

## OPEN PUBLIC RECORDS ACT (OPRA)<sup>1</sup>

### A. General Background

1. OPRA (N.J.S.A. 47:1A-1, et seq.) is New Jersey's law governing access to government records maintained by public agencies.
  - a. OPRA declares as New Jersey public policy that, with some limited exceptions, government records **shall** be readily accessible.
  - b. It provides requestors with a legal right to access, and limits on access are construed in favor of the public.
  - c. Common law still trumps, *i.e.*, a record not available under OPRA may be accessible under the common law.
2. What is a government record?
  - a. Any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof. (N.J.S.A. 47:1A-1.1)
    - i. In essence, a government record is any document or data made, maintained or kept on file by a public agency or received in the course of the agency's official business.
  - b. **All** government records are subject to public access unless specifically exempt under OPRA or another law.
    - i. There are 25 exceptions enumerated in OPRA (N.J.S.A. 47:1A-1.1):
      - (a) Inter-agency or intra-agency advisory, consultative or deliberative materials ("ACD").
        - (1) Education Law Center v. NJ Dep't of Education, 198 N.J. 274 (2009): Representative of school pupils in litigation with Department of Education ("DOE") brought action against DOE seeking disclosure of a memorandum generated by DOE consisting

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of statistical projections derived from alternative school funding formulas. The Superior Court, Law Division directed the release of the memorandum, which was affirmed by the Appellate Division. The Supreme Court reversed, holding that a record that contains or involves factual components is entitled to deliberative-process protection under exemption in OPRA when it was used in decision-making process and its disclosure would reveal deliberations that occurred during that process. The memorandum was entitled to protection under deliberative-process privilege and, therefore, was exempt from release under OPRA. The citizen's generalized interest in memorandum did not outweigh DOE's interest in non-disclosure, and thus did not require disclosure pursuant to a common-law right-of-access claim.

(2) Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006): The Government Records Council ("GRC") held that draft, unapproved meeting minutes are exempt from disclosure under OPRA as advisory, consultative and deliberative materials.

(b) Legislative records.

(c) Medical examiner records.

(d) Criminal investigatory records.

(1) Records that are not required by law to be made, maintained or kept on file that are held by a law enforcement agency which pertain to any criminal investigation or related civil enforcement proceeding.

(2) N.J.S.A. 47:1A-3.b lists specific criminal investigatory *information* that must be disclosed.

(e) Victim's records.

(f) Personal firearms records.

(g) Trade secrets and proprietary commercial or financial information.

(h) Records within the attorney-client privilege.

(i) Administrative or technical information regarding computer hardware, software and networks that if disclosed would jeopardize computer security.

- (j) Emergency or security information or procedures for any buildings or facility that if disclosed would jeopardize security of the building or facility or persons therein.
- (k) Security measures and surveillance techniques that if disclosed would create a risk to safety of persons, property, electronic data or software.
- (l) Information that if disclosed would give an advantage to competitors or bidders.
- (m) Information generated by or behalf of a public employer or public employees in connection with:
  - (1) Any sexual harassment complaint filed with a public employer;
  - (2) Any grievance filed by or against an individual; or
  - (3) Collective negotiation, including documents and statements of strategy or negotiating position.
- (n) Information that is a communication between a public agency and its insurance carrier, administrative service organization or risk management office.
- (o) Information that is to be kept confidential pursuant to a court order.
- (p) Certificate of honorable discharge issued by the U.S. government (Form DD-214) filed with a public agency.
- (q) Personal identifying information, specifically:
  - (1) Social security numbers;
  - (2) Credit card numbers;
  - (3) Unlisted telephone numbers; and
  - (4) Drivers' license numbers.
- (r) Certain records of higher education institutions.
- (s) Biotechnology secrets. (N.J.S.A. 47:1A-1.2)
- (t) Limitations on convicts seeking personal information pertaining to their victims or their victims' families. (N.J.S.A. 47:1A-2.2)

- (u) Ongoing investigations. (N.J.S.A. 47:1A-3.a)
- (v) Public defender records that relate to the handling of any case. (N.J.S.A. 47:1A-5.k)
- (w) Exemptions contained in a statute, legislative resolution, administrative regulation, Executive Order, Rules of Court or judicial decisions of this State, the New Jersey Constitution, or federal law, regulation or order. (N.J.S.A. 47:1A-9)
- (x) Personnel and pension records, except that the following may be released:
  - (1) An individual's name, title, position, salary, payroll record, length of service, date of separation and the reason for such separation, and the amount and type of pension received;
  - (2) When required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the U.S., or when authorized by an individual in interest; and
  - (3) Data contained in information which disclose conformity with specific experiential, education or medical qualifications required for government employment or receipt of a public pension, but not including any detailed medical or psychological information. (N.J.S.A. 47:1A-10)
  - (4) Individual employment contract and collective bargaining agreements. (N.J.S.A. 47:1A-5.e)
- (y) Safeguarding a citizen's reasonable expectation of privacy. (N.J.S.A. 47:1A-1)
  - (1) Burnett v. County of Bergen, 198 N.J. 408 (2009): Requestor brought action on behalf of title technology company to compel County to produce microfilm copies of land title records under OPRA. The Superior Court, Law Division directed County to redact any social security numbers (SSNs) from records and to insert watermark stating date of copying, which was affirmed by the Appellate Division. Plaintiff appealed seeking copies of the records without redaction. The Supreme Court held that the language in OPRA that advances the interest of ready access to government documents should be harmonized and balanced with language that safeguards citizen's reasonable expectation of

privacy. “Specifically, [OPRA] imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests.” A balancing of the relevant factors weighed in favor of redacting SSNs before release of the records.

B. Access to government records

1. Who can access government records?

- a. N.J.S.A. 47:1A-1 provides access to government records to citizens of this State.
- b. Although OPRA provides for access only to residents of New Jersey, the New Jersey Attorney General’s Office has opined that OPRA does not prohibit access to residents of other states, *i.e.*, access granted to anyone.
- c. McBurney v. Young, 133 S.Ct. 1709, 185 L.Ed.2d 758, 81 USLW 4276 (2013): Citizens of states other than Virginia brought §1983 action challenging Virginia's citizens-only Freedom of Information Act (“FOIA”) provision as unconstitutional under either the Privileges and Immunities Clause or the dormant Commerce Clause. The U.S. Supreme Court upheld the provision in Virginia’s FOIA that limits requests to those being made by citizens of Virginia.
- d. Scheeler v. City of Cape May, Docket No. CPM-L-444-15 (February 19, 2016): Former New Jersey resident now living in North Carolina brought a denial of access complaint against the City of Cape May, which had responded to plaintiff’s OPRA request but not to plaintiff’s satisfaction. The court upheld the introductory language of OPRA (N.J.S.A. 47:1A-1), which limits the right of access to citizens of the State of New Jersey.

2. Commercial Use of Government Records

- a. Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006): The GRC held that there is no restriction against commercial use under OPRA and it is not the province of the GRC to rule on this public policy aspect.

3. Official Agency Form

- a. Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009): The Superior Court, Appellate Division held that although requestors should utilize the OPRA request forms provided by the custodian of the records, no custodian is permitted to withhold such records if the written request for such records is not presented on the official form but contains the requisite information prescribed in the section of OPRA requiring custodians to adopt a form.

- b. Written requests not on the agency's official form cannot be denied solely because they are not on the official request form.
- c. Written requests not utilizing the agency's official form must mention OPRA.

C. Making an OPRA Request

- 1. Requestors must name a specific identifiable government record. (N.J.S.A. 47:1A-5.f)
  - a. Requestors should be as specific as possible, *i.e.*, name the type of record, subject matter, dates, parties to correspondence, etc.
  - b. Broad and/or unclear requests.
    - i. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005): Liquor licensee brought action under OPRA for disclosure of records sought in enforcement action by Division of Alcoholic Beverage Control ("ABC"), and served ABC with notice to take depositions of current and former agency officials. The Superior Court, Law Division entered an order allowing licensee to depose agency official for purpose of more clearly refining its OPRA request and obtaining documents for use in enforcement action. The Appellate Division reversed, holding that the licensee's records request was an improper wholesale request for a public agency to research, analyze, collate, and compile general information. "While OPRA provides an alternative means of access to government documents not otherwise exempt from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'" Public agencies are required to disclose only identifiable government records. In short, OPRA does not countenance open-ended searches of an agency's files.
    - ii. New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007): Because requestor did not specifically identify the records sought as required by OPRA, the custodian of records was not required to produce the records within seven business days pursuant to N.J.S.A. 47:1A-5.i. The requestor's obligation to specifically describe the document sought is essential to the agency's obligation and ability to provide a prompt response. OPRA does not contemplate wholesale requests for general information to be analyzed, collated, and compiled by the responding government entity.
  - c. Requests for information or that ask questions are not valid OPRA requests.

2. Requestors may submit OPRA requests by hand-delivery, mail, electronic submission, facsimile or other means of delivery conveyed to the appropriate custodian.
  - a. Public agencies may limit submission options based on technological capabilities, *e.g.*, a custodian does not accept faxed OPRA requests but accepts all other methods.
  - b. However, public agencies cannot impose unreasonable obstacles for a requestor, *e.g.*, a custodian cannot accept only hand-delivered OPRA requests.
3. Custodian of records is obligated to search his/her files to find identifiable government record listed in the OPRA request; however, a custodian is not required to research his/her files to figure out which records, if any, might be responsive. Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
4. Custodian is not obligated to create records in response to a request. Librizzi v. Township of Verona Police Department, GRC Complaint No. 2009-213 (August 2010).

D. Statutory Response Time

1. A custodian must grant or deny access as soon as possible, but no later than seven business days after the request is received. (N.J.S.A. 47:1A-5.i)
  - a. The seven business day response time begins to run on the day **after** the custodian receives the request.
  - b. A written response must be provided to each item requested that grants access, denies access, seeks clarification or requests an extension of time in which to respond.
    - i. Requests for an extension of time must be in writing within the seven business days, and provide an anticipated date upon the records will be provided.
2. **Immediate** access must be granted to budgets, bills, vouchers, contracts and government employee salary information. (N.J.S.A. 47:1A-5.e)

E. Form of Response

1. Requestors can specific access by:
  - a. Inspection;
  - b. Hard copies; or

c. Electronic.

F. Costs

1. N.J.S.A. 47:1A-5.b: If no other fee is established by law or regulation, then the fee is 5¢ for letter sized pages and 7¢ for legal sized pages.
2. If costs exceed 5¢ and 7¢, then the fee is actual, direct costs. Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010).
3. Electronic records are free of charge. (P.L. 2010, c. 75)
4. Actual costs of materials can be charged, *i.e.*, CDs, DVDs, cassettes, etc.

G. Special Service Charge (N.J.S.A. 47:1A-5.c)

1. Fee for labor associated with extraordinary or voluminous requests.
2. Must be reasonable and based on actual, direct costs.
3. Cannot be established in advance by ordinance, but rather determined on a case-by-case basis.
4. Must be estimated in advance **prior** to public agency incurring costs. Requestor must agree to pay.