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## The Open Public Records Act

# Practical Problems and Reasonable Solutions



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Nearly eight years ago, the New Jersey Legislature enacted the Open Public Records Act (OPRA). The new law represented a great victory for open government advocates and a significant step towards achieving transparency in government.

The old Right to Know Law limited access to government documents by narrowly construing the definition of a government record to mean only those records required by law to be made, maintained and kept on file in the course of government business. The Legislature appropriately expanded that definition and included all government records made, maintained, kept on file or received in the course of government business, without reference to whether the record is or is not required by law to be maintained.

With the stroke of a pen, requestors were given greater access to all records at the state, county and local levels of government. Custodians, by necessity, would be obligated to exercise greater diligence in order to ensure the additional access contemplated by the new statute. They would also need to ensure the transparency in government that the Legislature intended.

Recognizing the new needs of both requestors and records custodians, the Legislature also created the Government Records Council (GRC) to administer OPRA. The functions of the GRC included: the adjudication of Denial of Access Complaints; the creation and dissemination of informational resources about OPRA and GRC services; the operation a toll-free information hotline and website; issuing Advisory Opinions regarding the accessibility of government records; and the provision of OPRA training to the public and records custodians.

Nearly eight years later, the GRC continues to provide guidance to requestors and records custodians as they navigate OPRA by directly responding to inquiries about the law and issuing 1,676 decisions interpreting OPRA.<sup>1</sup> As a general observation based on the 2,000 complaints and almost 11,000 inquiries the GRC received, even though the majority of records custodians are providing timely access to government records throughout the state, there are some records custodians who are having trouble making the transition from the closed file cabinets maintained under the old Right to Know Law to the new era of transparency in government ushered in by OPRA.

This may be due to the practical issues associated with implementing OPRA for both requestors and custodians. Indeed, the GRC's guidance admittedly, has been occasionally hampered by the vagueness of the law itself.

**Technical Edits** Nearly eight years experience has shown that there are a few provisions contained within OPRA that could benefit from minor technical edits. Such edits would make the statute easier to read and would highlight the exceptions to the law for requestors and records custodians. The edits should include:

- Reordering the definitions section of the statute so that the definitions appear in alphabetical order;<sup>2</sup>
- Defining significant terms contained within the statute that the Courts and the GRC have worked hard to interpret, such as [1] special service charge, [2] extraordinary expenditure of time and effort, [3] other meaningful medium, [4] immediate access, [5] substantial disruption of agency operations, and [6] actual costs of records; collapsing all exemptions<sup>3</sup> from disclosure contained in OPRA into one section; and
- Enumerating all the exemptions from disclosure for ease of identification by requestors and records custodians.

**Actual Costs for Paper Copies of Government Records** OPRA's language requiring custodians to charge the "actual cost" of providing paper copies of records has become the subject of fairly complex interpretation and has caused practical problems in its implementation.

By statute, the cost for OPRA responses should not to exceed the enumerated rates of \$0.75/\$0.50/\$0.25.<sup>4</sup> This fee structure was universally misconstrued to mandate the enumerated rates instead of charging an unspecified "actual cost." This is likely because charging the specified enumerated rates was simply easier for custodians, the GRC and the Courts to implement—at least until recently. On February 10, 2010, the Appellate Division of the New Jersey Superior Court ruled that public agencies must charge requestors the actual cost of producing copies of records requested under OPRA. The Court ruled that agencies must determine their actual cost annually, but failed to specifically articulate the formula for such a calculation. The Court discussed actual cost formulas that include the cost of paper, ink, copy machines, copy machine service contracts, services not covered by copy machine service contracts, and even the cost of electricity as possible factors in the actual cost calculation. Ultimately, the Court did not provide a universal equation to be used in determining an agency's actual cost of providing copies of government records.

Absent this key guidance, applying this decision in the real world will be challenging to say the least. Based upon the current language of the statute which specifically requires actual, direct cost, not to include the cost of labor or other overhead expenses associated with making copies,<sup>5</sup> the GRC presently interprets actual cost of providing paper copies of government records to equal only the agency's cost of paper and ink (or toner).

While reasonable minds might differ on the subject of creating a universal cost for paper copies, a universal cost would enable practical implementation and create benefits for both requestors and records custodians. Costs would be known, anticipated or calculable and there would be no room for abuse, or the perception of the same, in the calculation of actual cost.

Immediate Access Interpreting "immediate access" has presented another practical issue in the implementation of OPRA. There is the difference between how requestors and custodians view and define this access to certain records. Under the law,<sup>6</sup> access to budgets, bills, vouchers, contracts, and public employee salaries and overtime information must be immediately provided to requestors. The GRC has adopted a "plain meaning" of the term "immediate." However, when a request is voluminous or the records requested require extensive redactions,<sup>7</sup> providing access immediately upon the receipt of an OPRA request is neither practical nor fair to custodians.

Going forward, in addition to defining a specific time frame for immediate access, the law should require custodians to file these "immediate access" records in such a manner that assists in their quick access. This provision might be viewed as temporarily burdensome to custodians, but would ultimately assist them in providing prompt compliance.

**Extraordinary Expenditure of Time and Effort & Special Service Charge** A third practical issue with OPRA is the lack of definitions for what constitutes an "extraordinary expenditure of time and effort" and what a reasonable "special service" charge is. The law allows custodians to assess a reasonable, "special service" charge based on actual, direct cost incurred in the fulfillment of a request that requires an extraordinary expenditure of time and effort.<sup>8</sup> However, the lack of definitions in the law for "extraordinary expenditure of time and effort" and "special service charge" unfortunately leave custodians with little guidance for determining when or how to apply this provision.

The Court has held<sup>9</sup> that the determination of when a request requires an "extraordinary expenditure of time and effort" is a subjective one based upon several factors, including: the size of the public agency, the public agency personnel available to fulfill the request, whether the records are in storage, the amount of time required to locate, retrieve and assemble the documents for inspection or copying, the amount of time required to return the documents to their original storage place, and the extent to which the requested records have to be redacted, etc. Despite these judicially defined criteria, determining the amount of a reasonable special service charge has proven to be very challenging for custodians.

Adding an objective criteria that defines what constitutes an extraordinary expenditure for the time and effort to fulfill a request would provide requestors and custodians alike with a common expectation from the filing a request. This would go a long way to eliminating the distrust that presently exists. Examples for the criteria could be based on time required to fulfill a request, number of pages of records responsive to a request, etc. Further, like a universal actual cost for providing paper copies of records, a universal amount or range of amounts (hourly rate) for the special service charge, perhaps based on an agency's size, would provide the bright line rule that is needed to have consistent implementation of the law across all public agencies in New Jersey.

**Substantial Disruption of an Agency's Operations** A fourth practical issue with the implementation of OPRA is the lack of a definition of, or objective criteria for determining what constitutes a request that "substantially disrupts" an agency's operations. The law allows a custodian to deny access when fulfilling a request that would substantially disrupt an agency's operations only after the custodian attempts to reach a reasonable solution with the requestor that accommodates the interests of the requestor and agency.<sup>10</sup>

The GRC only has allowed custodians to avail themselves of this provision on two or three occasions. In one instance,<sup>11</sup> the requestor submitted over 200 voluminous OPRA requests in just one year for the exact same records to a small municipality in Sussex County that has only part-time municipal employees. In another instance,<sup>12</sup> the requestor submitted one voluminous OPRA request for building inspection records of over 6,000 buildings that involved 6,000 files, each containing over 20 years of relevant and responsive documents.

While custodians have the guidance of these GRC decisions, more specific language in the law would establish a mutual expectation and understanding for requestors and custodians alike. The GRC has encountered both custodians who unlawfully deny access under this provision and requestors who unreasonably bombard custodians with multiple, voluminous requests that do actually substantially disrupt agency operations. Right now, the vagueness in the statute allows the door to swing both ways.

**Record Medium** Another practical issue with the implementation of OPRA is the application of the provision that requires custodians to provide records in the medium requested.<sup>13</sup> The statute requires that custodians must provide records in the medium requested only if the public agency maintains the record in that medium. Alternatively, when the public agency does not maintain the record in the medium requested, the statute requires custodians to provide the record to the requestor in "some other meaningful medium." However, because the law lacks a definition for "other meaningful medium," many disputes surrounding this provision have arisen. Requestors and custodians do not always agree on what constitutes some other meaningful medium.

The GRC interprets this provision to require custodians to obtain an outside vendor quote (without reference to the Local Public Contracts Law) for the cost of conversion of a record when the only meaningful medium to the requestor is one for which the custodian does not have the technological capacity to create. The Court addressed this very issue and agreed with the GRC's interpretation.<sup>14</sup> Specifically, the Court determined that a requestor must bear the cost of converting a record to some other meaningful medium not maintained by a public agency when the agency does not have the technology to create such medium. In that case, the requestor (Gannett Co. Inc.) requested a municipality's payroll records in a searchable, electronic format at no charge. The Court ruled that the media company must pay the \$1,100 fee the municipality incurs to convert the record to the medium requested.

While the custodial agency was victorious in this instance, it unfortunately was obligated to incur legal fees to defend its very reasonable position. A more specifically worded statute would avoid such a legal fight and ensure the straightforward implementation of OPRA as it relates to providing records in all mediums requested.

**Privacy** A sixth practical issue with the implementation of OPRA, and maybe the most important one, relates to the Legislature's statement<sup>15</sup> that public agencies have a responsibility and obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure would violate the citizen's reasonable expectation of privacy. The Supreme Court of New Jersey recently held<sup>16</sup> that "without ambiguity" this privacy provision "is neither a preface nor a preamble," but rather "the very language expressed in the privacy clause reveals its substantive nature; it does not offer reasons why OPRA was adopted, as preambles typically do; instead, it focuses on the law's implementation."

This "privacy clause" is the only language in OPRA to protect personal information contained in government records other than the few specific exemptions for social security numbers, unlisted telephone numbers, credit card numbers and drivers' license numbers.<sup>17</sup> Without applying this language in OPRA, New Jersey citizens would feel less safe and more vulnerable to identity theft. Surely now is the right time for the Legislature to revisit the Privacy Study Commission's report of recommendations<sup>18</sup> for addressing privacy concerns with personal information contained in government records.

**Toward Reasonable Solutions** By enacting OPRA, the Legislature successfully expanded the reach of average citizens into the desk drawers and file cabinets of all public agencies within the state, with only certain exceptions. This new spirit of open government in New Jersey should be celebrated and embraced by requestors and records custodians. However, because of the aforesaid practical problems of implementing OPRA, the celebration by custodians has, at times, been less than lively. With the minor technical edits and points of clarification to OPRA's current statutory language as described herein, the goals of transparency in government can be readily achieved and the custodians too can join the open government party.

1 All of the GRC's decisions are published on its website in a searchable format at [www.nj.gov/grc/decisions/search/index.shtml](http://www.nj.gov/grc/decisions/search/index.shtml) .

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

3 OPRA exempts from disclosure 24 categories of records and/or information contained in government records. For a list of those exemptions, see [www.nj.gov/grc/public/exempt/](http://www.nj.gov/grc/public/exempt/) .

4 N.J.S.A. 47:1A-5.b. provides that a copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following: first page to tenth page, \$ 0.75 per page; eleventh page to twentieth page, \$ 0.50 per page; all pages over twenty, \$ 0.25 per page. The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.

5 N.J.S.A. 47:1A-5.b.

6 N.J.S.A. 47:1A-5.e.

7 If a record contains material that must be redacted, such as a social security number, redaction may be accomplished by using a visually obvious method that shows the requestor the specific location of any redacted material in the record. A custodian should make a paper copy of the original record and manually black-out the exempt information on the copy with a dark colored marker and then provide a copy of the black-out record to the requestor.

8 N.J.S.A. 47:1A-5.c.

9 *Courier Post v. Lenape Regional High School District*, 360 N.J. Super. 191 (Law Div. 2002).

10 N.J.S.A. 47:1A-5.g.

11 *Caggiano v. Borough of Stanhope (Sussex)*, GRC Complaint No. 2006-220 (September 2007).

12 *Robert Vessio v. N.J. Dept. of Community Affairs*, GRC Complaint No. 2007-188 (April 2008).

13 N.J.S.A. 47:1A-5.d.

14 *Gannett Satellite Information Network, Inc. v. Borough of Raritan*, Docket No. SOM-L-1789-09 (Superior Court of New Jersey Law Division, filed Dec. 15, 2009).

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

16 *Fred Burnett v. County of Bergen*, 198 N.J. 408 (2009).

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

18 Final Report Privacy Study Commission—Submitted to Governor Richard J. Codey and The New Jersey Legislature, December 2004. See <http://www.state.nj.us/privacy/>.

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