

The Open Public Records Act

New Jersey Government Records Council

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Overview

- Section I – Understanding OPRA
- Section II – OPRA in Practice
- Section III – Complaint Process
- Section IV – Special Issues
- Section V – Exemptions in OPRA

Section I: Understanding OPRA



What is OPRA?

- Not Oprah the celebrity ☺
- Open Public Records Act - N.J.S.A. 47:1A-1 et seq.
- Replaced the “Right to Know Law.”
- Increases public’s accessibility to government records (cultural change in New Jersey).
- **Broadly defines a government record.**
- Provides compliance process via the GRC and NJ Superior Court.
- Provides for penalties to anyone who knowingly and willfully violates OPRA.

Non OPRA Requests

- Not all records requests are OPRA requests! Requestor elects to invoke OPRA’s provisions.
- OPRA does not affect common law right of access, or right of access via discovery.
- Challenges to common law requests and discovery request must be made to NJ Superior Court, not GRC.
- GRC cannot advise on process, fees, etc. regarding common law or discovery requests.

Who Can Request Records Under OPRA?

- Anyone!
- Although OPRA states “citizens of this State,” the Attorney General’s Office advises that OPRA does not prohibit access to residents of other states.
- A requestor may even file an OPRA request anonymously.

What is the GRC?



- GRC = Government Records Council.
- Duties listed in OPRA - N.J.S.A. 47:1A-7.
- Provides assistance to requestors and records custodians – cannot provide legal advice.
- Adjudicates denial of access complaints – court alternative. No statute of limitations.
- Five-member Council & professional staff.

Limitations of GRC's Authority

- GRC only has authority over **access** to records maintained by a public agency at the time of an OPRA request.
- No authority over accuracy of record content.
- No authority over the condition of records.
- No authority over records retention – Division of Archives and Records Management (DARM). See Circular Letter handout for specific e-mail guidance.
- No jurisdiction over the Judicial or Legislative Branches of State Government.
- No authority over other records requests (administrative, common law, discovery).
- No authority over how a custodian uses his/her legal counsel.
- GRC cannot adjudicate a complaint currently pending or adjudicated in Superior Court.
- No authority over Open Public Meetings Act issues.

Definitions

- All government records are subject to public access unless specifically exempt under OPRA or any other law.

Government Record: All records made, maintained, kept on file, or received in the course of official business.

- Expands Right to Know Law definition (records *required* to be maintained on file).
- 24 specific exemptions to disclosure (see exemptions handout).

Definitions

Custodian of a Government Record:

- Municipality - the municipal clerk or other department head if made known to the public.
- 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.

OPRA Request Forms

- N.J.S.A. 47:1A-5.f. contains OPRA request form requirements.
- Be careful about adding exemptions to OPRA request form. Custodians have run into trouble if OPRA provision is not described accurately. Example: personnel records are exempt, without reference to exceptions named under N.J.S.A. 47:1A-10.
- GRC's Model Request Form is available online for adoption.

OPRA Requests

- OPRA requests *should* be on the agency's official OPRA request form (Renna v. County of Union (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.

OPRA Hours

- Custodians must permit records to be inspected, examined, and copied by any person during regular business hours, unless:
 - a municipality has a population of 5,000 or fewer according to the most recent federal decennial census;
 - a board of education has a total district enrollment of 500 or fewer; or
 - a public authority has less than \$10 million in assets.
- If above applies, custodians may set OPRA hours during not less than six regular business hours over not less than three business days per week or the entity's regularly-scheduled business hours, whichever is less. N.J.S.A. 47:1A-5.a.

Section II: OPRA in Practice



Making an OPRA Request

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 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 (App. Div. 2009).

How Do I Know What to Request and from Where?

- Requestors are likely not aware of all records maintained by an agency.
- Custodians should assist requestors in identifying specific types of records – spirit of OPRA suggests cooperation from Custodian.
- Requestors must submit OPRA requests to the agency that maintains physical custody of the requested records. Example: Request for Trenton PD report submitted to Trenton PD. Request for Cherry Hill tax maps submitted to Cherry Hill.

Receiving an OPRA Request: Non-Custodian Employees

If an officer or employee of a public agency receives an OPRA request, they **must forward the request** to the records custodian **or direct the requestor** to the records custodian pursuant to N.J.S.A. 47:1A-5.h.

Steps to Follow When Responding to an OPRA Request

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.

Step 1: When is my deadline to respond?



When Does the Clock Begin?

- 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

- 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.

Immediate Access

- **Immediate access** 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** in storage, in use, or requires medium conversion. ([Renna v. County 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.

Additional Time Required

- Custodians may seek extensions of time beyond the seven (7) business day deadline with legitimate reasons (i.e. records in storage, medium conversion required, request voluminous, etc.).
- Requests must be in writing, within the seven (7) business days, and 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.](#)

Step 2: Is this a valid OPRA request?



Broad and/or Unclear Requests

- Example of an overly broad request: "Any and all records related to the construction of the new high school."
- "Records" is too broad of a term.
- Example of a valid request: "Any and all e-mails between Jane Doe and John Smith regarding the construction of the new high school from January 1, 2009 to February 28, 2009."
- Names specific type of record, parties to correspondence, subject and date range.

Broad and/or Unclear Requests

- 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** her files to **find** the identifiable government records listed in the Complainant's OPRA request. A custodian is not required to **research** her files to figure out which records, if any, might be responsive to a broad and unclear OPRA request. See Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).

Broad and/or Unclear Requests

In Burnett v. County of Gloucester, (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, rather than a request for a specific record. The court examined the holding in MAG and the GRC's decision in Donato v. Twp. of Union, GRC 2005-182, interim order (January 31, 2007) and determined that "[h]ere, it is the documents, themselves, that have been requested, and their retrieval requires a search, not research."

Step 3:

Do I have enough information to fulfill request?



Seeking Clarification

- A custodian may seek clarification of an overly broad or unclear request.
 - Request must be in writing, within seven (7) business days.
 - Response time stops until requestor responds – Moore v. Township of Old Bridge, GRC Complaint No. 2005-80 (August 2005).

Step 4:

**Will the request require a special service charge?
Substantial disruption of agency operations?**

Special Service Charge

- Special service charges for "extraordinary" requests must be 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 allowed!!
 - GRC's "14 Point Analysis" (see Handout)
 - Courier Post v. Lenape Regional High School, 360 N.J. Super. 191 (Law Div. 2002) and Fisher v. Department of Law & Public Safety, Division of Law, GRC Complaint No. 2004-55 (August 2006).

Substantial Disruption

- 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, Division of Fire Safety, GRC Complaint No. 2007-188.

Step 5: Obtain records responsive to request

Obtain Records Responsive

- Reasonable that Custodian does not have physical custody of all records maintained by agency.
- Custodian should document attempts to access records from other departments/personnel.
- Custodian should keep requestor informed of attempts to gain access to records.
- Custodian cannot be held responsible if another employee obstructs access as long as Custodian can prove attempts made to gain access to the records.

Step 6: Do the records or portions thereof fit into any of OPRA's exemptions?



OPRA's Exemptions

- 24 specific exemptions contained in OPRA (see handout).
- If record does not fit into any exemption, it is accessible under OPRA.
- Default answer is always YES!!!

Step 7: Redact as necessary, convert to requested medium, calculate appropriate fees.



Redactions

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.

Redactions Cont'd

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

- 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

- If conversion is completed in-house, there is generally no charge, unless actual costs can be demonstrated or special service charge applies.
- If an outside vendor is required, seek estimate and provide requestor with estimate for approval/rejection.
- Charge for conversion must be actual cost. See Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) – Custodian charged \$55.00 for a computer diskette.
- See also Gannett Satellite Information Network, Inc. v. Borough of Raritan, Docket No. SOM-L-1789-09 (December 2009) – Gannett requested records in particular format not maintained by agency. Court held that Gannett must pay for any required medium conversion.

Legislative Changes to Copying Costs

- Governor Christie signed legislation on September 10th that changes OPRA's fee schedule:
 - 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 became effective Tuesday November 9th.

Step 8: Provide records, or deny with legal basis, in writing

Method of Delivery

- A custodian must grant access to a government record by method of delivery requested by requestor (regular mail, fax, e-mail, etc). O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008).
- As of November 9th electronic delivery is free of charge pursuant to OPRA amendment.



Lawful Basis for Denial

- Custodians must provide lawful basis for denial at the time of denial.
- Burden of proving lawful denial of access rests on the custodian. N.J.S.A. 47:1A-6.
- This includes outright denials and redactions.
- Examples:
 - Jane Smith's payroll record is redacted pursuant to N.J.S.A. 47:1A-1.1, because social security numbers are exempt from public access.
 - 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.

Adequate Response

A proper response to an OPRA request:

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

Section III: Complaint Process



Options to Challenge a Denial of Access

Requestors may:

- File complaint in Superior Court, or
- File complaint with the Government Records Council
- NOT BOTH!! N.J.S.A. 47:1A-6

In Superior Court, complaint must be filed within 45 days of denial of access (Mason v. City of Hoboken, 196 NJ 51 (2008)).

No statute of limitations to file a Denial of Access Complaint with the GRC.

GRC Complaint Process

Step One: Denial of Access Complaint

Step Two: Mediation (optional, but must be in good faith)

Step Three: Adjudication

Step Four (if desired): Appeal to Appellate Division of NJ Superior Court

* See GRC Regulations for details regarding each step

Prevailing Party Attorney's Fees

- N.J.S.A. 47:1A-6 and 7.f.
- Teeters v. DYFS, 387 N.J. Super, 423 (App.Div. 2006).
 - A complainant is a "prevailing party" if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Also, when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed.
- Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).
 - A complainant is a "prevailing party" if he/she can demonstrate
 - (1) a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; and
 - (2) that the relief ultimately secured by plaintiffs had a basis in law.

Knowing and Willful Penalty

Who may be assessed a penalty?

Anyone! Per N.J.S.A. 47:1A-11.

A public official, officer, employee or custodian who **knowingly and willfully** violates OPRA and unreasonably denied access under the totality of the circumstances.

\$1,000 personal penalty – cannot be paid by agency.

Section IV:

**Special
Issues**

Privacy Concerns

The GRC generally upholds a custodian's redaction of home addresses, home telephone numbers, and home e-mail addresses when the custodian asserts privacy concerns and cites to N.J.S.A. 47:1A-1:

"a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy"

Privacy Concerns Cont'd

Burnette v. County of Bergen, 198 N.J. 408 (2009). Without ambiguity, the court held that the privacy provision "is neither a preface nor a preamble." 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." "Specifically, it imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests."

Commercial Use

There is no restriction against commercial use of government records under OPRA.

See Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006).

Harassment

- OPRA is silent on the number of OPRA requests one person can submit to a particular agency.
- In Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), the Appellate Division held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. The Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry.
- If you believe you are being harassed, you may have options in civil court.

Section V: Exemptions in OPRA (see handout)

GRC News Service

- Sign up to receive free e-mail updates regarding OPRA, precedential cases, and new issues of *The OPRA Alert*.
- www.nj.gov/grc/news/news.
- Simply enter your e-mail address online.



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