

Recent OPRA Decisions

Presented by the
New Jersey Government Records Council
and
New Jersey League of Municipalities



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Recent GRC Decisions

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Social Media

- Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2017-169 (Interim Order dated November 12, 2019)

- The Council held that a custodian unlawfully denied access to records from a GoFundMe campaign set up and managed by the Township Mayor.
- See also Larkin v. Borough of Glen Rock, Docket No. BER-L-2573-18 (June 15, 2018) (holding that the Mayor and Council's Facebook block lists were subject to disclosure); Wronko v. Borough of Carteret, Docket No. MID-L-5499-18 (Order dated January 11, 2019).

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Records Accessible on a Website

- Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014):

- Here, the GRC reversed its prior decision in Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC 2009-148 (Interim Order dated June 29, 2010), by providing that custodians have the ability to refer requestors to the **exact location** on the Internet where a responsive record can be located. Id. at 3-4.
- However, that does not permit you to say, "It's on our website; find it yourself!"

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GLOMAR Response

- **Harmon v. Morris Cnty. Prosecutor's Office**, GRC Complaint No. 2017-38 (February 2019)
 - The Council held that the custodian lawfully denied access to an OPRA request on the basis that he could "neither confirm nor deny" the exist of responsive records, also known as a "Glomar response."
 - The Council relied on the test derived from N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 447 N.J. Super. 182 (App. Div. 2016):

[T]he agency [must] (1) rel[y] upon the exemption authorized by OPRA that would itself preclude the agency from acknowledging the existence of such documents and (2) present[] a sufficient basis for the court to determine that the claimed exemption applies.

[Id. at 188.]

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Surveillance Cameras

- **Howard v. N.J. Transit**, GRC Complaint No. 2018-43 (November 2019)
 - The Council held that the custodian lawfully denied access to surveillance camera footage from a public transit center under N.J.S.A. 47:1A-1.1. See also Gilleran v. Twp. of Bloomfield, 227 N.J. 159 (2016).

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Records in Possession of the Judiciary

- **Simmons v. Mercado**, ___ N.J. Super. ___ (App. Div. 2020)
 - Plaintiff filed an OPRA request seeking arrest listings, complaints for DWI and drug paraphernalia possession of Simmons.
 - The Appellate Division reversed trial court and held that because the records were not maintained by the police, but by the Judiciary, the records were not within the custody or control of the police. As for the arrest records, the search parameters were so broad that it would have required research by the police and therefore was exempt.
 - Certification before the Supreme Court is pending.

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Draft Documents

- **Libertarians for Transparent Gov't v. Gov't Records Council**, 453 N.J. Super. 83 (App. Div. 2018)
 - Draft minutes are exempt from disclosure under OPRA's "inter-agency or intra-agency advisory, consultative, or deliberative [(ACD)] material" exemption. N.J.S.A. 47:1A-1.1.
- **Daniel v. Twp. of West Orange (Essex)**, GRC Complaint No. 2017-163 (May 2019)
 - Draft resolutions are exempt from disclosure under the ACD exemption, even if shared with a third party prior to approval. N.J.S.A. 47:1A-1.1; Eastwood v. Borough of Englewood Cliffs (Bergen), GRC 2012-121.

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Other GRC Decisions on Appeal 2020 Highlights

- **Smith v. Moorestown Twp.**, 2020 N.J. Super. Unpub. LEXIS 1108 (App. Div. 2020) (affirming GRC 2019-135): App. Div. affirmed the GRC's decision finding that Appellant filed his complaint prematurely. The court held that under the ordinary meaning of the term "denied," the Plaintiff's OPRA request was not denied at the time of filing as the Defendant had yet to respond to the request within the allotted seven (7) business day deadline.
- **Jackson v. N.J. Dep't of Corr.**, 2020 N.J. Super. Unpub. LEXIS 1152 (App. Div. 2020) (affirming GRC 2016-304): App. Div. affirmed the GRC's decision finding that the Defendant did not have an obligation to provide the Plaintiff with records that did not exist or create a new record. The court held that the decision was not arbitrary or capricious given the age of the requested records and their likely destruction in accordance with New Jersey's records retention schedule.

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2020 UPDATE ON OPRA CASES

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1. POLICE RECORDS - INTERNAL AFFAIRS FILES, DISCIPLINARY HISTORY

- **Municipal Internal Affairs Files** – Gannett Satellite Information Network, LLC d/b/a/ Asbury Park Press v. Tp. of Neptune, Docket No. Mon-L-2612-17, App. Div. Docket No. A-004006-18
 - Exempt under OPRA per A.G.'s Internal Affairs Policies and Procedures, but not under common law right of access.
 - See also Simmons v. City of Newark, 2018 N.J. Super. Unpub. LEXIS 2313 (App. Div. 2018) (certif. den. 240 N.J. 137 (2019))

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- **Personnel Records** – Libertarians for Transparent Gov't v. N.J. State Police, 2019 N.J. Super. Unpub. LEXIS 1156 (App. Div. 2019) (certif. granted).

- The App. Div. affirmed a trial court decision denying access to the identity of officer described as terminated for misconduct in a State Police 2015 annual report to Legislature denied.
- Information requested, "name, title, date of separation and reasons therefor" was exempt under OPRA, inasmuch as it is a personnel record and release would "violate both the letter and the spirit of the exemption itself."
- The Supreme Court granted certification, but later dismissed with prejudice based on a stipulation of dismissal. 239 N.J. 518 (2019); 2020 N.J. LEXIS 804 (2020).

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- Libertarians Tor Transparent Gov't v. Cumberland Cnty., ___ N.J. Super. ___, Docket No. A-1661-18 (App. Div. September 4, 2020) (2020 WL 5264825)

- Except for certain exceptions, personnel and pension records of public employees are not government records subject to release under OPRA. N.J.S.A.47:1A-10.
- Plaintiff sought a settlement agreement between corrections officer and Cumberland County that resolved a disciplinary action that allowed him to retire while retaining certain pension rights and years of service. The trial court agreed with Plaintiff that the agreement was not a personnel record under OPRA and was thus disclosable.
- The App. Div. reversed on the ground that it was not the settlement of litigation, but rather an administrative settlement within the context of a disciplinary proceeding, and accordingly, a personnel record. It remanded the common law claim to the trial court for determination. The order for counsel fees under OPRA was also reversed.

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- **Police SOP Manuals** – Rivera v. Borough of Fort Lee, 2019 N.J. Super. Unpub. LEXIS 1019 (App. Div. 2019).

- The App. Div. reversed and remanded a lower court decision that granted heavy redactions of police department's SOPs based on security exemptions.
- The trial court relied on a Vaughn Index that described the SOPs, rather than an *in camera* review. Remand required such a review because custodian had to demonstrate that disclosure of emergency or security information would pose a risk to persons, buildings of facility.

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- **Internal Affairs Records** – Rivera v. Union Cnty. Prosecutor's Office, 2020 N.J. Super. Unpub. LEXIS 1192 (App. Div. 2020)

- An Internal Affairs ("IA") investigation of Elizabeth Police Director resulted in resignation of PD. Defendants sent a letter to PD attorney who released it to the press. Plaintiff sought complete IA file under OPRA and common law.
- The App. Div. reversed the trial court, holding that IA materials are not personnel records, but the Attorney General's Internal Affairs Policy and Procedure ("IAPP") provides that IA reports are exempt from disclosure under OPRA. Applying the Loigman factors, the common law claim was also reversed on the basis that anonymity of complainants outweighs right to public access.

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2. FAILURE TO FILE OPRA REQUEST

- **Request to Proper Entity** – Moawad v. City of Bayonne Police Dep't, 2018 N.J. Super. Unpub. LEXIS 2487 (App. Div. 2018) (affirming GRC 2017-162).

- Appellant improperly filed a complaint against an agency to whom she did not submit the subject OPRA request.

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3. SPECIFICITY OF REQUEST

- **Records requests must specify the documents being sought** – Moretti v. Bergen Cnty. Prosecutor’s Office, 2019 N.J. Super. Unpub. LEXIS 64 (App. Div. 2019) (affirming GRC 2015-390).
 - App. Div. held that a request seeking “hardcopies via U.S. mail of records the Prosecutor had which would be helpful in continuing to live in Bergen County” or for “records for supporting materials so [he] does not become a victim of a municipal property seizure” was properly denied as invalid.
 - Supreme Court denied certification. 238 N.J. 57 (2019).

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- **Last Invoice** – Gordon v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 909 (App. Div. 2019).
 - Request for copy of the “last invoice” for the city’s purchase of CDs. City ultimately produced two invoices, one for CD sleeves and one for CDs, both after the date of the request. GRC ordered production of an invoice dated before the request, which was done. Even though the production was delayed due to which agency in city government had the documents, the GRC ruled that request was not willfully or purposely denied.
 - App. Div. affirmed the GRC’s decision.

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- **Research vs. Request for Identifiable Records** – Carter v. N.J. Dep’t. of Cmty. Affairs, 2019 N.J. Super. Unpub. LEXIS 2510 (App. Div. 2019) (affirming GRC 2016-262)

- Requester sought complete copies of any and all “Notice of Docketing” records resulting from appeal of any final decision of the Local Finance Board from 2011 through 2016. The GRC held that the request was invalid.
- App. Div. affirmed the GRC’s decision.
- Supreme Court denied certification. 241 N.J. 215 (2020).

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Question: Is a request seeking “any and all COs issued by the Town” valid?

- Such a request is invalid. OPRA is not a research tool or to be used for a fishing expedition. The request must contain a reasonable degree of specificity. However, custodian should contact requester to narrow the search by property and date range. Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 1660 (App. Div. 2008)

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4. PERSONAL EMAILS ON PUBLIC SERVER NOT GOVERNMENT RECORDS

- **Political Action Committee E-mails** – Carter v. Franklin Fire Dist. No. 1, 2018 N.J. Super. Unpub. LEXIS 2189 (App. Div. 2018) (affirming GRC 2011-318).
 - The App. Div. affirmed the GRC’s decision that e-mails related to PAC activities were not “government records” inasmuch as they were not made, maintained or received by the public entity in the course of its official business.

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5. PRIVACY

- **Return to Dog Licenses** – Bozzi v. Borough of Roselle Park, 462 N.J. Super. 415 (App. Div. 2020).
 - Prior opinions ruled that “reasonable expectations of privacy” formed the basis of redactions for dog license applicants’ names and addresses.
 - Recently, the App. Div. ruled that the Borough had not presented a colorable claim that the information invaded an “objectively reasonable expectation of privacy,” and therefore would not apply the Doe v. Poritz, 142 N.J. 1 (1995) factors in its analysis.

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6. POLICE AND CRIMINAL INVESTIGATORY RECORDS

- **Dash Cam Videos** – Ganzweig v. Twp. of Lakewood, 2019 N.J. Super. Unpub. LEXIS 235 (App. Div. 2019).
 - On remand from the Supreme Court for reconsideration in light of Paff v. Ocean Cnty. Prosecutor's Office, 235 N.J. 1 (2017), the App. Div. held that the requested recordings were exempt under the “investigation in progress” exemption.
 - The App. Div. also remanded for a Common Law determination. Thus, the Ganzweig saga continues.

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- **Use of Force Reports Involving Juvenile** – Digital First Media, d/b/a/ The Trentonian v. Ewing Twp., 462 N.J. Super. 389 (App. Div. 2020)
 - The App. Div. held that UFRs containing juvenile names are disclosable under OPRA, but after redacting said names and other identifying information.
 - Supreme Court denied certification. 243 N.J. 266 (2020).

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- **Sex Assault Victim's Diary** – Medina v. McFadden, 2020 N.J. Super. Unpub LEXIS 1097 (App. Div. 2020)

- Plaintiff, who was convicted of multiple sex crimes on minors, filed OPRA and common law requests for release of a copy of the diary of one of his victims because it may “point the finger” at someone else and exonerate him. The trial court denied the applications.
- The App. Div. affirmed holding that because there was no requirement to make the record (the diary) and because it came into police possession during the criminal investigation, it was a criminal investigatory record and exempt from disclosure. N.J.S.A. 47:1A-1.1. The court also affirmed the common law denial because the need for keeping the diary of the victim confidential outweighed the right for it to be disclosed.

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- **Question: Can a custodian redact juvenile information from auto-accident reports?**
 - Such reports (New Jersey Crash Investigation Report (NJTR-1)) must be released without redaction. N.J.S.A. 39:4-131.
- **Question: Can a custodian redact HIPAA information within auto-accident reports?**
 - No. Accident reports are released without redaction. N.J.S.A. 39:4-131.
- It should be noted that N. Jersey Media Grp., Inc. v. Twp. of Nutley, 2016 N.J. Super. Unpub. LEXIS 2166 (App. Div. 2016), the court did allow for redactions to an auto-accident report. However, the overall applicability of this decision is still unclear.
- **Question: Can a custodian redact a body camera video?**
 - Confidential information such as Social Security Numbers, HIPAA, etc., would be redacted using the same tests for confidentiality as for any other OPRA request.

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7. PRODUCTION OF RECORDS IN DIGITAL FORMAT

- **Digital Format** – Carter v. Franklin Fire Dist. No. 1, 2019 N.J. Super. Unpub. LEXIS 590 (App. Div. 2019) (affirmed in part, reversed in part GRC 2014-137 *et seq.*)
 - App. Div. affirmed the GRC's decision that respondent properly disclosed records in .pdf because appellant did not identify a specific digital format in his request.
 - However, the App. Div. remanded to GRC because the custodian's certification detailing search was not made on personal knowledge as to efforts of all parties' search efforts.

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8. ATTORNEY'S FEES

- **Attorney's Fees under the Common Law** – Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008)
 - OPRA contains a fee-shifting provision allowing a prevailing requestor to obtain attorney's fees.
- 12 years later, the “catalyst theory” often used in Common Law claims is still applied to OPRA fee issues.
 - Under the American Rule, each party bears its own costs and fees. In Mason, the Court made passing reference to the catalyst theory as applying to Common Law claims, in the absence of an apparent, theoretical distinction to its OPR analysis. However, no final ruling has been made by the Supreme Court.
 - Stay tuned, as the App. Div. is currently pondering the issue. Gannett, Docket No. Mon-L-2612-17 *on appeal as Docket No. A-004006-18*.

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- Nuckel v. N.J. Economic Dev. Auth., 2020 N.J. Super. Unpub LEXIS 948 (App. Div. 2020)
 - The App. Div. affirmed a trial court decision that denied counsel fees under OPRA and the common law, where Plaintiff was denied certain documents from the NJEDA on the basis that they contained, *inter alia*, trade secrets of the intervenor, who was an applicant before the NJEDA.
 - While the case was pending, Plaintiff subpoenaed the same documents directly from the applicant (intervenor) in a separate lawsuit. The trial court then dismissed the OPRA and common law complaint with prejudice. Plaintiff sought counsel fees under OPRA and common law as the “catalyst” for the disclosure. The trial court denied fees based on insufficient evidence that this action was the “catalyst” for the relief achieved, in that Plaintiff had already obtained the documents from a separate source.

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- **Pro se Litigants – Feld v. City of Orange Twp.**, 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. 2019)
 - *Pro se* litigants are not entitled to counsel fees under OPRA, especially when the litigant is an attorney.
- **Assad v. Absecon Bd. of Educ.**, 2020 N.J. Super. Unpub. LEXIS 1626 (App. Div. 2020)
 - Plaintiff requested copies of his school records. The Board produced what it had after diligent search but had not maintained all his records as required by N.J.S.A. 18A:36-19 and N.J.A.C. 6A:32-7.8(e). Plaintiff claimed a violation of OPRA and common law for failing to maintain all his records for 100 years and sought counsel fees because he was a “catalyst.” The trial court concluded that Plaintiff had received all the existing records and that the NJPRA did not allow a separate cause of action, only an administrative remedy. Further, Plaintiff was not a prevailing party, a “catalyst”, nor entitled to counsel fees, because he appeared *pro se*.
 - The App. Div. affirmed essentially following the reasoning of the trial court.

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- **Public Agency Must Follow Requirements of OPRA, Even When Told By FBI Not To Release Documents – Golden v. NJIT**, 934 F.3d 302 (3d Cir. 2019)
 - Attorney fees awarded by Federal Court in OPRA case, where FBI had directed NJIT not to release the records. NJIT complied and refused release. The Court ruled that NJIT had to follow OPRA, not the FBI.

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- **Amount of Attorney’s Fees**
 - “Lodestar” - The number of hours times a reasonable hourly rate.
 - However, when a requester is only partially successful, a court may adjust the formula.
 - Port Auth. PBA, Inc. v. Port Auth. of NY and NJ, 2018 N.J. Super. Unpub. LEXIS 2785 (App. Div. 2018): Of 58 requests, the agency granted 6, requested more time on 14, and denied 38 as overbroad for lack of clarity. When appealed, the court ordered the 14 produced, and affirmed the denial of the 38. It then calculated the fees using a proportional method of awarding fees based on the percentage of success to the total number of documents demanded. The method was affirmed on appeal.
 - Mills v. State of N.J. Div. of State Police, 2020 N.J. Super. Unpub. LEXIS 1545 (App. Div. 2020): Plaintiff sought certain documents related to his arrest, pursuant to OPRA and common law. The trial court reviewed the file *in camera* and ordered release of complaint, affidavit of probable cause, arrest report, and dismissal of charges. Plaintiff admitted having previously received all docs except 2-page arrest report. Under common law, the court ordered production of 46 additional pages of records but denied 120 pages of other documents. Plaintiff sought a fee award of \$13,248 and costs of \$362.95. The court reduced the fee to \$2,376 and no costs. App. Div. affirmed saying that hourly rate of \$360 and reduction because of limited success, was reasonable. No fees under CLRA were awarded because Mason, 196 N.J. 51 did not abrogate the American Rule. A remand was ordered for reconsideration of the costs requested.

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- **What is a Reasonable Hourly Rate?**
- To set the “Lodestar”, courts have held that the rate:
 - Should be determined in comparison to rate for “similar services by lawyers of reasonably comparable skill, experience and reputation in the community”, or “that would be charged by an adequately experienced attorney possessed of average skill and ordinary competence – not those that would be set by the most successful of highly skilled specialized attorney in the context of private practice.”
 - Degree of success likewise factors in.
- Cases currently on appeal have hourly rates for OPRA cases on \$500 or more. This places tremendous burdens on public entities whose funds ultimately come from the taxpayer. One Journal Square Partner Urban Renewal Co., LLC v. Jersey City, App. Div., A-004272-18.
- Be very careful in responding to OPRA requests.

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9. DELIBERATIVE PROCESS PRIVILEGE

- **The Privilege Requires Careful Analysis – Freeswick v. Wayne Twp. Bd. Of Educ.**, 2020 N.J. Super. Unpub. LEXIS 79 (App. Div. 2020).
 - Student transfers and athletic eligibility led to recommendations to improve the district’s related policy. The court held that interview summaries of Superintendent and employees, as well as opinions and recommendation of special counsel, were exempt from disclosure.
 - Attorney invoices were released subject to redaction of names on interviewees.

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10. RELEASE OF EXPUNGED RECORDS

- **Care to be Taken on Release of Confidential Records**
- OPRA incorporates confidentiality concerns – “reasonable expectation of privacy”, trade secrets, *etc.*, as a factor in releasing documents.
- Improper release could lead to claims for damages against the entity and the custodian.
 - Such claims would have to be made under the Tort Claims Act, N.J.S.A. 59:1-1. See K.S. v. Verrecchio, 2019 N.J. Super. Unpub. LEXIS 1132 (App. Div. 2019).

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11. ABUSE OF OPRA

- **What To Do When Overwhelmed – Twp. of Teaneck v. Jones, 2017 N.J. Super. Unpub. LEXIS 1606 (App. Div. 2019)**
 - Teaneck had 380 OPRA requests by one individual between November 2016 and January 2017.
 - Teaneck filed for an injunction to relieve them from having to respond to defendant and enjoining him from filing any future OPA requests, which the court denied.
 - On appeal, Teaneck sought to overturn the prior decision and claimed that defendant was not a prevailing party because it sought the injunction. However, the App. Div. affirmed the prior decision and held that defendant was a prevailing party entitled to a fee award.

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