

To: New Jersey Law Revision Commission
From: Rachael Segal, Legislative Law Clerk
Re: Meaning of ‘Name’ and ‘Identity’ for OPRA Exception in N.J.S. 47:1A-3(b) (*North Jersey Media Group, Inc. v. Township of Lyndhurst*)
Date: November 14, 2018

MEMORANDUM

Executive Summary

In *North Jersey Media Group, Inc. v. Township of Lyndhurst*,¹ the New Jersey Supreme Court considered how to interpret two exceptions in the Open Public Records Act (OPRA). Among the Court’s determinations was that Section 3(b) of OPRA uses ‘name’ and ‘identity’ interchangeably. The Court affirmed in part and reversed in part.

Background

New Jersey’s Open Public Records Act (“OPRA”)² codified the State’s policy of favoring broad access to public records.³ It states that (1) “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest,”⁴ (2) “any limitations on the right of access ... shall be construed in favor of the public’s right of access,”⁵ and (3) public agencies “shall have the burden of proving that the denial of access is authorized by law.”⁶ OPRA includes some exemptions, one of which was the exemption of records of an ongoing investigation, which “has two parts: section 3(a)⁷ and section 3(b)⁸.”⁹

Section 3(b) “requires the release of specific information about a criminal investigation ‘within 24 hours or as soon as practicable, of a request.’”¹⁰ Among other categories, this includes “information as to the name, address and age of any victims” in certain circumstances,¹¹ while also noting that when releasing information “as to the identity of a victim, the safety of the victim and

¹ *North Jersey Media Group, Inc. v. Township of Lyndhurst*, 229 N.J. 541 (2017).

² N.J.S. 47:1A-1 to -13.

³ *Lyndhurst*, 229 N.J. at 555.

⁴ *Id.* (citing N.J.S. 47:1A-1).

⁵ *Id.*

⁶ *Id.* (citing N.J.S. 47:1A-6).

⁷ N.J.S. 47:1A-3(a) (covering records that pertain to an investigation in progress)

⁸ N.J.S. 47:1A-3(b) (identifying information that the public agency must disclose within 24 hours of a request).

⁹ *Lyndhurst*, 229 N.J. at 556.

¹⁰ *Id.* at 570 (quoting N.J.S. 47:1A-3(b)).

¹¹ N.J.S. 47:1A-3(b); *Id.* (“unless there has not been sufficient opportunity for notification of next of kin of any victims of injury and/or death to any such victim or where the release of the names of any victim would be contrary to existing law or Court Rule”)

the victim's family, and the integrity of any ongoing investigation, shall be considered."¹² It further includes exceptions for "information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party," and "information as to the identity of the investigating and arresting personnel and agency."¹³

North Jersey Media Group, Inc. v. Township of Lyndhurst addressed what information was subject to an OPRA request after a car chase in which a suspect eluded police, crashed into a guardrail, and allegedly placed officers in danger as he attempted to drive away.¹⁴ Officers fired their weapons and the suspect was killed.¹⁵ After the event, an investigation was commenced, and the Attorney General issued a press release concerning the incident that did not reveal officers' names or how many officers fired weapons.¹⁶ Knowing that officers who use deadly force must complete certain reports,¹⁷ reporters filed OPRA requests for the names of the officers who used deadly force in the incident, among other items.¹⁸ The reporters filed an action¹⁹ in the Superior Court, alleging OPRA violations and common law right of access claims.²⁰ North Jersey Media Group (NJMG) sought release of the requested records or in camera review.²¹ The Trial Court ordered the records disclosed.²² The Appellate Division found the records exempt from disclosure pursuant to OPRA.²³

Analysis

The Supreme Court considered two OPRA exemptions, one of which was the exemption of records of an ongoing investigation,²⁴ which includes section 3(b).²⁵ Defendants argued that "section 3(b) does not require disclosure of the 'names' of the officers involved in a shooting incident and, in any event, allows law enforcement to withhold that information under circumstances that apply here."²⁶ Defendants maintained that Section 3(b) required them to release information, not records.²⁷

¹² N.J.S. 47:1A-3(b).

¹³ *Id.*

¹⁴ *Lyndhurst*, 229 N.J. at 550.

¹⁵ *Id.*

¹⁶ *Id.* at 552-553; and see Press Release, Attorney General, *Attorney General's Shooting Response Team Investigates Fatal Shooting in Rutherford Involving State Police & Local Officers* (Sept. 16, 2014).

¹⁷ Attorney General, *Use of Force Policy*, at 7 (Apr. 1985, revised June 2000); and see NJMG at 553.

¹⁸ *Lyndhurst*, 229 N.J. at 550.

¹⁹ Against municipalities, police departments, State Police and their records custodians.

²⁰ *Lyndhurst*, 229 N.J. at 550.

²¹ *Id.* at 554; see *Id.* (They also requested fees and costs pursuant to N.J.S. 47:1A-6).

²² *Id.* at 550.

²³ *Id.* at 558.

²⁴ N.J.S. 47:1A-3.

²⁵ *Lyndhurst*, 229 N.J. at 556.

²⁶ *Id.* at 562.

²⁷ *Lyndhurst*, 229 N.J. at 562; and see *id.* at 563 ("defendants argue that NJMG could not clear the steep hurdle that exists under the common law when a requester seeks records relating to an ongoing criminal investigation").

One of the certifications²⁸ focused on arguments in opposition to the release of the names of the officers involved in a shooting.²⁹ The certification argued that the stigma of being associated with a law enforcement investigation was “palpable,” “potentially devastating,” and

“not so easily removed” even if “no charges are substantiated”; that the officers would face extensive media coverage with real consequences to them, their families, and the agencies they serve; that the officers and their families would face the “risk of retaliation”; and that disclosure “would greatly prejudice” the integrity of “the ongoing [. . .] investigation.”³⁰

The Court found these reasons would apply to “nearly all cases in which a law enforcement officer uses deadly force.”³¹ It determined that the arguments “could lead to a change in the current law” if “accepted by the Legislature,” but that the courts were not the vehicle for that change.³²

The Court determined that “Section 3(b) uses ‘name’ and ‘identity’ interchangeably,” with little further comment on that fact.³³ As written, the law requires the disclosure of “the identity of the investigating and arresting personnel” and repeats that the exception on which defendants rely “shall be narrowly construed.”³⁴ Therefore, the Court determined that section 3(b) does “not require the State to demonstrate an actual threat against an officer,” but emphasized that “generic reasons alone cannot satisfy the statutory test.”³⁵

The Court did note that 3(b) allows flexibility as to timing of information request responses: “within 24 hours *or as soon as practicable*, of a request.”³⁶ The Court also notes that the “statute does not specify *how* information should be made available to the public,” so an agency using a press release under the time timeframe the law provides is acceptable.³⁷

Conclusion

Staff seeks authorization to conduct additional research and outreach to determine whether editing Section 3(b) regarding “name” and “identity,” or modifying the statute in some other limited way, would aid in interpreting the provision.

²⁸ Submitted by the Police Chief of Detectives, Paul Morris.

²⁹ *Lyndhurst*, 229 N.J. at 571.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 571-72 (quoting N.J.S. 47:1A-3(b));

³⁵ *Id.* at 572.

³⁶ *Id.* (citing N.J.S. 47:1A-3(b)).

³⁷ *Id.*