

The Open Public Records Act

OPRA For Schools

New Jersey Government Records Council



Disclaimer!

The Government Records Council (“GRC”), has prepared the information contained herein for educational and informational purposes only. The information is not intended, and should not be construed, as legal advice.

No reader should act or rely on the basis of the information contained herein without seeking appropriate legal counsel. Material herein does not constitute a decision of the GRC.

All material herein is copyright © 2020: The NJ Government Records Council. All rights are reserved.

The Most Important Number Today!

New Jersey Government Records Council

101 S. Broad Street

P.O. Box 819

Trenton, NJ 08625-0819

Toll-free (866) 850-0511

Fax: (609) 633-6337



E-mail: Government.Records@dca.nj.gov

Website: www.nj.gov/grc

OPRA Basics

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 16 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.

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**).

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.
- 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.”

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 Complaint No. 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 not 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?

- Of pertinence, every municipality within the State of New Jersey is considered a “public agency.” N.J.S.A. 47:1A-1.1.
- Also includes State departments and commissions, school districts, fire districts, the Port Authority of New York/New Jersey, the League of Municipalities, and the Legislature (although most of their records are per say exempt).
- Additional “quasi-governmental” agencies could be considered a “public agency.” See Paff v. N.J. State Firemen's Ass'n, 431 N.J. Super. 278, 289-90 (App. Div. 2013)

It's a Small "Public Agency" After All

- Under N.J.S.A. 47:1A-5(a), agencies meeting the following criteria can set limited OPRA hours:
 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 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
 - Municipalities may officially designate custodians in sub-departments “by formal action.” The GRC will recognize separate custodians by division/department when that custodian has been adequately publicized to the public.
- Best practices dictate that an agency should designate a substitute custodian to receive/fulfill requests in the Custodian’s absence.
- Non-municipal agencies designate their custodian “by formal action.”

What is Government Without Forms?

- OPRA requires every public agency 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. See Wolosky v. Twp. of East Hanover, GRC 2010-185 (holding that the agency's form not compliant, because it contained potentially misleading information).

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 See Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009).
- If an employee other than the custodian receives an OPRA request, ensure they know their obligation under N.J.S.A. 47:1A-5(h).

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 business days after receiving the request.”
- Exceptions include “immediate access” records, that information contained in N.J.S.A. 47:1A-3(b), and during a State of Emergency.
- 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).

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, and public employee salary and overtime information.

- See Renna v. Cnty. of Union, GRC 2008-110 (March 2009).
- 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

State of Emergency

- On March 20, 2020, P.L. 2020, c. 10, amended N.J.S.A. 47:1A-5(i) to provide that the response time frame “shall not apply” during a declared State of Emergency.
- However, the amendment also provides that said agencies “shall make a reasonable effort, as the circumstances permit, to respond . . . within seven business days . . .”
- For additional information, please review the GRC’s Special Statement 2020-01 at:

[https://www.state.nj.us/grc/news/alerts/GRC%20Special%20Statement%202020-01%20\(Final\).pdf](https://www.state.nj.us/grc/news/alerts/GRC%20Special%20Statement%202020-01%20(Final).pdf)

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.

Extensions of Time to Respond

- An extensions of time to a date certain for legitimate reasons (examples: records in storage, medium conversion, voluminous request) is a lawful response. Papiez v. Cnty. of Mercer, GRC 2012-59
- OPRA does not limit the number of extensions; however, the GRC has ruled on whether extensions were warranted and reasonable. See Ciccarone v. N.J. Dep't of Treasury, GRC 2013-280.
- Failure to grant/deny access by extended deadline date results in “deemed” denial. N.J.S.A. 47:1A-5(i).

Seeking Clarification

- Seek clarification of the request from the requestor. See Leibel v. Manalapan Englishtown Reg'l Bd. of Educ., GRC 2004-51.
- Clarification request must be in writing within the required response time.
- Response time stops until requestor responds. Time begins anew. Moore v. Twp. of Old Bridge, GRC 2005-80 (August 2005).

Overly Broad and Invalid Requests

- An OPRA request is invalid when it fails to identify with reasonable clarity the specific government records sought.
- The validity of an OPRA request typically falls into three (3) categories:
 - “Any and all” requests seeking “records” generically, *etc.* and requiring a custodian to conduct research. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007).
 - Requests seeking information or asking questions. *See e.g.* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).
 - Requests that are either not on an official OPRA request form or does not invoke OPRA. *See e.g.* Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

Overly Broad and Invalid Request Examples

- **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.”
- **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.”

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, without specifying the matters to which the settlements pertained, did not render the request a general request for information obtained through research. 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.

Records Not in Physical Possession?

Obligations

- 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 and agencies that are part of a Shared Services Agreement.
 - Burnett, 415 N.J. Super. 506.
 - Michalak v. Borough of Helmetta (Middlesex), GRC 2010-220
- 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.

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).

Cost Fee Exceptions

They Do Exist!

- OPRA allows an agency to charge fees “prescribed by law or regulation” N.J.S.A. 47:1A-5(b).
- 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”

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.
- Flat-Rates? Carluccio v. N.J. Dep't of Env'tl. Prot., GRC 2008-10 (September 2009)
- An ordinance is problematic.
- GRC's "14 Point Analysis"
 - Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191 (Law Div. 2002)
 - Fisher v. Dep't of Law & Public Safety, Div. of Law, GRC 2004-55 (August 2006).

Substantially Disrupted?

OPRA Has an Exemption For That.

- 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.

- Caggiano v. N.J. Div. of Consumer Affairs, GRC 2007-69: The Council ruled that the agency acted reasonably in trying to accommodate the requestor and properly met its burden of proving a substantial disruption of operations.
- **Conversely** Caldwell v. Vineland Bd. Of Educ. (Cumberland), GRC 2009-278: The Council held that the custodian violated OPRA by denying access under the exemption without trying to reach a reasonable accommodation.

Redactions Are For Redactors

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, GRC 2015-91.
 - 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!!**

Should I Waste My Brand New Sharpie on a Whole Page?

- 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.

Medium: The Requestor's Prerogative (Usually)

- A custodian **must** permit access to government records in the medium requested. N.J.S.A. 47:1A-5(d).
- If custodian does not maintain record in medium requested, he/she **must**:
 - **Convert** the record to the medium requested, or
 - Provide a copy in “some other meaningful medium” N.J.S.A. 47:1A-5(d).
- GRC interprets “meaningful” as meaningful to the requestor, not just convenient for the Custodian.
- But See Wolosky v. Twp. of Sparta, 2012 N.J. Super. Unpub. LEXIS 2717 (App. Div. 2012)

Medium Conversion

- There may be fees associated with medium conversion as set forth in N.J.S.A. 47:1A-5(d):
 - 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.
- Outside Vendors? See O'Shea v. Pine Hill Bd. Of Educ. (Camden), GRC 2007-192.

To Privacy, And Beyond!

- 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.

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.

Feeling Like A Requestor is Being a Little “Extra”?

- Excessive and harassing requests are a hot topic amongst the custodial community.
- **Simply stated: good luck!**
- Agencies have encountered mixed results when attempting to restrict an individual rights under OPRA.

The Knowing and The Willful

- 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's position is that the penalty is paid personally by the individual found in violation, not by the public agency.

- Knowing and willful = a high standard.
- The GRC has issued eight (8) knowing and willful fines to five (5) different custodians (the GRC has actually issued nine (9) penalties, but the Appellate Division reversed one). One of the five custodians has been fined three times in ten (10) years.
- 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).

Prevailing Party Fees

- 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. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006)
 - A factual causal nexus exists between the requestor’s litigation and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008)
 - The relief ultimately achieved had a basis in law.

PPAF (Cont'd)

- Keep in mind that PPAFs are not guaranteed in every case.
- The Appellate Division previously reversed a prevailing party award of over \$57,000. The court ruled that, although the agency provided certain records to the requestor post petition, the facts did not support that the filed action caused a change in the custodian's behavior. See N. Jersey Media Grp. v. State Dept. of Law and Pub. Safety, 2016 N.J. Super. Unpub. LEXIS 1881 (App. Div. 2016) (certif. denied, 228 N.J. 472 (2017)).

PPAF (Cont'd)

- Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (Interim Order dated October 28, 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.”
- See also Feld v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. 2019)

Relevant Statutes,
Regulations,
&
GRC Decisions

Higher Education Exemptions

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

- Pedagogical, scholarly, and/or academic research records and/or the specific details of any research project conducted under the auspices of a public higher education institution in New Jersey, including but not limited to research, development information, testing procedures, or information regarding test participants, related to the development of testing of any pharmaceutical delivery system, except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available.

Higher Education Exemptions (Cont'd)

- Test questions, scoring keys, and other examination data pertaining to the administration of an examination for employment or academic examination.
- Records of pursuit of charitable contributions or records containing the identity of a donor of a gift if the donor requires non-disclosure of the donor's identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization of dedication.

Higher Education Exemptions (Cont'd)

- Valuable or rare collections of books and/or documents obtained by gift, grant, bequest, or devise conditioned upon limited public access.
- Information contained on individual admission applications.
- Information concerning student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student.

Research in Higher Education

- Rosenbaum v. Rutgers Univ., GRC Complaint No. 2002-91 (January 2004)
 - The Council held that a custodian's denial of written responses to an opinion survey questionnaire conducted by the Center of Wildlife Damage Control (Rutgers University) in 1998, was lawful under N.J.S.A. 47:1A-1.1, because they contained specific details of a research project conducted under the university's auspices.
 - See also Stevens v. Rutgers Univ., GRC Complaint No. 2016-249 (June 2018)
- Haber v. Rutgers Univ., GRC Complaint No. 2017-122 (February 2019)
 - The Council upheld a custodian's denial of "Institutional Animal Care and Use Committee" protocols under the research exemptions.

Directory Information

- Family Educational Rights & Privacy Act (“FERPA”) (20 U.S.C. §1232g) requires that school districts, with certain exceptions, obtain the written consent of parents or older students prior to the disclosure of personally identifiable information from a student’s education records.
- However, the school district may disclose appropriately designated “**directory information**” without written consent, unless the parent or older student have advised the district to the contrary by “**opting-out**” of disclosure in accordance with district procedures.
- Parents or older students must “opt-out” of disclosure within a time frame established by the school district. Failure to affirmatively “opt-out” leads to the disclosure of directory information.

What is Directory Information?

- **Directory information**, which is information that is generally not considered harmful or an invasion of privacy if released, **can also be disclosed to outside organizations without the consent** of a parent or older student. Outside organizations include, but are not limited to, companies that manufacture class rings or publish yearbooks.
 - **The following information may be designated as “directory information:”**
 - i. Student name
 - ii. Address
 - iii. Telephone number
 - iv. E-mail address
 - v. Photograph
 - vi. Date/place of birth
 - vii. Major field of study
 - viii. Dates of attendance
 - ix. Grade level
 - x. Participation in officially recognized activities & sports
 - xi. Weight and height of members of athletic teams
 - xii. Degrees, honors, & awards received
 - xiii. Most recent educational agency or institution attended

Student Records

- In addition to FERPA, the N.J. State Dep't of Educ. has promulgated regulations defining a “student record” as “information related to an individual student gathered within or outside the school district and maintained within the school district, regardless of the physical form in which it is maintained.” N.J.A.C. 6A:32-2.1
- Only authorized organizations, agencies, or persons as identified in N.J.A.C. 6A:32-7.5 may access “student records.”
- Custodians shall still adhere to OPRA and FERPA. N.J.A.C. 6A:32-7.5(g).

Student Records

- L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547 (2019)
 - The New Jersey Supreme Court was divided equally, thus affirming the Appellate Division's decision that the records sought in this consolidated matter were "government records" under OPRA, and "education records" under FERPA. The court also held that the records would comprise "student records" within the meaning of N.J.A.C. 6A:32-2.1, which are protected from disclosure under N.J.S.A. 18A:36-19, even if redacted to eliminate personally identifiable information according to FERPA. The court held that that a requestor cannot gain access to a student record unless the requestor is within one of the categories of authorized individuals and entities identified under N.J.A.C. 6A:32-7.5(e)(1) through (16).
- The Appellate Division's decision in L.R. also addressed Popkin v. Englewood Bd. of Educ. (Bergen), GRC Complaint No. 2011-263 (December 2012) where the Council determined that access to a settlement agreement between the Board of Education and a special education student was exempt from disclosure under N.J.S.A. 47:1A-9(a), N.J.A.C. 6A:32-1.1 and N.J.A.C. 6A:32-7.5.

Redaction of Student Information

- Altomote v. Branchburg Twp. Sch. Dist. (Somerset), GRC Complaint No. 2015-39 (October 2015)
 - The Council held that the Complainant was only permitted access to information regarding his child; thus, the redactions of other student information in e-mails was lawful. N.J.S.A. 47:1A-9(a); N.J.A.C. 6A:32-7.1, et seq. See also Martinez v. Edison Bd. of Educ. (Middlesex), GRC Complaint No. 2014-126 (May 2015).

Redaction of Student Initials

- Wolosky v. Alvarez, 2017 N.J. Super. Unpub. LEXIS 79 (App. Div. 2017)
 - The Appellate Division affirmed the trial court's decision that defendants properly redacted student initials from invoices (citing C.G. v. Winslow Twp. Bd. of Educ., 443 N.J. Super. 415, 427 (July 27, 2015)). The Court noted that the trial court properly applied the balancing test to conclude that the students' privacy interest outweighed plaintiff's asserted need for the redacted information.
- **Important:** The defendants here were able to prove that the redaction of initials was necessary to protect the identities of those individuals. Thus, the Court's decision implies a case-by-case determination.

Student Disciplinary Records

- In White v. William Paterson Univ., GRC Complaint No. 2008-216 (August 2009), the complainant sought an unredacted copy of the audio recording of his disciplinary hearing.
 - In accordance with its prior decision in C.W. v. William Paterson Univ., GRC Complaint No. 2003-80 (August 2009), the Council determined that the custodian lawfully denied access to the redacted portions of the recording.

Handwritten Student Notes

- In Sage v. Freehold Reg'1 High Sch. Dist. (Monmouth), GRC Complaint No. 2010-108 (Final Decision dated November 29, 2011), the Council conducted an *in camera* review of a handwritten note responsive to the complainant's OPRA request.
- The Council determined that the note was exempt as ACD material because it contained "information of an alleged incident between a student and employee of the school district and was used in preparation of the school district's Final Incident Report." Id. at 6.

Admission Files, Test Scores, and Teacher Recommendations

- Bava v. Bergen Cnty. Sch. Dist., GRC Complaint No. 2003-84 (January 2004)
 - The complainant sought the admissions file, test scores, teacher recommendations, and comparison test scores for their daughter
 - The custodian denied access to the teacher recommendations citing "confidentiality" as well as NJ Dep't of Education ("DOE") regulations and denied access to the admissions test scores of other students, citing DOE regulations restricting access to "pupil records" to parents of those students.
- The Council determined that:
 - a student's teachers' recommendations are part of a student's "pupil record" pursuant to N.J.A.C. 6:3-6.1-6.3 and are not publicly accessible under OPRA.
 - Based on the information presented to the custodian regarding "comparison test scores," the custodian reasonably interpreted the term as a request for all applicants test scores and names.
 - A student's score on an admissions test is part of their "pupil record" pursuant to N.J.A.C. 6:3-6.1-6.3 and is not publicly accessible under OPRA.

Tests and Quizzes

- Lefkowitz v. Montville Township Public Sch. (Mercer), GRC Complaint No. 2016-138 (May 2018)
 - The complainant sought tests and quizzes from multiple classes, which the custodian denied under N.J.S.A. 47:1A-1.1 and Executive Order No. 9 (Gov. Hughes, 1963) (“EO 9”). The custodian later expanded her denial to include other exemptions in the Statement of Information.
 - Although the Council rejected a number of the raised exemptions, it found that a lawful denial occurred under EO 9 because NJDOE’s regulations required tests and quizzes to be given for benchmark purposes. N.J.A.C. 6A:8-3.1(c)(3)(iii).

Personnel Records

- N.J.S.A. 47:1A-10 exempts access to personnel records, with certain exceptions to include:

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.

- Vandy v. Burlington Cnty. Bd. of Social Serv., GRC Complaint No. 2016-319 (Interim Order dated November 13, 2018)
 - The Council's decision addresses multiple types of personnel records.

Teacher Transcripts

- A custodian disclosed requested transcripts but redacted the grade point average (“GPA”).
- The Council conducted a balancing test on the redactions and determined that redaction of the individual grades was appropriate. However, the custodian unlawfully denied access to the GPA under N.J.S.A. 47:1A-10.
- **Why?**

Are you qualified?

- NJDOE's regulations at N.J.A.C. 6A:9-8.1(a)2 and 6A:9-16 (recodified as N.J.A.C. 6A:9B-8.3 in December 2015) required teachers to conform with certain requirements when seeking employment, including a minimum 2.50 GPA. See Herron v. N.J. Dep't of Educ., GRC Complaint No. 2011-324 (Interim Order dated December 18, 2012).
- Thus, cumulative GPAs are considered "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." N.J.S.A. 47:1A-10.

Payroll Records

- Jackson v. Kean Univ., GRC Complaint No. 2002-98 (November 2003)
 - Lacking a definition for the term in OPRA, the Council looked to the plain meaning of the word “payroll record” and a definition contained in the N.J. Dep’t of Labor’s regulations at N.J.A.C. 12:16-2.1, which stated that:
 1. The beginning and ending dates;
 2. The full name of each employee and the day or days in each calendar week on which services for remuneration are performed;
 3. The total amount of remuneration paid to each employee showing separately cash, including commissions and bonuses; the cash value of all compensation in any medium other than cash; gratuities received regularly in the course of employment if reported by the employee, or if not so reported, the minimum wage rate prescribed under applicable laws of this State or of the United States or the amount of remuneration actually received by the employee from his employing unit, whichever is the higher; and service charges collected by the employer and distributed to workers in lieu of gratuities and tips;
 4. The total amount of all remuneration paid to all employees;
 5. The number of weeks worked.

Payroll - Attendance

- Burdick v. Franklin Twp. Bd. Of Educ. (Hunterdon), GRC Complaint No. 2007-74 (Interim Order dated October 31, 2007)
 - The complainant sought “[a]ttendance records of all full time employees and all members of the administration . . . for the period of July 1, 2005 to June 30, 2006 . . .” The custodian denied access, citing N.J.S.A. 47:1A-10, and noting that attendance records are not kept as payroll records in the normal course of business.
- The Council determined that the custodian unlawfully denied access to the attendance records because same constituted payroll records. Therefore, the requested records should be released as a payroll record pursuant to N.J.S.A. 47:1A-10.
- See also Gordon v. City of Orange (Essex), GRC Complaint No. 2013-189 (Interim Order dated August 27, 2013).

Résumé Redactions

- 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” OPRA’s personnel records section permits disclosure of only a narrow category of information concerning an employee’s education and experience on a résumé: the records showing that a public employee meets the specific education and experience qualifications that are prerequisites for his job. This suggests that redactions may be necessary where a résumé contains information unrelated to the qualifications specifically required for the employee’s position.
- See also Wolosky v. Twp. of Harding (Morris), GRC Complaint No. 2010-221 (June 2012)

Applications for Employment

- Toscano v. N.J. 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 (Gov. McGreevey 2002). *See* N.J.S.A. 47:1A-9(a).” Id. at 6. See also Deutsch v. N.J. Civil Serv. Comm’n, GRC Complaint No. 2011-361 (March 2013)

Outside Activity Questionnaires (OAQs)

- Dusenberry v. N.J. City Univ., GRC Complaint No. 2009-101 (April 28, 2010)
 - The Council held that the custodian lawfully denied access to outside activity questionnaires 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).

Employee Tax Records

- Tax information, such as W-2s and 1099 forms are exempt from disclosure.
- Gelber v. City of Hackensack (Bergen), GRC Complaint No. 2011-148 (June 2012)
 - The Council held that such documents are exempt pursuant to federal law (citing Lucente v. City of Union, GRC Complaint No. 2005-213 (July 2006)).

Ethics Forms

- Vargas v. N.J. Dep't of Educ., GRC Complaint No. 2012-126 (April 2013)
 - The complainant disputed redactions of street addresses on the responsive ethics forms.
 - The Council conducted a balancing test and determined that the Custodian lawfully redacted the responsive records. N.J.S.A. 18A:12-26.
- The Appellate Division reached a similar conclusion in Scheeler v. N.J. Dep't of Educ., 2017 N.J. Super. Unpub. LEXIS 119 (App. Div. 2017), where it affirmed the Council's holding in GRC Complaint No. 2014-125.

Personal Identifying Information

- Social security numbers: Herron v. NJ 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).

Surveillance Camera Footage

- Street v. North Arlington Sch. Dist. (Bergen), GRC Complaint No. 2017-103, *et seq.* (June 2019)
 - The Council held that security camera footage taken during an active-shooter drill was exempt from disclosure under OPRA's security and surveillance exemption. N.J.S.A. 47:1A-1.1; Gilleran v. Twp. of Bloomfield, 227 N.J. 159 (2016).

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.

Closed Session Minutes

- White v. Monmouth Reg'l Sch. Dist., GRC Complaint No. 2012-218 (Interim Order dated September 24, 2013)
 - The Council conducted an *in camera* review of closed session minutes and determined that the custodian lawfully denied access to the student initials and student/parent names under FERPA and lawfully denied access to teacher names under N.J.S.A. 47:1A-10.
 - However, the Council also determined that the custodian unlawfully denied access to the citizen's name because said redaction did not fall within the attorney-client privilege. Thus, the Council ordered disclosure of the minutes without redactions for the citizen's name.

Meeting Audio Recordings

- Miller v. Westwood Reg'l Sch. Dist. (Bergen), GRC Complaint No. 2009-49 (Interim Order dated February 23, 2010)
 - The Council held that an audio recording of an agency's public meeting, used to draft the agency's official meeting minutes, is NOT deliberative in nature and therefore NOT exempt from disclosure as ACD material. Citing Burlett v. Monmouth Cnty. Bd. of Freeholders, GRC Complaint No. 2004-75 (August 2004).

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.
 - See also Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014)
 - However, that does not permit you to say, “It’s on our website; find it yourself!”

Valid Request for E-mail

- Elcavage v. West Milford Twp. (Passaic), GRC 2009-07 (April 2010)
 - The Council held that a valid OPRA request for e-mails must include all of the following criteria:
 - (1) Content and/or subject
 - (2) Specific date or range of dates
 - (3) Sender and/or Recipient
 - Known to the GRC now as the “Elcavage Factors.”
 - Also applies to other forms of correspondence
 - Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).
- See *i.e.* Lewis-Gallagher v. Monroe Twp. Pub. Sch. Dist. (Gloucester), GRC Complaint No. 2018-8 (September 2019)

Text Messages

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

Text Messages (Cont'd)

- Charlotte Observer on August 5, 2017.
- The headline read:

“TOWN OFFICIAL CALLED NEIGHBORS LOUD MOUTHS. THEN HE LEARNED HIS TEXT MESSAGE WAS A PUBLIC RECORD”

- The text message was projected as part of a slide show on a wall during a town council meeting.

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).

Messages Composed & Sent by Requestor

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

No Responsive Records

- 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.

Council's Authority to Adjudicate

- Van Pelt v. Edison Twp. Board of Educ., GRC Complaint No. 2007-179 (January 2008)
 - In part, the complainant filed this complaint arguing that the custodian failed to disclose certain records sought. The complainant raised a concern that the BOE should have maintained the requested records to prove that they “fulfilled their responsibility of” of obtaining proper inspections and approvals.
 - The Council found that under N.J.S.A. 47:1A-7(b), it had no authority to determine what files an agency must maintain.

Ongoing/Continuing Requests

- 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.
- See also Blau v. Union Cnty. Clerk, GRC Complaint No. 2003-75 (Final Decision dated November 13, 2003).

Copyrighted Material

- Grauer v. NJ 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.”

Pending/Ongoing Litigation

- Darata v. Monmouth Cnty. Freeholders, GRC Complaint No. 2009-312 (Interim Order dated February 24, 2011)
 - The Council noted 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.

Shared Services

- Michalak v. Borough of Helmetta (Middlesex), 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 an inter-local (or shared services) agreement with Spotswood to operate their dispatch log. The Council found that the records were “made, maintained, or kept on file” for the Borough by the Spotswood Police Department pursuant to the agreement. Keep in mind that – in most cases, the location of a record is immaterial.

Ripeness of a Complaint

- Sallie v. N.J. Dep't of Banking and Ins., GRC Complaint No. 2007-226 (Final Decision dated April 29, 2009)
 - The Complainant filed a complaint, asserting that he had not received a response from the custodian and that seven (7) business 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/Not the Requestor

- Maxam v. Bloomfield Twp. Dep't of Health & Human Serv., 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: “[T]he right to institute any proceeding under this section shall be solely that of the requestor.”

Questions & Answers