

HISTORICAL BRIEFING: GOVERNMENT TRANSPARENCY IN NEW JERSEY

May 2024

“While there is still work to be done and while the subject itself—the public’s ‘Right to Know’—is fraught with the ever difficult problem of balancing a multitude of complex and diverse interests, it is our hope that this report will substantially enhance the public’s access to the operational and decision-making process of government. Government must be allowed to function, but to the greatest extent possible that functioning should occur under the searchlight of public awareness.”

– New Jersey Attorney George F. Kugler, Jr. to Governor William A. Cahill, 1974¹

In May 2024, [A4045/S2930](#) was adopted by the New Jersey Legislature, implementing changes to the public process of requesting and accessing government records across the state. The bill reforms the [Open Public Records Act \(OPRA\)](#) (N.J.S.A. 47:1A-1, et seq.), which was originally passed in 2002 and 2012.² Proponents of the bill cited its intentions to modernize public records requests through digitization provisions and the protection of personal information.³ Critics, on the other hand, expressed concern about the records exemption policies and abolishment of the right to recovery of legal fees in successful lawsuits against government agencies that withhold information.⁴ This short brief will contextualize government transparency and freedom of information legislation across the country, offering a historical framework for understanding OPRA reforms in New Jersey.

¹ George F. Kugler, Jr. “New Jersey’s Right to Know: A Report on Open Government,” The Attorney General’s Committee on the Right to Know, January 1974, 2, <https://dspace.njstatelib.org/items/efbef84d-9b82-4e16-9a5b-6910dea2678>.

² OPRA was originally proposed in 2001, but signed into law in 2002; “47: 1A5: Legislative History Checklist,” New Jersey State Law Library, November 11, 2014, <https://repo.njstatelib.org/handle/10929.1/20544>; Brian J. Molloy and Keith L. Hovey, “Legal Fees Under New Jersey’s: Open Public Records Act: A Guide to a Prevailing Party’s Right to Recovery,” *New Jersey Lawyer*, February 2012, <https://www.wilentz.com/about/publications/2012-02-15-legal-fees-under-new-jersey-s-open-public-records-act-a-guide-to-a-prevailing-party-s-right-to-recovery/> res/id=Attachments/index=0/hovey_molloy-njl-mag-article-february-2012.pdf; Loretta Weinburg, “The Story of OPRA Reform Proves We Need Real OPRA Reform,” *NJ.com*, January 20, 2024, <https://www.nj.com/opinion/2024/01/weinberg-the-story-of-opra-reform-proves-we-need-real-opra-reform-opinion.html>.

³ S.P. Sullivan and Brent Johnson, “Facing Intense Backlash, Lawmakers Hit the Brakes on NJ Records Law Overhaul,” *NJ.com*, March 14, 2024 <https://www.nj.com/politics/2024/03/facing-intense-backlash-lawmakers-hit-the-brakes-on-nj-records-law-overhaul.html>.

⁴ Sullivan and Johnson, “Facing Intense Backlash, Lawmakers Hit the Brakes on NJ Records Law Overhaul,” March 14, 2024.

Freedom of Information Act

On the federal level, the [Freedom of Information Act of 1966](#) (FOIA) emerged from the Cold War dynamics of the 1950s. It sought to counter the restrictive policies surrounding government secrecy that had been put in place during World War II by amending the 1946 Administrative Procedures Act.⁵ Under the McCarthyism of President Dwight D. Eisenhower's first term in office, thousands of federal employees were accused of being Communists and fired from their positions.⁶ Representative John Moss (D-C.A.), who was serving on the House's Civil Service Commission at the time, demanded further explanation of the dismissals, only to be rebuked by the Eisenhower Administration.⁷ By 1955, Moss joined the Government Operations Committee and suggested establishing a Special Subcommittee on Government Information, with the intention of investigating "bureaucratic secrecy" and encouraging openness.⁸

Over the course of eleven years, the subcommittee slowly produced hearings and reports on federal classification and information policies, spanning the Eisenhower to Johnson Administrations.⁹ This methodical approach enlisted the work of former journalists and eventually garnered enough bipartisan support from elected officials and federal attorneys under President Lyndon B. Johnson, who signed the Freedom of Information Act into law in 1966.¹⁰ Public demands for government transparency, oversight, accountability, as well as press freedom, continued to be prevalent in the wake of widespread secrecy surrounding the Vietnam War and Daniel Ellsberg's leak of the Pentagon Papers in 1971.¹¹ While federal agencies often attempted to undermine access to

⁵ Sam Archibald, "The Early Years of the Freedom of Information Act: 1955 to 1974," *PS: Political Science and Politics* 26, no. 4 (December 1993), 727; Kugler, Jr. "New Jersey's Right to Know," 15, 173; Mary-Rose Papandrea, "Under Attack: The Public's Right to Know and the War on Terror," *Boston College Third World Law Journal* 25, no. 35 (January 2005), 49, <https://lira.bc.edu/files/pdf?fileid=4cd9521f-8e1e-4ba0-aa76-ea08f9438c38>.

⁶ Robert McG. Thomas, Jr., "John E. Moss, 84, Is Dead; Father of Anti-Secrecy Law," *New York Times*, December 6, 1997, <https://www.nytimes.com/1997/12/06/us/john-e-moss-84-is-dead-father-of-anti-secrecy-law.html>.

⁷ Thomas, Jr., "John E. Moss, 84, Is Dead," December 6, 1997; Archibald, "The Early Years of the Freedom of Information Act," 726.

⁸ Thomas, Jr., "John E. Moss, 84, Is Dead," December 6, 1997; Archibald, "The Early Years of the Freedom of Information Act," 726.

⁹ Archibald, "The Early Years of the Freedom of Information Act," 727.

¹⁰ Archibald, "The Early Years of the Freedom of Information Act," 728-730; Thomas Blanton, ed., "Freedom of Information at 40: LBJ Refused Ceremony, Undercut Bill with Signing Statement," *The National Security Archive*, July 4, 2006, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB194/index.htm>.

¹¹ "40 Years After the Leak, Weighing the Impact of the Pentagon Papers," *PBS NewsHour*, June 13, 2011, <https://www.pbs.org/newshour/show/40-years-after-leak-weighing-the-impact-of-the-pentagon-papers>; Kugler, Jr. "New Jersey's Right to Know," 19, 22.

public records in the subsequent years, ongoing subcommittees in both the House and Senate sought to strengthen the penalties for withholding information in the wake of President Richard Nixon’s Watergate scandal, eventually resulting in stronger amendments to FOIA in 1974.¹² The common law and First Amendment “right of access” to government information was also upheld by the U.S. Supreme Court in 1978 and 1980.¹³

Open Meetings & Right to Know Laws

On the state level, New Jersey was at the forefront of developing an Open Meetings Law (N.J.S.A. 10:4-1 et seq.) as early as 1960 and a Right to Know Law (N.J.S.A. 47:1A-1, et seq.) in 1963.¹⁴ The first of these laws sought to protect the right of New Jersey’s citizens to attend meetings of “public bodies” such as town councils, while the latter provided the “right to inspect” public records for “protection of the public interest.”¹⁵ Today, the Open Meetings Law is known as the [Open Public Meetings Act \(OPMA\)](#) or the “Sunshine Law,” while the original Right to Know Law has been replaced by the [Open Public Records Act \(OPRA\)](#).¹⁶

The 1960 Open Meetings Law sought to make government decisions widely available to the public in hopes of preventing corruption and promoting public trust in elected officials.¹⁷ However, the New Jersey Legislature was initially exempt from making its meetings accessible, with the law only requiring that voting sessions be made open to the public.¹⁸ These provisions drew criticism from journalists and public interest groups alike, who branded the 1960 law as “totally ineffective and perhaps one of the worst open meetings laws in the country.”¹⁹

The 1963 Right to Know Law also came about through “public agitation”—largely by journalists—in favor of “public disclosure” legislation in New Jersey.²⁰ This law complemented citizens’ “common law right” access to public records in New Jersey, which had been confirmed through the 1879 state Supreme Court case *Ferry v. Williams*

¹² Archibald, “The Early Years of the Freedom of Information Act,” 730-731.

¹³ Papandrea, “Under Attack,” 36, 38; Terrance Adams, “Freedom of Information Laws and the First Amendment,” *Office of Legislative Research Report*, November 26, 2013, <https://www.cga.ct.gov/2013/rpt/2013-R-0439.htm>,

¹⁴ Kugler, Jr., “New Jersey’s Right to Know,” 8, 27-33.

¹⁵ Kugler, Jr., “New Jersey’s Right to Know,” 14, 27, 31.

¹⁶ ACLU New Jersey, “A Guide to the New Jersey Sunshine Law,” <https://www.aclu-nj.org/en/know-your-rights/guide-new-jersey-sunshine-law>.

¹⁷ Kugler, Jr., “New Jersey’s Right to Know,” 175.

¹⁸ Kugler, Jr., “New Jersey’s Right to Know,” 13-14.

¹⁹ Kugler, Jr., “New Jersey’s Right to Know,” 13-14.

²⁰ Kugler, Jr., “New Jersey’s Right to Know,” 8, 13.

(41 N.J.L. 332, Sup. Ct. 1879).²¹ The 1963 law also built upon the 1953 Destruction of Public Records Law (N.J.S.A. 47:3-8.1 et seq.), which established a committee within the New Jersey Department of Education to determine the “appropriate retention and destruction of [government] records.”²²

In a 1974 report, New Jersey Attorney General George F. Kugler, Jr. cited federal Supreme Court cases, such as *Environmental Protection Agency v. Mink* (1973), and New Jersey Supreme Court cases like *Irval Realty Inc. v. Board of Public Utility Commissioners of the State of New Jersey* (1972) as demonstrating the necessity of more transparent “right to know” laws.²³ Under Governor Richard Hughes, there were exceptions made in which state agencies were required to disclose their records, which caused similar issues as the federal Freedom of Information Act (FOIA) in terms of restricting access to information about pressing environmental issues, from the nationwide impact of fossil fuel companies to public utility accidents in New Jersey.²⁴

In the wake of litigation from the *Irval* public utilities case, public record became understood to be “any written memorial incident to the exercise of a public function by a government employee.”²⁵ Attorney General Kugler’s report helped demonstrate New Jersey’s shortcomings in government transparency legislation by offering a comparative perspective to federal legislation and strong Sunshine Laws in states like Florida, Colorado, California, and New Hampshire.²⁶ The New Jersey Legislature subsequently put in place sweeping reforms to the Open Public Meetings Act and Right to Know Law in 1975, seeking to expand access to public information, while balancing a “citizen's right of privacy and a government's right to function.”²⁷ OPMA was also amended in 1980 to

²¹ Kugler, Jr., “New Jersey’s Right to Know,” 7-8, 11; Molloy and Hovey, “Legal Fees Under New Jersey’s Open Public Records Act,” 21.

²² Kugler, Jr., “New Jersey’s Right to Know,” 14-15.

²³ Kugler, Jr., “New Jersey’s Right to Know,” 7.

²⁴ Kugler, Jr., “New Jersey’s Right to Know,” 10, 13, 17; Archibald, “The Early Years of the Freedom of Information Act,” 729.

²⁵ Kugler, Jr., “New Jersey’s Right to Know,” 12.

²⁶ Kugler, Jr., “New Jersey’s Right to Know,” 21-22.

²⁷ Kugler, Jr., “New Jersey’s Right to Know,” 3, 12-13; “Open Public Meetings Act,” New Jersey Foundation for Open Government, <https://njfog.org/opma>; “Open Public Records Act (OPRA),” New Jersey State League of Municipalities, <https://njlm.org/710/Open-Public-Records-Act-OPRA>; State of New Jersey Department of State, “Guidelines on the Open Public Meetings Law,” 1996, 1, <https://dspace.njstatelib.org/items/e681f420-c412-4e2e-93d9-978cf9a07f6d>; Mike Catalini, “New Jersey Lawmakers Fast Track Bill that Could Restrict Records Access Under Open Records Law,” *Associated Press*, March 11, 2024, <https://apnews.com/article/open-public-records-act-new-jersey-transparency-34da53dfb7564c46b49409227dba4e95>.

clarify the scope of “public bodies” and update the notice period required for government meetings, while upholding the penalties for noncompliance.²⁸

Modernizing Open Government Laws

These transparency laws, on both the state and federal level, were largely developed from the end of World War II through the Vietnam War, when government secrecy was of utmost concern to the public. They were revisited again in the early 2000s, in the wake of the digital transformations of the Information Age, as well as the crises of the September 11, 2001 terrorist attacks and American involvement in the Global War on Terror.²⁹ Under President George W. Bush and President Barack Obama’s administrations, the Patriot and Freedom Acts expanded federal surveillance apparatuses, limiting public access to information about the war and domestic intelligence gathering programs.³⁰ Similar to the Pentagon Papers, this led to a public leak of classified documents by government whistleblowers Edward Snowden and Chelsea Manning, as well as further amendments to FOIA.³¹

In 2007, federal reforms created the Office of Government Information Services (OGIS), which aids in facilitating access to public records through the National Archives.³² Under President Obama’s administration, FOIA was further strengthened in 2016 by withdrawing exemptions surrounding materials pertaining to “deliberative process,” including the drafts of documents, memoranda, and correspondence, which can currently be requested by journalists and the public alike.³³ However, during President Donald

²⁸ State of New Jersey, Office of Emergency Management, “10:4-6 ‘Senator Byron M. Baer Open Public Meetings Act,’” 2-3, https://www.nj.gov/njoem/serc/pdf/Open_Public_Meetings_Act_N.J.S.A._10_4-6-21.pdf; The Right to Know Law was amended in 1980, but went into effect in 1981.

²⁹ Papandrea, “Under Attack,” 35-37.

³⁰ Dale Mineshima-Lowe, “USA Patriot Act of 2001,” Free Speech Center at Middle Tennessee State University, February 18, 2024, <https://firstamendment.mtsu.edu/article/usa-patriot-act-of-2001>; These laws are also known as the USA PATRIOT and USA FREEDOM Acts.

³¹ Mineshima-Lowe, “USA Patriot Act of 2001”; Anthony B. Sanders, “Classified Documents,” Free Speech Center at Middle Tennessee State University, February 18, 2024, <https://firstamendment.mtsu.edu/article/classified-documents>.

³² Victoria Macchi, “We Make Access Happen: FOIA Q&A with OGIS Director Alina M. Semo,” National Archives, March 14, 2023, <https://www.archives.gov/news/articles/sunshine-week-2023>.

³³ Editorial Board, “FOIA at 50,” *Washington Post*, July 3, 2016, https://www.washingtonpost.com/opinions/foia-at-50/2016/07/03/6283af88-3fbo-11e6-a66f-aa6c1883b6b1_story.html.

Trump’s administration, FOIA requests and lawsuits peaked, with journalists citing active attempts at suppressing the release of government information.³⁴

Connecting federal with state legislation, the Florida Society of Newspaper Editors created “Sunshine Sunday” in 2002 to educate the public about the necessity of open government.³⁵ It was expanded to a nationwide Sunshine Week in 2005 by the American Society of Newspaper Editors, which coincides each year with commemorations of President James Madison’s birthday and National Freedom of Information Day in mid-March.³⁶ Its ongoing programming includes emphasis on freedom of speech, freedom of the press, and open government, which were enshrined in American democracy by President Madison’s contributions to the Bill of Rights and the 1787 Constitutional Convention.³⁷

Within New Jersey state government, the Open Public Meetings Act (OPMA) and Open Public Records Act (OPRA) were also significantly amended in 2002, replacing the previous government transparency legislation.³⁸ The creation of OPRA included establishing the Government Records Council within the Department of Community Affairs for overseeing information requests, while the updates to OPMA provided provisions for offering digital access to public meetings.³⁹ Through amendments between 2005 and 2012, OPRA was updated to specify the inclusion of digital records, reinforce request response times, establish grounds for denial by state agencies, and modernize the request fee structure.⁴⁰

³⁴ Philip Eil, “What the Trump administration meant for freedom of information requests,” *Columbia Journalism Review*, February 15, 2021, <https://www.cjr.org/analysis/what-the-trump-administration-meant-for-freedom-of-information-requests.php>.

³⁵ “Sunshine Week: March 10-16, 2024 and Freedom of Information Day: March 16, 2024,” *Census.gov*, March 10, 2024, <https://www.census.gov/newsroom/stories/sunshine-week.html>.

³⁶ “Sunshine Week,” *Census.gov*, March 10, 2024; “Everything You Need to Know About Sunshine Week,” State Policy Network, March 15, 2022, <https://spn.org/articles/sunshine-week>; United States Agency for International Development, “Sunshine Week 2024,” March 4, 2024, <https://www.usaid.gov/foia/news/sunshine-week-2024>.

³⁷ “Sunshine Week,” *Census.gov*, March 10, 2024; “Everything You Need to Know About Sunshine Week,” State Policy Network, March 15, 2022, <https://spn.org/articles/sunshine-week>; Diana Mitsu Klos and David Cuillier, “About Sunshine Week,” Joseph L. Brechner Freedom of Information Project, University of Florida College of Journalism and Communications, 2024, <https://sunshineweek.org/about>.

³⁸ State of New Jersey, Office of Emergency Management, “10:4-6,” 4.

³⁹ “Open Public Records Act,” Government Records Council, <https://www.nj.gov/grc/act.html#grc>; State of New Jersey, Office of Emergency Management, “10:4-6,” 4.

⁴⁰ “A Citizen’s Guide to the Open Public Records Act,” 2nd ed., Government Records Council, July 2011, 6, [https://www.nj.gov/grc/public/docs/Citizen's%20Guide%20to%20OPRA%20\(July%202011\).pdf](https://www.nj.gov/grc/public/docs/Citizen's%20Guide%20to%20OPRA%20(July%202011).pdf), 17; “Guide to the Open Public Records Act,” New Jersey State League of Municipalities, January 2014, <https://www.njlm.org/DocumentCenter/View/3042/Guide-to-the-Open-Public-Records-Act-PDF>, 6-7, 31-32.

A number of state court cases also impacted the enforcement of OPRA in New Jersey and even altered the practices of various government agencies. The payment of attorney fees in public records lawsuits and the right to privacy were litigated in cases such as *Mason v. City of Hoboken* (2008) and *Burnett v. County of Bergen* (2009).⁴¹ In *North Jersey Media Group Inc. v. Township of Lyndhurst* (2017), the New Jersey Supreme Court ruled that “Use of Force” reports by law enforcement should be made publicly accessible, which helped lead to statewide changes in police protocol in 2020.⁴²

There have been significant efforts to reform and modernize OPRA since 2017, with the latest bill passing in the New Jersey Legislature in May 2024.⁴³ While initial drafts of the bill sought to prevent commercial “data brokers” from acquiring the private information of New Jersey residents through OPRA requests, this provision was removed from the final version of A4045/S2930.⁴⁴ The bill will continue to aid in further protecting the home addresses of public officials like judges, supporting the 2020 Daniel’s Law.⁴⁵

The newest amendments to the Open Public Records Act also include provisions that require increased specificity in records requests and allow for further redactions of documents.⁴⁶ Additionally, government agencies may be permitted to delay providing

⁴¹ Susan Thatch, “Memorandum to the New Jersey Law Revision Commission re: N.J. Open Public Records Act (“OPRA”) -- N.J.S. 47:1A-1 et seq.,” April 11, 2016, 1-2, <https://dspace.njstatelib.org/server/api/core/bitstreams/6631ace6-775d-4b3a-abe6-227ddde11708/content>; Molloy and Hovey, “Legal Fees Under New Jersey’s Open Public Records Act,” 22; “A Citizen’s Guide to the Open Public Records Act,” July 2011, 6.

⁴² Walter M. Luers, “NJ Supreme Court Rules in *North Jersey Media v. Lyndhurst Twp.*,” New Jersey Foundation for Open Government, July 11, 2017, <https://njfog.org/4611/njfogs-statement-north-jersey-media-group-v-township-lyndhurst-n-j-supreme-court-ruling>; CJ Griffin, “New Use of Force Policy Makes Positive Changes, But Also Raises Questions,” *NJ OPRA Blog*, November 29, 2020, <https://www.pashmanstein.com/publication-new-use-of-force-policy-makes-positive-changes-but-also-raises-questions>.

⁴³ Weinburg, “The Story of OPRA Reform Proves We Need Real OPRA Reform,” January 20, 2024; Katie Sobko, “NJ Legislature Passes ‘Reform’ that Will Dismantle Public Access to Government Records,” *NorthJersey.com*, May 13, 2024, <https://www.northjersey.com/story/news/new-jersey/2024/05/13/nj-senate-passes-opra-reform-bill-public-records-access/73675100007>.

⁴⁴ Dana DiFilippo and Sophie Nieto-Munoz, “Lawmakers Approve Controversial Bill to Limit Public Access to Government Records,” *New Jersey Monitor*, March 11, 2024, <https://newjerseymonitor.com/2024/03/11/lawmakers-approve-controversial-bill-to-limit-public-access-to-government-records>; Sobko, “NJ Legislature Passes ‘Reform’ that Will Dismantle Public Access to Government Records,” May 13, 2024.

⁴⁵ Dana DiFilippo, “Critics Warn Senator’s Bill to Amend State’s Public Records Law Would Gut Transparency,” *New Jersey Monitor*, March 7, 2024, <https://newjerseymonitor.com/2024/03/07/critics-warn-senators-bill-to-amend-states-public-records-law-would-gut-transparency>.

⁴⁶ DiFilippo and Nieto-Munoz, “Lawmakers Approve Controversial Bill to Limit Public Access to Government Records,” March 11, 2024; Colleen O’Dea, “Radically Revised OPRA Bill Would Make It Much

access to materials and may no longer be required to pay legal fees in records denial lawsuits.⁴⁷ Notably, these most recent amendments may alter the process of accessing and remedying the withholding of public information across local and state government agencies.

Overall, contextualization of these government transparency laws in historical perspective helps provide a more complete picture of the issues at stake on both the state and federal level, and demonstrates their impact on the future of open government and participatory democracy in New Jersey.

FURTHER READING

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⁴⁷ O’Dea, “Radically Revised OPRA Bill Would Make It Much Tougher to Access Public Records,” *NJ Spotlight News*, May 14, 2024.

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