

## **The Right to Know and The Constitutional Right to Privacy**

**by Michael Berry**

Last month, when the Commonwealth Court issued its first published opinion addressing Pennsylvania's new Right-to-Know Law, it shone a bright light on a long-standing issue: the inherent tension between the public's right to access government records and a person's interest in the privacy of information that the government possesses about him. Pennsylvania courts wrestled with this issue for many years under the old Right-to-Know Law, and, despite the passage of the new law last year, it seems the issue will continue to vex the courts. Indeed, the Commonwealth Court's recent opinion, *Pennsylvania State Education Association v. Commonwealth*, further muddles the privacy question and, unless corrected, stands to cause an array of additional problems.

The *PSEA* case centers on whether the Right-to-Know Law prohibits the disclosure of public school employees' home addresses. Under the new law, the home addresses of law enforcement officers and judges are expressly exempt from disclosure. The law is silent with respect to other public employees' addresses and, thus, they are presumed to be publicly accessible unless subject to one of the law's many exemptions. Consistent with the text of the law, the Office of Open Records has issued a series of decisions holding that government agencies could not deny requests for records containing employees' addresses.

These holdings and a spate of requests for teachers' home addresses caused the Pennsylvania State Education Association to file suit to block any of its members' addresses from being released. The petitioners immediately moved for a preliminary injunction seeking to enjoin the Office of Open Records from ordering the disclosure of home addresses. Senior Judge Rochelle S. Friedman quickly granted the motion. A written opinion soon followed, and the Commonwealth Court sua sponte ordered the opinion to be published Aug. 25.

That opinion is short and to the point. It initially notes that "the Law does not specifically exempt the home addresses of public school employees ... from public disclosure." Nevertheless, the opinion continues, Article I of Pennsylvania's constitution provides a constitutional right to privacy that protects "against disclosure of personal matters in which a person has a legitimate expectation of privacy." As Friedman explains, this right arises when a person has a subjective expectation of privacy and that expectation is reasonable. The right to privacy, however, is qualified and "must be balanced against state interests."

The opinion then cites several cases decided under the old Right-to-Know Law, holding that people's privacy interest in their home addresses outweighed the public's interest in disclosure. Based on those holdings and hearing testimony about the privacy interests of some of the association's members, Friedman ruled that the teachers had "established a clear right to relief."

This analysis, and the opinion's conclusion that a person has a constitutional right to privacy in his home address, misses the mark in significant respects.

First, the reliance on previous cases exempting disclosure of home addresses under the old Right-to-Know Law is mistaken. The old law, like the new law, did not expressly exempt private information from public disclosure. Nevertheless, the courts permitted the government to withhold information deemed to be private in a number of cases. The rationales of those cases varied. In some older cases, courts suggested that information could be withheld based on a constitutional right to privacy. In most cases, however, courts read a privacy exemption into one of the old law's statutory exemptions, an exemption protecting information that potentially could impair personal security.

Less than two years ago, the Pennsylvania Supreme Court put an end to the confusion. In *Pennsylvania State University v. State Employees' Retirement Board*, the court rejected the argument that the right to privacy analysis is separate from the personal security exemption. Instead, it held that "the appropriate question is whether the records requested would potentially impair the reputation or personal security of another, and whether that potential impairment outweighs the public interest in dissemination of the records at issue." The court specifically concluded that "this analysis subsumes" the privacy issue.

The *PSEA* opinion erroneously overlooked the Supreme Court's *Pennsylvania State* case, which makes clear that the earlier decisions cited in the Commonwealth Court opinion do not stand for the proposition that a constitutional right to privacy protects home address information. Rather, that information was protected by statute.

The understanding that the privacy protection is grounded in the Right-to-Know Law, not in the constitution, is particularly significant because the General Assembly rewrote the personal security exemption when enacting the new law. The law no longer protects information that potentially impairs personal security. Rather, it protects information only if its disclosure "would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual." Now, an agency seeking to block the release of information on privacy grounds must meet this heightened standard. (The new law expressly bars public access to most information that was considered private under the old law, including phone numbers, Social Security numbers, personal financial information and medical information.)

Although the *PSEA* opinion cited this new standard, it did not analyze whether all public school employees could show that the release of their home addresses would be reasonably likely to pose a substantial and demonstrable risk to them. Instead, the opinion concluded that all public school employees' addresses are protected by the Pennsylvania Constitution. And that conclusion presents the second, more troubling problem with the decision.

The Pennsylvania Constitution, like the U.S. Constitution, protects a person's right to privacy. This right embodies two distinct concepts — the right to keep certain information from the government and the right to expect that the government will not disclose certain information about individuals. Although the law governing the two concepts differs slightly, the key to both is whether a person has a reasonable expectation of privacy in the information at issue.

In general, courts have extended the constitutional privacy right to only the most personal and intimate information, such as information concerning a person's medical condition, sexuality and innermost thoughts. A person's home address falls nowhere near the private sphere of other

information that is constitutionally protected, like medical files, nude photographs and diaries. Unlike this protected information, home addresses are readily available through a variety of sources, from observing where a person lives to looking in the white pages to reviewing an array of publicly accessible government records. And, unlike constitutionally protected information, people regularly disclose their home addresses without compulsion. The simple fact is that most people do not have any reasonable expectation that their home address is private, unknown and unknowable.

Indeed, the Pennsylvania Supreme Court has held just that. In 2003, the court concluded in *Commonwealth v. Duncan* that any subjective expectation of privacy that a person might have in his home address is not “objectively reasonable in light of the realities of the modern age.” As the court explained: “[I]t is all but impossible to live in our current society without repeated disclosure of one’s name and address, both privately and publicly. There’s nothing nefarious in such disclosures. An individual’s name and address, by themselves, reveal nothing about one’s personal private affairs.” Although the *PSEA* decision cited to the Supreme Court’s *Duncan* decision, it did not address either the court’s rationale or holding, both of which undermine the conclusion that people possess a constitutional right to privacy in their home addresses.

If the privacy of home addresses were considered a constitutional right, that right would lead to countless unintended consequences. For example, school districts would face constitutional claims for distributing school directories to their students. A person might be able to state a prima facie tort case for publication of private facts if his neighbor tells someone where he lives. Deeds might not be publicly recorded, and property tax assessment records might no longer be publicly available.

Given the uncertain parameters of this newly created constitutional right, it is no surprise that after receiving the preliminary injunction in the *PSEA* case, the Office of Open Records issued an advisory opinion saying that it would not release the addresses of any public employees – not just teachers – in any case. This measure, like the Commonwealth Court’s decision, goes too far.

To be sure, people have “some nontrivial privacy interest in nondisclosure” of their home addresses, as both the U.S. Supreme Court and the 3rd U.S. Circuit Court of Appeals have held, and teachers might have a legitimate interest in maintaining the relative obscurity of that information. Yet, that interest does not rise to the level of a constitutional right and is protected through the Right-to-Know Law’s personal security exemption, as the Pennsylvania Supreme Court previously held.

Whether teachers and other public employees can meet the personal security exemption under the new law remains an open question. That question, however, must be addressed in cases in which a citizen requests specific records containing addresses, where the competing personal and public interests can be assessed based on the circumstances surrounding a particular employee and the interest advanced by a particular request.

Although some requests for public employees’ home addresses will be exempt on personal security grounds, there will be other instances in which an employee’s privacy interest will be minimal and where the employee will not be able to demonstrate that the release of his

address poses a reasonably likely substantial risk to his personal security. And, while the public's interest in home addresses might be limited in some cases, in other cases the public interest will be significant – for example, in determining whether a city employee complies with the city's residency requirement. These issues can – and should – be assessed through the law's statutory exemption, not by creating a new constitutional right.

The Commonwealth Court will soon be considering whether to enter a permanent injunction in the *PSEA* case. In the meantime, the Office of Open Records has asked the Supreme Court to overturn the preliminary injunction. Both of those courts will have an opportunity to correct the holding that a constitutional right to privacy exists in home addresses. Until then, the state of the law will remain muddled, the Office of Open Records and other agencies will continue to block access to all addresses in all cases and those same addresses will be available from an array of other sources, presumably in direct violation of a newly created constitutional right.

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