

The Open Public Records Act

For Law Enforcement Agencies

New Jersey Government Records Council



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The Most Important Number Today!

New Jersey Government Records Council

101 S. Broad Street

P.O. Box 819

Trenton, NJ 08625-0819

Toll-free (866) 850-0511

Fax: (609) 633-6337

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

Website: www.nj.gov/grc

OPRA Basics

What is OPRA?

- The New Jersey Open Public Records Act. N.J.S.A. 47:1A-1 et. seq. (“OPRA”).
- Effective July 2002, OPRA replaced the former Right to Know Law and broadly expanded the definition of a public record. Over 20 Years!!!
- OPRA created the Government Records Council (“GRC”). N.J.S.A. 47:1A-7.
- OPRA authorizes a complaint process via either the GRC or Superior Court. N.J.S.A. 47:1A-6.

The Government Records Council

Among other duties, the GRC:

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

GRC Regulations

- On November 7, 2022, the GRC's amended regulations were adopted. Significant changes include:
 - 60 calendar day statute of limitation for complaint filings.
 - Intervenor Process
 - Process for complainants to remain anonymous in the Denial of Access Complaint Process
 - *Ex Parte* Communication restrictions.
 - Statement of Information (SOI) filing deadline now ten (10) business days
 - Post-SOI replies limited.
 - Administrative Orders

OPRA is Not a Requirement for Access to Records

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

Are There Others Way to Request Records

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

Who Can Request Records?

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

What is a “Public Agency” Under OPRA?

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

Is Your Agency Allowed to Set Limited OPRA Hours?

- Under N.J.S.A. 47:1A-5(a), agencies meeting the following criteria can set limited OPRA hours:
 1. Municipalities with a population of 5,000 residents or less.
 2. Boards of Education with total enrollment of 500 or fewer.
 3. Public authorities with less than \$10 million in assets.

- 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 it all mean!?!?
 - The GRC interprets that to mean 2 hours a day for 3 days a week, minimum, unless the agency's regularly scheduled business hours are less.

What is a “Government Record” Under OPRA?

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

Who is the Custodian?

- Municipality - the municipal clerk. N.J.S.A. 47:1A-1.1
 - Municipalities may officially designate custodians in sub-departments “by formal action.” The GRC will recognize separate custodians by division/department when that custodian has been adequately publicized to the public.
- Best practices dictate that an agency should designate a substitute custodian to receive/fulfill requests in the Custodian’s absence.
- Non-municipal agencies designate their custodian “by formal action.”

OPRA Request Forms & You

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

How Does a Requestor Submit an OPRA Request?

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

How must a custodian
respond to an OPRA
request?

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

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

Tips in Responding: Ask yourself...

1. When is my deadline to respond?
2. Is this a valid OPRA request?
3. Do I have enough information to fulfill request?
4. Will the request require a special service charge?
5. Substantial disruption of agency operations?
6. Can I obtain records responsive to request?
7. Do the records or portions thereof fit into any of OPRA's exemptions?
8. Must I redact, convert to requested medium, calculate appropriate fees?
9. Can I provide records via the requested method of delivery?
10. If I must deny, can I do so with legal basis in writing?

OPRA Response Times

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

- Day 1 starts the day after the custodian receives the request.
 - Assuming no holidays or other closings, if a request is received on Wednesday, when is it due?
- All responses must be in writing. N.J.S.A. 47:1A-5(i).

Immediate Access

N.J.S.A. 47:1A-5(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.

- See Renna v. Cnty. of Union, GRC 2008-110.
- The response itself must be immediate. Herron v. Twp. of Montclair, GRC 2006-178.
- Part of a larger request? Kohn v. Twp. of Livingston (Essex), GRC 2011-330.

Information Concerning a Criminal Investigation

N.J.S.A. 47:1A-3(b).

Certain information regarding a criminal investigation must be disclosed within 24 hours or as soon as practicable.

- 2 Categories
 - when crime is reported but no arrest yet made,
 - if an arrest has been made.
- Caveat: information may be withheld if determined to jeopardize: 1) the safety of any person; or 2) the investigation in progress

Relearning the Response Process: A Post-Public Health Emergency Exercise

State of Emergency

- On March 20, 2020, P.L. 2020, c. 10, amended N.J.S.A. 47:1A-5(i) to provide that the response time frame “shall not apply” during a declared State of Emergency or public health emergency.
 - [https://www.state.nj.us/grc/news/alerts/GRC%20Special%20Statement%202020-01%20\(Final\).pdf](https://www.state.nj.us/grc/news/alerts/GRC%20Special%20Statement%202020-01%20(Final).pdf).
- On June 4, 2021, P.L. 2021, c. 104 removed the moratorium on the response time frame effective immediately.
 - [https://www.nj.gov/grc/news/alerts/GRC%20Special%20Statement%202021-01%20\(Final\).pdf](https://www.nj.gov/grc/news/alerts/GRC%20Special%20Statement%202021-01%20(Final).pdf).

Calling in Back-up

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

What Does the GRC
Consider a Sufficient
Response?

A proper response to an OPRA request:

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

Lawful Basis for Denial

- Custodians must provide a lawful basis for denial at the time of denial.
- This includes outright denials and redactions. You cannot merely say, “it’s exempt, so go away!”
- Examples: Dear requestor:
 - With respect to request No. 3, Jane Smith’s social security number is redacted because social security numbers are exempt from public access pursuant to N.J.S.A. 47:1A-1.1.
 - The letter from John Smith, Esq., to Mary Jones, dated January 4, 2010, is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 as attorney-client privileged material that could divulge strategy.

Extensions of Time to Respond

- An extensions of time to a date certain for legitimate reasons (examples: records in storage, medium conversion, voluminous request) is a lawful response. Papiez v. Cnty. of Mercer, GRC 2012-59
- OPRA does not limit the number of extensions; however, the GRC has ruled on whether extensions were warranted and reasonable. See Ciccarone v. N.J. Dep't of Treasury, GRC 2013-280.
- Failure to grant/deny access by extended deadline date results in “deemed” denial. N.J.S.A. 47:1A-5(i).

Seeking Clarification

- Seek clarification of the request from the requestor. See Leibel v. Manalapan Englishtown Reg'l Bd. of Educ., GRC 2004-51.
- Clarification request must be in writing within the required response time.
- Response time stops until requestor responds. Time begins anew. Moore v. Twp. of Old Bridge, GRC 2005-80.

Broad and/or Unclear Requests

- An OPRA request is invalid when it fails to identify with reasonable clarity the specific government records sought.
- The validity of an OPRA request typically falls into three (3) categories:
 - “Any and all” requests seeking “records” generically, *etc.* and requiring a custodian to conduct research. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007).
 - Requests seeking information or asking questions. *See e.g.* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).
 - Requests that are either not on an official OPRA request form or does not invoke OPRA. *See e.g.* Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

Invalid Request Examples

- **Overly Broad:** “any and all records connected to the construction of the new high school.”
- **Valid:** “For the period from January 1, 2016, to March 1, 2016, any and all e-mails between Jane Doe and John Smith regarding the plumbing contract for the high school.”
- **Research:** “all meeting minutes from 2011 in which the Town Council discussed ABC Towing Company.”
- **Search:** “all Town Council meeting minutes from calendar year 2011.”

Be careful, though:

- The Court held that a request seeking “[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present” was valid. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010).
- Paff v. Galloway, 229 N.J. 340 (2017), where a requestor asked for an e-mail log showing the sender, recipient, date, and subject matter of e-mails of certain employees over a specific period of time. In reversing the Appellate Division, the Supreme Court rejected the agency’s position, essentially contending that producing the e-mail log did not amount to creating a new record.

Records Not in Physical Possession? Obligations

- It is reasonable that a custodian might not have physical custody of all records maintained by agency.
- A custodian should document attempts to access records from other departments & personnel.
- A custodian ideally should keep requestor informed of attempts to gain access to records.
- A custodian cannot be held responsible if another employee obstructs access if the custodian can prove attempts made to gain access to the records.

- Obtain records responsive from appropriate departments/personnel. That includes third parties and agencies that are part of a Shared Services Agreement.
 - Burnett, 415 N.J. Super. 506.
 - Michalak v. Borough of Helmetta (Middlesex), GRC 2010-220
- Again – the custodian is always on the hook, but other employees impeding access to government records can be found in violation of OPRA and can be fined. Johnson v. Borough of Oceanport, GRC Complaint No. 2007-107 (July 2007)

OPRA Copying Fees

- N.J.S.A. 47:1A-5(b) provides:
 - 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.
 - Any public agency whose actual costs to produce paper copies exceed the \$0.05 and \$0.07 rates may charge the actual cost of duplication.
 - Electronic records must be provided FREE OF CHARGE (*i.e.*, records sent via e-mail and fax).
 - Must charge the actual cost to provide records in another medium (*i.e.* computer disc, CD-ROM, DVD).

Cost Fee Exceptions They Do Exist!

- OPRA allows an agency to charge fees “prescribed by law or regulation” N.J.S.A. 47:1A-5(b).
- Example: Fees for Auto Accident Reports
 - N.J.S.A. 39:4-131 “If copies of reports are requested other than in person, an additional fee of up to \$5.00 may be added to cover the administrative costs of the report”

Special Service Charge

- Special service charges for “extraordinary” requests must be warranted and reasonable and based on actual direct cost. N.J.S.A. 47:1A-5(c).
- Actual direct cost means hourly rate of lowest level employee capable of fulfilling request (no fringe benefits).
- Only warranted when:
 - Copies cannot be reproduced by ordinary copying equipment in ordinary business size.
 - Accommodating request involves an extraordinary expenditure of time and effort.

- Labor fee for extraordinary/voluminous requests.
- The charge must be estimated in advance, prior to the charge being incurred.
- Important – the requestor must agree to pay.
- An agency cannot just incur the charge, invoice the requestor, and then send him to a collections agency if he fails to pay.

- Case-by-case determination.
- Flat-Rates? Carluccio v. N.J. Dep't of Env'tl. Prot., GRC 2008-10.
- An ordinance is problematic.
- GRC's "14 Point Analysis"
 - Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191 (Law Div. 2002).
 - Fisher v. Dep't of Law & Pub. Safety, Div. of Law, GRC 2004-55.

Substantial Disruption is a Valid Basis For Denial

- If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record(s) only after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency. N.J.S.A. 47:1A-5(g).
- This is a subjective determination based on the circumstances and an agency's resources available to fulfill a request.

- Caggiano v. N.J. Div. of Consumer Affairs, GRC 2007-69: The Council ruled that the agency acted reasonably in trying to accommodate the requestor and properly met its burden of proving a substantial disruption of operations.
- **Conversely** Caldwell v. Vineland Bd. Of Educ. (Cumberland), GRC 2009-278: The Council held that the custodian violated OPRA by denying access under the exemption without trying to reach a reasonable accommodation.

Redactions Are For Redactors

Redaction means editing a record to prevent public viewing of material that should not be disclosed. Words, sentences, paragraphs, or whole pages may be subject to redaction.

Custodians should manually "black out" the information prior to providing the copy to the requestor. Ensure that your redactions cannot be undone or seen through.

- A redaction should be made using a “visually obvious method.” White out is problematic. See Scheeler v. City of Cape May, GRC 2015-91.
- 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. Techniques such as "hiding" text or changing its color so it is invisible should not be used as sophisticated users can detect the changes.

**** Custodians must identify the legal basis for each redaction!!**

Do I Really Have to Redact This Whole Page?

- Custodians can use a full sheet of paper in the packet of responsive documents to indicate that the entire page was redacted and that the page should cite to the statutory exemption.

Medium: The Requestor's Prerogative (Usually)

- A custodian **must** permit access to government records in the medium requested. N.J.S.A. 47:1A-5(d).
- If custodian does not maintain record in medium requested, he/she **must**:
 - **Convert** the record to the medium requested, or
 - Provide a copy in “some other meaningful medium” N.J.S.A. 47:1A-5(d).
- GRC interprets “meaningful” as meaningful to the requestor, not just convenient for the Custodian.
- But See Wolosky v. Twp. of Sparta, 2012 N.J. Super. Unpub. LEXIS 2717 (App. Div. 2012)

Medium Conversion

- There may be fees associated with medium conversion as set forth in N.J.S.A. 47:1A-5(d):
 - A custodian may impose a charge, where applicable, related to conversion for:
 - Extensive use of technology.
 - Labor for programming, clerical and supervisory assistance that may be required.
- Outside Vendors? See O’Shea v. Pine Hill Bd. Of Educ. (Camden), GRC 2007-192.

To Privacy, And Beyond!

- OPRA's legislative findings state "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009)
- Decisions on privacy are always made on a case-by-case basis by balancing the requestor's need for the information against the agency's need to keep the information confidential.

Requestors Got You Down?

- Excessive and harassing requests are a hot topic amongst the custodial community.
- **Simply stated: good luck!**
- Agencies have encountered mixed results when attempting to restrict an individual rights under OPRA.

The Knowing and The Willful

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

- Knowing and willful = a high standard.
- The GRC has issued eight (8) knowing and willful fines to five (5) different custodians (the GRC has actually issued nine (9) penalties, but the Appellate Division reversed one). One of the five custodians has been fined three times in ten (10) years.
- The Courts can also impose a fine. N. Jersey Media Grp. v. State Office of the Governor, 451 N.J. Super. 282 (App. Div. 2017).

Prevailing Party Fees

- Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006): A complainant prevails when they **achieve the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct.** Attorney's fees may be awarded 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.
- See also Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008)

PPAF, cont.

- Boggia v. Borough of Oakland, GRC 2005-36.
- The Council denied prevailing party fees to the complainant, who was an attorney representing himself. The Council reasoned that “the courts of this state have determined that . . . fee shifting statutes are intended to compensate an attorney hired to represent a plaintiff, not an attorney . . . representing himself.” See also Feld v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. 2019).

Relevant Statutes,
Regulations,
&
GRC Decisions

N. Jersey Media Grp., Inc.: A Pathway to Addressing OPRA Requests

- N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017)
 - Criminal investigatory exemption: a two-prong test. N.J.S.A. 47:1A-1.1.
 - “Investigation in progress” exemption. N.J.S.A. 47:1A-3(a).
 - Information required to be disclosed under N.J.S.A. 47:1A-3(b).

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. Solloway v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-39 (January 2013).
- Janeczko v. N.J. Dep't of Law & Public Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79 and 2002-80 (June 2004).

On-going Investigations; Release Inimical to the Public Interest

- Access to records may be denied during an investigation in progress where disclosure is “inimical,” or harmful, to the public interest. There is an exception for records subject to access prior to becoming part of the investigation.
- See Rosario v. Port Authority of New York & New Jersey, 2021 N.J. Super. Unpub. LEXIS 1497 (App. Div. 2021), where the Appellate Division affirmed the trial court’s decision that upon applying the on-going investigation test performed in N. Jersey Media Group, Inc., 229 N.J. at 573-74, the Port Authority failed to prove that disclosure would be inimical to the public interest and that the plaintiff was a prevailing party.

3(b) Information

“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 . . .” See the list at N.J.S.A. 47:1A-3(b)

- Scheeler v. N.J. State Police, GRC Complaint 2015-80 (April 2016)
 - The Council held that the term “residence” was defined as arrestee’s entire address.

Complaints & Summonses

- Simmons v. Mercado, 247 N.J. 24 (2021).
 - The Supreme Court of New Jersey overturned the Appellate Division's decision holding that MPD had no obligation to obtain records maintained by the Judiciary through eCDR.
 - The Court reasoned that the summonses were created by MPD officers, and they could access them through the eCDR system. Thus, the Court required disclosure in accordance with the trial court's order.

See also AADARI v. Medina, 2022 N.J. Super. Unpub. LEXIS 73 (App. Div. 2022); AADARI v. Plaza & Town of West New York, 2022 N.J. Super. Unpub. LEXIS 600 (App. Div. 2022)

Auto Accident Reports

- Truland v. Borough of Madison, GRC Complaint No. 2006-88 (September 2007)
 - The Council held that “no redactions to the requested auto accident reports are warranted pursuant to N.J.S.A. 39:4-131.” The New Jersey statute cited specifically states that “information contained [in the report] shall not be privileged or held confidential.” The Council’s holding in Truland, has been applied to another complaint in which accident reports were at issue. See also Selby v. Hazlet Twp. Police Dep’t (Monmouth), GRC Complaint No. 2011-154 (Interim Order dated June 26, 2012).
 - Stark contrast with the personal information exemptions present in OPRA. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1.
 - But see N. Jersey Media Grp., Inc. v. Twp. of Nutley, 2016 N.J. Super. Unpub. LEXIS 2166 (App. Div. 2016). However, the Council is unsure of how this decision could impact other attempts to redact accident reports.

Victims' Records

- Exempt under N.J.S.A. 47:1A-1.1.
- Definition - 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. Includes immediate family if victim is deceased or incapacitated.
- "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.

Victims' Records (cont'd)

- N.J.S.A. 47:1A-1.1 exempts access to any written request by a crime victim or alleged victim which seeks access to records relating to that person's victimization or alleged victimization, including, but not limited to any law enforcement agency report, domestic violence offense report, or temporary or permanent restraining order.
- N.J.S.A. 47:1A-5(b) prohibits a crime victim, or alleged victim, from being charged any fee that otherwise would be charged to obtain a government record relating to that person's victimization or alleged victimization.

Internal Affairs & Disciplinary Records

- Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 467 N.J. Super. 385 (App. Div. 2021).
 - The Appellate Division affirmed the trial court's decision that internal affairs (IA) files were exempt from disclosure under OPRA through the Attorney General's Internal Affairs Policies and Procedures (IAPP).
 - The Appellate Division also affirmed the trial court's decision to disclose the records under common law but reversed the part holding that plaintiff's were a prevailing party.
 - Certification has been granted by the Supreme Court, but only to address the prevailing party fee issue.
- See also Rivera v. Union Cnty. Prosecutor's Office, 250 N.J. 124 (2022).

- **In Re: Attorney General Law Enforcement Directive Nos. 2020-5 and 2020-6, 465 N.J. Super. 111 (App. Div. 2020).**
 - In response to state and national demands for accountability and reform of law enforcement following the death of George Floyd, AG issued two Law Enforcement Directives amending the IAPP.
 - The Appellate Division upheld the directives despite challenge by various law enforcement groups on various theories, including violating OPRA. The release of internal affairs disciplinary investigations does not contravene OPRA because the AG is authorized by law to regulate police affairs. OPRA does not control where other law supersedes.

Glomar Response

- Harmon v. Morris Cnty. Prosecutor's Office, GRC Complaint No. 2017-38 (February 2019)
 - The Council held that the custodian lawfully denied access to an OPRA request on the basis that he could “neither confirm nor deny” the exist of responsive records, also known as a “Glomar response.”
 - The Council relied on the test derived from N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 447 N.J. Super. 182 (App. Div. 2016):

[T]he agency [must] (1) rel[y] upon the exemption authorized by OPRA that would itself preclude the agency from acknowledging the existence of such documents and (2) present[] a sufficient basis for the court to determine that the claimed exemption applies.

[Id. at 188.]

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.

Surveillance Cameras

- Howard v. N.J. Transit, GRC Complaint No. 2018-43 (November 2019).
 - The Council held that the custodian lawfully denied access to surveillance camera footage from a public transit center under N.J.S.A. 47:1A-1.1. See also Gilleran v. Twp. of Bloomfield, 227 N.J. 159 (2016).

Medical Examiner Records

- N.J.S.A. 47:1A-1.1 exempts photographs, negatives, prints, and videotapes taken at the scene of death or in the course of post mortem examination or autopsy.
- Exceptions:
 - when used in a criminal action or proceeding that 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
 - use by any law enforcement agency in this State or any other state or federal law enforcement agency.

Limits to Convicts

- N.J.S.A. 47:1A-2.2 exempts 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.
- Denying a request that clearly seeks records which would not contain any personal information pertaining to any individual because the Complainant failed to indicate whether or not he had been convicted of an indictable offense is **not** a lawful basis for a denial. Bart v. City of Paterson Hous. Auth. (Passaic), GRC Complaint No. 2007-133 (October 2007).

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 Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (February 2009): the 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.

Gun Permits

- N.J.S.A. 47:1A-1.1 exempts:
 - 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. For the purposes of this paragraph, personal identifying information shall include, but not be limited to, identity, name, address, social security number, telephone number, fax number, driver's license number, email address, or social media address of any applicant or licensee.
- In Galligan v. Twp. of West Deptford (Gloucester), GRC Complaint No. 2013-163 (March 2014), the Council noted that although the complainant's request preceded the amendment to OPRA for personal firearms records, it was important to acknowledge that this exemption now exists within OPRA.
- See also N.J.A.C. 13:54-1.15

Police Blotter/Call Sheet

- Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004).
- The requestor sought access to a police call sheet regarding specific incident. Custodian disclosed the record but redacted the name, address, and phone number of the citizen who brought the complaint to the Borough's attention.
- The 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.

9-1-1 Tapes

- Fact specific determination!
- Serrano v. South Brunswick Twp., 358 N.J. Super. 352 (March 2003): requested 9-1-1 call placed by defendant in murder trial a few hours before homicide. Court held that “although 911 recordings are government records pursuant to OPRA, they are subject to disclosure only to the extent that the privacy considerations set forth at N.J.S.A. 47:1A-1 are protected.”
- Asbury Park Press v. Ocean Cnty., 374 N.J. Super. 312 (Law Div. 2002): requested 9-1-1 call from shooting victim. Judge described listening to the tape as “a chilling, wrenching, lingering experience.” Court concluded that OPRA’s privacy provision in N.J.S.A. 47:1A-1 exempted tape from public access.

Criminal History Backgrounds

- Custis v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2018-76 (January 2020)

- The Council held that criminal history backgrounds, colloquially known as “rap” sheets, were exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); Executive Order No. 9 (Gov. Hughes, 1963).
- See also Lewis v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2016-131 (Interim Order dated March 27, 2018).

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.
 - See Melton v. City of Camden, GRC Complaint No. 2011-233 (January 2013).

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.
 - There are multiple exceptions, including the parents or guardian and to the attorney of the juvenile.

Child Abuse/Assault Records

- N.J.S.A. 2A:82-46(b) 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.

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.
 - See VanBree v. Bridgewater Twp. Police Dep’t (Somerset), GRC 2014-122 (October 2014).

EMS Reports

- **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).

Identity of Requestor Irrelevant

- In general, the identity of a requestor is not a consideration when deciding whether an exemption applies to a government record requested pursuant to OPRA except for those instances set forth at N.J.S.A. 47:1A-2.2 (victims' records) and N.J.S.A. 47:1A-10 (an individual can access his/her own personnel records).
- See White v. William Patterson Univ., GRC Complaint No. 2008-216 (August 2009); Cicero v. NJ Dep't of Children & Family Serv., Div. of Child Behavioral Health Serv., GRC Complaint No. 2009-201 (August 2010).

Moving Violations

- In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004), the Council ordered the custodian to release copies of moving violation summonses but held that the home addresses should be redacted after conducting a common law balancing test.
- Holding: “the majority of the Council finds it likely that release of the home addresses will result in unsolicited contact between the complainant and the individuals who previously received similar summonses.”

Use of Force Reports (“UFR”)

- O’Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009)
 - UFRs did not generically qualify under the criminal investigatory records exception of OPRA.
 - See Rivera v. Office of the Bergen County Prosecutor et al, 2012 N.J. Super. Unpub. LEXIS 1921 (App. Div. 2012) and Digital First Media, d/b/a/ The Trentonian v. Ewing Twp., 462 N.J. Super. 389 (App. Div. 2020) for guidance on the ability to redact certain UFRs.

Arrest Warrants

- Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013)
 - The Council held that **arrest warrants** are not exempt as criminal investigatory records because they are required to be made pursuant to N.J. Court Rules, R. 3:2-3(a).
 - See also Bell v. Hudson Cnty. Prosecutor's Office, GRC Complaint No. 2017-86 (Interim Order dated May 21, 2019).

Continuation & Incident Reports

- Morgano, GRC 2007-156: Police department continuation reports and incident reports respectively are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and are therefore exempt from disclosure – if the reports relate to the investigation of criminal activity.
- See also De La Cruz v. City of Union City (Hudson), GRC Complaint No. 2015-14 (May 2017).

Body Worn Cameras (“BWC”)

- Dericks (O.B.O. TAPintoSparta.net) v. Sparta Twp. (Sussex), GRC Complaint No. 2016-227 (September 2017)
 - The Council held that generally, BWC footage could not be considered “criminal investigatory” because Attorney General Law Enforcement Directives required them to be maintained. N. Jersey Media Grp., Inc., 229 N.J. 541; O’Shea, 410 N.J. Super. 371. See also Richard Rivera, LLC v. Twp. of Bloomfield, 2020 N.J. Super. Unpub. LEXIS 55 (App. Div. 2020).
 - Notwithstanding, the Council held that the footage at issue there was nonetheless exempt under N.J.S.A. 2A:4A-60.

Mobile Video Recording (“MVR”)

- Gorman v. Gloucester City Police Dep’t, GRC Complaint No. 2004-108 (October 2008)
 - FACT SPECIFIC!!
 - 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.”

Mobile Video Recording Cont'd

- However, trial courts have ruled differently than the Council re: disclosure of MVR recordings.
- The Law Division in Burlington County ordered disclosure of an MVR involving a drunk driving arrest. The Court held that the tape is not a criminal investigatory record and the subject of the tape, an elected official, did not have a reasonable expectation of privacy.
- Law Division in Atlantic County ordered disclosure of an MVR of a traffic stop of an elected official, provided that personal information, such as the social security number and driver's license number, must be redacted from the video. The Court held that driving while intoxicated is considered a motor vehicle traffic violation, not a crime, under state statute, which means the tape cannot be considered a criminal investigatory record. The decision also stated that the public's right to be informed about what transpired during the stop outweighs the public official's right to privacy.

DWI Records

- Blue v. Wall Twp. Police Dep't, GRC Complaint No. 2002-47 (August 2003)
 - The Council held that a Title 39 motor vehicle offense such as DWI was not a "crime" and that, therefore, police investigation of such offenses was accessible under OPRA and not a "criminal investigatory record" exempt from access pursuant to N.J.S.A. 47:1A-1.1.
 - However, the Council also stated that in the few cases where the Legislature has indicated a Title 39 violation is punishable as a crime records related to such charge would fall within the criminal investigatory records exemption. A similar result would apply where the Title 39 charge relates to a criminal investigation or prosecution, such as a fatal motor vehicle accident.

Radio Transmissions

- Radio transmissions are public records but should have redactions to remove any information that is specifically exempt, such as:
 - Social security numbers.
 - Driver's license numbers.
 - Home addresses and home telephone numbers.

Personnel 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.
- Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010): disciplinary history for Trenton PD Detective is exempt from public access as a personnel record pursuant to N.J.S.A. 47:1A-10.

Separation Agreements

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

Ongoing Requests

- **Blau v. Union Cnty. Clerk, GRC Complaint No. 2003-75 (November 2003)**

- Requests for copies on an ongoing or continuing basis are not valid under OPRA. Example: OPRA request submitted on September 1, 2010 for “all auto accident reports from date of request until end of calendar year.”

***Requestors must submit new OPRA request for each new batch of records sought.

Text Messages

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

Elcavage Factors

- The Council held that an OPRA request for e-mails must focus upon the following characteristics:
 - Content and/or subject
 - Specific date or range of dates
 - Sender and/or Recipient

Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010).

Armenti v. Robbinsville BOE (Mercer), GRC Complaint No. 2009-154 (February 2012).

E-mails: Withhold or Redact?

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

Directing A Requestor to a Website

- Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014)
 - Here, the GRC reversed its prior decision in Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC 2009-148 (Interim Order dated June 29, 2010), by providing that custodians have the ability to refer requestors to the **exact location** on the Internet where a responsive record can be located. Id. at 3-4.
 - However, that does not permit you to say, “It’s on our website; find it yourself!”

Part 3:
Questions & Answers