

NOT TO BE PUBLISHED WITHOUT  
THE APPROVAL OF THE COMMITTEE ON OPINIONS

WILLIAM J. BRENNAN,

*Plaintiff,*

v.

BERGEN COUNTY  
PROSECUTOR'S OFFICE; FRANK  
PUCCIO, CUSTODIAN OF  
RECORDS FOR THE BERGEN  
COUNTY PROSECUTOR'S OFFICE;  
and JOHN DOES 1-10, BEING  
AGENTS, SERVANTS, AND  
EMPLOYEES OF EACH AS A  
CONTINUING INVESTIGATION  
MAY REVEAL (WHO ARE  
FICTITIOUSLY NAMED BECAUSE  
THEIR IDENTITIES ARE  
UNKNOWN),

*Defendants.*

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

BERGEN COUNTY

DOCKET No. BER-L-20832-14

CIVIL ACTION

OPINION

**Argued: February 20, 2015**

**Decided: February 25, 2015**

**Honorable Peter E. Doyne, A.J.S.C.**

Donald F. Burke, Esq. appearing on behalf of the plaintiff, William J. Brennan (The Law Office of Donald F. Burke).

John M. Carbone, Esq. appearing on behalf of the defendants, Bergen County Prosecutor's Office, Frank Puccio and John Does 1-10 (Carbone & Faasse).

**Introduction**

Presented is an application filed by counsel for plaintiff, William J. Brennan ("plaintiff" or "Brennan") against defendants, the Bergen County Prosecutor's Office, Frank Puccio and John

Does 1-10 (the “BCPO,” “Puccio” or “John Does” when referenced individually, “defendants” when referenced collectively). Plaintiff sought a judgment finding defendants in violation of the Open Public Records Act, N.J.S.A. 47:1A-1 to -13 (“OPRA” or the “Act”), directing them to release the requested documents, awarding attorney’s fees and costs, and granting any other relief the court may deem just and equitable. Plaintiff also sought similar relief by way of the common law right of access to government records, the New Jersey Constitution (the “Constitution”) and the New Jersey Civil Rights Act (the “Civil Rights Act”).

**Facts/ Procedural History**

This matter arises from the partial denial of plaintiff’s OPRA request. On December 9, 2014, plaintiff, a resident and citizen of New Jersey, submitted the following request for records to the BCPO upon information and belief that office had seized baseball memorabilia from one William Stracher (“Stracher”) after prosecutors asserted he illegally sold prescription drugs:

Dear Mr. Molinelli:

In accordance with the Open Public Records Act and my common law right to access public records, I hereby request the following public records:

1. Records of payment received from all winning bidders on sports memorabilia items auctioned by your office on 05/03/2014 at the Bergen County Law & Public Safety Institute, Hall of Heroes Auditorium, 281 Campgaw Road in Mahwah, NJ 07430.
2. Contact information for each winning bidder of items auctioned by your office or agents on that date.
3. Contract between your office and the auctioneer conducting the aforementioned auction.
4. Records of bid submissions, price quotes and documents relevant to the award of a contract to auction material on behalf of your office.

I prefer to receive these public records electronically however if you are unable to produce these records in an electronic format I will accept them in a format that complies with OPRA. I authorize a charge of up to \$100.00 for the processing of my request, if the cost of processing my request exceeds \$100 please contact me via e-mail before processing this request.

Thank you in advance for your prompt attention to this matter.

Sincerely,

William Brennan  
14 Iowa Road  
Wayne, NJ 07470

On December 10, 2014, Puccio, in his capacity as the Custodian of Records for the BCPO, responded on behalf of that office to plaintiff's OPRA request, stating:

December 17, 2014

William Brennan  
14 Iowa Road  
Wayne, NJ 07470  
Via E-mail: firemanbrennan@yahoo.com [sic]

Re: Request for Public Records

Dear Mr. Brennan:

This is in response to your request for public records dated 12-09-14, which this office received on 12-09-14, and in which you requested four sets of records. I address each set of records separately.

**Item 1: Records of payment received from all winning bidders on sports memorabilia items auctioned by your office on 05/03/2014 at the Bergen County Law & Public Safety Institute, Hall of Heroes Auditorium, 281 Campgaw Road in Mahwah, NJ 07430**

The May 3, 2014, auction was conducted both live and online. Live bidders completed a numbered registration form that requested their name, address, telephone number and e-mail address. Each live bidder was then given a paddle bearing the number that was on their registration form. Online bidders were

also assigned a paddle number. Bidding was then conducted anonymously, by paddle number. A winning live bidder (buyer) was given a receipt that only listed their paddle number, listed as the buyer number. The receipt does not contain the buyer's name, address or any other identifying information. A winning online bidder (buyer) was sent an online receipt that listed the paddle number on the right and the buyer's name and address on the left.

I have placed the receipts for all live buyers (those receipts do not list names, etc.) and the online receipts for all online buyers with the names and addresses redacted on a compact disc. Since the bidding process was conducted anonymously, we are concerned that the buyers had no reasonable expectation of their identifying information ever being made public. You may be aware that Prosecutor Molinelli has already alerted the buyers to the recent reports regarding the auctions and the availability of refunds. (An unaddressed copy of his December 12, 2014 letter to the buyers is on the compact disc). Additionally, today we have sent a letter (unaddressed copy on the compact disc) to each buyer advising them of our receipt of Open Public Records Act requests for records that disclose their identity. We have requested that each buyer inform us by December 30, 2014 whether they consent to our releasing their identifying information. For all buyers who consent, we will then provide you with the registration form or unredacted online receipt. As to buyers who do not consent to the release of their personal information, we will be compelled to continue to keep that information confidential consistently with *N.J.S.A. 47:1A-1*. I anticipate advising you how the buyers have responded on either Friday, January 2, 2015, or Monday, January 5, 2015. There may be one exception to this time line [sic]. The auction was conducted for the Prosecutor's Office by an auctioneer. To comply with Item 1 above, we have had to obtain the relevant records from the auctioneer. As of the time of this writing, the auctioneer has been unable to locate the registration forms for Buyers 1, 8 and 30. The auctioneer has provided the receipts for those buyers and the receipts are included in the material provided to you. As soon as the auctioneer locates the registration forms for those buyers and provides them to this office, I shall send those buyers the same letter regarding the release of their personal information and proceed accordingly. I shall keep you informed of the process toward obtaining these registration forms. Because all the buyers may consent to the release of their personal information and render the issue moot, I have not fully elaborated on their expectation of privacy pursuant to OPRA. Nor have I addressed your access to that information under the common law. Should a buyer or buyers object to the

release of their information and the issue become ripe for argument, I shall provide you with a more detailed basis of the denial.

**Item 2: Contact information for each winning bidder of items auctioned by your office or agents on that date**

The Open Public Records Act (OPRA) provides for access to specifically identifiable government records, not to information. *MAG Entertainment, LLC v. Division of Alcoholic Beverages Control*, 375 N.J. Super. 534 (2005). Accordingly, this request is denied.

**Item 3: Contract between your office and the auctioneer conducting the aforementioned auction**

There was no contract specifically to conduct the auction that occurred on May 3, 2013. Rather, there was an overall contract to conduct auctioneering services for this office at that time as described in Item 4. Because the bid specifications are so detailed, the contract itself is often a one or two page document that largely references the bid specifications. As an example, I have provided the contract for the period August 3, 2005 through August 2, 2006. At the time of this writing, personnel in the county counsel and county purchasing divisions (where the contracts are kept) are attempting to locate the contract for the period covering May 3, 2013. As soon as they provide it to me, I shall forward it to you.

**Item 4: Records of bid submissions, price quotes and documents relevant to the award of a contract to auction material on behalf of your office**

The contract to conduct auctions on behalf of this office during 2013 was awarded pursuant to Bid No. 11-89 and Resolution No. 1071-11 on September 7, 2011.

The award was for the period September 7, 2011 through September 6, 2012 with an option for two, one year renewals. Caspert Management Co., Inc. was the only bidder. A copy of the bid, labeled "Bid 11-89" (31 pages) and Caspert's submission, labeled "Caspert Bid" (32 pages) are included on the compact disc in **PDF** format.

The cost for the compact disc is \$1.25. If you would like to obtain it by mail, please send a check in that amount made payable to the

County of Bergen to Assistant Prosecutor Thomas McGuire at the following address:

Assistant Prosecutor Thomas McGuire  
Bergen County Prosecutor's Office  
Justice Center  
10 Main Street  
Hackensack, NJ 07601

If you would like to pick up the compact disc, please contact Legal Secretary Maria Fagliari, 201-226-5148, and schedule a time to do so. Ms. Fagliari is authorized to provide the disc to you in exchange for the check. This office is not authorized to accept cash.

The Bergen County Prosecutor's Office also reserves the right to raise any other ground for denial not raised in this response. The failure of the Bergen County Prosecutor's Office to assert an exception or privilege does not act as a waiver of any ground for denial.

You have a right to appeal the decision that the document or documents are not public records or are otherwise exempt from disclosure. At your option, you may either institute a proceeding in the Superior court of New Jersey or file a complaint with the **Government Records Council ("GRC") by completing the Denial of Access Complaint Form. You may contact the GRC by toll-free telephone at 866-850-0511, by mail at PO Box 819, Trenton, NJ 08625, by e-mail at [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us), or at their web site at [www.state.nj.us/grc](http://www.state.nj.us/grc). The Council can also answer other questions about the law. All questions regarding complaints filed in Superior Court should be directed to the Court Clerk in your County.**

Very truly yours,  
John L. Molinelli  
Bergen County Prosecutor  
By:

Frank Puccio  
Executive Assistant Prosecutor

Notwithstanding his OPRA request, plaintiff never retrieved the CD-ROM from the BCPO.<sup>1</sup> Based on the substance of defendants' response, though, plaintiff asserts defendants have: (1) "unilaterally and unlawfully withheld the identities of persons who have contracted with the [BCPO] for the purchase of goods"; and (2) not yet provided the auctioneer's contract for the May 5, 2013 auction (the "auction"). In addition, plaintiff asserts defendants' response to his records request was inadequate given the statutory burden imposed upon public agencies to demonstrate the denial of access is authorized by law.

On December 26, 2014, plaintiff had filed a three-count verified complaint with an order to show cause and a memorandum of law in support of the relief requested. Respectively, the first through third counts allege violations of: (1) OPRA, (2) the common law right of access and (3) the Constitution and the Civil Rights Act.<sup>2</sup> Plaintiff sought a judgment directing defendants to release requested documents, awarding attorney's fees and costs, and granting any other relief the court may deem just and equitable.

On February 4, 2015, defendants had filed an answer in opposition to the verified complaint and a motion to partially dismiss the same, with the certification of Puccio ("Puccio Certification") and a letter brief in support of the relief requested.

On February 6, 2015, plaintiff had filed a reply in further support of the verified complaint.

Oral argument was entertained on February 20, 2015.

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<sup>1</sup> At oral argument, and for the first time, plaintiff's counsel, Donald F. Burke, Esq. ("Burke") conceded, as of the time the complaint was filed, his client had not retrieved the CD-ROM from the BCPO. The court has not been presented with any proofs suggesting plaintiff has since attempted to pick up the CD-ROM, or arranged for an alternate method of delivery.

<sup>2</sup> Although the complaint alleged violations of the Constitution and the Civil Rights Act, these claims were withdrawn by plaintiff's counsel at oral argument. Therefore, they shall not be considered.

## Legal Standards

### A. OPRA

#### 1. Generally

The purpose of OPRA, N.J.S.A. 47:1A-1 to -13, is plainly set forth in the statute: “to insure that government records, unless exempted, are readily accessible to citizens of New Jersey for the protection of the public interest.” Mason v. City of Hoboken, 196 N.J. 51, 57 (2008) (citing N.J.S.A. 47:1A-1). The Act replaced the former Right to Know Law, N.J.S.A. 47:1A-1 to -4 (repealed 2002), and perpetuates “the State’s long-standing public policy favoring ready access to most public records.” Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 36 (App. Div. 2005) (quoting Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003)). To accomplish that objective, OPRA establishes a comprehensive framework for access to public records. Mason, supra, 196 N.J. at 57. Specifically, the statute requires, among other things, prompt disclosure of records and provides different procedures to challenge a custodian’s decision denying access. Ibid.

OPRA mandates “all government records shall be subject to public access unless exempt.” N.J.S.A. 47:1A-1. Therefore, records must be covered by a specific exclusion to prevent disclosure. Ibid. The Act defines “government record” as follows:

[A]ny paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision



thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[N.J.S.A. 47:1A-1.1.]

The OPRA framework contemplates a swift timeline for disclosure of government records. Mason, supra, 196 N.J. at 57. Unless a shorter time period is prescribed by statute, regulation or executive order, a records custodian must grant or deny access to a government record “as soon as possible, but not later than seven business days after receiving the request.” N.J.S.A. 47:1A-5(i). Failure to respond within seven business days “shall be deemed a denial of the request.” Ibid. If the record is in storage or archived, the custodian must report that information within seven business days and advise when the record will be made available. Ibid.

If access to a government record is denied by the custodian, the requestor may challenge that decision by filing an action in Superior Court or a complaint with the Government Records Council (“GRC”). N.J.S.A. 47:1A-6. The right to institute any proceeding under this section, however, belongs solely to the requestor. Ibid. If the requestor elects to file an action in Superior Court, the application must be brought within forty-five days of the denial. See Mason, supra, 196 N.J. at 70 (holding, explicitly, a 45-day statute of limitations applies to OPRA actions). The Act, however, specifically provides “a decision of the [GRC] shall not have value as precedent for any case initiated in Superior Court,” N.J.S.A. 47:1A-7, though such decisions are normally considered unless “arbitrary, capricious or unreasonable, or [violative of] legislative policies expressed or implied in the act governing the agency.” Serrano, supra, 358 N.J. Super. at 362 (citing Campbell v. Dep’t of Civil Service, 39 N.J. 556, 562 (1963)).

In OPRA actions, the public agency bears the burden of proving the denial of access is authorized by law. N.J.S.A. 47:1A-6. As such, an agency “seeking to restrict the public’s right of

access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality.” Courier News v. Hunterdon Cnty. Prosecutor’s Office, 358 N.J. Super. 373, 382–83 (App. Div. 2003). Absent the necessary proofs, “a citizen’s right of access is unfettered.” Ibid. In assessing the sufficiency of the proofs submitted by the agency in support of its claim for nondisclosure, “a court must be guided by the overarching public policy in favor of a citizen’s right of access.” Ibid. If it is determined access has been improperly denied, such access shall be granted, and a prevailing party shall be entitled to a reasonable attorney’s fee. N.J.S.A. 47:1A-6.

## 2. OPRA Exemptions

Although OPRA defines “government record” broadly, the public’s right of access is not absolute. Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 284 (2009) (citing Mason, supra, 196 N.J. at 65). The statute excludes twenty-one categories of information, which are exempt from disclosure. Mason, supra, 196 N.J. at 65. Specifically, N.J.S.A. 47:1A-1 provides:

[A]ll government records shall be subject to public access unless exempt from such access by: [other provisions of OPRA]; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order.

The Supreme Court noted these protected categories include “criminal investigatory records, victims’ records, trade secrets, various materials received or prepared by the Legislature, certain records relating to higher education, and other items.” Mason, supra, 196 N.J. at 65. The Court also noted “records within the attorney-client privilege or any executive or legislative privilege, as well as items exempted from disclosure by any statute, legislative resolution, executive order, or court rule” are excluded. Ibid.

## 3. Personal Information

While OPRA favors the disclosure of government records, it also acknowledges “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 statute, however, does not define “personal information” or “reasonable expectation of privacy.” Nor does it contain a general privacy exemption. It does, though, specifically exempt certain types of personal information from disclosure, such as: social security numbers, credit card numbers, unlisted telephone numbers and driver’s license numbers. N.J.S.A. 47:1A-1.1. This personal information is to be redacted from a government record before the custodian permits access to the remainder of the document. N.J.S.A. 47:1A-5(a).

OPRA also provides exemptions for personal identifying information received in connection with the issuance of any license authorizing hunting with a firearm as well as any application to purchase a firearm. N.J.S.A. 47:1A-1.1. This information includes, but is not limited to: identity, name, address, social security number, telephone number and driver’s license number. Ibid.

In addition, OPRA provides an exemption for personal information that is protected from disclosure by any other state or federal statute, regulation or executive order. N.J.S.A. 47:1A-9. For example, OPRA may not be used to obtain the residential home address of a victim of domestic violence who is protected by the Address Confidentiality Program Act, N.J.S.A. 47:4-1 to -6. N.J.S.A. 47:4-2.

To resolve the competing interests of privacy and access, the Supreme Court has adopted the multifactorial test of Doe v. Poritz, 142 N.J. 1 (1995). Burnett v. Cnty. of Bergen, 198 N.J. 408, 427 (2009). “Although Doe considered constitutional privacy interests implicated by

Megan’s Law, it relied on case law concerning statutory privacy provisions under the Freedom of Information Act (FOIA).” Ibid. The test articulated in Doe identified the following factors:

1. the type of record requested;
2. the information it does or might contain;
3. the potential for harm in any subsequent nonconsensual disclosure;
4. the injury from disclosure to the relationship in which the record was generated;
5. the adequacy of safeguards to prevent unauthorized disclosure;
6. the degree of need for access; and
7. whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

[Ibid. (quoting Doe, supra, 142 N.J. at 88).]

#### 4. OPRA Fees

Generally, in New Jersey, a prevailing party is not entitled to attorney’s fees from the losing party. Id. at 70 (citation omitted). Fees may be awarded, however, when a statute, court rule or contractual agreement so provides. Ibid. Under OPRA, “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.” N.J.S.A. 47:1A-6. The Supreme Court, interpreting legislative revisions to the Act, has held OPRA “mandate[s] rather than permit[s], an award of attorney’s fees to a prevailing party.” Mason, supra, 196 N.J. at 75.

As the mandatory fee-shifting provision of OPRA is triggered only when a requesting party prevails, there must be a determination what constitutes a “prevailing party.” The Supreme Court has adopted a two-part test (the “catalyst theory”) to ascertain whether a requesting party has prevailed under OPRA. Id. at 76. Under this test, requestors are entitled to fees, absent a judgment

or an enforceable consent decree, when they can show: “(1) a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved; and (2) the relief ultimately secured by plaintiffs had a basis in law.” Ibid. (quoting Singer v. State, 95 N.J. 487, 495 (1984)) (internal quotation marks omitted). The Court has held requestors seeking fees are required to make this showing. Ibid.

#### B. New Jersey Common Law

In addition to OPRA, disclosure can be sought under the common law. The Act provides “[n]othing contained in [OPRA] shall be construed as limiting the common law right of access to a government record.” N.J.S.A. 47:1A-8. Thus, even if the information requested falls within one of the exceptions to access under the statutory construct of OPRA, requestors may still prevail by resorting to the common law right to access public records. To constitute a government record under the common law, the item must be:

[O]ne required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are \* \* \* that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it.

[S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 487–88 (1991) (quoting Nero v. Hyland, 716 N.J. 213, 222 (1978)).]

To reach this broader class of documents, requestors must satisfy a higher burden than required under OPRA: “(1) the person seeking access must establish an interest in the subject matter of the material; and (2) the citizen’s right to access must be balanced against the State’s interest in preventing disclosure.” Mason, supra, 196 N.J. at 67–68 (quoting Keddie v. Rutgers,

148 N.J. 36, 50 (1997)) (internal quotations and citations omitted). The Supreme Court has articulated several factors for a court to consider in performing its balancing:

(1) [T]he extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.

[S. Jersey Pub., supra, 124 N.J. at 488 (quoting Loigman v. Kimmelman, 102 N.J. 98, 113 (1986)).]

## **Analysis**

Presented is an intriguing question, among others, whether the winning bidders in a public auction have a reasonable expectation of privacy in their personal information transmitted to a public agency in connection with their participation in the auction. For the reasons set forth herein, the court finds they do not, but in light of defendants' good faith attempt to comply with the request and the state's obligation to safeguard personal information, defendants shall be afforded an additional ten days to cure the alleged infirmities.

### **A. OPRA**

#### **1. Government Records**

In order to trigger OPRA's disclosure requirements, the information sought must qualify as a "government record." N.J.S.A. 47:1A-1. The statute defines a government record broadly, in the following comprehensive fashion:

[A]ny paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof.

[N.J.S.A. 47:1A-1.1.]

Defendants assert the requested documents are not government records because they “were neither made nor received by the [BCPO] but were and are the records of Caspert Management Company.”<sup>3</sup> This argument, however, is unavailing as it is fundamentally inconsistent with OPRA’s policy favoring public access to government records. To be considered a government record, an item must be maintained or received in the course of official business by an “officer, commission, agency, or authority of the State or of any political subdivision.” N.J.S.A. 47:1A-1.1. Clearly, the Legislature intended this definition to encompass items made by or on behalf of the state. See Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 516–17 (App. Div. 2010) (holding, generally, for the proposition when a government agency delegates its functions to an agent, the records made or maintained by the agent are government records). The Burnett court continued, “[w]ere we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA.” Ibid. (citation omitted).

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<sup>3</sup> Hereinafter, Caspert Management Company shall be referred to as “Caspert.” Caspert is a private auctioneering and appraisal company that apparently contracted with the County of Bergen (the “County”) to provide auctioneering services on behalf of the BCPO.

In this case, the records sought were made and/or maintained by Caspert, on its own behalf and on behalf of the BCPO and/or the County. That they were not in the possession of the BCPO is of no moment, as Caspert was a contracting party with the BCPO and/or the County. The court is not prepared to find the requested documents are not government records simply because the BCPO delegated its recordkeeping function to a third party. Therefore, the court finds the requested documents are government records within the definition of N.J.S.A. 47:1A-1.1.

## 2. Personal Information

Once it has been determined the requested documents are government records, the public agency must point to a specific statutory exclusion to foreclose public access. N.J.S.A. 47:1A-1. OPRA excludes twenty-one categories of information from the definition of a government record. N.J.S.A. 47:1A-1.1. These protected categories include, *inter alia*, criminal investigatory records, victims' records, various materials prepared or received by the Legislature and certain records relating to higher education. *Ibid.* There is, however, no specific statutory exemption for personal identifying information. OPRA does, though, provide public agencies have a "responsibility and an obligation to safeguard from public access a citizen's personal information."

OPRA also clearly provides the burden is on the public agency to prove the denial of access is authorized by law. N.J.S.A. 47:1A-6. If an agency is unable to comply with a request for access, "the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5(g). Absent the necessary proofs, "a citizen's right of access is unfettered." *Courier, supra*, 358 N.J. Super. at 383. Moreover, in evaluating the sufficiency of the proofs in support of the agency's claim for nondisclosure, "a court must be guided by the overarching public policy in favor of a citizen's right of access." *Ibid.*



In this case, the BCPO denied plaintiff's request for "[r]ecords of payment received from all winning bidders" as it was concerned "the buyers had no reasonable expectation of their identifying information ever being made public." In support of its denial, the BCPO cited OPRA's privacy clause, N.J.S.A. 47:1A-1, but it did not reference a specific statutory exemption in favor of its assertion of nondisclosure. Rather, it promised to disclose the registration forms and/or receipts for all winning bidders who consented to the release of their personal information, to wit, their names, addresses and telephone numbers.<sup>4</sup> On January 5, 2015, nearly one month after plaintiff's request, the BCPO advised plaintiff only two buyers had consented to the release of their personal information.

The OPRA framework contemplates a swift timeline for disclosure of government records. Mason, supra, 196 N.J. at 57. A fortiori, then, it does not permit public agencies to adopt a "wait-and-see" approach to grant or deny public access. The statute provides, in relevant part: "[A] custodian of a government record shall grant access to a government record or deny a request for access to a government record within seven business days after receiving a request." N.J.S.A. 47:1A-5(i). If, however, a custodian fails to respond within seven business days, "the failure to respond shall be deemed a denial of the request." Ibid.

Although the BCPO failed to set forth a specific statutory exemption to justify its denial of access, the court is not prepared to find it violated OPRA. Rather, the court is mindful OPRA's privacy clause may be a valid basis for exemption. Burnett, supra, 198 N.J. at 427. Therefore, given plaintiff's failure to retrieve the documents which were made available, the

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<sup>4</sup> This is not, however, what OPRA requires. The Act creates a strong preference in favor of public access. N.J.S.A. 47:1A-1. Here, the BCPO promised to release the registration forms and/or receipts if and when the winning bidders consented to their dissemination. This mode of operation, though, posed the question improperly. The burden is on the public agency to provide access. Therefore, the BCPO should have contacted the winning bidders to advise them the documents would be disclosed absent an affirmative request not to disclose, with reasons and/or sought to intervene in this action.

state's obligation to safeguard personal information and the BCPO's good faith attempt to comply with OPRA, defendants are hereby afforded an additional ten days to contact the winning bidders and advise them they must either: (1) affirmatively object to the release of their personal information and state the reasons therefor or (2) move to intervene in this case.

### 3. Government Contracts

OPRA also provides, ordinarily, immediate access shall be granted to the following types of government records: "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e) (emphasis added). If, however, the government record is temporarily unavailable due to its use or storage, the public agency must so advise the requestor and make arrangements to promptly furnish a copy of the record. N.J.S.A. 47:1A-5(g). The agency has seven business days from its receipt of the request to transmit this information. N.J.S.A. 47:1A-5(i). The agency must also advise the requestor when the record can be made available. Ibid. "If the record is not made available by that time, access shall be deemed denied." Ibid.

In this case, it appears the County contracted with Caspert to provide auctioneering services for the BCPO. The contract was awarded pursuant to Bid No. 11-89 and Resolution No. 1071-11 on September 7, 2011. The award was for a twelve-month period from September 7, 2011 to September 6, 2012 with an option for two one-year renewals. On June 6, 2012, the County exercised the first option in the contract, which extended the award for another year, from September 7, 2012 to September 6, 2013. The auction occurred during this renewal period.

On December 9, 2014, plaintiff requested a copy of the contract "between [the BCPO] and the auctioneer conducting the [May 3, 2013] auction." On the following day, the BCPO advised it was not in possession of the contract, but County personnel were attempting to locate it. In the

interim, though, as an exemplar, the BCPO provided plaintiff with a copy of the contract for the period August 3, 2005 to August 2, 2006.<sup>5</sup> Thereafter, on December 18, 2014, the BCPO advised it was unable to locate a signed copy of the contract. Instead, it provided plaintiff with a copy of Resolution No. 754-12, which the County adopted on June 6, 2012.<sup>6</sup>

It appears the BCPO may have violated OPRA as it may have failed to make reasonable arrangements to promptly make a copy of the 2012-2013 contract available. See N.J.S.A. 47:1A-5(g). OPRA's directive is clear: the custodian must advise the requestor the item is temporarily unavailable and make arrangements to promptly make a copy of it available. Ibid. Here, the BCPO advised plaintiff it could not find the contract, but premised upon the current record, the court cannot conclude it has taken reasonable steps to recover it and make it available. Obviously, though, a public agency cannot produce that which it cannot locate. Therefore, defendants are hereby afforded an additional ten days to provide plaintiff and the court with a certified update regarding the status of the location of the contract as well as a specific explanation regarding its nonproduction.

#### B. Verification of Pleadings

R. 1:4-7 governs the verification of pleadings. The rule provides:

Pleadings need not be verified unless ex parte relief is sought thereon or a rule or statute otherwise provides. The verification shall not repeat the allegations of the pleadings but may incorporate them by reference if made on personal knowledge and so stated, and the allegations are of facts admissible in evidence to which the affiant is competent to testify.

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<sup>5</sup> The court was not presented with any proofs to allow for a determination as to whether the substance of the 2005-2006 contract was the same as or at least similar to the 2012-2013 contract.

<sup>6</sup> Hereinafter, Resolution No. 754-12 shall be referred to as the "June 6 Resolution." Notably, however, the June 6 Resolution merely provided the authority for the BCPO to conduct auctions for the September 7, 2012 to September 6, 2013 period. It did not attach or include a copy of the contract between the County and Caspert. The resolution provides the contract was to be executed by the County Executive and approved by County Counsel.

[R. 1:4-7.]<sup>7</sup>

Put somewhat more succinctly, “[the] rule requires that an affiant who incorporates the allegations of a pleading by reference state expressly in his [or her] verification that the allegations have been made on his [or her] personal knowledge.” Pressler, Current N.J. Court Rules, comment on R. 1:4-7 (2014). See Monmouth Cnty. Soc. Servs. v. P.A.Q., 317 N.J. Super. 187, 193–94 (App. Div.), certif. denied, 160 N.J. 90 (1998) (holding a verification made without personal knowledge of the facts alleged is a “nullity” and is therefore insufficient to invoke the jurisdiction of the court in an action requiring a verified complaint).

Defendants argue “[t]he court must strike the complaint for the failed and non-compliant verification and specifically paragraphs 2 through 5 [therein].” The basis for this contention is that plaintiff’s allegations, namely, those in the heretofore referenced paragraphs, were made without offering a source or statement of his personal knowledge. This argument, though technically correct, is unavailing as these “facts” are not material to the present dispute and the court has not relied on them in rendering its decision. This matter, ostensibly, is an OPRA dispute. Therefore, the court has focused its attention on the nature and substance of plaintiff’s request and defendants’ response thereto; not unimportant background facts the latter has urged are pivotal.

### C. Motion to Dismiss

R. 4:5-2 governs the criteria for adequacy of pleading. The rule provides, in relevant part:

[A] pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain a statement of the facts on which the claim is based, showing that the pleader is entitled to relief, and a demand for judgment for the relief to which the pleader claims entitlement.

[R. 4:5-2.]

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<sup>7</sup> R. 4:67-2(a), which is applicable to OPRA matters, provides such actions must be initiated by an order to show cause supported by a verified complaint. See Courier, supra, 358 N.J. Super. at 378 (holding the language in N.J.S.A. 47:1A-6 requires a trial court to proceed under the rules prescribed in R. 4:67).

To be adequate, “it is fundamental that the pleading must fairly apprise the adverse party of the claims and issues raised and that on a challenge to adequacy, all facts, reasonable inferences and implications are to be considered most strongly in favor of the pleader.” Pressler, Current N.J. Court Rules, comment 1 on R. 4:5-2 (2014). Therefore, a complaint is entitled to a liberal reading in determining its adequacy. Ibid. (citing Van Damm Egg Co. v. Allendale Farms, 199 N.J. Super. 452 (App. Div. 1985)).

Defendants argue dismissal is warranted as “the complaint is bereft of any facts that are clear and evident from the four corners of the complaint, such that the motion to dismiss must be granted.” This argument, however, is rejected. R. 4:5-7 provides: “Each allegation of a pleading shall be simple, concise and direct, and no technical forms of pleadings are required. All pleadings shall be liberally construed in the interest of justice.” The purpose of this rule is to “fairly apprise[] the adversary of the issues in dispute.” Pressler, Current N.J. Court Rules, comment on R. 4:5-7 (2014). In this case, plaintiff set forth the essential facts regarding the parties, his request for records and defendants’ response thereto. These facts were sufficient to place defendants on notice plaintiff was challenging the BCPO’s denial of his request by filing an action in Superior Court.<sup>8</sup> Therefore, the court is satisfied plaintiff has met the minimum pleading requirements.

#### D. Common Law Right of Access

In addition to OPRA, plaintiff has also sought relief under the common law right of access to government records. The definition of a government record under the common law is broader than under OPRA. Mason, supra, 196 N.J. at 67 (citations omitted). To reach this broader class of documents, the requestor must show: (1) the records are common law public documents; (2) an

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<sup>8</sup> See N.J.S.A. 47:1A-6, which provides a person who is denied access to a government record may, at his or her option, file an action in Superior Court or institute a proceeding with the GRC.

interest in the subject matter of the material; and (3) the balance of hardship favors disclosure. Keddie, supra, 148 N.J. at 50 (citations omitted).

At this point, however, given the court’s holding, it would be premature to conduct a common law analysis. The court has afforded to defendants the benefit of the full ten-day period to contact the winning bidders and provide an update regarding the status of the contract. Without that information, the court could not, for example, evaluate “the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed.” See S. Jersey Pub., supra, 124 N.J. at 488 (quoting Loigman, supra, 102 N.J. at 113). Therefore, the court reserves the right to conduct a common law analysis at a later point, upon further application, if necessary.

#### E. Attorney’s Fees

Plaintiff has also sought an award of reasonable attorney’s fees. OPRA provides “[a] requestor who prevails in any proceeding is entitled to a reasonable attorney’s fee.” N.J.S.A. 47:1A-6. To be eligible for fees, there must be a determination as to whether a requesting party has “prevailed.” See p. 12 supra. At this point, however, there can be no such determination as the court has not granted any relief – i.e., the documents sought by plaintiff are not now being ordered to be produced. Rather, as indicated previously, defendants have been afforded an additional ten days to contact the winning bidders and provide a certified update regarding the status of the whereabouts of the contract. Therefore, the court reserves the right to conduct a fee analysis at a later point, upon further application, if necessary.

#### **Conclusion**

OPRA is intended to be construed in favor of the public’s right of access. The purpose of the statute 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.” Asbury Park Press v. Ocean Cnty. Prosecutor’s Office, 374 N.J. Super 312, 329 (Law Div. 2004). To that end, “the court must always maintain a sharp focus on the purpose of OPRA and resist attempts to limit its scope, absent a clear showing that one of its exemptions or exceptions incorporated in the statute by reference is applicable to the requested disclosure.” Ibid.

In light of the foregoing, the court holds: (1) defendants shall be afforded an additional ten days to contact the winning bidders and advise them they must: (a) affirmatively object to the release of their personal information and state the reasons therefor or (b) move to intervene in this case; and (2) defendants shall be afforded an additional ten days to provide plaintiff with a certified update regarding the status of the contract as well as a specific explanation regarding its nonproduction.

Plaintiff’s counsel is hereby directed to prepare and submit the appropriate order under the five-day rule. The ten-day period shall begin on the same day the order is executed.