

CIVIL PROCEDURE

Conflicting Standards for Disclosure of Domestic Violence Records Under OPRA

By Jonathan N. Frodella

The Legislature created the Government Records Council (GRC) to help advocate and enforce the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 et seq. (OPRA) and to help the general public realize its newly expanded right of access to government records. The GRC's statutory responsibilities are mostly educational in nature, and it is charged with providing OPRA guidance to the public and to records custodians alike. The Legislature's emphasis on the GRC's educational role is understandable, since OPRA fundamentally changed the framework for analysis of government transparency issues in New Jersey. The GRC also provides a forum for adjudicating OPRA controversies, which initially served to complement its educational mission, but which has morphed into a quasi-judicial body with its own doctrines and precedents—some of which differ significantly from their counterparts in Superior Court.

The OPRA statute 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. However, it has become common practice for records custodians and their advisers to rely on GRC decisions and GRC educational materials when analyzing OPRA requests, which can result

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in substantial liability for municipalities when complainants choose to sue them in Superior Court instead of the GRC. Further, although the GRC is explicitly charged with providing “information regarding the law governing access to public records” via a toll-free helpline to “any person, *including records custodians*,” our courts give absolutely no deference to a custodian’s good-faith reliance on advice or guidance from the GRC. *See Paff v. Galloway Twp.*, 229 N.J. 340, 356-57, 162 (2017) (“Surely, if the Superior Court is to give no weight to a GRC decision, then informal guidance from the GRC can stand in no better position.”); *see also* N.J.S.A. 47:1A-7 (emphasis added).

The treatment of records relating to domestic violence is perhaps the most egregious example of how the GRC and

Superior Court can develop divergent lines of precedent. The Prevention of Domestic Violence Act of 1991, N.J.S.A. 2C:25-17 et seq. (PVDA), provides “[a]ll records maintained pursuant to [the PVDA] shall be confidential and shall not be made available to any individual or institution except as otherwise provided by law.” *See* N.J.S.A. 2C:25-33(a). The GRC takes the position, in both its decisions and its educational materials, that any record related to a domestic violence incident is confidential under the PVDA and therefore exempt from disclosure under OPRA, irrespective of any requirement under the PVDA that the record be maintained. *See, e.g., VanBree v. Bridgewater Twp. Police Dep’t (Somerset)*, GRC Complaint No. 2014-122 (October 2014); *Butala v. Twp. of*

Aberdeen (Monmouth), GRC Complaint No. 2014-194 (February 2015).

The Superior Court's interpretation of the confidentiality provision of the PVDA is more faithful to its text, which only applies to records maintained "pursuant to" the PVDA, not to all records relating to an incident of domestic violence. See N.J.S.A. 2C:25-33(a) (emphasis added). However, due to reliance on GRC decisions and GRC training materials, it is practically black letter law among records custodians that all records relating to domestic violence are exempt from disclosure under OPRA. The Appellate Division indirectly opined on these conflicting interpretations in the unpublished opinion *Paff v. Borough of Gibbsboro*, 2013 WL 2922374, at *9 (N.J. Super. Ct. App. Div. June 17, 2013).

The municipalities' reliance on the PDVA was also misplaced. N.J.S.A. 2C:25-33 states "[t]he Administrative Office of the Courts shall ... maintain a uniform record of all applications for relief pursuant to [N.J.S.A. 2C:25-25 to -29]", and "[a]ll records maintained pursuant to this act shall be confidential and shall not be made available to any individual or institution except as otherwise provided by law." The PDVA does not mandate the maintenance of arrest records or radio transmissions by police departments. Therefore, N.J.S.A. 2C:25-33 is inapplicable.

Although records relating to domestic violence are not exempt from disclosure under OPRA per se, they still present heightened confidentiality concerns and must be analyzed and redacted carefully to protect reasonable expectations of privacy (and to determine whether other OPRA exceptions or exemptions apply). See, e.g., *Paff v. Ocean Cty. Prosecutor's Office*, 235 N.J. 1, 28 (2018). These concerns are nowhere more apparent than in the context of OPRA requests for recordings made by police body-worn

cameras (BWCs) involving domestic violence or similar crimes. The *Paff* decision concerned recordings made by mobile video recorders (MVRs) in police cars—otherwise known as dashcams—and, although MVR recordings are exempt from disclosure under OPRA and are only accessible under the common-law right of access, the *Paff* court's privacy concerns are generalizable to other records, and judges consider them in connection with OPRA requests for BWC recordings.

For example, the *Paff* court opined that a victim of a sexual assault or similar crime would have a "compelling objection" to disclosure of a recording of the crime, even in redacted form. See *Paff*, at 28. In other circumstances, the court opined that privacy concerns may be resolved by "the blurring of a victim's face or other methods of redaction prior to disclosure." *Ibid*. The decision to withhold a record or disclose a redacted version must be made on a case-by-case basis, and records custodians should always "give serious consideration to the objections of individuals whose privacy interests are implicated." See *ibid*. These concerns apply to OPRA requests for other sensitive police records, as well, such as recordings and transcripts of 9-1-1 calls, which might be withheld in their entirety if they would "offend and disturb any person of normal sensibilities." See *Asbury Park Press v. Ocean Cty. Prosecutor's Office*, 374 N.J. Super. 312, 331 (Law. Div. 2004) ("Therefore, release of even a redacted transcript [of the 9-1-1 call] would intrude on the reasonable expectation of privacy that this court has found is protected by OPRA.")

Although the *Paff* court instructed courts to consider individual objections to the release of sensitive records, it reminded us that generic privacy objections provide insufficient grounds for courts to analyze the issue, and that "any pri-

vacy concerns about a disclosure sought pursuant to OPRA or the common law should be explained in detail." See *Paff*, at 28. In the context of BWC recordings, judges generally accept certain redactions without requiring custodians to articulate specific privacy concerns, including redactions of footage from inside a home, redactions of footage of interviews with juveniles, and redactions of footage of the victims of domestic violence (as described in a *Vaughn* index with statutory citations justifying each redaction). Still, every OPRA request for sensitive police records requires a careful, case-by-case analysis of the relevant facts and a balancing of the competing legal interests, so records custodians should consult their attorneys when processing such requests.

Records relating to incidents of domestic violence are not the only records governed by different disclosure standards based on the complainant's choice of forum, but they provide a potent reminder that records custodians should not rely on GRC decisions or GRC educational materials when analyzing OPRA requests. In addition to studying the reported OPRA cases from the Appellate Division and our Supreme Court, records custodians should become familiar with the jurisprudence of their vicinage assignment judge. Inconsistent interpretations of OPRA among the vicinages are potentially more dangerous than inconsistencies between the GRC and Superior Court, due to the possibility of multiple variations on the same issue and the inherent power of Superior Court judges to apply legal and equitable principles that are simply unavailable to the GRC. Therefore, the most astute records custodians keep a close eye on the Appellate Division and our Supreme Court, but keep a closer eye on their vicinage assignment judge. ■