



# The New Jersey Open Public Records Act Handbook for Records Custodians



## **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 Information Line: (866) 850-0511

E-Mail: [Government.Records@dca.nj.gov](mailto:Government.Records@dca.nj.gov)  
Website: [www.state.nj.us/grc/](http://www.state.nj.us/grc/)

**The Open Public Records Act:  
Handbook for Records Custodians  
Sixth Edition – April 2020**

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## Use of This Handbook

The OPRA Handbook for Records Custodians has been prepared by the Government Records Council (“GRC”) to help public agency records custodians understand the requirements of the State of New Jersey’s Open Public Records Act (N.J.S.A. 47:1A-1 et seq.). While the handbook focuses on the needs of records custodians, we anticipate that it will also be a useful resource for requestors interested in obtaining access to government records.

This handbook serves as guidance and does not constitute legal advice or a final decision of the GRC. Further, the GRC cannot tell a custodian exactly how to respond to an official OPRA records request because said response must depend on the specific facts of each request. Records custodians seeking legal advice should contact their designated legal counsel.

The Council’s website at [www.state.nj.us/grc/](http://www.state.nj.us/grc/) contains useful information on the law, including summaries of exceptions to disclosure, copies of gubernatorial Executive Orders, lists of statutes containing exceptions, and a search engine of prior GRC decisions. Custodians, their legal advisors, and the public are urged to check the website when questions arise and should also feel free to submit their questions to the Council via our toll-free information line (1-866-850-0511), e-mail ([Government.Records@dca.nj.gov](mailto:Government.Records@dca.nj.gov)), or regular mail (101 South Broad Street, P.O. Box 819, Trenton, NJ 08625-0819).

In addition to this handbook, the Council has other resource materials that may be useful in assisting custodians to understand the requirements of OPRA. These materials include the following, which are accessible from the GRC’s website at [www.nj.gov/grc/meetings/present](http://www.nj.gov/grc/meetings/present):

- OPRA PowerPoint presentation
- Annual Seminar Materials
- Useful OPRA Cases by Subject handout
- Exemptions in OPRA handout
- Special Service Charge (14-point analysis) handout
- E-mail Retention – DARM Circular

## SECTION 1 – OPRA DEFINED

### What is the Open Public Records Act (OPRA)?

OPRA is a State statute that replaced the previous “Right to Know Law” and governs the public’s access to government records in New Jersey. OPRA was enacted in 2002 to give the public greater access to records maintained by public agencies in New Jersey by balancing the public’s interest in government records, respect for personal privacy, and the efficient process of government. OPRA is codified as N.J.S.A. 47:1A-1 et seq.

### Does OPRA affect a requestor’s right to access records by other means?

OPRA does not affect a requestor’s common law right of access, right of access records via discovery or other court processes, or right to access records informally without invoking OPRA.

If, in addition to requesting records under OPRA, a requestor also requests government records under the common law, please consider the following:

A public record under the common law is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are that it be a written memorial, that it be made by a public officer, and that the officer is authorized by law to make it.

If the information requested is a “public record” under common law and the requestor has a legally recognized interest in the subject matter contained in the material, then the material must be disclosed if the individual's right of access outweighs the State's interest in preventing disclosure.

***Note that any challenge to a denial of a request for records under the common law cannot be made to the Government Records Council, as the Government Records Council only has jurisdiction to adjudicate challenges to denials of OPRA requests. N.J.S.A. 47:1A-7. A challenge to the denial of access under the common law can be made by filing an action in Superior Court.***

Additionally, discovery requests may be served upon a public agency for access to government records pursuant to N.J. Court Rules, R. 3:13-3 (2005) and R. 7:7-7 (2005). Please note that requests for discovery do not affect a requestor’s right to request the same records under OPRA.

***Also, any challenge to a denial of a request for records pursuant to a discovery request cannot be made to the Government Records Council, as the Government Records Council only has jurisdiction to adjudicate challenges to denials of OPRA requests. A challenge to the denial of access pursuant to a discovery request can be made by filing an action in Superior Court.***

### What public policies are expressed in OPRA?

OPRA provides overriding public policies in the legislative findings (N.J.S.A. 47:1A-1) to which all records custodians must adhere when handling each OPRA request for access to government records. Those public policies are:

- Government records must be readily accessible for inspection, copying, or examination by its citizens, with certain exceptions, for the protection of the public interest.
- Any limitations on the right of access to government records must be interpreted in favor of the public’s right of access.
- A public agency has a responsibility and an obligation to protect a citizen’s personal information that is in the possession of a public agency when disclosure of that information would violate the citizen’s reasonable expectation of privacy.”

Again, these three policies must be incorporated in a custodian’s handling of each OPRA request for access to government records.

In fact, in Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009), the New Jersey Supreme Court held without ambiguity, that the privacy provision “is neither a preface nor a preamble.” Rather, “the very language expressed in the privacy clause reveals its substantive nature; it does not offer reasons why OPRA was adopted, as preambles typically do; instead, it focuses on the law’s implementation.” “Specifically, it imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests.”

### **Who may file an OPRA request?**

Anyone may file an OPRA request! See Scheeler v. Atlantic Cnty. Mun. Joint Ins. Fund, 454 N.J. Super. 621 (App. Div. 2018). Also, requestors may file OPRA requests anonymously without providing any personal contact information, even though space for that information appears on the form; thus, anonymous requests are permitted. N.J.S.A. 47:1A-5(i). However, OPRA specifically prohibits anonymous requests for victims’ records. N.J.S.A. 47:1A-2.2(c). If a permissible anonymous request involves making copies and the estimated cost exceeds \$5.00, the custodian may request a deposit. N.J.S.A. 47:1A-5(f).

### **What is a “government record” under OPRA?**

OPRA defines a government record as:

Any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file . . . or that has been received* in the course of his or its official business . . .

[N.J.S.A. 47:1A-1.1 (emphasis added).]

Simply stated, a “government record” means any record that has been made, maintained, or kept on file, or that has been received in the course of official business.

OPRA’s definition of a “government record” expands the Right to Know Law definition (which was limited to records *required* by law to be maintained on file).

OPRA covers more than just paper records. Under OPRA, a “government record” includes printed records, tape recordings, microfilm, electronically stored records and information (including e-mails, text messages, social media records, and data sets stored in a database), books, maps, photographs, *etc.*

*All government records are subject to public access unless specifically exempt under OPRA or any other law. As a custodian, your default mindset should be – yes, this record is subject to public access!!* However, OPRA contains 27 specific exemptions that exempt access to records as follows:

**N.J.S.A. 47:1A-1 (Legislative Findings)**

- 1) Privacy Interest - “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.”

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

- 2) Inter-agency or intra-agency advisory, consultative or deliberative material (Note: generally refers to draft documents or documents used in a deliberative process).
- 3) Legislative records. Specifically:
  - a. information received by a member of the Legislature from a constituent or information held by a member of the Legislature concerning a constituent, including but not limited to information in written form or contained in any e-mail or computer data base, or in any telephone record whatsoever, *unless it is information the constituent is required by law to transmit;*
  - b. any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member's official duties, *except that this provision shall not apply to an otherwise publicly-accessible report which is required by law to be submitted to the Legislature or its members.*
- 4) Medical examiner records – photographs, negatives, print, videotapes taken at the scene of death or in the course of post mortem examination or autopsy, *except:*
  - a. *when used in a criminal action or proceeding in this State which relates to the death of that person,*
  - b. *for the use as a court of this State permits, by order after good cause has been shown and after written notification of the request for the court order has been served at least five days before the order is made upon the county prosecutor for the county in which the post mortem examination or autopsy occurred,*
  - c. *for use in the field of forensic pathology or for use in medical or scientific education or research, or*
  - d. *for use by any law enforcement agency in this State or any other state or federal law enforcement agency.*
- 5) Criminal investigatory records - 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. (Note: N.J.S.A. 47:1A-3(b) lists specific criminal investigatory information which must be disclosed).

- 6) Victims' records - 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.

Also, should a victim submit an OPRA request for records (" . . . including, but not limited to, any law enforcement agency report, domestic violence offense report, and temporary or permanent restraining order. . ."), that specific OPRA request is exempt from disclosure.

- 7) 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.

- 8) Trade secrets and proprietary commercial or financial information obtained from any source. Includes data processing software obtained by a public agency under a licensing agreement which prohibits its disclosure.
- 9) Any record within the attorney-client privilege. This paragraph does not allow for a denial of attorney invoices in their totality; however, redactions may apply for information contained in the invoices that are protected under the privilege.
- 10) Administrative or technical information regarding computer hardware, software and networks which, if disclosed would jeopardize computer security.
- 11) 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.
- 12) Security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software.
- 13) Information which, if disclosed, would give an advantage to competitors or bidders.
- 14) Information generated by or on behalf of public employers or public employees in connection with:



- a. Any sexual harassment complaint filed with a public employer;
  - b. Any grievance filed by or against an individual; or
  - c. Collective negotiations, including documents and statements of strategy or negotiating position.
- 15) Information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office.
  - 16) Information which is to be kept confidential pursuant to court order.
  - 17) Certificate of honorable discharge issued by the United States government (Form DD-214) filed 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.*
  - 18) Any copy of an oath of allegiance, oath of office, or any affirmation for incoming, current, and former officers and employees in State, County, or municipal government, and including members all members of the Legislative, Executive, and Judicial branches of government, *except that:*
    - a. Full name, title, and oath date are not confidential.
  - 19) Personal identifying information. Specifically:
    - a. Social security numbers, *except that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by State or federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor.*
    - b. Credit card numbers
    - c. Unlisted telephone numbers
    - d. Drivers' license numbers.

*Except for:*

- a. *Use by any government agency, including any court or law enforcement agency, in carrying out its functions,*
  - b. *or any private person or entity acting on behalf thereof,*
  - c. *or any private person or entity seeking to enforce payment of court-ordered child support; except with respect to the disclosure of driver information by the Division of Motor Vehicles as permitted by section 2 of P.L.1997, c.188 (C.39:2-3.4);*
- 20) List of persons in need of special assistant during an emergency maintained at either the municipal or county level in accordance with section 1 of P.L.2017, c.266 (C.40:48-2.67) or section 6 of P.L.2011, c.178 (C.App.A:9-43.13).
  - 21) Certain records of higher education institutions:

- a. Pedagogical, scholarly and/or academic research records and/or the specific details of any research project, *except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available.*
- b. Test questions, scoring keys and other examination data pertaining to the administration of an examination for employment or academic examination.
- c. Records of pursuit of charitable contributions or records containing the identity of a donor of a gift if the donor requires non-disclosure of the donor's identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization or dedication.
- d. Valuable or rare collections of books and/or documents obtained by gift, grant, bequest or devise conditioned upon limited public access.
- e. Information contained on individual admission applications.
- f. Information concerning student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student.

**N.J.S.A. 47:1A-1.2**

- 22) Biotechnology trade secrets.

**N.J.S.A. 47:1A-2.2**

- 23) Limitations to convicts - 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.* (This exemption also applies to anonymous requests for victims' information).

**N.J.S.A. 47:1A-3(a)**

- 24) Ongoing investigations – any records pertaining to an investigation in progress by any public agency if disclosure of such record or records shall be detrimental to the public interest. *This provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.*

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

- 25) Public defender records that relate to the handling of any case, *unless authorized by law, court order, or the State Public Defender.*

**N.J.S.A. 47:1A-9**

- 26) Upholds exemptions contained in other State or federal statutes and regulations, Executive Orders of the Governor, Rules of Court, Constitution of this State, or judicial case law.

**N.J.S.A. 47:1A-10**

- 27) Personnel and pension records, *except specific information identified as follows:*
- a. *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,*
  - b. *When required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest.*
  - c. *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.*

In accordance with OPRA's "catch-all" exemption at N.J.S.A. 47:1A-9, the following executive orders also apply as exemptions under OPRA:

**Executive Order No. 21 (Gov. McGreevey 2002)**

- 1) Records where inspection, examination or copying would substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism.
- 2) Records exempted from disclosure by State agencies' promulgated rules are exempt from disclosure by this Order.
- 3) Executive Orders No. 9 (Hughes), 11 (Byrne), 79 (Byrne) and 69 (Whitman) are hereby continued to the extent that they are not inconsistent with this Executive Order. Executive Order No. 9 (Hughes) exemptions that are still active:
  - a. Questions on examinations required to be conducted by any State or local governmental agency;
  - b. Personnel and pension records (same as N.J.S.A. 47:1A-10);
  - c. Records concerning morbidity, mortality and reportable diseases of named persons required to be made, maintained or kept by any State or local governmental agency;
  - d. Records which are required to be made, maintained or kept by any State or local governmental agency which would disclose information concerning illegitimacy;
  - e. Fingerprint cards, plates and photographs and other similar criminal investigation records which are required to be made, maintained or kept by any State or local governmental agency;

- f. Criminal records required to be made, maintained and kept pursuant to the provisions of R. S. 53:1-20.1 and R. S. 53:1- 20.2;
- g. Personal property tax returns required to be filed under the provisions of Chapter 4 of Title 54 of the Revised Statutes; and
- h. Records relating to petitions for executive clemency.

Executive Order No. 11 (Byrne) exemptions are the same as N.J.S.A. 47:1A-10.

Executive Order No. 79 (Byrne) exemptions are the similar to Nos. 8, 9, 10 above under N.J.S.A. 47:1A-1.1.

Executive Order No. 69 (Whitman) exemptions that are still active: 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.

### **Executive Order No. 26 (Gov. McGreevey 2002)**

- 1) Certain records maintained by the Office of the Governor:
  - a. Any record made, maintained, kept on file or received by the Office of the Governor in the course of its official business which is subject to an executive privilege or grant of confidentiality established or recognized by the Constitution of this State, statute, court rules or judicial case law.
  - b. All portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege.
  - c. All portions of records containing information provided by an identifiable natural person outside the Office of the Governor which contains information that the sender is not required by law to transmit and which would constitute a clearly unwarranted invasion of personal privacy if disclosed.
  - d. If any of the foregoing records shall contain information not exempted by the provision of the Open Public Records Act or the preceding subparagraphs (a), (b) or (c) hereof then, in such event, that portion of the record so exempt shall be deleted or excised and access to the remainder of the record shall be promptly permitted.
- 2) Resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. *The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.*
- 3) Records of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments.
- 4) Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.
- 5) Information in a personal income or other tax return

- 6) Information describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed.
- 7) Test questions, scoring keys and other examination data pertaining to the administration of an examination for public employment or licensing.
- 8) Records in the possession of another department (including NJ Office of Information Technology or State Archives) when those records are made confidential by a regulation of that department or agency adopted pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963), or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure.
- 9) Records of a department or agency held by the Office of Information Technology (OIT) or the State Records Storage Center of the Division of Archives and Records Management (DARM) in the Department of State, or an offsite storage facility outside of the regular business office of the agency. Such records shall remain the legal property of the department or agency and be accessible for inspection or copying only through a request to the proper custodian of the department or agency. In the event that records of a department or agency have been or shall be transferred to and accessioned by the State Archives in the Division of Archives and Records Management, all such records shall become the legal property of the State Archives, and requests for access to them shall be submitted directly to the State Archives.

**Please note that e-mails, text messages, and social media records are “government records” when they are made, maintained or kept on file in the course of official government business, or received in the course of official government business, regardless of location. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (August 2006).**

### **Who is the “custodian of a government record”?**

OPRA defines “custodian of a government record” as that official designated by formal action of a public agency’s director or governing body that has custody or control of the government records of the public agency. N.J.S.A. 47:1A-1.1. Some large state departments have determined that they can be more responsive to requests for access to government records by designating more than one custodian. For example, the New Jersey Department of Law & Public Safety is comprised of ten divisions and four agencies; each of the divisions and agencies in Law & Public Safety has designated a custodian to deal with records requests made to that division or agency.

OPRA provides that the custodian of government records in a municipality is the municipal clerk. However, a certain number of municipalities have chosen to designate additional custodians for specific departments within their governmental structure, such as police departments, boards of education, *etc.*, in order to facilitate public access to the records of those departments. Where applicable and appropriate, and where the evidence of record supports such a determination, the GRC has exercised its discretion to recognize such custodians when they are specifically and clearly identified, in order to make it easier for requestors to seek and obtain government records in an expeditious manner consistent with OPRA. See, *e.g.*, L.D. v. Bayonne Police Dep’t, GRC Complaint No. 2004-64 (August 2004); Barron v. Highland Park Police Dep’t, GRC Complaint No. 2004-145 (January 2005); Serrano v. New Brunswick Police Dep’t, GRC Complaint No. 2004-

151 (April 2005); Morris v. Trenton Police Dep't, GRC Complaint No. 2007-160 (May 2008); Paff v. Twp. of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008).

### What is a “public agency” under OPRA?

Only “public agencies” are subject to the provisions of OPRA. OPRA defines a “public agency” as:

- The executive branch of state government and all independent state agencies and authorities. This includes all state colleges and universities;
- The Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch;
- All counties, municipalities, school districts, fire districts, planning and zoning boards and other county and local boards or agencies, and all independent county or local agencies and authorities established by municipal or county governments. N.J.S.A. 47:1A-1.1.

The following agencies are not subject to the provisions of OPRA:

- The Judicial branch of state government or any agency officer, or employee of those branches (including the Supreme Court of New Jersey, the Superior Court of New Jersey, the municipal courts, the Administrative Office of the Courts, and the agencies, offices, and boards under their authority). The Courts have adopted their own records disclosure policies and procedures.
- Private businesses or not-for-profit entities, generally.

However, should a requestor challenge the entity’s assertion that it is not a “public agency” for purposes of OPRA, the GRC would be required to conduct a “public agency” test informed by Paff v. N.J. State Firemen's Ass’n, 431 N.J. Super. 278 (App. Div. 2013). There, the Appellate Division opted to use both a “creation” and “government function” test in finding that the Firemen’s Association was a “public agency” for purposes of OPRA. See The Times of Trenton Pub. Corp. v. Lafayette Yard Cmty. Development Corp., 368 N.J. Super. 425 (Apr 30, 2004); Fair Share Hous. Ctr, Inc. v. N.J. State League of Municipalities, 207 N.J. 489 (2011). See also Sussex Commons Ass’n, LLC v. Rutgers, The State Univ., 210 N.J. 531 (2012).

## SECTION 2 – HOW OPRA WORKS

OPRA is one means by which an individual can gain access to records in the State of New Jersey (informal, common law or discovery are some other methods). Thus, it is not the only method an individual may use when seeking information from New Jersey public agencies. Further, the requestor is the only individual capable of invoking OPRA either by submitting the request on the agency's official OPRA request form or by citing to OPRA in an equivalent writing. If an individual chooses to invoke OPRA in a request, then the statutory provisions will apply.

However, some agencies have adopted policies requiring an individual to submit an OPRA request for records. Such a policy is at the agency's prerogative and not statutorily required by OPRA, nor a GRC directive. Based on the foregoing, it is never "necessary" for anyone to file an OPRA request to obtain any type of government record (unless agency policy dictates such).

### What must your agency's official OPRA request form contain?

Pursuant to N.J.S.A. 47:1A-5(f), an OPRA request form **must** include the following:

- Space for the name, address, and phone number of the requestor and a 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;
- A statement as to whether prepayment of fees or a deposit is required;
- The time period within which the public agency is required by OPRA to make the record available;
- A 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; and
- Space for the custodian to sign and date the form if the request is fulfilled or denied.

### How is a request for access to a government record made?

A request for access to a government record must be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian. N.J.S.A. 47:1A-5(g). A records request under OPRA cannot be made verbally in person or by telephone.

Pursuant to Renna v. Cnty. of Union 407 N.J. Super. 230 (App. Div. 2009), OPRA requests *should* be on the agency's official OPRA request form. However, a written request that is not on the agency's official OPRA request form cannot be denied solely because the request is not on the proper form. Written requests which are not on the form must mention OPRA.

Some public agencies may not have a dedicated fax line for their records custodians and cannot accept fax requests. Some public agencies may accept requests for access to government records over the Internet or by e-mail. A public agency should examine its capability to accept electronically transmitted requests and establish appropriate policies and practices, including at least one viable electronic transmission method. See Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009) (holding that the custodian's refusal to accept OPRA requests via fax is reasonable but that a custodian may not exercise his/her authority under OPRA in a manner that

would impose an unreasonable obstacle to the transmission of a request for a government record. Additionally, the court stated that OPRA's requirement that custodians adopt a request form authorizes custodians to direct how government records can be transmitted as specified in the form, which need not include every method of transmission mentioned in N.J.S.A. 47:1A-5(g). See also Dello Russo v. City of East Orange (Essex), GRC Complaint No. 2014-430 (Interim Order dated September 29, 2015). The law does not require public agencies to provide new services beyond what they currently provide to accept records requests electronically.

**Internet Requests:** Some public agencies have created or contracted out systems that allow a citizen to fill out an online request form and file it with the custodian over the Internet. The means of submitting a request form (mail, in-person, Internet) will not affect which records will or will not be available for access. The request form, whether paper or electronic, must contain all the required information listed in N.J.S.A. 47:1A-5(f).

Requestors must be as specific as possible when requesting records. For example, requestors must identify types of records, dates or range of dates, parties to correspondence, subject matter, *etc.* However, requestors may not know the names of certain records. The spirit of OPRA implies that custodians assist requestors with identifying the records they are seeking. Requests for information or requests that ask questions are NOT valid OPRA requests.

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

OPRA permits a public agency to adopt one of two processes for when non-custodian officers or employees receive records requests. Any officer or employee of a public agency who receives a request for access to a government record may either:

1. Forward the request to the agency's records custodian; or
2. Direct the requestor to the agency's records custodian.

In other words, a public agency may require any employee to accept a records request for forwarding to the custodian, or may require any employee to return the request with direction on how to deliver it to the official records custodian. N.J.S.A. 47:1A-5(h).

### **When does the response time clock begin?**

The time frame to fulfill a request for access to government records under OPRA does not begin until the request form or equivalent written request has been delivered to the appropriate custodian. Sending a records request to the wrong officer or employee may result in a delay of the fulfillment of the request. However, an agency must make the identity of the custodian readily known to the public.

### **What is the time frame for a records custodian to respond to an OPRA request?**

Custodians should fulfill a request as soon as possible, but not later than seven (7) business days after the request is received, provided that the record is currently available and not in storage or archived. N.J.S.A. 47:1A-5(i). Day One (1) is the day following the custodian's receipt of the request.

It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7)



business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

If the custodian fails to respond to the requestor within seven (7) business days after receiving a request, the failure to respond will be considered a “deemed” denial. N.J.S.A. 47:1A-5(i).

As an exception to the typical response time frame, P.L. 2020, c.10, enacted on March 20, 2020, N.J.S.A. 47:1A-5(i) provides that the statutory time frame shall not apply during a “state of emergency, public health emergency, or state of local disaster emergency . . .” However, this provision does require that the custodian make a reasonable effort to comply with the statutory time frame.

### **Do some records require immediate access?**

OPRA requires that custodians must ordinarily grant *immediate* access to budgets, bills, vouchers, contracts (including collective negotiations agreements and individual employment contracts), and public employee salary and overtime information. N.J.S.A. 47:1A-5(e).

Immediate access means at once, without delay. However, situations may arise where immediate access to records cannot be readily provided. Exceptions may include instances in which the requested records are in use, in storage, or require medium conversion. 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.

Agencies should act reasonably, however, using their best efforts to comply with this requirement.

### **What if I need more time to respond to an OPRA request?**

Custodians may seek extensions of time beyond the seven (7) business day deadline for legitimate reasons (*e.g.* the record is in use or in storage). N.J.S.A. 47:1A-5(i). Custodians must request an extension from the requestor in writing, within the statutorily mandated seven (7) business days and provide an anticipated deadline date upon which the records will be provided. The length of the extension must be reasonable. Failure to grant or deny access by the extended deadline date results in a “deemed” denial of the request.

### **What if I have to redact records?**

Under OPRA, a government record that is otherwise publicly accessible may contain non-disclosable information that should be redacted. N.J.S.A. 47:1A-5(g). 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.

#### How to Redact

If a record contains material that must be redacted, such as a social security number or unlisted phone number, redaction *must be accomplished by using a visually obvious method that shows the requestor the specific location of any redacted material in the record*. For example, if redacting a social security number or similar type of small-scale redaction, custodians should:

Make a paper copy of the original record and manually “blackout” the information on the copy with a dark-colored marker. Then provide a copy of the blacked-out record to the requestor.

The blacked-out area shows where information was redacted, while the double copying ensures that the requestor will not be able to “see-through” to the original, non-accessible text.

Custodians should refrain from using the “white-out” method. However, in instances where this method is used to redact material, some visual symbol should be placed in the space formerly occupied by the redacted material to show the location of redacted material.

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. The purpose is to provide formal communication to the requestor, making it clear that the material was redacted and is not being provided.

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 and insert in place of the redacted material asterisks to obviously indicate the redaction. Techniques such as “hiding” text or changing its color so it is invisible should not be used as sophisticated users can detect the changes and potentially undo the “hiding” functions.

#### Explaining Why a Redaction is Made

When redactions are made to a record, the custodian can use either the request form to explain why those elements of a record are redacted, or use a separate document, depending on the circumstances, but also referring to the OPRA exception being claimed. This principle also applies if pages of information are redacted. Sometimes it is clear from inspection (entry called “Social Security Number” has a blackout over where the number would appear). The bottom line is that the requestor has a right to know the reason for the redaction, and the custodian has the responsibility to provide an explanation.

Custodians must identify the legal basis for **each** redaction!! This may be achieved in any number of ways, including but not limited to annotations next to the redaction or a document index.

#### **What if I have to convert mediums?**

OPRA provides that a custodian must permit access to a government record and provide a copy of the record(s) in the medium requested, if the public agency maintains the record in that medium. If the custodian does not maintain the record in the medium requested, they must:

- Convert the record to the medium requested; or
- Provide the record in some other meaningful medium (meaningful to the requestor).  
N.J.S.A. 47:1A-5(d).

If the agency maintains the record in the medium requested, the custodian can only charge the actual cost of copying (*e.g.* the cost of the floppy disk, flash drive, or CD-ROM). However, a custodian may impose a special service charge related to conversion for:

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

The special service charge must be based on the cost of the technology and labor actually incurred. This may include charges incurred by an outside vendor. N.J.S.A. 47:1A-5(c).

Before undertaking any conversion to another medium or taking other major actions that would result in the imposition of a special charge, the custodian must first inform the requestor that a special charge will be incurred and give the requestor the opportunity to accept or reject the extra fee. If the requestor objects to the special charge and refuses to pay it, the custodian may deny the request for access to the record. However, if the requestor is willing to pay for it, the agency has the responsibility to provide access to the government record in the requested format.

### **What if fulfilling the request would substantially disrupt the operations of the agency?**

If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record only **after** first attempting to reach a reasonable solution with the requestor that accommodates the interests of both 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.

Example: Caggiano v. N.J. Dep't of Law & Public Safety, Div. of Consumer Affairs, GRC Complaint No. 2007-69 (September 2007). The custodian certified that an extended inspection of records as contemplated by the complainant (for approximately a week) would substantially disrupt agency operations by requiring a Division of Consumer Affairs employee and a NJ State Police Officer to supervise the complainant's inspection of the requested records. The Council stated that:

The Custodian has reasonably offered to provide the Complainant with copies of all the records responsive upon payment of the statutory copying rates, which the Complainant has declined. The Custodian has also reasonably offered the Complainant two (2) hours to inspect the seven hundred forty-five (745) pages responsive to the Complainant's request, of which the Custodian states a substantial portion are records which the Complainant himself submitted to the Division. Additionally, the Custodian has reasonably offered to accommodate the Complainant's request by charging a special service charge for the hourly rate of a Division of Consumer Affairs employee to monitor the Complainant's inspection of the requested records in the event that said inspection exceeds two (2) hours. Further, the Custodian has reasonably offered to copy the remaining records at the OPRA copying costs in the event the Complainant exceeds a reasonable amount of time for the record inspection, which the Custodian states is one (1) business day. However, the Complainant objects to paying any inspection fees, as well as a two (2) hour inspection time limit.

The Council held that "because the Custodian has made numerous attempts to reasonably accommodate the Complainant's request but has been rejected by the Complainant, the Custodian has not unlawfully denied access to the requested record under N.J.S.A. 47:1A-5(c) and N.J.S.A. 47:1A-5(g).

### What if the request is overly broad or unclear?

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 Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005), N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Additionally, the GRC set forth criteria for a proper OPRA request seeking communications, including e-mails, text messages and other forms of correspondence. See Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).

A custodian may also seek clarification of a broad or unclear request. The custodian's request for clarification must be in writing, within seven (7) business days of receipt of the request. If a custodian seeks clarification of an OPRA request, the response time clock stops until the requestor provides a response to the custodian. Upon receipt of the requestor's clarification, the statutory response time begins anew.

Example of an overly broad request: "Any and all records related to the construction of the new high school."

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."

A custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant's OPRA request. A custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad and unclear OPRA request.

### How much can I charge to provide records?

N.J.S.A. 47:1A-5(b) provides that:

A copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation.

Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be \$0.05 per letter-size page or smaller, and \$0.07 per legal-size page or larger.

If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record. The actual cost of duplicating the record, upon which all copy fees are based, shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section.

Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs.

Id.

Based on the forgoing, custodians may apply the following copy costs to OPRA requests:

- 1) Custodians may charge OPRA requestors any copy fees that are established by other New Jersey laws or regulations, if said fees exist.

For example, N.J.S.A. 22A:4-1a sets forth specific fees for certain records filed with the New Jersey Department of Treasury (and requested from the Department of Treasury). Specifically, said statute provides that “[i]f a roll of microfilm images is requested, the State Treasurer shall collect a fee of \$1.00 for each image on the microfilm roll.” Thus, if a requestor seeks access to a microfilm roll from the Department of Treasury, the Department’s custodian must charge the fees established in N.J.S.A. 22A:4-1a. The same applies for any other records that have specific fees established in other New Jersey laws or regulations.

- 2) Custodians must charge a flat rate of \$0.05 per letter size (8 ½” x 11”) page or smaller, and \$0.07 per legal size (8 ½” x 14”) page or larger, *if providing a requestor with paper copies*.

For example, a custodian providing access to 3 pages of printed meeting minutes on letter size pages would charge a requestor \$0.15 (\$0.05 per page for 3 pages = \$0.15).

- 3) If a public agency can demonstrate that its copying costs exceed the enumerated rate of \$0.05 and/or \$0.07, then a custodian may charge that rate.

In these instances, OPRA allows custodians to charge the actual cost of duplication, which is limited to the cost of materials and supplies used to make the copy.

**How to Calculate Actual Costs (only if copies exceed the \$0.05 and \$0.07 rates)**

- Custodians should contact their supplier to determine the cost of paper and toner. A supplier is wherever the agency obtains those materials – paper and toner (*i.e.* central purchasing unit, Staples, Office Depot, *etc.*).
- Calculate or contact copying company to determine the agency’s annual copying volume (calendar or fiscal year, however the agency operates). This does NOT only include copies pertaining to OPRA requests – this is ALL copying on all copy machines in the agency for all purposes.
- Contact copying company to determine the average paper life of one toner/ink cartridge (*i.e.* how many pieces of paper the ink or toner should be able to copy).
- Custodians must maintain documentation of all information provided by copying company or office supplier (*i.e.* contracts or correspondence from purchasing agent or copying company) regarding this calculation.

- **Actual calculation is the total cost of paper purchased for 1 year (calendar or fiscal) + the total cost of toner purchased (calendar or fiscal) ÷ the annual copying volume.**

This calculation can be averaged for all copy machines in an agency that produces letter- and legal-sized copies. Special copiers, such as for color printing or blueprints copied in house, should be calculated separately.

The reference to “subsection c.” pertains to OPRA’s special service charge provision, which is applicable in instances when fulfilling an OPRA request requires an extraordinary amount of time and effort. For guidance on how and when to apply a special service charge to an OPRA request, please refer to the GRC’s “Special Service Charge” handout online at <http://www.nj.gov/grc/meetings/present/>.

The GRC strongly encourages every public agency to clearly identify the per page copy fee on its OPRA request form, whether it be the flat rates established in N.J.S.A. 47:1A-5(b), or the actual cost calculated by the agency.

- 4) Records provided via e-mail and facsimile are free of charge. However, Custodians must charge the actual cost to provide access to all other electronic materials such as flash drives, CDs, DVDs, videotapes, audiotapes, *etc.*

No specific calculation is required to determine the actual cost of these supplies. The “actual cost” is the specific fee the agency paid to purchase the materials. For example, if the GRC purchased a package of 100 CD-ROMs for \$100 and provided records to a requestor on 1 CD-ROM, the actual cost of said CD-ROM is \$1.00 ( $\$100 \div 100 = \$1.00$ ).

There could be exceptions to the “free of charge” policy. In one instance, the Council allowed a public agency to charge the cost associated with redactions because they did not have the capability to redact electronically prior to providing the responsive records. See Paff v. Twp. of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order dated May 24, 2011).

### **Can I ask the requestor for a deposit or prepayment?**

OPRA permits the custodian to require a deposit or prepayment of fees for requests received from anonymous requestors. N.J.S.A. 47:1A-5(f). An agency may also require a deposit or prepayment of fees when a request is voluminous, unusual or requires the use of an outside vendor.

OPRA requires the records request form to state whether prepayment of the fees or a deposit is required. The custodian should inform the requestor of the deposit or prepayment required and when the documents will be released upon payment.

### **When can I assess a special service charge?**

In certain circumstances, an agency may collect a special service charge in addition to the actual cost of duplicating records embodied in printed form. Specifically, custodians may charge a special service charge where the nature, format, manner of collection or volume of records to be inspected or copied is such that:

- The record cannot be reproduced using ordinary equipment, in usual business size (e.g. a map or plat); or
- Complying with the request involves an extraordinary expenditure of time and effort.

The agency may assess a special service charge that must be reasonable and based on actual direct cost. N.J.S.A. 47:1A-5(c). Actual direct cost means the hourly rate of the lowest level employee capable of fulfilling the request (no fringe benefits).

A special service charge is calculated on a case-by-case basis. No special service charges can be established in advance by ordinance.

For the Government Records Council to determine (1) whether a special service charge is warranted and (2) whether the special service charge the custodian assessed is reasonable, the custodian must provide answers to the following questions, commonly referred to as the “14-Point Analysis:”

1. What records are requested?
2. Give a general nature description and number of the government records requested.
3. What is the period of time over which the records extend?
4. Are some or all of the records sought archived or in storage?
5. What is the size of the agency (total number of employees)?
6. What is the number of employees available to accommodate the records request?
7. To what extent do the requested records have to be redacted?
8. What is the level of personnel, hourly rate, and number of hours, if any, required for a government employee to locate, retrieve, and assemble the records for copying?
9. What is the level of personnel, hourly rate, and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?
10. What is the level of personnel, hourly rate, and number of hours, if any, required for a government employee to return records to their original storage place?
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?
12. Who (name and job title) in the agency will perform the work associated with the records request and that person’s hourly rate?
13. What is the availability of information technology and copying capabilities?
14. Give a detailed estimate categorizing the hours needed to identify, copy, or prepare for inspection, produce, and return the requested documents.

The custodian must notify the requestor in advance of the special service charge. The requestor has the right to disagree with the special service charge. If the custodian and requestor cannot reach an agreement regarding the special service charge, the custodian may deny the OPRA request.

### **Can small public agencies specify OPRA hours?**

Public agencies may limit OPRA hours if they fall within one of the following categories described in N.J.S.A. 47:1A-5(a):

- A municipality having a population of 5,000 or fewer according to the most recent federal decennial census;
- A board of education having a total district enrollment of 500 or fewer; or
- A public authority having less than \$10 million in assets.

In these instances, a custodian must provide access to a government record that is authorized for public inspection or copying during “not less than six regular business hours over not fewer than three business days per week, or during the public agency’s regularly scheduled business hours, whichever is less.” Id. This means that an agency may limit OPRA hours to two (2) hours a day over three (3) business days a week or their regular business hours for that week, whichever is less.

The GRC stresses that agencies limiting their OPRA hours pursuant to N.J.S.A. 47:1A-5(a) must notify the public as to those hours within which OPRA requests will be addressed. See Frost v. North Hudson Regional Fire & Rescue, GRC Complaint No. 2008-198 (December 2009) (finding custodian counsel’s argument that the agency was qualified for limited OPRA hours without merit).

### **How can I deliver the requested records to the requestor?**

A custodian must grant access to a government record by the method of delivery requested by the requestor (pick-up, regular mail, fax, or e-mail). O’Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008). Charges for such delivery must comply with N.J.S.A. 47:1A-5(b). Be careful before attempting to charge for fax or e-mail deliveries. Unless you can prove the actual cost, you are not allowed to charge anything.

### **What do I do when I deny access?**

If the custodian is unable to comply with a request for access, they must indicate the specific reason for denying access on the request form and promptly return a copy to the requestor. N.J.S.A. 47:1A-5(g). The form must be signed and dated by the custodian, as it may serve as the basis for an appeal by the requestor to Superior Court or the GRC. A custodian’s response may be provided in another written format other than on the OPRA request form.

### **What does a proper response to an OPRA request require?**

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.
- addresses each record sought or each request item.
- addresses requestor’s preferred method of delivery.



- if special service charge assessed, provides estimate and gives requestor opportunity to accept or reject charge.
- includes a record index that identifies each record requested and the specific legal basis for a denial of access (including redactions) to each record.

**Remember:** verbal responses, even if within the statutorily mandated seven (7) business days, are not valid under OPRA.

### **How does a requestor appeal a denial of access?**

OPRA provides that a person who is denied access to a government record can choose:

1. to file suit in Superior Court; or
2. to file a complaint with the [GRC].

[N.J.S.A. 47:1A-6.]

A requestor cannot do both!

In Superior Court, a complaint must be filed within 45 days of the denial of access (Mason v. City of Hoboken, 196 NJ 51 (2008)). There is currently no statute of limitations to file a Denial of Access Complaint with the GRC.

### **How are complaints filed?**

Requestors initiate a complaint in either the New Jersey Superior Court or GRC alleging an unlawful denial of access. Once the GRC receives a complete Denial of Access complaint, it will proceed within the framework set forth in OPRA and the GRC's regulations at N.J.A.C. 5:105-1.

The process for filing a complaint with the Government Records Council is described in Section 3 of this handbook.

## SECTION 3 – THE GOVERNMENT RECORDS COUNCIL (GRC)

### What is the GRC?

OPRA established the GRC in the New Jersey Department of Community Affairs.

The members of the GRC are the Commissioner of the Department of Community Affairs or the Commissioner's designee; the Commissioner of the Department of Education or the Commissioner's designee; and three public members appointed by the Governor, with the advice and consent of the Senate, not more than two of whom shall be of the same political party. A public member shall not hold any other state or local elected or appointed office or employment while serving as a member of the Council.

OPRA permits the GRC to employ an executive director and such professional and clerical staff as is necessary to help it carry out its functions.

### What are the duties of the GRC?

The Government Records Council has the 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 possessed by public agencies, which 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 website 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.

### What is the scope of the GRC's authority?

- The GRC only has authority over access to records maintained by a public agency at the time of an OPRA request.

- The GRC lacks authority over the accuracy of record content.
- The GRC does not have authority over the condition of records.
- The GRC lacks authority over records retention. For retention schedules, contact Records Management Services (“RMS”) within the New Jersey Department of Treasury, Division of Revenue and Enterprise Services.
- The GRC does not have jurisdiction over the Judicial or Legislative Branches of State Government or any agency, officer, or employee of those branches.
- The GRC does not have authority over other types of records requests (administrative, common law, discovery).
- The GRC does not have authority over how a custodian uses his/her legal counsel.
- The GRC cannot adjudicate a complaint currently pending or previously adjudicated in New Jersey Superior Court.

### **How is a Denial of Access Complaint filed and handled?**

A complaint to the GRC must be in writing on the proper Denial of Access Complaint form. A complete complaint sets forth:

- 1) the facts regarding the request for access to the government records;
- 2) the specific records requested, as well as the circumstances under which the said records were sought;
- 3) the denial of access by the records custodian of the public agency; and
- 4) the legal arguments as to why the requestor believed the request was unlawfully denied.

The complaint should also include supporting documentation as prescribed in the Denial of Access Complaint form. Complaint forms are available from the Council office or as an electronic fillable .pdf from the Council’s website at [www.nj.gov/grc/register/](http://www.nj.gov/grc/register/).

Upon receipt of a complaint, the GRC ascertains whether the complainant agreed to mediate said complaint. If so, the GRC offers the parties the opportunity to resolve the dispute through mediation before a neutral mediator. Mediation is an informal, *confidential*, non-adversarial process having the objective of helping the parties reach a mutually acceptable, voluntary agreement. If both parties agree to mediate the complaint, the mediator will help the parties to identify issues, will encourage joint problem-solving, and will explore settlement alternatives with the parties.

If any party declines mediation or if mediation fails to resolve the matter to the satisfaction of the parties, the GRC will initiate an investigation concerning the facts and circumstances set forth in the complaint.

At the request of the GRC, the public agency must provide a Statement of Information (“SOI”) setting forth the facts regarding the request for access to the government records, describing the specifics of the custodian’s denial to those records. Upon request by the GRC, the public agency will have five (5) business days to submit the SOI.

### **What happens when the GRC starts investigating a complaint?**

*Generally:* All proceedings of the GRC are conducted as expeditiously as possible.

*Step 1:* The Council must decide whether the complaint is within its jurisdiction, or whether the complaint is frivolous or without any reasonable factual basis.

*Step 2:* If the Council concludes that the complaint is outside its jurisdiction or that the complaint is frivolous or without factual basis, it will issue an administrative disposition in writing to dismiss the complaint and send the decision to the complainant and custodian.

*Step 3:* If the Council determines that the complaint is within its jurisdiction and is not frivolous and has a factual basis, the Council will notify the records custodian of the nature of the complaint and the facts and circumstances set forth in the complaint.

*Step 4:* The custodian, through the SOI, will have the opportunity to provide the Council with a response containing information concerning the complaint.

*Step 5:* If the Council is able to make a determination about whether a record should be provided based upon the complaint and the custodian's response, it will issue a decision in writing and send it to the complainant and the records custodian.

*Step 6:* If the Council is unable to make a determination about whether a record should be provided based solely upon the submissions, the Council will provide for a hearing on the matter at its discretion. The hearing will be held in conformity with the rules and regulations for hearings by a state agency in contested cases under the Administrative Procedure Act, when they are applicable.

*Step 7:* Following the hearing, the Council will, by a majority vote of its members, render a decision as to whether the government record in question or a portion of it, must be made available for public access to the requestor.

*Step 8:* If the Council determines by a majority vote that a custodian **knowingly** and **willfully** violated OPRA and is found to have **unreasonably** denied access under the **totality of the circumstances**, the Council will impose civil penalties provided for under OPRA. N.J.S.A. 47:1A-11. Additional disciplinary proceedings may be initiated against a public official, officer, employee, or custodian against whom a penalty has been imposed.

*Step 9:* A final decision of the Council may be appealed to the Appellate Division of the New Jersey Superior Court. Parties also have the option of filing a request for reconsideration directly with the GRC.

Meetings held by the Council are subject to the Open Public Meetings Act ("OPMA"). The Council may move into closed session in accordance with OPMA during that portion of any proceeding deemed necessary.

Finally, the Council will not charge any party a fee in regard to actions filed with the Council.

### **What else should the custodian know about Council hearings and actions?**

#### Prevailing Party Attorneys Fees

If represented by counsel, a requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee. N.J.S.A. 47:1A-6.

Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), a complainant is a “prevailing party” if they achieve the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Also, 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.

Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a complainant is a “prevailing party” if they can demonstrate:

- 1) a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved; and
- 2) that the relief ultimately secured by plaintiffs had a basis in law.

However, if the Council determines that no unlawful denial of access occurred in a complaint, the complainant is generally not entitled to an award of attorney’s fee under OPRA.

### Knowing and Willful Penalty

A public official, officer, employee, or custodian who knowingly and willfully violates OPRA and is found to have unreasonably denied access under the totality of the circumstances shall be subject to a civil penalty of \$1,000 for an initial violation, \$2,500 for a second violation, and \$5,000 for a third violation that occurs within 10 years of an initial violation. N.J.S.A. 47:1A-11. The penalty shall be collected and enforced in proceedings in accordance with the Penalty Enforcement Law of 1999.

The GRC notes that persons other than the custodian may be subject to the civil penalty. See Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-107 (Interim Order dated February 25, 2009).

### GRC’s Regulations

For more information about the rules pertaining to the complaint process, see the GRC’s promulgated regulations (N.J.A.C. 5:105) on our website at:

[https://www.nj.gov/grc/home/rules/pdf/GRC%20Promulgated\\_Regulations%20%282015%20Re\\_Adopt%29.pdf](https://www.nj.gov/grc/home/rules/pdf/GRC%20Promulgated_Regulations%20%282015%20Re_Adopt%29.pdf).

## SECTION 4 – SPECIAL CIRCUMSTANCES

### **Can a requestor seek access to government records under OPRA for commercial use?**

There is no restriction against commercial use of government records under OPRA. See Spaulding v. Cnty. of Passaic, GRC Complaint No. 2004-199 (September 2006); Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009).

### **What do I do if I believe a requestor is using OPRA as a means to harass the agency?**

OPRA is silent on the number of OPRA requests one person can submit to a particular agency. However, if you believe you are being harassed you may have options in civil court.

### **Can a requestor bring his or her photocopier into my office to make copies?**

A custodian may, in his or her discretion, allow the use of personal photocopiers by requestors depending upon factors including, but not limited to, the specific circumstances of the request, the particular documents requested, the office hours, the available space within the office, the availability of personnel, the availability of appropriate electrical outlets, the consumption of energy, the need to preserve the security of public records or documents and protect them from damage, or other legitimate concerns. A custodian may require that photocopying be done on the agency's photocopier if to allow otherwise would disrupt operations, interfere with the security of public records, or expose records to potential damage.

### **Can I provide on-site inspection, but deny copies of records requested?**

No. If a record is subject to public access under OPRA, the record is available for public inspection as well as copying. Also, copyright law does not prohibit access to records that are otherwise accessible under OPRA.

### **What do I do if I receive an OPRA request for records that I previously provided to the same requestor?**

In Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008), the Appellate Division held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. The Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry.

It is important to note that the court's findings turned on the specific facts of this case. Specifically, the requestor attached a copy of the requested record to his OPRA request, thus proving that he was already in possession of said record at the time of his request. As such, a custodian cannot deny access solely because he/she previously provided the records to the requestor. The custodian must have evidence that the requestor is in possession of the records at the time of the OPRA request.

**If a requestor seeks a record posted to the agency’s website, can a custodian direct the requestor to that site?**

In Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014), the Council reversed its prior, longstanding policy that barred a custodian from merely directing a requestor to an agency’s website to obtain records responsive to an OPRA request. In reaching the new conclusion, the Council noted that “[t]he Legislature incorporated the notion of ‘reasonableness’ into several sections of OPRA.” Id. at 4 (citing N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-5(c)-(d); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-6, 7(f)). The Council thus set a reasonable policy by which a custodian may direct a requestor to records on the Internet:

[A] custodian shall direct a requestor, with reasonable clarity, to the specific location on the Internet where the responsive records reside. This shall include, if necessary, directions for accessing the responsive document that would be comprehensible to a reasonable person, including but not limited to providing a link to the exact location of the requested document. However, 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. Thus, 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 (footnote omitted).]