

NJLM June 2021 Mini-Conference

OPRA Update and Q&A

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OPRA Update

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OPRA is Not a Mandatory Process

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

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Are there other ways to request records?

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

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OPRA vs. Common Law

- OPRA provides that its provisions shall not affect an individual's right to access records under the common law. N.J.S.A. 47:1A-1.
- Each request process has a different threshold for disclosure.
- As previously noted, the GRC has no authority to address common law disputes.

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Who Can Request Records?

- Anyone!
- OPRA allows for anonymous requests
- Commercial Requestors
- Out-of-State Requestors: See *Scheeler v. Atl. Cnty. Mun. Joint Ins. Fund*, 454 N.J. Super. 621 (App. Div. 2018)
- The identity of the requestor may affect their right of access in limited circumstances

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Relearning the Response Process: A Post-Public Health Emergency Exercise

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Tips in Responding: Ask yourself...

1. When is my deadline to respond?
2. Is this a valid OPRA request?
3. Do I have enough information to fulfill request?
4. Will the request require a special service charge?
5. Substantial disruption of agency operations?
6. Can I obtain records responsive to request?
7. Do the records or portions thereof fit into any of OPRA's exemptions?
8. Must I redact, convert to requested medium, calculate appropriate fees?
9. Can I provide records via the requested method of delivery?
10. If I must deny, can I do so with legal basis in writing?

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When is a response to an OPRA request due?

- N.J.S.A. 47:1A-5(i) "As soon as possible, but not later than seven business days after receiving the request."
- The forgoing is notwithstanding any requests seeking access to records defined as "immediate access" records (N.J.S.A. 47:1A-5(e)) or information regarding a criminal investigation (N.J.S.A. 47:1A-3(b)).

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State of Emergency

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

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Calling in Back-up

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

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Important GRC Decisions

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E-mails: Withhold or Redact?

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

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Social Media

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

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Text Messages

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

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Records Accessible on a Website

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

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Shared Services

- Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012)

○ Agencies engaged in shared services agreement are equally responsible for obtaining and/or disclosing records maintained by the agency providing the service.

- *E.g.*: a municipality sharing police services with another municipality is responsible for obtaining responsive records from that agency in response to an OPRA request.

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GLOMAR Response

- Harmon v. Morris Cnty. Prosecutor's Office, GRC Complaint No. 2017-38 (February 2019)
 - The Council held that the custodian lawfully denied access to an OPRA request on the basis that he could "neither confirm nor deny" the exist of responsive records, also known as a "Glomar response."
 - The Council relied on the test derived from N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 447 N.J. Super. 182 (App. Div. 2016):

[T]he agency [must] (1) rely[on] upon the exemption authorized by OPRA that would itself preclude the agency from acknowledging the existence of such documents and (2) present[] a sufficient basis for the court to determine that the claimed exemption applies.

[Id. at 188.]

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Surveillance Cameras

- Howard v. N.J. Transit, GRC Complaint No. 2018-43 (November 2019)

○ The Council held that the custodian lawfully denied access to surveillance camera footage from a public transit center under N.J.S.A. 47:1A-1.1. *See also* Gilleran v. Twp. of Bloomfield, 227 N.J. 159 (2016).

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Draft Documents

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

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Auto-Accident Reports

- Truland v. Borough of Madison, GRC Complaint No. 2006-88 (September 2007)
 - The Council held that per N.J.S.A. 39:4-131 auto-accident reports are **not** privileged or confidential.
 - However, in N. Jersey Media Grp., Inc. v. Twp. of Nutley, 2016 N.J. Super. Unpub. LEXIS 2166 (App. Div. 2016), the court did allow for redactions due to an "investigation in progress."

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Plans

- Building plans: Nase v. Twp. of Middle (Cape May), GRC Complaint No. 2016-273 (July 2018)
 - The Council held that the responsive residential building plans were exempt from access under the security and surveillance exemptions. N.J.S.A. 47:1A-1.1.
- Site plans: Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2007-182 (October 2007)
 - The Council recognized the custodian's attempts to disclose site plans. See also Cottrell v. Borough of Glassboro, GRC Complaint No. 2005-247 (April 2006).

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Copyright

- Grauer v. N.J. Dep't of Treasury, GRC Complaint No. 2007-03 (November 2007)
 - The Council held that “[b]ased on the court’s holding in Bd. of Chosen Freeholders of Burlington Cnty. v. Robert Bradley Tombs, 215 Fed. Appx 80 (3d Cir. NJ 2006) and the GRC’s decision in Albrecht v. N.J. Dep’t of Treasury, GRC Complaint No. 2006-191 (July 25, 2007), copyright law does not prohibit access to a government record which is otherwise available under OPRA.”

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Poll Question

A request for e-mails to/from the Mayor between 7/1/20 and 9/30/20 containing the keyword “of” is a valid OPRA request.

False.

While the sample request contains each of the Elcavage factors, the vagueness of the keyword makes the above example invalid. See Doss v. Borough of Paramus (Bergen), GRC Complaint No. 2014-149 (Interim Order dated January 30, 2015)

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Questions & Answers

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