

## OPRA AND FACEBOOK

### Facts of the case:

OPRA request by a resident for the accounts blocked or removed from accounts of Mayor and Council.

Town's Position: Denied request stating that what you are requesting are private accounts that are not linked to public pages. Borough did not have the clerk as the custodian of the documents and claimed they were not subject to OPRA.

Plaintiff's Position: The accounts in question were created and are maintained by Council members in their official capacity as duly elected members of the town's governing body making their contents public accounts subject to OPRA.

### OPRA:

The purpose of OPRA is to insure that governmental records, unless exempted, are readily accessible to citizens of New Jersey for the protection of the public interest, in other words, "all government records shall be subject to the public access unless exempt." N.J.S.A. 47:1A-1.

#### What is a "government record"?

[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 courts 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

#### What is the time frame to respond?

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.” Id.

#### What is the recourse by the requestor from a denial?

The requestor may challenge the decision by filing an action in Superior Court or a complaint with the Government Records Council (GRC). N.J.S.A. 47:1A-6. Superior Court action must be brought within 45 days of denial.

#### Who has the burden of proof?

The public agency has the burden of proving the denial of access is authorized by law, i.e., the 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.

#### Attorney’ Fees?

If it is determined that 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.

#### Exemptions.

The statute excludes 21 categories of information, which are exempt from disclosure, and “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. O’Boyle v. Borough of Longport, 218 N.J. 168, 176 (2014).

“The only countervailing relief mechanism for those seeking access to a statutorily excluded document is the common law right of access.” Bergen Cnty. Imp. Auth. V. N.Jersey Media Grp., Inc., 370 N.J. Super. 504, 516-517 (App. Div. 2004), certif. denied, 182 N.J. 143 (2004).

#### The Privacy Interest Exemption.

“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. (Examples: social security number, credit card number, unlisted telephone number, drivers license number). Also exempts personal information protected from disclosure by any other state or federal statute, regulation or executive order. N.J.S.A. 47:1A-9.

#### Balancing Test.

To resolve the competing interests of privacy and access, there is a multifactorial test set forth in Doe v. Poritz, 142 N.J. 1 (1995), which identifies the following factors for consideration:

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.

**Before getting to the test, a party must first present a colorable claim that public access to records would invade a person's reasonable expectation of privacy. (Brennan v. Bergen County Prosecutor's Office, 2018 N.J. LEXIS 698, at \*9, \*10 (May 23, 2018)).**

#### Vaughn Index

Under R. 4:10-2(e), a party claiming privilege is required to “describe the nature of the documents...not produced or disclosed in a manner that, without revealing information itself privileged or protected (emphasis added), will enable other parties to assess the applicability of the privilege or protection.” The party asserting the privilege must provide a “specific explanation of why each document is privileged or immune from discovery [which] must include a comprehensive presentation of all factual grounds and legal analyses in a non-conclusory fashion.” Seacoast Builders Corp. v. Rutgers, 358 N.J. Super. 524, 542, 818 A.2d 455 (App. Div. 2003).

#### New Jersey Common Law

Government records can also be sought under common law. To prevail, a requestor must establish that (1) the requestor 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. Keddie v. Rutgers, 148 N.J. 36, 50 (1997).

#### Analysis For The Present Case.

The dispute is whether an elected official's individually controlled Facebook account can be deemed a public account and thus a government record subject to OPRA.

In the present case, 5 Councilmembers and the Mayor established Facebook pages after the election. Each official used the Facebook pages to discuss:

- a. Matters directly pending before the council, such as resolutions, ordinances, and budgets;
- b. Official business done by the committees on which the councilmember serves;
- c. To answer questions and interact with constituents and the public at large about the Borough's official business.

The Councilmembers set these pages up because they did not want to have their private personal pages have comments re their Borough affairs, and their family and friends to be exposed to the political content of these posts.

The Borough argued that the requested documents are not "government records" as they are elected officials' individually controlled social media pages and are not "made, maintained, or kept on file in the course of official business" and that no Borough ordinance or policy authorized, required or recommended their creation; and that no taxpayer funds or government-paid employees were involved in their creation.

The Facebook pages were at one point linked to the Borough website, and the Mayor's page listed his Borough email address, Borough phone number, and links to the Borough website, however, these Facebook pages were set up with private accounts by the Councilmembers:

The Borough argued that these pages individually set up the pages, solely controlled them, and maintained them without financial contribution from the Borough, and that as such, they are not subject to OPRA.

The Court held that **individual Facebook accounts established as a direct result of each council member's election, separate and distinct from their personal Facebook accounts, intertwined with the trappings of their office and used to communicate with constituents or members of the general public regarding issues facing the Borough are government records within the definition of OPRA.**

The Court further found that, **Defendants' argument that the Facebook accounts are not government documents because they are not authorized or required by either ordinance or statute unpersuasive. Defendants' interpretation of**

**government record taken to its logical conclusion would require the court to find that the Facebook accounts in question must have been specifically sanctioned by the Borough in order for the social media account to constitute a public record. Such an interpretation would greatly limit the legislature's intent to construe the definition of a public document broadly.**

### **DISTINGUISHABLE FACTS AND CASES**

In West v. City of Puyallup, 410 P.3d 1197, 1200 (Wash. Ct. App. 2018), the Facebook page was titled, "Friends of Julie Door", and she was an elected official who used the page as more of a campaign page, and when asked questions re the municipality, responded she is "prohibited from answering specific questions about the City's actions on Facebook and that questions should be directed to Door's work-related email address and telephone number." Id. at 1200.

In Pacheco v. Hudson, the Facebook account was for a New Mexico Judge's campaign account and that the Judge was not acting in his official capacity in establishing or maintaining the Facebook page, or that it was used to conduct judicial business, or that there was no nexus between the Judge's judicial account and his personal campaign activities. Pacheco v. Hudson, 415 P.3d 505, 507 (N.M. 2018).

### **MAINTENANCE AND CUSTODY OF A GOVERNMENT RECORD**

OPRA requires that for a document to constitute a government record the information must be "made, maintained or kept on file in the course of his or its official business..." N.J.S.A. 47:1A-1.1.

The Court held that, **"Duly elected council members control the content of what they post and hold the ability, through blocking other Facebook users, including the Plaintiff from accessing their Facebook pages and from participating in the interactive conversations occurring on those Facebook pages focused entirely on the official business of the Borough, thus subjecting those Facebook pages to OPRA."**

### **PRIVACY EXEMPTION**

The Court also held that, **"It is not reasonable for a Facebook user who openly dialogues with an elected official on that elected official's Facebook page to have a reasonable expectation of privacy in their name disclosure."**

## **COURT'S DECISION**

The Borough violated OPRA and is required to produce the list of Facebook accounts blocked or removed from all of the Facebook pages in question, and to pay statutory attorney's fees.

### **GUIDANCE FOR MUNICIPALITIES FROM THE DECISION**

- a. If an elected official maintains a Facebook page as an elected official, and uses it to communicate with constituents about matters involving the municipality's business, it is subject to OPRA no matter how it is set up or maintained;
- b. If an elected official maintains a campaign account Facebook page, and does not interact with the public and directs those members of the public to a municipal Facebook page for these types of issues, it is not subject to OPRA;
- c. It does not matter if the OPRA request is for postings or metadata, this is all subject to OPRA, i.e. blocked name lists;
- d. If an elected official maintains this type of Facebook account, there is an issue as to blocking an individual from posting their opinions on the Facebook page.

### **WHAT TO DO IN ORDER TO SAFEGUARD AGAINST AN OPRA COMPLAINT INVOLVING A FACEBOOK ACCOUNT**

- a. The easiest way to avoid these problems is to not have a Facebook account, as they are not required, however, the elected officials may want a way to communicate with the public in their own voice;
- b. Make sure that the elected official maintains a separate account as an elected official if they are going to have a Facebook account and don't have it cross over to the personal Facebook page or they will both be subject to OPRA;
- c. Develop a Social Media Policy for the municipality and have the elected officials sign onto the policy and follow it just like the employees.