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PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

NEW JERSEY LEAGUE OF MUNICIPALITIES ORIENTATION FOR MUNICIPAL OFFICIALS THAT ARE NEWLY ELECTED, RE-ELECTED, OR EXPERIENCED

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ACCESS TO PUBLIC RECORDS

LOCAL GOVERNMENT ETHICS

PRESENTED BY:

TRISHKA WATERBURY CECIL, ESQ.
MASON, GRIFFIN & PIERSON, P.C.
101 POOR FARM ROAD
PRINCETON, NEW JERSEY 08540
(609) 436-1211 (OFFICE)
(908) 528-4747 (CELL)
trishka@mgplaw.com

Trishka Waterbury Cecil, Esq.

Of Counsel, Mason, Griffin & Pierson, P.C.

Deputy General Counsel, New Jersey League of Municipalities

Trishka Waterbury Cecil, Esq. is Of Counsel to the law firm of Mason, Griffin & Pierson, PC in Princeton, New Jersey, where since 1999 she has practiced in the areas of local government and land use law, prerogative writ litigation, and appellate litigation. Ms. Cecil is admitted to practice in New Jersey and Pennsylvania, as well as before the federal District Court for the District of New Jersey, the Third Circuit Court of Appeals, and the United States Supreme Court. She earned her *juris doctor* degree *cum laude* in 1996 from the Boston University School of Law, after which she clerked for the Honorable Philip S. Carchman of the Superior Court of New Jersey.

Ms. Cecil serves as Deputy General Counsel for the New Jersey State League of Municipalities and Associate Counsel for the New Jersey Planning Officials. She is also a past president of the Institute of Local Government Attorneys, and Assistant Editor of the Local Government Law Review published by the Institute. She is the appointed attorney for the Municipality of Princeton, the Township of Clinton, the Borough of Hopewell, the Township of Union (Hunterdon County), the Cranbury Township Planning Board, the Cranbury Township Zoning Board of Adjustment, the Plainsboro Township Planning Board, and the Stockton Borough Planning Board, and has served as special counsel for numerous municipalities on issues such as First Amendment law, the Open Public Records Act, land use litigation, and sewer issues. In 2014, she was awarded the Institute of Local Government Attorneys' *Fred G. Stickel Award for Excellence in Municipal Law & Service to the Legal Profession*.

Ms. Cecil lives in Hunterdon County with her husband, seven-year-old twins, two dogs, a cat, and abundant wildlife.

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The New Jersey Open Public Records Act (OPRA)

What is OPRA?

The *Open Public Records Act*, more commonly known as “OPRA,” is the New Jersey law that governs the public’s access to government records maintained by public agencies, including local governments. A sweeping revision to the prior public records law, it was approved on January 8, 2002 and became effective on July 8, 2002 (P.L. 2001, c. 404). The law affects every aspect of local government and affects how every municipality in the State conducts its business.

Legislative findings

N.J.S.A. 47:1A-1 contains the legislative findings.

The Legislature finds and declares it to be the public policy of this State that:

government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access;

all government records shall be subject to public access unless exempt from such access by: P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order;

a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and nothing contained in P.L.1963, c. 73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

It is clear that the legislature intended OPRA to be as broad as possible. Indeed, all government records are public unless exempted. Exemptions can come from the following sources:

- statute
- a resolution from either or both houses of the legislature
- administrative regulations
- Executive Order of the Governor (or past Governor)
- Rules of Court
- Federal laws, regulations, or orders.

It is important to remember that unless one of these sources contains an exemption for a document, it is a public record and should be released.

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Definitions

N.J.S.A. 47:1A-1.1 contains several important definitions as well as the statutory exceptions to OPRA.

A. “*Government record*” means “any paper, written or printed book, document, drawing, map, plan photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency, or authority of the State, or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.”

This definition is important because *only those materials deemed “government records” fall under OPRA*. Courts have found that “not every paper prepared by a public employee fits within the definition of a government record for purposes of the Open Public Records Act.” If the public employee or public entity has not made, maintained, kept or received a document in the course of his or its official business, a document is not a government record subject to production under the OPRA. For example, handwritten notes taken at a meeting of a public body are not government records.

This definition also contains an important exception to OPRA. Materials that are consultative or deliberative are not government records. In order to fall under this exception, the document must satisfy two aspects:

- it cannot contain only facts; it must have recommendations, opinions, or advice;
- it must be generated before any decisions on its subject were made.

B. “*Public agency*” means “any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.”

This, too, is a broad definition, intended to encompass municipalities as well as the boards that serve municipalities, such as the planning, zoning, or environmental board.

Exemptions

All government records as defined above are subject to public access unless specifically exempt under OPRA or another law. The most common exceptions are:

- criminal investigatory records;
- victims' records, except that a victim of a crime shall have access to the victim's own records;
- trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure;

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- any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege;
- administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security;
- emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein;
- security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software;
- information which, if disclosed, would give an advantage to competitors or bidders;
- information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position;
- information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office;
- information which is to be kept confidential pursuant to court order;
- that portion of any document which discloses the social security number, credit card number, unlisted telephone number or driver license number of any person; except for use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf thereof, or any private person or entity seeking to enforce payment of court-ordered child support; except with respect to the disclosure of driver information by the New Jersey Motor Vehicle Commission as permitted by section 2 of P.L.1997, c. 188 (C.39:2-3.4); and except that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by State or federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor.

There is one additional and often-overlooked exemption in the legislative findings. A public body has a responsibility to *safeguard a citizen's personal information* when disclosure of that information would violate that citizen's right to privacy. In *Burnett v. County of Bergen*, 198 N.J. 408, (2009), the New Jersey Supreme Court found that this was a substantive provision, and not just a toothless statement of policy. The Supreme Court developed a balancing test that a public body should consider when they believe that a record may violate a citizen's privacy rights. In deciding whether to redact a record or deny access altogether, the public body should examine:

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- the type of record requested
- the information it does or might contain
- the potential for harm in any subsequent nonconsensual disclosure
- the injury from disclosure to the relationship in which the record was generated
- the adequacy of safeguards to prevent unauthorized disclosure
- the degree of need for access
- whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

Additional Notes

A. *Responding to OPRA requests*

1. The municipal clerk is the custodian of records.
2. The custodian must respond within 7 days, producing the record or a written response that states when the record will be available or specifying the exemption that applies.
3. The custodian can be fined for failure to comply with OPRA requirements.
4. Anyone who interferes with compliance can be fined.
5. The request must identify the record requested.
6. If the record requested does not exist, OPRA does not apply.
7. There is no requirement for the custodian to research or create a record in response to a request.
8. There is no exemption for records that might be embarrassing.

B. *Agenda Materials*

1. Backup materials for the agenda (attached reports and referenced documents) are public records and must be made available in electronic format along with the agenda in advance of the meeting. (Note: the backup materials are NOT part of the agenda but they must be made available.)

C. *E-Mails*

1. Email is a document.
2. **Email on public business is a public record**, even if created on a personal computer.
3. **Emails are frequently requested and usually must be released**

D. Record Retention Requirements

1. Specified by the New Jersey Division of Archives and Records Management (*see* www.nj.gov/state/darm) to access the Records Retention Schedule for municipal agencies and the Uniform Electronic Transactions Act (UETA).

E. Common law right to know

1. The “common law” right of access to a public record is unaffected by OPRA; the common law and the statute are independent of each other and many requests now include reference to both laws. To determine whether the record must be released under common law, courts have applied a balancing test between the public’s right to know and the need for confidentiality.

**Open Public Records Act
P.L. 2001, CHAPTER 404
N.J.S.A. 47:1A-1 et seq.**

**Government Records Council’s
“Readable” Version**

This document is a complete copy of P.L. 2001, c. 404, commonly known as the Open Public Records Act. It is the full text of the law, specifically formatted to be easily readable and to serve as a reference document for users. The formatting consisted of adding bulleted points, paragraph breaks and spacing to facilitate easy use. However, no text or punctuation has been altered.

To assist readers in using the law, references have been made in the left margin to highlight the content of each section or important subsections.

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Legislative policy declaration

C.47:1A-1 Legislative findings, declarations.

The Legislature finds and declares it to be the public policy of this State that:

All records shall be accessible

- government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L. 1963, c. 73 (*C. 47:1A-1 et seq.*) as amended and supplemented, shall be construed in favor of the public's right of access;

All records public unless meets a permitted exemption

- all government records shall be subject to public access unless exempt from such access by: P.L. 1963, c. 73 (*C. 47:1A-1 et seq.*) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order;

Privacy interest

- a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and nothing contained in P.L. 1963, c. 73 (*C. 47:1A-1 et seq.*), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

Definitions

C.47:1A-1.1 Definitions.

As used in P.L. 1963, c. 73 (*C. 47:1A-1 et seq.*) as amended and supplemented:

"Biotechnology" means any technique that uses living organisms, or parts of living organisms, to make or modify products, to improve plants or animals, or to develop micro-organisms for specific uses; including the industrial use of recombinant DNA, cell fusion, and novel bioprocessing techniques.

Defines custodian of records

"Custodian of a government record" or "custodian" means in the case of a municipality, the municipal clerk and in the case of any other public agency, the officer officially designated by formal action of that agency's director or governing body, as the case may be.

Open Public Records Act – N.J.S.A. 47:1A-1 et seq. (as of July 28, 2017)

- Defines government record "Government record" or "record" means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including sub-ordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.
- Records that are exempt A government record shall not include the following information which is deemed to be confidential for the purposes of P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented:
- Legislative records
- information received by a member of the Legislature from a constituent or information held by a member of the Legislature concerning a constituent, including but not limited to information in written form or contained in any e-mail or computer data base, or in any telephone record whatsoever, unless it is information the constituent is required by law to transmit;
 - any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member's official duties, except that this provision shall not apply to an otherwise publicly-accessible report which is required by law to be submitted to the Legislature or its members;
- Medical examiner records
- any copy, reproduction or facsimile of any photograph, negative or print, including instant photographs and videotapes of the body, or any portion of the body, of a deceased person, taken by or for the medical examiner at the scene of death or in the course of a post mortem examination or autopsy made by or caused to be made by the medical examiner except:
 - when used in a criminal action or proceeding in this State which relates to the death of that person,
 - for the use as a court of this State permits, by order after good cause has been shown and after written notification of the request for the court order has been served at least five

days before the order is made upon the county prosecutor for the county in which the post mortem examination or autopsy occurred,

- for use in the field of forensic pathology or for use in medical or scientific education or research, or
- for use by any law enforcement agency in this State or any other state or federal law enforcement agency;

Criminal investigation

- criminal investigatory records;

Victims' records

- victims' records, except that a victim of a crime shall have access to the victim's own records;
- any written request by a crime victim for a record to which the victim is entitled to access as provided in this section, including, but not limited to, any law enforcement agency report, domestic violence offense report, and temporary or permanent restraining order;

Personal firearms records

- personal firearms records, except for use by any person authorized by law to have access to these records or for use by any government agency, including any court or law enforcement agency, for purposes of the administration of justice;
- personal identifying information received by the Division of Fish and Wildlife in the Department of Environmental Protection in connection with the issuance of any license authorizing hunting with a firearm. For the purposes of this paragraph, personal identifying information shall include, but not be limited to, identity, name, address, social security number, telephone number, fax number, driver's license number, email address, or social media address of any applicant or licensee;

Trade secrets and proprietary information

- trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure;

Attorney client privilege

- any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may

Open Public Records Act – N.J.S.A. 47:1A-1 et seq. (as of July 28, 2017)

be redacted to remove any information protected by the attorney-client privilege;

- Computer security
 - administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security;
- Building security
 - emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein;
- Security measures and techniques
 - security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software;
- Advantage to bidders
 - information which, if disclosed, would give an advantage to competitors or bidders;
- Public employee related
 - information generated by or on behalf of public employers or public employees in connection
 - with any sexual harassment complaint filed with a public employer or
 - with any grievance filed by or against an individual or
 - in connection with collective negotiations, including documents and statements of strategy or negotiating position;
- Risk management
 - information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office;
- Court orders
 - information which is to be kept confidential pursuant to court order;
- Honorable discharge certificates
 - any copy of form DD-214, or that form, issued by the United States Government, or any other certificate of honorable discharge, or copy thereof, from active service or the reserves of a branch of the Armed Forces of the United States, or from service in the organized militia of the State, that has been filed by an individual with a public agency, except that a veteran or the veteran's spouse or surviving spouse shall have access to the veteran's own records; and

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Oath of allegiance or office

- any copy of an oath of allegiance, oath of office or any affirmation taken upon assuming the duties of any public office, or that oath or affirmation, taken by a current or former officer or employee in any public office or position in this State or in any county or municipality of this State, including members of the Legislative Branch, Executive Branch, Judicial Branch, and all law enforcement entities, except that the full name, title, and oath date of that person contained therein shall not be deemed confidential; and

Personal identifying information

- that portion of any document which discloses the social security number, credit card number, unlisted telephone number or driver license number of any person; except for
 - use by any government agency, including any court or law enforcement agency, in carrying out its functions,
 - or any private person or entity acting on behalf thereof,
 - or any private person or entity seeking to enforce payment of court-ordered child support; except with respect to the disclosure of driver information by the New Jersey Motor Vehicle Commission as permitted by section 2 of P.L. 1997, c. 188 (C. 39:2-3.4); and

except that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by State or federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor.

Higher education exemptions

- A government record shall not include, with regard to any public institution of higher education, the following information which is deemed to be privileged and confidential:
 - pedagogical, scholarly and/or academic research records and/or the specific details of any re-search project conducted under the auspices of a public higher education institution in New Jersey, including, but not limited to research, development information, testing procedures, or information regarding test participants, related to the development or testing of any pharmaceutical or

pharmaceutical delivery system, except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available;

- test questions, scoring keys and other examination data pertaining to the administration of an examination for employment or academic examination;
- records of pursuit of charitable contributions or records containing the identity of a donor of a gift if the donor requires non-disclosure of the donor's identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization or dedication;
- valuable or rare collections of books and/or documents obtained by gift, grant, bequest or devise conditioned upon limited public access;
- information contained on individual admission applications; and
- information concerning student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student.

Defines "Personal
firearms records

"Personal firearms record" means

- any information contained in a background investigation conducted by the chief of police, the county prosecutor, or the Superintendent of State Police, of any applicant for a permit to purchase a handgun, firearms identification card license, or firearms registration; any application for a permit to purchase a handgun, firearms identification card license, or firearms registration; any document reflecting the issuance or denial of a permit to purchase a handgun, firearms identification card license, or firearms registration; and any permit to purchase a handgun, firearms identification card license, or any firearms license, certification, certificate, form of register, or registration statement.
- For the purposes of this paragraph, information contained in a background investigation shall include, but not be limited to,

identity, name, address, social security number, phone number, fax number, driver's license number, email address, social media address of any applicant, licensee, registrant or permit holder.

Defines public agency

"Public agency" or "agency" means

- any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department;
- the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and
- any independent State authority, commission, instrumentality or agency.

The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

"Law enforcement agency" means a public agency, or part thereof, determined by the Attorney General to have law enforcement responsibilities.

"Constituent" means any State resident or other person communicating with a member of the Legislature.

"Member of the Legislature" means any person elected or selected to serve in the New Jersey Senate or General Assembly.

"Criminal investigatory record" means a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.

Defines victim's records

"Victim's record" means an individually-identifiable file or document held by a victims' rights agency which pertains directly to a victim of a crime except that a victim of a crime shall have access to the victim's own records.

"Victim of a crime" means a person who has suffered personal or psychological injury or death or incurs loss of or injury to personal or real

property as a result of a crime, or if such a person is deceased or incapacitated, a member of that person's immediate family.

"Victims' rights agency" means a public agency, or part thereof, the primary responsibility of which is providing services, including but not limited to food, shelter, or clothing, medical, psychiatric, psychological or legal services or referrals, information and referral services, counseling and support services, or financial services to victims of crimes, including victims of sexual assault, domestic violence, violent crime, child endangerment, child abuse or child neglect, and the Victims of Crime Compensation Board, established pursuant to P.L.1971, c.317 (C.52:4B-1 et seq.) and continued as the Victims of Crime Compensation Office pursuant to P.L.2007, c.95 (C.52:4B-3.2 et al.) and Reorganization Plan No. 001-2008.

Biotechnology exemption

C.47:1A-1.2 Restricted access to biotechnology trade secrets.

- a. When federal law or regulation requires the submission of biotechnology trade secrets and related confidential information, a public agency shall not have access to this information except as allowed by federal law.
- b. A public agency shall not make any biotechnology trade secrets and related confidential information it has access to under this act available to any other public agency, or to the general public, except as allowed pursuant to federal law.

Disclosable firearms information

C.47:1A-1.3 Certain firearms records considered public records

Notwithstanding the provisions of any other statute or regulation to the contrary, government record as defined in section 1 of P.L.1995, c.23 (C.47:1A-1.1) shall include aggregate information regarding the total number of permits to purchase a handgun and firearms purchaser identification cards, without any personal identifying information, that have been issued by the Superintendent of State Police or the Chief of Police of a municipal police department.

Limits to convicts

C.47:1A-2.2 Access to certain information by convict prohibited; exceptions.

- a. Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.) or the provisions of any other law to the contrary, where it shall appear

that a person who is convicted of any indictable offense under the laws of this State, any other state or the United States is seeking government records containing personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information, the right of access provided for in P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented shall be denied.

- b. A government record containing personal identifying information which is protected under the provisions of this section may be released only if the information is necessary to assist in the defense of the requestor. A determination that the information is necessary to assist in the requestor's defense shall be made by the court upon motion by the requestor or his representative.
- c. Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented, or any other law to the contrary, a custodian shall not comply with an anonymous re-quest for a government record which is protected under the provisions of this section.

Ongoing
Investigations

C.47:1A-3 Access to records of investigation in progress.

- a. Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented, where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced. Whenever a public agency, during the course of an investigation, obtains from another public agency a government record that was open for public inspection, examination or copying before the investigation commenced, the investigating agency shall provide the other agency with sufficient access to the record to allow the other agency to comply with requests made pursuant to P.L. 1963, c. 73 (C. 47:1A-1 et seq.).
- b. Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.), as amended and supplemented, the following information concerning a

criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such information:

- where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;
- if an arrest has been made, information as to the name, address and age of any victims unless there has not been sufficient opportunity for notification of next of kin of any victims of injury and/or death to any such victim or where the release of the names of any victim would be contrary to existing law or Court Rule. In deciding on the release of information as to the identity of a victim, the safety of the victim and the victim's family, and the integrity of any ongoing investigation, shall be considered;
- if an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;
- information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;
- information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;
- information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police; and
- information as to circumstances surrounding bail, whether it was posted and the amount thereof.

Notwithstanding any other provision of this subsection, where it shall appear that the information requested or to be examined will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release, such information may be withheld. This exception shall be narrowly construed to prevent disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety. Whenever a law enforcement official determines that it is necessary to withhold information, the official shall

issue a brief statement explaining the decision.

When access is available

C.47:1A-5 Times during which records may be inspected, examined, copied; access; copy fees.

Time when access is required

a. The custodian of a government record shall permit the record to be inspected, examined, and copied by any person during regular business hours; or

- in the case of a municipality having a population of 5,000 or fewer according to the most recent federal decennial census,
- a board of education having a total district enrollment of 500 or fewer, or
- a public authority having less than \$ 10 million in assets,

during not less than six regular business hours over not less than three business days per week or the entity's regularly-scheduled business hours, whichever is less; unless a government record is exempt from public access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

Information to be redacted

Prior to allowing access to any government record, the custodian thereof shall redact from that record any information which discloses the social security number, credit card number, unlisted telephone number, or driver license number of any person; except for

- use by any government agency, including any court or law enforcement agency, in carrying out its functions,
- or any private person or entity acting on behalf thereof,
- or any private person or entity seeking to enforce payment of court-ordered child support;

except with respect to the disclosure of driver information by the New Jersey Motor Vehicle Commission as permitted by section 2 of P.L.1997, c.188 (C.39:2-3.4); and except that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by State or

federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor.

Except where an agency can demonstrate an emergent need, a regulation that limits access to government records shall not be retroactive in effect or applied to deny a request for access to a government record that is pending before the agency, the council or a court at the time of the adoption of the regulation.

Fees for copies

- b. A copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation.

Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be

- \$ 0.05 per letter size page or smaller, and
- \$ 0.07 per legal size page or larger.

If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record. The actual cost of duplicating the record, upon which all copy fees are based, shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section.

Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs.

No fee shall be charged to a victim of a crime for a copy or copies of a record to which the crime victim is entitled to access, as provided in section 1 of P.L.1995, c.23 (C.47:1A-1.1).

Special service charges

- c. 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 re-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; provided, however, that in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance. The requestor shall have the opportunity to review and object to the charge prior to it being incurred.

Mediums for copying

- d. A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. If a request is for a record:
- (1) in a medium not routinely used by the agency;
 - (2) not routinely developed or maintained by an agency; or
 - (3) requiring a substantial amount of manipulation or programming of information technology,

the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.

Immediate access records

- e. Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.

Form for requests

- f. The custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:

- (1) specific directions and procedures for requesting a record;
- (2) a statement as to whether prepayment of fees or a deposit is

required;

- (3) the time period within which the public agency is required by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, to make the record available;
- (4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (5) space for the custodian to list reasons if a request is denied in whole or in part;
- (6) space for the requestor to sign and date the form;
- (7) space for the custodian to sign and date the form if the request is fulfilled or denied.

The custodian may require a deposit against costs for reproducing documents sought through an anonymous request whenever the custodian anticipates that the information thus requested will cost in excess of \$5 to reproduce.

- g. A request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.

A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record.

If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.

The custodian shall sign and date the form and provide the requestor with a copy thereof.

If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.

If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to promptly make available a copy of the

record.

If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.

h. Any officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.

Time period for responses by custodian

i. Unless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived.

In the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request, unless the requestor has elected not to provide a name, address or telephone number, or other means of contacting the requestor.

If the requestor has elected not to provide a name, address, or telephone number, or other means of contacting the requestor, the custodian shall not be required to respond until the requestor reappears before the custodian seeking a response to the original request.

If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request.

The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.

Notice to be posted

j. A custodian shall post prominently in public view in the part or parts of the office or offices of the custodian that are open to or frequented by the public a statement that sets forth in clear, concise and specific terms the right to appeal a denial of, or failure to provide, access to a government record by any person for inspection, examination, or copying or for purchase of copies thereof and the procedure by which an appeal may be filed.

Public defender

k. The files maintained by the Office of the Public Defender that relate to

records

the handling of any case shall be considered confidential and shall not be open to inspection by any person unless authorized by law, court order, or the State Public Defender.

Challenges to
access denial

C.47:1A-6 Proceeding to challenge denial of access to record.

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court which shall be heard in the vicinage where it is filed by a Superior Court Judge who has been designated to hear such cases because of that judge's knowledge and expertise in matters relating to access to government records; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to section 8 of P.L. 2001, c. 404 (C. 47:1A-7).

The right to institute any proceeding under this section shall be solely that of the requestor. Any such proceeding shall proceed in a summary or expedited manner. The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

Government
Records Council
(GRC)

C.47:1A-7 Government Records Council.

- a. There is established in the Department of Community Affairs a Government Records Council. The council shall consist of the Commissioner of Community Affairs or the commissioner's designee, the Commissioner of Education or the commissioner's designee, and three public members appointed by the Governor, with the advice and consent of the Senate, not more than two of whom shall be of the same political party.

The three public members shall serve during the term of the Governor making the appointment and until the appointment of a successor. A public member shall not hold any other State or local elected or appointed office or employment while serving as a member of the council. A public member shall not receive a salary for service on the

council but shall be reimbursed for reasonable and necessary expenses associated with serving on the council and may receive such per diem payment as may be provided in the annual appropriations act. A member may be removed by the Governor for cause. Vacancies among the public members shall be filled in the same manner in which the original appointment was made.

The members of the council shall choose one of the public members to serve as the council's chair.

The council may employ an executive director and such professional and clerical staff as it deems necessary and may call upon the Department of Community Affairs for such assistance as it deems necessary and may be available to it.

Duties of GRC

b. The Government Records Council shall:

- establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
- receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
- issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;
- prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
- prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;
- prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;
- make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records; and
- operate an informational website and a toll-free helpline staffed by

knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the council when access has been denied;

In implementing the provisions of subsections d. and e. of this section, the council shall: act, to the maximum extent possible, at the convenience of the parties; utilize teleconferencing, faxing of documents, e-mail and similar forms of modern communication; and when in-person meetings are necessary, send representatives to meet with the parties at a location convenient to the parties.

GRC hearings c. At the request of the council, a public agency shall produce documents and ensure the attendance of witnesses with respect to the council's investigation of any complaint or the holding of any hearing.

Use of mediation d. Upon receipt of a written complaint signed by any person alleging that a custodian of a government record has improperly denied that person access to a government record, the council shall offer the parties the opportunity to resolve the dispute through mediation.

Mediation shall enable a person who has been denied access to a government record and the custodian who denied or failed to provide access thereto to attempt to mediate the dispute through a process whereby a neutral mediator, who shall be trained in mediation selected by the council, acts to encourage and facilitate the resolution of the dispute.

Mediation shall be an informal, nonadversarial process having the objective of helping the parties reach a mutually acceptable, voluntary agreement. The mediator shall assist the parties in identifying issues, foster joint problem solving, and explore settlement alternatives.

Formal investigation e. If any party declines mediation or if mediation fails to resolve the matter to the satisfaction of all parties, the council shall initiate an investigation concerning the facts and circumstances set forth in the complaint. The council shall make a determination as to whether the complaint is within its jurisdiction or frivolous or without any reasonable factual basis.

If the council shall conclude that the complaint is outside its jurisdiction, frivolous or without factual basis, it shall reduce that conclusion to writing and transmit a copy thereof to the complainant and to the records custodian against whom the complaint was filed. Otherwise, the council shall notify the records custodian against whom

the complaint was filed of the nature of the complaint and the facts and circumstances set forth therein.

The custodian shall have the opportunity to present the board with any statement or information concerning the complaint which the custodian wishes. If the council is able to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, it shall reduce that conclusion to writing and transmit a copy thereof to the complainant and to the records custodian against whom the complaint was filed.

If the council is unable to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, the council shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.), insofar as they may be applicable and practicable.

The council shall, by a majority vote of its members, render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented. If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated P.L. 1963, c. 73 (C. 47:1A-1 et seq.), as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in section 12 of P.L. 2001, c. 404 (C. 47:1A-11).

A decision of the council may be appealed to the Appellate Division of the Superior Court. A decision of the council shall not have value as a precedent for any case initiated in Superior Court pursuant to section 7 of P.L. 2001, c. 404 (C. 47:1A-6). All proceedings of the council pursuant to this subsection shall be conducted as expeditiously as possible.

- f. The council shall not charge any party a fee in regard to actions filed with the council. The council shall be subject to the provisions of the "Open Public Meetings Act," P.L. 1975, c. 231 (C. 10:4-6), except that the council may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.
- g. The council shall not have jurisdiction over the Judicial or Legislative

Branches of State Government or any agency, officer, or employee of those branches.

Continuation of common law

C.47:1A-8 Construction of act.

Nothing contained in P.L. 1963, c. 73 (C. 47:1A-1 et seq.) , as amended and supplemented , shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency.

Continuation of existing exemptions

C.47:1A-9 Other laws, regulations, privileges unaffected.

- a. The provisions of this act, P.L. 2001, c. 404 (C. 47:1A-5 et al.), shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L. 1963, c. 73 (C. 47:1A-1 et seq.); any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.
- b. The provisions of this act, P.L. 2001, c. 404 (C. 47:1A-5 et al.), shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.

Access to personnel and pension records

C.47:1A-10 Personnel, pension records not considered public information; exceptions.

Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.) or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

- an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;
- personnel or pension records of any individual shall be accessible

when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

- data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

Violations

C.47:1A-11 Violations, penalties, disciplinary proceeding.

- a. A public official, officer, employee or custodian who knowingly and willfully violates P.L. 1963, c. 73 (C. 47:1A-1 et seq.), as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty of \$ 1,000 for an initial violation, \$ 2,500 for a second violation that occurs within 10 years of an initial violation, and \$ 5,000 for a third violation that occurs within 10 years of an initial violation. This penalty shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999," P.L. 1999, c. 274 (C. 2A:58-10 et seq.), and the rules of court governing actions for the collection of civil penalties. The Superior Court shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by this section.

Appropriate disciplinary proceedings may be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed.

Court Rules

C.47:1A-12 Court rules.

The New Jersey Supreme Court may adopt such court rules as it deems necessary to effectuate the purposes of this act.

Budget

C.47:1A-13 Annual budget request for the council.

The Commissioner of Community Affairs shall include in the annual budget request of the Department of Community Affairs a request for sufficient funds to effectuate the purposes of section 8 of P.L. 2001, c. 404 (C. 47:1A-7).

15. Privacy Study Commission.

- a. There is established a temporary Privacy Study Commission which shall consist of 13 members. The President of the Senate, the Minority

Leader of the Senate, the Speaker of the General Assembly and the Minority Leader of the General Assembly shall each appoint one public member.

The Governor shall appoint nine members and shall designate one of the commission's members to serve as chair of the commission. In making appointments to the commission, legislative leaders and the Governor shall cooperate and coordinate to ensure that the representatives of the following groups and organizations are represented among the commission's membership and that the membership represents a balance between groups which advocate citizen privacy interests and groups which advocate increased access to government records: State and local law enforcement agencies, State and local government officers and employees, attorneys practicing in the field of individual privacy rights, public interest groups with a record of activity with respect to openness in government, crime victim advocates, members of the news media, and at least one retired member of the State Judiciary. Vacancies in the membership of the commission shall be filled in the same manner as the original appointments were made.

- b. The commission shall organize within 14 days after the appointment of a majority of its members.
- c. The commission shall meet at the call of the chair and hold hearings at such places as the chair shall designate during the sessions and recesses of the Legislature. The commission shall comply with the provisions of the "Open Public Meetings Act, P.L.1975, c.231 (C.10:4-6 et seq.).
- d. The commission shall be entitled to call to its assistance and avail itself of the services of the employees of any State, county, or municipal department, board, bureau, commission or agency, as it may require and as may be available for its purposes, and to employ stenographic and clerical assistance and incur traveling and other miscellaneous expenses as may be necessary in order to perform its duties, within the limits of funds appropriated or otherwise made available to it for its purposes.
- e. The commission shall study the privacy issues raised by the collection, processing, use and dissemination of information by public agencies, in light of the recognized need for openness in government and recommend specific measures, including legislation, the commission may deem appropriate to deal with these issues and safeguard the privacy rights of individuals. In the course of its study, the commission shall review the current and proposed means used for the collection, processing, use and dissemination of information by State and local

government agencies.

- f. The commission shall report its findings and recommendations to the Governor and the Legislature within 18 months of the effective date of P.L.2001, c.404 (C.47:1A-5 et al.) and may accompany the same with any legislative bills which it may desire to recommend for adoption by the Legislature.

16. Appropriation.

There is appropriated \$95,000 from the General Fund to the Privacy Study Commission established pursuant to section 15 of P.L.2001, c.404.

17. Repealer.

Section 2 of P.L.1963, c.73 (C.47:1A-2), section 8 of P.L.1994, c.140 (C.47:1A-2.1) and section 4 of P.L.1963, c.73 (C.47:1A-4) are repealed.

18. Effective Date.

Sections 15 and 16 of this act shall take effect immediately and expire upon the date that the Privacy Study Commission submits its report to the Governor and the Legislature and the remainder of the act shall take effect on the 180th day after enactment, except that public agencies may take such anticipatory administrative action in advance as shall be necessary for the implementation of the act.

Approved January 8, 2002.



OPRA EXEMPTIONS (Exceptions are noted in italics)

N.J.S.A. 47:1A-1 (Legislative Findings)

- 1) Privacy Interest - “a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.” See Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009).

N.J.S.A. 47:1A-1.1

- 2) Inter-agency or intra-agency advisory, consultative or deliberative material (Note: refers generally to draft documents or documents used in a deliberative process).
- 3) Legislative records. Specifically:
 - a. information received by a member of the Legislature from a constituent or information held by a member of the Legislature concerning a constituent, including but not limited to information in written form or contained in any e-mail or computer data base, or in any telephone record whatsoever, *unless it is information the constituent is required by law to transmit*;
 - b. any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member's official duties, *except that this provision shall not apply to an otherwise publicly-accessible report which is required by law to be submitted to the Legislature or its members.*
- 4) Medical examiner records – photographs, negatives, print, videotapes taken at the scene of death or in the course of postmortem examination or autopsy, *except*:
 - a. *when used in a criminal action or proceeding in this State which relates to the death of that person,*
 - b. *for the use as a court of this State permits, by order after good cause has been shown and after written notification of the request for the court order has been served at least five days before the order is made upon the county prosecutor for the county in which the post mortem examination or autopsy occurred,*
 - c. *for use in the field of forensic pathology or for use in medical or scientific education or research, or*
 - d. *or use by any law enforcement agency in this State or any other state or federal law enforcement agency.*
- 5) Criminal investigatory records - records which are not required by law to be made, maintained or kept on file that are held by a law enforcement agency which pertain to any criminal investigation or related civil enforcement proceeding. (Note: N.J.S.A. 47:1A-3.b. lists specific criminal investigatory information which must be disclosed).

- 6) Victims' records
 - a. an individually-identifiable file or document held by a victims' rights agency which pertains directly to a victim of a crime except that a victim of a crime shall have access to the victim's own records. "Victims' rights agency" means a public agency, or part thereof, the primary responsibility of which is providing services, including but not limited to food, shelter, or clothing, medical, psychiatric, psychological or legal services or referrals, information and referral services, counseling and support services, or financial services to victims of crimes, including victims of sexual assault, domestic violence, violent crime, child endangerment, child abuse or child neglect, and the Victims of Crime Compensation Board.
 - b. any written OPRA request by a crime victim for a record to which the victim is entitled to access, including, but not limited to, any law enforcement agency report, domestic violence offense report, and temporary or permanent restraining order;
- 7) Personal firearms records:
 - a. *Except for use by any person authorized by law to have access to these records or for use by any government agency, including any court or law enforcement agency, for purposes of the administration of justice.*
 - b. Personal identifying information received by the Division of Fish and Wildlife in the Department of Environmental Protection in connection with the issuance of any license authorizing hunting with a firearm. For the purposes of this paragraph, personal identifying information shall include, but not be limited to, identity, name, address, social security number, telephone number, fax number, driver's license number, email address, or social media address of any applicant or licensee.
- 8) Trade secrets and proprietary commercial or financial information obtained from any source. Includes data processing software obtained by a public agency under a licensing agreement which prohibits its disclosure.
- 9) Any record within the attorney-client privilege. *This paragraph does not allow for a denial of attorney invoices in their totality*; however, redactions may apply for information contained in the invoices that are protected under the privilege.
- 10) Administrative or technical information regarding computer hardware, software and networks which, if disclosed would jeopardize computer security.
- 11) Emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein.
- 12) Security measures and surveillance techniques which, if disclosed, would create a risk to the safety or persons, property, electronic data or software.

- 13) Information which, if disclosed, would give an advantage to competitors or bidders.
- 14) Information generated by or on behalf of public employers or public employees in connection with:
 - a. Any sexual harassment complaint filed with a public employer;
 - b. Any grievance filed by or against an individual; or
 - c. Collective negotiations, including documents and statements of strategy or negotiating position.
- 15) Information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office.
- 16) Information which is to be kept confidential pursuant to court order.
- 17) Certificate of honorable discharge issued by the United States government (Form DD-214) filed with a public agency, *except that a veteran or the veteran's spouse or surviving spouse shall have access to the veteran's own records.*
- 18) Any copy of an oath of allegiance, oath of office, or any affirmation for incoming, current, and former officers and employees in State, County, or municipal government, and including members all members of the Legislative, Executive, and Judicial branches of government, *except that:*

Full name, title, and oath date are not confidential.

- 19) Personal identifying information. Specifically:
 - a. Social security numbers, *except that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by State or federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor.*
 - b. Credit card numbers
 - c. Unlisted telephone numbers
 - d. Drivers' license numbers.

Except for:

- a. *Use by any government agency, including any court or law enforcement agency, in carrying out its functions,*
- b. *or any private person or entity acting on behalf thereof,*
- c. *or any private person or entity seeking to enforce payment of court-ordered child support; except with respect to the disclosure of driver information by*

the Division of Motor Vehicles as permitted by section 2 of P.L.1997, c.188 (C.39:2-3.4);

- 20) List of persons in need of special assistant during an emergency maintained at either the municipal or county level in accordance with section 1 of P.L.2017, c.266 (C.40:48-2.67) or section 6 of P.L.2011, c.178 (C.App.A:9-43.13).
- 21) Certain records of higher education institutions:
- a. Pedagogical, scholarly and/or academic research records and/or the specific details of any research project, *except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available.*
 - b. Test questions, scoring keys and other examination data pertaining to the administration of an examination for employment or academic examination.
 - c. Records of pursuit of charitable contributions or records containing the identity of a donor of a gift if the donor requires non-disclosure of the donor's identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization or dedication.
 - d. Valuable or rare collections of books and/or documents obtained by gift, grant, bequest or devise conditioned upon limited public access.
 - e. Information contained on individual admission applications.
 - f. Information concerning student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student.

N.J.S.A. 47:1A-1.2

- 22) Biotechnology trade secrets.

N.J.S.A. 47:1A-2.2

- 23) Limitations to convicts - personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information. *Information may be released only if the information is necessary to assist in the defense of the requestor. A determination that the information is necessary to assist in the requestor's defense shall be made by the court upon motion by the requestor or his representative.*

N.J.S.A. 47:1A-3(a)

- 24) Ongoing investigations – any records pertaining to an investigation in progress by any public agency if disclosure of such record or records shall be detrimental to the public

interest. *This provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.*

N.J.S.A. 47:1A-5(k)

- 25) Public defender records that relate to the handling of any case, *unless authorized by law, court order, or the State Public Defender.*

N.J.S.A. 47:1A-9(a)-(b)

- 26) Upholds exemptions contained in other State or federal statutes and regulations, Executive Orders of the Governor, Rules of Court, Constitution of this State, or judicial case law.

N.J.S.A. 47:1A-10

- 27) Personnel and pension records, *except specific information identified as follows:*
- a. *An individual's name, title, position, salary, payroll record, length of service, date of separation and the reason for such separation, and the amount and type of any pension received,*
 - b. *When required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest.*
 - c. *Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information.*

In accordance with OPRA's "catch-all" exemption at N.J.S.A. 47:1A-9, the following executive orders also apply as exemptions under OPRA:

Executive Order No. 21 (McGreevey 2002)

- 1) Records where inspection, examination or copying would substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism.
- 2) Records exempted from disclosure by State agencies' promulgated rules are exempt from disclosure by this Order.
- 3) Executive Orders No. 9 (Hughes), 11 (Byrne), 79 (Byrne) and 69 (Whitman) are hereby continued to the extent that they are not inconsistent with this Executive Order.

Executive Order No. 9 (Hughes) exemptions that are still active:

- a. Questions on examinations required to be conducted by any State or local governmental agency;
- b. Personnel and pension records (same as N.J.S.A. 47:1A-10);
- c. Records concerning morbidity, mortality and reportable diseases of named persons required to be made, maintained or kept by any State or local governmental agency;
- d. Records which are required to be made, maintained or kept by any State or local governmental agency which would disclose information concerning illegitimacy;
- e. Fingerprint cards, plates and photographs and other similar criminal investigation records which are required to be made, maintained or kept by any State or local governmental agency;
- f. Criminal records required to be made, maintained and kept pursuant to the provisions of R. S. 53:1-20.1 and R. S. 53:1- 20.2;
- g. Personal property tax returns required to be filed under the provisions of Chapter 4 of Title 54 of the Revised Statutes; and
- h. Records relating to petitions for executive clemency.

Executive Order No. 11 (Byrne) exemptions are the same as N.J.S.A. 47:1A-10.

Executive Order No. 79 (Byrne) exemptions are the similar to # 8, 9, 10 above under N.J.S.A. 47:1A-1.1.

Executive Order No. 69 (Whitman) exemptions that are still active: Fingerprint cards, plates and photographs and similar criminal investigation records that are required to be made, maintained or kept by any State or local governmental agency.

Executive Order No. 26 (McGreevey 2002)

1) Certain records maintained by the Office of the Governor:

- a. Any record made, maintained, kept on file or received by the Office of the Governor in the course of its official business which is subject to an executive privilege or grant of confidentiality established or recognized by the Constitution of this State, statute, court rules or judicial case law.
- b. All portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege.
- c. All portions of records containing information provided by an identifiable natural person outside the Office of the Governor which contains information that the sender is not required by law to transmit and which would constitute a clearly unwarranted invasion of personal privacy if disclosed.
- d. If any of the foregoing records shall contain information not exempted by the provision of the Open Public Records Act or the preceding subparagraphs (a), (b) or (c) hereof then, in such event, that portion of the record so exempt shall be

deleted or excised and access to the remainder of the record shall be promptly permitted.

- 2) Resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. *The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.*
- 3) Records of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments.
- 4) Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.
- 5) Information in a personal income or other tax return
- 6) Information describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed.
- 7) Test questions, scoring keys and other examination data pertaining to the administration of an examination for public employment or licensing.
- 8) Records in the possession of another department (including NJ Office of Information Technology or State Archives) when those records are made confidential by a regulation of that department or agency adopted pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963), or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure.
- 9) Records of a department or agency held by the Office of Information Technology (OIT) or the State Records Storage Center of the Division of Archives and Records Management (DARM) in the Department of State, or an offsite storage facility outside of the regular business office of the agency. Such records shall remain the legal property of the department or agency and be accessible for inspection or copying only through a request to the proper custodian of the department or agency. In the event that records of a department or agency have been or shall be transferred to and accessioned by the State Archives in the Division of Archives and Records Management, all such records shall become the legal property of the State Archives, and requests for access to them shall be submitted directly to the State Archives.



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The following records are considered to be **non-disclosable** to the public pursuant to the source Executive Order.

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Document	Descriptions and Conditions	Source
Public records excluded by Executive Order	Records excluded by Executive Order of the Governor or by any regulation promulgated under the authority of any Executive Order of the Governor	EO 9
Regulations	Regulations adopted and promulgated by state and local government officials excluding certain records	EO 9 (Section 2)
	Rules proposed by state agencies on July 1, 2002 and modified by EO #26 containing proposed exceptions to disclosure under OPRA are exempted until formal adoption action is taken.	EO 21 (Section 4), EO 26 at www.nj.gov/opra
Personnel and pension records	Except as otherwise provided by law or when essential to the performance of official duties or when authorized by a person in interest, an instrumentality of government shall not disclose to anyone other than a person duly authority by this State or the United States to inspect in connection with his official duties, personnel and pension records of an individual. (See Disclosure section)	EO 11 (Section 2)
Job applicant information	<ul style="list-style-type: none"> Disclosure of resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure. 	EO 26 (Section 3)
Governor's Office documents	<ul style="list-style-type: none"> Any record made, maintained, kept on file or received by the Office of the Governor in the course of its official business which is subject to an executive privilege or grant of confidentiality established or recognized by the Constitution of this State, statute, court rules or judicial case law. All portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege. All portions of records containing information provided by an identifiable natural person outside the Office of the Governor which contains information that the sender is not required by law to transmit and which would constitute a clearly unwarranted invasion of personal privacy if disclosed. If any of the foregoing records shall contain information not exempted by the provision of the Open Public Records Act or the preceding subparagraphs (a), (b) or (c) hereof then, in such event, that portion of the record so exempt shall be deleted or excised and access to the remainder of the record shall be promptly permitted. 	EO 26 (Section 2)
Morbidity, mortality and reportable diseases of named persons records	Records of this kind that are required to be made, maintained or kept by any State or local governmental agency	EO 9 (Section 3(c))
Illegitimacy records	Records of this kind that are required to be made, maintained or kept by any State or local governmental	EO 9 (Section 3(d))

	agency which would disclose information concerning illegitimacy	
Fingerprint cards, plates and photographs and other similar criminal investigation records	Records of this kind which are required to be made, maintained or kept by any State or local governmental agency	EO 9 (Section 3(e))
Criminal records	Records of this kind that are required to be made, maintained and kept pursuant to the provisions of R.S. 53:1-20.1 and R.S. 53:1-20.2	EO 9 (Section 3(f))
Personal property tax returns	Records of this kind that are required to be filed under the provisions of Chapter 4 of Title 54 of the Revised Statute	EO 9 (Section 3(g))
Records relating to petitions for executive clemency		EO 9 (Section 3(h))
Certain procurement documents of any State department or agency	<ul style="list-style-type: none"> Records of this kind concerning surveillance equipment and investigatory services, when disclosure of the equipment type and the subject matter of the services could make known to the target of an investigation the fact that an investigation is in progress. Records concerning installation of intrusion and detection alarm systems, when disclosure could facilitate illegal entry. Records concerning studies of computer system security including final reports when disclosure could facilitate fraudulent use of the information 	EO 79 (Section 1) EO 79 (Section 2) EO 79 (Section 3)
Domestic security	Government records where accessibility would substantially interfere with the state's ability to protect and defend the state and its citizens against acts of sabotage or terrorism, or which, if disclosed would materially increase the risk or consequence of potential acts of sabotage or terrorism.	EO 21 (Section 1(a))
Complaints and investigations of discrimination, harassment or hostile environments	Confidential records of complaints and investigations of discrimination, harassment or hostile environments in accordance with the State Policy, regardless of whether they are open, closed or inactive	EO 26 (Section 4(a))
Information concerning individuals	<ul style="list-style-type: none"> Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation; Information in a personal income or other tax return Information describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed. 	EO 26 (Section 4(b))
Test questions, scoring keys and other examination data	Test questions, scoring keys and other examination data pertaining to the administration of an examination for public employment or licensing.	EO 26 (Section 4(c))
Records of one agency held by other agencies	Kept confidential if appropriately designated by the initial agency	EO 26 (Section 4(d))

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Ethics/Conflicts of Interest/Financial Disclosure Statements—Outline of Key Provisions

OVERVIEW

Duties of the public official:

- FROM THE OATH OF OFFICE: to faithfully, impartially and justly perform all of the duties of the office.
- The official is a trustee for the town’s inhabitants, and has a duty to protect the rights of those inhabitants.
- “Honesty and integrity in the performance of their duties is an absolute charge upon public officials and employees.” *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, cert. denied, 344 U.S. 838 (1952).
- The public official must place the interests of the public above all others.

Sources of the applicable ethical/conflict-of-interest requirements:

- Common law (court cases)
- Statutes
 - Local Government Ethics Law, *N.J.S.A. 40A:9-22.1 et seq.* (codifies common law)
 - Municipal Land Use Law, *N.J.S.A. 40:55-1 et seq.*

THE COMMON LAW

- Basic rule: “A public official is disqualified from participating in judicial or quasi-judicial proceedings in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body.” *Wyzykowski v. Rizas*, 132 N.J. 509, 523 (1993). If there is a possibility that a personal interest might hinder the official’s ability to serve the public interest above all else, the official must recuse.

- Four situations that require disqualification:
 - Direct pecuniary interest: financial tie is such that the official will or could realize a financial gain or loss
e.g., voting to award a contract to a company in which the official has a financial interest, or voting to build a road to a landlocked parcel owned by the official, or voting on a matter that will cause harm to the official’s business competitor.

 - Indirect pecuniary interest: a financial tie exists between the official and the matter under consideration but it is not so immediate that the official will realize a gain or loss
e.g., voting on a matter that will benefit the company of which the official is an employee, or voting on a matter that will benefit a company with which the official’s company has substantial business dealings

 - Direct personal interest: palpable interest that is not financial, but is of immediate and unique importance to the official
e.g., voting to purchase open space adjacent to the official’s home, or voting to hire a close friend’s child, or voting on a matter that will harm a personal enemy or an adversary in litigation

 - Indirect personal interest: instances in which the official’s judgment may be affected by membership in a given organization or a desire to help that organization further its policies
e.g., voting on a zoning ordinance that will positively or negatively affect the church of which the official is a member

- Appearance of impropriety: “It is the mere existence of the interest, not its actual effect, which requires the official action to be invalidated.” *Township of Lafayette v. Board of Chosen Freeholders of the County of Sussex*, 208 N.J. Super. 468 (App. Div. 1986). What matters is not just whether the official actually feels conflicted, but whether “an

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impartial and concerned citizen, intelligent and apprised of all the acts in the situation, would feel that there was the potential for non-objectivity on the part of the officeholder making a decision.”

- Analysis is highly fact-sensitive, and whether a particular interest is sufficient to disqualify a public official will always depend on the circumstances of the particular case: “The question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to temp the official to depart from his sworn public duty.” *Van Itallie v. Franklin Lakes*, 28 N.J. 258 (1958).
- Not every interest creates a conflict of interest: The appearance of impropriety must be “something more than a fanciful possibility. It must have a reasonable basis.” *Higgins v. Advisory Committee on Professional Ethics of the Supreme Court of New Jersey*, 73 N.J. 123 (1977).

- Not problematic:

de minimis situations, such as an official employed by Verizon voting to pay the phone bill, or an official employed by PSE&G voting to pay the electric bill

situations where the official’s interest is not unique but is shared by other members of the public, such as an official participating in matters related to the adoption of a redevelopment plan when he owns one of the approximately 1,000 homes in the redevelopment area

- Disqualification should be not required willy-nilly: “Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office...[Courts] must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality and many important instances of the services of its duly elected or appointed officials. *Van Itallie v. Franklin Lakes*, 28 N.J. 258 (1958).

THE LOCAL GOVERNMENT ETHICS LAW

N.J.S.A. 40A:9-22.1 et seq.

- Intended to codify prior common law

§ 40A:9-22.2. Findings, declarations

The Legislature finds and declares that:

- a. Public office and employment are a public trust;
 - b. The vitality and stability of representative democracy depend upon the public's confidence in the integrity of its elected and appointed representatives;
 - c. Whenever the public perceives a conflict between the private interests and the public duties of a government officer or employee, that confidence is imperiled;
 - d. Governments have the duty both to provide their citizens with standards by which they may determine whether public duties are being faithfully performed, and to apprise their officers and employees of the behavior which is expected of them while conducting their public duties; and
 - e. It is the purpose of this act to provide a method of assuring that standards of ethical conduct and financial disclosure requirements for local government officers and employees shall be clear, consistent, uniform in their application, and enforceable on a Statewide basis, and to provide local officers or employees with advice and information concerning possible conflicts of interest which might arise in the conduct of their public duties.”
- Who is covered:
 - All elected officials
 - Anyone employed by or serving on a board, commission, agency, etc. that performs functions other than of a purely advisory nature
 - Anyone who is a managerial executive employee of a local government agency
 - Library boards of trustees
 - Who is not covered:
 - School boards/school employees (subject instead to Schools Ethics Law)
 - Members of purely advisory boards

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- What is prohibited:

§40A:9-22.5. Provisions requiring compliance by local government officers, employees

Local government officers or employees under the jurisdiction of the Local Finance Board shall comply with the following provisions:

a. No local government officer or employee or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest;

b. [N/A]

c. No local government officer or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others;

d. No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment;

e. No local government officer or employee shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties;

f. No local government officer or employee, member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the local government officer has no knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence the local government officer in the discharge of his official duties;

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- g. No local government officer or employee shall use, or allow to be used, his public office or employment, or any information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated;
- h. No local government officer or employee or business organization in which he has an interest shall represent any person or party other than the local government in connection with any cause, proceeding, application or other matter pending before any agency in the local government in which he serves. This provision shall not be deemed to prohibit one local government employee from representing another local government employee where the local government agency is the employer and the representation is within the context of official labor union or similar representational responsibilities;
- i. No local government officer shall be deemed in conflict with these provisions if, by reason of his participation in the enactment of any ordinance, resolution or other matter required to be voted upon or which is subject to executive approval or veto, no material or monetary gain accrues to him as a member of any business, profession, occupation or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of such business, profession, occupation or group;
- j. No elected local government officer shall be prohibited from making an inquiry for information on behalf of a constituent, if no fee, reward or other thing of value is promised to, given to or accepted by the officer or a member of his immediate family, whether directly or indirectly, in return therefor; and
- k. Nothing shall prohibit any local government officer or employee, or members of his immediate family, from representing himself, or themselves, in negotiations or proceedings concerning his, or their, own interests.

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THE MUNICIPAL LAND USE LAW

N.J.S.A. 40:55D-1 et seq.

- Applies only to quasi-judicial bodies (zoning board, planning board) established under the MLUL
- *N.J.S.A. 40:55D-23b*: “No member of the Planning Board shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest.”
- *N.J.S.A. 40:55D-69*: “No member of the board of adjustment shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest.”
- Interpretation by the courts: “The statutory disqualification is markedly broadly couched, extending to personal as well as financial interests, ‘directly or indirectly’.” *Zell v. Borough of Roseland*, 42 N.J. Super. 75 (App. Div. 1956). The statutory bar “is not confined to instances of possible material gain but . . . extends to any situation in which the personal interest of a board member in the ‘matter’ before it, direct or indirect, may have the capacity to exert an influence on his action in the matter.” *Ibid.*

GUIDEPOSTS FOR APPLYING CONFLICT-OF-INTEREST RULES

- Ethics is situational and highly fact sensitive. The statutes and cases only offer a starting point for the analysis, and a general framework.
- There are no blanket rules: each situation must be evaluated on its specific facts, and the answer will be dictated by a practical feel of the situation.
- “In every case, what is being examined [by the court, after the fact] is a particular set of facts or circumstances. Thus, while it is possible to trace common elements through the cases, it is impossible to rely on the cases as an absolute predictive guide except in those fact situations which fall squarely within the scope of the cases. In other words, while statutes may be too general, cases may be too specific. Both can be used together as guides but neither furnishes an absolute answer” *Michael A. Pane, Local Government Law, 34 N.J. Practice §9:7 (4th Ed. 2015)*
- Standard is somewhat different for officials who are acting in a legislative versus a quasi-judicial capacity: “Courts do recognize that elected officials represent a variety of constituencies and are charged with solving a variety of problems. Thus, in the context of local government and in making decisions, it is not unusual for an elected official to vote on legislation promised in a campaign or to vote on legislation which benefits a particular group of constituents—sometimes even including that public official. As one case put it—a disqualification should not result from ‘a personal interest in the welfare of the community’ nor ‘the interest of nearly all businessmen in the borough in the general improvement of their businesses.’” *Michael A. Pane, Local Government Law, 34 N.J. Practice §9:8 (4th Ed. 2015) (quoting Hochberg v. Borough of Freehold, 40 N.J. Super. 276 (App. Div.), certif. denied, 22 N.J. 223 (1956))*

EXCEPTION: THE DOCTRINE OF NECESSITY

- Issue: what happens when a majority of the members of the body in question share an interest which should disqualify them?

E.g., a majority of the Board members belong to a particular religious institution and a measure opposed by that institution, such as the granting of a liquor license, comes before the body

- Older case law: As long as there is no evidence that the hearing is unfair, the doctrine of necessity should provide that the result should not be overturned.

See Borough of Fanwood v. Rocco, 33 N.J. 404 (1960)(citations omitted):

“Finally, reference may be made to the fact that there were members of the borough council who were also members of the objecting Presbyterian Church. It seems to us that if a quorum could have been convened without such councilmen then that course would have been the proper one for it is important that the appearance of objectivity and impartiality be maintained as well as their actuality. However, five of the six councilmen were members of the Presbyterian Church and their withdrawal would have left no quorum. At the time of his application Mr. Rocco did not seek disqualification of the councilmen, nor has he asserted any disqualification in his brief before this court. He has, however, suggested that the membership of the councilmen in the Presbyterian Church was a proper factor for the Director's consideration on his review of the denial of the application. The Director was fully aware of all of the circumstances and undoubtedly carefully scrutinized the entire record before him. He did not at any time question that there was widespread local sentiment in favor of keeping Fanwood's business center free of taverns and package stores, nor did he question the conscientiousness of the members of the governing body in honoring that sentiment. Mayor Todd, who was not a member of the Presbyterian Church, testified that all previous applications for the licensing of taverns and package stores in the area were denied and that the granting of the application would be contrary to the feeling of most of the people of Fanwood, ‘a thinking with which all of the gentlemen of the council concurred.’ Councilman Agnoli, the only member of the municipal council who was not a member of the Presbyterian Church, testified that he was absent when the application was considered and that if he had been present he ‘would have voted against it.’ At the hearing before the Director, there was no testimony establishing that the municipal governing body's determination to keep its business center free of package stores and taverns was in any respects unreasonable, and, while the Director did conclude to reverse its denial of the application, we have

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hereinbefore indicated why we consider that his action was improperly grounded and was soundly set aside by the Appellate Division.”

- Still applies (with caveats) today: In *Gunthner v. Planning Bd. of Borough of Bay Head*, 335 N.J. Super. 452 (Law. Div. 2000), a landowner who owned marina property contiguous to private yacht club brought action against planning board, seeking to disqualify seven board members who were also yacht club members and to obtain default approval of landowner's completed development application which would create eight residential lots with a marina. The Superior Court, Law Division, Ocean County, Serpentelli, A.J.S.C., held that: (1) board members who were also yacht club members had a conflict of interest, but (2) notwithstanding their conflict, members would be permitted to rule on application, consistent with members' duty to protect public interest.

BOTTOM LINE

- Not every interest has the capacity to entice a public official to depart from his sworn duty. Question is whether the official has a second, unique interest different from other officeholders which sets that officeholder apart, or an interest not shared with other members of the public; in other words, you have to look at the extent of the individual benefit conferred and the number of other citizens similarly situated and receiving benefits with the public official.” *Michael A. Pane, Local Government Law, 34 N.J. Practice §9:8 (4th Ed. 2015)*
 - Vote by official to build park in official’s neighborhood: ok
 - Vote by official to build park next to official’s house: not ok
 - In a town with multiple rescue squads, vote on general appropriations for all the squads by official who is a member of one of them: ok
 - Vote by that same official on a measure concerning the allocation of funds among the various squads: not ok
 - Vote by mayor in favor of proposed assisted living facility when mayor said he might seek to have his mother admitted to the facility if it was approved: ok, because there was no showing that the mayor depended on the developer of the facility to care for his mother, and the comment did not distinguish the mayor from any other member of the community

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PROCESS IF A CONFLICT EXISTS

- Requirement is complete recusal: “[A]ny person who is precluded from voting in any matter because of a conflict of interests or the appearance of same should not in any way participate in any of the discussion involved in same. . . . [D]isqualification as to action is disqualification as to participation and the only sensible and sure course of action is to remove oneself totally from the proceedings as to an item in which there is a question of self-interest or the appearance thereof.” Michael A. Pane, Local Government Law, 34 N.J. Practice §9:8 (4th Ed. 2015)(quoting *Darrell v. Governing Body of Clark Twp.*, 169 N.J. Super. 127 (App. Div. 1979)).

- I have a conflict; can I still participate in the discussion as long as I don’t vote?

Answer: NO

- I have a conflict; can I still preside over the meeting as long as I don’t participate in the discussion or vote?

Answer: NO

- I have a conflict, can I stay on the dais as long as I don’t preside, participate in the discussion or vote?

Answer: NO

- I have a conflict and I’ve completely recused myself, can I address the public body as a member of the public?

Answer: Yes, with caveats

- I have a conflict and I’ve completely recused myself, do I have to leave the room?

Answer: No, with caveats. There is no legal requirement to leave the room, but it’s the better practice

- I have a conflict and I voted, but my vote wasn’t needed and the measure would have passed anyway. Does the action stand?

Answer: NO—ACTION IS VOID

INCOMPATIBILITY OF OFFICE (DUAL OFFICE-HOLDING)

As described by Michael A. Pane in his treatise on local government law:

Having examined the nature of conflicts and the types of conflicts, it is worthwhile to mention the doctrine of incompatibility of office—a doctrine almost as old as Anglo-American law itself. In one sense, incompatibility of office represents a special type of conflict. It is a situation in which the nature of two offices is such that both positions cannot be executed with care or ability by the same individual, either because one is subordinate to the other or because one office in some other fashion interferes with the other. One obvious example of incompatibility of offices is having the municipal attorney serve as attorney for the Zoning Board of Adjustment or Planning Board. The statutes prohibit dual office-holding in this case because no one can serve the governing body faithfully and at the same time serve faithfully a body which: (a) is by law independent of the governing body; (b) must at times have its acts appealed to the governing body; (c) may actually be in court against the governing body or at least have different interests in a case; and (d) whose members are appointed by the body their attorney serves. Thus, since the officeholder cannot faithfully discharge both offices simultaneously, the offices are incompatible. In one case the classic definition of incompatibility was restated as follows:

Offices are incompatible when there is a conflict or inconsistency in their functions. Therefore offices are not compatible when one is subordinate to or subject to the supervision or control of the other or the duties of the offices clash requiring the officer to prefer one obligation over the other.

Taylor v. Salem County Bd. of Chosen Freeholders held that an employee of the County College who was also a Freeholder could not vote on appointments of members of the college Board of Trustees.

In one 1995 case, the Court held that the municipal court judge could not be part of an administration department headed by another official, because it was incompatible with the independence of the municipal court.

In some cases, the Legislature has modified the common law doctrine by specific legislation. For instance, a person can hold elected county office while holding elective municipal office, and a municipal governing body member may serve as a member of a municipal sewerage or utilities authority.

But note that the Chancery Division Court found the position of planning board member to be incompatible with membership on a regional sewer authority.

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Traditionally the doctrine of incompatibility has been applied with such thoroughness that a person, having accepted a second office incompatible with the first office held, was deemed to have vacated the first office. The doctrine has been made flexible to the extent of usually allowing an election between the two offices by the individual caught in the incompatibility.

In one case, a court has found that the remedy for an elected official's incompatible service as city commissioner and police officer on unpaid leave was for him to choose which office he wished to retain. The Appellate Division noted that “under a strict application of the common law, acceptance of another incompatible office automatically vacates the first one.”

The Appellate Division has determined that the offices of County Surrogate and city council member were incompatible because surrogates are regulated by the Supreme Court and are prohibited by Court Rules from participating in political activity.

Michael A. Pane, Local Government Law, 34 N.J. Practice §9:27 (4th Ed. updated June 2020)

FINANCIAL DISCLOSURE STATEMENT

- Required by the Local Government Ethics Law
- Does not apply to members of purely advisory bodies
- Must be filed annually by April 30 or within 30 days of taking office
- Filing is electronic—municipal clerk will send out instructions
- Disclosure statement is a public record—http://fds.state.nj.us/njdca_prod/fdssearch.aspx
- Must disclose each *source* of income (specific amounts do not have to be disclosed)
 - earned or unearned
 - exceeding \$2,000
 - received by the local government officer or a member of his immediate family during the preceding calendar year

except

 - Individual client fees, receipts or commissions received through a business organization need not be separately reported as sources of income
- Must provide the name and address of all business organizations in which the local government officer or a member of his immediate family had an interest during the preceding calendar year
- Must provide the address and brief description of all real property in the State in which the officer or a member of his immediate family held an interest during the preceding calendar year.
- Failure to file = violation of the LGEL and subjects the official to fines and, if official is appointed as opposed to elected, potential removal from office

Penalties for violating the Local Government Ethics Law

- An elected local government officer or employee found guilty ... shall be fined not less than \$100.00 nor more than \$500.00 (expect that the range of penalties will be increased, probably to a \$10,000 maximum, the same as the State Ethics Code)

Useful links:

www.nj.gov/dca/divisions/dlgs/programs/ethics.html
www.nj.gov/dca/divisions/dlgs/fds.html

A FEW CRIMINAL LAWS TO BE AWARE OF

Criminal (Anti-Bribery) Laws

N.J.S.A. 2C:27-10: Gifts to public servants.

- a. A public servant commits a crime if, under color of office and in connection with any official act performed or to be performed by the public servant, the public servant directly or indirectly, knowingly solicits, accepts or agrees to accept any benefit, whether the benefit inures to the public servant or another person, to influence the performance of an official duty or to commit a violation of an official duty.” See also (b) & (c).
-
- d. The provisions of this section shall not apply to:
 - (1) Fees prescribed by law to be received by a public servant or any other benefit to which the public servant is otherwise legally entitled if these fees or benefits are received in the manner legally prescribed and not bartered for another benefit to influence the performance of an official duty or to commit a violation of an official duty;
 - (2) Gifts or other benefits conferred on account of kinship or other personal, professional or business relationship independent of the official status of the recipient if these gifts or benefits are within otherwise legally permissible limits and are not bartered for another benefit to influence the performance of an official duty or to commit a violation of an official duty;
 - (3) Trivial benefits the receipt of which involve no risk that the public servant would perform official duties in a bias or partial manner.
- e. An offense prescribed by this section is a crime of the second degree. If that benefit solicited, accepted, agreed to be accepted or received is of a value of \$200.00 or less, any offense prescribed by this section is a crime of the third degree.”

N.J.S.A. 2C:27-11: Offer of unlawful benefit to public servant for official behavior.

This is the converse of 27-10. Under 27-11, the person who offers the benefit to the public servant is equally culpable for the same crime as the public servant.

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Official misconduct:

N.J.S.A. 2C:30-2:

A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit:

a. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner; or

b. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a crime of the second degree. If the benefit obtained or sought to be obtained, or of which another is deprived or sought to be deprived, is of a value of \$200.00 or less, the offense of official misconduct is a crime of the third degree.

Insider trading:

N.J.S.A. 2C:30-3

A person commits a crime if, in contemplation of official action by himself or by a governmental unit with which he is or has been associated, or in reliance on information to which he has or has had access in an official capacity and which has not been made public, he:

a. Acquires a pecuniary interest in any property, transaction or enterprise which may be affected by such information or official; or

b. Speculates or wagers on the basis of such information or official action; or

c. Aids another to do any of the foregoing, while in office or after leaving office with a purpose of using such information.

An offense proscribed by this section is a crime of the second degree. If the benefit acquired or sought to be acquired is of a value of \$200.00 or less, an offense proscribed by this section is a crime of the third degree.



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 803
TRENTON, NJ 08625-0803

LOCAL GOVERNMENT ETHICS LAW

New Jersey Statute
N.J.S.A. 40A:9-22.1 et seq.

and

Adopted Rules and Complaint Procedures
N.J.A.C. 5:35-1.1 et seq.

NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS
Division of Local Government Services
Local Finance Board
<http://www.state.nj.us/dca/divisions/dlgs/programs/ethics.html>

(Updated December 2015)



LOCAL GOVERNMENT ETHICS LAW
N.J.S.A. 40A:9-22.1 et seq.
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40A:9-22.1 Local government ethics law; short title

This act shall be known and may be cited as the “Local Government Ethics Law.”

L. 1991, c. 29, § 1.

40A:9-22.2 Legislative findings and declaration

The Legislature finds and declares that:

- a. Public office and employment are a public trust;
- b. The vitality and stability of representative democracy depend upon the public’s confidence in the integrity of its elected and appointed representatives;
- c. Whenever the public perceives a conflict between the private interests and the public duties of a government officer or employee, that confidence is imperiled;
- d. Governments have the duty both to provide their citizens with standards by which they may determine whether public duties are being faithfully performed, and to apprise their officers and employees of the behavior which is expected of them while conducting their public duties; and
- e. It is the purpose of this act to provide a method of assuring that standards of ethical conduct and financial disclosure requirements for local government officers and employees shall be clear, consistent, uniform in their application, and enforceable on a Statewide basis, and to provide local officers or employees with advice and information concerning possible conflicts of interest which might arise in the conduct of their public duties.

L. 1991, c. 29, § 2.

40A:12-22.3 Definitions

As used in this act:

- a. “Board” means the Local Finance Board in the Division of Local Government Services in the Department of Community Affairs;
- b. “Business organization” means any corporation, partnership, firm, enterprise, franchise, association, trust, sole proprietorship, union or other legal entity;
- c. “Governing body” means, in the case of a municipality, the commission, council, board or body, by whatever name it may be known, having charge of the finances of the municipality, and, in the case of a county, the board of chosen freeholders, or, in the

case of a county having adopted the provisions of the “Optional County Charter Law,” P.L.1972, c.154 (C.40:41A-1 et seq.), as defined in the form of government adopted by the county under that act;

d. “Interest” means the ownership or control of more than 10% of the profits, assets or stock of a business organization but shall not include the control of assets in a nonprofit entity or labor union;

e. “Local government agency” means any agency, board, governing body, including the chief executive officer, bureau, division, office, commission or other instrumentality within a county or municipality, and any independent local authority, including any entity created by more than one county or municipality, which performs functions other than of a purely advisory nature, but shall not include a school board;

f. “Local government employee” means any person, whether compensated or not, whether part-time or full-time, employed by or serving on a local government agency who is not a local government officer, but shall not mean any employee of a school district;

g. “Local government officer” means any person whether compensated or not, whether part-time or full-time: (1) elected to any office of a local government agency; (2) serving on a local government agency which has the authority to enact ordinances, approve development applications or grant zoning variances; (3) who is a member of an independent municipal, county or regional authority; or (4) who is a managerial executive employee of a local government agency, as defined in rules and regulations adopted by the Director of the Division of Local Government Services in the Department of Community Affairs pursuant to the “Administrative Procedure Act,” P.L. 1968, c. 410 (C.52:14B-1 et seq.), but shall not mean any employee of a school district or member of a school board;

h. “Local government officer or employee” means a local government officer or a local government employee;

i. “Member of immediate family” means the spouse or dependent child of a local government officer or employee residing in the same household.

L. 1991, c. 29, § 3. Amended by L. 2015, c. 95, § 21, eff. Aug. 10, 2015.

40A:9-22.4 Local Finance Board; jurisdiction

The Local Finance Board in the Division of Local Government Services in the Department of Community Affairs shall have jurisdiction to govern and guide the conduct of local government officers or employees regarding violations of the provisions of this act who are not otherwise regulated by a county or municipal code of ethics promulgated by a county or municipal ethics board in accordance with the provisions of this act. Local government officers or employees serving a local government agency created by more than one county or municipality and officers

or employees of county colleges established pursuant to N.J.S. 18A:64A-1 et seq. shall be under the jurisdiction of the board. The board in interpreting and applying the provisions of this act shall recognize that under the principles of democracy, public officers and employees cannot and should not be expected to be without any personal interest in the decisions and policies of government; that citizens who are government officers and employees have a right to private interests of a personal, financial and economic nature; and that standards of conduct shall distinguish between those conflicts of interest which are legitimate and unavoidable in a free society and those conflicts of interest which are prejudicial and material and are, therefore, corruptive of democracy and free society.

L. 1991, c. 29, §4. Amended by L. 1995, c. 21.

40A:9-22.5 Code of ethics for local government officers or employees under jurisdiction of Local Finance Board

Local government officers or employees under the jurisdiction of the Local Finance Board shall comply with the following provisions:

- a. No local government officer or employee or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest;
- b. No independent local authority shall, for a period of one year next subsequent to the termination of office of a member of that authority:
 - (1) award any contract which is not publicly bid to a former member of that authority;
 - (2) allow a former member of that authority to represent, appear for or negotiate on behalf of any other party before that authority; or
 - (3) employ for compensation, except pursuant to open competitive examination in accordance with Title 11A of the New Jersey Statutes and the rules and regulations promulgated pursuant thereto, any former member of that authority.

The restrictions contained in this subsection shall also apply to any business organization in which the former authority member holds an interest.

- c. No local government officer or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others;
- d. No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in

which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment;

e. No local government officer or employee shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties;

f. No local government officer or employee, member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the local government officer has no knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence the local government officer in the discharge of his official duties;

g. No local government officer or employee shall use, or allow to be used, his public office or employment, or any information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated;

h. No local government officer or employee or business organization in which he has an interest shall represent any person or party other than the local government in connection with any cause, proceeding, application or other matter pending before any agency in the local government in which he serves. This provision shall not be deemed to prohibit one local government employee from representing another local government employee where the local government agency is the employer and the representation is within the context of official labor union or similar representational responsibilities;

i. No local government officer shall be deemed in conflict with these provisions if, by reason of his participation in the enactment of any ordinance, resolution or other matter required to be voted upon or which is subject to executive approval or veto, no material or monetary gain accrues to him as a member of any business, profession, occupation or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of such business, profession, occupation or group;

j. No elected local government officer shall be prohibited from making an inquiry for information on behalf of a constituent, if no fee, reward or other thing of value is promised to, given to or accepted by the officer or a member of his immediate family, whether directly or indirectly, in return therefor; and

k. Nothing shall prohibit any local government officer or employee, or members of his immediate family, from representing himself, or themselves, in negotiations or proceedings concerning his, or their, own interests.

L. 1991, c. 29, § 5.

40A:9-22.6 Financial disclosure statement

a. Local government officers shall annually file a financial disclosure statement. All financial disclosure statements filed pursuant to this act shall include the following information which shall specify, where applicable, the name and address of each source of income and the local government officer's job title:

(1) Each source of income, earned or unearned, exceeding \$2,000 received by the local government officer or a member of his immediate family during the preceding calendar year. Individual client fees, customer receipts or commissions on transactions received through a business organization need not be separately reported as sources of income. If a publicly traded security is the source of income, the security need not be reported unless the local government officer or member of his immediate family has an interest in the business organization;

(2) Each source of fees and honorariums having an aggregate amount exceeding \$250 from any single source for personal appearances, speeches or writings received by the local government officer or a member of his immediate family during the preceding calendar year;

(3) Each source of gifts, reimbursements or prepaid expenses having an aggregate value exceeding \$400 from any single source, excluding relatives, received by the local government officer or a member of his immediate family during the preceding calendar year;

(4) The name and address of all business organizations in which the local government officer or a member of his immediate family had an interest during the preceding calendar year; and

(5) The address and brief description of all real property in the State in which the local government officer or a member of his immediate family held an interest during the preceding calendar year.

b. The Local Finance Board shall prescribe a financial disclosure statement form for filing purposes. For counties and municipalities which have not established ethics boards, the board shall transmit sufficient copies of the forms to the municipal clerk in each municipality and the county clerk in each county for filing in accordance with this act. The municipal clerk shall make the forms available to the local government officers serving the municipality. The county clerk shall make the forms available to the local government officers serving the county.

For counties and municipalities which have established ethics boards, the Local Finance Board shall transmit sufficient copies of the forms to the ethics boards for filing in accordance with this act. The ethics boards shall make the forms available to the local government officers within their jurisdiction.

For local government officers serving the municipality, the original statement shall be filed with the municipal clerk in the municipality in which the local government officer serves. For local government officers serving the county, the original statement shall be filed with the county clerk in the county in which the local government officer serves. A copy of the statement shall be filed with the board. In counties or municipalities which have established ethics boards a copy of the statement shall also be filed with the ethics board having jurisdiction over the local government officer. Local government officers shall file the initial financial disclosure statement within 90 days following the effective date of this act. Thereafter, statements shall be filed on or before April 30th each year, except that each local government officer shall file a financial disclosure statement within 30 days of taking office.

c. All financial disclosure statements filed shall be public records.

d. The Division of Local Government Services in the Department of Community Affairs may establish an electronic filing system for financial disclosure statements required to be filed pursuant to this section.

L. 1991, c. 29, § 6, eff. May 21, 1991. Amended by L. 2008, c. 72, § 1, eff. Sept. 6, 2008. Amended by L. 2015, c. 95; § 22, eff. Aug. 10, 2015.

40A:9-22.7 Powers of Local Finance Board

With respect to its responsibilities for the implementation of the provisions of this act, the Local Finance Board shall have the following powers:

- a. To initiate, receive, hear and review complaints and hold hearings with regard to possible violations of this act;
- b. To issue subpoenas for the production of documents and the attendance of witnesses with respect to its investigation of any complaint or to the holding of a hearing;
- c. To hear and determine any appeal of a decision made by a county or municipal ethics board;
- d. To forward to the county prosecutor or the Attorney General or other governmental body any information concerning violations of this act which may become the subject of criminal prosecution or which may warrant the institution of other legal proceedings by the Attorney General;

- e. To render advisory opinions as to whether a given set of facts and circumstances would constitute a violation of this act;
- f. To enforce the provisions of this act and to impose penalties for the violation thereof as are authorized by this act; and
- g. To adopt rules and regulations pursuant to the “Administrative Procedure Act,” P.L. 1968, c.410 (C.52:14B-1 et seq.) and to do other things as are necessary to implement the purposes of this act.

L. 1991, c. 29, § 7.

40A:9-22.8 Advisory opinions of Local Finance Board

A local government officer or employee not regulated by a county or municipal code of ethics may request and obtain from the Local Finance Board an advisory opinion as to whether any proposed activity or conduct would in its opinion constitute a violation of the provisions of this act. Advisory opinions of the board shall not be made public, except when the board by the vote of two-thirds of all of its members directs that the opinion be made public. Public advisory opinions shall not disclose the name of the local government officer or employee unless the board in directing that the opinion be made public so determines.

L. 1991, c. 29, § 8.

40A:9-22.9 Complaints to Local Finance Board; notice; hearing; decision

The Local Finance Board, upon receipt of a signed written complaint by any person alleging that the conduct of any local government officer or employee, not regulated by a county or municipal code of ethics, is in conflict with the provisions of this act, shall acknowledge receipt of the complaint within 30 days of receipt and initiate an investigation concerning the facts and circumstances set forth in the complaint. The board shall make a determination as to whether the complaint is within its jurisdiction or frivolous or without any reasonable factual basis. If the board shall conclude that the complaint is outside its jurisdiction, frivolous or without factual basis, it shall reduce that conclusion to writing and shall transmit a copy thereof to the complainant and to the local government officer or employee against whom the complaint was filed. Otherwise the board shall notify the local government officer or employee against whom the complaint was filed of the nature of the complaint and the facts and circumstances set forth therein. The officer or employee shall have the opportunity to present the board with any statement or information concerning the complaint which he wishes. Thereafter, if the board determines that a reasonable doubt exists as to whether the local government officer or employee is in conflict with the provisions of this act, the board shall conduct a hearing in the manner prescribed by section 12 of this act, concerning the possible violation and any other facts and circumstances which may have come to the attention of the board with respect to the conduct of the local government officer or employee. The board shall render a decision as to whether the conduct of the officer or employee is in conflict with the provisions of this act. This decision

shall be made by no less than two-thirds of all members of the board. If the board determines that the officer or employee is in conflict with the provisions of this act, it may impose any penalties which it believes appropriate within the limitations of this act. A final decision of the board may be appealed in the same manner as any other final State agency decision.

L. 1991, c. 29, § 9.

40A:9-22.10 Penalties

a. An appointed local government officer or employee found guilty by the Local Finance Board or a county or municipal ethics board of the violation of any provision of P.L. 1991, c. 29 (C.40A:9-22.1 et seq.) or of any code of ethics in effect pursuant to P.L., c. 29 (C.40A:9-22.1 et seq.), shall be fined not less than \$100.00 nor more than \$500.00, which penalty may be collected in a summary proceeding pursuant to “The Penalty Enforcement Law of 1999,” P.L. 1999, c. 274 (N.J.S.2A:58-1 et seq.). The board or a county or municipal ethics board shall report its findings to the office or agency having the power of removal or discipline of the appointed local government officer or employee and may recommend that further disciplinary action be taken.

b. An elected local government officer or employee found guilty by the Local Finance Board or a county or municipal ethics board of the violation of any provision of P.L. 1991, c. 29 (C.40A:9-22.1 et seq.) or of any code of ethics in effect pursuant to P.L. 1991, c. 29 (C.40A:9-22.1 et seq.), shall be fined not less than \$100.00 nor more than \$500.00, which penalty may be collected in a summary proceeding pursuant to “The Penalty Enforcement Law of 1999,” P.L. 1999, c. 274 (N.J.S.2A:58-1 et seq.).

c. The remedies provided herein are in addition to all other criminal and civil remedies provided under the law.

L. 1991, c. 29, § 10, eff. May 21, 1991. Amended by L. 1999, c. 440; § 101, eff. April 17, 2000.

40A:9-22.11 Disciplinary action

The finding by the Local Finance Board or a county or municipal ethics board that an appointed local government officer or employee is guilty of the violation of the provisions of this act, or of any code of ethics in effect pursuant to this act, shall be sufficient cause for his removal, suspension, demotion or other disciplinary action by the officer or agency having the power of removal or discipline. When a person who is in the career service is charged with violating the provisions of this act or any code of ethics in effect pursuant to this act, the procedure leading to removal, suspension, demotion or other disciplinary action shall be governed by any applicable procedures of Title 11A of the New Jersey Statutes and the rules promulgated pursuant thereto.

L. 1991,c. 29, §11.

40A:9-22.12 Rules and procedures applicable to hearings

All hearings required pursuant to this act shall be conducted in conformity with the rules and procedures, insofar as they may be applicable, provided for hearings by a State agency in contested cases under the “Administrative Procedure Act,” P.L.1968, c. 410 (C.52:14B-1 et seq.).

L. 1991, c. 29, § 12.

40A:9-22.13 County ethics boards; members; terms; compensation

a. Each county of the State governed under the provisions of P.L.1972, c.154 (C.40:41A-1 et seq.) may, by ordinance, and the remaining counties may, by resolution establish a county ethics board consisting of six members who are residents of the county, at least two of whom shall be public members. The members of the ethics board shall be appointed by the governing body of the county and no more than one of whom shall be from the same municipality. The members shall be chosen by virtue of their known and consistent reputation for integrity and their knowledge of local government affairs. No more than three members of the ethics board shall be of the same political party.

b. The members of the county ethics board shall annually elect a chairman from among the membership.

c. The members shall serve for a term of five years; except that of the members initially appointed, two of the public members shall be appointed to serve for a term of five years, one member shall be appointed to serve for a term of four years, and the remaining members shall be appointed to serve for a term of three years. Each member shall serve until his successor has been appointed and qualified. Any vacancy occurring in the membership of the ethics board shall be filled in the same manner as the original appointment for the unexpired term.

d. Members of the ethics board shall serve without compensation but shall be reimbursed by the county for necessary expenses incurred in the performance of their duties under this act.

L. 1991, c. 29, § 13.

40A:9-22.14 County ethics board; office; expenses; employees

a. The governing body of the county shall provide the county ethics board with offices for the conduct of its business and the preservation of its records, and shall supply equipment and supplies as may be necessary.

b. All necessary expenses incurred by the county ethics board and its members shall be paid, upon certification of the chairman, by the county treasurer within the limits of funds appropriated by the county governing body by annual or emergency appropriations for those purposes.

c. The county ethics board may appoint employees, including independent counsel, and clerical staff as are necessary to carry out the provisions of this act within the limits of funds appropriated by the county governing body for those purposes.

L. 1991,c. 29, §14.

40A:9-22.15 County code of ethics; promulgation; approval

Within 90 days after the establishment of a county ethics board, that ethics board shall promulgate, by resolution, a county code of ethics for all local government officers and employees serving the county. Local government officers and employees serving a county independent authority shall be deemed to be serving the county for purposes of this act.

The county code of ethics so promulgated shall be either identical to the provisions set forth in section 5 of this act or more restrictive, but shall not be less restrictive. Within 15 days following the promulgation thereof, the county code of ethics, and a notice of the date of the public hearing to be held thereon, shall be published in at least one newspaper circulating within the county and shall be distributed to the county clerk and to the heads of the local government agencies serving the county for circulation among the local government officers and employees serving the county. The county ethics board shall hold a public hearing on the county code of ethics not less than 30 days following its promulgation at which any local government officer or employee serving the county and any other person wishing to be heard shall be permitted to testify. As a result of the hearing, the ethics board may amend or supplement the county code of ethics as it deems necessary. If the county code of ethics is not identical to the provisions set forth in section 5 of this act, the county ethics board shall thereafter submit the county code of ethics to the Local Finance Board for approval. The board shall approve or disapprove a county code of ethics within 60 days following receipt. If the board fails to act within that period, the county code of ethics shall be deemed approved. A county code of ethics requiring board approval shall take effect for all local government officers and employees serving the county 60 days after approval by the board. A county code of ethics identical to the provisions set forth in section 5 of this act shall take effect 10 days after the public hearing thereon. The county ethics board shall forward a copy of the county code of ethics to the county clerk and shall make copies of the county code of ethics available to local government officers and employees serving the county.

L. 1991,c. 29, § 15.

40A:9-22.16 Powers of county ethics board

A county ethics board shall have the following powers:

- a. To initiate, receive, hear and review complaints and hold hearings with regard to possible violations of the county code of ethics or financial disclosure requirements by local government officers or employees serving the county;

- b. To issue subpoenas for the production of documents and the attendance of witnesses with respect to its investigation of any complaint or to the holding of a hearing;
- c. To forward to the county prosecutor or the Attorney General or other governmental body any information concerning violations of the county code of ethics or financial disclosure requirements by local government officers or employees serving the county which may become the subject of criminal prosecution or which may warrant the institution of other legal proceedings by the Attorney General;
- d. To render advisory opinions to local government officers or employees serving the county as to whether a given set of facts and circumstances would constitute a violation of any provision of the county code of ethics or financial disclosure requirements;
- e. To enforce the provisions of the county code of ethics and financial disclosure requirements with regard to local government officers or employees serving the county and to impose penalties for the violation thereof as are authorized by this act; and
- f. To adopt rules and regulations and to do other things as are necessary to implement the purposes of this act.

L. 1991, c. 29, §16.

40A:9-22.17 Advisory opinions of county ethics board

A local government officer or employee serving the county may request and obtain from the county ethics board an advisory opinion as to whether any proposed activity or conduct would in its opinion constitute a violation of the county code of ethics or any financial disclosure requirements. Advisory opinions of the county ethics board shall not be made public, except when the ethics board by the vote of two-thirds of all of its members directs that the opinion be made public. Public advisory opinions shall not disclose the name of the local government officer or employee unless the ethics board in directing that the opinion be made public so determines.

L. 1991, c. 29, § 17.

40A:9-22.18 Complaints to county ethics board; notice; hearing; decision

The county ethics board, upon receipt of a signed written complaint by any person alleging that the conduct of any local government officer or employee serving the county is in conflict with the county code of ethics or any financial disclosure requirements shall acknowledge receipt of the complaint within 30 days of receipt and initiate an investigation concerning the facts and circumstances set forth in the complaint. The ethics board shall make a determination as to whether the complaint is within its jurisdiction or frivolous or without any reasonable factual basis. If the ethics board shall conclude that the complaint is outside its jurisdiction, frivolous or without factual basis, it shall reduce that conclusion to writing and shall transmit a copy thereof

to the complainant and to the local government officer or employee against whom the complaint was filed. Otherwise the ethics board shall notify the local government officer or employee against whom the complaint was filed of the nature of the complaint and the facts and circumstances set forth therein. The officer or employee shall have the opportunity to present the ethics board with any statement or information concerning the complaint which he wishes. Thereafter, if the ethics board determines that a reasonable doubt exists as to whether the local government officer or employee is in conflict with the county code of ethics or any financial disclosure requirements, it shall conduct a hearing in the manner prescribed by section 12 of this act, concerning the possible violation and any other facts and circumstances which may have come to its attention with respect to the conduct of the local government officer or employee. The ethics board shall render a decision as to whether the conduct of the officer or employee is in conflict with the county code of ethics or any financial disclosure requirements. This decision shall be made by no less than two-thirds of all members of the ethics board. If the ethics board determines that the officer or employee is in conflict with the code or any financial disclosure requirements, it may impose any penalties which it believes appropriate within the limitations of this act. A final decision of the ethics board may be appealed to the Local Finance Board within 30 days of the decision.

L. 1991, c. 29, §18.

40A:9-22.19 Municipal ethics board; members; terms; compensation

a. Each municipality of the State may, by ordinance, establish a municipal ethics board consisting of six members who are residents of the municipality, at least two of whom shall be public members. The members of the ethics board shall be appointed by the governing body of the municipality. The members shall be chosen by virtue of their known and consistent reputation for integrity and their knowledge of local government affairs. No more than three members of the ethics board shall be of the same political party.

b. The members of the municipal ethics board shall annually elect a chairman from among the membership.

c. The members shall serve for a term of five years; except that of the members initially appointed, two of the public members shall be appointed to serve for a term of five years, one member shall be appointed to serve for a term of four years, and the remaining members shall be appointed to serve for a term of three years. Each member shall serve until his successor has been appointed and qualified. Any vacancy occurring in the membership of the ethics board shall be filled in the same manner as the original appointment for the unexpired term.

d. Members of the ethics board shall serve without compensation but shall be reimbursed by the municipality for necessary expenses incurred in the performance of their duties under this act.

L. 1991, c. 29, §19.

40A:9-22.20 Municipal ethics board; office; expenses; employees

- a. The governing body of the municipality shall provide the municipal ethics board with offices for the conduct of its business and the preservation of its records, and shall supply equipment and supplies as may be necessary.
- b. All necessary expenses incurred by the municipal ethics board and its members shall be paid, upon certification of the chairman, by the municipal treasurer within the limits of funds appropriated by the municipal governing body by annual or emergency appropriations for those purposes.
- c. The municipal ethics board may appoint employees, including independent counsel, and clerical staff as are necessary to carry out the provisions of this act within the limits of funds appropriated by the municipal governing body for those purposes.

L. 1991, c. 29, § 20.

40A:9-22.21 Municipal code of ethics; promulgation; approval

Within 90 days after the establishment of a municipal ethics board, that ethics board shall promulgate by resolution a municipal code of ethics for all local government officers and employees serving the municipality. Local government officers and employees serving a municipal independent authority shall be deemed to be serving the municipality for purposes of this act.

The municipal code of ethics so promulgated shall be either identical to the provisions set forth in section 5 of this act or more restrictive, but shall not be less restrictive. Within 15 days following the promulgation thereof, the municipal code of ethics, and a notice of the date of the public hearing to be held thereon, shall be published in at least one newspaper circulating within the municipality and shall be distributed to the municipal clerk and to the heads of the local government agencies serving the municipality for circulation among the local government officers and employees serving the municipality. The municipal ethics board shall hold a public hearing on the municipal code of ethics not less than 30 days following its promulgation at which any local government officer or employee serving the municipality and any other person wishing to be heard shall be permitted to testify. As a result of the hearing, the ethics board may amend or supplement the municipal code of ethics as it deems necessary. If the municipal code of ethics is not identical to the provisions set forth in section 5 of this act, the municipal ethics board shall thereafter submit the municipal code of ethics to the Local Finance Board for approval. The board shall approve or disapprove a municipal code of ethics within 60 days following receipt. If the board fails to act within that period, the municipal code of ethics shall be deemed approved. A municipal code of ethics requiring board approval shall take effect for all local government officers and employees serving the municipality 60 days after approval by the board. A municipal code of ethics identical to the provisions set forth in section 5 of this act shall take effect 10 days after the public hearing held thereon. The municipal ethics board shall forward a copy of the municipal code of ethics to the municipal clerk and shall make copies of the

municipal code of ethics available to local government officers and employees serving the municipality.

L. 1991, c. 29, § 21.

40A:9-22.22 Powers of municipal ethics board

A municipal ethics board shall have the following powers:

- a. To initiate, receive, hear and review complaints and hold hearings with regard to possible violations of the municipal code of ethics or financial disclosure requirements by local government officers or employees serving the municipality;
- b. To issue subpoenas for the production of documents and the attendance of witnesses with respect to its investigation of any complaint or to the holding of a hearing;
- c. To forward to the county prosecutor or the Attorney General or other governmental body any information concerning violations of the municipal code of ethics or financial disclosure requirements by local government officers or employees serving the municipality which may become the subject of criminal prosecution or which may warrant the institution of other legal proceedings by the Attorney General;
- d. To render advisory opinions to local government officers or employees serving the municipality as to whether a given set of facts and circumstances would constitute a violation of any provision of the municipal code of ethics or financial disclosure requirements;
- e. To enforce the provisions of the municipal code of ethics and financial disclosure requirements with regard to local government officers or employees serving the municipality and to impose penalties for the violation thereof as are authorized by this act; and
- f. To adopt rules and regulations and to do other things as are necessary to implement the purposes of this act.

L. 1991, c. 29, §22.

40A:9-22.23 Advisory opinions of municipal ethics board

A local government officer or employee serving the municipality may request and obtain from the municipal ethics board an advisory opinion as to whether any proposed activity or conduct would in its opinion constitute a violation of the municipal code of ethics or any financial disclosure requirements. Advisory opinions of the municipal ethics board shall not be made public, except when the ethics board by the vote of two-thirds of all of its members directs that the opinion be made public. Public advisory opinions shall not disclose the name of the local

government officer or employee unless the ethics board in directing that the opinion be made public so determines.

L. 1991, c. 29, § 23.

40A:9-22.24 Complaints to municipal ethics board; notice; hearing; decision

The municipal ethics board, upon receipt of a signed written complaint by any person alleging that the conduct of any local government officer or employee serving the municipality is in conflict with the municipal code of ethics or financial disclosure requirements, shall acknowledge receipt of the complaint within 30 days of receipt and initiate an investigation concerning the facts and circumstances set forth in the complaint. The ethics board shall make a determination as to whether the complaint is within its jurisdiction or frivolous or without any reasonable factual basis. If the ethics board shall conclude that the complaint is outside its jurisdiction, frivolous or without factual basis, it shall reduce that conclusion to writing and shall transmit a copy thereof to the complainant and to the local government officer or employee against whom the complaint was filed. Otherwise the ethics board shall notify the local government officer or employee against whom the complaint was filed of the nature of the complaint and the facts and circumstances set forth therein. The officer or employee shall have the opportunity to present the ethics board with any statement or information concerning the complaint which he wishes. Thereafter, if the ethics board determines that a reasonable doubt exists as to whether the local government officer or employee is in conflict with the municipal code of ethics or any financial disclosure requirements, it shall conduct a hearing in the manner prescribed by section 12 of this act, concerning the possible violation and any other facts and circumstances which may have come to its attention with respect to the conduct of the local government officer or employee. The ethics board shall render a decision as to whether the conduct of the officer or employee is in conflict with the municipal code of ethics or any financial disclosure requirements. This decision shall be made by no less than two-thirds of all members of the ethics board.

If the ethics board determines that the officer or employee is in conflict with the code or any financial disclosure requirements, it may impose any penalties, which it believes, appropriate within the limitations of this act. A final decision of the ethics board may be appealed to the Local Finance Board within 30 days of the decision.

L. 1991, c. 29, § 24.

40A:9-22.25 Preservation of records

All statements, complaints, requests or other written materials filed pursuant to this act, and any rulings, opinions, judgments, transcripts or other official papers prepared pursuant to this act shall be preserved for a period of at least five years from the date of filing or preparation, as the case may be.

L. 1991, c. 29, § 25.

ADOPTED RULES AND COMPLAINT PROCEDURES
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N.J.A.C. 5:35-1.1 et seq.

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5:35-1.1 Complaints; procedure

- (a) Every complaint alleging that a local government officer or employee, who is not regulated by a county or municipal code of ethics, has violated the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., shall be in writing and signed by the complainant. However, the Local Finance Board may upon its own initiative initiate a complaint against a local government employee or officer, in which case the summary of the complaint shall be contained in the Board's minutes and the complaint shall proceed, where applicable, in accordance with this subchapter or be transmitted to the appropriate county or municipal ethics board.
- (b) Complaints shall:
 - 1. State the point of the Local Government Ethics Law alleged to be violated;
 - 2. State the name(s) and title(s) of the parties involved in the action and against whom the complaint is filed;
 - 3. Set forth in detail the pertinent facts surrounding the alleged violative action;
 - 4. Indicate whether the complaint concerns the complainant in any way and what, if any, relationship the complainant has to the subject of the complaint; and
 - 5. Indicate any other action previously taken in an attempt to resolve the issue and indicate whether the issue is the subject of pending litigation elsewhere.
- (c) The Board shall not process a complaint on a matter which is pending in a court of law or administrative agency of the State.
- (d) The Board's staff shall acknowledge receipt of the complaint within 30 days of receipt of the complaint and commence a preliminary investigation as to whether the complaint is within the Board's jurisdiction or frivolous or without any reasonable factual basis.
- (e) Upon completion of the preliminary investigation, the Board shall make a determination as to whether the complaint is outside its jurisdiction or frivolous or without any reasonable factual basis.
 - 1. If the Board concludes that the complaint is outside its jurisdiction, frivolous or without any reasonable factual basis, the Board's staff shall advise the complainant and the local government employee or official, who is the subject of the complaint, in writing of the Board's conclusion.
 - 2. If the Board concludes that the complaint is within its jurisdiction, not frivolous, and having a reasonable factual basis, the Board shall direct a further investigation to be conducted by the Board's staff.

- (f) The Board's staff in conducting the investigation shall notify the local government employee or officer, who is the subject of the complaint, of the nature of the complaint and the facts and circumstances surrounding the complaint.
1. The local government employee or officer shall have the opportunity to present to the Board's staff any statements or other information concerning the complaint he or she wishes. Such statements or information shall be presented to the Board within 30 days of receipt of notification. Upon written application, the Board or its staff may extend the time for filing such statement.
 2. The Board's staff shall obtain any further information or statements from any person with relevant information or from any other source, necessary to conduct the investigation.
- (g) At the conclusion of the investigation, the Board's staff shall present to the Board the results of its investigation, which shall include any statements or information received from the local government employee or officer, who is the subject of the complaint, and from any person or source with relevant information. The Board shall consider the matter based on the documents submitted to the Board's staff or obtained by the Board's staff. However, the Board in its discretion may direct the complainant, the local government employee or officer, who is the subject of the complaint, or any other person with relevant information to appear before the Board or to provide to the Board any additional information. The local government employee or officer who is the subject of the complaint may request to appear before the Board. However, such appearance is not required, unless directed by the Board.
- (h) If the Board determines, based upon the results of the investigation, that no violation of the Local Government Ethics Law has been committed by the local government employee or officer, the Board shall issue a Notice of Dismissal to the individual and provide a copy to the complainant.
- (i) If the Board determines, based upon the results of the investigation, by a two-thirds vote that a violation of the Local Government Ethics Law has been committed by the local government employee or officer, the Board shall issue a Notice of Violation to the individual containing the nature of the violation, assessing a penalty, and advising the individual of his or her opportunity to request an administrative hearing.
1. The Notice of Violation shall be transmitted to the local government employee or officer by regular and certified mail or by personal service.
 2. The local government employee or officer, within 30 days of receipt of the letter, may request an administrative hearing to contest the Notice of Violation. Any request for an administrative hearing must be filed in the Board's office within 30 days of the receipt of the Notice of Violation by the local government employee

or officer. The Board in its sole discretion may extend the time for requesting an administrative hearing for any reason it deems appropriate.

3. If an administrative hearing is not requested or if not timely filed by the local government employee or officer, the Order shall be deemed the Final Decision of the Board.
- (j) Any administrative hearing shall be conducted in conformity with the rules and procedure, insofar as they may be applicable, of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.
1. The Board shall determine whether it will conduct the administrative hearing or whether to transmit the matter to the Office of Administrative Law as a “contested case” for the rendering of an initial decision.
 2. If the Board transmits the matter to the Office of Administrative Law as a “contested case,” the Board shall review the initial decision and render a final decision. However, any finding that a violation of the Local Government Ethics Law has been committed by the local government employee or officer, requires a two-thirds vote of the Board.

5:35-1.2 Confidentiality

- (a) Any complaints, statements, information, or documents obtained or prepared by the Board staff or the Board are deemed confidential and not subject to public disclosure during the course of the preliminary investigation or investigation to determine whether a violation of the Local Government Ethics Law has occurred, except as necessary for the Board’s staff or the Board to conduct the preliminary investigation or investigation.
- (b) The Board’s discussion regarding a preliminary investigation or investigation shall be in executive session. However, any vote by the Board regarding a preliminary investigation or investigation shall be in public session. In public session, the complaint shall only be identified by a docket number, determined by the Board’s staff.
- (c) The Notice, the complaint and allied statements or information obtained by the Board’s staff during the course of the preliminary investigation or investigation are subject to public disclosure 30 days after mailing a Notice of Dismissal, pursuant to N.J.A.C. 5:351.1(h), or a Notice of Violation, pursuant to N.J.A.C. 5:35-1.1(i).

5:35-1.3 Local ethics boards; complaint conflicts

- (a) A municipal or county ethics board, established pursuant to the Local Government Ethics Law, which has before it a complaint against a local government employee or officer regulated by its code of ethics and which is unable to act on the complaint because a

majority of the board has a conflict of interest or is otherwise precluded by ethical consideration from rendering a decision in a matter, shall request the Local Finance Board to assume original jurisdiction.

1. Such request shall be in writing signed by the chairperson of the county or municipal ethics board or its legal counsel and detail the exact nature of the complaint and the exact nature of the county or municipal board's inability to render a decision.
 2. Attached to the request shall be the complaint, the county or municipal code of ethics, and all relevant documents and information obtained by the county or municipal ethics board during the course of the investigation.
 3. The county or municipal ethics board shall advise, in writing, the complainant and the local government employee or officer, who is the subject of the complaint, of the request. A copy of which shall be provided to the Local Finance Board.
- (b) The Board shall review the request and determine whether the county or municipal ethics board is precluded from rendering a decision in the matter.
1. If the Board determines that the county or municipal ethics board is precluded from rendering a decision, the Board shall assume original jurisdiction over the matter and advise the county or municipal board of the determination. Thereafter, the complaint shall proceed in accordance with N.J.A.C. 5:35-1.1. However, the Board shall only consider whether a violation of the State's code of ethics has occurred.
 2. If the Board determines that the county or municipal ethics board is not precluded from rendering a decision, the Board shall advise the county or municipal ethics board of the determination. Thereafter, the county or municipal ethics board shall render a final decision in the matter in accordance with the Local Government Ethics Law.
 3. The county or municipal ethics board shall advise the complainant and the local government employee or officer, who is the subject of the complaint, of the Board's determination.

5:35-1.4 Local ethics boards; appeals of complaints

- (a) A final decision of a county or municipal ethics board, established pursuant to the Local Government Ethics Law, on a complaint may be appealed by the complainant or the local government employee or officer, who is the subject of the complaint, to the Local Finance Board within 30 days of the decision.

- (b) The appeal shall be in writing and include the grounds for appeal and attach the complaint and the decision of the county or municipal ethics boards. A copy of the appeal and allied papers shall be filed with the appropriate county or municipal ethics board.
- (c) Upon receipt of the appeal, the county or municipal ethics board shall transmit to the Local Finance Board the board's complete file in the matter, which shall include any transcripts or tapes of the hearing, and a copy of the municipal or county code of ethics.
- (d) The Board in its discretion may submit the appeal to the Office of Administrative Law as a "contested case" for the rendering of an initial decision in accordance with the Administrative Procedure Act and these rules. The Board shall review the initial decision and render a final decision.
- (e) If the record below is deemed sufficiently complete by the Board or an Administrative Law Judge, the Board, or an Administrative Law Judge, may consider the matter solely on the record below. If the record is not deemed sufficiently complete by the Board, or an Administrative Law Judge, the Board, or an Administrative Law Judge, in its discretion may direct the submission of additional evidence, testimony, or oral argument to complete the record.
- (f) Any final decision of the Board finding that a local government employee or officer has violated the Local Government Ethics Law requires a two-thirds vote of the Board.
- (g) The final decision of the Board shall be provided to the complainant, the local government employee or officer who is the subject of the complaint, and the appropriate county or municipal ethics board.

5:35-1.5 Advisory opinions

- (a) A local government employee or officer not regulated by a county or municipal code of ethics may request from the Local Finance Board an advisory opinion as to whether any proposed activity or conduct constitutes a violation of the Local Government Ethics Law.
 - 1. The request shall be in writing signed by the local government employee or officer who is the subject of the request or his or her attorney.
 - 2. The request shall set out the factual situation in detail, the specific question(s) of the requester, and whether there is any pending litigation or action relevant to the facts of the inquiry. The Board will not process an advisory opinion request on a matter pending in a court of law or an administrative agency of the State.
 - 3. The Board will not consider a request for an advisory opinion regarding activity or conduct that has already occurred, unless the requester certifies that the activity or conduct is likely to be of a continuing nature.

4. The Board will not consider a request for an advisory opinion from a local government officer or employee, or his or her attorney, who is not the subject of the proposed activity or conduct.
- (b) The Board's staff shall acknowledge receipt of the request within 30 days of receipt of the request.
 - (c) The Board's staff shall review and present to the Board requests for advisory opinions that comply with N.J.A.C. 5:35-1.5(a).
 - (d) The Board shall determine whether in its opinion the proposed activity or conduct constitutes a violation of the Local Government Ethics Law. The Board's determination shall be reduced to writing and provided to the requester.
 - (e) Advisory opinions shall not be made public unless two-thirds of the Board directs that the opinion be made public. Public advisory opinions shall not disclose the requester's identity, unless the Board in making the advisory opinion public also determines by a two-thirds vote to disclose the requester's identity. Discussions of advisory opinions by the Board shall be conducted in executive session, unless the requester requests that the Board's discussion be in the public session of the Board's meeting.
 - (f) Unless the Board determines that the advisory opinion be made public, the request for the advisory opinion and all allied documents or information obtained or prepared by the Board's staff shall remain confidential and not subject to public disclosure.
 - (g) If the request for the advisory opinion reports conduct or activity that has already occurred, the Board in its discretion may initiate a complaint against the requester if the Board believes that a violation of the Local Government Ethics Law may have occurred.

5:35-1.6 Local ethics boards; advisory opinion conflicts

- (a) A municipal or county ethics board, established pursuant to the Local Government Ethics Law, which has before it a request for an advisory opinion from a local government employee or officer regulated by its code of ethics and which is unable to act on the request because a majority of the board has a conflict of interest or is otherwise precluded by ethical considerations from rendering an advisory opinion, shall request the Local Finance Board to assume original jurisdiction.
- (b) The procedures, to the extent applicable, contained in N.J.A.C. 5:35-1.5 shall be followed for making the request and for determining whether the Board will assume jurisdiction or direct the county or municipal ethics board to consider the advisory opinion. If the Board assumes jurisdiction of the matter, the Board will only issue an advisory opinion as to whether the proposed conduct or action constitutes a violation of the State's code of ethics.

2020 Financial Disclosure Statement

Frequently Asked Questions

Local Government Officers FAQs

Q1. Am I required to file a financial disclosure statement (FDS)?

A. If your local government entity has determined that you are a “local government officer,” a classification that is defined in the Local Government Ethics Law, you must annually file a financial disclosure statement. More information concerning which elected and appointed positions may be subject to the annual filing requirement is contained in [Local Finance Notice 2020-03](#).

Q2. I believe that my local government entity incorrectly classified me as a local government officer. What should I do?

A. First, review the guidance provided in [Local Finance Notice #2020-03](#) to understand which positions are required to file. If you have any further questions as to your status, you should then contact your local government entity representative (LGE Representative) directly (e.g., municipal clerk, county clerk, etc.) to resolve any issues. Local Finance Board staff is unable to make changes to a roster and does not make specific assessments as to which locally appointed individuals are deemed local government officers. Subject to the guidance provided in [Local Finance Notice 2020-03](#), the classification process is a local function.

Q3. Are there any exemptions to the filing requirement if I am designated as a local government officer?

A. No. If you are classified as a “local government officer,” you must annually satisfy the filing requirement.

Q4. Are there any exemptions for law enforcement officers?

A. No. Any law enforcement officer who is classified as a local government officer must complete an annual financial disclosure statement. However, law enforcement officers shall mark the designated checkboxes in the real property section of the form (Section E) and the home address will be redacted from the public forms.

Q5. I file an FDS for the School Ethics Commission and/or State Ethics Commission. Do I still have to file the form from the Local Finance Board?

A. Yes, if you are classified as a local government officer you must file the form designated by the Local Finance Board, available at www.fds.nj.gov, in addition to other financial disclosure statements that you are required to file for other positions.

Q6. Can I file a paper copy of the FDS?

A. Since 2013, the FDS filing system has been an electronic system only. There are no paper forms of the FDS.

Q7. When I go to register, I receive an error message that says “First Name, Last Name or PIN did not match. Please verify and try again.” What does this mean?

A. The name entered on the roster by the LGE Representative must match the name you use to register. For example, if the LGE Representative listed you on the roster as “Robert Doe,” you

would have to register with Robert Doe and not Bob Doe, Robert Doe, Esq., etc. Please verify with your LGE Representative how they listed your name on the roster and, additionally, if he or she spelled your name correctly.

Q8. When I go to register, I receive an error message that says “user id is already in use.” What does this mean?

A. An e-mail address can only be registered once. If you receive the error message that says “user id is already in use, “this means that you have previously registered using that e-mail address. Instead, login with that e-mail address and password that you previously established. If you have any additional PINs, go to the “Manage Positions” section and add the new PINs.

Q9. When I validated my PIN# and created a login ID, I used an email address for my login ID that I would now like to change. However, I don’t see a way to change the login ID.

A. At this time, you cannot change the e-mail address used as your login ID. Your Clerk/LGE Rep can change the login ID e-mail address for you.

Q10. I forgot my password. What should I do?

A. On the login page, under the login button, you will see a “forgot password” button. Click on the forgot password button and enter your e-mail address. Your password will be e-mailed to you. Be sure to check your spam and junk folders. Your LGE Representative can also reset your password.

Q11. The term limit on my FDS is wrong. How can I edit it?

A. Only the LGE Representative (i.e. municipal clerk) can edit the “term expires” section on the FDS, as it is a field the LGE Representative fills out when entering the LGO on the roster. Please contact your LGE Representative to have it changed.

Q12. I serve as the municipal attorney for a municipality, but I have assigned one of my law firm’s associate attorneys to attend meetings and provide day-to-day legal services to the municipality. I understand that I am required to file an FDS, but does my associate also have to file an FDS?

A. The attorney appointed to represent the local government entity and any other attorneys within the law firm who regularly provide law related services to the entity must file an FDS. The typical scenario is one where a partner is appointed by the client to serve as municipal attorney, but the account is assigned to an associate who attends meetings, takes phone calls, provides legal opinions, and performs other law related services for the client. In contrast, other attorneys within the law firm who provide no services to the client would not be required to file an FDS.

Q13. I forgot to include on my FDS a vacation property that my wife and I own in Cape May County. Can I amend my FDS?

A. Yes, you may amend a filed FDS by logging in again, select “amend,” and click through each FDS screen until you get to the screen you would like to amend. Once the additional information is added, continue through each screen and submit the FDS again. The original FDS will remain on file for public viewing as a record must be kept of each filing.

Q14. Am I required to disclose my timeshare ownership in Section II, part E. of the FDS, where I would list the address and a brief description of all real property in the State of New Jersey in which an interest was held?

A. The answer depends on the nature of the timeshare interest under the New Jersey Real Estate Timeshare Act (N.J.S.A. 45:15-16.50, et seq.). Your timeshare interest may qualify as an interest in real property if your timeshare interest is a “timeshare estate.” Relevant questions to ask yourself include: Was your interest conveyed by deed? Does the timeshare interest pertain to a single timeshare property or does the timeshare plan include multiple sites? Please consult your personal attorney for additional guidance.

Q15. What is considered income for the Sources of Income section “Section II. Financial Information, Subsection A”?

A. Per N.J.S.A. 40A:9-22.6 (a)(1), “each source of income, earned or unearned, exceeding \$2,000 received by the local government officer or a member of his immediate family during the preceding calendar year” should be reported on the FDS in Section II. Financial Information, Subsection A.

Sources of income could include, but are not limited to:

- Salaries
- Social Security
- Pension
- Unemployment
- Rental Income (i.e. income received from rental properties)

Q16. Should I list my stocks under the Sources of Income section?

A. If a publicly traded security is the source of income, the security need not be reported unless the local government officer or member of his immediate family has an interest in the business organization. Per N.J.S.A. 40A:9-22.3(d), “interest” means the ownership or control of more than 10% of the profits, assets or stock of a business organization but shall not include the control of assets in a nonprofit entity or labor union.

Q17. I am self-employed. What do I put in the section for Source of Income?

A. List the name of the business. The names of individual clients are not required. Do not state self or spouse as a source of income; you must state from where (i.e. the name of the company) the income is derived.

Q18. Do I have to list my spouse’s source of income?

A. Yes. You must list the sources of income for yourself and any members of your immediate family, including spouse and dependent children residing in the same household, during the preceding calendar year.

Q19. I am a Councilmember and receive a salary from my municipality. Do I have to list the name of the municipality as a source of income?

A. Per N.J.S.A. 40A:9-22.6 (1), LGOs are required to list each source of income, earned or unearned, exceeding \$2,000 received by the local government officer or a member of his immediate family during the preceding calendar year. If you received over \$2,000 annually from

any sources, including from the local government which requires your filing, you need to list the name of the local government on your FDS in Section II.

Q20. I receive Social Security payments. What address do I list?

A. The most common unearned income payments are received from Social Security, State of New Jersey, and federal pensions. You may use these addresses for those organizations:

US Social Security Administration
2100 M Street
Washington, DC 20037

NJ Division of Pensions and Benefits
P.O. Box 295
Trenton, NJ 08625

Office of Personnel Management (for federal pensions)
1900 E Street
Washington, DC 20415

Q21. I serve as an elected official in my town, and I also serve as a commissioner with our joint insurance fund. What is the procedure for registering my LGO user account?

A. In this scenario, you are considered a local government officer by two distinct local government entities (municipal government and joint insurance fund). Each entity will assign you a unique PIN#; however, you will create a single LGO profile/account. You simply validate one of the PIN#,s, create your LGO profile/account, and then validate any additional PIN#,s assigned to you using the “Manage Positions” button. The FDS system electronically handles the process of linking your FDS to all of the rosters on which your name appears as an LGO. More detailed instructions and a brief LGO training video are available at www.fds.nj.gov.

Q22. I am unable to review my FDS on my screen when I click the “review” button.

A. Your computer must be enabled to allow “pop-ups” while completing the FDS. Instructions to change the “pop-up blocker” setting differ depending on the Internet browser being used (e.g., Explorer, Firefox, or Safari). Local Finance Board staff is unable to provide specific instructions on your computer system.

Q23. Can the FDS be filed or the FDS system accessed overseas?

A. The FDS website cannot be accessed outside the United States.



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 803
TRENTON, NJ 08625-0803

LOCAL GOVERNMENT ETHICS LAW

Public Advisory Opinions

Advisory opinions issued by the Local Finance Board are confidential matters. However, the Local Government Ethics Law provides that the Board may vote to make an advisory opinion public by a two-thirds vote of its members (N.J.S.A. 40A:9-22.8). Opinions that are made public by the Board shall not disclose the name of the local government officer or employee unless the Board determines that the name shall be disclosed.

Contained herein are the advisory opinions that the Local Finance Board has voted to make public, pursuant to N.J.S.A. 40A:9-22.8. The public opinions have been divided into five separate categories, which are (1) self-interest, (2) familial relationship, (3) legal or business conflicts, (4) incompatibility of office/outside employment, and (5) other.

By sharing the Board's opinion on the applicability of the Local Government Ethics Law to several similar questions, local officials and municipal attorneys may be better equipped to address potential ethics issues.

NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS
Division of Local Government Services
Local Finance Board
<http://www.state.nj.us/dea/divisions/dlgs/programs/ethics.html>



SELF-INTEREST/PURCHASES/CONTRACTS

	File Number	Question Presented	Board's Opinion	40A:9-22.5 Reference
1	91-001	Whether a member of the Township Planning Board, who holds an interest in a hardware business, may do business with the same municipality in which he serves.	Not prohibited by the Local Government Ethics Law	(a), (c)
2	91-009	Whether a firm may submit a bid to the Township for the performance of professional services to prepare a tax map if the spouse of a principal of the firm is employed as the Planning and Zoning Board Secretary for the same municipality.	Not prohibited by the Local Government Ethics Law	(a), (c)
3	92-009	Whether a member of the Board of Adjustment may be awarded a contract for computer service by the same local government in which he serves.	Not prohibited by the Local Government Ethics Law	(a), (c)
4	92-011	Whether a member of the Borough Council, who owns a cleaning service, may participate in drafting bid specifications for cleaning services, or if a member of the Council may submit a bid to the Borough if he or she does not participate in drafting the bid specs.	Prohibited by the Local Government Ethics Law	(c), (d)
5	92-015	Whether, if elected to the borough Council, an individual may continue to sell auto parts via State Contract to the Borough's Public Works, Fire and Police Departments	Prohibited by the Local Government Ethics Law	(a), (c)
6	04-001	May the spouse of the Mayor make applications for various permits on behalf of clients to the Township in which her husband is the Mayor. Mayor does not have any contact or interaction with the permit process.	Prohibited by the Local Government Ethics Law	(a)

7	07-009	May a municipality enter into a contract with an entity in which a member of the governing body has a 50% interest, if the entity is the lowest bidder and if the member of the governing body recuses himself from all matters related to the award of the contract.	Prohibited by the Local Government Ethics Law.	(a)
8	10-013	Whether a company may submit a sealed bid to the county board of chosen freeholders for the contract to remove deer carcasses from county roads when the owner of the company is also a member of the board of chosen freeholders.	Prohibited by the Local Government Ethics Law.	(a)
9	11-007	Whether a municipal police officer, who owns a computer service business in his private capacity, may provide computer services to the municipality he serves as a police officer.	Prohibited by the Local Government Ethics Law.	(c)
10	11-008	Whether a member of the governing body, who is a veterinarian in his private capacity, may provide animal shelter services to the municipality provided that he does not charge the municipality for the services.	Prohibited by the Local Government Ethics Law.	(a), (e)
11	12-001	Whether a governing body member may provide towing services to the municipality he serves.	Prohibited by the Local Government Ethics Law.	(d), (e)
12	12-013	Whether a member of the zoning board of adjustment, whose spouse is an elected official in the municipality, may enter into a contract with the municipality to perform professional land surveying services unrelated to matters contemplated by the zoning board of adjustment.	Prohibited by the Local Government Ethics Law.	(a), (d), (e), (h)

FAMILIAL RELATIONSHIPS

	File Number	Question Presented	Board's Opinion	40A:9-22.5 Reference
1	92-014	Whether the spouse of an elected official may engage in business transactions with the municipality.	Prohibited by the Local Government Ethics Law	(c), (d)
2	92-019	Whether the husband or son of the Township clerk may bid on Township jobs, be awarded Township contracts as the lowest bidder, or perform as a subcontractor to a Township job.	Faulkner Act may apply	None. N.J.S.A. 40:69A-163
3	06-024	Whether a member of the governing body may participate in her official capacity on the Public Works Administration Committee when her husband is employed as a laborer in the department of public works.	Prohibited by the Local Government Ethics Law.	(d), (e)
4	07-007	Whether a member of the governing body may vote in favor of the re-appointment of the municipal manager when the municipal manager is the elected official's first cousin.	Prohibited by the Local Government Ethics Law.	(d)
5	09-003	Whether a governing body member, whose emancipated son is a member of the municipal police department, may participate in matters related to the police department as a whole, such as collective bargaining.	Prohibited by the Local Government Ethics Law.	(d)
6	09-011	Whether a governing body member may participate in the municipal budget process when the governing body member's spouse is a volunteer member and captain of the first aid squad.	Prohibited by the Local Government Ethics Law from participating in matters directly related to emergency medical services.	(d)

7	09-016	Whether a member of the governing body, whose son is a police officer, may attend closed session meetings to discuss promotions in the police department if the governing body member does not speak during the closed sessions.	Prohibited by the Local Government Ethics Law.	(c), (d)
8	10-008	Whether a member of the governing body may vote to ratify a contract between the municipality and the police department when he does not participate in the collective bargaining process and the governing body member's son is an officer in the police department.	Prohibited by the Local Government Ethics Law.	(d)
9	10-016	Whether a member of the governing body may participate in matters related to the consideration of a failed local school budget if the governing body member's wife is an elected member of the school board.	Not prohibited by the Local Government Ethics Law.	(d)
10	11-018	Whether a member of the governing body may access information regarding the municipal department of public works when her husband is an employee of the department of public works.	Prohibited by the Local Government Ethics Law from accessing information not otherwise available to the general public.	(c), (d), (g)
11	13-008	Whether a member of the governing body may participate in matters related to an ordinance regarding the day-to-day operations of the police department when the governing body member's adult son is a municipal police officer.	Prohibited by the Local Government Ethics Law.	(d)
12	14-008	Whether the children of sitting members of a governing body may serve as unpaid interns at a municipally-run summer camp, and whether those same children may later become paid employees of the municipality.	Prohibited by the Local Government Ethics Law in both circumstances.	(c), (d)

13	16-006	Whether the involvement of a governing body member's spouse as a member of the public at meetings of the zoning board of adjustment prohibits the governing body member from participating in any zoning board appeal regarding those cases.	Not prohibited by the Local Government Ethics Law.	(d)
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LEGAL OR BUSINESS CONFLICTS

	File Number	Question Presented	Board's Opinion	40A:9-22.5 Reference
1	95-010	Whether a municipal Tax Assessor and Member of a County Board of Taxation in a County in which the municipality is not situated may prepare an appraisal to be used by another appraiser in an appearance and testimony before a County Board of Taxation and/or the Tax Court in the County in which requestor serves.	Generally not prohibited by the Local Government Ethics Law, however the State Conflicts of Interest Law may apply.	(e), (g)
2	06-006	Whether a governing body member may participate in matters related to the adoption of a redevelopment plans when he owns one of the approximately 1,000 homes within the redevelopment plan area.	Not prohibited by the Local Government Ethics Law.	(d)
3	07-008	Whether a member of the governing body may serve on the governing body when she is the plaintiff in multiple lawsuits filed against the municipality.	Not prohibited by the Local Government Ethics Law from serving on the governing body. Prohibited from participating on matters related to the specific legal action.	(d)
4	08-007	Whether a part-time municipal zoning officer may serve as the construction manager for the construction of a new police headquarters.	Prohibited by the Local Government Ethics Law.	(a), (d), (e)
5	12-019	Whether a member of the governing body may participate in matters related to the municipal police department when the governing body member has a law suit pending against the police department.	Prohibited by the Local Government Ethics Law.	(c), (d)

6	15-013	Whether the mayor of a municipality is permitted to participate in his official capacity in matters related to the termination of a municipal employee when said employee is one of the mayor's approximately 9,000 clients in his private employment.	Not prohibited by the Local Government Ethics Law.	(a), (d), (e)
7	16-003	Whether a commissioner in a Commission form of government may participate in her official capacity in matters related to the appointment of an individual to a municipal position where that individual is one of 4,000 the clients of the commissioner in her private employment.	Not prohibited by the Local Government Ethics Law.	(a), (d), (e)

INCOMPATIBILITY OF OFFICE/OUTSIDE EMPLOYMENT

	File Number	Question Presented	Board's Opinion	40A:9-22.5 Reference
1	91-011	Whether a member of a municipal Board of Appeals may work in or render services to the same municipality.	Not prohibited by the Local Government Ethics Law	(a), (h)
2	92-004/93-019	Whether publicly elected Board of Fire Commission Members, who handle the budget and expenditures of fire tax dollars, also serve as elected officials of the fire companies in their own districts, when they handle company monies raised or contributed privately.	Prohibited by the Local Government Ethics Law	(d), (e)
3	93-003	Whether an elected member of a Board of Chosen Freeholders may also serve as municipal prosecutor in four municipalities within the county he serves as Freeholder.	Not prohibited by the Local Government Ethics Law	(a), (d), (e)
4	93-023	Whether a Mayor may appointment a real estate developer to the municipal Planning Board if the potential appointee in question is a builder of both residential and commercial property within the municipality.	Not prohibited by the Local Government Ethics Law	(c), (h)
5	95-001	Whether a Councilperson, who is employed by the school district within the same municipality, is prohibited from participating in matters concerning the school budget in the event the budget is defeated by voters.	Not prohibited by the Local Government Ethics Law	(d), (i)

6	07-003	Whether a municipal employee may run for a position on the governing body, and, if elected, simultaneously serve in both positions.	Not prohibited from running for office. Prohibited from simultaneously holding both positions.	(d), (e)
7	08-013	Whether a county purchasing agent may run for and, if elected, serve as a member of a municipal governing body in the same county.	Not prohibited by the Local Government Ethics Law from running for or holding the positions simultaneously.	(d)
8	08-014	Whether a municipal employee, who serves as a special aide to the Mayor, would be prohibited from continuing her employment if she were to be appointed to fill a vacant seat on the governing body.	Prohibited by the Local Government Ethics Law from simultaneously holding both positions.	(d), (e)
9	10-007	Whether a member of the governing body, who also serves on the volunteer fire department in the municipality, may participate in votes related to the volunteer fire department.	Prohibited by the Local Government Ethics Law.	(d)
10	11-001	Whether a member of the governing body, who also serves as a volunteer fire fighter in the municipality, may act in his official capacity on matters involving the volunteer fire department.	Prohibited by the Local Government Ethics Law.	(d)
11	11-006	Whether a secretary to the planning board and secretary to the board of health may run for, and, if elected, serve as a member of the governing body while simultaneously continuing to hold the secretary positions.	Prohibited by the Local Government Ethics Law.	(d), (e)

12	12-007	<p>Concerning a member of the governing body, who also serves on the municipal ambulance corp:</p> <p>(1) Whether, if the governing body member recuses himself from one topic relating to the ambulance corps, must he recuse himself from all other topics related to the ambulance corps.</p> <p>(2) Whether it is permissible for the governing body member to participate in discussion regarding the replacement of liaison to the ambulance corps.</p> <p>(3) Whether the governing body member may cast a vote on any issues related to the ambulance corps.</p>	Prohibited by the Local Government Ethics Law on all counts.	(d), as well as <u>N.J.S.A</u> 40A:9-4(c)(6)
13	14-002	Whether an elected fire district commissioner may simultaneously serve as deputy chief in a fire district under the oversight of the fire commission.	Prohibited by the Local Government Ethics Law.	(d), (e)
14	14-003	Whether the executive director of a municipal utilities authority may run for and, if elected, serve as a member of the municipal governing body.	Prohibited by the Local Government Ethics Law.	(e)

OTHER

	File Number	Question Presented	Board's Opinion	40A:9-22.5 Reference
1	91-016	Whether an employee of a municipal Fire Department employee may be awarded a bid for a computer system by the City.	The request is governed by the Faulkner Act	<u>N.J.S.A.</u> 40:69A-163
2	91-020	Whether a member of the municipal Council may testify on behalf of a constituent before the municipal Planning Board.	Factual testimony not prohibited by the Local Government Ethics Law	(h)
3	92-028	Whether a member of the municipal Planning Board, who has sole ownership of a construction company which renovates historic office buildings, may accept a contract from the municipality as lowest bidder to do construction work for the municipality which entails the installation of playground equipment and renovation of buildings.	The request is governed by the Faulkner Act	<u>N.J.S.A.</u> 40:69A-163
4	96-006	Whether an individual may prepare appraisals for a County where he is also a member of the County Board of Taxation.	State Conflicts of Interest Law more properly applies	<u>N.J.S.A.</u> 52:13D-12
5	12-009	Whether a member of the governing body may post links to his personal social media pages on the municipal website.	Not prohibited by the Local Government Ethics Law, provided that the public is aware that the link will direct them to a separate website.	(c)
6	14-020	Whether an elected official may purchase a tax lien certificate sold on a tax delinquent property in her municipality, and whether an elected official may bid in an auction for municipally owned assets.	Not prohibited by the Local Government Ethics Law provided that the elected official does not receive confidential information related to either process by way of his/her position with the governing body.	(c), (d), (g)

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Board Member Beware?

By: **Trishka Waterbury Cecil, Esq.**
NJPO Associate Legal Counsel

The Far Reaching Scope of the Local Government Ethics Law's prohibition Against Members of Non-Advisory Boards and Commissions Acting on Behalf of Others before Municipal Boards, Commissions, Departments, or other Agencies.

Those who serve on a non-advisory municipal board or commission (*i.e.*, planning boards, zoning boards of adjustment, and historic preservation commissions) know that their actions are subject to the strictures of the Local Governmental Ethics Law ("LGEL"), *N.J.S.A.* 40A:9-22.1 *et seq.*, which establishes various ethical standards and other requirements that govern the conduct of local government officers and employees. The provision with which board members are likely the most familiar is *N.J.S.A.* 40A:9-22.5d, which bars a board member acting in any matter in which "he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment." Less often discussed, however, is *N.J.S.A.* 40A:9-22.5h, but it is one that board members and appointing authorities need to be aware of, because it can have a substantial impact on professionals (architects, engineers, attorneys) who serve on non-advisory boards and who also have clients in the municipality in which they serve.

N.J.S.A. 40A:9-22.5h ("subsection h") states that "[n]o local government officer or employee or business organization in which he has an interest shall represent any person or party other than the local government in connection with any cause, proceeding, application or other matter pending before any agency in the local government in which

NJPO Calendar of Events*

2017 Winter Spring Mandatory & Experienced Classes

Mandatory

<u>Date</u>	<u>County</u>	<u>Location</u>
Apr. 29	Somerset	Municipal Complex, Hillsborough
May 6	Essex	Kessler Institute, West Orange

Experienced

<u>Date</u>	<u>County</u>	<u>Location</u>
May 6	Essex	Kessler Institute, West Orange

* visit www.NJPO.org for registration information.

he serves." At its most obvious, this provision means that an attorney who serves on the municipal zoning board of adjustment cannot then represent an applicant before that municipality's planning board. What might come as more of a surprise is that this provision would also bar an architect or contractor who serves on a zoning board from testifying for a client in front of the planning board, or even from applying for a building permit on behalf of a client.

In 1991, the New Jersey Attorney General ("AG") issued an opinion that addressed the scope of subsection h, specifically, "whether the prohibition of representation extends only to members of the legal profession or whether it also extends to other professionals such as a professional engineer or an architect." *Attorney General Opinion* No. 91-0135 (Nov. 1, 1991). The Attorney General stated that

... the prohibition in the Local Government Ethics Law is broader than representation in proceedings before local government agencies. Also, prohibited are representation in any cause, application, or other matter pending before any agency in the local government.

The statute does not merely prohibit representation in legal proceedings in which an attorney would be necessary to provide such representation. Indeed, it is not unusual for professionals, other than attorneys, to submit applications and documents to local government agencies on behalf of another for planning board approval, for zoning approval, for a construction permit, or for a variety of other local required approvals. ... Undoubtedly, there are other examples where a professional, other than an attorney, will act on behalf of the

applicant to submit an application to a local government agency, to resolve any questions or difficulties associated with the application, or to represent an individual in his dealing with local government officials.

The Attorney General concluded that “the prohibition of representation is not restricted to only members of the legal profession. Rather, it extends to local government officers and employees *who stand in the place of another* regarding any cause, proceeding, application, or another matter pending before any agency in the local government the officer or employee serves.” (Emphasis added).

This opinion was followed by the Local Finance Board (“LFB”) in 1994 in *Bleeker v. Local Finance Bd.*, 94 N.J.A.R.2d (CAF) 122, 1994 WL 702292 (Sept. 9, 1994), *aff’d*, *Bleeker v. Dep’t of Community Affairs*, 96 N.J.A.R.2d (CAF) 107, 1996 WL 784183 (App. Div. Sept. 4, 1996). There, the LFB issued a finding that Bleeker - a member of the North Haledon Borough Council and the president of a construction company - violated subsection h because while he was a member of the Borough Council of North Haledon he represented a couple as a project manager for construction of their house before the North Haledon Borough engineer and construction official in matters related to the construction of their house. The Appellate Division affirmed the LFB’s finding that in doing so, Bleeker violated subsection h. As described by the court, “Bleeker entered into a contract with the DiPianos which, in part, called for him to act in a representative capacity before borough inspectors. On three occasions, Bleeker addressed the municipal engineer on behalf of the DiPianos with regard to a disputed application. On the application, his name appeared as the ‘Person in Charge of Operation.’” The court held that pursuant to the 1991 Attorney General opinion, “[t]hese activities constitute ‘representation’ contrary to N.J.S.A. 40A:9-22.5h.”



THE NEW JERSEY PLANNING OFFICIALS

*The Association of Planning Boards & Zoning Boards of Adjustment
Founded in 1938*

The New Jersey Planner is the official membership publication of The New Jersey Planning Officials Inc., published six times a year for over 9,000 local planning and zoning board members, elected officials, and professionals. Membership inquiries invited. Founded in November 1938, NJPO is non-profit 501(c)3 tax-exempt organization and, since 1939, an affiliate of the NJ State League of Municipalities.

P.O. Box 7113
Watchung, NJ 07069
908-412-9592; FAX 908-753-5123
E-mail: njpo@njpo.org
<http://www.NJPO.org>

President: G. Winn Thompson
Vice President: Gail Glashoff
Treasurer: Shaun C. Van Doren
General Counsel: Michele Donato, Esq.
Executive Director: Jason L. Kasler, AICP, PP

The opinions expressed in “The New Jersey Planner” are not those of New Jersey Planning Officials. Rather, they reflect the opinions of the authors themselves. Articles or information appropriate for The Planner should be submitted to the address listed above. Summaries of court decisions are intended only to guide and inform, not to serve as legally reliable interpretations of court opinions. Readers are urged to consult the full text of court decisions and rely upon legal counsel for interpretation.

Consistent with the court’s decision in *Bleeker*, the Office of Administrative Law in 2002 found that Frank Raucci, a member of the Leonia Zoning Board of Adjustment who was also a local contractor, violated subsection 22.5h when he applied for and signed building permits on behalf of a private client and appeared before the Leonia Planning Board to speak for his client on a matter. *See Raucci v. Local Finance Bd.*, 2002 WL 833305 (N.J. Adm. Apr. 9, 2002). There, the Administrative Law Judge (“ALJ”) concluded that

Raucci’s activities ... fall within the ambit of *N.J.S.A.* 40A:9-22.5(h). Indeed, unlike *Bleeker* where the official was simply designated as the person in charge of the operation on a soil movement application signed and submitted by the homeowners, Raucci submitted and signed the permit application in issue as “agent” of the owner. Accordingly, Raucci was clearly “standing in the place” of his client with regard to a “cause, proceeding, application or other matter pending” before the municipal building department. Such action cannot reasonably be said to be devoid of representative aspects.¹

It is important to note that in *Raucci*, “nothing in the record suggest[ed] that Raucci attempted to utilize his position to obtain an unwarranted privilege or advantage for himself or his client[,]” and “the record [was] devoid of evidence that Raucci’s integrity was in any way compromised and that his actions were other than an innocent oversight.” This made no difference, however, to the question of whether he had violated subsection h (although it did result in the ALJ imposing the minimum \$100 fine for the violation).

¹ The LFB had also charged Raucci with violating subsection 22.5h by hand-delivering to the Construction Official a permit application signed by his clients, discussing that application with the Construction Official, and later collecting the permits from the Construction Official on behalf of his clients. The ALJ, however, found that there was insufficient evidence in the record to support the violation. Nevertheless, board and commission members should be cautious about discussing their clients’ matters with municipal staff and officials.

What the above means is that individuals who serve on a non-advisory board or commission (planning board, zoning board, historic preservation commission) must be careful not to act on behalf of private clients before *any* municipal agency. This includes appearing on behalf of a client before any of the municipality’s boards or commissions, not just the specific board or commission on which they serve; engaging with municipal staff on behalf of their clients; and signing and submitting permit applications on behalf of their clients. (Less clear is whether an architect board member could still prepare and sign architectural plans, as long as he or she did not act on behalf of the client).

Lastly, the proscriptions of subsection h do not apply to individuals who serve on purely advisory bodies. The LGEL also does not prohibit board and commission members “from making an inquiry for information on behalf of a constituent, if no fee, reward or other thing of value is promised to, given to or accepted by the officer or a member of his immediate family . . . in return therefor[.]” and it does not “prohibit any local government officer or employee, or members of his immediate family, from representing himself, or themselves, in negotiations or proceedings concerning his, or their, own interests.” *N.J.S.A.* 40A:9-22.5j and -22.5k.

N.J.S.A. 40A:9-22.5h can have a significant impact on the activities of architects, engineers, contractors, attorneys, and other professionals who serve on non-advisory boards and commissions, so it is important that both they and the municipal appointing authorities be familiar with its provisions. Board members with specific questions should consult their board attorney. They can also seek advice directly from the Local Finance Board: under the LGEL, any local government officer or employee can ask the LFB for an advisory opinion as whether a given activity would, in the LFB’s opinion, constitute a violation of the Local Government Ethics. The LFB’s advisory opinions are normally confidential (they can only be made public by a two-thirds vote of the entire LFB membership), and even public



advisory opinion are not to disclose the name of the individual who requested the opinion unless the board so directs. Insofar as the LFB is the body responsible for enforcing the LGEL, board members could be well served by asking the LFB for written guidance. ❧

TEAR DOWNS REVISITED (COUNTER POINT)

By: Carl E. Peters, PP, PE, PLS, CO

In the September/October 2016 issue of the New Jersey Planner, Mr. William T. Sutphin, Esq. expressed his opinion that the demolition of a single-family home should be subject to additional regulation. His opinion seems to be based upon the following ideas:

1. Large homes are bad – small homes are good;
2. The New Jersey Municipal Land Use Law (MLUL) does not adequately regulate the construction of one and two family homes;
3. The zoning board, a body of appointed officials, is better suited to determine the size of homes, in a given zone, than the governing body who has been duly elected by the citizens.

When crafting the MLUL, the NJ Legislature carved out an exemption for one and two family houses from the requirement of site plan approval. Presumably, this exemption was created to reduce costs for homeowners as well as to allow them the maximum latitude in the development of their properties. A similar exemption exists in the NJ Uniform Construction Code (NJUCC), which allows a homeowner to prepare his/her own drawings rather than hire an architect.

The site plan exemption does not eliminate the requirement for the homeowner to meet the standards of the local zoning ordinance nor is the homeowner

who prepares his own building plans exempt from the requirements of the NJUCC.

What is the need for special review when an existing one or two-family house is demolished? The new house must be designed to conform to requirements of the zone or the property owner must request a variance from the Board of Adjustment. Only projects that meet the bulk standards of the local zoning ordinance can proceed directly to the Building Department. The bulk regulations are, in fact the definition of what is acceptable and adequate to meet the goals of the approved master plan. They provide guidance to architects and homeowners in the planning of their projects. If the governing body thinks that the zoning criteria should be modified, they have the power to do so. They can legislate small houses for their community if they believe it is the best public policy.

Mr. Sutphin recommends:

- Requiring submission of a building permit application for the proposed development of the property at the time of request for a demolition permit;
- Making the Board of Adjustment the arbiter of what is the appropriate scale and cost of home for the neighborhood.

Presumably, seven other residents of the municipality who have been appointed, not elected, would render a subjective decision about the suitability of a home's design. Isn't it preferable to have objective zoning criteria, enacted by the governing body, spelled out by ordinance?

Yes, an applicant can request a variance to exceed one or more of the bulk regulations in a district, but then, he must either prove that a hardship exists or that the benefits of the plan outweigh the detriments.

Mr. Sutphin's proposal would increase costs to homeowners. The system isn't broken. Don't try to fix it. ❧