.A. 47:1A-1.]

Notably, however, in determining what materials may be withheld in the interest of privacy, "[a]ny limitations on the right of access shall be construed in favor of the public's right of access" O'Shea, supra, 410 N.J. Super. at 379. Additionally, as we previously noted, OPRA provides, in pertinent part, "[p]rior 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" N.J.S.A. 47:1A-5(a).

The Supreme Court has recognized that, when privacy interests are implicated, in order to balance the competing interests of OPRA - the public's right to access and a public agency's duty to safeguard from public access a person's private information - the Doe³ factors should be applied. Burnett, supra, 198 N.J. at 427-28. Those factors are:

³ Doe involved constitutional challenges to Megan's Law. In Doe, the factors were used to balance the plaintiff's reasonable expectation of privacy in personal information versus the state's interest in releasing the information. Doe, supra, 142 N.J. at 87-88.

(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 disclosures; (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.

[Ibid.]

The custodian of public records carries the burden of demonstrating that denial of access to the records is authorized by law. Bent v. Twp. of Stafford Police Dep't., Custodian of Records, 381 N.J. Super. 30, 36 (App. Div. 2005). When reviewing a trial court's judgment in an OPRA case, we are guided by the principle that "a trial court's determinations with respect to the applicability of [OPRA] are legal conclusions subject to de novo review." O'Shea, supra, 410 N.J. Super. at 379.

All parties agree that the record requested in this case is a government record that is subject to disclosure under OPRA. The only issue in contention is whether the home addresses of

the list members should be redacted before the delivery of the list to plaintiff.⁴

The trial court found that in balancing the Doe factors, the lack of linkage between the home address and any other personal identifier weighed in favor of disclosure. The court further concluded that defendant provided no evidence that the list members might not welcome contact from plaintiff's group. Additionally, the court concluded that "the public purpose of plaintiff's organization is a good one and its private purpose of seeking to solicit membership is legitimate."

In balancing the State's interests in public access and privacy, we consider and apply the Doe factors. As to the first factor, the record sought here is the Senior Newsletter mailing list. As to the second factor, the information contained within the record consists of names and addresses of individuals who signed up for the newsletter. When recipients signed up for the newsletter, they were not told their information would be subject to disclosure. Plaintiff argues that those signing up for the newsletter self-selected themselves for additional communications. Defendant maintains that because the sign-up

⁴ The trial court noted that neither counsel nor the court could find any published precedent in which a court had been asked to apply the Doe factors to addresses contained in the public record that was the subject of an OPRA request.

was voluntary, the list members had no expectation that their information would be subject to disclosure, as contrasted with people who by law are required to file their information with a government.

The first two factors favor disclosure. For purposes of our analysis, we assume that these list members volunteered their names and addresses for a limited purpose, mainly senior citizen services, without considering whether the list would be divulged and whether they would receive additional information related to non-senior matters. As a practical matter, we surmise that little thought was given to the list's dissemination. We must reiterate that the intent and spirit of OPRA are to maximize public awareness of governmental matters. See Times of Trenton, supra, 183 N.J. at 535. The balance of the Doe factors suggests that the interest in the dissemination of information, even that unrelated to senior matters, outweighs a perceived notion of expectation of privacy.

More important in considering defendant's arguments is the third factor, which requires a court to assess the potential for harm as a result of a subsequent nonconsensual disclosure. The trial court found that the real potential for harm in this case was unsolicited contact via door-to-door canvassing, mailing or other contact by plaintiff's organization or any other

organization to which the list might be subsequently disclosed. Defendant argues that the trial court did not consider the possibility of potential victimization of seniors if the names and addresses of senior citizens were released. In fact, the trial court considered this argument to be speculative in the absence of any evidence of that threat.

In Burnett, the plaintiff requested eight million pages of land title records, extending over a period of twenty-two years, in order to create a commercial database of the records. Id. at 415. The records contained citizens' names, addresses, social security numbers and signatures. The Court weighed the competing interests, mainly the public's right to access and an agency's duty to safeguard personal information. Ibid. The Court noted that its analysis was heavily influenced by concerns regarding the sale and disclosure of social security numbers and that the request for the records "was not related to OPRA's core concern of transparency in government." Ibid. Notably, the Court stated, "[b]ut for the [social security numbers], the documents are plainly subject to disclosure." Id. at 428.

The Court further observed that the presence of social security numbers along with other personal identifiers, such as home addresses and names, elevated the privacy concerns at stake. Id. at 430. The Court concluded that the balance of

OPRA's twin aims weighed in favor of redacting the social security numbers from the records because "[i]n that way, disclosure would not violate the reasonable expectation of privacy citizens have in their personal information." Id. at 437. Importantly, the Court only ordered the social security numbers be removed, not the home addresses.

The Court has recognized that the potential release of one's home address implicates a privacy interest. Indeed, the Court has opined in regard to the disclosure of one's home address, though not in the context of an OPRA request, that "[t]he fact that plaintiff's home address may be publicly available, therefore, does not lead ineluctably to the conclusion that public disclosure of his address implicates no privacy interest." Doe, supra, 142 N.J. at 83. The Court further noted that "the issue here is 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." Ibid.

In Burnett, the Court was not concerned with the presence of home addresses and names in the records at issue there. The Court focused on the presence of a personal identifier, i.e. social security numbers, linked to names and home addresses. Defendant argues that the home addresses in this instance are

linked to a personal identifier, the designation "senior citizen." This argument, however, is not persuasive.

First, defendant concedes that anyone can put his or her name on the list at issue here. There is no requirement that a list member actually be a senior citizen. The record is devoid of any empirical data that the signatories were all senior citizens. There were no preconditions to signing up, and although we assume that the majority of signatories were seniors, they may well have included non-seniors in their number. The names could belong to senior citizens' children, care-takers, neighbors or anyone else with an interest in issues addressed in the newsletter.

Second, our concern is that the term "senior citizen" is too broad a label to fall within the purview of a meaningful identifier. It is without definition or parameters. We are not convinced that the designation "senior citizen" is any more of a personal identifier than the label "homeowner" in Burnett. We contrast this with the unique identifier of a social security number, the issue in Burnett. We do not minimize the concerns defendant expressed about senior citizens and the potential for crime or fraud, but there is a similar concern about the personal identifier "homeowner" and the potential for mischief when addresses of homeowners are disseminated. Likewise,

considering Doe, in that case the home address was coupled with information regarding a criminal conviction, a circumstance and identifier far removed from the factual scenario presented here. We conclude that the trial court correctly rejected defendant's argument as to the identifier.

As to the fourth Burnett factor, the trial court found that the list was generated by senior citizens in Union County and other interested persons who wished to receive information that the newsletter provided. The court noted that these people were never told that their home addresses could be subject to disclosure. Furthermore, no one has ever requested this list. The trial court noted defendant's concern that if it gave plaintiff an unredacted copy of the list, other organizations might potentially gain access to the list, which would increase the effect upon individuals whose names were on the list. Weighing the trial court's determination, that the potential injury would be door-to-door canvassing or mailing from plaintiff's group or other groups that subsequently received the list, against the reasoning for creating the list in the first place, to notify seniors of available services, the harm seems minimal. The list members signed up to receive information about governmental services. Plaintiff intends to send out information about governmental activity. As such, the "harm"

from disclosure is minimal when compared with the County's purpose in maintaining the list.⁵

Considering the fifth factor, the trial court found there were no safeguards to prevent disclosure of the names and addresses on the list. This argument is premised on the assumption that "senior citizen" is a personal identifier, a position we have rejected. The "senior citizen" designation does not reveal any personal information about the individuals on the list, not even their ages.

As to the sixth factor, the trial court found plaintiff was interested in obtaining this list in order to further the civic activities of the Watchdog. In assessing this factor, the Burnett Court found that disclosure of social security numbers did not further the goals of OPRA. Id. at 435. Here, plaintiff's Watchdog group is specifically aimed at furthering the stated goals of OPRA. The Watchdog intends to inform citizens of government activities in Union County. This is

⁵ We do note that modern technology can obviate some of the issues raised. First, making the newsletter available through defendant's website eliminates the need to secure any names or addresses. Anyone interested in reading the newsletter online need only visit the website, without providing an identifier. If defendant is interested in maintaining a record of those individuals interested in the newsletter, it can make the newsletter available through email. Clearly, technological advances may well impact many of the OPRA issues that focus on addresses (other than email addresses), mailings and other similar modes of dissemination of governmental information.

consistent with OPRA's objective 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, supra, 183 N.J. at 535 (quoting Asbury Park Press, supra, 374 N.J. Super. at 329). Courts have favored disclosure when the proposed recipient's purpose resonates with that of OPRA. See Asbury Park Press, supra, 374 N.J. Super. at 330 (denying media access to a 9-1-1 phone call that captured a victim's last words).

As to the seventh factor, requiring consideration of express statutory mandates, articulated public policy or other recognized public interests militating toward disclosure, the trial court noted that plaintiff has a First Amendment free speech right to contact citizens and discuss the Watchdog's activities. Defendant argues that plaintiff's First Amendment right is not compromised if she does not receive the addresses, rather she is free to contact anyone she desires, but that contact should not be limited to a particular class of vulnerable citizens. Defendant has failed to demonstrate that the list is comprised of names belonging only to senior citizens; nor has it shown that the fact that plaintiff can contact as many people as she desires has adverse policy consequences such that it weighs against disclosure of the

addresses on this particular list. The fatal flaw in defendant's argument is that it could be used to undermine most OPRA requests.

Finally, we do not agree that the GRC decisions cited by amicus and defendant compel a different result. In three opinions, the GRC held that OPRA requests for names and home addresses of dog license holders,⁶ Rutgers season football ticket holders,⁷ and fire/burglar alarm permit holders⁸ should not be granted. We note that these cases relied, in part, on the issue of unsolicited contact. Our view is that they are not persuasive in regard to the issue before us here.

We conclude that the trial judge properly applied Burnett and the Doe factors and appropriately ordered release of the addresses. In holding that the addresses were improperly redacted and should be made available, we do note that some of defendant's concerns could be abated by attaching a legend or notice to any solicitation of those willing to receive the

⁶ Bernstein v. Borough of Allendale, Government Records Council, Complaint No. 2004-195 (July 14, 2005), <http://www.state.nj.us/grc/decisions/2004-195.html>.

⁷ Faulkner v. Rutgers University, Government Records Council, Complaint No. 2007-149 (May 28, 2008), <http://www.state.nj.us/grc/decisions/pdf/2007-149.pdf>.

⁸ Arvin v. Borough of Oradell, Government Records Council, Complaint No. 2004-176 (March 10, 2005), <http://www.state.nj.us/grc/decisions/2004-176.html>.

newsletter that names and addresses are subject to OPRA and may be disclosed upon request. We recognize that this may inhibit potential newsletter recipients' willingness to avail themselves of the service; nevertheless, such notice affords the recipient full knowledge of the potential dissemination of one's name and address to third parties.

We reach a different result in our review of the judge's decision regarding the issue of counsel fees.

The judge determined the lodestar and then awarded a thirty-five percent contingency enhancement to plaintiff's counsel. In assessing the public interest and risk associated with the case, the judge concluded that a thirty-five percent enhancement was warranted because there was no published case law on point, and the application of a balancing test is an inherently risky undertaking due to the subjectivity involved in such process. As to the public interest, the judge noted that defendant theorized that a ruling in plaintiff's favor would open the floodgates to similar requests, and in that sense, this case is a matter of significant public interest. Our concern is the lack of emphasis the trial court placed on the unique dilemma confronting defendant when assessing the OPRA request. Defendant acted reasonably to protect legitimate interests in declining to reveal the addresses, and while we agree that

plaintiff is entitled to a fee, we question the quantum of the enhancement of the award.

OPRA is a fee-shifting statute. See NJDPM, supra, 185 N.J. at 157; see also N.J.S.A. 47:1A-6. Notably, "OPRA neither prohibits enhancements, nor does the Act require them. Because fee enhancements are not pre-ordained, trial courts should not enhance fee awards as a matter of course. Every case will depend upon its facts." NJDPM, supra, 185 N.J. at 157. Additionally, "[o]rdinarily, the facts of an OPRA case will not warrant enhancement of the lodestar because the economic risk in securing access to a particular government record will be minimal." Ibid. By way of example, the Court explained, "in a 'garden variety' OPRA matter, if a person's request for a traffic or tax record is denied, resulting in action that forces the custodian to promptly produce the record, enhancement will likely be inappropriate." Ibid.

The Supreme Court has stated, "unusual circumstances occasionally may justify an upward adjustment of the lodestar." Ibid. The Court, mindful that contingency enhancements could constitute overpayment or double-payment, instructed that "a court's job simply will be to determine whether a case was taken on a contingent basis, whether the attorney was able to mitigate the risk of nonpayment in any way, and whether other economic

risks were aggravated by the contingency of payment." Rendine v. Pantzer, 141 N.J. 292, 339 (1995) (internal quotations and citations omitted). If determined to be appropriate, "[c]ontingency enhancements in fee-shifting cases ordinarily should range between five and fifty[]percent of the lodestar fee, with the enhancement in typical contingency cases ranging between twenty and thirty-five percent of the lodestar." Id. at 343. On appellate review, "fee determinations by trial court's [sic] will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (quoting Rendine, supra, 141 N.J. at 317).

In NJDPM, the Court remanded for determination of the percentage of the fee enhancement. In doing so, it instructed the Law Division to assess the public importance of the matter, the degree of success achieved, the high risk of non-payment, and any other facts the prevailing party presented, as well as factors presented by the non-prevailing party in that matter. Id. at 158.

As to the risk here, while plaintiff correctly notes that there is no published precedent directly on point, Doe and Burnett provided significant guidance as to the likelihood of success on the merits. The Burnett Court did not focus on the

presence of home addresses and names but rather on the social security numbers identified with those names and addresses. Likewise, in Doe, the Court found that while a privacy interest was implicated in releasing the plaintiff's home address, it was the linkage to criminal convictions that supported the Court's conclusion.

Plaintiff argues that the combination of a balancing test and the lack of published case law directly on point weighed in favor of an enhancement. Whether a reasonable expectation of privacy outweighs the interest in disclosure, however, requires a balancing test, and the matters will be decided on a case by case basis. There will rarely be a similar case directly on point.

While we do not suggest that this case presents the "garden variety" mentioned in NJDPM, supra, 185 N.J. at 157, the facts presented here, contrasted with those of NJDPM, do not suggest a review of the enhancement.

We question whether the release of the addresses will "open the floodgates." We note that plaintiff's was the first request for this information, and we are skeptical that the public interest in such information is as high as suggested. See *ibid.* (observing the public interest in information regarding a

challenge to the Department of Corrections' rules and procedures for carrying out capital punishment via lethal injection).

We recognize the importance of fee-shifting and preserving the rights of those who avail themselves of OPRA to gather information to which, as members of the public, they are entitled. We are also mindful of the need for custodians, acting in good faith and concern for the public, to measure requests so that citizens can be safeguarded in appropriate circumstances.

The trial court awarded thirty-five percent because of previous litigation where there was no published case law and because this case required a balancing of different factors. That reasoning, standing alone, cannot support this contingency enhancement. This case involved an application of Doe factors, and that exercise does not warrant a thirty-five percent contingency enhancement.

We take particular note of the Court's most recent consideration of the Rendine factors in Walker v. Guiffre, ___ N.J. ___ (2012) (slip op. at 13), where the Court held that the Rendine framework remains in full force and effect in spite of the United States Supreme Court's decision in Perdue v. Kenny A., ___ U.S. ___, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010). Our Supreme Court clarified some of the principles set forth in

Rendine, as applied in cases in which there is no mechanism for mitigating the risk of non-payment, where there is no possibility of payment absent an award of fees, and where the relief sought is primarily not monetary but equitable in nature.

We conclude that the matter should be remanded for further consideration of whether a contingency enhancement was warranted, and if so, the quantum of such enhancement.

We affirm in part, and reverse and remand in part. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION