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**Special Statement of the Government Records Council 2020-01**

From: Frank F. Caruso, Executive Director

Date: March 26, 2020

Re: P.L. 2020, c.10 and COVID-19 Impacts on OPRA

In response to the recent amendment to Open Public Records Act (“OPRA”), the Government Records Council (“GRC”) has prepared the following guidance on the effects of work disruptions and potential closures due to COVID 19. The GRC notes that this information does not constitute legal advice or a final decision of the Council since the provisions of OPRA are applied to the specific facts of the request and/or complaint.

Generally, a custodian is required to allow for inspection or copying of government records “during regular business hours.” N.J.S.A. 47:1A-5(a). Moreover, OPRA provides that a custodian must respond to an OPRA request “not later than seven business days after receiving the request.” N.J.S.A. 47:1A-5(i). In determining whether the seven (7) business days have expired, the GRC has turned to N.J. Court Rules, which provides that “. . . the day of the act or event from which the designated period begins to run is not to be included.” R. 1:3-1; See also Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-325 (Final Decision dated October 27, 2015). Thus, the statutorily mandated seven (7) business day time frame begins on the first (1<sup>st</sup>) business day after the date of receipt of an OPRA request.

Further, the GRC has consistently interpreted the term “business days” to mean those days on which a “public agency” is open for “regular business hours.” N.J.S.A. 47:1A-5(a). This term does not include weekends, holidays, and regular or emergency closures. Thus, in the instance that a public agency is closed on an emergency basis and is not open for “regular business hours,” whether in the short- or long-term, it is reasonable to conclude that those days on which the agency is closed is not included in the statutory response time frame.

Enacted on March 20, 2020, P.L. 2020, c.10 amended N.J.S.A. 47:1A-5(i) as follows:

During a period declared pursuant to the laws of this State as a state of emergency, public health emergency, or state of local disaster emergency, the deadlines by which to respond to a request for, or grant or deny access to, a government record under paragraph (1) of this subsection or subsection e. of this section shall not apply, provided, however, that the custodian of a government record shall make a

reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter.

[Id. at (2).]

P.L. 2020, c.10 provides that OPRA's statutory deadlines do not apply for the duration of a Governor-declared state of emergency pursuant to the Disaster Control Act (N.J.S.A. App.A.9-33 *et seq.*) or a public health emergency under the Emergency Health Powers Act (N.J.S.A. 26:13-1 *et seq.*), or when a state of local disaster emergency is declared by a county or by a municipality. Further, the new amendment requires custodians to make a "reasonable effort" to respond to an OPRA request during that time. However, the amendment also adds that any custodian with the ability to follow the deadlines as set forth in N.J.S.A. 47:1A-5(e) and 5(i) should do so.

In furtherance of a custodian's "reasonable effort," the GRC notes that an available response option is to take extensions of time as needed. Specifically, OPRA requires a custodian to respond in writing within the statutorily mandated time frame stating that an extension until a date certain is necessary. See Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011); Werner v. NJ Civil Serv. Comm'n, GRC Complaint No. 2011-151 (December 2012). This is notwithstanding whether a requestor objects to an extension of time. However, the GRC has accepted complaints regarding disputed extensions of time. In determining these complaints, the GRC decided on the reasonableness of extensions. Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014). Since that time, the GRC has looked to Ciccarone, GRC 2013-280, to make a reasonableness determination in other complaints. See Rodriguez v. Kean Univ., GRC Complaint No. 2015-114 (April 2016); Rodriguez v. Kean Univ., GRC Complaint No. 2016-196 (February 2018).

Please note that any dispute over extensions will be reviewed on a case-by-case basis because OPRA does not include a limitation on requesting extensions. However, the GRC's analysis of this issue has included recognition of "extenuating circumstances." Those circumstances would include, but not be limited to, retrieval of records that are in storage or archived (especially if at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the public agency, or the public agency's need to reallocate resources to a higher priority due to force majeure.

In closing, the GRC stresses that custodians within agencies operating under normal business hours during an emergency, even if closed to the public or working off-site, are obligated to respond to OPRA requests upon receipt in due course to the extent possible. Additionally, custodians should proactively advise the public (by website notification and/or other methods) if the method of transmission for OPRA requests has changed or been limited due to a state of emergency. Similarly, members of the public wishing to submit OPRA requests should contact the applicable public agency for updates on any limitations or disruptions affecting the OPRA process during a state of emergency.