




OPRA and Ethics for Newly Elected Officials



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OPRA

The Open Public Records Act

- Makes government records available to the public.
- Limited exceptions
- Can create a financial liability to the municipality

The Dual Purposes of OPRA

The Records Custodian (the Municipal Clerk) must:

- Release records (unless an exemption exists)

AND BALANCE

- Safeguard personal information which has been entrusted from disclosure when citizen provides information with reasonable expectation of privacy.

3

What is a Public Record

A "government record" is 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.

4

What happens when a request is made?

Each public agency has a designated “Records Custodian”

- The Custodian is responsible for all OPRA requests received.
- All OPRA requests received by any elected official or employee must be immediately forwarded to her.
- Liability can transfer from the Custodian to you if the OPRA request is not forwarded or if you fail to provide her with records that you may have on a personal device.

5

What happens when a request is made?

The Custodian calculates the Deadline

- Seven Business Days
- Starts with the day after receipt of the request
- Vacation and Sick Leave does not stop the clock
- Immediate Access – bills, budgets, vouchers.



6

What happens when a request is made?

Is the request Valid?

- Must ask for a document
- Not required to answer questions – the person can ask those during public comment or simply outside of an OPRA request
- Not required to conduct “research” - looking for documents is not research.
- Custodian must respond in writing

7

Can Custodian “Stop the Clock”?

7 business days but...

- Unclear request can stop the clock – if you tell them
- Partial response better than no response
- Clerk can ask for an extension (be reasonable)
 - Must state reasons why the deadline can't be met
 - Must give a realistic response date



8

Emails are subject to OPRA!

All the requestor needs is:

- name of the sender or recipient
- subject or topic (search terms)
- date or date range



Sample – “Any emails between Mayor Smith and Township Manager Brown between January 1, 2022 and January 31, 2022 discussing the parks or recreation grants.”

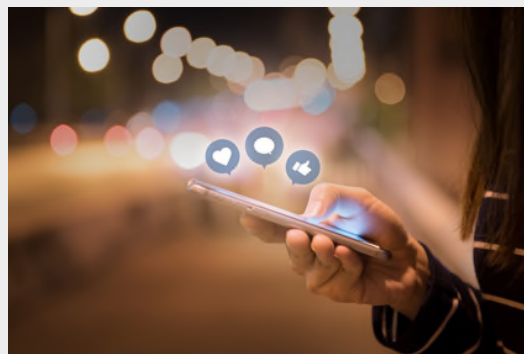
Elcavage v. West Milford Township, (GRC 2009-07)

9

Instant Message – Beware of Emails

Emails:

- Use of Personal Accounts
- Twitter, Facebook
- Examination of Private Computers
- Elected Officials have a duty to produce documents



10

How did the Custodian Search?

Paff Certification - Paff v. New Jersey Department of Labor, 393 N.J. Super. 334 (App. Div. 2007)

sworn statements by agency personnel setting forth in detail the following information:

- (1) the search undertaken to satisfy the request;
- (2) the documents found that are responsive to the request;
- (3) the determination of whether the document or any part thereof is confidential and the source of the confidential information;
- (4) a statement of the agency's document retention/destruction policy and the last date on which documents that may have been responsive to the request were destroyed.

- **LIABILITY can switch from Custodian to Elected Official if documents are not provided.**

11

OPRA Concerns for Custodian/Attorney

- OPRA takes time away from normal business
 - Special Service Charges are permitted in some situations
- Exemptions
 - Approximately 25 – 30 exemptions
 - **Assume all records will be made public**
- Redactions
 - Justify every redaction
 - Create a redaction log
 - Embarrassment not an exemption!

12

Denying a Request

If challenged, the municipality can be sued in Superior Court or a complaint can be filed with Government Records Council.

- If the Municipality loses at either venue, the Municipality is responsible for the requestor's reasonable attorney fees.
- Attorney fees are typically more than \$10,000.
- If the Custodian did everything right but an Elected Official does not produce documents, the Court can pass this liability on to the individual Elected Official. (4th Degree Crime, financial penalty and legal fees).

13

Rules of Thumb

- Every written or electronic communication you make about government business is subject to OPRA.
- The Custodian and, when needed, the attorney handle all responses to OPRA requests.
- Properly responding helps reduce liability to the Municipality.
- Paying attorney fees for OPRA denials takes money away from other budget priorities.

14

Rules of Thumb

- Do not destroy public records.
- Only a custodian, with proper permission from the State, can destroy public records.
- If you create a public document on a personal device, you must provide a copy to the custodian so that it can be preserved.

15

ETHICS

- Sadly, the public seems to have adopted a sometime cynical view of the motivations of public officials.
- Allegations against public officials abound.
- The rules governing conflict of interest are essential to your success.

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).

16

Four Situations for Disqualification

1. Direct pecuniary interests. You cannot vote to award a contract to a company in which you have a financial interest or someone in your family has a financial interest.
2. Indirect pecuniary interests: If you are a member of the Princeton Borough Council, and are employed by Princeton University, you cannot vote on any land use legislation that would benefit the University. *Griggs v. Borough of Princeton*, 33 N.J. 207 (1960).
3. Direct personal interests: Example: A Council member who votes to either award a contract to a company owned by a woman who was her maid of honor in her wedding; or if they have had a really bad falling out, who votes to deny her company a contract!
4. Indirect personal interests: A member of the Planning Board should recuse himself from voting on an application if a family member, or an organization or company in which (s)he holds a leadership position, owns property within 200' of the subject application property.

17

ETHICS

- The Legislature codified these common law principles in the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq.
- Public offices are a public trust
- Must be Integrity in the system
- Perceived conflicts undermine the public trust.

18

ETHICS – Other Statutes

- Municipal Land Use Law

“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 interests.”

19

ETHICS

- Criminal Law

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.”

20

ETHICS

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." [compare to N.J.S.A. 40A:9-22.6(a)(3), which has a \$400 threshold].

21

Ten Commandments of Civility

- "The Ten Commandments of Public Civility." by John C. Gillespie, Esq., as the same appeared in the League of Municipalities Magazine
- 1. Thou shalt not rudely interrupt a colleague midsentence; nor "speak over" a colleague while she/he is speaking.
- 2. Thou shalt not assume that shrillness of tone is a substitute for substantive dialogue.
- 3. Thou shalt treat the members of the public with the same courtesy as you would if they were members of your municipal family - - 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 or humiliate your target.

22

Ten Commandments of Civility

- "The Ten Commandments of Public Civility." - continued
- 5. Thou shalt, where possible, explore areas of common ground where legitimate disagreements exist, in an effort to find compromise, and 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 hired and/or appointed to their positions, just as you were, and that they deserve the same level of respect for having earned those positions.
- 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.
- 9. Thou shalt not pretend something is much more important than it really is, simply to score points with others.
- 10. Thou shalt always remember that it is okay to agree to disagree, and that reasonable people can indeed disagree reasonably.

23

Questions and Contact Info

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24