

OPRA Today & Tomorrow

Frank F. Caruso, Executive Director
New Jersey Government Records Council



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The Most Important Number Today!

New Jersey Government Records Council

101 S. Broad Street

P.O. Box 819

Trenton, NJ 08625-0819



Toll-free (866) 850-0511

Fax: (609) 633-6337

E-mail: Government.Records@dca.nj.gov

Website: www.nj.gov/grc

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OPRA Today

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WHAT IS OPRA?

- The New Jersey Open Public Records Act. N.J.S.A. 47:1A-1 et. seq. ("OPRA").
- Effective July 2002, OPRA replaced the former Right to Know Law and broadly expanded the definition of a public record. Almost 22 Years!!!
- OPRA created the Government Records Council ("GRC"). N.J.S.A. 47:1A-7.
- OPRA authorizes a complaint process via either the GRC or Superior Court. N.J.S.A. 47:1A-6.

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The Government Records Council

Among other duties, the GRC:

- Adjudicates denials of access.
- Administers a mediation program.
- Prepares informational materials.
- Provides OPRA training.
- Operates an OPRA hotline (1-866-850-0511).

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OPRA Did Not Become the Only Record Request Process in 2002

- OPRA applies to those requests where the requestor chooses to invoke the statute.
- A request *should be* on an official OPRA request form. However, use of the form is not mandatory. See Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009): “the form should be used but no request . . . should be rejected if such form is not used.”

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Are there other ways to request records?

- Common law requests.
- Discovery requests, which is not the same as OPRA. See Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008).
- Administrative/Informal requests (example: requestor comes to Clerk’s counter and orally asks to review minutes book).
- Other court processes (*i.e.* subpoenas, court orders)
 - GRC has not adjudicatory authority

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Who Can Request Records?

- Anyone!
- OPRA allows for anonymous requests
- Commercial Requestors
- Out-of-State Requestors: See Scheeler v. Atl. Cnty. Mun. Joint Ins. Fund, 454 N.J. Super. 621 (App. Div. 2018)
- The identity of the requestor may affect their right of access in limited circumstances

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What is a “Public Agency” Under OPRA?

- Every municipality within the State of New Jersey is considered a “public agency.” N.J.S.A. 47:1A-1.1.
- Also includes State departments and commissions, school districts, fire districts, the Port Authority of New York/New Jersey, the League of Municipalities, and the Legislature (although most of their records are per say exempt).
- Additional “quasi-governmental” agencies could be considered a “public agency.” See Paff v. N.J. State Firemen’s Ass’n, 431 N.J. Super. 278, 289-90 (App. Div. 2013)

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What is a “government record” under OPRA?

- The default answer is all records that are made, maintained, kept on file, or received in the course of official business. N.J.S.A. 47:1A-1.1.
- However, exemptions within OPRA, other statutes, regulations, executive orders, *etc.* may effectively exempt access to records in part or whole.

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Substitutions and Alternate Designations

- Best practices dictate that an agency should designate a substitute custodian to receive/fulfill requests in the custodian’s absence. See Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-325 (Final Decision dated October 27, 2015).
- Agencies may also choose to designate departmental custodians. See Paff v. Twp. of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008)

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OPRA Forms

- OPRA requires every public agency to adopt an official OPRA request form.
- Required form criteria prescribed by N.J.S.A. 47:1A-5(f). The GRC's Model Request Form is also available for download.
- Agencies may create their own request form but be careful. See Wolosky v. Twp. of East Hanover, GRC 2010-185 (holding that the agency's form not compliant, because it contained potentially misleading information).

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How Does a Requestor Submit an OPRA Request?

- Hand delivery, mail, electronic transmission, or otherwise conveyed to the appropriate custodian. N.J.S.A. 47:1A-5(g).
- Agencies may limit submission options based on technological capabilities. But See Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009).
- If an employee other than the custodian receives an OPRA request, ensure they know their obligation under N.J.S.A. 47:1A-5(h).

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How must a custodian respond to an OPRA request?

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- A response must be IN WRITING! No oral responses. No telephonic responses.
- Within required response time.
- By addressing each item requested, either:
 - Granting access;
 - Denying access;
 - Seeking clarification; or
 - Requesting an extension of time.

The GRC's top violation finding a "deemed" denial.

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Response Types

- Granting Access: Typically, in the medium and method requested
- Lawful Basis for Denial: *At the time of denial* for each record or redaction.
- Extensions of Time:
 - To a date certain instead of a time period or time frame. Papiez v. Cnty. of Mercer, GRC 2012-59.
 - Note that extensions can be challenged for reasonableness. Ciccarone v. N.J. Dep't of Treasury, GRC 2013-280.
- Clarification:
 - Leibel v. Manalapan Englishtown Reg'l Bd. of Educ., GRC 2004-51.
 - Time begins anew upon receipt of clarification. Moore v. Twp. of Old Bridge, GRC 2005-80.

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When is a response to an OPRA request due?

- N.J.S.A. 47:1A-5(i) "As soon as possible, but not later than seven business days after receiving the request."
- Exceptions include "immediate access" records, that information contained in N.J.S.A. 47:1A-3(b), and during a State of Emergency.
- Remember the most common OPRA violation: "Deemed" denial. N.J.S.A. 47:1A-5(i).

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OPRA “Hours”

- Under N.J.S.A. 47:1A-5(a), agencies meeting the following criteria can set limited OPRA hours to 2 hours a day for 3 days a week, minimum, unless the agency’s regularly scheduled business hours are less:

1. Municipalities with a population of 5,000 residents or less.
2. Boards of Education with total enrollment of 500 or fewer.
3. Public authorities with less than \$10 million in assets.

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Tips in Responding: Ask yourself...

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?
5. Substantial disruption of agency operations?
6. Can I obtain records responsive to request?
7. Do the records or portions thereof fit into any of OPRA’s exemptions?
8. Must I redact, convert to requested medium, calculate appropriate fees?
9. Can I provide records via the requested method of delivery?
10. If I must deny, can I do so with legal basis in writing?

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A proper response to an OPRA request:

- Is in writing within seven (7) business days!!!
- (Exception for immediate access and 3(b))!!!!
- Grants access, denies access, seeks clarification, or requests an extension of time (including an anticipated deadline date) w/in the appropriate response time.
- Addresses each record requested. Stand by!
- Addresses requestor’s preferred method of delivery.
- Provides an account of the actual cost of duplicating the records, if any.
- If special service charge applies, provides estimate and gives requestor opportunity to accept or reject.
- Includes index that identifies the specific legal basis for a denial of access (including redactions).

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OPRA Tomorrow

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P.L. 2024, c.16

(The Law Former Known As S2930)

- On June 5, 2024, Governor Murphy signed into law significant OPRA reform legislation.
- Effective Date – September 3, 2024 (90 days after signing).

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Highlighted Changes For Requestors

- New Exemptions/Exceptions found in N.J.S.A. 47:1A-1.1:
 - Expansion of the “administrative or technical information” exemption to include peripheral device information operating on a network.
 - Security alarm activity, access reports, and footage, except where a limited incident request is submitted, and disclosure would not jeopardize the overall system.
 - Expansion of personal information exemption to include all personal telephone numbers, personal e-mail addresses, birth dates, and bank card information “required . . . for government applications, services, or programs.”
 - Personal information of juveniles under 18, with exceptions.
 - Personal identifying information on domestic animal permits, licenses, and registrations.
 - Metadata except for “authorship, identity of editor, and time of change.”
 - Owner and maintenance manuals.
 - HIPAA data.
 - Indecent graphic images contained in photographs or video as defined in P.L. 2024, c.16.
 - Exemptions and exceptions to election records contained within a new section.

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Highlighted Changes For Requestors

- Correspondence request N.J.S.A. 47:1A-5(g):
 - Codified a version of the factors set forth in Elcavage v. West Milford Twp. (Passaic), GRC 2009-07 (April 2010) as follows:
 - Sender/recipient → “[J]ob title or accounts”.
 - Date or range of dates → “[R]easonable time period”.
 - Subject/Content → “[A] specific subject matter”.
- OPRA Request “Limits” N.J.S.A. 47:1A-5(g):
 - Requestors cannot utilize OPRA to seek records that are already the subject of a court order or pending discovery request. Requestors must certify!
 - Requestors can only submit a request to one public agency at a time.
 - While custodians can deny access to identical repeat requests, note that requestors are not prohibited from submitting periodic, updated requests.
- Prevailing Party Award Changes N.J.S.A. 47:1A-6:
 - PPAF awards now permissive but will be mandatory where an agency commits 1) an unreasonable denial of access; 2) an act of bad faith; and/or 3) a knowing and willful violation.

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Commercial Requestors

- Commercial entities, as defined in N.J.S.A. 47:1A-1.1, will still be permitted to submit OPRA requests.
 - The definition exempts specific organizations and uses, such as journalist and labor organizations.
- However:
 - Commercial entities will be required to certify to their commercial status upon submission of the OPRA request or face a civil penalty as outlined in N.J.S.A. 47:1A-11.
 - Fourteen (14) business day response time frame for commercial requests; however, custodians must notify the requestor of this time frame within seven (7) business days. N.J.S.A. 47:1A-5(i).
 - Note that commercial requestors may pay a “special service fee” not exceeding two times the cost of production to receive records within seven (7) business days.

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Highlighted Changes For Custodians

- Response Time Frames and Extensions N.J.S.A. 47:1A-5(g); 5(i):
 - Generally, still the same as previously described, except:
 - Commercial requests: 14 business days as previously described.
 - Records requiring Daniel’s Law review: 14 business days.
 - Immediate access: only applies to records from the last 24 months.
 - Extensions appear capped at 21 business days from date of notification to the requestor.
- Statutory Support for Disclosure Through Internet N.J.S.A. 47:1A-5(e):
 - Codified version of the procedure for directing individuals to the place on the internet where a record that is unabridged and complete is stored set forth in Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014).
 - Request considered fulfilled if requestor does not object within seven (7) business days.
 - If the requestor cannot locate the record and so advises, the custodian is required to assist the requestor within seven (7) business days. If still unsuccessful, the requestor may ask for a physical copy, which the custodian will be required to provide within seven (7) business days thereafter.

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Highlighted Changes For Custodians

- Special Service Charge N.J.S.A. 47:1A-5(c):
 - An SSC can be charged that is reasonable and absent an enabling ordinance.
 - The charge must still be provided in advance of it being occurred; however, the custodian will also be required to include “an explanation for and itemized list of the fees or charges.” The burden of challenging the reasonableness of the fee will shift to the requestor.
- Medium/Format conversions N.J.S.A. 47:1A-5(d):
 - Would recognize format (electronic file type) as a conversion term.
 - Conversion costs may still apply for internal/third party vendor use.
 - A custodian would be under no obligation to convert a record if substantial technological manipulation is required; however, disclosure in the current medium/format would still be required.
- Harassment (New Section):
 - Courts may issue protective orders limiting individuals found to have submitted OPRA requests “with the intent to substantially interrupt the performance of government function.”
 - An extremely high bar!

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Highlighted Changes For the GRC

- Council comprised of nine (9) members N.J.S.A. 47:1A-7:
 - DCA Commissioner Designee will serve as Chair.
 - Four (4) members directly appointed by the Governor.
 - Two (2) members appointed from recommendations made by the Senate President.
 - Two (2) members appointed from recommendations made by the Assembly Speaker.
 - Initially three (3) years and then five (5) year terms thereafter.
- Complaint Process N.J.S.A. 47:1A-5(f); N.J.S.A. 47:1A-6:
 - Anonymous requestors will not be permitted to file complaints either with the GRC or courts.
 - Statute of Limitation will decrease from 60 calendar days to 45 calendar days.
- Adjudications N.J.S.A. 47:1A-7(e):
 - Beginning eighteen (18) months after enactment – adjudication within 90 days of receipt (not including time in mediation).
 - Staff may request a 45-day extension for good cause.

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Highlighted Changes For the GRC

- OPRA Model Request Form N.J.S.A. 47:1A-5(f); N.J.S.A. 47:1A-7:
 - Agencies will be required to adopt the GRC’s model request form..
 - Updates to the form for new questions required through PL 2024, c.16.
 - Requirement to promulgate regulations to establish a uniform form that complies with the requirements of OPRA.
 - Make the form available to incarcerated individuals.
- Data Compilation N.J.S.A. 47:1A-7(h):
 - The Superior Court shall provide the GRC with a listing of all actions settled thereby.
 - The GRC is required to compile a database of that data.
 - The Administrative Office of the Courts is also required to submit to the GRC specific data regarding OPRA cases at the end of each court year.
- GRC Website N.J.S.A. 47:1A-7(b):
 - The GRC will be statutorily tasked with periodically reviewing its website for updates as needed.

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How Do We Get From Today into Tomorrow?

Be Prepared.

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Recent GRC Decisions

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Voter Profiles

- **Werner v. Middlesex Cnty. Bd. of Elections, GRC Complaint No. 2014-348 (Interim Order dated July 28, 2015).**
 - Voter registry lists comprised of voter profiles are subject to disclosure pursuant to N.J.S.A. 19:31-18.1
 - However, because the Complainant had been convicted of an indictable offense, home and mailing addresses could be redacted. See N.J.S.A. 47:1A-2.2.

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E-mails: Withhold or Redact?

- **Golas v. Essex Cnty. Dep't of Corr., GRC Complaint No. 2018-12 (Interim Order dated January 7, 2020)**
 - The Council held that the custodian lawfully denied access to certain portions of the bodies of the responsive e-mails.
 - However, following long-standing precedential case law, the Council required the custodian to disclose the e-mails redacting only those exempt portions and disclosing the basic e-mail information. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC 2009-185.

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Social Media

- **Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2017-169 (Interim Order dated November 12, 2019)**
 - The Council held that a custodian unlawfully denied access to records from a GoFundMe campaign set up and managed by the Township Mayor.
 - See also Larkin v. Borough of Glen Rock, Docket No. BER-L-2573-18 (June 15, 2018) (holding that the Mayor and Council's Facebook block lists were subject to disclosure); Wronko v. Borough of Carteret, Docket No. MID-L-5499-18 (Order dated January 11, 2019).

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Text Messages

- **Verry v. Franklin Fire District No. 1, GRC Complaint No. 2014-387 (July 2015).**
- The Council held that a plain reading of OPRA supports that text messages are "government records" subject to disclosure so long as the text messages have been "made, maintained or kept on file . . . or . . . received in the course of . . . official business. . ." N.J.S.A. 47:1A-1.1. The Council stressed that its determination broadly addresses the characterization of text messages as "government records" and notes that exemptions to disclosure may apply on a case-by-case basis. The Council's determination should therefore not be construed to provide for unmitigated access to text messages.

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Draft Documents

- **Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018)**
 - Draft minutes are exempt from disclosure under OPRA's "inter-agency or intra-agency advisory, consultative, or deliberative [(ACD)] material" exemption. N.J.S.A. 47:1A-1.1.
- **Daniel v. Twp. of West Orange (Essex), GRC Complaint No. 2017-163 (May 2019)**
 - Draft resolutions are exempt from disclosure under the ACD exemption, even if shared with a third party prior to approval. N.J.S.A. 47:1A-1.1; Eastwood v. Borough of Englewood Cliffs (Bergen), GRC 2012-121.

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Personnel Records

- **Libertarians For Transparent Gov't v. Cumberland Cnty., 250 N.J. 46 (2022).**
 - The Supreme Court reversed the Appellate Division's decision in Libertarians For Transparent Gov't v. Cumberland Cnty., 465 N.J. Super. 11, (App. Div. 2020) and held that a separation agreement between an employee and the County was not a personnel record exempt from disclosure under N.J.S.A. 47:1A-10.
 - The Court held that because "reason for separation" was part of a disclosable personnel record, the County was required to disclose the agreement with redactions for all other non-disclosable information.
 - But see Shurin v. Bd. of Educ. Schs. of Tech., 2022 N.J. Super. Unpub. LEXIS 1771 (App. Div. 2022)

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Retroactive Application of Case Law

- **Owoh v. Borough of Norwood, et al., 2023 N.J. Super. Unpub. LEXIS 41 (App. Div. 2023)**
 - The App. Div. affirmed the Council's decisions in GRC 2019-256, 2020-83, and 2020-111 which held that the custodians' responses were consistent with Simmons v. Mercado, 464 N.J. Super. 77 (App. Div. 2020) at that time and that it would not retroactively apply Simmons, 247 N.J. 24.
 - The court held that Simmons, 247 N.J. 24 was merely a clarification of the law rather than a major new direction.
- Cert. Denied 2023 N.J. LEXIS 789 (2023).

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Shared Services

- **Michalak v. Borough of Helmetta (Middlesex), GRC 2010-220 (Interim Order dated January 31, 2012)**
 - The Council held that both custodians of agencies engaged in a shared services agreement would be responsible for responding to OPRA requests even if only one of those agencies is maintaining the records sought.
- **But see Owoh v. City of Camden, 2023 N.J. Super. Unpub. LEXIS 597 (App. Div. 2023):**
 - The App. Div. reversed the Council's decision in GRC 2018-291, *et seq.* and held that the City not unlawfully deny access to the Complainant's request for records made and maintained by the County, and appropriately directed the Complainant to same.

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