

A Balancing Act

# The Right to Privacy Versus the Right to Access Public Records



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**T**he purpose of this article is to describe the importance to New Jersey governmental entities of the recently decided case: *Fred Burnett v. County of Bergen and Bergen County Clerk's Office*, 402 N.J. Super 319 (2008) ("Burnett"). This case is important because the New Jersey Supreme Court, although limiting the holding to the facts before it, has given state and local governments guidance on to how to harmonize their 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 two important competing interests: public access to information under the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 to 13 and the safeguarding of citizens' reasonable expectation to privacy.

**Decision** 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 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, and the requestor pays for the redaction.

**Background** Fred Burnett worked for Data Trace Services, which compiles and sells information from public records.



He requested from Bergen County the bulk release of information that totaled approximately eight million pages of land title records over a period of 22 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 Burnett 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.

**Trial Court** On August 30, 2006 Burnett sued the county seeking a court order requiring the county to inform him promptly of the copying fee and the date the records would be available. The 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, the 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. The 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 Court** On appeal, the Appellate Court 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 Court because the plaintiff had consented to it at the trial court level.

**Supreme Court** Burnett appealed to the New Jersey Supreme Court stating that the Appellate Court 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.

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IN OTHER AREAS.

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, and for redaction of SSNs. The Court also adopted and applied a seven step balancing test it had established in *Doe v. Portiz*, 142 N.J. 1, 88 (1995) ("Doe") to determine the interests of a citizen's privacy versus 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 decision 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. Each time a public record that contains personal information is released, there may be legal implications that need to be carefully thought through. If public

records containing personal information are 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.

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