

LOCAL FINANCE NOTICE

NEW DIVISION DIRECTOR NAMED

Department of Community Affairs Commissioner Susan Bass Levin recently announced that Matthew U. Watkins will assume the position of Director of the Division of Local Government Services. Mr. Watkins is an experienced New Jersey local government administrator, most recently serving as South Brunswick's Township Manager.

DCA and Division staff welcomes Mr. Watkins as he assumes his new responsibilities on July 8, 2002.

Implementing the Open Public Records Act (OPRA)

Overview

Important changes to the State's public records law take effect on July 7, 2002. The result of a law passed earlier this year, the Open Public Records Act, or "OPRA" (P.L. 2001, c. 404, N.J.S.A. 47:1A-1 et seq.) goes beyond the existing "Right-To-Know" law that governs public access to government records.

The law affects most of the State's government entities. It significantly changes the range of records that are available for public access, and how government agencies, through their records custodians are, obligated to provide them to the public. This Local Finance Notice is an overview of the law and provides advice to local units on actions they should take to implement OPRA in their jurisdictions.

Additional information on the law is available from a number of sources, including the newly created Government Records Council (GRC) web site www.nj.gov/grc. The site will contain an ever-increasing collection of guidance, forms, and information about the law.

Local officials with questions on OPRA issues should consult these resources as well as rely on advice from their legal advisors. The law includes specific deadlines for public agencies to respond to requests for records and failing to abide by them can result in fines and costs assessed against agencies and custodians.

OPRA makes substantial changes in the definition of a "government record," (previously called a "public record") and in the role of government "records custodians" to make them available to the public on a timely basis. Local units must carefully review the law to determine what steps they must take to ensure compliance with it. The following is an excerpt of the State Legislature's very clear public policy found in the opening sentences of the law:

“...Government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access, shall be construed in favor of the public's right of access;

All government records shall be subject to public access unless exempt from such access; and

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...”

This section of the law also notes that nothing in the new law replaces the existing “common law” right of access to any record.

In other words, the State’s policy on public records is now:

1. That all records, subject to certain exceptions, are open to public inspection and copying;
2. That limits on access shall be construed in favor of the public’s right to access; and
3. That public agencies have an obligation to secure personal information when its disclosure would violate a “citizen’s reasonable expectation of privacy”.

This policy is very different from the previous law that said only those documents required by law to be kept and maintained were considered “public” records. Thus, local officials must carefully study the new law to ensure that their policies provide the required access. Substantial changes in local practices may be required to meet these new policies.

The balance of this Notice provides an overview of key elements of the law and actions local officials should take to ensure compliance. The online version of the Notice provides hyperlinks to the law of the highlighted terms.

Further, the Government Records Council has released a “Custodian’s Handbook” which provides greater detail on all these issues. All officials responsible for implementing the law in their agency should consult the Handbook for additional guidance.

What is a Public Record

In simplest terms, a **government record** is a piece of information, either printed or recorded, or stored electronically or on film, which is used in the course of government business by a **public agency**. A public agency includes all local units, their subsidiaries, boards, commissions, etc. A government record includes formal and informal documents, electronic, printed or handwritten.

Exempt from the requirements of the law is the State’s judiciary, which includes the municipal courts. The judiciary will be updating its own rules in the near future. As they are part of the judicial system, the provisions of OPRA do not apply to municipal courts.

Under the law, all government records are to be accessible to the public, unless there is an exception to disclosure for the record. The law itself lists more than 25 exceptions; it also provides that other exceptions can

be added through Executive Orders issued by the Governor, rules of State agencies, other State or federal laws, or court decisions.

Exceptions were created for specific purposes. When custodians are considering if a specific record meets an exception, the following should be considered and examined:

- A citizen's reasonable expectation of privacy in records in the possession of a public agency,
- Because of public safety and security concerns, or
- To help insure full and robust debate and consideration of issues within public bodies.

The broadest examples of exceptions to the law include the following areas:

- Inter- or intra-agency advisory, consultative, or deliberative material.
- Personal information (i.e., home addresses, home phones, social security numbers, drivers licenses, or credit card numbers).
- Information related to domestic or public security.

Please note that the word "confidential" is not an exception.

Generally speaking, the "advisory, consultative, or deliberative" (ACD) exception refers to information involved in reaching policy decisions by government agencies. It refers to the last of the reasons for exceptions: "to help insure full and robust debate and consideration of issues within public bodies." The use of this exception should be carefully considered.

Further, while public agencies are encouraged to indicate material as ACD, just labeling it as ACD does not automatically make something ACD and an exception from disclosure. If disclosure of such records is requested, the decision should be made at the time a request is made and in consideration of the circumstances.

Finally, any public record that contains personal information to which a citizen has a "reasonable expectation of privacy" (specifically including social security number, driver's license, unlisted phone numbers, and credit card numbers) that information must be redacted before a requester has the opportunity to view or get a copy of it. In some cases, that may mean the custodian will have to copy the record, black out or otherwise cover-up the information, then copy again to make certain that the information cannot be viewed at all (fees cannot be charged for these intermediate copies).

For copies of information stored in a computer, agencies should consider preparing special reports or displays for commonly requested information that normally includes personal information.

Finally, in order for a records custodian to withhold a government record from access by the public, there **must** be a specific exception that explains the reason for denying access. That reason must be given to the individual requesting the information, in writing on the request form, at the time access is denied.

The Government Records Council website contains an extensive list of exceptions. The list includes the different Executive Orders signed by the various Governors (Hughes to McGreevey), the State agency rules and State statute exemptions.

The Role of a Records Custodian

OPRA requires that each public agency appoint a “records custodian” as the person who receives requests from the public for access to public records. Governing bodies or the heads of public agencies can appoint multiple custodians or sub-custodians based on the needs and structure of their organization.

However, in the case of municipalities, OPRA specifies that the municipal clerk is the custodian of records. While it is clear that the municipal clerk has absolute responsibility for the official records of the municipal corporation and the governing body, State law is less clear on the role of the Clerk when it comes to custodianship of records in other agencies, such as the police department, finance office, or land use administration. Municipal officials are urged to act accordingly to ensure that public needs are met in making determinations on custodian decisions. Consideration should be given to formally assigning custodian responsibility by ordinance, resolution, or having the clerk assign “sub-custodian” responsibility as local needs and the law finds responsible.

It is clear that the Legislature intended that the Municipal Clerk’s office be a “single point of entry” for obtaining government records. While municipal records may be available directly from other offices (i.e., police records from the police department), the Clerk’s office is a place where any record could be requested, and internally processed to the appropriate office to ensure that a timely response is made.

It is the custodian’s job to ensure that the deadlines established under OPRA for responding to records requests are met, and that records are available for public access. In addition, it is the custodian who may be subject to fines in those circumstances when intentional denial of access was found to have taken place.

Responding to Requests for Access

Records Request Forms

All custodians must adopt a form to be used by the public for requesting access to public records. The law requires that these forms contain certain elements of information. Key elements include:

- The name, address, and phone number of the requester (not required for anonymous requests);
- A brief description of the government record sought;
- Space for the custodian to indicate records that will be made available, when the record will be available, and the fees to be charged;
- Specific directions and procedures for requesting a record;
- A statement as to whether prepayment of fees or a deposit is required;
- A statement of the requester'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 requester to sign and date the form;
- Space for the custodian to sign and date the form if the request is fulfilled or denied.

In addition, the form must note that the custodian must respond to the request no later than seven business days from its receipt. For the purposes of this requirement, the day after the form is received is considered to be the first day.

Fulfilling Requests

Custodians are required to act promptly to fulfill requests. The seven business day limit does not mean that all requests should be fulfilled on the seventh day; that is simply the last date that fulfillment can be made without violating the law. If a separate law about a particular record requires a shorter time period, the shorter period applies.

If the records are in storage or the response to the request requires more than seven business days in order to prepare copies or provide access, the custodian must, within the seven business day period, advise the requester when access to the requested records will be provided. This time period must be reasonable and can be negotiated with the requester. Failure to agree on a time period results in a denial of access, and the requester can file a complaint on the matter. However, if a request would substantially disrupt the agency's operations, and if attempts to reach a reasonable solution to access fail, a custodian can deny a record.

Access is denied by listing the records being denied and the reason for denial (or when access would be provided) on the request form. In addition, the requester must be provided with a pamphlet, prepared by the Government Records Council advising them of access and appeal rights. The pamphlet is available on the GRC website.

Immediate Access

There is certain information that the law requires must be provided "immediately" upon request. OPRA requires that immediate access ordinarily must be granted to budgets, bills, vouchers, contracts (including collective bargaining agreements and individual employment contracts), and public employee salary and overtime information.

Immediate access means at once, without delay. The custodian must make an effort to provide the access as soon as possible when a request for this category of records is submitted. It is recognized that compliance with this requirement may interfere with the work of an office because in some cases the requester must be observed while inspecting the records to ensure that documents are not tampered with. Agencies should act reasonably, using their best efforts to comply with this requirement.

The "ordinarily" part of the law means immediate access applies only to government records that are readily accessible to the custodian. Otherwise, the regular request process applies.

We anticipate that the requesters will take this section very seriously. Where practical, local units should consider taking steps to make these readily available (i.e., have copies ready for inspection or have copies pre-printed) to minimize disrupting routine operations.

Fees for Copies

OPRA maintains the existing fee schedule for records that are routinely copied in-house. That schedule is:

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|---------------------|--------------|
| Pages 1 through 10 | \$.75/ page |
| Pages 11 through 20 | \$.50/ page |
| All pages after 20 | \$.25/ page |

This schedule will apply to requests for copies of government records unless a statute or State regulation sets a different fee. Public agencies cannot set arbitrary fees, unless it can demonstrate that its actual cost (excluding overhead) of duplicating a record is more than these rates. This part of the law remains unchanged.

The law allows higher amounts to be charged if the work is beyond what can be handled in-house to fulfill a request. When such extra work is required, the local unit can charge it's actual direct cost, without labor costs. This has specific applicability to sending engineering drawings or blueprints to specialty vendors.

The law also provides for "special circumstances," when records cannot be reproduced by regular copying equipment or involves extraordinary time and effort. In these cases, the actual cost (material and supply; no staff labor) plus a "Special Service Charge" can be charged. The special service charge can include the cost of staff plus other direct costs (no overhead) related to the work. This can apply to requests that involve a large number of records that must be recovered from storage, or special projects that require an extraordinary effort on the part of staff to meet the request.

Further, the law specifically requires that municipalities must set specific rates for the special service charge by ordinance. Those rates can be by the hour or based on the costs of an outside vendor.

In all cases, a requester must be advised of fees before the work is started. The local unit can also set policies on requiring deposits or pre-payment given the specific types of requests it may receive.

Finally, the law requires public agencies to make records available in mediums other than how the agency routinely stores them. An example may be conversions of computerized records to a CD-ROM, or in more complicated cases, conversion of film to computerized records. In these cases, a special charge is authorized when a request is for a record:

- In a medium not routinely used by the agency (i.e., electronic or film);
- Not routinely developed or maintained by an agency; or
- Requiring a substantial amount of manipulation or programming of information technology

The agency can assess its actual direct cost plus a "special charge" based on cost of technology or labor actually incurred. This is to ensure that these types of requests are fully paid for by the requester.

E-Mail and the Impact of Records Retention Rules

E-mail is a transmission of a record; like US mail, but e-mail by itself is not necessarily a government record and not automatically disclosable. To determine if e-mail is a government record, the following questions need to be asked:

1. Does the content of an e-mail meet the definition of government record?

2. If so, what kind of record is it?
3. How long do I keep it?

If e-mail is a government record, the custodian must ensure it is properly stored, and if required, made available for public access. A key element in making this decision is determining how long the e-mail must be kept. The answer to this lies with the State's records retention rules promulgated by the Division of Archives and Records Management (DARM). Each agency must carefully review the retention requirements to ensure that its e-mail and other computerized records follow the appropriate retention schedule for each kind of record. In many cases, important decisions must be made to develop ways of saving material in a computer system, or simply printing out certain documents and retaining them with other similar paper documents (which of course, are disposed of in accordance with the retention schedule).

In some ways, attention to records retention practices are an unintended consequence of OPRA. This is because the DARM records retention schedules will be online to assist the public in gaining access to government records. Thus, agencies should ensure that their policies are up-to-date, records are disposed of in accordance with DARM rules, and their stored records are accessible.

When Access is Denied

There will be cases when a custodian must deny access to a requested record in accordance with the law. The law anticipates there will be disputes over interpretation of exceptions, access timing, and costs. Two models of resolving disputes are provided: use of the court system and use of the Government Records Council. In both cases, the law requires that the custodian must prove why the record is not subject to public access (reversing the old law where the requester had to prove that a record was subject to disclosure), and allow attorney fees to be granted to the requester, should the public agency be found to have illegally withheld access.

Under the Court process, any denial of access can be taken to Superior Court, through a motion in lieu of a prerogative writ. These matters warrant legal advice, a \$200 filing fee, and a period of time for the parties to file their papers before a judge can rule or hold a hearing.

The Government Records Council is intended to be more "user-friendly." The Council cannot charge any fees for its services. The following summarizes the Council's process:

- (1) A requester makes an inquiry about a denial to the Council (in writing or over its toll-free help-line) and Council staff attempts to intervene with the parties and resolve the dispute.
- (2) If intervention fails, the requester can file a formal complaint, which, after verification by the Council staff, results in the opportunity for the parties to resolve the matter by informal mediation. The State's Office of Dispute Settlement, an impartial agency dedicated to resolving disputes, conducts the informal mediation without involvement of the Council.
- (3) If mediation is rejected by one of the parties or fails, the Council staff will review the complaint, and if found valid, will conduct an investigation, from which the Council's Executive Director will issue preliminary findings. If accepted by both parties, the case is closed; if rejected by one, the matter will be referred to the full Council for review of the record.

- (4) If the Council reaches a determination on the record, a final agency decision is issued. The Council could choose to handle it as a contested case, in which a hearing would be held, then a final agency decision would be made. Any appeal of a final agency decision would go to the Appellate Division of the courts.

The GRC and the courts have the ability to order attorney fees paid by the public agency if it finds the public agency wrongfully prevented public access. In addition, a custodian, who the Council finds to have willfully and knowingly denied access in the totality of the circumstances, can be fined and be subject to disciplinary action.

Role of the Government Records Council

The Government Records Council has statutory responsibility to:

- Establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
- Receive, hear, review, and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
- Issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;
- Prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
- Prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;
- Prepare lists for use by records custodians of the types of records in the possession of public agencies that are government records;
- Make training opportunities available for records custodians and other public officers and employees to explain the law governing access to public records; and
- Operate an informational Web site and a toll-free help-line staffed by knowledgeable employees of the Council during regular business hours which will enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the Government Records Council when access has been denied.

The Council is an independent agency, but is organizationally located in the Department of Community Affairs and assisted in its mission by the Division of Local Government Services.

In order to communicate with the wide range of records custodians in public agencies, the Council will use the Internet, e-mail, and its web site as the primary vehicles of delivering information. All information will be made available on the web site before it is available in printed form; some material may only be available electronically. In fact, the printed material referred to in this Notice is not being mailed to individuals receiving this Notice. It is available on the Council's web site or by submitting the request form included with this Notice.

Thus, use of the Internet is an integral element of ensuring compliance with the law. Custodians should ensure that they have access to its resources. In addition to the web site, the Council is researching the use of GovConnect as a basis for communicating with custodians.

As the effective date of the OPRA approaches, GRC and DLGS staff has been active in performing the following activities:

- Developing informational material: a Custodian's Handbook, a "Citizens Guide to OPRA," a flyer about access rights and appeals of denials for custodians to give requesters whose request is denied, and a poster for custodians to place in their office to tell requesters about their rights to appeal a denial.
- Setting up a web site with information for the public, custodians, and the press.
- Establishing a toll-free help-line for individuals with questions about the law or desiring to file complaints with the Council.
- Developing a series of "Frequently Asked Questions" to assist the public and custodians in dealing with OPRA issues.
- Preparing and delivering presentations about the law to records custodians.

Detailed contact information for the Council will be available on the website shortly.

What Custodians Should Do

OPRA takes effect on July 7th. Public agencies should be developing and implementing their plans now. Among those plans should be the following activities:

- Review of this Notice, the law, and the Custodian's handbook.
- Go to the Council's web site for additional information (www.nj.gov/grc)
- Appoint appropriate custodians for the local unit; municipalities should carefully consider the role of the Municipal Clerk as custodian for other parts of their organization.
- Review records retention issues
- Educate staff
- Be prepared to deal with immediate access requirements
- Adopt a records request form that meets the requirements of the law
- Municipalities should set fees for special service requests
- Examine practices for making common information available to simplify compliance
- Adopt a policy regarding deposits and prepayment of fees

Obtaining GRC Information

Custodians with Internet access should immediately go to the GRC website (www.nj.gov/grc) and review the information available. Specifically, they should download the Custodian's Handbook, the public flyer (to copy locally and make available to the public when access is denied), the Access Poster to post pursuant to the law. Once familiar with the law, the Frequently Asked Questions site should be visited to resolve questions that arise.

If a custodian does not have Internet access, use the enclosed form to request that information be mailed to you. All municipal clerks have access through GovConnect therefore; information will not be mailed to them. Clerks that have not yet enrolled or who do not yet have access to GovConnect should contact the GovConnect help line at 609-943-4724 to enroll promptly.

Conclusion

Without question, the Open Public Records Act provides a significant challenge to local units. It is broad and sweeping in its impact and it changes basic rules and expectations of how local units provide and respond to requests to access for public records. Local units should carefully examine their practices and adopt new ones that will meet the statutory intent and law of the State. The bottom line of OPRA is simple:

- If it's a record, it's disclosable, unless there is an exception to it.
- Easier public access to records is now the law and agencies must adapt to it.

Enclosure: Information Order Form

Distribution: Via GovConnect e-mail to Municipal Clerks and Clerks to Board of Chosen Freeholders to distribute to their governing bodies
Mail to Executive Directors of local authorities and Presidents of Fire Districts.