

The Open Public Records Act

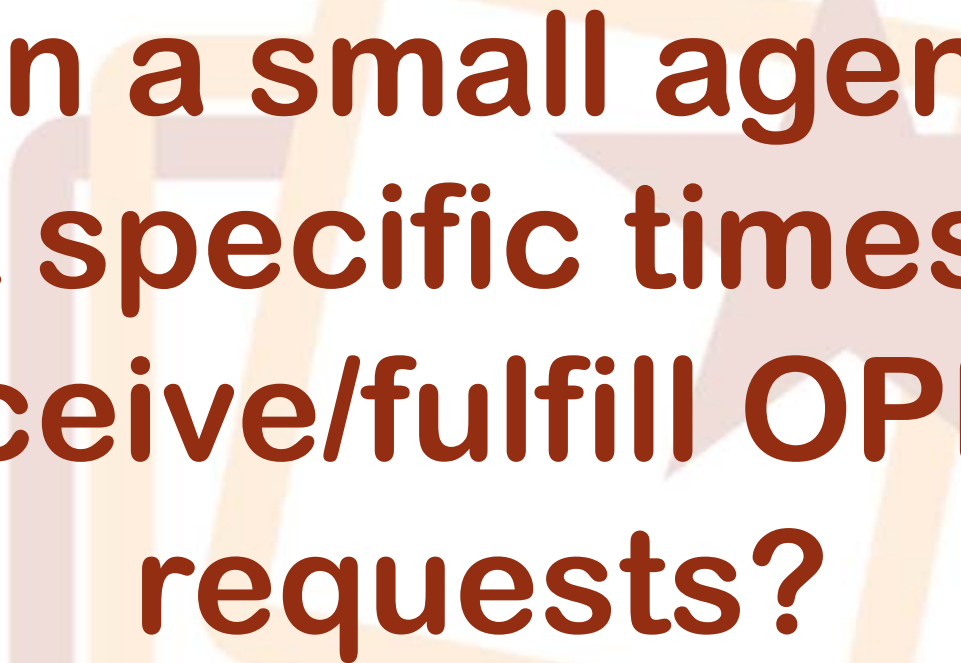
**New Jersey Government Records Council
Video 4**



**Government
Records Council**

A decorative graphic consisting of three overlapping squares with rounded corners, each with a different color (light blue, light green, and light red). A large, light red star is positioned in the center, overlapping the squares.

Special OPRA Issues

A faint background graphic consisting of a large, light-colored star with a square outline around it, both rendered in a light orange or tan color. The text is centered over this graphic.

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

- Yes!

- Who?
 1. Municipalities with a population of 5,000 residents or less;
 2. Board of Education with total enrollment of 500 or fewer;
 3. Public authority with less than \$10 million in assets.



- What times?
 - Not less than 6 regular business hours over not less than 3 business days per week, or the entity's regularly scheduled business hours, whichever is less.

- What does this really mean?
 - 2 hours a day for 3 days a week, minimum, unless the agency's regularly scheduled business hours are less.



The background features a decorative graphic consisting of three overlapping squares with rounded corners. The squares are rendered in a light orange and beige color palette. A large, semi-transparent, light purple star is positioned in the upper right quadrant, partially overlapping the squares. The text is centered over this graphic.

**What about privacy
concerns?**

- OPRA states in its Legislative Findings, “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 Burnette 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.



- What does this mean?
 - The GRC has routinely upheld a custodian's redaction of home addresses and home telephone numbers due to privacy concerns.
- 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.



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**What about the
commercial use of
government records?**

- There is no restriction against the commercial use of government records under OPRA.
- This means there is no limitation on a business entity obtaining records through OPRA to be used for commercial gain.
- Example: attorney or chiropractor obtaining motor vehicle accident reports from police departments to use for direct mail solicitation.



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**What if OPRA requests
become excessive or
harassing?**

- OPRA is silent on the number of OPRA requests one person can submit to a particular agency.
- Remember there are options in OPRA to help with “overwhelming” OPRA requests:
 - Requesting an extension of time to fulfill the request.
 - Assessing a special service charge.
 - Denying the request due to substantial disruption of agency operations.
- However, if you believe you are being harassed, you may have options in civil court. There are no remedies in OPRA itself.



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**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: 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!



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**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.
- Penalty is paid personally by individual found in violation, not the public agency.



- Extremely high standard for penalty.
 - Actions must have been much more than negligent conduct;
 - 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.



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**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 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.



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What is the Government Records Council?

- Court alternative to challenging a denial of access under OPRA.
- Prepares informational materials for requestors and custodians regarding OPRA.
- Provides OPRA training.
- Operates a toll-free inquiry hotline for OPRA questions.



- GRC Complaint Process:
 - Step One: Denial of Access Complaint.
 - Step Two: Mediation (optional, but must be in good faith).
 - Step Three: Adjudication.
 - Step Four (if desired): Appeal to Appellate Division of NJ Superior Court.
 - See GRC Regulations for details regarding each step .



- When calling the GRC with an OPRA question, be aware of the following:
 - Information provided by the GRC is based on the information presented by the requestor or custodian and is not an official decision of the Council.
 - The GRC cannot tell a custodian exactly how to respond to an OPRA request.
 - The GRC provides *guidance* not *legal advice*.



- What is the difference between *guidance* and *legal advice*?
 - **Guidance:** think of the GRC as a reference library. The GRC can give you all the resources you need (OPRA provisions, prior case law) so that you can make your own decision on whether to grant or deny access. The GRC cannot make this decision for you.
 - **Legal Advice:** The GRC cannot tell custodians exactly how to respond to a request. This is a conflict of interest in the event a complaint is filed with the GRC. Only your legal counsel can give you legal advice.



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