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This opinion shall not "constitute precedent or be binding upon any court."  
Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4884-15T3

JESSE WOLOSKY,

Plaintiff-Appellant,

v.

BOROUGH OF WASHINGTON,

Defendant-Respondent.

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Argued November 2, 2017 – Decided November 17, 2017

Before Judges Haas and Rothstadt.

On appeal from Superior Court of New Jersey,  
Law Division, Warren County, Docket No. L-  
0099-16.

Richard M. Gutman argued the cause for  
appellant.

Tara A. St. Angelo argued the cause for  
respondent (Gebhardt & Kiefer, PC, attorneys;  
Leslie A. Parikh and Ms. St. Angelo, on the  
brief).

PER CURIAM

Plaintiff Jesse Wolosky appeals from the June 8, 2016 Law  
Division order denying his request for an unredacted copy of a  
municipal clerk's payroll record. We affirm.

The relevant facts are not in dispute. Plaintiff made a request to defendant Borough of Washington under the Open Public Records Act, N.J.S.A. 47:1A-1 to -13 (OPRA), for "[a] copy of the actual existing official year[-]end payroll record for 2015 or the year[-]end pay stub for 2015 for the Manager/Municipal Clerk." The Borough responded to plaintiff's request by giving him the clerk's 2015 year-end payroll document<sup>1</sup> with the clerk's deductions for pension contributions, pension loan payments, and health insurance payments redacted.

Plaintiff asked for an explanation for the redactions, and the Borough's attorney provided a detailed, written response. Among other things, the attorney stated that the information plaintiff requested about the clerk's pension contributions, pension loan, and health insurance payments were "personnel [and] pension records" that were exempt from disclosure under N.J.S.A. 47:1A-10. The attorney also advised plaintiff that the Borough's position was consistent with that taken by the Government Records Council (GRC) in similar cases.

Plaintiff filed a complaint and order to show cause seeking access to the redacted information. Following oral argument,

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<sup>1</sup> This document listed the clerk's annual salary for 2015, together with her federal and state tax, Medicare, and Social Security payments for the year.

Judge Yolanda Ciccone rendered a concise and thoughtful oral opinion denying plaintiff's request and dismissing his complaint.

By way of background, 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." Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). In furtherance of that purpose, the Legislature has declared that "government records<sup>[2]</sup> 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, and any limitations on the right of access . . . shall be construed in favor of the public's right of access[.]" N.J.S.A. 47:1A-1.

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<sup>2</sup> "'Government record' or 'record' means any 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 course 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." N.J.S.A. 47:1A-1.1.

However, "the right to disclosure is not unlimited" and OPRA is clear that "the public's right of access [is] not absolute." Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 588 (2011). In this regard, N.J.S.A. 47:1A-10 specifically states that "the personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record and shall not be made available for public access[.]" N.J.S.A. 47:1A-10 reflects the Legislature's determination "that personnel records are, by definition, not classified as government records at all; any document that qualifies as a personnel record is therefore not subject to being disclosed notwithstanding the other provisions of the statute." Kovalcik, supra, 206 N.J. at 592.

Under OPRA, a "personnel record" may only be disclosed "if and only if, [it] . . . fits within one of the three exceptions to the general exemption for personnel records" set forth in N.J.S.A. 47:1A-10. Ibid. As plaintiff argued before Judge Ciccone, one of the three exceptions set forth in N.J.S.A. 47:1A-10 provides that "an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record" and subject to release under OPRA.

Ibid. (emphasis added).<sup>3</sup> Plaintiff asserted that the information he requested concerning the clerk's pension and health insurance payments was part of her "payroll record" and, therefore, should be released under N.J.S.A. 47:1A-10.

Judge Ciccone rejected plaintiff's contention on this point and concluded that the clerk's pension contributions, pension loan, and health insurance payments were not a required part of an employee's payroll record and, therefore, not subject to disclosure under OPRA. In so ruling, the judge relied upon the New Jersey Department of Labor and Workforce Development's definition of this term in N.J.A.C. 12:16-2.1(a), which states:

Every employing unit having workers in employment, regardless of whether such unit is or is not an "employer" as defined in the Unemployment Compensation Law, shall keep payroll records which shall show, for each pay period:

1. The beginning and ending dates;
2. The full name of each employee and the day or days in each calendar week on which services for remuneration are performed;
3. The total amount of remuneration paid to each employee showing separately cash, including commissions and bonuses; the cash value of all compensation in any medium other than cash; gratuities received regularly in the course of employment if reported by the employee, or if not so reported, the minimum

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<sup>3</sup> Executive Order No. 11 (Nov. 15, 1974) likewise contains a provision that mirrors the exception for payroll records.

wage rate prescribed under applicable laws of this State or of the United States of the amount of remuneration actually received by the employee from his employing unit, whichever is the higher[, ] and service charges collected by the employer and distributed to workers in lieu of gratuities and tips;

4. The total amount of all remuneration paid to all employees;

5. The number of weeks worked.

Because an employee's pension and health insurance payments are not a required part of a "payroll record" under this regulation, Judge Ciccone concluded that this information was not covered by the exception to non-disclosure for payroll records set forth in N.J.S.A. 47:1A-10.<sup>4</sup> Therefore, the judge dismissed plaintiff's complaint because the clerk's personnel and pension records were protected from disclosure by N.J.S.A. 47:1A-10.

Although this ruling ended the inquiry, Judge Ciccone nevertheless went on to address plaintiff's contention that the clerk's expectation of privacy did not outweigh the public's general right to access to government documents. The judge stated that she applied the balancing test analysis established by the

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<sup>4</sup> Decisions of the GRC "shall not have value as a precedent for any case initiated in the Superior Court[,]" N.J.S.A. 47:1A-7(e). Nevertheless, we note that the GRC has taken a similar position in at least two of its prior decisions, as well as in the training materials it provides to government agencies. See McCormack v. N.J. Dep't of Treasury, GRC Complaint No. 2005-164 (July 2008); Jackson v. Kean Univ., GRC Complaint No. 2002-98 (Feb. 2004).

Supreme Court in Doe v. Poritz, 142 N.J. 1, 88 (1995), which requires a judge to consider the following seven factors:

(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.

[Ibid.]

After analyzing these factors, Judge Ciccone found that "the controlling factor for this [c]ourt is the determination that the public's right to access of the amount of money that [the clerk] contributes to her health insurance and pension is heavily outweighed by [the clerk's] expectation of privacy in the information." Therefore, the judge concluded that even if the redacted information was not already specifically exempt from disclosure under N.J.S.A. 47:1A-10, the Borough properly denied plaintiff's OPRA request under the Doe balancing test. This appeal followed.

On appeal, plaintiff argues that Judge Ciccone erred in dismissing his OPRA claim. We disagree.

Because "determinations about the applicability of OPRA and its exemptions are legal conclusions," our standard of review is de novo. Carter v. Doe, 230 N.J. 258, 273-74 (2017) (citing O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 379 (App. Div. 2009)). We have considered plaintiff's contentions in light of the record and the legal principles discussed above, and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We are satisfied that Judge Ciccone properly determined that plaintiff was not entitled to the redacted information concerning the clerk's pension and health insurance payments. Therefore, we affirm substantially for the reasons expressed in the judge's cogent oral opinion.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION