



THE OPRA ALERT

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SHARED SERVICES AGREEMENTS: THE IMPACT ON OPRA

The Open Public Records Act (OPRA) provides requestors with a statutory right to access records that are “made, maintained, kept on file...or received” in the course of a public agency’s official business. N.J.S.A. 47:1A-1.1. This specific language paints the picture that a public agency physically maintains the records sought on site, a scenario in which a requestor can walk into an office, request a record, and the custodian can pull the record from a file cabinet on site.

However, more often public agencies are encountering situations in which the records sought pursuant to an OPRA request are not physically maintained by the agency itself. For example, in Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005), the requestor sought access to e-mails that related to official Borough business which were located on the Mayor’s home computer. The custodian alleged that due to the location of the e-mails (not in the immediate possession of the municipality) the e-mails were not government records. The Government Records Council (GRC) determined that the definition of a government record is not restricted by the physical location of the record and ordered the custodian to disclose the requested e-mails to the requestor.

In another complaint, Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (Interim Order December 19, 2007), the requestor sought access to records maintained by the Borough Engineer. The Engineer did not work in the Borough office, but rather worked for an engineering firm and maintained a contractual agreement with the Borough to provide engineering services. The GRC determined that because the work done by the Borough Engineer was directly related to and arose from business done by him on behalf of the Borough of Bloomsbury (even if the Borough Engineer was not an actual employee of the Borough, he maintained a contractual relationship with the Borough), the requested records maintained on file by the Borough Engineer were considered government records pursuant to N.J.S.A. 47:1A-1.1 and were subject to public access.

New Jersey’s courts have had a similar result regarding access to government records that are not physically maintained by a public agency. In Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), plaintiff appealed a summary judgment against him holding that production of records was not required because the same were not in the County’s possession, but were maintained by the County’s insurance broker. The Appellate Division held that the requested records were “made” by or on behalf of the County in the course of its official business. The court stated “[w]ere we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA. N.J.S.A. 47:1A-1.” Id. at 516-517.

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Most recently, the impact of shared services agreements on OPRA has come before the GRC. In Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order January 31, 2012), the requestor sought access to dispatch call logs. The custodian asserted that the Borough did not maintain the dispatch records because the calls are routed through the Spotswood Police Department. The GRC subsequently requested that the Custodian legally certify to whether the Borough has entered into a shared services agreement with the Spotswood Police Department pursuant to N.J.S.A. 40A:65-1 et seq. (or the previous Interlocal Services Act at N.J.S.A. 40:8A-1 et seq.). The Custodian certified that the Borough of Helmetta and the Borough of Spotswood have been in an interlocal agreement for many years for dispatch services. Thus, the GRC addressed the issue of whether a public agency is obligated to obtain records responsive to an OPRA request from another public agency with which it has an interlocal agreement or with whom it is sharing services.

In making a determination, the GRC turned to its prior decision in Meyers and the court's decision in Burnett discussed above. The GRC determined that both Meyers and Burnett applied in the complaint. The GRC reasoned that:

“[s]pecifically, the Borough entered into an interlocal agreement with the [Spotswood Police Department] to operate the Borough's dispatch log. Similar to a third party agreement between a public agency and a private entity such as an insurance broker, the records responsive in this matter were records ‘made, maintained or kept on file’ for the Borough by the [Spotswood Police Department] pursuant to said agreement. As in Burnett, *supra*, the responsive dispatch logs were created on behalf of the Borough by the [Spotswood Police Department]. Additionally, as previously held in Meyers, the location of the requested records is immaterial; thus, the Custodian had an obligation to obtain the responsive logs from the [Spotswood Police Department] for disclosure.”

What Does This Mean?

Custodians must be cautious when responding to OPRA requests for records that are not in the custodian's immediate possession. As demonstrated above, there are instances in which a custodian is obligated to provide records to a requestor which are physically maintained off site by another agency. The location of a record does not give the record its status of a government record. A government record is any record “made, maintained, kept on file...or received” in the course of official business. N.J.S.A. 47:1A-1.1. When making the determination as to whether a record is a government record for the purposes of OPRA, custodians should ask themselves, “Has this record been made or maintained in the course of, or on behalf of, the agency's official business?” If the answer is yes, the record is a government record for the purposes of OPRA, notwithstanding any specific exemption to the contrary.



REDACTIONS: A CAUSE FOR CONCERN

Under OPRA, all government records maintained by a public agency are available for public access, unless the records are specifically exempt from disclosure pursuant to one of OPRA's 24 exemptions. Often, there are only portions of a government record that fit into a specific OPRA exemption and the remainder of the record remains available for public access. OPRA addresses this scenario in N.J.S.A. 47:1A-5.g., stating:

“[i]f the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.”

The process of deleting or excising information from a record is known as “redacting.” When a custodian redacts information from a government record, the custodian is denying access to that information. Anytime a custodian denies access under OPRA, the custodian is required to provide the requestor with the specific legal basis for the denial. This means that a custodian is required to provide a requestor with the specific legal basis for each redaction.

For example, if a custodian provides access to a record under OPRA on which the custodian has redacted a social security number and a home telephone number, the custodian has made two (2) redactions. As such, the custodian must identify the specific legal basis for the two (2) redactions. In this scenario, the custodian should indicate to the requestor in writing that both a social security number and a home telephone number have been redacted from the record because same are exempt from public access pursuant to N.J.S.A. 47:1A-1.1.

Custodians cannot deny access to an entire record when only portions of the record are exempt from public access. A common example of this error occurs with access to closed session meeting minutes. For example, if every discussion contained on a set of closed session meeting minutes is exempt from public access (perhaps personnel discussions or contract negotiations), a custodian may be tempted to deny access to the entire record. This would be a violation of OPRA. The entire record is not exempt from public access. Only the individual discussions are exempt from public access. (Disclaimer: every discussion is exempt in this scenario and is not an indication that any or all discussions contained in closed session minutes are always exempt from public access). Other information contained on the closed session minutes, such as the date and time of the meeting, the meeting location and the people present are still public. Thus, the custodian must redact all of the exempt information and still provide access to the remainder of the record. Again, the custodian is required to provide a requestor with the specific legal basis for each redaction. Remember: custodians bear the burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

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REDACTIONS CONTINUED

How to Redact

If a record contains material that must be redacted, such as a social security number or unlisted phone number, redaction *must be accomplished by using a visually obvious method that shows the requestor the specific location of any redacted material in the record*. For example, if redacting a social security number or similar type of small-scale redaction, custodians should:

Make a paper copy of the original record and 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.

The blacked out area shows where information was redacted, while the double copying ensures that the requestor will not be able to "see-through" to the original, non-accessible text. If "white-out" correction fluid is used to redact material, some visual symbol should be placed in the space formerly occupied by the redacted material to show the location of redacted material.

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 and insert in place of the redacted material asterisks to obviously indicate the redaction. Techniques such as "hiding" text or changing its color so it is invisible should not be used as sophisticated users can detect the changes and potentially undo the "hiding" functions.

Explaining Why a Redaction is Made

When redactions are made to a record, the custodian can use either the request form to explain why those elements of a record are redacted, or use a separate document, depending on the circumstances, but also referring to the OPRA exception being claimed. This principle also applies if pages of information are redacted. Sometimes it is clear from inspection (entry called "Social Security Number" has a black out over where the number would appear). The bottom line is that the requestor has a right to know the reason for the redaction, and the custodian has the responsibility to provide an explanation.

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

FREQUENTLY ASKED QUESTIONS

The GRC is pleased to announce the creation of a new information resource for both the public and records custodians – Frequently Asked Questions. The GRC now has two (2) sets of Frequently Asked Questions available online:

1. Frequently Asked Questions for the Public - <http://www.nj.gov/grc/public/faqs/>
2. Frequently Asked Questions for Custodians - <http://www.nj.gov/grc/custodians/faqs/>

The list of frequently asked questions will help records requestors and records custodians understand some of the most common issues regarding the Open Public Records Act. If you do not find the answer to your question on these pages please contact the GRC directly and a representative will be happy to assist you.



The Government Records Council (GRC) is committed to making the Open Public Records Act (OPRA) work for the citizens of New Jersey. Since the law's inception, the GRC has worked hard to make government records more easily accessible to the public. The GRC is committed to being the facilitator of open government in New Jersey.

Created under OPRA, the Government Records Council:

- Responds to inquiries and complaints about the law from the public and public agency records custodians;
- Issues public information about the law and services provided by the Council;
- Maintains a toll-free help-line and website to assist the public and records custodians;
- Issues advisory opinions on the accessibility of government records;
- Delivers training on the law;
- Provides mediation of disputes about access to government records; and
- Resolves disputes regarding access to government records.

Government Records Council members are:

Robin Berg Tabakin, Esq. (Chairwoman)

Owner of Technoforce, LLC and former State President of the New Jersey Association of Women Business Owners

Richard E. Constable, III

Commissioner of the NJ Department of Community Affairs

Chris Cerf

Acting Commissioner of the NJ Department of Education

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Government Records Council staff members are:

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