



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

March 31, 2015 Government Records Council Meeting

Penny L. Smith
Complainant

Complaint No. 2014-301

v.

NJ Department of Banking & Insurance
Custodian of Record

At the March 31, 2015 public meeting, the Government Records Council (“Council”) considered the March 24, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian has borne her burden of proving that disclosure of the Mortgage Loan Originators’ e-mail addresses would violate the reasonable expectation of privacy provision because all seven Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009), factors weigh in favor of non-disclosure. N.J.S.A. 47:1A-6, N.J.S.A. 47:1A-1.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 31st Day of March, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: April 2, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 31, 2015 Council Meeting**

**Penny L. Smith¹
Complainant**

GRC Complaint No. 2014-301

v.

**New Jersey Department of Banking & Insurance²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of Mortgage Loan Originators' ("MLO") e-mail addresses listed in the Nationwide Mortgage Licensing System & Registry ("NMLS").³

Custodian of Record: Christina Holden
Request Received by Custodian: July 31, 2014
Response Made by Custodian: August 7, 2014
GRC Complaint Received: August 25, 2014

Background⁴

Request and Response:

On July 31, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On August 7, 2014, the Custodian responded in writing to advise that the Centralized Licensing Unit, via Maria Galambos, has responded to the request directly.

On August 15, 2014, the Complainant e-mailed Ms. Galambos, stating that she reviewed the information proposed for disclosure and noticed that MLO e-mail addresses were not included. The Complainant requested confirmation that this information would be included in her response. On the same day, Ms. Galambos responded, advising that MLO e-mail addresses are considered "personal information" and that the Centralized Licensing Unit does not provide this information.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Eleanor Heck.

³ The Complainant requested additional records that are not at issue in this complaint.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

On August 18, 2014, the Complainant e-mailed Ms. Galambos to state that she reviewed the “Citizen’s Guide to OPRA” (Second Edition – July 2011) and was unable to locate an exemption for e-mail addresses. The Complainant stated that the addresses are submitted by the MLO’s sponsoring company and are usually their business e-mail address. However, regardless of whether the e-mail addresses are personal or business-related, there is no exemption under OPRA supporting Ms. Galambos’ denial. The Complainant requested that Ms. Galambos confirm whether the e-mail addresses would be provided and that she is willing to resubmit an OPRA request if necessary.

Denial of Access Complaint:

On August 25, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts the e-mail addresses at issue are submitted by the MLO’s sponsoring company and are usually the business e-mail address. The Complainant argued that she reviewed the “Citizen’s Guide to OPRA” (Second Edition – July 2011) and was unable to locate an exemption for e-mail addresses.

Statement of Information:

On October 6, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 31, 2014 and responded on August 7, 2014, advising the Complainant that the Centralized Licensing Unit responded directly to the Complainant. The Custodian certified that Ms. Galambos communicated with the Complainant thereafter through August 15, 2014.

The Custodian stated that because the e-mail addresses at issue are not kept in a database within the New Jersey Department of Banking and Insurance’s (“DOBI”) possession, a description of the licensing process might be useful. The Custodian stated that, according to the New Jersey Residential Mortgage Lending Act (“Act”), mortgage companies and MLOs must be licensed in order to do business in the State. N.J.S.A. 17:11C-54(b)-(c). However, under the Federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (“SAFE Act”), NMLS is required to collect application information and the necessary fees (although the State also charges a separate fee per N.J.S.A. 17:11C-58(c)(1)). The Custodian averred that a person or entity seeking to be licensed in any State submits information to NMLS on a Form MU4, which requires both business and residential addresses and telephone numbers. The applicant is also given the option to provide an e-mail address but does not necessarily specify whether same is a business or personal address. The Custodian noted that all information is possessed by NMLS and not DOBI; however, she typically obtains responsive information from NMLS in response to this type of OPRA request.

The Custodian contended that she properly denied access to the responsive e-mail addresses under N.J.S.A. 47:1A-1 and Executive Order No. 26 (Gov. McGreevey, 2002)(“EO 26”)(exempting disclosure of information “provided by an identifiable natural person . . . which contains information . . . not required by law to transmit and which would constitute a clearly unwarranted invasion of personal privacy . . .”). The Custodian asserted that the courts have held that personal information, such as a government official’s telephone records or internet

subscriber information, is exempt. N. Jersey Newspapers, Co. v. Passaic Cnty. Bd. of Chosen Freeholders, 127 N.J. 11, 18 (1992); State v. Reid, 194 N.J. 386, 389 (2008). The Custodian argued that it necessarily follows that e-mail addresses implicate a similar privacy interest. To that end, the Custodian provided responses to the seven-factor balancing test found in Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009), as follows:

1. The type of record.

Response: A list of licensees that DOBI already provided to the Complainant.

2. Information contained in the record.

Response: E-mail addresses from a list of licensed MLOs. The Custodian argued that individuals have a greater privacy interest in e-mail addresses over telephone numbers due to the lack of an “e-mail address directory similar to a phone book.” Erin Elizabeth Marks, Spammers Clog In-Boxes Everywhere: Will the CAN-Spam Act of 2003 Halt the Invasion, 54 Case W. Res. L. Rev. 943, 947 (Spring 2004).

3. Potential for harm in subsequent nonconsensual disclosure.

Response: Disclosure could cause owners to get spammed with commercial and/or political messages they did not request. Additionally, the Supreme Court’s concern about identity theft in Burnett applies to e-mails as well because same are closely linked to other important aspects of an individual’s online activity, potentially including access to bank accounts, credit cards, *etc.*

4. Injury from disclosure to the relationship in which the record was generated.

Response: Licensees are not required to submit an e-mail address; however, they would be less willing to submit same if they believed it would be made available to the public. Withholding these addresses would deprive DOBI of an important means of efficient and economical communication.

5. Adequacy of safeguards to prevent unauthorized disclosure.

Response: There are no procedures in place to prevent dissemination and disclosure once made public.

6. Degree of need for access.

Response: The Complainant did not provide a need; thus, this factor weighs heavily towards non-disclosure.

7. Whether there is an express statutory mandate, articulated public policy, or other recognized interest militating towards access.

Response: Public policy recognizes the privacy interests that citizens have in their e-mail addresses.

The Custodian thus argued that all seven (7) factors favor nondisclosure of the responsive e-mail addresses

Additional Submissions:

On February 26, 2015, the GRC requested the Complainant complete a balancing test questionnaire. On March 6, 2015, the Complainant requested an extension of time to submit her responses. The GRC responded granting an extension of time until March 10, 2015. To date, the Complainant has not responded to the GRC's inquiry.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA provides that "a public agency has a responsibility and 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 . . ." N.J.S.A. 47:1A-1. As privacy interests are at issue here, the GRC asked the Complainant to respond to balancing test questions so the Council could employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995). The GRC notes that the GRC did not request a balancing test questionnaire from the Custodian because she included one in her SOI. The Supreme Court has explained that N.J.S.A. 47:1A-1's safeguard against disclosure of personal information is substantive and requires "a balancing test that weighs both the public's strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy." Burnett, 198 N.J. at 422-23, 427.

When "balanc[ing] OPRA's interests in privacy and access" courts consider the following factors:

- (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 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.

Id. at 427 (*quoting Doe*, 142 N.J. at 88).

This test will enable the Council to weigh the Township's asserted need to protect the privacy of individuals against the Complainant's asserted need to access the requested records.

A. *Courts Have Required that Certain Personal Information Be Redacted From Records Released In Response to an OPRA Request Where OPRA's Interest in Privacy Outweighs the Interest in Access.*

In Burnett, a commercial business requested approximately eight million pages of land title records extending over a twenty-two year period; the records contained names, addresses, social security numbers, and signatures of numerous individuals. Burnett, 198 N.J. at 418. After balancing the seven factors, the Court “[found] that the twin aims of public access and protection of personal information weigh in favor of redacting [social security numbers] from the requested records before releasing them” because “[i]n that way, disclosure would not violate the reasonable expectation of privacy citizens have in their personal information.” Id. at 437. The Court emphasized that the “balance [was] heavily influenced by concerns about the bulk sale and disclosure of a large amount of social security numbers—which [the commercial business] admittedly does not need, and which are not an essential part of the records sought.” Id. at 414. Moreover, “the requested records [were] not related to OPRA’s core concern of transparency in government.” Ibid.

Similarly, the Appellate Division has concluded that the identity of an individual who attempted suicide by jumping off a bridge should not be disclosed in an OPRA request seeking police and fire department reports about the incident under Burnett. *See also Alfano v. Margate City*, 2012 N.J. Super. Unpub. LEXIS 2179 (App. Div. 2012).

B. *Courts Have Not Required Redaction of Certain Personal Information From Records Released In Response to an OPRA Request Where OPRA's Interest in Access Outweighs the Interest in Privacy.*

In contrast, the Appellate Division has affirmed a trial court's determination that the identity of a person who called 911 complaining about illegal parking blocking his driveway should not be redacted when the owner of the car filed an OPRA request seeking a copy of the 911 call under Burnett. Ponce v. Town of W. New York, 2013 N.J. Super. Unpub. LEXIS 436 (App. Div. 2013). The trial judge explained that:

The type of information requested by [the car owner] is not particularly sensitive or confidential. When the caller made a complaint [to] the police department that someone was blocking his or her driveway he or she could reasonably expect that his name may be revealed in connection with the complaint. There has not been evidence presented to suggest that revealing the caller's identity or the call itself would result in any serious harm or confrontation between the caller and the - - [sic] and the [car owner]. It may in fact be helpful for the [car owner] to know the information in order to challenge his parking violation. [Id. at 7-8.]

The Appellate Division emphasized that the City's arguments against disclosure of the caller's identity were "predicated on the notion that if [the car owner] learns the identity of his accuser he will retaliate in some fashion, thus discouraging the average person from reporting incidents to the police via the 911 emergency system." *Id.* at 9. However, the City "[had] not presented any evidence of past hostility between these two individuals" and the court emphasized that "[a]bsent compelling reasons, which are conspicuously absent in this record, few can argue that in a free society an accused is not entitled to know the identity of his accuser." *Id.* at 9-10. Therefore, the court concluded that "[n]one of the concerns in favor of confidentiality articulated by the Court in *Burnett*, 198 N.J. at 427, [were] applicable" and affirmed the trial court's decision ordering disclosure of the caller's identity. *Ponce*, 2013 N.J. Super. Unpub. LEXIS 436 at 10.

Similarly, the Appellate Division has concluded that addresses should not be redacted from a mailing list of self-identified "senior citizens" that was compiled by a county to contact those individuals through a newsletter. *Renna*, 2012 N.J. Super. Unpub. LEXIS 342 (App. Div. 2012). A website operator filed an OPRA request seeking access to that mailing list so that she could disseminate information in furtherance of non-profit activities related to monitoring county government. *Id.* at 2. The Court applied the *Burnett* factors. *Id.* at 11. The first two factors weighed in favor of disclosure, because "the intent and spirit of OPRA are to maximize public awareness of governmental matters" and "the interest in the dissemination of information, even that unrelated to senior matters, outweighs a perceived notion of expectation of privacy." *Id.* at 12.

C. *Application of the Burnett Factors to Balance OPRA's Interests in Privacy and Access in the Present Matter Dictates that the Responsive E-mail Addresses Be Disclosed in Their Totality.*

The present matter requires application of the *Burnett* factors to balance OPRA's dual interests in privacy and access as applied to the release of MLO e-mail addresses. The GRC notes that the Complainant was given the opportunity to submit a balancing test questionnaire on February 26, 2015. After an extension of time, the Complainant failed to provide her responses. Thus, the GRC must weigh these factors based solely on those submissions contained within the record.

i. *Burnett Factors One and Two*

The first and second *Burnett* factors require consideration of the records requested, and the type of information contained therein, respectively. Regarding the type of records requested, the Complainant sought a list of mortgage companies and MLOs licensed to do business in the State.

The type of information at issue is e-mail addresses submitted by MLOs as part of their license application. According to the MU4 form submitted to NMLS provided as part of the SOI, submission of e-mail addresses is optional.

ii. Burnett Factors Three and Four

The third and fourth Burnett factors address the potential for harm in subsequent nonconsensual disclosure of the responsive e-mail addresses, and the injury from disclosure to the relationship in which the addresses were generated, respectively.

The Custodian asserted that disclosure of the e-mail addresses could cause owners and MLOs to be spammed by commercial and/or political messages that they did not request. Also, the Custodian asserted that identity theft could be a real issue, as expressed by the Burnett court. Additionally, the Custodian argued that licensees may be less likely to submit e-mail addresses if they believed the addresses would be made public. The Custodian asserted that the choice to not provide an e-mail address would deprive DOBI was a more efficient means of communication with the licensees.

The GRC notes that it previously recognized the significant risk that disclosure of e-mail addresses could cause unsolicited contact or contribute to identity theft. See Mayer v. Borough of Tinton Falls (Monmouth), GRC Complaint No. 2008-245 (Interim Order dated April 8, 2010). In weighing this factor, the GRC also looks to Burnett, in which the Court broadly analyzed the disclosure of social security numbers along with other personal identifiers being disclosed. There, the Court determined that disclosure of social security numbers in tandem with other personal identifiers “elevated privacy concerns.” See also Renna, 2012 N.J. Super. Unpub. LEXIS at 14.

Here, the Custodian disclosed a large amount of information, including mailing addresses, telephone numbers, websites, branch locations, etc. Taking into account the disclosure of e-mail addresses in addition to all information already provided, there is an additional risk for those individual MLOs, especially in the instances of those using private e-mail addresses.

Further, the fact that applicants are not required to submit an e-mail address presents a unique factor from typical cases involving e-mail addresses. It stands to reason that an individual applicant providing an e-mail address that they are otherwise not required to provide would be chilled from providing same if faced with the possibility of receiving unsolicited communications as a result of disclosure.

Thus, the potential harm in disclosure and injury in relation to DOBI’s acquisition of the addresses is greater because of the optional nature of same. For these reasons, factors three and four weigh in favor of non-disclosure.

iii. Burnett Factor Five

The fifth Burnett factor requires consideration of the adequacy of safeguards to prevent unauthorized disclosure of the e-mail addresses. The Custodian stated that there were no safeguards in place to prevent dissemination of the information once it is made public.

In weighing this factor, the GRC must again look to the optional nature in which applicants provide their e-mail addresses. The evidence supports that DOBI has, in the least, a

preliminary policy of not disclosing the e-mail addresses. However, the Custodian stated that there is no safeguard from preventing dissemination once the addresses were made public. Further, the Complainant did state whether she planned to disseminate the information or use same for unsolicited contact.

Because of the absence of adequate safeguards from the Complainant's possible misuse of the responsive e-mail addresses, this factor also weighs in favor of non-disclosure.

iv. *Burnett Factor Six*

The sixth Burnett factor addresses the degree of need for access to the e-mail addresses. As previously noted, because the Complainant failed to submit her balancing test, the GRC relies on the Custodian's submission only. *See also Schecter v. Thomas Edison State Coll.*, GRC Complaint No. 2013-174 (January 2014). In the SOI, the Custodian argued that this factor weighs heavily towards non-disclosure because the Complainant failed to state a need for same. The GRC notes that the Complainant was provided with a wealth of other contact information for MLOs, thus lessening the perspective need for e-mail addresses in addition to the information already provided.

Thus, this factor necessarily weighs in favor of non-disclosure.

v. *Burnett Factor Seven*

The seventh Burnett factor requires consideration as to whether an express statutory mandate, articulated public policy, or other recognized public interest militating toward access to the e-mail addresses exists. The Custodian asserted that public policy recognizes the privacy interest that citizens have regarding their e-mail addresses.

In the absence of the Complainant's need or response to the dissemination or unsolicited contact of individuals choosing to e-mail addresses, the GRC must adhere to the privacy interest recognized in OPRA and public policy. Thus, this factor also weighs in favor of non-disclosure.

vi. *Balancing of the Burnett Factors*

On balancing the Burnett factors, OPRA's dual object to provide both public access and protection of personal information weigh in favor of non-disclosure of the responsive e-mail addresses. Most notably, MLOs were given the option of providing e-mail addresses as a supplement to the required contact information. The GRC is satisfied that disclosure of this information could chill them from providing same in the future. Further, the Complainant also failed to submit a balancing test questionnaire. The Complainant was provided with a wealth of other MLO contact information; thus, disclosure of the e-mail addresses heighten the risk of privacy concerns.

Therefore, the Custodian has borne her burden of proving that disclosure of the MLO e-mail addresses would violate the reasonable expectation of privacy provision because all seven Burnett, factors weigh in favor of non-disclosure. N.J.S.A. 47:1A-6, N.J.S.A. 47:1A-1.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proving that disclosure of the Mortgage Loan Originators' e-mail addresses would violate the reasonable expectation of privacy provision because all seven Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009), factors weigh in favor of non-disclosure. N.J.S.A. 47:1A-6, N.J.S.A. 47:1A-1.

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March 24, 2015