

**New Jersey  
OPRA and Police  
Records**

*Presented by Keith Bendul MAS, CPM,  
Chief of Police, Fort Lee Police Department*

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**Do you know?**

- Who is the Custodian of Records for your jurisdiction?
- What does your Borough's Records Ordinance say?
- Is there a separate Custodian of Records for your police department?
- What does your police department's Records SOP say?
- How are record requests accepted?
- Who can accept?

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**Disclaimer**

- *The information contained in this presentation was obtained from sources which to the best of my knowledge are authentic and reliable. I assume no liability in connection with the material presented.*
- *No policy or procedure should be amended or modified without the advise of legal counsel.*

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**Introduction**

- Fort Lee PD Bergen County  
97 officers
- Chief of Police
- Patrol Division Commander
- Training Bureau Supervisor
- Records Bureau Supervisor
- (201) 592-3700 x3529
- [kbendul@NJSACOP.org](mailto:kbendul@NJSACOP.org)
- [ChiefBendul@FortLeePolice.org](mailto:ChiefBendul@FortLeePolice.org)
- PO 1989, Sgt. 2000, Lt. 2004,  
Capt. 2011, Chief 2013

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**Introduction**

- NJSACOP Executive Board
- NJSACOP Instructor
- BCPA Executive Board
- Masters Degree Administrative  
Science Fairleigh Dickinson  
University
- Bachelors Degree FDU
- SHRM Professional in Human  
Resource Management
- NJ Certified Public Manager Program
- NJ Chiefs of Police Association  
Command & Leadership Course

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**Courses**

- NJ Records Management for  
Supervisors & Records Clerks 2-day  
course
- NJ OPRA for Police Chiefs &  
Executive Officer 4-hour Executive  
Overview Course
- NJ New Chief's Orientation:
  - OPRA Presentation
  - Crisis Management Presentation
- NJLM – NJMG v Lyndhurst webinar

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**What Road are we on?**

- **Discovery Drive**
  - Defendant- Court Process
- **Subpoena Street**
  - Plaintiff / Defendant- Court Process
- **Common Law Way**
  - Request report: verbal / written
  - Window Walk-In
- **OPRA Blvd.**
  - OPRA Request - MUST be in writing & mention OPRA / FOIA

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**Requestor Relief**

- Trial Judge- Discovery Issues & Subpoena Issues
- Government Records Council:
  - OPRA Requests
  - GRC Centralized Decisions
- Superior Court
  - OPRA Requests
  - Common Law Requests
  - GRC Decisions NOT precedential
  - Court decisions decentralized

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**OPRA Relief & Confusion**

- OPRA less clear over time
  - Boundaries being pushed
- When responding Custodians don't know jurisdiction of relief
  - GRC- slow process, consistent decision with itself, not precedential
  - Superior Court- quicker process, conflicting decisions

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**Homework**

- Sign up GRC NEWSLETTER
  - <http://www.state.nj.us/grc/news/news/>
- Visit GRC Decision Search
  - <http://www.state.nj.us/grc/decisions/search/index.shtml>
- Google Scholar Case Law Search <https://scholar.google.com/>

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**Statutory Requirements**

- **NJSA 47:1A-1 et seq**
- **AKA Open Public Records Act**
  - *"all government records shall be subject to public access unless exempt by this statute as amended, 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, Rules of Court or any other Federal Statute, Order or Regulation.*
- **Paradigm shift when it replace the narrow Right to Know Law**
- **Become and Open Government Ambassador, Public Servant**

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**Common Law**

- **No need to also meet OPRA requirements.**
- **Records created official's duties, not required by law.**
- **Supreme Court Two-Prong Test:**
  - Requestor's Establish Interest
  - Versus Balancing Test State Interests.

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**Common Law**

- **Keddie v. Rutgers (1997)**
- the records are common-law public documents;
- person has an interest in the subject matter of the material;
- citizen's right to access outweighs the State's interest in preventing disclosure.
- Allows access to a broader class of documents, requestors must make a greater showing than required under OPRA.

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**Common Law – 6 Factors**

- **Loigman v. Kimmelman- Examine**
- (1) impede agency functions by discouraging citizens provide information
- (2) effect person gave info & ID not be disclosed
- (3) agency decision making chilled by disclosure;
- (4) information- factual data v. evaluative reports
- (5) findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency
- (6) disciplinary or investigatory proceedings circumscribe individual's asserted need <sup>14</sup>

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**Common Law**

- Can a request may be made under Common Law as well as OPRA?
- YES! Second Bite at the same apple, different "Rules of the Road"
- Requests dual standards analysis confusion

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### What is a Government Record under OPRA?

*“... 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*

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### Discovery vs. OPRA

- Not ALL requests are OPRA.
- Discovery and OPRA are **not** the same.
- GRC cannot advise on discovery issues such as fees to be charged. Refer to Court Rules or seek guidance from County Prosecutor.
- Discovery does not affect a requestor's right to access records under OPRA.
- Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008): Council held that Custodian's denial of OPRA request on the grounds that requestor could only obtain records via discovery (N.J. Court Rule R. 3:13-3 or 7:7-7) is **not** a lawful basis for denial.

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### Discovery Rule 7:7-7

- Court Process Discovery and Inspection
- “All discovery requests by defendant shall be served on the municipal prosecutor, who shall be responsible for making government discovery available to the defendant”.
- “defendant ... shall be provided with copies of all relevant material”
- Provided within 10 days after receiving the request.
- Discovery to the State
- <https://www.judiciary.state.nj.us/attorneys/assets/rules/r7-7.pdf>

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**Subpoena Rule 1:9**

- Court Process
- -may be issued by the clerk of the court or by an attorney
- -may require production of books, papers, documents, electronically stored information, or other objects designated therein.
- -the court on motion made promptly may quash or modify the subpoena
- <https://www.judiciary.state.nj.us/attorneys/asets/rules/r1-9.pdf>

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**Exemptions used by Police**

- Attorney Client Privilege
- IT info that would jeopardize security
- Emergency or security procedures for any building or facility
- Security or surveillance techniques
- Personal Firearms Records
- Privacy Interest
- Limited case law or direction

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**Exemptions used by Police**

- Information generated by or on behalf of public employers or public employees in connection with:
  - Sexual harassment complaint
  - Grievance by or against any employee
  - Collective bargaining information
- Communications between agency and insurance carrier/risk management
- Confidential by court order
- DD-214: Honorable Discharge
- Social Security numbers

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**Exemptions used by Police**

- Credit card numbers
- Unlisted telephone numbers
- Drivers' license numbers\*\*
- Convicts requesting their victims records
- On-going investigations
- Inter/intra agency advisory, consultative or deliberative material

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**Exemptions used by Police**

- Records exempted by other state or federal statutes and regulations, Executive Orders, Rules of Court, privileges created by State Constitution, statute, court rule or case law.
- Personnel and Pension records except:
  - Name, title, position, salary, payroll record, length of service, separation and reason and amount of pension received

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**Exemptions used by Police**

- Law enforcement records:
  - ME photos
  - Criminal investigatory records
  - Victims records
- Convicts requesting their victims records
- New- Crime Victim's Request for Reports (PL 2014 Ch. 19 A1676)

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### Who Can Request Records Under OPRA?

- **Anyone!**
  - Residents of other states
  - Criminal Defendant
  - Civil Plaintiff
- **Although OPRA names “citizens of this State,”** *Scheeler v Atlantic* (2018) OPRA not prohibit non-residents / non-citizens requests.
- **A requestor may even file an OPRA request anonymously.**<sup>25</sup>

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### Custodian’s Responsibilities

- **Obtain Records Responsive**
- ***Michalak v. Helmetta Borough GRC #2010-220*** another PD held the responsive records for the Borough (interlocal services agreement).
- Custodian “had an obligation to obtain the responsive records from the PD”
- ***Burnett v. Gloucester County of, (App. Div. 2010)*** same ruling.
- **Applicable to Centralized Dispatch Agreements**

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### Steps in Responding to an OPRA Request ★

1. When is my deadline to respond?
2. Is this a valid OPRA request?
3. Do I have enough information to fulfill request?
4. Will the request require a special service charge? Substantial disruption of agency operations?
5. Obtain records responsive to request.
6. Do the records or portions thereof fit into any of OPRA's exemptions?
7. Redact as necessary, convert to requested medium, calculate appropriate fees.
8. Provide records via requested method of delivery, or deny with legal basis in writing.

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### Proper OPRA Response ★

- In writing with 7 business days:
  - Grant access
  - Deny access
  - Seek clarification
  - Request extension
    - Give New Date
    - (Multiple extension for 170 days unreasonable)
- Address each record requested
- Address preferred method of delivery
- Provide estimate of any special service charges with opportunity to accept or reject charge
- Identify legal basis for denial including redactions
- DON'T ASK USE!
- Clarify to direct to documents possessed

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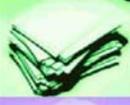
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### Denying a Request

- Burden of Proof in on the Records Custodian!
- Seeking Legal Advice NOT valid reason denial.
- Previously provided documents NOT valid reason denial.

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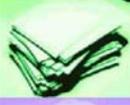
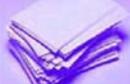
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### Denying -Knowing and Willful Penalty

- 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. N.J.S.A. 47:1A-11. The penalty shall be collected and enforced in proceedings in accordance with the Penalty Enforcement Law of 1999.
- Can an employee other than the custodian be assessed a penalty? YES!!
- Appropriate disciplinary proceedings may be initiated against a public official, officer, employee, or custodian against whom a penalty has been imposed.

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**Exempted From Disclosure**

- Citizens Reasonable Expectation of Privacy
  - "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."
- 25 OPRA Exemptions
  - <http://www.state.nj.us/grc/public/exempt/>
- Statutory exemptions
- Executive Order Exemptions
  - <http://www.state.nj.us/grc/public/eoexempt/>
- Court Decisions

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**Legislative Changes to Copying Costs OPRA & Discovery**

- Flat fee of \$0.05 per page for letter sized pages and smaller;
- Flat fee of \$0.07 per page for legal sized pages and larger;
- Electronic records must be provided **FREE OF CHARGE** (i.e. records sent via e-mail and fax); and
- Must charge the actual cost to provide records in another medium (i.e. computer disc, CD-ROM, DVD).
- **DISCOVERY FEES are the SAME**
- R 3:13-5 and R 7:7-7(i)(1)-(3) <sup>32</sup>

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**Special Service Charge 14-Point Analysis**

- NJSA 47:1A-5.c: *whenever the nature, format...of a government record... is such that the record cannot be reproduced by ordinary document copying equipment or involves an extraordinary expenditure of time and effort, the public agency may charge a reasonable special service charge in addition to the actual cost of duplication.*
- <http://www.state.nj.us/grc/pdf/OPRASpecialServiceCharge.pdf>
- **\*\*see Teaneck v Jones OPRA Harassment<sup>33</sup>**

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### Redaction- Special Service Charge?

- By Hand
- Copy
- Black Marker
- Re-Copy
- Template
- White-Out can flake off
- "See-Through"
- Explain
- Electronic
- RMS feature
  - OPRA Compliant
- Print2PDF
- Adobe Blackout
- Template
- "Clean" Redacted Electronic File
- "See-Through"
- Explain

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### Law Enforcement Agency Records

- Incident reports
- Criminal reports
- Motor vehicle accidents
- Arrest reports
- Juvenile reports
- Juvenile arrest reports
- DV reports
- Restraining orders
- Jail logs
- Property/evidence reports
- Impound reports
- Work schedules
- Alarm files
- Complaints
- Vacation checks
- Radio logs
- Blotters
- Budgets
- Applicant files

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### Law Enforcement Agency Records

- Dispatch tapes
- 911-calls
- Purchase orders
- Personnel assignments
- Training records
- Calibration/Certs.
- Letters
- Memos
- Rules and Regulations
- Personnel files
- Disciplinary records
- IA files
- Press Releases
- Photos
- MVR recordings
- UCR reports
- CI files
- Radar logs
- Finance reports
- Written Directives

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**Law Enforcement Agency Records**

- Criminal History
- DL Abstract
- Bulletins/BOLOS
- Statistical reports
- Field Interview
- Firearm Apps.
- Latent Prints
- Mug shots
- Crime Scene Photos
- Composites
- Time Sheets
- Grant Records

37

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**L.E. Records Routinely Accessible**

- Accident reports
- Impound reports
- Press releases
- Purchase orders
- Vouchers
- CBA/employment contracts
- BOLOs/Composites
- Calibrations/certs
- Finance reports
- Title, position, salary, payroll records
- Length of service, separation and reason
- Amount of pension received
- Uniform Crime Report
- Crime statistics

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**L.E. Records Routinely Accessible**

- Non-operational written directives
- Logs
- Rules and Regulations
- Criminal complaints-served
- Motor vehicle summonses-subject to redaction
- Training records that prove that an employee meet specified occupational qualifications

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### Records That May be Exempt

- Incident Reports-Privacy Interests
- 911 Tapes- Serrano v. South Brunswick
- Dispatch tapes- Ongoing Investigation
- Written Directives-Security
- \*\* Rivera v Fort Lee: NJAC 13:1E-3.2(a) redactions being appealed. Unique terror threat, denied Common Law access.
- Mug Shots/Crime Scene Photos
- Juvenile Records-2A:4A-60
- MV Summonses (redacted address)
- Crime Victims Records-Victim/Victim Rights Agency/Convicts

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### Exempt Records

- Criminal Investigatory Records:  
*"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 proceedings".*
- GRC: Remain exempt even after investigation ends and no indictment is made.

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### Exempt Records

- Crime Victims Records-convicts
- Arrest Reports
- Criminal Histories-CJIS policies & N.J.A.C. 13:59-1.2
- Fingerprint Cards
- DL Abstracts
- Property Reports
- Operational Directives
- \*\* Rivera v Fort Lee: NJAC 13:1E-3.2(a) redactions being appealed. Unique terror threat, denied Common Law access.
- IT Information

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## Exempt Records

- Field Interview Reports
- Domestic Violence
  - NJSA 2C:25-33
  - (\*\* see NJMG v. Teaneck DV Murder)
- Autopsy Records
- Firearms permits/licenses
  - NJAC 13:54-1.15
- Criminal Intelligence-Federal Guidelines 28 CFR. Part 23
- Crime Scene Photos-B Shot

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## Exempt Records

- Internal Affairs-AG Guidelines
  - \*\* (Won Appeal Paff v. BC Sheriff)
  - Seeking Regulatory Approval of IA
  - Seeking records through OAL Courts
- Disciplinary Records-Unless it is a reason for separation
- Statistical research
- Records not normally kept

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## Medical Examiner Records

- N.J.S.A. 47:1A-1.1 exempts photographs, negatives, prints, videotapes taken at the scene of death or in the course of post mortem examination or autopsy.
- Lynn v MCPO (2018) blanket request homicide investigation file to be invalid, photographs exempt OPRA, EO #69, 29 N.J.R. 2729(a)
- Exceptions:
  - when used in a criminal action or proceeding which relates to the death of that person,
  - for the use as a court of this State permits,
  - for use in the field of forensic pathology or for use in medical or scientific education or research, or
  - or use by any law enforcement agency in this State or any other state or federal law enforcement agency.

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### Criminal Investigatory Records

- Exempt under N.J.S.A. 47:1A-1.1.
- Definition - 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.
- Janeczko v. NJ Department of Law & Public Safety, Division of Criminal Justice, GRC Complaint No. 2002-79 and 2002-80 (affirmed on appeal in May 2004): Council held that exemption does not permit access to the records after the investigation is closed.

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### Criminal Investigatory Records

- Exempt under N.J.S.A. 47:1A-1.1.
- DARM Retention Schedule for Criminal Records:
- Definition - 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.
- "criminal investigatory records" does not dissipate merely because a criminal matter proceeds to a conclusion following a trial
- (See NJ Media v. Lyndhurst)

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### Criminal Investigatory Records

- Lagerkvist v. DCJ (App. 2015)
- Internet Journalist, Double Dipping Pension Investigation- Closed.
- PFRS meeting & minutes info public.
- OPRA & Common Law- some records provided. Appealed- OPRA denied
- Common Law proceeded
- Confidentiality Keddie balancing analysis. Allegation public corruption.
- Closed, no informant, no special investigative technique methods. Letter request investigation public, Memo denied deliberative, 2 documents remanded back to the trial court.

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### Ongoing Investigation

- The record sought pertains to an investigation **in progress** by **any public agency**, access may be denied if:
- access to the record shall be **inimical to the public interest**; provided, not prohibit access that was open for public access before the investigation commenced.
- Exception shall be narrowly construed, 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.

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### Ongoing Investigation

- **Paff v. NJSP (App Div. 2017)** Cited Lyndhurst "The Court held that 'the danger to an ongoing investigation would typically weigh against disclosure of detailed witness statements and investigative reports while the investigation is underway, under both OPRA and the common law'.

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### Ongoing Investigation

- **Ganzweig v. Lakewood (App. Div. 2017)**
- Appeal 2014 order finding violated OPRA and 2015 awarding \$22,000 in counsel fees and costs.
- Case remanded post-Lyndhurst decision.
- The prosecutor must give "particularized reasons", ongoing IA matter not necessarily grounds to deny access, incident is already public and resulted in the dismissal of a criminal indictment against two individuals.

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### Security & Surveillance Information

- N.J.S.A. 47:1A-1.1 exempts:
  - 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 or persons, property, electronic data or software.
- N.J.S.A. 2A:156A-19 exempts orders authorizing interception of a wire, electronic or oral communication or the contents of, or information concerning, an intercepted wire, electronic or oral communication or evidence derived therefrom. <sup>52</sup>

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### Security Camera- Borough Hall Parking Lot

- **Gilleran v Bloomfield 2016**
  - **\*\* Overturned 2015 decision by Supreme Court**
  - OPRA & Common Law
  - 5 days security camera footage, she reduced to 14 hours
  - Access denied protected by Emergency Security Procedures
  - Bloomfield claimed could disclose PO, victims, Informants, Public reporting crimes
  - OPRA not blanket security camera exemption
  - Case specific fact pattern
- **NOTE:** New State Records Comm. Retention video retained for thirty days. <sup>53</sup>

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### EMS Reports

- In Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008), the Council held that EMS Division Incident Report is exempt from disclosure as a medical record pursuant to Executive Order No. 26 (McGreevey 2002).

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**Privacy**

- If plan to deny access claiming third party privacy:
- Did you contact the third party?
- Did you notify them that the requested document(s) contain personal information?
- Did you ask them if they consent to you releasing the document or object to you releasing the record?
- Do you have it in writing?

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**Privacy**

- Brennan v BCPO (2018)
- Sought disclosure of names and addresses of winning bidders at public auction under OPRA & Common Law
- BCPO sent letter to winners.
- Prosecutor's Office offered redacted copies of receipts
- Trial court directed defendants to release the requested information.
- Appellate Division reversed.
- Supreme Court ruled that defendants did not present a colorable claim in support of their privacy argument. Forfeiture proceedings and public auctions of forfeited property are not conducted in private. Ordered release.

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**Arrest Reports ★**

- N.J.S.A. 47:1A-3.b. grants access to arrestee's name, age, residence, occupation, marital status, time and place of arrest, text of the charges, arresting agency, identity of arresting personnel, amount of bail and whether it was posted.
- Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2009): Council held that the most comprehensive government record that contains the information in N.J.S.A. 47:1A-3.b. is an arrest report.

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**Gun Permits**

- *N.J.A.C. 13:54-1.15* exempts:
  - Any background investigation conducted by the chief of police, the Superintendent or the county prosecutor, of any applicant for a permit, firearms identification card license, or registration, in accordance with the requirements of this chapter... and shall not be disclosed to any person not authorized by law of this chapter to have access to such investigation, including the applicant.
  - Any application for a permit, firearms identification card, or license, and any document reflecting the issuance or denial of such permit, firearms identification card, or license, and any permit, firearms identification card, license, certification, certificate, form of register, or registration statement, maintained by any State or municipal governmental agency ... and shall not be disclosed to any person not authorized by law or this chapter to have access to such documentation, including the applicant, except on the request of persons acting in their governmental capacities for purposes of the administration of justice.

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**Gun Permits Firearm ID Cards #**

- *N.J.S.A. 47:1A-1.3* (PL2013 c.112s.1)
  - "1. 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".
  - First time OPRA statute requires the collection and calculation data which is public information. (Slippery Slope)

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**Disciplinary Records**

- *N.J.S.A. 47:1A-10* exempts personnel records\*, with the exception of:
  - 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.
  - Statewide request "10day" discipline, reference letter, out of state LE

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**\*Personnel Records**

- **Havlusch v. Allenhurst GRC 2011-243**
- Sign-in Sheets disclosable as payroll records including information indicating leave of absence.

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**\*Personnel Records**

- **Jackson v. Kean University GRC 2002-98**
- Paid leave info subject to disclosure under NJSA 47:1A-10 and Labor regulation NJAC 12: 16-2.1, "Payroll records" :
- Name, dates, calendar days which services for remuneration are performed;
- The total amount of remuneration paid to each employee (cash, value of all compensation in any medium, etc.)
- Total remuneration \$ paid, # weeks worked
- (\* Officer Involved Shooting implications) <sup>62</sup>

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**Disciplinary Records**

- **Internal Affairs Investigations**
- What can be released from IA File, when?
  - Administrative Hearing- Discovery
  - Incident Civil Lawsuit – Defense Attorney
  - Prosecutor or AG
  - Court Order
  - LE Executive “for good cause”

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### Disciplinary Records

- Off-Duty Driving Incident
  - OPRA & Common Law Request
- Report prepared IA Captain, resulted discipline
- “no other remedies available to the Plaintiff to obtain these records”
- Analysis of Loigman factors favor of disclosure.
- Report to Capt available OPRA / Common Law (redactable)
- Notices of Preliminary and Final Disciplinary records not available OPRA / Common Law <sup>64</sup>

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### Internal Affairs

- Paff v Cape May (2015) OPRA Common Law
- “Fallon Report” investigation, access denied
- Separation Agreements, access denied
  - (may be as \*Payroll Records)
- 4 Brady Letters denied OPRA, granted Common Law <sup>65</sup>

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### Internal Affairs

- Paff v Warren Prosecutor County (2015)
- Common Law
- 13 documents ( complaint letter, statements, Admin. Records, interview notes) for IA Generator Used by Corrections
- Sheriff called Prosecutor, take criminal investigation
- No criminal charges filed. Proceed Administratively
- Prosecutor released 2 redacted reports, others Crim. Invest. and /or IA
- OPRA denied, Common Law Granted w/ redactions
- All reference to witnesses, DOB, addresses, phone numbers, personal identifiers
- IA investigator’s names NOT redacted
- Confidentiality may wane after investigation closed
- Denied blanket “Deliberative” material defense, 2 <sup>66</sup> bullet points redacted.

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### Internal Affairs- Criminal Activity

- Paff v Atlantic County Pros. Office 2015
- “Tip” FD funds, “neither confirm / deny”
- Crime Information (later provided)
- All police reports
- Criminal Complaint (later provided)
- Copy Reimbursement
- Denied access outstanding documents, “on-going invest”, Court- no “cover-up”

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### Applications for Employment

- Executive Order No. 26 (McGreevey 2002) exempts applications for employment or other information concerning job applicants while a recruitment search is ongoing.
- N.J.S.A. 47:1A-10 exempts personnel records, with the exception of:
  - 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;
  - 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.

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### Auto Accident Reports ★

- N.J.S.A. 39:4-131 states that reports are **not** privileged or confidential. (NO REDACTION)
  - Truland v. Borough of Madison, GRC Complaint No. 2006-88 (September 2007): Council held that no redactions to auto accident reports are warranted.
  - **\*\*Pending Legislation certain info redacted**
- **\*\*NJMG v Nutley Shoplifter Crash**- ongoing invest, overturned trial court & \$32,580 fee
- N.J.S.A. 39:4-131 (Rev. 2010) also states that when requests are **not requested in person**, custodian may charge flat fee \$5.00 for mailing, plus OPRA fee.
  - **Hardyston Ordinance**
  - **No Longer \$5 for 3 pages + \$1 thereafter.**
  - Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (April 2007): Council held that additional fees listed in N.J.S.A. 39:4-131 can be charged to cover administrative costs of mailing the reports (in addition to OPRA copying fee).

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**Police Blotter/Call Sheet**

- Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004).
- Requestor sought access to police call sheet regarding specific incident. Custodian disclosed record but redacted the name, address and phone number of the citizen who brought the complaint to the Borough's attention.
- Council conducted balancing test and held that the name, address and phone number of the citizen who brought the complaint to the Borough's attention should remain redacted due to the potential harm of unsolicited contact and confrontation between the citizen and the requestor.

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**911 Tapes**

- Middlesex Prosecutor v NJ Adv Media (2018)
- Consolidated 3 cases
- Pros. Appeals Law decision attorney fees
- OPRA for all 911 Calls related to shooting
- Denied: Ongoing Investigation & Citizen Privacy
- MCPO Motioned for Protective Order (denied)
- 911 highly charged emotional situation
- Day Order to Show Cause (OTSC) provided disk redacted 911 call.
- MCPO ordered provide Vaughn Index
- Judge ruled 911 redaction proper but Newspapers prevailing party: "Catalyst Theory"- causal nexus lawsuit to released document.
- Fees \$72k Hometown News and \$40K NJ Adv. Media

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**Mug Shots & Fingerprint Cards**

- Executive Order No. 69 (Whitman 1997) (continued by EO 21 (McGreevey 2002)) exempts:
  - 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.
  - \*Pending Legislation to make RG photographs public.

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**Child Abuse/Assault Records**

- **N.J.S.A. 2A:82-46b** states:
  - Any report, statement, photograph, court document, indictment, complaint or any other public record (in prosecutions for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, endangering the welfare of children under, or in any action alleging an abused or neglected child under) which states the name, address and identity of a victim shall be confidential and unavailable to the public.
- **Paff v Ocean County Pros.** (2015) OPRA & CL
- Public rumor school staff interviewed
- Privacy Expectation (decide Criminal Investigatory)
- "Crime Information" cant be released without compromising juvenile/family privacy 73

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**Domestic Violence Records**

- **N.J.S.A. 2C:25-33** ("Prevention of Domestic Violence Act of 1991") states that:
  - All records maintained pursuant to this act shall be confidential and shall not be made available to any individual or institution except as otherwise provided by law.
- **\*\*Bergen Cty: NJMG v Teaneck- Hatchet murder 2<sup>nd</sup> town, prosecutor press conference existing FRO court ruled reports not "maintained" pursuant to 2C.** 74

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**Juvenile Records**

- **N.J.S.A. 2A:4A-60** states:
  - Social, medical, psychological, legal and other records of the court and probation division, and records of law enforcement agencies, pertaining to juveniles charged as a delinquent or found to be part of a juvenile-family crisis, shall be strictly safeguarded from public inspection.
  - Multiple exceptions, including the parents or guardian and to the attorney of the juvenile.

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### Moving Violations

- Merino v. Borough of Ho-Ho-Kus, GRC
  - Released MV summonses, but held that the home addresses should be redacted
- Correa v Jersey City 2016
  - OPRA electronic copies reports or data base
  - Excel format- date, time, officer, statute,
  - Offense, street name, defendant name, def. address, corp. name, corp. address, ticket #, license plate
- Jersey City special fee \$1,024, requestor objected.
- Ruling
- NJCJIS Info not apply, not criminal
- Access under Common Law as well

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### Petty/Disorderly Persons Offenses

- Although the criminal statute, N.J.S.A. 2C:2-4(b), labels disorderly persons offenses as "petty offenses and not crimes," the Code of Criminal Justice defines the term "crime" broadly, to mean "a crime, a disorderly persons offense or a petty disorderly persons offense unless a particular section in this code is intended to apply to less than all three." N.J.S.A. 2C:1-14 (General Definitions).
- Thus, records pertaining to disorderly persons offenses, including petty offenses, which are not required by law to be made, maintained or kept on file that is held by a law enforcement agency involving a criminal investigation are deemed to be "criminal investigatory records," and are not disclosable, pursuant to OPRA.
- Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005).

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### Use of Force Reports

- North Jersey Media v Lyndhurst (2017) concurred with O'Shea v. Township of West Milford, 410 N.J. Super, 371 (App. Div. 2009):
- O'Shea Trial judge held that the UFRs were not exempt from the general disclosure requirements of OPRA as criminal investigatory records under N.J.S.A. 47:1A-1.1.
- On appeal, the court agreed with the trial judge's reasoning and determined that the New Jersey Attorney General's guidelines, policies and procedures requiring the completion of UFRs and their maintenance in the files of police departments had the force of law for police entities, rendering such documents accessible under OPRA.
- Therefore, UFRs did not qualify, generically, under the criminal investigatory records exception of OPRA.
- Appellate Division affirmed the trial judge's order regarding the access entitlement issues.
- (Crim. Invest. Exemption not applicable)
- Lyndhurst- negated Law Division Seton Hall v Tenafly Use of Force subjected to redaction of names.

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**Officer Involved Shooting**

- Rutherford NJ: Multi-agency pursuit suspected car thieves, resulting in Deadly Force
- OPRA & Common Law request
- **NJMG v Lyndhurst**-North Arlington-Rutherford-Bergen County-New Jersey PDs (49 page decision)
- Towns deferred to NJ AG Office Shooting Response Team investigating.
- **Facts:**
- 911 Call to North Arlington
- 4 PDs alerted for suspect vehicle
- Located, 4 minute pursuit through towns, crash guardrail, used deadly force.
- 3 levels of government- jurisdictional issues.
- Common Law- not only personal interest, national issue

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**Officer Involved Shooting**

- **Criminal Investigatory**
- Reports: Officers' Daily, Incident, Operation, Investigation, Offense, Supplemental
- Logs: vehicle, notations, daily activity logs,
- Daily bulletins, statistical & tally sheets
- CAD dispatch - criminal information
- Officer communications
- MVR recordings (initiated part Crim Invest.)
- **Not Exceptions to the Exemption**
- 911 recordings
- CAD reports
- **Use of Force Public (Lyndhurst & O'Shea)**<sup>80</sup>

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**Officer Involved Shooting**  
**Other Key Aspects:**

- No AG Directive on MVR
- AG Directive on Body Camera MAY negate Criminal Investigatory exemption, watching **Paff v Ocean County MVR Case**
- Complex Case through three court decisions.
- Common Law interest in OIS.
- Pending NEW AG Directive release video 20 day after Preliminary Invest "substantially complete".<sup>81</sup>

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### Mobile Video Recording -GRC

- Gorman v. Gloucester City Police Department, GRC Complaint No. 2004-108 (October 2008).
- Council reviewed the MVR *in camera* and conducted a common law balancing test.
- "Upon applying the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995) and by the GRC in Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (February 2004), and balancing the Complainant's need for the police mobile video recorded tape versus the potential for harm should the tape be disclosed, it is clear the potential for harm outweighs the Complainant's need for access. Accordingly, the Complainant was lawfully denied access to the requested mobile video recorded tape."
- ([NJ Media v Paramus 2012](#))

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### Mobile Video Recording MV K9

- OPRA & Common Law Request
  - Driver's Summonses
  - Dash Cam Video
- K9 deployed during the arrest of a MV driver
- Officer subsequently charged Agg. Assault, Official Misconduct
- Summonses Provided- Criminal Eluding & MV
- MVR Denied Reasons:
  - Ongoing Investigation- made pre-investigation
  - AG IA Guideline- made pre-IA
  - Criminal Investigatory-
  - Expectation of Privacy (victim driver)
- Before P.L.2014, CHAPTER 54, #A2280, approved September 10, 2014 effective April 2015
- ([Paff v Ocean County Law 2014 appeal pending Supreme Court decision](#))

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### Mobile Video Recording - Court

- Paff v. Neptune (Monmouth Law Division 2016)
- MV DWI Stop Resisting / Obstructing
- Denied EO69 Criminal Investigatory different than OPRA definition: "required" v. "not required" by law
- Defense relied unpublished NJ Media v Paramus
- No mention Appellate NJ Media v Lyndhurst

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**Body Camera Video Recording**

- Departments need to monitor the developing trend of Body Cameras.
- 40A:14-118.1** P.L.2014, CHAPTER 54, #A2280 approved September 10, 2014 effective April 2015 **ON HOLD**
- Body worn camera alternative
- Privacy Issues
- "Mandatory Use" requirements  
**AG Directive for BWC negate Crim. Invest. Derick v Sparta** (GRC 2016-227) body cam public, but not release juvenile house party.
- MVRs are different as they have:
  - Audio Component within limited range
  - Don't record the interior of a person's residence. <sup>85</sup>

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**Body Camera Video Recording**

- Body Camera Law- status **on Hold**
- Impact Criminal Investigation exclusion because now required by law to be made.
- AG Directive Body Camera Notify Prosecutor of request, tracking requests for AG not giving legal advice on OPRA
- BLOOMFIELD SHOOTING PROS WITHHOLD**
- Are your officers self-recording? <sup>86</sup>

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**Radio Transmissions**

- Bentz v. Borough of Paramus Police Department (Bergen)**, GRC Complaint No. 2008-25 (August 2009).
- Request for "Audio tape of radio transmission on frequencies 1, 2, 3 – 1800-0000 10/30/07 and 1800-0000 10/31/07."
- Custodian provided access but failed to do so within the prescribed time frame.

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**Training Records**

- Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004).
- N.J.S.A. 47:1A-10 provides that personnel records that “disclose conformity with specific experiential, educational or medical qualifications required for government employment” shall be considered a government record and must be made available for public access.
- Training records relating to a police officer’s public employment as a law enforcement official would be subject to public access.

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**Training Records**

- Requests for training certificates on AG Mandated Training
  - Incident Command System
  - Active Shooter Response
  - Firearms Qualifications
- Is mandated training a “specific experiential, educational or medical qualifications required for government employment”?
- Kovalcik v Somerset Prosecutor (2011) sought CV and list Interrogation Courses. Criminal trial motion denied does not become a Confidentiality Order. OPRA then denied NRR. Background file prior training listed. Matter undecided as it was remanded back for a hearing. Language specific case.

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**Litigation & Lawsuits**

- Wronko v. Jackson (2017) ALL Attorney Invoices & Litigation Settlements, not overly broad, overturned trial court and remanded.

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**DWI Reports  
Exempt  
Yes or No?????**

- **NO!!!**
- **Glen Blue for Labor Management Concepts v. Wall Township GRC complaint 2002-47**
- **Not criminal investigatory**

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**DRE Reports  
Exempt  
Yes or No?????**

- **Recent request for:**
- **DRE Rolling Log**
- **Complaints, DWI Complaints (Merino address redactions)& Criminal Complaints**
- **Arrest Listing**
- **Considerations:**
- **Part of Criminal Investigation**
- **Juvenile offenders**
- **Volume of request- Special Service Fee**

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**Access by Crime Victims**

- **NJSA 47:1A-1.1 Victim's records are exempt except that a victim may have access to their own record's**
- **Victim's Records: a file or document held by a victim's rights agency which pertains directly to a victim of a crime.**
- **Victim Rights Agency: public agency primary responsibility providing services to crime victims.**

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## Juvenile Records

- **2A:4A-60:**
  - Any court or probation division
  - AG or County Prosecutor
  - Parent/Guardian or attorney
  - Dept. of Human Services if providing care or custody
  - Institution of confinement
  - Court order
  - Juvenile Justice Commission JJC
  - Law enforcement
  - Parties to a civil action

**Permits Disclosure to School Officials**

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## Crime Information ★

- **Criminal investigatory records normally exempt**
- **The following information concerning a criminal investigation must be made available within 24 hours of request**
  - When a crime has been committed but no arrest-type of crime, time, location, and type of weapon if any
  - Arrest made-victims information unless there has not been time to notify next of kin or contrary to court rule or law. Safety of victim and family to be considered
  - Arrest made-arrestee's information, occupation, marital status, complaining party

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## Crime Information ★

- **The following information concerning a criminal investigation must be made available within 24 hours**
  - Text of any charges such as the complaint, accusation, indictment unless sealed or contrary to law
  - Identity of investigating/arresting officer and agency and the length of the investigation

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### Officer Involved Shooting New Aspect:

- **Crime Information**
- **Arresting Officer- Off. Involved Shooting**
- **Seizure=Arrest, Deadly Force=Seizure,**
- **Officer Deadly Force=Arresting Officers**
- AG Directive PD not involved OIS Criminal Investigation
- How provide "Seizing Officer(s)" names within 24 hours?
  - Refer to Prosecutor's Office
- Prepare Officers for Media, protection home & family
- CJP- Hearing evidence presented

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### Crime Information ★

- **The following information concerning a criminal investigation must be made available within 24 hours of request**
  - Time and place of arrest, resistance, pursuit, possession, nature and use of weapons and ammunition used by the suspect and the police
  - Information regarding bail- PD not have under CJP.

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### Recent NJSACOP Topics

- NJMG v BCPO (2016)
- Seek numerous documents regarding investigation not result in charges
- "Glomar Response" neither confirm or deny existence of records
- Use judiciously & Consult your attorney!
- Federal FOIA response now OPRA
- Court: OPRA's exemption for confidentiality N.J.S.A. 47:1A-9(b) and recognized the confidentiality of investigative records

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### Recent NJSACOP Topics

- Teaneck v Jones (2017)
- Town denied \$10k settlement of civil case.
- Onslaught 500+ OPRA requests, 1,250 hours to complete.
- Seeking injunction- relief denied, custodian not allowed to seek relief.
- Could seek Spec Service Charge or deny, risk litigation & attorney fees. Deny "disrupt agency operations" ONLY 2 cases upheld.
- Town could charge criminally harassment.
- "The court appreciates the difficult position plaintiffs were put in due to the volume of OPRA requests, yet that does not relieve plaintiffs from compliance with the OPRA statutes".
- Later awarded Attorney Fees \$19,924.

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### Recent NJSACOP Topics

- Paff v Galloway (2017) Email List information Supreme Court decision electronically stored info (sender, recipient, date, subject) subject to extraction under OPRA. Extracting electronic info in not creating a new record. GRC advice "not given substantial deference" by the Court.
- **RMS System reports "extraction"**.<sup>101</sup>

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### Recent NJSACOP Topics

- Paff v. CMPO Brady letters to Mayor ruled releasable & \$45,176 fees, App Div. remanded back for 6<sup>th</sup> Logiman Factor analysis
- Lawsuit seeking Failed Drug Tests (Reason Separation) and Separation Agreements (Reason Separation)

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**Recent NJSACOP Topics**

- Wolosky v Somerset Cty (2017) Sought OPRA Log (No Record) provided redacted OPRA Forms.
- Court ruled home address and email correctly redacted Privacy.
- Unlisted phone already exempt.

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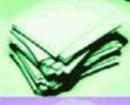
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**Recent NJSACOP Topics**

- NJMG v Clifton (2018) OPRA & Common Law
- Sought Report Payroll System change timing. Report prepared expected grievance, modified 5x.
- Denied access advisory, deliberative or consultative material.

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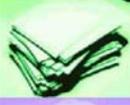
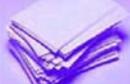
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**Recent NJSACOP Topics**

- Libertarians v Ocean Prosecutor (2018) OPRA & Common Law
- Sought Reason of Separation
- Tip failed drug test.
- Provided Memo noting effective date of resignation, no reason given.
- Reason for separation was resignation as listed in the Memo.

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### Recent NJSACOP Topics

- NJMG v Bergen Prosecutor (2009)
- Disclosure of prosecutor's office employee's outside employment was not required under N.J.S.A. 47:1A-10).

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### Records Retention

- NJSA 47:3-15 Destruction of Public Records Law
- No person shall destroy, sell or otherwise dispose of any public record, archives, or printed document without having first advised and obtain approval from the Division of Archives and records Management
- **Retention NOT required by law**
- Records may be disposed of subject to retention schedule:
- <http://www.nj.gov/treasury/revenue/rms/retention.shtml>

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### E-mail

- Is e-mail a public record subject to disclosure and retention????
- **YES!!!!**

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### E-mail Logs (Metadata)

- **Paff v Galloway Super. 2017**
- Access granted to Stored Data
- Extracting Stored Data is not creating a new document, log “metadata” not hard to create but redaction may be burdensome.
- Clerk OPRAed GRC Email Log-denied “No Record”. Deference not granted by Court.
- Data columns subject to redactions per exemptions

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### Text Messages

- **Verry v. Franklin Fire District GRC #2014-387**
- Text messages are “government records” subject to disclosure so long as the text messages have been “made, maintained or kept on file or received in the course of official business” N.J.S.A. 47:1A-1.1.
- Broadly addresses the characterization and notes that exemptions to disclosure may apply on a case-by-case basis.
- The Council’s determination should therefore not be construed to provide for unmitigated access to text messages.

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### Social Media

- **Knight First Amendment Rights v Trump- US Court SDNY Decision President Trump Twitter Account**
- **Vineland**
- **DARM Presentation**

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**OPRA Questions**

- Legal Advice:
- **Agency Attorney**
- Operational Issues:
- **County Prosecutor**
- OPRA Issues:
- **Government Records Council**
- **Toll Free/GRC Information Line:**  
866.850.0511  
[www.nj.gov/grc/](http://www.nj.gov/grc/)

112

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**Questions**

- **Thank You For Your Time**
- **Keith Bendul**
- **(201) 592-3700 x3529**
- [KBendul@NJSACOP.org](mailto:KBendul@NJSACOP.org)

113

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**Thank You**

114

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