Government
Records Council

The Open Public Records Act: Understanding OPRA and GRC Decisions

March 7, 2006

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The Open Public Records Act:

Understanding OPRA

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What Is OPRA?

- Open Public Records Act - N.J.S.A. 47:1A-1 et seq.
- Replaced the "Right to Know Law" – same cite
- Increases public's accessibility to government records
- Provides compliance process via the GRC
- Defines a government record
- Provides for penalties

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What Is the Government Records Council?

- Duties provided at N.J.S.A. 47:1A-7
- Agency that provides assistance to the public and to records custodians
- Hears complaints about denials of access to records
- Five-member Council
- Professional staff

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What Public Agencies Are Covered Under OPRA?

- N.J.S.A. 47:1A-1.1
- Executive Branch
- State Authorities
- State Commissions
- State Colleges and Universities
- County Government
- Municipalities
- Fire Districts
- School Boards
- Planning and Zoning Boards
- Business Improvement Districts

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Are All Government Records Accessible to the Public?

- Yes, but …
- Government records shall be readily accessible with certain exceptions N.J.S.A. 47:1A-1
- Limitations on access shall be construed in favor of the public
- Public agencies must safeguard a citizen's personal information

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Can a Public Agency Deny a Request?

- Yes, but ...
- If the public agency can demonstrate that the denial is authorized by law. N.J.S.A. 47:1A-6 (burden of proof on custodian)
- If the request is not on the agency's official OPRA records request form

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GRC Advisory Opinion 2006-01
What Constitutes a Valid OPRA Request

- Based on the language of the statute, and judicial recognition of the importance of the statutory request form, it is determined that the statute requires all requestors to submit OPRA requests on an agency's official OPRA records request form.
- OPRA's provisions come into play only when a request for records is submitted on the agency's official OPRA records request form
- When an agency has not adopted its own official OPRA request form, the requestor may use the GRC's Model Request Form

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Why are Some Records Not Disclosed?

- Exceptions
  - Citizen's reasonable expectation of privacy
  - OPRA exceptions
  - Other statutory exceptions
  - Executive order exceptions
  - Regulatory exceptions
  - Common law decisions

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OPRA Exceptions – N.J.S.A. 47:1A-1.1

- "ACD" or "Deliberative Material"
  - Inter-agency or intra-agency advisory, consultative or deliberative material.
- Legislative Records
- Law Enforcement Records:
  - Medical examiner photos
  - Criminal investigatory records (N.J.S.A. 47:1A-3.b. list information that must be disclosed)
  - Victims' records

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OPRA Exceptions – N.J.S.A. 47:1A-1.1 (cont'd)

- Trade secrets and proprietary commercial or financial information
- Any record within the attorney-client privilege
- Information which would jeopardize security:
  - Computer hardware, software and networks administrative or technical information
  - Emergency or security information or procedures for any buildings or facility
  - Security measures and surveillance techniques that create risk to people, property or computer hardware

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OPRA Exceptions – N.J.S.A. 47:1A-1.1 (cont'd)

- Information, which if disclosed, would give an advantage to competitors or bidders
- Information generated by or on behalf of public employers or public employees in connection with:
  - Any sexual harassment complaint filed with a public employer
  - Any grievance filed by or against an employee
  - Collective negotiations documents and statements of strategy or negotiating

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OPRA Exceptions – N.J.S.A. 47:1A-1.1 (cont'd)

- Information that is a communication between a public agency and its insurance carrier, administrative service organization or risk management office
- Information that is to be kept confidential pursuant to court order
- Certificate of honorable discharge issued by the United States Government (Form DD-214) filed with a public agency

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OPRA Exceptions – N.J.S.A. 47:1A-1.1 (cont'd)

- Personal identifying information
  - Social security number
  - Credit card number
  - Unlisted telephone number
  - Driver license number

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OPRA Exceptions – N.J.S.A. 47:1A-1.1 (cont'd)

- Certain records of higher education institutions
  - Research records
  - Questions or scores for exam for employment or academics
  - Charitable contribution information
  - Rare book collections gifted for limited access
  - Admission applications
  - Student records, grievances or disciplinary proceeds revealing a students' identification

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OPRA Exceptions

- N.J.S.A 47:1A-1.2 - Biotechnology trade secrets
- N.J.S.A 47:1A-2.2 – Convicts requesting their victims' records
- N.J.S.A 47:1A-3.a. – Ongoing investigations of non-law enforcement agencies (must prove disclosure is inimical to the public interest)

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OPRA Exceptions

- N.J.S.A. 47:1A-5.k. – Public defender records
- N.J.S.A. 47:1A-10 - Personnel and pension records (except certain information is disclosable)
- N.J.S.A. 47:1A-9 – State or federal statutes and regulations, Executive Orders, Rules of Court, and privileges created by State Constitution, statute, court rule or judicial case law

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OPRA Exceptions

- Executive Order #26 Documents
  - Records of discrimination, harassment or hostile environments
  - Medical or psychiatric history, tax return information and personal finances
  - Examination data
  - Records in the possession of another department, including OIT or State Archives
  - Resume of an unsuccessful candidate for employment if the candidate consents

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Request Response Times

- **As soon as possible, but no later than 7 business days** after the request is received. N.J.S.A. 47:1A-5.i.
- **Immediate access** to budgets, bills, vouchers and contracts. N.J.S.A. 47:1A-5.e.
- **If a record is in storage or archived**, a written agreement is necessary if record will not be available within the 7 Business days. N.J.S.A. 47:1A-5.i.

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Copy and Inspection Fees (Actual Cost)

- Basic per page copy fees:
  - $0.75 for the first 10 pages, $0.50 for pages 11-20, $0.25 each page over 20 N.J.S.A. 47:1A-5.b.
- Municipal ordinance when actual cost exceeds OPRA rates. N.J.S.A. 47:1A-5.c.
- Special service charges for “extraordinary” requests. N.J.S.A. 47:1A-5.c.
- Medium conversion N.J.S.A. 47:1A-5.d.

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Copy and Inspection Fees (cont'd)

- Special service charges for "extraordinary" requests (reasonable based on actual direct cost). N.J.S.A. 47:1A-5.c.
  - Copies can't be reproduced by ordinary copying equipment in ordinary business size
  - Accommodating request involves an extraordinary expenditure of time and effort

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Copy and Inspection Fees (cont'd)

- Medium conversion - reasonable cost based on the following:
  - Extensive use of technology and
  - Labor for programming, clerical and supervisory assistance that may be required

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

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What Happens If a Request Is Denied?

- Requestors may:
  - File complaint in Superior Court, **or**
  - File complaint with the Government Records Council
  - N.J.S.A. 47:1A-6

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The GRC Process

- Website – web based general guidance
- Inquiry – specific guidance requested via e-mail, telephone and written
- Filing of complaint
- Mediation – Office of Dispute Settlement
- Adjudication

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Website General Guidance

- Readable version of OPRA
- Handbook for Records Custodians
- Frequently Asked Questions
- A Citizen's Guide to OPRA
- GRC Decisions
- OPRA Guidelines
- Advisory Opinions

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Inquiry

- The information provided by the GRC staff is guidance and does not constitute legal advice as to whether a particular record is exempt from disclosure or not since the provisions of OPRA are applied to the specific facts of the request and/or complaint
- Offer resources for decision making
- Guidance never preempts the Council

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Complaints

- Denial of Access Complaint
  - must be submitted on GRC form (on website)
  - must be signed by the requestor (not legal representative)

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Mediation

- Offer to mediate sent to both parties
- Mediation Process provided for by statute
- State's Office of Dispute Settlement – not the GRC
- Non-adversarial
- Agreement to mediate must be signed by requestor and custodian (not counsel)

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Mediation (Cont'd)

- Informal, voluntary process conducted by an impartial third party
- Confidential (even to GRC staff)
- No cost
- Parties control the outcome
- Telephone or face-to-face

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Adjudication Stages

- Complaint investigation and analysis
- Preparation of Findings and Recommendations of the Executive Director
- Council action
- Appeal of Council decisions to Superior Court (optional to parties)

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Adjudication – Investigation and Analysis

- If mediation fails or is rejected, complaint investigation and analysis commences
- Request for Statement of Information sent to records custodians – 5 business days to respond (must be signed by custodian not legal representative)
- Complainant response
- Custodian's certifications

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Adjudication – Investigation and Analysis (cont'd)

- Statement of Information ("SOI")
  - Custodian's answer to an OPRA Complaint
  - Document Index
    - Itemized list of all documents responsive to request
    - Identify specific documents provided
    - Identify documents not provided with legal explanation and citation for denial of access
  - Custodian must sign SOI certifying to the information provided in the SOI

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Adjudication – Preparation of Findings and Recommendations

- Staff investigates and analyzes parties' positions
- Legal opinion sought if necessary
- Preparation of Findings and Recommendation of Executive Director
- Case scheduled for Council meeting

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Adjudication – Council Action

- Council meets in closed session to discuss legal issues, if necessary and allowed under OPMA
- Public session – Council discusses cases
- Parties do not testify unless directed to by the Council
- Council members vote
- Final Decisions and Interim Orders sent to parties

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Adjudication – Appeal

- Parties can appeal GRC decisions to the Appellate Division of the Superior Court
- A “stay” must be requested from the GRC before an appeal is made

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Selected Council Activities

- Streamlined disposition of cases
  - Administrative case dispositions (Council votes on these cases)
- Hearings
- *In Camera* Inspections

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Streamlined Disposition of Cases

- Administrative case dispositions:
  - All records responsive were provided
  - No record(s) responsive to the request
  - No valid OPRA request (request was verbal or not on OPRA request form)
  - Not within GRC jurisdiction to adjudicate (requests of Judiciary or Legislature)
  - Not a request for a government record (request for information or answers)
  - Complaint voluntarily withdrawn or settled in mediation

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Hearings

- The Council holds hearings on selected issues
- The Council concluded its first hearing on whether a custodian knowingly and willfully violated OPRA and unreasonably denied access pursuant to N.J.S.A. 47:1A-11 (O'Shea, 2004-17)

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In Camera Inspections

- Closed meeting inspection of records by the Council claimed to be exempt from disclosure
- Performed when the Council cannot make a decision on disclosure based on party submissions
- Unredacted documents destroyed after inspection
- Performed at Council's discretion (happens more often now)

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Prevailing Party Attorney's Fees

- Attorney's fees may be awarded only when the requestor has obtained a final decision from the GRC that access was improperly denied and the record requested must be disclosed. N.J.S.A. 47:1A-6 and 7.f.
- Not awarded when a record is released after a complaint is filed with the GRC, but before a final decision is rendered.

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The Open Public Records Act:

GRC Decisions

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Answer Each OPRA Request Individually (First Council Hearing)

- O'Shea (2004-17)
  - Lack of response to 1 of 3 requests at issue
  - Council's first hearing on the issue of a knowing and willful violation
  - Hearing concluded on 5/12/05
  - Custodian found to be negligent, but not knowing and willful. N.J.S.A. 47:1A-11.

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Responses to OPRA Requests Must Be in Writing

- Cole (2004-33)
  - Verbal response. No response in writing results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.c.
  - Document not in existence at time of request
  - Not a knowing and willful violation

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Judiciary Not Within GRC Jurisdiction

- Waldron (2003-148)
  - Requested documents are the subject of a Superior Court case
  - GRC lacks jurisdiction over judiciary pursuant to N.J.S.A. 47:1A-7.g.

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GRC Lacks Authority Over Accuracy of Record Content

- Kawanzaa (2004-167)
  - Work credits, commutation credits and jail credits
  - Records responsive to request were disclosed
  - Complainant raised issue of accuracy of documents
  - Council ruled that it does not have authority over content of documents pursuant to N.J.S.A. 47:1A-7.b.

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GRC Lacks Authority Over Record Retention

- Merino (2003-110)
  - Access denied on the basis that the NJ State's Division of Archives and Records Management (DARM) didn't require the record to be maintained
  - Council ruled that OPRA isn't contingent on DARM requirements
  - If it's on file, custodians need to provide access or assert a lawful denial

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Municipal Clerk is the Record Custodian Under OPRA

- Calogero (2003-119)
  - Complainant sought Mayor's e-mails
  - Custodian directed requestor to the Mayor
  - Council ruled that it's the Custodian's burden to respond to the request

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Government Employees Must Forward Requests to Custodian

- Seabrook (2004-40)
  - Police department received request, not municipal clerk
  - Request was a valid OPRA request
  - Initially, no written response
  - Acceptable response ultimately provided by municipal attorney
  - If an officer or employee of a public agency receives an OPRA request, they shall forward the request to the records custodian. N.J.S.A. 47:1A-5.h.

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No Defense for Denial

- Smith (2004-142)
  - Capital and operating expenditure documents at issue
  - No defense offered pursuant to N.J.S.A. 47:1A-6
  - Council ordered disclosure and a hearing on whether a knowing and willful violation occurred
  - Custodian ultimately provided access
  - Complainant voluntarily withdrew complaint

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Specific Legal Citations Supporting Denial Required

- Schwarz (2004-60)
  - Custodian did not provide specific citation to OPRA and HIPPA
  - Council ruled that specific citations are needed pursuant to N.J.S.A. 47:1A-6

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Requests of a Continuing Nature

- Blau (2003-75)
  - Council's interim order states requests of a continuing nature are not valid OPRA requests
  - Medium conversion was also at issue
  - Referred to OAL for conversion issue and whether a knowing and willful violation due to an untimely response existed
  - Case now closed because complainant voluntarily withdrew complaint

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Broad or Unclear Requests

- Bent (2004-78)
  - Request was broad and unclear and sought opinions and interpretations (any and all)
  - The Council found that the information sought did not fall within the statutory definition of a government record pursuant to OPRA
  - The Council's decision was affirmed on appeal in the published court decision Michael Bent v. Stafford Police Department, 381 N.J. Super. 30, 884 A.2d 240, (October 21, 2005)
  - See also MAG Entertainment v Alcohol Beverage Control, 375 N.J. Super. 534; 868 A.2d 1067, (March 7, 2005)

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Broad and Unclear - Cont'd.

- Moore (2005-80)
  - Complainant did not respond to Custodian's request for clarification
  - Custodian specified the reasons it sought clarification
  - The Council concluded that the Custodian met the burden of proving the denial of access was proper
  - See also Liebel (2004-51)

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Location of Government Record Not Always Relevant

- Meyers (2005-127)
  - E-mails from Mayor's personal e-mail account were sought
  - Custodian claimed that the e-mails were not a government record because of there location
  - The Council concluded that the Mayor used his personal e-mail account to conduct borough business
  - A government record is not restricted by its location and the Custodian is not inhibited from obtaining – N.J.S.A. 47:1A-1.1
  - See also Seerey (2005-38)

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Location of Government Record Not Always Relevant – Cont'd.

- Jackson (2002-98)
  - Improper assertion that leave of absence documentation not disclosable because maintained in personnel files
  - Council ruled that disclosure is dictated by document content, not its physical location. N.J.S.A. 47:1A-10.

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Advisory Consultative Deliberative Privilege – *In Camera* Inspection

- O'Shea (2004-93)
  - Secretary's handwritten notes taken at closed session meeting
  - Council originally concluded records not exempt from disclosure as "ACD"
  - Decision was appealed and case remanded for *in camera* inspection
  - Council conducted *in camera* inspection and reversed its decision
  - Currently on appeal

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Criminal Investigatory Records

- Nance (2003-125)
  - Access denied on the basis of OPRA's Criminal Investigatory Record exemption
  - Petty and disorderly persons offenses found to be criminal in nature because of their inclusion under Title 2C of the NJ Statutes
  - The records sought were not required by law to be made, maintained and kept on file pursuant to N.J.S.A. 47:1A-1.1
  - Council upheld public agency's position

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Once a Criminal Investigatory Record, Always a Criminal Investigatory Record

- Janeczko (2002-79 and 2002-80)
  - Request for police investigation reports of a criminal incident
  - The records were exempt from disclosure under the definition of criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1
  - A criminal investigatory exemption does not permit access once the investigation is completed
  - The Council's decision was affirmed on appeal

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Special Service Charge

- Fisher (2004-55)
  - N.J.S.A. 47:1A-5.c.
  - $1,877.93 charge assessed
  - Council adopted a 14-point framework for analysis
  - Human resource level requirement is at issue
  - Now on appeal
  - See also The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191 (Law Div. 2002)

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Special Service Charge (Cont'd)

- Renna (2004-134)
  - Custodian requested a special service charge of $2,260.00
  - After applying the "Fisher 14," the Council allowed only $1,048.17

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Conversion of Medium

- Sharkey (2004-67)
  - Accounting system records
  - Council ordered conversion from paper to electronic format and pass on direct costs to comply
  - N.J.S.A. 47:1A-5.d.

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Laws Superceding OPRA's Access (Federal Law)

- Tombs (2003-123)
  - Request for digital copy of Geographical Information System(GIS) topographic mapping data
  - The case was referred to the Office of Administrative Law ("OAL") because there were contested facts
  - The records were exempt from disclosure under federal law and OAL concluded that the GRC could not order disclosure
  - The Council accepted the OAL's initial decision

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Agency Policy Does Not Preempt OPRA

- Renna (2004-136)
  - Requestor sought record via e-mail or fax
  - Custodian refused on basis of agency policy
  - N.J.S.A. 47:1A-6 requires the custodian provide a “lawful” basis for denial
  - N.J.S.A. 47:1A-9 did not apply
  - Council ordered disclosure in the requested medium

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Balancing of Party Interests

- Avin cases – (2004-176, 178, 179, 180, 181, 182)
  - Release of fire and burglar alarm permits, including name and address information
  - Council ruled not disclosable
  - Security and emergency concerns for the residents outweighs the complainant's right to access
    - Council, not the custodian, may ask the requestor his/her need for access

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Balancing of Party Interests (Cont'd)

- Perino (2004-128)
  - Complainant sought name, address and phone number of the citizen who brought a complaint to the borough
  - Potential harm of unsolicited contact and confrontation between the citizen and Complainant were considered
  - Complainant's stated need did not outweigh the citizen's expectation of privacy

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Disclosure May Not Be Contingent on Disclaimer

- Kushner (2004-111)
  - Complainant sought GIS documentation
  - Custodian based release on requestor first executing a disclaimer, hold harmless, indemnification and limitation of use agreement
  - Council ruled against the custodian

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