

The Open Public Records Act

New Jersey Government Records Council



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The Most Important Number Today!

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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. 15 Years!!!
- OPRA created the Government Records Council.
- OPRA authorizes a complaint process via either the GRC or Superior Court. N.J.S.A. 47:1A-6.

2002 – NJ enacted OPRA

OPRA broadly defines a government record, much more so than the Right to Know law. OPRA is an effort to give the public greater access to government records by balancing:

1. The public's interest in government records.
2. Respect for personal privacy.
3. The efficient process of government.

What OPRA is NOT Supposed to Be!

1. A method of abuse.
2. A game of gotcha.
3. A way to waste government time and money.

OPRA created THE GOV'T RECORDS COUNCIL:

Among other duties, the GRC:

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

- GRC Complaint Process:
 - Step One: Denial of Access Complaint. You can now file DOACs online!!!
 - Step Two: Mediation (optional).
 - Step Three: Adjudication.
 - Step Four (if desired): Appeal from the GRC's decision to Appellate Division of NJ Superior Court.

- When calling the GRC with an OPRA question (Remember the telephone number – 866-850-0511), please be aware of the following:
 - Information provided by the GRC is not an official decision of the Council & **not legal advice**.
 - The GRC cannot tell a custodian how to respond, nor tell a requestor how to phrase a request.
 - Hypothetical scenarios can be problematic.

Guidance v. Legal Advice

- The GRC can provide guidance. Use the GRC as a reference library. We can provide resources you might need (OPRA provisions, prior GRC case law) so that you can make your own decision whether to grant or deny. The GRC cannot make the decision for you.
- The GRC is not statutorily empowered to provide you legal advice. We cannot tell custodians exactly how to respond to a request. Get a lawyer! Nor can we tell requestors how to craft a request.

GRC has no authority...

- The GRC has no authority over the content of a record. Kawanzaa v. NJDOC, GRC 2004-167.
- The GRC has no authority over records retention requirements. Toscano v. NJ Labor, Voc. Rehab Services, GRC 2007-296.

Mediation Program

- N.J.S.A. 47:1A-7(d).
- **Confidential** - information that is disclosed in the course of mediation and not otherwise obtainable is confidential, for settlement purposes only, and cannot be used in any future proceeding unless expressly agreed to by the parties. Parties will not be bound by anything said or done in mediation unless and until there is a written Settlement Agreement.
- **Informal** - mediation is not a legal proceeding. There will be no testimony or witnesses, and rules of evidence do not apply.
- **No cost** - mediation is free to both parties.

Mediation, cont.

- **No attorney representation is necessary.**
- **Parties control the outcome** - Parties negotiate the terms that meet their interests. In addition, parties do not waive any of their rights by coming to mediation, nor will they be sanctioned for not participating or not reaching agreement.
- **Voluntary** - both parties must agree to participate in mediation.
- **Consistent with the Uniform Mediation Act.** N.J.S.A. 2A:23C-1 *et seq.*

When is OPRA used?

- When the requestor chooses to invoke the statute. The requestor elects to invoke OPRA's provisions by submitting an OPRA request.

Are there other ways to request records?

- Common law requests.
- Discovery requests.
- Administrative/Informal requests (example: requestor comes to Clerk's counter and orally asks to review minutes book).
- OPRA does not affect common law right of access or discovery requests. **Not mutually exclusive.**

Discovery v. OPRA

- Discovery and OPRA are not the same.
- GRC cannot advise on discovery issues such as process or fees to be charged. Refer to Court Rules or seek guidance from legal counsel.
- Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008): Council held that Custodian's denial of an OPRA request on the grounds that requestor could only obtain records via discovery is not a lawful denial under OPRA.
- Requestors may access same records under OPRA that could/should be accessed through discovery.

We'll see you in court!!

- Challenges to common law requests and discovery requests can be pursued through the Superior Court.
- The GRC has no jurisdiction over either.

Are there restrictions on who
can request records?

Yes...

Convicts

- There are limitations to those convicted of certain offenses. N.J.S.A. 47:1A-2.2.
- “[Where a] person who is convicted of any indictable offense under the laws of this State, any other state, or the United States is seeking government records containing personal information pertaining to the person's **victim or the victim's family** . . . the right of access shall be denied.” Exception to that exception, which will be discussed later.

With respect to out-of-state requestors

In September 2016, the GRC ruled that out-of-state requestors have no standing under OPRA. Scheeler, Jr. v. Burlington Township, GRC Case No. 2015-93. To the GRC's knowledge, the complainant never appealed from that decision.

HOWEVER, please proceed with caution before you rely on that decision because . . .

Out-of-state, cont.

... because

In the past two years, there have been at least five cases out of Superior Court regarding out-of-state requestors: two out of Atlantic County, one from Burlington County, one from Gloucester County, and one from Ocean County. Higher courts will need to resolve the conflict.

Please seek competent legal advice!

What is an OPRA Request?

- A request *should be* on an official OPRA request form (for example, either the agency's form or the GRC's Model Request Form). However, use of the form is not mandatory.
- Renna v. County of Union (App. Div. 2009): “the form should be used but no request ... should be rejected if such form is not used.”
- A written request (letter, fax, e-mail, cocktail napkin, etc.) that clearly references OPRA. See Renna v. County of Union (App. Div. 2009).
- If written request does not mention OPRA anywhere, it is not an OPRA request.
- Oral requests are never OPRA requests.

OPRA Request Form Requirements

- Every public agency is required to adopt an official OPRA request form. N.J.S.A. 47:1A-5(f). The GRC's Model Request Form is available to download.
- Agencies may create their own request form, but be careful not to include misinformation or stray too far afield in your creativity.
- Wolosky v. Twp. of East Hannover, GRC 2010-185: The Council found the agency's form not compliant, because it contained potentially misleading information.

- Include a place for the name, address, and phone number of the requestor and brief description of the government record sought.
- Space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged.
- Specific directions and procedures for requesting a record.
- Statement as to whether prepayment of fees or a deposit is required.

- Time period within which the public agency is required to make the record available.
- Statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal.
- Space for the custodian to list reasons if a request is denied in whole or in part.
- Space for the requestor to sign and date the form.
- Space for the custodian to sign and date the form if the request is fulfilled or denied.

OPRA Request Example: Invalid Non-Form Request

Invalid – No OPRA reference

- Please provide all copies of all meeting minutes from January 1, 2002, to the present date. Please e-mail those minutes to me at the address listed below.

OPRA Request Example: Valid Non-Form Request

Better?

- Pursuant to the New Jersey OPRA law, N.J.S.A. 47:1A-1 *et seq.*, please provide the Town Council's open session meeting minutes from the April 15, 2016 public meeting. Kindly e-mail the minutes to the address listed below.

How Does a Requestor Submit an OPRA Request?

- Hand delivered, mailed, transmitted electronically, 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...

- An agency cannot impose an unreasonable obstacle for requestor! Paff v. City of East Orange (App. Div. 2009).

- **Example 1:** XYZ Township only accepts hand delivered requests on Wednesday mornings between 10:00 and 11:00.

The limitation imposes an obstacle, which might be found unreasonable.

- **Example 2:** ABC Township does not accept faxed OPRA requests but accepts all other methods.

The limitation might be reasonable under appropriate circumstances.

What if an employee
other than the custodian
receives the OPRA
request?

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

Two lawful options:

1. Return the request to the requestor and direct requestor to proper custodian; or
2. Accept the request and forward it to proper custodian.

What is a “government record” under OPRA?

- In short, all records that are made, maintained, kept on file, or received in the course of official business.
- Not just records that are required to be maintained on file – that was the former RTK. OPRA blew that requirement out of the water.

What government records can someone access under OPRA?

- Almost everything.
- Default thinking: granting access is the RULE. Denying access is the EXCEPTION.
- HOWEVER...
- Statutory exemptions to access.
- Executive Orders, regulations, and other laws may exempt records.

Who is the official
records custodian?

- Municipality - the municipal clerk. N.J.S.A. 47:1A-1.1
 - Sub-departments may have own custodian if made known to the public.
- Any other public agency - the officer officially designated by formal action of that agency's director or governing body, as the case may be. N.J.S.A. 47:1A-1.1.

- Should have substitute custodian to receive/fulfill requests in the Custodian's absence.
- A substitute is particularly important in cases where immediate access records are at issue. N.J.S.A. 47:1A-5(e).

Police Custodians

- With respect to a municipality, the **GRC** will recognize a separate custodian for police departments when such custodian has been adequately publicized to the public.
- Keep in mind – that is the GRC's position. A judge in a black robe might disagree, contending that the statute ultimately governs.

What is a “public agency” under OPRA?

N.J.S.A. 47:1A-1.1

- Any of the principal departments in Executive branch of State government, or any division board, bureau, office, commission, or other instrumentality within or created by such department.
- Examples:
 - NJ Department of Banking and Insurance.
 - Department of Agriculture.
 - The Attorney General's Office.

- Any independent State authority, commission, instrumentality, or agency.
 - Example: Lottery Commission.
- Political subdivision of the State, or any entity created by a political subdivision.
 - Municipalities, County government, school districts, League of Municipalities.
- Newest – Port Authority of New York/New Jersey
L. 2015, c. 64.

- The Legislature of this state and any office, board, bureau, or commission within or created by the Legislative Branch.
- Keep in mind, though, that most legislative records are exempt. *See* N.J.S.A. 47:1A-1.1

Fun Fact!

- A certain non-profit recently stipulated to a court of law that they are indeed subject to OPRA.
- They are not a governmental agency, but for whatever reason, they accept responsibility for OPRA.

When is a response to an
OPRA request due?

- N.J.S.A. 47:1A-5(i) “As soon as possible, but not later than seven days after receiving the request.”

Exceptions – stand by!!!

- The most common OPRA violation: “deemed” denial.
- “In the event that a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request.” 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 received on Wednesday, when is it due?
- All responses must be in writing. Merely telephoning the requestor to say that the request is either granted or denied is not legally sufficient.

Are there exceptions to
the standard seven day
response time?
YES!!!

Immediate Access:

Yes! 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.
- Public employee salary and overtime information.

Immediate Access

- Immediate means as immediately as possible – **at once, without delay** unless records are in storage, in use, or require medium conversion. Renna v. Cnty. of Union, GRC 2008-110 (March 2009).
- If a custodian cannot provide immediate access to records, the custodian must reduce the reason to writing and request an extension of time to comply with the “immediate” statutory requirement.
- 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.

Keep in mind the provisions of N.J.S.A. 47:1A-3(b):

The following information shall be available to the public within 24 hours or as soon as practicable.

- when crime is reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any.
- if an arrest has been made, information as to the name, address and age of any victims ... the safety of the victim and the victim's family, and the integrity of any ongoing investigation shall be considered in disclosing this information.

- If an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule.
- Information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule.

- Information as to the identity of the investigating and arresting personnel and agency and the length of the investigation.
- Information of the circumstances immediately surrounding the arrest, including, but not limited to, the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police.
- Information as to circumstances surrounding bail, whether it was posted and the amount thereof.

What if the request
cannot be fulfilled within
the required time frame?

- Seek extension of time for legitimate reasons (examples: records in storage, medium conversion, voluminous request).
- Extension “request” must be in writing, within required response time (either standard or immediate) and include an anticipated date on which records will be provided.
- The requestor’s approval is not required.
- Failure to grant/deny access by extended deadline date results in deemed denial.
- Ciccarone v. NJ Dep’t of Treasury, GRC 2013-280.

Date certain to respond

- The Council held that although the Custodian timely sought an extension of time, she failed to provide a date certain on which she would respond. N.J.S.A. 47:1A-5(i).

Papiez v. County of Mercer, GRC Complaint No. 2012-59.

What if there is not
enough information to
fulfill the request?

- A request must identify with reasonable clarity the specific government records sought. The requestor must name specifically identifiable government records.
- A request must be specific, ideally identifying the type of record, dates, parties to correspondence, subject matter, etc.
- *A copy of all traffic tickets where a Honda Civic was involved??*
- *All reports authored by Patrolman Smith??*

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 assessed, 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.

Paff v. Willingboro BOE, GRC 2007-272:

The Council held that the custodian's failure to respond to each requested item individually resulted in an insufficient response.

That also applies to immediate access records.

- If request is overly broad or unclear, seek clarification or deny access to request.
- Clarification request must be in writing within required response time.
- Response time stops until requestor responds. Time begins anew. Moore v. Twp. of Old Bridge, GRC 2005-80 (August 2005).

What is an overly broad
or unclear request?

- Fails to identify with reasonable clarity the specific government records sought.
 - **Bad example:** “any and all records connected to the construction of the new high school.”
 - **Better version:** “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.”

- A request that requires the custodian to conduct research.
 - **Bad Example:** “all meeting minutes from 2011 in which the Town Council discussed ABC Towing Company.”
 - **Better:** “all Town Council meeting minutes from calendar year 2011.”
- A custodian is obligated to *search* his/her files to *find* the identifiable government records listed in the Complainant’s OPRA request. A custodian is not required to *research* his/her files to figure out which records, if any, might be responsive to a broad and unclear OPRA request. See Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007).

Broad and/or Unclear Requests

- If a request does not name specifically identifiable records or is overly broad, a custodian may deny access pursuant to the following court decisions: MAG, Bent, NJ Builders, and various GRC decisions that are too numerous to cite here.
- “Any and all” is arguably broad, BUT it does not always suggest an invalid request....

Be careful, though:

. . . A requestor sought access to "[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present." Burnett v. Cnty. of Gloucester, (App. Div. 2010).

The Appellate Division concluded that the request for settlement agreements and releases, without specifying the matters to which the settlements pertained, did not render the request a general request for information obtained through research. The court held that, "[h]ere, it is the documents, themselves, that have been requested, and their retrieval requires a search, not research."

To Review: Seeking Clarification

- A custodian may seek clarification of an overly broad or unclear request.
 - Request must be in writing, within seven (7) business days.
- The response time stops until requestor responds.

Clarification Appropriate

- Leibel v. Manalapan Englishtown Reg'l Bd. of Educ., GRC 2004-51 (September 2004): “Under the circumstances, the Custodian reasonably sought clarification ... in order to fulfill the OPRA request The Custodian is proper in requiring clarification when a request is too broad in scope and a reasonable basis exists to seek said clarification.”
- Kelley v. Rockaway Twp. (Morris), GRC 2009-19 (November 2009): The Custodian sought clarification of the overly broad request, and the requestor failed to clarify the request. Ultimately, the Council held that the custodian did not unlawfully deny access because the request was invalid.

A custodian is generally not required to create records in order to fulfill an OPRA request.

BUT...

See Paff v. Galloway (2017), where a requestor asked for a 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 Court rejected the agency's position, essentially contending that producing the e-mail log did not amount to creating a new record.

This case is a very important ruling regarding information stored in databases.

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?

What if the requested records are not in the custodian's possession?

Obtain Records Responsive

- 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 as long as the custodian can prove attempts made to gain access to the records.

- Obtain records responsive from appropriate departments/personnel. That includes third parties.
 - Example: Is a Custodian required to obtain requested attorney's bills, which are maintained by special counsel's office, and not the municipality? In general, yes! Burnett case.
- 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.

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.

Again, remember that our top violation is “deemed” denials.

What is the cost to obtain records under 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).

So, are there any
exceptions to those
fees?

Yes, there are! Here
is just one 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”

Method of Delivery

- A custodian must grant access to a government record by the requested method of delivery (regular mail, fax, e-mail, etc). O'Shea v. Twp. of Fredon (Sussex), GRC 2007-251 (April 2008).
- Charges for such delivery must reflect actual cost. The legislature amended OPRA several years ago to provide that electronic delivery is free of charge.
- Fun Fact – You may charge actual postage costs. Livecchia v. Borough of Mount Arlington, GRC 2008-80 (April 2010).
- If a request asks for electronic copies, you cannot decide on your own that the requestor does not need electronic records and instead send paper copies if the records can be produced in electronic format.

What is a special service charge?

- 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.

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.

- Case-by-case determination.
- 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) and Fisher v. Dep't of Law & Public Safety, Div. of Law, GRC 2004-55 (August 2006).

Special Service Charge Example

- Request: XYZ records from 2005 to present.
- Let's assume that encompasses 3,000 pages of responsive records that will take custodian 7 hours to retrieve, review, redact, and reproduce.
- In that case, the Custodian might!!! be able to charge a staffer's direct hourly rate for the 7 hours required to fulfill the request.
- Custodian must estimate cost and notify requestor before fulfilling the request.

What if the request
substantially disrupts the
operations of the
agency?

Substantial Disruption

- 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.

- Example 1: Caggiano v. Borough of Stanhope, GRC 2006-220 – Requestor submitted a 7 page, 59 item request spanning over 12 years of records.
- Example 2: Vessio v. NJ Department of Community Affairs, Division of Fire Safety, GRC 2007-188 – Requestor submitted 13 item request, which included all fire safety violations issued from 1986-2006 and all complaints filed since 1997.

- Caggiano v. NJ Division of Consumer Affairs, GRC 2007-69: In this case, the agency fell all over itself to try to accommodate the requestor, but the requestor was not willing to work with the agency.
- 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.

What if only portions of
a record are exempt from
public access?

Redactions

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
Complaint No. 2015-91.

Redactions, Cont.

If full pages are to be redacted, the custodian should give the requestor a visible indication that a particular page of that record is being redacted, such as a blank sheet bearing the words "page redacted" or a written list of the specific page numbers being withheld.

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!!**

What if an entire page of
a document needs to be
redacted?

Redactions, cont.

- 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.

Can a requestor ask for records in a specific medium?

Requests in a certain medium

- **Yes! And, guess what?!**
- **You must provide the records in the requested format – to the extent reasonably possible!**

Medium Conversion

- A custodian **must** permit access to government records in the medium requested. N.J.S.A. 47:1A-5(d).
- More yet – 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.

Is there a fee to convert
records to a specific
medium?

Medium Conversion, cont.

A custodian may impose a special charge related to conversion for:

- Extensive use of technology.
- Labor for programming, clerical and supervisory assistance that may be required.

Medium Conversion, cont.

- If conversion is completed in-house, there is generally no charge, unless actual costs can be demonstrated or special service charge applies.
- If an outside vendor is required, seek estimate and provide requestor with estimate for approval/rejection. O'Shea v. Pine Hill Bd. Of Educ. (Camden), GRC 2007-192 (February 2009).

- Charge for conversion must be actual cost. Libertarian Party of Central NJ v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) – the custodian charged \$55.00 for a computer diskette.
- Gannett Satellite Info. Network, Inc. v. Borough of Raritan, Docket No. SOM-L-1789-09 (December 2009) – Gannett requested records in particular format not maintained by agency. Court held that Gannett must pay for any required medium conversion.

Actual costs apply. So, what do you think?

- **Example 1:** Requestor wants a record sent via e-mail. Custodian must scan paper document to convert to electronic format. Request takes the Custodian 5 minutes to complete. Can you charge for that one?
- **Example 2:** Requestor wants an audio recording of a meeting mailed to him in CD-ROM format. The custodian copies the recording in house onto a \$0.50 CD. The request takes Custodian 20 minutes to complete. Postage is \$0.50. What's the total charge?

- **Example 3:** Requestor wants large tax maps on CD-ROM. Custodian does not have capability to scan large maps and must use a third party vendor. The vendor charges the agency \$15.00 for service. Can the \$15.00 fee be passed onto requestor?
- **Remember:** Vendor fees are special service charges and must be approved by requestor prior to being incurred.

How must a custodian
send records to a
requestor?

- A custodian must grant access to a government record by the specific method of delivery identified by the requestor.

Example: A requestor wants records sent via fax. The custodian must send the records via fax.

What times of day must an agency allow for OPRA inspections, copying, etc.

- N.J.S.A. 47:1A-5(a).
- You must allow for inspection, examination, copying, etc., “during regular business hours.”

Can a small agency set
specific times to
receive/fulfill OPRA
requests?

- Yes! N.J.S.A. 47:1A-5(a).
 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.
- Could I have that in English please?
 - 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 about privacy
concerns?

- 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.”
- In Burnett v. County of Bergen, 198 N.J. 408 (2009), the court held that OPRA’s legislative findings are more than a preamble and impose an obligation on agencies to protect against disclosure of personal information.

Privacy, cont.

- Dog license applications? Yes or no?
- Bernstein v. Borough of Allendale, GRC Complaint No. 2004-195:
- The Council conducted a balancing test and held that “pursuant to N.J.S.A. 47:1A-1 and Executive Order 21, the records should not be disclosed because of the unsolicited contact, intrusion, or potential harm that may result.”

Privacy, cont.

- Dog licenses, part two:
- Atlantic County SPCA v. City of Absecon, 2009
NJ Super. Lexus 1370 (App. Div. 2009).
- The Court conducted a balancing test and held that ASPCA's need for access to dog license information out-weighed the City's need for confidentiality. A major factor was the ASPCA's mission to investigate alleged animal abuse.

- Each determination is made based on the specific facts of the complaint by balancing the requestor's need for the information against the agency's need to keep the information confidential.

Privacy, cont.

The GRC has routinely upheld a custodian's redaction of home addresses and home telephone numbers due to privacy concerns. However, that position is not universal.

What about the
commercial use of
government records?

Commercial Requests

- **Sorry, but there is no restriction against commercial requestors based solely on the fact that they are commercial requestors. Period.**
- **Some states have such restrictions. New Jersey is not one of those states.**

What if OPRA requests
become excessive or
harassing?

Excessive or Harassing

- **Simply stated: good luck!**
- There is one example out of North Jersey, where an agency went to a Superior Court judge and sought an order to invalidate numerous requests from a particular frequent requestor. The town sought to enjoin that requestor from making future requests.
- The Court in that case granted a limited restriction. In that case, the requestor went out of his way to be a problem, and the judge agreed.

Excessive/Harass, cont.

- There is an example out there of a requestor who was fired by a public agency.
- After being fired, she began a campaign of peppering the agency with public records requests.
- She asks for anything and everything under the sun, and there is no pattern.
- Could the agency contend that her campaign does not advance the purposes of OPRA?
- Perhaps – but, good luck. Keep in mind that people have a right to public records access.

- Another agency has a court-ordered restraining order against a particular requestor. He's only permitted to contact the agency via regular mail.
- In short, if an agency can make a good argument to a court, it could be sustained.

What if the requestor
asks for records that
have already been
provided?

- Unless the custodian has proof at the time of the new OPRA request that the requestor is still in possession of the same records, access must be granted again.
- In Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), the court held that the complainant could not have been denied access to a record if he had the record in his possession at the time of the OPRA request.
- Important: In Bart, the custodian had proof at the time of the request that the complainant was still in possession of the requested record. This decision is not universally applicable!

What if the responsive records are posted online or posted to an agency's website?

- Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014):
 - Here, the GRC reversed its prior decision in Kaplan v. Winslow Township Board of Education (Camden), Complaint No. 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; go find it!”

- A custodian's ability to direct a requestor to the specific location of a government record on the Internet is contingent upon on the requestor's ability to electronically access the records. A custodian is not absolved from providing the record in hardcopy if the requestor is unable to obtain the information from the Internet and makes it known to the custodian within seven (7) business days after receipt of the custodian's response, in which case the custodian will have seven (7) business days from the date of such notice to disclose the record(s) in hardcopy. Id. at 4.

What is the knowing and
willful penalty?

- 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 holds that the penalty is paid personally by the individual found in violation, not by the public agency.

- Knowing and willful = a high standard.
 - Actions must have been much more than negligent conduct.
 - The individual must have had some knowledge that his actions were wrongful.
 - Actions must have had a positive element of conscious wrongdoing.
 - Actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden.
 - Actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional.

K&W Fines?

- The GRC has issued six knowing and willful fines to five different custodians (the GRC has actually issued seven penalties, but the Appellate Division reversed one). One of the five custodians has been fined twice.

What are prevailing
party attorney's fees?

- When a requestor “prevails” in OPRA litigation (in court or with GRC) and is represented by legal counsel, the defendant public agency must pay the requestor’s reasonable attorney’s fees.
- What does it mean to “prevail?”
 - The filing of the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.
 - A factual causal nexus exists between the requestor’s litigation and the relief ultimately achieved.
 - The relief ultimately achieved had a basis in law.

Prevailing Party Fees

- Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). The GRC's standard is that a complainant is a "prevailing party" if **she achieves 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.

PPAF, cont.

- Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). The GRC follows the standard that a plaintiff is a 'prevailing party' if he achieves the desired result because the complaint brought about a voluntary change in the defendant's conduct.

PPAF, cont.

- The GRC position is that requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate:
 - (1) a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; and
 - (2) that the relief ultimately secured has a basis in law.

PPAF, cont.

- Keep in mind that PPAFs are not guaranteed in every case.
- The App. Div. last year reversed a prevailing party award to the tune of \$57,000. The court ruled that, although the agency had provided certain other records to the requestor post petition, the OPRA suit did not necessarily cause the change in the Custodian's behavior. North Jersey Media v. State Dept. of Law and Public Safety.

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.”

So, here we go!!!

REAL

WORLD

SITUATIONS

Text Messages

- 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.

Verry v. Franklin Fire District No. 1, GRC 2014-387 (July 2015).

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).

Messages composed & sent by requestor

The agency's Custodian lawfully denied access to the responsive records because the Complainant sought e-mails that he, himself, had composed and sent to the agency and because disclosure of those records to the Complainant "does not advance the purpose of OPRA."

Caggiano v. New Jersey Office of the Governor, GRC 2014-408 (July 2015).

Form DD-214

Certificate of honorable discharge: N.J.S.A. 47:1A-1.1

[A]ny copy of form DD-214 . . . or any other certificate of honorable discharge . . . from active service or the reserves of a branch of the Armed Forces of the United States, or from service in the organized Militia of the State, that has been filed by an individual with a public agency,

except that a veteran or the veteran's spouse or surviving spouse shall have access to the veteran's own records.

- Rosenblum v. Borough of Closter, GRC Complaint No. 2005-16 (October 2005).

Personal identifying information:

- Social security numbers. Herron v. NJ Department of Education, GRC Complaint No. 2011-268 (December 2012).
- Credit card numbers. GRC typically finds them exempt.
- Unlisted telephone numbers. Smith v. Department of Corrections, GRC Complaint No. 2004-163 (June 2005).
- Drivers' license numbers. Blue v. Wall Township Police Department, GRC Complaint No. 2002-47 (August 2003).

No Responsive Records

- Pusterhofer v. NJ Department of Education, GRC 2005-49.
- The Council held that no unlawful denial of access occurred because the custodian certified that no responsive records exist and the complainant provided no competent, credible evidence to refute the custodian's certification.

Ongoing/Continuing

- Blau v. Union County Clerk, GRC 2003-75: The complainant sought access to copies of deeds and mortgages on an ongoing basis. The Council held that “[t]he request for copies on a continuing basis is not valid under OPRA.”
- Paff v. Neptune Twp. Housing Authority GRC 2010-307. The Council held that if the complainant wanted access to approved meeting minutes, he would have to submit a new request after the minutes were approved.

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.
- 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.
 - For use by any law enforcement agency in this State or any other state or federal law enforcement agency.

Copyrighted Material

Grauer v. NJ Dep't of Treasury, GRC 2007-03 (November 2007):

The Council held that “[b]ased on the court’s holding in Bd. of Chosen Freeholders of Burlington Cnty. v. Robert Bradley Tombs, 215 Fed. Appx 80 (3d Cir. NJ 2006) and the GRC’s decision in Albrecht v. NJ Dep’t of Treasury, GRC Complaint No. 2006-191 (July 25, 2007), copyright law does not prohibit access to a government record which is otherwise available under OPRA.”

Litigation

- Darata v. Monmouth County Freeholders, GRC 2009-312.
- “The GRC notes that pending litigation is not a lawful basis for denial of access ... under OPRA. OPRA provides a statutory right of access to governmental records, which is not in any way supplanted by pending or ongoing litigation.”
Id. at 8.

Meeting Minutes

- The GRC has ruled: Parave-Fogg v. Lower Alloways Creek Twp., GRC 2006-51.
- The Council held that draft, unapproved meeting minutes are exempt from disclosure as ACD material.
- A Law Division judge last year agreed with the GRC that unapproved minutes are not subject to disclosure. That case is pending appellate review.

Meeting Minutes, cont.

- Miller v. Westwood Regional Sch. Dist. (Bergen), GRC 2009-49.
- The Council held that an audio recording of an agency's public meeting, used to draft the agency's official meeting minutes, is NOT deliberative in nature and therefore NOT exempt from disclosure as ACD material.

Offsite Records

- Michalak v. Borough of Helmetta, GRC 2010-220.
- The Council held that the custodian was required to obtain responsive records from the Spotswood Police Department because the Borough had entered into an interlocal (or shared services) agreement with Spotswood to operate their dispatch log. The Council found that the records were “made, maintained, or kept on file” for the Borough by the Spotswood Police Department pursuant to the agreement. Keep in mind that – in most cases, the location of a record is immaterial.

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 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.

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 or 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.

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.

OAQs

Dusenberry v. NJ City Univ., GRC Complaint No. 2009-101 (April 28, 2010): The Council held that the custodian lawfully denied access to outside activity questionnaires because they are personnel records exempt from disclosure and because the University had an obligation to safeguard from public access a citizen's personal information. N.J.S.A. 47:1A-10; North Jersey Media Group, Inc. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 386 (App. Div. 2009).

Résumés

- Kovalcik v. Somerset County Prosecutor's Office, 206 N.J. 581, 594 (2011):
- “OPRA, as it relates to personnel records, begins with a presumption of non-disclosure and proceeds with a few narrow exceptions” OPRA’s personnel records section permits disclosure of only a narrow category of information concerning an employee’s education and experience on a résumé: the records showing that a public employee meets the specific education and experience qualifications that are prerequisites for his job. This suggests that redactions may be necessary where a résumé contains information unrelated to the qualifications specifically required for the employee’s position.

Employment Apps.

- Toscano v. NJ Dep't of Human Serv., Div. of Mental Health Serv., GRC 2010-147 (May 2011):

The Council held that, “[t]he employment application sought by Complainant is not disclosable pursuant to OPRA because it is a personnel record which is exempt from disclosure pursuant to N.J.S.A. 47:1A-10, and Executive Order 26 (McGreevey 2002). *See* N.J.S.A. 47:1A-9(a).” Id. at 6.

HOWEVER.....

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.
 - 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.

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 2011-39 (January 2013).
- Janeczko v. NJ Dep't of Law & Public Safety, Div. of Criminal Justice, GRC 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.

Lyndhurst Case

- Please refer to the Supreme Court's recent decision in North Jersey Media Group v. Lyndhurst Township (2017).
- That case addressed, for example:
 - Use of Force Reports
 - Dash-Cam Videos
 - Witness Statements and Detailed Investigative Reports

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).

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.
- "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.)

****AS OF NOVEMBER 1, 2014****

- 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.

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.

Security Cameras

- Refer to Gilleran v. Township of Bloomfield (November 2016), where the majority court wrote:

“the broad brush of compelled release under OPRA, on demand for any or no reason, of the Township’s security system’s surveillance videotape product, revealing its capabilities and vulnerabilities, is contrary to the legislative intent[,] motivating OPRA’s exemptions based on security concerns. We hold that the videotape requested in this matter is not subject to public access under OPRA’s security exclusions.”

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 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.

Auto Accident Reports

- N.J.S.A. 39:4-131 states that reports are **not** privileged or confidential.
 - Truland v. Borough of Madison, GRC Complaint No. 2006-88 (September 2007): Council held that no redactions to auto accident reports are warranted.
- N.J.S.A. 39:4-131 also states that when reports are not requested in person, custodian may charge additional fee (in addition to OPRA fees) of up to \$5.00.
 - Donato v. Jersey City Police Dep't, 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).

Police Blotter/Call Sheet

- Perino v. Borough of Haddon Heights, GRC 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.

9-1-1 Tapes

- Fact specific determination!
- Serrano v. South Brunswick Twp., 358 N.J. Super. 352 (March 2003): requested 911 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 911 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 Compilations

• N.J.A.C. 13:59-1.2 authorizes access **only** to:

- Governmental entities of this State, the Federal government or any other state for any official governmental purposes, including, but not limited to, employment, licensing and the procurement of services.
- A person or non-governmental entity of any state, that seeks to directly engage the services of the subject of the record, for purposes of determining the subject's qualifications for employment, volunteer work or other performance of services.
- Attorneys-at-law licensed by any state for use in any contested matters docketed in any state or Federal courts or administrative agencies of any state.
- Private detectives licensed by the New Jersey Division of State Police pursuant to N.J.S.A. 45:19-8 et seq., for purposes of obtaining information in furtherance of the performance of their statutorily authorized functions, as specifically enumerated by N.J.S.A. 45:19-9(a)1 to 9.
- A named individual as prescribed pursuant to N.J.A.C. 13:59-1.7 (For the purpose of determining the accuracy thereof, any individual may request a fingerprint search on his or her personal criminal history record).

Mug Shots & Fingerprint Cards

- Mug shots, booking photos, whatever you might want to call them. Exempt or disclosable?
- 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.
 - **However**, Governor Christie last month signed L. 2017, c. 123, which addresses mug shots. We've sought legal advice as to how that might affect disclosure.

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. HOWEVER . . .
- Pepe v. Pepe, 258 N.J. Super. 157 (Ch. Div. 1992): court held that this exemption is not absolute and could be balanced to determine if the release of the records will be detrimental to the victim.

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.

Ongoing or Prospective Requests

- Requests for copies on an ongoing or continuing basis are not valid under OPRA. Blau v. Union Cnty. Clerk, GRC Complaint No. 2003-75 (November 2003).
 - 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.

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).

Moving Violations

- In Merino v. Borough of Ho-Ho-Kus, GRC 2003-110 (July 2004), the Council ordered the custodian to release copies of all moving violation summonses issued by a particular officer, 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.”

Mobile Video Recording

- Gorman v. Gloucester City Police Dep't, GRC 2004-108 (October 2008).
- FACT SPECIFIC!! Consult current case law!
- The GRC 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.

- However, trial courts have ruled differently than the Council re: disclosure of MVR recordings.
- 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 social security number and driver's license number, are 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 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 is connected with a criminal investigation or prosecution, such as a fatal motor vehicle accident.

Radio Transmissions

- The GRC generally finds radio transmissions to be public records, but they must be redacted to remove any information that is specifically exempt, such as:
 - Social security numbers
 - Driver's license numbers
 - Unlisted telephone numbers

Training Records

- Merino v. Borough of Ho-Ho-Kus, GRC 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.

Ripeness of a complaint

- Sallie v. New Jersey Dep't of Banking and Insurance, GRC 2007-226.
- The complainant filed a complaint, asserting that he had not received a response from the custodian and that seven days would have passed by the time the GRC received the complaint. The Council held that the complaint was unripe for adjudication and dismissed the complaint.

No standing, not the requestor

- Maxam v. Bloomfield Township Department of Health & Human Services, GRC 2013-302:
- The Council held that because the complainant was neither the requestor of the records nor the requestor's legal representative, the complainant has no standing to pursue an action for unlawful denial of access.
- N.J.S.A. 47:1A-6: "the right to institute any proceeding under this section shall be solely that of the requestor."

- Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). Request for correspondence between the Governor's Office and Port Authority re: E-Z Pass benefits provided to Port Authority retirees.
- Court noted request confined to specific subject matter with sufficient identifying information, namely, E-ZPass benefits provided to retirees. Court held that defendant "performed a search and was able to locate records responsive ..." which "... belied any assertion that the request was lacking in specificity or was overbroad."

Part 3:

Questions & Answers