

# Update on the Law

## **ALERT: New Jersey Supreme Court Rules on Privacy Rights of Residents in Case Under the Open Public Records Act**

### **Purpose**

The purpose of this newsletter is to describe the importance of the recently decided case: **Fred Burnett v. County of Bergen and Bergen County Clerk's Office, 2009 N.J. Lexis 165 ("Burnett")**. The reason this case is important is because the New Jersey Supreme Court, although limiting the holding to the facts before it, have given state and local governments guidance as to how to harmonize the obligations to make public records available and the individual's expectation to privacy of personal information that may be found in those public records. This guidance will be valuable to governmental entities, especially at the local level, as they wrestle with how to protect the privacy of their residents with the right to access public records.

### **Issue**

In the Burnett case the issue before the Court was how to balance between two important competing interests: public access to information under the Open Public Records Act ("OPRA"), N.J. 47:1A-1 to 13 and the safeguarding of citizens' reasonable expectation to privacy.

### **Holding**

The New Jersey Supreme Court upheld the lower courts' rulings that a New Jersey resident has an expectation of privacy under OPRA in that his/her personal information, namely Social Security Numbers ("SSNs"), found in certain public records will be protected. Public records containing personal information that are requested for release under OPRA can be released if the personal information is first redacted. The requestor must pay for the redaction.

### **Background**

The plaintiff, Fred Burnett, worked for Data Trace Services, an aggregator of public information that sells aggregated information via licensed access to its searchable database. The plaintiff requested from Bergen County the bulk release of information that totaled approximately eight million pages of land title records over a period of twenty-two years. The requested information, which was kept on microfilm, contained social security numbers, as well as other personal identifiers, such as names, addresses, signatures and marital status. The parties exchanged correspondence on the request, but

couldn't resolve the issue of cost. Further, the County advised the plaintiff that a disclaimer in the form of a watermark would appear on the copies of all the documents so they couldn't be mistaken for current, official records.

### **Litigation Trial Court**

On August 30, 2006 the plaintiff sued the County seeking declaratory judgment and an injunction requiring Bergen County to inform him promptly of the copying fee and the date the records would be available. Bergen County responded that it didn't have the resource capacity to complete such a large copying project, nor the budget, especially in light of the requirement in OPRA that SSNs needed to be redacted before any of the documents could be released. Because there was no technology then in existence to redact information directly from microfilm, Bergen County would have had to convert the microfilm to paper or electronic format, then visually examine each record or scan them electronically so that the SSNs could be masked or blocked. Bergen County obtained a bid of \$460,000 from a private vendor to perform these tasks. The trial court, concluding it was against the public's interest to enable identity theft of its citizens, issued an order directing the County to inform the plaintiff of the copying fee that the plaintiff could pay, redact any SSNs, and insert a watermark stating the date of the copying of each document.

### **Appellate Division**

On appeal the Appellate Division upheld the trial court on different grounds, stating that OPRA did not require the redaction of SSNs, but that the state constitution's privacy protections, namely those found in article I, section 1, required redaction due to the potential of identity theft if personal information was released in bulk. The issue of the watermark was not before the Appellate Division because the plaintiff had consented to it at the trial court level.

### **Supreme Court**

The plaintiff appealed to the New Jersey Supreme Court stating that the Appellate Division shouldn't have created a constitutional right to privacy in SSNs found in recorded realty documents, that there shouldn't be an expectation to privacy in public records, and that OPRA expressly prohibits the County from redacting SSNs from recorded realty documents. The Supreme Court did not feel the need to address the constitutional issue because OPRA's language provides for a balancing of the interests in privacy and disclosure, as well as for redaction of SSNs. The Court also adopted and applied a seven step balancing test it had established in the case of *Doe v. Portiz*, 142 N.J. 1, 88 (1995) ("Doe") in order to determine the interests of a citizen's privacy verses the public's right to disclosure. In matching the facts of the case against OPRA and by applying the seven part balancing test from *Doe*, the Court held in favor of redacting the SSNs from the requested records before releasing them. In this way any disclosure would not violate a reasonable expectation of privacy that citizens have in their personal information. Further, under OPRA the costs of redacting the SSNs were to be borne by the requestor of the information.

### **Conclusion**

Although the Supreme Court was clear in stating that its holding was limited to the facts of this case, state and local governmental entities may take comfort in the guidance it provides in determining whether to release public records that contain personal information about its residents. Of other interest is the apparent constitutional right to privacy that the Appellate Division has created, although the Supreme Court declined to rule on this important issue. Each time a public record that contains personal information is released, there may be legal implications that need to be thought through carefully. If personal information is wrongfully released, a governmental entity may inadvertently expose itself to liability in other areas. However if public records are not released under OPRA because they may contain personal information, then the governmental entity may also have liability. As a governmental entity walks this tightrope, it is prudent to consult with legal advisers with expertise in the privacy field.

### **About the Author**

Todd Ruback is head of the Technology and Privacy practice group at the law firm of DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis & Lehrer, P.C. The law firm has expertise in representing municipalities in New Jersey, as well as numerous corporations. Mr. Ruback helps municipalities, public entities and corporations in the area of data protection and privacy by consulting as to what information should be protected, how it should be protected, and under what circumstances it can be released. Other services include client audits to help clients understand the type of data they possess, and implementing or refreshing security policies and practices to mitigate against potential data breaches. He further offers data breach incident responses services and data breach defense litigation and consultation. For further discussion this author may be contacted at the following: Todd Ruback, Esq. 908-757-7800 x196  
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