

The Open Public Records Act

New Jersey Government Records Council



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What is OPRA?

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- New Jersey's law governing access to government records maintained by public agencies.
- Provides requestors with a legal **right** to access records.
- Limits on access are to be construed in favor of the public.
- N.J.S.A. 47:1A-1 et. seq.

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A legal **right** to access records.

How did we get here?

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SCOTUS



has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA or OPRA laws.

McBurney v. Young, 509 U.S. ___ (2013)

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"The Constitution itself is not a Freedom of Information Act."

Houchins v. KOED, Inc., 438 U.S. 1, 14 (1978)

"The Government could decide not to give out this information at all."

LA Police Dep't v. United Reporting Publishing Corp., 528 U.S. 32, 40 (1999)

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Founding-era English cases required a personal interest



“One man has no right to look into another’s title deeds or rolls himself.”

King v. Shelly, 3 T.R. 141, 142 (K.B. 1789)

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19th-century American cases do not support broad based right to access public info



“At common law, parties had no vested rights in the examination of a record of title, or other public records, save by some interest in the land or subject of record.”

Cormack v. Wolcott, 37 Kan. 391, 394 (1887)

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By the 1960s:

Constitutional and inherent rights of American citizens

+

Idea of government subservience to the individual

Necessary for gov't info to be available to the public

Sensitivity of some gov't info

+

Private interests

Certain types of gov't info should remain secret

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Freedom of Information Act

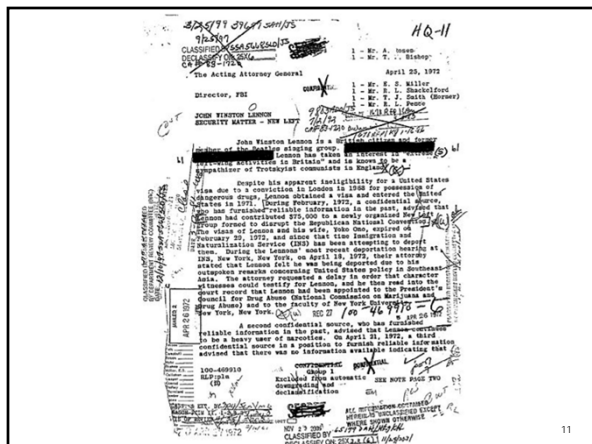
Congress enacts in 1966 to deal with requests for government records, consistent with belief that the people have a right to know about them

BUT...

Includes exemptions addressing issues of sensitivity and personal rights.



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2002 – NJ enacts OPRA

To give the public greater access to records maintained by public agencies in NJ by balancing:

1. The public's interest in government records;
2. Respect for personal privacy; and
3. The efficient process of government.

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What OPRA is NOT Supposed to Be!

1. A method of abuse
2. A game of gotcha
3. A way to waste government time and money

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Challenging a Denial of Access under OPRA: Court or GRC

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What is the Government Records Council?

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- Adjudicates denials of access (quasi-judicial).
- Court alternative.
- Mediation.
- Advisory Opinions.
- Prepares informational materials.
- Provides OPRA training.
- Operates an OPRA hotline.

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- GRC Complaint Process:
 - Step One: Denial of Access Complaint.
 - Step Two: Mediation (optional).
 - Step Three: Adjudication.
 - Step Four (if desired): Appeal to Appellate Division of NJ Superior Court.
 - See GRC Regulations for details.

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- When calling the GRC with an OPRA question, be aware of the following:
 - Information provided by the GRC is not an official decision of the Council.
 - The GRC cannot tell a custodian how to respond.
 - *Guidance, not legal advice.*

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Guidance v. Legal Advice

- Guidance: use as a reference library. Provide resources you need (OPRA provisions, prior case law) so that you can make your own decision on whether to grant or deny access. The GRC cannot make this decision for you.
- Legal Advice: The GRC cannot tell custodians exactly how to respond to a request. Get a lawyer.

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- 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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When is OPRA used?

- When the requestor chooses to invoke the statute.

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Are there other ways to request records?

- Common law requests.
- Discovery requests.
- Administrative/Informal requests (example: requestor comes to Clerk's counter and verbally asks to review minutes book).

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Who can request records under OPRA?

Anyone!

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What is an OPRA Request?

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- A request on official OPRA request form (either agency's form or GRC's Model Request Form).
- Written request (letter, fax, e-mail) that clearly references OPRA.
- If written request does not mention OPRA anywhere, it is not an OPRA request.
- Verbal requests are never OPRA requests.

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OPRA Request Form Requirements

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- Every public agency is required to adopt an official OPRA request form.
- GRC's Model Request Form is available to download.
 - www.nj.gov/grc/custodians/request
- Agencies may create their own request form, but be careful not to include "misinformation."

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Statutory Form Requirements

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- Include the name, address, and phone number of the requestor and brief description of the government record sought;
- Space for the custodian to respond which record will be made available, when the record will be available, and the fees to be charged;
- Specific directions and procedures for requesting a record;
- Statement as to whether prepayment of fees or a deposit is required;

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- Time period within which the public agency is required to make the record available;
- Statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- Space for the custodian to list reasons if a request is denied in whole or in part;
- Space for the requestor to sign and date the form; and
- Space for the custodian to sign and date the form if the request is fulfilled or denied.

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OPRA Request Example: Official Form

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AGENCY NAME HERE
OPEN PUBLIC RECORDS ACT REQUEST FORM
 Agency Address
 Agency Telephone Number & Fax Number
 Agency e-mail address
 Name of Agency Custodian

Important Notice
 The last page of this form contains important information related to your rights concerning government records. Please read it carefully.

Requestor Information - Please Print
 First Name: Joe MI Last Name: Citizen
 E-mail Address: Requestor@someemail.com
 Mailing Address: 123 Any Street
 City: Any City State: NJ Zip: 00000
 Telephone: 609-555-5555 FAX: 609-555-5555
 Preferred Delivery: Pick US Mail On-Site Request Fax E-mail X

Payment Information
 Maximum Authorization Cost: \$
 Select Payment Method:
 Cash Check Money Order
 Fees: Letter size pages - \$0.00 per page
 Legal size pages - \$0.07 per page
 Other materials (CD, DVD, etc.) - actual cost of material
 Delivery: Delivery available. See additional information on delivery below.
 Extra: Special service charge, dependent upon request.

If you are requesting records containing personal information, please circle one: Under penalty of N.J.S.A. 2C:28-3, I certify that I HAVE / HAVE NOT been convicted of any indictable offense under the laws of New Jersey, any other state, or the United States.
 Signature: Joe Citizen Date: May 1, 2012

Record Request Information: Please be as specific as possible in describing the records being requested. Also, please note that your preferred method of delivery will only be accommodated if the custodian has the technological means and the integrity of the records will not be jeopardized by such method of delivery.
 I would like a copy of the City's open and closed session meeting minutes from January 1, 2012 to the present date. Kindly send to my e-mail address at Requestor@someemail.com.

OPRA Request Example: Valid Non-Form Request

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May 1, 2012
 Attention: Municipal Clerk, Any City, New Jersey
 Sent via facsimile
 Dear Clerk,
 Please accept this facsimile as my official request for records under the State's Open Public Records Act. I would like a copy of the City's open and closed session meeting minutes from January 1, 2012 to the present date. Kindly send to my e-mail address at Requestor@someemail.com.
 Sincerely,
 Joe Citizen

OPRA Request Example: Invalid Non-Form Request

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May 1, 2012
 Attention: Municipal Clerk, Any City, New Jersey
 Sent via facsimile
 Dear Clerk,
 I would like a copy of the City's open and closed session meeting minutes from January 1, 2012 to the present date. Kindly send to my e-mail address at Requestor@someemail.com.
 Sincerely,
 Joe Citizen

How Does a Requestor Submit an OPRA Request?

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- Hand delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.
- Agencies may limit submission options based on technological capabilities.

BUT...

- Cannot impose an unreasonable obstacle for requestor!

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- Example 1: ABC Township does not accept faxed OPRA requests, but accepts all other methods.
- Example 2: XYZ agency only accepts hand delivered requests.

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What if an employee other than the custodian receives the OPRA request?

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1. Return the request to the requestor and direct requestor to proper custodian; or
2. Accept the request and forward it to proper custodian. N.J.S.A. 47:1A-5.h.

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What is a “government record” under OPRA?

- All records that are made, maintained, kept on file, or received in the course of official business.
- This means everything! Not just records that are required to be maintained on file.

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What government records can a requestor access under OPRA?

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- Almost everything.
- 24 statutory exceptions of records accessible to the public.
- Executive Orders and other laws may exempt records.
- Think: granting access is the RULE. Denying access is the EXCEPTION.
- A custodian's default mindset should be that everything can be disclosed.

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Who is the official records custodian?

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- Municipality - the municipal clerk.
 - Sub departments may have own custodian 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.
- Have a substitute.

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What is a "public agency" under OPRA?

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- Principal departments in Executive branch of State government, or any agency within or created by such department.
 - Examples: NJ Department of Community Affairs and Attorney General's Office
- Legislature of the State and any agency within or created by Legislative Branch.
 - Example: Office of Legislative Services.

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- Any independent State authority, commission, instrumentality or agency.
 - Example: State Ethics Commission
- Political subdivision of the State, or any entity created by a political subdivision
 - Examples: municipalities, League of Municipalities and school districts.

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When is a response to an OPRA request due?

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- As soon as possible.
- Seven (7) business days after custodian's receipt of the request.
- Day 1 starts the day after the custodian receives the request.
- All responses must be in writing.

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Are there exceptions to the standard seven day response time?

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- Yes! See N.J.S.A. 47:1A-5(e).
1. Immediate access shall ordinarily be granted to:
 - Budgets
 - Bills
 - Vouchers
 - Contracts
 - Government employee salary/overtime information.
- Immediate access means on the spot.

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2. The following information shall be available to the public within 24 hours or as soon as practicable:
 - when crime reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;
 - if an arrest has been made, information as to the name, address and age of any victims ... the safety of the victim and the victim's family, and the integrity of any ongoing investigation shall be considered in disclosing this information;

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o If an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;

o Information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;

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o Information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;

o Information of the circumstances immediately surrounding the arrest, including, but not limited to, the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police; and

o Information as to circumstances surrounding bail, whether it was posted and the amount thereof.

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What if the request cannot be fulfilled within the required time frame?

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- Seek extension of time for legitimate reasons (examples: records in storage, medium conversion, voluminous request).
- Extension "request" must be in writing, within required response time (either standard or immediate) and include an anticipated date on which records will be provided.
- Requestor does not need to approve.
- Failure to grant/deny access by extended deadline date results in deemed denial.

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What if there is not enough information to fulfill the request?

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- Request must identify with reasonable clarity the specific government records sought.
- If request is overly broad or unclear, seek clarification or deny access to request.
- Clarification request in writing within required response time.
- Response time stops until requestor responds. Time begins anew.

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What is an overly broad or unclear request?

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- Fails to identify with reasonable clarity the specific government records sought.
 - Example: “any and all records related to the construction of the new high school.”
 - Valid version: “any and all e-mails between Jane Doe and John Smith regarding the construction of the new high school between January 1, 2012, and present.”

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- A request that requires the custodian to conduct research.
 - Example: “all meeting minutes from 2011 in which the Council discussed ABC Towing Company.”
 - Valid version: “all meeting minutes from 2011.”

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“Outlier” Court Cases Regarding Overly Broad Requests

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- Burnett v. County of Gloucester (App. Div. 2010) – Request for “any and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present.”
- Court held that not specifying the matters to which the settlements pertained did not render the request invalid. It is the documents themselves that have been requested and their retrieval requires a search, not research.

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- Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). Request for correspondence between the Governor’s Office and Port Authority re: E-ZPass benefits provided to Port Authority retirees.
- Court noted request confined to specific subject matter with sufficient identifying information, namely, EZ-Pass benefits provided to retirees. Court held that defendant “performed a search and was able to locate records responsive ...” which “... belied any assertion that the request was lacking in specificity or was overbroad.”

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OPRA Exemptions

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1. Advisory, consultative or deliberative material (ACD)

- Draft documents: Parave Fogg v. Lower Alloways Creek, GRC Complaint No. 2006-51 (August 2006).
- Deliberative process: Roykovich v. West Milford Board of Education (Sussex), GRC Complaint No. 2011-258 (April 2013).

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2. Legislative records

- GRC does not have authority over the Legislature. N.I.S.A. 47:1A-7(g).
3. Medical examiner records: photos, negatives, prints, videotapes taken at scene of death or in course of autopsy.

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4. Criminal investigatory records

- Pursley v. Township of Hardyston Police Department (Sussex), GRC Complaint No. 2011-137 (January 2013).

5. Victims' records

- Paff v. Warren County Prosecutor's Office, GRC Complaint No. 2007-167 (December 2008) (holding that Prosecutor's Office is not a victims' rights agency).

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6. Trade secrets and proprietary commercial or financial information.

- Albrecht v. NJ Department of Treasury, GRC Complaint No. 2006-191 (July 2008).

7. Attorney-client privilege

- Wargacki v. County of Bergen, GRC Complaint No. 2011-198 (January 2013).

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8. Administrative/technical info regarding computer hardware, software and networks which, if disclosed would jeopardize computer security.

- Rogers v. Roxbury Board of Education (Morris), GRC Complaint No. 2008-229 (April 2009).

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9. Emergency/security info or procedures for buildings or facilities which, if disclosed, would jeopardize security of the building or facility or persons therein.

- Kohn v. Township of Livingston (Essex), GRC Complaint No. 2011-330 (February 2013).

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10. Security measures/surveillance techniques which, if disclosed, would create a risk to safety of persons, property, electronic data or software.

- Rivera v. City of Passaic (Passaic), GRC Complaint No. 2011-214 (September 2012).

11. Advantage to competitors

- Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (June 2011).

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12. Info generated by public employer/employee regarding:

- o Sexual harassment complaint
- o Grievance
- o Collective negotiations
- Lemongello v. City of Brigantine (Atlantic), GRC Complaint No. 2010-88 (February 2011).

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13. Communications between public agency and insurance carrier, administrative service organization or risk management office.

- Kvederas v. Town of Morristown (Morris), GRC Complaint No. 2009-70 (April 2010).

14. Information confidential pursuant to court order.

- Serrano v. South Brunswick Township, GRC Complaint No. 2002-33 (January 2003) (holding that record is not protected by court order).

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15. Certificate of honorable discharge

- Rosenblum v. Borough of Closter, GRC Complaint No. 2005-16 (October 2005).

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16. Personal identifying information:

- o Social security numbers. Herron v. NJ Department of Education, GRC Complaint No. 2011-268 (December 2012).
- o Credit card numbers.
- o Unlisted telephone numbers. Smith v. Department of Corrections, GRC Complaint No. 2004-163 (June 2005).
- o Drivers' license numbers. Blue v. Wall Township Police Department, GRC Complaint No. 2002-47 (August 2003).

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17. Higher education records:

- o Academic research: Rosenbaum v. Rutgers University, GRC Complaint No. 2002-91 (January 2004).
- o Test questions, scoring keys, examination data.
- o Charitable contribution records.
- o Rare book collections/documents obtained by gift.
- o Admission applications. I.C. v. NJ Department of Education, GRC Complaint No. 2008-91 (February 2012).
- o Student records/disciplinary records: White v. William Patterson University, GRC Complaint No. 2008-216 (August 2009).

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18. Biotechnology trade secrets.

19. Limitations to convicts.

20. Ongoing investigations.

- Winant v. Borough of Dumont (Bergen), GRC Complaint No. 2011-31 (August 2012).

21. Public defender records.

- Morgano v. NJ Office of the Public Defender, GRC Complaint No. 2008-79 (July 2008).

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22. Exemptions contained in other state or federal statutes, regulations, Executive Orders, Rules of Court, Constitution of this State, or judicial case law.

- Downing v. NJ Department of Children & Family Services, GRC Complaint No. 2010-295 (April 2012).

23. Personnel and pension records

- Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010).
- There are exceptions to this rule!

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24. Privacy interest

- Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004).

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What if the requested records are not in the custodian's possession?

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- Obtain records responsive from appropriate departments/personnel. This includes third parties.
 - o Example: Custodian is required to obtain requested attorney's bills which are maintained by special counsel's office, and not the municipality.
- Custodians should document attempts made to access records from other departments/personnel.
- Other employees impeding access to government records can be found in violation of OPRA.

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How must a custodian respond to an OPRA request?

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- In writing! No verbal responses.
- Within required response time.
- By addressing each item requested, either:
 - Granting access;
 - Denying access;
 - Seeking clarification; or
 - Requesting an extension of time.

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What is the cost to obtain records under OPRA?

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- OPRA's fee provision: N.J.S.A. 47:1A-5(b):
- Fee prescribed by law or regulation (if another law sets specific fee for specific record).
 - Municipal ordinances do not count!
- If no other fee established by law or regulation exists:
 - \$0.05 per page for letter sized printed pages
 - \$0.07 per page for legal sized printed pages

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- Actual cost of printed pages, if agency can prove costs exceed \$0.05/\$0.07. Actual cost calculation contained in November 2010 *OPRA Alert* on GRC's website.
- Electronic records (sent via e-mail or fax) are free of charge.
- CD, DVD, cassette, etc. – actual cost of material.

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What is a special service charge?

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- Labor fee for extraordinary/voluminous requests.
- Must be reasonable and based on actual direct cost (hourly rate of lowest level employee capable of fulfilling request, no fringe benefits).
- Cannot be established in advance by ordinance. Case by case determination.
- GRC's 14 point analysis helps determine if fees are warranted.
- Estimated in advance prior to being incurred. Requestor must agree to pay.

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Special Service Charge Example

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- Request: Meeting minutes from 2005 to present.
- 1,000 pages of responsive records will take custodian 2 ½ hours to copy.
- Custodian may likely charge her direct hourly rate for the 2 ½ hours required to fulfill request.
- Custodian must estimate cost and notify requestor before fulfilling the request.

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What if the request substantially disrupts the operations of the agency?

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- May deny access only after attempting to reach a reasonable solution with requestor that accommodates the interests of both requestor and the agency.
- Accommodation varies based on circumstances of request.
- Subjective determination based on the resources of the agency.
- Applies in extreme scenarios only.

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- Example 1: Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 – Requestor submitted a 7 page, 59 item request spanning over 12 years of records.
- Example 2: Vessio v. NJ Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-188 – Requestor submitted 13 item request, which included all fire safety violations issued from 1986-2006 and all complaints filed since 1997.

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What if only portions of a record are exempt from public access?

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What if an entire page of a document needs to be redacted?

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How are electronic records redacted?

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Can a requestor ask for records in a specific medium?

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Is there a fee to convert records to a specific medium?

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- Maybe. Actual costs apply.
- Example 1: Requestor wants a record sent via e-mail. Custodian must scan paper document to convert to electronic format. Request takes the Custodian 5 minutes to complete. No charges apply.
- Example 2: Requestor wants audio recording of a meeting on CD-ROM. Custodian copies recording in house onto CD-ROM agency purchased for \$0.50. Request takes Custodian 20 minutes to complete. Charge is \$0.50.

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- Example 3: Requestor wants large tax maps on CD-ROM. Custodian does not have capability to scan large maps and must use third party vendor. Vendor charges the agency \$5.00 for service. \$5.00 fee is passed onto requestor.

- Special Note: Vendor fees are special service charges and must be approved by requestor prior to being incurred.

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How must a custodian send records to a requestor?

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- Must grant access to a government record by the specific method of delivery identified by the requestor.
 - Example: Requestor wants records sent via fax, custodian must send records via fax.
- Remember – all limitations on access shall be construed in favor of the public.

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Special OPRA Issues

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Can a small agency set specific times to receive/fulfill OPRA requests?

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- Yes!
 1. Municipalities with a population of 5,000 residents or less;
 2. Board of Education with total enrollment of 500 or fewer; or
 3. Public authority with less than \$10 million in assets.

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- What times?
 - Not less than 6 regular business hours over not less than 3 business days per week, or the entity's regularly scheduled business hours, whichever is less.
- What does this really mean?
 - 2 hours a day for 3 days a week, minimum, unless the agency's regularly scheduled business hours are less.

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What about privacy concerns?

110

- OPRA's Legislative Findings state "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."
- In Burnett v. County of Bergen, 198 N.J. 408 (2009), the court held that OPRA's legislative findings are more than a preamble, and impose an obligation on agencies to protect against disclosure of personal information.

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- What does this mean?
 - The GRC has routinely upheld a custodian's redaction of home addresses and home telephone numbers due to privacy concerns.
- Each determination is made based on the specific facts of the complaint by balancing the requestor's need for the information against the agency's need to keep the information confidential.

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What about the commercial use of government records?

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What if OPRA requests become excessive or harassing?

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What if the requestor asks for records that have already been provided?

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- Unless the custodian has proof at the time of the new OPRA request that the requestor is still in possession of the same records, access must be granted again.
- In Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), the court held that the complainant could not have been denied access to a record if he had the record in his possession at the time of the OPRA request.
- Important: The custodian had proof at the time of the request that the complainant was still in possession of the requested record. This decision is not universally applicable!

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What is the knowing and willful penalty?

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- A public official, officer, employee or custodian who knowingly and willfully violates OPRA and unreasonably denies access under the totality of the circumstances is assessed a monetary penalty.
 - \$1,000 for initial violation;
 - \$2,500 for second violation within 10 years of initial violation;
 - \$5,000 for third violation within 10 years of initial violation.
- Penalty is paid personally by individual found in violation, not the public agency.

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- Extremely high standard for penalty.
 - Actions must have been much more than negligent conduct;
 - Individual must have had some knowledge that his actions were wrongful;
 - Actions must have had a positive element of conscious wrongdoing;
 - Actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden;
 - Actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional.

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What are prevailing party attorney's fees?

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- When a requestor “prevails” in OPRA litigation (in court or with GRC) and is represented by legal counsel, the defendant public agency must pay the requestor’s attorney’s fees.
- What does it mean to “prevail?”
 - The filing of the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.
 - A factual causal nexus exists between the requestor’s litigation and the relief ultimately achieved.
 - The relief ultimately achieved had a basis in law.

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Review

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- Who chooses when an OPRA request is submitted?
- Is OPRA the only way to request records?
- Can residents of other states request records under OPRA?
- Do all OPRA requests have to be on an official form?
- What is required of a non-form written request to be considered a valid OPRA request?
- Are verbal requests valid under OPRA?

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- Can a requestor submit an OPRA request by e-mail?
- Can an employee who is not the records custodian refuse to accept an OPRA request?
- What is a “government record” under OPRA?
- Are any records exempt from public access?
- Who is the custodian for a State agency?

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- When is a response to an OPRA request for contracts due?
- What should a custodian do if she cannot fulfill an OPRA request within the required time frame?
- A custodian calls a requestor to say that the requested records are ready for pickup. Is this a valid response to the request?
- What is the cost to provide records on DVD?

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