

The Open Public Records Act

New Jersey Government Records Council

**Catherine Starghill, Esq.
Executive Director**



Overview

- Part 1 – Review of OPRA in practice
- Part 2 – Exemptions/Rulings specifically related to law enforcement records
- Part 3 – Questions & Answers

Part 1:
Review of OPRA in Practice

What is OPRA?

- Not Oprah the celebrity. 😊
- Open Public Records Act - N.J.S.A. 47:1A-1 et seq.
- Replaced the “Right to Know Law.”
- Increases public’s accessibility to government records (cultural change in New Jersey).
- ***Broadly defines a government record.***
- Provides compliance process via the GRC and NJ Superior Court.
- Provides for penalties to anyone who knowingly and willfully violates OPRA.

Non OPRA Requests

- Not all records requests are OPRA requests!
- Requestor elects to invoke OPRA's provisions by submitting OPRA request form or other written request mentioning OPRA.
- OPRA does not affect common law right of access, or right of access via discovery.
- Challenges to common law requests and discovery requests must be made to NJ Superior Court, not GRC.
- GRC cannot advise on process, fees, etc. regarding common law or discovery requests.

Discovery vs. OPRA

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

Who Can Request Records Under OPRA?

- Anyone!
- Although OPRA names “citizens of this State,” the Attorney General’s Office advises that OPRA does not prohibit access to residents of other states.
- A requestor may even file an OPRA request anonymously.

What is a Government Record?

- All government records are subject to public access unless specifically exempt under OPRA or any other law.
- **Government Record:** All records made, maintained, kept on file, or received in the course of official business.
- Expands Right to Know Law definition (records *required* to be maintained on file).
- 24 specific exemptions to disclosure (see exemptions handout).

Who is the Custodian?

Custodian of a Government Record:

- Municipality - the municipal clerk or other department head 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.
- GRC recognizes separate custodian for police departments when such custodian has been adequately publicized to the public.

OPRA Requests

- OPRA requests *should* be on the agency's official OPRA request form (Renna v. County of Union (App. Div. 2009)).
- Written requests not on an official form cannot be denied solely because they are not on the official request form.
- Written requests not on an official form must mention OPRA.
- If written request does not mention OPRA, it is not an OPRA request.

Making an OPRA Request

Requestors:

- Must name specific identifiable government records.
- Be as specific as possible – identify type of record, dates, parties to correspondence, subject matter, etc.
- Requests for information or that ask questions are **not** valid OPRA requests.
- Method of submission – 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).

Receiving an OPRA Request: Non-Custodian Employees

If an officer or employee of a public agency receives an OPRA request, they **must forward the request** to the records custodian **or direct the requestor** to the records custodian pursuant to N.J.S.A. 47:1A-5.h.

Steps in Responding to an OPRA Request

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?
Substantial disruption of agency operations?
5. Obtain records responsive to request.
6. Do the records or portions thereof fit into any of OPRA's exemptions?
7. Redact as necessary, convert to requested medium, calculate appropriate fees.
8. Provide records via requested method of delivery, or deny with legal basis in writing.

When Does the Clock Begin?

- The seven (7) business day response time begins when the custodian receives the OPRA request.
- There should be another employee designated to receive/fulfill requests in custodian's absence.
- Day 1 is the day after the custodian receives the OPRA request.
- When receiving an OPRA request, custodians should calculate the statutory response time and **must** adhere to it.
 - ***This is the most common violation of OPRA by records custodians.***

Statutory Response Time

- A custodian shall grant or deny access **as soon as possible, but no later than 7 business days** after the request is received. N.J.S.A. 47:1A-5.i.
- A custodian unable to comply with a request must indicate specific reason(s) in writing. N.J.S.A. 47:1A-5.g.
- A custodian must provide a response to each item requested, either:
 - Granting access;
 - Denying access;
 - Seeking clarification; or
 - Requesting an extension of time.

Failure to do so in writing within the seven (7) business days constitutes a “deemed” denial.

Immediate Access

- **Immediate access** ordinarily granted to budgets, bills, vouchers, contracts, and government employee salary information. N.J.S.A. 47:1A-5.e.
- Immediate means as immediately as possible – **on the spot unless** in storage, in use, or requires medium conversion. (Renna v. County of Union, GRC Complaint No. 2008-110 (March 2009)).
- If a custodian cannot provide immediate access to records for a legitimate reason, the custodian must reduce such reason to writing and request an extension of time to comply with the “immediate” statutory requirement.

Additional Time Required

- Custodians may seek extensions of time beyond the seven (7) business day deadline with legitimate reasons.
- Requests must be in writing, within the seven (7) business days, and provide an anticipated date upon which the records will be provided.
- Failure to grant or deny access by the extended deadline date results in a “deemed” denial. N.J.S.A. 47:1A-5.i.

Broad and/or Unclear Requests

- Example of an overly broad request: “Any and all records related to the construction of the new high school.”
- “Records” is too broad of a term.
- Example of a valid request: “Any and all e-mails between Jane Doe and John Smith regarding the construction of the new high school from January 1, 2009 to February 28, 2009.”
- Names specific type of record, parties to correspondence, subject and date range.

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 Schuler (GRC decision).
- 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. Township of Union, GRC Complaint No. 2005-182 (February 2007).

Broad and/or Unclear Requests

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

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."

Seeking Clarification

- A custodian may seek clarification of an overly broad or unclear request.
 - Request must be in writing, within seven (7) business days.
 - Response time stops until requestor responds – Moore v. Township of Old Bridge, GRC Complaint No. 2005-80 (August 2005).

Special Service Charge

- 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.
 - Accommodating request involves an extraordinary expenditure of time and effort (also allowed for **inspection**).
 - Case-by-case determination - No ordinance allowed!!
 - GRC’s “14 Point Analysis” (see Handout)
 - Courier Post v. Lenape Regional High School, 360 N.J. Super. 191 (Law Div. 2002) and Fisher v. Department of Law & Public Safety, Division of Law, GRC Complaint No. 2004-55 (August 2006).

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 an agency's resources available to fulfill a request.
- See Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220; Vessio v. NJ DCA, Division of Fire Safety, GRC Complaint No. 2007-188.

Obtain Records Responsive

- Reasonable that Custodian does not have physical custody of all records maintained by agency.
- Custodian should document attempts to access records from other departments/personnel.
- Custodian should keep requestor informed of attempts to gain access to records.
- Custodian cannot be held responsible if another employee obstructs access as long as Custodian can prove attempts made to gain access to the records.

OPRA's Exemptions

- 24 specific exemptions contained in OPRA (see handout).
- If record does not fit into any exemption, it is accessible under OPRA.
- Default answer is always YES!!!

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 on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requestor.

Redactions Cont'd

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!!**

Redaction Example



State of New Jersey
Government Records Council
GOVERNMENT RECORDS REQUEST FORM
101 South Broad Street, PO Box 819
Trenton, NJ 08625-0819
Phone: 866-850-0511 Fax: (609) 633-6337
E-mail: grc@dca.state.nj.us Website: www.nj.gov/grc



Important Notice

The reverse side of this form contains important information related to your rights concerning government records. Please read it carefully.

Requestor Information – Please Print

First Name Jane MI M Last Name Smith

E-mail Address N/A

Mailing Address [REDACTED]

City [REDACTED] State [REDACTED] Zip [REDACTED]

Telephone [REDACTED] FAX N/A

Preferred Delivery: Pick Up US Mail On-Site Inspect Fax Email

If you are requesting records containing personal information, please select one: Under penalty of N.J.S.A. 2C:28-3, I certify that I **HAVE** / **HAVE NOT** been convicted of any indictable offense under the laws of New Jersey, any other state, or the United States.

Signature Jane Smith Date 9/1/2010

Payment Information

Maximum Authorization Cost \$ 5.00

Select Payment Method

Cash Check Money Order

Fees: Actual cost of duplication

Delivery: Delivery / postage fees additional depending upon delivery type.

Extras: Special service charge dependent upon request.

Medium Conversion

- 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 (meaningful to the requestor).
- Custodian may impose a special charge related to conversion for:
 - Extensive use of technology and
 - Labor for programming, clerical and supervisory assistance that may be required.

Medium Conversion Cont'd

- 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.
- Charge for conversion must be actual cost. See Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006) – Custodian charged \$55.00 for a computer diskette.
- See also Gannett Satellite Information 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.

Legislative Changes to Copying Costs

- Governor Christie signed legislation on September 10, 2010 that changes OPRA's fee schedule:
 - 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); and
 - Must charge the actual cost to provide records in another medium (i.e. computer disc, CD-ROM, DVD).
- Fees became effective Tuesday November 9, 2010.

Fees for Auto Accident Reports

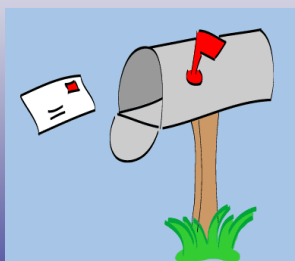
- The same legislation that amended the OPRA copy fees also amended the fee schedule for motor vehicle accident reports.
- **Old fee schedule:** the same fee established by OPRA. If copies of reports are requested other than in person, an additional fee of up to \$5.00 for the first three pages and \$1.00 per page thereafter may be added to cover the administrative costs of the report...”
N.J.S.A. 39:4-131.
- **New fee schedule:** the same fee established by OPRA (\$0.05/\$0.07). 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...”
- The amendment removes the subsequent charge of \$1.00 for each page after the third page and sets a flat fee of an additional \$5.00 (in addition to the new OPRA fees) when reports are requested other than in person.

Online Police Reports

- Some police departments utilize online services such as <http://PoliceReports.US> where requestors can access police reports without filing an OPRA request.
- These services are outside the scope of OPRA and fees for such services are outside of the GRC's authority.
- If requestor submits OPRA request for police reports that can be accessed online, custodian must still provide copies at OPRA copying fees.
- Custodian cannot direct requestor to website instead of providing copies. Langford v. City of Perth Amboy, GRC Complaint No. 2005-181 (May 2007).

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. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008).
- Charges for such delivery must reflect actual cost (until November 9th when electronic delivery becomes free of charge pursuant to OPRA amendment).
- May charge actual postage costs. Livecchia v. Borough of Mount Arlington, GRC Complaint No. 2008-80 (April 2010).



Lawful Basis for Denial

- Custodians must provide lawful basis for denial at the time of denial.
- This includes outright denials and redactions.
- Examples:
 - Jane Smith's payroll record is redacted pursuant to N.J.S.A. 47:1A-1.1. because social security numbers are exempt from public access.
 - 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.

Adequate Response

A proper response to an OPRA request:

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

Part 2:
Exemptions/Rulings
Specifically Related to
Law Enforcement Records

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

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.
- Janeczko v. NJ Department of Law & Public Safety, Division of Criminal Justice, GRC Complaint No. 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.

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.

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.

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 Housing Authority (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 County Prosecutor's Office, GRC Complaint No. 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.

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.

Disciplinary 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.

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; and
 - 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.

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 Department, 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 Complaint No. 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.

911 Tapes

- Fact specific determination!
- Serrano v. South Brunswick Township, 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 County, 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; and
 - 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

- 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.

Child Abuse/Assault Records

- N.J.S.A. 2A:82-46b 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.
- 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 Requests

- Requests for copies on an ongoing or continuing basis are not valid under OPRA. Blau v. Union County 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).

Identity of Requestor Irrelevant

- 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 University, GRC Complaint No. 2008-216 (August 2009); Cicero v. New Jersey Department of Children & Family Services, Division of Child Behavioral Health Services, 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 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.”

Use of Force Reports

- O'Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009).
- Trial judge held that the UFRs were not exempt from the general disclosure requirements of OPRA as criminal investigatory records under N.J.S.A. 47:1A-1.1.
- On appeal, the court agreed with the trial judge's reasoning and determined that the New Jersey Attorney General's guidelines, policies and procedures requiring the completion of UFRs and their maintenance in the files of police departments had the force of law for police entities, rendering such documents accessible under OPRA.
- Therefore, UFRs did not qualify, generically, under the criminal investigatory records exception of OPRA.
- Appellate Division affirmed the trial judge's order regarding the access entitlement issues.

Continuation & Incident Reports

- Police department continuation reports and incident reports respectively, are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and thus are exempt from disclosure (only if the reports relate to the investigation of a **crime** as defined in New Jersey statutes).
- Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2009).

Mobile Video Recording

- Gorman v. Gloucester City Police Department, GRC Complaint No. 2004-108 (October 2008).
- 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

- 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 Township Police Department, 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 is connected with a criminal investigation or prosecution, such as a fatal motor vehicle accident.

Radio Transmissions

- Are public records, but could 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.

Training Records

- Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 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.

Part 3:
Questions & Answers

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GRC Contact Information

New Jersey Government Records Council

101 S. Broad Street

P.O. Box 819

Trenton, NJ 08625-0819



Office: (609) 292-6830

Fax: (609) 633-6337

Toll-free (866) 850-0511

E-Mail: grc@dca.state.nj.us

Website: www.nj.gov/grc