

# OPRA & Recent Decisions

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# OPRA Update and Recent GRC Decisions

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# The Most Important Number Today!

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# OPRA Update

# OPRA is Not a Mandatory Process

- OPRA applies to those requests where the requestor chooses to invoke the statute.
- A request *should be* on an official OPRA request form. However, use of the form is not mandatory. See Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009): “the form should be used but no request . . . should be rejected if such form is not used.”

# Are there other ways to request records?

- Common law requests.
- Discovery requests, which is not the same as OPRA. See Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008).
- Administrative/Informal requests (example: requestor comes to Clerk's counter and orally asks to review minutes book).
- Other court processes (*i.e.* subpoenas, court orders)
  - GRC has not adjudicatory authority

# State of Emergency

- On March 20, 2020, P.L. 2020, c. 10, amended N.J.S.A. 47:1A-5(i) to provide that the response time frame “shall not apply” during a declared State of Emergency or public health emergency.
  - [https://www.state.nj.us/grc/news/alerts/GRC%20Special%20Statement%202020-01%20\(Final\).pdf](https://www.state.nj.us/grc/news/alerts/GRC%20Special%20Statement%202020-01%20(Final).pdf).
- On June 4, 2021, P.L. 2021, c. 104 removed the moratorium on the response time frame effectively immediately.
  - [https://www.nj.gov/grc/news/alerts/GRC%20Special%20Statement%202021-01%20\(Final\).pdf](https://www.nj.gov/grc/news/alerts/GRC%20Special%20Statement%202021-01%20(Final).pdf).

# Calling in Back-up

- For municipalities, a “custodian of record” is defined as the municipal clerk. N.J.S.A. 47:1A-1.1.
- Best practices dictate that an agency should designate a substitute custodian to receive/fulfill requests in the custodian’s absence. See Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-325 (Final Decision dated October 27, 2015).
- Agencies may also choose to designate departmental custodians. See Paff v. Twp. of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008)

# Recent GRC Decisions

# Social Media

- Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2017-169 (Interim Order dated November 12, 2019)
  - The Council held that a custodian unlawfully denied access to records from a GoFundMe campaign set up and managed by the Township Mayor.
  - See also Larkin v. Borough of Glen Rock, Docket No. BER-L-2573-18 (June 15, 2018) (holding that the Mayor and Council's Facebook block lists were subject to disclosure); Wronko v. Borough of Carteret, Docket No. MID-L-5499-18 (Order dated January 11, 2019).

# Text Messages

- Verry v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2014-387 (July 2015).
  - The Council held that a plain reading of OPRA supports that text messages are “government records” subject to disclosure so long as the text messages have been “made, maintained or kept on file . . . or . . . received in the course of . . . official business. . . .” N.J.S.A. 47:1A-1.1. The Council stressed that its determination broadly addresses the characterization of text messages as “government records” and notes that exemptions to disclosure may apply on a case-by-case basis. The Council’s determination should therefore not be construed to provide for unmitigated access to text messages.

# Records Accessible on a Website

- Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014):
  - Here, the GRC reversed its prior decision in Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC 2009-148 (Interim Order dated June 29, 2010), by providing that custodians have the ability to refer requestors to the **exact location** on the Internet where a responsive record can be located. Id. at 3-4.
  - However, that does not permit you to say, “It’s on our website; find it yourself!”

# Shared Services

- Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012)
  - Agencies engaged in shared services agreement are equally responsible for obtaining and/or disclosing records maintained by the agency providing the service.]
  - *E.g.:* a municipality sharing police services with another municipality is responsible for obtaining responsive records from that agency in response to an OPRA request.

# Surveillance Cameras

- Howard v. N.J. Transit, GRC Complaint No. 2018-43 (November 2019)
  - The Council held that the custodian lawfully denied access to surveillance camera footage from a public transit center under N.J.S.A. 47:1A-1.1. See also Gilleran v. Twp. of Bloomfield, 227 N.J. 159 (2016).

# Draft Documents

- **Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018)**
  - Draft minutes are exempt from disclosure under OPRA's "inter-agency or intra-agency advisory, consultative, or deliberative [(ACD)] material" exemption. N.J.S.A. 47:1A-1.1.
- **Daniel v. Twp. of West Orange (Essex), GRC Complaint No. 2017-163 (May 2019)**
  - Draft resolutions are exempt from disclosure under the ACD exemption, even if shared with a third party prior to approval. N.J.S.A. 47:1A-1.1; Eastwood v. Borough of Englewood Cliffs (Bergen), GRC 2012-121.

# Auto-Accident Reports

- Truland v. Borough of Madison, GRC Complaint No. 2006-88 (September 2007):
  - The Council held that “no redactions to the requested auto accident reports are warranted pursuant to N.J.S.A. 39:4-131.” The New Jersey statute cited specifically states that “information contained [in the report] shall not be privileged or held confidential.” The Council’s holding in Truland, has been applied to another complaint in which accident reports were at issue. See also Selby v. Hazlet Twp. Police Dep’t (Monmouth), GRC Complaint No. 2011-154 (Interim Order dated June 26, 2012).
  - Stark contrast with the personal information exemptions present in OPRA. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1.
  - But see N. Jersey Media Grp., Inc. v. Twp. of Nutley, 2016 N.J. Super. Unpub. LEXIS 2166 (App. Div. 2016). However, the GRC is unsure of how this decision could impact other attempts to redact accident reports.

# E-mails: Withhold or Redact?

- **Golas v. Essex Cnty. Dep't of Corr., GRC Complaint No. 2018-12 (Interim Order dated January 7, 2020)**
  - The Council held that the custodian lawfully denied access to certain portions of the bodies of the responsive e-mails.
  - However, following long-standing precedential case law, the Council required the custodian to disclose the e-mails redacting only those exempt portions and disclosing the basic e-mail information. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC 2009-185.

# Other GRC Decisions on Appeal

## 2021 Highlights

- Scott v. N.J. Health Care Facilities Fin. Auth., 2021 N.J. Super. Unpub. LEXIS 66 (App. Div. 2021) (On appeal from GRC Complaint No. 2015-256)
  - The Appellant sought correspondence and agreements between the Appellee and the IRS regarding bonds issued to Deborah, a non-profit hospital. The GRC held that because the requested records contained Deborah's federal tax return information within the meaning of 26 U.S.C.A. 6103 ("Section 6103"), they were exempt under N.J.S.A. 47:1A-9(a). The Appellate Division agreed, finding that the records fell within the broad definition under Section 6103; that the return information was Deborah's; and that Section 6103 applied to the Appellee and its employees. Affirmed.

# 2021 UPDATE ON OPRA CASES

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# 1. POLICE RECORDS - INTERNAL AFFAIRS FILES, DISCIPLINARY HISTORY

- **Municipal Internal Affairs Files** – Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 467 N.J. Super. 385 (App. Div. 2021)
  - Exempt under OPRA per A.G.'s Internal Affairs Policies and Procedures, but not under common law right of access.
  - Attorney General revised IAPP regulations and released redacted IA files of Sgt. Seidle. App. Div. affirmed trial court's rulings on OPRA and common law, ruling that the release of the IA files by the AG had not mooted these issues, nor the attorney fee issues, which are discussed *infra*.
  - See also Simmons v. City of Newark, 2018 N.J. Super. Unpub. LEXIS 2313 (App. Div. 2018) (certif. denied, 240 N.J. 137 (2019))

# ATTORNEY GENERAL'S AMENDMENTS TO INTERNAL AFFAIRS POLICY AND PROCEDURES

- In re ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE Nos. 2020-5 and 2020-6, 465 N.J. Super. 111 (App. Div. 2020)
  - In response to state and national demands for accountability and reform of law enforcement following the death of George Floyd, AG issued two Law Enforcement Directives amending the statewide rules for internal affairs investigations (IAPP).
  - App. Div. upheld the directives despite challenge by various law enforcement groups on various theories, including violating OPRA. The release of internal affairs disciplinary investigations does not contravene OPRA because the AG is authorized by law to regulate police affairs. OPRA does not control where other law supersedes.

- **Personnel Records – Libertarians for Transparent Gov’t v. N.J. State Police, 2019 N.J. Super. Unpub. LEXIS 1156 (App. Div. 2019)**
  - The App. Div. affirmed a trial court decision denying access to the identity of officer described as terminated for misconduct in a State Police 2015 annual report to Legislature denied.
  - Information requested, “name, title, date of separation and reasons therefor” was exempt under OPRA, inasmuch as it is a personnel record and release would “violate both the letter and the spirit of the exemption itself.”
  - The Supreme Court granted certification, but later dismissed with prejudice based on a stipulation of dismissal. 239 N.J. 518 (2019); 243 N.J. 515 (2020).

- Libertarians For Transparent Gov't v. Cumberland Cnty., 465 N.J. Super. 11, (App. Div. 2020)
  - Except for certain exceptions, personnel and pension records of public employees are not government records subject to release under OPRA. N.J.S.A.47:1A-10.
  - Plaintiff sought a settlement agreement between corrections officer and Cumberland County that resolved a disciplinary action that allowed him to retire while retaining certain pension rights and years of service. The trial court agreed with Plaintiff that the agreement was not a personnel record under OPRA and was thus disclosable.
  - The App. Div. reversed on the ground that it was not the settlement of litigation, but rather an administrative settlement within the context of a disciplinary proceeding, and accordingly, a personnel record. It remanded the common law claim to the trial court for determination. The order for counsel fees under OPRA was also reversed.

## 2. PRIVACY

- **Return to Dog Licenses – Bozzi v. Borough of Roselle Park, 462 N.J. Super. 415 (App. Div. 2020).**
  - Prior opinions ruled that “reasonable expectations of privacy” formed the basis of redactions for dog license applicants’ names and addresses.
  - Recently, the App. Div. ruled that the Borough had not presented a colorable claim that the information invaded an “objectively reasonable expectation of privacy,” and therefore would not apply the Doe v. Poritz, 142 N.J. 1 (1995) factors in its analysis. Its analysis concluded that there was little basis to fear that privacy would be impacted, inasmuch as people walk dogs in public and there is no reason to deny businesses the information so they can conduct their business.

- **Bozzi v. City of Jersey City, 248 N.J. 274 (2021)**
  - The Supreme Court affirmed by majority opinion the Appellate Division's decision that ordered the production of all names and addresses of dog license applications on the basis that "owning a dog is a substantially public endeavor in which people do not have a reasonable expectation of privacy . . ." Id. The Court thus found no colorable claim to engage in a balancing test.
  - The dissenting Justice argued that contrary to the majority opinion, there did exist a colorable claim to apply the privacy balancing test. The Justice further found that the test weighed against disclosure of the license names and addresses.

# 3. POLICE AND CRIMINAL INVESTIGATORY RECORDS

- **Use of Force Reports Involving Juvenile** – Digital First Media, d/b/a/ The Trentonian v. Ewing Twp., 462 N.J. Super. 389 (App. Div. 2020)
  - The App. Div. held that UFRs containing juvenile names are disclosable under OPRA, but after redacting said names and other identifying information.
  - Supreme Court denied certification. 243 N.J. 266 (2020).

- **Sex Assault Victim's Diary** – Medina v. McFadden, 2020 N.J. Super. Unpub LEXIS 1097 (App. Div. 2020)
  - Plaintiff, who was convicted of multiple sex crimes on minors, filed OPRA and common law requests for release of a copy of the diary of one of his victims because it may “point the finger” at someone else and exonerate him. The trial court denied the applications.
  - The App. Div. affirmed holding that because there was no requirement to make the record (the diary) and because it came into police possession during the criminal investigation, it was a criminal investigatory record and exempt from disclosure. N.J.S.A. 47:1A-1.1. The court also affirmed the common law denial because the need for keeping the diary of the victim confidential outweighed the right for it to be disclosed.

- **Police Complaints, Summonses, Arrest Listings – Simmons v. Mercado, 247 N.J. 24 (2021)**

- The Supreme Court reversed the Appellate Division's holding that evidence showed that, once the complaints and summonses were entered into the State's electronic Complaint Disposition Record (eCDR), the complaints and summonses became court records "because the system does not allow for the usage of a particular charge or complain as a search parameter."
- The Court reinstated that trial court's decision and required defendants to search for a produce records responsive to plaintiff's OPRA request.

# 4. Ongoing Investigation

- Rosario v. Port Authority of New York & New Jersey  
2021 N.J. Super. Unpub. LEXIS 1497 (App. Div. 2021)
  - A plaintiff's attorney submitted an OPRA request for records relating to an accident on the George Washington Bridge and was denied production based upon the ongoing investigation exception. N.J.S.A. 47:1A-3(a).
  - The Appellate Division affirmed the trial court's order requiring disclosure of the requested records, who in turn only produced a small portion of responsive records. The court agreed that the Authority did not prove that release of the documents would be inimical to the public and that the fee award was proper.

# 5. ATTORNEY'S FEES

- **Attorney's Fees under the Common Law – Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008)**
  - OPRA contains a fee-shifting provision allowing a prevailing requestor to obtain attorney's fees.
- 12 years later, the “catalyst theory” often used in Common Law claims is still applied to OPRA fee issues.
  - Under the American Rule, each party bears its own costs and fees. In Mason, the Court made passing reference to the catalyst theory as applying to Common Law claims, in the absence of an apparent, theoretical distinction to its OPR analysis. However, no final ruling has been made by the Supreme Court.

- Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 467 N.J. Super. 385 (App. Div. 2021)
  - As discussed earlier, this case involved both OPRA and the common law. While the court affirmed the trial court that the IA files were exempt from disclosure under OPRA, it ruled that they were obtainable under the common law. However, the award of counsel fees under the common law was reversed. The App. Div. determined that under Mason there is no unqualified right to counsel fees and no statutory right to counsel fees. The Township acted in accordance with the IAPP and that its position was advanced in good faith. Further, the AG's release of the files was not as a result of Gannett's litigation. Accordingly, the request was denied.

- But See Gonzalez v. Cuttrell, 2021 N.J. Super. Unpub. LEXIS 2563 (App. Div. 2021)
  - Plaintiff was awarded counsel fees and costs under the common law following the language of Mason, 196 N.J. 51, 57. The trial court found that the catalyst theory applied because there was no “apparent, theoretical basis” for declining to apply that theory to plaintiff’s common law claim.

# 6. DELIBERATIVE PROCESS PRIVILEGE

- Doe v. Rutgers, The State University of New Jersey, 466 N.J. Super. 14 (App. Div. 2021)
  - Former graduate student submitted five separate OPRA requests for several records regarding himself and additional personnel information.
  - App. Div. ruled that, except for his personal records, the requests were overbroad, required extraordinary effort to fill, and sought access to inherent “inter-agency or intra-agency advisory, consultative, or deliberative material.” N.J.S.A. 47:1A-1.1.