

# Electronic Records and The Open Public Records Act

New Jersey Government Records Council



# What is a Government Record?

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- All records made, maintained, kept on file, or received in the course of official business.
- Includes 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. N.J.S.A. 47:1A-1.1.

# Are E-mails Government Records?

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- Yes! All e-mails sent or received by public employees regarding official business are by definition government records.
- Does not matter whether e-mail was sent or received on public agency e-mail server.
- Meyers v. Borough of Fairlawn, GRC Complaint No. 2005-127 (May 2006) – GRC held that e-mails sent or received on Mayor’s private e-mail account were government records because Mayor conducted official business in said e-mails.

# OPRA Requests for E-mails

- Must contain 3 characteristics pursuant to Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-08 (April 2010):
  1. Content and/or subject
  2. Specific date or range of dates
  3. Sender and/or recipient

Example: All e-mails from Jane Doe to John Smith from January 1, 2010 to February 1, 2010 regarding the 2010 towing contract.

# Private E-Mail Addresses

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- There may be privacy concerns associated with releasing private (not public agency issued) e-mail addresses.
- OPRA exempts information that would violate a citizen's reasonable expectation of privacy if disclosed. N.J.S.A. 47:1A-1.
- Currently no hard line answer as to whether private e-mail addresses are exempt from disclosure (similar to home addresses). One GRC decision ordered disclosure (fact specific) and another is still pending adjudication at OAL.
- GRC would likely conduct a common law balancing test to balance the requestor's need for the private e-mail address against the agency's need to keep it confidential.

# OPRA Request Submissions

- OPRA requests shall be in writing and hand delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian. N.J.S.A. 47:1A-5.g.
- Custodians can prescribe the method by which an OPRA request must be transmitted to the agency as long as it would not impose an unreasonable obstacle to the transmission of a request for a government record (i.e. fax, e-mail, etc.) Paff v. City of East Orange (App. Div. 2009).
- Agencies must publicize submission options if limiting for any reason.

# Requested Mediums

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- A custodian shall permit access to a government record in the medium requested if the public agency maintains the record in that medium.
- If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium – **meaningful to the requestor.** N.J.S.A. 47:1A-5.d.

# Requested File Formats

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- Paff v. County of Camden, GRC Complaint No. 2009-25 (April 2010)- Requestor sought access to record in a particular file format - text file, word processing file, or a non-scanned PDF file. GRC ordered the Custodian to provide record in medium requested. Custodian provided record in Microsoft Word format.
- Custodians may charge actual conversion costs, if any, associated with similar requests.

# Compiling Data/Information

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- Requestors may ask for certain “fields” of information (Example: payroll records including employee’s name, title, salary, and length of service).
- Custodians do not have to compile data from various sources to create a new record. Custodians are only obligated to provide records that exist at the time of the request. (Example: Existing payroll records may only contain employee name and salary. Custodian does not have to add in the other requested information).

# Response Methods

- Custodians must grant access to a government record by method of delivery requested by requestor (regular mail, fax, e-mail, etc). O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008).
- Custodians may charge actual postage to deliver records by mail. Livecchia v. Borough of Mount Arlington, GRC Complaint No. 2008-80 (April 2010).

# Fees for Electronic Records

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- ❑ Electronic records must be provided FREE OF CHARGE (i.e. records sent via e-mail and fax) pursuant to legislative changes to copy fees effective November 9, 2010.
- ❑ Custodians must charge the actual cost to provide records in another medium (i.e. computer disc, CD-ROM, DVD).
- ❑ Special service charges may still apply if request warrants such (medium conversion or voluminous request).

# What is Actual Cost?



Example: A municipality purchases a package of 100 DVDs for \$100. A requestor submits an OPRA request for a DVD of the latest Town Council meeting. The Custodian charges the requestor \$1.00 for the DVD.

# Special Service Charges

- Special service charges for “extraordinary” requests must be 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; or
  - ▣ Accommodating request involves an extraordinary expenditure of time and effort (also allowed for inspection).
- Case-by-case determination - No ordinance allowed!!
- See 14 point analysis in Custodian’s Handbook for more information (available on GRC’s website).

# Special Service Charge Example

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- ❑ Scenario: Requestor wants tax maps scanned and provided on CD-ROM. Agency does not have technological capability to fulfill request.
- ❑ Response: Custodian gets quote from vendor to complete request (Staples, Kinkos, FedEx Office, etc.). Custodian provides quote to requestor as special service charge.
- ❑ All special services charges must be provided to requestor prior to being incurred by agency.  
N.J.S.A. 47:1A-5.c.

# Redacting Electronic Records

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- If an electronic record 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.
- Redactions may need to be made to paper copies first before converting to electronic medium.
- Custodians must identify the legal basis for each redaction!!

# Records Located Online



- Even if requested records are available online, custodians must provide access pursuant to an OPRA request.
- Directing requestor to the agency's website is not a proper response to an OPRA request. Langford v. City of Perth Amboy, GRC Complaint No. 2005-181 (May 2007).

# Commercial Use



- There is no restriction against the commercial use of government records under OPRA. Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006).
- Example: Many municipalities receive routine OPRA requests from tax search companies for tax records.

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