SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3421-20
A-1440-21
A-1517-21

RISE AGAINST HATE, a N.J. nonprofit corporation, and ANDREW JUNG,

Plaintiffs-Respondents,

v.

CHERRY HILL TOWNSHIP, and NANCY SAFFOS, in her official capacity as Custodian of Records for CHERRY HILL TOWNSHIP,

Defendants-Appellants.

RISE AGAINST HATE.ORG, a nonprofit organization and a 501(c)(3) public charity,

Plaintiff-Respondent,

v.

BRIDGEWATER TOWNSHIP, and LINDA DOYLE, in her official

capacity as Records Custodian,

Defendants-Appellants.

RISE AGAINST HATE.ORG, a nonprofit organization and a 501(c)(3) public charity,

Plaintiff-Respondent,

v.

TOWNSHIP OF WEST DEPTFORD, and LEE ANN DEHART, in her official capacity as Records Custodian,

Defendants-Appellants.

Submitted July 11, 2022 – Decided March 29, 2023

Before Judges Currier, DeAlmeida and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-0206-21, Somerset County, Docket No. L-1471-21, and Gloucester County, Docket No. L-1121-21.

Brown & Connery, LLP, attorneys for appellants in Docket Nos. A-3421-20 and A-1517-21 (Michael J. Miles and Jose A. Calves, on the briefs).

Savo, Schalk, Corsini, Gillespie, O'Grodnick & Fisher, PA, attorneys for appellant in Docket No. A-1440-21 (Alexander G. Fisher and Matthew R. Flynn, on the briefs).

Pashman Stein Walder Hayden, PC, and Law Offices of Eric A. Shore, attorneys for respondents (CJ Griffin and Michael J. Zoller, of counsel and on the briefs).

The opinion of the court was delivered by

DeALMEIDA, J.A.D.

At issue is whether, in the circumstances presented here, members of the public have an objectively reasonable expectation in the privacy of their email addresses sufficient to protect them from disclosure under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. We conclude members of the public who submit their email addresses to receive electronic newsletters and notices from a municipality have an objectively reasonable expectation that their email addresses will not be disclosed to a non-government organization that intends to send unsolicited emails to them to further the organization's political and social objectives.

I.

The facts in these consolidated matters are similar and not in dispute.

A-3421-20

Plaintiff Rise Against Hate (RAH) is a 501(c)(3) non-profit corporation with an office in defendant Township of Cherry Hill.[1] RAH's purpose is to raise public awareness about racism and civil rights and to inform the public about the law. Among other things, the organization investigates racial disparities and monitors municipalities to ensure that they, and their agents, employees, law enforcement officers, and officials honor residents' civil rights.

Plaintiff Andrew Jung is a member of the board of advisors of RAH. He is also the founder and Chair of Asian Hate Crimes Task Force (AHCTF), a 501(c)(3) non-profit organization that spreads awareness of hate crimes against the Asian community and educates the public about Asian culture, history, and current events.[2]

Defendant Nancy Saffos is the records custodian for Cherry Hill. On December 7, 2020, and December 14, 2020, Jung filed OPRA requests with

[1] In the record, plaintiff is referred to as both Rise Against Hate and Rise Against Hate.Org.

[2] At the time that Jung filed his complaint, AHCTF's formation as a non-profit corporation was pending. It has since been granted non-profit status.

Saffos seeking disclosure of three email subscriber lists maintained by Cherry Hill, entitled "Notify Me," "Civil Alerts," and "Mayor's Weekly Update." Members of the public subscribe to these lists by providing an email address at which they consent to receive periodic newsletters and notices from the municipality. When members of the public register for these lists, Cherry Hill provides a disclaimer that their personal information will not be disclosed unless required by law.

The December 7, 2020 request was filed on behalf of RAH, which intends to use the subscriber lists to send unsolicited emails concerning RAH's activities, investigations, and other matters relating to the civil rights of historically marginalized communities. RAH intends to distribute information it previously gathered regarding what it claims are racial disparities in policing in Cherry Hill and gender-based pay discrimination by the township.

The December 14, 2020 request was filed by Jung in his capacity as Chair of AHCTF, which also intends to use the subscriber lists to send unsolicited emails to further the organization's objectives. RAH and AHCTF did not request the names, street addresses, social security numbers, or other information of the subscribers.

Saffos denied both requests. Although recognizing that the subscriber lists are government records, Saffos determined that the requested information is protected from public disclosure by the personal privacy provision of N.J.S.A. 47:1A-1.

On January 22, 2021, RAH and Jung filed a complaint in the Law Division alleging that the denial of the requests violated OPRA. Defendants cross-moved pursuant to R. 4:6-2(e) to dismiss the complaint for failure to state a claim upon which relief can be granted.[3]

On June 11, 2021, the trial court issued a written opinion ordering disclosure of the requested information and denying defendants' cross-motion to dismiss the complaint. Noting the parties' agreement that the subscriber lists are government records, the court found that the custodian had not raised a colorable claim that disclosure of the email addresses on the subscriber lists would violate

[3] In July 2020, a co-director of RAH filed an OPRA request on behalf of the organization for the same information. Neither he nor the organization appealed the denial of that request. The trial court rejected defendants' argument that the December 7, 2020 request on behalf of RAH was time-barred because the denial of the July 2020 request was not appealed. Cherry Hill did not address that argument in its merits brief. We therefore deem any arguments with respect to that claim waived. "[A]n issue not briefed is deemed waived." Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023); Telebright Corp., Inc. v. Dir., N.J. Div. of Tax., 424 N.J. Super. 384, 393 (App. Div. 2012) (deeming a contention waived when the party failed to include any arguments supporting the contention in its brief).

the objectively reasonable expectations of privacy of the subscribers. The court reasoned that disclosure of email addresses would be less invasive of privacy than the disclosure of home addresses, which courts have found to be subject to release when found in government records in some circumstances. The court noted that email addresses can easily be changed and do not reveal the physical location or, in many cases, the identity of the owner of the email address. In addition, the court found that recipients of unsolicited emails from RAH and AHCTF, if uninterested in receiving communications from those organizations, can easily block, or divert to a spam folder, any future emails from them. The court also noted that before subscribers submitted their email addresses, Cherry Hill put them on notice that those addresses would be disclosed if required by law. This fact, the court found, lessened any privacy interest.

Although not necessary in light of its finding that the custodian failed to raise a colorable claim of privacy, the trial court undertook an analysis of the factors set forth in Burnett v. Cnty. of Bergen, 198 N.J. 408, 427 (2009), to determine whether any privacy interest in non-disclosure of the email addresses was outweighed by the interest in public access to that information. The court found the asserted privacy interest to be minimal because the requested information revealed only email addresses and no personal identifiers

connecting those email addresses to any person. In addition, the court concluded that the public would benefit from the dissemination by RAH and AHCTF of information relating to government actions. On balance, the court found, had the custodian made a colorable claim of privacy, the privacy interest would have been outweighed by the benefit of disclosure.

A June 11, 2021 order directs Cherry Hill to disclose the subscriber lists and denies defendants' cross-motion to dismiss the complaint.

A-1440-21

Defendant Linda Doyle is the records custodian for defendant Township of Bridgewater. On September 17, 2021, an RAH officer submitted a request for a copy of email distribution lists maintained by Bridgewater. Members of the public subscribe to these lists by providing an email address at which they consent to receive newsletters and notices from the municipality. RAH intends to use the subscriber lists to send unsolicited emails concerning RAH's activities, investigations, and other matters relating to the civil rights of historically marginalized communities. RAH did not request the names, street addresses, social security numbers, or other information of the subscribers.

A township official denied the request pursuant to N.J.S.A. 47:1A-1, stating that although the requested information is a government record,

disclosure of the email addresses would violate the reasonable expectation of privacy of those who subscribed to the township's newsletters and notices.

RAH subsequently filed a complaint in the Law Division alleging that the denial of its request violated OPRA and the common law right of access. Defendants cross-moved to dismiss the complaint for failure to state a claim.

On December 13, 2021, the trial court issued an oral opinion ordering disclosure of the requested information and denying Bridgewater's cross-motion. The court found that the custodian made a colorable claim that disclosure of the email addresses would violate the reasonable expectation of privacy of the subscribers. After applying the Burnett factors, however, the court concluded that although the members of the public who registered for the township's newsletters and notices likely did not expect that their email addresses would be disclosed to a non-government organization, the harm from disclosure – the receipt of unsolicited emails and RAH's potential further distribution of the email addresses to other organizations – can be ameliorated by blocking or filtering technology. The court found this harm to be outweighed by RAH's interest in obtaining the subscriber lists to effectuate the purposes of the organization, which included disseminating information about government actions. Thus, the court found that the requested information is not protected

from disclosure under OPRA. In addition, after weighing RAH's interest in disclosure of the email addresses against the privacy interest of the subscribers, the court found that RAH also has a right to the requested information under the common law right of access.

A December 13, 2021 order directs Bridgewater to produce the requested information and denies the township's cross-motion to dismiss the complaint.

A-1517-21

On July 18, 2021, RAH submitted an OPRA request to defendant Lee Ann DeHart, the records custodian for defendant Township of West Deptford. It sought production of two email subscriber lists maintained by West Deptford: "West Deptford Township News" and "RiverWinds Community Center News." When subscribing to the lists, members of the public provide an email address at which they consent to receive newsletters and notices from the municipality. RAH did not request the names, street addresses, social security numbers, or other information of the subscribers. It intends to use the subscriber lists to send unsolicited emails concerning RAH's activities, investigations, and other matters relating to the civil rights of historically marginalized communities.

DeHart denied the request. She determined that although the requested information is a government record: (1) the email addresses are protected from

disclosure by N.J.S.A. 47:1A-1 because the members of the public who joined the distribution lists have an objectively reasonable expectation that their email addresses will not be disclosed to a non-government organization that intends to use that information to send unsolicited emails furthering the organization's objectives; and (2) disclosure of the requested information would not further the purposes of OPRA to maximize public knowledge of the operations of municipal government.

RAH subsequently filed suit in the Law Division, alleging that the denial of its request violated OPRA and the common law right of access. West Deptford cross-moved to dismiss the complaint, arguing that the requested information is precluded from public disclosure by N.J.S.A. 47:1A-1.

On October 25, 2021, the trial court issued an oral opinion ordering disclosure of the requested information and denying West Deptford's cross-motion. The court found that DeHart had not advanced a colorable claim that members of the public have an objectively reasonable expectation that email addresses they submit to a municipality's newsletter distribution list will be protected from public disclosure to a non-government organization. The court found that "[a]ny objectively reasonable person knows that their email addresses are regularly disclosed, sold, whatever the case may be and that's why we all

have these spam emails in our inboxes." In addition, the court rejected West Deptford's claim that disclosure of the email addresses would expose the email address holders to cybersecurity threats. Noting that most email addresses do not contain the addressee's full name, the court found that RAH's request

> was so tailored that even if they had the email address of a person, they would not have any other information whatsoever, perhaps not even the name of the person, which would raise a likelihood that their medical records, or banking records, or any other personal documentation could be access[ed] or compromised in some fashion just because someone has your email address.

In addition, the court noted that although the Legislature had recently amended OPRA several times to expand the categories of personal information in government records excluded from public disclosure, it had not protected email addresses.

Although recognizing that its finding with respect to the absence of a colorable claim of privacy effectively ended its analysis, the court addressed the Burnett factors. Finding no interest in maintaining the privacy of the email addresses, minimal harm from disclosure, and that RAH established a need for access, the court concluded that release of the requested information would be warranted under a Burnett analysis. The court did not analyze whether RAH is entitled to disclosure of the requested information under the common law.

An October 25, 2021 order directs West Deptford to produce the requested information and denies the township's cross-motion to dismiss the complaint.

In all three matters, the municipal defendants filed an appeal and the trial court stayed its order directing disclosure of the requested information pending appeal. We consolidated the appeals for purposes of argument and this opinion.

II.

We review de novo trial court decisions regarding the applicability of OPRA and whether statutory exclusions from public disclosure of information in government records have been met. O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 379 (App. Div. 2009); Asbury Park Press v. Cty. of Monmouth, 406 N.J. Super. 1, 6 (App. Div. 2009). "The purpose of OPRA 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." O'Shea, 410 N.J. Super. at 379 (quoting Times of Trenton Publ'g Corp. v. Lafayette Yard Community Dev. Corp., 183 N.J. 519, 535 (2005) (internal quotations omitted)). The statute "shall be construed in favor of the public's right of access . . . ." N.J.S.A. 47:1A-1. The records custodian has the burden to show that its denial of access was authorized by law. N.J.S.A. 47:1A-6; Lagerkvist v. Off. of Governor, 443 N.J. Super. 230, 234 (App. Div. 2015).

N.J.S.A. 47:1A-1 provides that "government records shall be readily accessible for inspection, copying, or examination . . . with certain exceptions, for the protection of the public interest . . . ." N.J.S.A. 47:1A-1. A "[g]overnment record" includes

> any . . . information stored or maintained electronically . . . that has been made, maintained or kept on file in the course of . . . official business by any officer . . . of the State or of any political subdivision thereof . . . or that has been received in the course of . . . official business by any such officer . . . .
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> [N.J.S.A. 47:1A-1.1.]

There is no dispute that the subscriber lists requested by RAH and AHCTF are government records created with information maintained by officers of the respective municipalities in the course of official business. See Paff v. Twp. of Galloway, 229 N.J. 340 (2017) (electronic fields of information, including email addresses, constituted government records under OPRA).

Defendants argue, however, the email addresses on the subscriber lists are excluded from public disclosure because of privacy concerns. The statute expressly excludes email addresses in public government records from disclosure in three circumstances. "A government record shall not include[:]" (1) "personal identifying information received by the Division of Fish and Wildlife . . . in connection with the issuance of any license authorizing hunting

with a firearm" including the "email address . . . of any applicant or licensee . . . [;]" (2) "information received by a member of the Legislature from a constituent . . . including . . . information . . . contained in any e-mail or computer data base . . . [;]" and (3) a "[p]ersonal firearms record," which includes the "email address . . . of any applicant, licensee, registrant or permit holder." N.J.S.A. 47:1A-1.1. These exclusions do not apply here.

In addition, N.J.S.A. 47:1A-5(a) provides that

> [p]rior to allowing access to any government record, the custodian thereof shall redact from that record any information which discloses the social security number, credit card number, unlisted telephone number, or driver license number of any person, or . . . the home address, whether a primary or secondary residence, of any active, formerly active, or retired judicial officer, prosecutor, or law enforcement officer, or . . . any immediate family member thereof . . . .[4]

The statute, which was amended several times in the recent past to expand protection of personal information, L. 2020, c. 125 § 1 (excluding home addresses of judicial officers from public disclosure); L. 2021, c. 19, § 18 (excluding records of certain marijuana convictions from public disclosure); L. 2021, c. 37 § 10 (excluding home addresses of immediate family members of

[4] The statute permits, in some circumstances, disclosure of social security numbers when they appear in documents required to be made, maintained or kept on file by a public agency. N.J.S.A. 47:1A-5(a).

judicial officers and others from public disclosure), does not include email addresses of people who subscribe to municipal newsletters and notices.

To justify their redactions, defendants rely on a provision of OPRA that concerns personal information more generally. N.J.S.A. 47:1A-1 provides that "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 . . . ."

This provision requires government records custodians, when reviewing a request for disclosure, to apply "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." Burnett, 198 N.J. at 427. The Supreme Court adopted the multi-factor framework set forth in Doe v. Poritz, 142 N.J. 1, 88 (1995), to determine whether the public interest justifies disclosure of personal information in a government record. Those factors are:

> (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.
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> [Burnett, 198 N.J. at 427 (quoting Doe, 142 N.J. at 88).]

Three recent Supreme Court opinions apply the Doe factors to requests for government records that public agencies argued contain private information.

Burnett involved a request for disclosure of documents relating to real property, such as mortgages, deeds, construction liens, and releases from judgment that had been filed with a county clerk over a twenty-two-year period. Id. at 415. The requestor intended to compile the documents in an easily searchable electronic database to which it would sell access. Ibid. The records, which were otherwise "plainly subject to disclosure," id. at 428, contained social security numbers (SSNs), implicating the privacy provision of OPRA. Id. at 416. The custodian sought to redact the SSNs pursuant to N.J.S.A. 47:1A-1, arguing that the parties whose SSNs appeared in the documents had an objectively reasonable expectation they would not be disclosed to the public. Ibid.

With respect to the first two Doe factors, the Court recognized the public interest in the availability of records relating to realty, given that "[t]he very purpose of recording and filing them 'is to place the world on notice of their

contents.'" Id. at 429 (quoting Dugan v. Camden Cnty. Clerk's Off., 376 N.J. Super. 271, 279 (App. Div. 2005)). "Potential buyers and creditors rely on the records to establish and protect their ownership interests." Ibid. (citing N.J.S.A. 46:22-1). In addition, the Court noted that SSNs are not required on the documents in question and were likely added by lenders and others who prepared them for filing. Ibid. Thus, the Court observed, it was unlikely that people realized their SSNs were on documents subject to public inspection or would be included in a computerized database available to be searched by anyone willing to pay for access to their information. Id. at 429-30.

In addition, the Court observed that while SSNs might be available in other public settings, that fact alone was not sufficient to erase the interest in limiting dissemination of that information. Id. at 430. The Court also found an elevated privacy interest because the SSNs appeared on the records along with other personal information, such as names, addresses, marital status, and mortgage details, ibid., and because the requestor intended to compile the information in an easily searchable database. Id. at 430-31.

As for the potential harm from disclosure, the Court found of "particular concern" the "significant risk of identity theft from disclosure of vast numbers of SSNs." Id. at 431. This is so, the Court found, because "SSNs are unique

identifiers. They are closely tied to a person's financial affairs and their disclosure presents a great risk of harm." Ibid. "'[A]rmed with one's SSN, an unscrupulous individual could obtain a person's welfare benefits or Social Security benefits, order new checks at a new address on the person's checking account, obtain credit cards, or even obtain that person's paycheck . . . .'" Ibid. (quoting Greidinger v. Davis, 998 F.2d 1344, 1354-55 (4th Cir. 1993) (citations and footnote omitted)).

With respect to factor five, the Court found that there were no safeguards against unlimited disclosure of the SSNs once released. Id. at 434. The Court also noted that the requestor had no demonstrated need for the SSNs and could fulfill its objective without access to the SSNs. Ibid. The Court held,

> [a]s a general rule, we do not consider the purpose behind OPRA requests. See [Michelson v. Wyatt, 379 N.J. Super. 611, 620 (App. Div. 2005)]. An entity seeking records for commercial reasons has the same right to them as anyone else. However, when legitimate privacy concerns exist that require a balancing of interests and consideration of the need for access, it is appropriate to ask whether unredacted disclosure will further the core purposes of OPRA: "'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. City of Hoboken, 196 N.J. 51, 64 (2008) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Off., 374 N.J. Super. 312, 329 (Law Div. 2004))]; see also Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 [(2004)]

> (noting that under [the Freedom of Information Act], to give effect to exemptions protecting personal privacy of citizens, "the usual rule that the citizen need not offer a reason for requesting the information must be inapplicable").
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> [Id. at 435.]

The Court concluded that "[n]either of OPRA's goals is furthered by disclosing SSNs that belong to private citizens to commercial compilers of computer databases. Were a similar request made by an investigative reporter or public interest group examining land recording practices of local government, this factor would weigh differently in the balancing test." Ibid.

Finally, the Court noted that the Legislature had "expressed increasingly strong concerns against disclosure of SSNs in recent years" through the enactment of statutes prohibiting the inclusion of SSNs on documents filed with a county recording authority. Id. at 435-36. The Court held that

> [o]n balancing the above factors, we find that the twin aims of public access and protection of personal information weigh in favor of redacting SSNs from the requested records before releasing them. In that way, disclosure would not violate the reasonable expectation of privacy citizens have in their personal information.
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> [Id. at 437.]

In Brennan v. Bergen Cnty. Prosecutor's Off., 233 N.J. 330, 333 (2018), a county prosecutor's office held a public auction to sell sports memorabilia it had

previously seized. All bidders submitted a registration form that included their names, addresses, telephone numbers, and email addresses. Ibid. There were thirty-nine successful bidders. Id. at 334. After a news report raised questions about the authenticity of the items, the prosecutor's office offered the successful bidders refunds. Ibid.

Brennan submitted an OPRA request for the contact information for each winning bidder. Ibid. The prosecutor's office produced receipts issued to the winning bidders "that did not include the buyers' names or addresses." Ibid. Brennan filed suit in the Law Division, alleging a violation of OPRA.

After applying the Doe factors, the trial court ordered release of the unredacted records. Ibid. The court found the privacy interest "limited" because the buyers' names and addresses were already publicly available from various sources. Ibid. The court also concluded that the risk of harm from disclosure was "relatively miniscule." Ibid. We reversed. We also applied the Doe factors, but concluded that the privacy interest was significant because the release of the buyers' names and addresses would reveal that they are collectors of valuable memorabilia, which might make them targets for theft. Ibid. In addition, we reasoned that the interest in government accountability was not served by disclosure because the buyers "were not responsible for any government actions

in connection with the auction." Id. at 336. We, therefore, found that Brennan was not entitled to the release of unredacted versions of the records. Ibid.

The Supreme Court reversed. The Court emphasizes that Burnett does not "require[] courts to analyze the Doe factors every time a party asserts that a privacy interest exists." Id. at 341. As the Court explained,

> [i]n Asbury Park Press v. County of Monmouth, for example, the Court ordered disclosure of a settlement agreement between the County of Monmouth and an employee. 201 N.J. 5, 6 (2010). The employee had filed a lawsuit claiming sex discrimination, harassment, retaliation, and a hostile work environment. Id. at 6. The County relied on OPRA's privacy clause to try to prevent disclosure of the agreement. Id. at 6-7.
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> Noting that the case was "a far cry from Burnett," the Court quickly dispensed with the argument. Ibid. The Court explained that "OPRA's privacy clause has no application here because this case does not implicate the concerns raised in Burnett." Id. at 7. The Court also saw "no reason to analyze the Doe factors" when "a former county employee chose to file a public action – a complaint against the County which was available to the public" – and the matter would have unfolded in open court had the case not settled. Ibid. Disclosure of the settlement, the Court observed, "would not violate any reasonable expectation of privacy." Ibid.
>
> [Ibid.]

The Court clarified its holding in Burnett, as it was interpreted in Asbury Park Press: "before an extended analysis of the Doe factors is required, a

custodian must present a colorable claim that public access to the records requested would invade a person's objectively reasonable expectation of privacy." Id. at 342. When the custodian does "not present a colorable privacy claim at the outset . . . there is no need to resort to the Doe factors." Ibid.

Applying that standard, the Court concluded that the custodian at the prosecutor's office did not present a colorable claim of privacy in the names and addresses of the successful bidders. As the Court explained, "[t]he bidders knew that they were participating in a public auction" and "that they were bidding on seized property forfeited to the government." Ibid. In addition, the Court noted, "[f]orfeiture proceedings and public auctions of forfeited property are not conducted in private." Ibid. Statutes require the filing of a complaint before property can be forfeited and public notice in advance of the auction. Ibid. The Court concluded:

> [a]ll of those circumstances undermine the notion that a bidder could reasonably expect the auction in this case to be cloaked in privacy. Viewed objectively, it was unreasonable for a buyer to expect that the information requested would remain private. If anything, the sale of government property at a public auction is a quintessential public event that calls for transparency. To guard against possible abuses, the public has a right to know what property was sold, at what price, and to whom. OPRA's plain terms call for disclosure of that type of recorded information, including the names and

> addresses of successful bidders. To hold otherwise would jeopardize OPRA's purpose . . . .
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> [Id. at 343.]

Recently, in Bozzi v. City of Jersey City, 248 N.J. 274, 278 (2021), the owner of an invisible fence installation business submitted an OPRA request for a copy of Jersey City's dog license records. He noted that the city may "redact information relating the breed of the dog, the purpose of the dog – if it is a service or law enforcement animal – and any phone numbers associated with the records. He sought only the names and addresses of the dog owners." Ibid. He intended to use the information to solicit customers for his business. Id. at 277.

The city denied the request, asserting that disclosure of the names and addresses of dog license applicants would violate their objectively reasonable expectations of privacy. Id. at 278. In addition, the city noted that disclosure "may jeopardize the security of both dog-owners' and non-dog-owners' property, as well as potentially put the dogs themselves at risk for theft." Ibid.

After the requestor filed suit alleging a violation of OPRA, the city submitted a certification from its Police Chief, expressing "exceptional[] concern[]" about release of the information. Ibid. He certified that

> those residing at addresses known not to have dogs on the premises may be exposed as more vulnerable to robbery or burglary. Further, disclosure may expose

> the locations of victims who have fled from threats, stalking, and other harm. And finally, knowing an address has a dog may encourage wrongdoers to bring a weapon.
>
> [Ibid.]

A second certification stated there were five reported dog thefts in the city in the year preceding the request. Id. at 279.

The trial court concluded that the information was not excluded from public disclosure. Ibid. We affirmed. Id. at 279-80.

On appeal, the Supreme Court noted that there is no express statutory exemption from public disclosure for names and home addresses appearing in dog license applications. Id. at 284. Thus, the Court observed, the requested information could be protected from disclosure only if it fell within the more general privacy provision of N.J.S.A. 47:1A-1. Id. at 285.

As the Court held, "[i]t is . . . the ownership and licensing of a dog that would have to provide a reasonable expectation of privacy for Jersey City to make . . . a colorable claim. And it is here that Jersey City's claim fails, because we find no reasonable expectation of privacy in owning or licensing a dog." Id. at 286. The Court found that

> [o]wning a dog is, inherently, a public endeavor. Owners – and the dogs themselves – are regularly exposed to the public during daily walks, grooming

> sessions, and veterinarian visits. Many owners celebrate their animals on social media or bumper stickers, inherently public platforms. Some people put up signs stating that there is a dog at the residence; others frequent certain parks or establishments specifically made for dogs and dog owners. Some owners even enter their dogs into public shows, events, and competitions. Dog owners who continually expose their dogs to the public cannot claim that dog ownership is a private undertaking. Just like the participants in the public auction in Brennan, dog owners are fully aware of the public exposure of their actions.
>
> [Ibid.]

Because it concluded that the Jersey City custodian did not state a colorable claim that public disclosure of the requested information would violate an objectively reasonable expectation of privacy, the Court did not apply the Doe factors to determine if disclosure was permitted. Id. at 287.

We have carefully considered the record in light of these precedents and conclude that the trial courts erred when they found that the requested information is not protected from public disclosure.

We agree with the trial courts that no provision of OPRA expressly excludes from public disclosure the email addresses of people who subscribe to municipal newsletters and notices. As detailed above, the Legislature identified three circumstances in which email addresses in government records are categorically excluded from disclosure. None of those circumstances apply

here. We think it significant that N.J.S.A. 47:1A-1.1 expressly protects from disclosure information about constituents stored in a computer database by a member of the Legislature, but does not extend that protection to such information in possession of municipal officials. The Legislature appears to have drawn a deliberate distinction between themselves and municipal officials with respect to information of the type requested here. We do not think, however, that the Legislature intended to subject email addresses in municipal records to public disclosure in every circumstance.

In addition, N.J.S.A. 47:1A-5(a) contains a detailed list of personal information in government records that must be redacted before disclosure. That list does not include email addresses. Unlike in Burnett, the Legislature has not enacted a statute expanding protection for email addresses in the government records of municipalities.[5]

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[5] The significance of the omission of email addresses from N.J.S.A. 47:1A-5(a) must be considered in light of the 2004 report from the Privacy Study Commission, created by Governor McGreevey in 2002, through Executive Order No. 21. The Commission recommended that for purposes of OPRA, email addresses be treated in the same manner as unlisted telephone numbers, which are protected from disclosure in N.J.S.A. 47:1A-5(a). See Privacy Study Commission, Final Report 12 (2004). The Legislature has not adopted that recommendation. The Supreme Court found legislative inaction with respect to a recommendation of the Commission "strongly cautions against creating a judicial exception" that effectuates the unadopted recommendation. Bozzi, 248

The only provision under which the information requested here may be protected from disclosure is the personal information privacy provision of N.J.S.A. 47:1A-1. We conclude that the custodians made colorable claims that disclosure of the email addresses would invade the reasonable expectations of privacy of the people who subscribed to municipal newsletters and notices. It is a colorable proposition that people who register for the passive electronic receipt of information from a municipality do not expect their email addresses will be disclosed to non-government organizations that intend to send them unsolicited emails furthering the organizations' political and social objectives.

We also conclude that an expectation of privacy in these circumstances is objectively reasonable and outweighs what we find to be the minimal public interest advanced by disclosure of the requested information. We apply the Doe factors in turn:

(1) As we explained, the information sought is the email addresses of people who subscribed to receive municipal newsletters and notices;

N.J. at 284-85 (citing Brennan, 233 N.J. at 339). We do not view our holding today as creating a categorical exemption for email addresses. We instead interpret the long-standing privacy provision in N.J.S.A. 47:1A-1 to apply to email addresses in the circumstances presented in these appeals.

(2) The requested information contains email addresses, which are generally widely publicly disclosed and, in this instance, voluntarily given to municipal officials. The context in which this information was disclosed, however, underscores the reasonableness of an expectation that the email addresses would not be further disclosed to non-government organizations. By consenting to the passive receipt of periodic, generic newsletters and notices, the subscribers are not participating in an inherently public act, seeking to influence government decision making, or engaging in a dialogue with public officials or employees about public business. They merely consented to receive information from government officials that will be sent to anyone else who subscribes to the newsletters and notices;

(3) We acknowledge that the harm from disclosure of the requested information is likely minimal. RAH and AHCTF admit that they intend to send unsolicited emails to the addresses on the subscriber lists. While it is likely that some recipients of the unsolicited emails will be interested in the information they convey, it is equally likely that other recipients will disagree with the political and social objectives of the organizations or will simply wish not to be contacted by them. We recognize that unsolicited emails are an unfortunate reality of modern life. We do not agree, however, that their inevitability means

that people should be subjected to additional unsolicited emails from organizations, which may have political and social objectives with which they disagree, merely because they consented to receiving newsletters and notices from a municipality. Although unwanted emails can be filtered, screened, or blocked, they remain a nuisance, particularly in light of the absence of limitations on further distribution of the subscriber lists once released;

(4) We think it is likely that at least some members of the public will be deterred from subscribing to municipal newsletters and notices if subscriber lists are subject to public disclosure. The value of being able to passively receive information from municipal officials may be outweighed in the minds of some people by the prospect of receiving unsolicited emails from non-government organizations furthering the organizations' political and social objectives;

(5) While there is no practical way to prevent RAH and AHCTF from further distributing the email addresses, the groups have not expressly indicated that they intend to share the subscriber lists with other organizations;

(6) We disagree that RAH and AHCTF made a showing of need for the requested information. Nothing in the record suggests that the organizations will be unable to distribute emails to the public furthering their objectives

without the municipal subscriber lists. The organizations are free to compile subscriber lists of their own from people who consent to receiving emails from them. While the municipal subscriber lists provide an inexpensive and easy way for RAH and AHCTF to disseminate information, those lists are not essential to accomplishing that goal;

(7) We also find that disclosure would not further the public interest. The purpose of OPRA is to facilitate transparency in government. Given the passive nature in which municipal newsletters and notices are sent, disclosure of subscriber lists does little to enlighten the public about the operations of government. As noted above, the subscriber lists do not identify people who have engaged government officials in discussions about public business. They are, instead, a list of email addresses of people who consented to the one-way receipt of generic information.

We conclude that in the circumstances presented here, the objectively reasonable interest in privacy associated with protecting the email addresses on the subscriber lists outweighs the limited public interest that would be advanced by public disclosure. The trial courts erred when they ordered disclosure of the requested information under OPRA.

In the Bridgewater and West Deptford complaints, RAH alleged it is entitled to disclosure of the requested information under the common law right of access. The trial court in Bridgewater found that disclosure was required under the common law. The trial court in West Deptford did not address the issue. No party raises the common law on appeal. We have weighed the factors applicable to a common law claim for access to government records, Keddie v. Rutgers, the State Univ., 148 N.J. 36, 50 (1997), and conclude that the interest in maintaining the privacy of the email addresses on the subscriber lists outweighs any interest RAH and AHCTF have in accessing that information.

The orders on appeal are reversed to the extent they require the disclosure of the requested information pursuant to OPRA and/or the common law and deny defendants' cross-motions. We remand the matters for further proceedings consistent with this opinion, given that attorney's fees were awarded by the trial courts with respect to information we conclude is not subject to disclosure. We do not retain jurisdiction.

Reversed and remanded.