SUPREME COURT OF NEW JERSEY
DOCKET NO. 084392
Appeal No. A-12-20

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| ERNEST BOZZI,<br><br>Plaintiff-Appellee<br><br>v.<br><br>CITY OF JERSEY CITY, and IRENE MCNULTY,<br><br>Defendants-Appellants | CIVIL ACTION<br><br>On Appeal from an Order of the Superior Court of New Jersey Appellate Division Docket No. A-4205-18T2<br><br>Sat Below:<br>Hon. Jack M. Sabatino, PJAD<br>Hon. Thomas W. Sumner, JAD<br>Hon. Richard Geiger, JAD |

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**BRIEF OF AMICUS CURIAE**
**ELECTRONIC PRIVACY INFORMATION CENTER**

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## INTEREST OF THE AMICUS CURIAE

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values.[1]

EPIC routinely participates as amicus curiae in privacy cases throughout the country, including cases before this Court. See, e.g., Brief of Amicus Curiae EPIC Supporting Appellant, State v. Andrews, 243 N.J. 447 (No. 82209) (arguing that the Fifth Amendment protects privacy interests in cellphone passcodes); Brief for EPIC as Amicus Curiae Supporting Appellant, State v. Earls, 214 N.J. 564 (2013) (No. 68765) (arguing that individuals have a reasonable expectation of privacy in the current location of their cell phones); Brief for EPIC as Amicus Curiae Supporting Appellant, G.D. v. Kenny, 205 N.J. 275 (2011) (No. 65366) (urging this Court to preserve the right of expungement to combat the risk that private firms will make inaccurate and incomplete data available); Brief for EPIC et al. as Amici Curiae Supporting Appellee, State v. Reid, 194 N.J. 386 (2008) (No. 60756) (urging this Court to recognize that

[1] EPIC Appellate Advocacy Fellow Melodi Dincer contributed to this brief.

users have a constitutionally protected privacy interest in the identifying information provided to Internet service providers).

EPIC has filed amicus briefs in numerous federal and state cases concerning the right to privacy in personal information contained in government records. See, e.g., Brief of Amicus Curiae EPIC in Support of Plaintiffs-Appellees, Does 1-10 v. Univ. of Wash., 695 Fed. App'x 265 (9th Cir. 2017) (No. 16-36038) (arguing that the right to informational privacy requires redaction of names and other personally identifying information from government records sought under Washington's open government law); Brief for EPIC as Amicus Curiae Supporting Appellant, Chicago Tribune Co. v. Univ. of Illinois Bd. of Trustees, 680 F.3d 1001 (7th Cir. 2012) (No. 11-2066) (arguing that the federal student privacy law barred disclosure of certain educational records under Illinois' open government law); Brief for EPIC as Amicus Curiae Supporting Appellant, Doe v. Luzerne Cty, 660 F.3d 169 (3d Cir. 2011) (No. 10-3921) (arguing that digital video and images of the plaintiff's body constitute personally identifiable information and disclosure implicated the right to informational privacy); Brief for EPIC as Amicus Curiae Supporting Appellees, Ostergren v. Cuccinelli, 615 F.3d 263 (4th Cir. 2010) (No. 09-1723) (arguing for limited disclosure of social security numbers in government records under Virginia's open government law); Brief for EPIC et al. as

Amicus Curiae Supporting Respondents, NASA v. Nelson, 562 U.S. 134 (2011) (No.09-530) (arguing that the right to informational privacy is well recognized and the Privacy Act would not sufficiently protect information concerning federal employees).

EPIC also has extensive experience with Freedom of Information Act ("FOIA") litigation. See, e.g., Complaint for Injunctive Relief, EPIC v. ICE, No. 20-3071 (2020) (seeking public disclosure of agency records related to facial recognition services under FOIA); Complaint for Injunctive Relief, EPIC v. DOJ, No. 19-810 (2019) (seeking public disclosure of the unredacted Mueller Report under FOIA).

**PRELIMINARY STATEMENT**

When it comes to recognizing constitutional limits on the Government's authority to collect personal information, this Court has been a trailblazer. The Court presciently recognized a right to privacy in cell site location information years before the U.S. Supreme Court did the same in Carpenter v. United States, 138 S. Ct. 2206 (2018). State v. Earls, 214 N.J. 564, 584-85 (2013). The Court has also recognized a right to privacy in internet subscriber information (which federal courts have yet to do), State v. Reid, 194 N.J. 386, 399 (2008), telephone billing or toll records (four years before the Electronic Communications Privacy Act protected them), State v. Hunt, 91 N.J. 338 (1982), and personal bank records (refusing to follow

the third-party doctrine in United States v. Miller, 425 U.S. 435 (1976)), State v. McAllister, 184 N.J. 17 (2005). The Court was also the first to find a reasonable expectation of privacy in employee email communications with personal attorneys sent on company computers. Stengart v. Loving Care Agency, Inc., 201 N.J. 300 (2010).

But when it comes to ensuring that personal information in government records is adequately protected, New Jersey is lagging behind. For more than forty years, the Federal Freedom of Information Act ("FOIA") has limited the disclosure of personal information in government records. 5 U.S.C. §§ 552(b)(6), (b)(7)(C). The FOIA, like New Jersey's Open Public Records Act ("OPRA"), has threshold requirements for its privacy exemption, including establishing a colorable privacy interest in the information requested. But, unlike in New Jersey, federal courts have recognized that individuals have not only a colorable, but a substantial privacy interest in limiting the disclosure of their personal information (including names and addresses) contained in government records. Federal courts have also recognized that disclosure of private information cannot be justified unless there is a public interest in the disclosure. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004). And even where there is such a public interest, there must be a careful evaluation of the competing interests to

determine whether disclosure "would constitute a clearly unwarranted invasion of personal privacy." Id.; see also Wash. Post v. Dep't of Health & Human Servs., 690 F.2d 252, 261 (D.C. Cir 1982).

New Jersey's open records law was enacted several decades after the FOIA. The law has not yet been extensively interpreted. The privacy provision, in particular, demands closer attention, as this case reveals. The Court would do well to take into account the existing federal standards, both under the FOIA and under cases concerning the constitutional right to informational privacy. Otherwise, New Jersey could fall further behind the prevailing standards of privacy protection that have been upheld by state and federal governments throughout the country.

The names and addresses of individuals, along with specific traits or characteristics about the individuals reflected in the requested records, are private and deserve protection. In this case, disclosure of names and addresses of dog owners would lead directly to unwanted solicitations and other unwarranted invasions of privacy. Other courts have already acknowledged that attempts to extract commercial value from personal information, such as lists of names and addresses, pose acute threats to individual privacy. This Court should follow suit.

Indeed, courts have found that commercial interests alone can never justify the disclosure of personal information in a government record. The core interest of open government laws is to shed light on the workings of the government—not to transform the government into a lead generator for commercial ventures. Federal law prohibits the disclosure of personal information unless there is a public interest in the disclosure, and even then the public interest must be weighed against the privacy interest. A commercial interest without a colorable public interest is always outweighed by any privacy interest in the information. This Court should adopt the same rule.

**ARGUMENT**

The OPRA requires the government to withhold personal information in government records when disclosure of the information would violate the individual's reasonable expectation of privacy. N.J.S.A. 47:1A-1; Burnett v. Cty of Bergen, 198 N.J. 408, 422-23 (2009); N.J. Gov. Records Council, A Citizen's Guide to the Open Public Records Act, at 6 (2d ed. July 2011).[2] The legislature added this privacy directive to the law to prevent the OPRA from "inadvertently creat[ing] an unqualified right to many, many documents that will impact on

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2 https://www.nj.gov/grc/public/docs/Citizen's%20Guide%20to%20OPRA%20(July%202011).pdf.

the legitimate privacy interest of citizens in the state." Burnett, 198 N.J. at 426 (quoting Issues Dealing with Public Access to Government Records: Hearing on S. 161, S. 351, S. 573, and S. 866 Before the S. Judiciary Comm., 209th Leg. (N.J. 200) (statement of Sen. Norman Robertson)).

When a requestor challenges an agency's decision to withhold information under the privacy exemption, courts must determine, at the threshold, whether there is a "colorable claim that public access to records would invade a person's reasonable expectation of privacy." Brennan v. Bergen Cty. Prosecutor's Office, 233 N.J. 330, 333 (2018) (emphasis in original). A court then weighs the public interest in access to government records against the privacy interest in the information in the records. Burnett, 198 N.J. at 427, 428-37; Carter v. Doe (In re N.J. Firemen's Ass'n Obligation), 230 N.J. 258, 279-80 (2017). The Court uses balancing factors derived from federal informational privacy and open government law. Doe v. Poritz, 142 N.J. 1, 88-91 (1995); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980); Whalen v. Roe, 429 U.S. 598, 600-601 (1977).

Federal courts also follow a multi-step process to analyze privacy withholdings under FOIA Exemption 6: courts first determine whether the information at issue is a personnel, medical, or "similar" file; whether there is a significant privacy interest in the information; whether the requestor asserted a FOIA public

interest in disclosure; and finally, if there is a significant privacy interest at stake and a FOIA public interest in disclosure, balance the interests to determine whether disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); U.S. Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487, 495-96 (1994) [hereinafter "FLRA"]; U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 599-600 (1982); Nat'l Assoc. of Retired Fed. Emps. v. Horner, 879 F.2d 873, 874-75 (D.C. Cir. 1989); see also Dep't of Justice, Guide to the Freedom of Information Act, at 1-2 (2019).[3]

The federal test thus has a threshold requirement for both the privacy interest and the public interest, and only when the litigants have made a showing of both does a court move on to a balancing of the interests. The required threshold showing for each is minimal, and it is only at the balancing stage that the court considers whether the disclosure is "unwarranted." Similarly, the OPRA directs courts to consider whether an expectation of privacy is reasonable only at the disclosure stage, not at the threshold stage. The Court's decision in Brennan created confusion when it conflated the threshold privacy analysis with the final disclosure analysis. Agencies need not demonstrate a reasonable expectation of privacy at the outset because

[3] https://www.justice.gov/oip/page/file/1207336/download.

reasonableness, in the context of open government disclosures, can only be analyzed once the public interest has been identified. At the threshold, agencies should only have to make a colorable claim that there is a privacy interest in the information requested—and federal courts have found that there is a clear privacy interest in the names and addresses contained in government records. The holding of Brennan does not conflict with this rule because the public interest in disclosure in that case outweighed the privacy interest. But the Court needs to reverse in this case and make clear that there is a privacy interest in names and addresses and that only a public interest in disclosure can overcome the privacy interest in a reasonableness balancing analysis.

## I. Disclosure of personal information in a government record presents a colorable privacy claim.

In the course of daily life, individuals are regularly required to divulge their names, addresses, and other bits of personal information to the government. Open records laws like the OPRA protect privacy in the plethora of identifying information contained in government records. This Court has previously looked to federal privacy and open government law for guidance in interpreting the OPRA's privacy protection and should continue to do so. Federal courts have established that there is a colorable privacy interest in personal information

contained in public records, including names and addresses. In particular, courts have found that disclosure of such information threatens privacy because it could lead to unwarranted solicitations. Disclosure also undermines an individual's ability to control information about themselves and implicates privacy rights because it makes that information available to anyone, for any purpose. The privacy risk is especially apparent when disclosure is guaranteed to facilitate commercial exploitation of personal information. Individuals already lack control over what information they must include in a government form for something as simple as owning a dog. They retain, at minimum, an expectation of privacy in that information from disclosure for purely commercial purposes.

The privacy right protected in FOIA Exemption 6, which is similar to OPRA's privacy protection, is based on the well-established constitutional right to informational privacy. This right stems from the Fourteenth Amendment and includes an individual's right to prevent government disclosure of personal information. Whalen v. Roe, 429 U.S. 589, 599 n. 23, 24 (1977). The right broadly encompasses "control over knowledge about oneself," including control over who can access that knowledge. U.S. v. Westinghouse Elec. Corp., 638 F.2d 570, 577 n.5 (internal citation omitted). Federal courts adopted the balancing test applied in Doe v. Poritz to avoid infringing on this privacy right.

142 N.J. 1, 87-88 (1995); Westinghouse Elec. Corp., 638 F.2d at 578.

The right to informational privacy is a singularly "fundamental and cherished right." Id. at 576. Accordingly, federal courts recognize that FOIA Exemption 6 "encompasses the individual's control of information concerning his or her person"—that is, their right to informational privacy. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989) [hereinafter "RCFP"]. Courts have set a very low bar at the threshold privacy analysis to avoid infringing on the right to informational privacy. A substantial privacy interest is "anything greater than a de minimis privacy interest." Multi Ag Media LLC v. Dep't of Agric., 515 F.3d 1224, 1229-30 (D.C. Cir. 2008); see also Dep't of State v. Ray, 502 U.S. 164, 176 (1991) (finding a de minimis invasion of privacy becomes significant when personal information in a public record can be linked to identify an individual); Fed. Labor Relations Auth. v. Dep't of Veterans Affairs, 958 F.2d 503, 510-511 (2d Cir. 1994) (finding "more than de minimis privacy interest" threatened by disclosure of names and addresses of federal employees); Fed. Labor Relations Auth. v. Dep't of Navy, Naval Comms. Unit Cutler, 941 F.2d 49, 56 (1st Cir. 1991) ("While of modest strength this [privacy interest in names and addresses] is nonetheless real enough to be worthy of recognition and protection in appropriate circumstances.").

The Exemption 6 privacy interest reaches a wide variety of identifying information including names, addresses, email addresses, phone numbers, dates of birth and marriage, criminal and medical histories, and social security numbers. See, e.g., Wash. Post Co., 456 U.S. 595, 600 (1982); Associated Press v. Dep't of Justice, 549 F.3d 62, 65 (2d Cir. 2008); Henson v. Dep't of Health & Human Servs., 892 F.3d 868, 878 (7th Cir. 2018); Maryland v. Dep't of Veterans Affairs, 130 F. Supp. 3d 342, 353 (D.D.C. 2015). Even prosaic, basic identifying information that "is not normally regarded as highly personal" meets the threshold requirement. Wash. Post Co., 456 U.S. at 600; see also Associated Press, 549 F.3d at 65 ("Personal information, including a citizen's name, address, and criminal history, has been found to implicate a privacy interest cognizable under the FOIA exemptions."); Judicial Watch, Inc. v. Food & Drug Admin., 449 F.3d 141 (D.C. Cir. 2006) ("We have also read the statute to exempt not just files, but also bits of personal information, such as names and addresses, the release of which would create[ ] a palpable threat to privacy."). Indeed, courts do not permit disclosure of name and address lists under the FOIA unless there is a clear public interest in disclosure that outweighs the privacy interest in non-disclosure.

The right to privacy under Exemption 6 does not depend on whether the category of information may be available through other

means. The Supreme Court has recognized that, in modern society, "there are few facts that are not at one time or another divulged to another," but the Government's collection of personal information in government records necessarily implicates an individual's ability to control to whom that information is disclosed. RCFP, 489 U.S. at 763, 764; see also Horner, 879 F.2d at 875 ("That people expect to be able to exercise that control [over disclosure of their identities and whereabouts] is evidenced by . . . unlisted telephone numbers, . . . and postal boxes.") (internal quotations omitted). Most relevant to the case before this Court, federal courts have found that individuals retain a privacy interest in home addresses even though such information is disclosed in other contexts. See FLRA, 510 U.S. 487, 500 (1994) (finding a significant privacy interest in the names and home addresses of nonunionized agency employees); Sheet Metal Workers Int'l Assoc., Local Union No. 19 v. U.S. Dep't of Veterans Affairs, 135 F.3d 891, 905 (3d Cir. 1998) ("At the same time, we find unconvincing the union's argument that employees have waived their privacy rights because their addresses are available from other public sources.") And the fact that an event (like the one in Brennan) or a characteristic (like owning a dog) is not wholly private does not nullify the privacy interest at stake. RCFP, 489 U.S. at 763; id. at 770 ("[T]he fact that an event is not wholly 'private' does not mean that an individual has no interest in

limiting the disclosure or dissemination of that information.") (internal citation omitted).

Even when it comes to the personal information of government employees, who have a somewhat diminished privacy interest because they are who make government work, the U.S. Supreme Court has found "*some* nontrivial privacy interest in nondisclosure [of their addresses]." FLRA, 510 U.S. at 500-501 (emphasis in original), 495 (citing to RCFP, 489 U.S. 749 (1989)). With respect to addresses in general, the court has emphasized that the "privacy of the home" is "accorded special consideration in our Constitution, laws, and traditions." Id. at 501; see also Wadhwa v. Sec. U.S. Dep't of Veterans Affairs, 707 Fed. App'x 61, 64 (3d Cir. 2007); Associated Press v. U.S. Dep't of Defense, 554 F.3d 274 (2d Cir. 2009) (exempting names and addresses of family members of Guantanamo Bay detainees); Judicial Watch, Inc., 449 F.3d at 153 (exempting names and addresses of individuals involved in development of an abortifacient drug); Lakin Law Firm, P.C. v. Fed. Trade Comm'n, 352 F.3d 1122 (7th Cir. 2003) (exempting names of consumers who filed FTC complaints from class action lawyers-requestors); Minnis v. U.S. Dep't of Agric., 737 F.2d 784, 787 (9th Cir. 1984) (exempting a list of names and addresses of river travel permit applicants from disclosure to a riverside business owner).

Courts widely recognize that Exemption 6 protects citizens against unwanted solicitations. The U.S. Supreme Court has

recognized that disclosure of addresses, and the subsequent influx of solicitations, diminishes the sacred privacy of the home. FLRA, 510 U.S. at 501. The interest in avoiding unsolicited mail exists even if some of the recipients may be interested in the communications. Id. at 500-501; see also Sheet Metal Workers, 135 F.3d 891, 904 (3d Cir. 1998) ("significant privacy concerns attached to the home and employees' interest in avoiding a barrage of unsolicited contact weigh[s] heavily in our consideration.")

Anticipated commercial exploitation heightens the privacy interest in requested information because it increases the likelihood that disclosure will interfere with personal privacy. Horner, 879 F.2d at 878. In FLRA, the U.S. Supreme Court recognized that disclosure of names and addresses of federal employees would not be limited to the specific requestors. Because others, including commercial entities, were entitled to the same access under FOIA, the Court concluded that "the individual privacy interest that would be protected by nondisclosure is far from insignificant." 510 U.S. at 501. The D.C. Circuit has explained that FOIA requests are not for bald lists of names and addresses. Horner, 879 F.2d at 876. Rather, requestors seek records that are "delimited by one or more defining characteristics" (i.e., dog ownership). Id. The "apparent commercial value" of a list of names and addresses united by a shared trait makes the privacy interest

at stake "more significant" because "many parties in addition to the party making the initial request would be interested" in soliciting those individuals. Id. at 876, 877. In Horner, the list of retired employees' information would allow any entity for whom "such individuals might be an attractive market" to access "from the Government, at nominal cost, a list of prime sales prospects to solicit," leading to a "fusillade" of unsolicited contact. 879 F.2d at 876. Disclosure would "interfere with the subjects' reasonable expectations of undisturbed enjoyment in the solitude and seclusion of their own homes," a significant privacy threat. Id.; see also Wine Hobby USA, Inc. v. U.S. Internal Revenue Serv., 502 F.2d 133, 137 (3d Cir. 1974) (holding disclosure of names and addresses for commercial purposes will invade privacy by subjecting individuals to "unsolicited and possibly unwanted mail.") Minnis, 737 F.2d at 787 (disclosure of a list of names and addresses that can be used for advertising would result in a "barrage of mailings and personal solicitations"); Am. Fed'n of Gov't Emps., AFL-CIO, Local 1923 v. U.S., Dep't of Health & Human Servs., 712 F.2d 931, 932 (4th Cir. 1983) (revealing home addresses would result in an "unchecked barrage of mailings and perhaps personal solicitations, for no effective restraints could be placed on the range of uses to which the information, once revealed, might be put").

Federal courts recognize that commercial interest in personal information can extend beyond the requestor to the public at large. Under FOIA, "information available to anyone is information available to everyone," so there is always a risk that disclosed information will be exploited by a third party. Horner, 879 F.2d at 875. As a consequence, "it would be illogical as well as unfair to the person whose privacy is at stake for the court to balance the public interest in disclosure to the whole world against the private interest in avoiding disclosure only to the party making the request, and to ignore the impact on personal privacy of the more general disclosure that will likely ensue." Id.

It is clear that a list of names and addresses of dog owners has commercial interest. The requestor in this case has advanced a commercial interest in the information, and he is not alone. Other businesses that sell dog products—including food, toys, health insurance, veterinary services, day care and boarding—would also be interested in the data. Dog ownership would also be a data point of interest to data aggregators. See Edith Ramiez et al., Fed. Trade Comm'n, Data Brokers: A Call for Transparency and Accountability (May 2014);[4] Louise Matsakis, The WIRED Guide to

[4] https://www.wired.com/story/wired-guide-personal-data-collection/.

Your Personal Data (and Who Is Using It), WIRED (Feb. 15, 2019);[5] Caitlin Dewey, 98 Personal Data Points That Facebook Uses to Target Ads to You, Wash. Post (Aug. 19, 2016);[6] Experian, Pet Enthusiasts Lists (2020).[7] That is precisely why the law protects private information held in government records. These records were never intended to be treated as customer lists or solicitation lists for private companies.

## II. A purely commercial interest in personal information cannot meet the threshold public interest requirement for disclosure.

The OPRA was not intended to transform the government into a lead generator for private commercial interests. Like the FOIA, the core purpose of the OPRA is to ensure transparency about government affairs so that citizens can know what their government is up to. Information requests that do not shed light on the workings of the government do not promote the public interest underlying OPRA. And any privacy interest in the requested information will necessarily outweigh a purely commercial interest in disclosure. Cases decided under the federal open government law persuasively establish there is no

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[5] https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf.
[6] https://www.washingtonpost.com/news/the-intersect/wp/2016/08/19/98-personal-data-points-that-facebook-uses-to-target-ads-.
[7] https://www.experian.com/small-business/pet-owners.

public interest in disclosing information for a purely commercial use. If the requestor cannot advance a colorable public interest in disclosure of the requested information, then the names and addresses can be withheld at the threshold without considering the balance of the interests.

Requests for information that are only justified by commercial interests do not serve the purpose of the OPRA. The purpose of the 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." Brennan, 233 N.J. at 343 (citations omitted). Commercial requests do not serve this interest. Decisions by the U.S. Supreme Court and other federal courts applying similar principles under the FOIA support this conclusion. The required public interest showing must reflect the core purpose of FOIA—"to open agency action to the light of public scrutiny." Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976); see also FLRA, 510 U.S. at 495 (describing the "core purpose of the FOIA" as "contribut[ing] significantly to public understanding of the operations of activities of the government.") (emphasis in original).

Courts largely reject the use of open government law to access information on private individuals when disclosure does not shed light on government activities. The purpose of government transparency "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." RCFP, 489 U.S. at 773; see also Sheet Metal Workers, 135 F.3d 891, 904 (3d Cir. 1998) ("Proliferation of information about private citizens [in government records] implicates neither the spirit nor the purpose" of FOIA."); Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of Air Force, 26 F.3d 1479, 1484 (9th Cir. 1994) ("FOIA . . . does not create an avenue to acquire information about other private parties held in the government's files."); Lakin Law Firm, 352 F.3d 1122, 1123 (7th Cir. 2003) ("[T]he FOIA's central purpose is . . . not that information about private citizens that happens to be in the warehouse of the Government be so disclosed."). When the government record concerns an individual and not government activities, "the FOIA based public interest in disclosure is at its nadir." RCFP, 489 U.S. at 780.

Commercial interest in names and addresses without a concomitant interest in transparency about government activities falls short of the FOIA public interest threshold showing. See, e.g., Wine Hobby, 502 F.2d 133, 137 (3d Cir. 1974) ("[D]isclosure of names of potential customers for commercial business is wholly unrelated to the purposes behind [the FOIA]."); Minnis, 737 F.2d 784, 787 (9th Cir. 1984) ("[A]bsent

any asserted public interest in disclosure, a commercial interest would not justify the invasion of privacy."); HMG Mktg. Assocs. v. Freeman, 523 F. Supp. 11, 14 (S.D.N.Y. 1980) (list of people who ordered specially minted silver dollars exempt from disclosure to direct mail advertiser because court "hard pressed" to discern any public interest in advertiser's acquisition of the mailing list).

The U.S. Supreme Court is even skeptical of non-commercial interests in names and addresses that do not promote the specific purposes of the FOIA. In FLRA, the court rejected a union request for names and addresses of federal employees because the public interest in contacting the employees to inform them about their union rights was not a public interest under the FOIA, even though other laws, such as the Labor Act, supported the public policy of union organizing and requisite employee contacts. FLRA, 510 U.S. at 502-503.

Disclosure for purely commercial purposes guarantees the concomitant privacy harm of unsolicited solicitation with no public benefit in return. The Court should not compromise the right to privacy in personal information for commercial gain when commercial entities have a myriad of other methods to solicit prospective customers. While a government-produced list of local dog owners would expedite market research in this case, other courts recognize the pyrrhic nature of this exchange. The

Ninth Circuit refused disclosure of names and addresses of river travel permit applicants sought by a river-side lodge owner, listing several, privacy non-invasive advertising methods he could pursue instead: "advertising in specialty publications, contacting local Chambers of Commerce, or obtaining a listing in the telephone yellow pages." Minnis, 737 F.2d 784, 787 (9th Cir. 1984). In refusing disclosure of federal employees' names and addresses to a union requestor, the Third Circuit similarly emphasized how "alternate, less intrusive methods to collect the information [the union] wanted" were available, including distributing fliers, posting signs or advertisements, and using existing information already available to the requestor. Sheet Metal Workers, 135 F.3d 891 (3d Cir. 1998).

When commercial requestors can offer no public interest for disclosing the personal information requested, there is no need to balance the interests. The Court should adopt the rule that those who request personal information in a government record must make a threshold showing of a public interest that serves the core purpose of the OPRA.

**CONCLUSION**

Amicus respectfully asks this Court to reverse the Appellate Division's ruling, find that there is a colorable privacy interest in names and addresses contained in dog license records, and rule that, to overcome a colorable privacy interest in requested

information, requestors must present a colorable interest in disclosure that serves the OPRA's purpose of public oversight of government actions.

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