

The Open Public Records Act

New Jersey Government Records Council



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The Most Important Number Today!

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WHAT IS OPRA?

- The New Jersey Open Public Records Act. N.J.S.A. 47:1A-1 et. seq. (“OPRA”).
- Effective July 2002, OPRA replaced the former Right to Know Law and broadly expanded the definition of a public record. Over 17 Years!!!
- OPRA created the Government Records Council (“GRC”). N.J.S.A. 47:1A-7.
- OPRA authorizes a complaint process via either the GRC or Superior Court. N.J.S.A. 47:1A-6.

2002 – NJ enacted OPRA

OPRA broadly defines a government record, much more so than the Right to Know law. OPRA is an effort to give the public greater access to government records by balancing:

1. The public's interest in government records.
2. Respect for personal privacy.
3. The efficient process of government.

What OPRA is NOT Supposed to Be!

1. A method of abuse.
2. A game of “gotcha.”
3. A way to waste government time and money.

The Government Records Council

Among other duties, the GRC:

- Adjudicates denials of access (quasi-judicial).
- Administers a mediation program.
- Prepares informational materials.
- Provides OPRA training.
- Operates an OPRA hotline (**1-866-850-0511**).

- GRC Complaint Process:
 - Step One: Denial of Access Complaint. You can now file DOACs online!!!
 - Step Two: Mediation (optional).
 - Step Three: Adjudication.
 - Step Four (if desired): Appeal from the GRC's decision to Appellate Division of NJ Superior Court.

Guidance v. Legal Advice

- The GRC can provide guidance. Use the GRC as a reference library. We can provide resources you might need (OPRA provisions, prior GRC case law) so that you can make your own decision whether to grant or deny. The GRC cannot make the decision for you.
- The GRC is not statutorily empowered to provide you legal advice. We cannot tell custodians exactly how to respond to a request. Get a lawyer! Nor can we tell requestors exactly how to craft a request.

Mediation Program

- N.J.S.A. 47:1A-7(d); N.J.S.A. 2A:23C-1 *et seq.* (“Uniform Mediation Act”)
- **Mediation** is an **Informal** and **Confidential** provided by the GRC at no cost to the parties. Mediation is voluntary: a complaint will be referred to mediation if both parties agree to it.
- Not agreeing to mediate will not adversely affect the declining party.
- Attorney presentation is not required.

When is OPRA used?

- When the requestor chooses to invoke the statute. The requestor elects to invoke OPRA's provisions by submitting an OPRA request.

Are there other ways to request records?

- Common law requests
- Discovery requests, which is not the same as OPRA. See Bart v. City of Passaic (Passaic), GRC 2007-162 (April 2008)
- Administrative/Informal requests (example: requestor comes to Clerk's counter and orally asks to review minutes book)
- Other court processes (*i.e.* subpoenas, court orders)
 - GRC has no adjudicatory authority

Who Can Request Records?

- Anyone!
- OPRA allows for anonymous requests
- Commercial Requestors
- Out-of-State Requestors: See Scheeler v. Atl. Cnty. Mun. Joint Ins. Fund, 454 N.J. Super. 621 (App. Div. 2018)
- The identity of the requestor may affect their right of access in limited circumstances.

What is a “public
agency” under OPRA?

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

- Any of the principal departments in Executive branch of State government, or any division board, bureau, office, commission, or other instrumentality within or created by such department.
- Examples:
 - NJ Department of Banking and Insurance.
 - Department of Agriculture.
 - The Attorney General's Office.

- Any independent State authority, commission, instrumentality, or agency.
 - Example: Lottery Commission.
- Political subdivision of the State, or any entity created by a political subdivision.
 - Municipalities, County government, school districts, League of Municipalities.
- Port Authority of New York/New Jersey
L. 2015, c. 64.

- The Legislature of this state and any office, board, bureau, or commission within or created by the Legislative Branch.
- Keep in mind, though, that most legislative records are exempt. See N.J.S.A. 47:1A-1.1

What is a “government record” under OPRA?

- The default answer is all records that are made, maintained, kept on file, or received in the course of official business. N.J.S.A. 47:1A-1.1.
- However, exemptions within OPRA, other statutes, regulations, executive orders, *etc.* may effectively exempt access to records in part of whole.

Who is the official
records custodian?

- Municipality - the municipal clerk. N.J.S.A. 47:1A-1.1
 - Sub-departments may have own custodian 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.

- Best practices dictate that an agency should designate a substitute custodian to receive/fulfill requests in the Custodian's absence.
- With respect to a municipality, the GRC will recognize separate custodians by division/department when that custodian has been adequately publicized to the public.

What is an OPRA Request?

- A request *should be* on an official OPRA request form. However, use of the form is not mandatory. See Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009): “the form should be used but no request . . . should be rejected if such form is not used.”
- A written request (letter, fax, e-mail, cocktail napkin, *etc.*) that clearly references OPRA.
- If a written request does not mention OPRA anywhere, it is not an OPRA request.
- Verbal requests are never OPRA requests.

OPRA Request Form Requirements

- Every public agency is required to adopt an official OPRA request form.
- Required form criteria prescribed by N.J.S.A. 47:1A-5(f). The GRC's Model Request Form is also available for download.
- Agencies may create their own request form, but be careful not to include misinformation or stray too far afield in your creativity. See Wolosky v. Twp. of East Hannover, GRC 2010-185 (holding that the agency's form not compliant, because it contained potentially misleading information).

OPRA Request Example: Invalid Non-Form Request

Is This Non-Form Request Valid?

- This is a request for all meeting minutes from January 1, 2002, to the present date. Please e-mail those minutes to me at the address listed below.
- No. The requestor fails to identify OPRA; thus, it is not a valid OPRA request.

How About This Request?

- Please provide the Town Council's open session meeting minutes from the April 15, 2016 public meeting in accordance with N.J.S.A. 47:1A-6. Kindly e-mail the minutes to the address listed below.
- Yes! The requestor identifies that they are making the request pursuant to OPRA.

How Does a Requestor Submit an OPRA Request?

- Hand delivery, mail, electronic transmission, or otherwise conveyed to the appropriate custodian. N.J.S.A. 47:1A-5(g).
- Agencies may limit submission options based on technological capabilities.

BUT...

- An agency cannot impose an unreasonable obstacle for requestor! Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009).

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

N.J.S.A. 47:1A-5(h) requires the employee to:

1. Return the request to the requestor and direct requestor to proper custodian; or
2. Accept the request and forward it to proper custodian.

How must a custodian
respond to an OPRA
request?

- A response must be IN WRITING! No oral responses. No telephonic responses.
- Within required response time.
- By addressing each item requested, either:
 - Granting access;
 - Denying access;
 - Seeking clarification; or
 - Requesting an extension of time.

Again, remember that our top violation is “deemed” denials.

Tips in Responding: Ask yourself...

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?
5. Substantial disruption of agency operations?
6. Can I obtain records responsive to request?
7. Do the records or portions thereof fit into any of OPRA's exemptions?
8. Must I redact, convert to requested medium, calculate appropriate fees?
9. Can I provide records via the requested method of delivery?
10. If I must deny, can I do so with legal basis in writing?

When is a response to an
OPRA request due?

- N.J.S.A. 47:1A-5(i) “As soon as possible, but not later than seven days after receiving the request.”

Exceptions – stand by!!!

- The most common OPRA violation: “Deemed” denial. N.J.S.A. 47:1A-5(i).

- Day 1 starts the day after the custodian receives the request.
 - Assuming no holidays or other closings, if a request is received on Wednesday, when is it due?
- All responses must be in writing. N.J.S.A. 47:1A-5(i).

Are there exceptions to
the standard seven day
response time?

YES!!!

Immediate Access:

N.J.S.A. 47:1A-5(e).

Immediate access ordinarily shall be granted to:

- Budgets.
- Bills.
- Vouchers.
- Contracts, including collective negotiations agreements and individual employment contracts.
- Public employee salary and overtime information.

Immediate Access

- Immediate means as immediately as possible – **at once, without delay** unless records are in storage, in use, or require medium conversion. Renna v. Cnty. of Union, GRC 2008-110 (March 2009).
- If a custodian cannot provide immediate access to records, the custodian must reduce the reason to writing and request an extension of time to comply with the “immediate” statutory requirement.
- The response itself must be immediate. Herron v. Twp. of Montclair, GRC 2006-178.
- Part of a larger request? Kohn v. Twp. of Livingston (Essex), GRC 2011-330.

Information Concerning a Criminal Investigation

N.J.S.A. 47:1A-3(b).

Certain information regarding a criminal investigation must be disclosed within 24 hours or as soon as practicable.

- 2 Categories
 - when crime is reported but no arrest yet made,
 - if an arrest has been made.
- Caveat: information may be withheld if determined to jeopardize: 1) the safety of any person; or 2) the investigation in progress

What Does the GRC
Consider a Sufficient
Response?

A proper response to an OPRA request:

- Is in writing within seven (7) business days!!!
- (Exception for immediate access and 3(b))!!!!
- Grants access, denies access, seeks clarification, or requests an extension of time (including an anticipated deadline date) w/in the appropriate response time.
- Addresses each record requested. Stand by!
- Addresses requestor's preferred method of delivery.
- Provides an account of the actual cost of duplicating the records, if any.
- If special service charge applies, provides estimate and gives requestor opportunity to accept or reject.
- Includes index that identifies the specific legal basis for a denial of access (including redactions).

Lawful Basis for Denial

- Custodians must provide a lawful basis for denial at the time of denial.
- This includes outright denials and redactions. You cannot merely say, “it’s exempt, so go away!”
- Examples: Dear requestor:
 - With respect to request No. 3, Jane Smith’s social security number is redacted because social security numbers are exempt from public access pursuant to N.J.S.A. 47:1A-1.1.
 - The 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 that could divulge strategy.

What if the request
cannot be fulfilled within
the required time frame?

- Seek extension of time to a date certain for legitimate reasons (examples: records in storage, medium conversion, voluminous request).
 - Papiez v. Cnty. of Mercer, GRC 2012-59.
- The requestor's approval is not required
- Failure to grant/deny access by extended deadline date results in "deemed" denial.
- Ciccarone v. N.J. Dep't of Treasury, GRC 2013-280.

What if there is not
enough information to
fulfill the request?

- When addressing a request that the custodian believes may not include enough information to provide a proper response, he/she generally has two (2) options:
 - Seeking clarification of the request
 - Denying the request on the basis that it is invalid.
Stay tuned . . .

Seeking Clarification

- Seek clarification of the request from the requestor. See Leibel v. Manalapan Englishtown Reg'l Bd. of Educ., GRC 2004-51 (September 2004)
- Clarification request must be in writing within the required response time.
- Response time stops until requestor responds. Time begins anew. Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC 2011-100 (IO June 2012).

What is an overly broad
or unclear request?

- Fails to identify with reasonable clarity the specific government records sought.
 - **Overly Broad:** “any and all records connected to the construction of the new high school.”
 - **Valid:** “For the period from January 1, 2016, to March 1, 2016, any and all e-mails between Jane Doe and John Smith regarding the plumbing contract for the high school.”

- A request that requires the custodian to conduct research.
 - **Research:** “all meeting minutes from 2011 in which the Town Council discussed ABC Towing Company.”
 - **Search:** “all Town Council meeting minutes from calendar year 2011.”
- A custodian is obligated to *search* his/her files to *find* records, but is not required to *research* his/her files to figure out which records might be responsive to an OPRA request. See Donato v. Twp. of Union, GRC 2005-182 (February 2007).

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 various GRC decisions that are too numerous to cite here.
- “Any and all” is arguably broad, BUT it does not always suggest an invalid request....

Be careful, though:

. . . A requestor sought access to "[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present."

Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010): The Appellate Division concluded that the request for settlement agreements and releases was valid. The court held that, "[h]ere, it is the documents, themselves, that have been requested, and their retrieval requires a search, not research."

A custodian is generally not required to create records in order to fulfill an OPRA request.

BUT...

See Paff v. Galloway, 229 N.J. 340 (2017), where a requestor asked for an e-mail log showing the sender, recipient, date, and subject matter of e-mails of certain employees over a specific period of time. In reversing the Appellate Division, the Supreme Court rejected the agency's position, essentially contending that producing the e-mail log did not amount to creating a new record.

This case is a very important ruling regarding information stored in databases.

What if the requested records are not in the custodian's possession?

Obtain Records Responsive

- It is reasonable that a custodian might not have physical custody of all records maintained by agency.
- A custodian should document attempts to access records from other departments & personnel.
- A custodian ideally should keep requestor informed of attempts to gain access to 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.

- Obtain records responsive from appropriate departments/personnel. That includes third parties.
 - Example: Is a Custodian required to obtain requested attorney's bills, which are maintained by special counsel's office, and not the municipality? In general, yes! Burnett case.
- Again – the Custodian is always on the hook, but other employees impeding access to government records can be found in violation of OPRA and can be fined.

What is the cost to obtain records under OPRA?

Copying Fees

- N.J.S.A. 47:1A-5(b) provides:
 - 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).
 - Must charge the actual cost to provide records in another medium (*i.e.* computer disc, CD-ROM, DVD).

So, are there any exceptions
to those fees?

Yes, there are! Here is just
one example:

Fees for Auto Accident Reports

- N.J.S.A. 39:4-131 “If copies of reports are requested other than in person, an additional fee of up to \$5.00 may be added to cover the administrative costs of the report”

Method of Delivery

- A custodian must grant access to a government record by the requested method of delivery (regular mail, fax, e-mail, *etc.*). O'Shea v. Twp. of Fredon (Sussex), GRC 2007-251 (April 2008).
- Charges for such delivery must reflect actual cost. The legislature amended OPRA several years ago to provide that electronic delivery is free of charge.
- Fun Fact – You may charge actual postage costs. Livecchia v. Borough of Mt. Arlington (Morris), GRC 2008-80 (April 2010).
- If a request asks for electronic copies, you cannot decide on your own that the requestor does not need electronic records and instead send paper copies if the records can be produced in electronic format.

What is a special service charge?

Special Service Charge

- Special service charges for “extraordinary” requests must be warranted and 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.

- Labor fee for extraordinary/voluminous requests.
- The charge must be estimated in advance, prior to the charge being incurred.
- Important – the requestor must agree to pay.
- An agency cannot just incur the charge, invoice the requestor, and then send him to a collections agency if he fails to pay.

- Case-by-case determination.
- An ordinance is problematic.
- GRC's "14 Point Analysis"
 - Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191 (October 28, 2002)
 - Fisher v. Div. of Law, 400 N.J. Super. 61 (App. Div. 2008) (Affirming Fisher, GRC 2004-55 (August 2006)).

Special Service Charge Example

- Request: XYZ records from 2005 to present.
- Let's assume that encompasses 3,000 pages of responsive records that will take custodian 7 hours to retrieve, review, redact, and reproduce.
- In that case, the Custodian might be able to charge a staffer's direct hourly rate for the 7 hours required to fulfill the request.
- Custodian must estimate cost and notify requestor before fulfilling the request.

What if the request
substantially disrupts the
operations of the
agency?

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 the circumstances and an agency's resources available to fulfill a request.
- See Caggiano v. N.J. Div. of Consumer Affairs, GRC 2007-69 (September 2007)
- But See Caldwell v. Vineland Bd. Of Educ. (Cumberland), GRC 2009-278 (March 2011)

What if only portions of
a record are exempt from
public access?

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 prior to providing the copy to the requestor. Ensure that your redactions cannot be undone or seen through.

- A redaction should be made using a “visually obvious method.” White out is problematic. See Scheeler v. City of Cape May (Cape May), GRC 2015-91 (IO December 2015).
- 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!!**

What if an entire page of
a document needs to be
redacted?

Redactions, cont.

- Custodians can use a full sheet of paper in the packet of responsive documents to indicate that the entire page was redacted and that the page should cite to the statutory exemption.

Can a requestor ask for records in a specific medium?

Requests in a certain medium

- **Yes! And, guess what?!**
- **You must provide the records in the requested format – to the extent reasonably possible!**

Medium Conversion

- A custodian **must** permit access to government records in the medium requested. N.J.S.A. 47:1A-5(d).
- More yet – 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” N.J.S.A. 47:1A-5(d).
 - GRC interprets “meaningful” as meaningful to the requestor, not just convenient for the Custodian.

Is there a fee to convert
records to a specific
medium?

Medium Conversion, cont.

- Potentially:
 - A custodian may impose a charge, where applicable, related to conversion for:
 - Extensive use of technology.
 - Labor for programming, clerical and supervisory assistance that may be required.

Medium Conversion, cont.

- 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. O'Shea v. Pine Hill Bd. Of Educ. (Camden), GRC 2007-192 (February 2009).

Actual costs apply. So, what do you think?

- **Example 1:** Requestor wants a record sent via e-mail. Custodian must scan paper document to convert to electronic format. The request takes the Custodian 5 minutes to complete. Can you charge for a fee here?
- **Example 2:** Requestor wants an audio recording of a meeting mailed to him in CD-ROM format. The custodian copies the recording in-house onto a \$0.50 CD. The request takes Custodian 20 minutes to complete. Postage is \$0.50. Is there a total charge passable to the requestor?

- **Example 3:** Requestor wants large tax maps on CD-ROM. The Custodian does not have capability to scan large maps and must use a third party vendor. The vendor charges the agency \$15.00 for service. Can the \$15.00 fee be passed onto requestor?
- **Remember:** Vendor fees are akin to special service charges and must be approved by requestor prior to being incurred.

How must a custodian
send records to a
requestor?

- A custodian must grant access to a government record by the specific method of delivery identified by the requestor.

Example: A requestor wants records sent via fax. The custodian must send the records via fax.

Can a small agency set
specific times to
receive/fulfill OPRA
requests?

- Yes! N.J.S.A. 47:1A-5(a).
 1. Municipalities with a population of 5,000 residents or less.
 2. Boards of Education with total enrollment of 500 or fewer.
 3. Public authorities with less than \$10 million in assets.

- What times?
 - Not less than 6 regular business hours over not less than 3 business days per week or the entity's regularly scheduled business hours, whichever is less.
- What does it all mean?!
 - The GRC interprets that to mean 2 hours a day for 3 days a week, minimum, unless the agency's regularly scheduled business hours are less.

What about privacy
concerns?

- OPRA’s legislative findings state “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.” N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009)
- Decisions on privacy are always made on a case-by-case basis by balancing the requestor’s need for the information against the agency’s need to keep the information confidential.

Privacy, cont.

- Dog license applications? Yes or no?
- Bernstein v. Borough of Allendale, GRC Complaint No. 2004-195: 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.”

Privacy, cont.

- Dog licenses, part two:
- Atlantic Cnty. SPCA v. City of Absecon, 2009 N.J. Super. Unpub. LEXIS 1370 (App. Div. 2009): The Court conducted a balancing test and held that ASPCA's need for access to dog license information out-weighed the City's need for confidentiality. A major factor was the ASPCA's mission to investigate alleged animal abuse.

Privacy, cont.

The GRC has routinely upheld a custodian's redaction of home addresses and home telephone numbers due to privacy concerns.

However, that position is not universal.

What if OPRA requests
become excessive or
harassing?

Excessive or Harassing

- **Simply stated: good luck!**
- There is one example out of North Jersey, where an agency went to a Superior Court judge and sought an order to invalidate numerous requests from a particular frequent requestor. The town sought to enjoin that requestor from making future requests.
- The Court in that case granted a limited restriction. The Court agreed that the the requestor went out of his way to be a problem.

Excessive/Harass, cont.

- One agency was able to obtain a restraining order against an individual that included a full ban on OPRA request submissions.
- In short, if an agency can make a good argument to a court, it could be sustained.

What if the requestor
asks for records that
have already been
provided?

- Unless the custodian has proof at the time of the new OPRA request that the requestor is still in possession of the same records, access must be granted again.
- In Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008), the court held that the complainant could not have been denied access to a record if he had the record in his possession at the time of the OPRA request.
- Important: In Bart, the custodian had proof at the time of the request that the complainant was still in possession of the requested record. This decision is not universally applicable!

What if the responsive records are posted online or posted to an agency's website?

- Rodriguez v. Kean Univ., GRC 2013-69 (March 2014):
 - Here, the GRC reversed its prior decision in Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC 2009-148 (IO June 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; go find it!”

- A custodian's ability to direct a requestor to the specific location of a government record on the Internet is contingent upon on the requestor's ability to electronically access the records.
- If the requestor is unable to obtain the information from the Internet and makes it known to the custodian within seven (7) business days after receipt of the custodian's response, the custodian will have seven (7) business days from the date of such notice to disclose the record(s) in hardcopy. Id. at 4.

What is the knowing and
willful penalty?

- A public official, officer, employee or custodian who knowingly and willfully violates OPRA and unreasonably denies access under the totality of the circumstances is assessed a monetary penalty.
 - \$1,000 for initial violation.
 - \$2,500 for second violation within 10 years of initial violation.
 - \$5,000 for third violation within 10 years of initial violation.
- The GRC holds that the penalty is paid personally by the individual found in violation, not by the public agency.

- Knowing and willful = a high standard.
 - Actions must have been much more than negligent conduct.
 - The individual must have had some knowledge that his actions were wrongful.
 - Actions must have had a positive element of conscious wrongdoing.
 - Actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden.
 - Actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional.

K&W Fines?

- The GRC has issued six knowing and willful fines to five different custodians (the GRC has actually issued seven penalties, but the Appellate Division reversed one). One of the five custodians has been fined twice.
- The Courts can also impose a fine. N. Jersey Media Grp. v. State Office of the Governor, 451 N.J. Super. 282 (App. Div. 2017)

What are prevailing
party attorney's fees?

Prevailing Party Fees

- Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006): A complainant prevails when they **achieve 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.
- See also Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008)

- When a requestor “prevails” in OPRA litigation (in court or with GRC) and is represented by legal counsel, the defendant public agency must pay the requestor’s reasonable attorney’s fees.
- What does it mean to “prevail?”
 - The filing of the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.
 - A factual causal nexus exists between the requestor’s litigation and the relief ultimately achieved.
 - The relief ultimately achieved had a basis in law.

PPAF, cont.

- The GRC position is that requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate:
 - (1) a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; and
 - (2) that the relief ultimately secured has a basis in law.

PPAF, cont.

- Keep in mind that PPAFs are not guaranteed in every case.
- In 2016, the App. Div. reversed a prevailing party award to the tune of \$57,000. The court ruled that, although the agency had provided certain other records to the requestor post petition, the OPRA suit did not necessarily cause the change in the Custodian's behavior. N. Jersey Media Grp. v. State Dep't of Law and Pub. Safety, 2016 N.J. Super. Unpub. LEXIS 1881 (App. Div. 2016).

PPAF, cont.

- Boggia v. Borough of Oakland, GRC 2005-36 (IO October 2005).
- The Council denied prevailing party fees to the complainant, who was an attorney representing himself. The Council reasoned that “the courts of this state have determined that . . . fee shifting statutes are intended to compensate an attorney hired to represent a plaintiff, not an attorney . . . representing himself.”
- More recently: Feld v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. 2019)

So, here we go!!!

REAL

WORLD

SITUATIONS

Text Messages

- The Council held that a plain reading of OPRA supports that text messages are “government records” subject to disclosure so long as the text messages have been “made, maintained or kept on file . . . or . . . received in the course of . . . official business. . . .” N.J.S.A. 47:1A-1.1. The Council stressed that its determination broadly addresses the characterization of text messages as “government records” and notes that exemptions to disclosure may apply on a case-by-case basis. The Council’s determination should therefore not be construed to provide for unmitigated access to text messages.

Verry v. Franklin Fire District No. 1, GRC Complaint No. 2014-387 (July 2015).

Elcavage Factors

- The Council held that an OPRA request for e-mails must focus upon the following characteristics:
 - Content and/or subject
 - Specific date or range of dates
 - Sender and/or Recipient

Elcavage v. West Milford Twp. (Passaic),
GRC Complaint No. 2009-07 (April 2010).

Messages composed & sent by requestor

The agency's Custodian lawfully denied access to the responsive records because the Complainant sought e-mails that he, himself, had composed and sent to the agency and because disclosure of those records to the Complainant "does not advance the purpose of OPRA."

Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2014-408 (July 2015).

Form DD-214

Certificate of honorable discharge: N.J.S.A. 47:1A-1.1

[A]ny copy of form DD-214 . . . or any other certificate of honorable discharge . . . from active service or the reserves of a branch of the Armed Forces of the United States, or from service in the organized Militia of the State, that has been filed by an individual 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.

Rosenblum v. Borough of Closter, GRC Complaint No. 2005-16 (October 2005).

Personal identifying information:

- Social security numbers. Herron v. N.J. Dep't of Educ., GRC Complaint No. 2011-268 (December 2012).
- Credit card numbers. GRC typically finds them exempt.
- Unlisted telephone numbers. Smith v. Dep't of Corr., GRC Complaint No. 2004-163 (June 2005).
- Drivers' license numbers. Blue v. Wall Twp. Police Dep't, GRC Complaint No. 2002-47 (August 2003).

No Responsive Records Exist

- Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
- The Council held that no unlawful denial of access occurred because the custodian certified that no responsive records exist and the complainant provided no competent, credible evidence to refute the custodian's certification.

Ongoing/Continuing Requests

- Blau v. Union Cnty. Clerk, GRC Complaint No. 2003-75 (January 2005): The complainant 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.”
- Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012): The Council held that if the complainant wanted access to approved meeting minutes, he would have to submit a new request after the minutes were approved.

Medical Examiner Records

- N.J.S.A. 47:1A-1.1 exempts photographs, negatives, prints, videotapes taken at the scene of death or in the course of post mortem examination or autopsy.
- Exceptions:
 - When used in a criminal action or proceeding that relates to the death of that person.
 - For the use as a court of this State permits.
 - For use in the field of forensic pathology or for use in medical or scientific education or research.
 - For use by any law enforcement agency in this State or any other state or federal law enforcement agency.

Copyrighted Material

- Grauer v. N.J. Dep't of Treasury, GRC Complaint No. 2007-03 (November 2007): The Council held that “[b]ased on the court’s holding in Bd. of Chosen Freeholders of Burlington Cnty. v. Robert Bradley Tombs, 215 Fed. Appx 80 (3d Cir. NJ 2006) and the GRC’s decision in Albrecht v. N.J. Dep't 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.”

Litigation

- Darata v. Monmouth Cnty. Freeholders, GRC Complaint No. 2009-312 (Interim Order dated February 24, 2011): “The GRC notes that pending litigation is not a lawful basis for denial of access ... under OPRA. OPRA provides a statutory right of access to governmental records, which is not in any way supplanted by pending or ongoing litigation.” Id. at 8.

Meeting Minutes

- Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006): The Council held that draft, unapproved meeting minutes are exempt from disclosure as ACD material.
- See also: Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div.), certif. denied 233 N.J. 484 (2018)

Off-site Records

- Michalak v. Borough of Helmetta, GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012):
 - The Council held that the custodian was required to obtain responsive records from the Spotswood Police Department because the Borough had entered into a shared services agreement with them to operate their dispatch log.
 - The Council found that the records were “made, maintained, or kept on file” for the Borough by Spotswood pursuant to the agreement.
- Keep in mind that – in most cases, the location of a record is immaterial.

Gun Permits

- N.J.S.A. 47:1A-1.1 exempts personal firearms records and identifying information received by the Division of Fish and Wildlife in the N.J. Department of Environmental Protection.
- N.J.A.C. 13:54-1.15 exempts access to firearm background check records, as well as, applications for a permit, firearms identification card, or license, and any document reflecting the issuance or denial of such.
 - Both exemptions contain extremely limited exceptions.
- In Galligan v. Twp. of West Deptford (Gloucester), GRC Complaint No. 2013-163 (March 2014), the Council noted that although the complainant's request preceded the amendment to OPRA for personal firearms records, it was important to acknowledge that this exemption now exists within OPRA.

Personnel Records

- Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 594 (2011): "OPRA, as it relates to personnel records, begins with a presumption of non-disclosure and proceeds with a few narrow exceptions"
- N.J.S.A. 47:1A-10 exempts personnel records, with the exception of:
 - 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.
 - When authorized by an individual in interest.
 - 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.

Outside Activity Questionnaires

Dusenberry v. N.J. City Univ., GRC Complaint No. 2009-101 (April 2010): The Council held that the custodian lawfully denied access to OAQs because they are personnel records exempt from disclosure and because the University had an obligation to safeguard from public access a citizen's personal information. N.J.S.A. 47:1A-10; N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 386 (App. Div. 2009).

Résumés

- Executive Order No. 26 (Gov. McGreevey 2002): Disclosure of resumes not required during recruitment process.
- EO 26 requires disclosure of the successful candidate's resume at the conclusion of the recruitment. Additionally, resumes of unsuccessful candidates may be disclosed with their consent.
- Redactions may be necessary where a résumé contains information otherwise not disclosable. See Scheeler v. State Dep't of Children & Families, 2017 N.J. Super. Unpub. LEXIS 3154 (App. Div. 2017) .

Employment Apps.

- Toscano v. NJ Dep't of Human Serv., Div. of Mental Health Serv., GRC Complaint No. 2010-147 (May 2011):

The Council held that, “[t]he 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).” Id. at 6.

Criminal Investigatory Records

- Exempt under N.J.S.A. 47:1A-1.1.
- Definition - 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. N. Jersey Media Grp. v. Twp. of Lyndhurst, 229 N.J. 541 (2017)
- Janeczko v. N.J. Dep't of Law & Public Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79, *et seq.* (affirmed on appeal in May 2004): The Council held that exemption does not permit access to the records after the investigation is closed.

Limits to Convicts

- OPRA exempts an individual convicted of an indictable offense from obtaining certain information pertaining to the person's victim or the victim's family. See N.J.S.A. 47:1A-2.2 for a comprehensive list.
- Exception!
 - 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.
- Note that denying a request that clearly seeks records not containing personal information because the requestor failed to indicate whether or not he had been convicted of an indictable offense is not a lawful basis for a denial. Bart v. City of Paterson Hous. Auth. (Passaic), GRC Complaint No. 2007-133 (October 2007).

Victims' Records

- Exempt under N.J.S.A. 47:1A-1.1.
- Definition - 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.

Victims' Records (cont.)

****AS OF NOVEMBER 1, 2014****

- N.J.S.A. 47:1A-1.1. exempts access to any written request by a crime victim or alleged victim which seeks access to records relating to that person's victimization or alleged victimization, including, but not limited to any law enforcement agency report, domestic violence offense report, or temporary or permanent restraining order.
- N.J.S.A. 47:1A-5(b) prohibits a crime victim, or alleged victim, from being charged any fee that otherwise would be charged to obtain a government record relating to that person's victimization or alleged victimization.

Security & Surveillance Information

- N.J.S.A. 47:1A-1.1 exempts:
 - Administrative or technical information regarding computer hardware, software and networks which, if disclosed would jeopardize computer security.
 - 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.
 - Security measures and surveillance techniques which, if disclosed, would create a risk to the safety or persons, property, electronic data or software.
- N.J.S.A. 2A:156A-19 exempts orders authorizing interception of a wire, electronic or oral communication or the contents of, or information concerning, an intercepted wire, electronic or oral communication or evidence derived therefrom.

Security Cameras

- Refer to Gilleran v. Twp. of Bloomfield, 227 N.J. 159, 164 (2016), where the majority court wrote:

“The compelled release under OPRA, on demand for any or no reason, of a security system’s operational product revealing otherwise nonpublic information about monitoring capability is at odds with the legislative intent in creating security exceptions to OPRA. The security exceptions will be applied in a commonsense manner that fulfills the very purpose of having security-based exceptions, and we will do so mindful of present day practical challenges to maintenance of security in public facilities.”

Arrest Reports

- N.J.S.A. 47:1A-3(b) grants access to arrestee's name, age, residence, occupation, marital status, time and place of arrest, text of the charges, arresting agency, identity of arresting personnel, amount of bail and whether it was posted.
- Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint 2007-156 (February 2009): The Council held that the most comprehensive government record that contains the information in N.J.S.A. 47:1A-3(b) is an arrest report.

Auto Accident Reports

- N.J.S.A. 39:4-131 states that reports are **not** privileged or confidential.
 - Truland v. Borough of Madison, GRC Complaint No. 2006-88 (September 2007): The Council held that no redactions to auto accident reports are warranted.
- N.J.S.A. 39:4-131 also states that when reports are not requested in person, custodian may charge additional fee (in addition to OPRA fees) of up to \$5.00.
 - Donato v. Jersey City Police Dep't, GRC Complaint No. 2005-251 (April 2007): The Council held that additional fees listed in N.J.S.A. 39:4-131 can be charged to cover administrative costs of mailing the reports (in addition to OPRA copying fee).

Police Blotter/Call Sheet

- Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004).
- Requestor sought access to police call sheet regarding specific incident. Custodian disclosed record but redacted the name, address, and phone number of the citizen who brought the complaint to the Borough's attention.
- The Council conducted balancing test and held that the name, address and phone number of the citizen who brought the complaint to the Borough's attention should remain redacted due to the potential harm of unsolicited contact and confrontation between the citizen and the requestor.

9-1-1 Tapes

- Fact specific determination!
- Serrano v. South Brunswick Twp., 358 N.J. Super. 352 (March 2003): requested 911 call placed by defendant in murder trial a few hours before homicide. The court held that “although 911 recordings are government records pursuant to OPRA, they are subject to disclosure only to the extent that the privacy considerations set forth at N.J.S.A. 47:1A-1 are protected.”
- Asbury Park Press v. Ocean Cnty., 374 N.J. Super. 312 (Law Div. 2002): Plaintiff sought a 911 call from shooting victim. The court described listening to the tape as “a chilling, wrenching, lingering experience.” The court concluded that OPRA’s privacy provision in N.J.S.A. 47:1A-1 exempted tape from public access.

Criminal History Compilations

- Lewis v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2016-131 (March 2018): The Council held that criminal history compilations, "colloquially known as criminal rap sheets," were exempt from disclosure under Executive Order No. 9 (Gov. Hughes, 1963).
- N.J.A.C. 13:59-1.2 provides for certain limited exceptions including government employees, attorneys-at-law (for use in pending court matters), and individuals seeking their own personal history.

Mug Shots & Fingerprint Cards

- Mug shots, booking photos, whatever you might want to call them. Exempt or disclosable?
- Executive Order No. 69 (Gov. Whitman 1997) (continued by EO 21 (McGreevey 2002)) exempts:
 - 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.

Child Abuse/Assault Records

- N.J.S.A. 2A:82-46(b) states:
 - Any report, statement, photograph, court document, indictment, complaint or any other public record (in prosecutions for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, endangering the welfare of children under, or in any action alleging an abused or neglected child under) which states the name, address and identity of a victim shall be confidential and unavailable to the public.

Domestic Violence Records

- N.J.S.A. 2C:25-33 (“Prevention of Domestic Violence Act of 1991”) states that:
 - All records maintained pursuant to this act shall be confidential and shall not be made available to any individual or institution except as otherwise provided by law. HOWEVER . . .
- See *VanBree v. Bridgewater Twp. Police Dep’t (Somerset)*, GRC Complaint No. 2014-122 (October 2014).

Juvenile Records

- N.J.S.A. 2A:4A-60 states:
 - Social, medical, psychological, legal and other records of the court and probation division, and records of law enforcement agencies, pertaining to juveniles charged as a delinquent or found to be part of a juvenile-family crisis, shall be strictly safeguarded from public inspection.
 - Multiple exceptions, including the parents or guardian and to the attorney of the juvenile.

EMS Reports

- In Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008), the Council held that EMS Division Incident Report is exempt from disclosure as a medical record pursuant to Executive Order No. 26 (Gov. McGreevey 2002).

Moving Violations

- In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004), the Council ordered the custodian to release copies of all moving violation summonses issued by a particular officer. However, the Council also held that the home addresses should be redacted, due to the threat of unsolicited contact, after conducting a common law balancing test.

Mobile Video Recording

- Gorman v. Gloucester City Police Dep't, GRC Complaint No. 2004-108 (October 2008).
- FACT SPECIFIC!! Consult current case law!
- The GRC reviewed the MVR *in camera* and conducted a common law balancing test.
- “Upon applying the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995) and by the GRC in Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (February 2004), and balancing the Complainant’s need for the police mobile video recorded tape versus the potential for harm should the tape be disclosed, it is clear the potential for harm outweighs the Complainant’s need for access. Accordingly, the Complainant was lawfully denied access to the requested mobile video recorded tape.”

Mobile Video Recording Cont.

- Most recently: Paff v. Ocean Cty. Prosecutor's Office, 235 N.J. 1 (2018): The majority Court, concurring with the Appellate Division's dissenting opinion, held that the responsive MVR recordings were exempt from disclosure as a criminal investigatory record. See also N. Jersey Media Grp. v. Twp. of Lyndhurst, 229 N.J. 541 (2017).

While the above supports that MVRs may be exempt under the criminal investigatory exemption, they must meet the two-prong test in order to be exempt.

DWI Records

- Blue v. Wall Twp. Police Dep't, GRC 2002-47 (August 2003). The Council held that a Title 39 motor vehicle offense such as DWI was not a "crime" and that, therefore, police investigation of such offenses was accessible under OPRA and not a "criminal investigatory record" exempt from access pursuant to N.J.S.A. 47:1A-1.1.
- However, the Council also stated that in the few cases where the Legislature has indicated a Title 39 violation is punishable as a crime records related to such charge would fall within the criminal investigatory records exemption. A similar result would apply where the Title 39 charge is connected with a criminal investigation or prosecution, such as a fatal motor vehicle accident.

Radio Transmissions

- The GRC generally finds radio transmissions to be public records, but they must be redacted to remove any information that is specifically exempt, such as:
 - Social security numbers
 - Driver's license numbers
 - Unlisted telephone numbers

Training Records

- Merino v. Borough of Ho-Ho-Kus, GRC 2003-110 (July 2004).
- N.J.S.A. 47:1A-10 provides that personnel records that “disclose conformity with specific experiential, educational, or medical qualifications required for government employment” shall be considered a government record and must be made available for public access.
- Training records relating to a police officer’s public employment as a law enforcement official would be subject to public access.

Ripeness of a complaint

- Sallie v. N.J. Dep't of Banking and Ins., GRC Complaint No. 2007-226 (August 2009)
- The complainant filed a complaint, asserting that he had not received a response from the custodian and that seven days would have passed by the time the GRC received the complaint. The Council held that the complaint was unripe for adjudication and dismissed the complaint.

No Standing (Complainant Not Requestor)

- Maxam v. Bloomfield Twp. Dep't of Health & Human Serv. (Essex), GRC Complaint No. 2013-302 (October 2014): The Council held that because the complainant was neither the requestor of the records nor the requestor's legal representative, the complainant has no standing to pursue an action for unlawful denial of access.
- N.J.S.A. 47:1A-6: "the right to institute any proceeding under this section shall be solely that of the requestor."

- Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012): Plaintiff sought correspondence between the Governor's Office and Port Authority re: E-Z Pass benefits provided to Port Authority retirees.
- The court noted request confined to specific subject matter with sufficient identifying information, namely, E-Z Pass benefits provided to retirees. The court held that defendant "performed a search and was able to locate records responsive ..." which "... belied any assertion that the request was lacking in specificity or was overbroad."

Part 3:

Questions & Answers