

OPRA & Recent Decisions

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OPRA Update and Recent GRC Decisions

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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

Substitute Custodians

- 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).

GRC Regulations

- On November 7, 2022, the GRC's amended regulations were adopted. Significant changes include:
 - 60 calendar day statute of limitation for complaint filings.
 - Intervenor Process
 - Process for complainants to remain anonymous in the Denial of Access Complaint Process
 - *Ex Parte* Communication restrictions.
 - Statement of Information (SOI) filing deadline now ten (10) business days
 - Post-SOI replies limited.
 - Administrative Orders

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 Council 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!”

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 Council is unsure of how this decision could impact other attempts to redact accident reports.

Redaction Method

- Whiteside v. Twp. of Little Falls (Passaic), GRC Complaint No. 2021-89 (Interim Order dated August 30, 2022).
 - The Custodian's method of whiting out the Register was not an appropriate form of redaction. N.J.S.A. 47:1A-5(g); Scheeler, Jr. v. City of Cape May (Cape May), GRC Complaint No. 2015-91 (Interim Order dated December 15, 2015).

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 (Interim Order dated May 24, 2011).

Other GRC Decisions on Appeal

2022 Highlights

- **Gordon v. City of Orange, 2022 N.J. Super. Unpub. LEXIS 1226 (App. Div. 2022) (On appeal from GRC Complaint No. 2013-255).**
 - Appellant challenges the Council's decision that affirmed the findings of the Administrative Law Judge ("ALJ") that no other City of Orange employee (besides the then-custodian) knowingly and willfully violated OPRA. The Appellate Division found there was no basis to disagree with the factual findings of the ALJ. Affirmed.

2022 UPDATE ON OPRA CASES

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1. Creation of Records

- **Simmons v. Mercado, 247 N.J. 24 (2021).**
 - Millville Police Department (MPD) denied an OPRA request seeking complaint summonses housed on the Judiciary's eCDR system.
 - The Supreme Court of New Jersey overturned the Appellate Division's decision holding that MPD had no obligation to obtain records maintained by the Judiciary.
 - The Court reasoned that the summonses were created by MPD officers, and they could access them through the eCDR system. Thus, the Court required disclosure in accordance with the trial court's order.

See also AADARI v. Medina, 2022 N.J. Super. Unpub. LEXIS 73 (App. Div. 2022); AADARI v. Plaza & Town of West New York, 2022 N.J. Super. Unpub. LEXIS 600 (App. Div. 2022)

2. On-going Investigations; Release Inimical to the Public Interest

- **Rosario v. Port Authority of New York & New Jersey, 2021 N.J. Super. Unpub. LEXIS 1497 (App. Div. 2021).**
 - Following an accident that rendered a client comatose, an attorney sought certain records under OPRA.
 - The Port Authority denied access under the on-going investigation exemption. N.J.S.A. 47:1A-3(a).
 - The Appellate Division affirmed the trial court's decision that upon applying the on-going investigation test performed in N. Jersey Media Group, Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 573-74 (2017), the Port Authority failed to prove that disclosure would be inimical to the public interest and that the plaintiff was a prevailing party.

3. Privacy – Dog Licenses

- 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.

4. Personnel Records

- Libertarians For Transparent Gov't v. Cumberland Cnty., 250 N.J. 46 (2022).
 - The Supreme Court reversed the Appellate Division's decision in Libertarians For Transparent Gov't v. Cumberland Cnty., 465 N.J. Super. 11, (App. Div. 2020) and held that a separation agreement between an employee and the County was not a personnel record exempt from disclosure under N.J.S.A. 47:1A-10.
 - The Court held that because "reason for separation" was part of a disclosable personnel record, the County was required to disclose the agreement with redactions for all other non-disclosable information.

- **AADARI v. Profitt, 2022 N.J. Super. Unpub. LEXIS 622 (App. Div. 2022).**
 - The Appellate Division reversed the trial court’s decision that cancelled checks were not “government records” subject to disclosure and that the information disclosed regarding two (2) separated officers was sufficient.
 - The court held that the “payment listing” document obtained through the agency’s Joint Insurance Fund was sufficient. The court further held that plaintiff was entitled to documents that contained the reason for separation in light of Libertarians, 250 N.J. 46.
 - The court held that plaintiff was a prevailing party and remanded for further proceedings.

- **Shurin v. Bd. of Educ. Schs. of Tech., 2022 N.J. Super. Unpub. LEXIS 1771 (App. Div. 2022).**
 - The Appellate Division affirmed the trial court's holding that a settlement agreement of a personnel matter resolved administratively (and without separation) was not disclosable.
 - In reaching this conclusion, the court distinguished the agreement at issue here from the one at issue in Libertarians, 250 N.J. 46.

5. Internal Affairs & Disciplinary Records

- Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 467 N.J. Super. 385 (App. Div. 2021).
 - The Appellate Division affirmed the trial court's decision that internal affairs (IA) files were exempt from disclosure under OPRA through the Attorney General's Internal Affairs Policies and Procedures (IAPP).
 - The Appellate Division also affirmed the trial court's decision to disclose the records under common law but reversed the part holding that plaintiff's were a prevailing party.
 - Certification has been granted by the Supreme Court, but only to address the prevailing party fee issue.

- **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 IAPP.
 - The Appellate Division 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.

- **Rivera v. Union Cnty. Prosecutor's Office, 250 N.J. 124 (2022).**
 - The Supreme Court reversed the Appellate Division's decision that responsive IA records were exempt from disclosure under both OPRA and the common law.
 - While the Court agreed that the records were not subject to access under OPRA, it reversed and remanded the common law question to the trial court for an *in camera* review and application of the balancing test.

- **Salvero v. City of Elizabeth & James Cosgrove, 2022 N.J. Super. Unpub. LEXIS 544 (App. Div. 2022).**
 - The Appellate Division remanded back to the trial court to reconsider his holding based on Rivera, 250 N.J. 124, which was decided just prior to oral arguments in this case.

- **AADARI v. Franchetta, 2022 N.J. Super. Unpub. LEXIS 879 (App. Div. 2022).**
 - The Appellate Division applied Rivera, 250 N.J. 124 in finding that plaintiffs were not entitled to records related to IA investigations under OPRA. The court also remanded to the trial court for a determination on whether the records were disclosable under the common law.
 - The court applied Libertarians, 250 N.J. 46 in holding that plaintiffs were entitled documents containing the “reason for separation.”
 - The court also affirmed plaintiff’s fee award.

6. Attorney Requestors

- Underwood Props., LLC v. City of Hackensack, 470 N.J. Super. 202 (App. Div. 2022).
 - The Appellate Division upheld a prevailing party fee award where an attorney filed an OPRA request and resulting action in court on behalf of his client.

7. Special Education Settlements

- C.E. v. Elizabeth Pub. Sch. Dist., 472 N.J. Super. 253 (App. Div. 2022).
 - The Appellate Division affirmed the trial court's decision requiring disclosure of all settlement-related documents in cases filed with the Office of Administrative Law (OAL). In reaching this conclusion, the court distinguished the facts here from those in L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547 (2019).
 - The court held that the federal Individuals with Disabilities Education Act required disclosure of findings of facts and decisions to the public with redactions.
 - The court also held that plaintiff was a prevailing party although the records were ultimately obtained through a separate OPRA request to the OAL.

7. Attorney-Client/Deliberative Process Privilege

- **Malanga v. Twp. of W. Orange, 2022 N.J. Super. Unpub. LEXIS 730 (App. Div. 2022).**
 - Defendants denied access to 32 e-mails between their attorney and a planning firm hired by the Planning Board under the attorney-client privilege and “inter-agency, or intra-agency advisory, consultative, or deliberative [(ACD)] material” exemptions. N.J.S.A. 47:1A-1.1.
 - The trial court upheld the denial, reasoning that the firm “was a necessary intermediary” between the Planning Board and Township.
 - The Appellate Division affirmed the ACD holding but vacated and remanded on application of the attorney-client privilege.
 - The court rejected that HGA was a “necessary intermediary.”
 - The court also reasoned that the Township’s attorney could not represent both the Township and Planning Board.

8. ATTORNEY'S FEES

- 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.
- 14 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.

- **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.

- **Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 467 N.J. Super. 385 (App. Div. 2021).**
 - As discussed earlier, the Supreme Court has granted certification on the issue of awarding fees under the common law.