

All Records of Any Governmental Agency in NJ are Open to the Public!

Unlike the old Right to Know Law which very narrowly defined those records that were open to the public, the Open Public Records Act ("OPRA") *very broadly* defines a government record that is open to the public.

Under OPRA, a government record is any record that has been made, maintained, kept on file or received in the course of government business. This broad definition includes all the records in every government office, *including* e-mails on personal computers via personal e-mail accounts in which a government employee engages in government business. See *Meyers v. Borough of Fairlawn*, GRC Complaint No. 2005-127 (May 2006) at www.nj.gov/grc/decisions/2005-127.html.

There are only 24 reasons or

exemptions from disclosure which allow a records custodian to lawfully deny access. The list of 24 exemptions is located on the GRC website at www.nj.gov/grc/custodians/exempt/.

One of the 24 exemptions is a "catch-all" for all the exemptions contained in other federal or state statutes, regulations, and Executive Orders.

Records custodians *may not* deny access to any records requested unless those records fit within one of the 24 exemptions.

Additionally, records custodians must provide requestors with the records in the medium or format requested. If the medium or format requested is not maintained by the governmental agency, the records custodian *must* (1) convert the



record to the medium requested (even if by outside vendor) or (2) provide the record in some other meaningful medium *acceptable* to the requestor. N.J.S.A. 47:1A-5.d.

The Proper Response to an OPRA Records Request is a Written One!!

OPRA mandates that if a records custodian is unable to comply with a request for access, the custodian *must* indicate the specific basis for the denial on the request form, sign and date the form and promptly return a copy of such form to the requestor. N.J.S.A. 47:1A-5.g. While the GRC does not require a records custodian to use the OPRA request form

to explain the lawful basis for the denial of access (because more space may be necessary), the GRC does require that all responses to OPRA requests either (1) granting access, (2) denying access, (3) requesting an extension of time to comply for a legitimate reason, or (4) asking for clarification of a legitimately broad or unclear request be in writing to be a

valid response to an OPRA request. A records custodian's failure to give a requestor a written response within the statutorily mandated 7 business days results in a *deemed denial* pursuant to N.J.S.A. 47:1A-5.g. & -5.i. See *Kelley v. Twp of Rockaway*, GRC Complaint No. 2007-11 (November 2007) at www.nj.gov/grc/decisions/pdf/2007-11.pdf.

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The Burden of Proof for a Lawful Denial of Access is on the Custodian



“... the only lawful basis for a denial of access is one of the 24 exemptions from disclosure contained in OPRA”

OPRA specifically places the burden of proving that a denial of access is lawful on the records custodian. N.J.S.A. 47:1A-6. Additionally, OPRA requires a records custodian to indicate the lawful basis for a denial of access in writing at the time of the request. N.J.S.A. 47:1A-5.g. Therefore, it is not enough for a records custodian to simply deny access with no explanation. Further, the only lawful basis for a denial of access is one of the 24 exemptions from disclosure contained in OPRA.

Here are a few tips for avoiding unlawful denials of access:

(1) While seeking legal advice regarding how to respond to a complicated OPRA request is encouraged by the GRC, it is not a lawful basis for a denial. See Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006) at www.nj.gov/grc/decisions/2005-115.html.

(2) If an extension of time to respond to an OPRA request is legitimately required, a records custodian must state the date such a response will be given in writing and failure to meet that date results in a deemed denial. N.J.S.A. 47:1A-5.i. See Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) at www.nj.gov/grc/decisions/pdf/2007-164.pdf.

(3) Denying access to records requested simply because same or similar records were provided to the same requestor in response to a different request results in an unlawful denial. OPRA does not limit the frequency with which a requestor may request the same records. See Caggiano v. Borough of Stanhope, GRC Complaint Nos. 2005-211 et seq. (January 2006) at www.nj.gov/grc/decisions/2005-211.html. Also, each request requires a new and separate response.

See O'Shea v. Twp West Milford, GRC Complaint No. 2004-17 (May 2005) at www.nj.gov/grc/decisions/2004-17.html.

(4) A requestor's statutory right to access government records is not precluded simply because the requestor is in litigation against the custodial agency. Discovery does not preempt OPRA. See Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008) at www.nj.gov/grc/decisions/pdf/2007-162.pdf.

(5) Meeting minutes that have been approved by the governing body must be released (with redactions when a lawful basis exists) without reference to whether the governing body or custodial agency attorney authorizes such release. See Bernstein v. Township of Knowlton, GRC Complaint No. 2007-278 (June 2008) at www.nj.gov/grc/decisions/pdf/2007-278.pdf.

Broad or Unclear Requests May Be Denied - But Beware!!

The GRC and the courts have ruled that OPRA records requests that do not name identifiable government records are not valid. See Bent v. Stafford Police Department, GRC Complaint No. 2004-78 (October 2004), affirmed on appeal 381 N.J. Super. 30 (App.Div. 2005); Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App.Div. 2005); N.J. Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App.Div. 2007).

A records custodian's response to such a request should include a request for clarification, and if none is given, the request may be denied based on prior GRC decisions and case law from the courts.

However, not all requests for records that begin "any and all" are broad or unclear. If the requestor identifies a type of government record (i.e. resolutions or minutes) and states a specific time frame—such request are valid. See Discroll v. School District of Chatham,

GRC Complaint Nos. 2007-300, -301, -302, and -303 (June 2008).

Additionally, a records custodian is required to search his/her files to find identifiable government records listed in an OPRA request. A records custodian is not required to research his/her files to figure out which records, if any, are responsive to a broad or unclear request. See Donato v. Twp of Union, GRC Complaint No. 2005-182 (February 2007).



Special Service Charge (con't)

employee to return records to their original storage place? (11) What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request? (12) Who (name and job title) in the agency will perform the work associated with the records request and what is that per-

son's hourly rate? (13) What is the availability of information technology and copying capabilities? (14) Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

Thus, based on this 14-point

analysis, no two special service charges are the same. No custodial agency may establish special service charge fees by ordinance or regulations. Each records request requiring "an extraordinary expenditure of time and effort" mandates its own subjective determination.



Home Addresses and Telephone Numbers - Can they be Redacted?

In 2004, the GRC received legal advice from the NJ Office of the Attorney General regarding the legal standards governing the disclosure of home addresses. Additionally, the NJ Superior Court, Appellate Division held that the GRC must enforce OPRA's declaration, in N.J.S.A. 47:1A-1, that "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." Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 368-69 (App.Div. 2003); see also National Archives and Records Administration v. Favish, 541 U.S. 157, 124 S.Ct. 1570 (U.S. March 30, 2004) (personal privacy interests are protected under FOIA).

Further, the NJ Supreme Court has indicated that, as a general matter, the public disclosure of an individual's home address "does implicate privacy interests." Doe v. Poritz, 142 N.J. 1, 82 (1995). The Supreme Court specifically noted that such privacy interests are affected where disclosure of a person's address results in unsolicited contact. The Supreme Court

concluded that the privacy interest in a home address must be balanced against the interest in disclosure.

However, records custodians cannot conduct the balancing test because OPRA does not allow a records custodian to ask a requestor his/her need for records containing home addresses. But, the GRC has always upheld the redaction of home addresses (and telephone numbers) contained in government records. See Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004); Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004); Avin v. Borough of Oradell, GRC Complaint No. 2004-176 (March 2005); Bernstein v. Borough of Allendale, GRC Complaint No. 2004-195 (July 2005); and Paff v. Warren County Prosecutor's Office, GRC Complaint No. 2007-167 (February 2008).

Most recently, the United States District Court prohibited the City of Trenton from disclosing the names, addresses, social security numbers and other personally

identifying information contained on the certified payroll records of contract workers pursuant to the Prevailing Wage Act. *Please note that this decision only applies to the particular records at issue in the case.* The court held that "[d]isclosure of employee's personal information to third parties while revealing nothing about the inner workings of government, not only violates these employees' reasonable expectation of privacy under the Federal Constitution, but also does nothing to advance the purpose of OPRA, which is to promote transparency in government. See John Does and PKF-Mark III, Inc. v. City of Trenton, Department of Public Works—Water Division, No. 607 Civ. 2008 (D.N.J.) (June 16, 2008) Memorandum Opinion.

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