



# THE OPRA ALERT

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## OPRA REQUIRES AN OFFICIAL FORM BUT CUSTODIANS MAY NOT WITHHOLD RECORDS WHEN AN OPRA REQUEST IS NOT ON AN OFFICIAL FORM

While the title of this article may sound contradictory, the Appellate Division of New Jersey Superior Court recently concluded it is not. On May 21, 2009, the Appellate Division ruled that “all requests for OPRA records must be in writing; that such requests shall utilize the forms provided by the custodian of the records; however, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in *N.J.S.A. 47:1A-5(f)*. Where the requester fails to produce an equivalent writing that raises issues as to the nature or substance of the requested records, the custodian may require that the requester complete the form generated by the custodian pursuant to *N.J.S.A. 47:1A-5(g)*.” *Tina Renna v. County of Union*, 407 N.J. Super. 230, 232 (App.Div. 2009).\*\*

Further, the Court “acknowledge[d] the stated concern of the GRC that the form requirement allows custodians to respond

‘more efficiently because, by streamlining and standardizing the request process, it eliminates situations where a custodian must distinguish between non-OPRA requests routinely received for government records and OPRA requests that are subject to a more stringent time frame for a response.’ We also recognize the public policy concern that the Legislature did not want to subject agencies to an undue burden, or to spurious lawsuits, or to guessing games as to the nature of a request, which might prompt an inappropriate response to the requester. Nevertheless, these legitimate policy concerns must cede to the broader policy of governmental transparency and the right of citizens to have open and virtually unfettered access to government records.” *Supra* at 244-245.

### So what is a custodian to do?

The Court specifically states that “[i]f a writing is transmitted that provides the required statutory information, the custodian shall

[must] comply with the production provision of the statute. In the event the submitted writing, exclusive of the form, is insufficient for the custodian to fulfill its statutory responsibility, such as the record may not be subject to OPRA or the request does not contain sufficient information, the custodian may require the requester to complete the official form prepared pursuant to *N.J.S.A. 47:1A-5(g)*. *We perceive this as the exception rather than the rule.*” *Supra* at 245-246.

### Still confused?

The GRC relies on language in this decision which states “[t]he custodian must have before it sufficient information to make the threshold determination as to the nature of the request and whether it falls within the scope of OPRA. Accordingly, we conclude that the form should be used, *but no request for information should be rejected if such form is not used.*” *Supra* at pages 245.

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“...we conclude that the form should be used, but no request for information should be rejected if such form is not used.”

## OPRA REQUIRES AN OFFICIAL FORM CONT'D

Therefore this language requires written non-form records requests to clearly state that the request is a records request made under the provisions of OPRA. **Any mention of OPRA in the written non-form records request is sufficient.** This is the only requirement of a written non-form OPRA records request.

### Bottom Line

The GRC's Advisory Opinion 2006-01 "What constitutes a valid OPRA request?" has been ruled invalid by the Appellate Division of New Jersey Superior Court in the matter of Tina Renna v. County of Union, 407 N.J. Super. 230 (App.Div. 2009). Further, custodians **must** respond to records requests in accordance with the requirements of OPRA for requests on an agency's official OPRA request form, as well as written non-form records request which mention "OPRA."

\*\* The requirements pursuant to N.J.S.A. 47:1A-5.f. are:

"[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will

be available, and the fees to be charged. The form shall also include the following:

1. specific directions and procedures for requesting a record ;
2. a statement as to whether prepayment of fees or a deposit is required;
3. the time period within which the public agency is required by OPRA to make the record available;
4. a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
5. space for the custodian to list reasons if a request is denied in whole or in part;
6. space for the requestor to sign and date the form;
7. space for the custodian to sign and date the form if the request is fulfilled or denied.

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

(It is unlikely that the court meant for requestors to include all of the requisite information prescribed in N.J.S.A. 47:1A-5.f. in a written, non-form OPRA request.)

## METHODS FOR SUBMITTING OPRA REQUESTS

On the same day as a different Appellate Division panel rendered the decision in Tina Renna v. County of Union, 407 N.J. Super. 230 (App.Div. 2009), the same court concluded that "the legislative delegation of authority to a custodian of government records to adopt a form for use in making OPRA requests that include 'specific directions and procedures for requesting a record,' N.J.S.A. 47:1A-5(f)(1), extends to prescribing the method by which an OPRA request must be transmitted to the agency." John Paff v. City of East Orange, 407 N.J. Super. 221, 228 (App.Div. 2009).

### What is that about a form?

The Court states that "[t]he subsection of OPRA that deals with a custodian of government records' authority to specify the method of submission of requests for government records is N.J.S.A. 47:1A-5(f)(1), which provides in pertinent part:

"[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government re-

cord held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. ... The form shall also include the following: (1) *specific directions and procedures for requesting a record.* ..." *Supra* at 227.

Thus, the Court held that "N.J.S.A. 47:1A-5(f)(1) expressly delegates authority to each custodian of government records to adopt a form for use in making OPRA requests that

includes 'specific directions and procedures for requesting a record.'" *Supra*.

### What ... But I Thought ...?

In this decision, the Appellate Division affirmed the GRC's final determination that a custodian has discretion in developing processes so that he or she can best meet his or her obligations under OPRA, and that there may be compelling reasons why a

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## METHODS FOR SUBMITTING OPRA REQUESTS CONT'D

public agency may choose not to receive OPRA requests by means of facsimile transmissions, like for example, some public agencies may not have a dedicated fax line for their records custodian.

This Appellate Division panel specifically defers to the GRC's interpretation of *N.J.S.A. 47:1A-5(f)(1)*. Specifically, the Court states that "[w]hen the Legislature delegates authority to a state agency to administer and interpret a statute, our courts will defer to that agency's interpretation of the statute 'provided it is not plainly unreasonable.' *In Re Pub. Serv. Elec. & Gas Co.*, 167 N.J. 377, 384, 771 A.2d 1163 (2001) (quoting *Merin v. Maglaki*, 126 N.J. 430, 437, 599 A.2d 1256 (1992))." *Supra* at 228.

The Court held that "[t]he GRC's interpretation of *N.J.S.A. 47:1A-5(f)(1)* is supported by substantial policy considerations. There are more than one thousand state agencies, political subdivisions and independent authorities subject to OPRA. ... These public agencies vary greatly in size, internal administrative organization and sophistication of operations. It is undoubtedly feasible for many public agencies to accept OPRA requests by fax. However, other public agencies may lack a dedicated facsimile line for the custodian of government record[s]' use or other means of assuring expeditious and reliable transmission to the custodian of OPRA requests transmitted by fax. *N.J.S.A. 47:1A-5(f)(1)* recognizes the significant variations in the operations of the public agencies subject to OPRA by delegating broad authority to each individual custodian to prescribe 'specific directions and procedures for requesting a record.'" *Supra* at 228-229.

The Court therefore concluded that "the GRC's interpretation of this subsection is 'not plainly unreasonable,' ... and should be accepted by the courts. *Supra* at 229.

### Not so fast!

The Court did caution custodians that "the procedures adopted by a custodian of government records for transmittal of OPRA requests, like any other action by a public official or agency, **must be reasonable** ... Consequently, a custodian may not exercise his authority under *N.J.S.A. 47:1A-5(f)(1)* **in a manner that would impose an unreasonable obstacle to the transmission of a request for governmental records**, such as, for example, by requiring any OPRA request to be hand-delivered." *Supra* at 229.

## WHAT DO THESE NEW COURT DECISIONS MEAN?

According to these decisions, the following applies to the manner in which records custodians must deal with OPRA requests:

1. Records custodians must accept OPRA requests on official forms and written non-form requests that mention "OPRA."
2. Records custodians may only direct a requestor to the agency OPRA request form as an "exception" to the rule.
3. Records custodians may prescribe on the official OPRA request form the method by which an OPRA request must be transmitted to an agency.
4. Records custodians must be reasonable when prescribing the method of transmittal for OPRA records requests so as not to impose an unreasonable obstacle.

If a records custodian does anything else in reliance on these two new court decisions, they do so at their own risk!!!

## COMING SOON TO THE GRC'S WEBSITE

- Updated Model Request Form
- Summary of court decisions regarding OPRA



[www.nj.gov/grc](http://www.nj.gov/grc)

The Government Records Council (GRC) is committed to making the Open Public Records Act (OPRA) work for the citizens of New Jersey. Since the law's inception, the GRC has worked hard to make government records more easily accessible to the public. The GRC is committed to being the facilitator of open government in New Jersey.

Created under OPRA, the Government Records Council:

- Responds to inquiries and complaints about the law from the public and public agency records custodians
- Issues public information about the law and services provided by the Council
- Maintains a toll-free help-line and Web site to assist the public and records custodians
- Issues advisory opinions on the accessibility of government records
- Delivers training on the law
- Provides mediation of disputes about access to government records
- Resolves disputes regarding access to government records

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If you have a question regarding the  
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