

# The Open Public Records Act

*For Law Enforcement Agencies*

*June 2017*

**New Jersey Government Records Council**



New Jersey Government Records Council

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# Disclaimer!!

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- Information provided by the GRC is merely guidance. The GRC cannot provide legal advice. No information provided here is intended or should be construed as legal advice. The GRC cannot tell a custodian exactly how to respond to an OPRA request. Nor can the GRC tell a requestor how to phrase a request.
- You are advised to consult a qualified attorney for legal advice.

# What is OPRA?

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- O.P.R.A. is the Open Public Records Act - N.J.S.A. 47:1A-1 et seq.
- OPRA replaced the “Right to Know Law.”
- OPRA increases the public’s accessibility to government records by broadly defining a government record.
- OPRA provides a compliance process via the GRC & Superior Court.
- OPRA provides for penalties against public officials who knowingly and willingly violate OPRA.

# Non OPRA Requests

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- Not all records requests are OPRA requests!
- The requestor elects to invoke OPRA's provisions by submitting an OPRA request.
- OPRA does not affect common law rights of access or the right of access via discovery.
- Challenges to common law requests and discovery requests must be made to NJ Superior Court. The GRC has no authority over either.
- The GRC cannot advise on process, fees, etc. regarding common law or discovery requests.

# Discovery vs. OPRA

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- Discovery and OPRA are not the same.
- The GRC cannot advise on discovery issues such as fees to be charged. Refer to Court Rules or seek guidance from County Prosecutor.
- Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008): The Council held that the Custodian's denial of an OPRA request on the grounds that the requestor could only obtain records via discovery is not a lawful basis for denial.
- Requestors may access the same records under OPRA that could/should be accessed through discovery.

# What is a Government Record?

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- OPRA expands the former Right to Know Law's definition (records *required* to be maintained on file).
- **Government Record:** All records made, maintained, kept on file, or received in the course of official business.
- Under OPRA, all government records are subject to public access unless specifically exempt under OPRA or any other law.
- There are specific exemptions to disclosure.

# Who is the Custodian?

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## Custodian of a Government Record:

- Municipality – generally the municipal clerk.
- 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.
- The GRC will recognize a separate custodian for police departments when such custodian has been adequately publicized to the public. See Paff v. Berkeley Heights (Union), GRC 2007-271 (Nov. 2008).

# OPRA Requests

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- OPRA requests *should* be on the agency's official OPRA request form. See Renna v. Cnty. of Union, 407 N.J. Super. 230, (App. Div. 2009).
- Written requests not on an official form cannot be denied solely because they are not on the official request form.
- Written requests not on an official form must mention OPRA. If a written request does not mention OPRA, it is not an OPRA request.

# Making an OPRA Request

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## Requestors:

- Must name specific, identifiable government records.
- Be as specific as possible – identify type of record, dates, parties to correspondence, subject matter, etc.
- Requests for information or requests that ask questions are not valid OPRA requests.
- Method of submission – custodians can prescribe the method by which an OPRA request must be transmitted to the agency as long as it would not impose an unreasonable obstacle to the transmission of a request for a government record (i.e. fax, e-mail, etc.) Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009).

# Receiving an OPRA Request: Non-Custodian Employees

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If an officer or employee of a public agency, other than the proper custodian, receives an OPRA request, he or she **must either forward the request to the records custodian or direct the requestor to the records custodian.**

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

# Steps in Responding to an OPRA Request

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

# When Does the Clock Begin?

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

# Statutory Response Time

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

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

# Adequate Response

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A proper response to an OPRA request:

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

# Immediate Access

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- **Immediate access** ordinarily must be granted to budgets, bills, vouchers, contracts, and government employee salary information. N.J.S.A. 47:1A-5(e).
- Immediate means as immediately as possible – on the spot – unless the record is in storage, in use, or requires medium conversion. *See Renna v. Cnty. of Union, GRC Complaint No. 2008-110 (March 2009)*.
- If a custodian cannot provide immediate access to records for a legitimate reason, the custodian must reduce such reason to writing and request an extension of time to comply with the “immediate” statutory requirement. *See Rodriguez v. Kean Univ., GRC 2015-407 (April 2017)*.
- The response must be immediate.

# Seeking Clarification

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- A custodian may seek clarification of an overly broad or unclear request.
  - A request for clarification must be in writing, within the appropriate statutory response time.
  - Response time stops until requestor responds and begins anew after the clarification is received. *See* Moore v. Twp. of Old Bridge, GRC Complaint No. 2005-80 (August 2005); Burns v. Borough of Rockaway P.D. (Morris), GRC Complaint No. 2011-113.

# Clarification Appropriate

- Leibel v. Manalapan Englishtown Reg'l Bd. of Educ., GRC Complaint No. 2004-51 (September 2004): “Under the circumstances, the Custodian reasonably sought clarification ... in order to fulfill the OPRA request .... The Custodian is proper in requiring clarification when a request is too broad in scope and a reasonable basis exists to seek said clarification.”
- Kelley v. Rockaway Twp. (Morris), GRC Complaint No. 2009-19 (November 2009): The Custodian sought clarification of the overly broad request, and the requestor failed to clarify the request. Ultimately, the Council held that the custodian did not unlawfully deny access because the request was invalid.

# Additional Time Required

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- Custodians may seek extensions of time beyond the seven (7) business day deadline with legitimate reasons. A complainant's affirmative consent is not necessary.
- Requests must be in writing, within the seven (7) business days, and must provide an anticipated date upon which the records will be provided.
- Failure to grant or deny access by the extended deadline date results in a "deemed" denial.  
N.J.S.A. 47:1A-5(i).

# Extensions of Time

A custodian sought seven (7) extensions, totaling fifty-two (52) business days. The complainant initially agreed to the first four (4) extensions but noted that no further extensions would be tolerated. The Council, noting that extensions are rooted in well settled case law, decided that an additional twenty-seven (27) business days “following expiration of the last agreed-upon extension of time . . . is clearly an excessive amount of time and flies in the face of OPRA’s mandate to ‘promptly comply . . .’ with a records request . . . .” The Council determined that the custodian’s excessive extensions resulted in a “deemed” denial, based on the specific facts of the complaint. Ciccarone v. NJ Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014).

# Broad and/or Unclear Requests

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- Examples of overly broad requests: “Any and all records related to the construction of the new high school” or “All minutes from meetings where City Council discussed the towing contract.”
- Example of a better request: “For the period from January 1, 2016, to February 1, 2016, all e-mails between Jane Doe and John Smith regarding the construction of the new high school.”
- A valid request names specific type(s) of record(s), parties to correspondence, subject, and date range.

# Broad and/or Unclear Requests

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- If a request does not name specifically identifiable records or is overly broad, a custodian may deny access pursuant to the following court decisions: MAG, Bent, NJ Builders, and Schuler (GRC decision).
- A custodian is obligated to *search* files to *find* the identifiable government records listed in the Complainant's OPRA request. A custodian is not required to *research* files to figure out which records, if any, might be responsive to a broad and unclear OPRA request. See Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007).

# Broad and/or Unclear Requests

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In Burnett v. Cnty. of Gloucester, 415 NJ Super. 506 (App. Div. 2010) the requestor sought access to "[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present."

The Appellate Division concluded that the request for settlement agreements and releases without specifying the matters to which the settlements pertained did not render the request a general request for information obtained through research. The court held that, "[h]ere, it is the documents, themselves, that have been requested, and their retrieval requires a search, not research."

# Special Service Charge

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- 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 (also allowed for inspection).
  - Case-by-case determination - No ordinance recognized.
  - GRC’s “14 Point Analysis” (available on GRC’s website)
    - 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 Complaint No. 2004-55 (August 2006).

# Substantial Disruption

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- If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record(s) only *after* attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency. N.J.S.A. 47:1A-5(g).
- This is a subjective determination based on an agency's resources available to fulfill a request.
- See Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220; Vessio v. NJ DCA, Div. of Fire Safety, GRC Complaint No. 2007-188.

# Substantial Disruption

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In Caggiano v. NJ Dep't of Law and Public Safety, Division of Consumer Affairs, GRC 2007-69 (September 2007), the Complainant sought inspection of multiple records, totaling 745 pages. The Custodian granted access but required the Complainant to pay the hourly rate of an employee to supervise the inspection for every hour that exceeded the initial two (2) hours. The Council found that Custodian made numerous reasonable attempts to accommodate the Complainant and that “the extended records inspection . . . would substantially disrupt the agency’s operations . . . .”

# Substantial Disruption

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In Davis v. NJ Dep't of Health & Senior Services, GRC 2012-94 and 2012-142 (consolidated), the complainant submitted three (3) OPRA requests for 49 separate items that resulted in at least 1,000 pages of records. Despite the Custodian's reasonable efforts, the parties were unable to reach a mutual agreement. The Council found that, based on the specific facts of the case, the Custodian's reasonable efforts to accommodate the complainant substantially disrupted the agency's operations.

# Obtain Records Responsive

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- It is reasonable that a custodian might not have physical custody of all records maintained by the agency.
- A custodian should document attempts to access records from other departments/personnel. *See Johnson v. Borough of Oceanport, GRC Complaint No. 2007-107 (July 2007).*
- A custodian should keep the 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 access the records.

# Obtain Records Responsive

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- In Michalak v. Borough of Helmetta (Middlesex), GRC 2010-220 (January 2012), the Spotswood Police Department held the responsive records for the Borough as part of an interlocal services agreement. The Council held that the custodian “had an obligation to obtain the responsive records from the Spotswood Police Department and provide same . . . .” See Burnett v. County of Gloucester, 415 NJ Super 506 (App. Div. 2010).

# OPRA's Exemptions

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- Specific exemptions are contained in OPRA.
- If a record does not fit into any exemption, it is accessible under OPRA.
- The default answer is always YES! unless a specific exemption exists.

# Redactions

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Redaction means editing a record to prevent public viewing of material that should not be disclosed. Words, sentences, paragraphs, or whole pages may be subject to redaction.

Custodians should manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requestor. A visually obvious method must be used.

# Redactions Cont'd

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If full pages are to be redacted, the custodian should give the requestor a visible indication that a particular page of that record is being redacted, such as a blank sheet bearing the words "page redacted" or a written list of the specific page numbers being withheld.

If an electronic document is subject to redaction (i.e., word processing or Adobe Acrobat© files), custodians should be sure to delete the material being redacted. Techniques such as "hiding" text or changing its color so it is invisible should not be used as sophisticated users can detect the changes.

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

# Medium Conversion

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

# Medium Conversion Cont'd

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- If conversion is completed in-house, there is generally no charge, unless actual costs can be demonstrated or a special service charge applies.
- If an outside vendor is required, seek an estimate and provide the requestor with an estimate for approval/rejection. O'Shea v. Pine Hill Bd. Of Educ. (Camden), GRC Complaint No. 2007-192 (February 2009).

# Copying Fees

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- 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); and
  - Must charge the actual cost to provide records in another medium (i.e. computer disc, CD-ROM, DVD).

# Fees for Auto Accident Reports

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- 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 . . . .”

# Online Police Records

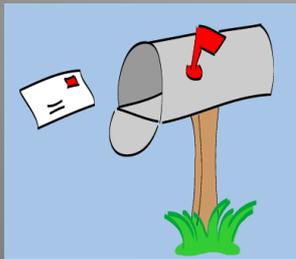
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- Some police departments utilize online services such as <http://PoliceReports.US> where requestors can access police reports without filing an OPRA request.
- These services are outside the scope of OPRA, and fees for such services are outside of the GRC's authority.
- *See Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014), regarding the ability to direct a requestor to online records.*

# Method of Delivery

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- 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 Complaint No. 2007-251 (April 2008).
- Charges for such delivery must reflect actual cost. The legislature amended OPRA several years ago to say that electronic delivery is free of charge.
- May charge actual postage costs. Livecchia v. Borough of Mount Arlington, GRC Complaint No. 2008-80 (April 2010).



# Lawful Basis for Denial

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- Custodians must provide lawful basis for denial at the time of denial. This includes outright denials and redactions.
- Examples:
  - Jane Smith's social security number is redacted from the requested payroll record because N.J.S.A. 47:1A-1.1 exempts social security numbers from public access.
  - 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 reveal strategy in upcoming litigation.

# Glomar Response

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- VERY LIMITED CIRCUMSTANCES!! Consult your attorney!
- The Appellate Division held that an agency may decline to confirm or deny the existence of responsive records in answering a request for records concerning a person who has not been charged with a crime. North Jersey Media Group v. Bergen Prosecutor's Office, 447 N.J. Super. 182 (App Div. 2016).
- Such a response has long been permitted under the federal FOIA law as a way to avoid disclosure of exempt, sensitive information, such as whether a person was or is under investigation. The Appellate Division held that OPRA permits the response for the same reason.
- The court said that OPRA's exemption for a grant of confidentiality recognized by case law applies here. N.J.S.A. 47:1A-9(b). The court found that case law has long recognized the confidentiality of investigative records regarding a person who has been neither arrested nor charged.

# Knowing and Willful Violation

N.J.S.A. 47:1A-11 provides that a “public official, officer, employee or custodian” who knowingly and willfully violates OPRA and is found to have unreasonably denied access under the totality of the circumstances shall be subject to a civil penalty of \$1,000 for an initial violation, \$2,500 for a second violation that occurs within 10 years of an initial violation, and \$5,000 for a third violation that occurs within 10 years of an initial violation.

OPRA allows for appropriate disciplinary proceedings to be initiated (by the appointing authority) against a public official, officer, employee, or custodian against whom a penalty has been imposed.

# 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).

Armenti v. Robbinsville BOE (Mercer), GRC Complaint No. 2009-154 (February 2012).

# 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).

# Medical Examiner Records

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- N.J.S.A. 47:1A-1.1 exempts photographs, negatives, prints, and 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, or
  - use by any law enforcement agency in this State or any other state or federal law enforcement agency.

# Criminal Investigatory Records

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- 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. Solloway v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-39 (January 2013).
- Janeczko v. NJ Dep't of Law & Public Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79 and 2002-80 (affirmed on appeal in May 2004): Council held that exemption does not permit access to the records after the investigation is closed.

## 3(b) Information

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“The following information concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such information . . .” See the list at N.J.S.A. 47:1A-3(b)

The GRC ruled on the term “residence” in Scheeler v. N.J. State Police, GRC Complaint 2015-80 (April 2016).

# Lyndhurst Case and OPRA's 3(b) information

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The Appellate Division held *inter alia* that “[r]egardless of whether a document can be withheld as a ‘criminal investigatory record’ under N.J.S.A. 47:1A-1.1, or as a document pertaining to [certain] ongoing investigation[s], a public agency must still disclose certain ‘information’ pertaining to a criminal investigation within twenty-four hours of a request or as soon as practicable. N.J.S.A. 47:1A-3(b).”

North Jersey Media Group, Inc. et al v. Twp. of Lyndhurst et al, 2015 N.J. Super LEXIS 96 (App. Div. 2015).

# Victims' Records

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- 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'd

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- If a victim is deceased or incapacitated, a member of that victim's immediate family also qualifies as the "victim of a crime."

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

# Victims' Records (cont'd)

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## Effective 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

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- 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

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- In November 2016, the Supreme Court held that “[c]ompelling release on demand of security surveillance video would be contrary to the legislative intent motivating OPRA’s exemptions based on security concerns . . . . Requests for video from surveillance cameras protecting public facilities are better analyzed under the common law right of access.”

Gilleran v. Twp. of Bloomfield *et al*, 227 N.J. 159 (2016).

# Limits to Convicts

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- N.J.S.A. 47:1A-2.2 exempts personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information.
- Information may be released only if the information is necessary to assist in the defense of the requestor. A determination that the information is necessary to assist in the requestor's defense shall be made by the court upon motion by the requestor or his representative.
- Denying a request that clearly seeks records which would not contain any personal information pertaining to any individual because the Complainant 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).

# Arrest Reports

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- 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 No. 2007-156 (February 2009): 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.

# Gun Permits

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- N.J.S.A. 47:1A-1.1 exempts:
  - personal firearms records, except for use by any person authorized by law to have access to these records or for use by any government agency, including any court or law enforcement agency, for purposes of the administration of justice.
  - personal identifying information received by the Division of Fish and Wildlife in the Department of Environmental Protection in connection with the issuance of any license authorizing hunting with a firearm. For the purposes of this paragraph, personal identifying information shall include, but not be limited to, identity, name, address, social security number, telephone number, fax number, driver's license number, email address, or social media address of any applicant or licensee.
- 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.

# Gun Permits

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- N.J.A.C. 13:54-1.15 exempts:
  - Any background investigation conducted by the chief of police, the Superintendent or the county prosecutor, of any applicant for a permit, firearms identification card license, or registration, in accordance with the requirements of this chapter...and shall not be disclosed to any person not authorized by law or this chapter to have access to such investigation, including the applicant.
  - Any application for a permit, firearms identification card, or license, and any document reflecting the issuance or denial of such permit, firearms identification card, or license, and any permit, firearms identification card, license, certification, certificate, form of register, or registration statement, maintained by any State or municipal governmental agency ... and shall not be disclosed to any person not authorized by law or this chapter to have access to such documentation, including the applicant, except on the request of persons acting in their governmental capacities for purposes of the administration of justice.

# Personnel Records

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- 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.
- Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010): disciplinary history for Trenton PD Detective is exempt from public access as a personnel record pursuant to N.J.S.A. 47:1A-10.

# Applications for Employment

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- Executive Order No. 26 (McGreevey 2002) exempts applications for employment or other information concerning job applicants while a recruitment search is ongoing.
- 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; and
  - 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.

# Auto Accident Reports

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- 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): Council held that no redactions to auto accident reports are warranted.
- As stated previously, N.J.S.A. 39:4-131 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): 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

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- Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004).
- The requestor sought access to a police call sheet regarding specific incident. Custodian disclosed the 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

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- Fact specific determination!
- Serrano v. South Brunswick Twp., 358 N.J. Super. 352 (March 2003): requested 9-1-1 call placed by defendant in murder trial a few hours before homicide. 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): requested 9-1-1 call from shooting victim. Judge described listening to the tape as “a chilling, wrenching, lingering experience.” Court concluded that OPRA’s privacy provision in N.J.S.A. 47:1A-1 exempted tape from public access.

# Criminal History Compilations

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- N.J.A.C. 13:59-1.2 authorizes access only to:
  - Governmental entities of this State, the Federal government or any other state for any official governmental purposes, including, but not limited to, employment, licensing and the procurement of services;
  - A person or non-governmental entity of any state, that seeks to directly engage the services of the subject of the record, for purposes of determining the subject's qualifications for employment, volunteer work or other performance of services;
  - Attorneys-at-law licensed by any state for use in any contested matters docketed in any state or Federal courts or administrative agencies of any state;
  - Private detectives licensed by the New Jersey Division of State Police pursuant to N.J.S.A. 45:19-8 et seq., for purposes of obtaining information in furtherance of the performance of their statutorily authorized functions, as specifically enumerated by N.J.S.A. 45:19-9(a)1 to 9; and
  - A named individual as prescribed pursuant to N.J.A.C. 13:59-1.7 (For the purpose of determining the accuracy thereof, any individual may request a fingerprint search on his or her personal criminal history record).

# Mug Shots & Fingerprint Cards

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- Executive Order No. 69 (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.

Melton v. City of Camden, GRC Complaint No. 2011-233 (January 2013).

# Child Abuse/Assault Records

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- 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

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- 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.
- Pepe v. Pepe, 258 N.J. Super. 157 (Ch. Div. 1992): court held that this exemption is not absolute and could be balanced to determine if the release of the records will be detrimental to the victim.
- *See also* VanBree v. Bridgewater Twp. Police Dep’t (Somerset), GRC 2014-122 (October 2014).

# Juvenile Records

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- 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.
  - There are multiple exceptions, including the parents or guardian and to the attorney of the juvenile.

# Ongoing Requests

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- Requests for copies on an ongoing or continuing basis are not valid under OPRA. Blau v. Union Cnty. Clerk, GRC Complaint No. 2003-75 (November 2003).
  - Example: OPRA request submitted on September 1, 2010 for “all auto accident reports from date of request until end of calendar year.”
- Requestors must submit new OPRA request for each new batch of records sought.

# EMS Reports

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- 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 (McGreevey 2002).

# Identity of Requestor Irrelevant

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- In general, the identity of a requestor is not a consideration when deciding whether an exemption applies to a government record requested pursuant to OPRA except for those instances set forth at N.J.S.A. 47:1A-2.2 (victims' records) and N.J.S.A. 47:1A-10 (an individual can access his/her own personnel records).
- See White v. William Patterson Univ., GRC Complaint No. 2008-216 (August 2009); Cicero v. NJ Dep't of Children & Family Serv., Div. of Child Behavioral Health Serv., GRC Complaint No. 2009-201 (August 2010).

# Moving Violations

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- In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004), the Council ordered the custodian to release copies of moving violation summonses but held that the home addresses should be redacted after conducting a common law balancing test.
- Holding: “the majority of the Council finds it likely that release of the home addresses will result in unsolicited contact between the complainant and the individuals who previously received similar summonses.”

# Use of Force Reports (“UFR”)

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- O’Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009).
- On appeal, the Court affirmed the Law Division’s holding that UFRs are not criminal investigatory records and determined that the New Jersey Attorney General's guidelines, policies, and procedures requiring the completion of UFRs and their maintenance in the files of police departments had the force of law for police entities, rendering such documents accessible under OPRA.
- Therefore, UFRs did not generically qualify under the criminal investigatory records exception of OPRA.
- See Rivera v. Office of the Bergen County Prosecutor et al, 2012 N.J. Super Unpub. LEXIS 1921, for guidance on the ability to redact certain UFRs.

# Arrest Warrants

- The Council held that **arrest warrants** are not exempt as criminal investigatory records because they are required to be made pursuant to NJ Court Rules R. 3:2-3(a). Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013).

# Continuation & Incident Reports

- Police department continuation reports and incident reports respectively are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and are therefore exempt from disclosure – if the reports relate to the investigation of criminal activity. Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2009).

# Mobile Video Recording (“MVR”)

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- Gorman v. Gloucester City Police Dep’t, GRC Complaint No. 2004-108 (October 2008).
- FACT SPECIFIC!!
- Council 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'd

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- However, trial courts have ruled differently than the Council re: disclosure of MVR recordings.
- The Law Division in Burlington County ordered disclosure of an MVR involving a drunk driving arrest. The Court held that the tape is not a criminal investigatory record and the subject of the tape, an elected official, did not have a reasonable expectation of privacy.
- Law Division in Atlantic County ordered disclosure of an MVR of a traffic stop of an elected official, provided that personal information, such as the social security number and driver's license number, must be redacted from the video. The Court held that driving while intoxicated is considered a motor vehicle traffic violation, not a crime, under state statute, which means the tape cannot be considered a criminal investigatory record. The decision also stated that the public's right to be informed about what transpired during the stop outweighs the public official's right to privacy.

# DWI Records

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- Blue v. Wall Twp. Police Dep't, GRC Complaint No. 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

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- Radio transmissions are public records but should have redactions to remove any information that is specifically exempt, such as:
  - Social security numbers.
  - Driver's license numbers.
  - Home addresses and home telephone numbers.

# Training Records (discussed before)

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- Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 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.

# Directing A Requestor to a Website

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- 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), Complaint No. 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.
  - 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 access the records electronically. A custodian is not absolved from providing the record in hardcopy 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, in which case the custodian will have seven (7) business days from the date of such notice to disclose the record(s) in hardcopy. Id. at 4.

# Part 3:

# Questions & Answers