

## **Home Addresses in Public Records**

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Executive Order 26 directs the Privacy Study Commission to "to study the issue of whether and to what extent the home address and home telephone number of citizens should be made publicly available by public agencies and to report back to the Governor and the Legislature within six months."

### **Who Expects Their Home Address to be Private?**

Many people have a reasonable expectation that their home address will be private, including:

- Children
- Renters
- People with "unlisted" phone numbers
- People who have no phone number listed in their name
- People who live in a relative's house (including spouses)

The government may infringe upon this expectation of privacy when it disseminates this otherwise unobtainable information to the public. Even more serious are examples of government records that contain other sensitive information. For example, municipal recreation department records include children's records, which may contain birth dates, emergency phone numbers, and medical conditions.

### **Is There a Legal Right to Privacy?**

Yes. You will not find the word "privacy" in the U.S. constitution or in the New Jersey constitution, but both charters protect an aspect of personal liberty that we ordinarily call privacy. Federal and state courts have explained the right to privacy in several cases. The United States Supreme Court defined a constitutional right to information privacy in Whalen v. Roe, 429 U.S. 589, 599-600 (1977). The right to

privacy embraces both (i) an “individual interest in avoiding disclosure of personal matters” and (ii) an “interest in independence in making certain kinds of important decisions.”

Addressing the first category of “informational privacy,” federal courts have found that the government causes harm when it publishes information that its citizens reasonably expected to remain private. In Fraternal Order of Police Lodge 5 v. Philadelphia, 812 F.2d 105, 116 (3d Cir. 1987), for example, the court held that the government can protect the integrity of its police force by refusing to hire applicants it deems untrustworthy, but it cannot invade the privacy of candidates by forcing them to disclose intimate details about their personal lives without first justifying their need to do so. The balancing test for determining whether to make disclosures is set forth in United States v. Westinghouse Electric Corp., 638 F.2d 570 (3d Cir. 1980).

The second category of privacy rights, involving the freedom to make intimate decisions, has been the subject of several cases before the New Jersey Supreme Court. The constitutional right to privacy takes the form, under the New Jersey Constitution, of a right to be free from state interference on illegitimate grounds. The first paragraph of Article I provides that:

All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying life and liberty, of acquiring, possessing and protecting property and of pursuing and obtaining safety and happiness.

The New Jersey Supreme Court has repeatedly held that the government cannot interfere with the privacy right protected by the state constitution, in cases like In re Quinlan, 70 N.J. 10 (1976) (“right to die”); State v. Saunders, 75 N.J. 200, 219 (1977)

(consensual sexual relations between adults); State v. Baker, 81 N.J. 99, 109 (1979) (family composition); In re Grady, 85 N.J. 235 (1981) (sterilization); Right to Choose v. Byrne, 91 N.J. 287 (1982) (procreation); Greenberg v. Kimmelman, 99 N.J. 552, 570 (1985) (right to marry).

Protection of one's home address clearly falls within the category of "informational privacy."

### **Does the Right To Privacy Protect My Home Address?**

Yes. The courts have established that you have a reasonable expectation of privacy with respect to your home address. For example, in United States Dep't of Defense v. Fair Labor Relations Authority, 510 U.S. 487 (1994), the U.S. Supreme Court explained:

It is true that home addresses are publicly available through sources such as telephone directories and voter registration lists, but in an organized society, there are few facts that are not at one time or another divulged to another. ... An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information is made available to the public in some form.... Id. at 500. "We are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws and traditions." Id. at 501.

There are several cases in which the federal courts have similarly emphasized the sanctity of the home. See, e.g., Rowan v. United States Post Office Dep't, 397 U.S. 728, 737 (1970) (individuals have a right to reject unwanted mailings, based upon Congress's desire to protect the privacy of the home); Paul P. v. Farmer, 227 F.3d 98, 101 (3d Cir. 2000) (even sex offenders have a non-trivial privacy interest in their home address); Fed. Labor Relations Auth. v. Dep't of Navy, 966 F.2d 747, 756 (3d Cir. 1992) (en banc) (disclosure of an individual's home address infringes upon a recognized privacy interest);

Fed. Labor Relations Auth. v. Dep't of Treasury, 884 F.2d 1446, 1453 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055 (1990) (Privacy Act prohibits release of home addresses); Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989) (zero legitimate interest in disclosing home addresses of retired or disabled federal employees).

The right to privacy confers, as against the government, “the right to be let alone - the most comprehensive of rights and the right most valued by civilized men.” Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). In Rowan, the Supreme Court held that the “right to be let alone” in one’s home requires upholding, against First Amendment challenges, the rights of homeowners to take their names and addresses off various mailing lists:

We ... categorically reject the argument that a vendor has a right under the constitution or otherwise to send unwanted material into the home of another.... That we are often “captives” outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere.... The asserted right of a mailer, we repeat, stops at the outer boundary of every person’s domain.” Rowan, 397 U.S. at 738.

Rowan places the right to be let alone in one’s home “in the scales with the [constitutionally-protected] rights of others to communicate.” 397 U.S. at 736.

As the New Jersey Supreme Court has explained, “[d]isclosure of a plaintiff’s home address, particularly when coupled with the other information disclosed, implicates a privacy interest.” Doe v. Poritz, 142 N.J. 1, 84 (1995).

[T]he question of whether an individual has a privacy interest in his or her bare address does not fully frame the issue. The more meaningful question is whether inclusion of the address in the context of the particular requested record raises significant privacy concerns, for example because the inclusion of the address can invite unsolicited contact or intrusion based on the additional information.

Id. at 83.

An address tells more than simply where someone lives; it can identify specific and sometimes personal characteristics about its residents. Home address lists communicate specific traits shared by a community, which gives the lists considerable commercial value to businesses, solicitors, marketing experts, insurance companies, social scientists, pollsters and others. Thus, disclosure of one's home address and name could simultaneously divulge to an astute or interested observer significant and highly personal details about one's life, and expose the person and his or her family to commercial, political, social and potential safety invasions.

The compilation of home addresses in widely available telephone directories might suggest a consensus that these addresses are not considered private were it not for the fact that a significant number of persons, ranging from public officials and performers to just ordinary folk, choose to list their telephones privately, because they regard their home addresses to be private information. Indeed, their view is supported by decisions holding that home addresses are entitled to privacy under FOIA, which exempts from disclosure personal files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

Paul P. v. Farmer, 227 F.3d 98, 101 (3d Cir. 2000) (quoting the Freedom of Information Act, 5 U.S.C. § 552(b)(6)).

### **What if My Home Address is in a "Public Record"?**

Just because a piece of information is in a "public record" doesn't mean it can be published for any purpose. As the U.S. Supreme Court explained in United States Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989):

"[There is a] privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public." Id. at 767. "The compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of information. The dissemination of that composite of information infringes upon both the common law and the literal understandings of privacy [that] encompass the individual's control of information concerning his or her

person.” *Id.* at 763. “Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a [government-created] computerized summary located in a single clearinghouse of information.” *Id.* at 764. “[T]he fact that an event is not wholly ‘private’ does not mean that an individual has no interest in limiting disclosure or dissemination of the information.” *Id.* at 770.

In my opinion, the core purpose of the New Jersey Open Public Records Act (OPRA), N.J.S.A. 47:1A et seq., is to enhance public understanding of the operations and activities of government. Official information that sheds light on a state agency’s performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency’s own conduct. *See DOD*, 510 U.S. at 495-96, quoting *Reporters Committee*, 489 U.S. at 773, and *Dep’t of Air Force v. Rose*, 425 U.S. 352, 360-361 (1976).

### **Where’s the Harm if the Government Discloses Home Addresses?**

People often make a genuine effort to keep their home address information private, by getting an unlisted telephone number or asking to be removed from mailing lists. If one does not want one’s residence to be known, the importance of its being unknown goes to the core of individual privacy. People who do not want their addresses released have limited means for preventing disclosure, and little recourse once the disclosure has been made.

Improper disclosure of information by the government is a recognized injury. In Virginia, for example, when the voter registration system required voters to disclose their Social Security Numbers publicly in order to vote, the courts found the system to be unconstitutional. *Greidinger v. Davis*, 988 F.2d 1344 (4th Cir. 1993).

Home addresses are therefore well within the “zone of privacy” under which individuals are “reasonably expected” to be free from governmental intrusion. The U.S. Supreme Court and the Third Circuit have found that privacy interests were infringed by the government even when disclosure of home addresses resulted in only a minimal effect, such as unsolicited contact. See e.g., Dep’t of Defense, 510 U.S. at 500-501.<sup>1</sup>

The government intrudes upon the zone of privacy when it publishes information beyond what is reasonably expected in the course of daily life. The government may overcome this right of its citizens in limited circumstances, but it must first establish its need to do so.

### **What Should the Government Do?**

The first and most important task for the state is to make sure that people understand that their information will become public when it becomes part of an open public record. When people reasonably expect the government to keep their personal data confidential, by paying extra for an “unlisted” number or making traditional assumptions, the state should a) notify them that the information may be published; b) change the recordkeeping system so that unlisted numbers can be flagged and withheld; or c) redact the personal data from disclosure.

We should ask what public interest is served by making personal information public. Government data on individuals (“personal data”) has twin aspects, being concerned with both government operations and the affected individuals. As such, the existence of personal data necessarily entails conflicts between the public right to know and individual right of privacy. Citizens have a (not unlimited) right to know what their

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<sup>1</sup> Many Supreme Court cases make the point, in a variety of contexts, that the home is the last refuge of privacy. See, e.g., Kyllo v. United States, 533 U.S. 27 (2001) (thermal imaging); Frisby v. Schultz, 487 U.S. 474 (1988) (residential picketing); FCC v. Pacifica, 438 U.S. 726 (1978) (broadcast media).

government is doing, while individuals have a (not unlimited) right to keep sensitive information about themselves private.

For example, the Attorney General maintains a list of all professionals who are licensed by the Division of Consumer Affairs. These licensed professionals are required to file an “address of record,” which may sometimes be a home address. If a consumer wishes to determine whether a particular individual is licensed, he or she can call the DCA, which will provide the licensee’s name and licensing status. Should the DCA disclose the professional’s home address? In my opinion, it serves no public interest to do so.

The conflicting rights of privacy and freedom of information can be resolved in various ways. Different approaches may be appropriate for different situations, such as:

- giving notice to the affected person
- giving affected persons a chance to opt-in or opt-out
- requiring a statement of purpose
- making the fact of access a public record
- preventing convicts from getting access
- forbidding certain kinds of use
- establishing categories of information
- hiring interns to redact personal data
- restoring practical inaccessibility

It may be appropriate to enumerate, or at least categorize, those situations in which personal information like addresses and phone numbers could conceivably be considered a legitimate part of a public record. For example, voter lists may be part of a definable universe of records in which the state has an overriding interest, such as preventing voter fraud. (Or maybe not; it may suffice to disclose only the town or county or state of residence.)<sup>2</sup>

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<sup>2</sup> Almost half of the states prohibit the commercial use of voter registration records. For example, California provides that voter registration lists may only be released to candidates, political committees, or



## **Conclusion**

The bottom line, in my opinion, is that for personally identifiable information, the determination of what constitutes a “public record” should be a conclusion, not an initial assumption. If municipal recreation department records include children’s records, with sensitive information such as birth dates, emergency phone numbers, and medical conditions, we need to ask whether those records should be public at all.

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for “election, scholarly, journalistic, political, or governmental purposes.” Cal. Gov't Code § 6254.4 and Cal. Elec. Code § 2194(a)(2). Florida prohibits the use of lists of registered voters for any use other than uses “related to elections, political or governmental activities, voter registration, or law enforcement.” Fla. Stat. § 98.095(2).