



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 30, 2019 Government Records Council Meeting

John Beggiano
Complainant

Complaint No. 2017-144

v.

Township of Hillsborough (Somerset)
Custodian of Record

At the July 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 2019 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 responsive Township newsletter e-mail address list would violate the privacy exempt present in OPRA. N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. 408, 422-23, 427 (2009). As such, the Custodian lawfully denied access to said list. N.J.S.A. 47:1A-6.

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 30th Day of July 2019

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: August 2, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
July 30, 2019 Council Meeting**

**John Beggiato¹
Complainant**

GRC Complaint No. 2017-144

v.

**Township of Hillsborough (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copy via e-mail of the Township of Hillsborough’s (“Township”) e-newsletter e-mail list in .csv or Excel format.

Custodian of Record: Pamela Borek

Request Received by Custodian: June 19, 2017

Response Made by Custodian: June 28, 2017

GRC Complaint Received: July 6, 2017

Background³

Request and Response:

On June 19, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 28, 2017, the Custodian responded in writing denying access to the responsive list under the personal privacy exemption. N.J.S.A. 47:1A-1 (citing Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009) and Wolosky v. Somerset Cnty., 2017 N.J. Super. Unpub. LEXIS 781 (App. Div. 2017)).

Denial of Access Complaint:

On July 6, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the responsive e-mail list was disclosable in accordance with Geier v. Twp. of Plumsted, Docket No. L-3718-09 (Slip. Op., March 19, 2010). The Complainant thus contended that he was unlawfully denied access to the responsive e-mail list.

¹ No legal representation listed on record.

² Represented by William Willard, Esq., of DiFrancesco, Bateman, P.C. (Warren, NJ).

³ 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Statement of Information:

On July 28, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on June 19, 2017. The Custodian certified that she responded in writing on June 28, 2017 denying access to the responsive e-mail address list.

The Custodian contended that she lawfully denied access to the responsive list for the reasons advanced in her response. N.J.S.A. 47:1A-1; Burnett, 198 N.J. 408. The Custodian noted that she consulted with Counsel prior to responding to the OPRA request prior to responding.

Additional Submissions:

On August 14, 2017, the Complainant submitted a letter rebuttal to the SOI. The Complainant recognized that privacy is the threshold issue at the center of this complaint. The Complainant stated that in Renna v. Cnty. of Union, 2012 N.J. Super. Unpub LEXIS 342 (App. Div. 2012), the court stated that disclosure of a person’s home address represented a higher invasion of privacy than disclosure of e-mail addresses. The Complainant asserted that the only harm to disclosure of e-mail addresses could be eliminated by employing an “opt-out” option for newsletter registrants, which the Township could easily add to its mailing list registration.

The Complainant stated that the e-mail list was used to distribute newsletters containing public meeting announcements, upcoming events, programs, accolades, *etc.* The Complainant further alleged that the newsletter was also used to promote the interests of the current Township Committee, “sometimes in very self-serving ways at the expense of being totally transparent.” The Complainant thus asserted that his need for the information mirrored that in Renna. The Complainant stated that he intended to use the list to inform Township residents of policies and practices “which may not be adequately and accurately set forth in the [T]ownship’s own newsletter.” The Complainant contended that his need to promote “public awareness of important public affairs affecting citizens’ lives” outweighed the Township’s right to exempt access to the e-mail list. See also Geier, Docket No. L-3718-09.

On August 28, 2017, Edward Purcell, Esq.⁴ submitted a letter brief on behalf of the Custodian’s Counsel attaching a legal certification. Therein, Mr. Purcell reasserted the Township’s position that the responsive e-mail list was exempt under the privacy exemption at N.J.S.A. 47:1A-1. Mr. Purcell argued that registrants providing their e-mail addresses had a reasonable expectation that their e-mail addresses would remain private. Mr. Purcell noted that the newsletter registration page contained a disclaimer giving the Township exclusive “permission to e-mail” the registrants. Purcell Cert. at ¶ 4. Mr. Purcell further noted that Constant Contact’s privacy statement gave registrants the impression that their e-mail addresses would not be disclosed. Purcell Cert. at ¶ 6. Mr. Purcell thus contended that the Complainant’s arguments ignore these disclaimers.

Mr. Purcell argued that disclosure would lead to registrants receiving partisan materials, which would result in a negative and chilling effect on the registrants. Mr. Purcell alleged that the Complainant, a local political party leader, now argued that disclosure of the e-mail list would

⁴ Mr. Purcell is an associate within Custodian Counsel’s law firm.

“permit open and equal access.” Mr. Purcell stressed that contrary to the Complainant’s “self-serving” arguments, the newsletter is “not a partisan document.” Mr. Purcell contended that a quick review of the newsletter supported the forgoing statement.

Mr. Purcell finally argued that requiring disclosure here could lead to a windfall of requests from other political groups and organizations. Mr. Purcell argued that the registrants would in turn be inundated with unsolicited mailings and other communications simply because they signed up for the Township newsletter. Mr. Purcell argued that registrants did not sign up for such a misuse of their e-mail addresses.

On September 12, 2017, the Complainant submitted a letter disputing Mr. Purcell’s assertion that the newsletters contained benign information. The Complainant contended that the Township’s primary defense that registrants expected privacy when signing up for the newsletter could not be established with certainty. The Complainant contended that registrants were required to balance their own right to know with privacy when submitting their e-mail addresses. The Complainant further contended that registrants were given the right to “opt out,” which renders the privacy issue moot. The Complainant argued that registrants’ privacy “cannot be infringed” if they opted out of delivery from a particular sender. The Complainant alleged that “in today’s digital age,” people necessarily know that giving out their e-mail address could lead to unwanted e-mails, which could be remedied by simply unsubscribing to them.

The Complainant further argued that Mr. Purcell only established that registrants gave the Township permission to e-mail them. The Complainant asserted that no language present in either disclaimer gave them sole permission to use the registrants’ e-mail addresses. The Complainant also argued that Constant Contact’s privacy statement offered an “opt-out” option. The Complainant additionally asserted that the privacy statement did not extend to the Township because 1) the statement did not explicitly name the Township; and 2) the Township is a “public agency” required to disclose records that do not violate a citizen’s reasonable expectation of privacy.

The Complainant alleged that Mr. Purcell omitted the most self-serving and misleading articles favoring the current Township Committee. The Complainant alleged that the newsletters contained articles dealing with important public affairs advocated by a unanimous Republican Committee. The Complainant thus disputed Mr. Purcell’s assertion that the articles were non-partisan in nature, considering the current Committee makeup. The Complainant contended that articles of public import are slanted by the Committee view. The Complainant asserted that he intended to use the e-mail list to provide another view point to offset this slant. The Complainant included examples of articles he alleged contained “slants . . . to favor [the Committee’s] actions,” as well as examples of how he would utilize the e-mail address list to offset same. The Complainant asserted that he desired to simply provide registrants with “all the facts that the citizens of [the Township] are entitled to.” The Complainant further asserted that it would be up to the registrants to determine whether to unsubscribe from the resulting e-mails.

The Complainant finally argued that Wolosky, 2017 N.J. Super. Unpub LEXIS 781 was inapposite to the instant complaint: the court there determined that e-mail and home addresses on

OPRA request forms were exempt. The Complainant asserted that Geier, Docket No. L-3718-09 decided the exact issue of a newsletter e-mail list.

On May 3, 2019, the GRC requested that both the Custodian and Complainant provide completed balancing test questionnaires by close of business on May 8, 2019. On May 8, 2019, on behalf of the Custodian, Mr. Purcell submitted a balancing test questionnaire providing the following responses:

1. The type of record(s) requested.

Response: Mr. Purcell identified the responsive record as an e-mail address list of individuals who signed up for the Township's newsletter. Mr. Purcell noted that individuals signing up for the newsletter were alerted (through a sign-up page and Constant Contact privacy statement) that the Township, and not third parties, would e-mail them.

2. The information the requested records do or might contain.

Response: Mr. Purcell identified that the disputed information was e-mail addresses, which are personal information that would allow for instantaneous communication with citizens via their smart phones. Mr. Purcell argued that protecting the e-mail addresses was akin to protecting personal telephone numbers.

3. The potential harm in any subsequent non-consensual disclosure of the requested records.

Response: Mr. Purcell argued that once e-mail addresses are disclosed there is no ability to prevent further disclosure. Mr. Purcell averred that the e-mail addresses could be sold or disclosed without any recourse for unsolicited contact, advertising, commercial solicitation, fraud, or other nefarious purposes. Mr. Purcell argued that a citizen signing up for a Township newsletter should not be subjected to such risks.

4. The injury from disclosure to the relationship in which the requested record was generated.

Response: Mr. Purcell stated that disclosure here would cause citizens to refrain from providing certain personal information to the Township going forward. Mr. Purcell noted that the Township had an emergency services system for which citizens can register. Mr. Purcell averred that disclosure of their personal information here could have a chilling effect on citizens' trust in government and their willingness to provide personal information for "such worthwhile services.

5. The adequacy of safeguards to prevent unauthorized disclosure.

Response: Mr. Purcell averred that, if disclosed, the Township had no ability to safeguard against further disclosure: the addresses may be sold or disclosed without recourse.

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

Response: Mr. Purcell averred that there is no statutory mandate, articulated public policy, or other public interest militating towards disclosure. Mr. Purcell stated that to the contrary, OPRA imposed an obligation towards protecting personal privacy. Burnett, 198 N.J. 408; Wolosky, 2017 N.J. Super. Unpub. LEXIS 781.

On the same day, the Complainant submitted his balancing test questionnaire, accompanied by a copy of the letter submitted September 12, 2017, providing the following responses:

1. Why do you need the requested record(s) or information?

Response: The Complainant stated that he needed the information to provide citizens “the opportunity to receive unbiased and complete information” about the Township’s actions. The Complainant reiterated from prior submissions that he believed the current Committee was using the newsletter to provide bias and misleading information to citizens for their benefit.

2. How important is the requested record(s) or information to you?

Response: The Complainant asserted that the requested records were important because the Township’s actions have negatively impacted citizens. The Complainant noted that it was his goal to provide his own newsletter to citizens via e-mail, to which they can “opt-out.” The Complainant also noted that he wished to provide information to citizens that he believed was “withheld” from them to their detriment.

3. Do you plan to redistribute the requested record(s) or information?

Response: The Complainant stated that he would not redistribute the e-mail addresses. The Complainant asserted that he intended to use them for the reasons identified above.

4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?

Response: The Complainant acknowledged that the first e-mail to citizens would be unsolicited; however, an e-mail service (such as Constant Contact) would allow them to unsubscribe from future e-mails if they so desired. The Complainant noted that these types of e-mail services do not allow a sender to re-add an e-mail address after a recipient has unsubscribed. The Complainant asserted that control of privacy interest is ultimately in placed with “owner of the e-mail address.”

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 in this matter, the GRC asked both the Complainant and the Custodian 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 New Jersey 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 v. Cnty. of Bergen, 198 N.J. 408, 422-23, 427 (2009).

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 e-mail address list.

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, supra, 198 N.J. at 418. After balancing the seven factors, the Court “f[ou]nd 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 [wa]s 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 [we]re 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. Alfano v. Margate City, 2012 N.J. Super. Unpub. LEXIS 2179, 1-2, 8-10 (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, 3-4 (App. Div. 2013). The trial judge explained that

[t]he 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 “ha[d] 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, supra, 198 N.J. at 427, [we]re applicable” and affirmed the trial court’s decision ordering disclosure of the caller’s identity. Ponce, supra, at 10.

Similarly, the Appellate Division has concluded that addresses should not be redacted from a mailing list of self-identified “senior citizens” compiled by a county to contact those individuals through a newsletter. Renna v. Cnty. of Union, 2012 N.J. Super. Unpub. LEXIS 342, 1, 11-12 (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 E-mail Addresses Not Be Disclosed*

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 the complaining party’s personal information contained in a government 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. The subject OPRA request, as well as the submissions of the parties, confirm that the record at issue is an e-mail list for the Township’s newsletter. Further, the parties agree that the pertinent information contained therein is e-mail addresses of citizens who signed up for the Township’s newsletter.

ii. *Burnett Factors Three and Four*

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

Regarding the potential harm in nonconsensual disclosure, the Township spoke to its inability to control nonconsensual disclosure should the e-mail list be released. Further, the Township argued that the injury from disclosure was significant: citizens may refrain from signing up for additional “worthwhile” electronic notification services if they believed their information would disseminated through OPRA.

Conversely, the Complainant averred that he would not disclose the information to anyone else; rather, he would use it to provide his own newsletter to registered citizens. The Complainant also argued that disclosure would result in minimum unsolicited contact. The Complainant reasoned that any of the citizens to whom he sent his first newsletter to would have the opportunity to unsubscribe upon receipt; thus, they would not incur any further interaction with him. The Complainant asserted that privacy ultimately rested with the “owner of the e-mail address.”

The GRC addressed the disclosure of an e-mail address list in Mayer v. Borough of Tinton Falls (Monmouth), GRC Complaint No. 2008-245 (Interim Order dated April 8, 2010). There, the

Council held that these factors weighed against disclosure of the addresses there. The Council reasoned that inherent risks of disclosing e-mail addresses were significant, contrary to Federal law and New Jersey Supreme Court case law, and could result in various forms of unsolicited contact and criminal activity. *Id.* at 18-20 (citing *Doe*, 142 N.J. 1; *Burnett*, 198 N.J. 408; CANSPAM Act of 2003, 15 U.S.C.S. §7701).

The GRC is not persuaded by the Complainant's position that any "opt-out" or unsubscribe policy would minimize unsolicited contact. The act of contacting the citizens through e-mail addresses disclosed under an OPRA request would clearly be unsolicited. Even if citizens were to "opt-out" or unsubscribe from the Complainant's newsletter, the damage is in effect already done. Such an action could result in the type of significant communication hardships that the Township surmised would occur if the list were disclosed. The GRC does not believe any "opt-out" policy would change a citizen's perception of the Township's disclosure of their e-mail addresses for confirmed unsolicited contact. Further, the Complainant wrongly asserts that under OPRA, the e-mail address owner controls his or her own "privacy interest." In fact, OPRA mandates that the public agency, and not the private citizen, "has an obligation to safeguard . . . a citizen's personal information . . ." when considering disclosure under OPRA. *N.J.S.A.* 47:1A-1; *Doe*, 142 N.J. at 82 (1995).

Significant concerns about the potential harm from disclosure of the e-mail list exist here. In fact, the Complainant has stated that he intended to contact each person on the list via e-mail after receiving it. This is regardless of those individuals' ability to "opt-out" thereafter. For this reason, the GRC finds that 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 Township asserted that there were none: if the e-mails were disclosed they could be sold or redistributed without recourse. The GRC again notes that the Complainant expressed that he would not redistribute the e-mail addresses.

When addressing how this factor applies to e-mail addresses, the GRC has typically militated towards non-disclosure. See *Mayer*, GRC 2008-245 at 20; *Smith v. N.J. Dep't of Banking & Ins.*, GRC Complaint No. 2014-301 (March 2015). See also *Wolosky*, 2017 N.J. Super. Unpub. LEXIS 781, 7. The GRC similarly finds here that, regardless of the Complainant's non-distribution statement, there are no safeguards in place to prevent the unauthorized disclosure of the e-mail addresses at any point after disclosure. Thus, factor five 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 address list. In his balancing test questionnaire, the Complainant stated that he needed the information to provide citizens with his own newsletter. The Complainant asserted that the current Committee used the newsletter to provide biased and misleading information, and he wished to provide them "the opportunity to receive unbiased and complete information." Previously, in a letter received on September 12, 2017, the Complainant argued that he should prevail here based on *Renna*, 2012

N.J. Super. Unpub LEXIS 342 and Geier, Docket No. L-3718-09. The Complainant also argued that Wolosky, 2017 N.J. Super. Unpub. LEXIS 781 was inapposite to the facts here because that issue involved multiple pieces of personal information in third party OPRA requests.

In weighing this factor, the GRC looks to all case law discussed above and Mayer, GRC 2008-245 for common ground, noting that the privacy issue is necessarily fact-specific.

In Renna, plaintiff ran a website dedicated to public transparency and sought an address list compiled by defendants to “further the civic activities of” her site. Id. at 18. The trial court found this argument persuasive to favor disclosure in factor six, holding that the goal of plaintiff’s website was “consistent with OPRA’s objective to “maximize public knowledge about public affairs . . .” Id. (citation omitted).

In Wolosky, appellant sought to require defendants to disclose third party OPRA requests without redactions for personal contact information, including e-mail addresses. Plaintiff asserted that he was a “government activist” and was “interested in identifying the government records other citizens have requested, and contacting those individuals ‘if he so desires’ . . .” Id. at 8-9. The Appellate Division was not persuaded and held that factor six favored non-disclosure. The Court reasoning that appellant’s interest was outweighed by “the interest those persons have in not being contacted by plaintiff or others to whom he might disclose the information.” Id. at 9.

In Geier, plaintiff, a write-in candidate in the Township committee race, sought access to a newsletter e-mail list. Before the trial court, plaintiff argued that his need for the list encompassed a number of campaign-related factors. Id. at 4. Incidentally, although the trial court ultimately held that the e-mail list was disclosable, it held that this factor did not weigh in favor of disclosure:

The plaintiff has not shown a particularized need for the list, only a desire to know the identity of the subscribers and to communicate with them electronically . . . Moreover, the requirement of government transparency is achieved through the public availability of the newsletter itself.

[Id. at 7.]

Conversely, in Mayer, the Council held the complainant’s need for the newsletter e-mail list militated factor six towards disclosure. Specifically, the complainant, a councilman at the time of his request, provided evidence the councilman in control of the list used same to send campaign material to recipients. The Council relied on N.J.S.A. 19:31-18.1(a)-(c) in holding that the emphasis for disclosure was based on complainant’s legal right to voter registration information. The Council ultimately held that the e-mail address list should be disclosed.

In deciding factor six, the Council notes that the key aspects of the instant complaint are similar to those in Geier, and Wolosky. The Complainant here has expressed his interest in sending out a competing newsletter under the auspice of presenting an “unbiased” point of view. The Complainant’s motivation is similar to plaintiff’s in Geier in this respect. Further, the Complainant has many more options available to him than the plaintiff in Geier did at that time for providing counterinterviews to the Township’s newsletter. These options include social media platforms,

compiling his own e-mail list, or other internet-based options which are more widely accessible today than in 2009. Also, as noted by the Geier court, transparency is achieved because the Complainant has access to the newsletters he wishes to critique. Finally, as in Wolosky, the interest of those signing for the Township e-mail list outweighs the Complainant's interest in contacting them because he disagrees with his local government.

This complaint departs from Mayer, GRC 2008-245 and Renna, 2012 N.J. Super. Unpub LEXIS 342. Unlike in Mayer, the Complainant has not provided any evidence of campaign material in Township newsletters. That a councilman up for re-election took pictures with children at a fishing competition does not raise to a level similar to the direct campaign material sent through the newsletter list in Mayer. For this reason, there is no evidence in the record to suggest that similar "limited circumstances" exist here that would warrant this factor militating towards disclosure. Further, and unlike in Renna, the Complainant has not provided any evidence that he was part of a watchdog agency or the Township's government. Actually, such a factor was important in the decision to disclose personal information in both Renna and Mayer. See also Bean, Jr v. Borough of Belmar (Monmouth), GRC Complaint No. 2013-39 (Interim Order dated December 20, 2013) (holding that an elected official could access personal information of donors/recipients based partly on his position as an elected official in the municipality).

Thus, factor six weighs against disclosure for the reasons stated above.

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 address list exists. Here, Mr. Purcell stated that he could not identify such a mandate. As previously discussed herein, most statutory mandates, articulated policies and public interest militate towards non-disclosure of personal information. Thus, this factor also militates towards non-disclosure.

vi. *Balancing of the Burnett Factors*

On balancing the Burnett factors in this complaint, OPRA's dual object to provide both public access and protection of personal information weigh against disclosure of the requested e-mail address list. Most notably, unsolicited contact is implicit here, as the Complainant intends to use the list to contact registered citizens. Those citizens have an inherent privacy interest in not having their e-mail addresses shared for such a purpose, which the GRC agrees could chill them from providing it in the future if they knew it would be disclosed. Further, the disclosure of the list does not maximize the Complainant's knowledge in "government" anymore than the actual newsletter, to which he has access. If the Complainant disagrees with the content of said newsletter, his options for voicing same to others in the Township is not negatively impacted by not having access to the e-mail list.

Therefore, the Custodian has borne her burden of proving that disclosure of the responsive Township newsletter e-mail address list would violate the privacy exempt present in OPRA.

N.J.S.A. 47:1A-1; Burnett, 198 N.J. at 422-23, 427. As such, the Custodian lawfully denied access to said list. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the Custodian has borne her burden of proving that disclosure of the responsive Township newsletter e-mail address list would violate the privacy exempt present in OPRA. N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. 408, 422-23, 427 (2009). As such, the Custodian lawfully denied access to said list. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Acting Executive Director

July 23, 2019