



The New Jersey Open Public Records Act Handbook for Records Custodians



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**The Open Public Records Act:
Handbook for Records Custodians
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Use of This Handbook

The OPRA Handbook for Records Custodians has been prepared by the Government Records Council to help public agency records custodians understand the requirements of the State of New Jersey's Open Public Records Act (N.J.S.A. 47:1A-1 et seq.). While the handbook focuses on the needs of records custodians, we anticipate that it will also be a useful resource for requestors interested in obtaining access to government records.

This handbook serves as a reference, but it does not serve as legal advice and is not a substitute for legal advice from public agency legal advisors. Records custodians should rely on agency legal advice on issues that could result in disputes, particularly those related to a denial of access to government records.

The Council's website at www.state.nj.us/grc contains useful information on the law, including summaries of exceptions to disclosure, copies of gubernatorial Executive Orders, lists of statutes containing exceptions, and a search engine of all prior GRC decisions. Custodians, their legal advisors, and the public are urged to check the website when questions arise and should also feel free to submit their questions to the Council via our toll-free information line (1-866-850-0511), e-mail (grc@dca.state.nj.us), or regular mail (101 South Broad Street, P.O. Box 819, Trenton, NJ 08625-0819).

In addition to this handbook, the Council has other resource materials that may be useful in assisting custodians understand the requirements of OPRA. These materials include the following which can be accessed from the GRC's website at www.nj.gov/grc/meetings/present:

- A Readable Version of OPRA
- OPRA PowerPoint presentation
- Exemptions in OPRA handout
- Special Service Charge handout
- Useful OPRA Cases by Subject handout
- E-mail Retention – DARM Circular

SECTION 1 – OPRA DEFINED

What is the Open Public Records Act (OPRA)?

OPRA is a State statute that replaces the old “Right to Know Law” which governs the public’s access to government records in New Jersey. OPRA was enacted to give the public greater access to records maintained by public agencies in New Jersey by balancing the public’s interest in government records, respect for personal privacy, and the efficient process of government. The law is compiled in the statutes as N.J.S.A. 47:1A-1 et seq.

OPRA does not affect a requestor’s common law right of access, or right of access via discovery.

If, in addition to requesting records under OPRA, a requestor also requests government records under the common law, please consider the following:

A public record under the common law is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it.

If the information requested is a "public record" under common law and the requestor has a legally recognized interest in the subject matter contained in the material, then the material must be disclosed if the individual's right of access outweighs the State's interest in preventing disclosure.

Note that any challenge to a denial of a request for records under the common law cannot be made to the Government Records Council, as the Government Records Council only has jurisdiction to adjudicate challenges to denials of OPRA requests. A challenge to the denial of access under the common law can be made by filing an action in Superior Court.

Additionally, discovery requests may be served upon a public agency for access to government records pursuant to *N.J. Court Rules, 1969 R. 3:13-3* (2005) and *N.J. Court Rules, 1969 R. 7:7-7* (2005). Please note that requests for discovery do not affect a requestor’s right to request the same records under OPRA.

Also, any challenge to a denial of a request for records pursuant to a discovery request cannot be made to the Government Records Council, as the Government Records Council only has jurisdiction to adjudicate challenges to denials of OPRA requests. A challenge to the denial of access pursuant to a discovery request can be made by filing an action in Superior Court.

What public policies are expressed in OPRA?

OPRA provides overriding public policies in the legislative findings (N.J.S.A. 47:1A-1) to which all records custodians must adhere when handling each OPRA request for access to government records. Those public policies are:

- Government records must be readily accessible for inspection, copying, or examination by its citizens, with certain exceptions, for the protection of the public interest.
- Any limitations on the right of access to government records must be interpreted in favor of the public’s right of access.
- A public agency has a responsibility and an obligation to protect a citizen’s personal information that is in the possession of a public agency when disclosure of that information would violate the citizen’s reasonable expectation of privacy.”

Again, these three policies must be incorporated in a custodian’s handling of each OPRA request for access to government records.

In fact, in Burnett v. County of Bergen, 198 N.J. 408 (2009), the Court held without ambiguity, that the privacy provision “is neither a preface nor a preamble.” Rather, “the very language expressed in the privacy clause reveals its substantive nature; it does not offer reasons why OPRA was adopted, as preambles typically do; instead, it focuses on the law’s implementation.” “Specifically, it imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests.”

Who may file an OPRA request?

Anyone! Although OPRA specifically references “citizens of this State,” (N.J.S.A. 47:1A-1) the Attorney General’s Office advises that OPRA does not prohibit access to residents of other states. Also, requestors may file OPRA requests anonymously without providing any personal contact information, even though space for that information appears on the form; thus anonymous requests are permitted. However, OPRA specifically prohibits anonymous requests for victims’ records. N.J.S.A. 47:1A-2.2. If a permissible anonymous request involves making copies and the estimated cost exceeds \$5.00, the custodian may request a deposit.

What is a government record?

OPRA defines a government record as:

“... 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* ... or *that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

Generally stated, a “government record” means any record that has been made, maintained, or kept on file in the course of official business, or that has been received in the course of official business.

OPRA’s definition of a government record expands the old Right to Know Law definition (which was limited to records *required* by law to be maintained on file).

OPRA covers more than just paper records. Under OPRA, a “government record” includes printed records, tape recordings, microfilm, electronically stored records (including e-mails and data sets stored in a database), books, maps, photographs, etc.

All government records are subject to public access unless specifically exempt under OPRA or any other law. As a custodian, your default mindset should be – yes, this record is subject to public access!! Exceptions to this default mindset are the 24 specific exemptions contained in OPRA which are listed below:

N.J.S.A. 47:1A-1.1

- 1) Inter-agency or intra-agency advisory, consultative or deliberative material
- 2) Legislative records
- 3) Law enforcement records:
 - a. Medical examiner photos
 - b. Criminal investigatory records (however, N.J.S.A. 47:1A-3.b. lists specific criminal investigatory information which must be disclosed)
 - c. Victims’ records
- 4) Trade secrets and proprietary commercial or financial information
- 5) Any record within the attorney-client privilege
- 6) Administrative or technical information regarding computer hardware, software and networks which, if disclosed would jeopardize computer security
- 7) Emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein
- 8) Security measures and surveillance techniques which, if disclosed, would create a risk to the safety or persons, property, electronic data or software
- 9) Information which, if disclosed, would give an advantage to competitors or bidders
- 10) Information generated by or on behalf of public employers or public employees in connection with:
 - a. Any sexual harassment complaint filed with a public employer
 - b. Any grievance filed by or against an employee
 - c. Collective negotiations documents and statements of strategy or negotiating
- 11) Information that is a communication between a public agency and its insurance carrier, administrative service organization or risk management office
- 12) Information that is to be kept confidential pursuant to court order
- 13) Certificate of honorable discharge issued by the United States government (Form DD-214) filed with a public agency

- 14) Social security numbers
- 15) Credit card numbers
- 16) Unlisted telephone numbers
- 17) Drivers' license numbers
- 18) Certain records of higher education institutions:
 - a. Research records
 - b. Questions or scores for exam for employment or academics
 - c. Charitable contribution information
 - d. Rare book collections gifted for limited access
 - e. Admission applications
 - f. Student records, grievances or disciplinary proceedings revealing a students' identification

N.J.S.A. 47:1A-1.2

- 19) Biotechnology trade secrets

N.J.S.A. 47:1A-2.2

- 20) Convicts requesting their victims' records

N.J.S.A. 47:1A-3.a.

- 21) Ongoing investigations of non-law enforcement agencies (must prove disclosure is inimical to the public interest)

N.J.S.A. 47:1A-5.k.

- 22) Public defender records

N.J.S.A. 47:1A-9

- 23) Upholds exemptions contained in other State or federal statutes and regulations, Executive Orders, Rules of Court, and privileges created by State Constitution, statute, court rule or judicial case law

N.J.S.A. 47:1A-10

- 24) Personnel and pension records, except specific information identified as follows:
 - a. An individual's name, title, position, salary, payroll record, length of service, date of separation and the reason for such separation, and the amount and type of any pension received
 - b. When authorized by an individual in interest
 - c. Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government

employment or for receipt of a public pension, but not including any detailed medical or psychological information

N.J.S.A. 47:1A-1 (Legislative Findings)

“a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.”

Burnett v. County of Bergen, 198 N.J. 408 (2009). Without ambiguity, the court held that the privacy provision “is neither a preface nor a preamble.” Rather, “the very language expressed in the privacy clause reveals its substantive nature; it does not offer reasons why OPRA was adopted, as preambles typically do; instead, it focuses on the law’s implementation.” “Specifically, it imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests.”

Executive Order No. 21 (McGreevey 2002)

- 1) Records where inspection, examination or copying would substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism.
- 2) Records exempted from disclosure by State agencies’ proposed rules are exempt from disclosure by this Order.

Executive Order No. 26 (McGreevey 2002)

- 1) Certain records maintained by the Office of the Governor
- 2) Resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing
- 3) Records of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments
- 4) Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation
- 5) Information in a personal income or other tax return
- 6) Information describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed
- 7) Test questions, scoring keys and other examination data pertaining to the administration of an examination for public employment or licensing

- 8) Records in the possession of another department (including NJ Office of Information Technology or State Archives) when those records are made confidential by regulation or EO 9.

Please note that e-mails are government records when they are made, maintained or kept on file in the course of official government business, or received in the course of official government business. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (August 2006).

Who is the “custodian of a government record”?

OPRA defines “custodian of a government record” as that official designated by formal action of a public agency’s director or governing body that has custody or control of the government records of the public agency. N.J.S.A. 47:1A-1.1. Some large state departments have determined that they can be more responsive to requests for access to government records by designating more than one custodian. For example, the New Jersey Department of Law & Public Safety is comprised of ten divisions and four agencies; each of the divisions and agencies in Law & Public Safety has designated a custodian to deal with records requests made to that division or agency.

OPRA provides that the custodian of government records in a municipality is the municipal clerk. However, OPRA does not preclude a municipality from developing reasonable and practical measures for responding to OPRA requests, which may include the designation of deputy custodians for particular types of records. Municipalities should carefully consider their practices to ensure that the public is efficiently served and that requests for records are granted or properly denied within the statutorily mandated seven (7) business days.

What is a “public agency” under OPRA?

Only “public agencies” are subject to the provisions of OPRA. OPRA defines a “public agency” as:

- The executive branch of state government and all independent state agencies and authorities. This includes all state colleges and universities;
- The Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch;
- All counties, municipalities, school districts, fire districts, planning and zoning boards and other county and local boards or agencies, and all independent county or local agencies and authorities established by municipal or county governments. N.J.S.A. 47:1A-1.1.

The following agencies are not subject to the provisions of OPRA:

- The Judicial branch of state government or any agency officer, or employee of those branches (including the Supreme Court of New Jersey, the Superior Court of New Jersey, the municipal courts, the Administrative Office of the Courts, and the agencies, offices, and boards under their authority). The Courts have adopted their own records disclosure policies and procedures.

- Private businesses or not-for-profit entities. However, if a private business or not-for-profit entity has all or some of the following factors, such private entity *may* be subject to the provisions of OPRA:
 - (1) the entity exercises sovereign powers of government;
 - (2) the entity was created for the express purpose of redeveloping property donated to it by a municipality;
 - (3) the entity has a Board of Trustees/Directors appointed by a Mayor or City Council;
 - (4) there is a mandated reversion of the donated property after the completion of the project and repayment of the associated debt;
 - (5) the entity has corporate bylaws requiring distribution of all assets to the donating city upon the dissolution or liquidation of the corporation;
 - (6) the entity has a Disposition Agreement with the donating city that designates the city as the “agency” and the corporation as the “redeveloper” pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A-12A-1 to -49; and
 - (7) the entity has the authority to issue tax-exempt bonds for the financing of the redevelopment project.

See The Times of Trenton Publishing Corporation v. Lafayette Yard Community Development Corporation, 368 N.J. Super. 425, 846 A.2d 659 (April 2004) (Lafayette Yard Community Development Corporation is a “public agency” under OPRA), Fallstick v. Haddon Township & Haddon Township Business Partnership, Inc., GRC Complaint No. 2004-73 (October 2004) (Haddon Township Business Partnership, Inc. is a “public agency” under OPRA), and Herron v. Montclair Community Pre-K Center, GRC Complaint No. 2005-130 (September 2006) (Montclair Community Pre-K Center is a “public agency” under OPRA).

SECTION 2 – OPRA AT WORK

What must your agency's OPRA Request form contain?

Pursuant to N.J.S.A. 47:1A-5.f., an OPRA request form **must** include the following:

- Space for the name, address, and phone number of the requestor and a brief description of the government record sought;
- Space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged;
- Specific directions and procedures for requesting a record;
- A statement as to whether prepayment of fees or a deposit is required;
- The time period within which the public agency is required by OPRA to make the record available;
- A statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- Space for the custodian to list reasons if a request is denied in whole or in part;
- Space for the requestor to sign and date the form; and
- Space for the custodian to sign and date the form if the request is fulfilled or denied.

How is a request for access to a government record made?

A request for access to a government record must be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian. N.J.S.A. 47:1A-5.g. A records request under OPRA cannot be made by telephone.

Pursuant to Renna v. County of Union (App. Div. 2009), OPRA requests *should* be on the agency's official OPRA request form. However, a written request that is not on the agency's official OPRA request form cannot be denied solely because the request is not on the proper form. Written requests which are not on the form must mention OPRA.

Some public agencies may not have a dedicated fax line for their records custodians and cannot accept fax requests. Some public agencies may accept requests for access to government records over the Internet or by e-mail. A public agency should examine its capability to accept electronically transmitted requests and establish appropriate policies and practices. The law does not require public agencies to provide new services beyond what they currently provide in order to accept records requests electronically. See Paff v. City of East Orange (App. Div. 2009) (unpublished) (holding that the custodian's refusal to accept OPRA requests via fax is reasonable but that a custodian may not exercise his/her authority under OPRA in a manner that would impose an unreasonable obstacle to the transmission of a request for a government record. Additionally, the court stated that OPRA's requirement that custodians adopt a request form authorizes custodians to direct how government records can be transmitted as specified in the form, which need not include every method of transmission mentioned in N.J.S.A. 47:1A-5.g.).

Internet Requests: Some public agencies have created systems that will permit a citizen to fill out an online request form and file it with the custodian over the Internet. The means of submitting a request form (mail, in-person, Internet) will not affect which records will or will not be available for access. The request form, whether paper or electronic, must contain all of the required information listed in N.J.S.A. 47:1A-5.f.

Requestors must be as specific as possible when requesting records. For example, requestors must identify types of records, dates, parties to correspondence, subject matter, etc. However, requestors may not know the names of certain records. The spirit of OPRA implies that custodians assist requestors with identifying the records they are seeking. Requests for information or requests that ask questions are NOT valid OPRA requests.

What happens if an employee other than the custodian receives an OPRA request?

OPRA permits a public agency to adopt one of two processes for when non-custodian officers or employees receive records requests. Any officer or employee of a public agency who receives a request for access to a government record may either:

1. Forward the request to the agency's records custodian; or
2. Direct the requestor to the agency's records custodian.

In other words, a public agency may decide to permit any employee to accept a records request, or an agency may require delivery of the request to the agency records custodian. N.J.S.A. 47:1A-5.h.

When does the response time clock begin?

The time frame to fulfill a request for access to government records under OPRA does not begin until the request form or equivalent written request has been delivered to the appropriate records custodian. Sending a records request to the wrong officer or employee may result in a delay of the fulfillment of the request. However, an agency must make the identity of the records custodian readily known to the public.

What is the time frame for a records custodian to respond to an OPRA request?

Custodians should fulfill a request as soon as possible but not later than seven business days after the request is received, provided that the record is currently available and not in storage or archived. N.J.S.A. 47:1A-5.i. Day One (1) is the day following the custodian's receipt of the request.

It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

If the custodian fails to respond to the requestor within seven business days after receiving a request, the failure to respond will be deemed a denial of the request. N.J.S.A. 47:1A-5.i.

Do some records require immediate access?

OPRA requires that custodians must ordinarily grant *immediate* access to budgets, bills, vouchers, contracts (including collective negotiations agreements and individual employment contracts), and public employee salary and overtime information. N.J.S.A. 47:1A-5.e.

Immediate access means at once, without delay. Exceptions may include instances in which the requested records are in use, in storage, or require medium conversion. In such instances, the custodian must provide access as immediately as possible. Agencies should act reasonably, however, using their best efforts to comply with this requirement.

If a custodian cannot provide immediate access to records for a legitimate reason, the custodian must reduce such reason to writing and request an extension of time to comply with the immediate statutory requirement.

What if I need more time to respond to an OPRA request?

Custodians may seek extensions of time beyond the seven (7) business day deadline for legitimate reasons (e.g. the record is in use or in storage). N.J.S.A. 47:1A-5.i. Custodians must request an extension from the requestor in writing, within the statutorily mandated seven (7) business days and provide an anticipated deadline date upon which the records will be provided. The length of the extension must be reasonable. Failure to grant or deny access by the extended deadline date results in a deemed denial of the request.

What if I have to redact records?

Under OPRA, a government record that is otherwise publicly accessible may contain non-disclosable information that should be redacted. N.J.S.A. 47:1A-5.g. Redaction means editing a record to prevent public viewing of material that should not be disclosed. Words, sentences, paragraphs, or whole pages may be subject to redaction.

How to Redact

If a record contains material that must be redacted, such as a social security number or unlisted phone number, redaction *must be accomplished by using a visually obvious method that shows the requestor the specific location of any redacted material in the record*. For example, if redacting a social security number or similar type of small-scale redaction, custodians should:

Make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker. Then provide a copy of the blacked-out record to the requestor.

The blacked out area shows where information was redacted, while the double copying ensures that the requestor will not be able to "see-through" to the original, non-accessible text. If "white-out" correction fluid is used to redact material, some visual symbol should be placed in the space formerly occupied by the redacted material to show the location of redacted material.

If full pages are to be redacted, the custodian should give the requestor a visible indication that a particular page of that record is being redacted, such as a blank sheet bearing the words "Page Redacted" or a written list of the specific page numbers being withheld. The purpose is to provide formal communication to the requestor making it clear that material was redacted and is not being provided.

If an electronic document is subject to redaction (i.e., word processing or Adobe Acrobat files) custodians should be sure to delete the material being redacted and insert in place of the redacted material asterisks to obviously indicate the redaction. Techniques such as "hiding" text or

changing its color so it is invisible should not be used as sophisticated users can detect the changes and potentially undo the “hiding” functions.

Explaining Why a Redaction is Made

When redactions are made to a record, the custodian can use either the request form to explain why those elements of a record are redacted, or use a separate document, depending on the circumstances, but also referring to the OPRA exception being claimed. This principle also applies if pages of information are redacted. Sometimes it is clear from inspection (entry called "Social Security Number" has a black out over where the number would appear). The bottom line is that the requestor has a right to know the reason for the redaction, and the custodian has the responsibility to provide an explanation.

Custodians must identify the legal basis for **each** redaction!!

What if I have to convert mediums?

OPRA provides that a custodian must permit access to a government record and provide a copy of the record(s) in the medium requested, if the public agency maintains the record in that medium. If the custodian does not maintain the record in the medium requested, he/she must:

- Convert the record to the medium requested; or
- Provide the record in some other meaningful medium (meaningful to the requestor).
N.J.S.A. 47:1A-5.d.

If the agency maintains the record in the medium requested, the custodian can only charge the actual cost of copying (e.g. the cost of the floppy disk or CD-ROM). However, a custodian may impose a special service charge related to conversion for:

- Extensive use of technology; and
- Labor for programming, clerical and supervisory assistance that may be required.

The special service charge must be based on the cost of the technology and labor actually incurred. This may include charges incurred by an outside vendor. N.J.S.A. 47:1A-5.c.

Before undertaking any conversion to another medium or taking other major actions that would result in the imposition of a special charge, the custodian must first inform the requestor that a special charge will be incurred and give the requestor the opportunity to accept or reject the extra fee. If the requestor objects to the special charge and refuses to pay it, the custodian may deny the request for access to the record. However, if the requestor is willing to pay for it, the agency has the responsibility to provide access to the government record in the requested format.

What if fulfilling the request would substantially disrupt the operations of the agency?

If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record only **after** first attempting to reach a reasonable solution with the requestor that accommodates the interests of both the requestor and the agency. N.J.S.A. 47:1A-5.g.

This is a subjective determination based on an agency's resources available to fulfill a request.

Example: Caggiano v. NJ Dept of Law & Public Safety, Div of Consumer Affairs, GRC Complaint No. 2007-69 (September 2007). The Custodian certified that an extended review of records as contemplated by the Complainant (for approximately a week) would substantially disrupt agency operations by requiring the extended attendance of a Division of Consumer Affairs employee and a NJ State Police Officer at the Complainant’s inspection of the requested records. The Council stated that:

“[t]he Custodian has reasonably offered to provide the Complainant with copies of all the records responsive upon payment of the statutory copying rates, which the Complainant has declined. The Custodian has also reasonably offered the Complainant two (2) hours to inspect the seven hundred forty-five (745) pages responsive to the Complainant’s request, of which the Custodian states a substantial portion are records which the Complainant himself submitted to the Division. Additionally, the Custodian has reasonably offered to accommodate the Complainant’s request by charging a special service charge for the hourly rate of a Division of Consumer Affairs employee to monitor the Complainant’s inspection of the requested records in the event that said inspection exceeds two (2) hours. Further, the Custodian has reasonably offered to copy the remaining records at the OPRA copying costs in the event the Complainant exceeds a reasonable amount of time for the record inspection, which the Custodian states is one (1) business day. However, the Complainant objects to paying any inspection fees, as well as a two (2) hour inspection time limit.”

The Council held that “because the Custodian has made numerous attempts to reasonably accommodate the Complainant’s request but has been rejected by the Complainant, the Custodian has not unlawfully denied access to the requested record under N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.g.

Disclaimer: The Borough of Stanhope is a small municipality. As such, a request that would substantially disrupt the operations of the Borough might not be considered a substantial disruption of operations for another public agency.

What if the request is overly broad or unclear?

If a request does not name specifically identifiable records or is overly broad, a custodian may deny access pursuant to the following court decisions: MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

A custodian may also seek clarification of a broad or unclear request. The custodian’s request for clarification must be in writing, within seven (7) business days of receipt of the request. If a custodian seeks clarification of an OPRA request, the response time clock stops until the requestor provides a response to the custodian.

Example of an overly broad request: “Any and all records related to the construction of the new high school.”

Example of a valid request: “Any and all e-mails between Jane Doe and John Smith regarding the construction of the new high school from January 1, 2009 to February 28, 2009.”

A custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant’s OPRA request. A custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad and unclear OPRA request.

How much can I charge to provide records?

The basic per page copy fees are the actual cost of providing said copies, not to exceed: \$0.75 for the first 10 pages, \$0.50 for pages 11-20, \$0.25 each page over 20. N.J.S.A. 47:1A-5.b.

Pursuant to Windish v. Mt. Arlington BOE, (Unpublished/App.Div. 2007), OPRA rates are okay for small municipalities.

If a municipality’s actual costs exceed the OPRA rates, the municipality must establish such fees in advance by ordinance. N.J.S.A. 47:1A-5.c. However, no other municipal ordinance is relevant to an OPRA request regarding fees (i.e. special service charges may not be established in advance by municipal ordinance).

Actual cost includes the cost of materials and supplies, NOT labor or overhead expenses. N.J.S.A. 47:1A-5.b.

In Getts v. Mercer County Clerk’s Office - Law Division Mercer County (May 2009), the court determined that custodians must charge actual cost for paper copies. This decision is noteworthy, but not yet universally applicable.

Deposits and Prepayments

OPRA permits the custodian to require a deposit or prepayment of fees for requests received from anonymous requestors. N.J.S.A. 47:1A-5.f. An agency may require a deposit or prepayment of fees when a request is voluminous, unusual or requires the use of an outside vendor.

OPRA requires the records request form to state whether prepayment of the fees or a deposit is required. The custodian should inform the requestor of the deposit or prepayment required and when the documents will be released upon payment.

When can I assess a special service charge?

In certain circumstances, an agency may collect a special service charge in addition to the actual cost of duplicating records embodied in printed form. Where the nature, format, manner of collection, or volume of records to be inspected or copied is such that:

- The record cannot be reproduced using ordinary equipment, in ordinary business size (e.g. a map or plat); or
- Complying with the request involves an extraordinary expenditure of time and effort,

the agency may assess a special service charge that must be reasonable and based on actual direct cost. N.J.S.A. 47:1A-5.c. Actual direct cost means hourly rate of the lowest level employee capable of fulfilling the request (no fringe benefits).

What warrants an imposition of a special service charge is extremely subjective and the determination is made on a case-by-case basis. No special service charges can be established in advance by ordinance.

For the Government Records Council to determine (1) whether a special service charge is warranted and (2) whether the special service charge the custodian assessed is reasonable, the custodian must provide answers to the following questions:

1. What records are requested?
2. Give a general nature description and number of the government records requested.
3. What is the period of time over which the records extend?
4. Are some or all of the records sought archived or in storage?
5. What is the size of the agency (total number of employees)?
6. What is the number of employees available to accommodate the records request?
7. To what extent do the requested records have to be redacted?
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?
13. What is the availability of information technology and copying capabilities?
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

The custodian must notify the requestor in advance of the special service charge. The requestor has the right to disagree with the special service charge. If the custodian and requestor cannot reach an agreement regarding the special service charge, the request is considered denied.

Can small public agencies specify OPRA hours?

In the case of:

- A municipality having a population of 5,000 or fewer according to the most recent federal decennial census,
- A board of education having a total district enrollment of 500 or fewer, or
- A public authority having less than \$10 million in assets,

a records custodian must provide access to a government record that is authorized for public inspection or copying during not less than six regular business hours over not fewer than three business days per week, or during the public agency's regularly scheduled business hours, whichever is less. N.J.S.A. 47:1A-5.a.

How can I deliver the requested records to the requestor?

A custodian must grant access to a government record by the method of delivery requested by the requestor (regular mail, fax, or e-mail). O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008). Charges for such delivery must reflect actual cost. Be careful before attempting to charge for fax or e-mail deliveries. Unless you can prove actual cost, you are not allowed to charge anything.

What do I do when I deny access?

If the custodian is unable to comply with a request for access, the custodian must indicate the specific reason for denying access on the request form and promptly return a copy to the requestor. N.J.S.A. 47:1A-5.g. The form must be signed and dated by the custodian, as it may serve as the basis for an appeal by the requestor to Superior Court or the Government Records Council. A custodian's response may be provided in another written format other than on the OPRA request form.

When responding to an OPRA request, a custodian must provide a response to each record requested.

What does a proper response to an OPRA request require?

A proper response to an OPRA request:

- is in *writing* within seven (7) business days!!!
- grants access, denies access, seeks clarification, or requests an extension of time
- addresses each record requested
- addresses requestor's preferred method of delivery
- if special service charge assessed, provides estimate and gives requestor opportunity to accept or reject charge

- includes a record index that identifies each record requested and the specific legal basis for a denial of access (including redactions) to each record.

Verbal responses, even if within the statutorily mandated seven business days, are not valid under OPRA.

How does a requestor appeal a denial of access?

OPRA provides that a person who is denied access to a government record can choose:

1. to file suit in Superior Court; or
2. to file a complaint with the Government Records Council. N.J.S.A. 47:1A-6.

A requestor cannot do both!

In Superior Court, a complaint must be filed within 45 days of the denial of access (Mason v. City of Hoboken, 196 NJ 51 (2008)). There is no statute of limitations to file a Denial of Access Complaint with the GRC.

How are complaints filed?

To start a summary (expedited) lawsuit in the New Jersey Superior Court, a written complaint and an order to show cause must be prepared and filed with the court. The court requires a filing fee and the requestor must serve the lawsuit papers on the appropriate public official(s).

The court will schedule a hearing and resolve the dispute. Decisions may be appealed to the Appellate Division of the New Jersey Superior Court. Successful plaintiffs may be entitled to reasonable attorney fees. Plaintiffs should consider consulting with an attorney to learn about initiating and pursuing lawsuits in the New Jersey Superior Court.

The process for filing a complaint with the Government Records Council is described in Section 3 of this handbook.

SECTION 3 – THE GRC

What is the Government Records Council?

OPRA established the Government Records Council (GRC) in the New Jersey Department of Community Affairs.

The members of the Government Records Council are the Commissioner of the Department of Community Affairs or the Commissioner's designee; the Commissioner of the Department of Education or the Commissioner's designee; and three public members appointed by the Governor, with the advice and consent of the Senate, not more than two of whom shall be of the same political party. A public member shall not hold any other state or local elected or appointed office or employment while serving as a member of the Council.

OPRA permits the Government Records Council to employ an executive director and such professional and clerical staff as is necessary to help it carry out its functions.

What are the duties of the Government Records Council?

The Government Records Council has the statutory responsibility to:

- Establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
- Receive, hear, review, and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
- Issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;
- Prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
- Prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;
- Prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;
- Make training opportunities available for records custodians and other public officers and employees to explain the law governing access to public records; and
- Operate an informational Web site and a toll-free help-line staffed by knowledgeable employees of the Council during regular business hours which will enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the Government Records Council when access has been denied.

What is the scope of the GRC's authority?

- The GRC only has authority over access to records maintained by a public agency at the time of an OPRA request.
- The GRC lacks authority over the accuracy of record content.
- The GRC does not have authority over the condition of records.
- The GRC lacks authority over records retention. For retention schedules, contact the New Jersey Department of State, Division of Archives and Records Management (DARM).
- The GRC does not have jurisdiction over the Judicial or Legislative Branches of State Government or any agency, officer, or employee of those branches.
- The GRC does not have authority over other types of records requests (administrative, common law, discovery).
- The GRC does not have authority over how a custodian uses his/her legal counsel.
- The GRC cannot adjudicate a complaint currently pending or previously adjudicated in New Jersey Superior Court.

How is a Denial of Access Complaint filed and handled?

A complaint to the Government Records Council must be in writing on the GRC's Denial of Access Complaint form. The complaint should set forth the facts regarding the request for access to the government records, describing the specific records requested, and the circumstances under which the records were requested, and the denial of access by the records custodian of the public agency. Complaint forms are available from the Council office or from the Council's website at www.nj.gov/grc/register/.

Upon receipt of a complaint, the Government Records Council offers the parties the opportunity to resolve the dispute through mediation before a neutral mediator. Mediation is an informal, non-adversarial process having the objective of helping the parties reach a mutually acceptable, voluntary agreement.

The mediator will help the parties to identify issues, will encourage joint problem-solving, and will explore settlement alternatives with the parties.

If any party declines mediation or if mediation fails to resolve the matter to the satisfaction of the parties, the Government Records Council will initiate an investigation concerning the facts and circumstances set forth in the complaint.

At the request of the Government Records Council, the public agency must provide a Statement of Information setting forth the facts regarding the request for access to the government records, describing the specifics of the custodian's denial to those records.

What happens when the Government Records Council starts investigating a complaint?

Complaints Generally: All proceedings of the Government Records Council are conducted as expeditiously as possible.

Step 1: The Council must decide whether the complaint is within its jurisdiction, or whether the complaint is frivolous or without any reasonable factual basis.

Step 2: If the Council concludes that the complaint is outside its jurisdiction or that the complaint is frivolous or without factual basis, it will issue a decision in writing to dismiss the complaint and send the decision to the complainant and the records custodian.

Step 3: If the Council determines that the complaint is within its jurisdiction and is not frivolous and has a factual basis, the Council will notify the records custodian of the nature of the complaint and the facts and circumstances set forth in the complaint.

Step 4: The custodian will have the opportunity to provide the Council with a response containing information concerning the complaint.

Step 5: If the Council is able to make a determination about whether a record should be provided based upon the complaint and the custodian's response, it will issue a decision in writing and send it to the complainant and the records custodian.

Step 6: If the Council is unable to make a determination about whether a record should be provided based solely upon the submissions, the Council may conduct a hearing on the matter at its discretion. The hearing will be held in conformity with the rules and regulations for hearings by a state agency in contested cases under the Administrative Procedure Act, when they are applicable.

Step 7: Following the hearing, the Council will, by a majority vote of its members, render a decision as to whether the government record in question, or a portion of it, must be made available for public access to the requestor.

Step 8: If the Council determines by a majority vote that a custodian **knowingly** and **willfully** violated OPRA and is found to have **unreasonably** denied access under the **totality of the circumstances**, the Council will impose penalties provided for under OPRA.

Step 9: A final decision of the Council may be appealed to the Appellate Division of the New Jersey Superior Court.

Meetings held by the Council are subject to the Open Public Meetings Act. The Council may move into closed session during that portion of any proceeding in which the contents of a contested record would be disclosed.

Finally, the Council will not charge any party a fee in regard to actions filed with the Council.

What else should the custodian know about Council hearings and actions?

Prevailing Party Attorneys Fees

If represented by counsel, a requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee. N.J.S.A. 47:1A-6.

Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App.Div. 2006), a complainant is a "prevailing party" if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Also, when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a

settlement of the parties that indicates access was improperly denied and the requested records are disclosed.

Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a complainant is a “prevailing party” if he/she can demonstrate:

1. a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved; and
2. that the relief ultimately secured by plaintiffs had a basis in law.

If the decision of the public agency to deny access to the requested record is upheld, the public agency is not entitled to an attorney’s fee from the requestor under OPRA.

Knowing and Willful Penalty

A public official, officer, employee, or custodian who knowingly and willfully violates OPRA and is found to have unreasonably denied access under the totality of the circumstances shall be subject to a civil penalty of \$1,000 for an initial violation, \$2,500 for a second violation, and \$5,000 for a third violation that occurs within 10 years of an initial violation. N.J.S.A. 47:1A-11. The penalty shall be collected and enforced in proceedings in accordance with the Penalty Enforcement Law of 1999.

Can an employee other than the custodian be assessed a penalty? YES!!

Appropriate disciplinary proceedings may be initiated against a public official, officer, employee, or custodian against whom a penalty has been imposed.

GRC’s Regulations

For more information about the rules pertaining to the GRC’s complaint process, see the GRC’s promulgated regulations (*N.J.A.C. 5:105* (2008)) on our website at www.nj.gov/grc/home/rules/pdf/Promulgated_Regulations.pdf.

SECTION 4 – SPECIAL CIRCUMSTANCES

Can a requestor seek access to government records under OPRA for commercial use?

There is no restriction against commercial use of government records under OPRA. See Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006) and Burnett v. County of Bergen, 198 N.J. 408 (2009).

What do I do if I believe a requestor is using OPRA as a means to harass the agency?

OPRA is silent on the number of OPRA requests one person can submit to a particular agency. However, if you believe you are being harassed you may have options in civil court.

Can a requestor bring his or her own photocopier into my office to make copies?

A custodian may, in his or her discretion, allow the use of personal photocopiers by requestors depending upon factors including, but not limited to, the specific circumstances of the request, the particular documents requested, the office hours, the available space within the office, the availability of personnel, the availability of appropriate electrical outlets, the consumption of energy, the need to preserve the security of public records or documents and protect them from damage, or other legitimate concerns. A custodian may require that photocopying be done on the agency's photocopier if to allow otherwise would disrupt operations, interfere with the security of public records, or expose records to potential damage.

Can I provide on-site inspection, but deny copies of records requested?

No. If a record is subject to public access under OPRA, the record is available for public inspection as well as copying. Also, copyright law does not prohibit access to records that are otherwise accessible under OPRA.

What do I do if I receive an OPRA request for records that I previously provided to the same requestor?

In Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), the Appellate Division held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. The Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry.

It is important to note that the court's findings turned on the specific facts of this case. Specifically, the requestor attached a copy of the requested record to his OPRA request, thus proving that he was already in possession of said record at the time of his request. As such, a custodian cannot deny access solely because he/she previously provided the records to the requestor. The custodian must have evidence that the requestor is in possession of the records at the time of the OPRA request.