



# THE OPRA ALERT

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## BIG CHANGES TO THE GRC'S PROCESS HAVE ARRIVED

The Government Records Council (GRC) is announcing that new amendments to its regulations pertaining to the Open Public Records Act (OPRA) (N.J.A.C. 5:105) were adopted and became effective on November 7, 2022. The new amendments address processes previously not covered by the regulations and also provide consistency with the New Jersey Court Rules.

This OPRA Alert addresses many of the significant changes taking effect upon readoption.

## NEW STATUTE OF LIMITATION

For purposes of OPRA, a statute of limitation denotes the time between a denial of access and last day on which a requestor may file a complaint. Historically, only New Jersey's courts have enforced a statute of limitation on OPRA complaints, which is 45 calendar days after a denial. See Mason v. City of Hoboken, 196 N.J. 51 (2008).

N.J.A.C. 5:105-2.1 now implements a 60-calendar day, or the next business day thereafter, statute of limitation. This means that a requestor filing a Denial of Access Complaint must do so with 60 calendar days after:

- ⇒ The requestor has received a written denial of access from the custodian; or
- ⇒ The custodian has failed to respond within 7 business days

The GRC notes that the statute of limitation does allow a requestor filing beyond that the new time frame to submit a motion providing reasons why the GRC should accept the complaint "as within time."

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## INTERVENORS NOW HAVE A PROCESS

Since inception of OPRA, the GRC has lacked a process to grant interested third-parties the ability to participate in an adjudication, commonly known as intervenors, until the Appellate Division's decision in Gill v. N.J. Dep't of Banking & Ins., 404 N.J. Super. 1 (App. Div. 2008). There, the court held that the GRC's rejection of the party's request to intervene was arbitrary and unreasonable. Without an established intervenor process, the court set forth factors required to be considered for reviewing requests to intervene

As a result, the new amendments define a process for intervenors, specifically N.J.A.C. 5:105-2.2(b). This amended provision provides a step-by-step process on how to submit an application for intervention, the time frame within which a party must file objections, the factors that the GRC needs to consider as part of its determination, and the specific manner in which the GRC must notify the parties of its decision. The amendment further clarifies the denial of access complaint process and assists potential intervenors in navigating this process.

## ANONYMITY AND THE DENIAL OF ACCESS COMPLAINT PROCESS

Historically, the GRC has allowed anonymous requestors, to include those using pseudonyms, to file a Denial of Access Complaint anonymously. However, in A.A. v. Gramiccioni, 442 N.J. Super. 276 (App. Div. 2015), the Appellate Division was tasked with determining whether an anonymous requestor could proceed anonymously in a court-filed complaint. The A.A. court disagreed that such a right was guaranteed by OPRA, reasoning that “[u]nlike other statutes, where the Legislature has expressly permitted litigants in certain types of matters to proceed anonymously, the Legislature has not granted that right to OPRA requestors.” Id. at 283. However, the court noted that an anonymous requestor may proceed anonymously in certain circumstances. Id. at 284.

As a result of this decision, the GRC now includes as part of its regulations, specifically N.J.A.C. 5:105-2.3(j)-(l), a prohibition on anonymous complaints with exceptions. These new provisions outline how an anonymous requestor shall file their complaint, the threshold factors considered in whether an anonymous requestor may remain so, and the GRC's process for notifying an anonymous complainant of how to proceed anonymously. This new process is consistent with A.A. and will not apply to anonymous complaints filed prior to the adoption of the GRC's amended regulations.

## ANNOUNCING NEW SUBMISSION PROCEDURES AND DEADLINES

Over the last 14 years since the its initial promulgation of N.J.A.C. 5:105, et seq., the GRC has reviewed the complaint process and identified what works properly, as well as the parts of the process that lack efficiency or overall clarity.

The adoption of amended regulations allows the GRC to include necessary changes to address various issues. A non-exhaustive list is as follows:

- **Letters of Representation (N.J.A.C. 5:105-2.3(f); 2.4(f)):** Previously, the GRC would accept less formal means of notification that party was represented by an attorney. However, the regulations now require that any representative of a party engaged in a Denial of Access Complaint must submit a formal letter of representation. Absent receipt of the formal letter of representation, the GRC will only communicate with the complainant and custodian identified in the complaint.
- **Statement of Information Response Time Frame (N.J.A.C. 5:105-2.4(g)):** Previously, the GRC required custodians to file an SOI within 5 business days after formal request therefrom. The newly adopted regulations now provide a custodian 10 business days to submit the requested SOI.
- **Submissions Beyond the Statement of Information (N.J.A.C. 5:105-2.4(n)):** Previously, the GRC would allow parties to submit additional responses for consideration without limitation. The newly adopted regulations now provide a complainant one response to the Statement of Information and a custodian an opportunity to reply to the complainant's response.
- **Filing Form Requirements (Various Provisions):** Filings with the GRC must now include the corresponding official form. Additionally, the GRC has codified its long-standing policy that submissions in excess of 50 pages are required to be submitted as a physical copy.
- **Prevailing Party Settlements (N.J.A.C. 5:105-2.13 (b)):** The newly adopted regulations codify the GRC's long-standing policy of allowing parties 20 business days to settle the amount of fees due to a prevailing party.
- **Ex Parte Communications (N.J.A.C. 5:105-1.3; 2.3(b); 2.4(b)):** The newly adopted regulations define "*ex parte*" communications, which are substantive complaint submissions not shared with all complaint parties, and provide that these communications will not be considered as part of an adjudication.

## WHERE HAVE ALL THE INTERIM ORDERS GONE?

Historically, the GRC has issued Interim Orders for actions such as requiring compliance, seeking additional information, ordering documents for *in camera* review, and referring complaints to the Office of Administrative Law. These Interim Orders has also required complaint managers to engage in additional adjudications until all issues were addressed and a Final Decision issued. In an effort to make the Denial of Access Complaint process more efficient, the GRC is moving towards adjudicating more complaints as Final Decisions without utilizing Interim Orders as often.

In order to achieve the forgoing process shift, the GRC has added a new type of decision: the Administrative Order. N.J.A.C. 5:105-2.9(a)(1). The Administrative Order will allow the Council to conduct actions such as ordering records for an *in camera* review, without requiring an Interim Order. Administrative Orders will appear as on the Council's monthly meeting agenda for consent vote.

## GRC-SPECIFIC OPRA REGULATIONS

In accordance with N.J.S.A. 47:1A-9(a), included in its amended regulations at N.J.A.C. 5:105-1.6 are exemptions for specific documents maintained by the GRC. Those are:

- ⇒ Denial of Access Complaint submissions during the pendency of an adjudication.
- ⇒ Mediation communications as defined in N.J.S.A. 2A:23C-4, except for the "Mediation Disposition Report".
- ⇒ Unredacted documents provided to the Council for an *in camera* review.

## CLARIFICATIONS ON MEDIATION

The GRC regulations, specifically N.J.A.C. 5:105-2.5, have been amended to provide clarity to the mediation process. The new changes include:

- ⇒ Clarifying a mediation communication and that same is not disclosable without consent of all mediation participants. N.J.A.C. 5:105-2.5(f).
- ⇒ Providing a process for "nonparty participants" to participate in mediation. N.J.A.C. 5:105-2.5(h).
- ⇒ Allowing the mediation to refer a complaint back to the GRC for adjudication if a party breaches any portion of the formally-signed agreement. N.J.S.A. 5:105-2.5(j).
- ⇒ Providing that the Council shall administratively dismiss a complaint once the mediator has received notification that a complaint has been settled. N.J.A.C. 5:105-2.5(m).

## ABOUT THE GRC

The GRC is committed to fulfilling OPRA's promise of ensuring transparency in New Jersey government without sacrificing efficiency. Since the law's inception, the GRC has worked tirelessly on adjudicating Denial of Access Complaints and educating both the public and government employees through its online materials, OPRA trainings, and inquiry hotline.

Created under OPRA at N.J.S.A. 47:1A-7, the Government Records Council:

- Responds to inquiries and complaints about the law from the public and public agency records custodians
- Issues public information about the law and services provided by the Council
- Maintains a toll-free help-line and Web site to assist the public and records custodians
- Issues advisory opinions on the accessibility of government records
- Delivers training on the law
- Provides mediation of disputes about access to government records
- Resolves disputes regarding access to government records

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