APPEALS COURT CLOSES OPRA LOOPHOLE

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In a June 4, 2010 decision, the Appellate Division of Superior Court closed a loophole in the State's Open Public Records Act (OPRA) used by State agencies to deny access to government records. Together with a case the court decided late last year, this may lead to greater transparency in identifying habitats for threatened and endangered species.

The Legislature significantly expanded the right to access government records in 2002, when it replaced the old Right to Know Law with OPRA. While OPRA grants broad access to government records, it does have exceptions, both specific and open-ended. For example, specific exemptions withhold public access to information that could jeopardize homeland security, and to social security and credit card numbers that would invade personal privacy. One of the more open-ended exceptions to OPRA allows agencies to deny access to "inter-agency or intra-agency advisory, consultative, or deliberative material." This is used by agencies to withhold "draft" reports or other unfavorable information.

Another open-ended statutory exception incorporates into OPRA exemptions established by executive order of the Governor, or by a regulation promulgated under the authority of an executive order of the Governor. This set the stage for Executive Order 21, issued by then-Governor McGreevey the day after OPRA went into effect in July 2002. Governor McGreevey recognized that State agencies had proposed rules to exempt certain government records from disclosure, but the public notice and comment process required by the Administrative Procedure Act prior to adoption of these rules could not be completed before OPRA became effective. Executive Order 21 bridged this gap by allowing State agencies to handle OPRA requests in a manner consistent with their proposed rules. Specifically, government records that would be exempt from disclosure by proposed agency rules were exempt from disclosure by Executive Order 21. Governor McGreevey reaffirmed this a month later in Executive Order 26.

The Department of Environmental Protection (DEP) was among the agencies that proposed rules to implement OPRA back in 2002. Among other things, DEP proposed to exempt from disclosure records showing the "*location of threatened and/or endangered plant and animal species, rare plant and animal species, and natural communities; and the location of historic and/or archeological sites where the record is not being used for permit or enforcement decisions.*" DEP also proposed to exempt from disclosure "*records that reveal the identity of a complainant*."

DEP never adopted these rules, and the rule proposal expired in July 2003. Nonetheless, DEP has often harkened back to Governor McGreevey's Executive Orders, and to its long-expired rule proposal, to deny requests by

property owners for information concerning sightings of threatened and endangered species used to hinder efforts to develop their land.

DEP has also relied on the Executive Orders and rule proposal to preclude property owners from probing the scientific validity of species sighting information. Species sightings in DEP's database include not just sightings by DEP personnel or other recognized professionals, but sightings reported by the members of the general public. Property owners may have legitimate questions as to the qualifications and reliability of those supplying this information. Yet even in situations where DEP does acknowledge that species sighting information is so tied to a permit or enforcement decision that it must be released, DEP may refuse to disclose the identity of the person reporting the sighting. DEP relies on the "identity of a complainant" exception in its proposed rules, notwithstanding that reporting the sighting of a species does not make one a complainant.

The Appellate Division's recent decision in *Slaughter v. Government Records Council* may help put an end to such agency abuses. Back in 2002, the Department of Law and Public Safety proposed rules that would have exempted its Standard Operating Procedures from disclosure under OPRA. Notwithstanding that the proposed rules were never adopted, the Department refused to disclose its Standard Operating Procedures, relying on Governor McGreevey's Executive Orders and the Department's 2002 rule proposal.

The Appellate Division disagreed. The court reached the obvious, common sense conclusion that Executive Order 21 "was only intended to establish a stopgap exemption from disclosure during the interim period between the effective date of OPRA and the adoption by State agencies of proposed rules." The court concluded that Executive Order 21 was never intended to allow State agencies that failed to complete the rulemaking process in the eight years since OPRA was adopted to nonetheless rely on these stale rule proposals to hide information from the public. Nonetheless, the court gave the agency five months of breathing room, giving it one more bite at the apple, one more chance to propose and adopt rules governing exemptions from OPRA.

In addition to the public's right to access government records under OPRA, there is also what is known as the "common law" right to access government records. In some respects the common law provides a right of access that is broader than OPRA, as it contains no categorical exceptions. In other respects, however, the common law is narrower than OPRA, because it requires a case-by-case balancing between the requestor's interest in disclosure and the government's interest in withholding the information. OPRA, which does not include such a balancing provision, specifies that nothing in OPRA limits the common law right of access to a government record.

DEP also contends that under the common law right of access, property owners may be denied access to information concerning the location of species. DEP concludes that under the applicable balancing test, the public interest in the confidentiality of the location of threatened and endangered species outweighs the private right to access.

Regardless of whether there is merit to DEP's position under the common law, another recent Appellate Division decision makes clear that such a balancing test is not a legitimate basis for denying access under OPRA. In late 2009 the Appellate Division ruled that a person requesting documents does not have to satisfy both the OPRA and common law rights to access, but, rather, need only satisfy one or the other. In *O'Shea v West Milford,* the court went on to decide that documents that are not available under one approach may be accessed under the other. Indeed, if a requestor is entitled to a document under OPRA, it must be given to her, regardless of whether access could be denied under the common law.

In light of these two court decisions, DEP should no longer be able to rely on its 2002 rule proposal to deny information concerning the location of threatened or endangered species or the identity of individuals reporting species sightings. And, regardless of whether a balancing analysis would justify DEP's refusal to disclose this information under the common law, such a balancing analysis cannot be used to deny disclosure under OPRA. Let us hope these two court decisions result in greater transparency with regard to sightings of threatened and endangered species.