

## PRIVACY

# Victims of Serious Crimes Need More Protection Under OPRA

By Jonathan N. Frodella

The New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 et seq. (OPRA), requires every custodian of government records to adopt a form that can be used to request access to the records in its custody, but custodians cannot require the use of such forms by people requesting access to government records. *See Renna v. Cty. of Union*, 407 N.J. Super. 230 (App. Div. 2009). This presents difficulties when requestors fail to certify regarding their convictions of indictable offenses, since N.J.S.A. 47:1A-2.2(a) provides that “where it shall appear that a person who is convicted of any indictable offense [...] is seeking government records containing personal information pertaining to the person’s victim or the victim’s family [...] the right of access” shall be denied. Currently, record custodians bear the full burden of investigation when requestors choose not to provide relevant background informa-



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tion. Online services that automatically publish government records to the world have complicated this issue further by potentially reframing the analysis of victims’ privacy interests, so custodians must consult their agency’s attorneys as soon as possible after receiving any of the kinds of requests described herein.

The *Renna* court held that requestors of government records need not use official forms if their requests are clear, in writing, and provide the information required by N.J.S.A. 47:1A-5(f), which is the OPRA provision mandating the adoption of offi-

cial request forms. However, Section 5(f) does not require requestors to certify or provide information regarding their criminal backgrounds, and the Government Records Council (GRC), which is the agency charged with adjudicating OPRA controversies and publishing guidance on OPRA, has determined that custodians cannot require requestors to certify or provide information regarding their criminal backgrounds in connection with their requests. *See James v. NJ Dep’t of Law and Public Safety, Div. of Consumer Affairs*, GRC Complaint No. 2011-36 (August 2012).

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The GRC's own model OPRA request form includes a section where requestors can certify that they have or have not been convicted of any indictable offenses. In *James*, the complainant failed to complete this certification, but despite the complainant's return address being a prison address, the GRC determined the custodian erred by asking the complainant to provide relevant criminal background information. The GRC apparently endorses the position that custodians of government records are independent investigators who must rely on resources such as newspapers when requestors choose not to provide necessary criminal background information. See *Killion v. Hammonton Police Dep't (Atl.)*, GRC Complaint No. 2013-228 (September 2014).

The *Killion* opinion is notable because the complainant was not convicted of his relevant offense until three months after he served his OPRA request, yet the GRC decided the custodian validly denied access to records containing personal information pertaining to relatives of his victim. In an unpublished decision, the Appellate Division affirmed by deferring to the GRC's "expertise in such matters" and its conclusion that "the privacy interests of the victim and the victim's family presented a valid ground for denial[.]" *Killion v. Hammonton Police Dep't (Atl.)*, 2016 WL 3525285, at \*1 (App. Div. June 29, 2016). Neither the GRC nor the Appellate Division explicitly stated records may be withheld pending disposition of criminal charges, but the Appellate Division's reference

to general privacy concerns and the GRC's opinion that the legislature's intent was "to protect the identities of victims and their relatives from those who perpetrate a crime against them," both indicate that victims and alleged victims might enjoy Section 2.2 protections prior to a requestor's actual conviction of an indictable offense.

*James* and *Killion* are consistent with *Renna*, where the Appellate Division held that OPRA requests "shall utilize the forms provided by the custodian of the records" but that "no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in [Section 5(f)]." *Renna*, 407 N.J. Super. at 232. Since Section 5(f) does not require requestors of government records to disclose information regarding their convictions of indictable offenses, custodians cannot require requestors to disclose such information, notwithstanding the GRC's inclusion of an indictable offense certification in its model OPRA request form. Therefore, custodians are left on their own if requestors choose not to provide relevant background information, and custodians must bear the burden of completing investigations within short periods of time that are nevertheless subject to great scrutiny.

The proposed OPRA amendment (S107, June 14, 2018) addresses this problem by requiring disclosure of relevant criminal background information. However, the proposed amendment would not require of-

ficial forms to include an indictable offense certification or a space to provide relevant criminal background information. The proposed amendment only requires criminal background information when official OPRA request forms are not used. This is probably a drafting oversight, since the proposed amendment would allow custodians to deny requests for failure to provide relevant criminal background information (though only after attempting to contact the requestor to obtain such information). The proposed amendment, if clarified, would protect the privacy interests of victims and their families, and would provide necessary guidance to requestors and custodians alike.

There is little guidance for responding to OPRA requests that fail to include relevant criminal background information, although such requests share some instructive similarities with anonymous requests. Custodians are *not permitted* to comply with anonymous requests for records that contain personal information pertaining to victims, but such records cannot be withheld in their entirety based on "the remote possibility that the anonymous requestor had been convicted of an indictable offense, or that the information sought would be personal information about the requestor's victim or family." See *Scheeler v. Office of the Governor*, 448 N.J. Super. 333, 341 (App. Div. 2017). Although this part of the trial court decision was not appealed, the Appellate Division appears to approve of this approach to anonymous requests.

At this time, government records containing personal information cannot be withheld in their entirety solely because the request was made anonymously. However, the *Scheeler* court arguably approved of the trial court's decision to provide a "middle ground" as a solution to this problem: Responsive records must be produced, but subject to redaction of personal information that would not otherwise be redacted in a standard OPRA response. *See ibid.* Likewise, if a custodian determines its criminal background investigation is inconclusive or otherwise materially deficient, the custodian may wish to apply this "middle ground" approach and redact personal information from responsive records.

Another complication is the rise of online services such as OPRAmachine which provide a user interface for making OPRA requests and automatically publish all communications between the requestor and the custodian to the world, including all government records produced in response to the request. There is a case pending in the Law Division regarding the validity of requests made through OPRAmachine (*Coombs v. County of Monmouth*, MON-L-3195-18), and the results might be instructive to custodians who receive requests for records containing victim information, especially if made through OPRAmachine or some other service that automatically publishes government records to the world.

The New Jersey Supreme Court considers the dissemination of government records "via a centralized computer database" to be an important factor when balancing the "twin aims of public access [to government records] and protection of personal information." *See Burnett v. County of Bergen*, 198 N.J. 408, 437 (2009). Under the specific facts of *Burnett*, the court determined redaction of social security numbers was appropriate because, inter alia, the records would be disseminated "via a centralized computer database," there were no adequate safeguards to prevent unauthorized disclosure, releasing social security numbers could cause harm, and the requestor, a commercial real-estate data aggregator, had no need for the social security numbers.

Likewise, in the unreported decision *Bolkin v. Borough of Fair Lawn*, WL 2679673, at \*2 (App. Div. June 16, 2014), the Appellate Division determined that government records containing the names and addresses of pet owners could be disclosed because, inter alia, the 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[.]" (emphasis added). The analysis certainly would have been different if OPRAmachine or a similar service had been used, since there could be no agreement limiting disclosure or

use of the records. *Bolkin* and *Burnett* show that subsequent dissemination of records is an important consideration when balancing interests, and although most requestors can distribute records freely, courts seem to hold that the probability the average requestor will publish records to the world is low. However, that probability is increased to 100 percent when requests are submitted through services that publish records automatically.

During the pendency of the *Coombs* case and the proposed OPRA amendment, custodians should take steps to encourage, but not require, use of their official OPRA forms, possibly by revising their websites to emphasize the forms, and to be more user friendly in general. Additionally, custodians should consult their agency's attorneys when responding to an anonymous request for government records that contain personal information, or requests for such records that include no relevant criminal background information, or requests for such records through OPRAmachine or other services that automatically publish government records to the world. Until there is better guidance, whether in the form of an amended OPRA statute or tribunal authority, each of the aforementioned situations requires a case-by-case analysis, and record custodians should contact their agency's attorneys as soon as possible in each such situation. ■