



The Open Public Records Act: Understanding OPRA, Overview Of The GRC Process And Review Of GRC Decisions

**New Jersey Government Records
Council**

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The Open Public Records Act:

Understanding OPRA

What Is OPRA?

- 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
- Provides compliance process via the GRC
- Defines a government record
- Provides for penalties

What Is The GRC?

- GRC = Government Records Council
- Duties listed in OPRA - N.J.S.A. 47:1A-7
- Agency that provides assistance to the public and to records custodians
- Adjudicates denials of access complaints
- Five-member Council
- Professional staff

What Public Agencies Are Covered Under OPRA?

➤ N.J.S.A. 47:1A-1.1

➤ Executive Branch

- State Authorities
- State Commissions
- State Colleges and Universities

➤ Counties

➤ Municipalities

- Fire Districts
- School Boards
- Planning and Zoning Boards
- Business Improvement Districts

Are All Government Records Accessible To The Public?

- Yes ... N.J.S.A. 47:1A-1
- Government records shall be readily accessible with certain exceptions
- Limitations on access shall be construed in favor of the public
- Public agencies must safeguard a citizen's personal information

Can A Public Agency Deny A Request?

- Yes ... N.J.S.A. 47:1A-6
- If the public agency can demonstrate that the denial is authorized by law. (burden of proof on custodian)
- If the request is not on the agency's official OPRA records request form

Advisory Opinion 2006-01

What Constitutes A Valid OPRA Request

- Based on the language of the statute, and judicial recognition of the importance of the statutory request form, it is determined that the statute requires all requestors to submit OPRA requests on an agency's official OPRA records request form.
- OPRA's provisions come into play only when a request for records is submitted on the agency's official OPRA records request form.

Advisory Opinion 2006-01

What Constitutes A Valid OPRA Request (cont'd)

- When an agency has not adopted its own official OPRA request form, the requestor may use the Model Request Form downloadable from the GRC website.
 - A custodian is in violation of OPRA if he/she does not have an official OPRA request form available to the public.
 - All custodial agencies should download the “OPRA logo” from the GRC website to use as the identifying link to OPRA information for its agency on its own website.
- **Important Caveat:** If a records custodian attempts to fulfill a records request not on an official request form, the custodian may not use the lack of an official request form as a defense for not adhering to the provisions of OPRA.

Advisory Opinion 2006-01

What Constitutes A Valid OPRA Request (cont'd)

- New Jersey Builders Association v. New Jersey Council on Affordable Housing (App.Div. Decided January 24, 2007)
 - The court held that the requestor's 5 page, 39 paragraph request bears no resemblance to the record request envisioned by the Legislature, which is one submitted on a form ..."

Why Are Some Records Not Disclosed?

- Exemptions (see Handout)
 - Citizen's reasonable expectation of privacy
 - OPRA exemptions (24 exemptions in OPRA)
 - Other state and federal statutory exemptions
 - Exemptions in state regulations and rules
 - Executive Order exemptions (EOs 21 & 26)
 - Court decisions

Who Is The Records Custodian?

- In the case of a municipality = Municipal Clerk.
- In the case of any other public agency = the officer officially designated by formal action of that agency's director or governing body.
- N.J.S.A. 47:1A-1.1

Who May Be Assessed A Penalty?

- A public official, officer, employee or custodian who knowingly and willfully violates OPRA...may be assessed a penalty
- N.J.S.A. 47:1A-11

Request Response - Timeliness

- 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.
- **Immediate access** to budgets, bills, vouchers and contracts. N.J.S.A. 47:1A-5.e.
 - Immediate means “immediate”
- **If a record is in storage or archived**, a written notice is necessary if record will not be available within the 7 business days. N.J.S.A. 47:1A-5.i.

Copy And Inspection Fees (Actual Cost)

- Basic per page copy fees:
 - \$0.75 for the first 10 pages, \$0.50 for pages 11-20, \$0.25 each page over 20 N.J.S.A. 47:1A-5.b.
- Municipal ordinance when actual cost exceeds OPRA rates. N.J.S.A. 47:1A-5.c.
- Special service charges for “extraordinary” requests. N.J.S.A. 47:1A-5.c.
- Medium conversion N.J.S.A. 47:1A-5.d.

Copy And Inspection Fees (cont'd)

- Special service charges for “extraordinary” requests must be reasonable and based on actual direct cost. N.J.S.A. 47:1A-5.c.
 - Fisher (2004-55) – 14 point analysis
 - Warranted when:
 - ◆ Copies can't be reproduced by ordinary copying equipment in ordinary business size
 - ◆ Accommodating request involves an extraordinary expenditure of time and effort

Copy And Inspection Fees (cont'd)

- Medium conversion - reasonable cost based on the following:
 - Extensive use of technology and
 - Labor for programming, clerical and supervisory assistance that may be required
- N.J.S.A. 47:1A-5.d.

What Happens If A Request Is Denied?

- Requestors may:
 - File complaint in Superior Court, or
 - File complaint with the Government Records Council
- N.J.S.A. 47:1A-6

OPRA Responsibilities of a Custodian

- The custodian must:
 - (1) adopt forms for requests,
 - (2) locate and redact documents,
 - (3) isolate exempt documents,
 - (4) assess fees and means of production,
 - (5) identify requests that require “extraordinary expenditure of time and effort” and warrant assessment of a “special service charge,” and
 - (6) when unable to comply with a request, “indicate the specific basis.” New Jersey Builders Association v. New Jersey Council on Affordable Housing (App.Div. Decided January 24, 2007)

OPRA Responsibilities of a Requestor

- The requestor must:
 - (1) pay the costs of reproduction and
 - (2) submit the request with information that is essential to permit the custodian to comply with its obligations. New Jersey Builders Association v. New Jersey Council on Affordable Housing (App.Div. Decided January 24, 2007)

The Open Public Records Act:

Overview Of The GRC Process

GRC Resources & Complaint Process

Resources:

- Website – OPRA reference materials
- Inquiry – OPRA guidance requested via e-mail, fax, telephone and mail

Complaint Process:

- Step One: Denial of Access Complaints
- Step Two: Mediation
- Step Three: Adjudication



GRC Website

www.nj.gov/grc

- Readable version of OPRA
- Handbook for Records Custodians
- Frequently Asked Questions
- A Citizen's Guide to OPRA
- GRC Decisions
- Advisory Opinions

OPRA Inquiries

Inquiry Hotline: 866-850-0511

- The information provided by the GRC staff is guidance and does not constitute legal advice as to whether a particular record is exempt from disclosure or not since the provisions of OPRA are applied to the specific facts any records request
- Offer resources for decision-making
- GRC staff guidance is not a decision of the GRC

Step One: Filing A Denial Of Access Complaint

➤ Denial of Access Complaint

- must be submitted on GRC form (found at www.nj.gov/grc)
- must be signed by the individual who requested the records

Step Two: Mediation

- Offer to mediate sent to both parties
- Mediation process provided by statute
 - Provided at no charge to the parties
- State's Office of Dispute Settlement – not the GRC
- Confidential (even to GRC staff) per the Uniform Mediation Act (N.J.S.A. 2A:23C-1 et seq.)

Step Two: Mediation (cont'd)

- Agreement to mediate must be signed by requestor and custodian
 - An attorney representing a party in the matter must sign the form only to indicate his/her representation.
- Voluntary, informal, non-adversial process conducted by an impartial third party
- Parties control the outcome
 - Conducted by telephone or face-to-face

Step Three: Adjudication

- Phase One: Complaint investigation and analysis
- Phase Two: Preparation of “Findings and Recommendations of the Executive Director”
- Phase Three: Council action
- Phase Four: Appeal of Council decisions to Appellate Division of Superior Court (optional to parties)

Step Three: Adjudication – Investigation and Analysis

- If mediation fails or is rejected, complaint investigation and analysis commences
- Request for Statement of Information sent to custodians – 5 business days to respond (must be signed by custodian not legal counsel)

Step Three: Adjudication – Investigation and Analysis (cont'd)

- Statement of Information (“SOI”)
 - Custodian’s answer to an OPRA Complaint
 - Document Index
 - ◆ Itemized list of all documents responsive to request
 - ◆ Identify specific documents provided
 - ◆ Identify documents not provided with legal explanation and citation for denial of access
 - Custodian must sign SOI certifying to the information provided in the SOI

Step Three: Adjudication – Preparation of Findings and Recommendations

- Staff investigates and analyzes parties' positions
- Findings and Recommendations of the Executive Director is prepared by GRC staff and approved by the Executive Director
- Case is scheduled for a particular Council meeting date

Step Three: Adjudication – Council Action

- Council discusses and vote to accept, reject or modify the Findings and Recommendations of the Executive Director
 - Parties do not testify unless directed to do so by the Council
- Interim Orders and Final Decisions sent to parties within 5-10 business days

Step Three: Adjudication – Appeal

- Parties can appeal GRC orders and decisions to the Appellate Division of Superior Court
- A “stay” must be requested from the Council before the date custodian action is required (for Interim orders) and before an appeal to Superior Court is filed (for Final Decisions)

Council Activities & Issues of Interest

- Administrative Case Dispositions
- *In Camera* Inspections
- Prevailing Party Attorney's Fees

Administrative Case Dispositions

- All records responsive provided in timely manner
- No records responsive to the request exist
- No valid OPRA request (request was verbal or not on OPRA request form)
- Not within GRC jurisdiction to adjudicate (records request submitted to the Judiciary or Legislature)
- Not a request for a government record (request for information or answers)
- Complaint voluntarily withdrawn or settled in mediation
- Action pending in Superior Court regarding the records request listed in the denial of access complaint

In Camera Inspections

- Inspection of records conducted by the Council during closed session to verify that the custodian's asserted exemption from disclosure actually applies to the records
- Unredacted documents destroyed after inspection
- Performed at Council's discretion (see Paff v. Dept of Lbr, Bd of Rev, 379 N.J. Super. 346 (App.Div. 2005))

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.
 - 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.

Prevailing Party Attorney's Fees (cont'd)

- New Jersey Builders Association v. New Jersey Council on Affordable Housing, (App.Div. Decided January 24, 2007)
 - The court held that a requestor was not entitled to prevailing party attorney's fees under OPRA because the custodian established that its response was "authorized by law" in accordance with N.J.S.A. 47:1A-6.

The Open Public Records Act:

GRC Decisions

Government Employees Must Forward Requests or Direct Requestor

➤ Neff (2005-101)

- Records recorded: Expense records
- Custodian acted in accordance with OPRA when he provided the Complainant with the records made, maintained, kept or received by the Office of the Attorney General, but directed the Requestor to the designated records custodians for the several divisions within the Department of Law & Public Safety (“L&PS”) for the records sought that were made, kept and maintained by the individual divisions.

Government Employees Must Forward Requests or Direct Requestor (cont'd)

➤ Neff (2005-101)

- Further, each of these divisions was by statute authorized and by regulation required to have its own designated records custodian and **nothing in OPRA required that there be one, central custodian** with total responsibility for all of the records made, kept and maintained throughout the entire principal department of L&PS.
- 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.

Answer Each OPRA Request Individually & Knowing and Willful

➤ O'Shea (2004-17)

- Custodian only responded to two (2) of three (3) separate records requests for similar records made close in time
- Council hearing on the issue of a knowing and willful violation of OPRA pursuant to N.J.S.A. 47:1A-11.
- Custodian found to be negligent, but not knowing and willful according to the legal standard required for such a finding

Location of Government Record Not Always Relevant

- Meyers (2005-127)
 - 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 used his personal e-mail account to conduct Borough business, therefore making those e-mails government records under OPRA
 - A government record is not restricted by its location. N.J.S.A. 47:1A-1.1

Deemed Denial

➤ Cottrell (2005-247)

- Requested records: Parking site plans
- Custodian indicated in the Statement of Information that the delay in granting or denying access was because **the Custodian was waiting for legal advice from the municipal attorney**
- Failure to respond = Deemed Denial pursuant to N.J.S.A. 47:1A-5.c.
 - ◆ Custodian failed to provide a written response **granting or denying access** to requestor within the statutorily mandated seven (7) business days

Deemed Denial (cont'd)

➤ Cottrell (2005-247)

- ◆ Custodian failed to obtain an extension of the statutorily mandated response time in writing
- ◆ While seeking legal advice when responding to requests is encouraged, it is **not a lawful basis for a denial of access** pursuant to N.J.S.A. 47:1A-6.
- Custodian **must grant or deny** access as soon as possible, but no later than seven (7) business days pursuant to N.J.S.A. 47:1A-5.i.
- Council requires custodian's response to records requests and custodian's requests to extend statutory response time **in writing**

Specific Law Supporting Denial Required At Time Of Denial

➤ Schwarz (2004-60)

- 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.

Request is Broad and Unclear

➤ Bent (2004-78)

- 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 Michael Bent v. Stafford Police Department, 381 N.J. Super. 30 (App.Div. October 21, 2005)
- See also Mag Entertainment, LLC v. Division of Alcohol Beverage Control, 375 N.J. Super. 534 (App.Div. 2005)

Request is Broad and Unclear (cont'd)

➤ **Moore (2005-80)**

- 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

➤ **New Jersey Builders Association v. New Jersey Council on Affordable Housing, (App.Div. Decided January 24, 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.

Request is Broad and Unclear - Search vs. Research

➤ Donato (2005-182)

- 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.

Advisory Consultative Deliberative ("ACD") – Meeting Minutes

➤ Parave-Fogg (2006-51)

- Requested records: Governing body meeting minutes
- The Custodian asserted that she would release the requested meeting minutes upon their approval by the governing body
- 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

Criminal Investigatory Records

➤ Nance (2003-125)

- Requested records: Incident reports
- Custodian denied access and asserted that records were exempt as criminal investigatory records (because a criminal investigation was in progress)
- Council upheld custodian's denial of access
- Criminal investigatory records are specifically excluded from the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1

Once a Criminal Investigatory Record, Always a Criminal Investigatory Record

- Janeczko (2002-79 and 2002-80)
 - Requested records: Police investigation reports of a criminal incident
 - 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

Auto Accident Reports

➤ Donato (2005-251)

- Requested records: Auto accident reports
- Custodian charged \$5.00 per 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 the first three pages and **\$1.00 per page** thereafter **in addition to the OPRA copy rates**.

Denial for Privacy Concerns

- Avin (2004-176, -177, -178, -179, -180, -181, -182)
- Bernstein (2004-195 & 2005-02, -06, -13, -99)
 - Requested records: Various permits and licenses, including name and address information
 - Council conducted a balancing test of the parties' interest in the records and ruled that records were exempt from disclosure due to security and emergency concerns for the residents
 - Council determined that the citizens' expectation of privacy outweighed the complainant's right to access
 - ◆ Council, not the custodian, may ask the requestor his/her need for access

Denial for Privacy Concerns (Cont'd)

➤ Perino (2004-128)

- Requested record: Zoning complaint filed against requestor including name, address and telephone number of the citizen who filed the complaint
- Council conducted a balancing test of the parties' interest in the records and ruled that the records were exempt from disclosure due to the potential harm of unsolicited contact and confrontation between the citizen and requestor
- Council determined that requestor's stated need did not outweigh the citizen's expectation of privacy

Laws Superseding OPRA's Access (Federal Law)

➤ Tombs (2003-123)

- Requested records: Digital copy of Geographical Information System topographic mapping data
- The case was referred to the Office of Administrative Law because there were contested facts
- An Administrative Law Judge ruled that the records were exempt from disclosure under federal law (Federal Homeland Security) and that the GRC could not order disclosure
- The Council's decision was appealed and affirmed in an unpublished opinion of the Appellate Division of Superior Court in December 2006

Agency Policy Does Not Supersede OPRA

➤ Renna (2004-136)

- Requestor wanted to receive records via e-mail or fax
- Custodian refused based on agency policy prohibiting the transmission of records via e-mail or fax
- Agency policy does not supersede OPRA
- Council ordered disclosure in the medium requested (via e-mail) pursuant to N.J.S.A. 47:1A-5.d.

Special Service Charge

➤ Fisher (2004-55)

- Special service charge is allowed under OPRA. N.J.S.A. 47:1A-5.c.
- Council established 14 factor criteria for evaluating (1) whether a special service charge is warranted and (2) whether amount is reasonable
- See also The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191 (Law Div. 2002)

Special Service Charge (cont'd)

➤ Renna (2004-134)

- Custodian requested a special service charge of \$2,260.00
- After applying the “Fisher 14,” the Council allowed only \$1,048.17
- Council determined that the level of human resource used and number of hours assessed were not necessary

GRC Lacks Authority Over Accuracy of Record Content

➤ Kawanzaa (2004-167)

- Requested records: Work credits, commutation credits and jail credits
- Records responsive to request were disclosed within the statutorily required time
- Complainant raised issue with the accuracy of the records' content
- Council ruled that it does not have authority over content of records pursuant to N.J.S.A. 47:1A-7.b.

GRC Lacks Authority Over Records Retention

➤ Merino (2003-110)

- Custodian's Response: No records responsive exist
- The NJ Dept of State - Division of Archives and Records Management (DARM) approved records retention schedule which allowed the destruction of the requested records before the request was made
- Council ruled that it does not have authority over records retention pursuant to N.J.S.A. 47:1A-7.b.