

REPORT ON HOME ADDRESSES AND TELEPHONE NUMBERS

December 20, 2004

The Honorable Richard J. Codey, Acting Governor
Senator Richard J. Codey, President of the Senate
Assemblyman Albio Sires, Speaker of the General Assembly

Dear Acting Governor and Members of the Legislature,

On behalf of the New Jersey Privacy Study Commission, I am pleased to present to you the Commission's report on the privacy concerns and protection recommendations for home addresses and home telephone numbers contained in government records.

The Commission prepared this report pursuant to Governor McGreevey's mandate in Executive Order 26 to study the issue of whether and to what extent the home addresses and home telephone numbers of citizens should be made publicly available by public agencies. This report is the culmination of the Commission's consideration of public comment, as well as statutory and judicial analysis on the issue.

The Commission believes that the policy recommendations for administrative and legislative action contained in this report strike an appropriate balance between the needs for openness and the transparency of government and the citizens' reasonable expectation of privacy in their home addresses and home telephone numbers contained in government records. Further, it is the Commission's belief that its findings and recommendations will be useful to both the executive and legislative branches of government in New Jersey, as well as serve the best interest of the citizens of New Jersey.

Sincerely,

M. Larry Litwin, APR
Chair, New Jersey Privacy Study Commission

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EXECUTIVE SUMMARY

The disclosure of home addresses and telephone numbers contained in government records is at the forefront of the privacy debate in New Jersey. While the New Jersey Open Public Records Act favors disclosure of government records, it also states that public agencies have a responsibility to safeguard personal information when disclosure would violate a citizen's reasonable expectation of privacy.

In light of the concern over the disclosure of home addresses and telephone numbers, the New Jersey Privacy Study Commission was given the special directive to review this issue and develop recommendations before concluding on the Commission's general task of studying the privacy issues raised by state and local government's collection, processing, use and dissemination of information under OPRA.

The Commission created the Special Directive Subcommittee to specifically study whether and to what extent home addresses and telephone numbers should be disclosed by public agencies in the state. In doing so, the Subcommittee considered the arguments for and against disclosure set forth by the public at open hearings held throughout the state. Comments were received from academic experts, representatives of state and local government, the American Civil Liberties Union, organizations for open government, organizations of education professionals, victims' organizations, press organizations, commercial resellers of government records, professional investigators, attorneys and private citizens.

The Subcommittee also considered legislation enacted by other states that have specifically addressed the issue of public disclosure of home addresses and telephone numbers as examples of legislative frameworks currently in place throughout the country. Additionally, the Subcommittee reviewed the statutory interpretations of an individual's reasonable expectation of privacy regarding the disclosure of home addresses and telephone numbers in the federal Freedom of Information Act and the Privacy Act of 1974. Further, the Subcommittee considered the judicial interpretations of the same provided by the U.S. Supreme Court, U.S. Court of Appeals for the Third Circuit, and the New Jersey Supreme Court as the Subcommittee developed its policy recommendations on this issue.

In accordance with its special directive, the New Jersey Privacy Study Commission developed the following recommendations for consideration by Governor McGreevey and the Legislature:

- Home telephone numbers should not be disclosed.
- Public agencies should notify individuals that their home addresses may be disclosed pursuant to OPRA requests.
- Individuals should be permitted to provide an address of record for disclosure purposes, in addition to their home address when interacting with public agencies.

- The Governor or Legislature should establish objective guidelines defining when and from which government records home addresses should be redacted.
- Individuals should be permitted to opt out of disclosure of their home addresses.
- In the future, computer systems and applications should be programmed to collect but not disclose home addresses and telephone numbers.

This report, including the policy recommendations contained therein, will be incorporated in the final report of the New Jersey Privacy Study Commission at the conclusion of its complete study of the privacy issues raised by the collection, processing, use and dissemination of information by public agencies.

INTRODUCTION

The Special Directive to the Privacy Study Commission

This report responds to Executive Order 26, in which Governor McGreevey directed the New Jersey Privacy Study Commission "to study the issue of whether and to what extent the home address and home telephone number of citizens should be made publicly available by public agencies and to report back to the Governor and the Legislature..."¹

The Legislature created the New Jersey Privacy Study Commission in the Open Public Records Act to "study the privacy issues raised by the collection, processing, use and dissemination of information by public agencies, in light of the recognized need for openness in government and recommend specific measures, including legislation, the Commission may deem appropriate to deal with these issues and safeguard the privacy rights of individuals."²

The Privacy Study Commission ("Commission") is a temporary body consisting of 13 members representing groups that advocate citizen privacy interests and groups that advocate increased access to government records. Its membership includes representatives of local law enforcement agencies, one local government official, attorneys practicing in the fields of municipal law and individual privacy rights, representatives of educational professionals and organizations, one crime victim advocate, one representative of the news media, one legislative expert and one retired member of the state judiciary. The Special Directive Subcommittee is a subset of the Commission created to address the specific issue of whether and to what extent home addresses and home telephone numbers of citizens should be made publicly available to public agencies (the "special directive").³

RECOMMENDATIONS

The New Jersey Open Public Records Act ("OPRA") favors disclosure of public records. OPRA proclaims the public policy of New Jersey to be that "government records shall be readily accessible

¹ Executive Order 26, dated August 13, 2002, may be found at the following website: <http://www.state.nj.us/infobank/circular/eom26.shtml>.

² N.J.S. 47:1A-15. The full text of the New Jersey Open Public Records Act may be found at <http://www.state.nj.us/grc/act.html#privacy>.

³ Members of the Special Directive Subcommittee are: Grayson Barber (Chair of the subcommittee), Thomas J. Cafferty, George Cevasco, Edithe A. Fulton, Hon. Rosemary Karcher Reavey, J.S.C. (retired), William John Kearns, Jr., M. Larry Litwin (Chair of the Privacy Study Commission) and Karen Sutcliffe. Other members of the Privacy Study Commission are: Richard P. DeAngelis, Jr., John Hutchison, Pamela M. McCauley, Jack McEntee, and H. Lawrence Wilson, Jr. The Privacy Study Commission gratefully acknowledges the assistance of its staff attorney, Catherine Starghill, and the generous support of the New Jersey Department of Community Affairs in making Ms. Starghill available to the Commission.

for inspection, copying, or examination by the citizens of this state.”⁴ Any limitations on the right of access are to be construed in favor of the public’s right of access.

OPRA also specifically states 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.”⁵ Thus, the right of privacy is secondary to the public right to access.

In establishing its recommendations regarding whether and to what extent home addresses and home telephone numbers should be made publicly available by public agencies, the Commission considered the legislative findings that favor disclosure while also protecting privacy.

The Commission proposes the following recommendations as a way to balance the public’s recognized need for openness in government while safeguarding the privacy rights of individuals:

1. Home Telephone Numbers Should Not Be Disclosed

It is often difficult for records custodians to determine whether the home telephone numbers in government records are commercially listed or unlisted by regional telephone companies. This means that for practical purposes, records custodians may not be able to comply with the provision of OPRA that directs them to redact unlisted telephone numbers from requested records.⁶ Therefore, the Commission recommends that all home telephone numbers not be disclosed under OPRA.

While this recommendation may be implemented for future records through the inclusion of a “check box” that requires individuals to identify whether the telephone number listed on all new government forms and applications is in fact a home telephone number, it is problematic for existing records. Thus, the Commission recommends that the Governor or Legislature mandate a divided approach for implementing this recommendation. As to records created prior to the inclusion of this “check box”, all telephone numbers in government records should not be disclosed pursuant to OPRA requests unless the record clearly identifies that the telephone number is not a home telephone number. This will not harm requestors since they may utilize other resources to obtain commercially listed home telephone numbers, including regional telephone directories or Internet search engines.

2. Public Agencies Should Notify Individuals that Their Home Addresses May Be Disclosed Pursuant to OPRA Requests

Many people are unaware that currently under OPRA their home address may be publicly disclosed when they give this information to public agencies. Several private citizens testified at the Commission’s open public hearings that when they give information about themselves to the government they expect it to go no further.

Accordingly, the Commission recommends that the Governor or Legislature require public agencies to provide notice that home addresses may be disclosed. This may be accomplished by mandating

⁴ N.J.S.A. 47:1A-1.

⁵ Id.

⁶ N.J.S.A. 47:1A-1.1.

that all public agencies include a notice widely visible in the public areas of their offices and on all new government forms and applications that reads, “Your home address may be disclosed pursuant to an OPRA request.”

(This recommendation assumes that the Governor or Legislature adopts Recommendation 1. If that recommendation is not adopted and implemented, then the Commission recommends that public agencies should notify individuals that both home addresses and telephone numbers may be disclosed pursuant to OPRA requests.)

3. Individuals Should Be Permitted to Provide an Address of Record For Disclosure Purposes, In Addition to Their Home Address When Interacting with Public Agencies

In many cases, public agencies collect home addresses from individuals not for the purpose of establishing domicile or performing other statutorily required functions, but for other purposes such as future contact and correspondence. Therefore, the Commission recommends that individuals who do not want their home addresses to be disclosed under OPRA should, when appropriate, have the option of also providing an address of record for disclosure purposes when public agencies respond to OPRA requests.

The Commission recommends that the Legislature implement this recommendation by mandating that all new government forms and applications request both an actual home address and an address of record. Public agencies will then have the actual home address to perform their legislatively mandated functions as necessary, but will only disclose the address of record (if one is provided) pursuant to OPRA requests. Actual home addresses should remain accessible to law enforcement, public safety and in real estate records necessary for land transactions, title searches, and property tax assessments.

4. The Governor or Legislature Should Establish Objective Guidelines Defining When and From Which Government Records Home Addresses Should Be Redacted

It is commonly understood that many records have been in the public domain as a matter of course ever since records have been collected and maintained by public agencies, such as real estate records necessary for land transactions, title searches and property tax assessments. Public agencies should continue to disclose these records to facilitate the execution of land transactions or in the fulfillment of statutorily required functions (as is the case for tax assessments). In other cases, however, the functions of public agencies do not strictly rely on the disclosure of home addresses and individuals providing agencies with this information may not expect that the agencies will disclose their information.

Since OPRA does not permit records custodians to ask requestors their reasons for requesting government records to determine whether the disclosure of the home addresses would violate an individual's reasonable expectation of privacy, records custodians need objective guidelines that define when and from which government records home addresses should be disclosed under OPRA. The Commission has identified two strategies for developing such guidelines:

a.) Identify Categories of Records From Which Home Addresses Should Be Redacted

In addition to those records currently exempt from disclosure under OPRA, the Commission recommends that the Governor or Legislature identify those government records from which home addresses should not be redacted and those records from which home addresses should be redacted in the interest of safeguarding an individual's reasonable expectation of privacy. This exercise would be an enhancement to OPRA and may result in an amendment to the statute. The Commission further recommends that the Governor or Legislature garner the assistance of the Department of the State - Division of Archives and Records Management ("DARM") to execute this recommendation.

DARM's Implementation of this Recommendation

Existing DARM infrastructure may expedite the execution of this recommendation. Specifically, DARM has compiled a comprehensive list of all the records created, filed and maintained by every public agency in the State of New Jersey, along with retention schedules and other record keeping requirements established and approved by the State Records Committee. This compilation of retention schedules could become the basis for a *register* of all records of public agencies that is expanded to include detailed information on each record indicating whether the record contains home addresses that should be redacted.

DARM offered this proposed "register" for consideration and inclusion in OPRA as a keystone for the implementation of the intent of the act and had sought to secure funding for new software necessary to create it. The Commission recommends the implementation of this register as a practical and comprehensive means of establishing objective guidelines defining when and from which records home addresses should be redacted.

This recommendation is a practical approach for providing guidance to records custodians because custodians are already familiar with DARM's records retention schedules and use them often in their daily operations. Therefore, the Commission believes that records custodians may easily incorporate in their daily operations review of an expanded compilation of records retention schedules that include detailed information on each record regarding whether home addresses contained therein should be redacted when processing OPRA requests.

The Commission also recommends that the funding for the creation and maintenance of the register, which will require research to determine the privacy requirements of each record and new software to create the register, come from DARM's portion of the newly established New Jersey Public Records Preservation Account. The Public Records Preservation Account was created for the management, storage and preservation of public records from the monies received by county clerks

attributable solely to the amount of increases to the document filing fees established by the Legislature in July 2003.⁷

The Commission further recommends that DARM consider several factors to determine whether home addresses should be exempted:⁸

- the type of record;
- the potential for harm in any subsequent nonconsensual disclosure;
- the injury from disclosure to the relationship in which the record was generated;
- the adequacy of safeguards to prevent unauthorized disclosure;
- the degree of need for access;
- whether there is an express statutory mandate, articulated public policy or other recognizable interest militating toward access.

In conducting its study, the Commission implores DARM to devote special attention to an individual's reasonable expectation of privacy in records of vital statistics, professional licensing records, and recreational licensing records just to name a few.⁹

b.) Identify Groups of Individuals Whose Home Addresses Should Be Redacted

In addition to identifying categories of records from which home addresses should be redacted, the Governor or Legislature should exempt certain groups of individuals from the disclosure of their home address due to the demonstrable safety risks to the members of these groups.¹⁰

The Commission recommends that the home addresses of the following groups of individuals be redacted unless disclosure is required by any other statute, resolution of either or both Houses of the Legislature, regulation promulgated under the authority of any statute or

⁷ N.J.S.A. 22A:4-4.2.

⁸ These factors are enumerated in United States v. Westinghouse Electric Corp., 638 F.2d 570 (3d Cir. 1980).

⁹ States maintain records spanning an individual's life from birth to death, including records of births, marriages, divorces, professional licenses, voting information, worker's compensation, personnel files (for public employees), property ownership, arrests, victims of crime, and scores of other pieces of information. These records contain personal information including a person's physical description (age, photograph, height, weight, and eye color); race, nationality, and gender; family life (children, marital history, divorces, and even intimate details about one's marital relationship); residence, and contact information (address, telephone number, value and type of property owned, and description of one's home); political activity (political party affiliation, contributions to political groups, and frequency of voting); financial condition (bankruptcies, financial information, salary, and debts); employment (place of employment, job position; salary, and sick leave); criminal history (arrests, convictions, and traffic citations); health and medical condition (doctor's reports, psychiatrist's notes, drug prescriptions, diseases and other disorders); and identifying information (mother's maiden name, and Social Security number).

¹⁰ For example, judges and law enforcement officers may be targets of retaliation and crime victims may be targets of further intimidation and harassment.

Executive Order of the Governor, Executive Order of the Governor, rules of court, any federal law, federal regulation or federal order:

- (1) active and former law enforcement personnel, including correctional and probation officers,
- (2) judges,
- (3) current and former attorneys general, deputy and assistant attorneys general, county and municipal prosecutors, and assistant county and municipal prosecutors,
- (4) crime victims,
- (5) personnel of the Department of Human Services - Division of Youth and Family Services whose duties include the investigation of abuse, neglect, exploitation, fraud, theft, and other criminal activities,
- (6) personnel of the Department of Treasury – Division of Taxation or local government whose responsibilities include revenue collection and enforcement, and
- (7) current and former code enforcement officers.

There may be other groups of individuals whose positions create a demonstrable safety risk not set forth in this list. If that is so, the Commission believes it would be appropriate to similarly exempt such other groups of individuals by legislative regulation or Executive Order.

Members of the Commission have expressed concern over the practical difficulties associated with implementing this recommendation. Specifically, it is believed that there may be difficulties identifying whether an individual whose home address is listed in government records are members of an exempt group. However, it is also believed that this may be resolved in the future by mandating that all individuals completing government forms and applications requiring home addresses indicate whether they are members of any of the exempt groups. This may be accomplished by also mandating that all new government forms and applications that request home addresses have “check boxes” for the identification of an individual as a member of an exempt group. With regard to existing records, those entitled to this privacy protection will have an affirmative obligation to notify public agencies of their protective status.

Several members of the Commission believe that no group of individuals should be given special treatment regarding the nondisclosure of their home addresses as is provided in this recommendation.

5. Individuals Should Be Permitted To Opt Out of Disclosure of Their Home Addresses

This recommendation is offered as an alternative to Recommendation 3. discussed above. The Commission believes it may be appropriate in some cases to give individuals a means to indicate that they do not want their home addresses disclosed to the public under OPRA. Therefore, the Commission recommends that a study be conducted to determine which government forms and applications requiring home addresses are appropriate for the opt out option due to the potential for

abuse (e.g. selecting such an option to avoid law enforcement). It is believed that this study may be conducted by DARM in conjunction with the Commission's recommendation 4.a. discussed above.

After determining which government forms and applications are appropriate for the opt out option, the Governor or Legislature may mandate that this option be implemented by including an "opt out" check box on all new government forms and applications in the future.

One member of the Commission specifically disagrees with this recommendation, opining that, in light of the other recommendations in this report, there is no need for this provision and further opining that this provision could lead to an incomplete public record.

6. In the Future, Public Agencies Should Program Their Computer Systems and Applications to Collect But Not Disclose Home Addresses and Telephone Numbers When Redaction is Required

In the future most OPRA requests will likely be answered in electronic form, making computer systems and application design a technological answer to ensuring that home addresses and home telephone numbers are not disclosed when redaction is required. Therefore, the Commission recommends that as new computer systems and applications are phased in, they should be designed to flag the data fields for home addresses and home telephone numbers and automatically redact this information when required by public agencies responding to OPRA requests. This recommendation does not pertain to existing government records in hardcopy or electronic form.

PUBLIC COMMENT

The Commission held seven public hearings on the issue of whether and to what extent individuals' home addresses and home telephone numbers should be made publicly available by public agencies. The hearings were held at locations in northern, southern and central New Jersey. The Commission received live testimony and written comments from individuals and organizations throughout the state. The following section is based upon live testimony and written comments (including e-mails) from the public received by the Commission through March 2004.¹¹

On the subject of home addresses in open public records, the views expressed fall into two broad categories: one asserting that home addresses should not be disclosed under OPRA and the other asserting to the contrary that they should be disclosed.¹²

¹¹ The Commission meets approximately once a month and invites the public to attend and comment on its work. This report incorporates public comments from these regular meetings, as well as from special public hearings. The regular monthly meetings are not taped, so written testimony is in the record but transcripts of those meetings are not available.

¹² Most of the comments received by the Commission deal only with home address information. The Commission assumes that the points of view and courses of reasoning apply to home telephone numbers, as well as to home addresses.

1. Arguments Against Disclosing Home Addresses and Telephone Numbers Under OPRA

Academic Expert

Professor Daniel J. Solove, Associate Professor of Law at Seton Hall Law School in New Jersey, submitted written comments regarding his assertion that the disclosure of home addresses and telephone numbers under OPRA could potentially be unconstitutional, and would constitute a departure from the federal approach under the Freedom of Information Act.¹³ He described groups of people who have a strong interest in keeping their home addresses confidential (including celebrities, domestic violence victims, stalking victims, witnesses in criminal cases, abortion doctors and police officers), and cited case law from federal and state courts recognizing a state interest in preserving residential privacy.

Professor Solove stated that the United States Supreme Court has recognized a substantial privacy interest in home addresses and telephone numbers, citing Department of Defense v. F.L.R.A., 510 U.S. 487 (1994) (interpreting the Freedom of Information Act and the Privacy Act of 1974). He also stated that the United States Court of Appeals for the Third Circuit held that case law “reflect[s] the general understanding that home addresses are entitled to some privacy protection, whether or not so required by statute,” citing Paul P. v. Verniero, 170 F.3d 396, 404 (3d Cir. 1999).

Professor Solove also asserted that if New Jersey were to routinely give out home addresses and home telephone numbers, it may not only be violating the U.S. Constitution (as interpreted by many federal courts of appeal including, most importantly, the Third Circuit), but it may also be repudiating the privacy protections of the federal Freedom of Information Act approach, which is the approach on which most states’ open public records acts are modeled.¹⁴

Further, Professor Solove stated that “[t]his conclusion certainly doesn’t mean that New Jersey is barred from disclosing addresses and telephone numbers in public records. But it does mean that any such disclosures will be balanced against the state’s interest in disclosing them. ... It is important to note that the personal information in public records is often compelled by the government. People don’t give it out freely but are often forced to do so. Broad disclosure of people’s addresses can compromise people’s safety. It may benefit the media, which wants easy access to information, and commercial interests, which want to use addresses for marketing purposes. But in balancing under the Constitution, courts look to the extent to which the greater public interest is served by disclosure.”

New Jersey Department of Human Services

The New Jersey Department of Human Services (DHS) provided a “statement of concern” in which the DHS Office of Education noted that it does not believe that the Internet is a secure medium for maintaining government records that often contain personal information.

¹³ Professor Solove recently published a legal text entitled, “Information Privacy Law” (Aspen Publishing, 2003) (with Marc Rotenberg), and has written extensively on the subject.

¹⁴ See, e.g., McClain v. College Hospital, 99 N.J. 346, 356 (1985) (noting that most state open public records acts are modeled on the federal Freedom of Information Act).

American Civil Liberties Union of New Jersey

The American Civil Liberties Union of New Jersey (ACLU-NJ) testified that confidence in government at all levels is best sustained by access to the information necessary to promote the vigorous public discussion that a well functioning democracy requires. However, when dealing with information that individuals reasonably expect to remain private and unpublished by the government, the ACLU-NJ stated that there should be a presumption that such information remains confidential unless there is an overriding justification for its disclosure.

To that end, the ACLU-NJ urged special protection for four categories of information: home address, Social Security Number, medical information and financial information.¹⁵ The ACLU-NJ proposed that two exceptions should apply to the confidentiality of home addresses: voter registration records and tax assessment records. They stated that these records containing home addresses should be disclosed, whereas all other records containing home addresses should remain confidential. As to financial records, the ACLU-NJ recommended one exception for the disclosure of the salaries of public employees.

The ACLU-NJ stated that citizens disclose their home addresses because they are compelled to do so by state law and in order to receive basic governmental services. According to the ACLU-NJ, citizens have no choice but to give their home addresses to the government, they should reasonably expect that the government will not re-disclose their addresses to unknown third parties. The ACLU-NJ asserted a right to privacy in one's home address, under both the New Jersey Constitution and the United States Constitution citing the following Meghan's Law cases: Doe v. Poritz, 142 N.J. 1 (1995); Paul P. v. Farmer, 227 F.3d 98, 101 (3d Cir. 2000); and Paul P. v. Verniero, 170 F.3d 396 (3d Cir. 1999).

The ACLU-NJ urged the Commission to adopt an objective standard to determine whether home addresses and other confidential information should be disclosed under any circumstances. A balancing test, it argued, would put too much discretion into the hands of government officials.

The ACLU-NJ recounted a request it received from a domestic violence victim who was alarmed to find her home address on the state's web site of licensed professionals. The ACLU-NJ urged the State of New Jersey to review and assess which government records containing personal information should be redacted and which would be appropriate for full public disclosure because they shed light on governmental operations and other issues of public concern.

New Jersey Education Association

The New Jersey Education Association submitted written testimony stating "in the strongest terms possible, that public school employees have a most reasonable expectation of privacy such that their home address and telephone number should not be subject to disclosure to any member of the public at any time." The Association's representative testified that "NJEA believes in accessible and

¹⁵ OPRA already specifically exempts Social Security Numbers from disclosure. N.J.S.A. 47:1A-1.1. This report refers to Social Security Numbers for the purpose of summarizing relevant testimony. Medical and financial records are beyond the scope of this report since they are individually addressed at the federal level via the Financial Services Modernization Act and the Health Insurance Portability and Accounting Act, respectively.

transparent government. However, we believe that in the pursuit of that ideal it is important that government not allow the privacy rights of individuals to be trampled. ... We are particularly concerned about the potential impact of releasing information about school employees as a distinct class.”

New Jersey School Boards Association

The New Jersey School Boards Association, a non-partisan federation representing elected officials of more than 600 school districts, stated that the Legislature should exempt from disclosure the home addresses and telephone numbers of school board members. “To promote community participation and encourage a broad pool of candidates for school board elections, the government should not require school board members to give up their reasonable expectation of privacy simply because they want to serve their community.” The Association’s representative further recommended that “the home addresses and home telephone numbers of citizens should never be disclosed by public agencies unless such disclosure is required by law enforcement agencies.”

New Jersey Principals and Supervisors Association

In written testimony, the New Jersey Principals and Supervisors Association stated that “if the home addresses and telephone numbers of school administrators are easily released to the public, there is the potential for harassment of these leaders and even abuse. Our past experience indicates that such incidents do occur.”

Domestic Violence Victims’ Organizations

The New Jersey Coalition for Battered Women submitted a written statement strongly opposing the disclosure of names, addresses, phone numbers and personal information to the general public. “No victim of domestic violence should be impeded in her or his efforts to remain safe from a batterer by the unmonitored disclosure of their contact information by the government.”

Municipal Clerk of the Borough of Paramus

One submission, from the Municipal Clerk for the Borough of Paramus, described a case of alleged harassment as a result of OPRA. A requester obtained the names and addresses of all members of the Paramus Shade Tree and Park Commission, took photos of their homes and measurements of their properties, and disclosed the information to others. The requestor urged others to contact the members of the Shade Tree and Park Commission on his behalf. The chairman of the Commission complained. The clerk expressed concern that it would be difficult to attract municipal volunteers “if the public has the ability to reach workers in the public sector for harassment such as this.”

Private Citizens

Dozens of individuals submitted impassioned pleas for privacy, in written and verbal testimony. Several made the point that when they provide personal information to the government, they expect the information to go no further. Two expressed fears about identity theft; two inveighed against unwanted solicitations (including “spam”). Three private citizens made specific reference to a federal law that permits disclosure of personal financial information unless a client makes the effort

to “opt-out.”¹⁶ One citizen stated that “people do not want people with disabilities as neighbors,” and said that if addresses and phone numbers of residential programs were made available, disabled individuals might be harassed. One individual testified that attorneys were using municipal court records to contact accident and crime victims as prospective clients. Several witnesses stated that the government should disclose no personal information about them.

Complaining specifically about unsolicited junk mail from mortgage services companies, one witness stated that “even though I am in the financial services business myself, I have absolutely no sympathy for the companies who mine this personal information for their own ends. The complaints from realtors groups, mortgage services companies, and credit card companies should not outweigh the right of citizens to a little privacy -- especially when concerning financial information.”

Another witness complained specifically about receiving solicitations from attorneys who use motor vehicle accident reports to solicit prospective clients. One e-mail said, “I believe that the state government and state agencies are entirely too free with information that should not be public.” Another answered the question of whether and to what extent home addresses and home telephone numbers of citizens should be made publicly available by public agencies as “None and NEVER.”

One witness, apparently by avocation, combs the refuse of government agencies to determine how carefully their confidential files are handled. He held up a document he declared to contain a public employee’s name, title, salary and Social Security Number. His point, colorfully made, was that confidential information should be adequately protected, in practice as well as by statute. Another witness frequently sued for access to governmental records at his own expense. He claimed to have brought more litigation against public agencies “than all the newspapers put together.”

2. Arguments in Favor of Disclosing Home Addresses and Telephone Numbers Under OPRA

Academic Expert

Professor Fred H. Cate, Professor at Indiana University School of Law-Bloomington, submitted written comments and testified before the Commission regarding his assertion that no constitutional privacy right attached to home addresses and home telephone numbers.¹⁷ He stated that the constitution does not prohibit public access to home addresses and telephone numbers in government records. In fact, he stated that the Constitution permits and even encourages public access to such information. He further stated that assertions to the contrary are “incorrect as a matter of law.”

¹⁶ The Financial Services Modernization Act (“Gramm-Leach-Bliley”), 15 U.S.C. § 6801 (1999) (establishes “notice and opt-out” as the standard for protecting financial privacy). The witnesses that cited it urged New Jersey to adopt “opt-in” as a better standard, stressing that home address information should not be disclosed without the resident’s express consent.

¹⁷ Professor Cate is a distinguished professor and director of the Center for Cybersecurity Research at Indiana University School of Law-Bloomington, IN. He has researched, taught and written about information privacy issues for 13 years.

Professor Cate also stated that scholars and courts have identified many rights to privacy in the Constitution.¹⁸ However, he further stated that while those rights are all important rights, most of them have nothing to do with the government's disclosure of home addresses and telephone numbers in government records. According to him, few of those rights involve privacy of information at all.

Professor Cate stated that there is only one U.S. Supreme Court case that articulates a constitutional right in the nondisclosure of information, although it does so in the context of nondisclosure *to* the government, rather than any obligation of nondisclosure *by* the government, citing Whalen v. Roe, 429 U.S. 589. He further stated that the U.S. Supreme Court has never decided a case in which it found that disclosure *to or by* the government violated the constitutional right recognized in Whalen.

Professor Cate stated that there is no right to privacy guaranteed by the Constitution that would speak in any way to the government's disclosure of home addresses. For example, he stated that the United States Court of Appeals for the Fourth Circuit struck down the Drivers Privacy Protection Act, 18 U.S.C. §§2721-2725, stating that "neither the Supreme Court nor this Court has ever found a constitutional right to privacy with respect to the type of information found in motor vehicle records. Indeed, this is the very sort of information to which individuals do not have a reasonable expectation of privacy," citing Condon v. Reno, 155 F.3d. 453, 464 (4th Cir. 1998); reversed on other grounds, Reno v. Condon, 528 U.S. 441 (2000).

Professor Cate further cited U.S. West, Inc. v. FCC, 182 F.3d 1224, 1235 (10th Cir. 1999), certiorari denied, 528 U.S. 1188 (2000), for the proposition that if government agencies decline to publish information, the agencies should have the burden to show that dissemination of the information would inflict *specific and significant harm* on individuals.

New Jersey Foundation for Open Government

The New Jersey Foundation for Open Government (NJFOG) urged the Commission to reject any sweeping ban on disclosures of home addresses. NJFOG emphasized the axiom that free speech, and by extension open public records, are essential for representative democracy. NJFOG stated that to ban the disclosure of home addresses would undermine OPRA and impair the ability of the news media to do investigative reporting. The organization's representative stated that for example, to redact home addresses "would make it difficult to determine if the Mary Williams who contributed \$1,000 to the county sheriff's election campaign is the same Mary Williams who billed the sheriff's department for \$10,000 in consulting fees last year." NJFOG further stated that OPRA has been in effect for a year and there have been no significant privacy intrusions reported in the media.

Regarding home addresses, NJFOG pointed out that only a minority of states restrict disclosure and, within that minority, home addresses are protected only for discrete groups such as judges and law

¹⁸ Professor Cate stated that the rights of privacy in the Constitution include the rights to be free from unreasonable searches and seizures by the government, to make decisions about contraception, abortion, and other "fundamental" issues such as marriage, procreation, child rearing, and education, the rights to disclose certain information to the government, to associate free from government intrusion, and to enjoy one's own home free from intrusion by the government, sexually explicit mail or radio broadcasts, or other intrusions.

enforcement officers. NJFOG argued that the disclosure of home addresses is significantly less intrusive than the disclosure of Social Security Numbers, and further stated that most people do not seem to attach much value to the privacy of their home addresses since commercial telephone directories routinely publish this information.

NJFOG also stated that it believes that the redaction of home addresses from government records is a labor-intensive and costly proposition. NJFOG expressed concern that the burden of the expense might be imposed upon requestors of government records. The organization highlighted that OPRA provides that when requests involve an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that “shall be reasonable.” N.J.S.A. 47:1A-5(c). NJFOG expressed concern that “some records requests that are now considered routine could morph into requests requiring exceptional effort. In some cases, they could be delayed or denied for that reason and others - especially those involving computer records -- could become prohibitively expensive because extra programming would be needed to redact them.”

NJFOG recognized that “people, in certain circumstances, may have an interest in keeping their home address or telephone number private.” But it maintained that any suggestion that the federal or state constitution could protect this information would be “philosophically flawed, administratively impractical, unnecessarily sweeping and a serious threat to the goal of open government.”

New Jersey Press Association

The New Jersey Press Association stated that “there is no right of privacy protecting home addresses under the United States or New Jersey Constitution.”

Asbury Park Press

Two representatives of the Asbury Park Press testified on the value of home addresses to newspapers. They stated that journalists perform a critical “watchdog” function serving as the public’s eyes and ears to monitor the affairs of government. They further stated that losing access to home addresses could impair the newspaper’s ability to track sources and impede the function of newspapers in fulfilling their role that may be characterized as an essential part of the system of checks and balances on government.

The representatives also stated that the newspaper’s code of ethics requires that anonymous sources be corroborated and that this often requires checking public sources of information to ensure accuracy in reporting. They added that newspapers use home addresses as an extension of one’s name to further ensure accuracy in reporting.

Freedom of Information Center

In written testimony, the Freedom of Information Center at the University of Missouri School of Journalism argued that blanket privacy restrictions would impair government accountability.

Society of Professional Journalists

The Society of Professional Journalists submitted e-mail comments suggesting that restrictions on the disclosure of home addresses would impair news reporting.

Commercial Resellers of Government Records

Another argument in favor of disclosing home addresses is that commercial “data mining” serves compelling governmental interests. The Commission heard testimony from Reed-Elsevier, the parent company of Lexis-Nexis and the largest commercial reseller of government records (on a subscription basis) in the United States, urging the Commission not to exempt home addresses from disclosure under OPRA. They stated that the databases compiled from government records throughout the 50 states are used for many purposes, including compelling government interests such as apprehending criminal suspects, locating witnesses to crimes, and child support enforcement.

Real Estate and Title Search Professionals

Several real estate and title search companies testified that they need government records containing home addresses for the purpose of facilitating real estate transactions. They further stated that in the current market, some real estate transactions require 24-hour turnaround. They asserted that the purchase and sale of real estate requires extensive review of government records that have traditionally been open for public inspection, such as property deeds, mortgages, municipal tax assessment records, tax liens and judgment liens. These witnesses urged the Commission not to restrict these government records now.

A California company, DataTrace, testified that it is building a database from real property records it obtains from New Jersey county clerks’ offices, as well as from tax and judgment records. They stated that the database will be made available on a subscription basis and is critical to its business.

A New Jersey company, Charles Jones, LLC, indexes judgments, liens and bankruptcies, and provides advanced database management services in support of real estate transactions throughout New Jersey and the Mid-Atlantic states. Its representative specifically asked the Commission not to conclude in its final report that there could be any constitutional protection for home addresses.

A company affiliated with Charles Jones, Superior Information Services, emphasized that information from public records can be used to feed the credit reporting system, which underlies, in large measure, the economic systems of the nation. These companies urged the Commission to recommend no restrictions on the disclosure of home addresses.

Tax Collectors and Treasurers Association of New Jersey

A representative of the Tax Collectors and Treasurers Association of New Jersey, presented his organization’s concerns regarding the need for public or limited disclosure of home addresses for tax sales, foreclosures and parties of interest to real estate transactions (such as taxpayers, real estate owners and heirs, prior tax lien holders, and occupants).

Association of Municipal Assessors of New Jersey

The Association of Municipal Assessors of New Jersey emphasized the need to ensure that local assessors have the ability to ascertain home addresses from certain government records, particularly recorded property deeds. “Assessors must have an appropriate address to identify properties as a means of ensuring the fair and equitable assessment of all properties under their jurisdiction.”

New Jersey Land Title Association

A representative of the New Jersey Land Title Association addressed the Commission regarding the necessity of public or limited disclosure of home addresses for title searching and tax lien verification. He stated that title search companies use property addresses to determine whether there are judgments or liens against properties.

Geographic Information Systems Professional

The Commission also heard testimony from the coordinator of Geographic Information Systems in Somerset County. He expressed concern that OPRA “neglected to address the capabilities of new technology for using data in ways that have not been thought of before.”

Professional Investigators

The Commission received verbal and written testimony from several professional investigators, who emphasized the value of government records, and home addresses in particular, for performing services related to law enforcement. They asserted that these services include investigating insurance fraud, locating witnesses, pursuing deadbeat parents, and performing due diligence for law firms. One professional investigator characterized these services as the “front line for homeland security,” and several others cited demands for employee background checks.

The professional investigators testified that they adhere to a voluntary code of professional conduct,¹⁹ and that their state licensing requires a number of hours of security or police work. Accordingly, they characterized themselves as accountable for any misuse of personal information. One professional investigator urged the Commission to determine whether the crime of identity theft arose from the misuse of government records or some other means.

Attorneys

Nine attorneys sent letters opposing any effort to restrict access to home addresses, especially in reports of motor vehicle offenses. The attorneys stated that they use the records as a resource for offering their services to prospective clients, locating witnesses and conducting investigations.

Private Citizens and Other Comments

A business agent for the plumbers and pipe fitters’ union said he needed home addresses to uncover cheating by unscrupulous contractors. One witness expressed a desire for home addresses in

¹⁹ The self-regulatory framework of Individual Reference Services Group (IRSG) is outlined in a report to Congress: www.ftc.gov/bcp/privacy/wkshp97/irsdoc1.

firearms records, so that he could ascertain whether his neighbors owned guns. An individual testified via e-mail that the philosophy of open government compelled the disclosure of home addresses. One letter received by the Commission expressed concern that unless home addresses were disclosed, real estate transactions would have to be processed manually which would take more time and manpower thus increasing the cost of the transactions. One individual pursued an avocation of testing the responsiveness of state agencies in responding to OPRA requests, and urged the Commission to resist, on principle, any limits on open government.

One individual urged the Commission to allow volunteer organizations the opportunity to receive names and addresses from local government. He stated that “without the access to [home addresses], volunteer organizations could not continue to serve their community. This is the primary source of income through mailings requesting donations to support the organization.”

In written testimony, a landlord explained that a broad statewide rental assistance program has begun a process of requiring landlords to identify “comparable rents” when setting the rent for an assisted dwelling. In order to find such information, he stated that small landlords, in particular, require access to home addresses from government clerks.

OTHER JURISDICTIONS

All governments collect and use personal information in order to govern. Many of these records have long been open for public inspection. Democratic governments moderate the need for information with their obligation to be open to the people and to protect the privacy of individuals. In the United States, these needs are recognized in the federal and state constitutions and in various public laws.

In an effort to protect the privacy of individuals, many jurisdictions in the United States have enacted specific legislation regarding the disclosure of home addresses and home telephone numbers. They are as follows:

California. The California Public Records Act prohibits state agencies from disclosing home addresses of crime victims, judges, elected officials, state employees and utility customers. Cal. Gov’t Code § 6254.

Home addresses in voter registration records are similarly confidential, and are not permitted to be disclosed. Cal. Gov’t Code § 6254.3

The home address, telephone number, occupation, precinct number, and prior registration number provided by people who register to vote may not be released to the public. Journalists, scholars, political researchers, and other government officials may still get the information. Cal. Election Code § 2194.

Telephone companies may not include unlisted telephone numbers on lists they rent, except to collection agencies and law enforcement. Cal. Pub. Util. Code § 2891.1

Anybody renting or distributing a mailing or telephone list must obtain the user's identity and a sample of the solicitation and verify the legitimacy of the business. Users or renters of lists with children's names on them must take special precautions. Cal. Penal Code § 637.9

Colorado. State officials must keep the following records confidential but permit the individual to see his or her own file: medical and personnel files, library material, and the address and phone number of public school students. Colo. Rev. Stat. § 24-72-204(3)(a) and 24-90-119.

Florida. The Florida "Sunshine" law creates a general and very strong presumption in favor of disclosure of government records. It has no corresponding privacy statute; instead it lists some 500 exceptions to the general rule of disclosure, including exceptions as to the home addresses of specific groups of individuals: law enforcement personnel, firefighters, judges, state attorneys, managers of local government agencies, crime victims, government employees, and the spouses and children of individuals in these groups. Fla. Stat. Ann § 119.07.

Every state agency must audit and purge its publication mailing lists biennially by giving addressees the opportunity to continue or to stop receipt of the publications. Fla. Stat. Ann. § 283.28.

Illinois. Motor vehicle and driver license information may not be released to persons without a specific business reason, and there is a ten-day waiting period. Home addresses may not be released if a person has a court order of protection. The law also allows a person to "opt-out" of rentals of DMV lists for commercial mailings and requires mailing firms to disclose how they will use the lists they procure. 624 ILCS 5/2-123.

Indiana. Each state agency is required to "refrain from preparing lists of the names and addresses of individuals for commercial or charitable solicitation purposes except as expressly authorized by law or [the public records] committee." Ind. Code Ann. 4-1-6.2

Kansas. Most sales of state lists, including motor vehicle records, are prohibited. Kans. Stat. Ann. §§ 21-3914 and 74-2012.

Montana. State agencies may not rent or exchange mailing lists without the consent of the persons on the lists, except to other state agencies. Voting and motor vehicle records not included. Law enforcement not included. Individuals may compile their own lists from publicly available documents, and certain schools may use lists of license applicants. Mont. Code Ann. § 2-6-109.

Vermont. Lists compiled by public agencies, with exceptions, may not be disclosed if that would violate a person's right to privacy or would produce private gain. Vt. Stat. Ann. title 1 § 317(10).

Washington. "The work and home addresses, other than the city of residence, of a person shall remain undisclosed" by state agencies if a person says in writing that disclosure would endanger life, physical safety, or property. Wash. Rev. Code Ann. § 42.17.310 (1) (BB).

Voter registration lists are not to be used for commercial purposes. Wash. Rev. Code Ann. § 29.04.100.

Wisconsin. A state or local agency may not sell or rent lists with home addresses unless specifically authorized by statute. Wisc. Stat. Ann. Subch. IV, Ch. 19.

LEGAL ANALYSIS

1. The New Jersey Open Public Records Act and Home Addresses

OPRA favors the disclosure of public records while acknowledging the state's "responsibility and obligation" to safeguard citizens' personal information. However, OPRA does not provide a definition of "personal information" or a "reasonable expectation of privacy." Nor does it contain a general exemption for home addresses and home telephone numbers. However, certain other personal information is exempted from disclosure under OPRA, including Social Security Numbers, credit card numbers, unlisted telephone numbers and drivers license numbers.²⁰ The statute mandates that records custodians redact this information from government records disclosed pursuant to OPRA requests.²¹

OPRA also provides an exemption for personal information that is protected from disclosure by other state or federal statutes, regulations, or executive orders.²² For example, OPRA may not be used to obtain the residential home address of an individual who has obtained protection through the state's Address Confidentiality Program.²³

Conversely, OPRA specifically provides for the public disclosure of some home addresses, such as the residence of crime victims and criminal defendants listed in reports of criminal investigations.²⁴ However, this provision instructs records custodians to consider "the safety of the victim and the victim's family, and the integrity of any ongoing investigation" before disclosing such information.²⁵ It also provides that "where it shall appear that the information requested or to be examined will jeopardize the safety of any investigation in progress or may be otherwise inappropriate to release, such information may be withheld."²⁶ Additionally, OPRA provides that no

²⁰ N.J.S.A. 47:1A-1.1.

²¹ N.J.S.A. 47:1A-5.

²² N.J.S.A. 47:1A-9.

²³ The Address Confidentiality Program, N.J.S.A. 47:4-1 et seq., allows victims of domestic violence to use an alternate address for all state and local governmental purposes, including driver's licenses and registration, professional licensing, banking and insurance records, welfare, etc. New Jersey laws also enable victims of domestic violence to vote without revealing their addresses, N.J.S.A. 19:31-3.2. Victims of sexual assault and stalking may use an alternate address on their driver's license and registration. N.J.S.A. 39:3-4.

²⁴ N.J.S.A. 47:1A-3(b).

²⁵ Id.

²⁶ Id.

criminal convict should be granted access to information about the convict's victim, including the victim's home address.²⁷

The Commission observes an apparent contradiction regarding the accessibility of a crime victim's home address under OPRA. Although the statute provides that "a custodian shall not comply with an anonymous request for a government record which is protected under the provisions of this section,"²⁸ for practical purposes, records custodians cannot determine whether the individuals identified in the records have ever been victims of crimes. Furthermore, records custodians cannot readily discern whether requestors are criminal convicts, especially in light of the fact that OPRA permits anonymous records requests. Therefore, it may be practically impossible to completely comply, at least in the case of anonymous requests, with OPRA. However, Recommendation 4.b. provides a resolution to this situation by identifying crime victims on all new government forms and applications, and not disclosing their home addresses pursuant to OPRA requests.

Thus, OPRA currently provides divergent treatment regarding the public disclosure of home addresses of individuals contained in government records.

2. Governor McGreevey's Executive Orders 21 and 26

The state's treatment of home addresses and home telephone numbers has been the subject of debate since OPRA was enacted. Shortly after the new statute came into effect, the Governor issued Executive Order 21, which, among other things, directed public agencies not to disclose home addresses or home telephone numbers.²⁹ The Order stated that "the Open Public Records Act does not afford county and local governments with any means for exempting access to their records, even where the public interest or a citizen's reasonable expectation of privacy would clearly be harmed by disclosure of those records." Executive Order 21 was later rescinded and replaced by Executive Order 26, which restored access to home addresses and publicly listed telephone numbers, but directed the Privacy Study Commission to analyze and report on this issue.³⁰

The Legislature (through OPRA) and Governor McGreevey (through Executive Orders 21 and 26) express concern over violating a citizen's reasonable expectation of privacy through the disclosure of personal information like home addresses and home telephone numbers. However, both acknowledged the need for additional study and understanding of what a "citizen's reasonable expectation of privacy" means in the context of the potential disclosure of this information pursuant to OPRA requests for government records.

The Commission's recommendations were developed in light of the statutory and judicial interpretations of an individual's reasonable expectation of privacy in home addresses and home telephone numbers, as well as policy considerations concerning the same.

²⁷ N.J.S.A. 47:1A-2.2.

²⁸ N.J.S.A. 47:1A-2.2(c).

²⁹ Executive Order 21, dated July 8, 2002, may be found at the following website: <http://www.state.nj.us/infobank/circular/eom21.shtml>.

³⁰ Executive Order 26, dated August 13, 2002, may be found at the following website: <http://www.state.nj.us/infobank/circular/eom26.shtml>.

3. Reasonable Expectation of Privacy in Home Addresses and Telephone Numbers

OPRA, in its legislative findings, declares “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.”³¹ Because an individual’s “reasonable expectation of privacy” in home addresses is not explicitly defined in OPRA, the Commission turned to interpretations in federal statutes and judicial decisions for guidance.

a.) Statutory Interpretations of “Reasonable Expectation of Privacy” Regarding the Disclosure of Home Addresses

The federal government addresses the need for “open government” through its Freedom of Information Act (FOIA)³² which generally provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions or by one of three special law enforcement record exclusions. Of those exemptions and special exclusions, one exemption is for “private matters” and another is for “other statutes,” including the Privacy Act (discussed below). Thus, although the goal of FOIA is full disclosure of government records, Congress concluded that some confidentiality is necessary.

FOIA is an information disclosure statute that, through its exemption structure, strives to strike a balance between information disclosure and nondisclosure, with an emphasis on the fullest responsible disclosure. Inasmuch as FOIA’s exemptions are discretionary, not mandatory,³³ agencies may make discretionary disclosures of exempt information, as a matter of their administrative discretion, where they are not otherwise prohibited from doing so.

Congress later enacted the Privacy Act to complement FOIA.³⁴ After extensive hearings and careful consideration of how best to protect privacy in an era of automated information systems, Congress passed the Privacy Act of 1974.³⁵ It is the most comprehensive privacy law in the United States.³⁶ The purpose of the Privacy Act is to balance the federal government’s need to maintain information about individuals with the rights of individuals to be protected against unwarranted

³¹ N.J.S.A. 47:1A-1.

³² Freedom of Information Act (FOIA), 5 U.S.C. §552.

³³ See Chrysler Corporation v. Brown, 441 U.S. 281, 293 (1979); Bartholdi Cable Co. v. FCC, 114 F.3d 274, 282 (D.C. Cir. 1997) (FOIA’s exemptions simply permit, but do not require, an agency to withhold exempted information).

³⁴ Freedom of Information Act (FOIA), 5 U.S.C. § 552. The Privacy Act, 5 U.S.C. §552a, was adopted with amendments to FOIA in 1974.

³⁵ Privacy Act of 1974, 5 U.S.C. § 552a (1974).

³⁶ The United States Department of Justice has characterized the Privacy Act as a statute that is difficult to decipher and apply due to its imprecise language, limited legislative history, and somewhat outdated regulatory guidelines. U.S. Dept. of Justice, “Overview of the Privacy Act of 1974, May 2002 Edition” (last updated December 11, 2003).

invasions of their privacy stemming from federal agencies' collection, maintenance, use and disclosure of personal information.

The Privacy Act focuses on four basic policy objectives:

- (1) To restrict disclosure of personally identifiable records maintained by agencies.
- (2) To grant individuals increased rights of access to agency records maintained on them.
- (3) To grant individuals the right to seek amendment of agency records maintained on them upon a showing that the records are not accurate, relevant, timely or complete.
- (4) To establish a code of "fair information practices" which requires agencies to comply with statutory norms for collection, maintenance, and dissemination of records.

The New Jersey Supreme Court has looked to FOIA and the Privacy Act for guidance in cases interpreting the "Right To Know Law"³⁷ and the Common Law Right to Know³⁸. See, e.g., Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 50 (1995); McClain v. College Hospital, 99 N.J. 346, 356 (1985). The Commission similarly looks to these statutes and the court decisions interpreting them for guidance in discerning the "reasonable expectation of privacy" articulated in OPRA.

As a starting point, we turn to the U.S. Supreme Court which has stated that individuals have a reasonable expectation of privacy with respect to their home addresses. Reading FOIA and the Privacy Act together, the Supreme Court explained this point in United States Dep't of Defense v. Fair Labor Relations Authority, 510 U.S. 487 (1994), as follows:

It is true that home addresses are publicly available through sources such as telephone directories and voter registration lists, but in an organized society, there are few facts that are not at one time or another divulged to another...An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information is made available to the public in some form ... Id. at 500. "We are reluctant to disparage the privacy of the home,

³⁷ The predecessor to OPRA was known as the "Right to Know Law." P.L. 1963, c.73 (C.47:1A-1 et seq.). The old statute provided limited access to records that were "required by law to be made, maintained or kept on file."

³⁸ The alternative method to using OPRA to obtain non-public government records involves litigating for a right to access. A body of case law, historically known as the "Common Law Right to Know," generally provides broader access to government records, but requires a judicial balancing test. The balancing test requires that the documents are government records, the requestor have a good reason to inspect the records, and the requestor's reasons for inspecting the records outweigh the state's interest in confidentiality. See Irval Realty, Inc. v. Board of Public Utility Commissioners, 61 N.J. 366, 294 A.2d 425 (1972). OPRA specifically provides that it is not to be construed to limit this common law right of access to government records. N.J.S.A. 47:1A-8.

which is accorded special consideration in our Constitution, laws and traditions.” Id. at 501.

b.) Judicial Interpretations of “Reasonable Expectation of Privacy” Regarding the Disclosure of Home Addresses

i. U.S. Supreme Court

The U.S. Supreme Court has not yet positively ruled on a constitutional right in the nondisclosure by the government of bare home addresses in government records. However, the court has recognized a constitutional right of privacy in the nondisclosure of certain personal information. Further, the court has only upheld that right, thus shedding light on what is meant by “a reasonable expectation of privacy in personal information” generally, in one instance.

In Whalen v. Roe, 429 U.S. 599 (1977), the court held that the constitutionally protected zone of privacy included the individual interest in avoiding disclosure of personal matters. Id. However, the court held that a state statute requiring that copies of prescriptions for certain drugs be provided to the state did not infringe on individuals’ interest in nondisclosure.

Similarly, in Nixon v. Administrator of General Services, 433 U.S. 425 (1977), the court held that President Nixon had a constitutional privacy interest in the personal records of his conversations with his family. However, the court also held that the challenged statute that allowed government archivists to take custody of the former President’s materials for screening did not impermissibly infringe on his privacy interests.

Conversely, the court has held that even a decedent’s family’s privacy interest outweighed public interest in disclosure of personal information and positively held for the nondisclosure of certain death-scene photographs of the decedent. See National Archives and Records Administration v. Favish, 124 S. Ct. 1570 (March 30, 2004).

ii. U.S. Court of Appeals for the Third Circuit

The U.S. Court of Appeals for the Third Circuit (the federal appeals court that governs New Jersey), unlike the U.S. Supreme Court, has specifically held in Megan’s Law cases that there are privacy interests in home addresses. In Paul P. v. Verniero, 170 F.3d 396, 404 (3d Cir. 1999), the court concluded that case law reflects the general understanding that home addresses are entitled to some privacy protection, whether or not so required by a statute. Id. at 404. The court also held that even sex offenders have a non-trivial privacy interest in their home addresses.³⁹ Id. (quoting Dep’t of Defense at 501). However, the court also held that Megan’s Law does not violate sex offenders’

³⁹ See also A.A. v. New Jersey, 341 F.3d 206 (3d Cir. 2003). In this Megan’s Law case, the court held that (1) sex offenders’ right of privacy in their home addresses gave way to the state’s compelling interest to prevent sex offenses, (2) the state’s internet publication of their home addresses did not violate offenders’ constitutional privacy rights, and (3) the state’s compilation of information on them, including offenders’ names, ages, race, birth date, height, weight, and hair color, did not violate offenders’ constitutional right to privacy.

constitutional right to privacy, either by requiring disclosure of home addresses⁴⁰ or on the ground that required disclosures may place a strain on sex offenders' family relationships⁴¹.

This court also articulated the common law balancing test used to determine whether an individual's privacy interest outweighs the public's interest in disclosure in United States v. Westinghouse Electric Corp., 638 F.2d 570 (3d Cir. 1980). Specifically, the court stated that:

The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access. Id. at 578.⁴²

While OPRA does not mandate this common law balancing test nor allow records custodians to inquire into the reason an individual has requested a particular government record, this analysis is instructive in an understanding of the meaning of a reasonable expectation of privacy regarding the disclosure of home addresses.

iii. New Jersey Supreme Court

The New Jersey Supreme Court has yet to rule on a case involving the public disclosure of bare home addresses in open government records. However, the court has addressed the public disclosure of an individual's home address when coupled with other personally identifiable information in the Megan's Law case of Doe v. Poritz, 142 N.J. 1, 84 (1995). The court's ruling and reasoning provides guidance into an understanding of an individual's reasonable expectation of privacy regarding the disclosure of home addresses.

In Doe, convicted sex offenders sought to enjoin enforcement of sex offender registration and community notification statutes (Megan's Law). The court held that public disclosure of sex offenders' home addresses, together with other information disclosed, *implicated a privacy interest* even if all the disclosed information may have been separately available to the public from other sources.

However, the court highlighted the distinction between merely providing access to information and compiling and disclosing that information. In particular, the court stated that it believed a privacy interest is implicated when the government assembles those diverse pieces of information – name, appearance, address, and crime – into a single package and disseminates that package to the public, thereby ensuring that a person cannot assume anonymity (as was required under the community notification law). Id.

⁴⁰ Id.

⁴¹ Id. at 405

⁴² These factors are included in Recommendation 4.a. "Identify Categories of Records From Which Home Addresses Should and Should Not Be Disclosed."

[T]he question of whether an individual has a privacy interest in his or her *bare* address does not fully frame the issue. The more meaningful question is whether inclusion of the address in the context of the particular requested record raises significant privacy concerns, for example because the inclusion of the address can invite unsolicited contact or intrusion based on the additional information. *Id.* at 83.

In the end, the court held that the state's interest in public disclosure of sex offenders' registration substantially outweighed the offenders' privacy interest. Nevertheless, it is significant to the Commission's study of the issue that the court recognized a privacy interest in home addresses when that information is disclosed with other personally identifiable information "ensuring that a personal cannot assume anonymity."

c.) Reasonable Expectation of Privacy in Home Addresses Versus Non-Governmental Disclosure of Home Addresses

Some members of the public have objected to the nondisclosure of home addresses by government agencies due to the fact that this same information may be obtained from non-governmental sources. Therefore, those who support this position argue that an individual whose home address and home telephone number are publicly published cannot reasonably expect any privacy in such information.

Supporters of this position further hold that if a piece of information can be found anywhere in the public domain, it should also be readily available from the state through OPRA. For example, they argue that if a citizen's home address can be found in a commercial telephone directory, voter registration records, or property tax records, then there is no "reasonable expectation of privacy" in that information, and therefore the state should disclose the home address when it appears as part of any government record requested pursuant to OPRA.

Others assert that any inquiry on an online search engine (such as www.google.com) of a telephone number may provide a street address corresponding to the telephone number, and possibly even a map for locating the residence. Thus, the view holds that (at least for individuals with publicly listed their telephone numbers) there is no reasonable expectation of privacy in home addresses and home telephone numbers and so the state need not shield the same information from disclosure in government records.

Some individuals do not care if their addresses are published or disclosed by the government. However, for others it can be a matter of life or death. A vivid example of this is the murder of Rebecca Shaffer, who was killed by a stalker who obtained her address from motor vehicle records.⁴³

Others, who object to government's disclosure of home addresses, believe that such disclosure is not justified by the fact that some - or even most - people allow their home addresses and home telephone numbers to be published by non-governmental sources. As the Third Circuit explained:

⁴³ This murder prompted Congress to adopt the Drivers Privacy Protection Act, 18 U.S.C. §§2721-2725, which regulates the disclosure of personal information contained in the records of state motor vehicle departments. See Reno v. Condon, 528 U.S. 441 (2000).

The compilation of home addresses in widely available telephone directories might suggest a consensus that these addresses are not considered private were it not for the fact that a significant number of persons, ranging from public officials and performers to just ordinary folk, choose to list their telephones privately, because they regard their home addresses to be private information. Indeed, their view is supported by decisions holding that home addresses are entitled to privacy under FOIA, which exempts from disclosure personal files “the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

Paul P. v. Farmer, 227 F.3d 98, 101 (3d Cir. 2000) (quoting the Freedom of Information Act, 5 U.S.C. § 552(b)(6)). See also Remsburg v. Docusearch, 149 N.H. 148, 816 A.2d 1001 (2003) (stalker case).

Moreover, those who oppose disclosure believe that just because a piece of information is in a “public record” doesn’t mean it can be published for any purpose. Likewise, the U.S. Supreme Court explained in United States Dep’t of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), that there is a “privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public.” Id. at 767. “The compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of information. The dissemination of that composite of information infringes upon both the common law and the literal understandings of privacy [that] encompass the individual’s control of information concerning his or her person.” Id. at 763. “Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a [government-created] computerized summary located in a single clearinghouse of information.” Id. at 764. “[T]he fact that an event is not wholly ‘private’ does not mean that an individual has no interest in limiting disclosure or dissemination of the information.” Id. at 770.

d.) Standard for Recognizing a Reasonable Expectation of Privacy in Home Addresses

A question that has divided the courts and the members of the Commission is the standard for recognizing a “reasonable expectation of privacy.” One member of the Commission, for example, proposed recommending the creation of categories of individuals whose home addresses and telephone numbers would be exempt from disclosure, or alternatively recommended that records custodians be directed to deny access when there is “clear evidence of the substantial likelihood of harm or threat resulting from the disclosure of personal information.”⁴⁴

Another member, by contrast, stated that, as a municipal clerk, he believed members of the public had a reasonable expectation of privacy when they gave their personal information to his office. He agreed there should be categories of records that are accessible and non-accessible, but did not agree with the suggestion that the safety of a particular group of individuals by virtue of the nature

⁴⁴ See New Jersey Privacy Study Commission meeting minutes of September 19, 2003 at http://www.nj.gov/privacy/minutes_091903.html.

of their employment (i.e., judges and law enforcement officers) was any more important than that of another group.⁴⁵

There is a split among the circuits on this issue as well. The U.S. Court of Appeals for the Tenth Circuit held that “the government must show that the dissemination of the information desired to be kept private would inflict specific and significant harm on individuals....” in U.S. West, Inc. v. FCC, 182 F.3d 1224, 1235 (10th Cir. 1999), cert. denied, 528 U.S. 1188 (2000). The District of Columbia Circuit came out the other way on a very similar issue, holding that the government may restrict disclosure of people’s names and addresses in spite of a corporation’s First Amendment claim of entitlement to the information. Trans Union Corporation v. FCC, 245 F.3d 809, petition for rehearing denied, 267 F.3d 1138 (D.C. Cir. 2001).

Even under a “clear evidence of substantial likelihood of harm” standard, home addresses have a constitutional dimension. In Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998), for example, the defense attorney for some drug dealers sought names and addresses from the personnel files of the police officers involved in the arrests. The court held that release of the information invaded the police officers’ privacy because it exposed them to a substantial risk of harm. Not only did it implicate their fundamental interest in personal safety, it violated constitutional rights. “The City’s release of private information ... rises to constitutional dimensions by threatening the personal security and bodily integrity of the officers and their family members.” Id. at 1064. The information extended beyond addresses, but the court’s reasoning suggests that the primary concern giving rise to the privacy interest was the officers’ safety, and it is the address information that is central to this safety concern.

CONCLUSION

The Commission believes that in some cases disclosure under OPRA of personally identifiable information such as home addresses may violate a citizen’s reasonable expectation of privacy.⁴⁶ People who do not want their home addresses released have limited means for preventing disclosure, and little recourse once the disclosure has been made. The Legislature has specifically articulated in OPRA its intention of not forcing individuals to sacrifice their privacy as a condition of doing business with the government when it stated 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.”⁴⁷ Likewise, Governor McGreevey articulated the same intention in Executive Orders 21 and 26.

The Commission believes an individual’s reasonable expectation of privacy in his or her home address and telephone number may be violated in certain circumstances when the government

⁴⁵ See New Jersey Privacy Study Commission meeting minutes of September 19, 2003 at http://www.nj.gov/privacy/minutes_091903.html.

⁴⁶ Improper disclosure of information by the government is a recognized injury. See, e.g., Greidinger v. Davis, 988 F.2d 1344 (4th Cir. 1993) (voter registration system found to be unconstitutional because it required voters to disclose their Social Security Numbers publicly in order to vote).

⁴⁷ N.J.S.A. 47:1A-1.

discloses this information to the public. The potential for violating this reasonable expectation of privacy is exacerbated by the increased reliance on technology in governmental administration. Until recently, public records were difficult to access. Finding information about an individual used to involve making personal visits to local offices to locate records. But in electronic form, public records can be easily obtained and searched from anywhere. Once scattered about the country, public records are now often consolidated by commercial entities into gigantic databases.

In accordance with its mandate from Governor McGreevey, the Commission developed the following recommendations for consideration by the Governor and the Legislature:

- Home telephone numbers should not be disclosed.
- Public agencies should notify individuals that their home addresses may be disclosed pursuant to OPRA request.
- Individuals should be permitted to provide an “address of record” for disclosure purposes, in addition to their home address when interacting with public agencies.
- The Governor or Legislature should establish objective guidelines defining when and from which government records home addresses should be redacted.
- Individuals should be permitted to opt out of disclosure of their home addresses.
- In the future, computer systems and applications should be programmed to collect but not disclose home addresses and telephone numbers.

The recommendations outlined in this report are based upon statutory and judicial interpretations of an individual’s reasonable expectation of privacy regarding the disclosure by government of his or her home address and telephone number, as well as policy considerations of the same.