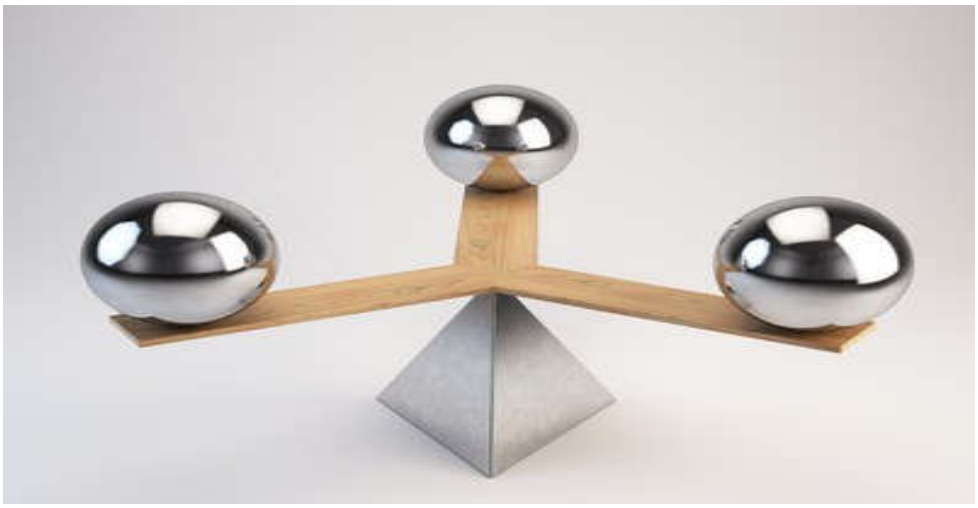
Hot Topics in Insurance Defense

Civil Litigation Track (Waves)

This seminar will feature speakers who will discuss multiple issues of current importance to attorneys engaged in civil litigation primarily defending lawsuits through assignments from insurance carriers. The topics include litigation funding, changes in the OPRA laws, proposed revisions to the civil mandatory non-binding arbitration program and ethical considerations with respect to conflicts of interest for attorneys assigned to represent an insured through a carrier. In addition, we will have a sitting Superior Court judge who will provide their perspective of these issues.

Navigating Conflicts
The Tripartite Relationships



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Tripartite Relationship – The Big Picture

The "*tripartite relationship*" refers to the dynamic between the insurer, the insured, and the defense attorney hired by the insurer to defend the insured.

Conflicts of interest can arise within this relationship, particularly regarding control of the defense, information, attorney fees, and settlement decisions.

As a result, the insurer-appointed attorney's duties and obligations to both the insured and the insurer create potential complications.

Tripartite Relationship Roles

The tripartite relationship is formed with the primary objective of achieving a successful result in litigation. However, peripheral goals and interests of the parties, which are not always mutual.

Understanding the roles of the "three" in the tripartite relationship and each role's responsibility is critical throughout the claims process.

Insurer: The **insurer's role** includes the duty to defend, as well as the right to select defense counsel for the claim, control the defense of the claim, and negotiate and settle the claim (if specifically provided within the policy).

Insured: The **insured's role** includes the duties to give timely notice of the claim and to cooperate with the insurer in the investigation and defense of the claim.

Attorney: The **attorney's role** is defined by the applicable Rules of Professional Conduct. These Rules govern the attorney-client relationship, and to create obligations that a defense attorney must adhere to regarding competence, confidentiality, conflicts of interest, and privilege – to name a few.

Communication Conflicts Overview

The tripartite insurer-insured-counsel relationship requires the insurer, its insured and the insured's counsel to communicate with each other in the defense of a claim. In general, all parties work together to come to a mutually beneficial resolution to the claim at issue.

There may, however, be challenges to the assertion of the attorney-client privilege to prevent the disclosure of communications between counsel and the insurer. The rules that governs the tripartite relationship differ among jurisdictions and counsel should be aware of how courts address this issue.

There is the potential for conflicts of interests to arise in the course of the relationship between the parties. In addition, not all of the communications amongst the three parties involved in the relationship - the insurer, insured and the counsel – may be covered by the attorney-client privilege.

It is tantamount that defense attorney understand the protection of communications within the insurer-insured-counsel relationship.

Potential Conflicts

Several conflicts can arise within the tripartite relationship:

- **Control of the Defense:** The insurer may want to control the defense to minimize costs, while the insured may want a more aggressive defense.
- **Information Control:** The insurer may want to control the flow of information to protect its interests, potentially hindering the insured's ability to make informed decisions. Whereas the insured may want to minimize the flow of information to the insurer to ensure it maintains coverage and a defense.
- **Attorney Fees and Expenses:** The insurer may seek to manage litigation costs, which could conflict with the insured's interests in a thorough and effective defense.
- **Settlement Control:** The insurer and insured may have differing views on the optimal settlement strategy, leading to conflict. This tension could also put the insurer at risk of a bad faith claim and/or extracontractual liability.
- **Coverage Disputes:** When a coverage dispute arises, the insurer's interests in avoiding coverage obligations will likely clash with the insured's interest in receiving a full defense.

Ethical Considerations

Attorney's Dual Obligations:

- The defense attorney has duties to both the insurer and the insured. In New Jersey, the insured is generally considered the primary client, but the attorney must also consider the insurer's interests.

Ethical Considerations:

- Defense counsel must be mindful of their ethical obligations to both the insured and the insurer, and the potential for conflict of interest must be carefully considered.

Resolving Conflicts:

- In cases of conflict, the attorney may need to withdraw from the case, or the insurer may need to appoint independent counsel to represent the insured.

New Jersey Law:

- New Jersey law recognizes the importance of protecting the insured's interests in the tripartite relationship, and courts have addressed various aspects of the relationship.

Reservation of Rights:

- In New Jersey, if an insurer is defending an insured under a reservation of rights, it must clearly inform the insured of the potential conflict of interest and the reasons for the reservation.

Independent Counsel

In New Jersey, when a conflict of interest exists, the insured may select independent counsel. If it is later determined that the claim was within the policy, the insurer's duty to defend converts into a duty to reimburse. See *Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 390, 267 A.2d 7, 10 (1970);* see also *Flomerfelt v. Cardiello, 202 N.J. 432 (2010).*

In *Burd*, the insured shot a man with a shotgun for which the insured was convicted. 56 N.J.at 386-87, 267 A.2d at 8–9. The victim sued the insured alleging both negligent and intentional tort, and the insurer declined to defend on the ground that the Homeowner's policy under which the insured sought coverage, expressly excluded coverage of bodily injury or property damage caused intentionally by or at the direction of the Insured. *Id*. The insured retainer independent counsel, and the plaintiff was awarded damages *Id*. subsequently, the insured brought action against the insurer to recover the amount of the judgment, and the costs incurred in defending the action. *Id.*

In the context of making a determination on the coverage issues, the Court noted,

> [T]he carrier should not be permitted to assume the defense if it intends to dispute its obligation to pay a plaintiff's judgment, unless of course the insured expressly agrees to that reservation. This is not to free the carrier from its covenant to defend, but rather to translate its obligation into one to reimburse the insured if it is later adjudged that the claim was one within the policy covenant to pay."

Id. at 389; *accord Hartford Accident & Indemnity Co. v. Aetna Life & Casualty Insurance Co.*, 98 N.J. 18 (1984); see also *Hebela v. Healthcare Ins. Co.*, 370 N.J. Super. 260 (App. Div. 2004) (applying equitable principle of "unjust enrichment," court allowed recoupment of defense costs); and see *SL Indus., Inc. v. America Motorists Ins. Co.*, 128 N.J. 188 (1992) (wherein the New Jersey Supreme Court held that an insurer may seek reimbursement if it can carry the burden to show defense costs that are allocable to non-covered claims).

Duty to Settle/Bad Faith

A Rova Farms claim in New Jersey is a claim that an insurer in bad faith failed to settle a claim within the policy limits, therefore exposing the insured to liability for excess damages. A successful claim results in the insurer being held liable for the entire judgment, even in excess of the policy limits.

In *Rova Farms Resort, Inc., v. Investors Insurance Co.*, 65 N.J. 474, 323 A.2d 495 (1974), the New Jersey Supreme Court imposed an affirmative duty on an insurer to initiate settlement negotiations because the court deemed the insurer a fiduciary of the insured in the settlement and defense of third-party claims. In the wake of Rova Farms, failing to explore settlement opportunities by taking the initiative to attempt to negotiate a settlement within the policy coverage constitutes bad faith. See *Wood v. New Jersey Mfrs. Ins. Co.*, 206 N.J. 562, 21 A.3d 1131 (2011).

However, there are factors that may evidence that despite the Rova Farms claim, the insurer was acting in good faith. *Rova Farms*, 65 N.J. 474 at 490. Among these factors are whether an offer of settlement was made by the plaintiffs; the view of the carrier or its attorney regarding liability; the range of the verdict; the strengths and weaknesses of the evidence; the history of similar cases; and the relative appearance, persuasiveness, and appeal of the parties and witnesses. *Id*.

Additionally, a *Rova Farms* claim "represents a traditional contract claim that the insurer breached the implied covenant of good faith and fair dealing and to which the right to trial by jury attaches." *Wood*, 206 N.J. at 565.

Key New Jersey Case Law

Under New Jersey law, insurers wishing to control the defense of an insured while simultaneously reserving the right to dispute liability can do so only with the consent of the insured. See *Merchants Indemnity Corp. v. Eggleston*, 27 N.J. 114, 127 (1962), The insured's consent can be inferred from the insured's failure to reject an offer to defend, but if the insured consents by silence, the reservation of rights letter "must fairly inform the insured that the offer may be accepted or rejected." *Id*. at 127-128.

When an insurer fails to inform an insured of the ability to accept or reject the terms of the defense, the insurer is estopped from later denying coverage. See *Nazario v. Lobster House*, No. A-3025-07T1, 2009 WL 1181620 (App. Div.), certif. denied 200 N.J. 209 (2009).

In New Jersey: "Insurance defense counsel routinely represent two clients: the insurer and the insured." *Longo v. Am. Policyholder's Ins. Co.*, 181 N.J. Super. 87 (Law Div. 1981).

"An attorney provided by an insurance company to represent an insured defendant owes that person the same unswerving allegiance that he would if he were retained and paid by the defendant himself. While he owes to both a duty of good faith and due diligence in the discharge of his duties, the rights of one cannot be subordinated to those of the other." *Liebermann v. Employers Ins. of Wausau*, 84 N.J. 325, 338 (1980) (*quoting Liebermann v. Employers Ins. of Wausau*, 171 N.J. Super. 39, 49 (App. Div. 1979)).

Where a lawsuit alleged both covered and uncovered claims, the insurer could either defend under a reservation or rights or refuse to defend and with the potential obligation to reimburse insured should the claim later be determined to be covered claim. *Flomerfelt v. Cardiello*, 202 N.J. 432 (2010).

Implicated Rules of Professional Conduct

RPC 5.4(c) – A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

RPC 1.6(a) – A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for (1) disclosures that are impliedly authorized in order to carry out the representation . . .

RPC 1.7 –

(a) [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . (2) there is a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer.

(b) [A] lawyer may represent [such] a client if . . . (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation.

RPC 1.8(f) – A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and

(3) information relating to representation of a client is protected as required by RPC 1.6.

Kimberly Parson is the managing partner for the New Jersey office of Rebar Kelly where her practice focuses insurance defense and representing clients in insurance coverage litigation. Ms. Parson also has experience in providing coverage opinions and advice to insurance carriers concerning their coverage obligations under various types of insurance policies including, comprehensive general liability, group property and casualty lines, public entity insurance, specialty and professional liability, D&O coverage, cyber insurance, excess and umbrella coverage, contractors and builders risk insurance, and employer's liability coverage.

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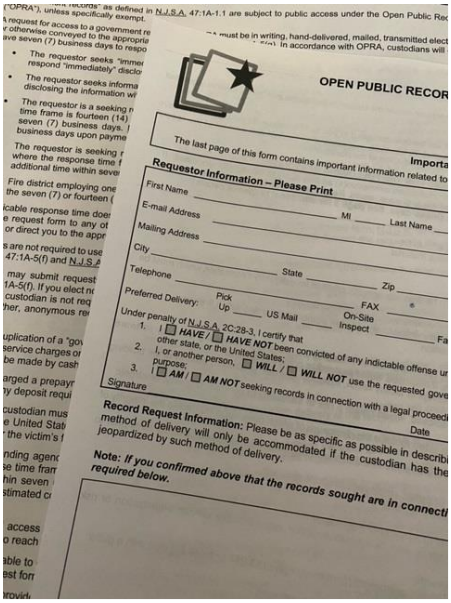
Government Records Council

A Citizen's Guide to the Open Public Records Act



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A Citizen's Guide to the Open Public Records Act

Fifth Edition – October 2024

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A Citizen's Guide to the Open Public Records Act

The Government Records Council ("GRC") has prepared the Citizen's Guide to the Open Public Records Act, to help the public understand the requirements of the State of New Jersey's Open Public Records Act (N.J.S.A. 47:1A-1, *et seq.*). This guide is intended to explain the rights and responsibilities of both citizens of New Jersey and public agencies that maintain records. However, it does not constitute legal advice or a final decision of the GRC. Please consult an attorney to obtain legal advice.

The GRC notes that this guide has been updated to reflect amendments made to OPRA through P.L. 2024, c.16, which went into effect on September 3, 2024. That legislation made several changes that impact longstanding processes and policies to include limitations on access, request filing and response requirements, and GRC operations.

The Council's website at www.state.nj.us/grc/ contains useful information on the law, including a summary of OPRA, copies of gubernatorial Executive Orders, lists of statutes containing exemptions and exceptions, information on the Denial of Access Complaint process, and a search engine of all prior GRC decisions. Requestors are urged to check the website when questions arise and should also feel free to submit questions to the GRC via our toll-free information line (1-866-850-0511), e-mail (Government.Records@dca.nj.gov), or regular mail (101 South Broad Street, P.O. Box 819, Trenton, NJ 08625-0819).

In addition to this guide, the Council has other resource materials that may be useful in assisting requestors understand the provisions of OPRA. These materials include the following, which can be accessed from the GRC's website at www.nj.gov/grc/meetings/present:

- OPRA PowerPoint presentations
- Exemptions in OPRA handout
- Special Service Charge handout
- Useful OPRA Cases by Subject handout

SECTION 1 – OPRA DEFINED

What is the Open Public Records Act ("OPRA")?

OPRA is the state statute that replaced the previous "Right to Know Law" on July 7, 2002. OPRA governs the public's access to government records in New Jersey. OPRA is codified as N.J.S.A. 47:1A-1, *et seq*.

Specifically, OPRA is intended to:

- Expand the public's right of access to government records;
- Create an administrative appeals process if access is denied; and
- Define what records are and are not "government records.

Are there other ways to request access to government records besides OPRA?

Yes. OPRA is only one means by which an individual can gain access to records in the State of New Jersey. Other potential request methods include informal requests, requests made under common law or discovery, request processes set forth by statute or regulation, and other court processes (subpoenas, court orders, *etc.*). Further, the requestor is the only individual capable of invoking OPRA either by submitting the request on the agency's official OPRA request form or by citing to OPRA in an equivalent writing inclusive of all information required to be on the form. If an individual chooses to invoke OPRA in a request, then the statutory provisions will apply.

However, some agencies have adopted policies requiring an individual to submit an OPRA request for records. Such a policy is at the agency's prerogative and not statutorily required by OPRA, nor a GRC directive. Based on the foregoing, it is never "necessary" for anyone to file an OPRA request to obtain any type of record (unless individual agency policy dictates such).

If, in addition to requesting records under OPRA, a requestor seeks government records under the common law, please consider the following:

- A public record under the common law is one required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are that it be in writing, that it be made by a public officer, and that the officer be authorized by law to make it.

- If the information requested is a "public record" under common law and the requestor has a legally recognized interest in the subject matter contained in the material, then the material must be disclosed if the individual's right of access outweighs the State's interest in preventing disclosure.

Discovery requests may be served upon a public agency for access to government records pursuant to N.J. Court Rules, R. 3:13-3 (2005) and R. 7:7-7. Pending requests for discovery will affect a requestor's ability to request the same records under OPRA. N.J.S.A. 47:1A-5(g).

Note that any challenge to a denial of a request for records pursuant to either the common law or as part of discovery cannot be made to the GRC, which only has jurisdiction to adjudicate

challenges to denials of OPRA requests. N.J.S.A. 47:1A-7(b). *A challenge to the denial in the above processes can be made by filing an action in Superior Court. Additionally, the GRC cannot provide any guidance on how to submit a request through either common law or discovery.*

What public policies are expressed in OPRA?

OPRA provides overriding public policies in the legislative findings (N.J.S.A. 47:1A-1), which must be considered during the handling of all OPRA requests for access to government records. Those public policies are:

- Government records must be readily accessible for inspection, copying, or examination by its citizens, with certain exceptions, for the protection of the public interest.

- Any limitations on the right of access to government records must be interpreted in favor of the public's right of access.

- A public agency has a responsibility and an obligation to protect a citizen's personal information that is in the possession of a public agency when disclosure of that information would violate the citizen's reasonable expectation of privacy.

Regarding privacy, in Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009), the New Jersey Supreme Court held without ambiguity, that the privacy provision "is neither a preface nor a preamble." Rather, "the very language expressed in the privacy clause reveals its substantive nature; it does not offer reasons why OPRA was adopted, as preambles typically do; instead, it focuses on the law's implementation . . . Specifically, it imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests."

The above means that OPRA's privacy provision is a substantive exemption from public access. The GRC has in the past relied on this privacy provision to substantiate a custodian's withholding from public access a citizen's personal information not clearly defined as exempt in N.J.S.A. 47:1A-1.1. Thus, there may be complaints where the GRC will be required to conduct a balancing test to weigh the requestor's need for the personal information against the agency's need to keep the information confidential. Thus, decisions to withhold personal information under this provision will be made on a case-by-case basis.

Who may file an OPRA request?

Anyone may file an OPRA request! See Scheeler v. Atlantic Cnty. Mun. Joint Ins. Fund, 454 N.J. Super. 621 (App. Div. 2018). This includes commercial and out-of-state requestors. Also, requestors may file OPRA requests anonymously without providing any personal contact information, and the request shall not be considered incomplete. N.J.S.A. 47:1A-5(f). OPRA also prohibits anonymous requests for victims' records. N.J.S.A. 47:1A-2.2(c). However, it should be noted that under P.L. 2024, c.16, anonymous requestors are not permitted to file a complaint either with the courts or GRC. N.J.S.A. 47:1A-5(f).

What is a "government record"?

OPRA's definition of a "government record" expands the Right to Know Law's definition, which was limited to records *required* by law to be maintained on file.

OPRA specifically defines a "government record" as:

> 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 . . .* or *that has been received* in the course of his or its official business . . .
>
> [N.J.S.A. 47:1A-1.1 (emphasis added).]

Simply stated, a "government record" means any record that has been made, maintained, or kept on file, or that has been received in the course of official business.

OPRA covers more than just paper records. Under OPRA, a "government record" includes printed records, tape recordings, microfilm, electronically stored records and information (including but not limited to e-mails, text messages, social media records, and data sets stored in a database), books, maps, photographs, *etc.*

All government records are subject to public access unless specifically exempt under OPRA or any other law. There are nearly 40 specific exemptions contained in OPRA, which are listed below:

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."

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:

   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) 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:*

a. *for use by a legal next of kin, a legal representative, or an attending physician of the deceased person,*
b. *for the use as a court of this State permits, or for 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).

The portion of any criminal record concerning a person's detection, apprehension, arrest, detention, trial or disposition for unlawful manufacturing, distributing, or dispensing, or possessing or having under control with intent to manufacture, distribute, or dispense, marijuana or hashish in violation of paragraph (11) of subsection b. of N.J.S.A. 2C:35-5, or a lesser amount of marijuana or hashish in violation of paragraph (12) of subsection b. of that section, or a violation of either of those paragraphs and a violation of subsection a. of section 1 of N.J.S.A. 2C:35-7 or subsection a. of section 1 of N.J.S.A. 2C:35-7.1 for distributing, dispensing, or possessing, or having under control with intent to distribute or dispense, on or within 1,000 feet of any school property, or on or within 500 feet of the real property comprising a public housing facility, public park, or public building, or for obtaining, possessing, using, being under the influence of, or failing to make lawful disposition of marijuana or hashish in violation of paragraph (3) or (4) of subsection a., or subsection b., or subsection c. of N.J.S.A. 2C:35-10, or for a violation of any of those provisions and a violation of N.J.S.A. 2C:36-2 for using or possessing with intent to use drug paraphernalia with that marijuana or hashish;

6) Victims' records

a. victims' records, *except that a victim of a crime shall have access to the victim's own records.*

Note: the definition of a "victim's record" is 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.

However, victims may seek and obtain records regarding their victimization regardless of whether same are held by a "victim's rights agency".

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, e*xcept*

   a. *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

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, tablets, telephones, electronic computing devices, software applications, and networks or devices which operate on or as a part of a computer network or related technologies within the same, which shall include system logs, event logs, transaction logs, tracing logs, or any logs which are reasonably construed to be similar to the same and generated by the devices or servers covered within this paragraph, which, if disclosed, could jeopardize computer security, or related technologies.

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) Security alarm system activity and access reports, including video footage, for any public building, facility, or grounds *unless the request identifies a specific incident that occurred, or a specific date and limited time period at a particular public building, facility, or grounds, and is deemed not to compromise the integrity of the security system by revealing capabilities and vulnerabilities of the system*.

14) Information which, if disclosed, would give an advantage to competitors or bidders, including detailed or itemized cost estimates prior to bid opening.

15) 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.

16) Information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office.

17) Information which is to be kept confidential pursuant to court order.

18) Certificate of honorable discharge issued by the United States government (Form DD-214, NBG-22, or other form) 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*.

19) 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*.

20) 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. In accordance with section 2 of N.J.S.A. 47:1B-2, commonly known as "Daniel's Law", that portion of any document which discloses the home address, whether a primary or secondary residence, of any active, formerly active, or retired judicial officer, law enforcement officer, child protective investigator in the Division of Child Protection and Permanency, or prosecutor, or, as defined in section 1 of N.J.S.A. 47:1B-1, any immediate family member thereof.
c. Credit card numbers.
d. Debit card numbers.
e. Bank account information.
f. Month and day of birth.
g. Personal e-mail address required by a public agency for government applications, services, or programs.
h. Telephone numbers.
i. Drivers' license numbers.

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,*
- *any private person or entity seeking to enforce payment of court-ordered child support;*
- *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);*

- *with respect to the disclosure of information included in records and documents maintained by the Department of the Treasury in connection with the State's business registry programs;*

21) That portion of any document that discloses the personal identifying information of any person provided to a public agency for the sole purpose of receiving official notifications.

22) 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).

23) Juvenile information - that portion of any document that requires and would disclose personal identifying information of persons under the age of 18 years, *except*:

a. *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) or the disclosure of driver information to any insurer or insurance support organization, or a self-insured entity, or its agents, employees, or contractors, for use in connection with claims investigation activities, antifraud activities, rating, or underwriting, and*
b. *with respect to the disclosure of voter information on voter and election records pursuant to section 8 of P.L.2024, c.16 (C.47:1A-5.3);*

24) Personal identifying information disclosed on domestic animal permits, licenses, and registration.

25) Metadata - structured reference data that helps to sort and identify attributes of the information it describes, referred to as metadata, or any extrapolation or compilation thereof, which shall include the SMTP header properties of emails, except that portion that identifies authorship, identity of editor, and time of change.

26) New Jersey State Firemen's Association financial relief applications.

27) Owner and maintenance manuals.

28) HIPAA data - data classified under the "Health Insurance Portability and Accountability Act of 1996," Pub.L.104-191.

29) Any indecent or graphic images of a person's intimate parts, as defined in section 10 of P.L.2024, c.16 (C.47:1A-5.2), that are captured in a photograph or video recording without the prior written consent of the subject of the photograph or video footage, as defined in section 10 of P.L.2024, c.16 (C.47:1A-5.2).

30) 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

31) Biotechnology trade secrets.

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

32) 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)

33) 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)

34) 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-5.3

35) Certain election records exempt from disclosure:
   a. Ballots marked by a voter, vote tabulations, or election results for any election prior to the time of the closing of the polls on the date of the election, *except as otherwise provided for by law, rule, or regulation*; and

b. Manuals instructions, specifications, technical information, or programming code of computers, software, applications, networks, tablets, voting machines, printers, scanners, and any other equipment, systems, policies or plans used for the conduct of elections, the disclosure of which, could have the potential to jeopardize the security, integrity or accuracy of the conduct of elections, tabulation of votes, or determination of election results, *except as otherwise provided for by law, rule, or regulation, or in response to a subpoena or order of a court or tribunal of competent jurisdiction*.

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

36) 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

37) 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.

Who is the "custodian of a government record"?

OPRA defines "custodian of a government record" or "custodian" as that official designated by formal action of a public agency's director or governing body that has custody or control of the government records of the public agency. N.J.S.A. 47:1A-1.1. Some large state departments have determined that their OPRA process is more efficient through designation of more than one custodian. For example, the New Jersey Department of Law & Public Safety is comprised of ten divisions and four agencies; each of the divisions and agencies in Law & Public Safety has designated a custodian to deal with records requests made to that division or agency.

Additionally, while OPRA provides that the custodian in a municipality is the municipal clerk, certain municipalities have chosen to designate additional custodians for specific departments within their governmental structure, such as police departments, building departments, *etc.*, in order to facilitate public access to the records of those departments. Where applicable and appropriate, and where the evidence of record supports such a determination, the GRC has

exercised its discretion to recognize such custodians when they are specifically and clearly identified, in order to make it easier for requestors to seek and obtain government records in an expeditious manner consistent with OPRA. See, *e.g.*, L.D. v. Bayonne Police Dep't, GRC Complaint No. 2004-64 (August 2004); Barron v. Highland Park Police Dep't, GRC Complaint No. 2004-145 (January 2005); Serrano v. New Brunswick Police Dep't, GRC Complaint No. 2004-151 (April 2005); Morris v. Trenton Police Dep't, GRC Complaint No. 2007-160 (May 2008); Paff v. Twp. of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008).

What is a "public agency" under OPRA?

Only the following defined as a "public agency" is subject to the provisions of OPRA:

- The executive branch of state government and all independent state agencies and authorities. This includes all state colleges and universities;

- The Legislature of the State and any office, board, bureau, or commission within or created by the Legislative Branch;

- All counties, municipalities, school districts, fire districts, planning and zoning boards and other county and local boards or agencies, and all independent county or local agencies and authorities established by municipal or county governments. N.J.S.A. 47:1A-1.1.

The following agencies **are not** subject to the provisions of OPRA:

- The Judicial branch of state government or any agency officer, or employee of that branch (including the Supreme Court of New Jersey, the Superior Court of New Jersey, the municipal courts, the Administrative Office of the Courts, and the agencies, offices, and boards under their authority). The Courts have their own records disclosure policies and procedures.

- Private businesses or not-for-profit entities, generally.

  However, should a requestor challenge the entity's assertion that it is not a "public agency" for purposes of OPRA, the GRC may be required to conduct a "public agency" test informed by Paff v. N.J. State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013). There, the Appellate Division opted to use both a "creation" and "government function" test in finding that the Firemen's Association was a "public agency" for purposes of OPRA. See The Times of Trenton Pub. Corp. v. Lafayette Yard Cmty. Development Corp., 368 N.J. Super. 425 (Apr 30, 2004); Fair Share Hous. Ctr, Inc. v. N.J. State League of Municipalities, 207 N.J. 489 (2011). See also Sussex Commons Ass'n, LLC v. Rutgers, The State Univ., 210 N.J. 531 (2012).

SECTION 2 – HOW OPRA WORKS

How do I submit an OPRA request?

A request for access to a government record must be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian. N.J.S.A. 47:1A-5(g). A records request under OPRA cannot be made verbally.

Requests must be submitted to the public agency that maintains possession of the requested records, unless as per P.L. 2024, c.16 through remote access or as a courtesy copy. N.J.S.A. 47:1A-5(i)(1). For example, a request for the City of Trenton's FY-2018 budget would be submitted to the City of Trenton. A request for payroll records of a school business administrator would be submitted to the school district in which the administrator is employed.

Please note that the GRC is not a central repository for all records made or maintained within the State of New Jersey. Thus, OPRA requests submitted to the GRC seeking records from any other public agency will be returned to the requestor.

Pursuant to N.J.S.A. 47:1A-5(f), requestors should use the agency's official OPRA request form, but are permitted to submit their request via "a letter, or an email" that includes all information required on the adopted form. Id. This includes answering the certification questions related to "commercial purpose" use and whether the requestor is seeking records in connection with a legal proceeding (including case identifiers if yes). This new statutory requirement represents a significant change from the GRC's prior position after Renna v. Cnty. of Union 407 N.J. Super. 230 (App. Div. 2009) that a written equivalent request would be considered a valid OPRA request if it clearly identified itself as an OPRA request. **Requestors failing to include all form information on their written equivalent or including substantially more information than required on the form could result in the request being denied**. N.J.S.A. 47:1A-5(f).

Some public agencies may not have a dedicated fax line for their records custodians and therefore choose not to accept fax requests. Some public agencies may accept requests for access to government records through an online portal or by e-mail. See Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009) (holding that a custodian may limit the methods of transmission through which requestors can submit an OPRA request if those methods do not present an unreasonable obstacle to access). See also Dello Russo v. City of East Orange (Essex), GRC Complaint No. 2014-430 (Interim Order dated September 29, 2015). OPRA does not require public agencies to launch new services beyond those currently offered to accept records requests electronically.

Electronically Submitted Requests Some public agencies and third parties (such as OPRAmachine) have created systems that allow a citizen to fill out an online request form and file it with the custodian over the Internet. The means of submitting a request form (mail, in-person, Internet) will not affect which records will or will not be available for access. The online request form, whether an actual form or portal, must contain all the required form information listed in N.J.S.A. 47:1A-5(f) and (g).

Requestors must be as specific as possible when requesting records. For example, requestors must identify types of records, dates or range of dates, parties to correspondence, subject matter, *etc*. However, requestors may not know the names of certain records. The spirit of OPRA implies that custodians assist requestors with identifying the records they are seeking, although a custodian's

failure to do so is not a violation of OPRA. Requests for information or requests that ask questions are not valid OPRA requests. For example, "[h]ow many paper clips did the Township purchase in 2016?" would not be a valid OPRA request because the requestor did not identify a specific record.

Can I request records in a specific medium?

OPRA provides that a custodian must permit access to a government record and provide a copy of the record(s) in the medium or format requested, if the public agency maintains the record in that medium or format. Under P.L. 2024, c.16, the medium conversion requirements have changed. Specifically, N.J.S.A. 47:1A-5(d) now provides that if the custodian does not maintain the record in the medium requested, they must:

- Convert the record to the medium requested if same is available to the public agency and does not require a substantial amount of manipulation or programming of information technology or the services of a third-party vendor; or
- If the record is not maintained in the electronic medium or format and would require substantial amount of manipulation or programming of information technology or the services of a third-party vendor to convert thereto, at a minimum, provide a copy in the electronic format maintained by the public agency.

If the agency maintains the record in the medium requested, the custodian can only charge the actual cost of copying (*e.g.*, the cost of the floppy disk, flash drive, or CD). However, a custodian may impose a special service charge related to conversion for:

- Extensive use of technology; and
- Labor for programming, clerical and supervisory assistance that may be required.

The special service charge must be based on the cost of the technology and labor actually incurred. This may include actual charges incurred by third party vendor. N.J.S.A. 47:1A-5(c), (d).

Before undertaking any medium/format conversion that will result in a special service charge, the custodian must first inform the requestor that the charge will be incurred, including an explanation and itemized list of fees and charges, and give the requestor the opportunity to accept or reject the extra fee. N.J.S.A. 47:1A-5(c). If the requestor objects to the special service charge and refuses to pay it, the custodian may deny the request for access to the record. However, if the requestor is willing to pay for it, the agency is not required to provide access until the requestor has remitted payment.

Can I specify how I want the custodian to send me the requested records?

A custodian must grant access to a government record by the method of delivery requested by the requestor (regular mail, fax, e-mail, or onsite inspection) unless encountering conversion issues discussed above. O'Shea v. Twp. of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008). OPRA requires the production of electronic records free of charge (unless charges expressed in N.J.S.A. 47:1A-5(b), (c), and/or (d) apply), except that a public agency may charge the actual cost of any needed supplies such as computer discs or flash drives. N.J.S.A. 47:1A-5(b).

Can a public agency create specific OPRA hours?

Public agencies may limit OPRA hours if they fall within one of the following categories described in N.J.S.A. 47:1A-5(a):

- 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.

In these instances, a custodian must provide access to a government record that is authorized for public inspection or copying during "not less than six regular business hours over not fewer than three business days per week, or during the public agency's regularly scheduled business hours, whichever is less." Id. This means that an agency may limit OPRA hours to two (2) hours a day over three (3) business days a week or their regular business hours for that week, whichever is less.

The GRC notes that small agencies with limited OPRA hours must notify the public of those hours. See Frost v. North Hudson Reg'l Fire & Rescue, GRC Complaint No. 2008-198 (December 2009) (finding custodian counsel's argument that the agency was qualified for limited OPRA hours without merit).

All other agencies must process OPRA requests during their regular business hours.

What happens if I submit my OPRA request to an employee other than the custodian?

OPRA requires non-custodial officers or employees receiving OPRA requests to perform one of two actions. Specifically, any officer or employee of a public agency who receives a request for access to a government record may either:

1) Forward the request to the agency's records custodian; or
2) Direct the requestor to the agency's records custodian.

In other words, a public agency may either permit any employee to accept a request and forward it to the appropriate custodian, or the employee may refuse to accept the request and direct the requestor to the appropriate custodian. N.J.S.A. 47:1A-5(h). The request will not be considered "submitted" until it is received by the custodian.

When should I expect a response to my OPRA request?

Generally, custodians should fulfill a request **as soon as possible** but not later than seven (7) business days after the request is received, provided that the record is currently available and not in storage or archived. N.J.S.A. 47:1A-5(i). However, there are several exceptions as follows to include those added through P.L. 2024, c.16:

- The requestor seeks "immediate access" records as outlined in N.J.S.A. 47:1A-5(e); where the custodian must respond "immediately" disclosing responsive records not to exceed twenty-four (24) months old.
- The requestor seeks information required to be disclosed by N.J.S.A. 47:1A-3(b), where the custodian must respond disclosing the information within twenty-four (24) hours or as a soon as practical.

- The requestor seeks records for a "commercial purpose" as defined in N.J.S.A. 47:1A-1.1, where the response time frame is fourteen (14) business days, but the custodian is required to notify the requestor of the additional time within seven (7) business days. N.J.S.A. 47:1A-5(i). However, the response time frame can be reduced to seven (7) business days upon payment of no more than two times the cost to produce the responsive records.
- The requestor seeks records requiring review for compliance with "Daniel's Law" (N.J.S.A. 47:1B-1, *et seq.*), where the response time frame is fourteen (14) business days, but the custodian is required to notify the requestor of the additional time within seven (7) business days. N.J.S.A. 47:1A-5(i).
- The requestor seeks certain types of election records, as outlined in N.J.S.A. 47:1A-5.3, where the response time frame is immediate but no later than two (2) business days.
- The requestor submits a request during a state of emergency, public health emergency, or state or local disaster emergency, where the statutory time frame does not apply. N.J.S.A. 47:1A-5(i)(2). However, custodians should still attempt to respond within the statutorily applicable time frame where reasonable.

Note: Fire district employing one or fewer full-time employees serving as custodians may add seven (7) business days to the seven (7) or fourteen (14) business day response time frames.

It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA. In accordance with P.L. 2024, c.16, OPRA now expressly allows for an electronic response to an OPRA request filed electronically if the records sought are available electronically. N.J.S.A. 47:1A-5(f).

If the custodian fails to respond to the requestor within the applicable response time frame after receiving a request, the request is "deemed" denied. N.J.S.A. 47:1A-5(i).

When does the response time clock begin?

The time frame to fulfill a request for access to government records under OPRA does not begin until the request form or complete written equivalent request has been delivered to the custodian. The first (1st) business day is the business day following the custodian's receipt of the request. Sending an OPRA request to the wrong officer or employee may result in a response delay. However, an agency must make the identity of the custodian readily known to the public.

Can I access any records immediately?

Yes. OPRA requires that custodians must ordinarily grant *immediate* access to budgets, bills, vouchers, contracts (including collective negotiations agreements and individual employment contracts), and public employee salary and overtime information. N.J.S.A. 47:1A-5(e) (emphasis added). However, and as noted above, P.L. 2024, c.16 provides that any immediate access records older than twenty-four (24) months are not subject to "immediate access". Also, under P.L. 2024, c.16, OPRA now also generally allows for specific election records to be disclosed "immediately," but within two (2) business days. N.J.S.A. 47:1A-5.3.

"Immediate access" means at once, without delay. Exceptions may include instances in which the requested records are voluminous, in use, in storage, or require medium conversion. In such

instances, the custodian must provide access as immediately as possible. Agencies should act reasonably, however, using their best efforts to comply with this requirement.

If a custodian cannot provide immediate access to records for a legitimate reason, the custodian must reduce such reason to writing and request an extension of time immediately, as required by statute.

Can the custodian take more than seven (7) business days to respond to my OPRA request?

In accordance with P.L. 2024, c.16, N.J.S.A. 47:1A-5(i)(1) now contemplates two (2) types of extensions:

- If records are in storage or archived, a custodian may take an extension not to exceed twenty-one (21) business days from the date the requestor is noticed of the extension.
- If there exists "unforeseen circumstances or circumstances that otherwise necessitate additional time", a custodian may take an extension of time that is reasonable. See Ciccarone v. v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014).

Failure to grant or deny access by the extended deadline date results in a deemed denial of the request.

What should a custodian's response to my request contain?

A proper response to an OPRA request:

- is in *writing* within seven (7) business days!!!
- grants access, denies access, seeks clarification, or requests an extension of time.
- addresses each record sought or each request item.
- addresses requestor's preferred method of delivery.
- if special service charge assessed, provides estimate (including explanation and itemized fees and charges) and gives requestor opportunity to accept or reject charge.
- Where applicable, includes a document index that identifies each record requested and the specific legal basis for a denial of access (including redactions) to each record.

Verbal responses, unaccompanied by a written response, even if within the statutorily mandated seven (7) business days, are not valid under OPRA.

How much can the custodian charge me for my OPRA request?

N.J.S.A. 47:1A-5(b) provides that:

> (1) 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.

> 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 if the request is completed by directing the requestor to the requested government record that is available on the public agency's website or the website of another public agency.
>
> (2) 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 [OPRA].
>
> [Id.]

Based on the forgoing, custodians may apply the following copy costs to OPRA requests:

1) Custodians may charge OPRA requestors any copy fees that are established by other New Jersey laws or regulations, if said fees exist.

   For example, N.J.S.A. 22A:4-1a sets forth specific fees for certain records filed with the New Jersey Department of Treasury (and requested from the Department of Treasury). Specifically, said statute provides that "[i]f a roll of microfilm images is requested, the State Treasurer shall collect a fee of $1.00 for each image on the microfilm roll." Thus, if a requestor seeks access to a microfilm roll from the Department of Treasury, the Department's custodian must charge the fees established in N.J.S.A. 22A:4-1a. The same applies for any other records that have specific fees established in other New Jersey laws or regulations.

2) Custodians must charge a flat rate of $0.05 per letter size (8 ½" x 11") page or smaller, and $0.07 per legal size (8 ½" x 14") page or larger, *if providing a requestor with paper copies*. **Note that P.L. 2024, c.16 removed consideration of calculating an "actual cost" exceeding the foregoing copying costs.**

   For example, a custodian providing access to three (3) pages of printed meeting minutes on letter size pages would charge a requestor $0.15 ($0.05 per page for three (3) pages = $0.15).

3) Records provided via e-mail and facsimile are free of charge. However, custodians may charge for the actual cost to provide access to electronic records on supplies such as flash drives, CDs, DVDs, videotapes, audiotapes, *etc.*

   The "actual cost" is the specific fee the agency paid to purchase the materials. For example, if the GRC purchased a package of 100 CD-ROMs for $100 and provided records to a requestor on 1 CD-ROM, the actual cost of said CD-ROM is $1.00 ($100 ÷ 100 = $1.00).

   There could be exceptions to the "free of charge" policy. In one instance, the Council allowed a public agency to charge the cost associated with redactions because they did not have the capability to redact electronically prior to providing the responsive records. See Paff v. Twp. of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order dated May 24, 2011).

Deposits

OPRA permits the custodian to require a deposit against costs for reproducing records sought whenever they anticipate that reproduction cost for the records requested will exceed $5.00. N.J.S.A. 47:1A-5(f).

What is a special service charge?

In accordance with N.J.S.A. 47:1A-5(c), an agency may collect a special service charge in addition to the actual cost of duplicating records. A public agency may assess a special service charge whenever the nature, format, manner of collection, or volume of records to be inspected or copied is such that:

- The record cannot be reproduced using ordinary equipment, in ordinary business size; or
- Involves an extraordinary expenditure of time and effort to accommodate the request.

Actual direct cost means hourly rate of the lowest level employee capable of fulfilling the request (no fringe benefits). A special service charge is calculated on a case-by-case basis. No special service charges can be established in advance by ordinance.

The custodian must notify the requestor in advance of the special service charge. Under P.L. 2024, c.16, custodians are now required to include as part of their response "an explanation for and an itemized list of the fees or charges" associated with the assessed fee at the time it is provided to the requestor. N.J.S.A. 47:1A-5(c).

The requestor has the right to disagree with the special service charge. If the custodian and requestor cannot reach an agreement regarding the special service charge, the request could be considered denied. Requestors may challenge a custodian's special service charge by filing a Denial of Access Complaint with the GRC or filing an action in the Superior Court of New Jersey. However, under P.L. 2024, c.16, the charge will be presumed reasonable and the burden to prove otherwise shifts to the requestor.

The GRC maintains its 14-point analysis, a copy of which can be viewed at as a guideline for assessing a special service charge https://www.nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf. However, the GRC's analysis of a particular special service charge issue may change given the new rebuttal standard set forth by P.L. 2024, c.16.

Can the custodian "black out" portions of the records I requested?

Under OPRA, a government record that is otherwise publicly accessible may contain non-disclosable information that should be redacted. N.J.S.A. 47:1A-(g). Redaction means editing a record to prevent disclosure of information that is exempt from disclosure. Words, sentences, paragraphs, or whole pages may be subject to redaction.

How Custodians Can Redact

If a record contains information that must be redacted, such as a social security number, *redaction must be accomplished by using a visually obvious method that shows the requestor the specific location of any redacted material in the record*.

If full pages are to be redacted, the custodian should give the requestor a visible indication that a particular page of that record is being redacted, such as a blank sheet bearing the words "Page Redacted", or a written list of the specific page numbers being withheld. The purpose is to provide notice to the requestor, making it clear that material was redacted and is not being provided.

If an electronic document is subject to redaction (*i.e.*, word processing or Adobe Acrobat® files), custodians should be sure to delete the material being redacted and insert in place of the redacted material either asterisks or some other obvious indication of the redaction. Techniques such as "hiding" text or changing its color so it is seemingly invisible should not be used because: 1) it is not visually obvious; and 2) sophisticated computer users can detect the changes and potentially undo the redactions.

Explaining Why a Redaction is Made

When redactions are made to a record, the custodian can use either the request form to explain the lawful basis for those redactions or use a separate document to identify the redactions and lawful basis therefor, such as a document index. This principle also applies if pages of information are redacted. Sometimes it may be clear from inspection, such as where record form field called "Social Security Number" has been blacked out where the number would appear. The bottom line is that the requestor has a right to know the reason for the redaction, and the custodian has the legal obligation to provide the specific lawful basis therefor per N.J.S.A. 47:1A-5(g).

Custodians must identify the legal basis for **each** redaction!! This may be achieved in any number of ways, including but not limited to annotations next to the redaction or a document index.

What is a broad and/or unclear request?

Under P.L. 2024, c.16, OPRA now provides that a custodian is not required to fulfill an OPRA request if they determine ". . . that the request would require research and the collection of information from the contents of government records and the creation of new government records setting forth that research and information." N.J.S.A. 47:1A-5(g).

This language reflects the longstanding ability of custodians to deny access to requests considered invalid. The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad ("any and all," requests seeking "records" generically, *etc.*) and requires a custodian to conduct research. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking non-electronically stored information or asking questions. See *e.g.* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is submitted on a form invoking some other process or a non-form request not invoking OPRA. See *e.g.* Naples v. N.J. Motor Vehicle Comm'n, GRC Complaint No. 2008-97 (December 2008).

Additionally, P.L. 2024, c.16 sets forth criteria for a valid OPRA request seeking communications, including e-mails, text messages, other forms of correspondence, and social media communications. N.J.S.A. 47:1A-5(g). The criteria, which mirrors those originally devised in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010), are comprised of:

- "[S]pecific job title or accounts" (including "specific individuals by . . . job title and position")
- "[A] specific subject matter"
- "[A] reasonable time period"

Custodians are permitted to deny access to an OPRA request that does not conform to the above criteria.

> Example of an overly broad request: "Any and all records related to the construction of the new high school."

The term "records" does not reasonably identify a specific government record.

> Example of a valid request: "Any and all e-mails between Jane Doe and John Smith regarding the construction of the new high school from January 1, 2009, to February 28, 2009."

This request follows the new statutory standard for communications and would be considered valid.

A custodian is obligated to ***search*** files to ***find*** the identifiable government records listed in the Complainant's OPRA request. A custodian is not required to ***research*** files to figure out which records, if any, might be responsive to a broad and unclear OPRA request.

A custodian may, but is not required to, seek clarification of a broad or unclear request. The custodian's request for clarification must be in writing, within seven (7) business days of receipt of the request. If a custodian seeks clarification of an OPRA request, the response time clock stops until the requestor provides a response to the custodian. Upon receipt of the requestor's clarification, the applicable statutory response time begins anew.

What is a substantial disruption to agency operations?

If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record only **after** first attempting to reach a reasonable solution with the requestor that accommodates the interests of both the requestor and the agency. N.J.S.A. 47:1A-5(g).

This is a subjective determination, based on an agency's resources available to fulfill a request.

Example: Caggiano v. N.J. Dep't of Law & Pub. Safety, Div. of Consumer Affairs, GRC Complaint No. 2007-69 (September 2007). The custodian certified that an extended inspection of records as contemplated by the complainant (for approximately a week) would substantially disrupt agency operations by requiring two (2) individuals to supervise the inspection. The Council stated that:

> The Custodian has reasonably offered to provide the Complainant with copies of all the records responsive upon payment of the statutory copying rates, which the Complainant has declined. The Custodian has also reasonably offered the Complainant two (2) hours to inspect the seven hundred forty-five (745) pages responsive to the Complainant's request, of which the Custodian states a substantial

> portion are records which the Complainant himself submitted to the Division. Additionally, the Custodian has reasonably offered to accommodate the Complainant's request by charging a special service charge for the hourly rate of a Division of Consumer Affairs employee to monitor the Complainant's inspection of the requested records in the event that said inspection exceeds two (2) hours. Further, the Custodian has reasonably offered to copy the remaining records at the OPRA copying costs in the event the Complainant exceeds a reasonable amount of time for the record inspection, which the Custodian states is one (1) business day. However, the Complainant objects to paying any inspection fees, as well as a two (2) hour inspection time limit.

The Council held that "because the Custodian has made numerous attempts to reasonably accommodate the Complainant's request but has been rejected by the Complainant, the Custodian has not unlawfully denied access to the requested record under N.J.S.A. 47:1A-5(c) and N.J.S.A. 47:1A-5(g).

Can a custodian deny me access to government records?

Yes. There are multiple exemptions to public access contained in OPRA. These exemptions are listed in Section 1 of this guide. If a record requested or portions thereof fit into any of OPRA's exemptions, the custodian may deny access.

If the custodian is unable to comply with a request for access, the custodian must indicate the specific reason for denying access on the request form and promptly return a copy to the requestor. N.J.S.A. 47:1A-(g). The form may be signed and dated by the custodian, as it would serve as the basis for an appeal by the requestor to Superior Court or the GRC. However, a custodian's written response in another format is acceptable, including an electronic response to any electronic records request if government records are available electronically." N.J.S.A. 47:1A-5(f).

What can I do if a custodian denies me access to government records?

Under P.L. 2024, c.16, N.J.S.A. 47:1A-6 provides that a person who is denied access to a government record and "is accurately identified by name" can choose to:

1. File suit in Superior Court: **Inquiries regarding the proper way to file a complaint with New Jersey Superior Court should be directed to the relevant county court. Additionally, requestors may consider consulting with an attorney to learn about initiating and pursuing lawsuits in the courts.**

2. File a complaint with the [GRC].

A requestor cannot do both!

Requestors may file complaints within 45 calendar days from the date of denial. However, anonymous requestors are prohibited from filing a complaint. N.J.S.A. 47:1A-5(f).

The GRC's regulations at N.J.A.C. 5:105-2.1 previously implemented a 60-calendar statute of limitation but allowing individuals to submit a motion to file within time. While the 45-calendar day time frame now supersedes that regulatory provision, the GRC will continue to entertain motions to file within time for untimely filed complaints until further notice.

SECTION 3 – THE GOVERNMENT RECORDS COUNCIL (GRC)

What is the GRC?

OPRA established the GRC in the New Jersey Department of Community Affairs.

In accordance with P.L. 2024, c.16, the total number of Council members have increased from five (5) to nine (9) members. N.J.S.A. 47:1A-7(a). Those are the Commissioner of the Department of Community Affairs or the Commissioner's designee, which serves as chair; and eight (8) public members. Initially, all eight (8) are appointed directly by the Governor and serve a three-year term. Four (4) of those members are direct appointments (no more than two (2) from the same political party); two (2) are appointed from persons recommended by the President of the Senate (no more than one (1) from the same political party); and two (2) are appointed from persons recommended by the Speaker of General Assembly (no more than one (1) from the same political party).

After the expiration of the above terms, any new members will serve a five-year term and be appointed as follows: four (4) appointed by the Governor with the advice and consent of the Senate (no more than two (2) from the same political party); two (2) directly appointed by the Governor from persons recommended by the President of the Senate (no more than one (1) from the same political party); and two (2) directly appointed by the Governor from persons recommended by the Speaker of the General Assembly (no more than one (1) from the same political party).

Members now also receive a salary equivalent to the members of the Local Finance Board in the Division of Local Government Services. A public member shall not hold any other state or local elected office while serving as a member of the Council. P.L. 2024, c.16 has also removed the public employee or appointee prohibition.

OPRA permits the Council to employ an executive director and such professional and clerical staff as is necessary to help it carry out its functions.

What are the duties of the GRC?

The GRC has statutory authority to:

- 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;
- Make training opportunities available for records custodians and other public officers and employees to explain the law governing access to public records; and
- Promulgate rules and regulations to establish a uniform government record request form for all government record requests permitted for use by any public agency that includes the required form components as set forth in N.J.S.A. 47:1A-5(f). The form shall include

certification that a party to a legal proceeding may not request a government record if the record sought is the subject of a court order or a pending discovery request. The council shall make the form available electronically and in print and shall make the form available to incarcerated individuals; and

- Operate an informational website and a toll-free help-line staffed by knowledgeable employees of the Council during regular business hours which will 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 GRC when access has been denied.

The GRC is also required to periodically review its website and make adjustments as needed to achieve maximum clarity and usefulness of all resources posted thereon.

What is the scope of the GRC's authority?

The GRC only has authority to adjudicate complaints regarding whether a public agency lawfully denied **access** to records sought pursuant to an OPRA request.

- The GRC does not have authority over the accuracy or condition of records.
- The GRC lacks authority over records retention. For retention schedules, contact Records Management Services within the New Jersey Department of Treasury, Division of Revenue and Enterprise Services.
- The GRC does not have jurisdiction over the Judicial or Legislative Branches of State Government or any agency, officer, or employee of those branches. N.J.S.A. 47:1A-7(g).
- The GRC does not have jurisdiction over Open Public Meetings Act ("OPMA") issues. Questions regarding OPMA should be directed to a county prosecutor's office.
- The GRC does not have authority over other types of request processes (administrative, common law, discovery, *etc.*).
- The GRC does not have authority over how a custodian utilizes their legal counsel.
- The GRC cannot adjudicate a complaint where a parallel action is pending or was previously adjudicated in New Jersey Superior Court.

What can the GRC do for me?

The GRC can provide guidance regarding the general accessibility of government records. If you want to request a specific record or you have been denied access to a specific record, the GRC can inform you about any past decisions regarding the same or similar records, if in existence, for guidance. The GRC can also provide guidance regarding the request process and what to expect once an OPRA request is submitted. Also, the GRC can investigate your unlawful denial of access allegation should you decide to file a formal Denial of Access Complaint.

The GRC cannot engage in pre-complaint intervention, nor can it provide you legal advice.

How is a Denial of Access Complaint filed and handled?

A complaint to the GRC must be in writing on the proper Denial of Access Complaint form. N.J.A.C. 5:105-23(c). A complete complaint sets forth:

1) the facts regarding the request for access to the government records;

2) the specific records requested, as well as the circumstances under which the said records were sought;
3) the denial of access by the records custodian of the public agency; and
4) the legal arguments as to why the requestor believed the request was unlawfully denied.

The complaint must also, to the extent possible, provide supporting documentation as outlined on page 2 of the Denial of Access Complaint form. Complaint forms are available from the Council office or as an electronic fillable .pdf from the Council's website at www.nj.gov/grc/register/. Incomplete complaint forms, including those filed beyond the 45-day statute of limitation without a motion to file within time, will be returned to the filer advising of the deficiency. Further, complaints will not be processed until the requestor cures those deficiencies and submits their complaint.

Additional Requirements

- Complaints must be filed within 45 calendar days of the alleged denial.
- Complaints must include the complainant's name, address, telephone number or fax number, and email address, if available. N.J.A.C. 5:105-2.3(l).
- Complaints in excess of fifty (50) pages are required to be submitted in hardcopy. N.J.A.C. 5:105-2.3(c).
- Anonymous requestors are not permitted to file a complaint per N.J.S.A. 47:1A-5(f).

Mediation is only available to requestors who have filed a formal Denial of Access Complaint. Upon receipt of the complaint, the GRC establishes whether the complainant agreed to mediate said complaint. If so, the GRC will send an offer of mediation to the respondent public agency. If the agency also agrees, the complaint will be referred to mediation.

Mediation is an informal, *confidential*, non-adversarial process with the objective of helping the parties reach a mutually acceptable, voluntary agreement. When a complaint enters mediation, the mediator will help the parties identify the relevant complaint issues, will encourage joint problem-solving, and will explore settlement alternatives with the parties.

If any party declines mediation or if mediation fails to resolve the matter by agreement, the GRC will initiate an investigation concerning the facts and circumstances set forth in the complaint.

What happens when the GRC starts investigating a complaint?

At the request of the GRC, the public agency must provide a Statement of Information ("SOI") setting forth the facts regarding the request for access to the government records, describing the specifics of the custodian's denial to those records. N.J.A.C. 5:105-2.4(a), (g).

All proceedings of the GRC are conducted as expeditiously as possible.

Step 1: The Council must decide whether the complaint is within its jurisdiction, or whether the complaint is frivolous or without any reasonable factual basis.

Step 2: If the Council concludes that the complaint is outside its jurisdiction or that the complaint is frivolous or without factual basis, it will issue an administrative disposition in writing to dismiss the complaint and send the decision to the complainant and custodian.

Step 3: If the Council determines that the complaint is within its jurisdiction and is not frivolous and has a factual basis, the Council will notify the records custodian of the nature of the complaint and the facts and circumstances set forth in the complaint.

Step 4: The custodian, through the SOI, will have the opportunity to provide the Council with a response containing information concerning the complaint.

Step 5: If the Council is able to make a determination about whether a record should be provided based upon the complaint and the custodian's response, it will issue a decision in writing and send it to the complainant and the records custodian.

Step 6: If the Council is unable to make a determination about whether a record should be provided based solely upon the submissions, the Council will provide for a hearing on the matter at its discretion. The hearing will be held in conformity with the rules and regulations for hearings by a state agency in contested cases under the Administrative Procedure Act, when they are applicable.

Step 7: Following the hearing, the Council will, by a majority vote of its members, render a decision as to whether the government record in question, or a portion of it, must be made available for public access to the requestor.

Step 8: If the Council determines by a majority vote that a custodian **knowingly** and **willfully** violated OPRA and is found to have **unreasonably** denied access under the **totality of the circumstances**, the Council will impose civil penalties provided for under OPRA. N.J.S.A. 47:1A-11. Additional disciplinary proceedings may be initiated against a public official, officer, employee, or custodian against whom a penalty has been imposed.

Step 9: A final decision of the Council may be appealed to the Appellate Division of the New Jersey Superior Court within 45 calendar days from the date the decision is rendered. N.J.S.A. 47:1A-7(e). Parties also have the option of filing a request for reconsideration directly with the GRC within 10 business days. N.J.A.C. 5:105-2.10.

Meetings held by the Council are subject to OPMA. The Council may move into closed session in accordance with OPMA during that portion of any proceeding in accordance with N.J.S.A. 10:4-12(b). See N.J.S.A. 47:1A-7(f).

Finally, the Council is statutorily prohibited from charging any party a fee in regard to actions filed with the Council. N.J.S.A. 47:1A-7(f).

What else should I know about Council hearings and actions?

Letters of Representation

If a complainant or "public agency" is represented by an attorney in a Denial of Access Complaint, the GRC requires that any representative of a party engaged in a denial of access complaint must submit a formal letter of representation. N.J.A.C. 5:105-2.3(f); 2.4(f). Absent receipt of the formal letter of representation, the GRC will not update the service list and will only communicate with the complainant and custodian identified in the complaint.

Ex Parte Communications

The GRC's regulations define "*ex parte*" communications, which are substantive complaint submissions not shared with all complaint parties and provide that these communications will not be considered as part of an adjudication. N.J.A.C. 5:105-1.3. The GRC will not consider any substantive submissions that are not copied to all parties.

Intervenors

The GRC's regulations define a process for intervenors, specifically N.J.A.C. 5:105-2.2(b). This provision provides a step-by-step process on how to submit an application for intervention, the time frame within which a party must file objections, the factors that the GRC needs to consider as part of its determination, and the specific manner in which the GRC must notify the parties of its decision.

Dismissal Without Prejudice Due to Disclosure

Under P.L. 2024, c.16, the GRC and courts are required to dismiss a complaint "without prejudice" (meaning a complaint can be refiled after dismissal) when the public agency discloses the records at issue in a Denial of Access Complaint within seven (7) business days after receipt of the complaint. N.J.S.A. 47:1A-6. The GRC notes that prevailing party attorney's fees, discussed below, may be considered as part of this dismissal.

Prevailing Party Attorney's Fees

If represented by counsel, a requestor who prevails in any proceeding may be entitled to a reasonable attorney's fee. N.J.S.A. 47:1A-6. Throughout OPRA's history, fee awards were mandatory whenever a requestor represented by counsel prevailed in a Denial of Access Complaint or court filing.

Under P.L. 2024, c.16, N.J.S.A. 47:1A-6 provides that the fee shifting provision is now permissive, meaning there may be instances where a requestor prevailing in a proceeding may not receive an award of attorney's fees. However, the prevailing party fee award becomes mandatory when the agency: 1) unreasonably denied access to a record; 2) acted in bad faith; or 3) committed a knowing and willful violation. Id. As noted above, a fee award may also be considered if a complaint is dismissed without prejudice because the agency disclosed the records at issue within seven (7) business days after receiving a Denial of Access Complaint. Id.

Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), a complainant is a "prevailing party" if they achieve the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Also, when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed.

Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a complainant is a "prevailing party" if they can demonstrate that: 1) a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; and 2) that the relief ultimately secured by plaintiffs had a basis in law.

Prevailing party fees are not awarded when a requestor does not prevail, even if the Council finds that a technical violation of OPRA occurred. Additionally, fees cannot be awarded to attorneys representing themselves in a complaint. See Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006); Feld v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. 2019).

Knowing and Willful Penalty

Prior to P.L. 2024, c.16, the GRC interpreted OPRA to require the individual found to have knowingly and willfully violated OPRA to personally pay the civil penalty. However, the new provision now explicitly provides that:

> If a public official, officer, employee, or custodian who knowingly and willfully violates OPRA and is found to have unreasonably denied access under the totality of the circumstances, *the public agency employing the individual(s) 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.
>
> [N.J.S.A. 47:1A-11(a) (emphasis added).]

The penalty shall be collected and enforced in proceedings in accordance with the Penalty Enforcement Law of 1999. N.J.S.A. 47:1A-11(c). Further, an agency is permitted to take appropriate disciplinary action against any individual(s) on whom the civil penalty has been imposed. N.J.S.A. 47:1A-11(d).

The GRC notes that persons other than the custodian may be subject to the civil penalty. See Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-107 (Interim Order dated February 25, 2009).

GRC's Regulations

For more information about the rules pertaining to the complaint process, see the GRC's promulgated regulations (N.J.A.C. 5:105) on our website at N.J.A.C. 5:105 (nj.gov)

SECTION 4 – SPECIAL CIRCUMSTANCES

Can I have access to government records under OPRA for commercial use?

Yes. Commercial requestors are still permitted to utilize OPRA. However, under P.L. 2024, c.16 a person seeking to directly, or through another party, use records for a "commercial purpose" must certify to this fact as part of their OPRA request. For purposes of clarity, "commercial purpose" means:

> [T]he direct or indirect use of any part of a government record for sale, resale, solicitation, rent, or lease of a service or any use by which the user expects a profit either through commission, salary, or fee.
>
> [N.J.S.A. 47:1A-1.1.]

The GRC notes that there are exceptions to this definition, which are outlined therein. They include news media, journalists, labor unions, and non-profits if they are not selling the information to a third party with expectation of a fee. Id.

A requestor who intends to use the record for the above purpose or intends to give the records to another person for such purpose, shall certify that the intended use is for "commercial purposes". A fourteen (14) business day response time frame applies to "commercial purpose" requests unless the requestor pays up to two times the cost to reduce the time frame to seven (7) business days. Custodians must notify those seeking records for a "commercial purpose" of the fourteen (14) business day response time frame within seven (7) business days.

Finally, a requestor intentionally failing to certify that they will use the record for a commercial purpose "shall be subject to a civil penalty of $1,000 for the first offense, $2,500 for the second offense, and $5,000 for each subsequent offense." N.J.S.A. 47:1A-11. This fine may be imposed by the courts.

Can I seek access to records that are connected to a litigation?

Potentially. A requestor may seek records in connection with litigation, whether past, present, or future, as long as the records sought are not part of a court order, including pending discovery request.

Under P.L. 2024, c.16, parties to a litigation (which include a party subject to a court order, legal representation, and other persons acting on behalf of the forgoing) are not permitted to use OPRA to seek records that are already sought in a court order, including a pending discovery request. N.J.S.A. 47:1A-5(g). Labor unions seeking records in certain circumstances are the exception to this provision. As part of this new provision, requestors are now required to certify whether the records sought pertain to pending litigation and if so, identify the proceeding.

How many OPRA requests can I make to one agency?

OPRA does not limit the number of OPRA requests one person can submit to a particular agency. However, P.L. 2024, c.16 provides for limitations on submitting OPRA requests as follows:

- Requestors cannot submit an OPRA request to multiple agencies in a single transmission. N.J.S.A. 47:1A-5(g).
- Custodians can deny access to OPRA requests submitted to multiple custodians within one public agency if an identical or substantially similar request is already pending before the agency. N.J.S.A. 47:1A-5(g).

Can I request the same records more than once?

Previously, the Council often looked to Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008) when addressing this issue. There, the Appellate Division held that a complainant could not have been denied access to a requested record he admitted he held in his possession at the time of the OPRA request. The Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry.

With the above in mind, under P.L. 2024, c. 16, OPRA now provides that a custodian is not required to fulfill an OPRA request for records identical to a prior OPRA request if the information in the record has not changed. This provision does not apply to periodic requests for regularly updated records. N.J.S.A. 47:1A-5(i).

Can I bring my own personal copying device into an agency's office to make copies?

A custodian may, in their discretion, allow the use of personal copying devices (photocopiers, scanners, *etc*.) by requestors depending upon factors including, but not limited to, the specific circumstances of the request, the particular documents requested, office hours, available space within the office, availability of personnel, availability of electrical outlets, consumption of energy, the need to preserve the security of records and protect them from damage, or other legitimate concerns. A custodian may require that photocopying or scanning be done on the agency's equipment if it would not disrupt operations, interfere with the security of records, or expose records to potential damage.

Can the custodian provide on-site inspection but deny copies of requested records?

No. If a record is subject to public access under OPRA, the record is available for public inspection as well as copying. Also, it is presently unclear whether copyright law acts prohibit access to records that are otherwise accessible under OPRA.

Can a custodian direct me to their website as a means of disclosing responsive records?

Under P.L. 2024, c.16, OPRA allows custodians to direct requestors to records maintained on their agency's website and creates a clear process for situations where the requestor is having difficulty accessing those records. N.J.S.A. 47:1A-5(e).

Specifically, if a record sought under OPRA is posted in a "complete and unabridged form" on the agency's website, the custodian can direct the requestor thereto and provide any needed direction on how to access same. If the requestor does not respond within seven (7) business days of the response, the request shall be considered fulfilled unless the record omits disclosable information. If the record is incomplete or abridged, the custodian is required to disclose the original version of the record with redactions, where applicable.

However, if the requestor is having difficulty locating the record after a good faith attempt to do so, the following applies:

- The requestor must notify the custodian of this difficulty within seven (7) business days of the disclosure response.
- Upon notification, the custodian is required to reasonably assist the requestor within seven (7) business days to locate and access the record.
- If the requestor is still unable to locate and access the record, they may request a hardcopy of said record.
- Upon notification, the custodian is required to disclose the record in hardcopy at no more than two (2) times the applicable copy cost within seven (7) business days of the requestor's notification.

This new provision is reminiscent of the policy set forth in Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014), which reversed the GRC's prior, longstanding policy that barred a custodian from merely directing a requestor to an agency's website to obtain records responsive to an OPRA request.

John C. Macce Bio

John Macce is a Partner in the law firm Macce & Cresti, P.C. He is a Certified Civil Trial Attorney having been originally certified in 2000 and recertified three times since. Mr. Macce's practice covers a broad area of civil law with a focus on property/casualty and tort defense on matters received from the insurance industry as well as representing multiple commercial clients. Mr. Macce also represents many municipal entities in Title 59 actions and has also been involved recently in clergy abuse cases.

Mr. Macce is member of the New Jersey State Bar Association's Board of Trustees where he has worked with the Putting Lawyers First Committee. In addition to his position as Trustee he has been a longstanding member of the NJSBA's Judicial Administration Committee and Insurance Defense Committees. He served as the Hunterdon County representative to the NJSBA's Judicial and Prosecutorial Committee from 2007 to 2013.

Mr. Macce is currently a Vice Chair of the District XIII Fee Arbitration Committee for the second time having held this position previously from 2018-2021. He is an active member of the Hunterdon County Bar Association where he is the Chair of the Hunterdon County Judicial and Prosecutorial Committee and the co-chair of the Mock Trial Committee, Bench/Bar Liaison Committee, By-Laws Committee as well as a long standing and prior co-chair of the Civil Practice committee.

KIMBERLY ESPINALES-MALONEY, J.S.C.

BIOGRAPHY

Kimberly Espinales-Maloney was nominated by New Jersey Governor Chris Christie as a Superior Court Judge in June 2014. On July 11, 2014, after confirmation by the Legislature, Ms. Espinales-Maloney became the first Ecuadorian American Superior Court Judge in Hudson County. She currently sits in the Civil Division where she presides over civil, special civil, landlord/tenant and small claims matters. She is also the Special Civil Supervising Judge and sits on the Supreme Court Committee on Diversity, Inclusion and Community Engagement.

Prior to her appointment to the bench, she was a Certified Civil Trial Attorney who represented various insurance companies and their insureds in both personal injury and commercial lawsuits. She was the sole trial counsel in over thirty jury trials, with a high percentage of no cause verdicts.

Aside from her practice, Ms. Espinales-Maloney was active in the legal community. Immediately preceding her appointment, she was an Officer of the Hudson County Bar Association and a member of the Civil Practice and Diversity Committees. She was also a barrister for the Hudson Inns of Court as well as a member of the New Jersey State Bar Association.

Ms. Espinales-Maloney began her legal career as a law clerk for the Honorable Lawrence Weiss, Superior Court Judge, Civil Division, in Union County. She earned a J.D. in 1998 from Seton Hall University School of Law and a B.A. in Political Science in 1994 from Rutgers College.

FRANK D. DERIENZO

Back to All Attorneys (/attorneys/)

Associate

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FRANK D. DERIENZO graduated Cum Laude from Montclair State University in 2009 and received his J.D. from the Rutgers University School of Law-Newark in 2012. Mr. DeRienzo joined the firm in 2012 and maintains an active general liability defense practice with a concentration in automobile and premises liability, products liability and commercial/residential fire loss and property damage claims. He has tried numerous cases in

the Superior Court of New Jersey and is currently admitted in New Jersey, the District Court of New Jersey and New York. Mr. DeRienzo is an active member of the New Jersey State Bar Association, serving on the Board of Trustees from 2021-2022 and the Nominating Committee in 2024-2025, as well as sitting on the Legislative Committee, Civil Trial Bar Executive Committee and Insurance Defense Executive Committee. Outside of the courtroom, Mr. DeRienzo has been a firefighter in Parsippany-Troy Hills for over 15 years, holding the ranks of Captain, Deputy Chief and President.

PRACTICE AREAS

ADMISSIONS

- State of New Jersey
- State of New York
- United States District Court for the District of New Jersey

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Representative Matters

H.C. Equities, LP v. County of Union, 247 N.J. 366 (2021)

Alliance for Disabled in Action v. Township of North Brunswick, 185 N.J. 339 (2005)

Spriggs v. City of Plainfield, (App. Div.) 2022 WL 16331

Diaz v. South Plainfield, (D.N.J.) 2017 WL 3315286

Urbanski v. Township of Edison, (App. Div.) 2014 WL 183966

Bar Admissions

New Jersey (2001)

U.S. District Court, District of New Jersey (2001)

U.S. Court of Appeals for the Third Circuit (2003)

U.S. Supreme Court (2015)

BIOGRAPHY

John F. "Jack" Gillick is a Partner at Rainone, Coughlin, Minchello, LLC and has an extensive history representing both public and private entities and their employees. Mr. Gillick concentrates his practice on the litigation of employment, civil rights, and personal injury claims, and has represented clients in dozens of jury trials on matters ranging from unlawful discrimination to constitutional violations to premises and automobile liability. He also has experience in conducting workplace investigations, providing employee and public official training, and handling indemnification and other employment-related contract issues. In addition to his significant trial and institutional work, Mr. Gillick has argued and won multiple appeals before both the New Jersey Supreme Court and Third Circuit Court of Appeals, has been counsel of record on numerous appellate opinions, and is admitted to practice before the United States Supreme Court.

The Immediate Past President for the Middlesex County Bar Association, Mr. Gillick currently serves as Vice President for the New Jersey State Bar Foundation, President of the Middlesex County Trial Lawyers Association, and Legal Counsel for the Boy Scouts of America, Monmouth Council. Mr. Gillick also serves as a member of the Judicial Administration and Insurance Defense Committees for the New Jersey State Bar Association and is a former President of the Middlesex County Bar Foundation and Trustee for the New Jersey Institute for Continuing Legal Education. He has also taught continuing legal education

Education

Juris Doctor, Seton Hall University School of Law (2001)

Bachelor of Arts, English Literature, William Paterson University (1996)

Bachelor of Arts, Secondary Education, William Paterson University (1996)

Honors & Recognition

"Super Lawyer," New Jersey Monthly Magazine (2009-present)

Dow Jones Newspaper Fund (1995)

Outstanding Senior, William Paterson University (1995)

"Rising Star," New Jersey Super Lawyers Magazine/New Jersey Monthly, 2009

Professional Associations and Memberships

New Jersey Institute for Continuing Legal Education (NJICLE) – Trustee

New Jersey State Bar Association, Young Lawyers Division – Executive Committee

Middlesex County Bar Foundation – Trustee

Middlesex County Bar Association – Member

New Jersey State Bar Association – Member

American Bar Association – Member

Areas of Practice

Personal Injury

Employment

Civil Rights

courses for both the Middlesex County and New Jersey State Bar Associations.

Mr. Gillick received his Juris Doctor from Seton Hall University in 2001, where he was Articles Editor for the Legislative Journal, President of the Irish American Law Students Association, a Senator of the Student Bar Association, and an intern for the New Jersey State Assembly's Democratic Office and the Hon. Rosemary K. Reavey. He thereafter served as Law Clerk to the Hon. Jack L. Lintner, former Presiding Judge of the Superior Court, Appellate Division.

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Kimberly Parson is the managing partner of the firm's New Jersey office. She has experience representing clients in complex commercial litigation, focusing on insurance coverage litigation, general commercial litigation, personal injury liability, products liability, environmental liability, mass torts, professional liability (including medical malpractice, long-term care, agent/broker liability, legal malpractice, design professionals and miscellaneous professionals), and employment liability; as well as in New Jersey's Municipal Court. Kimberly also has experience in providing coverage opinions and advice to insurance carriers concerning their coverage obligations under various types of insurance policies, including comprehensive general liability, group property and casualty lines, public entity insurance, specialty and professional risk, excess, contractors, automobile liability, and workers' compensation and/or employer's liability coverage. In addition, she represents clients with municipal court liability and is a former New Jersey Municipal Court Prosecutor.

Kimberly is a sought-after speaker and panelist who has been a presenter at several insurance coverage-related seminars. Outside of work, she is an avid reader and history buff.

Professional Experience

Prior to joining Rebar Kelly, Kimberly worked for a top-tier law firm's insurance coverage group, where she counseled Fortune 500 companies and small businesses in actions filed in several jurisdictions and in a variety of insurance coverage contexts, including actions involving coverage for personal injury claims, products liability claims, environmental contamination claims, construction defect claims, and mass tort liability claims. Before this Kimberly was the founding partner of a law firm located in Bergen County, New Jersey.

Education

Bachelor of Arts, New York University

Juris Doctor, Seton Hall Law School, 2001

Primary Practice Areas

- Complex Litigation
- Construction Defect Coverage
- Construction & Labor Law Litigation
- Contribution Subrogation
- COVID-19 Claims
- Employment Law
- Employers Liability
- Employment Practices Liability
- Environmental Coverage
- Excess Coverage
- NYLL (NY Labor Law)
- Premises Liability
- Product Liability
- Professional Liability

- Real Estate Agent & Broker Defense
- Real Estate Errors & Omissions
- Sexual Assault/Molestation/Human Trafficking
- Third Party Coverage

Bar Memberships & Court Admissions

- New York
- Pennsylvania
- New Jersey
- U.S. District Court for the District of New Jersey

Professional Affiliations and Professional Organizations

- Fellow, New Jersey State Bar Association Leadership Academy
- Member, New Jersey State Bar Association (NJSBA)
- Secretary, New Jersey State Bar Association, Insurance Law Section
- Member and CLE Chair, NJSBA Insurance Law Committee
- Member, NJSBA Insurance Defense Committee
- Member, NJSBA Legal Education Committee
- Member, NJSBA Business and Commercial Litigation Committee
- Preferred Member, International Association of Women (IAW)
- Preferred Member, National Association of Professional Women (NAPW)
- Member, Thomson Reuters Law Firm Council

Notable Honors

- U.S. Senate Certificate of Special Recognition – Distinguished Legal Participation
- Frank R. Lautenberg, United States Senator, Social Justice Award
- Certificate of Special Congressional Recognition – Service to Bergen County
- New Jersey General Assembly – Assembly Resolution of Honor (Community Service)
- New Jersey General Assembly – Assembly Resolution of Honor (Legal Services)
- Urban League Guild of Bergen County – Community Service Award
- Bergen County Freeholders – Certificate of Commendation
- County of Bergen – Certificate of Commendation (Legal Services)
- Judicial Clerkship Honorable Elijah L. Miller (Superior Court of New Jersey, Bergen County)

Speaking Engagements and Authorship

- 2021 Insurance Coverage Boot Camp – New Jersey State Bar Association, Continuing Legal Education Seminar (Panelist and Co-Author of Seminar Materials) – *Presenter for Insurance Coverage Litigation Section*.
- 2021 Insurance Law Institute – New Jersey State Bar Association, Continuing Legal Education Seminar (Panelist and Co-Author of Seminar Materials) – *Presenter for Employment Practices Liability Section*.
- 2021 Emerging Issues In Insurance Law – New Jersey State Bar Association, Continuing Legal Education Seminar (Panelist and Co-Author of Seminar Materials) – *Presenter for Cyber Insurance Section*.
- 2021 Insurance Law Issues Impacting the Cannabis Industry – New Jersey State Bar Association, Continuing Legal Education Seminar (Moderator).
- 2021 Cyber Insurance in Commercial Contracts: What You Must Know and Do – The Knowledge Group (Panelist and Co-Author of Seminar Materials) – *Presenter for Trends in Recent Court Decisions Involving Cyber Insurance Coverage Section*.
- 2020 Insurance Law - A Primer on COVID Claims and Coverage Issues (Panelist and Co-Author of Seminar Materials) – *Presenter for Policy Interpretation Case Law When Assessing Coverage For Coronavirus related Claims Section*.
- 2020 Insurance Law Institute – New Jersey State Bar Association, Continuing Legal Education Seminar (Panelist and Co-Author of Seminar Materials)
- 2020 Insurance Law Issues Impacting the Cannabis Industry – New Jersey State Bar Association, Continuing Legal Education Seminar (Panelist and Co-Author of Seminar Materials)
- 2020 Primer on COVID Claims and Coverage Issues – New Jersey State Bar Association, Continuing Legal Education Seminar (Panelist and Co-Author of Seminar Materials)

Speaking Engagements and Authorship (cont.)

- 2019 Insurance Coverage Boot Camp – New Jersey State Bar Association, Continuing Legal Education Seminar (Panelist and Co-Author of Seminar Materials)
- 2018 Construction Law & Coverage: Parties, Contract Terms and Insurance Issues, – New Jersey State Bar Association, Continuing Legal Education Seminar (Panelist and Co-Author of Seminar Materials)
- 2017 Insurance Law Boot Camp – New Jersey State Bar Association, Continuing Legal Education Seminar (Panelist and Co-Author of Seminar Materials)
- 2016 Enforcement and Interpretation of Insurance Policies – New Jersey State Bar Association, Continuing Legal Education Seminar (Panelist and Co-Author of Seminar Materials)

Published Works & Articles

- New Jersey Lawyer magazine, October 2021 special issue on Insurance: *A Hack a Day – Can Insurance Keep the Resulting Losses Away? How Insurance Protects Against Cyber Risks and How Courts Interpret Coverage*.