NEW JERSEY STATE LEAGUE OF MUNICIPALITIES
ORIENTATION FOR MUNICIPAL OFFICIALS THAT ARE NEWLY ELECTED, RE-ELECTED, OR EXPERIENCED

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# CONFLICTS OF INTEREST

# ACCESS TO PUBLIC RECORDS

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Ms. Cecil is General Counsel to the New Jersey State League of Municipalities and co-chairs the League's Legislative Committee. She is also a past president of the Institute of Local Government Attorneys. In 2014, she was the recipient of the Institute of Local Government Attorneys' Fred G. Stickel Award for Excellence in Municipal Law & Service to the Legal Profession.

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Ms. Cipriani holds a Diplomate in New Jersey Local Government Law from the Center of Government Services of Rutgers, The State University of New Jersey and the New Jersey Institute of Local Government Attorneys. She is the Treasurer of the New Jersey Institute of Local Government Attorneys and an Associate Editor of the Local Government Law Review.

# CONTENTS

**MASON, GRIFFIN & PIERSON**
PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

# Ethics/Conflicts of Interest/Financial Disclosure Statements—Outline of Key Provisions

## *OVERVIEW*

*Duties of the public official*:

- FROM THE OATH OF OFFICE: to faithfully, impartially and justly perform all of the duties of the office.
- The official is a trustee for the town's inhabitants, and has a duty to protect the rights of those inhabitants.
- "Honesty and integrity in the performance of their duties is an absolute charge upon public officials and employees." *Driscoll v. Burlington-Bristol Bridge Co*., 8 N.J. 433, cert. denied, 344 U.S. 838 (1952).
- The public official must place the interests of the public above all others.

*Sources of the applicable ethical/conflict-of-interest requirements*:

- Common law (court cases)
- Statutes
    - Local Government Ethics Law, *N.J.S.A.* 40A:9-22.1 *et seq.* (codifies common law)
    - Municipal Land Use Law, *N.J.S.A.* 40:55-1 *et seq.*

***THE COMMON LAW***

- Basic rule: "A public official is disqualified from participating in judicial or quasi-judicial proceedings in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body." *Wyzykowski v. Rizas*, 132 N.J. 509, 523 (1993). If there is a possibility that a personal interest might hinder the official's ability to serve the public interest above all else, the official must recuse.

- Four situations that require disqualification:

  - Direct pecuniary interest: financial tie is such that the official will or could realize a financial gain or loss

    *e.g.*, voting to award a contract to a company in which the official has a financial interest, or voting to build a road to a landlocked parcel owned by the official, or voting on a matter that will cause harm to the official's business competitor.

  - Indirect pecuniary interest: a financial tie exists between the official and the matter under consideration but it is not so immediate that the official will realize a gain or loss

    *e.g.*, voting on a matter that will benefit the company of which the official is an employee, or voting on a matter that will benefit a company with which the official's company has substantial business dealings

  - Direct personal interest: palpable interest that is not financial, but is of immediate and unique importance to the official

    *e.g.*, voting to purchase open space adjacent to the official's home, or voting to hire a close friend's child, or voting on a matter that will harm a personal enemy or an adversary in litigation

  - Indirect personal interest: instances in which the official's judgment may be affected by membership in a given organization or a desire to help that organization further its policies

    *e.g.*, voting on a zoning ordinance that will positively or negatively affect the church of which the official is a member

- Appearance of impropriety: "It is the mere existence of the interest, not its actual effect, which requires the official action to be invalidated." *Township of Lafayette v. Board of Chosen Freeholders of the County of Sussex*, 208 N.J. Super. 468 (App. Div. 1986). What matters is not just whether the official actually feels conflicted, but whether "an

impartial and concerned citizen, intelligent and apprised of all the acts in the situation, would feel that there was the potential for non-objectivity on the part of the officeholder making a decision."

- Analysis is highly fact-sensitive, and whether a particular interest is sufficient to disqualify a public official will always depend on the circumstances of the particular case: "The question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to temp the official to depart from his sworn public duty." *Van Itallie v. Franklin Lakes*, 28 N.J. 258 (1958).

- Not every interest creates a conflict of interest: The appearance of impropriety must be "something more than a fanciful possibility. It must have a reasonable basis." *Higgins v. Advisory Committee on Professional Ethics of the Supreme Court of New Jersey*, 73 N.J. 123 (1977).

    - Not problematic:

      *de minimis* situations, such as an official employed by Verizon voting to pay the phone bill, or an official employed by PSE&G voting to pay the electric bill

      situations where the official's interest is not unique but is shared by other members of the public, such as an official participating in matters related to the adoption of a redevelopment plan when he owns one of the approximately 1,000 homes in the redevelopment area

- Disqualification should be not required willy-nilly: "Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office…[Courts] must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality and many important instances of the services of its duly elected or appointed officials. *Van Itallie v. Franklin Lakes*, 28 N.J. 258 (1958).

***THE LOCAL GOVERNMENT ETHICS LAW***
***N.J.S.A. 40A:9-22.1 et seq.***

- Intended to codify prior common law

**§ 40A:9-22.2. Findings, declarations**

The Legislature finds and declares that:

a. Public office and employment are a public trust;

b. The vitality and stability of representative democracy depend upon the public's confidence in the integrity of its elected and appointed representatives;

c. Whenever the public perceives a conflict between the private interests and the public duties of a government officer or employee, that confidence is imperiled;

d. Governments have the duty both to provide their citizens with standards by which they may determine whether public duties are being faithfully performed, and to apprise their officers and employees of the behavior which is expected of them while conducting their public duties; and

e. It is the purpose of this act to provide a method of assuring that standards of ethical conduct and financial disclosure requirements for local government officers and employees shall be clear, consistent, uniform in their application, and enforceable on a Statewide basis, and to provide local officers or employees with advice and information concerning possible conflicts of interest which might arise in the conduct of their public duties."

- Who is covered:
  - All elected officials
  - Anyone employed by or serving on a board, commission, agency, etc. that performs functions other than of a purely advisory nature
  - Anyone who is a managerial executive employee of a local government agency
  - Library boards of trustees

- Who is not covered:
  - School boards/school employees (subject instead to Schools Ethics Law)
  - Members of purely advisory boards

- What is prohibited:

**§40A:9-22.5. Provisions requiring compliance by local government officers, employees**

Local government officers or employees under the jurisdiction of the Local Finance Board shall comply with the following provisions:

a. No local government officer or employee or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest;

b. [N/A]

c. No local government officer or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others;

d. No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment;

e. No local government officer or employee shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties;

f. No local government officer or employee, member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the local government officer has no knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence the local government officer in the discharge of his official duties;

g. No local government officer or employee shall use, or allow to be used, his public office or employment, or any information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated;

h. No local government officer or employee or business organization in which he has an interest shall represent any person or party other than the local government in connection with any cause, proceeding, application or other matter pending before any agency in the local government in which he serves. This provision shall not be deemed to prohibit one local government employee from representing another local government employee where the local government agency is the employer and the representation is within the context of official labor union or similar representational responsibilities;

i. No local government officer shall be deemed in conflict with these provisions if, by reason of his participation in the enactment of any ordinance, resolution or other matter required to be voted upon or which is subject to executive approval or veto, no material or monetary gain accrues to him as a member of any business, profession, occupation or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of such business, profession, occupation or group;

j. No elected local government officer shall be prohibited from making an inquiry for information on behalf of a constituent, if no fee, reward or other thing of value is promised to, given to or accepted by the officer or a member of his immediate family, whether directly or indirectly, in return therefor; and

k. Nothing shall prohibit any local government officer or employee, or members of his immediate family, from representing himself, or themselves, in negotiations or proceedings concerning his, or their, own interests.

***THE MUNICIPAL LAND USE LAW***
***N.J.S.A. 40:55D-1 et seq.***

- Applies only to quasi-judicial bodies (zoning board, planning board) established under the MLUL

- *N.J.S.A.* 40:55D-23b: "No member of the Planning Board shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest."

- *N.J.S.A.* 40:55D-69: "No member of the board of adjustment shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest."

- Interpretation by the courts: "The statutory disqualification is markedly broadly couched, extending to personal as well as financial interests, 'directly or indirectly'." *Zell v. Borough of Roseland*, 42 N.J. Super. 75 (App. Div. 1956). The statutory bar "is not confined to instances of possible material gain but . . . extends to any situation in which the personal interest of a board member in the 'matter' before it, direct or indirect, may have the capacity to exert an influence on his action in the matter." *Ibid*.

***GUIDEPOSTS FOR APPLYING CONFLICT-OF-INTEREST RULES***

- Ethics is situational and highly fact sensitive. The statutes and cases only offer a starting point for the analysis, and a general framework.

- There are no blanket rules: each situation must be evaluated on its specific facts, and the answer will be dictated by a practical feel of the situation.

- "In every case, what is being exminated [by the court, after the fact] is a particular set of facts or circumstances. Thus, while it is possible to trace common elements through the cases, it is impossible to rely on the cases as an absolute predictive guide except in those fact situations which fall squarely within the scope of the cases. In other words, while statutes may be too general, cases may be too specific. Both can be used together as guides but neither furnishes an absolute answer . . . ." *Michael A. Pane, Local Government Law, 34 N.J. Practice §9:7 (4th Ed. 2015)*

- Standard is somewhat different for officials who are acting in a legislative versus a quasi-judicial capacity: "Courts do recognize that elected officials represent a variety of constituencies and are charged with solving a variety of problems. Thus, in the context of local government and in making decisions, it is not unusual for an elected official to vote on legislation promised in a campaign or to vote on legislation which benefits a particular group of constituents—sometimes even including that public official. As one case put it—a disqualification should not result from 'a personal interest in the welfare of the community' nor 'the interest of nearly all businessmen in the borough in the general improvement of their businesses.'" *Michael A. Pane, Local Government Law, 34 N.J. Practice §9:8 (4th Ed. 2015) (quoting Hochberg v. Borough of Freehold, 40 N.J. Super. 276 (App. Div.), certif. denied, 22 N.J. 223 (1956))*

## *EXCEPTION: THE DOCTRINE OF NECESSITY*

- Issue: what happens when a majority of the members of the body in question share an interest which should disqualify them?

  *E.g.,* a majority of the Board members belong to a particular religious institution and a measure opposed by that institution, such as the granting of a liquor license, comes before the body

- Older case law: As long as there is no evidence that the hearing is unfair, the doctrine of necessity should provide that the result should not be overturned.

  *See Borough of Fanwood v. Rocco, 33 N.J. 404 (1960)(citations omitted):*
  "Finally, reference may be made to the fact that there were members of the borough council who were also members of the objecting Presbyterian Church. It seems to us that if a quorum could have been convened without such councilmen then that course would have been the proper one for it is important that the appearance of objectivity and impartiality be maintained as well as their actuality. However, five of the six councilmen were members of the Presbyterian Church and their withdrawal would have left no quorum. At the time of his application Mr. Rocco did not seek disqualification of the councilmen, nor has he asserted any disqualification in his brief before this court. He has, however, suggested that the membership of the councilmen in the Presbyterian Church was a proper factor for the Director's consideration on his review of the denial of the application. The Director was fully aware of all of the circumstances and undoubtedly carefully scrutinized the entire record before him. He did not at any time question that there was widespread local sentiment in favor of keeping Fanwood's business center free of taverns and package stores, nor did he question the conscientiousness of the members of the governing body in honoring that sentiment. Mayor Todd, who was not a member of the Presbyterian Church, testified that all previous applications for the licensing of taverns and package stores in the area were denied and that the granting of the application would be contrary to the feeling of most of the people of Fanwood, 'a thinking with which all of the gentlemen of the council concurred.' Councilman Agnoli, the only member of the municipal council who was not a member of the Presbyterian Church, testified that he was absent when the application was considered and that if he had been present he 'would have voted against it.' At the hearing before the Director, there was no testimony establishing that the municipal governing body's determination to keep its business center free of package stores and taverns was in any respects unreasonable, and, while the Director did conclude to reverse its denial of the application, we have

> hereinbefore indicated why we consider that his action was improperly grounded and was soundly set aside by the Appellate Division."

- Still applies (with caveats) today: In *Gunthner v. Planning Bd. of Borough of Bay Head*, 335 *N.J. Super*. 452 (Law. Div. 2000), a landowner who owned marina property contiguous to private yacht club brought action against planning board, seeking to disqualify seven board members who were also yacht club members and to obtain default approval of landowner's completed development application which would create eight residential lots with a marina. The Superior Court, Law Division, Ocean County, Serpentelli, A.J.S.C., held that: (1) board members who were also yacht club members had a conflict of interest, but (2) notwithstanding their conflict, members would be permitted to rule on application, consistent with members' duty to protect public interest.

***BOTTOM LINE***

- Not every interest has the capacity to entice a public official to depart from his sworn duty. Question is whether the official has a second, unique interest different from other officeholders which sets that officeholder apart, or an interest not shared with other members of the public; in other words, you have to look at the extent of the individual benefit conferred and the number of other citizens similarly situated and receiving benefits with the public official." *Michael A. Pane, Local Government Law, 34 N.J. Practice §9:8 (4th Ed. 2015)*

    - Vote by official to build park in official's neighborhood: ok

    - Vote by official to build park next to official's house: not ok

    - In a town with multiple rescue squads, vote on general appropriations for all the squads by official who is a member of one of them: ok

    - Vote by that same official on a measure concerning the allocation of funds among the various squads: not ok

    - Vote by mayor in favor of proposed assisted living facility when mayor said he might seek to have his mother admitted to the facility if it was approved: ok, because there was no showing that the mayor depended on the developer of the facility to care for his mother, and the comment did not distinguish the mayor from any other member of the community

## *PROCESS IF A CONFLICT EXISTS*

- Requirement is complete recusal: "[A]ny person who is precluded from voting in any matter because of a conflict of interests or the appearance of same should not in any way participate in any of the discussion involved in same. . . . [D]isqualification as to action is disqualification as to participation and the only sensible and sure course of action is to remove oneself totally from the proceedings as to an item in which there is a question of self-interest or the appearance thereof." Michael A. Pane, Local Government Law, 34 N.J. Practice §9:8 (4th Ed. 2015)(quoting *Darrell v. Governing Body of Clark Twp*., 169 N.J. Super. 127 (App. Div. 1979)).

    - I have a conflict; can I still participate in the discussion as long as I don't vote?

      Answer: NO

    - I have a conflict; can I still preside over the meeting as long as I don't participate in the discussion or vote?

      Answer: NO

    - I have a conflict, can I stay on the dais as long as I don't preside, participate in the discussion or vote?

      Answer: NO

    - I have a conflict and I've completely recused myself, can I address the public body as a member of the public?

      Answer: Yes, with caveats

    - I have a conflict and I've completely recused myself, do I have to leave the room?

      Answer: No, with caveats. There is no legal requirement to leave the room, but it's the better practice

    - I have a conflict and I voted, but my vote wasn't needed and the measure would have passed anyway. Does the action stand?

      Answer: NO—ACTION IS VOID

## *INCOMPATIBILITY OF OFFICE (DUAL OFFICE-HOLDING)*

As described by Michael A. Pane in his treatise on local government law:

> Having examined the nature of conflicts and the types of conflicts, it is worthwhile to mention the doctrine of incompatibility of office—a doctrine almost as old as Anglo-American law itself. In one sense, incompatibility of office represents a special type of conflict. It is a situation in which the nature of two offices is such that both positions cannot be executed with care or ability by the same individual, either because one is subordinate to the other or because one office in some other fashion interferes with the other. One obvious example of incompatibility of offices is having the municipal attorney serve as attorney for the Zoning Board of Adjustment or Planning Board. The statutes prohibit dual office-holding in this case because no one can serve the governing body faithfully and at the same time serve faithfully a body which: (a) is by law independent of the governing body; (b) must at times have its acts appealed to the governing body; (c) may actually be in court against the governing body or at least have different interests in a case; and (d) whose members are appointed by the body their attorney serves. Thus, since the officeholder cannot faithfully discharge both offices simultaneously, the offices are incompatible. In one case the classic definition of incompatibility was restated as follows:
>
> > Offices are incompatible when there is a conflict or inconsistency in their functions. Therefore offices are not compatible when one is subordinate to or subject to the supervision or control of the other or the duties of the offices clash requiring the officer to prefer one obligation over the other.
>
> *Taylor v. Salem County Bd. of Chosen Freeholders* held that an employee of the County College who was also a Freeholder could not vote on appointments of members of the college Board of Trustees.
>
> In one 1995 case, the Court held that the municipal court judge could not be part of an administration department headed by another official, because it was incompatible with the independence of the municipal court.
>
> In some cases, the Legislature has modified the common law doctrine by specific legislation. For instance, a person can hold elected county office while holding elective municipal office, and a municipal governing body member may serve as a member of a municipal sewerage or utilities authority.
>
> But note that the Chancery Division Court found the position of planning board member to be incompatible with membership on a regional sewer authority.

Traditionally the doctrine of incompatibility has been applied with such thoroughness that a person, having accepted a second office incompatible with the first office held, was deemed to have vacated the first office. The doctrine has been made flexible to the extent of usually allowing an election between the two offices by the individual caught in the incompatibility.

In one case, a court has found that the remedy for an elected official's incompatible service as city commissioner and police officer on unpaid leave was for him to choose which office he wished to retain. The Appellate Division noted that "under a strict application of the common law, acceptance of another incompatible office automatically vacates the first one."

The Appellate Division has determined that the offices of County Surrogate and city council member were incompatible because surrogates are regulated by the Supreme Court and are prohibited by Court Rules from participating in political activity.

*Michael A. Pane, Local Government Law, 34 N.J. Practice §9:27 (4th Ed. updated June 2020)*

## *FINANCIAL DISCLOSURE STATEMENT*

- Required by the Local Government Ethics Law
- Does not apply to members of purely advisory bodies
- Must be filed annually by April 30 or within 30 days of taking office
- Filing is electronic—municipal clerk will send out instructions
- Disclosure statement is a public record—http://fds.state.nj.us/njdca_prod/fdssearch.aspx
- Must disclose each *source* of income (specific amounts do not have to be disclosed)
    - earned or unearned
    - exceeding $2,000
    - received by the local government officer or a member of his immediate family during the preceding calendar year

  *except*
    - Individual client fees, receipts or commissions received through a business organization need not be separately reported as sources of income
- Must provide the name and address of all business organizations in which the local government officer or a member of his immediate family had an interest during the preceding calendar year
- Must provide the address and brief description of all real property in the State in which the officer or a member of his immediate family held an interest during the preceding calendar year.
- Failure to file = violation of the LGEL and subjects the official to fines and, if official is appointed as opposed to elected, potential removal from office

*Penalties for violating the Local Government Ethics Law*

- An elected local government officer or employee found guilty … shall be fined not less than $100.00 nor more than $500.00 (expect that the range of penalties will be increased, probably to a $10,000 maximum, the same as the State Ethics Code)

*Useful links*:

www.nj.gov/dca/divisions/dlgs/programs/ethics.html
www.nj.gov/dca/divisions/dlgs/fds.html

## *A FEW CRIMINAL LAWS TO BE AWARE OF*

**Criminal (Anti-Bribery) Laws**

***N.J.S.A.* 2C:27-10: Gifts to public servants**.

a. A public servant commits a crime if, under color of office and in connection with any official act performed or to be performed by the public servant, the public servant directly or indirectly, knowingly solicits, accepts or agrees to accept any benefit, whether the benefit inures to the public servant or another person, to influence the performance of an official duty or to commit a violation of an official duty." See also (b) & (c).

. . . .

d. The provisions of this section shall not apply to:

(1) Fees prescribed by law to be received by a public servant or any other benefit to which the public servant is otherwise legally entitled if these fees or benefits are received in the manner legally prescribed and not bartered for another benefit to influence the performance of an official duty or to commit a violation of an official duty;

(2) Gifts or other benefits conferred on account of kinship or other personal, professional or business relationship independent of the official status of the recipient if these gifts or benefits are within otherwise legally permissible limits and are not bartered for another benefit to influence the performance of an official duty or to commit a violation of an official duty;

(3) Trivial benefits the receipt of which involve no risk that the public servant would perform official duties in a bias or partial manner.

e. An offense prescribed by this section is a crime of the second degree. If that benefit solicited, accepted, agreed to be accepted or received is of a value of $200.00 or less, any offense prescribed by this section is a crime of the third degree."

***N.J.S.A.* 2C:27-11: Offer of unlawful benefit to public servant for official behavior.**

This is the converse of 27-10. Under 27-11, the person who offers the benefit to the public servant is equally culpable for the same crime as the public servant.

**Official misconduct:**

***N.J.S.A.* 2C:30-2:**

> A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit:
> a. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner; or
>
> b. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a crime of the second degree. If the benefit obtained or sought to be obtained, or of which another is deprived or sought to be deprived, is of a value of $200.00 or less, the offense of official misconduct is a crime of the third degree.

**Insider trading**:

***N.J.S.A.* 2C:30-3**

> A person commits a crime if, in contemplation of official action by himself or by a governmental unit with which he is or has been associated, or in reliance on information to which he has or has had access in an official capacity and which has not been made public, he:
>
> a. Acquires a pecuniary interest in any property, transaction or enterprise which may be affected by such information or official; or
>
> b. Speculates or wagers on the basis of such information or official action; or
>
> c. Aids another to do any of the foregoing, while in office or after leaving office with a purpose of using such information.

An offense proscribed by this section is a crime of the second degree. If the benefit acquired or sought to be acquired is of a value of $200.00 or less, an offense proscribed by this section is a crime of the third degree.

State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 803
TRENTON, NJ 08625-0803

# LOCAL GOVERNMENT ETHICS LAW

## New Jersey Statute
## N.J.S.A. 40A:9-22.1 et seq.

## and

## Adopted Rules and Complaint Procedures
## N.J.A.C. 5:35-1.1 et seq.

NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS
Division of Local Government Services
Local Finance Board
http://www.state.nj.us/dca/divisions/dlgs/programs/ethics.html

(Updated December 2015)

**LOCAL GOVERNMENT ETHICS LAW**
**N.J.S.A. 40A:9-22.1 et seq.**
**TABLE OF CONTENTS**

## 40A:9-22.1 Local government ethics law; short title

This act shall be known and may be cited as the "Local Government Ethics Law."

L. 1991, c. 29, § 1.

## 40A:9-22.2 Legislative findings and declaration

The Legislature finds and declares that:

a. Public office and employment are a public trust;

b. The vitality and stability of representative democracy depend upon the public's confidence in the integrity of its elected and appointed representatives;

c. Whenever the public perceives a conflict between the private interests and the public duties of a government officer or employee, that confidence is imperiled;

d. Governments have the duty both to provide their citizens with standards by which they may determine whether public duties are being faithfully performed, and to apprise their officers and employees of the behavior which is expected of them while conducting their public duties; and

e. It is the purpose of this act to provide a method of assuring that standards of ethical conduct and financial disclosure requirements for local government officers and employees shall be clear, consistent, uniform in their application, and enforceable on a Statewide basis, and to provide local officers or employees with advice and information concerning possible conflicts of interest which might arise in the conduct of their public duties.

L. 1991, c. 29, § 2.

## 40A:12-22.3 Definitions

As used in this act:

a. "Board" means the Local Finance Board in the Division of Local Government Services in the Department of Community Affairs;

b. "Business organization" means any corporation, partnership, firm, enterprise, franchise, association, trust, sole proprietorship, union or other legal entity;

c. "Governing body" means, in the case of a municipality, the commission, council, board or body, by whatever name it may be known, having charge of the finances of the municipality, and, in the case of a county, the board of chosen freeholders, or, in the

case of a county having adopted the provisions of the "Optional County Charter Law," P.L.1972, c.154 (C.40:41A-1 et seq.), as defined in the form of government adopted by the county under that act;

d. "Interest" means the ownership or control of more than 10% of the profits, assets or stock of a business organization but shall not include the control of assets in a nonprofit entity or labor union;

e. "Local government agency" means any agency, board, governing body, including the chief executive officer, bureau, division, office, commission or other instrumentality within a county or municipality, and any independent local authority, including any entity created by more than one county or municipality, which performs functions other than of a purely advisory nature, but shall not include a school board;

f. "Local government employee" means any person, whether compensated or not, whether part-time or full-time, employed by or serving on a local government agency who is not a local government officer, but shall not mean any employee of a school district;

g. "Local government officer" means any person whether compensated or not, whether part-time or full-time: (1) elected to any office of a local government agency; (2) serving on a local government agency which has the authority to enact ordinances, approve development applications or grant zoning variances; (3) who is a member of an independent municipal, county or regional authority; or (4) who is a managerial executive employee of a local government agency, as defined in rules and regulations adopted by the Director of the Division of Local Government Services in the Department of Community Affairs pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C.52:14B-1 et seq.), but shall not mean any employee of a school district or member of a school board;

h. "Local government officer or employee" means a local government officer or a local government employee;

i. "Member of immediate family" means the spouse or dependent child of a local government officer or employee residing in the same household.

L. 1991, c. 29, § 3. Amended by L. 2015, c. 95, § 21, eff. Aug. 10, 2015.

### 40A:9-22.4 Local Finance Board; jurisdiction

The Local Finance Board in the Division of Local Government Services in the Department of Community Affairs shall have jurisdiction to govern and guide the conduct of local government officers or employees regarding violations of the provisions of this act who are not otherwise regulated by a county or municipal code of ethics promulgated by a county or municipal ethics board in accordance with the provisions of this act. Local government officers or employees serving a local government agency created by more than one county or municipality and officers

or employees of county colleges established pursuant to N.J.S. 18A:64A-1 et seq. shall be under the jurisdiction of the board. The board in interpreting and applying the provisions of this act shall recognize that under the principles of democracy, public officers and employees cannot and should not be expected to be without any personal interest in the decisions and policies of government; that citizens who are government officers and employees have a right to private interests of a personal, financial and economic nature; and that standards of conduct shall distinguish between those conflicts of interest which are legitimate and unavoidable in a free society and those conflicts of interest which are prejudicial and material and are, therefore, corruptive of democracy and free society.

L. 1991, c. 29, §4. Amended by L. 1995, c. 21.

## 40A:9-22.5 Code of ethics for local government officers or employees under jurisdiction of Local Finance Board

Local government officers or employees under the jurisdiction of the Local Finance Board shall comply with the following provisions:

a. No local government officer or employee or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest;

b. No independent local authority shall, for a period of one year next subsequent to the termination of office of a member of that authority:

(1) award any contract which is not publicly bid to a former member of that authority;

(2) allow a former member of that authority to represent, appear for or negotiate on behalf of any other party before that authority; or

(3) employ for compensation, except pursuant to open competitive examination in accordance with Title 11A of the New Jersey Statutes and the rules and regulations promulgated pursuant thereto, any former member of that authority.

The restrictions contained in this subsection shall also apply to any business organization in which the former authority member holds an interest.

c. No local government officer or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others;

d. No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in

which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment;

e. No local government officer or employee shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties;

f. No local government officer or employee, member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the local government officer has no knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence the local government officer in the discharge of his official duties;

g. No local government officer or employee shall use, or allow to be used, his public office or employment, or any information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated;

h. No local government officer or employee or business organization in which he has an interest shall represent any person or party other than the local government in connection with any cause, proceeding, application or other matter pending before any agency in the local government in which he serves. This provision shall not be deemed to prohibit one local government employee from representing another local government employee where the local government agency is the employer and the representation is within the context of official labor union or similar representational responsibilities;

i. No local government officer shall be deemed in conflict with these provisions if, by reason of his participation in the enactment of any ordinance, resolution or other matter required to be voted upon or which is subject to executive approval or veto, no material or monetary gain accrues to him as a member of any business, profession, occupation or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of such business, profession, occupation or group;

j. No elected local government officer shall be prohibited from making an inquiry for information on behalf of a constituent, if no fee, reward or other thing of value is promised to, given to or accepted by the officer or a member of his immediate family, whether directly or indirectly, in return therefor; and

k. Nothing shall prohibit any local government officer or employee, or members of his immediate family, from representing himself, or themselves, in negotiations or proceedings concerning his, or their, own interests.

L. 1991, c. 29, § 5.

## 40A:9-22.6 Financial disclosure statement

a. Local government officers shall annually file a financial disclosure statement. All financial disclosure statements filed pursuant to this act shall include the following information which shall specify, where applicable, the name and address of each source of income and the local government officer's job title:

(1) Each source of income, earned or unearned, exceeding $2,000 received by the local government officer or a member of his immediate family during the preceding calendar year. Individual client fees, customer receipts or commissions on transactions received through a business organization need not be separately reported as sources of income. If a publicly traded security is the source of income, the security need not be reported unless the local government officer or member of his immediate family has an interest in the business organization;

(2) Each source of fees and honorariums having an aggregate amount exceeding $250 from any single source for personal appearances, speeches or writings received by the local government officer or a member of his immediate family during the preceding calendar year;

(3) Each source of gifts, reimbursements or prepaid expenses having an aggregate value exceeding $400 from any single source, excluding relatives, received by the local government officer or a member of his immediate family during the preceding calendar year;

(4) The name and address of all business organizations in which the local government officer or a member of his immediate family had an interest during the preceding calendar year; and

(5) The address and brief description of all real property in the State in which the local government officer or a member of his immediate family held an interest during the preceding calendar year.

b. The Local Finance Board shall prescribe a financial disclosure statement form for filing purposes. For counties and municipalities which have not established ethics boards, the board shall transmit sufficient copies of the forms to the municipal clerk in each municipality and the county clerk in each county for filing in accordance with this act. The municipal clerk shall make the forms available to the local government officers serving the municipality. The county clerk shall make the forms available to the local government officers serving the county.

For counties and municipalities which have established ethics boards, the Local Finance Board shall transmit sufficient copies of the forms to the ethics boards for filing in accordance with this act. The ethics boards shall make the forms available to the local government officers within their jurisdiction.

For local government officers serving the municipality, the original statement shall be filed with the municipal clerk in the municipality in which the local government officer serves. For local government officers serving the county, the original statement shall be filed with the county clerk in the county in which the local government officer serves. A copy of the statement shall be filed with the board. In counties or municipalities which have established ethics boards a copy of the statement shall also be filed with the ethics board having jurisdiction over the local government officer. Local government officers shall file the initial financial disclosure statement within 90 days following the effective date of this act. Thereafter, statements shall be filed on or before April 30th each year, except that each local government officer shall file a financial disclosure statement within 30 days of taking office.

c. All financial disclosure statements filed shall be public records.

d. The Division of Local Government Services in the Department of Community Affairs may establish an electronic filing system for financial disclosure statements required to be filed pursuant to this section.

L. 1991, c. 29, § 6, eff. May 21, 1991. Amended by L. 2008, c. 72, § 1, eff. Sept. 6, 2008. Amended by L. 2015, c. 95; § 22, eff. Aug. 10, 2015.

### 40A:9-22.7 Powers of Local Finance Board

With respect to its responsibilities for the implementation of the provisions of this act, the Local Finance Board shall have the following powers:

a. To initiate, receive, hear and review complaints and hold hearings with regard to possible violations of this act;

b. To issue subpoenas for the production of documents and the attendance of witnesses with respect to its investigation of any complaint or to the holding of a hearing;

c. To hear and determine any appeal of a decision made by a county or municipal ethics board;

d. To forward to the county prosecutor or the Attorney General or other governmental body any information concerning violations of this act which may become the subject of criminal prosecution or which may warrant the institution of other legal proceedings by the Attorney General;

e. To render advisory opinions as to whether a given set of facts and circumstances would constitute a violation of this act;

f. To enforce the provisions of this act and to impose penalties for the violation thereof as are authorized by this act; and

g. To adopt rules and regulations pursuant to the "Administrative Procedure Act," P.L. 1968, c.410 (C.52:14B-1 et seq.) and to do other things as are necessary to implement the purposes of this act.

L. 1991, c. 29, § 7.

### 40A:9-22.8 Advisory opinions of Local Finance Board

A local government officer or employee not regulated by a county or municipal code of ethics may request and obtain from the Local Finance Board an advisory opinion as to whether any proposed activity or conduct would in its opinion constitute a violation of the provisions of this act. Advisory opinions of the board shall not be made public, except when the board by the vote of two-thirds of all of its members directs that the opinion be made public. Public advisory opinions shall not disclose the name of the local government officer or employee unless the board in directing that the opinion be made public so determines.

L. 1991, c. 29, § 8.

### 40A:9-22.9 Complaints to Local Finance Board; notice; hearing; decision

The Local Finance Board, upon receipt of a signed written complaint by any person alleging that the conduct of any local government officer or employee, not regulated by a county or municipal code of ethics, is in conflict with the provisions of this act, shall acknowledge receipt of the complaint within 30 days of receipt and initiate an investigation concerning the facts and circumstances set forth in the complaint. The board shall make a determination as to whether the complaint is within its jurisdiction or frivolous or without any reasonable factual basis. If the board shall conclude that the complaint is outside its jurisdiction, frivolous or without factual basis, it shall reduce that conclusion to writing and shall transmit a copy thereof to the complainant and to the local government officer or employee against whom the complaint was filed. Otherwise the board shall notify the local government officer or employee against whom the complaint was filed of the nature of the complaint and the facts and circumstances set forth therein. The officer or employee shall have the opportunity to present the board with any statement or information concerning the complaint which he wishes. Thereafter, if the board determines that a reasonable doubt exists as to whether the local government officer or employee is in conflict with the provisions of this act, the board shall conduct a hearing in the manner prescribed by section 12 of this act, concerning the possible violation and any other facts and circumstances which may have come to the attention of the board with respect to the conduct of the local government officer or employee. The board shall render a decision as to whether the conduct of the officer or employee is in conflict with the provisions of this act. This decision

shall be made by no less than two-thirds of all members of the board. If the board determines that the officer or employee is in conflict with the provisions of this act, it may impose any penalties which it believes appropriate within the limitations of this act. A final decision of the board may be appealed in the same manner as any other final State agency decision.

L. 1991, c. 29, § 9.

### 40A:9-22.10 Penalties

a. An appointed local government officer or employee found guilty by the Local Finance Board or a county or municipal ethics board of the violation of any provision of P.L. 1991, c. 29 (C.40A:9-22.1 et seq.) or of any code of ethics in effect pursuant to P.L., c. 29 (C.40A:9-22.1 et seq.), shall be fined not less than $100.00 nor more than $500.00, which penalty may be collected in a summary proceeding pursuant to "The Penalty Enforcement Law of 1999," P.L. 1999, c. 274 (N.J.S.2A:58-1 et seq.). The board or a county or municipal ethics board shall report its findings to the office or agency having the power of removal or discipline of the appointed local government officer or employee and may recommend that further disciplinary action be taken.

b. An elected local government officer or employee found guilty by the Local Finance Board or a county or municipal ethics board of the violation of any provision of P.L. 1991, c. 29 (C.40A:9-22.1 et seq.) or of any code of ethics in effect pursuant to P.L. 1991, c. 29 (C.40A:9-22.1 et seq.), shall be fined not less than $100.00 nor more than $500.00, which penalty may be collected in a summary proceeding pursuant to "The Penalty Enforcement Law of 1999," P.L. 1999, c. 274 (N.J.S.2A:58-1 et seq.).

c. The remedies provided herein are in addition to all other criminal and civil remedies provided under the law.

L. 1991, c. 29, § 10, eff. May 21, 1991. Amended by L. 1999, c. 440; § 101, eff. April 17, 2000.

### 40A:9-22.11 Disciplinary action

The finding by the Local Finance Board or a county or municipal ethics board that an appointed local government officer or employee is guilty of the violation of the provisions of this act, or of any code of ethics in effect pursuant to this act, shall be sufficient cause for his removal, suspension, demotion or other disciplinary action by the officer or agency having the power of removal or discipline. When a person who is in the career service is charged with violating the provisions of this act or any code of ethics in effect pursuant to this act, the procedure leading to removal, suspension, demotion or other disciplinary action shall be governed by any applicable procedures of Title 11A of the New Jersey Statutes and the rules promulgated pursuant thereto.

L. 1991,c. 29, §11.

## 40A:9-22.12 Rules and procedures applicable to hearings

All hearings required pursuant to this act shall be conducted in conformity with the rules and procedures, insofar as they may be applicable, provided for hearings by a State agency in contested cases under the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.).

L. 1991, c. 29, § 12.

## 40A:9-22.13 County ethics boards; members; terms; compensation

a. Each county of the State governed under the provisions of P.L.1972, c.154 (C.40:41A-1 et seq.) may, by ordinance, and the remaining counties may, by resolution establish a county ethics board consisting of six members who are residents of the county, at least two of whom shall be public members. The members of the ethics board shall be appointed by the governing body of the county and no more than one of whom shall be from the same municipality. The members shall be chosen by virtue of their known and consistent reputation for integrity and their knowledge of local government affairs. No more than three members of the ethics board shall be of the same political party.

b. The members of the county ethics board shall annually elect a chairman from among the membership.

c. The members shall serve for a term of five years; except that of the members initially appointed, two of the public members shall be appointed to serve for a term of five years, one member shall be appointed to serve for a term of four years, and the remaining members shall be appointed to serve for a term of three years. Each member shall serve until his successor has been appointed and qualified. Any vacancy occurring in the membership of the ethics board shall be filled in the same manner as the original appointment for the unexpired term.

d. Members of the ethics board shall serve without compensation but shall be reimbursed by the county for necessary expenses incurred in the performance of their duties under this act.

L. 1991, c. 29, § 13.

## 40A:9-22.14 County ethics board; office; expenses; employees

a. The governing body of the county shall provide the county ethics board with offices for the conduct of its business and the preservation of its records, and shall supply equipment and supplies as may be necessary.

b. All necessary expenses incurred by the county ethics board and its members shall be paid, upon certification of the chairman, by the county treasurer within the limits of funds appropriated by the county governing body by annual or emergency appropriations for those purposes.

c. The county ethics board may appoint employees, including independent counsel, and clerical staff as are necessary to carry out the provisions of this act within the limits of funds appropriated by the county governing body for those purposes.

L. 1991,c. 29, §14.

### 40A:9-22.15 County code of ethics; promulgation; approval

Within 90 days after the establishment of a county ethics board, that ethics board shall promulgate, by resolution, a county code of ethics for all local government officers and employees serving the county. Local government officers and employees serving a county independent authority shall be deemed to be serving the county for purposes of this act.

The county code of ethics so promulgated shall be either identical to the provisions set forth in section 5 of this act or more restrictive, but shall not be less restrictive. Within 15 days following the promulgation thereof, the county code of ethics, and a notice of the date of the public hearing to be held thereon, shall be published in at least one newspaper circulating within the county and shall be distributed to the county clerk and to the heads of the local government agencies serving the county for circulation among the local government officers and employees serving the county. The county ethics board shall hold a public hearing on the county code of ethics not less than 30 days following its promulgation at which any local government officer or employee serving the county and any other person wishing to be heard shall be permitted to testify. As a result of the hearing, the ethics board may amend or supplement the county code of ethics as it deems necessary. If the county code of ethics is not identical to the provisions set forth in section 5 of this act, the county ethics board shall thereafter submit the county code of ethics to the Local Finance Board for approval. The board shall approve or disapprove a county code of ethics within 60 days following receipt. If the board fails to act within that period, the county code of ethics shall be deemed approved. A county code of ethics requiring board approval shall take effect for all local government officers and employees serving the county 60 days after approval by the board. A county code of ethics identical to the provisions set forth in section 5 of this act shall take effect 10 days after the public hearing thereon. The county ethics board shall forward a copy of the county code of ethics to the county clerk and shall make copies of the county code of ethics available to local government officers and employees serving the county.

L. 1991,c. 29, § 15.

### 40A:9-22.16 Powers of county ethics board

A county ethics board shall have the following powers:

a. To initiate, receive, hear and review complaints and hold hearings with regard to possible violations of the county code of ethics or financial disclosure requirements by local government officers or employees serving the county;

b. To issue subpoenas for the production of documents and the attendance of witnesses with respect to its investigation of any complaint or to the holding of a hearing;

c. To forward to the county prosecutor or the Attorney General or other governmental body any information concerning violations of the county code of ethics or financial disclosure requirements by local government officers or employees serving the county which may become the subject of criminal prosecution or which may warrant the institution of other legal proceedings by the Attorney General;

d. To render advisory opinions to local government officers or employees serving the county as to whether a given set of facts and circumstances would constitute a violation of any provision of the county code of ethics or financial disclosure requirements;

e. To enforce the provisions of the county code of ethics and financial disclosure requirements with regard to local government officers or employees serving the county and to impose penalties for the violation thereof as are authorized by this act; and

f. To adopt rules and regulations and to do other things as are necessary to implement the purposes of this act.

L. 1991, c. 29, §16.

### 40A:9-22.17 Advisory opinions of county ethics board

A local government officer or employee serving the county may request and obtain from the county ethics board an advisory opinion as to whether any proposed activity or conduct would in its opinion constitute a violation of the county code of ethics or any financial disclosure requirements. Advisory opinions of the county ethics board shall not be made public, except when the ethics board by the vote of two-thirds of all of its members directs that the opinion be made public. Public advisory opinions shall not disclose the name of the local government officer or employee unless the ethics board in directing that the opinion be made public so determines.

L. 1991, c. 29, § 17.

### 40A:9-22.18 Complaints to county ethics board; notice; hearing; decision

The county ethics board, upon receipt of a signed written complaint by any person alleging that the conduct of any local government officer or employee serving the county is in conflict with the county code of ethics or any financial disclosure requirements shall acknowledge receipt of the complaint within 30 days of receipt and initiate an investigation concerning the facts and circumstances set forth in the complaint. The ethics board shall make a determination as to whether the complaint is within its jurisdiction or frivolous or without any reasonable factual basis. If the ethics board shall conclude that the complaint is outside its jurisdiction, frivolous or without factual basis, it shall reduce that conclusion to writing and shall transmit a copy thereof

to the complainant and to the local government officer or employee against whom the complaint was filed. Otherwise the ethics board shall notify the local government officer or employee against whom the complaint was filed of the nature of the complaint and the facts and circumstances set forth therein. The officer or employee shall have the opportunity to present the ethics board with any statement or information concerning the complaint which he wishes. Thereafter, if the ethics board determines that a reasonable doubt exists as to whether the local government officer or employee is in conflict with the county code of ethics or any financial disclosure requirements, it shall conduct a hearing in the manner prescribed by section 12 of this act, concerning the possible violation and any other facts and circumstances which may have come to its attention with respect to the conduct of the local government officer or employee. The ethics board shall render a decision as to whether the conduct of the officer or employee is in conflict with the county code of ethics or any financial disclosure requirements. This decision shall be made by no less than two-thirds of all members of the ethics board. If the ethics board determines that the officer or employee is in conflict with the code or any financial disclosure requirements, it may impose any penalties which it believes appropriate within the limitations of this act. A final decision of the ethics board may be appealed to the Local Finance Board within 30 days of the decision.

L. 1991, c. 29, §18.

### 40A:9-22.19 Municipal ethics board; members; terms; compensation

a. Each municipality of the State may, by ordinance, establish a municipal ethics board consisting of six members who are residents of the municipality, at least two of whom shall be public members. The members of the ethics board shall be appointed by the governing body of the municipality. The members shall be chosen by virtue of their known and consistent reputation for integrity and their knowledge of local government affairs. No more than three members of the ethics board shall be of the same political party.

b. The members of the municipal ethics board shall annually elect a chairman from among the membership.

c. The members shall serve for a term of five years; except that of the members initially appointed, two of the public members shall be appointed to serve for a term of five years, one member shall be appointed to serve for a term of four years, and the remaining members shall be appointed to serve for a term of three years. Each member shall serve until his successor has been appointed and qualified. Any vacancy occurring in the membership of the ethics board shall be filled in the same manner as the original appointment for the unexpired term.

d. Members of the ethics board shall serve without compensation but shall be reimbursed by the municipality for necessary expenses incurred in the performance of their duties under this act.

L. 1991, c. 29, §19.

## 40A:9-22.20 Municipal ethics board; office; expenses; employees

a. The governing body of the municipality shall provide the municipal ethics board with offices for the conduct of its business and the preservation of its records, and shall supply equipment and supplies as may be necessary.

b. All necessary expenses incurred by the municipal ethics board and its members shall be paid, upon certification of the chairman, by the municipal treasurer within the limits of funds appropriated by the municipal governing body by annual or emergency appropriations for those purposes.

c. The municipal ethics board may appoint employees, including independent counsel, and clerical staff as are necessary to carry out the provisions of this act within the limits of funds appropriated by the municipal governing body for those purposes.

L. 1991, c. 29, § 20.

## 40A:9-22.21 Municipal code of ethics; promulgation; approval

Within 90 days after the establishment of a municipal ethics board, that ethics board shall promulgate by resolution a municipal code of ethics for all local government officers and employees serving the municipality. Local government officers and employees serving a municipal independent authority shall be deemed to be serving the municipality for purposes of this act.

The municipal code of ethics so promulgated shall be either identical to the provisions set forth in section 5 of this act or more restrictive, but shall not be less restrictive. Within 15 days following the promulgation thereof, the municipal code of ethics, and a notice of the date of the public hearing to be held thereon, shall be published in at least one newspaper circulating within the municipality and shall be distributed to the municipal clerk and to the heads of the local government agencies serving the municipality for circulation among the local government officers and employees serving the municipality. The municipal ethics board shall hold a public hearing on the municipal code of ethics not less than 30 days following its promulgation at which any local government officer or employee serving the municipality and any other person wishing to be heard shall be permitted to testify. As a result of the hearing, the ethics board may amend or supplement the municipal code of ethics as it deems necessary. If the municipal code of ethics is not identical to the provisions set forth in section 5 of this act, the municipal ethics board shall thereafter submit the municipal code of ethics to the Local Finance Board for approval. The board shall approve or disapprove a municipal code of ethics within 60 days following receipt. If the board fails to act within that period, the municipal code of ethics shall be deemed approved. A municipal code of ethics requiring board approval shall take effect for all local government officers and employees serving the municipality 60 days after approval by the board. A municipal code of ethics identical to the provisions set forth in section 5 of this act shall take effect 10 days after the public hearing held thereon. The municipal ethics board shall forward a copy of the municipal code of ethics to the municipal clerk and shall make copies of the

municipal code of ethics available to local government officers and employees serving the municipality.

L. 1991, c. 29, § 21.

### 40A:9-22.22 Powers of municipal ethics board

A municipal ethics board shall have the following powers:

a. To initiate, receive, hear and review complaints and hold hearings with regard to possible violations of the municipal code of ethics or financial disclosure requirements by local government officers or employees serving the municipality;

b. To issue subpoenas for the production of documents and the attendance of witnesses with respect to its investigation of any complaint or to the holding of a hearing;

c. To forward to the county prosecutor or the Attorney General or other governmental body any information concerning violations of the municipal code of ethics or financial disclosure requirements by local government officers or employees serving the municipality which may become the subject of criminal prosecution or which may warrant the institution of other legal proceedings by the Attorney General;

d. To render advisory opinions to local government officers or employees serving the municipality as to whether a given set of facts and circumstances would constitute a violation of any provision of the municipal code of ethics or financial disclosure requirements;

e. To enforce the provisions of the municipal code of ethics and financial disclosure requirements with regard to local government officers or employees serving the municipality and to impose penalties for the violation thereof as are authorized by this act; and

f. To adopt rules and regulations and to do other things as are necessary to implement the purposes of this act.

L. 1991, c. 29, §22.

### 40A:9-22.23 Advisory opinions of municipal ethics board

A local government officer or employee serving the municipality may request and obtain from the municipal ethics board an advisory opinion as to whether any proposed activity or conduct would in its opinion constitute a violation of the municipal code of ethics or any financial disclosure requirements. Advisory opinions of the municipal ethics board shall not be made public, except when the ethics board by the vote of two-thirds of all of its members directs that the opinion be made public. Public advisory opinions shall not disclose the name of the local

government officer or employee unless the ethics board in directing that the opinion be made public so determines.

L. 1991, c. 29, § 23.

### 40A:9-22.24 Complaints to municipal ethics board; notice; hearing; decision

The municipal ethics board, upon receipt of a signed written complaint by any person alleging that the conduct of any local government officer or employee serving the municipality is in conflict with the municipal code of ethics or financial disclosure requirements, shall acknowledge receipt of the complaint within 30 days of receipt and initiate an investigation concerning the facts and circumstances set forth in the complaint. The ethics board shall make a determination as to whether the complaint is within its jurisdiction or frivolous or without any reasonable factual basis. If the ethics board shall conclude that the complaint is outside its jurisdiction, frivolous or without factual basis, it shall reduce that conclusion to writing and shall transmit a copy thereof to the complainant and to the local government officer or employee against whom the complaint was filed. Otherwise the ethics board shall notify the local government officer or employee against whom the complaint was filed of the nature of the complaint and the facts and circumstances set forth therein. The officer or employee shall have the opportunity to present the ethics board with any statement or information concerning the complaint which he wishes. Thereafter, if the ethics board determines that a reasonable doubt exists as to whether the local government officer or employee is in conflict with the municipal code of ethics or any financial disclosure requirements, it shall conduct a hearing in the manner prescribed by section 12 of this act, concerning the possible violation and any other facts and circumstances which may have come to its attention with respect to the conduct of the local government officer or employee. The ethics board shall render a decision as to whether the conduct of the officer or employee is in conflict with the municipal code of ethics or any financial disclosure requirements. This decision shall be made by no less than two-thirds of all members of the ethics board.

If the ethics board determines that the officer or employee is in conflict with the code or any financial disclosure requirements, it may impose any penalties, which it believes, appropriate within the limitations of this act. A final decision of the ethics board may be appealed to the Local Finance Board within 30 days of the decision.

L. 1991, c. 29, § 24.

### 40A:9-22.25 Preservation of records

All statements, complaints, requests or other written materials filed pursuant to this act, and any rulings, opinions, judgments, transcripts or other official papers prepared pursuant to this act shall be preserved for a period of at least five years from the date of filing or preparation, as the case may be.

L. 1991, c. 29, § 25.

**ADOPTED RULES AND COMPLAINT PROCEDURES**
**TABLE OF CONTENTS**
**N.J.A.C. 5:35-1.1 et seq.**

**5:35-1.1 Complaints; procedure**

(a) Every complaint alleging that a local government officer or employee, who is not regulated by a county or municipal code of ethics, has violated the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., shall be in writing and signed by the complainant. However, the Local Finance Board may upon its own initiative initiate a complaint against a local government employee or officer, in which case the summary of the complaint shall be contained in the Board's minutes and the complaint shall proceed, where applicable, in accordance with this subchapter or be transmitted to the appropriate county or municipal ethics board.

(b) Complaints shall:

1. State the point of the Local Government Ethics Law alleged to be violated;

2. State the name(s) and title(s) of the parties involved in the action and against whom the complaint is filed;

3. Set forth in detail the pertinent facts surrounding the alleged violative action;

4. Indicate whether the complaint concerns the complainant in any way and what, if any, relationship the complainant has to the subject of the complaint; and

5. Indicate any other action previously taken in an attempt to resolve the issue and indicate whether the issue is the subject of pending litigation elsewhere.

(c) The Board shall not process a complaint on a matter which is pending in a court of law or administrative agency of the State.

(d) The Board's staff shall acknowledge receipt of the complaint within 30 days of receipt of the complaint and commence a preliminary investigation as to whether the complaint is within the Board's jurisdiction or frivolous or without any reasonable factual basis.

(e) Upon completion of the preliminary investigation, the Board shall make a determination as to whether the complaint is outside its jurisdiction or frivolous or without any reasonable factual basis.

1. If the Board concludes that the complaint is outside its jurisdiction, frivolous or without any reasonable factual basis, the Board's staff shall advise the complainant and the local government employee or official, who is the subject of the complaint, in writing of the Board's conclusion.

2. If the Board concludes that the complaint is within its jurisdiction, not frivolous, and having a reasonable factual basis, the Board shall direct a further investigation to be conducted by the Board's staff.

(f) The Board's staff in conducting the investigation shall notify the local government employee or officer, who is the subject of the complaint, of the nature of the complaint and the facts and circumstances surrounding the complaint.

1. The local government employee or officer shall have the opportunity to present to the Board's staff any statements or other information concerning the complaint he or she wishes. Such statements or information shall be presented to the Board within 30 days of receipt of notification. Upon written application, the Board or its staff may extend the time for filing such statement.

2. The Board's staff shall obtain any further information or statements from any person with relevant information or from any other source, necessary to conduct the investigation.

(g) At the conclusion of the investigation, the Board's staff shall present to the Board the results of its investigation, which shall include any statements or information received from the local government employee or officer, who is the subject of the complaint, and from any person or source with relevant information. The Board shall consider the matter based on the documents submitted to the Board's staff or obtained by the Board's staff. However, the Board in its discretion may direct the complainant, the local government employee or officer, who is the subject of the complaint, or any other person with relevant information to appear before the Board or to provide to the Board any additional information. The local government employee or officer who is the subject of the complaint may request to appear before the Board. However, such appearance is not required, unless directed by the Board.

(h) If the Board determines, based upon the results of the investigation, that no violation of the Local Government Ethics Law has been committed by the local government employee or officer, the Board shall issue a Notice of Dismissal to the individual and provide a copy to the complainant.

(i) If the Board determines, based upon the results of the investigation, by a two-thirds vote that a violation of the Local Government Ethics Law has been committed by the local government employee or officer, the Board shall issue a Notice of Violation to the individual containing the nature of the violation, assessing a penalty, and advising the individual of his or her opportunity to request an administrative hearing.

1. The Notice of Violation shall be transmitted to the local government employee or officer by regular and certified mail or by personal service.

2. The local government employee or officer, within 30 days of receipt of the letter, may request an administrative hearing to contest the Notice of Violation. Any request for an administrative hearing must be filed in the Board's office within 30 days of the receipt of the Notice of Violation by the local government employee

or officer. The Board in its sole discretion may extend the time for requesting an administrative hearing for any reason it deems appropriate.

3. If an administrative hearing is not requested or if not timely filed by the local government employee or officer, the Order shall be deemed the Final Decision of the Board.

(j) Any administrative hearing shall be conducted in conformity with the rules and procedure, insofar as they may be applicable, of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

1. The Board shall determine whether it will conduct the administrative hearing or whether to transmit the matter to the Office of Administrative Law as a "contested case" for the rendering of an initial decision.

2. If the Board transmits the matter to the Office of Administrative Law as a "contested case," the Board shall review the initial decision and render a final decision. However, any finding that a violation of the Local Government Ethics Law has been committed by the local government employee or officer, requires a two-thirds vote of the Board.

**5:35-1.2 Confidentiality**

(a) Any complaints, statements, information, or documents obtained or prepared by the Board staff or the Board are deemed confidential and not subject to public disclosure during the course of the preliminary investigation or investigation to determine whether a violation of the Local Government Ethics Law has occurred, except as necessary for the Board's staff or the Board to conduct the preliminary investigation or investigation.

(b) The Board's discussion regarding a preliminary investigation or investigation shall be in executive session. However, any vote by the Board regarding a preliminary investigation or investigation shall be in public session. In public session, the complaint shall only be identified by a docket number, determined by the Board's staff.

(c) The Notice, the complaint and allied statements or information obtained by the Board's staff during the course of the preliminary investigation or investigation are subject to public disclosure 30 days after mailing a Notice of Dismissal, pursuant to N.J.A.C. 5:351.1(h), or a Notice of Violation, pursuant to N.J.A.C. 5:35-1.1(i).

**5:35-1.3 Local ethics boards; complaint conflicts**

(a) A municipal or county ethics board, established pursuant to the Local Government Ethics Law, which has before it a complaint against a local government employee or officer regulated by its code of ethics and which is unable to act on the complaint because a

majority of the board has a conflict of interest or is otherwise precluded by ethical consideration from rendering a decision in a matter, shall request the Local Finance Board to assume original jurisdiction.

1. Such request shall be in writing signed by the chairperson of the county or municipal ethics board or its legal counsel and detail the exact nature of the complaint and the exact nature of the county or municipal board's inability to render a decision.

2. Attached to the request shall be the complaint, the county or municipal code of ethics, and all relevant documents and information obtained by the county or municipal ethics board during the course of the investigation.

3. The county or municipal ethics board shall advise, in writing, the complainant and the local government employee or officer, who is the subject of the complaint, of the request. A copy of which shall be provided to the Local Finance Board.

(b) The Board shall review the request and determine whether the county or municipal ethics board is precluded from rendering a decision in the matter.

1. If the Board determines that the county or municipal ethics board is precluded from rendering a decision, the Board shall assume original jurisdiction over the matter and advise the county or municipal board of the determination. Thereafter, the complaint shall proceed in accordance with N.J.A.C. 5:35-1.1. However, the Board shall only consider whether a violation of the State's code of ethics has occurred.

2. If the Board determines that the county or municipal ethics board is not precluded from rendering a decision, the Board shall advise the county or municipal ethics board of the determination. Thereafter, the county or municipal ethics board shall render a final decision in the matter in accordance with the Local Government Ethics Law.

3. The county or municipal ethics board shall advise the complainant and the local government employee or officer, who is the subject of the complaint, of the Board's determination.

### 5:35-1.4 Local ethics boards; appeals of complaints

(a) A final decision of a county or municipal ethics board, established pursuant to the Local Government Ethics Law, on a complaint may be appealed by the complainant or the local government employee or officer, who is the subject of the complaint, to the Local Finance Board within 30 days of the decision.

(b) The appeal shall be in writing and include the grounds for appeal and attach the complaint and the decision of the county or municipal ethics boards. A copy of the appeal and allied papers shall be filed with the appropriate county or municipal ethics board.

(c) Upon receipt of the appeal, the county or municipal ethics board shall transmit to the Local Finance Board the board's complete file in the matter, which shall include any transcripts or tapes of the hearing, and a copy of the municipal or county code of ethics.

(d) The Board in its discretion may submit the appeal to the Office of Administrative Law as a "contested case" for the rendering of an initial decision in accordance with the Administrative Procedure Act and these rules. The Board shall review the initial decision and render a final decision.

(e) If the record below is deemed sufficiently complete by the Board or an Administrative Law Judge, the Board, or an Administrative Law Judge, may consider the matter solely on the record below. If the record is not deemed sufficiently complete by the Board, or an Administrative Law Judge, the Board, or an Administrative Law Judge, in its discretion may direct the submission of additional evidence, testimony, or oral argument to complete the record.

(f) Any final decision of the Board finding that a local government employee or officer has violated the Local Government Ethics Law requires a two-thirds vote of the Board.

(g) The final decision of the Board shall be provided to the complainant, the local government employee or officer who is the subject of the complaint, and the appropriate county or municipal ethics board.

### 5:35-1.5 Advisory opinions

(a) A local government employee or officer not regulated by a county or municipal code of ethics may request from the Local Finance Board an advisory opinion as to whether any proposed activity or conduct constitutes a violation of the Local Government Ethics Law.

1. The request shall be in writing signed by the local government employee or officer who is the subject of the request or his or her attorney.

2. The request shall set out the factual situation in detail, the specific question(s) of the requester, and whether there is any pending litigation or action relevant to the facts of the inquiry. The Board will not process an advisory opinion request on a matter pending in a court of law or an administrative agency of the State.

3. The Board will not consider a request for an advisory opinion regarding activity or conduct that has already occurred, unless the requester certifies that the activity or conduct is likely to be of a continuing nature.

4. The Board will not consider a request for an advisory opinion from a local government officer or employee, or his or her attorney, who is not the subject of the proposed activity or conduct.

(b) The Board's staff shall acknowledge receipt of the request within 30 days of receipt of the request.

(c) The Board's staff shall review and present to the Board requests for advisory opinions that comply with N.J.A.C. 5:35-1.5(a).

(d) The Board shall determine whether in its opinion the proposed activity or conduct constitutes a violation of the Local Government Ethics Law. The Board's determination shall be reduced to writing and provided to the requester.

(e) Advisory opinions shall not be made public unless two-thirds of the Board directs that the opinion be made public. Public advisory opinions shall not disclose the requester's identity, unless the Board in making the advisory opinion public also determines by a two-thirds vote to disclose the requester's identity. Discussions of advisory opinions by the Board shall be conducted in executive session, unless the requester requests that the Board's discussion be in the public session of the Board's meeting.

(f) Unless the Board determines that the advisory opinion be made public, the request for the advisory opinion and all allied documents or information obtained or prepared by the Board's staff shall remain confidential and not subject to public disclosure.

(g) If the request for the advisory opinion reports conduct or activity that has already occurred, the Board in its discretion may initiate a complaint against the requester if the Board believes that a violation of the Local Government Ethics Law may have occurred.

### 5:35-1.6 Local ethics boards; advisory opinion conflicts

(a) A municipal or county ethics board, established pursuant to the Local Government Ethics Law, which has before it a request for an advisory opinion from a local government employee or officer regulated by its code of ethics and which is unable to act on the request because a majority of the board has a conflict of interest or is otherwise precluded by ethical considerations from rendering an advisory opinion, shall request the Local Finance Board to assume original jurisdiction.

(b) The procedures, to the extent applicable, contained in N.J.A.C. 5:35-1.5 shall be followed for making the request and for determining whether the Board will assume jurisdiction or direct the county or municipal ethics board to consider the advisory opinion. If the Board assumes jurisdiction of the matter, the Board will only issue an advisory opinion as to whether the proposed conduct or action constitutes a violation of the State's code of ethics.

**State of New Jersey**
**Department of Community Affairs**
**Division of Local Government Services**
**Local Finance Board**

# Local Government Ethics Law
# Financial Disclosure Statement

*This Financial Disclosure Statement is required annually of all local government officers in accordance with N.J.S. 40A:9-22.1 et seq., the Local Government Ethics Law.*

**Year of Service: 2015**

## Section I. Personal Information - *Local Government Officer*

First Name: John | Middle: | Last Name: Doe | Suffix:

Home Address: 123 Main Street
Summerville Township NJ, 08888

Telephone Numbers: Home:
Business:

Spouse (includes Civil Union partner).

First Name: Jane | Middle: | Last Name: Doe | Suffix:

| | *Entity* | *Agency/Board* | *Position Held* | *Term Expires ** |
|---|---|---|---|---|
| 1 | Summerville | Summerville Township | Mayor | |

** = if applicable*

## Section II. Financial Information

**Provide the following information for yourself and *members of your immediate family* for the prior calendar year. If none, please indicate NONE in the space provided.**

***A. List the name and address of each source of income, earned and unearned, which you received in excess of $2,000. If a publicly traded security is the source of income, the security need not be reported unless you or a member of your immediate family has an interest in the business organization.***

| | *Name* | *Address* | *Self/Spouse* | *Dependent Name* |
|---|---|---|---|---|
| 1 | IBM Corp. (DO NOT STATE 'SELF' OR 'SPOUSE') | 456 Main Street, Winterville, NJ 08333 | Self | |
| 2 | Summerville School District (DO NOT STATE 'SELF' OR 'SPOUSE') | 466 Main Street, Summerville, NJ 08888 | Spouse | |

***B. List the name and address of each source of fees and honorariums having an aggregate amount exceeding $250 received from any single source for personal appearances, speeches, or writing.***

| | *Name* | *Address* | *Self/Spouse* | *Dependent Name* |
|---|---|---|---|---|
| 1 | Rutgers University | 100 Davidson Road, Piscataway, NJ 08766 | Self | |

***C. List the name and address of each source of gifts, reimbursements or prepaid expenses having an aggregate value exceeding $400 from any single source,***

| | *Name* | *Address* | *Self/Spouse* | *Dependent Name* |
|---|---|---|---|---|
| 1 | ABC Company | 789 Birch Street, Trenton, NJ 08625 | Self | |

***D. List the name and address of all business organizations in which an interest was held.***

| | *Name* | *Address* | *Self/Spouse* | *Dependent Name* |
|---|---|---|---|---|
| 1 | None | | | |

***E. List the address and a brief description of all real property in the State of New Jersey in which an interest was held.***

| | *Municipality/County* | *Block* | *Lot* | *Qual.* | *Address* | *% Own ** | *Self/Spouse* | *Dependent Name* |
|---|---|---|---|---|---|---|---|---|
| 1 | Avon-By-The-Sea (Monmouth) | 232 | 22 | | | 100.00 | Joint | |

** = % of Ownership*

***F. Optional Comments:***

**Section III. Certification & online filing process**

**I hereby certify that this Financial Disclosure Statement contains no willful misstatement of fact or omission of material fact and, constitutes a full disclosure with respect to all matters required by N.J.S.A.40A:9-22.1 et seq., to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to fines and possible disciplinary action.**

*Date: 02/23/2015* *Name: John Doe*

**I further certify that I intend my electronic signature on this statement to be the legally binding equivalent of my traditional handwritten signature.**

# 2020 Financial Disclosure Statement
# Frequently Asked Questions

**Local Government Officers FAQs**

**Q1. Am I required to file a financial disclosure statement (FDS)**?

A. If your local government entity has determined that you are a "local government officer," a classification that is defined in the Local Government Ethics Law, you must annually file a financial disclosure statement. More information concerning which elected and appointed positions may be subject to the annual filing requirement is contained in Local Finance Notice 2020-03.

**Q2. I believe that my local government entity incorrectly classified me as a local government officer. What should I do?**

A. First, review the guidance provided in Local Finance Notice #2020-03 to understand which positions are required to file. If you have any further questions as to your status, you should then contact your local government entity representative (LGE Representative) directly (e.g., municipal clerk, county clerk, etc.) to resolve any issues. Local Finance Board staff is unable to make changes to a roster and does not make specific assessments as to which locally appointed individuals are deemed local government officers. Subject to the guidance provided in Local Finance Notice 2020-03, the classification process is a local function.

**Q3. Are there any exemptions to the filing requirement if I am designated as a local government officer?**

A. No. If you are classified as a "local government officer," you must annually satisfy the filing requirement.

**Q4. Are there any exemptions for law enforcement officers?**

A. No. Any law enforcement officer who is classified as a local government officer must complete an annual financial disclosure statement. However, law enforcement officers shall mark the designated checkboxes in the real property section of the form (Section E) and the home address will be redacted from the public forms.

**Q5. I file an FDS for the School Ethics Commission and/or State Ethics Commission. Do I still have to file the form from the Local Finance Board?**

A. Yes, if you are classified as a local government officer you must file the form designated by the Local Finance Board, available at www.fds.nj.gov, in addition to other financial disclosure statements that you are required to file for other positions.

**Q6. Can I file a paper copy of the FDS?**

A. Since 2013, the FDS filing system has been an electronic system only. There are no paper forms of the FDS.

**Q7. When I go to register, I receive an error message that says "First Name, Last Name or PIN did not match. Please verify and try again." What does this mean?**

A. The name entered on the roster by the LGE Representative must match the name you use to register. For example, if the LGE Representative listed you on the roster as "Robert Doe," you

would have to register with Robert Doe and not Bob Doe, Robert Doe, Esq., etc. Please verify with your LGE Representative how they listed your name on the roster and, additionally, if he or she spelled your name correctly.

**Q8. When I go to register, I receive an error message that says "user id is already in use." What does this mean?**
A. An e-mail address can only be registered once. If you receive the error message that says "user id is already in use, "this means that you have previously registered using that e-mail address. Instead, login with that e-mail address and password that you previously established. If you have any additional PINs, go to the "Manage Positions" section and add the new PINs.

**Q9. When I validated my PIN# and created a login ID, I used an email address for my login ID that I would now like to change. However, I don't see a way to change the login ID.**
A. At this time, you cannot change the e-mail address used as your login ID. Your Clerk/LGE Rep can change the login ID e-mail address for you.

**Q10. I forgot my password. What should I do?**
A. On the login page, under the login button, you will see a "forgot password" button. Click on the forgot password button and enter your e-mail address. Your password will be e-mailed to you. Be sure to check your spam and junk folders. Your LGE Representative can also reset your password.

**Q11. The term limit on my FDS is wrong. How can I edit it?**
A. Only the LGE Representative (i.e. municipal clerk) can edit the "term expires" section on the FDS, as it is a field the LGE Representative fills out when entering the LGO on the roster. Please contact your LGE Representative to have it changed.

**Q12. I serve as the municipal attorney for a municipality, but I have assigned one of my law firm's associate attorneys to attend meetings and provide day-to-day legal services to the municipality. I understand that I am required to file an FDS, but does my associate also have to file an FDS?**
A. The attorney appointed to represent the local government entity and any other attorneys within the law firm who regularly provide law related services to the entity must file an FDS. The typical scenario is one where a partner is appointed by the client to serve as municipal attorney, but the account is assigned to an associate who attends meetings, takes phone calls, provides legal opinions, and performs other law related services for the client. In contrast, other attorneys within the law firm who provide no services to the client would not be required to file an FDS.

**Q13. I forgot to include on my FDS a vacation property that my wife and I own in Cape May County. Can I amend my FDS?**
A. Yes, you may amend a filed FDS by logging in again, select "amend," and click through each FDS screen until you get to the screen you would like to amend. Once the additional information is added, continue through each screen and submit the FDS again. The original FDS will remain on file for public viewing as a record must be kept of each filing.

**Q14. Am I required to disclose my timeshare ownership in Section II, part E. of the FDS, where I would list the address and a brief description of all real property in the State of New Jersey in which an interest was held?**
A. The answer depends on the nature of the timeshare interest under the New Jersey Real Estate Timeshare Act (N.J.S.A. 45:15-16.50, et seq.). Your timeshare interest may qualify as an interest in real property if your timeshare interest is a "timeshare estate." Relevant questions to ask yourself include: Was your interest conveyed by deed? Does the timeshare interest pertain to a single timeshare property or does the timeshare plan include multiple sites? Please consult your personal attorney for additional guidance.

**Q15. What is considered income for the Sources of Income section "Section II. Financial Information, Subsection A"?**
**A.** Per N.J.S.A. 40A:9-22.6 (a)(1), "each source of income, earned or unearned, exceeding $2,000 received by the local government officer or a member of his immediate family during the preceding calendar year" should be reported on the FDS in Section II. Financial Information, Subsection A.

Sources of income could include, but are not limited to:
- Salaries
- Social Security
- Pension
- Unemployment
- Rental Income (i.e. income received from rental properties)

**Q16. Should I list my stocks under the Sources of Income section?**
A. If a publicly traded security is the source of income, the security need not be reported unless the local government officer or member of his immediate family has an interest in the business organization. Per N.J.S.A. 40A:9-22.3(d), "interest" means the ownership or control of more than 10% of the profits, assets or stock of a business organization but shall not include the control of assets in a nonprofit entity or labor union.

**Q17. I am self-employed. What do I put in the section for Source of Income?**
A. List the name of the business. The names of individual clients are not required. Do not state self or spouse as a source of income; you must state from where (i.e. the name of the company) the income is derived.

**Q18. Do I have to list my spouse's source of income?**
A. Yes. You must list the sources of income for yourself and any members of your immediate family, including spouse and dependent children residing in the same household, during the preceding calendar year.

**Q19. I am a Councilmember and receive a salary from my municipality. Do I have to list the name of the municipality as a source of income?**
A. Per N.J.S.A. 40A:9-22.6 (1), LGOs are required to list each source of income, earned or unearned, exceeding $2,000 received by the local government officer or a member of his immediate family during the preceding calendar year. If you received over $2,000 annually from

any sources, including from the local government which requires your filing, you need to list the name of the local government on your FDS in Section II.

**Q20. I receive Social Security payments. What address do I list?**
A. The most common unearned income payments are received from Social Security, State of New Jersey, and federal pensions. You may use these addresses for those organizations:
US Social Security Administration
2100 M Street
Washington, DC 20037

NJ Division of Pensions and Benefits
P.O. Box 295
Trenton, NJ 08625

Office of Personnel Management (for federal pensions)
1900 E Street
Washington, DC 20415

**Q21. I serve as an elected official in my town, and I also serve as a commissioner with our joint insurance fund. What is the procedure for registering my LGO user account?**
A. In this scenario, you are considered a local government officer by two distinct local government entities (municipal government and joint insurance fund). Each entity will assign you a unique PIN#; however, you will create a single LGO profile/account. You simply validate one of the PIN#s, create your LGO profile/account, and then validate any additional PIN#s assigned to you using the "Manage Positions" button. The FDS system electronically handles the process of linking your FDS to all of the rosters on which your name appears as an LGO. More detailed instructions and a brief LGO training video are available at www.fds.nj.gov.

**Q22. I am unable to review my FDS on my screen when I click the "review" button.**
A. Your computer must be enabled to allow "pop-ups" while completing the FDS. Instructions to change the "pop-up blocker" setting differ depending on the Internet browser being used (e.g., Explorer, Firefox, or Safari). Local Finance Board staff is unable to provide specific instructions on your computer system.

**Q23. Can the FDS be filed or the FDS system accessed overseas?**
A. The FDS website cannot be accessed outside the United States.

THE NEW JERSEY
# PLANNER
THE NEW JERSEY PLANNING OFFICIALS

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## Board Member Beware?

**By: Trishka Waterbury Cecil, Esq.**
**NJPO Associate Legal Counsel**

The Far Reaching Scope of the Local Government Ethics Law's prohibition Against Members of Non-Advisory Boards and Commissions Acting on Behalf of Others before Municipal Boards, Commissions, Departments, or other Agencies.

Those who serve on a non-advisory municipal board or commission (*i.e.*, planning boards, zoning boards of adjustment, and historic preservation commissions) know that their actions are subject to the strictures of the Local Governmental Ethics Law ("LGEL"), *N.J.S.A.* 40A:9-22.1 *et seq.*, which establishes various ethical standards and other requirements that govern the conduct of local government officers and employees. The provision with which board members are likely the most familiar is *N.J.S.A.* 40A:9-22.5d, which bars a board member acting in any matter in which "he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment." Less often discussed, however, is *N.J.S.A.* 40A:9-22.5h, but it is one that board members and appointing authorities need to be aware of, because it can have a substantial impact on professionals (architects, engineers, attorneys) who serve on non-advisory boards and who also have clients in the municipality in which they serve.

*N.J.S.A.* 40A:9-22.5h ("subsection h") states that "[n]o local government officer or employee or business organization in which he has an interest shall represent any person or party other than the local government in connection with any cause, proceeding, application or other matter pending before any agency in the local government in which he serves." At its most obvious, this provision means that an attorney who serves on the municipal zoning board of adjustment cannot then represent an applicant before that municipality's planning board. What might come as more of a surprise is that this provision would also bar an architect or contractor who serves on a zoning board from testifying for a client in front of the planning board, or even from applying for a building permit on behalf of a client.

In 1991, the New Jersey Attorney General ("AG") issued an opinion that addressed the scope of subsection h, specifically, "whether the prohibition of representation extends only to members of the legal profession or whether it also extends to other professionals such as a professional engineer or an architect." *Attorney General Opinion* No. 91-0135 (Nov. 1, 1991). The Attorney General stated that

> … the prohibition in the Local Government Ethics Law is broader than representation in proceedings before local government agencies. Also, prohibited are representation in any cause, application, or other matter pending before any agency in the local government.

## NJPO Calendar of Events*

**2017 Winter Spring Mandatory & Experienced Classes**

**Mandatory**

| Date | County | Location |
|---|---|---|
| Apr. 29 | Somerset | Municipal Complex, Hillsborough |
| May 6 | Essex | Kessler Institute, West Orange |

**Experienced**

| Date | County | Location |
|---|---|---|
| May 6 | Essex | Kessler Institute, West Orange |

* visit www.NJPO.org for registration information.

> The statute does not merely prohibit representation in legal proceedings in which an attorney would be necessary to provide such representation. Indeed, it is not unusual for professionals, other than attorneys, to submit applications and documents to local government agencies on behalf of another for planning board approval, for zoning approval, for a construction permit, or for a variety of other local required approvals. … Undoubtedly, there are other examples where a professional, other than an attorney, will act on behalf of the applicant to submit an application to a local government agency, to resolve any questions or difficulties associated with the application, or to represent an individual in his dealing with local government officials.

The Attorney General concluded that "the prohibition of representation is not restricted to only members of the legal profession. Rather, it extends to local government officers and employees *who stand in the place of another* regarding *any* cause, proceeding, application, or another matter pending before *any* agency in the local government the officer or employee serves." *(*Emphasis added).

This opinion was followed by the Local Finance Board ("LFB") in 1994 in *Bleeker v. Local Finance Bd.*, 94 *N.J.A.R.*2d (CAF) 122, 1994 WL 702292 (Sept. 9, 1994), *aff'd, Bleeker v. Dep't of Community Affairs*, 96 *N.J.A.R.*2d (CAF) 107, 1996 WL 784183 (App. Div. Sept. 4, 1996). There, the LFB issued a finding that Bleeker - a member of the North Haledon Borough Council and the president of a construction company - violated subsection h because while he was a member of the Borough Council of North Haledon he represented a couple as a project manager for construction of their house before the North Haledon Borough engineer and construction official in matters related to the construction of their house. The Appellate Division affirmed the LFB's finding that in doing so, Bleeker violated subsection h. As described by the court, "Bleeker entered into a contract with the DiPianos which, in part, called for him to act in a representative capacity before borough inspectors. On three occasions, Bleeker addressed the municipal engineer on behalf of the DiPianos with regard to a disputed application. On the application, his name appeared as the 'Person in Charge of Operation.'" The court held that pursuant to the 1991 Attorney General opinion, "[t]hese activities constitute 'representation' contrary to N.J.S.A. 40A:9-22.5h."

**THE NEW JERSEY PLANNING OFFICIALS**
***The Association of Planning Boards & Zoning Boards of Adjustment***
***Founded in 1938***

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Consistent with the court's decision in *Bleeker*, the Office of Administrative Law in 2002 found that Frank Raucci, a member of the Leonia Zoning Board of Adjustment who was also a local contractor, violated subsection 22.5h when he applied for and signed building permits on behalf of a private client and appeared before the Leonia Planning Board to speak for his client on a matter. *See Raucci v. Local Finance Bd.*, 2002 WL 833305 (N.J. Adm. Apr. 9, 2002). There, the Administrative Law Judge ("ALJ") concluded that

> Raucci's activities … fall within the ambit of *N.J.S.A.* 40A:9-22.5(h). Indeed, unlike *Bleeker* where the official was simply designated as the person in charge of the operation on a soil movement application signed and submitted by the homeowners, Raucci submitted and signed the permit application in issue as "agent" of the owner. Accordingly, Raucci was clearly "standing in the place" of his client with regard to a "cause, proceeding, application or other matter pending" before the municipal building department. Such action cannot reasonably be said to be devoid of representative aspects. [1]

It is important to note that in *Raucci*, "nothing in the record suggest[ed] that Raucci attempted to utilize his position to obtain an unwarranted privilege or advantage for himself or his client[,]" and "the record [was] devoid of evidence that Raucci's integrity was in any way compromised and that his actions were other than an innocent oversight." This made no difference, however, to the question of whether he had violated subsection h (although it did result in the ALJ imposing the minimum $100 fine for the violation).

What the above means is that individuals who serve on a non-advisory board or commission (planning board, zoning board, historic preservation commission) must be careful not to act on behalf of private clients before *any* municipal agency. This includes appearing on behalf of a client before any of the municipality's boards or commissions, not just the specific board or commission on which they serve; engaging with municipal staff on behalf of their clients; and signing and submitting permit applications on behalf of their clients. (Less clear is whether an architect board member could still prepare and sign architectural plans, as long as he or she did not act on behalf of the client).

Lastly, the proscriptions of subsection h do not apply to individuals who serve on purely advisory bodies. The LGEL also does not prohibit board and commission members "from making an inquiry for information on behalf of a constituent, if no fee, reward or other thing of value is promised to, given to or accepted by the officer or a member of his immediate family . . . in return therefor[,]" and it does not "prohibit any local government officer or employee, or members of his immediate family, from representing himself, or themselves, in negotiations or proceedings concerning his, or their, own interests." *N.J.S.A.* 40A:9-22.5j and -22.5k.

*N.J.S.A.* 40A:9-22.5h can have a significant impact on the activities of architects, engineers, contractors, attorneys, and other professionals who serve on non-advisory boards and commissions, so it is important that both they and the municipal appointing authorities be familiar with its provisions. Board members with specific questions should consult their board attorney. They can also seek advice directly from the Local Finance Board: under the LGEL, any local government officer or employee can ask the LFB for an advisory opinion as whether a given activity would, in the LFB's opinion, constitute a violation of the Local Government Ethics. The LFB's advisory opinions are normally confidential (they can only be made public by a two-thirds vote of the entire LFB membership), and even public

[1] The LFB had also charged Raucci with violating subsection 22.5h by hand-delivering to the Construction Official a permit application signed by his clients, discussing that application with the Construction Official, and later collecting the permits from the Construction Official on behalf of his clients. The ALJ, however, found that there was insufficient evidence in the record to support the violation. Nevertheless, board and commission members should be cautious about discussing their clients' matters with municipal staff and officials.

advisory opinion are not to disclose the name of the individual who requested the opinion unless the board so directs. Insofar as the LFB is the body responsible for enforcing the LGEL, board members could be well served by asking the LFB for written guidance.

## TEAR DOWNS REVISITED (COUNTER POINT)

By: Carl E. Peters, PP, PE, PLS, CO

In the September/October 2016 issue of the New Jersey Planner, Mr. William T. Sutphin, Esq. expressed his opinion that the demolition of a single-family home should be subject to additional regulation. His opinion seems to be based upon the following ideas:

1. Large homes are bad – small homes are good;

2. The New Jersey Municipal Land Use Law (MLUL) does not adequately regulate the construction of one and two family homes;

3. The zoning board, a body of appointed officials, is better suited to determine the size of homes, in a given zone, than the governing body who has been duly elected by the citizens.

When crafting the MLUL, the NJ Legislature carved out an exemption for one and two family houses from the requirement of site plan approval. Presumably, this exemption was created to reduce costs for homeowners as well as to allow them the maximum latitude in the development of their properties. A similar exemption exists in the NJ Uniform Construction Code (NJUCC), which allows a homeowner to prepare his/her own drawings rather than hire an architect.

The site plan exemption does not eliminate the requirement for the homeowner to meet the standards of the local zoning ordinance nor is the homeowner who prepares his own building plans exempt from the requirements of the NJUCC.

What is the need for special review when an existing one or two-family house is demolished? The new house must be designed to conform to requirements of the zone or the property owner must request a variance from the Board of Adjustment. Only projects that meet the bulk standards of the local zoning ordinance can proceed directly to the Building Department. The bulk regulations are, in fact the definition of what is acceptable and adequate to meet the goals of the approved master plan. They provide guidance to architects and homeowners in the planning of their projects. If the governing body thinks that the zoning criteria should be modified, they have the power to do so. They can legislate small houses for their community if they believe it is the best public policy.

Mr. Sutphin recommends:

- Requiring submission of a building permit application for the proposed development of the property at the time of request for a demolition permit;

- Making the Board of Adjustment the arbiter of what is the appropriate scale and cost of home for the neighborhood.

Presumably, seven other residents of the municipality who have been appointed, not elected, would render a subjective decision about the suitability of a home's deign. Isn't it preferable to have objective zoning criteria, enacted by the governing body, spelled out by ordinance?

Yes, an applicant can request a variance to exceed one or more of the bulk regulations in a district, but then, he must either prove that a hardship exists or that the benefits of the plan outweigh the detriments. Mr. Sutphin's proposal would increase costs to homeowners. The system isn't broken. Don't try to fix it.


Focus: Ethics & Civility

# The Need for Civility in Local Government Dialogue

## A decade later, these sentiments still ring true for municipal officials

By John C. Gillespie, Esq., Parker McCay; NJLM Associate Legal Counsel

Ten years ago, John C. Gillespie composed an article for *NJ Municipalities* on civility along with the Ten Commandments of Public Civility. It remains an excellent reference tool for municipal officials and here we re-run the piece with a few notations for reference to the passage of time.

The fundamental premise for this article is that, as local public officials, we should both show and demand public civility, public tolerance, and civil discourse at this time of increasing political polarization at the national level and in the media. Rhetoric has become too vitriolic, we are losing the ability to discuss things with civility.

[The 2008] Presidential campaign is proof enough that we are reaching dangerous levels. The President of the United States is called a "cheap thug and a killer," and is morphed into Hitler in a political ad. His opponent calls the Republican Party "the worst bunch of crooks and liars." The U.S. Senator who ran for President on the Democratic ticket is a Viet Nam veteran who earned three Purple Hearts and a Silver Star; yet opposition loyalists question his patriotism because of anti-war positions he took upon his return home.

Unfortunately negative campaigning is now a fact of life. But poisonous rhetoric is not limited to federal campaigns or national political discourse, we find it at the local level as well. Regrettably, there is no "trickle-down" effect; we are literally showered with it.

I began outlining this discussion [in 2007]. My first draft proposed to simply acknowledge the existence of this condition; to confront it with thoughtful evaluation; and to promote a discussion that would hopefully cause people to conclude that our discourse should be more civil and that Council meetings should be forums for intelligent dialogue and debate; but not

stages for rudeness, nasty sarcasm, or intimidation. But after another year of watching the condition deteriorate, it accomplishes little to merely suggest an outcome. We must demand that this change; and that change must begin at the local level, the level where people feel the impact of government actions most directly.

During a very well attended session at the November [2008] League Conference, we asked a few questions:

1. How many of the attendees shared this concern that political civility is being eroded?

2. How many believed that politics is an honorable profession?

3. Or should be an honorable profession?

4. How many agreed that this incivility contributes to the negative view the public has of our political system?

The almost unanimous response of the 80 or so attendees was yes to each question. Let the discussion, therefore, begin.

## What is civility?

What is civility? I like these definitions:

1. Courteous behavior, politeness.

2. A courteous act or utterance.

3. The act of showing regard for others.

Pretty simple stuff isn't it? Unfortunately, we don't always witness folks actively "showing regard for others" at public meetings. The problem exists both on the dais and in the audience. Residents visiting meetings are often nastier than elected officials can ever be to one another. Yet, the audience takes its lead from the dais. When elected officials are rude to each other, the audience sees this, and feels like it has a free pass to act likewise. Eventually, the situation devolves into sarcasm, rudeness, and even name calling.

We are a society that requires instant gratification; we decide what products to buy based on 30-second ads; we rely on 60-second news summaries to tell us all we need to know about an incident that took place over the course of hours, if not days We want to lose 10 pounds in four days; develop washboard abs in a week; and go from 0 to 60 mph in 3.5 seconds.

The late Johnny Carson said while discussing TV talk shows, "Everything today seems to be sound bites. Nobody wants to hear a good conversation. It's kind of a lost art." The same holds true in political dialogue. We want to get our points across, but we assume the sound bite audience will only listen for a little while. So, we resort to quick hits that will register. A quick hit is met with an equally short jab; after jabs are traded somebody decides they need to up the ante and throws an overhand right. The other side responds with a roundhouse left, and the fight is on. Now the audience is paying attention! And, of course, the tone has completely changed. What started out as a topic for public discussion, which requires the participants to make an argument in support of their point of view, transforms the participants into having an argument–as in having a fight.

Temperate, thoughtful dialogue designed to find common ground on matters of public interest gives way to shrill hyperbole intended not so much to differentiate the points of view and distinguish the issues, but to polarize the parties interested in those issues and points of view. "Agreeing to disagree" is subverted by outright antagonism.

Tolerance for opposing views is an essential ingredient to a successful

# The 10 Commandments of Public Civility™

**1.** Thou shalt not rudely interrupt a colleague midsentence nor speak over a colleague while she/he is speaking.
**Suggestion:** Quit taking your lead from cable "news" shows that are anything but news, and instead offer only editorial political hyperbole.

**2.** Thou shalt not assume that shrillness of tone is a substitute for substantive dialogue.
**Suggestion:** See example 1 above

**3.** Thou shalt treat the members of the public with the same courtesy as you would if they were members of your body–and perhaps more importantly, require that they treat you and your colleagues the same way.

**4.** Thou shalt not resort to zingers designed solely to embarrass your target. (Unless, of course, it is the Township Planner–then it's always ok.)

**5.** Thou shalt, where possible, explore areas of common ground where legitimate disagreements exist in an effort to move forward on matters of public importance.

**6.** Thou shalt not allow legitimate critique of policy and practice to become a personal attack aimed at the person who devised the policy or implements the practice.

**7.** Thou shalt always recognize that your colleagues were also elected, just as you were, and deserve the same level of respect for having run and won.
**Example:** Remember that the members of the public who elected the colleague that you don't like may be the same folks who send you packing next time around.

**8.** Thou shalt not ridicule or belittle a colleague or a member of the public simply because he or she disagrees with you on an issue.
**Suggestion:** Believing that the words "under God" belong in the Pledge of Allegiance doesn't make someone a theocratic moron. Conversely, someone who articulates a position urging that the words "under God" should be excluded from the Pledge of Allegiance doesn't make that person a heathen.

**9.** Thou shalt not pretend something is much more important than it really is simply to score points with an audience.

**10.** Thou shalt always remember that it is ok to agree to disagree, and that reasonable people can indeed disagree reasonably.

democracy. I don't have to agree with you; I should however be tolerant of your unfortunate, misguided thoughts! Voting against buying new uniforms for the youth football program does not necessarily mean "you are going to get those kids killed." Voting to approve a bond ordinance for a new municipal building to replace the one that is 80 years old and falling apart doesn't mean "you're going to bankrupt our children's future." And voting against an emergency squad's request for a new ambulance doesn't mean "you'll have blood on your hands when someone's 911 call isn't answered in time."

The challenge for local government officials–the ones who most closely relate to their constituents on a daily basis at the supermarket, on the soccer fields, and at PTA meetings, is to restore civility to our political discussions and to improve the tone of those conversations. Perhaps it is the word "political" that causes the change in attitude, volume, and tone. Perhaps if we remember that local officials are less "politicians" and more "public servants," elected to advance the community's interests, it will be easier to remember it is more important to have thoughtful, purposeful conversations than to get into arguments. It is more important to enjoy dialogue with the residents in the community than to yell at one another. And again, this goes both ways. It requires that we not only treat our elected colleagues in a more dignified fashion; it requires that we demand that of our constituents as well, particularly during the course of a public meeting. Indeed, the Chair's exercise of control over a public meeting is not an example of tyranny; it is the key ingredient to a successful dialogue. If everyone was sitting around a small table discussing community issues, there would be no yelling or personal attacks. That there is a 10-foot sea of space between the speaker and the dais should not change the dynamics.

> **"Tolerance for opposing views is an essential ingredient to a successful democracy."**

High-pitched, vitriolic rhetoric has a severe negative impact upon a community, and even the operation of local government. This harsh tone and preference to argue rather than discuss must give way to thoughtful dialogue. Only local public officials can change the landscape and restore the fundamental premise that it is ok to agree to disagree without being personally attacked for doing so.

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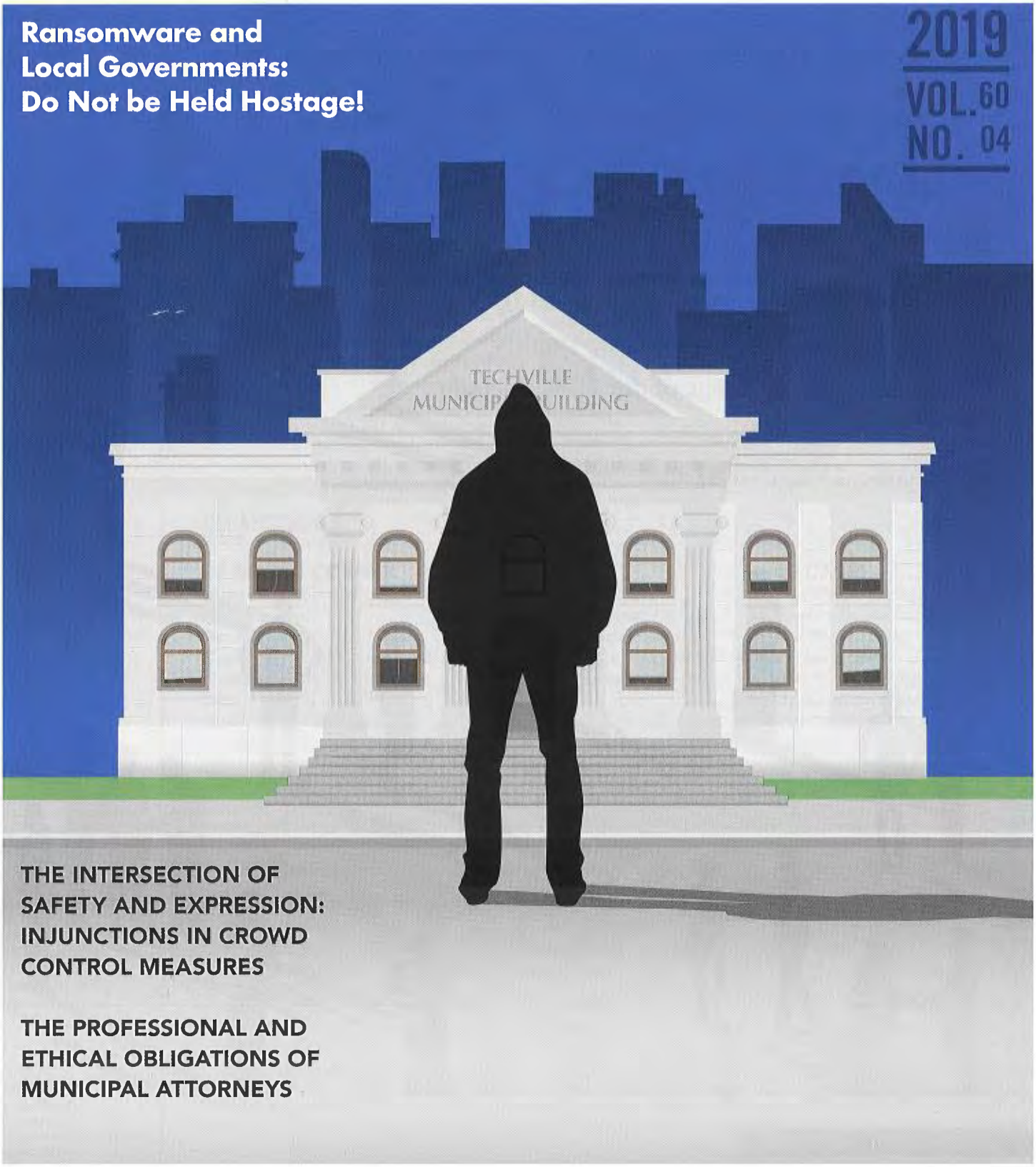
## Ransomware and Local Governments: Do Not be Held Hostage!




THE INTERSECTION OF SAFETY AND EXPRESSION: INJUNCTIONS IN CROWD CONTROL MEASURES

THE PROFESSIONAL AND ETHICAL OBLIGATIONS OF MUNICIPAL ATTORNEYS

# The Professional and Ethical Obligations of Municipal Attorneys

BY: JOHN C. GILLESPIE, *Parker McCay P.A., Mount Laurel, New Jersey*

ILLUSTRATION:TRUJILLO DESIGN

## Introduction

Not every issue that municipal lawyers confront will require an extensive analysis of ethical principles, but it is critical that we understand those duties and rigorously discharge them. This article is intended to review certain of those responsibilities. It cites New Jersey precedents and the New Jersey Rules of Professional Conduct, which closely follow the ABA Model Rules and should therefore be useful for most readers.

## I. Municipal Attorneys – Who is our client?

How often are municipal attorneys asked by individual members of a governing body to provide them with advice on certain matters relating to the performance of their duties (or even matters falling outside the scope of their duties), and they say to us, "Now this is privileged, right?" The answer, of course, is that conversations with individual elected officials do not always fall within the attorney-client privilege. Because underlying that question is the assumption that each member of the governing body is also individually our client. That is, in fact, not the case. N.J.S.A. 40A:9-139 provides:

> In every municipality the governing body, by ordinance, shall provide for the appointment of a municipal attorney who may be designated as the corporation counsel or municipal attorney...

By statute, then, the attorney for the municipality is just that: the attorney for the municipality. He or she is not, by virtue of that status, also separately the attorney for each individual member of the governing body. A municipality is a municipal corporate body politic. N.J.S.A. 40:43-1. The governing body of a municipality is "the board or body having control over the subject matter in connection with which the term is used, and having the power and authority to legislate thereon..." N.J.S.A. 40:42-2. The distinction between representation of the governing body, and "being the attorney for the members of same." is important. It relates not only to defining the scope and duties of the statutory position of municipal attorney, but implicates other issues such as the application of the attorney-client privilege; disclosure obligations; recusal from certain matters, and the like.

The New Jersey Advisory Committee on Professional Ethics issued Opinion No. 655 on December 9, 1991. It wrote:

> It is well recognized that in carrying out his official duties, a municipal attorney represents the collective governing body and not the individual members. This is based upon R.P.C. 1.13(a) which states that a lawyer representing any organization represents the collective organization as distinct from directors, officers, employees, members and the like.

New Jersey R.P.C. 1.13(a) actually says:

> A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other

> constituents. For purposes of R.P.C. 4.2 and 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entities, but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that 'significant involvement' requires involvement greater, and other than, the supplying of factual information or data respecting the matter...

Under this Rule, the municipal attorney's duties are to the organization, and not to its individual "directors, officers, employees, members, shareholders or other constituents." The Model Rules do not include the language describing the "control group." Instead, the Model Rules simply encourage lawyers to make clear to an organization's directors, employees, members, shareholders, or other constituents, that when the organization's interests may be adverse to that individual, the lawyer's duty is to the client organization only.

Nevertheless, in the course of representing a public entity, as with any other corporation, the corporate attorney is often asked to give advice to individual governing body members, the manager/administrator, assessor, clerk, department heads, and staff. To the extent that they relate to the activities of the governing body, this advice would appear to be equally privileged, as those corporate officers would certainly fall within the entity's "control group." New Jersey R.P.C. 1.13(a); see also M.R.P.C. 4.2, 4.3; *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981), (where the United States Supreme Court recognized that middle level and lower level employees often have the relevant information needed by corporate counsel if (s)he is to adequately advise the client with respect to potential difficulties); and, New Jersey Evidence Rule 504(3)[11] (and N.J.S.A. 2A:84A-20), which provides:

> As used in this Rule a 'client' means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyers representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity...A communication made in the course of relationship between lawyer and client shall be presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege.

Therefore, communications by such employees to corporate counsel are covered by the privilege. In contrast, Model Rule 1.13 does not include the language describing the "control group." Instead, the Model Rules leave the difficult issue of privilege for each state to decide, while encouraging lawyers to make clear to an organization's directors, employees, members, shareholders, or other constituents, that the organization itself, and not that individual, is the client. That, of course, is necessary and appropriate, because the client remains the municipal corporation. (This is not to say, however, that a municipal attorney cannot represent individual members of the governing body in matters not relating to municipal business. The municipal attorney can, for example, represent individual governing body members with regard to personal Wills and Estate issues, corporate matters in which the member of the governing body is a shareholder or member of a limited liability company, etc. Obviously, in such cases, the representation/relationship must be disclosed to the other members of the governing body; and it is suggested that the member who is represented by the municipal attorney, should not vote on the Municipal Attorney's appointment or re-appointment, payment of her/his bills, etc.)

The distinction between the municipal attorney's obligations to represent the municipal corporation, as opposed to individual members of the governing body, is underscored where issues arise that suggest some form of impropriety or misconduct by an individual member of the governing body.

The distinction between the municipal attorney's obligations to represent the municipal corporation, as opposed to individual members of the governing body, is underscored where issues arise that suggest some form of impropriety or misconduct by an individual member of the governing body. In *Bell Atlantic Corp. v. Bulger*, 2 F.3d 1304 (3d Cir. 1993), the court was confronted with an allegation of a conflict-of-interest of a law firm representing Bell Atlantic Corp., and certain individual defendants. The Circuit looked to the commentary under the Model Rules of Professional Conduct, R. 1.13(a), upon which New Jersey's R.P.C. 1.13 is based. The court wrote:

> We look to the Model Rules of Professional Conduct to furnish the appropriate ethical standard (cit. om.) Under R. 1.13(a), a lawyer's obligation runs to the entity. The commentary to R. 1.13 provides:
>
> > The question can arise whether counsel for the organization may defend [a derivative]

*Continued on page 16*

A member of **Parker McCay's** Executive Committee, John Gillespie concentrates his practice in the areas of municipal law, governmental defense litigation, land use and redevelopment. He has represented public entities and land use applicants for more than 35 years. He regularly represents national clients in development applications and defends dozens of public entities in class action lawsuits, police liability claims and constitutional law challenges. He is a graduate of Villanova University Law School.

*Ethical Obligations* cont'd from page 15

> action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those instances, R. 1.7 governs who should represent the directors and the organization.

> We believe serious charges of wrongdoing have not been levelled against the individual defendants... There are no allegations of self-dealing, stealing, fraud, intentional misconduct, conflicts of interest, or usurpation of corporate opportunities by defendant directors...

> We have no hesitation in holding that - - except in patently frivolous cases - - allegations of directors' fraud, intentional misconduct or self-dealing require separate counsel. We recognize that corporate law has traditionally distinguished between breach of the duty of care and breach of the duty of loyalty, the latter being more great...[12]

In this regard, in the municipal context, Opinion 526 of the New Jersey Advisory Committee on Professional Ethic [113 N.J.L.J. 383 (April 5, 1984)] is instructive. The question posed in Opinion 526 arose where "an insurer filed suit against the municipality joining certain officials of that public body in a claim that the defendants made willful misrepresentations and committed fraud in seeking indemnity in excess of its lawsuit entitlement under contract." The Committee concluded that:

> The duty of the municipal attorney includes the need to exercise his professional judgment on behalf of his public body free from and independent of any interest or bias he may have for or against municipal officials with whom he or she is in continual day-to-day contact on the regular affairs of that municipality. If the professional contact with the co-defendant official is substantial and continuing, special counsel should be engaged to defend the municipality.

When that elected official asks you, "Now this is privileged, right?" the answer needs to be "Well, it depends"; but also caution that person: "Since I represent the public body as a corporation, what you tell me may be privileged as to the corporation, but it's not privileged in that I may have an obligation to tell the other members of the governing body what you are about to tell me. So think about that before you begin this confession!"

## II. Privileged versus Public Communications

It is settled that the attorney-client privilege applies to public entities as well as private corporations.[13] In the public sector, however, not every written communication will be protected from disclosure by the privilege.

> New Jersey statutory law defines "government record" or "record" to mean:
>
> > Any paper, written or printed book, document, drawing, map...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, commissioner, agency or authority of the state or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commissioner, agency, or authority of the state or of any political subdivision thereof, including subordinate boards thereof...
> >
> > The terms shall not include inter-agency or intra-agency advisory, consultative or deliberative material.[14]

There is specifically exempted under the statute, however, "any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or involves except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege. . . ."[15]

In New Jersey, as in many states, municipal attorneys are "government officers."[16] Since our public entity clients, and their elected and appointed officials, "receive" our communications, the communications are public records. The question, of course, is whether the attorney-client privilege exempts them from disclosure.

In determining whether a communication falls within the privilege, courts generally engage in a balancing test. Courts recognize that the attorney-client privilege is "limited to communications made to the attorney in his professional capacity."[17] In a New Jersey case, a plaintiff, who sued her employer under the State Law Against Discrimination, sought the results of an investigation into her pre-litigation claims, which investigation involved in-house counsel for the New Jersey Turnpike Authority. The Turnpike Authority asserted the attorney-client privilege and refused to release the report. The court wrote:

> Defendant maintains that the attorney-client privilege protects the entire investigatory process because attorneys employed by defendant participated in the investigation. We disagree with that blanket contention... While an organizational corporation like Defendant can be a 'client' for purposes of the privilege, NJRE 504(3), a fine line exists between an attorney who provides legal services or advice to an organization and one who performs essential non-legal duties. An attorney who is not performing legal services or providing legal advice in some form does

not qualify as a 'lawyer' for purpose of the privilege. Thus, when an attorney conducts an investigation not for the purpose of preparing for litigation or providing legal advice, but rather for some other purpose, the privilege is inapplicable. That result obtains even where litigation may eventually arise from the subject of the attorney's activities.

The key issue regarding the applicability of the privilege in this case is the purpose of the various components of the investigation that defendant initiated into plaintiff's allegations of sexual harassment. If the purpose was to provide legal advice or to prepare for litigation, then the privilege applies. However, if the purpose was to simply enforce defendant's anti-harassment policy or to comply with its legal duty to investigate and to remedy the allegations, then the privilege does not apply.[8]

Accordingly, if the nature of the lawyer's activities are not specifically related to the practice of law but involve some other assignment which, while presumably relying upon the attorney's general skill set, is not necessarily construed as "giving legal advice," any communications arising from same may not be protected by the privilege; and absent some other exception, could be subject to discovery and/or dissemination.

How are general communications from the municipal attorney to the municipal client treated, vis-a-vis, legal opinions? Often, we mark them "Personal & Confidential: Attorney-Client Privilege," because they do indeed constitute pure legal advice. However, it is often to the governing body's benefit to make that advice known to the public. Keeping in mind that the privilege is always waivable by the client, the governing body, as a whole (and not through any one of its individual members acting unilaterally), can vote to make the opinion/advice public.

[I]f the nature of the lawyer's activities are not specifically related to the practice of law but involve some other assignment which, while presumably relying upon the attorney's general skill set, is not necessarily construed as "giving legal advice," any communications arising from same may not be protected by the privilege; and absent some other exception, could be subject to discovery and/or dissemination.

**Closed Session Minutes.** The New Jersey Open Public Meetings Act[9] has two sections that come into play in this discussion of "public v. private" communications in the field of local government law. N.J.S.A. 10:4-12 requires all meetings of public bodies to be open to the public at all times. However, it provides a number of exceptions including the following:

> 10:4-12(b). A public body may exclude the public only from that portion of a meeting at which the public body discusses:
>
> (7) any pending or anticipated litigation or contract negotiation other than in subsection b.4 herein in which the public body is or may become a party.
>
> Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

N.J.S.A. 10:4-14 requires that:

> Each public body shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with [N.J.S.A. 10:4-12(b)(7)].

Accordingly, the question arises as to when and under what circumstances, can minutes of closed sessions, where the attorney-client privilege was invoked as the reason for going into closed session, be released. First, as indicated in § 10:4-12(b)(7), the matter falling within the attorney-client privilege can be discussed in closed session "to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer." Thus, in the simple situation where we are often asked to give an opinion in public, and there is no particular confidentiality, privacy interest, or other reason not to give it publicly, we generally do so. However, there is often advice that we want to give to the governing body that we do not want to share with the general public. The courts have recognized this need:

> Although New Jersey has a notably strong public policy in favor of open government as evidenced by the Open Public Meetings Act, N.J.S.A. 10:4-6 to —21, and the Right to Know Law, N.J.S.A. 47:1A-1 to -4, the public's right of inspection is not unlimited....Thus, the Legislature recognized that matters falling within the privilege should be free from public review notwithstanding that a government entity is a client and despite the strong public policy favoring maximum access to government deliberations.[10]

*Continued on page 18*

*Ethical Obligations* cont'd from page 17

With regard to closed session minutes, the court in the Turnpike Authority decision referenced above stated:

> If a communication is covered by the privilege, then the public body may legitimately meet with its attorney in closed session. The minutes, part or all of which may constitute work product, then may be appropriately suppressed or redacted.[11]

The question then becomes: at what point do the minutes become subject to disclosure at a later date, after the matter is concluded? And, how long are you allowed to keep closed session minutes "closed"? The *Press v. Ocean County Joint Insurance Fund* court addressed these as well:

> The Court should also consider whether the requested documents pertain to pending or closed cases as the need for confidentiality is greater in pending matters. (Citing to Keddie v. Rutgers, 148 N.J. 36, 54 (1954). Nevertheless, `even in closed cases...attorney work product and documents containing legal strategies may be entitled to protection from disclosure.' Id. The attorney-client privilege 'recognizes' that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system... Moreover, there is a manifest potential for chilling the free flow of communications between attorney and client, if strategy, advice and evaluation are to be disclosed even upon the conclusion of cases. The possibility that settlements will be inhibited is clear. Feared disclosure of such privileged communications, even after the case is completed, could severely restrict a public entity's willingness to resolve litigation by settlement. That prospect contravenes the strong judicial policy favoring consensual resolution. The public interest in rapid and cost-efficient disposition of claims against government bodies, as well as the fundamental fairness of adjusting claimant's rights fairly and promptly, argues for the protection of that portion of the process that is most critical in accomplishing those goals.[12]

Similarly, this analysis should be applied not just to the settlement of lawsuits, but to negotiations regarding, for example: contracts with unions, so that the strategies, which likely will be the same in three years after the current contract expires, are not disclosed to the union; negotiations leading to an agreement to acquire real estate (you never want the seller of the property to know that you were really willing to pay more!); and similar matters that require full candor. Therefore, non-disclosure of the advice by an attorney to his/her clients, and of the client's questions and implementation of those strategies, is advisable.

### III. Whistleblowing: The Duty to Report?

M.R.P.C. 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may13 reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) To prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime of fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

N.J.S.A. 2A:84A-20(1) and Evidence Rule 504 both provide:

> Subject to Rule 530 and as except as otherwise provided by paragraph

> 2 of this Rule, communications between a lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has privilege (a) to refuse to disclose any such communication and (b) to prevent his lawyer from disclosing it...

Finally, M.R.P.C. 1.4 provides:

> (a) A lawyer shall:
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
> (3) keep the client reasonably informed about the status of the matter;
> (4) promptly comply with reasonable requests for information; and
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The question presented is, what do you do when a member of the governing body, or, for example, the Township Manager or Administrator, or Municipal Clerk confides in you as the municipal attorney, that he or she has done something which may well be contrary to the interests of the municipality, and/or create an adverse relationship between that person and the Township? This, again, invites the recognition that the client of a municipal attorney is the municipality, and that while the individual officials may enjoy some claim of nondisclosure through the attorney-client privilege, none of them are "the client." A municipal attorney's obligation remains to the client: the municipality. Accordingly, if an individual member of the governing body, or a member of its "control group" brings such information to the municipal attorney, it appears clear that the municipal attorney has the obligation to keep his client informed to the "extent reasonably necessary to permit the client to make informed decisions regarding the representation." M.R.P.C. 1.4(b).

Caselaw also offers guidance:

> This appeal concerns the conflict between two fundamental obligations of lawyers: the duty of confidentiality, Rules of Professional Conduct (R.P.C. 1.6(a), and the duty to inform clients of material facts, R.P.C. 1.4(b)...Crucial to the attorney-client relationship is the attorney's obligation not to reveal confidential information learned in the course of representation. Thus, R.P.C. 1.6(a) states that 'a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized and ordered to carry out the representations.' Generally, 'the principle of attorney-client confidentiality imposes a sacred trust on the attorney not to disclose the client's confidential communication.' (*citation omitted).* "A lawyer's obligation to communicate to one client all information needed to make an informed decision qualifies the firm's duty to maintain the confidentiality of a co-client's information. R.P.C. 1.4(b), which reflects a lawyer's duty to keep clients informed, requires that 'a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.' See, also Gautam v. DeLuca, 215 N.J. Super. 338, 397 (App. Div. 1987) (stating that an attorney has continuing duty to 'inform his client promptly of any information important to him'); Passanate v. Yormark, 138 N.J. Super. 233, 238 (App. Div. 1975) (attorney's duty 'includes the obligation of informing his client promptly of any known information important to him')...[14]

Accordingly, the municipal attorney is under an obligation to report to the governing body, matters brought to his or her attention, which would be important for the governing body to know in the furtherance of its duties on behalf of the municipal corporation. Presumably, if the information brought to the municipal attorney relates to some proposed act of a criminal or fraudulent nature, then the attorney would be allowed under M.R.P.C. 1.6(b), and obligated under the New Jersey Rules, to disclose that information to "the appropriate authorities."

## IV. Representing Clients After Public Service

In New Jersey, most municipal attorneys maintain separate, private law practices, and generally do not devote full time to their position as municipal attorney. Obvious exceptions, of course, are found in the Cities of Newark, Jersey City, Trenton, Atlantic City, Camden and other major municipalities. While all municipal attorneys are considered "local government officers" (because N.J.S.A. 40A:9-139 creates the required position of "municipal attorney," and because Attorney General Opinion 91-0092, says so), most are appointed under New Jersey's Local Public Contracts Law, N.J.S.A. 40A:11-5, through the award of a "professional service" agreement. Under either scenario, however, one's tenure as a municipal attorney is not always long in duration. Given the nature of the position as a political appointment, "things often change." As a consequence "former municipal attorneys" are often sought by private clients to represent their interests "in front of," or against, the attorney's former client/employer. The question, of course, is whether an attorney who previously, and perhaps even "recently" served as a municipal attorney, can represent private clients in matters adverse to that public entity's interests; and, if so, under what circumstances may (s)he do so.

Under many state statutes, employees of state departments are required to wait a period of time, often one year, before taking employment that requires them to appear before, submit applications to,

*Continued on page 34*

*Ethical Obligations* cont'd from page 19

or act on behalf of clients on front of, the department in which they were previously employed.

No such specific statutory proscription applies to New Jersey's municipal attorneys. There is, however, helpful guidance available.

M.R.P.C. 1.9(a) provides that: "[a] lawyer who has represented a client in a matter shall not thereafter represent another client in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing."

On the other hand, the New Jersey rules state that: "[a] public entity cannot consent to representation otherwise prohibited by this Rule." R.P.C. 1.9(d). The Model Rules do not have a corresponding exception.

M.R.P.C. 1.11, entitled "Successive Government and Private Employment", provides, in pertinent part:

> (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
>
> (1) is subject to Rule 1.9(c); and
> (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.
>
> (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
>
> (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
>
> (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.
>
> (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
>
> (1) is subject to Rules 1.7 and 1.9; and
> (2) shall not:
> (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
> (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).
>
> (e) As used in this Rule, the term "matter" includes:
>
> (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
> (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

M.R.P.C. 1.11(d) is simply the reverse of the above sections, and relates to an attorney now serving in the public sector, who was previously in private practice.

An application to disqualify an attorney under M.R.P.C. 1.9, or its state equivalent, requires a Court "to balance competing interests, weighing the need to maintain the highest standards of the profession against a client's right freely to choose his counsel."[15] However, in finding that balance, Courts must consider that "a person's right to retain counsel of his or her choice is limited in that there is no right to demand to be represented by an attorney disqualified because of an ethical requirement."[16]

The burden of proof is upon[17] the former client seeking to disqualify the attorney from representing the new client. As the New Jersey Supreme Court held in *City of Atlantic City v. Trupos*, 201 N.J. 447 (2009), if that burden of production, or of going forward is met, the burden then shifts to the attorney sought to be disqualified to demonstrate that the matter or matters in which he represented the former client were not the same or substantially related to the controversy in which the disqualification motion is brought. "That said, the burden of

persuasion on all elements under R.P.C, 1.9(a) remains with the moving party, as it `bears the burden of proving that disqualification is justified."[18]

In *Trupos*, the Court fairly well ignored R.P.C. 1.11, focusing instead, on that clause of 1.11(a) which provides: ". . . and subject to R.P.C. 1.9. . . ." The *Trupos* court recognized its 2004 elimination of "the appearance of impropriety" standard in evaluating claims of attorney conflicts, and focused on the specific R.P.C.'s. It phrased the question before it as follows:

> In the shifting of allegiances that arises when lawyers `change sides' in their representation of new clients, the confidences of prior clients must be preserved. The propriety of a lawyer representing a current client adverse to the interests of a former client generates attention - between fealty to a former client and zealousness in favor of a current client - - that this court must address.[19]

In *Trupos*, the former city attorney had been retained to represent a number of taxpayers in tax appeals against the City of Atlantic City. The City urged that the attorney was privy to its confidential strategies regarding the defense and settlement of tax appeals, and therefore should not be permitted to represent the taxpayers against the City of Atlantic City, a mere year after leaving the City's employ. It sought to disqualify him from representing those taxpayers.

The court analyzed the matter under R.P.C. 1.9:

> The presence of two of the three necessary predicates to the application of R.P.C. 1.9(a)'s disqualification bar [which are] not in dispute: the law firm formerly represented plaintiff, and the interest of the law firm's clients in the 2009 tax appeals are materially adverse to plaintiff's interests in those appeals. Therefore, the only substantive open question remaining in this appeal is whether the 2006 — 2007 tax appeals - - where the law firm represented plaintiff - - and the 2009 tax appeals - - where the law firm sought to represent taxpayers adverse to the plaintiff - - are 'the same or substantially related matters.'

That inquiry must start from the now well established principle that whether the matters are the 'same or substantially related' must be based in fact, as we have rejected the appearance of impropriety as a factor to be considered in determining whether a prohibited conflict-of-interest exists under R.P.C.1.9.[20]

The New Jersey Supreme Court ultimately concluded that there were no confidential communications that the City had shared with the law firm that could or might be used against the City in the law firm's prosecution of tax appeals on behalf of the taxpayers; that there was no proof that the facts of the prior representation were relevant or material to the subsequent tax appeals three years later; and that, therefore, while there might be a "purely superficial similarity" involved in all of these tax appeals, they were not "the same or substantially related matters."

*Trupos* is great reading for municipal attorneys who are seeking to return to private practice, and specifically, who are asked to undertake matters adverse to their former public entity clients. As can be seen from *Trupos*, the determination is fact sensitive, and not subject to any general proscription.

## CONCLUSION

The foregoing is a subset of the many ethical complexities facing local government lawyers. While a complete analysis of the subject would be a significant undertaking, it is hoped that the issues discussed here provide greater clarity and promote the professional excellence to which we aspire.

## NOTES

1. F.R.E. 501 states: ". . . in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." A note clarifies that the rule is designed to require the application of State privilege law in civil actions and proceedings governed by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). 2. Bell Atlantic Corp. v. Bulger, 3 F.2d at 1316, 1317.
3. See e.g., Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980); Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir.), United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 621 (D.D.C. 1979); Detroit Screwmatic Co. v. United States, 49 F.R.D. 77 (S.D.N.Y. 1970); United States v. Anderson, 34 F.R.D. 518 (D. Colo. 1963).
4. N.J.S.A. 47:1A-1.
5. *Id.*
6. *See* New Jersey Attorney General Op. 91-2009, "Municipal Attorneys as 'Local Government Officers' Pursuant to the Local Government Ethics Law," Sept. 20, 1991.
7. In re: Teleglobe Communications Corp., 493 F.3d 345, 359 (3d Cir. 2007); Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981).
8. Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 550-551 (1997).
9. Each state has an analogue to the NJ Open Public Meetings Act. Of course, there is variation in the specific requirements of each state's sunshine law. The following website contains summaries and links to each state's open meeting statute: https://ballotpedia.org/State_open_meetings_laws.
10. Press v. Ocean County Joint Insurance Fund, 337 N.J. Super. 480, 490-91 (Law Div. 2001).
11. *Payton, supra* note 8, at 558.
12. *Press, supra* note 10, at 391-392.
13. The New Jersey Rules of Professional Conduct, like many states, differs from the M.P.C. requiring disclosure by using the word *shall* in this rule.
14. A v. B 158, N.J. 51, 14-15 (1999).
15. Dewey v. R.J. Reynolds Tobacco Co, 109 N.J. 201, 218 (1988); Silver Chrysler, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 753 (2d Cir. 1975); Hughes v. Paine, Webber, Jackson & Curtis Inc., 565 F. Supp. 663, 667 (N.D. Ill. 1983).
16. .*Dewey supra* note 15, at 218.
17. *Id.* at 221-222
18. City of Atlantic City v. Trupos, 201 N.J. 447, 463 (2009) (*citing to* N.J. Division of Youth and Family Services v. V.J., 386 N.J. Super. 71, 75 (Ch. Div. 2004)).
19. *Id.* at 450-451.
20. *Id.*

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The New Jersey Open Public Records Act (OPRA)

**What is OPRA**?

The *Open Public Records Act,* more commonly known as "OPRA," is the New Jersey law that governs the public's access to government records maintained by public agencies, including local governments. A sweeping revision to the prior public records law, it was approved on January 8, 2002 and became effective on July 8, 2002 (P.L. 2001, c. 404). The law affects every aspect of local government and affects how every municipality in the State conducts its business.

**Legislative findings -** *N.J.S.A.* 47:1A-1 contains the legislative findings.

> The Legislature finds and declares it to be the public policy of this State that:
>
> government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access;
>
> all government records shall be subject to public access unless exempt from such access by: P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order;
>
> 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; and nothing contained in P.L.1963, c. 73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

It is clear that the legislature intended OPRA to be as broad as possible. Indeed, all government records are public unless exempted. Exemptions can come from the following sources:

- statute
- a resolution from either or both houses of the legislature
- administrative regulations
- Executive Order of the Governor (or past Governor)
- Rules of Court
- Federal laws, regulations, or orders.

It is important to remember that unless one of these sources contains an exemption for a document, it is a public record and should be released.

**Definitions**

*N.J.S.A*. 47:1A-1.1 contains several important definitions as well as the statutory exceptions to OPRA.

A. *"Government record"* means "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 of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. **The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material."**

This definition is important because *only those materials deemed "government records" fall under OPRA.* Courts have found that "not every paper prepared by a public employee fits within the definition of a government record for purposes of the Open Public Records Act." If the public employee or public entity has not made, maintained, kept or received a document in the course of his or its official business, a document is not a government record subject to production under the OPRA. For example, handwritten notes taken at a meeting of a public body are not government records.

This definition also contains an important exception to OPRA. Materials that are consultative or deliberative are not government records. In order to fall under this exception, the document must satisfy two aspects:

- it cannot contain only facts; it must have recommendations, opinions, or advice;
- it must be generated before any decisions on its subject were made.

B. *"Public agency*" means "any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions."

This, too, is a broad definition, intended to encompass municipalities as well as the boards that serve municipalities, such as the planning, zoning, or environmental board.

**Exemptions**

All government records as defined above are subject to public access unless specifically exempt under OPRA or another law. The most common exceptions are:

- criminal investigatory records;
- victims' records, except that a victim of a crime shall have access to the victim's own records;
- trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure;
- any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege;
- administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security;
- emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein;
- security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software;
- information which, if disclosed, would give an advantage to competitors or bidders;
- information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position;
- information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office;
- information which is to be kept confidential pursuant to court order;
- social security number;
- credit card number, debit card number, bank account information
- month and day of birth
- any personal email address required for applications, services, or programs
- personal telephone number
- the street address portion of any person’s primary or secondary home address, or
- driver license number.

- Administrative or technical information regarding tablets, telephones, electronic computing devices, software applications, or devices which operate on or as a part of a computer network or related technologies within the same,;
- Security alarm system activity and access reports, including video footage, for any public building, facility, or grounds unless the request identifies a specific incident that occurred, or a specific date and limited time period at a particular public facility and is deemed not to compromise the integrity of the security system;
- Personal identifying information provided to a public agency for the sole purpose of receiving official notifications or animal licenses or registration
- Metadata which shall include the SMTP header properties of emails, except that portion that identifies authorship, identity of editor, and time of change;
- Data classified under the HIPAA
- Indecent or graphic images of a person's intimate parts
- that portion of any document which discloses the social security number, credit card number, unlisted telephone number or driver license number of any person; except for use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf thereof, or any private person or entity seeking to enforce payment of court-ordered child support; except with respect to the disclosure of driver information by the New Jersey Motor Vehicle Commission as permitted by section 2 of P.L.1997, c. 188 (C.39:2-3.4); and except that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by State or federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor.

There is one additional and often-overlooked exemption in the legislative findings. A public body has a responsibility to *safeguard a citizen's personal information* when disclosure of that information would violate that citizen's right to privacy. In *Burnett v. County of Bergen,* 198 N.J. 408, (2009), the New Jersey Supreme Court found that this was a substantive provision, and not just a toothless statement of policy. The Supreme Court developed a balancing test that a public body should consider when they believe that a record may violate a citizen's privacy rights. In deciding whether to redact a record or deny access altogether, the public body should examine:

- the type of record requested
- the information it does or might contain
- the potential for harm in any subsequent nonconsensual disclosure
- the injury from disclosure to the relationship in which the record was generated

- the adequacy of safeguards to prevent unauthorized disclosure
- the degree of need for access
- whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

**Additional Notes**

A. Responding to OPRA requests

1. The municipal clerk is the custodian of records.
2. The custodian must respond within 7 days, producing the record or a written response that states when the record will be available or specifying the exemption that applies.

B. Response times for certain requests is extended to 14 business days

1. Requests requiring review under Daniel's Law
2. Requests for commercial purposes

   - "Commercial purpose" is the use of any part of a government record for sale, resale, solicitation, rent, or lease of a service, or any use by for a profit, except by the news media, scholarly or governmental organizations, political committees, labor organizations, contractors seeking information to the enforcement of the law regarding wage and hour protections, workplace safety, or public procurement process, or nonprofit entities that do not sell government records

3. The custodian can be fined for failure to comply with OPRA requirements.
4. Anyone who interferes with compliance can be fined.
5. Nonresponse to a request is deemed a denial unless the requestor has elected not to accurately identify themselves or has failed to provide an accurate address, email address, or telephone number
6. Records in storage may receive extensions, which shall be no more than 21 business days from the date the requestor is so advised or shall be deemed denied.
7. The custodian shall not be required to complete an identical request for access to a government record from the same requestor if the information has not changed.
8. A requestor shall have 14 business days to retrieve the government records following notice from the custodian that the request has been completed.
9. The request must identify the record requested.

10. If the record requested does not exist, OPRA does not apply.
11. There is no requirement for the custodian to research or create a record in response to a request.
12. Government records shall be made available to the public on a publicly available website to the extent feasible.
13. If government records are available on a website, the custodian may require the requestor to obtain the record from the website following a statutorily established procedure
14. There is no exemption for records that might be embarrassing.

C. Agenda Materials

1. Backup materials for the agenda (attached reports and referenced documents) are public records and must be made available in electronic format along with the agenda in advance of the meeting. (Note: the backup materials are NOT part of the agenda but they must be made available.)

D. E-Mails and Text messages

1. Email and text messages are documents.
2. **Email or text message on public business is a public record**, even if created on a personal computer or phone.
3. **Emails and text messages are frequently requested and usually must be released**

E. Record Retention Requirements

1. Specified by the New Jersey Division of Archives and Records Management (*see* www.nj.gov/state/darm) to access the Records Retention Schedule for municipal agencies and the Uniform Electronic Transactions Act (UETA).

F. Common law right to know

1. The "common law" right of access to a public record is unaffected by OPRA; the common law and the statute are independent of each other and many requests now include reference to both laws. To determine whether the record must be released under common law, courts have applied a balancing test between the public's right to know and the need for confidentiality.

G. Request Form

1. The Government Records Council has created a form which Custodians must adopt.

2. The form is not required to be used if the requestor includes all of the information required on the adopted form.

3. The custodian may deny a request that is incomplete, except that the fact that a request is anonymous shall not be grounds for denial.

4. The form also shall include space for a requestor to certify whether the government record will be used for a commercial purpose, and the requestor shall be required to provide this information for the request to be fulfilled.

5. If the request includes substantially more information than required on the form and requires more than reasonable effort to clarify the information, the custodian may deny the request.

6. Submission of repeated requests to multiple custodians in the same public agency for the same record, while an identical or substantially similar request is pending in the agency, shall permit the custodian to deny the request.

H. Records in the Possesssion of Other Agencies

1. A public agency shall not be considered to be in possession of a public record that is created maintained, or received by another public agency and made available to the public agency either by remote access to a computer network or by distribution as a courtesy copy, unless that agency is the judiciary .

2. A records custodian of a public agency that receives such a request is not obligated to provide the record to the requestor.

3. The custodian shall direct the requestor within seven business days to the public agency that created, maintains, or received the requested record.

I. Medium or Format of Document

1. Document must be provided in the requested medium or format if it is available and does not require substantial manipulation or programming, or services of a third party vendor.

2. If the public agency converts the record to the medium or format requested, the agency may charge a reasonable special service fee that shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.

3. If the public agency does not maintain the record in the electronic medium or format requested, and the medium or format is not available to the public agency without a substantial amount of manipulation or information technology, the custodian shall be under no obligation to convert the record but shall, at a minimum, provide a copy in the electronic format maintained by the public agency.

J. OPRA and Discovery

1. A party to a legal proceeding may not request a government record if the record sought is the subject of a court order including a pending discovery request and a custodian shall not be required to complete such a request.

K. Denial of Access Complaints Filed by Requestors

1. Only requestors who are accurately identified by name may file denial of access complaints.

2. The Court or GRC may, but does not have to, award attorneys fees to a prevailing party.

3. If the public agency has been determined to have unreasonably denied access, acted in bad faith, or knowingly and willfully then the requestor is entitled to attorney's fees.

4. If an agency produces records within seven business days of service of an action in Superior Court or a complaint before the Government Records Council, the matter is be dismissed without prejudice and the requestor may be entitled to a reasonable attorney's fee if the custodian knew or should have known that the denial of access violated OPRA

L. Complaints Against Requestors

1. An agency may file a complaint to the Superior Court alleging that a requestor sought records with the intent to substantially interrupt the performance of government function,

2. The court may issue a protective order limiting the number and scope of requests or order such other relief as appropriate, including referral of the matter to mediation or a waiver of the required response time

3. The court may issue the protective order if it finds by clear and convincing evidence that the requestor has sought records under OPRA with the intent to substantially interrupt the performance of government function.

4. The complaint shall include a declaration of facts by the public agency demonstrating that it has complied with OPRA and has made a good faith effort to reach an informal resolution of the issues relating to the records requests.

5. The public agency bears the burden of proof by clear and convincing evidence.

Government Records Council

**Open Public Records Act**
**N.J.S.A. 47:1A-1 et seq.**

# Government Records Council's "Readable" Version

This document is a complete copy of P.L. 2001, c. 404, commonly known as the Open Public Records Act, as of the enactment P.L. 2024, c. 16 on September 3, 2024. It is the full text of the law, specifically formatted to be easily readable and to serve as a reference document for users. The formatting consisted of adding bulleted points, paragraph breaks and spacing to facilitate easy use. However, no text or punctuation has been altered.

To assist readers in using the law, references have been made in the left margin to highlight the content of each section or important subsections.

Legislative policy declaration

**C.47:1A-1 Legislative findings, declarations.**

The Legislature finds and declares it to be the public policy of this State that:

All records shall be accessible

- government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L. 1963, c. 73 (*C. 47:1A-1* et seq.) as amended and supplemented, shall be construed in favor of the public's right of access;

All records public unless under a permitted exemption

- all government records shall be subject to public access unless exempt from such access by: P.L. 1963, c. 73 (*C. 47:1A-1* et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order;

Privacy interest

- 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; and nothing contained in P.L. 1963, c. 73 (*C. 47:1A-1* et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

Definitions

**C.47:1A-1.1 Definitions.**

As used in P.L. 1963, c. 73 (*C. 47:1A-1* et seq.) as amended and supplemented:

"Biotechnology" means any technique that uses living organisms, or parts of living organisms, to make or modify products, to improve plants or animals, or to develop micro-organisms for specific uses; including the industrial use of recombinant DNA, cell fusion, and novel bioprocessing techniques.

Defines "child protective investigator"

"Child protective investigator in the Division of Child Protection and Permanency" means an employee of the Division of Child Protection and Permanency in the Department of Children and Families whose primary duty is to investigate reports of child abuse and neglect, or any other employee of the Department of Children and Families whose duties include investigation, response to, or review of allegations of child abuse and neglect.

Defines "commercial purpose" with exceptions

"Commercial purpose" means the direct or indirect use of any part of a government record for sale, resale, solicitation, rent, or lease of a service or any use by which the user expects a profit either through commission, salary, or fee. "Commercial purpose" shall not include the use of a government record for any purpose by:

**(1)** the news media, or any parent company, subsidiary, or affiliate of any news media, as defined by section 2 of P.L.1977, c.253 (C.2A:84A-21a);

**(2)** any news, journalistic, educational, scientific, scholarly, or governmental organization;

**(3)** any person authorized to act on behalf of a candidate committee, joint candidate committee, political committee, continuing political committee, political party committee, or legislative leadership committee, as defined by section 3 of P.L.1973, c.83 (C.19:44A-3), registered with the New Jersey Election Law Enforcement Commission;

**(4)** any labor organization;

**(5)** any contractor signatory to a collective bargaining agreement seeking information material to the enforcement of State or federal statutes or regulations regarding, but not limited to, wage and hour protections, workplace safety, or public procurement and public bidding, including, but not limited to, requests for certified payrolls or information about all bids submitted in response to a public procurement process subsequent to the deadline for the submission of all bids for that solicitation;

**(6)** any employee, agent, contractor, or affiliates of any entity identified in paragraphs (1) through (5) of this definition in this section; or

**(7)** any non-profit entity, including organizations or individuals qualified for exemption from federal taxation pursuant to section 501(c)(3) of the federal Internal Revenue Code, 26 U.S.C. s.501(c)(3) and section 501(c)(4) of the federal Internal Revenue Code, 26 U.S.C. § 501(c)(4), when the entity does not sell, resell, solicit, rent, or lease a government record to an unaffiliated third party in a way in which the entity expects a fee.

Defines "constituent"

"Constituent" means any State resident or other person communicating with a member of the Legislature.

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| Defines "criminal investigatory record" | "Criminal investigatory record" means a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding. |
| Defines "custodian of record" | "Custodian of a government record" or "custodian" means in the case of a municipality, the municipal clerk and in the case of any other public agency, the officer officially designated by formal action of that agency's director or governing body, as the case may be. |
| Defines "government record" | "Government record" or "record" means 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 of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material. |
| Defines "labor organization" | "Labor organization" means any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining, of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection in connection with employment. |
| Records that are exempt | A government record shall not include the following information which is deemed to be confidential for the purposes of P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented: |
| Legislative records | ▪ information received by a member of the Legislature from a constituent or information held by a member of the Legislature concerning a constituent, including but not limited to information in written form or contained in any e-mail or computer data base, or in any telephone record whatsoever, unless it is information the constituent is required by law to transmit;<br><br>▪ any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member's official duties, except that this provision shall not apply to an otherwise publicly-accessible report which is required by law to be submitted to the Legislature or its members; |

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| Medical examiner records | ▪ any copy, reproduction or facsimile of any photograph, negative or print, including instant photographs and videotapes of the body, or any portion of the body, of a deceased person, taken by or for the medical examiner at the scene of death or in the course of a post mortem examination or autopsy made by or caused to be made by the medical examiner except:<br>• for use by a legal next of kin, a legal representative, or an attending physician of the deceased person,<br>• for the use as a court of this State permits, or for use by any law enforcement agency in this State or any other state or federal law enforcement agency; |
| Criminal investigatory records | ▪ criminal investigatory records;<br>▪ the portion of any criminal record concerning a person's detection, apprehension, arrest, detention, trial or disposition for unlawful manufacturing, distributing, or dispensing, or possessing or having under control with intent to manufacture, distribute, or dispense, marijuana or hashish in violation of paragraph (11) of subsection b. of N.J.S.2C:35-5, or a lesser amount of marijuana or hashish in violation of paragraph (12) of subsection b. of that section, or a violation of either of those paragraphs and a violation of subsection a. of section 1 of P.L.1987, c.101 (C.2C:35-7) or subsection a. of section 1 of P.L.1997, c.327 (C.2C:35-7.1) for distributing, dispensing, or possessing, or having under control with intent to distribute or dispense, on or within 1,000 feet of any school property, or on or within 500 feet of the real property comprising a public housing facility, public park, or public building, or for obtaining, possessing, using, being under the influence of, or failing to make lawful disposition of marijuana or hashish in violation of paragraph (3) or (4) of subsection a., or subsection b., or subsection c. of N.J.S.2C:35-10, or for a violation of any of those provisions and a violation of N.J.S.2C:36-2 for using or possessing with intent to use drug paraphernalia with that marijuana or hashish; |
| Victims' records | ▪ victims' records, except that a victim of a crime shall have access to the victim's own records;<br>▪ any written request by a crime victim for a record to which the victim is entitled to access as provided in this section, including, but not limited to, any law enforcement agency report, domestic violence offense report, and temporary or permanent restraining order; |

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| Personal firearms records | ▪ personal firearms records, except for use by any person authorized by law to have access to these records or for use by any government agency, including any court or law enforcement agency, for purposes of the administration of justice; |
| | ▪ personal identifying information received by the Division of Fish and Wildlife in the Department of Environmental Protection in connection with the issuance of any license authorizing hunting with a firearm; |
| Trade secrets and proprietary information | ▪ trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include software, applications, and code obtained by a public body under a licensing agreement which prohibits its disclosure; |
| Attorney client privilege | ▪ any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege; |
| Computer security | ▪ administrative or technical information regarding computer hardware, tablets, telephones, electronic computing devices, software applications, and networks or devices which operate on or as a part of a computer network or related technologies within the same, which shall include system logs, event logs, transaction logs, tracing logs, or any logs which are reasonably construed to be similar to the same and generated by the devices or servers covered within this paragraph, which, if disclosed, could jeopardize computer security, or related technologies; |
| Building security | ▪ emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein; |
| Security measures and techniques | ▪ security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software; |
| Security alarms and footage | ▪ security alarm system activity and access reports, including video footage, for any public building, facility, or grounds unless the request identifies a specific incident that occurred, or a specific date and limited time period at a particular public building, facility, or grounds, and is deemed not to compromise the integrity of the security system by revealing capabilities and vulnerabilities of the system; |

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| Advantage to bidders | ▪ information which, if disclosed, would give an advantage to competitors or bidders, including detailed or itemized cost estimates prior to bid opening; |
| Public employee related | ▪ information generated by or on behalf of public employers or public employees in connection<br>• with any sexual harassment complaint filed with a public employer or<br>• with any grievance filed by or against an individual or<br>• in connection with collective negotiations, including documents and statements of strategy or negotiating position; |
| Risk management | ▪ information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office; |
| Court orders | ▪ information which is to be kept confidential pursuant to court order; |
| Honorable discharge certificates | ▪ any copy of form DD-214, NGB-22, or that form, issued by the United States Government, or any other certificate of honorable discharge, or copy thereof, from active service or the reserves of a branch of the Armed Forces of the United States, or from service in the organized militia of the State, that has been filed by an individual with a public agency, except that a veteran or the veteran's spouse or surviving spouse shall have access to the veteran's own records; |
| Oath of allegiance or office | ▪ any copy of an oath of allegiance, oath of office or any affirmation taken upon assuming the duties of any public office, or that oath or affirmation, taken by a current or former officer or employee in any public office or position in this State or in any county or municipality of this State, including members of the Legislative Branch, Executive Branch, Judicial Branch, and all law enforcement entities, except that the full name, title, and oath date of that person contained therein shall not be deemed confidential; and |
| Personal information (including Daniel's Law information) | ▪ that portion of any document which discloses the social security number, credit card number, debit card number, bank account information, month and day of birth, any personal email address required by a public agency for government applications, services, or programs, any telephone number or driver license number of any person, or, in accordance with section 2 of P.L.2021, c.371 (C.47:1B-2), that portion of any document which discloses the home address, |

whether a primary or secondary residence, of any active, formerly active, or retired judicial officer, law enforcement officer, child protective investigator in the Division of Child Protection and Permanency, or prosecutor, or, as defined in section 1 of P.L.2021, c.371 (C.47:1B-1), any immediate family member thereof; except for:

- use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf thereof,
- or any private person or entity seeking to enforce payment of court-ordered child support;
- with respect to the disclosure of driver information by the New Jersey Motor Vehicle Commission as permitted by section 2 of P.L. 1997, c. 188 (C. 39:2-3.4);
- with respect to the disclosure of information included in records and documents maintained by the Department of the Treasury in connection with the State's business registry programs;
- that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by State or federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor;

Personal information for official notification

- that portion of any document that discloses the personal identifying information of any person provided to a public agency for the sole purpose of receiving official notifications;

Special Needs Assistance Lists

- a list of persons identifying themselves as being in need of special assistance in the event of an emergency maintained by a municipality for public safety purposes pursuant to section 1 of P.L.2017, c.266 (C.40:48-2.67) and their personal identifying information; and
- a list of persons identifying themselves as being in need of special assistance in the event of an emergency maintained by a county for public safety purposes pursuant to section 6 of P.L.2011, c.178 (C.App.A:9-43.13) and their personal identifying information;

Juvenile information

- that portion of any document that requires and would disclose personal identifying information of persons under the age of 18 years, except:
    - with respect to the disclosure of driver information by the New Jersey Motor Vehicle Commission as permitted by section 2 of P.L.1997, c.188 (C.39:2-3.4) or the disclosure of driver information to any insurer or insurance support organization, or a self-insured entity, or its agents, employees, or contractors, for use in connection with claims investigation activities, antifraud activities, rating, or underwriting, and
    - with respect to the disclosure of voter information on voter and election records pursuant to section 8 of P.L.2024, c.16 (C.47:1A-5.3);

Domestic animal records

- personal identifying information disclosed on domestic animal permits, licenses, and registration;

Metadata

- structured reference data that helps to sort and identify attributes of the information it describes, referred to as metadata, or any extrapolation or compilation thereof, which shall include the SMTP header properties of emails, except that portion that identifies authorship, identity of editor, and time of change;

NJSFA applications

- New Jersey State Firemen's Association financial relief applications;

Manuals

- Owner and maintenance manuals;

HIPAA data

- data classified under the "Health Insurance Portability and Accountability Act of 1996," Pub.L.104-191;

Indecent/graphic images

- any indecent or graphic images of a person's intimate parts, as defined in section 10 of P.L.2024, c.16 (C.47:1A-5.2), that are captured in a photograph or video recording without the prior written consent of the subject of the photograph or video footage, as defined in section 10 of P.L.2024, c.16 (C.47:1A-5.2).

Higher education exemptions

A government record shall not include, with regard to any public institution of higher education, the following information which is deemed to be privileged and confidential:

- pedagogical, scholarly and/or academic research records and/or the specific details of any re-search project conducted under the auspices of a public higher education institution in New Jersey, including, but not limited to research, development information, testing procedures,

or information regarding test participants, related to the development or testing of any pharmaceutical or pharmaceutical delivery system, except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available;

- test questions, scoring keys and other examination data pertaining to the administration of an examination for employment or academic examination;

- records of pursuit of charitable contributions or records containing the identity of a donor of a gift if the donor requires non-disclosure of the donor's identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization or dedication;

- valuable or rare collections of books and/or documents obtained by gift, grant, bequest or devise conditioned upon limited public access;

- information contained on individual admission applications; and

- information concerning student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student.

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| Certain info still required to be disclosed | Nothing in this section shall be construed to limit the requirements to provide and make publicly available the information pursuant to section 5 of P.L.1963, c.150 (C.34:11-56.29) and section 5 of P.L.1999, c.238 (C.34:11-56.52). |
| Defines "judicial officer" | "Judicial officer" means any active, formerly active, or retired federal, state, county, or municipal judge, including a judge of the Tax Court and any other court of limited jurisdiction established, altered, or abolished by law, a judge of the Office of Administrative Law, a judge of the Division of Workers' Compensation, and any other judge established by law who serves in the executive branch. |
| Defines "law enforcement agency" | "Law enforcement agency" means a public agency, or part thereof, determined by the Attorney General to have law enforcement responsibilities. |
| Defines "law enforcement officer" | "Law enforcement officer" means a person whose public duties include the power to act as an officer for the detection, apprehension, arrest, and conviction of offenders against the laws of this State. |

Defines "member of the Legislature"

"Member of the Legislature" means any person elected or selected to serve in the New Jersey Senate or General Assembly.

Defines "personal firearms record"

"Personal firearms record" means:

- any information contained in a background investigation conducted by the chief of police, the county prosecutor, or the Superintendent of State Police, of any applicant for a permit to purchase a handgun, firearms identification card license, or firearms registration; any application for a permit to purchase a handgun, firearms identification card license, or firearms registration; any document reflecting the issuance or denial of a permit to purchase a handgun, firearms identification card license, or firearms registration; and any permit to purchase a handgun, firearms identification card license, or any firearms license, certification, certificate, form of register, or registration statement.

- For the purposes of this paragraph, information contained in a background investigation shall include, but not be limited to, identity, name, address, social security number, telephone number, fax number, driver's license number, email address, social media address of any applicant, licensee, registrant or permit holder.

Defines "public agency"

"Public agency" or "agency" means

- any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department;

- the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and

- any independent State authority, commission, instrumentality or agency.

The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

Defines "victim of a crime"

"Victim of a crime" means a person who has suffered personal or psychological injury or death or incurs loss of or injury to personal or real property as a result of a crime, or if such a person is deceased or

incapacitated, a member of that person's immediate family.

Defines "victim's record"

"Victim's record" means an individually identifiable file or document held by a victims' rights agency which pertains directly to a victim of a crime except that a victim of a crime shall have access to the victim's own records.

Defines "victims' rights agency"

"Victims' rights agency" means a public agency, or part thereof, the primary responsibility of which is providing services, including, but not limited to, food, shelter, or clothing, medical, psychiatric, psychological or legal services or referrals, information and referral services, counseling and support services, or financial services to victims of crimes, including victims of sexual assault, domestic violence, violent crime, child endangerment, child abuse or child neglect, and the Victims of Crime Compensation Board, established pursuant to P.L.1971, c.317 (C.52:4B-1 et seq.) and continued as the Victims of Crime Compensation Office pursuant to P.L.2007, c.95 (C.52:4B-3.2 et al.) and Reorganization Plan No. 001-2008.

Defines "personal identifying information"

As used in this section, "personal identifying information" means information that may be used, alone or in conjunction with any other information, to identify a specific individual. Personal identifying information shall include, but shall not be limited to, the following data elements: name, social security number, credit card number, debit card number, bank account information, month and day of birth, any personal email address required by a public agency for government applications, services, or programs, personal telephone number, the street address portion of any person's primary or secondary home address, or driver license number of any person. "Personal identifying information" shall not include any street address, mailing address, email address, or telephone number of a public agency. "Personal identifying information" shall not include the email address of a governmental affairs agent.

Biotechnology exemption

**C.47:1A-1.2 Restricted access to biotechnology trade secrets.**

a. When federal law or regulation requires the submission of biotechnology trade secrets and related confidential information, a public agency shall not have access to this information except as allowed by federal law.

b. A public agency shall not make any biotechnology trade secrets and related confidential in-formation it has access to under this act available to any other public agency, or to the general public, except as allowed pursuant to federal law.

Disclosable firearms info

**C.47:1A-1.3 Certain firearms records considered public records**

Notwithstanding the provisions of any other statute or regulation to the

contrary, government record as defined in section 1 of P.L.1995, c.23 (C.47:1A-1.1) shall include aggregate information regarding the total number of permits to purchase a handgun and firearms purchaser identification cards, without any personal identifying information, that have been issued by the Superintendent of State Police or the Chief of Police of a municipal police department.

Limits to convicts

**C.47:1A-2.2 Access to certain information by convict prohibited; exceptions.**

a. Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.) or the provisions of any other law to the contrary, where it shall appear that a person who is convicted of any indictable offense under the laws of this State, any other state or the United States is seeking government records containing personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information, the right of access provided for in P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented shall be denied.

b. A government record containing personal identifying information which is protected under the provisions of this section may be released only if the information is necessary to assist in the defense of the requestor. A determination that the information is necessary to assist in the requestor's defense shall be made by the court upon motion by the requestor or his representative.

c. Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented, or any other law to the contrary, a custodian shall not comply with an anonymous re-quest for a government record which is protected under the provisions of this section.

Ongoing Investigations

**C.47:1A-3 Access to records of investigation in progress.**

a. Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented, where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation

commenced. Whenever a public agency, during the course of an investigation, obtains from another public agency a government record that was open for public inspection, examination or copying before the investigation commenced, the investigating agency shall provide the other agency with sufficient access to the record to allow the other agency to comply with requests made pursuant to P.L. 1963, c. 73 (C. 47:1A-1 et seq.).

b. Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.), as amended and supplemented, the following information concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such information:

- where a crime has been 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 unless there has not been sufficient opportunity for notification of next of kin of any victims of injury and/or death to any such victim or where the release of the names of any victim would be contrary to existing law or Court Rule. In deciding on the release of information as to the identity of a victim, the safety of the victim and the victim's family, and the integrity of any ongoing investigation, shall be considered;
- 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;
- 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;
- information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;
- 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
- information as to circumstances surrounding bail, whether it was posted and the amount thereof.

Notwithstanding any other provision of this subsection, where it shall

appear that the information requested or to be examined will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release, such information may be withheld. This exception shall be narrowly construed to prevent disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety. Whenever a law enforcement official determines that it is necessary to withhold information, the official shall issue a brief statement explaining the decision.

Requests and Responses

**C.47:1A-5 Times during which records may be inspected, examined, copied; access; copy fees.**

Time when access is required

a. The custodian of a government record shall permit the record to be inspected, examined, and copied by any person during regular business hours; or

- in the case of a municipality having a population of 5,000 or fewer according to the most recent federal decennial census,
- a board of education having a total district enrollment of 500 or fewer, or
- a public authority having less than $ 10 million in assets,

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; unless a government record is exempt from public access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

Personal information to be redacted

Prior to allowing access to any government record, the custodian thereof shall redact from that record any information which discloses the social security number, credit card number, personal telephone number, or driver license number of any person, or, in accordance with section 2 of P.L.2021, c.371 (C.47:1B-2), the home address, whether a primary or secondary residence, of any active, formerly active, or retired judicial officer, prosecutor, law enforcement officer, or child protective investigator in the Division of Child Protection and Permanency, or, as defined in section 1 of P.L.2021, c.371 (C.47:1B-1), any immediate family member thereof; except for:

- use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private

person or entity acting on behalf thereof,

- any private person or entity seeking to enforce payment of court-ordered child support;

- with respect to the disclosure of driver information by the New Jersey Motor Vehicle Commission as permitted by section 2 of P.L. 1997, c. 188 (C. 39:2-3.4);

- that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by State or federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor;

Except where an agency can demonstrate an emergent need, a regulation that limits access to government records shall not be retroactive in effect or applied to deny a request for access to a government record that is pending before the agency, the council or a court at the time of the adoption of the regulation.

Fees for copies

b. (1) A copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation.

Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be

- $ 0.05 per letter size page or smaller, and

- $ 0.07 per legal size page or larger.

Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs.

No fee shall be charged if the request is completed by directing the requestor to the requested government record that is available on the public agency's website or the website of another public agency.

(2) No fee shall be charged to a victim of a crime for a copy or copies of a record to which the crime victim is entitled to access, as provided in section 1 of P.L.1995, c.23 (*C.47:1A-1.1*).

Special service charges

c. Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be based upon the actual direct cost of providing the copy or copies, and such special service charge shall be reasonable. The custodian shall provide the requestor with an explanation for and an itemized list of the fees or charges.

The requestor shall have the opportunity to review and object to any fee or charge prior to it being incurred. There shall be a rebuttable presumption that the fees or charges presented by the custodian are reasonable. If the requestor objects to the fees or charges, the burden of proof shall be on the requestor to demonstrate that the fees or charges are unreasonable.

Mediums for copying

d. A custodian shall permit access to a government record and provide a copy thereof in the medium or format requested if the public agency maintains the record in that medium or format.

- If the public agency does not maintain the record in the medium or format requested, the custodian shall convert the record to the medium or format requested, if the medium or format is available to the public agency and does not require a substantial amount of manipulation or programming of information technology or the services of a third-party vendor.
    - If the public agency converts the record to the medium or format requested, the agency may charge, in addition to the actual cost of duplication, a special service fee that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.
- If the public agency does not maintain the record in the electronic medium or format requested, and the medium or format is not available to the public agency without a substantial amount of manipulation or programming of information technology, the custodian shall be under no obligation to convert the record to the electronic medium or format requested but shall, at a minimum, provide a copy in the electronic format maintained by the public

agency.

Immediate access records

e. Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information. Immediate access to government records shall not be required to be granted for documents over 24 months old.

Government records shall be made available to the public on a publicly available website to the extent feasible. A public agency may enter into shared services agreements for providing certain government records electronically.

Directing requestors to the internet

If the government record in a complete and unabridged form is readily available on a public agency's website, the custodian may require the requestor to obtain the record from the website, which shall contain a search bar feature on its home page. The custodian shall provide the requestor with directions to assist in finding the record on the website, including providing the website URL address and the location on the website of the search bar, menu button, tab, link, landing page, or equivalent, which contains the requested record. If the requestor does not respond to the custodian within seven business days of the custodian providing information about a record on the public agency's website, the request shall be deemed fulfilled unless the version of the government record on the public agency's website fails to contain non-protected information contained in the original record, in which case the custodian shall produce the original version of the record subject to any redactions required by law.

- If, after the custodian has provided instructions on how to find a record on a public agency's website, the requestor is unable to find the record upon making a good faith effort to locate the record on the website, the requestor shall notify the custodian within seven business days of the custodian providing the information. Upon receiving such a request for assistance from a requestor, the custodian shall make a reasonable attempt to assist the requestor in finding the record on the website within seven business days of the requestor notifying the custodian.

- If the requestor is still unable to locate the record and requests a physical copy, the custodian shall provide the requestor with a physical copy of the record for a fee not exceeding two times the cost of the production of the document. The custodian shall provide the requestor with the physical copy of the record within seven business days of the request for a physical copy.

Form for requests

f. The custodian of a public agency shall adopt the form established by the Government Records Council pursuant to subsection b. of section 8 of P.L.2001, c.404 (C.47:1A-7), for the use of any person who requests access to a government record held or controlled by the public agency.

- The form shall provide space for the name, address, email address and telephone number of the requestor and a brief description of the government record sought.

Proper request submissions

A request shall be submitted by a requestor in the form adopted by the custodian and the custodian may deny a request that is incomplete, except that a requestor indicating the request is being submitted anonymously shall not be grounds for denial. A completed form adopted by the custodian, a letter, or an email from a requestor including all of the information required on the adopted form shall suffice in place of a completed form as a valid government record request.

- If the letter or email from a requestor includes substantially more information than required on the adopted form and requires more than reasonable effort to clarify the information, the custodian may deny the request.
- If a letter or an email from a requestor does not include all of the information required on the adopted form, the custodian may deny the record request.

Anonymous requests

A request may be submitted anonymously provided, however, that anonymous requestors shall not be permitted to institute proceedings pursuant to section 7 of P.L.2001, c.404 (C.47:1A-6). A request that is submitted anonymously shall not be considered incomplete.

Additional form requirements

The form also shall include space for a requestor to certify whether the government record will be used by that requestor or another person for a commercial purpose, and the requestor shall be required to provide this information for the request to be fulfilled.

The form shall also include the following:

**(1)** specific directions and procedures for requesting a record;

**(2)** a statement as to whether prepayment of fees or a deposit is required;

**(3)** the time period within which the public agency is required by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, to make the record available;

**(4)** a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;

**(5)** space for the custodian to list reasons if a request is denied in whole or in part;

**(6)** space for the requestor to sign and date the form;

**(7)** space for the custodian to sign and date the form if the request is fulfilled or denied.

Deposits

The custodian may require a deposit against costs for reproducing documents sought through a request whenever the custodian anticipates that the information thus requested will cost in excess of $5 to reproduce.

Electronic forms and responses

Custodians who have adopted electronic government record request forms shall provide directions on how to submit requests for government records, including any required forms, on the public agency's website.

Custodians shall be permitted to provide an electronic response to any electronic records request if government records are available electronically.

Requests and Responses

g. A request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian. A public agency may make available to the public on its website an online form, portal, or software for transmitting requests electronically. The form established by the Government Records Council, pursuant to subsection b. of section 8 of P.L.2001, c.404 (C.47:1A-7), may be submitted electronically or by fax.

- Each submission of a government record request form or an email record request shall be made to the custodian of not more than one public agency.

- Submission of repeated requests to multiple custodians in the same public agency for the same record, while an identical or substantially similar request is pending in the agency, shall permit the custodian to deny the request.

A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record.

If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the

form and provide the requestor with a copy thereof.

If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.

Substantial disruption of operations

If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after informing the requestor of the potential disruption to agency operations and attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.

Records sought that are part of a court order/pending discovery request

A party to a legal proceeding may not request a government record if the record sought is the subject of a court order, including a pending discovery request, and a custodian shall not be required to complete such a request. The requestor shall be required to certify whether the government record is being sought in connection with a legal proceeding and identify the proceeding for the request to be fulfilled. For purposes of this provision, a party to a legal proceeding shall include a party subject to a court order, any attorney representing that party, and any person acting as an agent for or on behalf of that party.

Exceptions

Nothing in this paragraph shall bar a request for a government record filed by a labor organization or by a contractor signatory to a collective bargaining agreement seeking information material to the enforcement of State or federal statutes or regulations regarding, but not limited to, wage and hour protections, workplace safety, or public procurement and public bidding, including, but not limited to, requests for certified payrolls or information about all bids submitted in response to a public procurement process subsequent to the deadline for the submission of all bids for that solicitation, when the request by the labor organization or contractor signatory is not sought in connection with or in furtherance of discovery requests in a court proceeding.

Criteria for correspondence requests

A custodian shall not be required to complete a request, including for, but not limited to, mail, email, text messages, correspondence, or social media postings and messages, if the request does not identify a specific job title or accounts to be searched, a specific subject matter, and is not confined to a reasonable time period, or if the custodian determines that the request would require research and the collection of information from the contents of government records and the creation of new government records setting forth that research and information. It shall be sufficient for a requestor to identify specific individuals by the individual's job title and position.

Request received by other officers or employees

h. Any officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record. The request shall not be considered submitted until it is received by the custodian of records.

Time period for responses

i. (1) Unless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, or 14 business days if the request is for a commercial purpose or if the records have to be reviewed by the public agency for the purpose of the agency's compliance with P.L.2021, c.371 (C.47:1B-1 et seq.), but the custodian shall notify the requestor of the additional response time within seven business days, provided that the record is currently available and not in storage or archived. The response time periods of seven or 14 business days, as established in this subsection, shall be an additional seven business days longer if the public agency is a fire district which employs one or fewer full-time employees who serve as custodians. If a commercial requestor would like to receive the record within seven business days, as established in this subsection, the custodian shall provide the requestor with a copy of the record and may charge a special service fee not exceeding two times the cost of the production of the record.

Extensions – reasonable circumstances

In the event a records custodian is unable to fulfill a records request due to unforeseen circumstances or circumstances that otherwise reasonably necessitate additional time to fulfill the records request, the custodian shall be entitled to a reasonable extension of any response deadline and shall notify the requestor of the time extension within seven business days after receiving the request.

"Deemed" denial

In the event a custodian fails to respond within seven business days or 14 business days, as appropriate, after receiving a request, the failure to respond shall be deemed a denial of the request, unless the requestor has elected not to accurately identify themselves or to provide an accurate address, email address, or telephone number. If the requestor has elected not to accurately identify themselves or to provide an accurate address, email address, or telephone number, the custodian shall not be required to respond until the requestor contacts the custodian seeking a response to the original request.

Extensions – Records in storage

If the government record is in storage or archived, the requestor shall be so advised within seven or 14 business days, as appropriate, after the custodian receives the request. The requestor shall be advised by

the custodian when the record can be made available, which shall be no more than 21 business days from the date the requestor is so advised. If the record is not made available by that time, access shall be deemed denied.

Possession through remote access or as a courtesy copy

A public agency shall not be considered to be in possession of a public record that is created, maintained, or received by another public agency and made available to the public agency either by remote access to a computer network or by distribution as a courtesy copy, unless the agency that created, maintained, or received the record resides within the judicial branch of the State Government. A records custodian of a public agency that receives a request for a record created, maintained, or received by another public agency shall not be obligated to provide the record to the requestor. In the event the custodian does not provide the record, the custodian shall direct the requestor within seven business days to the public agency that, to the best of their knowledge, created, maintains, or received the requested record, at which time the request shall be considered completed.

Identical requests

The custodian shall not be required to complete an identical request for access to a government record from the same requestor if the information has not changed. Nothing in this section shall prevent a requestor from filing periodic requests regarding regularly updated public records, including, but not limited to, certified payrolls, permits, and licensing applications.

Retrieval of records by requestors

A requestor shall have 14 business days to retrieve the government records following notice from the custodian that the request has been completed and the records are available.

State of emergency time period for response

(2) During a period declared pursuant to the laws of this State as a state of emergency, public health emergency, or state of local disaster emergency, the deadlines by which to respond to a request for, or grant or deny access to, a government record under paragraph (1) of this subsection or subsection e. of this section shall not apply, provided, however, that the custodian of a government record shall make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or 14 business days, as appropriate, or as soon as possible thereafter.

Notice to be posted

j. A custodian shall include information on the public agency's website and public records request form regarding a requestor's right to appeal a denial of, or failure to provide, access to a government record and the procedure by which an appeal may be filed, which shall include the website address and toll-free information line phone number of the Government Records Council.

Public defender records

k. The files maintained by the Office of the Public Defender that relate to the handling of any case shall be considered confidential and shall not be open to inspection by any person unless authorized by law, court order, or the State Public Defender.

Protective orders

**C.47:1A-5.1 Verified complaint, government records, requestor with intention to interrupt government functioning, protective order**

a. Notwithstanding any other law or rule or regulation to the contrary, whenever there is filed a verified complaint to the Superior Court of the county in which the request for access to government records was made under P.L.1963, c.73 (C.47:1A-1 et seq.) alleging that a requestor has sought records with the intent to substantially interrupt the performance of government function, the court may issue a protective order limiting the number and scope of requests the requestor may make or order such other relief as it deems appropriate, including referral of the matter to mediation or a waiver of the required response time. The court may issue the protective order if it finds by clear and convincing evidence that the requestor has sought records under P.L.1963, c.73 (C.47:1A-1 et seq.) with the intent to substantially interrupt the performance of government function. The complaint shall be accompanied by a declaration of facts by the public agency withholding the records demonstrating that it has complied with P.L.1963, c.73 (C.47:1A-1 et seq.) and has made a good faith effort to reach an informal resolution of the issues relating to the records requests.

The requestor shall have notice and an opportunity to answer the allegations set forth in the petition submitted by the public agency.

The public agency shall have the burden of proof by clear and convincing evidence.

The court's consideration of a public agency's complaint for relief shall proceed in a summary or expedited manner.

b. The order specified in subsection a. of this section may limit, or, in appropriate circumstances, eliminate the public agency's duty to respond to government records requests from the requestor in the future.

Exceptions

c. Requests for government records filed by a labor organization or by a contractor signatory to a collective bargaining agreement seeking information material to the enforcement of State or federal statutes or regulations regarding, but not limited to, wage and hour protections, workplace safety, or public procurement and public bidding, including, but not limited to, requests for certified payrolls or information about all bids submitted in response to a public procurement process subsequent to the

deadline for the submission of all bids for that solicitation, when the request by the labor organization or contractor signatory is not sought in connection to or in furtherance of discovery requests in a court proceeding, shall not be considered to be intended to interrupt government functions, and shall not form the basis for the filing of a complaint under this section.

Indecent and graphic images

**C.47:1A-5.2 Prior written consent, subject, legal next of kin, indecent, graphic photograph, video footage**

Consent

a. A person who has obtained a photograph or video recording pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.), and who is not a subject of the photograph or video footage, shall not disclose any indecent or graphic images of the subject's intimate parts, captured by the photograph or recording, without the prior written consent of the subject of the photograph or video footage or written consent of the legal next of kin if the subject is deceased.

Penalties

b. A person who knowingly violates the provisions of subsection a. of this section shall be guilty of a disorderly persons offense.

Definitions

c. As used in this section:

- "Disclose" means to sell, manufacture, give, provide, lend, mail, deliver, transfer, publish, post, distribute, circulate, disseminate, present, exhibit, advertise, offer, share, or make available through the Internet or by any other means, whether or not for pecuniary gain.
- "Indecent or graphic" means images depicting exposed intimate parts in a manner that would be clearly visible to a reasonable person.
- "Intimate parts" means the following body parts: sexual organs, genital area, anal area, inner thigh, groin, buttock, or breast of a person.
- "Subject of the photograph or video footage" means a person who appears in the photograph or video recording.

Election Records

**C.47:1A-5.3 Applicability**

a. The provisions of this section shall apply only to the New Jersey Division of Elections, the New Jersey Election Law Enforcement Commission, County Boards of Elections, County Superintendents of Elections, County Clerks, Municipal Clerks, Fire District Board Clerks, School District Business Administrators, and School District Board Secretaries, hereafter referred to as an "election agency" or "election agencies." Except as otherwise provided for in this section, all provisions of this act, P.L.2024,

c.16 (C.47:1A-5.1 et al.), shall apply to all election agencies. Nothing herein shall be construed to mean that an election agency is required to provide a record in response to a request for records, unless it has made or received and maintains said requested record pursuant to law or regulation.

Disclosure with no redactions except as permitted

b. Notwithstanding any other law, rule, or regulation to the contrary, except as otherwise provided in sections 2 and 3 of P.L.2021, c.371 (C.47:1B-1 et seq.), subsection b. of section 1 of P.L.1994, c.148 (C.19:31-3.2), or in any rules or regulations promulgated by the Secretary of State pursuant to subsection f. of this section, the following shall be records for which the provided information shall not be redacted by an election agency except for voter signatures, Social Security numbers, driver license numbers, and non-driver identification numbers:

**(1)** Voter registration forms and forms changing the provided information thereof;

**(2)** Party affiliation forms and forms changing the provided information thereof;

**(3)** Applications for a vote-by-mail ballot, except as otherwise provided in sections 3 and 13 of P.L.2020, c.70 (C.19:63-1 et seq.);

**(4)** Forms or reports submitted to the Election Law Enforcement Commission;

**(5)** Nominating petitions for any candidate for any elected office, which shall be provided in a manner that includes voter signatures on such petitions;

**(6)** Petitions to recall an elected official, which shall be provided in a manner that includes voter signatures on such petitions;

**(7)** Petitions or submissions for any public question or referenda to be considered by voters, which shall be provided in a manner that includes voter signatures on such petitions;

**(8)** Any submissions, responses, objections, or challenges pertaining to a record referred to in this subsection; and

**(9)** Any addendums, amendments, corrections, withdrawals, or accompanying forms or submissions pertaining to a record referred to in this subsection.

2-day response time frame, with

c. Notwithstanding any other law, rule, or regulation to the contrary, the following shall be records and information that an election agency shall

exceptions

make available to requestors for immediate access and transmission via email as soon as possible, but not later than two business days after receipt of the request, provided the request is not for a commercial purpose, for which a fee shall not be charged nor collected:

**(1)** Nominating petitions for any candidate for any elected office filed with the election agency within the preceding 90 days of the date the request is received;

**(2)** Petitions to recall an elected official filed with the election agency within the preceding 90 days of the date the request is received;

**(3)** Petitions or submissions for any public question or referenda to be considered by voters filed with the election agency within the preceding 90 days of the date the request is received;

**(4)** Any submissions, responses, objections, or challenges filed with the election agency within the preceding 90 days pertaining to a record referred to in this subsection;

**(5)** Any addendums, amendments, corrections, withdrawals, or accompanying forms or submissions filed with the election agency within the preceding 90 days pertaining to a record referred to in this subsection; and

**(6)** The inspection and transmission deadline requirements of this subsection shall be deemed satisfied if an election agency posts on its website the records and information referred to in this subsection.

Immediate response time frame within 16 days of an election

d. Notwithstanding any other law, rule, or regulation to the contrary, the following in paragraphs (1) through (4) of this subsection shall be records and information that an election agency shall make available to requestors for immediate access and transmission via email as soon as possible, provided the request pertains only to an election to be held within 16 days after the date of the request and is not for a commercial purpose. The transmission shall be not later than two business days after receipt of the request when said request is made between one and 15 days before the date of the election pertaining to the request. For any request submitted the day before an election by noon, the request shall be completed by noon the day of the election. A fee shall not be charged nor collected. This subsection shall apply to:

**(1)** Lists, in a format capable of being sorted by the requestor, of registered voters, including their name, address, party affiliation, and municipal voting ward and district, who have requested, been mailed, or returned a vote-by-mail ballot, including the dates the ballot was

requested by the voter, mailed to the voter, and received by the appropriate election agency;

**(2)** Lists, in a format capable of being sorted by the requestor, of registered voters, including their name, address, party affiliation, and municipal voting ward and district, who have cast a vote during the early voting period, including the date and polling location the vote was cast;

**(3)** The inspection and transmission deadline requirements of this subsection shall be deemed satisfied if an election agency posts on its website the records and information referred to in this subsection; and

**(4)** Whenever the requirements of this subsection would cause a voter's privacy to be violated, the information shall be provided in a manner that maintains the privacy of the voter.

Exemptions

e. The following records or information shall not be subject to disclosure pursuant to a request for public records:

**(1)** Ballots marked by a voter, vote tabulations, or election results for any election prior to the time of the closing of the polls on the date of the election, except as otherwise provided for by law, rule, or regulation; and

**(2)** Manuals instructions, specifications, technical information, or programming code of computers, software, applications, networks, tablets, voting machines, printers, scanners, and any other equipment, systems, policies or plans used for the conduct of elections, the disclosure of which, could have the potential to jeopardize the security, integrity or accuracy of the conduct of elections, tabulation of votes, or determination of election results, except as otherwise provided for by law, rule, or regulation, or in response to a subpoena or order of a court or tribunal of competent jurisdiction.

Rulemaking

f. The Secretary of State may adopt regulations necessary to effectuate the purposes of this act, which regulations shall be effective immediately upon filing with the Office of Administrative Law for a period not to exceed 18 months, and may, thereafter, be amended, adopted or readopted in accordance with the provisions of the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.).

Challenges to access denial

**C.47:1A-6 Proceeding to challenge denial of access to record.**

Statute of limitation

A person who is denied access to a government record by the custodian of

the record, at the option of the requestor who is accurately identified by name, may, within 45 days of the date of denial:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court which shall be heard in the vicinage where it is filed by a Superior Court Judge who has been designated to hear such cases because of that judge's knowledge and expertise in matters relating to access to government records; or

- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to section 8 of P.L. 2001, c. 404 (C. 47:1A-7).

The right to institute any proceeding under this section shall be solely that of the requestor. Any such proceeding shall proceed in a summary or expedited manner. The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been improperly denied, the court or Government Records Council shall order that access be allowed.

Prevailing party fees

A requestor who prevails in any proceeding may be entitled to a reasonable attorney's fee. While the court or Government Records Council may award a reasonable attorney's fee to a prevailing party in any proceeding, if the public agency has been determined to have unreasonably denied access, acted in bad faith, or knowingly and willfully violated P.L.1963, c.73 (C.47:1A-1 et seq.), then the court or Government Records Council shall award a reasonable attorney's fee.

Dismissal without prejudice on disclosure

If the records sought are produced by the public agency within seven business days of service of an action in Superior Court or a complaint before the Government Records Council, upon notification to the Superior Court or the Government Records Council, the matter shall be dismissed without prejudice and the requestor may be entitled to a reasonable attorney's fee if the custodian knew or should have known that the denial of access violated P.L.1963, c.73 (C.47:1A-1 et seq.).

Government Records Council (GRC)

**C.47:1A-7 Government Records Council.**

Council membership

a. (1) There is established in the Department of Community Affairs a Government Records Council. The council shall consist of the Commissioner of Community Affairs or the commissioner's designee, who shall serve as Chair, and eight public members appointed as follows: four appointed by the Governor with the advice and consent of the Senate, no more than two of whom shall be members of the

same political party; two directly appointed by the Governor from persons recommended by the President of the Senate, no more than one of whom shall be a member of the same political party; and two directly appointed by the Governor from persons recommended by the Speaker of the General Assembly, no more than one of whom shall be a member of the same political party. Each public member shall serve for a term of five years and until a successor is appointed and qualified.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, or any other law, rule, or regulation to the contrary, within 90 days following the enactment date of P.L.2024, c.16 (C.47:1A-5.1 et al.), the Governor shall directly appoint eight public members to the council, each of whom shall serve for a term of three years and until a successor is appointed and qualified, as follows: two from persons recommended by the President of the Senate, no more than one of whom shall be a member of the same political party; two from persons recommended by the Speaker of the General Assembly, no more than one of whom shall be a member of the same political party; and four appointed at the sole discretion of the Governor, no more than two of whom shall be members of the same political party. The terms of office of the members of the council serving on the date of enactment of P.L.2024, c.16 (C.47:1A-5.1 et al.), shall expire upon the Governor's direct appointment of the new members pursuant to this subsection.

(3) A public member shall not hold any other State or local elected office while serving as a member of the council. A public member shall receive a salary equivalent to that provided by law for a public member of the Local Finance Board of the Division of Local Government Services in the Department of Community Affairs. A member may be removed by the Governor for cause. Vacancies among the public members shall be filled by appointment by the Governor, according to the provisions of subsection a. of this section, and for the remainder of the unexpired term.

The council may employ an executive director and such professional and clerical staff as it deems necessary and may call upon the Department of Community Affairs for such assistance as it deems necessary and may be available to it.

Duties of GRC

b. The Government Records Council shall:

- establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;

- receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;

- issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;

- prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;

- prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;

- prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;

- make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records;

- promulgate rules and regulations to establish a uniform government record request form for all government record requests permitted for use by any public agency that includes the required form components as set forth in subsection f. of section 6 of P.L.2001, c.404 (C.47:1A-5). The form shall include certification that a party to a legal proceeding may not request a government record if the record sought is the subject of a court order or a pending discovery request. The council shall make the form available electronically and in print and shall make the form available to incarcerated individuals; and

- operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the council when access has been denied;

In implementing the provisions of this section, the council shall: act, to the maximum extent possible, at the convenience of the parties; utilize video conferencing, teleconferencing, faxing of documents, e-mail and similar forms of modern communication; conduct virtual meetings and hearings when practical and at the discretion of the council; and when in-person

meetings are necessary, send representatives to meet with the parties at a location convenient to the parties.

The council shall periodically review the information and format of its website and make such adjustments as shall be deemed necessary to ensure that the information is clearly presented, accessible, and useful for the general public. The council shall conduct such an initial review within six months following the effective date of P.L.2024, c.16 (C.47:1A-5.1 et al.).

GRC hearings

c. At the request of the council, a public agency shall produce documents and ensure the attendance of witnesses with respect to the council's investigation of any complaint or the holding of any hearing.

Use of mediation

d. Upon receipt of a written complaint signed by any person alleging that a custodian of a government record has improperly denied that person access to a government record, the council shall offer the parties the opportunity to resolve the dispute through mediation.

Mediation shall enable a person who has been denied access to a government record and the public agency that employs the records custodian who denied or failed to provide access thereto to attempt to mediate the dispute through a process whereby a neutral mediator, who shall be trained in mediation selected by the council, acts to encourage and facilitate the resolution of the dispute.

Mediation shall be an informal, nonadversarial process having the objective of helping the parties reach a mutually acceptable, voluntary agreement. The mediator shall assist the parties in identifying issues, foster joint problem solving, and explore settlement alternatives.

Formal investigation

e. If any party declines mediation or if mediation fails to resolve the matter to the satisfaction of all parties, the council shall initiate an investigation concerning the facts and circumstances set forth in the complaint. The council shall make a determination as to whether the complaint is within its jurisdiction or frivolous or without any reasonable factual basis. The council may assign staff attorneys to conduct the investigation, present findings, and make recommendations to the council.

If the council shall conclude that the complaint is outside its jurisdiction, frivolous, or without factual basis, it shall reduce that conclusion to writing and transmit a copy thereof to the complainant and to the public agency that employs the records custodian against whom the complaint was filed. Otherwise, the council shall notify the public agency that employs the records custodian against whom the complaint was filed of the nature of the complaint and the facts and circumstances set forth therein.

The public agency that employs the records custodian shall have the opportunity to present the board with any statement or information concerning the complaint which the agency wishes. If the council is able to make a determination as to a record's accessibility based upon the complaint and the agency's response thereto, it shall reduce that conclusion to writing and transmit a copy thereof to the complainant and to the public agency that employs the records custodian against whom the complaint was filed.

If the council is unable to make a determination as to a record's accessibility based upon the complaint and the agency's response thereto, the council shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a State agency in contested cases under the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), insofar as they may be applicable and practicable.

Council decisions

The council shall, by a majority vote of its members, render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented. If the council determines, by a majority vote of its members, that a custodian is found to have knowingly and willfully violated P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, and to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in section 12 of P.L.2001, c.404 (C.47:1A-11) on the public agency that employs the custodian.

Appeal of council decisions

A decision of the council may be appealed to the Appellate Division of the Superior Court. Such appeals shall be filed within 45 days from the date the council renders a decision. A decision of the council shall not have value as a precedent for any case initiated in Superior Court pursuant to section 7 of P.L.2001, c.404 (C.47:1A-6). All proceedings of the council pursuant to this subsection shall be conducted as expeditiously as possible.

Adjudication time frames

Beginning 18 months following the effective date of P.L.2024, c.16 (C.47:1A-5.1 et al.), the council shall adjudicate all complaints that come before it within 90 days of the complaint's filing, with the ability to extend for 45 days for good cause, exclusive of any time period during which the parties are engaged in a mediation process pursuant to this section. The council shall make such organizational adjustments and modify its procedures as it deems necessary to ensure that complaints are adjudicated in such a timeframe.

f. The council shall not charge any party a fee in regard to actions filed with

the council. The council shall be subject to the provisions of the "Open Public Meetings Act," P.L.1975, c.231 (C.10:4-6), except that the council may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed. A requestor who prevails in any proceeding may be entitled to a reasonable attorney's fee as provided for in section 7 of P.L.2001, c.404 (C.47:1A-6).

g. The council shall not have jurisdiction over the Judicial or Legislative Branches of State Government or any agency, officer, or employee of those branches.

Court reporting

h. The Superior Court shall provide the Government Records Council a list of all actions which have been brought before the courts filed pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.), commonly known as the open public records act, which have been settled by the parties thereto. Such a list shall provide the docket number and names of the parties to the action. The council shall compile a database comprised of the data provided by the Superior Court.

The Administrative Office of the Courts, on behalf of the Superior Court of New Jersey, shall provide the Government Records Council a report at the end of each court year of all cases filed pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.). The report shall be grouped by defendant and county filed in and shall include a comprehensive list of all cases filed with a summary judgment regarding P.L.1963, c.73 (C.47:1A-1 et seq.), Statewide, itemized by the following factors:

**(1)** Case caption;

**(2)** County of venue;

**(3)** Docket number;

**(4)** Counsel of records;

**(5)** Case disposition; and

**(6)** Attorney's fees requested and awarded.

Complaint Dismissal

**C.47:1A-7.1 Complaints, appeals, Government Records Council, Superior Court, anonymous, fictitious identity, dismissal with prejudice**

a. All complaints and appeals pending before the Government Records Council or the Superior Court filed prior to the effective date of P.L.2024, c.16 (C.47:1A-5.1 et al.), either anonymously or using a fictitious name or identity, may be dismissed with prejudice upon a motion by the public

agency, unless the complainant files an amendment to their complaint that accurately identifies their name and mailing address within 90 days of the effective date of P.L.2024, c.16 (C.47:1A-5.1 et al.).

b. The parties to any complaint or appeal pending before the Government Records Council, the Superior Court or the Supreme Court of New Jersey filed prior to the effective date of P.L.2024, c.16 (C.47:1A-5.1 et al.), shall be permitted to file an amendment to their respective complaints and answers within 90 days of the effective date of P.L.2024, c.16 (C.47:1A-5.1 et al.).

Continuation of common law

**C.47:1A-8 Construction of act.**

Nothing contained in P.L. 1963, c. 73 (C. 47:1A-1 et seq.), as amended and supplemented, shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency.

Continuation of existing exemptions

**C.47:1A-9 Other laws, regulations, privileges unaffected.**

a. The provisions of this act, P.L. 2001, c. 404 (C. 47:1A-5 et al.), shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L. 1963, c. 73 (C. 47:1A-1 et seq.); any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

b. The provisions of this act, P.L. 2001, c. 404 (C. 47:1A-5 et al.), shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.

Access to personnel and pension records

**C.47:1A-10 Personnel, pension records not considered public information; exceptions.**

Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.) or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

- an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;

- personnel or pension records of any individual shall be accessible 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 United States, or when authorized by an individual in interest; and

- data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

Violations

**C.47:1A-11 Violations, penalties, disciplinary proceeding.**

a. If a public official, officer, employee, or custodian is found to have knowingly and willfully violated P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, and to have unreasonably denied access under the totality of the circumstances, the public agency that employs the custodian, officer, employee, or official shall be subject to a civil penalty of $1,000 for an initial violation, $2,500 for a second violation that occurs within 10 years of an initial violation, and $5,000 for a third violation that occurs within 10 years of an initial violation. The penalties authorized pursuant to this subsection may be imposed by the courts or by the Government Records Council.

b. A requestor who is found to have intentionally failed to certify that a records request is for a commercial purpose shall be subject to a civil penalty of $1,000 for the first offense, $2,500 for the second offense, and $5,000 for each subsequent offense. The penalties may be imposed by the courts.

c. These penalties shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.), and the rules of court governing actions for the collection of civil penalties. The Superior Court shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by this section.

d. Appropriate disciplinary proceedings may be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed.

Court Rules

**C.47:1A-12 Court rules.**

The New Jersey Supreme Court may adopt such court rules as it deems necessary to effectuate the purposes of this act.

Budget

**C.47:1A-13 Annual budget request for the council.**

The Commissioner of Community Affairs shall include in the annual budget request of the Department of Community Affairs a request for sufficient funds to effectuate the purposes of section 8 of P.L. 2001, c. 404 (C. 47:1A-7).

**11. Appropriation.**

a. There is hereby appropriated $4,000,000 from the State General Fund to the Department of Community Affairs to provide grants to political subdivisions of the State for the purpose of making government records that are accessible under P.L.1963, c.73 (C.47:1A-1 et seq.) available electronically, including through the use of shared services agreements.

b. There is hereby appropriated $4,000,000 from the State General Fund to the Department of Community Affairs for the Government Records Council.

c. There is hereby appropriated $2,000,000 from the State General Fund to the Department of Community Affairs for the Government Records Council to effectuate the purposes of section 8 of P.L.2001, c.404 (C.47:1A-7) as amended by section 4 of P.L.2024, c.16 (C.47:1A-7).

**12. Effective Date.**

This act shall take effect 90 days following the date of enactment.

Approved June 5, 2024 (P.L. 2024, c.16).

Government Records Council

# OPRA EXEMPTIONS

**(Exceptions are noted in italics)**

## N.J.S.A. 47:1A-1 (Legislative Findings)

1) Privacy Interest - "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." See Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009).

## N.J.S.A. 47:1A-1.1

2) Inter-agency or intra-agency advisory, consultative or deliberative material

**Note**: refers generally to draft documents or documents used in a deliberative process.

3) Legislative records:

a. information received by a member of the Legislature from a constituent or information held by a member of the Legislature concerning a constituent, including but not limited to information in written form or contained in any e-mail or computer data base, or in any telephone record whatsoever, *unless it is information the constituent is required by law to transmit*;
b. any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member's official duties, *except that this provision shall not apply to an otherwise publicly-accessible report which is required by law to be submitted to the Legislature or its members*.

4) any copy, reproduction or facsimile of any photograph, negative or print, including instant photographs and videotapes of the body, or any portion of the body, of a deceased person, taken by or for the medical examiner at the scene of death or in the course of a post mortem examination or autopsy made by or caused to be made by the medical examiner, *except:*

a. *for use by a legal next of kin, a legal representative, or an attending physician of the deceased person,*
b. *for the use as a court of this State permits, or for use by any law enforcement agency in this State or any other state or federal law enforcement agency.*

5) Criminal investigatory records - records which 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.

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

The portion of any criminal record concerning a person's detection, apprehension, arrest, detention, trial or disposition for unlawful manufacturing, distributing, or dispensing, or possessing or having under control with intent to manufacture, distribute, or dispense, marijuana or hashish in violation of paragraph (11) of subsection b. of N.J.S.A. 2C:35-5, or a lesser amount of marijuana or hashish in violation of paragraph (12) of subsection b. of that section, or a violation of either of those paragraphs and a violation of subsection a. of section 1 of N.J.S.A. 2C:35-7 or subsection a. of section 1 of N.J.S.A. 2C:35-7.1 for distributing, dispensing, or possessing, or having under control with intent to distribute or dispense, on or within 1,000 feet of any school property, or on or within 500 feet of the real property comprising a public housing facility, public park, or public building, or for obtaining, possessing, using, being under the influence of, or failing to make lawful disposition of marijuana or hashish in violation of paragraph (3) or (4) of subsection a., or subsection b., or subsection c. of N.J.S.A. 2C:35-10, or for a violation of any of those provisions and a violation of N.J.S.A. 2C:36-2 for using or possessing with intent to use drug paraphernalia with that marijuana or hashish;

6) Victims' records

a. victims' records, *except that a victim of a crime shall have access to the victim's own records*

**Note**: the definition of a "victim's record" is an individually identifiable file or document held by a victims' rights agency which pertains directly to a victim of a crime except that a victim of a crime shall have access to the victim's own records. "Victims' rights agency" means a public agency, or part thereof, the primary responsibility of which is providing services, including but not limited to food, shelter, or clothing, medical, psychiatric, psychological or legal services or referrals, information and referral services, counseling and support services, or financial services to victims of crimes, including victims of sexual assault, domestic violence, violent crime, child endangerment, child abuse or child neglect, and the Victims of Crime Compensation Board.

However, victims may seek and obtain records regarding their victimization regardless of whether same are held by a "victim's rights agency".

b. any written OPRA request by a crime victim for a record to which the victim is entitled to access, including, but not limited to, any law enforcement agency report, domestic violence offense report, and temporary or permanent restraining order;

7) Personal firearms records, e*xcept*

a. *For use by any person authorized by law to have access to these records or for use by any government agency, including any court or law enforcement agency, for purposes of the administration of justice;*

Personal identifying information received by the Division of Fish and Wildlife in the Department of Environmental Protection in connection with the issuance of any license authorizing hunting with a firearm

8) Trade secrets and proprietary commercial or financial information obtained from any source. Includes data processing software obtained by a public agency under a licensing agreement which prohibits its disclosure.

9) Any record within the attorney-client privilege. *This paragraph does not allow for a denial of attorney invoices in their totality*; however, redactions may apply for information contained in the invoices that are protected under the privilege.

10) Administrative or technical information regarding computer hardware, tablets, telephones, electronic computing devices, software applications, and networks or devices which operate on or as a part of a computer network or related technologies within the same, which shall include system logs, event logs, transaction logs, tracing logs, or any logs which are reasonably construed to be similar to the same and generated by the devices or servers covered within this paragraph, which, if disclosed, could jeopardize computer security, or related technologies.

11) Emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein.

12) Security measures and surveillance techniques which, if disclosed, would create a risk to the safety or persons, property, electronic data or software.

13) Security alarm system activity and access reports, including video footage, for any public building, facility, or grounds *unless the request identifies a specific incident that occurred, or a specific date and limited time period at a particular public building, facility, or grounds*, *and is deemed not to compromise the integrity of the security system by revealing capabilities and vulnerabilities of the system*.

14) Information which, if disclosed, would give an advantage to competitors or bidders, including detailed or itemized cost estimates prior to bid opening.

15) Information generated by or on behalf of public employers or public employees in connection with:

    a. Any sexual harassment complaint filed with a public employer;
    b. Any grievance filed by or against an individual; or
    c. Collective negotiations, including documents and statements of strategy or negotiating position.

16) Information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office.

17) Information which is to be kept confidential pursuant to court order.

18) Certificate of honorable discharge issued by the United States government (Form DD-214, NBG-22, or other form) filed with a public agency, *except that a veteran or the veteran's spouse or surviving spouse shall have access to the veteran's own records*.

19) Any copy of an oath of allegiance, oath of office, or any affirmation for incoming, current, and former officers and employees in State, County, or municipal government, and including members all members of the Legislative, Executive, and Judicial branches of government, *except that full name, title, and oath date are not confidential*.

20) Personal identifying information. Specifically:

a. Social security numbers, *except that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by State or federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor*.
b. In accordance with section 2 of N.J.S.A. 47:1B-2, commonly known as "Daniel's Law", that portion of any document which discloses the home address, whether a primary or secondary residence, of any active, formerly active, or retired judicial officer, law enforcement officer, child protective investigator in the Division of Child Protection and Permanency, or prosecutor, or, as defined in section 1 of N.J.S.A. 47:1B-1, any immediate family member thereof.
c. Credit card numbers.
d. Debit card numbers.
e. Bank account information.
f. Month and day of birth.
g. Personal e-mail address required by a public agency for government applications, services, or programs.
h. Telephone numbers.
i. Drivers' license numbers.

*Except for:*

- *use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf thereof,*
- *any private person or entity seeking to enforce payment of court-ordered child support;*

- *with respect to the disclosure of driver information by the New Jersey Motor Vehicle Commission as permitted by section 2 of P.L. 1997, c. 188 (C. 39:2-3.4);*
- *with respect to the disclosure of information included in records and documents maintained by the Department of the Treasury in connection with the State's business registry programs;*

21) That portion of any document that discloses the personal identifying information of any person provided to a public agency for the sole purpose of receiving official notifications.

22) List of persons in need of special assistant during an emergency maintained at either the municipal or county level in accordance with section 1 of P.L.2017, c.266 (C.40:48-2.67) or section 6 of P.L.2011, c.178 (C.App.A:9-43.13).

23) Juvenile information - that portion of any document that requires and would disclose personal identifying information of persons under the age of 18 years, *except*:

a. *with respect to the disclosure of driver information by the New Jersey Motor Vehicle Commission as permitted by section 2 of P.L.1997, c.188 (C.39:2-3.4) or the disclosure of driver information to any insurer or insurance support organization, or a self-insured entity, or its agents, employees, or contractors, for use in connection with claims investigation activities, antifraud activities, rating, or underwriting, and*
b. *with respect to the disclosure of voter information on voter and election records pursuant to section 8 of P.L.2024, c.16 (C.47:1A-5.3);*

24) Personal identifying information disclosed on domestic animal permits, licenses, and registration.

25) Metadata - structured reference data that helps to sort and identify attributes of the information it describes, referred to as metadata, or any extrapolation or compilation thereof, which shall include the SMTP header properties of emails, except that portion that identifies authorship, identity of editor, and time of change.

26) New Jersey State Firemen's Association financial relief applications.

27) Owner and maintenance manuals.

28) HIPAA data - data classified under the "Health Insurance Portability and Accountability Act of 1996," Pub.L.104-191.

29) Any indecent or graphic images of a person's intimate parts, as defined in section 10 of P.L.2024, c.16 (C.47:1A-5.2), that are captured in a photograph or video recording without the prior written consent of the subject of the photograph or video footage, as defined in section 10 of P.L.2024, c.16 (C.47:1A-5.2).

30) Certain records of higher education institutions:

a. Pedagogical, scholarly and/or academic research records and/or the specific details of any research project, *except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available*.
b. Test questions, scoring keys and other examination data pertaining to the administration of an examination for employment or academic examination.
c. Records of pursuit of charitable contributions or records containing the identity of a donor of a gift if the donor requires non-disclosure of the donor's identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization or dedication.
d. Valuable or rare collections of books and/or documents obtained by gift, grant, bequest or devise conditioned upon limited public access.
e. Information contained on individual admission applications.
f. Information concerning student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student.

## **N.J.S.A. 47:1A-1.2**

31) Biotechnology trade secrets.

## **N.J.S.A. 47:1A-2.2**

32) Limitations to convicts - personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information. *Information may be released only if the information is necessary to assist in the defense of the requestor. A determination that the information is necessary to assist in the requestor's defense shall be made by the court upon motion by the requestor or his representative*.

## **N.J.S.A. 47:1A-3(a)**

33) Ongoing investigations – any records pertaining to an investigation in progress by any public agency if disclosure of such record or records shall be detrimental to the public interest. *This provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced*.

## N.J.S.A. 47:1A-5(k)

34) Public defender records that relate to the handling of any case, *unless authorized by law, court order, or the State Public Defender*.

## N.J.S.A. 47:1A-5.3

35) Certain election records exempt from disclosure:
   a. Ballots marked by a voter, vote tabulations, or election results for any election prior to the time of the closing of the polls on the date of the election, *except as otherwise provided for by law, rule, or regulation*; and
   b. Manuals instructions, specifications, technical information, or programming code of computers, software, applications, networks, tablets, voting machines, printers, scanners, and any other equipment, systems, policies or plans used for the conduct of elections, the disclosure of which, could have the potential to jeopardize the security, integrity or accuracy of the conduct of elections, tabulation of votes, or determination of election results, *except as otherwise provided for by law, rule, or regulation, or in response to a subpoena or order of a court or tribunal of competent jurisdiction*.

## N.J.S.A. 47:1A-9(a)-(b)

36) Upholds exemptions contained in other State or federal statutes and regulations, Executive Orders of the Governor, Rules of Court, Constitution of this State, or judicial case law.

## N.J.S.A. 47:1A-10

37) Personnel and pension records, *except specific information identified as follows*:

   a. *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 any pension received,*
   b. *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 United States, or when authorized by an individual in interest.*
   c. *Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information*.

In accordance with OPRA's "catch-all" exemption at N.J.S.A. 47:1A-9, the following executive orders also apply as exemptions under OPRA:

## Executive Order No. 21 (McGreevey 2002)

1) Records where inspection, examination or copying would substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism.

2) Records exempted from disclosure by State agencies' promulgated rules are exempt from disclosure by this Order.

3) Executive Orders No. 9 (Hughes), 11 (Byrne), 79 (Byrne) and 69 (Whitman) are hereby continued to the extent that they are not inconsistent with this Executive Order.

   Executive Order No. 9 (Hughes) exemptions that are still active:

   a. Questions on examinations required to be conducted by any State or local governmental agency;
   b. Personnel and pension records (same as N.J.S.A. 47:1A-10);
   c. Records concerning morbidity, mortality and reportable diseases of named persons required to be made, maintained or kept by any State or local governmental agency;
   d. Records which are required to be made, maintained or kept by any State or local governmental agency which would disclose information concerning illegitimacy;
   e. Fingerprint cards, plates and photographs and other similar criminal investigation records which are required to be made, maintained or kept by any State or local governmental agency;
   f. Criminal records required to be made, maintained and kept pursuant to the provisions of R. S. 53:1-20.1 and R. S. 53:1- 20.2;
   g. Personal property tax returns required to be filed under the provisions of Chapter 4 of Title 54 of the Revised Statutes; and
   h. Records relating to petitions for executive clemency.

   Executive Order No. 11 (Byrne) exemptions are the same as N.J.S.A. 47:1A-10.

   Executive Order No. 79 (Byrne) exemptions are the similar to # 8, 9, 10 above under N.J.S.A. 47:1A-1.1.

   Executive Order No. 69 (Whitman) exemptions that are still active: Fingerprint cards, plates and photographs and similar criminal investigation records that are required to be made, maintained or kept by any State or local governmental agency.

## Executive Order No. 26 (McGreevey 2002)

1) Certain records maintained by the Office of the Governor:

    a. Any record made, maintained, kept on file or received by the Office of the Governor in the course of its official business which is subject to an executive privilege or grant of confidentiality established or recognized by the Constitution of this State, statute, court rules or judicial case law.
    b. All portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege.
    c. All portions of records containing information provided by an identifiable natural person outside the Office of the Governor which contains information that the sender is not required by law to transmit and which would constitute a clearly unwarranted invasion of personal privacy if disclosed.
    d. If any of the foregoing records shall contain information not exempted by the provision of the Open Public Records Act or the preceding subparagraphs (a), (b) or (c) hereof then, in such event, that portion of the record so exempt shall be deleted or excised and access to the remainder of the record shall be promptly permitted.

2) Resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. *The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure*.

3) Records of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments.

4) Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.

5) Information in a personal income or other tax return

6) Information describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed.

7) Test questions, scoring keys and other examination data pertaining to the administration of an examination for public employment or licensing.

8) Records in the possession of another department (including NJ Office of Information Technology or State Archives) when those records are made confidential by a regulation of that department or agency adopted pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963), or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure.

9) Records of a department or agency held by the Office of Information Technology (OIT) or the State Records Storage Center of the Division of Archives and Records Management (DARM) in the Department of State, or an offsite storage facility outside of the regular business office of the agency. Such records shall remain the legal property of the department or agency and be accessible for inspection or copying only through a request to the proper custodian of the department or agency. In the event that records of a department or agency have been or shall be transferred to and accessioned by the State Archives in the Division of Archives and Records Management, all such records shall become the legal property of the State Archives, and requests for access to them shall be submitted directly to the State Archives.

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL



# Executive Orders' Exemptions From Disclosure

The following records are considered to be **non-disclosable** to the public pursuant to the source Executive Order.

## Non-Disclosable Records

| Document | Descriptions and Conditions | Source |
|---|---|---|
| **Public records excluded by Executive Order** | Records excluded by Executive Order of the Governor or by any regulation promulgated under the authority of any Executive Order of the Governor | EO 9 |
| **Regulations** | Regulations adopted and promulgated by state and local government officials excluding certain records | EO 9 (Section 2) |
| | Rules proposed by state agencies on July 1, 2002 and modified by EO #26 containing proposed exceptions to disclosure under OPRA are exempted until formal adoption action is taken. | EO 21 (Section 4), EO 26 at www.nj.gov/opra |
| **Personnel and pension records** | Except as otherwise provided by law or when essential to the performance of official duties or when authorized by a person in interest, an instrumentality of government shall not disclose to anyone other than a person duly authority by this State or the United States to inspect in connection with his official duties, personnel and pension records of an individual. (See Disclosure section) | EO 11 (Section 2) |
| **Job applicant information** | • Disclosure of resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing.<br>• The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure. | EO 26 (Section 3) |
| **Governor's Office documents** | • Any record made, maintained, kept on file or received by the Office of the Governor in the course of its official business which is subject to an executive privilege or grant of confidentiality established or recognized by the Constitution of this State, statute, court rules or judicial case law.<br>• All portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege.<br>• All portions of records containing information provided by an identifiable natural person outside the Office of the Governor which contains information that the sender is not required by law to transmit and which would constitute a clearly unwarranted invasion of personal privacy if disclosed.<br>• If any of the foregoing records shall contain information not exempted by the provision of the Open Public Records Act or the preceding subparagraphs (a), (b) or (c) | EO 26 (Section 2) |

| | | |
|---|---|---|
| | hereof then, in such event, that portion of the record so exempt shall be deleted or excised and access to the remainder of the record shall be promptly permitted. | |
| **Morbidity, mortality and reportable diseases of named persons records** | Records of this kind that are required to be made, maintained or kept by any State or local governmental agency | EO 9 (Section 3(c)) |
| **Illegitimacy records** | Records of this kind that are required to be made, maintained or kept by any State or local governmental agency which would disclose information concerning illegitimacy | EO 9 (Section 3(d)) |
| **Fingerprint cards, plates and photographs and other similar criminal investigation records** | Records of this kind which are required to be made, maintained or kept by any State or local governmental agency | EO 9 (Section 3(e)) |
| **Criminal records** | Records of this kind that are required to be made, maintained and kept pursuant to the provisions of R.S. 53:1-20.1 and R.S. 53:1-20.2 | EO 9 (Section 3(f)) |
| **Personal property tax returns** | Records of this kind that are required to be filed under the provisions of Chapter 4 of Title 54 of the Revised Statute | EO 9 (Section 3(g)) |
| **Records relating to petitions for executive clemency** | | EO 9 (Section 3(h)) |
| **Certain procurement documents of any State department or agency** | • Records of this kind concerning surveillance equipment and investigatory services, when disclosure of the equipment type and the subject matter of the services could make known to the target of an investigation the fact that an investigation is in progress.<br>• Records concerning installation of intrusion and detection alarm systems, when disclosure could facilitate illegal entry.<br>• Records concerning studies of computer system security including final reports when disclosure could facilitate fraudulent use of the information | EO 79 (Section 1)<br>EO 79 (Section 2)<br>EO 79 (Section 3) |
| **Domestic security** | Government records where accessibility would substantially interfere with the state's ability to protect and defend the state and its citizens against acts of sabotage or terrorism, or which, if disclosed would materially increase the risk or consequence of potential acts of sabotage or terrorism. | EO 21 (Section 1(a)) |
| **Complaints and investigations of discrimination, harassment or hostile environments** | Confidential records of complaints and investigations of discrimination, harassment or hostile environments in accordance with the State Policy, regardless of whether they are open, closed or inactive | EO 26 (Section 4(a)) |
| **Information concerning individuals** | • Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation;<br>• Information in a personal income or other tax return<br>• Information describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed. | EO 26 (Section 4(b)) |
| **Test questions, scoring keys and other examination data** | Test questions, scoring keys and other examination data pertaining to the administration of an examination for public employment or licensing. | EO 26 (Section 4(c)) |
| **Records of one agency held by other agencies** | Kept confidential if appropriately designated by the initial agency | EO 26 (Section 4(d)) |

# Frequently Asked Questions



## 1. What is the Open Public Records Act?

OPRA is a New Jersey statute that governs the public's access to government records in New Jersey. The law is compiled in the statutes as N.J.S.A. 47:1A-1 et seq. For a readable version of the statute, click here.

Specifically, OPRA is intended to:

- Expand the public's right of access to government records;
- Create an administrative appeals process if access is denied; and
- Define what records are and are not "government records."

▲ Top

## 2. When is OPRA Used?

OPRA is used when the requestor wants to gain access to government records and wants to invoke the OPRA statute, which provides a statutory right of access to government records and holds a records custodian to a response deadline.

What does this mean? The requestor must choose to submit an OPRA request. Custodians do not decide when a requestor must use OPRA and cannot force requestors to submit an OPRA request.

Top

3. **Are there other ways a requestor can access records besides OPRA?**

Yes. OPRA does not affect a requestor's common law right of access, or right of access via discovery.

If a requestor seeks government records under the common law, please consider the following:

A public record under the common law is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it.

If the information requested is a "public record" under common law and the requestor has a legally recognized interest in the subject matter contained in the material, then the material must be disclosed if the individual's right of access outweighs the State's interest in preventing disclosure.

***Note that any challenge to a denial of a request for records under the common law CANNOT be made to the Government Records Council, as the Government Records Council only has statutory authority to adjudicate challenges to denials of OPRA requests.***

A challenge to the denial of access under the common law can be made by filing an action in Superior Court. Additionally, the GRC cannot provide any guidance on how to respond to a request under the common law.

Discovery requests may also be served upon a public agency for access to government records pursuant to *N.J. Court Rules, 1969 R. 3:13-3* (2005) and *N.J. Court Rules, 1969 R. 7:7-7* (2005). Please note that requests for discovery do not affect a requestor's right to request the same records under OPRA.

***Note that any challenge to a denial of a request for records pursuant to a discovery request CANNOT be made to the Government Records Council, as the Government Records Council only has jurisdiction to adjudicate challenges to denials of OPRA requests***.

A challenge to the denial of access pursuant to a discovery request can be made by filing an action in Superior Court.

***Additionally, the GRC CANNOT provide any guidance on how to respond to a request through discovery.***

Top

4. **Who may file an OPRA request?**

Anyone! Although OPRA specifically references "citizens of this State," (N.J.S.A. 47:1A-1) the Attorney General's Office advises that OPRA does not prohibit access to residents of other states. Also, requestors may file OPRA requests anonymously without providing any personal contact information, even though space for that information appears on the form; thus anonymous requests are permitted. However, OPRA specifically prohibits anonymous requests for victims' records. N.J.S.A. 47:1A-2.2. If a permissible anonymous request involves making copies and the estimated cost exceeds $5.00, the custodian may request a deposit.

Top

5. **What is an OPRA Request?**

An official OPRA request is a request for government records submitted to a public agency either: on an official OPRA request form; or an otherwise written request that clearly references OPRA. ***If a written request does not mention OPRA in any way, it is not an OPRA request. Verbal requests are never OPRA requests***.

**Custodians cannot force requestors to use the public agency's official form if the requestor has submitted an otherwise valid written OPRA request**.

Top

6. **What does an OPRA request look like?**

Click here to view an OPRA request on an official OPRA request form. *This example uses the GRC's Model Request Form which is available for download here.

Click here to see a non-form OPRA request. *This example demonstrates a valid non-form OPRA request because the request clearly references OPRA.

Click here to see an invalid non-form OPRA request. *This example demonstrates an invalid non-form OPRA request because the request does not reference OPRA. This is not an OPRA request. Remember, valid OPRA requests must reference OPRA in the request.

Top

7. **What is a "government record?"**

OPRA specifically defines a government record as:

"... 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* ... or *that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

Generally stated, a "government record" means any record that has been made, maintained, or kept on file in the course of official business, or that has been received in the course of official business.

OPRA covers more than just paper records. Under OPRA, a "government record" includes printed records, tape recordings, microfilm, electronically stored records (including e-mails and data sets stored in a database), books, maps, photographs, etc.

All government records are subject to public access unless they are specifically exempt under OPRA or any other law. There are 24 specific exemptions contained in OPRA.

Top

8. **What records are exempt from public access?**

There are multiple specific exemptions contained in OPRA. There are also exemptions contained in various Executive Orders. Click here for a listing of all exemptions in OPRA as well as exemptions contained in Executive Orders.

These exemptions do not represent an exhaustive list of records that are not available for public access. There may be exemptions contained in other State statutes, regulations, case law, etc.

Top

9. **Who is the "custodian of a government record?"**

OPRA defines "custodian of a government record" as the official designated by formal action of a public agency's director or governing body that has custody or control of the government records of the public agency. Some large state departments have determined that they can be more responsive to requests for access to government records by designating more than one custodian. For example, the New Jersey Department of Law & Public Safety is comprised of ten divisions and four agencies; each of the divisions and agencies in Law & Public Safety designated a custodian to deal with records requests made to that division or agency.

OPRA provides that the custodian of government records in a municipality is the Municipal Clerk. However, OPRA does not preclude a municipality from developing reasonable and practical measures for responding to OPRA requests, which may include the designation of deputy custodians for particular types of records (most common occurrence is the Police Department).

The GRC does not maintain a letter or resolution template to appoint an official custodian and OPRA does not mandate any specific method other than "formal action" of the agency's director or governing body.

Top

10. **What is a "public agency" under OPRA?**

Only "public agencies" are subject to the provisions of OPRA. OPRA defines a "public agency" as:

- The executive branch of state government and all independent state agencies and authorities. This includes all state colleges and universities;
- The Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch;

- All counties, municipalities, school districts, fire districts, planning and zoning boards and other county and local boards or agencies, and all independent county or local agencies and authorities established by municipal or county governments. N.J.S.A. 47:1A-1.1.

The Judicial branch of state government (including the Supreme Court of New Jersey, the Superior Court of New Jersey, the municipal courts, the Administrative Office of the Courts, and the agencies, offices, and boards under their authority) are not considered public agencies under OPRA. The Courts have adopted their own records disclosure policies and procedures. See here.

Private businesses are not public agencies under OPRA.

Top

### 11. How must a requestor submit an OPRA request?

A request for access to a government record must be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian. ***A records request under OPRA cannot be made verbally.***

Some public agencies have created systems that will permit a citizen to fill out an online request form and file it with the custodian over the Internet. The means of submitting a request form (mail, in-person, Internet) will not affect which records will or will not be available for access.

Agencies may limit a requestor's submission options based on the agency's technological capabilities. However, the agency cannot impose an unreasonable obstacle for requestor.

Example: City of East Orange does not accept faxed OPRA requests, but accepts all other methods. This limitation does not present an unreasonable obstacle on the requestor because delivery of the request is possible by other means.

Example: XYZ agency only accepts hand delivered requests. This presents an unreasonable obstacle on the requestor because there is no other means of delivering the request to the agency.

Remember, all limitations on access shall be construed in favor of the public.

Top

### 12. Can I require payment for records before providing access?

Yes. In Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), the Council held that, "[a]s the Custodian is awaiting payment for the duplication cost of the requested records, she is not required to release said records until payment is received..." You may access this decision online here.

Additionally, the GRC's Model Request Form states that custodians may charge a 50% or other deposit when a request for copies exceeds $25. Further, anonymous requests in excess of $5.00 require a deposit of 100% of estimated fees. You may access the GRC's Model Request Form here.

Top

### 13. Do I have to provide records in a specific medium?

Yes. OPRA provides that a custodian must permit access to a government record and provide a copy of the record(s) in the medium requested, if the public agency maintains the record in that medium. If the custodian does not maintain the record in the medium requested, he/she must:

- Convert the record to the medium requested; or
- Provide the record in some other meaningful medium (meaningful to the requestor).

If the agency maintains the record in the medium requested, the custodian can only charge the actual cost of copying (such as the cost of the floppy disk or CD-ROM). However, a custodian may impose a special service charge related to conversion for:

- Extensive use of technology; and
- Labor for programming, clerical and supervisory assistance that may be required.

The special service charge must be based on the cost of the technology and labor actually incurred. This may include charges incurred by an outside vendor.

Before undertaking any conversion to another medium or taking other major actions that would result in the imposition of a special charge, the custodian must first inform the requestor that a special charge will be incurred and give the requestor the opportunity to accept or reject the extra fee. If the requestor objects to the special charge and refuses to pay it, the custodian may deny the request for access to the record. However, if the requestor is willing to pay for it, the agency has the responsibility to provide access to the government record in the requested format.

**Can I charge a fee to convert records to a specific medium?**

Maybe. Actual costs apply.

Example 1: A requestor wants a record sent via e-mail. The Custodian must scan a paper document to convert it to electronic format. The request takes the Custodian 5 minutes to complete. No charges apply.

Example 2: A requestor wants an audio recording of a meeting on CD-ROM. The Custodian copies the recording in house onto a CD-ROM the agency purchased for $0.50. The request takes the Custodian 20 minutes to complete. The charge is $0.50.

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

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

Top

14. **Do I have to send records to a requestor by the method the requestor specifies?**

Yes. A custodian must grant access to a government record by the method of delivery requested by the requestor (such as regular mail, fax, or e-mail). OPRA permits the production of electronic records free of charge, except that a public agency may charge the actual cost of any needed supplies such as computer discs.

Top

15. **What happens if an employee other than me receives an OPRA request?**

OPRA permits a public agency to adopt one of two processes for when non-custodian officers or employees receive records requests. Any officer or employee of a public agency who receives a request for access to a government record may either:

- Forward the request to the agency's records custodian; or
- Direct the requestor to the agency's records custodian.

In other words, a public agency may decide to permit any employee to accept a records request which must then be promptly forwarded to the appropriate custodian, or the employee may refuse to accept the request and direct the requestor to the appropriate custodian.

Top

16. **When is a response to an OPRA request due?**

Custodians should respond in writing to an OPRA request as soon as possible but not later than seven (7) business days after the request is received, provided that the record is currently available and not in storage or archived. Day One (1) is the day following the custodian's receipt of the request. The Custodian's response must grant access to the records sought, deny access to the records sought, ask for clarification of the request or ask for an extension to time to fulfill the request.

Top

17. **Do I have to provide access to any records immediately?**

Yes. OPRA requires that custodians must ordinarily grant immediate access to budgets, bills, vouchers, contracts (including collective negotiations agreements and individual employment contracts), and public employee salary and overtime information.

Immediate access means at once, without delay. Exceptions may include instances in which the requested records are in use, in storage, or require medium conversion. In such instances, the custodian must provide access as immediately as possible. Agencies should act reasonably, however, using their best efforts to comply with this requirement.

If a custodian cannot provide immediate access to records for a legitimate reason, the custodian must immediately provide such reason in writing to the requestor and notify the requestor of the anticipated deadline date upon which the records will be provided.

Top

18. **What happens if I cannot fulfill a request within the required time frame to respond?**

Custodians may seek extensions of time beyond the seven (7) business day deadline for legitimate reasons (such as the record is in use or in storage). Custodians must notify the

requestor in writing, within the statutorily mandated seven (7) business days and provide an anticipated deadline date upon which the records will be provided. The length of the extension must be reasonable under the circumstances. The Custodian's failure to grant or deny access to the requested records by the extended deadline date results in a deemed denial of the request.

Top

19. **How must I respond to an OPRA request?**

In writing...always! It is the GRC's position that a custodian's written response, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA. The Custodian's written response must either grant access, deny access, seek clarification or specify a particularextension of time required to fulfill the request.

The GRC has response templates for custodians' convenience here.

Top

20. **How much can I charge to provide records in response to an OPRA request?**

Custodians may charge the fee prescribed by law or regulation, if another law sets a specific fee for specific record. What does this mean? This sentence means that custodians are to charge OPRA requestors any copy fees that are established by other New Jersey laws or regulations, if said fees exist.

For example, N.J.S.A. 22A:4-1a sets forth specific fees for certain records filed with the New Jersey Department of Treasury (and requested from the Department of Treasury). Specifically, said statute provides that "[i]f a roll of microfilm images is requested, the State Treasurer shall collect a fee of $1.00 for each image on the microfilm roll." Thus, if a requestor seeks access to a microfilm roll from the Department of Treasury, the Department's custodian must charge the fees established in N.J.S.A. 22A:4-1a. The same applies for any other records that have specific fees established in other New Jersey laws or regulations.

Municipal ordinances do not qualify under OPRA as being another law or regulation.

If there is no other fee established by law or regulation, the standard copying fee is $0.05 per page for letter sized printed pages and $0.07 per page for legal sized printed pages. This is the most common copying fee under OPRA. For example, a custodian providing access to 3 pages of printed meeting minutes on letter size pages would charge a requestor $0.15 ($0.05 per page for 3 pages = $0.15).

If a public agency can prove that its actual costs to produce printed pages are more than $0.05/$0.07, the agency may charge its actual costs. Click here for details on how to calculate actual costs.

Electronic records sent via e-mail or fax are free of charge.

Custodians must charge the actual cost for all other materials such as CD, DVD, cassette, etc. The actual cost is the cost of the material only and cannot include any labor fees. For example, if the GRC purchased a package of 100 CD-ROMs for $100 and provided records to a requestor on 1 CD-ROM, the actual cost of said CD-ROM is $1.00 ($100 ÷ 100 = $1.00).

Top

21. **When can I charge a special service charge?**

A special service charge is essentially a labor fee that may be charged when a request is voluminous, requiring extensive time and effort, or when the request required extensive use of technology. Special services charges must be reasonable and based on actual direct cost of fulfilling the request. Actual direct cost means the hourly rate of the lowest level employee capable of fulfilling the request (no fringe benefits).

The imposition of a special service charge is extremely subjective and the determination is made on a case-by-case basis. No special service charges can be established in advance by ordinance.

The custodian must notify the requestor in advance of the special service charge. The requestor has the right to disagree with the special service charge. If the custodian and requestor cannot reach an agreement regarding the special service charge, the request is considered denied. Requestors may challenge a custodian's special service charge by filing a Denial of Access Complaint with the Government Records Council or filing an action in the Superior Court of New Jersey.

The following is an example of a special service charge for a voluminous request:

Request: Meeting minutes from 2005 to present. There are 1,000 pages of responsive records which will take the custodian 2 ½ hours to copy. The Custodian may 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.

Top

### 22. What is a broad and/or unclear request?

A broad and/or unclear request fails to name specific government records, or requires the custodian to conduct research.

Example of an overly broad request: "Any and all records related to the construction of the new high school."

The term "records" does not reasonably identify a specific government record.

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."

This request identifies a specific type of record, parties to the correspondence, dates and subject matter.

Example of a request that requires research: "all meeting minutes from 2011 in which the Council discussed Jane Doe, Human Resource Manager."

This request is invalid because it requires the custodian to research/read through all the 2011 minutes to determine when the Council discussed Jane Doe, Human Resource Manager.

Example of a valid request: "all meeting minutes from 2011."

The requestor would then have to conduct his own research to determine which minutes contain the subjects in which he is interested.

A custodian may either deny an overly broad/unclear request, or seek clarification of the request. The custodian's request for clarification must be in writing, within seven (7) business days of receipt of the request. If a custodian seeks clarification of an OPRA request, the response time clock stops until the requestor provides a response to the custodian.

Top

### 23. Do I have to provide records to commercial entities under OPRA?

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

Top

### 24. How many OPRA requests can a requestor make to one agency?

There is no restriction on the number of OPRA requests one person can submit to a particular agency.

Top

### 25. Can a requestor bring his/her own photocopier into an agency's office to make copies?

Maybe. A custodian may, in his or her discretion, allow the use of personal photocopiers by requestors, depending upon factors including, but not limited to, the specific circumstances of the request, the particular documents requested, the office hours of the agency, the available space within the office, the availability of personnel, the availability of appropriate electrical outlets, the consumption of energy, the need to preserve the security of public records or documents and protect them from damage, or other legitimate concerns. A custodian may require that photocopying be done on the agency's photocopier if to allow otherwise would disrupt operations, interfere with the security of public records, or expose records to potential damage.

Top

### 26. Can I provide on-site inspection of a record but deny access to actual copies?

No. If a record is subject to public access under OPRA, the record is available for public inspection as well as copying. Also, copyright law does not prohibit access to records that are otherwise accessible under OPRA.

Top

27. **Can a requestor ask me for the same records under OPRA more than once?**

Maybe. 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.

It is important to note that the court's findings turned on the specific facts of this case. Specifically, the requestor attached a copy of the requested record to his OPRA request, thus proving that he was already in possession of said record at the time of his request. As such, a custodian cannot deny access solely because he/she previously provided the records to the requestor. The custodian must have evidence that the requestor is in possession of the records at the time of the OPRA request.

▲ Top

28. **Can I create specific OPRA hours?**

Yes! However, OPRA provides that only the following public agencies may do so:

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

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.

All other agencies must process OPRA requests during their regular business hours.

▲ Top

29. **Can I deny access to any government records?**

Yes. There are 24 specific exemptions to public access contained in OPRA. If a record requested, or portions of a record requested, fit into any of OPRA's 24 exemptions, the custodian may deny access.

The custodian must provide the requestor with the specific legal basis for the denial of access.

▲ Top

30. **What happens if only portions of a record are exempt from public access?**

Under OPRA, a government record that is otherwise publicly accessible may contain non-disclosable information that should be redacted. Redaction means editing a record to prevent public viewing of material that cannot lawfully be disclosed. Words, sentences, paragraphs, or whole pages may be subject to redaction.

How Custodians Must Redact

If a record contains material that must be redacted, such as a social security number, redaction *must be accomplished by using a visually obvious method that shows the requestor the specific location of any redacted material in the record*. For example, if redacting a social security number or similar type of small-scale redaction, custodians should:

Make a paper copy of the original record and 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.

The blacked out area shows where information was redacted, while the double copying ensures that the requestor will not be able to "see-through" to the original, non-accessible text. The purpose is to provide formal notification to the requestor making it clear that material was redacted and is not being provided.

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 and insert in place of the redacted material asterisks to obviously indicate the redaction. Techniques such as "hiding" text or changing its color so it is invisible should not be used as sophisticated computer users can detect the changes and potentially undo the "hiding" functions.

Explaining Why a Redaction is Made

When redactions are made to a record, the custodian can use either the request form to explain why parts of a record are redacted, or use a separate document, depending on the circumstances, and must also refer to the OPRA exception which allows the redaction. This principle also applies if pages of information are redacted.

The bottom line is that the requestor has a right to know the reason for the redaction, and the custodian has the responsibility to provide an explanation.

Custodians must identify the legal basis for **each** redaction.

Top

31. **I am concerned about releasing personal information contained on a government record. Can I redact information such as a citizen's home address?**

Maybe. OPRA states in its Legislative Findings (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."

Additionally, 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.

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. Thus, there is no hard line rule regarding access to personal information such as home addresses.

Top

32. **An employee/member of the agency submitted an OPRA request. Is he/she exempt from paying the OPRA fees?**

No. Nothing in OPRA exempts anyone from having to pay the requisite fees to obtain government records. If a custodian wants to provide records to any person free of charge, it is at the custodian's discretion.

Top

33. **The requestor has not yet picked up the requested records. How long do I have to keep the request open?**

OPRA is silent on how long a custodian must keep a request open when the requestor fails to pick up the requested records. OPRA only speaks to the timeframe within which a custodian must respond to the request, which is as soon as possible, but not later than seven (7) business days (unless immediate access records are requested). Additionally, the GRC does not have any prior decisions addressing this issue. However, as guidance the GRC suggests that custodians make all reasonable attempts to contact the requestor for a reasonable period of time to indicate that the records are ready. After this reasonable period of time elapses, there is nothing in OPRA mandating a custodian from keeping a request open indefinitely. What constitutes a "reasonable" amount of time is not defined anywhere in the statute.

Top

34. **What happens if no records responsive to a request exist?**

If there are no records responsive to an OPRA request, the custodian is still required to respond to the request in writing, within the required time frame. The custodian's response must simply indicate that no records responsive to the OPRA request exist. Click here for an example.

Top

35. **What is a substantial disruption of agency operations?**

If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record only after first attempting to reach a reasonable solution with the requestor that accommodates the interests of both 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.

Example: Caggiano v. NJ Dept of Law & Public Safety, Div of Consumer Affairs, GRC Complaint No. 2007-69 (September 2007). The Custodian certified that an extended review of records as contemplated by the Complainant (for approximately a week) would substantially disrupt agency operations by requiring the extended attendance of a Division of Consumer Affairs employee and a NJ State Police Officer at the Complainant's inspection of the requested records. The Council stated that:

"[t]he Custodian has reasonably offered to provide the Complainant with copies of all the records responsive upon payment of the statutory copying rates, which the Complainant has declined. The Custodian has also reasonably offered the Complainant two (2) hours to inspect the seven hundred forty-five (745) pages responsive to the Complainant's request, of which the Custodian states a substantial portion are records which the Complainant himself submitted to the Division. Additionally, the Custodian has reasonably offered to accommodate the Complainant's request by charging a special service charge for the hourly rate of a Division of Consumer Affairs employee to monitor the Complainant's inspection of the requested records in the event that said inspection exceeds two (2) hours. Further, the Custodian has reasonably offered to copy the remaining records at the OPRA copying costs in the event the Complainant exceeds a reasonable amount of time for the record inspection, which the Custodian states is one (1) business day. However, the Complainant objects to paying any inspection fees, as well as a two (2) hour inspection time limit."

The Council held that "because the Custodian has made numerous attempts to reasonably accommodate the Complainant's request but has been rejected by the Complainant, the Custodian has not unlawfully denied access to the requested record under N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.g.

Top

### 36. What should be included on my agency's OPRA request form?

Every public agency is required to adopt an official OPRA request form. N.J.S.A. 47:1A-5.f. The OPRA request form requirements are:

- Space for the name, address, and phone number of the requestor and brief description of the government record sought;
- Space for the custodian to indicate 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;
- A statement as to whether prepayment of fees or a deposit is required;
- The time period within which the public agency is required to make the record available;
- A 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;
- Space for the custodian to sign and date the form if the request is fulfilled or denied.

For convenience, the GRC's Model Request Form is available to download here. Custodians may add their agency's information onto this form and adopt the form as the agency's official form.

Agencies may also create their own request form, but must be careful not to include "misinformation." Click here for an example.

Top

### 37. What happens if I need more information in order to respond to an OPRA request?

A valid OPRA request must identify with reasonable clarity the specific government records sought.

Custodians may seek clarification of an overly broad or unclear request, or deny access to request.

Clarification requests must be in writing within required response time. The response time stops until requestor responds providing clarification of the request, and then the response time begins anew.

Top

### 38. What happens if I do not maintain the requested records in my office?

The custodian must obtain records responsive from appropriate departments/personnel. This includes third parties.

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.

Top

39. **I have a requestor who is harassing me with numerous OPRA requests. What can I do?**

OPRA is silent on the number of OPRA requests one person can submit to a particular agency.

Remember there are options in OPRA to help with "overwhelming" OPRA requests:

- Requesting an extension of time to fulfill the request.
- Assessing a special service charge.
- Denying the request due to substantial disruption of agency operations.

However, if you believe you are being harassed, you may have options in civil court. There are no remedies in OPRA itself.

Top

40. **Government Records Council**

**What is the Government Records Council?**

OPRA established the Government Records Council (GRC) in the New Jersey Department of Community Affairs.

The members of the Government Records Council are the Commissioner of the Department of Community Affairs or the Commissioner's designee; the Commissioner of the Department of Education or the Commissioner's designee; and three public members appointed by the Governor, with the advice and consent of the Senate, not more than two of whom shall be of the same political party. A public member shall not hold any other state or local elected or appointed office or employment while serving as a member of the Council.

OPRA permits the Government Records Council to employ an executive director and such professional and clerical staff as is necessary to help it carry out its functions.

**What are the duties of the Government Records Council?**

The Government Records Council has the statutory responsibility to:

- Establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
- Receive, hear, review, and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
- Issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;
- Prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
- Prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;
- Prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;
- Make training opportunities available for records custodians and other public officers and employees to explain the law governing access to public records; and
- Operate an informational Web site and a toll-free help-line staffed by knowledgeable employees of the Council during regular business hours which will enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the Government Records Council when access has been denied.

**What is the scope of the GRC's authority?**

- The GRC only has authority over **access** to records maintained by a public agency at the time of an OPRA request.
- The GRC lacks authority over the accuracy of record content.
- The GRC does not have authority over the condition of records.
- The GRC lacks authority over records retention. For retention schedules, contact Records Management Services within the New Jersey Department of Treasury.
- The GRC does not have jurisdiction over the Judicial or Legislative Branches of State Government or any agency, officer, or employee of those branches.
- The GRC does not have authority over other types of records requests (administrative, common law, discovery).
- The GRC does not have authority over how a custodian uses his/her legal counsel.
- The GRC cannot adjudicate a complaint currently pending or previously adjudicated in New Jersey Superior Court.

**What can the Government Records Council do for me?**

The Government Records Council can provide guidance regarding the accessibility of government records. The GRC can inform you about any past decisions regarding the same or similar records, if any such cases exist. However, the GRC cannot tell a custodian exactly how to respond to an OPRA request.

The GRC provides guidance, not legal advice. What is the difference between guidance and legal advice? Guidance: think of the GRC as a reference library. The GRC can give you all the 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. This is a conflict of interest in the event a complaint is filed with the GRC. Only your legal counsel can give you legal advice.

Also, the GRC provides various OPRA training opportunities for records custodians. Click here for the latest OPRA training schedule.

**How is a Denial of Access Complaint filed and handled?**

A complaint to the Government Records Council must be in writing on the official Denial of Access Complaint form. The complaint should set forth the facts regarding the request for access to the government records, describing the specific records requested, and the circumstances under which the records were requested, and the denial of access by the records custodian of the public agency. Complaint forms are available from the Council's office or from the Council's website here.

Upon receipt of a complaint, the Government Records Council offers the parties the opportunity to resolve the dispute through mediation before a neutral mediator. Mediation is an informal, non-adversarial process having the objective of helping the parties reach a mutually acceptable, voluntary agreement.

The mediator will help the parties to identify issues, will encourage joint problem-solving, and will explore settlement alternatives with the parties.

If any party declines mediation or if mediation fails to resolve the matter to the satisfaction of the parties, the Government Records Council will initiate an investigation concerning the facts and circumstances set forth in the complaint.

At the request of the Government Records Council, the public agency must provide a Statement of Information setting forth the facts regarding the request for access to the government records, and describing the specifics of the custodian's denial to those records.

**What happens when the Government Records Council starts investigating a complaint?**

All proceedings of the Government Records Council are conducted as expeditiously as possible.

*Step 1:* The Council must decide whether the complaint is within its jurisdiction or whether the complaint is frivolous or without any reasonable factual basis.

*Step 2:* If the Council concludes that the complaint is outside its jurisdiction or that the complaint is frivolous or without factual basis, it will issue a decision in writing to dismiss the complaint. A copy of the Council's decision is sent to the complainant and the records custodian.

*Step 3:* If the Council determines that the complaint is within its jurisdiction and is not frivolous and has a factual basis, the Council will notify the records custodian of the nature of the complaint and the facts and circumstances set forth in the complaint.

*Step 4:* The custodian will have the opportunity to provide the Council with a response containing information concerning the complaint.

*Step 5:* If the Council is able to make a determination about whether a record should be provided based upon the complaint and the custodian's response, the Council will issue a decision in writing and send it to the complainant and the records custodian.

*Step 6:* If the Council is unable to make a determination about whether a record should be provided based solely upon the submissions, the Council may conduct a hearing on the matter at its discretion. The hearing will be held in conformity with the rules and regulations for hearings by a state agency in contested cases under the Administrative Procedure Act (N.J.S.A. 52:14B-1 et seq.), when they are applicable.

*Step 7:* Following the hearing, the Council will, by a majority vote of its members, render a decision as to whether the government record in question, or a portion of it, must be made available for public access to the requestor.

*Step 8:* If the Council determines by a majority vote that a custodian **knowingly** and **willfully** violated OPRA and is found to have **unreasonably** denied access under the **totality of the circumstances**, the Council will impose penalties provided for under OPRA.

*Step 9:* A final decision of the Council may be appealed to the Appellate Division of the New Jersey Superior Court.

Meetings held by the Council are subject to the Open Public Meetings Act. The Council may move into closed session during that portion of any proceeding in which the contents of a contested record would be disclosed.

Finally, the Council will not charge any party a fee in regard to complaints filed with the Council.

**What else should I know about Council hearings and actions?**

Prevailing Party Attorney's Fees

If represented by counsel, a requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

Pursuant to 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.

Additionally, pursuant to 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:

0. a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; and
0. that the relief ultimately secured by plaintiffs had a basis in law.

If the decision of the public agency to deny access to the requested record is upheld, the public agency is not entitled to an attorney's fee from the requestor under OPRA.

Knowing and Willful Penalty

A public official, officer, employee, or custodian who knowingly and willfully violates OPRA and is found to have unreasonably denied access under the totality of the circumstances shall be subject to a civil penalty of $1,000 for an initial violation, $2,500 for a second violation, and $5,000 for a third violation that occurs within 10 years of an initial violation. The penalty shall be collected and enforced in proceedings in accordance with the Penalty Enforcement Law of 1999.

An employee other than the custodian may be assessed a penalty. Appropriate disciplinary proceedings may be initiated against a public official, officer, employee, or custodian against whom a penalty has been imposed.

GRC's Regulations

For more information about the rules pertaining to the GRC's complaint process, see the GRC's promulgated regulations (*N.J.A.C. 5:105* (2008)) on our website here.

Top

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Seeing this link on any public agency web site brings up information about the agency's public record access information. New Jersey public agencies are urged to use this symbol to bring web users to their OPRA information.

GRC: Home | About GRC | GRC Meetings & OPRA Training Schedule | GRC Prior Decisions | OPRA, Advisory Opinion & Other Laws | OPRA for the Public | Register a Denial of Access Complaint | OPRA for Records Custodians | GRC Mediation | OPRA Inquiries & GRC News Service
Statewide: NJ Home | Services A to Z | Departments/Agencies | FAQs