



THE OPRA ALERT

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HURRICANE SANDY'S IMPACT ON OPRA

As we all know, Hurricane Sandy devastated New Jersey during the week of October 28, 2012. The State is currently in recovery, which undoubtedly will take a significant amount of time for some of the most affected areas. While New Jersey rebuilds, government and businesses are attempting to return to "business as usual" as best they can. For New Jersey's public agencies, this means receiving and processing OPRA requests. A citizen's right to access government records is not suspended under OPRA in the wake of a natural disaster. However, OPRA contains provisions which will assist records custodians in fulfilling OPRA requests, even in extreme scenarios such as natural disasters.

First, custodians can obtain an extension of time to fulfill an OPRA request. To obtain a proper extension of time, a custodian must respond to the OPRA request, in writing, within the statutorily mandated time period to respond (either immediately for immediate access records, or the standard seven (7) business days) stating that an extension is needed. Most importantly, the custodian must provide the requestor with an anticipated date on which the records will be provided. How much time is appropriate for a custodian's extension under OPRA? There is no standard time frame because each extension is based on the specific facts of the request and the specific availability of resources in each agency.

Next, OPRA allows custodians to charge special service charges for voluminous or labor intensive requests. OPRA allows a public agency to assess a special service charge "[w]henver the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size **or involves an extraordinary expenditure of time and effort to accommodate the request.**" (Emphasis added). N.J.S.A. 47:1A-5.c.

In these situations, a public agency must charge the hourly rate of the lowest level employee capable of fulfilling the request. Additionally, OPRA requires that "the requestor shall have the opportunity to review and object to the charge prior to it being incurred."

Special service charges are subjective and will depend on the specific facts of the request, like how voluminous the request is, whether any records are in storage, and how many employees are available and capable of fulfilling the request.

The GRC maintains a handout online that contains more information regarding special service charges. See <http://www.nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf> (also attached). This handout contains a list of 14 questions the GRC would ask a custodian if a Denial of Access Complaint were filed that challenged a special service charge. The GRC analyzes special services charges only if a requestor chooses to file a Denial of Access Complaint alleging that the charge is either excessive or not warranted.

Special service charges *could* be assessed in instances when fulfilling a request involves an extraordinary amount of time. Please note that this determination is extremely subjective and will depend on the specific facts of the request. The GRC cannot make an official determination regarding special service charges unless the Council is adjudicating a Denial of Access Complaint.

Finally, OPRA contains a provision allowing custodians to deny an OPRA request that would substantially disrupt the operations of an agency. Specifically, OPRA states that if a request for access to a government record would substantially disrupt agency operations, the custodian must first attempt to reach a reasonable solution with the requestor that accommodates the interests of both the requestor and the agency, and only if the accommodation fails may the custodian deny the request. N.J.S.A. 47:1A-5.g.

Substantial disruptions are subjective determinations based on an agency's resources available to fulfill a request. Similarly, the offered accommodation to the request will also vary depending on the specifics of the request. An example appears in Caggiano v. NJ Dept of Law & Public Safety, Div of Consumer Affairs, GRC Complaint No. 2007-69 (September 2007). The Custodian in this complaint certified that an extended review of the requested records as contemplated by the Complainant (for approximately a week) would substantially disrupt agency operations by requiring the extended attendance of a Division of Consumer Affairs employee and a NJ State Police Officer at the Complainant's inspection of the requested records. The Council stated that:

"[t]he 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..." *(quote continued on next page)*



"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.

As demonstrated above, there are tools within OPRA to assist records custodians with fulfilling OPRA requests during extreme instances, such as the aftermath of Hurricane Sandy. Any requestor or records custodian with questions regarding OPRA requests in general, or how OPRA requests are impacted by Hurricane Sandy are encouraged to call the GRC's offices toll-free at 1-866-850-0511 or e-mail us at Government.Records@dca.nj.gov.

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SPECIAL SERVICE CHARGE 14-POINT ANALYSIS

Whenever a records custodian asserts that fulfilling an OPRA records request requires an “extraordinary” expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5.c. In this regard, OPRA provides:

“Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves *an extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ...*” (Emphasis added.) N.J.S.A. 47:1A-5.c.

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:

1. What records are requested?
2. Give a general nature description and the number of 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, and return the requested records to their original storage place.