

# The Open Public Records Act

New Jersey Government Records Council

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Executive Director



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## Overview

- Section I – Understanding OPRA
- Section II – OPRA in Practice
- Section III – Complaint Process
- Section IV – Special Issues
- Section V – Exemptions in OPRA

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## Section I: Understanding OPRA



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### What is OPRA?

- Not Oprah the celebrity ☺
- Open Public Records Act - N.J.S.A. 47:1A-1 et seq.
- Replaced the "Right to Know Law."
- Increases public's accessibility to government records (cultural change in New Jersey).
- **Broadly defines a government record.**
- Provides compliance process via the GRC and NJ Superior Court.
- Provides for penalties to anyone who knowingly and willfully violates OPRA.

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### Non OPRA Requests

- Not all records requests are OPRA requests! Requestor elects to invoke OPRA's provisions.
- OPRA does not affect common law right of access, or right of access via discovery.
- Challenges to common law requests and discovery request must be made to NJ Superior Court, not GRC.
- GRC cannot advise on process, fees, etc. regarding common law or discovery requests.

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### Who Can Request Records Under OPRA?

- Anyone!
- Although OPRA states "citizens of this State," the Attorney General's Office advises that OPRA does not prohibit access to residents of other states.
- A requestor may even file an OPRA request anonymously.

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## What is the GRC?



- GRC = Government Records Council.
- Duties listed in OPRA - N.J.S.A. 47:1A-7.
- Provides assistance to requestors and records custodians – cannot provide legal advice.
- Adjudicates denial of access complaints – court alternative. No statute of limitations.
- Five-member Council & professional staff.

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## Limitations of GRC's Authority

- GRC only has authority over access to records maintained by a public agency at the time of an OPRA request.
- No authority over accuracy of record content.
- No authority over the condition of records.
- No authority over records retention – Division of Archives and Records Management (DARM). See Circular Letter handout for specific e-mail guidance.
- No jurisdiction over the Judicial or Legislative Branches of State Government.
- No authority over other records requests (administrative, common law, discovery).
- No authority over how a custodian uses his/her legal counsel.
- GRC cannot adjudicate a complaint currently pending or adjudicated in Superior Court.
- No authority over Open Public Meetings Act issues.

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## Definitions

- All government records are subject to public access unless specifically exempt under OPRA or any other law.

**Government Record:** All records made, maintained, kept on file, or received in the course of official business.

- Expands Right to Know Law definition (records *required* to be maintained on file).
- 24 specific exemptions to disclosure (see exemptions handout).

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### Definitions

#### Custodian of a Government Record:

- Municipality - the municipal clerk or other department head if made known to the public.
- Any other public agency - the officer officially designated by formal action of that agency's director or governing body, as the case may be. N.J.S.A. 47:1A-1.1.

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### OPRA Request Forms

- N.J.S.A. 47:1A-5.f. contains OPRA request form requirements.
- Be careful about adding exemptions to OPRA request form. Custodians have run into trouble if OPRA provision is not described accurately. Example: personnel records are exempt, without reference to exceptions named under N.J.S.A. 47:1A-10.
- GRC's Model Request Form is available online for adoption.

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### OPRA Requests

- OPRA requests *should* be on the agency's official OPRA request form (Renna v. County of Union (App. Div. 2009)).
- Written requests not on an official form cannot be denied solely because they are not on the official request form.
- Written requests not on an official form must mention OPRA.

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### OPRA Hours

- Custodians must permit records to be inspected, examined, and copied by any person during regular business hours, unless:
  - a municipality has a population of 5,000 or fewer according to the most recent federal decennial census;
  - a board of education has a total district enrollment of 500 or fewer; or
  - a public authority has less than \$10 million in assets.
- If above applies, custodians may set OPRA hours during not less than six regular business hours over not less than three business days per week or the entity's regularly-scheduled business hours, whichever is less. N.J.S.A. 47:1A-5.a.

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### Section II: OPRA in Practice




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### Making an OPRA Request

**Requestors:**

- Must name specific identifiable government records.
- Be as specific as possible – identify type of record, dates, parties to correspondence, subject matter, etc.
- Requests for information or that ask questions are NOT valid OPRA requests.
- Method of submission – custodians can prescribe the method by which an OPRA request must be transmitted to the agency as long as it would not impose an unreasonable obstacle to the transmission of a request for a government record (i.e. fax, e-mail, etc.) Paff v. City of East Orange (App. Div. 2009).

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### How Do I Know What to Request and from Where?

- Requestors are likely not aware of all records maintained by an agency.
- Custodians should assist requestors in identifying specific types of records – spirit of OPRA suggests cooperation from Custodian.
- Requestors must submit OPRA requests to the agency that maintains physical custody of the requested records. Example: Request for Trenton PD report submitted to Trenton PD. Request for Cherry Hill tax maps submitted to Cherry Hill.

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### Receiving an OPRA Request: Non-Custodian Employees

If an officer or employee of a public agency receives an OPRA request, they **must forward the request** to the records custodian **or direct the requestor** to the records custodian pursuant to N.J.S.A. 47:1A-5.h.

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### Steps to Follow When Responding to an OPRA Request

1. When is my deadline to respond?
2. Is this a valid OPRA request?
3. Do I have enough information to fulfill request?
4. Will the request require a special service charge? Substantial disruption of agency operations?
5. Obtain records responsive to request.
6. Do the records or portions thereof fit into any of OPRA's exemptions?
7. Redact as necessary, convert to requested medium, calculate appropriate fees.
8. Provide records via requested method of delivery, or deny with legal basis in writing.

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### Step 1: When is my deadline to respond?



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### Statutory Response Time

- A custodian shall grant or deny access **as soon as possible, but no later than 7 business days** after the request is received. N.J.S.A. 47:1A-5.i.
- A custodian unable to comply with a request must indicate specific reason(s) in writing. N.J.S.A. 47:1A-5.g.
- A custodian must provide a response to each item requested, either:
  - Granting access;
  - Denying access;
  - Seeking clarification; or
  - Requesting an extension of time.

Failure to do so in writing within the seven (7) business days constitutes a "deemed" denial.

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### When Does the Clock Begin?

- The seven (7) business day response time begins when the custodian receives the OPRA request.
- There should be another employee designated to receive/fulfill requests in custodian's absence.
- Day 1 is the day after the custodian receives the OPRA request.
- When receiving an OPRA request, custodians should calculate the statutory response time and **must** adhere to it.
  - *This is the most common violation of OPRA by records custodians.*

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### Immediate Access

- **Immediate access** to budgets, bills, vouchers, contracts, and government employee salary information. N.J.S.A. 47:1A-5.e.
- Immediate means as immediately as possible – **on the spot unless** in storage, in use, or requires medium conversion. (Renna v. County of Union, GRC Complaint No. 2008-110 (March 2009)).
- 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.

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### Additional Time Required

- Custodians may seek extensions of time beyond the seven (7) business day deadline with legitimate reasons (i.e. records in storage, medium conversion required, request voluminous, etc.).
- Requests must be in writing, within the seven (7) business days, and provide an anticipated date upon which the records will be provided.
- Failure to grant or deny access by the extended deadline date results in a “deemed” denial. N.J.S.A. 47:1A-5.i.

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**Step 2:**  
**Is this a valid OPRA request?**



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### Broad and/or Unclear Requests

- 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, Bent, NJ Builders, and Schuler (GRC decision).
- 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. See Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).

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### Broad and/or Unclear Requests

- Example of an overly broad request: "Any and all records related to the construction of the new high school."
- "Records" is too broad of a term.
- 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."
- Names specific type of record, parties to correspondence, subject and date range.

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### Broad and/or Unclear Requests

In Burnett v. County of Gloucester, (App. Div. 2010) the requestor sought access to "[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present."

The Appellate Division concluded that the request for settlement agreements and releases without specifying the matters to which the settlements pertained did not render the request a general request for information obtained through research, rather than a request for a specific record. The court examined the holding in MAG and the GRC's decision in Donato v. Twp. of Union, GRC 2005-182, interim order (January 31, 2007) and determined that "[h]ere, it is the documents, themselves, that have been requested, and their retrieval requires a search, not research."

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**Step 3:**  
**Do I have enough information to fulfill request?**



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**Seeking Clarification**

- A custodian may seek clarification of an overly broad or unclear request.
  - Request must be in writing, within seven (7) business days.
  - Response time stops until requestor responds – Moore v. Township of Old Bridge, GRC Complaint No. 2005-80 (August 2005).
  - When requestor responds, a new response time begins.

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**Step 4:**  
**Will the request require a special service charge?  
Substantial disruption of agency operations?**

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### Special Service Charge

- Special service charges for “extraordinary” requests must be reasonable and based on actual direct cost. N.J.S.A. 47:1A-5.c.
- Actual direct cost means hourly rate of lowest level employee capable of fulfilling request (no fringe benefits).
  - **Only** warranted when:
    - Copies cannot be reproduced by ordinary copying equipment in ordinary business size
    - Accommodating request involves an extraordinary expenditure of time and effort (also allowed for **inspection**).
  - Case-by-case determination - No ordinance allowed!!
  - GRC’s “14 Point Analysis” (see Handout)
    - Courier Post v. Lenape Regional High School, 360 N.J. Super. 191 (Law Div. 2002) and Fisher v. Department of Law & Public Safety, Division of Law, GRC Complaint No. 2004-55 (August 2006).

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### Substantial Disruption

- If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record(s) only after attempting to reach a reasonable solution with the requestor that accommodates the interests of 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.
- See Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220; Vessio v. NJ DCA, Division of Fire Safety, GRC Complaint No. 2007-188.

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## Step 5:

### Obtain records responsive to request

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### Obtain Records Responsive

- Reasonable that Custodian does not have physical custody of all records maintained by agency.
- Custodian should document attempts to access records from other departments/personnel.
- Custodian should keep requestor informed of attempts to gain access to records.
- Custodian cannot be held responsible if another employee obstructs access as long as Custodian can prove attempts made to gain access to the records.

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### Step 6:

**Do the records or portions thereof fit into any of OPRA's exemptions?**



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### OPRA's Exemptions

- 24 specific exemptions contained in OPRA (see handout).
- If record does not fit into any exemption, it is accessible under OPRA.
- Default answer is always YES!!!

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### Step 7:

**Redact as necessary, convert to requested medium, calculate appropriate fees.**



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### Redactions

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.

Custodians should 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.

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### Redactions Cont'd

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.

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. Techniques such as "hiding" text or changing its color so it is invisible should not be used as sophisticated users can detect the changes.

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

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### Medium Conversion

- A custodian **must** permit access to government records in the medium requested. N.J.S.A. 47:1A-5.d.
- If custodian does not maintain record in medium requested, he/she **must**:
  - **Convert** the record to the medium requested, or
  - Provide a copy in some other "meaningful" medium (meaningful to the requestor).
- Custodian may impose a special charge related to conversion for:
  - Extensive use of technology and
  - Labor for programming, clerical and supervisory assistance that may be required.

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### Medium Conversion Cont'd

- If conversion is completed in-house, there is generally no charge, unless actual costs can be demonstrated or special service charge applies.
- If an outside vendor is required, seek estimate and provide requestor with estimate for approval/rejection.
- Charge for conversion must be actual cost. See Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) – Custodian charged \$55.00 for a computer diskette.
- See also Gannett Satellite Information Network, Inc. v. Borough of Raritan, Docket No. SOM-L-1789-09 (December 2009) – Gannett requested records in particular format not maintained by agency. Court held that Gannett must pay for any required medium conversion.

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### Legislative Changes to Copying Costs

- Governor Christie signed legislation on September 10, 2010 that changed OPRA's fee schedule to the following:
  - Flat fee of \$0.05 per page for letter sized pages and smaller;
  - Flat fee of \$0.07 per page for legal sized pages and larger;
  - Any public agency whose actual costs to produce paper copies exceed the \$0.05 and \$0.07 rates may charge the actual cost of duplication;
  - Electronic records must be provided FREE OF CHARGE (i.e. records sent via e-mail and fax); and
  - Must charge the actual cost to provide records in another medium (i.e. computer disc, CD-ROM, DVD).
- Fees became effective November 9, 2010.

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### Copying Costs Cont'd

- Fees contained in municipal ordinances DO NOT trump OPRA's copy fees!
- Fees contained in municipal ordinances are moot as it relates to OPRA requests.
- Custodians must charge the appropriate fees pursuant to N.J.S.A. 47:1A-5.b.
- Special service charges cannot be established by ordinance. They are calculated on a case-by-case basis based on what personnel is fulfilling the request.

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### Step 8: Provide records, or deny with legal basis, in writing

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### Method of Delivery

- A custodian must grant access to a government record by method of delivery requested by requestor (regular mail, fax, e-mail, etc). O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008).
- As of November 9<sup>th</sup> electronic delivery is free of charge pursuant to OPRA amendment.



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### Lawful Basis for Denial

- Custodians must provide lawful basis for denial *at the time of denial*.
- Burden of proving lawful denial of access rests on the custodian. N.J.S.A. 47:1A-6.
- This includes outright denials and redactions.
- Examples:
  - Jane Smith's payroll record is redacted pursuant to N.J.S.A. 47:1A-1.1. because social security numbers are exempt from public access.
  - Letter from John Smith, Esq. to Mary Jones dated January 4, 2010 is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. as attorney-client privileged material.

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### Adequate Response

- 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.
  - Provides an account of the actual cost of duplicating the records.
  - If special service charge assessed, provides estimate and gives requestor opportunity to accept or reject charge.
  - Includes index that identifies the specific legal basis for a denial of access (including redactions).

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### Section III: Complaint Process



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## Options to Challenge a Denial of Access

Requestors may:

- File complaint in Superior Court, or
- File complaint with the Government Records Council
- NOT BOTH!! N.J.S.A. 47:1A-6

In Superior Court, complaint must be filed within 45 days of denial of access (Mason v. City of Hoboken, 196 NJ 51 (2008)).

No statute of limitations to file a Denial of Access Complaint with the GRC.

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## GRC Complaint Process

Step One: Denial of Access Complaint

Step Two: Mediation (optional, but must be in good faith)

Step Three: Adjudication

Step Four (if desired): Appeal to Appellate Division of NJ Superior Court

\* See GRC Regulations for details regarding each step

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## Prevailing Party Attorney's Fees

- N.J.S.A. 47:1A-6 and 7.f.
- 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.
- 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.

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## Knowing and Willful Penalty

Who may be assessed a penalty?  
Anyone! Per N.J.S.A. 47:1A-11.

A public official, officer, employee or custodian who **knowingly and willfully** violates OPRA and unreasonably denied access under the totality of the circumstances.

\$1,000 personal penalty for 1<sup>st</sup> offense – cannot be paid by agency.

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## Section IV: Special Issues

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## Privacy Concerns

The GRC generally upholds a custodian's redaction of home addresses, home telephone numbers, and home e-mail addresses when the custodian asserts privacy concerns and cites to N.J.S.A. 47:1A-1:

“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”

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### Privacy Concerns Cont'd

Burnette 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."

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### 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).

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### Harassment

- OPRA is silent on the number of OPRA requests one person can submit to a particular agency.
- 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.
  - *This holding is extremely fact specific since the custodian had proof at the time of the OPRA request that the requestor was already in possession of the requested record. Not universally applicable!*
- If you believe you are being harassed, you may have options in civil court.

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## Section V: Exemptions in OPRA (see handout)

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### GRC News Service

- Sign up to receive free e-mail updates regarding OPRA, precedential cases, and new issues of *The OPRA Alert*.
- [www.nj.gov/grc/news/news](http://www.nj.gov/grc/news/news).
- Simply enter your e-mail address online.



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### GRC Contact Information

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## **OPRA EXEMPTIONS** (Exceptions are noted in italics)

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

- 1) Inter-agency or intra-agency advisory, consultative or deliberative material (Note: generally refers to draft documents or documents used in a deliberative process).
- 2) Legislative records. Specifically:
  - a. information received by a member of the Legislature from a constituent or information held by a member of the Legislature concerning a constituent, including but not limited to information in written form or contained in any e-mail or computer data base, or in any telephone record whatsoever, *unless it is information the constituent is required by law to transmit*;
  - b. any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member's official duties, *except that this provision shall not apply to an otherwise publicly-accessible report which is required by law to be submitted to the Legislature or its members.*
- 3) Medical examiner records – photographs, negatives, print, videotapes taken at the scene of death or in the course of post mortem examination or autopsy, *except:*
  - a. *when used in a criminal action or proceeding in this State which relates to the death of that person,*
  - b. *for the use as a court of this State permits, by order after good cause has been shown and after written notification of the request for the court order has been served at least five days before the order is made upon the county prosecutor for the county in which the post mortem examination or autopsy occurred,*
  - c. *for use in the field of forensic pathology or for use in medical or scientific education or research, or*
  - d. *or use by any law enforcement agency in this State or any other state or federal law enforcement agency.*
- 4) Criminal investigatory records - records which are not required by law to be made, maintained or kept on file that are held by a law enforcement agency which pertain to any criminal investigation or related civil enforcement proceeding. (Note: N.J.S.A. 47:1A-3.b. lists specific criminal investigatory information which must be disclosed).
- 5) Victims' records - an individually-identifiable file or document held by a victims' rights agency which pertains directly to a victim of a crime except that a victim of a crime shall have access to the victim's own records. "Victims' rights agency" means a public agency, or part thereof, the primary responsibility of which is providing services, including but not limited to food, shelter, or clothing, medical, psychiatric, psychological or legal services or referrals, information and referral services,

counseling and support services, or financial services to victims of crimes, including victims of sexual assault, domestic violence, violent crime, child endangerment, child abuse or child neglect, and the Victims of Crime Compensation Board.

- 6) Trade secrets and proprietary commercial or financial information obtained from any source. Includes data processing software obtained by a public agency under a licensing agreement which prohibits its disclosure.
- 7) Any record within the attorney-client privilege.
- 8) Administrative or technical information regarding computer hardware, software and networks which, if disclosed would jeopardize computer security.
- 9) 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.
- 10) Security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software.
- 11) Information which, if disclosed, would give an advantage to competitors or bidders.
- 12) 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 individual; or
  - c. Collective negotiations, including documents and statements of strategy or negotiating position.
- 13) Information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office.
- 14) Information which is to be kept confidential pursuant to court order.
- 15) Certificate of honorable discharge issued by the United States government (Form DD-214) filed with a public agency, *except that a veteran or the veteran's spouse or surviving spouse shall have access to the veteran's own records.*
- 16) Personal identifying information. Specifically:
  - a. Social security numbers, *except that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by State or federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor.*

- b. Credit card numbers
- c. Unlisted telephone numbers
- d. Drivers' license numbers.

*Except for:*

- a. *Use by any government agency, including any court or law enforcement agency, in carrying out its functions,*
- b. *or any private person or entity acting on behalf thereof,*
- c. *or any private person or entity seeking to enforce payment of court-ordered child support; except with respect to the disclosure of driver information by the Division of Motor Vehicles as permitted by section 2 of P.L.1997, c.188 (C.39:2-3.4);*

17) Certain records of higher education institutions:

- a. Pedagogical, scholarly and/or academic research records and/or the specific details of any research project, *except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available.*
- b. Test questions, scoring keys and other examination data pertaining to the administration of an examination for employment or academic examination.
- c. Records of pursuit of charitable contributions or records containing the identity of a donor of a gift if the donor requires non-disclosure of the donor's identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization or dedication.
- d. Valuable or rare collections of books and/or documents obtained by gift, grant, bequest or devise conditioned upon limited public access.
- e. Information contained on individual admission applications.
- f. Information concerning student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student.

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

18) Biotechnology trade secrets.

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

19) Limitations to convicts - personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information. *Information may be released only if the information is necessary to assist in the defense of the requestor.*

*A determination that the information is necessary to assist in the requestor's defense shall be made by the court upon motion by the requestor or his representative.*

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

- 20) Ongoing investigations – any records pertaining to an investigation in progress by any public agency if disclosure of such record or records shall be detrimental to the public interest. *This provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.*

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

- 21) Public defender records that relate to the handling of any case, *unless authorized by law, court order, or the State Public Defender.*

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

- 22) Upholds exemptions contained in other State or federal statutes and regulations, Executive Orders of the Governor, Rules of Court, Constitution of this State, or judicial case law.

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

- 23) 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 required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or 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)**

- 24) Privacy Interest - “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.”

Burnette 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' promulgated rules are exempt from disclosure by this Order.
- 3) Executive Orders No. 9 (Hughes), 11 (Byrne), 79 (Byrne) and 69 (Whitman) are hereby continued to the extent that they are not inconsistent with this Executive Order.

Executive Order No. 9 (Hughes) exemptions that are still active:

- a. Questions on examinations required to be conducted by any State or local governmental agency;
- b. Personnel and pension records (same as N.J.S.A. 47:1A-10);
- c. Records concerning morbidity, mortality and reportable diseases of named persons required to be made, maintained or kept by any State or local governmental agency;
- d. Records which are required to be made, maintained or kept by any State or local governmental agency which would disclose information concerning illegitimacy;
- e. Fingerprint cards, plates and photographs and other similar criminal investigation records which are required to be made, maintained or kept by any State or local governmental agency;
- f. Criminal records required to be made, maintained and kept pursuant to the provisions of R. S. 53:1-20.1 and R. S. 53:1- 20.2;
- g. Personal property tax returns required to be filed under the provisions of Chapter 4 of Title 54 of the Revised Statutes; and
- h. Records relating to petitions for executive clemency.

Executive Order No. 11 (Byrne) exemptions are the same as N.J.S.A. 47:1A-10.

Executive Order No. 79 (Byrne) exemptions are the similar to # 8, 9, 10 above under N.J.S.A. 47:1A-1.1.

Executive Order No. 69 (Whitman) exemptions that are still active: Fingerprint cards, plates and photographs and similar criminal investigation records that are required to be made, maintained or kept by any State or local governmental agency.

## Executive Order No. 26 (McGreevey 2002)

- 1) Certain records maintained by the Office of the Governor:
  - a. Any record made, maintained, kept on file or received by the Office of the Governor in the course of its official business which is subject to an executive privilege or grant of confidentiality established or recognized by the Constitution of this State, statute, court rules or judicial case law.
  - b. All portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege.
  - c. All portions of records containing information provided by an identifiable natural person outside the Office of the Governor which contains information that the sender is not required by law to transmit and which would constitute a clearly unwarranted invasion of personal privacy if disclosed.
  - d. If any of the foregoing records shall contain information not exempted by the provision of the Open Public Records Act or the preceding subparagraphs (a), (b) or (c) hereof then, in such event, that portion of the record so exempt shall be deleted or excised and access to the remainder of the record shall be promptly permitted.
- 2) Resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. *The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.*
- 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 a regulation of that department or agency adopted pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963), or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure.

- 9) Records of a department or agency held by the Office of Information Technology (OIT) or the State Records Storage Center of the Division of Archives and Records Management (DARM) in the Department of State, or an offsite storage facility outside of the regular business office of the agency. Such records shall remain the legal property of the department or agency and be accessible for inspection or copying only through a request to the proper custodian of the department or agency. In the event that records of a department or agency have been or shall be transferred to and accessioned by the State Archives in the Division of Archives and Records Management, all such records shall become the legal property of the State Archives, and requests for access to them shall be submitted directly to the State Archives.



## **SPECIAL SERVICE CHARGE 14-POINT ANALYSIS**

Whenever a records custodian asserts that fulfilling an OPRA records request requires an “extraordinary” expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5.c. In this regard, OPRA provides:

“Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves *an extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ...*” (Emphasis added.) N.J.S.A. 47:1A-5.c.

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 the number of 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, and return the requested records to their original storage place.

## **Useful OPRA Cases by Subject**

Note: This is NOT an exhaustive list of cases or subject areas.

### **911 Tapes**

Serrano v. South Brunswick Township, 358 N.J. Super. 352; 817 A.2d 1004, (March 19, 2003). The complainant requested an audiotape of a 911 call in which a defendant allegedly killed his father three hours after he placed the call. The court affirmed the GRC's decision to release the tape.

1. 911 calls are required by law to be recorded by a government agency and these tapes must be retained for "no less than 31 days." (See N.J.S.A. 52:17C-1 and N.J.A.C. 17:24-2.4).
2. 911 tapes come within the definition of a government record for the purposes of OPRA.
3. Judge Alley noted:
  - a. This case does not provide the opportunity for a definitive ruling on the question of whether 911 tapes are public records under OPRA.
  - b. The 911 caller himself made the existence of the call part of the public record in the pretrial proceedings of his criminal case and had expressly taken the position in these proceedings that he did not object to the release of the 911 tape. The court is not concluding that all 911 tapes are open to the public under OPRA. They decided that only under the circumstances of this case the prosecutor was not entitled to withhold this 911 tape from the public.

### **Advisory, Consultative or Deliberative Material**

Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009). The court held that "a record, which contains or involves factual components, is entitled to deliberative-process protection when it was used in the decision-making process and its disclosure would reveal deliberations that occurred during that process."

### **Arrest Reports**

Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2009). The Council held that "certain information with respect to a crime must be disclosed pursuant to N.J.S.A. 47:1A-3.b...The most comprehensive government record containing information subject to disclosure pursuant to N.J.S.A. 47:1A-3.b is the police arrest report, alternatively referred to as a uniform arrest report...Arrest reports typically contain the arrestee's (defendant's) name, age, residence, occupation, marital status, time and place of arrest, text of the charges, arresting agency, identity of the arresting personnel, amount of bail and whether it was posted. This is the same information that is mandated for disclosure pursuant to N.J.S.A. 47:1A-3.b."

### **Auto Accident Reports**

Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (April 2007). Custodian charged \$5.00 per accident report. Council ruled that N.J.S.A. 39:4-131 states that auto accident reports are not privileged or confidential and that if the request is not made in person, the custodian may charge up to \$5.00 for each of the first three pages and \$1.00 per page thereafter in addition to the OPRA copy rates.

Truland v. Borough of Madison, GRC Complaint No. 2006-88 (September 2007). The Custodian charged \$5.00 for each of the seven (7) reports plus OPRA's per page copy fee. The Council held that the Custodian has lawfully charged the Complainant \$40.25 for the requested accident reports pursuant to N.J.S.A. 39:4-131. Further, the Council held that no redactions are warranted on said reports.

### **Broad and/or Unclear Requests**

MAG Entertainment, LLC v. Division of Alcohol Beverage Control, 375 N.J. Super. 534 (App.Div. 2005). The court held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Bent v. Stafford Police Department, GRC Complaint No. 2004-78 (October 2004). Request was broad and unclear ("any and all"). The Council ruled that the information sought did not amount to an identifiable government record. The Council's decision was affirmed on appeal in the published court decision Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005).

New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). Because the requestor did not specifically identify the records sought, as required by N.J.S.A. 47:1A-5.f., OPRA did not require the custodian to produce the records within seven (7) business days pursuant to N.J.S.A. 47:1A-5.i. Requestor submitted a 5 page document listing 38 separate requests all of which include a request for "any and all documents and data used or considered ... supporting, demonstrating, justifying or verifying" various determinations relevant to COAH's determinations about fair-share housing obligations.

Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). The Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005)."

Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council held that "an OPRA request for an e-mail or e-mails shall therefore focus upon the following four (4) characteristics:

- Content and/or subject
- Specific date or range of dates
- Sender
- Recipient

In accord with MAG, *supra*, and its progeny, in order to specifically identify an e-mail, OPRA requests must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during

which the e-mail was transmitted or the e-mails were transmitted, and (3) a valid e-mail request must identify the sender and/or the recipient thereof.”

### **Building Plans**

Cardillo v. City of Hoboken Zoning Office, GRC Complaint No. 2005-158 (December 2006). The requestor sought access to renovation plans of a property. The Council held that “[t]he legend, general notes, title of the document and all items contained under the architect firm name should be disclosed. The remainder of the document, which includes the design schematics and plans, is exempt from disclosure and should be redacted pursuant to N.J.S.A. 47:1A-1.1. This information contains security information which would jeopardize the building and persons therein. The exempt portion of this document contains information about the removal and remainder of doors and windows and the location of all rooms inside which could jeopardize the security of the building and the persons residing in the building.”

Kohn v. Township of Livingston (Essex), GRC Complaint No. 2007-319 (July 2008). The requestor sought access to floor plans for the new municipal complex. The Council held that, “[t]he requested floor plans are exempt from disclosure for containing security information or procedures for any building facility which, if disclosed, would jeopardize security of the building or facility or persons therein pursuant to N.J.S.A. 47:1A-1.1.”

### **Clarification**

Moore v. Township of Old Bridge, GRC Complaint No. 2005-80 (August 2005). Complainant did not respond to custodian’s request for clarification of request which the Custodian believed to be broad and unclear. The Council concluded that the Custodian did not unlawfully deny access because the Custodian did seek clarification of the request which was in fact broad and unclear.

### **Commercial Use of Government Records**

Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006). The Council held that “there is no restriction against commercial use under OPRA and it is not the province of the GRC to rule on this public policy aspect.”

### **Copy Cost**

Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006). Custodian charged \$55.00 for a computer diskette. The court held that charge for medium conversion must be actual cost.

Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010). The Court held that as of July 1, 2010, public agencies may not charge requestors more than the “actual costs” of photocopying government records. If charges imposed are equal to or less than those stated in the second sentence of Section 1A-5(b) [the enumerated rates], a challenger would have the burden of demonstrating that the agency's actual costs were indeed lower. If the challenger fails to sustain that burden, the agency will prevail and may continue to charge its existing rates. On the other hand, if the agency's charges exceed the rates stated in the second sentence, then the burden will be placed on the agency to demonstrate that its actual costs are indeed higher than those enumerated rates and are therefore justified. (Please

note that the Court omitted the exact formula for which public agencies must use in determining its annual actual cost for paper copies of records requested under OPRA.)

Livecchia v. Borough of Mount Arlington, GRC Complaint No. 2008-80 (April 2010). The Council held that “[i]t is reasonable for a custodian to charge a requestor the actual postage cost associated with delivering records by mail. The Custodian in the matter before the Council must charge *actual* postage cost not anticipated postage cost associated with delivery by mail of the requested records.”

Paff v. Township of Teaneck (Bergen), GRC Complaint No. 2010-09 (May 2011). The Council held that “[a]lthough the actual cost of providing records electronically is likely \$0.00 pursuant to Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010), because the Custodian had to make copies to redact the requested minutes prior to providing same electronically, the Custodian’s charge of \$6.00 represents the actual cost to provide the records to the Complainant pursuant to N.J.S.A. 47:1A-5.b.”

Reid v. New Jersey Department of Corrections, GRC Complaint No. 2010-83 (May 2011). The Council held that, “[b]ased on the court’s holding in In re Adoption of a Child by M.W., 116 N.J. Super. 506 (App. Div. 1971), R. 1:13-2(a) contains no language relieving the Complainant from paying the appropriate copying costs because he is indigent. Thus, the Complainant must pay the proposed copy cost of \$32.25 in order to receive the records at issue in this complaint.”

#### **Copyright**

Grauer v. NJ Department of Treasury, GRC Complaint No. 2007-03 (November 2007). The Council held that “[b]ased on the court’s holding in Board of Chosen Freeholders of Burlington County v. Robert Bradley Tombs, 215 Fed. Appx 80 (3d Cir. NJ 2006) and the GRC’s decision in Albrecht v. New Jersey Department of Treasury, GRC Complaint No. 2006-191 (July 25, 2007), copyright law does not prohibit access to a government record which is otherwise available under OPRA.”

#### **Criminal Investigatory Records**

Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (August 2003). Council ruled that the records were exempt under the criminal investigatory exemption from disclosure and that this exemption does not permit access to the records even after the investigation is closed. The Council’s decision was appealed and affirmed in an unpublished opinion of the Appellate Division of Superior Court in May 2004.

#### **Custodian Not Obligated to Create Records or Provide After Creation**

Librizzi v. Township of Verona Police Department, GRC Complaint No. 2009-213 (August 2010). The Council held that the Custodian was under no obligation to create a record in response to the Complainant’s OPRA request.

#### **Deemed Denial**

Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). A custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days

results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i.

### **Discovery vs. OPRA**

Mid-Atlantic Recycling Technologies, Inc., v. City of Vineland, 222 F.R.D. 81, (April 27, 2004). The corporation filed a complaint against defendants, alleging that defendants engaged in arbitrary and irrational conduct in an effort to deprive it of its business through selective enforcement of certain environmental compliance policies. Defendants asserted that the city received numerous requests for documents under OPRA for documents related to issues in the case. Defendants requested that the court enter a protective order precluding the corporation from conducting discovery outside the limitations imposed by the Federal Rules of Civil Procedure. The court found that the Federal Rules of Civil Procedure did not act as an automatic bar of a litigant's rights to obtain or seek documents under a public record access statute, such as OPRA. The court further found that defendants did not show good cause for a protection order by demonstrating a particular need for protection. Defendants' broad allegations of harm were not substantiated. The court rejected defendants' arguments that Fed. R. Civ. P. 26 limited or restricted a party's right to request documents under OPRA.

Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008). The Council held that the Custodian’s denial of the Complainant’s OPRA request, on the grounds that the Complainant could only obtain the requested records through discovery, is not a lawful basis for a denial of access.

### **Frivolous Requests & Complaints**

Caggiano v. Borough of Stanhope (Sussex), GRC Complaint Nos. 2007-20, 2007-21, 2007-22 & 2007-23 (September 2007). The Council held that “[t]he following evidence of record supports the conclusion that the Complainant in these consolidated Denial of Access Complaints commenced these complaints ‘in bad faith, solely for the purpose of harassment[:.]’ –

- a. the Complainant filed four (4) separate OPRA requests for identical records within a few days of each other;
- b. in each OPRA request, the Complainant failed to wait until the expiration of the statutorily-mandated seven (7) business day response period at N.J.S.A. 47:1A-5.i before he filed another OPRA request for identical records;
- c. the Custodian offered the requested records to the Complainant on July 25, 2006 and September 12, 2006 when the contracts were received by the Borough, but the Complainant refused to accept the records and denied that they were contracts;
- d. in spite of the disclosure of the requested records (whether or not the Complainant agreed with the content of those records), the Complainant filed the instant Denial of Access Complaints with the GRC;
- e. the Complainant failed to inform the GRC in any of his filings that the Custodian had made available to him the requested records prior to the filing of the Complainant’s Denial of Access Complaints;
- f. in his May 21, 2007 letter to the Custodian, the Complainant threatens to file “five separate complaints for each contract not being immediately available[,]” which is *prima facie* evidence of the Complainant’s ongoing bad faith and intention to harass the Custodian and the Borough of Stanhope in these consolidated complaints; and
- g. the extremely high number and frequency of OPRA requests filed by the Complainant with the Borough of Stanhope in 2006 and 2007.

The complaints herein should therefore be dismissed as frivolous pursuant to N.J.S.A. 47:1A-7.e.”

### **GRC’s Authority**

Kawanzaa v. NJ Department of Corrections, GRC Complaint No. 2004-167 (March 2005). Council does not have authority over content of records pursuant to N.J.S.A. 47:1A-7.b.

Toscano v. NJ Dept of Labor, Division of Vocational Rehabilitation Services, GRC Complaint No. 2007-296 (March 2008). Council does not have authority over records retention pursuant to N.J.S.A. 47:1A-7.b.

### **Identity of Requestor is Irrelevant**

White v. William Patterson University, GRC Complaint No. 2008-216 (August 2009). The Council held that the identity of a requestor is not a consideration when deciding whether an exemption applies to a government record requested pursuant to OPRA except for those instances set forth at N.J.S.A. 47:1A-2.2. and N.J.S.A. 47:1A-10.

### **Illegible Records**

Lopez v. County of Hudson, GRC Complaint No. 2009-267 (March 2011). The Council held that, “[t]he Custodian’s provision of illegible records to the Complainant in response to the OPRA request when legible records existed constitutes a limitation on the right of access accorded by OPRA pursuant to N.J.S.A. 47:1A-1 and a violation of OPRA.”

### **Immediate Access**

Renna v. County of Union, GRC Complaint No. 2008-110 (March 2009). The Council held that because a completed version of the requested record did not exist in the medium requested at the time of the Complainant’s OPRA request and required medium conversion pursuant to N.J.S.A. 47:1A-5.d., and because the Custodian provided the Complainant access to the requested record in the medium requested immediately after the medium conversion was completed, the Custodian did not violate N.J.S.A. 47:1A-5.e.

### **Informing of Record Location Instead of Providing Access**

Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006). The Council held that the Custodian should have given the Complainant a copy of the Board of Education’s OPRA request form instead of just informing him where he could find that information (on its website). Based on the above, the Custodian is in violation of N.J.S.A. 47:1A-1.

Langford v. City of Perth Amboy, GRC Complaint No. 2005-181 (May 2007). The Council held that the Custodian should have provided the Complainant with the requested rules instead of informing the Complainant where the requested rules are located (the Director of Human Services office). As such, the Custodian violated N.J.S.A. 47:1A-1.

### Lawful Basis Required

Schwarz v. New Jersey Department of Human Services, GRC Complaint No. 2004-60 (February 2005). Custodian did not provide specific citations to OPRA and HIPAA. Council ruled that the custodian bears the burden of proving that a denial of access is lawful pursuant to N.J.S.A. 47:1A-6. This means that specific citations to the law (OPRA or other law) that allows a denial of access are required **at the time of the denial** and must be included in the Statement of Information.

### Litigation

Darata v. Monmouth County Board of Chosen Freeholders, GRC Complaint No. 2009-312 (February 2011). The Council held that, “[t]he GRC notes that pending litigation is not a lawful basis for denial of access to records requested under OPRA. OPRA provides a statutory right of access to government records which is not in any way supplanted by pending or ongoing litigation.”

### Location of Government Record Not Relevant

Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (August 2006). Requested records: E-mails from Mayor’s personal e-mail account. Custodian claimed that the e-mails were not government records because they were not maintained in the custodian’s files. The Council concluded that the Mayor conducted government business through a personal e-mail account, thus making those e-mails government records according to the definition of a government record in OPRA. N.J.S.A. 47:1A-1.1.

### Meeting Minutes

Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). The GRC ruled that **draft, unapproved meeting minutes** are exempt from disclosure as ACD. Inter-agency or intra-agency advisory, consultative, or deliberative material is not included within the definition of a government record. N.J.S.A. 47: 1A-1.1.

Miller v. Westwood Regional School District (Bergen), GRC Complaint No. 2009-49 (April 2010). The Council held that a recording of an agency’s public meeting that is used to draft the agency’s official meeting minutes is not deliberative in nature, and therefore such recording is not exempt from disclosure under OPRA as advisory, consultative or deliberative (ACD) material pursuant to In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000), Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009), and Burlett v. Monmouth County Board of Freeholders, GRC Complaint No. 2004-75 (August 2004).

Merckx v. Township of Franklin Board of Education (Gloucester), GRC Complaint No. 2009-47 (April 2010). The Council held that because all of the requested closed session minutes were approved by the Board of Education at the time of the Complainant’s OPRA request and no longer constituted advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., the Custodian failed to bear her burden of proving a lawful denial of access to the requested closed session meeting minutes pursuant to N.J.S.A. 47:1A-6. A second approval by the governing body for public release of the requested minutes is not required because N.J.S.A. 47:1A-5.g. allows for the redaction of information that is exempt from disclosure under OPRA. In fact, OPRA requires the disclosure of a record with redactions of only the information which is asserted to be exempt from disclosure. A denial of access to the entire record is therefore unlawful under OPRA.

### **Method of Record Delivery**

O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008). The Council held that "although the Custodian responded in writing granting access to Items No. 1 and No. 3 in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g."

### **Method of Request Submission**

Paff v. City of East Orange, (App.Div. 2009). The court stated 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. The court also stated that OPRA's requirement that custodians adopt a request form authorizes custodians to direct how government records requests 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.

### **Ongoing/Continuing Requests**

Blau v. Union County Clerk, GRC Complaint No. 2003-75 (November 2003). The requestor sought access to copies of deeds and mortgages on an ongoing basis. The Council held that, "[t]he request for copies 'on a continuing basis' is not valid under OPRA and that the requestor must submit a new OPRA request to the custodian for each new batch of documents sought."

### **Ongoing Investigation**

Henderson v. New Jersey Department of Law and Public Safety, Division of Alcoholic Beverage Control, GRC Complaint No. 2010-139 (May 2011). The Council held that, "[t]he requested records pertain to an ongoing investigation conducted by the Alcoholic Beverage Control, and disclosure of such records would be inimical to the public interest because such disclosure would jeopardize the state agency's ability to conduct such investigation, thus, the Custodian lawfully denied access to such records pursuant to N.J.S.A. 47:1A-3.a.; N.J.S.A. 47:1A-6."

### **Personnel Records**

Randazzo-Thompson v. City of Vineland (Cumberland), GRC Complaint No. 2010-76 (May 2011). The Council held that, "There is no evidence in the record to indicate that the Complainant herein knew of the right of confidentiality in her personnel file afforded pursuant to N.J.S.A. 47:1A-10, and therefore no evidence that she knowingly waived that right when she signed and submitted the OPRA request form. Accordingly, the Custodian properly denied access to the contents of the Complainant's personnel file pursuant to W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958), Country Chevrolet, Inc. v. Township of N. Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983), Paff v. Byrnes, 385 N.J. Super. 574 (App. Div. 2006), and N.J.S.A. 47:1A-10."

Toscano v. New Jersey Department of Human Services, Division of Mental Health Services, GRC Complaint No. 2010-147 (May 2011). The Council held that, "The employment application sought by Complainant is not disclosable pursuant to OPRA because it is a personnel record which is exempt from disclosure pursuant to N.J.S.A. 47:1A-10, and Executive Order 26 (McGreevey 2002). *See* N.J.S.A. 47:1A-9.a."

### **Prepayment of Copy Fees**

Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). The Council held that “[a]s the Custodian is awaiting payment for the duplication cost of the requested records, she is not required to release said records until payment is received pursuant to N.J.S.A. 47:1A-5.b.”

### **Prevailing Party Attorney’s Fees**

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. Attorney’s fees may be awarded 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.

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.

### **Privacy Concerns**

Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004). The Complainant sought access to “Copies of (1) all moving violations of Officer Michael Tuttle during career with Ho-Ho-Kus Police Department, (2) training records of Officer Tuttle; and (3) records of complaints or internal reprimands against Officer Tuttle.” After conducting a balancing test, the Council found that the home addresses should be redacted from the records provided to the Complainant.

Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004). The Complainant requested the name, address and phone number of a citizen who filed a noise complaint with the Police Department. After conducting a balancing test, the Council held that “The Complainant’s stated need for access does not outweigh the citizen’s expectation of privacy. In arriving at this conclusion, the potential harm of unsolicited contact and confrontation between the citizen and the OPRA complainant and/or its agents or representatives was considered. Therefore, the name, address and phone number of the citizen who brought the complaint to the Borough’s attention should remain redacted from the requested documentation.”

Avin v. Borough of Oradell, GRC Complaint No. 2004-176 (March 2005). Note: This is one complaint out of seven filed by this requestor to several municipalities regarding the same or similar records. The Complainant in this case sought access to a “list of all homeowners who applied for a fire alarm or burglar alarm permit in the last 3 years.” The Council balanced the severity of the security concerns of the residents of the town against the public’s right of access under OPRA and held that the Custodian should not disclose the homeowners’ names and addresses.

Bernstein v. Borough of Allendale, GRC Complaint No. 2004-195 (July 2005). Note: This is one of six complaints filed by this requestor to several municipalities regarding the same or similar records. The Complainant in this case sought access to the names and addresses of dog license owners. The Council conducted a balancing test and held that “pursuant to N.J.S.A. 47:1A-1 and Executive Order 21 the records should not be disclosed because of the unsolicited contact, intrusion or potential harm that may result.”

Paff v. Warren County Office of the Prosecutor, GRC Complaint No. 2007-167 (February 2008). The Complainant requested various records pertaining to State v. Philip Gentile, Indictment/Accusation No. 07-02-00060-A. After conducting a balancing test, the Council held that the redacted portions of the requested records (name and address of victim) were properly redacted due to privacy concerns pursuant to N.J.S.A. 47:1A-1.

Faulkner v. Rutgers University, GRC Complaint No. 2007-149 (May 2008). The Complainant requested names and addresses for Rutgers University football and basketball season ticket holders for 2006. After conducting a balancing test, the Council held that “the Custodian did not unlawfully deny the Complainant access to the requested season ticket holders’ lists pursuant to N.J.S.A. 47:1A-1, which states that 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.”

Burnette 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.”

Walsh v. Township of Middletown (Monmouth), GRC Complaint No. 2008-266 (January 2010). The Custodian redacted addresses from financial disclosure statements due to privacy concerns. The Council stated that “[p]ursuant to the Local Government Ethics Law, all financial disclosure statements filed are public records. N.J.S.A. 40A:9-22.6(c).” As such, the Council held that “[b]ased on the language of N.J.S.A. 40A:9-22.6(b), N.J.S.A. 40A:9-22.6(c) and the court’s note in Kenny v. Byrne, 144 N.J. Super. 243, 252 (App. Div. 1976), the Custodian has unlawfully redacted addresses of real property owned by public officials. Additionally, the Custodian has failed to bear her burden of proof that said redactions were authorized by law. N.J.S.A. 47:1A-6.” The Council ordered the Custodian to release the requested financial disclosure statements without redactions for real property owned.

### **Public Agency**

The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J. Super. 425, (April 2004). The court held that:

- (1) a private, non-profit corporation created for the express purpose of redeveloping property donated to it by the city of Trenton,
- (2) having a Board of Trustees appointed by the Mayor and City Council,
- (3) with the mandated reversion of the donated property after the completion of the project and repayment of the debt,
- (4) having corporate bylaws requiring the distribution of all assets to the city upon the dissolution or liquidation of the corporation,
- (5) having a Disposition Agreement with the 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
- (6) having the authority to issue tax-exempt bonds for the financing of the project qualified the corporation as a "public body" under the Open Public Meetings Act (OPMA). The court further held that the corporation was "an 'instrumentality' created by the City and a 'public

agency' under the OPRA for essentially the same reasons that it is a 'public body' under the OPMA." *Id.* at 442, 670.

### **Records Previously Provided**

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.

### **Redactions**

Paff v. Borough of Manasquan (Monmouth), GRC Complaint No. 2009-281 (March 2011). The Council held that, "[t]he method of "whiting out" the executive session portion of the minutes provided did not allow the Complainant to clearly identify the specific location. Therefore, the Custodian's method of "whiting out" the requested minutes is not "a visually obvious method that shows ... the specific location of any redacted material in the record" and is thus not appropriate under OPRA. N.J.S.A. 47:1A-5.g."

### **Search vs. Research**

Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). The Council held that the Custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant's OPRA request (auto accident reports for a certain period of time). The Council further held, however, that the 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 in accordance with the decision of MAG, supra, and NJ Builders Association, supra.

### **Security and Surveillance**

Burton v. NJ Department of Law & Public Safety, Division of State Police, GRC Complaint No. 2010-330 (May 2010). The Council held that, "[t]he Custodian has lawfully denied access to the requested payroll records because said records are exempt from public access under N.J.S.A. 47:1A-9.a. which upholds exemptions contained in an Executive Order of the Governor, or any regulation promulgated pursuant to an Executive Order of the Governor. Executive Order No. 47 (Christie 2010) permits rules proposed by the NJ Department of Law & Public Safety to remain in full effect. N.J.A.C. 13:1E-3-2(a)3 exempts records which may reveal an agency's surveillance, security or investigative techniques or procedures and N.J.A.C. 13:1E-3.2(a)7 exempts "[t]he duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment, including, but not limited to, overtime data pertaining to an individual law enforcement officer." Despite payroll records being public records under N.J.S.A. 47:1A-10, the release of said records in this instance leaves the Executive Protection Bureau vulnerable to how heavy of a security level it places on protecting various dignitaries and are therefore exempt under the regulations cited above."

Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011). The Council held that, "[b]ecause request Items No. 3 and 10 sought police daily duty logs, which

records necessarily include details regarding surveillance techniques and staffing levels which, if disclosed, could pose a risk to the safety of police personnel as well as civilians employed by the Plainfield Police Department, such records are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1.”

### **Special Service Charge**

Fisher v. Department of Law and Public Safety, Division of Law, GRC Complaint No. 2004-55 (August 2006). The Council held that a special service charge is allowed under OPRA. N.J.S.A. 47:1A-5.c. Council established a 14 factor criteria for evaluating (1) whether a special service charge is warranted and (2) whether the amount is reasonable.

Courier Post v. Lenape Regional High School, 360 N.J. Super. 191 (Law Div. 2002). The court found that the request for six and one-half years of attorneys' monthly itemized bills required an extraordinary expenditure of time and effort to accommodate the request. Therefore, a special service charge was allowed for the custodian's time.

O'Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009). The Council held that “[b]ecause the Custodian has certified that the Pine Hill Board of Education lacks the equipment necessary to fulfill the OPRA request, and because the vendor invoice submitted by the Custodian is reasonable and based on the cost actually incurred by the agency, and because the Complainant has failed to submit any credible evidence that the vendor invoice submitted by the agency is unreasonable, the proposed estimate of \$10.48 for duplication is reasonable and consistent with N.J.S.A. 47:1A-5.c.”

### **Substantial Disruption**

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.”

### **Timeliness – Lawful Basis to Extend**

John Paff v. Township of Springfield (Union), GRC Complaint No. 2008-77 (August 2009). The Council held that “although both the Custodian and the Custodian’s Counsel provided written responses to the Complainant’s OPRA request dated February 1, 2008 requesting an extension of time within the statutorily mandated seven (7) business days, said responses are inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because they fail to provide an anticipated deadline date upon which the requested records will be provided.”

### **Valid OPRA Requests**

Renna v. County of Union, 2009 WL 1405572 (N.J.Super.A.D.). The court held that “the form should be used, but no request for information should be rejected if such form is not used.” Thus, custodians **must** respond to records requests in accordance with the requirements of OPRA for requests on an agency’s official OPRA request form, as well as written non-form records request which mention “OPRA.”

Gatson v. Borough of Cliffside Park Police Department (Bergen), GRC Complaint No. 2009-239 (October 2010). The Council held that, “[b]ecause a custodian may not refuse a request for records made under OPRA which is in writing and clearly invokes OPRA, and because the evidence of record indicates that the request form used by the Complainant clearly invoked OPRA, the Custodian’s denial of access to the records requested violates OPRA pursuant to N.J.S.A. 47:1A-5.g. and Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009).”



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# The New Jersey Open Public Records Act Handbook for Records Custodians



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**The Open Public Records Act:  
Handbook for Records Custodians  
Fifth Edition – January 2011**

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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](http://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](mailto: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](http://www.nj.gov/grc/meetings/present):

- 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 (Note: generally refers to draft documents or documents used in a deliberative process).
- 2) Legislative records. Specifically:
  - a. information received by a member of the Legislature from a constituent or information held by a member of the Legislature concerning a constituent, including but not limited to information in written form or contained in any e-mail or computer data base, or in any telephone record whatsoever, *unless it is information the constituent is required by law to transmit;*
  - b. any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member's official duties, *except that this provision shall not apply to an otherwise publicly-accessible report which is required by law to be submitted to the Legislature or its members.*
- 3) Medical examiner records – photographs, negatives, print, videotapes taken at the scene of death or in the course of post mortem examination or autopsy, *except:*
  - a. *when used in a criminal action or proceeding in this State which relates to the death of that person,*
  - b. *for the use as a court of this State permits, by order after good cause has been shown and after written notification of the request for the court order has been served at least five days before the order is made upon the county prosecutor for the county in which the post mortem examination or autopsy occurred,*
  - c. *for use in the field of forensic pathology or for use in medical or scientific education or research, or*
  - d. *or use by any law enforcement agency in this State or any other state or federal law enforcement agency.*
- 4) Criminal investigatory records - records which are not required by law to be made, maintained or kept on file that are held by a law enforcement agency which pertain to any criminal investigation or related civil enforcement proceeding. (Note: N.J.S.A. 47:1A-3.b. lists specific criminal investigatory information which must be disclosed).
- 5) Victims’ records - an individually-identifiable file or document held by a victims' rights agency which pertains directly to a victim of a crime except that a victim of a

- crime shall have access to the victim's own records. "Victims' rights agency" means a public agency, or part thereof, the primary responsibility of which is providing services, including but not limited to food, shelter, or clothing, medical, psychiatric, psychological or legal services or referrals, information and referral services, counseling and support services, or financial services to victims of crimes, including victims of sexual assault, domestic violence, violent crime, child endangerment, child abuse or child neglect, and the Victims of Crime Compensation Board.
- 6) Trade secrets and proprietary commercial or financial information obtained from any source. Includes data processing software obtained by a public agency under a licensing agreement which prohibits its disclosure.
  - 7) Any record within the attorney-client privilege.
  - 8) Administrative or technical information regarding computer hardware, software and networks which, if disclosed would jeopardize computer security.
  - 9) 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.
  - 10) Security measures and surveillance techniques which, if disclosed, would create a risk to the safety or persons, property, electronic data or software.
  - 11) Information which, if disclosed, would give an advantage to competitors or bidders.
  - 12) 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 individual; or
    - c. Collective negotiations, including documents and statements of strategy or negotiating position.
  - 13) Information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office.
  - 14) Information which is to be kept confidential pursuant to court order.
  - 15) Certificate of honorable discharge issued by the United States government (Form DD-214) filed with a public agency, *except that a veteran or the veteran's spouse or surviving spouse shall have access to the veteran's own records.*
  - 16) Personal identifying information. Specifically:
    - a. Social security numbers, *except that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by State or federal law, regulation or order or by State statute, resolution of either or both houses of the*

*Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor.*

- b. Credit card numbers
- c. Unlisted telephone numbers
- d. Drivers' license numbers.

*Except for:*

- a. *Use by any government agency, including any court or law enforcement agency, in carrying out its functions,*
- b. *or any private person or entity acting on behalf thereof,*
- c. *or any private person or entity seeking to enforce payment of court-ordered child support; except with respect to the disclosure of driver information by the Division of Motor Vehicles as permitted by section 2 of P.L.1997, c.188 (C.39:2-3.4);*

17) Certain records of higher education institutions:

- a. Pedagogical, scholarly and/or academic research records and/or the specific details of any research project, *except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available.*
- b. Test questions, scoring keys and other examination data pertaining to the administration of an examination for employment or academic examination.
- c. Records of pursuit of charitable contributions or records containing the identity of a donor of a gift if the donor requires non-disclosure of the donor's identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization or dedication.
- d. Valuable or rare collections of books and/or documents obtained by gift, grant, bequest or devise conditioned upon limited public access.
- e. Information contained on individual admission applications.
- f. Information concerning student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student.

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

18) Biotechnology trade secrets.

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

19) Limitations to convicts - personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information. *Information may be*

*released only if the information is necessary to assist in the defense of the requestor. A determination that the information is necessary to assist in the requestor's defense shall be made by the court upon motion by the requestor or his representative.*

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

- 20) Ongoing investigations – any records pertaining to an investigation in progress by any public agency if disclosure of such record or records shall be detrimental to the public interest. *This provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.*

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

- 21) Public defender records that relate to the handling of any case, *unless authorized by law, court order, or the State Public Defender.*

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

- 22) Upholds exemptions contained in other State or federal statutes and regulations, Executive Orders of the Governor, Rules of Court, Constitution of this State, or judicial case law.

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

- 23) 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 required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or 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)**

- 24) Privacy Interest - “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.”

Burnette 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' promulgated rules are exempt from disclosure by this Order.
- 3) Executive Orders No. 9 (Hughes), 11 (Byrne), 79 (Byrne) and 69 (Whitman) are hereby continued to the extent that they are not inconsistent with this Executive Order.

Executive Order No. 9 (Hughes) exemptions that are still active:

- a. Questions on examinations required to be conducted by any State or local governmental agency;
- b. Personnel and pension records (same as N.J.S.A. 47:1A-10);
- c. Records concerning morbidity, mortality and reportable diseases of named persons required to be made, maintained or kept by any State or local governmental agency;
- d. Records which are required to be made, maintained or kept by any State or local governmental agency which would disclose information concerning illegitimacy;
- e. Fingerprint cards, plates and photographs and other similar criminal investigation records which are required to be made, maintained or kept by any State or local governmental agency;
- f. Criminal records required to be made, maintained and kept pursuant to the provisions of R. S. 53:1-20.1 and R. S. 53:1- 20.2;
- g. Personal property tax returns required to be filed under the provisions of Chapter 4 of Title 54 of the Revised Statutes; and
- h. Records relating to petitions for executive clemency.

Executive Order No. 11 (Byrne) exemptions are the same as N.J.S.A. 47:1A-10.

Executive Order No. 79 (Byrne) exemptions are the similar to # 8, 9, 10 above under N.J.S.A. 47:1A-1.1.

Executive Order No. 69 (Whitman) exemptions that are still active: Fingerprint cards, plates and photographs and similar criminal investigation records that are required to be made, maintained or kept by any State or local governmental agency.

**Executive Order No. 26 (McGreevey 2002)**

- 1) Certain records maintained by the Office of the Governor:

- a. Any record made, maintained, kept on file or received by the Office of the Governor in the course of its official business which is subject to an executive privilege or grant of confidentiality established or recognized by the Constitution of this State, statute, court rules or judicial case law.
  - b. All portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege.
  - c. All portions of records containing information provided by an identifiable natural person outside the Office of the Governor which contains information that the sender is not required by law to transmit and which would constitute a clearly unwarranted invasion of personal privacy if disclosed.
  - d. If any of the foregoing records shall contain information not exempted by the provision of the Open Public Records Act or the preceding subparagraphs (a), (b) or (c) hereof then, in such event, that portion of the record so exempt shall be deleted or excised and access to the remainder of the record shall be promptly permitted.
- 2) Resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. *The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.*
  - 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 a regulation of that department or agency adopted pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963), or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure.
  - 9) Records of a department or agency held by the Office of Information Technology (OIT) or the State Records Storage Center of the Division of Archives and Records Management (DARM) in the Department of State, or an offsite storage facility outside of the regular business office of the agency. Such records shall remain the legal property of the department or agency and be accessible for inspection or copying only through a

request to the proper custodian of the department or agency. In the event that records of a department or agency have been or shall be transferred to and accessioned by the State Archives in the Division of Archives and Records Management, all such records shall become the legal property of the State Archives, and requests for access to them shall be submitted directly to the State Archives.

**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.

### **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?**

On September 10, 2010, Governor Christie signed legislation that changed OPRA's copy fee provision at N.J.S.A. 47:1A-5.b. Said provision of OPRA has since been amended to provide that:

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be \$0.05 per letter size page or smaller, and \$0.07 per legal size page or larger. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record. The actual cost of duplicating the record, upon which all copy fees are based, shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs.” (Emphasis added). N.J.S.A. 47:1A-5.b.

To fully understand the impact of this amendment to OPRA's copy fee schedule, the GRC interprets each sentence of the amended fee provision below:

1. “[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation.”

This sentence means that custodians are to charge OPRA requestors any copy fees that are established by other New Jersey laws or regulations, if said fees exist. For example, N.J.S.A. 22A:4-1a sets forth specific fees for certain records filed with the New Jersey Department of Treasury (and requested from the Department of Treasury). Specifically, said statute provides that “[i]f a roll of microfilm images is requested, the State Treasurer shall collect a fee of \$1.00 for each image on the microfilm roll.” Thus, if a requestor seeks access to a microfilm roll from the Department of Treasury, the Department's custodian must charge the fees established in N.J.S.A. 22A:4-1a. The same applies for any other records that have specific fees established in other New Jersey laws or regulations.

2. “Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be \$0.05 per letter size page or smaller, and \$0.07 per legal size page or larger.”

For records that do not have a specific fee established by statute (like the Treasury example above), custodians must charge a flat rate of \$0.05 per letter size (8 ½” x 11”) page or smaller, and \$0.07 per legal size (8 ½” x 14”) page or larger, *if providing a requestor with paper copies*. For example, a custodian providing access to 3 pages of printed meeting minutes on letter size pages would charge a requestor \$0.15 (\$0.05 per page for 3 pages = \$0.15).

3. “*If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.* The actual cost of duplicating the record, upon which all copy fees are based, shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section.” (Emphasis added).

It is possible that the actual cost to produce paper copies will exceed \$0.05 per letter size page or smaller and \$0.07 per legal size page or larger for some public agencies. In these instances, the OPRA amendment allows custodians to charge the actual cost of duplication, which is limited to the cost of materials and supplies used to make the copy.

#### **How to Calculate Actual Costs (only if copies exceed the \$0.05 and \$0.07 rates)**

- Custodians should contact their supplier to determine the cost of paper and toner. A supplier is wherever the agency obtains those materials – paper and toner (i.e. central purchasing unit, Staples, Office Depot, etc).
- Calculate or contact copying company to determine the agency’s annual copying volume (calendar or fiscal year, however the agency operates). This does NOT only include copies pertaining to OPRA requests – this is ALL copying on all copy machines in the agency for all purposes.
- Contact copying company to determine the average paper life of one toner/ink cartridge (i.e. how many pieces of paper the ink or toner should be able to copy).
- Custodians must maintain documentation of all information provided by copying company or office supplier (i.e. contracts or correspondence from purchasing agent or copying company) regarding this calculation.
- **Actual calculation is the total cost of paper purchased for 1 year (calendar or fiscal) + the total cost of toner purchased (calendar or fiscal) ÷ the annual copying volume.**

This calculation can be averaged for all copy machines in an agency that produce letter and legal copies. Special copiers, such as for color printing or blueprints copied in house, should be calculated separately.

4. “If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record. *The actual cost of duplicating the record, upon which all copy fees are based, shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section.*” (Emphasis added).

The reference to “subsection c.” pertains to OPRA’s special service charge provision, which is applicable in instances when fulfilling an OPRA request requires an extraordinary amount of time and effort. For guidance on how and when to apply a special service charge to an OPRA request, please refer to the GRC’s “Special Service Charge” handout online at <http://www.nj.gov/grc/meetings/present/>.

The GRC strongly encourages every public agency to clearly identify its per page copy fee on its OPRA request form, whether it be the flat rates established in N.J.S.A. 47:1A-5.b., or the actual cost calculated by the agency.

5. “Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs.”

Records provided via e-mail and facsimile are free of charge. Custodians must charge the actual cost to provide access to all other electronic materials such as CD-ROMs, DVDs, videotapes, audiotapes, etc. No specific calculation is required to determine the actual cost of these supplies. The actual cost is the specific fee the agency paid to purchase the materials. For example, if the GRC purchased a package of 100 CD-ROMs for \$100 and provided records to a requestor on 1 CD-ROM, the actual cost of said CD-ROM is \$1.00 ( $\$100 \div 100 = \$1.00$ ).

**These changes become effective for all New Jersey public agencies on Tuesday November 9, 2010.**

#### 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/](http://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](http://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?**

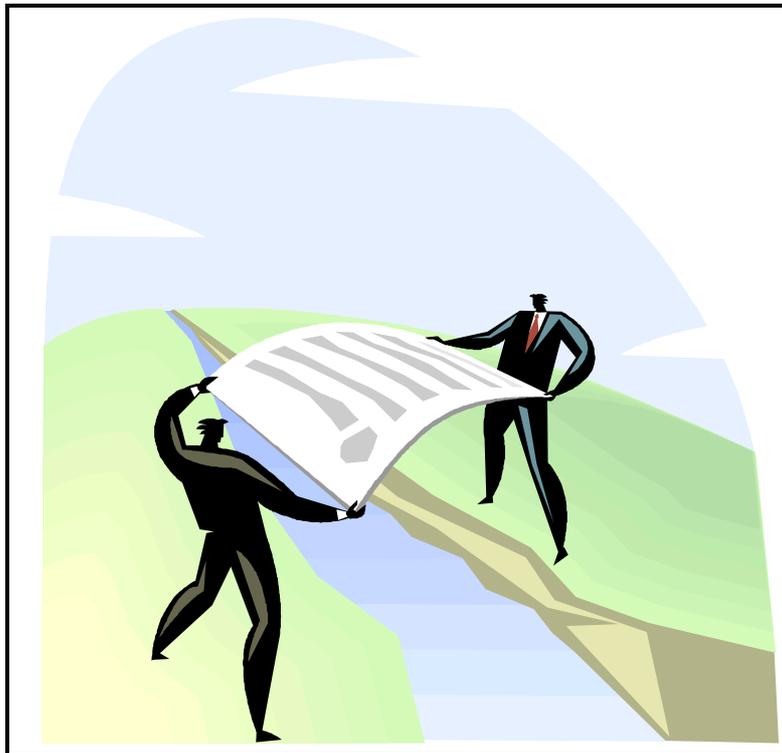
In Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), the Appellate Division held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. The 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.**



# **Custodian's Toolkit**

**A Resource to Facilitate Easier Access to Public  
Records under the Open Public Records Act**



First Edition

March 2011

# Custodian's Toolkit

First Edition – March 2011

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## Use of this Toolkit

The Government Records Council created the Custodian's Toolkit to help public agency records custodians fulfill their legal obligations under New Jersey's Open Public Records Act ([N.J.S.A. 47:1A-1 et seq.](#)).

This toolkit serves as a reference, but is not legal advice and is not a substitute for the same 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 response templates provided in this toolkit are meant to serve as guidance on how to respond to OPRA requests. Custodians may need to edit the templates as necessary to properly respond to individual OPRA requests. However, these templates provide custodians with a solid starting point on how to respond to various types of requests.

The Council's website at [www.state.nj.us/grc](http://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](mailto:grc@dca.state.nj.us)), or regular mail (101 South Broad Street, P.O. Box 819, Trenton, NJ 08625-0819).

In addition to this toolkit, 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.

### Additional Resources:

- 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
- Handbook for Records Custodians

**SECTION 1:**

**Eight Steps to Ensuring  
Easier Access to Government  
Records**



## **Facilitating Transparency in Government: Eight Steps to Ensuring Easier Access to Government Records**

OPRA allows open access to records maintained by public agencies with some limitations. In an attempt to assist records custodians facilitate the transparency in government sought by the enactment of OPRA, the GRC has created an eight step guideline for custodians to follow when responding to OPRA requests. These steps will assist records custodians stay organized, track deadlines, and ensure government records are accessible to the public in compliance with the law.

### **1. Calculate Statutory Response Deadline**

OPRA mandates that custodians grant or deny access as soon as possible, but not later than seven business days after receiving the request. N.J.S.A. 47:1A-5.i. Failure to adhere to the statutorily mandated response time is by far the most common violation of OPRA, yet the easiest to avoid. Upon receiving an OPRA request, a custodian should immediately calculate the seven business day response deadline so that he/she is fully aware of the last possible date upon which a *written* response to the request must be provided.

Day one of the calculation begins the day *after* the custodian receives the OPRA request. This calculation applies to the agency's actual business days. If the agency is closed for a holiday, this date does not count towards the seven business day deadline.

Additionally, custodians should designate someone who can respond to OPRA requests in the custodian's absence. A custodian's vacation or sick leave does not absolve the public agency from its responsibility to fulfill OPRA requests in a timely manner.

Although OPRA states that a custodian must grant or deny access within the prescribed time period, the GRC has expanded a custodian's response options to include requests for clarification of an unclear request and requests for an extension of time beyond the seven business days.

There are specific records that follow a different response deadline requirement. OPRA mandates that immediate access be granted to budgets, bills, vouchers, contracts and government employee salary information. N.J.S.A. 47:1A-5.e. Immediate access means "on the spot," unless the records are in storage, in use, or require medium conversion that cannot be performed immediately by the public agency. In these instances, immediate access records must be provided as immediately as possible after the custodian notifies the requestor in writing that an extension of the immediate access requirement is needed and for what reason.

## **2. Determine If Request Is A Valid OPRA Request**

A valid OPRA request seeks specific, identifiable government records. Valid OPRA requests do not ask questions, do not seek information, and do not require a custodian to conduct any research or create a new record. The GRC has routinely upheld a custodian's denial of a request on the basis that it is invalid because it asks questions, seeks information, and requires the custodian to conduct research or create a new record. Upon receiving an OPRA request, custodians should determine if the request fits into any of these categories and respond in writing accordingly.

## **3. Determine If There Is Enough Information To Fulfill Request**

A custodian may be unsure of which specific records are being requested. OPRA allows a custodian to seek clarification from the requestor when this is the case. A custodian's request

for clarification must be in writing within the seven business day response time. The custodian's response time stops until the requestor provides clarification.

#### **4. Determine If Request Requires Special Service Charge Or Will Substantially Disrupt Agency Operations**

OPRA allows custodians to charge special service charge only when fulfilling a request requires an extraordinary amount of time and effort. Special service charges cannot be set in advance by ordinance because they are determined on a case-by-case basis. The GRC has a resource online with 14 questions a custodian should answer to assist in determining if a special service charge is warranted (<http://www.nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>).

OPRA's substantial disruption provision allows a custodian to deny access to a request that would substantially disrupt the operations of the agency, but only after attempting to reach a reasonable solution that accommodates the interests of both the requestor and the agency. These are subjective determinations based on an agency's resources available to fulfill a request and are usually applied to extreme requests for thousands of records. The GRC has only upheld a custodian's denial of access based on substantial disruption of an agency's operations in a handful of times since 2002.

#### **5. Obtain Records Responsive To Request**

It is reasonable that a custodian will not have physical custody of every record maintained by the agency. As such, a custodian should document attempts to gain access to records maintained elsewhere and ensure that the requestor receives the requested records. A custodian cannot be held responsible if another employee obstructs access, as long as the custodian can prove attempts made to gain access to the records. The GRC will hold the officer,

official or employee who obstructs access accountable, not the custodian who diligently attempted to obtain the records responsive.

#### **6. Determine If Records or Portions Thereof Fit Within Any of OPRA's Exemptions**

All government records are subject to public access unless they fit within one of OPRA's 24 specific exemptions. A list of the 24 exemptions is located on the GRC's website at <http://www.nj.gov/grc/pdf/OPRAExemptions.pdf>.

#### **7. Redact, Convert to Requested Medium, and Calculate Appropriate Fees**

If there are portions of a record that are exempt from disclosure, a custodian must redact those portions prior to providing access. Instructions for properly redacting records can be found in the Custodian Handbook located on the GRC's website at <http://www.nj.gov/grc/custodians/handbook/>.

Requestors are permitted under OPRA to seek records in specific mediums, such as paper or electronic copies. A custodian must permit access in the medium requested. N.J.S.A. 47:1A-5.d. If a custodian does not maintain the record in the requested medium, he/she must either convert the record to the requested medium (charging any related costs for the conversion) or provide access in some other "meaningful medium" – meaningful to the requestor.

The OPRA copy fee schedule has recently changed to the following:

- \$0.05 per page for letter sized pages and smaller;
- \$0.07 per page for legal sized pages and larger;
- If the actual cost to produce paper copies exceeds the \$0.05 and \$0.07 rates, custodians may charge the actual cost of duplication;
- Electronic records are FREE OF CHARGE (i.e. records sent via e-mail and fax);
- Actual cost to provide records in another medium (i.e. computer disc, CD-ROM, DVD).

#### **8. Provide Records By Requested Method of Delivery or Deny Access Providing**

##### **The Legal Basis in Writing**

A custodian must grant access to a government record by the method of delivery requested (regular mail, e-mail, or fax). Custodians may charge associated costs for same (i.e. actual postage costs).

A custodian is obligated to provide the legal basis for each individual redaction or record denied. In the custodian's response, the custodian must reference the specific OPRA or other state or federal exemption that allows nondisclosure.

Additionally, custodians must respond to each item requested. If records responsive to a request are not being provided, custodians **must** provide the legal basis for denying access in writing. Simply stating the records are not public records amounts to an insufficient response.

This eight step guideline will assist records custodians fulfill their obligation to provide open access to New Jersey's government records, and achieve the goals of OPRA. As always, if a custodian has questions about an OPRA request or the law, they are encouraged to contact the GRC for guidance (1-866-850-0511).

**SECTION 2:**  
**OPRA Response Templates**



[Insert Date]

[Insert Requestor's Name]  
[Insert Requestor's Address]  
[Insert City, State, Zip]

Dear [insert name of requestor],

The [insert name of agency] received your Open Public Records Act (OPRA) request on [insert date agency received request]. The official Records Custodian, [insert name of custodian], received your OPRA request on [insert date custodian received request]. As such, the seven (7) business day deadline to respond to your request is [insert deadline date]. This response to your request is being provided to you on the [Xth] business day after the custodian's receipt of said request.

The following records are being provided in their entirety and are responsive to your request.

1. [Insert name of record, number of pages]
  2. [Insert name of record, number of pages]
  3. [Insert name of record, number of pages]
- Include more as necessary.*

These records are being transmitted to you via [insert requestor's preferred method of delivery], as per your request. Pursuant to N.J.S.A. 47:1A-5.b., the cost associated with this request is [insert amount]. [Include instructions on how requestor can remit payment].

If your request for access to a government record has been denied or unfilled within the seven (7) business days required by law, you have a right to challenge the decision by the [insert name of agency] to deny access. At your option, you may either institute a proceeding in the Superior Court of New Jersey or file a complaint with the Government Records Council (GRC) by completing the Denial of Access Complaint Form. You may contact the GRC by toll-free telephone at 866-850-0511, by mail at P.O. Box 819, Trenton, NJ, 08625, by e-mail at [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us), or at their web site at [www.state.nj.us/grc](http://www.state.nj.us/grc). The GRC can also answer other questions about the law. All questions regarding complaints filed in Superior Court should be directed to the Court Clerk in your County.

Sincerely,

[Insert name of Custodian]  
[Insert name of agency]  
[Insert Custodian's contact information]



[Insert Date]

[Insert Requestor's Name]  
 [Insert Requestor's Address]  
 [Insert City, State, Zip]

Dear [insert name of agency],

The [insert name of agency] received your Open Public Records Act (OPRA) request on [insert date agency received request]. The official Records Custodian, [insert name of custodian], received your OPRA request on [insert date custodian received request]. As such, the seven (7) business day deadline to respond to your request is [insert deadline date]. This response to your request is being provided to you on the [Xth] business day after the custodian's receipt of said request.

The table below identifies the records that being denied in whole or in part as well as the legal basis for each denial, as is required by N.J.S.A. 47:1A-6.

List of all records responsive to OPRA request (include the number of pages for each record).	List of all records provided, <u>with redactions</u> , or denied in their entirety.	If records are disclosed with redactions, give a general nature description of the redactions.	If records were denied in their entirety, give a general nature description of the record.	List the legal explanation and statutory citation for the denial of access to records in their <u>entirety</u> or <u>with redactions</u> .
<b>Example:</b> Closed session minutes for the May 15, 2006 Council Meeting	Closed session minutes provided with redactions	Redactions were made only to delete the discussion of the Council members regarding the personnel matter of Jane Doe.	N/A	<u>N.J.S.A. 47:1A-9.a.</u> (allows exemptions from disclosure contained in other state statutes to apply under OPRA) and <u>N.J.S.A. 10:4-12</u> (allows governing bodies to exclude the public from discussions of personnel matters).

\* A list of OPRA's exemptions is attached to this response letter.

These records are being transmitted to you via [insert requestor's preferred method of delivery], as per your request. Pursuant to N.J.S.A. 47:1A-5.b., the cost associated with this request is [insert amount]. [Include instructions on how requestor can remit payment].

If your request for access to a government record has been denied or unfilled within the seven (7) business days required by law, you have a right to challenge the decision by the [insert name of agency] to deny access. At your option, you may either institute a proceeding in the Superior Court of New Jersey or file a complaint with the Government Records Council ("GRC") by completing the Denial of Access Complaint Form. You may contact the GRC by toll-free telephone at 866-850-0511, by mail at P.O. Box 819, Trenton, NJ, 08625, by e-mail at [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us), or at their web site at [www.state.nj.us/grc](http://www.state.nj.us/grc). The Council can also answer other questions about the law. All questions regarding complaints filed in Superior Court should be directed to the Court Clerk in your County.

Sincerely,

[Insert name of Custodian]

[Insert name of agency]

[Insert Custodian's contact information]

**OPRA EXEMPTIONS**  
**(Exceptions are noted in italics)**

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

- 1) Inter-agency or intra-agency advisory, consultative or deliberative material (Note: generally refers to draft documents or documents used in a deliberative process).
- 2) Legislative records. Specifically:
  - a. information received by a member of the Legislature from a constituent or information held by a member of the Legislature concerning a constituent, including but not limited to information in written form or contained in any e-mail or computer data base, or in any telephone record whatsoever, *unless it is information the constituent is required by law to transmit;*
  - b. any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member's official duties, *except that this provision shall not apply to an otherwise publicly-accessible report which is required by law to be submitted to the Legislature or its members.*
- 3) Medical examiner records – photographs, negatives, print, videotapes taken at the scene of death or in the course of post mortem examination or autopsy, *except:*
  - a. *when used in a criminal action or proceeding in this State which relates to the death of that person,*
  - b. *for the use as a court of this State permits, by order after good cause has been shown and after written notification of the request for the court order has been served at least five days before the order is made upon the county prosecutor for the county in which the post mortem examination or autopsy occurred,*
  - c. *for use in the field of forensic pathology or for use in medical or scientific education or research, or*
  - d. *or use by any law enforcement agency in this State or any other state or federal law enforcement agency.*
- 4) Criminal investigatory records - records which are not required by law to be made, maintained or kept on file that are held by a law enforcement agency which pertain to any criminal investigation or related civil enforcement proceeding. (Note: N.J.S.A. 47:1A-3.b. lists specific criminal investigatory information which must be disclosed).
- 5) Victims' records - an individually-identifiable file or document held by a victims' rights agency which pertains directly to a victim of a crime except that a victim of a crime shall have access to the victim's own records. "Victims' rights agency" means a public agency, or part thereof, the primary responsibility of which is providing services, including but not limited to food, shelter, or clothing, medical, psychiatric, psychological or legal services or referrals, information and referral services, counseling and support services, or financial services to victims of crimes, including victims of sexual assault, domestic violence, violent crime, child endangerment, child abuse or child neglect, and the Victims of Crime Compensation Board.
- 6) Trade secrets and proprietary commercial or financial information obtained from any source. Includes data processing software obtained by a public agency under a licensing agreement which prohibits its disclosure.
- 7) Any record within the attorney-client privilege.

- 8) Administrative or technical information regarding computer hardware, software and networks which, if disclosed would jeopardize computer security.
- 9) 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.
- 10) Security measures and surveillance techniques which, if disclosed, would create a risk to the safety or persons, property, electronic data or software.
- 11) Information which, if disclosed, would give an advantage to competitors or bidders.
- 12) 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 individual; or
  - c. Collective negotiations, including documents and statements of strategy or negotiating position.
- 13) Information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office.
- 14) Information which is to be kept confidential pursuant to court order.
- 15) Certificate of honorable discharge issued by the United States government (Form DD-214) filed with a public agency, *except that a veteran or the veteran's spouse or surviving spouse shall have access to the veteran's own records.*
- 16) Personal identifying information. Specifically:
  - a. Social security numbers, *except that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by State or federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor.*
  - b. Credit card numbers
  - c. Unlisted telephone numbers
  - d. Drivers' license numbers.

*Except for:*

  - a. Use by any government agency, including any court or law enforcement agency, in carrying out its functions,
  - b. or any private person or entity acting on behalf thereof,
  - c. or any private person or entity seeking to enforce payment of court-ordered child support; *except with respect to the disclosure of driver information by the Division of Motor Vehicles as permitted by section 2 of P.L.1997, c.188 (C.39:2-3.4);*
- 17) Certain records of higher education institutions:
  - a. Pedagogical, scholarly and/or academic research records and/or the specific details of any research project, *except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available.*

- b. Test questions, scoring keys and other examination data pertaining to the administration of an examination for employment or academic examination.
- c. Records of pursuit of charitable contributions or records containing the identity of a donor of a gift if the donor requires non-disclosure of the donor's identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization or dedication.
- d. Valuable or rare collections of books and/or documents obtained by gift, grant, bequest or devise conditioned upon limited public access.
- e. Information contained on individual admission applications.
- f. Information concerning student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student.

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

- 18) Biotechnology trade secrets.

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

- 19) Limitations to convicts - personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information. *Information may be released only if the information is necessary to assist in the defense of the requestor. A determination that the information is necessary to assist in the requestor's defense shall be made by the court upon motion by the requestor or his representative.*

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

- 20) Ongoing investigations – any records pertaining to an investigation in progress by any public agency if disclosure of such record or records shall be detrimental to the public interest. *This provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.*

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

- 21) Public defender records that relate to the handling of any case, *unless authorized by law, court order, or the State Public Defender.*

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

- 22) Upholds exemptions contained in other State or federal statutes and regulations, Executive Orders of the Governor, Rules of Court, Constitution of this State, or judicial case law.

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

- 23) 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 required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or 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)**

- 24) Privacy Interest - “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.”

Burnette 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’ promulgated rules are exempt from disclosure by this Order.
- 3) Executive Orders No. 9 (Hughes), 11 (Byrne), 79 (Byrne) and 69 (Whitman) are hereby continued to the extent that they are not inconsistent with this Executive Order.

Executive Order No. 9 (Hughes) exemptions that are still active:

- a. Questions on examinations required to be conducted by any State or local governmental agency;
- b. Personnel and pension records (same as N.J.S.A. 47:1A-10);
- c. Records concerning morbidity, mortality and reportable diseases of named persons required to be made, maintained or kept by any State or local governmental agency;
- d. Records which are required to be made, maintained or kept by any State or local governmental agency which would disclose information concerning illegitimacy;
- e. Fingerprint cards, plates and photographs and other similar criminal investigation records which are required to be made, maintained or kept by any State or local governmental agency;
- f. Criminal records required to be made, maintained and kept pursuant to the provisions of R. S. 53:1-20.1 and R. S. 53:1- 20.2;
- g. Personal property tax returns required to be filed under the provisions of Chapter 4 of Title 54 of the Revised Statutes; and
- h. Records relating to petitions for executive clemency.

Executive Order No. 11 (Byrne) exemptions are the same as N.J.S.A. 47:1A-10.

Executive Order No. 79 (Byrne) exemptions are the similar to # 8, 9, 10 above under N.J.S.A. 47:1A-1.1.

Executive Order No. 69 (Whitman) exemptions that are still active: Fingerprint cards, plates and photographs and similar criminal investigation records that are required to be made, maintained or kept by any State or local governmental agency.

### Executive Order No. 26 (McGreevey 2002)

- 1) Certain records maintained by the Office of the Governor:
  - a. Any record made, maintained, kept on file or received by the Office of the Governor in the course of its official business which is subject to an executive privilege or grant of confidentiality established or recognized by the Constitution of this State, statute, court rules or judicial case law.
  - b. All portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege.
  - c. All portions of records containing information provided by an identifiable natural person outside the Office of the Governor which contains information that the sender is not required by law to transmit and which would constitute a clearly unwarranted invasion of personal privacy if disclosed.
  - d. If any of the foregoing records shall contain information not exempted by the provision of the Open Public Records Act or the preceding subparagraphs (a), (b) or (c) hereof then, in such event, that portion of the record so exempt shall be deleted or excised and access to the remainder of the record shall be promptly permitted.
- 2) Resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. *The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.*
- 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 a regulation of that department or agency adopted pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963), or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure.
- 9) Records of a department or agency held by the Office of Information Technology (OIT) or the State Records Storage Center of the Division of Archives and Records Management (DARM) in the Department of State, or an offsite storage facility outside of the regular business office of the agency. Such records shall remain the legal property of the department or agency and be accessible for inspection or copying only through a request to the proper custodian of the department or agency. In the event that records of a department or agency have been or shall be transferred to and accessioned by the State Archives in the Division of Archives and Records Management, all such records shall become the legal property of the State Archives, and requests for access to them shall be submitted directly to the State Archives.



[Insert Date]

[Insert Requestor's Name]  
[Insert Requestor's Address]  
[Insert City, State, Zip]

Dear [insert name of requestor],

The [insert name of agency] received your Open Public Records Act (OPRA) request on [insert date agency received request]. The official Records Custodian, [insert name of custodian], received your OPRA request on [insert date custodian received request]. As such, the seven (7) business day deadline to respond to your request is [insert deadline date]. This response to your request is being provided to you on the [Xth] business day after the custodian's receipt of said request.

Your OPRA request sought access to the following:

[Copy from OPRA request].

This request seeks information or asks questions and does not identify specific government records. As such, your request is an invalid OPRA request and is denied. When a request is "complex" because it fails to specifically identify the documents sought, then that request is not "encompassed" by OPRA. See New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J.Super. 166, 180 (App. Div. 2007). A proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents. See Bent v. Stafford Police Department, 381 N.J.Super. 30, 37 (App. Div. 2005). Custodians are not required to conduct research or create new records in response to an OPRA request.

If your request for access to a government record has been denied or unfilled within the seven (7) business days required by law, you have a right to challenge the decision by the [insert name of agency] to deny access. At your option, you may either institute a proceeding in the Superior Court of New Jersey or file a complaint with the Government Records Council (GRC) by completing the Denial of Access Complaint Form. You may contact the GRC by toll-free telephone at 866-850-0511, by mail at P.O. Box 819, Trenton, NJ, 08625, by e-mail at [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us), or at their web site at [www.state.nj.us/grc](http://www.state.nj.us/grc). The GRC can also answer other questions about the law. All questions regarding complaints filed in Superior Court should be directed to the Court Clerk in your County.

Sincerely,

[Insert name of Custodian]

[Insert name of agency]

[Insert Custodian's contact information]



[Insert Date]

[Insert Requestor's Name]  
[Insert Requestor's Address]  
[Insert City, State, Zip]

Dear [insert name of requestor],

The [insert name of agency] received your Open Public Records Act (OPRA) request on [insert date agency received request]. The official Records Custodian, [insert name of custodian], received your OPRA request on [insert date custodian received request]. As such, the seven (7) business day deadline to respond to your request is [insert deadline date]. This response to your request is being provided to you on the [Xth] business day after the custodian's receipt of said request.

Your OPRA request sought access to the following:

[Copy from OPRA request].

Currently, your request fails to identify with reasonable clarity the specific government records sought, as is required by Bent v. Stafford Police Department, 381 N.J.Super. 30, 37 (App. Div. 2005). At this time, we request clarification of your OPRA request. Please respond in writing and identify the specific government records sought so that we may process your request. Failure to provide written clarification of your request will result in the closure of this OPRA request.

If your request for access to a government record has been denied or unfilled within the seven (7) business days required by law, you have a right to challenge the decision by the [insert name of agency] to deny access. At your option, you may either institute a proceeding in the Superior Court of New Jersey or file a complaint with the Government Records Council (GRC) by completing the Denial of Access Complaint Form. You may contact the GRC by toll-free telephone at 866-850-0511, by mail at P.O. Box 819, Trenton, NJ, 08625, by e-mail at [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us), or at their web site at [www.state.nj.us/grc](http://www.state.nj.us/grc). The GRC can also answer other questions about the law. All questions regarding complaints filed in Superior Court should be directed to the Court Clerk in your County.

Sincerely,

[Insert name of Custodian]  
[Insert name of agency]  
[Insert Custodian's contact information]



[Insert Date]

[Insert Requestor's Name]  
[Insert Requestor's Address]  
[Insert City, State, Zip]

Dear [insert name of requestor],

The [insert name of agency] received your Open Public Records Act (OPRA) request on [insert date agency received request]. The official Records Custodian, [insert name of custodian], received your OPRA request on [insert date custodian received request]. As such, the seven (7) business day deadline to respond to your request is [insert deadline date]. This response to your request is being provided to you on the [Xth] business day after the custodian's receipt of said request.

Your OPRA request sought access to the following:

[copy from OPRA request].

Your request requires additional time beyond the seven (7) business days to fulfill because [insert reasons why, such as request size, records are in storage, records require extensive medium conversion, etc.] OPRA allows custodians to seek extensions of time pursuant to N.J.S.A. 47:1A-5.i. Specifically, OPRA states that, "the requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied."

Your request requires an extension of time until [insert date custodian anticipates records can be provided].

If your request for access to a government record has been denied or unfilled within the seven (7) business days required by law, you have a right to challenge the decision by the [insert name of Agency] to deny access. At your option, you may either institute a proceeding in the Superior Court of New Jersey or file a complaint with the Government Records Council (GRC) by completing the Denial of Access Complaint Form. You may contact the GRC by toll-free telephone at 866-850-0511, by mail at P.O. Box 819, Trenton, NJ, 08625, by e-mail at [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us), or at their web site at [www.state.nj.us/grc](http://www.state.nj.us/grc). The GRC can also answer other questions about the law. All questions regarding complaints filed in Superior Court should be directed to the Court Clerk in your County.

Sincerely,

[Insert name of Custodian]

[Insert name of agency]

[Insert Custodian's contact information]



[Insert Date]

[Insert Requestor's Name]  
[Insert Requestor's Address]  
[Insert City, State, Zip]

Dear [insert name of requestor],

The [insert name of agency] received your Open Public Records Act (OPRA) request on [insert date agency received request]. The official Records Custodian, [insert name of custodian], received your OPRA request on [insert date custodian received request]. As such, the seven (7) business day deadline to respond to your request is [insert deadline date]. This response to your request is being provided to you on the [Xth] business day after the custodian's receipt of said request.

OPRA allows public agencies to impose special service charges whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or when fulfilling a request requires an extraordinary expenditure of time and effort. See N.J.S.A. 47:1A-5.c. Special service charges must be based upon the actual direct cost of providing the copy or copies.

OPRA mandates that the requestor shall have the opportunity to review and object to the charge prior to it being incurred. See N.J.S.A. 47:1A-5.c. As such, a detailed estimate is provided below:

[Identify lowest level employee capable of fulfilling the request, their direct hourly rate (minus fringe benefits), the number of hours anticipated to complete request and the total estimated special service charge].

Kindly respond in writing with your acceptance or rejection of this estimated charge. We will not begin to process this request until we receive your written acceptance.

If you reject the estimated charge and you wish to challenge the special service charge, you have a right to challenge the decision. At your option, you may either institute a proceeding in the Superior Court of New Jersey or file a complaint with the Government Records Council (GRC) by completing the Denial of Access Complaint Form. You may contact the GRC by toll-free telephone at 866-850-0511, by mail at P.O. Box 819, Trenton, NJ, 08625, by e-mail at [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us), or at their web site at [www.state.nj.us/grc](http://www.state.nj.us/grc). The GRC can also answer other questions about the law. All questions regarding complaints filed in Superior Court should be directed to the Court Clerk in your County.

Sincerely,

[Insert name of Custodian]

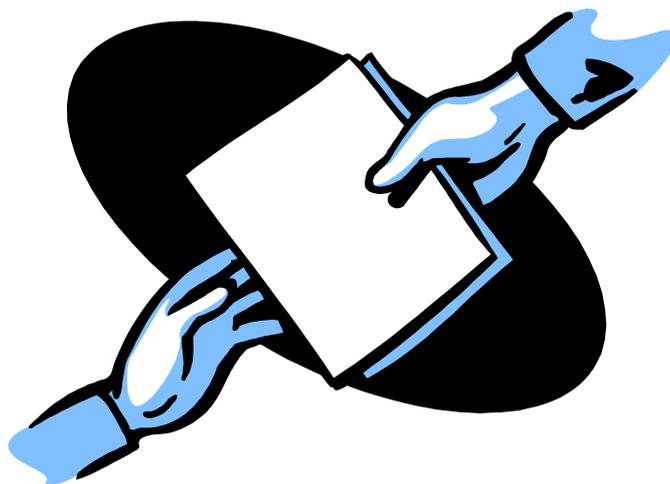
[Insert name of Agency]

[Insert Custodian's contact information]



---

# A Citizen's Guide to the Open Public Records Act



**New Jersey Government Records Council**

101 S. Broad Street  
P.O. Box 819  
Trenton, NJ 08625-0819

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Second Edition – July 2011

## A Citizen's Guide to the Open Public Records Act

Second Edition – July 2011

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## **A Citizen's Guide to the Open Public Records Act**

The Citizen's Guide to the Open Public Records Act (OPRA) has been prepared by the Government Records Council to help the public understand the requirements of the State of New Jersey's Open Public Records Act (N.J.S.A. 47:1A-1 et seq.). This guide is intended to familiarize those who want access to public records of their rights and of the responsibilities of public agencies that hold records, but is not to serve as a legal reference.

The Council's website at [www.state.nj.us/grc](http://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. Requestors 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](mailto:grc@dca.state.nj.us)), or regular mail (101 South Broad Street, P.O. Box 819, Trenton, NJ 08625-0819).

In addition to this guide, the Council has other resource materials that may be useful in assisting requestors understand the provisions of OPRA. These materials include the following which can be accessed from the GRC's website at [www.state.nj.us/grc/meetings/present](http://www.state.nj.us/grc/meetings/present):

- 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 the State statute that replaces the old “Right to Know Law” which governs the public’s access to government records in New Jersey. The law is compiled in the statutes as N.J.S.A. 47:1A-1 et seq.

Specifically, OPRA is intended to:

- Expand the public’s right of access to government records;
- Create an administrative appeals process if access is denied; and
- Define what records are and are not “government records.”

### Are there other ways to request access to government records besides OPRA?

Yes. 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 seeks 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, the GRC cannot provide any guidance on how to submit a request under the common law.***

Discovery requests may also 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.

*Note that 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. Additionally, the GRC cannot provide any guidance on how to submit a request through discovery.*

### **What public policies are expressed in OPRA?**

OPRA provides overriding public policies in the legislative findings (N.J.S.A. 47:1A-1) which must be considered during the handling of all OPRA requests 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."

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."

The above means that the court considers OPRA's privacy provision to be a substantive exemption from public access. The Government Records Council has routinely relied on this privacy provision to substantiate a custodian's withholding from public access a citizen's personal information such as home address and home telephone numbers. However, in each instance the Government Records Council conducts a balancing test to weigh the requestor's need for the personal information against the agency's need to keep the information confidential per advice from the NJ Office of the Attorney General. Thus, decisions to withhold personal information under this provision are made on a case-by-case basis.

### **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. N.J.S.A. 47:1A-5.f.

### **What is a “government record?”**

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 specifically 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 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. There are 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 (Note: generally refers to draft documents or documents used in a deliberative process).
- 2) Legislative records. Specifically:
  - a. information received by a member of the Legislature from a constituent or information held by a member of the Legislature concerning a constituent, including but not limited to information in written form or contained in any e-mail or computer data base, or in any telephone record whatsoever, *unless it is information the constituent is required by law to transmit*;
  - b. any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member's official duties, *except that this provision shall not apply to an otherwise publicly-accessible report which is required by law to be submitted to the Legislature or its members*.

- 3) Medical examiner records – photographs, negatives, prints, videotapes taken at the scene of death or in the course of post mortem examination or autopsy, *except*:
  - a. *when used in a criminal action or proceeding in this State which relates to the death of that person,*
  - b. *for the use as a court of this State permits, by order after good cause has been shown and after written notification of the request for the court order has been served at least five days before the order is made upon the county prosecutor for the county in which the post mortem examination or autopsy occurred,*
  - c. *for use in the field of forensic pathology or for use in medical or scientific education or research, or*
  - d. *or use by any law enforcement agency in this State or any other state or federal law enforcement agency.*
- 4) Criminal investigatory records - records which are not required by law to be made, maintained or kept on file that are held by a law enforcement agency which pertain to any criminal investigation or related civil enforcement proceeding. (Note: N.J.S.A. 47:1A-3.b. lists specific criminal investigatory information which must be disclosed).
- 5) Victims' records - an individually-identifiable file or document held by a victims' rights agency which pertains directly to a victim of a crime except that a victim of a crime shall have access to the victim's own records. "Victims' rights agency" means a public agency, or part thereof, the primary responsibility of which is providing services, including but not limited to food, shelter, or clothing, medical, psychiatric, psychological or legal services or referrals, information and referral services, counseling and support services, or financial services to victims of crimes, including victims of sexual assault, domestic violence, violent crime, child endangerment, child abuse or child neglect, and the Victims of Crime Compensation Board.
- 6) Trade secrets and proprietary commercial or financial information obtained from any source. Includes data processing software obtained by a public agency under a licensing agreement which prohibits its disclosure.
- 7) Any record within the attorney-client privilege.
- 8) Administrative or technical information regarding computer hardware, software and networks which, if disclosed would jeopardize computer security.
- 9) 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.
- 10) Security measures and surveillance techniques which, if disclosed, would create a risk to the safety or persons, property, electronic data or software.
- 11) Information which, if disclosed, would give an advantage to competitors or bidders.

- 12) 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 individual; or
  - c. Collective negotiations, including documents and statements of strategy or negotiating position.
- 13) Information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office.
- 14) Information which is to be kept confidential pursuant to court order.
- 15) Certificate of honorable discharge issued by the United States government (Form DD-214) filed with a public agency, *except that a veteran or the veteran's spouse or surviving spouse shall have access to the veteran's own records.*
- 16) Personal identifying information. Specifically:
  - a. Social security numbers, *except that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by State or federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor.*
  - b. Credit card numbers
  - c. Unlisted telephone numbers
  - d. Drivers' license numbers.

*Except for:*

  - a. *Use by any government agency, including any court or law enforcement agency, in carrying out its functions,*
  - b. *or any private person or entity acting on behalf thereof,*
  - c. *or any private person or entity seeking to enforce payment of court-ordered child support; except with respect to the disclosure of driver information by the Division of Motor Vehicles as permitted by section 2 of P.L.1997, c.188 (C.39:2-3.4);*
- 17) Certain records of higher education institutions:
  - a. Pedagogical, scholarly and/or academic research records and/or the specific details of any research project, *except that a custodian may not deny inspection of a government record or part thereof that gives the name, title,*

*expenditures, source and amounts of funding and date when the final project summary of any research will be available.*

- b. Test questions, scoring keys and other examination data pertaining to the administration of an examination for employment or academic examination.
- c. Records of pursuit of charitable contributions or records containing the identity of a donor of a gift if the donor requires non-disclosure of the donor's identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization or dedication.
- d. Valuable or rare collections of books and/or documents obtained by gift, grant, bequest or devise conditioned upon limited public access.
- e. Information contained on individual admission applications.
- f. Information concerning student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student.

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

- 18) Biotechnology trade secrets.

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

- 19) Limitations to convicts - personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information. *Information may be released only if the information is necessary to assist in the defense of the requestor. A determination that the information is necessary to assist in the requestor's defense shall be made by the court upon motion by the requestor or his representative.*

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

- 20) Ongoing investigations – any records pertaining to an investigation in progress by any public agency if disclosure of such record or records shall be detrimental to the public interest. *This provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.*

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

- 21) Public defender records that relate to the handling of any case, *unless authorized by law, court order, or the State Public Defender.*

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

- 22) Upholds exemptions contained in other State or federal statutes and regulations, Executive Orders of the Governor, Rules of Court, Constitution of this State, or judicial case law.

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

- 23) 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 required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or 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)**

- 24) Privacy Interest - "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."

Burnette 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) Executive Orders No. 9 (Hughes), 11 (Byrne), 79 (Byrne) and 69 (Whitman) are hereby continued to the extent that they are not inconsistent with this Executive Order.

Executive Order No. 9 (Hughes) exemptions which are still active:

- a. Questions on examinations required to be conducted by any State or local governmental agency;
- b. Personnel and pension records (same as N.J.S.A. 47:1A-10);
- c. Records concerning morbidity, mortality and reportable diseases of named persons required to be made, maintained or kept by any State or local governmental agency;
- d. Records which are required to be made, maintained or kept by any State or local governmental agency which would disclose information concerning illegitimacy;
- e. Fingerprint cards, plates and photographs and other similar criminal investigation records which are required to be made, maintained or kept by any State or local governmental agency;
- f. Criminal records required to be made, maintained and kept pursuant to the provisions of R. S. 53:1-20.1 and R. S. 53:1- 20.2;
- g. Personal property tax returns required to be filed under the provisions of Chapter 4 of Title 54 of the Revised Statutes; and
- h. Records relating to petitions for executive clemency.

Executive Order No. 11 (Byrne) exemptions are the same as N.J.S.A. 47:1A-10.

Executive Order No. 79 (Byrne) exemptions are the similar to # 8, 9, 10 above under N.J.S.A. 47:1A-1.1.

Executive Order No. 69 (Whitman) exemptions that are still active: Fingerprint cards, plates and photographs and similar criminal investigation records that are required to be made, maintained or kept by any State or local governmental agency.

#### **Executive Order No. 26 (McGreevey 2002)**

1) Certain records maintained by the Office of the Governor:

- a. Any record made, maintained, kept on file or received by the Office of the Governor in the course of its official business which is subject to an executive privilege or grant of confidentiality established or recognized by the Constitution of this State, statute, court rules or judicial case law.
- b. All portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege.
- c. All portions of records containing information provided by an identifiable natural person outside the Office of the Governor which contains information that the sender is not required by law to transmit and which would constitute a clearly unwarranted invasion of personal privacy if disclosed.
- d. If any of the foregoing records shall contain information not exempted by the provision of the Open Public Records Act or the preceding subparagraphs (a),

(b) or (c) hereof then, in such event, that portion of the record so exempt shall be deleted or excised and access to the remainder of the record shall be promptly permitted.

- 2) Resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. *The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.*
- 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 a regulation of that department or agency adopted pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963), or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure.
- 9) Records of a department or agency held by the Office of Information Technology (OIT) or the State Records Storage Center of the Division of Archives and Records Management (DARM) in the Department of State, or an offsite storage facility outside of the regular business office of the agency. Such records shall remain the legal property of the department or agency and be accessible for inspection or copying only through a request to the proper custodian of the department or agency. In the event that records of a department or agency have been or shall be transferred to and accessioned by the State Archives in the Division of Archives and Records Management, all such records shall become the legal property of the State Archives, and requests for access to them shall be submitted directly to the State Archives.

### **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 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 (most common occurrence is the Police Department).

### **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. See [www.judiciary.state.nj.us/superior/copies\\_court\\_rec.htm](http://www.judiciary.state.nj.us/superior/copies_court_rec.htm).
- 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

### How do I submit an OPRA request?

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 verbally.

Requests are to be submitted to the public agency that maintains physical custody of the requested records. For example, a request for the City of Trenton's 2011 budget would be submitted to the City of Trenton. A request for payroll records of a school business administrator would be submitted to the school district in which the administrator is employed.

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 request form. Written requests which are not on the form must mention OPRA. Therefore, if a requestor elects not to use an agency's official OPRA request form, he/she must submit an otherwise written request that clearly identifies itself as an OPRA request.

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. 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.).

**Electronically Submitted 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, although a custodian's failure to do so is not a violation of OPRA. Requests for information or requests that ask questions are NOT valid OPRA requests.

### **Can I request records in a specific medium?**

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

### **Can I specify how I want the Custodian to send me the requested records?**

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). OPRA was amended to allow the production of electronic records free of charge, except that a public agency may charge the actual cost of any needed supplies such as computer discs. N.J.S.A. 47:1A-5.b.

### **Can a public agency create specific 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.

All other agencies must process OPRA requests during their regular business hours.

### **What happens if an employee other than the custodian receives my 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 to be forwarded to the appropriate custodian, or the employee may refuse to accept the request and direct the requestor to the appropriate custodian. N.J.S.A. 47:1A-5.h.

### **When should I expect a response to my OPRA request?**

Custodians should fulfill a request as soon as possible but not later than seven (7) 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 (7) 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.

### **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.

### **Can I access any records immediately?**

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.

### **Can the custodian take more than seven (7) business days to respond to my 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 should a custodian's response to my request contain?**

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 (7) business days, are not valid responses under OPRA.

### **How much can the custodian charge me for my OPRA request?**

On September 10, 2010, Governor Christie signed legislation that changed OPRA's copy fee provision at N.J.S.A. 47:1A-5.b. Said provision of OPRA has since been amended to provide that:

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be \$0.05 per letter size page or smaller, and \$0.07 per legal size page or larger. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record. The actual cost of duplicating the record, upon which all copy fees are based, shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs.” (Emphasis added). N.J.S.A. 47:1A-5.b.

To fully understand the impact of this amendment to OPRA’s copy fee schedule, the Government Records Council interprets each sentence of the amended fee provision below:

1. “[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation.”

This sentence means that custodians are to charge OPRA requestors any copy fees that are established by other New Jersey laws or regulations, if said fees exist. For example, N.J.S.A. 22A:4-1a sets forth specific fees for certain records filed with the New Jersey Department of Treasury (and requested from the Department of Treasury). Specifically, said statute provides that “[i]f a roll of microfilm images is requested, the State Treasurer shall collect a fee of \$1.00 for each image on the microfilm roll.” Thus, if a requestor seeks access to a microfilm roll from the Department of Treasury, the Department’s custodian must charge the fees established in N.J.S.A. 22A:4-1a. The same applies for any other records that have specific fees established in other New Jersey laws or regulations.

2. “Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be \$0.05 per letter size page or smaller, and \$0.07 per legal size page or larger.”

For records that do not have a specific fee established by statute (like the Treasury example above), custodians must charge a flat rate of \$0.05 per letter size (8 ½” x 11”) page or smaller, and \$0.07 per legal size (8 ½” x 14”) page or larger, *if providing a requestor with paper copies*. For example, a custodian providing access to 3 pages of printed meeting minutes on letter size pages would charge a requestor \$0.15 (\$0.05 per page for 3 pages = \$0.15).

3. “*If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.* The actual cost of duplicating the record, upon which all copy fees are based, shall be the cost of materials and supplies used to make a

copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section.” (Emphasis added).

It is possible that the actual cost to produce paper copies will exceed \$0.05 per letter size page or smaller and \$0.07 per legal size page or larger for some public agencies. In these instances, the OPRA amendment allows custodians to charge the actual cost of duplication, which is limited to the cost of materials and supplies used to make the copy.

#### **How to Calculate Actual Costs (only if paper copies exceed the \$0.05 and \$0.07 rates)**

- Custodians should contact their supplier to determine the cost of paper and toner. A supplier is wherever the agency obtains those materials – paper and toner (i.e. central purchasing unit, Staples, Office Depot, etc).
- Calculate or contact copying company to determine the agency’s annual copying volume (calendar or fiscal year, however the agency operates). This does NOT only include copies pertaining to OPRA requests – this is ALL copying on all copy machines in the agency for all purposes.
- Contact copying company to determine the average paper life of one toner/ink cartridge (i.e. how many pieces of paper the ink or toner should be able to copy).
- Custodians must maintain documentation of all information provided by copying company or office supplier (i.e. contracts or correspondence from purchasing agent or copying company) regarding this calculation.
- **Actual calculation is the total cost of paper purchased for 1 year (calendar or fiscal) + the total cost of toner purchased (calendar or fiscal) ÷ the annual copying volume.**

This calculation can be averaged for all copy machines in an agency that produce letter and legal copies. Special copiers, such as for color printing or blueprints copied in house, should be calculated separately.

4. “If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record. *The actual cost of duplicating the record, upon which all copy fees are based, shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section.*” (Emphasis added).

The reference to “subsection c.” pertains to OPRA’s special service charge provision, which is applicable in instances when fulfilling an OPRA request requires an extraordinary amount of time and effort. For guidance on how and when a special service charge applies to an OPRA request, please refer to the GRC’s “Special Service Charge” handout online at <http://www.nj.gov/grc/meetings/present/>.

The GRC strongly encourages every public agency to clearly identify its per page copy fee on its OPRA request form, whether it be the flat rates established in N.J.S.A. 47:1A-5.b., or the actual cost calculated by the agency.

5. "Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs."

Records provided via e-mail and facsimile are free of charge. Custodians must charge the actual cost to provide access to all other electronic materials such as CD-ROMs, DVDs, videotapes, audiotapes, etc. No specific calculation is required to determine the actual cost of these supplies. The actual cost is the specific fee the agency paid to purchase the materials. For example, if the GRC purchased a package of 100 CD-ROMs for \$100 and provided records to a requestor on 1 CD-ROM, the actual cost of said CD-ROM is \$1.00 ( $\$100 \div 100 = \$1.00$ ).

**These changes became effective for all New Jersey public agencies on Tuesday November 9, 2010.**

#### Deposits

OPRA permits the custodian to require a deposit against costs for reproducing records sought from anonymous requestors whenever the custodian anticipates that reproduction cost for the records requested will exceed \$5.00. N.J.S.A. 47:1A-5.f.

#### **What is 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 plan); 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 (after a Denial of Access Complaint is filed):

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. Complainants may challenge a custodian's special service charge by filing a Denial of Access Complaint with the Government Records Council or filing an action in the Superior Court of New Jersey.

#### **Can the custodian “black out” portions of the records I requested?**

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 cannot lawfully be disclosed. Words, sentences, paragraphs, or whole pages may be subject to redaction.

#### How Custodians Can Redact

If a record contains material that must be redacted, such as a social security 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 notification 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 computer 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 parts of a record are redacted, or use a separate document, depending on the circumstances, and must also refer to the OPRA exception which allows the redaction. This principle also applies if pages of information are redacted. 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 is a broad and/or unclear request?**

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."

The term "records" does not reasonably identify a specific government record.

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."

This request identifies a specific type of record, parties to the correspondence, dates and subject matter.

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.

### **What is a substantial disruption to agency operations?**

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.

### **Can a custodian deny me access to government records?**

Yes. There are 24 specific exemptions to public access contained in OPRA. These exemptions are listed in Section 1 of this guide. If a record requested, or portions of a record requested, fit into any of OPRA's 24 exemptions, the custodian may 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 can I do if a custodian denies me access to government records?**

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 for filing 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 guide.

## 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.

### **What can the Government Records Council do for me?**

The Government Records Council can provide guidance regarding the accessibility of government records. If you want to request a specific record or you have been denied access to a specific record, the GRC can inform you about any past decisions regarding the same or similar records, if any such cases exist. The GRC can also provide guidance regarding the request process and what to expect once an OPRA request is submitted. Also, the GRC can investigate your allegation of a denial of access should you decide to file an official complaint.

### **How is a Denial of Access Complaint filed and handled?**

A complaint to the Government Records Council must be in writing on the official 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.state.nj.us/grc/register/](http://www.state.nj.us/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?**

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. A copy of the Council's decision is sent 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, the Council 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 (N.J.S.A. 52:14B-1 et seq.), 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 complaints filed with the Council.

## **What else should I know about Council hearings and actions?**

### Prevailing Party Attorney's 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.

An employee other than the custodian may be assessed a penalty. 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.state.nj.us/grc/home/rules/pdf/Promulgated\\_Regulations.pdf](http://www.state.nj.us/grc/home/rules/pdf/Promulgated_Regulations.pdf).

## SECTION 4 – SPECIAL CIRCUMSTANCES

### **Can I have access to government records under OPRA for commercial use?**

Yes. There is no restriction against the 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).

### **How many OPRA requests can I make to one agency?**

There is no restriction on the number of OPRA requests one person can submit to a particular agency.

### **Can I bring my own photocopier into an agency's 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 the custodian 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.

### **Can I request the same records more than once?**

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.**