

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2205-12T4

PERRY BOLKIN,

Plaintiff-Respondent,

v.

BOROUGH OF FAIR LAWN and  
JOANNE M. KWASNIEWSKI,  
in her official capacity  
as the Municipal Clerk  
and Records Custodian of  
Borough of Fair Lawn,

Defendants-Appellants.

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Submitted April 1, 2014 – Decided June 16, 2014

Before Judges Messano and Hayden.

On appeal from the Superior Court of New  
Jersey, Bergen County, Docket No. L-6547-02.

Ronald P. Mondello, P.C., attorneys for  
appellants (Mr. Mondello, on the brief)

Walter M. Luers, attorney for respondent.

PER CURIAM

Plaintiff Perry Bolkin filed a verified complaint against  
the Borough of Fair Lawn (Fair Lawn) and its municipal clerk,  
Joanne M. Kwasniewski (collectively defendants), alleging  
violation of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-

1 to -13. Plaintiff claimed he had requested that defendants provide him with "the names and addresses of pet owners in . . . Fair Lawn." Defendants denied the request, claiming that disclosure would violate the pet owners' reasonable expectations of privacy. Defendant's denied plaintiff's modified request, which sought "all dog and cat applications on file, or all dog and cat licenses on file, or a list of all licensed dog and cat owners, if it exist[ed]," on the same grounds. The Law Division entered an order to show cause why plaintiff was not entitled to the requested relief and counsel fees.

Defendants filed an answer, along with certifications from Fair Lawn residents who objected to having their status as pet owners disclosed. Judge Peter E. Doyne, A.J.S.C., heard oral argument on plaintiff's complaint.

Counsel explained that plaintiff, a resident of Fair Lawn and a member of the League of Humane Voters (LOHV), requested the information in order to send pet owners political literature informing them of policy positions espoused by various candidates for office. Plaintiff wanted only the "names and the addresses" of license holders, and agreed that any records furnished by defendants could be redacted to exclude more personal information, such as the breed of dog or cat, or the age of the owner.

Defendants specifically argued that "public disclosure of . . . home address[es] . . . implicate[d] privacy interest[s]." The certifications supplied by pet-owning citizens sounded common themes: they never anticipated public disclosure of their home addresses when they applied for a license; they did not want to receive political solicitations; and they feared potential theft of their identities. A certification supplied by Fair Lawn's Chief of Police stated that disclosure would frustrate the purpose of those who owned dogs for security reasons.

In his comprehensive written opinion, Judge Doyne initially concluded that pet license applications were "government records for purposes of OPRA."<sup>1</sup> The judge then balanced public disclosure, as required by OPRA, against the privacy interests of license holders. He considered the factors identified by the Court in Burnett v. County of Bergen, 198 N.J. 408 (2009), specifically

(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

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<sup>1</sup> The judge noted that the parties stipulated to redacting the following information from the applications: "pet breeds, SSN (if present), nature of the ownership (i.e., whether the dog is used for protection, disability, etc.), the age or other descriptive data of the owner or pet, or any other data that was not merely the name and address of the owner."

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 v. Poritz, 142 N.J. 1, 88 (1995)).]

Judge Doyne found the first two factors favored disclosure, since "[n]ames and addresses are not exempt from disclosure under OPRA, and disclosure of this information should be favored barring significant concerns under the remaining factors." Addressing factor three, the judge noted that "plaintiff consented to retaining the information only for his personal use and distribution . . . ." Regarding the fourth factor, Judge Doyne concluded that "[t]he disclosure, while potentially causing . . . possible nuisance due to unwanted solicitation, does not include extremely personal or private information that would . . . discourage an individual from owning, and properly licensing, a dog or cat."

The judge concluded that the fifth factor was "of little concern[,]" because the information, i.e., names and addresses, was readily available and "has historically been available to

the public."<sup>2</sup> Concerning the sixth factor, Judge Doyne reasoned that discussion of views held by political candidates was "surely in the public interest." Finally, regarding the seventh factor, the judge noted that "as there appear[ed] to be no strong reason supporting denial of the information, the Legislature's overarching intention to favor OPRA and disclosure . . . must prevail." Judge Doyne concluded that "because the privacy concerns of the individuals . . . are outweighed by the overall public interest in disclosure through OPRA, defendant[s] must disclose the requested names and addresses."

On December 14, 2012, the judge entered an order that required defendants to provide plaintiff with "the names and addresses of people who submitted cat and dog applications in Fair Lawn and acquired licenses[,]" with all other personal identifiers redacted. By consent, plaintiff agreed not to provide the information "to any other person or entity and [to] limit his use of such information to written communications through the mail[.]" The order also provided that LOHV would be permitted to access the information only upon "application duly

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<sup>2</sup> Judge Doyne cited Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 41-42, 55 (1995), where the Court held that the common-law right of public access applied to a computer copy of the county's tax-assessment list, which included the street address and assessed value of parcels, as well as the name and address of the owner and whether the owner was entitled to a deduction or exemption as a senior citizen, veteran or disabled veteran.

filed with th[e] [c]ourt" and agreement to similar restrictions on its use. Lastly, the order awarded counsel fees in an amount to be determined if the parties could not otherwise "agree to a reasonable amount."<sup>3</sup>

Before us, defendants contend that Judge Doyne erred because the disputed records are exempt from disclosure under OPRA's "privacy exception," and plaintiff has no "common law right of access" to the records. Defendants also argue that the license holders' due process rights entitled them to notice of the hearing and a right to be heard. Lastly, defendants contend that we should reverse the order under review, or at least stay our decision, because of legislation introduced that would exempt the names and addresses of pet license holders from OPRA and the common-law right to access public records.

We have considered these arguments in light of the record and applicable legal standards. We affirm substantially for the reasons expressed by Judge Doyne. We add only the following comments.

"OPRA's purpose is 'to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Mason v.

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<sup>3</sup> The parties agreed to stay the order pending appeal. By subsequent order dated January 25, 2013, the parties also resolved the issue of counsel fees.

City of Hoboken, 196 N.J. 51, 64-65 (2008) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). "To bring about that purpose, OPRA declares that 'government records shall be readily accessible . . . by citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access . . . shall be construed in favor of the public's right of access.'" Id. at 65 (emphasis added) (quoting N.J.S.A. 47:1A-1).

Defendants concede that the names and addresses of pet license holders are "government records" pursuant to N.J.S.A. 47:1A-1.1, and they are not specifically exempt from disclosure under OPRA. They argue that these records, however, are not the "type and kind of government documents" that reflect OPRA's overriding purpose for disclosure, and that OPRA recognizes "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.

The Court has said that this privacy provision "is neither a preface nor a preamble[.]" but rather "part of the body of the law." Burnett, supra, 198 N.J. at 422-23 (citations omitted).

In harmonizing this language with other portions of OPRA requiring disclosure, the Court adopted "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." Id. at 427. The Doe/Burnett balancing test "must be applied case by case," with different factual circumstances potentially compelling different results. Id. at 437.

Defendants essentially contend that Judge Doyne misapplied the Burnett balancing test. We disagree. In our judgment, the judge carefully considered the issues presented, balanced the interests at stake, and properly concluded that disclosure, with appropriate redaction, was required by OPRA.<sup>4</sup> Having reached this conclusion, we need not consider defendants' argument regarding the common-law right to access public records.

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<sup>4</sup> The parties brought to Judge Doyne's attention, and now to ours, an unpublished decision of our colleagues, Atl. Cnty. SPCA v. City of Absecon, A-3047-07 (App. Div. June 5, 2009), which addressed nearly identical factual circumstances. There, after considering the Doe/Burnett balancing factors, the panel concluded that the "twin aims of public access and protection of personal information favor disclosure of the names and addresses of individuals possessing dog licenses issued by the City." Id. (slip op. at 18-19). The panel compelled redaction of "unlisted telephone numbers" and other "personal identifier[s]." Id. (slip op. at 19). While the decision is not precedential, see R. 1:36-3, we find its reasoning persuasive.



Defendants also argue that licensed pet owners in Fair Lawn were denied due process because they were not provided with notice and an opportunity to be heard before the Law Division. However, defendants never raised this issue below. In fact, Judge Doyne specifically asked if Fair Lawn had provided notice, since only they had the names and addresses of the license holders and, thus, were the only parties who could have provided notice. Defense counsel responded in the negative and never asserted that the hearing should be adjourned to permit such notice. "It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229, 234 (1973) (citation omitted). Although the issues in this case involve the public interest, we decline to consider defendants' argument presented for the first time on appeal.

Lastly, defendants argue we should reverse the order under review, or stay issuing our decision, pending the Legislature's consideration and presumed passage of S-2819 (2013), which was introduced by Senator Robert M. Gordon, whose district includes

Fair Lawn. The proposed legislation provides that any "portion of a personal government record which discloses any personal information, including the name and address, of any person[,]" is exempt from OPRA. A "[p]ersonal government record" is defined in the bill as "a government record that pertains solely to a pet or home alarm system permit, license, or registration."

Defendants never moved to stay appellate proceedings. Moreover, they cite no authority for the proposition that the mere introduction of a piece of Legislation should compel a stay. Additionally, our review of the legislative history of S-2819 reveals that, although the bill was referred to committee, no further action was taken. See New Jersey Legislature, Bill Search of S-2819 (2012-2013), <http://www.njleg.state.nj.us> (last visited June 6, 2014). To our knowledge, no similar bill has been introduced during the current legislative session, which began in January 2014.

We contrast this legislative inactivity with the enactment of L. 2013, c. 116, which became effective on August 8, 2013, after Judge Doyme's decision. That legislation exempted two additional categories of government records from OPRA's disclosure requirements, specifically, "personal firearms records" and "personal identifying information received by the Division of Fish and Wildlife . . . in connection with the

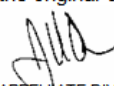
issuance of any license authorizing hunting with a firearm." N.J.S.A. 47:1A-1.1 (2013). Notably, when introduced as A-3788 (2013), the bill also included a proposed amendment to OPRA's privacy provision, N.J.S.A. 47:1A-1, that would have added the following underlined language:

[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 and to safeguard from public access information when disclosure thereof would jeopardize personal or public safety[.]

The Legislature, however, chose not to amend the privacy provision when it enacted L. 2013, c. 116.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

  
CLERK OF THE APPELLATE DIVISION